No. 25-

IN THE

Supreme Court of the United States

NATHAN AND KELLIE REYELTS,

Petitioners,

v.

KEITH ELLISON, ATTORNEY GENERAL OF MINNESOTA; FARIBAULT-MARTIN COUNTY HUMAN SERVICES; RED LAKE NATION; L.K., MOTHER; AND MCKENZIE BORTH, GUARDIAN AD LITEM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Child Welfare Act ("ICWA") and the Minnesota Indian Family Preservation Act ("MIFPA") impose race-based rules that *require* protecting "Indian children" *less* than non-"Indian" children. When this Court declined to address the equal-protection challenge to ICWA in *Haaland v. Brackeen*, 599 U.S. 255, 294 n.10 (2023), it observed that non-"Indians" seeking to be an "Indian child's" forever family would "[o]f course" have standing to bring that challenge in state court. Petitioners are those people. For more than a year, they provided foster care to two "Indian children" born with severe disabilities. ICWA/MIFPA derailed their permanency plans when the county moved the children to an Indian cousin, citing "ICWA/MIFPA" and Red Lake's preference. Pet.App.314a. The Minnesota Court of Appeals majority recognized Petitioners' standing, although it rejected their challenge. Pet.App.110a-127a. But then the District Court denied them intervention into the children's case—in express part *because* they "motioned th[at] Court to find ICWA and MIFPA unconstitutional." Pet.App.76a. The Minnesota Supreme Court affirmed and, citing that exclusion, refused to consider the constitutional challenge. Pet.App.20a, 31a-36a.

Absent reversal, ICWA/MIFPA's denial of equal protection will continue, and other states could follow Minnesota's roadmap to try to evade this Court's review.

The questions presented are:

1. Whether ICWA and MIFPA unconstitutionally deny equal protection to "Indian" children and to non-"Indian" people who seek custody of them.

2. Whether denying Petitioners intervention because of their good-faith argument that ICWA and MIFPA are unconstitutional violates the First Amendment.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. Petitioners, Nathan and Kellie Reyelts, seeking a declaratory judgment that ICWA and MIFPA are unconstitutional, petitioned to intervene in a child-protection proceeding regarding twin toddlers whom they sought to adopt or be permanent custodians of, and petitioned for custody of the twins. Pet.App.311a-312a, 271a-309a. They participated in state trial court, at the Minnesota Court of Appeals, and at the Minnesota Supreme Court.

Respondents are: Keith Ellison, Attorney General of Minnesota; Faribault-Martin County Human Services; Red Lake Nation; L.K., Mother; and McKenzie Borth, Guardian ad Litem.

2. Petitioners are all individuals. Respondents are individuals or tribal and state government agencies.

RELATED PROCEEDINGS

Matter of Welfare of Child. of L.K., No. A23-1762, A24-1296 32 N.W.3d 163 (Minn. 2026). Judgment entered April 9, 2026.

Matter of Welfare of Child. of L.K., A23-1762, 9 N.W.3d 174 (Minn. App. 2024). Judgment entered April 9, 2026.

Matter of Welfare of Child. of L.K., Nos. 46-JV-22-32 (CHIPS File), 42-JV-23-128 (Minn. Dist. Ct.). Final appealable reconsideration order entered July 24, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Nathan and Kellie Reyelts respectfully petition for a writ of certiorari to review the opinions of the Minnesota Court of Appeals and of the Minnesota Supreme Court.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported at 32 N.W.3d 163, (Minn. 2026), and is reprinted in the Appendix at 1a-53a. That opinion came after opinions by the Minnesota Court of Appeals, reported at 9 N.W.3d 174 (Minn. App. 2024), and reprinted at Pet. App.80a-127a (majority) and 128a-153a (dissent). The relevant decision of the Juvenile Court, which came after remand from the Court of Appeals, is unreported and is reprinted at Pet.App.54a-79a.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on April 9, 2026. App. 187a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution are reproduced at Pet.App.189a.

Relevant portions of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.), are reproduced at Pet.App.190a-208a.

Relevant portions of the Minnesota Indian Family Protection Act (Minn. Stat. § 260.751 et seq.), are reproduced at Pet.App.208a-263a.

Relevant Portions of the Minnesota Juvenile Court Act (Minn. Stat. § 260C.001 et seq.), are reproduced at Pet.App.264a-270a.

Minnesota Rule of Juvenile Protection 34.02 is reproduced at Pet.App.270a.

INTRODUCTION

In *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), this Court was confronted with a challenge to the constitutionality of the Indian Child Welfare Act ("ICWA"), a federal law that separates at-risk children into the race-based categories of "Indian" and non-"Indian" and then imposes different, less-protective rules on the child-welfare cases involving "Indian children." For example, ICWA's race-based "placement preferences" require that "Indian children" be placed in foster homes or adoptive homes with "Indian" adults, rather than equally (or better) qualified families who are of other ethnic or national backgrounds. These and other racially discriminatory provisions of ICWA led this Court to acknowledge that ICWA and its state adjuncts raise serious "equal protection concerns." 570 U.S. at 656.

In *Haaland v. Brackeen*, 599 U.S. 255 (2023), these and other constitutional objections to ICWA were raised again. The plaintiffs there lacked standing to raise the equal-protection claims, however, based on redressability problems. *Id.* at 292-94. Still, this Court added that

"[o]f course" an injured party could "challenge ICWA's constitutionality in state court" in a future case. *Id.* at 294 n.10.

That is what the Petitioners did here—or tried to do, only to run into an unconstitutional roadblock: the Minnesota Supreme Court held that *the very fact that Petitioners challenge ICWA's constitutionality* can be used as proof that they are inappropriate caretakers for the children. It accordingly affirmed barring them from challenging ICWA's constitutionality (and that of its state-law adjunct, MIFPA). It then went out of its way to vacate the state appellate court's constitutional opinion, breaking from its longstanding practice of *not* using such a vacation procedure, *see Just. v. Marvel, LLC,* 979 N.W.2d 894, 903 n.9 (Minn. 2022)—and departing from Minnesota law in many other drastic ways, *see* Below, Section II.C.

That effort to prevent this Court's review of the equal-protection issue was foreshadowed during oral arguments when one justice repeatedly expressed animosity toward Petitioners' constitutional challenge, suggesting it was somehow improper for them to "try to get the issue of constitutionality of the Indian Child Welfare Act before the United States Supreme Court," and that "the big question for me" was whether Petitioners intended to seek this Court's review.[1]

That offends the Constitution three times over.

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1. https://mncourts.gov/supremecourt/oralargumentwebcasts/2024/in-the-matter-of-the-welfare-of-the-children-of-l.k.-and-a.s., 34:35-35:00 (9/30/2024); https://mncourts.gov/supremecourt/oralargumentwebcasts/2025/in-the-matter-of-the-welfare-of-the-children-of-l.k.-and-a.s., 31:10-31:33 (4/1/2025).

First, ICWA/MIFPA are unconstitutional. The "equal protection concerns" they raise, *Adoptive Couple*, 570 U.S. at 656, are matters of pressing urgency. Every day, at-risk "Indian children" are deprived of equal protection by laws that many so desperately need. As a result, "Indian children" are—because of federal and state law—being physically and psychologically abused, with the states' knowledge, and in some cases even murdered by adults known to the state to be abusive. And each day, children like those involved in this case are denied the possibility of safe, loving homes, solely because of the color of their skin. Petitioners have the standing to raise these constitutional challenges that was missing in *Brackeen*.

Second, affirming the exclusion of Petitioners *because* they seek to challenge those laws in court, on the theory that for them to object to ICWA/MIFPA is proof of their unfitness, violates the First and Fourteenth Amendment rights to petition for redress and to due process of law.

Third, that exclusion was part of an effort to avoid this Court's review of ICWA/MIFPA's constitutionality. This Court doesn't allow its review to be evaded by state-court maneuvering, and should not allow it here. In cases like *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958), this Court has made clear that state courts cannot use "[n]ovelty in procedural requirements … to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." Yet that's what the Minnesota courts have attempted here. Petitioners challenged the constitutionality of laws that inflict grave harms on children and adults. Expressly relying on that challenge, state courts denied them

intervention. That drastically departs from Minnesota procedures, and reflects an effort to thwart review under the veneer of state-law grounds.

This case cries out for certiorari.

STATEMENT OF THE CASE

Petitioners are foster parents who cared for a pair of "Indian children" in need of serious ongoing medical care at the Mayo Clinic, due to prenatal drug exposure. Petitioners moved to intervene in the "CHIPS" proceeding[2] governing the children's care. In that proceeding, they intended to raise constitutional objections to the application of ICWA and its Minnesota state version, MIFPA.

Under Minnesota law, such intervention motions are governed by the "best interests of the child" standard, Minn. R. Juv. Pro. P. 34.02, which focuses on whether the participation of the intervenor would best serve the individual needs of the child(ren). But here, the state trial court denied Petitioners intervention *because they contend* that ICWA/MIFPA are unconstitutional.

That is a violation of Petitioners' First Amendment rights to freedom of speech, petition, and access courts—*and* violates the due-process clause of the Fourteenth Amendment—which together forbid courts from penalizing a party on account of that party's good-faith, non-frivolous legal arguments.

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2. CHIPS stands for "Child in Need of Protection or Services," and refers to the Minnesota state-law proceedings governing the twins.

Petitioners sought relief in the Minnesota Supreme Court. But that court—a year and a half after oral arguments—affirmed the denial of intervention and concluded that Petitioners therefore lacked standing to bring their equal-protection challenges. Consequently, the court chose not to address the severe violations of equal protection that ICWA/MIFPA impose upon innocent, at-risk Native American children and the adults who want to help them.

Unfortunately, this isn't the first time a state court has tried to employ such a technique. *See* below, Section II.B. Nor will it be the last if this Court denies review. The decision below creates a roadmap for blocking review of ICWA by casting anyone who challenges ICWA as unfit to participate in a child-welfare case.

This Court should grant certiorari. First, it should address the constitutionality of ICWA/MIFPA, which deprive both Petitioners and the "Indian children" of their rights to equal protection and due process. Second, it should address the constitutionality of Minnesota's refusal to permit Petitioners' intervention and hold that excluding people from court because of their good-faith constitutional challenge is unconstitutional.

The twins are born in severe medical distress and are placed with Petitioners

This case concerns fraternal twins born in Martin County, Minnesota, to a mother (L.K.) who tested positive for amphetamines, methamphetamines, and opiates at the time of birth. Pet.App.56a, ¶3. Both children suffered severe physical disabilities due to prenatal drug use,

and required extensive hospital stays. *Id.*, ¶4. The boy experienced withdrawal symptoms, and the girl was born not breathing; after being revived, she was placed on a ventilator at the Mayo Clinic in Rochester. *Id.* She experienced seizures and other severe maladies. *Id.*

Three days after birth, Human Services of Faribault & Martin Counties ("HSFMC") commenced a CHIPS proceeding, and the court determined that out-of-home placement was necessary to prevent imminent physical harm to the children. Pet.App.83a, 170a. The boy was discharged from the hospital at 11-days old and placed with Nate and Kellie Reyelts (Petitioners), who are non-"Indian" licensed foster parents. Pet.App.56a, ¶ 5, 83a. The girl remained in intensive care until she was 37-days old, and then discharged into their foster care. *Id.*

The state trial court (District Court) found that the twins are either enrolled or eligible for enrollment in the Red Lake Nation, and that ICWA/MIFPA apply. Pet.App.174a. A few weeks after their birth, Red Lake submitted an affidavit in support of placing them in out-of-home foster care. Pet.App.83a

The Reyeltses also submitted a 20-page affidavit, which noted that the county and the guardians ad litem represented that they were "the identified permanency placement for the twins with the plan being adoption." 9.12.2023 Pet. Aff., ¶5. A county-attorney email included with the affidavit confirmed this. Pet.App.314a.

The Reyeltses cared for the children for more than a year, taking them to many necessary medical appointments at the Mayo Clinic and facilitating in-home medical visits.

Pet.App.83a-84a. This care included monthly physical therapy, quarterly occupational therapy, and quarterly early-childhood-specialist services. *Id.*

On August 1, 2023, when the children were one year and four months old, Red Lake announced that it wanted the twins sent to live with a cousin of mother L.K.(9.12.2023 Pet. Aff., ¶5), who is known as R.F. Pet. App.57a, ¶10, 84a, 314a. On September 9, 2023, the county informed the Reyeltses that the children would be placed with R.F. on September 13." 9.12.2023 Pet. Aff., ¶2. There was no transition plan. *Id.*, ¶¶2, 34-41; Pet.App.84a. On September 12, therefore, the Reyeltses filed an emergency motion for permissive intervention in the District Court, seeking a stay of the change of placement, a finding that "good cause" exists under ICWA/MIFPA not to change the placement, and a declaration that ICWA/MIFPA are unconstitutional. Pet.App.310a-312a.

The District Court held a hearing the next day (September 13) but confined its attention to the placement change, deferring other issues for later. Pet.App.163a-164a, ¶3. The Reyeltses argued that the placement should be stayed because there was no transition plan; because R.F.—who had never met the children—was unfamiliar with their medical needs; because such placement was distant from L.K.; and because L.K. favored placement with the Reyeltses. Pet.App.277a-282a. But on September 13, the District Court denied the motion, concluding that the change in placement should occur immediately, and that the children should be placed on the Red Lake Reservation, approximately 350 miles away from the Mayo Clinic and the Reyeltses' home. Pet.App.162a-168a.

The Petitioners file a petition for custody

On October 4, the Reyeltses filed a petition for third-party custody (Pet.App.9a), and the District Court held a hearing on that petition the next day (although it gave the other parties the opportunity to file written submissions afterward). The guardian ad litem (GAL) and Red Lake moved to dismiss that petition, and on October 31, the District Court denied the Reyeltses' motion and dismissed their petition. It did not rule on the constitutionality of ICWA/MIFPA. Pet.App.154a-161a.

The Court of Appeals reversed. Pet.App.80a-127a. Although it rejected their constitutional challenges to ICWA/MIFPA on the merits (Pet.App.115a-126a), it held that the Reyeltses were not disqualified from seeking intervention by virtue of being former foster parents of the twins (Pet.App.96a-100a). It remanded to District Court to address the Reyeltses' petition for intervention under Minnesota Rule of Juvenile Protection 34.02. Pet. App.91a-93a, 126a-127a.

Next, the Reyeltses petitioned the Minnesota Supreme Court for review, which was granted. That court also partially stayed the Court of Appeals' remand order, thereby barring the District Court from transferring the case to tribal court. Pet.App.18a. But the District Court continued proceedings regarding the Reyeltses' intervention motion.[3]

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3. Meanwhile, MSFMC removed the twins from R.F.'s care "on emergent basis" and placed them with their maternal grandmother. Pet.Add.60a, ¶21.

On remand, the District Court denied the Reyeltses' intervention motion and petition. Pet.App.54a-79a. It held that the petition was not in the twins' best interests because the tribe opposed the Reyeltses having custody, because the twins had not been in their custody for 11 months, but had been in the custody of their maternal grandmother for 1.5 months, and because the Reyeltses had "motioned this Court to find ICWA and MIFPA unconstitutional," which, the court said, revealed a dismissive "attitude toward the importance of the children's tribal identity" and thus rendered their participation in the case "a disadvantage" to the twins. Pet.App.73a-77a.

The Reyeltses petitioned for accelerated review in the Minnesota Supreme Court, which was granted. Pet.App.14a-15a. There they pressed their arguments regarding ICWA/MIFPA's unconstitutionality and their exclusion violating the First Amendment. Pet.App.31a, 45a.

The arguments against ICWA/MIFPA's constitutionality that the Reyeltses seek to make

This Court has addressed ICWA on only three occasions: *Mississippi Choctaw v. Holyfield,* 490 U.S. 30 (1989), *Adoptive Couple*, *supra,* and *Brackeen, supra*. In the latter two cases, several justices expressed concerns about its racially discriminatory provisions—and for good reason.

ICWA imposes rules on child-welfare matters if the child is an "Indian child"—rules that differ from those governing child-welfare matters involving non-"Indian" children. Specifically, these rules are *less protective*

of the child. For example, the race-based placement preferences drastically limit the adoption and foster-care options for in-need "Indian" children, and often result in children being placed in homes that are less suited to their protection and care. Also, its "active efforts" provision bars state-child-welfare services from rescuing abused children from abusive families unless state officials first take extraordinary steps to reunite those families—steps that aren't required if the children are non-"Indian." The consequence is that states must return abused "Indian children" to families that have abused them, when they would not do so for non-"Indian" children. Also, in cases involving non-"Indian" children, the rights of an abusive parent may be terminated based on clear-and-convincing evidence of the need for such action—the standard this Court established in *Santosky v. Kramer*, 455 U.S. 745, 768-69 (1982)—whereas, for "Indian children," the standard is actually higher than the beyond-a-reasonable-doubt standard.[4] 25 U.S.C. § 1912(f). *Santosky* observed that "a reasonable-doubt standard would erect an unreasonable barrier to state efforts to free permanently neglected children for adoption." *Id.* at 769. But that's exactly the rule ICWA imposes on "Indian children."

These and other provisions thoroughly justify this Court's concern in *Adoptive Couple, supra*, that ICWA "put[s] certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." 570 U.S. at 655.

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4. ICWA requires both evidence beyond a reasonable doubt and testimony from expert witnesses to establish grounds for the termination of the rights of an abusive parent. This is a standard higher than that required for death-penalty convictions.

At issue here are ICWA/MIFPA's placement preferences and requirements for permanent custody of "Indian children." 25 U.S.C. §§ 1912(e), (f); 1915(a)(b); Minn. Stat. §§ 260.763, 260.771, 260.773. Under these rules, state courts must typically transfer cases seeking custody of "Indian children" to tribal courts, where the Bill of Rights does not apply, *see United States v. Bryant*, 579 U.S. 140, 149 (2016), or, if transfer does not occur, state courts must follow race-based placement preferences whereby the children must be placed with "Indian" adults rather than adults of other races, ethnicities, or national origins.[5] Because the Reyeltses are not "Indian" under ICWA/MIFPA, those statutes place them on an unequal footing with respect to "Indian" adults when it comes to fostering or adopting "Indian" children in need. *See Brackeen*, 599 U.S. at 292.

ICWA/MIFPA are race-based because their applicability is triggered by the fact that the child is an "Indian child,"[6] which is defined as a child who is eligible

5. Throughout this case, and again here, Petitioners contend that ICWA/MIFPA are not only race-based, but also national-origin based. The Court has rarely discussed the distinction, *see, e.g., Oyama v. California*, 332 U.S. 633 (1948), but because national-origin discrimination is subject to the same strict scrutiny as race-based discrimination, it's unnecessary at this point to resolve that. All references to race-based discrimination in this Petition should be understood to include national origin-based discrimination, too.

6. Critically, "Indian child" status is *not* a function of tribal law, but of state and federal law. *See In re Abbigail A.*, 375 P.3d 879, 885 (Cal. 2016) (recognizing this distinction). While tribes may determine citizenship as they please, the state and federal statutes that alone create "Indian child" status must comply with the equal

for tribal membership (even if she is not, in fact, a member) and who has a biological parent who is a tribal member. 25 U.S.C. § 1903(4). While different tribes have different eligibility rules, all are triggered by biological ancestry alone. None requires consideration of any cultural, social, political, or linguistic connections to a tribe.

That means a child is deemed "Indian"—and that she and the adults involved in her care are subject to ICWA/MIFPA's unequal burdens—based on biology alone—"an immutable characteristic determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)—regardless of whether she ever actually joins a tribe.

MIFPA is even more constitutionally offensive. It imposes the same disadvantages on "Indian children," but its definition of that term is even more obviously race-based. A child is an "Indian child" under MIFPA if she is either a tribal member or eligible for membership, *regardless of the parent's membership status*. Minn. Stat. § 260.755, subd. 8. Thus, even more clearly than under ICWA, a child is classified as "Indian" under MIFPA *solely* due to the blood in her veins.

How ICWA and MIFPA were applied in this case

From nearly the day the twins were born and for 16 months afterwards, the Reyeltses showered the twins with love and care, shepherded them from medically

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protection guarantees of the Fifth and Fourteenth Amendments. Thus ICWA/MIFPA (or their invalidity) have no effect on any tribe's capacity to determine its own citizenship.

dire starting points in life, and grew "100% committed" to being their forever family. 9.12.2023 Pet. Aff., ¶¶1-5. County officials chose the Reyeltses to be *the* permanency plan for them. *Id.*, ¶5; Pet.App.314a. But then everything went wrong, because of "ICWA/MIFPA." Pet.App.314a (county-attorney email).

County officials took the twins from the Reyeltses' custody and sent them to live with a cousin of the children's biological mother who they had never met (a placement which fell through), and when the Reyeltses tried to intervene in the child-custody proceeding to challenge ICWA/MIFPA's constitutionality, the courts said no, *because* they challenge ICWA/MIFPA's constitutionality. When the Minnesota Supreme Court affirmed that, it did so because the Reyeltses have a legal disagreement with the Tribe and believe that placing the twins with them is in the twins' best interests. Pet.App.31a-35a.

Had the children been any other race, the Reyeltses' petitions would have been decided pursuant to race-neutral state law that concerns itself solely with the children's best interests as individuals. *See* Minn. Stat. § 260C.212, subd. 2 ("The policy of the state of Minnesota is to ensure that the child's best interests are met by requiring an individualized determination of the needs of the child….").

But because the children are biologically eligible for tribal membership, ICWA/MIFPA would require either that the case be transferred to tribal court or that the children be placed with other tribal members, or with members of any tribe, or with individuals chosen by the tribe, instead of the Reyeltses. 25 U.S.C. § 1915(a), (b); Minn. Stat. § 260.773, subds. 2, 3.

What's more, if permanent custody required termination of parental rights, the Reyeltses would be forced to prove beyond a reasonable doubt, with the testimony of expert witnesses,[7] that such termination was necessary to prevent imminent harm to the children. 25 U.S.C. § 1912(f); Minn. Stat. § 260.771, subd. 6. By contrast, if the children were members of any other race, the state court could terminate parental rights based on a clear-and-convincing-evidence standard, without need of expert witness testimony. Minn. Stat. § 260C.317, subd. 1.

In these and other ways, the application of ICWA/MIFPA to this case transformed it, procedurally and substantively, all to the detriment of the twins and the Reyeltses.

The Minnesota courts bar the Reyeltses' intervention for unconstitutional reasons

The Reyeltses sought to raise these constitutional objections in every forum available. But the trial court concluded that *this very fact* rendered their participation in the case undesirable. In simple terms, it said that because the Reyeltses think ICWA/MIFPA unconstitutional, their participation in the case is contrary to the children's best interests.

It made that determination while the equal-protection challenge was pending before the Minnesota Supreme Court. The Reyeltses therefore argued before *that* court that the District Court's determination violated their First

7. Under the Bureau of Indian Affairs' ICWA regulations, such experts must be acceptable to tribal officials, and must be experts in tribal culture. 23 C.F.R. § 23.122.

Amendment rights to speech and petition, because they were being penalized for presenting a good-faith legal argument to a court. Yet the state Supreme Court joined in this determination to penalize the Reyeltses for having the temerity to raise the argument. One justice even expressed animosity toward the Reyeltses' constitutional challenge, suggesting it was improper for them to "try to get the issue of constitutionality of the Indian Child Welfare Act before the United States Supreme Court."[8]

On March 11, 2026, that court affirmed denial of the intervention motion, and said the District Court had not acted improperly in predicating its denial of their participation on the fact that they contend ICWA/MIFPA are unconstitutional. *See* Pet.App.75a, ¶50.ii.C. It began by expressing doubt that "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. It then concluded that the real reason for denial of intervention was the Reyeltses' supposed "'lack of understanding about the importance of [the twins' indigenous] heritage." Pet.App.34a. This alleged lack of understanding was supposedly proven by the Reyeltses' contention that ICWA/MIFPA are unconstitutional: "[their] challenge to ICWA and MIFPA," it said, is "indicative of appellants' [negative] 'attitude toward the importance of the children's tribal identity,'"—which was sufficient to justify the District Court's conclusion that the Reyeltses'

8. https://mncourts.gov/supremecourt/oralargumentwebcasts/2024/in-the-matter-of-the-welfare-of-the-children-of-l.k.-and-a.s., 34:35-35:00 (9/30/2024); https://mncourts.gov/supremecourt/oralargumentwebcasts/2025/in-the-matter-of-the-welfare-of-the-children-of-l.k.-and-a.s., 31:10-31:33 (4/1/2025).

participation in the case would be contrary to the twins' best interests. Pet.App.29a-31a. That finding was despite the Reyeltses' detailed Native American Culture Plan for raising the twins with strong indigenous identities. Pet. App.316a-323a.

The court then buttressed this conclusion with the odd assertion that the Reyeltses' "'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.30a-31a. In other words, the very fact that the Reyeltses think placement with them is in the children's best interests renders them unfit.

"Kafkaesque" is not an unfair way to describe such proceedings.

The Reyeltses petition this Court

The Reyeltses now come before this Court with two constitutional injuries: the fact that ICWA/MIFPA discriminate against them and the children based on race—and the fact that Minnesota courts have barred them from even raising that legal argument, on the grounds that doing so renders them unfit to take custody of children.

In *Brackeen*, this Court acknowledged the serious concerns ICWA raises, and said that that non-"Indians" could "[o]f course" raise these arguments through the normal appellate chain from state court. 599 U.S. at 294 n.10. The Reyeltses tried to do that—and were excluded by the Minnesota courts as a result.

"Novelty in procedural requirements" cannot be used "to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Patterson*, 357 U.S. at 457-58. The state courts' maneuvering should not be allowed to foil this Court's review.

ARGUMENT

I. The Court should take this case to address the constitutionality of ICWA and MIFPA

A. A brief overview of ICWA/MIFPA's constitutional offenses

How Minnesota law protects an abused or neglected child depends on that child's race. For *non*-"Indian" children, "[t]he paramount consideration" is the child's "health, safety, and best interests." Minn. Stat. § 260C.001, subd. 2(a). But "[i]n proceedings involvement an American Indian child"—a category defined exclusively by biological factors—"the best interests of the child must be determined consistent with [MIFPA] and [ICWA]." *Id.* A side-by-side comparison of shows that these statutes do not equally protect "Indian children."

1. For *non*-"Indian" children, the state's policy when deciding on placement focuses on "an *individualized* determination of the needs of the child," which weighs many factors. Minn. Stat. § 260C.212, subd. 2(a)-(b) (emphasis added). When it comes to the placement of children in need of shelter, Minnesota law gives no preference to adults who have a blood relationship with the child. It only

requires that relatives be given first "consider[ation]," *id.*, subd. 2(a)(1)—and *consideration*, Minnesota courts have held—is different from a *preference*, because requiring *consideration* doesn't mandate placement. *See In re S.G.*, 828 N.W.2d 118, 124 (Minn. 2013) ("the language directing the order of consideration does not require that the district court prefer a relative over a nonrelative … nor does it establish a preference for relatives.").[9]

Such *consideration* is statutorily specified to include not just blood relatives but also "individual[s] who [are] … important friend[s] of the child or of the child's parent or custodian," or "who [have] a significant relationship to the child or the child's parent or custodian." Minn. Stat. § 260C.212, subd. 2(a)(2).

2. For an "Indian child," the rules are different. MIFPA *conclusively presumes* that the "'[b]est interests of an Indian child' means compliance with [ICWA] and [MIFPA]." The best interests of "Indian children" are *per se* declared to be "interwoven" with "the best interests of the Indian child's Tribe." *Id.* § 260.755, subd. 2a. Minnesota law says "the best interests of an Indian child" are defined by MIFPA, and that the placement agency "*shall* follow the order of placement preferences in [ICWA]." Minn. Stat. § 260C.212, subd. 2(a), (b)(11) (emphasis added).

3. ICWA likewise treats "the best interests of Indian children" differently than the best interests of

9. A prior version of the CHIPS statute did give a *preference* to blood relatives, but that was replaced with a statute that requires only "that the court should consider" relative placement. *In re Welfare of A.M.C.*, No. A16-0282, 2016 WL 4421517, at *5 (Minn. Ct. App. Aug. 22, 2016).

non-"Indian" children. As *Holyfield* observed, ICWA gives the tribe "an interest in the child which is distinct from but on a parity with the interest of the parents." 490 U.S. at 52.[10] Consequently, "the phrase 'best interests of Indian children' in the context of the ICWA is different than the general Anglo–American 'best interest of the child' standard." *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 169 (Tex. App. 1995). Specifically, it is *not* an *individualized* assessment. For "Indian children," the child's *specific* needs are only "one of the constellation of factors" a court must consider. *In re Alexandria P.*, 204 Cal. Rptr. 3d 617, 634 (Cal. App. 2016).

Accordingly, ICWA imposes placement preferences—i.e., mandates—that "Indian children" be placed with blood relatives, tribal members, or tribe-approved entities in accordance with ICWA's statutory preference tiers. These govern adoption, 25 U.S.C. § 1915(a), and foster care or preadoptive placements. *Id.* § 1915(b). MIFPA does the same. Minn. Stat. §§ 260.773, subd. 4; 260.773, subd. 3.

4. As noted earlier, whether a child is entitled to the *individualized* best-interests test, or the less-protective "Indian" best interests test, turns on whether ICWA or MIFPA classify her as "Indian," which turns *exclusively* on blood ancestry, *not* political, cultural, or social affiliation. *See* 25 U.S.C. § 1903(4). MIFPA defines "Indian child" similarly, except without the "biological child" piece: MIFPA says any unmarried person under 18 who is "eligible for membership" in a tribe is an "Indian child."

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10. In *Troxel v. Granville,* 530 U.S. 57 (2000), this Court held that it is unconstitutional for the government to give anyone an interest in a child "on a parity with" the interests of parents.

Minn. Stat. § 260.755, subd. 8(2). This means that while parents can prevent application of ICWA by renouncing their tribal membership,[11] there is nothing they can do to prevent MIFPA's application to their children.

Tribal membership virtually always turns exclusively on a child's biological ancestry. It does so here, as the Red Lake Nation conceded below.[12]

B. It is critical to address ICWA/MIFPA's constitutionality to protect at-risk "Indian children" who are being harmed every day.

Thanks to ICWA, vulnerable children of Native American descent across America are being subjected to worse conditions, for longer, than their peers of other races. Because ICWA (and MIFPA) makes it vastly more difficult for children who are biologically eligible for tribal membership to be rescued from abusive homes or placed in permanent adoptive homes, these children suffer more abuse and neglect than they would if they were, say, black, Jewish, white, or Asian. Indeed, the application of these laws has repeatedly resulted in the preventable murder of "Indian children," when state officials have been compelled to return them to households known to be abusive.

A few brief examples:

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11. *See* Indian Child Welfare Act Proceedings, 81 Fed.Reg. 38778, 38783 (June 14, 2016); *In re D.M.*, 320 Cal. Rptr. 3d 757, 776 (Cal. App. 2024).

12. https://mncourts.gov/supremecourt/oralargumentwebcasts/2024/in-the-matter-of-the-welfare-of-the-children-of-l.k.-and-a.s., 37:00-37:25 (9/30/2024).

- In 2013, two Spirit Lake Sioux children were taken—pursuant to ICWA—from the safe, loving foster home in which they had lived for more than two of their three years of life, and sent to live on the reservation with their grandfather and his wife, who had until then shown no interest in caring for them. The grandfather's wife had a record of child abuse, which—had the children been of any other ethnicity—would have prevented their placement in that household. Slightly over a month later, the grandfather's wife murdered one of them. *See* Flatten, *Death on a Reservation* (Goldwater Institute, 2015).[13]

- In 2014, Nebraska's Supreme Court held that state officials violated ICWA when removing three girls from the custody of their sexually abusive father. *In re. Shayla H.*, 855 N.W.2d 774 (Neb. 2014). It said officials had provided the "reasonable" efforts state law requires for children of other races, but not the "active" efforts ICWA requires for "Indian children." That difference is critical because "reasonable efforts" contains an exception for cases of "aggravated circumstances" such as sexual molestation, Neb. Rev. Stat. § 43-283.01 (4)(a), but ICWA's "active efforts" requirement does not. *People ex rel. J.S.B., Jr.*, 691 N.W.2d 611, 618–19 (S.D. 2005). Consequently, the children were returned to the household, where they were again molested, and had to be removed again. The trial court later said they had "experienced lifetimes of trauma," which would not have happened had they

13. https://www.goldwaterinstitute.org/death-on-a-reservation/.

been of another race. *In re Interest of Shayla H., et al.*, Doc. JV13 (Juvenile Court of Lancaster County, May 1, 2015) at 3.

- In 2019, a 5-year-old Crow boy, Tony Renova, was murdered by his parents in Columbus, Ohio. He had been removed from their care when one-month old, and placed with a loving foster family, where he lived safely for five years. Had he been of any other ethnicity, his foster parents could have become his forever home. Instead, ICWA applied, and state officials were required to return him to his parents, who had violent criminal histories, and who starved, tortured, and beat him to death. *See* Pronovost, *Losing Tony,* Stillwater County News, Dec. 5, 2019[14]; Rosenbaum, *Judge Gives Maximum Sentences to All 3 Involved in 5-year-old's Beating Death*, Great Falls Tribune, July 6, 2022.[15]

There are far too many similar cases to list here.[16]

There's no question that, as Justice Gorsuch emphasized in *Brackeen,* ICWA was adopted out of a desire to remedy past injustices and prevent their recurrence. 599 U.S. at 297. But noble as this motive was, ICWA's race-based restrictions and rules limiting the

14. https://perma.cc/2FP2-PDX9.

15. https://www.greatfallstribune.com/story/news/crime/2022/07/26/3-sentenced-in-5-year-old-antonio-renovas-murder-in-great-falls-montana-emilio-emmanuel-renova/65383015007/.

16. *See further* Flatten, *supra*; Sandefur, *The Unconstitutionality of the Indian Child Welfare Act*, 26 Tex. Rev. L. & Pol. 55, 95-98 (2021).

ability to rescue "Indian children" from harm or to find them safe, loving, permanent homes, is now inflicting new injustices on these children.

II. The Reyeltses have the standing that was missing in *Brackeen*

A. ICWA/MIFPA imposes on Petitioners a barrier that makes it more difficult for them to seek custody than adults of other races—which is a constitutional injury

In *Brackeen*, this Court found that the individual plaintiffs lacked standing to raise equal-protection challenges to ICWA due to a redressability problem: they only sought relief against federal defendants, and that would not have redressed their injuries. 599 U.S. at 292. The Court acknowledged that the plaintiffs in that case *had* suffered injury—"[t]he racial discrimination they allege counts as an Article III injury," *id.*—but there was no redressability because all they could hope for was an "opinion," rather than a judgment. *Id.* at 294. Instead, the proper way to raise the equal-protection argument would be for parties to object in state court, and then seek review here. *Id.* at 294 n.10.

That is what the Reyeltses are doing—and they *do* have standing. They are suffering the same injury as the *Brackeen* plaintiffs, perhaps worse. They aren't just placed "last in line for potential placements," and not only does ICWA/MIFPA "'erect[] a barrier that makes it more difficult for [them] to obtain a benefit than it is for members of another [racial] group,'" *id.* (citation omitted), but they have actually had children taken from them, and have lost their opportunity to have their permanent-custody

petition reviewed in a race-neutral manner, due to the operation of these statutes.

And whereas the *Brackeen* plaintiffs had a redressability problem because they sought relief against the wrong defendants, no such concern exists here.

B. The court below unconstitutionally barred Petitioners' challenges to ICWA's constitutionality by deeming that challenge proof of unfitness and thereby excluding them from the case—something that should not be allowed to happen

The court below said the Reyeltses' intervention would not be in the twins' best interests because the Reyeltses contend that ICWA/MIFPA are unconstitutional. But it violates the First Amendment to penalize a litigant in that way from presenting a good-faith, non-frivolous legal argument. *Herring v. New York*, 422 U.S. 853, 860 (1975). And it violates procedural due process to bar a person from court, not because her legal argument is wrong, but because she dares to make it. Due process requires, at a minimum, that the Reyeltses be given a meaningful opportunity for their non-frivolous arguments to be heard on the merits—not to have the fact that they are making those arguments used as a justification for an adverse ruling. That is why it is an abuse of discretion to penalize a party for "press[ing] a legitimate argument [or] protest[ing] an erroneous ruling." *Andrews v. Superior Court*, 98 Cal. Rptr. 2d 426, 429 (Cal. App. 2000); *cf. Perkins Coie LLP v. U.S. Dep't of Just.*, 783 F. Supp. 3d 105, 120–21 (D.D.C. 2025) (government may not "penalize[] a particular law firm … due to the Firm's representation … of clients pursuing claims and taking positions.").

Although the Minnesota court claimed that the Reyeltses' contention that ICWA/MIFPA are unconstitutional "had no bearing" on their intervention motion being denied, that is contradicted both by the record and by the Minnesota Supreme Court's ruling itself, which agreed with the lower courts that the Reyeltses' "challenge to ICWA and MIFPA" was evidence that they have a "[negative] attitude toward the twins' indigenous heritage." Pet.App.35a, 75a, ¶50.ii.C.

And the proceedings below were rife with evidence of prejudice against the Reyeltses based not on the *merits* of their equal-protection arguments, but on the fact that they dared to raise such arguments at all. For example, during the oral argument before the Minnesota Supreme Court, one justice asserted that it was "gamesmanship" for the Reyeltses to even petition that court for review because they were just "using this Court as an avenue to try to get the issue of constitutionality of the Indian Child Welfare Act before the United States Supreme Court"—a question the justice said was "probably going to be controversial."[17] The same justice demanded of the Reyeltses' counsel, "[i]t seems as if this case is being used as an avenue for your, I don't even know if it's your clients, but to try to find ICWA and MIFPA unconstitutional, rather than the real concern about these kids."[18]

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17. https://mncourts.gov/supremecourt/oralargumentwebcasts/2024/in-the-matter-of-the-welfare-of-the-children-of-l.k.-and-a.s., 34:35-35:00 (9/30/2024).

18. https://mncourts.gov/supremecourt/oralargumentwebcasts/2025/in-the-matter-of-the-welfare-of-the-children-of-l.k.-and-a.s., 31:10-31:33 (4/1/2025).

This isn't the first time a state court has used this tactic. In 2018, a juvenile court in Ohio likewise removed a GAL from a case on the grounds that he had argued to the court that ICWA is unconstitutional. That case, called *Matter of C.J. Jr.,* involved an Ohio-born 5-year-old whose father was a member of an Arizona-based tribe, and who had been placed immediately after birth with a foster family. Although the child had never even visited Arizona, and had lived with his Ohio foster parents all his life, the tribal court issued an *ex parte* order pursuant to ICWA demanding that he be sent to live on the reservation near Phoenix with race-matched strangers he had never met. The Ohio Court of Appeals reversed that order, 108 N.E.3d 677 (Ohio Ct. App. 2018), but once remanded, the juvenile court ordered the GAL removed from all future proceedings because he "questions the Constitutionality of ICWA, which includes arguing that ICWA is racially-based." Decision and Judgment Entry, *In re C.J. Jr.,* No. 15JU-232 (Ohio Ct. Com. Pl. Nov. 13, 2018) at 36, 39.[19]

The decision below also resembles the Florida Supreme Court's decision in *Palmore v. Sidoti*, 466 U.S. 429 (1984), which denied custody of a child based on race, but asserted that this was not racial discrimination, because the court's true concern was with the child's best interests—and those interests would be harmed by being placed with a mixed-race couple. This Court did not accept that excuse, *see id.* at 433, and should not accept similar excuses now.

19. The GAL appealed, but the case was settled prior to a decision.

C. The decision below does not rest on adequate, independent state-law grounds

A state-court ruling is not supported by an adequate, independent state law ground precluding this Court's review if that ruling is "merely a device to prevent a review of the other [federal] ground of the judgment." *Cruz v. Arizona*, 598 U.S. 17, 26 (2023) (citation omitted); *see also Ford v. Georgia*, 498 U.S. 411, 424 (1991) (where state procedural rule was "unannounced at the time of petitioner's trial" it was "inadequate to serve as an independent state ground."). "A state ground of decision is independent only when it does not depend on a federal holding…"*Crawford v. Mississippi*, 146 S.Ct. 33 (Mem) (2025).

The Minnesota courts denied the Reyeltses' intervention motion because they would argue that ICWA/MIFPA are unconstitutional. The District Court candidly said that it was denying the Reyelts's motion in part because they "motion[ed] for this Court to find ICWA and MIFPA unconstitutional." Pet.App.34a-35a, 75a-76a, ¶50.ii.C. Not only did the decision depend upon a federal holding, the affirmance of that decision deviated from usual Minnesota law and practice in dramatic ways.

First, the court vacated the equal-protection opinion without determining that the Court of Appeals lacked jurisdiction or authority to render that decision—contrary to Minnesota practice. *See, e.g., Marvel,* 979 N.W.2d at 903 n.9 (declining to vacate: "When we have vacated court of appeals decisions without deciding the merits of the underlying issues, it has typically been because the court of appeals did not have authority or jurisdiction.

[Appellant] does not point us to any case where we vacated a court of appeals decision on the merits as to issues that we did not address.").[20]

Second, the court never explained how the Reyeltses not being parties to the juvenile-protection proceeding could affect their standing to pursue their declaratory judgment challenge to ICWA/MIFPA. Such standing is separately provided by Minnesota's declaratory judgment statute, which doesn't require that they be parties to any such proceeding. *See* Minn. Stat. § 555.01. Constitutional challenges are proper under that statute. *See, e.g.*, *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 337–38 (Minn. 2011). Minnesota courts have never before said that standing to bring Section 555.01 challenges depends on party status in child-welfare cases.

Third, in denying intervention, the court deviated from its practice of "follow[ing] the policy of encouraging all legitimate interventions." *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 28 (Minn. 1981), under which, permissive-

20. The lone precedent the Minnesota Supreme Court cited to justify this anomalous move was one in which "it was 'immediately apparent ... that the appellate court's opinion far exceeded the bounds of appropriate appellate review.'" *Id.* (quoting *Pike v. Gunyou*, 491 N.W.2d 288, 289-90 (Minn. 1992)). That certainly does not characterize this case; all the Court of Appeals did was address MIFPA's constitutionality, because that was critical to the outcome, Pet.App.110a-113a, and because it mattered to Petitioners' intervention and custody motions. The Minnesota Supreme Court's invocation of *Pike* was therefore a transparent effort to rationalize a "clear[] break from the past," *Cruz,* 598 U.S. at 27, that was "clearly at variance" with state law. *Bouie v. City of Columbia*, 378 U.S. 347, 356 (1964).

intervention denials are "subject to reversal in appropriate cases," *Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 221 N.W.2d 162, 166 (Minn. 1974). Although the court cited *Valentine v. Lutz*, 512 N.W.2d 868 (Minn. 1994), as "guid[ing] our decision" to affirm the intervention denial, Pet.App.26a-28a, *Valentine* was entirely different; it affirmed denial of intervention to foster parents into a child-protection proceeding where the child had been thriving in a relative's home for more than a year. *Id.* at 869, 871. Here, the opposite is true. After the twins were torn from the Reyeltses' home, they were moved to a placement that fell through only nine months later—and then to a grandmother on an emergency basis, (in the middle of the night). Pet.App.60a, ¶21. They had only been with the grandmother for six weeks when the Reyeltses' petition was denied. *Compare* date of transfer, *id.*, with date of decision, *id.* at 79a. Nor is there any indication that the *Valentine* court blocked the intervention because of a constitutional challenge. Minnesota has never before said that individuals seeking intervention and custody in a CHIPS case may be denied intervention *because they believe the law governing the case is unconstitutional and detrimental to the children's welfare.*

Fourth, the court implicitly decided that the Reyeltses could not seek declaratory relief because of its decision to affirm the denial of their intervention motion—the theory being that only parties to such CHIPS proceedings can file motions in such proceedings. Pet.App.43a-44a, n.25. No party asked the court to review that issue. Its choice to do so was contrary to its "presumption that 'we do not address issues that were not raised in a petition for review.'" *Great Nw. Ins. Co. v. Campbell*, 24 N.W.3d 256, 261 n.3 (Minn. 2025) (citation omitted).

Fifth, the court's assertion that the Reyeltses forfeited arguing that they should be allowed to move for custody as relatives is untenable. Pet.App.41a-42a, n.21 The court said the district court "did not consider" a motion to that effect, *id.*, but as the Reyeltses stated in their intervention motion, they sought party status "so they may file an alternative transfer of legal custody permanency petition." Pet.App.272a, ¶3. 311a, ¶2. The only people who can file such petitions are "part[ies] to the permanency proceeding." Minn. Stat. § 260C.515, subd. 4(d). A permanency proceeding is separate from a juvenile-protection proceeding—and the permanency proceeding had not yet begun. *See id.* § 260C.503, subd. 1(a).[21]

The point is not to bog this Court down with Minnesota procedure, but to show that the decision below deviated from standard state practice in many unusual ways, all combining to establish the kind of "[n]ovelty in procedural requirements" that this Court does not allow lower courts to employ "to thwart review in this Court"—especially in cases involving challenges to racially discriminatory laws. *Patterson*, 357 U.S. at 457-58.

Several justices of this Court have recently expressed frustration at lower courts for exploiting jurisdictional doctrines "as a way of avoiding some particularly

21. The court also faulted the Reyeltses for only raising certain arguments in a reply, Pet.App.41a-42a, n.21, but Minnesota law requires that replies be "'liberally construed to allow the appellant to respond to the arguments advanced by the respondent, even if they are not technically 'new matter,'" *Goeman v. Allstate Ins. Co.*, 725 N.W.2d 375, 378 (Minn. App. 2006) (citations omitted)—yet another rule the court below ignored.

contentious constitutional questions." *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist., Wisconsin*, 145 S. Ct. 14, 14-15 (2024) (Alito and Thomas, JJ., respecting denial of cert.); *Lee v. Poudre Sch. Dist. R-1*, 146 S.Ct. 26, 26 (2025) (Alito, Thomas, and Gorsuch, JJ., respecting denial of cert.). That's what happened here.

The Minnesota Supreme Court's rejection of the Reyeltses' constitutional arguments, on the grounds that they were not parties to the case for state-law reasons, does not constitute an adequate, independent state law ground. To the contrary, it reflects an effort to employ novel procedural requirements to bar review in this Court of the crucial constitutional issues at stake.

III. Lower courts need guidance respecting ICWA/MIPFA's constitutionality

ICWA/MIFPA's race-based burdens are so pervasive that they affect an indefinitely large number of legal issues in cases involving children, leaving state courts in grave doubt and resulting in many conflicts on many different issues.

Consider the "existing Indian family doctrine" (EIFD), which says ICWA cannot be constitutionally applied to a child whose sole connection to a tribe is biological, as opposed to political or cultural. Originally a saving construction to prevent ICWA from operating as a race-based burden, that doctrine has now been rejected by most courts, *see, e.g., In re. A.J.S.*, 204 P.3d 543, 549 (Kan. 2009), meaning that in those states, courts *may not* inquire whether an alleged "Indian child" has any political, social, cultural, or linguistic connection to a tribe. Only race matters there.

Yet this Court appeared to endorse the EIFD in *Adoptive Couple*, when it held that the child's biological connection to the tribe is *not* sufficient to qualify as an "Indian family" under ICWA. *See* 570 U.S. at 651-52.

Even more confusingly, California courts disagree over the EIFD. One of that state's appellate districts has endorsed it, *see In re Bridget R.*, 49 Cal. Rptr. 2d 507, 520-22 (Cal. App. 1996); *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 723–24 (Cal. App. 2001), another has rejected it, *In re Alicia S.*, 76 Cal. Rptr. 2d 121 (Cal. App. 1998), and still another has, bizarrely, done both. *Compare Crystal R. v. Superior Ct.*, 69 Cal. Rptr. 2d 414, 427 (Cal. App. 1997) (endorsing doctrine), *with In re Vincent M.*, 59 Cal. Rptr. 3d 321, 334-37 (Cal. App. 2007) (finding it "unconvincing" but refusing to overrule *Crystal R.* or abolish the rule). Yet for well over twenty years, the California Supreme Court has declined to address this acknowledged split.

Adding to the confusion, the Bureau of Indian Affairs promulgated rules that purport to overrule these state court decisions applying federal constitutional guarantees. *See* 25 C.F.R. § 23.103 ("In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.").

This Court has already said courts cannot base adoption and custody decisions on race. *Palmore*, 466 U.S. at 434. Indeed, federal law makes it illegal to deny or delay an adoption based on race. 42 U.S.C. § 1996b(1). That law, however, includes on exception: it is lawful—indeed,

mandatory—to discriminate against adults and children based on race in cases involving "Indian children." *See id.* § 1996b(3).

IV. Excluding people from court because they dare to make a good-faith constitutional challenge is so egregiously unconstitutional as to by itself warrant summary reversal

Due process requires that a court "hear[] before it condemns … [and] proceed[] not arbitrarily or capriciously, but upon inquiry." *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). The First Amendment right of petition is "in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 397 (2011).

Yet the District Court excluded Petitioners from the proceeding expressly because they "motioned [the court] to find ICWA/MIFPA unconstitutional." Pet.App.75a, ¶50. ii.C. The state Supreme Court affirmed, holding that any violation was harmless, for reasons that do not pass the smell test. Pet.App.34a-35a. First, it said the challenge, in combination with Petitioners' legal dispute with the Tribe, showed they were dismissive of the twins' indigenous culture. *Id.* Petitioners had a detailed culture plan for raising the twins with strong indigenous identities, and were learning Ojibwe, practicing smudging, and engaging in other Native cultural practices. Pet.App.316a-323a. Second, it said Petitioners have "strong attachment" to the twins and believe that placing the twins in their custody is in the twins' best interests—which the court said is "bias." Pet.App.30a-31a.

To bar someone from court for making a good-faith argument against the constitutionality of the law governing her case is an act of unusually grievous arbitrariness. If left unaddressed, the decision below risks short-circuiting this Court's ability to review ICWA's constitutionality and providing state courts a roadmap for doing likewise. To prevent that, the Court should do one of two things:

1. It should grant review in full and address the First Amendment issue, alongside the equal-protection challenge.

2. Alternatively, if it denies review of the equal-protection challenge, it should grant review of the First Amendment issue, vacate that portion of the lower court's opinion, and remand for adjudication of the equal-protection challenge.

CONCLUSION

The petition for certiorari should be *granted*.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE SUPREME COURT FOR THE STATE OF MINNESOTA, FILED MARCH 11, 2026

STATE OF MINNESOTA
IN SUPREME COURT

A23-1762, A24-1296

IN THE MATTER OF THE WELFARE OF THE CHILDREN OF: L.K., PARENT.

Filed March 11, 2026

OPINION

HUDSON, Chief Justice.

On April 9, 2022, twins Ki. K. and Kh. K. were born in Martin County with severe medical problems. They are both eligible for membership in the Miskwaagamiiwi-zaaga'iganing Tribe, also known as Red Lake Nation. Immediately following their births, respondent Human Services of Faribault and Martin Counties (the County) filed a petition for a Child in Need of Protection or Services (CHIPS) on behalf of both children. Following an emergency protective care hearing, the children's interim legal care, custody, and control were transferred from their biological mother, respondent L.K., to the County. Upon their discharge from the hospital, both twins were placed in emergency foster care with appellants, N.R. and K.R. After approximately a year and a half, appellants learned the twins were scheduled to move

imminently and live with one of their maternal relatives. In the twins' CHIPS proceedings, appellants filed an emergency motion for permissive intervention, a petition for third-party custody, and a motion to stay the move to the maternal relative. The district court denied the motions for permissive intervention and for a stay of the move and dismissed the petition for third-party custody. The district court did so without addressing appellants' argument that the Indian Child Welfare Act (ICWA) and the Minnesota Indian Family Preservation Act (MIFPA) violate the Fifth and Fourteenth Amendments' guarantees of equal protection. Appellants appealed. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings on the issues of permissive intervention and third-party custody. The court of appeals addressed appellants' constitutional challenge as to MIFPA, over arguments that the issue was not properly before that court.

Appellants filed a petition for review with this court, which we granted on two issues: (1) whether ICWA and MIFPA violate the Fifth and Fourteenth Amendments' guarantees of equal protection; and (2) whether the district court and court of appeals erred as a matter of law in finding that the mother's preference for placement of her children with appellants did not constitute "good cause" to deviate from the placement preferences of MIFPA. We heard oral argument on these two issues on September 30, 2024. At oral argument, appellants confirmed that they had abandoned the second issue.

While the issue of ICWA's and MIFPA's constitutionality remained pending before our court, the district court reconsidered the permissive intervention motion and the third-party custody petition based on the court of appeals' remand instructions. The district court again denied permissive intervention and dismissed the petition for third-party custody. Appellants appealed the denials to the court of appeals and then filed a petition for accelerated review before this court, which we granted.

We now consolidate these two appeals for purposes of this decision. We hold that the district court did not err in denying appellants' petition for permissive intervention and in dismissing their third-party custody petition. We therefore affirm the district court's decision. With respect to the court of appeals' decision, the only issue still contested by the parties is whether ICWA and MIFPA violate constitutional requirements of equal protection. But we conclude that because appellants are not proper parties to the CHIPS proceedings, it is not appropriate to pass on their constitutional challenge. And because it was likewise unnecessary for the court of appeals to do so, we vacate the portion of the court of appeals' decision addressing the constitutionality of MIFPA.

FACTS

The following facts are established from the record on appeal, including the CHIPS petition, reports filed with the district court, and pretrial hearings. *See* Minn. R. Civ. App. P. 110.01 (stating the record on appeal includes

the documents filed in the trial court and the transcript of the proceedings).[1]

Initial Placement with Foster Parents

Kh. K. and Ki. K. are Indian children[2] who were born in acute medical distress on April 9, 2022. The County filed

1. In general, the facts in this case are undisputed. The record is limited to the facts and guardian ad litem reports as established in the district court up to the time of the filing of the second appeal. However, two parties—the mother and appellants—ask us to take judicial notice of new facts that arose during the pendency of this appeal. Because these facts are irrelevant to our decision in this case, we will not take judicial notice of them. *See Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977) ("It is well settled that an appellate court may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered."). For that same reason, we grant the guardian ad litem's motion to strike the factual developments in footnote 16 of appellants' principal brief and page 14 of appellants' reply brief in the second appeal.

2. We use the term "Indian" in this opinion because "Indian" and "Indian child" are used by both ICWA and MIFPA and hold a statutorily defined meaning. *See* 25 U.S.C. §§ 1903(3), (4) (defining "Indian" as "any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation"; and defining "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe"); Minn. Stat. § 260.755, subds. 7, 8 (2024) (using the same definition of "Indian" person as ICWA; and defining "Indian child" as "an unmarried person who is under age 18 and is: (1) a member of an Indian tribe; or (2) eligible for membership in an Indian tribe"). Ki. K. and Kh. K. are Indian children because they are eligible for membership in Red Lake Nation.

a CHIPS petition three days after their births, alleging that they were medically neglected, lacked the level of care required for their physical health, were without proper parental care, and were in an environment that could be injurious to their health. Following an emergency protective care hearing on April 14, 2022, the district court transferred the children's interim legal care, custody, and control to the County. The district court issued an order after the hearing finding that the Indian Child Welfare Act (ICWA), *see* 25 U.S.C. §§ 1901-63, and the Minnesota Indian Family Preservation Act (MIFPA), *see* Minn. Stat. §§ 260.751- .835 (2024), applied to the proceedings because of the twins' eligibility for membership in Red Lake Nation.[3]

Due to the severity of the medical complications with which the children were born, both Kh. K. and Ki. K. spent several weeks in the hospital after their births. Kh. K. was discharged on April 20, 2022, and placed in a foster home with appellants, who are licensed foster parents but are not eligible for membership in an Indian tribe. Ki. K. remained in the hospital for several weeks after her brother's discharge, before her later release to appellants' home on May 16, 2022. Both twins remained at risk for developmental delays and other long-term risk factors and required ongoing medical support.

According to reports by a County social worker and a guardian ad litem (GAL) assigned to the case,

3. We agree with the district court's determination that ICWA and MIFPA apply.

appellants were diligent and loving foster parents. Among other things, they created a Native American cultural plan to connect the children with their tribal heritage and facilitated visits with the twins' biological mother. The foster parents took the twins to all their medical appointments, and doctors reported seeing positive growth and recovery in both children over the course of the one year that the twins lived with appellants. Parental reunification efforts on behalf of the County, the GAL, Red Lake Nation, and the mother were ongoing during this time. The County also instituted a case plan with the mother to return her to parental fitness and achieve family reunification in compliance with Minnesota Statutes section 260C.212 (2024).

September 12, 2023 Motion to Stay Placement with Maternal Relatives

In July 2023, Red Lake Nation conducted a relative search for the twins' long-term placement options. The Tribe contacted one of the twins' maternal aunts, R.F., who was a registered foster parent, a member of Red Lake Nation, and who had one of the twins' half-siblings in her care. R.F. indicated she was willing and able to take the twins. Shortly before the planned move, the County informed appellants that the twins would be transitioned into R.F.'s care on September 13, 2023, and sent them details about the logistics of the transfer of physical placement. As the logistics evolved, appellants communicated with the County, Red Lake Nation, and the GAL about the planned transition. On September 12, 2023, before the twins had left appellants' home, appellants filed

an emergency motion to stay the change of placement and to intervene in the twins' CHIPS proceedings.

In their September 12, 2023 emergency motion, appellants made four arguments: (1) that the court should grant them permissive intervention into the CHIPS proceedings as being in the best interests of the children pursuant to Minnesota Rules of Juvenile Protection Procedure 34.02; (2) in the alternative, the court should grant them party status to allow for them to file a transfer of legal custody permanency petition; (3) the court should make a finding that "good cause" exists under the placement preferences articulated in ICWA to temporarily place the children with them due to (a) the mother's preference for placement with them, and (b) the children's extraordinary medical needs; and (4) the court should issue a declaratory judgment that MIFPA and ICWA are unconstitutional under the Equal Protection Clauses of the United States Constitution's Fifth and Fourteenth Amendments. In addition to the motion, appellants filed an affidavit in which they alleged that the mother told them numerous times that she supported the twins' permanent placement with appellants and that she opposed placement with R.F. Appellants also alleged that the County had "repeatedly represented to [them] that [they] were the preferred long-term placement for the twins," and that moving the twins to R.F.'s home would take the twins farther away from their medical team and their mother. Appellants simultaneously filed a notice of their constitutional challenge with the Minnesota and United States attorneys general. Respondent parties—the County, Red Lake Nation, and the GAL—all opposed the motion. The mother supported the motion.

Appendix A

In a September 13, 2023 emergency hearing, the parties agreed to defer consideration of the constitutional and permissive intervention issues and requested that the court determine only the issue of temporary placement. The court agreed to do so. The court also noted that it had not received independent verification from the mother—aside from the claims in appellants' affidavit—as to her placement preference for the twins.

On September 15, 2023, the district court ordered that the change of placement to R.F. was to continue as planned. In a subsequent written order, the court made the following findings: (1) it was in the children's best interests to allow the County to continue to have temporary custody over the children with the authority to place the children in alternative care; and (2) no good cause existed to deviate from ICWA, MIFPA, and the general child custody statutes' temporary placement preferences, under which R.F. would be the designated preferred placement because she is a member of Red Lake Nation, she has the children's half-sister in her care, and she was approved as a placement option by the Tribe.

In September 2023, a few days after the hearing, the twins were formally moved from appellants to live with R.F. Nine months later, in June 2024, the twins were moved from R.F.'s house to that of their maternal grandmother, M.L., where they currently reside. The GAL's reports to the court—up to the time of the second appeal—continued to indicate that the twins were thriving in their grandmother's care: the grandmother lives close to their doctors; lives in the same neighborhood as their

mother, who visits once a week; has one of the twins' other siblings in her care; and is a member of Red Lake Nation.

October 4, 2023 Amended Motion to Intervene in CHIPS Proceeding

On October 4, 2023, appellants amended their motion to intervene in the CHIPS proceeding in juvenile court. *See* Minn. R. Juv. Prot. P. 34.02 (stating that "[a]ny person may be permitted to intervene as a party if the court finds that such intervention is in the best interests of the child"). Their only change was to request that the court join them as necessary parties to the proceedings, arguing that "joinder is[] (a) necessary for a just and complete resolution of the matter; and (b) in the best interests of the child." *See* Minn. R. Juv. Prot. P. 35. Concurrently, appellants filed a petition for third-party custody in juvenile court.[4] They alleged that they are interested third parties pursuant to Minnesota Statutes section 257C.03, subdivisions 7(a)(1)(i)—(iii), and that it is in the best interests of the children for appellants to have sole legal and physical custody.[5] *See* Minn. Stat. § 257C.03,

4. Juvenile court actions are governed by Minnesota Statutes chapter 260C (2024). The original jurisdiction of the juvenile court includes CHIPS matters, "permanency matters, including termination of parental rights," "postpermanency reviews," and "adoption matters." Minn. Stat. § 260C.001, subd. 1(b) (2024).

5. Minnesota Statutes chapter 257C (2024) governs third-party and de facto custody proceedings. Ordinarily such proceedings are brought in family court. *See* Minn. Stat. § 257C.03, subd. 1(a) (providing that such proceeding may be brought "[i]n a court of this state with jurisdiction to decide child custody matters").

subd. 7(a)(2). The GAL opposed the amended motion for intervention, disputed that there was good cause to place the children with appellants, and moved to dismiss the petition for third-party custody. The County opposed granting appellants permissive intervention. The mother supported appellants' motion for permissive intervention or necessary party status and also filed an affidavit stating that she supported the twins' placement with appellants and did not want them with R.F. Red Lake Nation opposed the motion for permissive intervention and moved to dismiss the petition for third-party custody.

On October 5, 2023, the court held a hearing to discuss the amended motion for intervention and the petition for third-party custody. All parties agreed that the constitutional issues should be bifurcated from the permissive intervention and third-party custody claims, and the Minnesota Attorney General's Office reserved its right to argue the constitutional issues. The district court made the following determinations in an order dated October 31, 2023: (1) appellants are not interested third parties for purposes of a third-party custody petition; and (2) appellants' intervention should be denied because it is not in the best interests of the children for them to be placed with appellants. The constitutional issues were not addressed in that order. On November 20, 2023, appellants appealed the September order denying the motion to stay placement and the October order denying intervention and dismissing the third-party custody petition.

Appendix A

First Appeal of District Court's Orders

The court of appeals ruled on four issues in a divided precedential opinion issued June 3, 2024. *In re Welfare of Child. of L.K. & A.S.*, 9 N.W.3d 174 (Minn. App. 2024). First, the court considered whether the district court abused its discretion in denying appellants permissive intervention in the juvenile court proceeding. *Id.* at 183-85. Minnesota Rule of Juvenile Protection Procedure 34.02 governs permissive intervention in juvenile court and states: "Any person may be permitted to intervene as a party if the court finds that such intervention is in the best interests of the child." The court of appeals ruled that the district court erred by "considering circumstances relevant to placement but not relevant to *intervention*." *L.K.*, 9 N.W.3d at 184 (emphasis added). It reversed the district court's order denying appellants permissive intervention and remanded for the district court to reconsider the motion in light of the best interests of the children in terms of *intervention. Id.* at 185.

The court of appeals then turned to the district court's decision to dismiss appellants' third-party custody petition, which was filed in the juvenile court's CHIPS file. *Id.* at 185-86. The court of appeals first addressed whether appellants were "interested third parties" within the scope of Minnesota Statutes section 257C.03, which enables interested third parties who are not parents to petition for custody of a child. *L.K.*, 9 N.W.3d at 186-87. The statute's "definition of 'interested third party' provides that the term 'does not include an individual who *has a child placed* in the individual's care' through a custody consent decree,

'a court order or voluntary placement under chapter 260C [foster care],' or an adoption." *Id.* at 186 (emphasis added) (quoting Minn. Stat. § 257C.01, subd. 3(b) (2022)). Thus, the court of appeals reasoned that this first issue turned on whether "interested third party" excluded all foster parents who had ever had a child placed in their care or excluded only foster parents who currently had a child in their home. *Id.* The court of appeals majority ultimately concluded that the statute excludes only *current* foster parents from petitioning for third-party custody, and because appellants did not have the twins in their home when they filed the petition, they were not categorically excluded by section 257C.01, subdivision 3(b). *Id.* at 187.

The court also addressed the proposition, presented by the GAL as an alternative ground of affirmance, that appellants are not permitted to file a third-party custody petition in a CHIPS case to which they are not a party. *Id.* The court of appeals first recognized that, based on its precedent in *Stern v. Stern*, 839 N.W.2d 96 (Minn. App. 2013), it is "the juvenile court [that] has jurisdiction over appellants' petition." *L.K.*, 9 N.W.3d at 188. And the court of appeals expressly left open that, "on remand, the district court [may] determine[] that appellants' third-party-custody petition should not have been filed in the pending CHIPS case."[6] *Id.* The court of appeals only rejected the specific argument made by the GAL that Minn. R. Juv. Prot. P 32.02(e)—which states that

6. The court of appeals also left open the possibility that, on remand "the district court may direct appellants to file [a third-party custody petition] in a new case." *L.K.*, 9 N.W.3d at 188.

"part[ies] shall have the right to . . . bring motions before the court"—on its own compels that "a person must be a party to a pending CHIPS case before filing a third-party custody petition in that case." *L.K.*, 9 N.W.3d at 188.

The third issue the court of appeals addressed concerned the district court's decision to temporarily place the twins with the maternal aunt rather than with appellants. *Id.* at 188-91. Both MIFPA and ICWA provide ranked preferences for temporary out-of-home placements. *See* 25 U.S.C. § 1915(b) (ICWA's placement preferences); Minn. Stat. § 260.773, subd. 3 (incorporating the order of ICWA's placement preferences). However, a court may depart from the preferences upon a finding of good cause.[7] Minn. Stat. § 260.773, subd. 10(2). Appellants argued that the district court erred when it determined that the good-cause exceptions advanced by appellants did not apply. The court of appeals, however, concluded that the district court did not err in rejecting appellants' arguments that there was good cause to depart from the placement preferences based on (1) the mother's attestation to the court that she preferred the twins stay with appellants and (2) the twins' medical needs. *L.K.*, 9 N.W.3d at 190-91. The court of appeals thus affirmed the

7. *See* Minn. Stat. § 260.773, subd. 10(2)(i), (iii) ("The court shall follow the placement preferences . . . except as follows: . . . where the court determines there is good cause based on: the reasonable request of the Indian child's parents . . . [or] the testimony of a qualified expert designated by the Indian child's Tribe . . . that supports placement outside the order . . . due to extraordinary physical or emotional needs of the Indian child that require highly specialized services. . . .").

district court's order that preferred placement with R.F., and in turn, with the grandmother M.L. *Id.* at 198.

Finally, the court of appeals turned to the merits of the constitutionality of MIFPA.[8] Although the court of appeals acknowledged that the district court had not decided the issue, and that appellate courts are generally limited to considering only those issues that were considered by the district court, the court of appeals nevertheless concluded that the issue was properly before it because, among other things, it had been presented to the district court and it was potentially decisive of the controversy on the merits. *Id.* at 192-93. The panel split in determining whether appellants had standing to challenge MIFPA, with the majority finding that appellants had standing because they suffered an injury in fact. *Id.* at 193-94. The court of appeals further concluded that MIFPA is subject to the rational-basis test, *id.* at 197-98, and that the statute is constitutional because it survives rational-basis review, *id.* at 198, 205-10 (Reyes, J., concurring in part and dissenting in part) (disagreeing with the court of appeals that appellants had standing to challenge the statute, but agreeing that if it were to reach the issue, the statute is constitutional).

Appellants petitioned our court for further review of the third and fourth issues, concerning the good-cause

8. Although appellants challenged the constitutionality of both ICWA and MIFPA, the court of appeals considered only the constitutionality of MIFPA "because the district court relied on MIFPA's placement preferences in denying appellants' motion to stay the change of placement." *L.K.*, 9 N.W.3d at 194.

exceptions and the constitutionality of MIFPA and ICWA, which we granted. Although appellants sought (and we granted) review of the issue of the good-cause exceptions, they abandoned it before our court.[9] Regarding MIFPA's constitutionality, as explained further below, we conclude that the court of appeals erred by addressing that issue, and accordingly, we vacate that part of the court of appeals' decision.

July 24, 2024 Order Reconsidering Appellants' Motions on Remand

No petition for review was sought from the court of appeals' remand order on appellants' permissive intervention motion and third-party custody petition. The district court took up these issues again in an order dated July 24, 2024.[10] In that order, the district court noted that the twins continued to do well in M.L.'s care, and that the mother had filed an amended affidavit indicating her support for the children's placement with M.L. The district court then considered whether appellants permissive intervention was in the best interests of the children in terms of intervention and concluded that it was not. It reasoned that although appellants were seasoned

9. Specifically, appellants did not address the issue in their briefing, and when asked at oral argument, they acknowledged that they had abandoned it.

10. Appellants' petition for further review was filed on June 12, 2024. We granted the petition for further review on July 2, 2024, after the district court held a hearing on June 21, 2024 based on the court of appeals' remand instructions, but before the district court issued its order on July 24, 2024.

foster parents and had genuine love for the twins, their knowledge of the twins' physical, medical, and emotional needs was stale given that the twins had not been in appellants' home for nearly one year. The court expressed concern that appellants' actions "indicate[d] a disregard for or a lack of understanding about the importance of" the twins' tribal heritage. It pointed to appellants' petition for third-party custody over the Tribe's objections and their claims that ICWA and MIFPA are unconstitutional as indications that their participation in the case would be a disadvantage. It also noted that appellants had allowed the mother to visit the children on numerous occasions without the County's knowledge and had urged the mother to support their petition for custody against her better judgment.

In the same order, the district court reconsidered appellants' petition for third-party custody in the CHIPS case. The court first determined that the petition was procedurally improper. Relying on *Stern*, 839 N.W.2d at 98, 104, the district court found that here, "the third-party custody petition could not have been filed in family law court." The district court also concluded, however, that "[t]here is no right to file a third-party petition for custody within a juvenile protection matter" because Minnesota Rules of Juvenile Protection Procedure 33.01, 34.02, and 35 are "an exhaustive list of the procedures available to an individual who seeks a status from which to assert a custody claim for the children or participate in a juvenile protection matter." And the court further concluded that a third-party custody petition would be "impractical" in a juvenile protection proceeding because,

among other things, "there is simply no reason to risk a third-party custody petition disrupting a child protection matter where there are multiple avenues for a qualified individual to become a party or participant within a juvenile protection matter under the juvenile protection rules and statutes."

In the alternative, the district court stated that even if its procedural decision were to be reversed, appellants would still not be entitled to an evidentiary hearing on the merits, and the petition would fail for that reason. In reaching that conclusion, the court considered twelve statutory factors under Minnesota Statutes section 257C.04, subdivision 1 (2024), to determine whether appellants proved by a preponderance of the evidence that it is in the children's best interests to be in their custody. The court weighed those factors and concluded that appellants' petition and affidavit did not allege sufficient facts to prove that they would satisfy the criteria to be considered interested third parties and that appellants' custody would be in the children's best interests. Therefore, the court concluded that appellants could not satisfy the test laid out in *Lewis-Miller v. Ross*, 710 N.W.2d 565, 570 (Minn. 2006), which only entitles a third party to an evidentiary hearing when the facts alleged, if proven, would satisfy section 257C.03, subdivision 7. The court ultimately dismissed appellants' third-party custody petition and denied their motion for permissive intervention in the existing CHIPS proceeding.

Appendix A

Second Appeal of District Court's Order

After the district court issued its order, appellants moved in this court for a stay of further district court proceedings, including the stay of a pending motion by Red Lake Nation to transfer the CHIPS case to Tribal court. *See* Minn. R. Juv. Prot. P. 31.01, subd. 1 ("At any stage in the proceedings, an Indian child's parent, Indian custodian, or tribe may request transfer of the juvenile protection matter to the Indian child's tribe. . . ."). We granted the stay in part, prohibiting the district court from transferring this matter to tribal court until we ordered the stay lifted.

Appellants also filed a second appeal, No. A24-1296, contesting the district court's July 24, 2024 order denying their intervention motion and dismissing their third-party custody petition. The court of appeals stayed that appeal pending oral argument before this court on the first appeal. On October 7, 2024, immediately following oral argument with our court on the first appeal, appellants filed a petition for accelerated review in this court as to the second appeal, which we granted. Appellants raised four new issues in the second appeal: (1) whether the district court violated appellants' constitutional rights to petition the government by prohibiting their intervention in the CHIPS case based on their good-faith challenges to existing law; (2) whether the district court erred by denying appellants' motion for permissive intervention under Minnesota Rule of Juvenile Protection Procedure 34.02; (3) whether the district court erred by denying appellants an evidentiary hearing to establish interested-

third-party status pursuant to Minnesota Statutes section 257C.03 (2024); and (4) whether the district court erred in dismissing appellants' third-party custody petition. We heard oral argument on these four issues on April 1, 2025. We have consolidated the two appeals for the purposes of this opinion.

ANALYSIS

We address in this opinion the issues raised in both appeals. The only issue remaining from the first appeal is the constitutionality of ICWA and MIFPA.[11] That issue is an important one that justified our grant of review of this case. But that issue can be raised only by a proper party to the CHIPS proceedings. Accordingly, a threshold question in these consolidated appeals is whether appellants were proper parties to the CHIPS case. Appellants sought party status in two ways: by seeking permissive intervention and by filing a petition for third-party custody. The district court denied appellants party status under both routes.

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11. The other question appellants raised in their first appeal is whether the district court erred in finding that there was not good cause to deviate from MIFPA's temporary out-of-home placement preferences when it placed the twins with their maternal relatives rather than with appellants. *See* Minn. Stat. § 260.773, subd. 10(2); 25 U.S.C. § 1915(b). Because appellants abandoned this issue at oral argument in their first appeal and in their briefing, we do not address it. *See Lang v. Chicago & N. W. R. Co.*, 295 N.W. 57, 62, 208 Minn. 487 (Minn. 1940) ("Assignments of error made without any argument or discussion whatever must be deemed abandoned."); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) ("This issue was not argued in the briefs and accordingly must be deemed waived.").

Considering each route in turn, we first conclude that the district court did not abuse its discretion when it denied appellants' permissive intervention motion. We then turn to the question of whether the district court erred when it dismissed appellants' petition for third-party custody filed in juvenile court, and we conclude it did not. Because we affirm the district court's decisions on both issues, we hold that appellants are not parties in the twins' CHIPS case.

Accordingly, we do not address appellants' equal protection arguments—on which we granted review—because appellants are not parties to the case and because the district court's decision on intervention was not predicated on the foster parents' tribal eligibility status. We further conclude that the court of appeals erred by addressing appellants' equal protection arguments given that doing so was not necessary to resolve the orders before it on appeal, and we therefore vacate its opinion as it pertains to the constitutionality of ICWA and MIFPA. We now explain the reasoning for our decision.

I.

A.

The first question before us is whether the district court erred in denying appellants' motion for permissive intervention into the twins' open CHIPS case. We review a district court's denial of permissive intervention under an abuse of discretion standard. *Norman v. Refsland*, 383 N.W.2d 673, 676 (Minn. 1986).

Appendix A

1.

We begin with an overview of the juvenile protection statutes, as relevant to this case. "The paramount consideration in all juvenile protection proceedings is the health, safety, and best interests of the child." Minn. Stat. § 260C.001, subd. 2(a) (2024).[12] These proceedings exist to "identify[] and protect[] abused children." *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 134 (Minn. 2014). Once any child is adjudicated in need of protection or services, *see* Minn. Stat. § 260C.141 (2024), the child's custody is vested in the State, and simultaneous legal proceedings begin along two separate tracks pursuant to Minnesota Statutes sections 260.012(a) (2024) and 260C.223, subdivision 1(b) (2024). The first track requires the State's social services agency to "eliminate the need for removal and to reunite the child with the child's family at the earliest possible time"—that is, it must prioritize reunification. Minn. Stat. § 260.012(a). The second track is "concurrent permanency planning" and requires the agency to "develop an alternative permanency plan while

12. In 2024 and 2025, after the twins' CHIPS action was commenced in district court, the Legislature amended MIFPA and the child welfare statutes. *See*, *e.g.*, Act of May 18, 2024, ch. 115, art. 17, §§ 1-49, 2024 Minn. Laws 1544, 1685-708 (codified as amended at Minn. Stat. §§ 260.751-.835 (2024)); *id.*, ch. 115, art. 17, § 51, subd. 1(n), 2024 Minn. Laws at 1711 (codified at Minn. Stat. § 260C.178 (2024)); *id.*, art. 18, §§ 36-39, 2024 Minn. Laws at 1737-46 (codified as amended at Minn. Stat. §§260C.212-.515); Act of June 14, 2024, ch. 3, art. 10, §§ 17-30, 2025 Minn. Laws 1st Spec. Sess. 1730, 1732-47 (codified as amended at Minn. Stat. §§ 260C.178-.452). These amendments are not applicable to this case and do not change our analysis.

making reasonable efforts for reunification." Minn. Stat. § 260C.223, subd. 1(b). ICWA and MIFPA apply to both tracks and also require the State to make "active efforts" to prevent the breakup of the Indian family. Minn. Stat. § 260C.221, subd. 1(b) (2024); 25 U.S.C. § 1912(d).

For the purposes of concurrent permanency planning, child welfare law requires consideration of the "availability of relatives and other concerned individuals to provide . . . permanent placement. . . ." Minn. Stat. § 260C.223, subd. 2(a)(3) (2024). The statute imposes an ongoing responsibility on the social services agency to "conduct a relative search . . . and engage relatives in case planning and permanency planning," "consider placing the child with relatives" in a specific order, and "place siblings . . . in the same home." Minn. Stat. § 260.012(e)(3)-(5) (2024). The County conducted a relative search and identified R.F. and then M.L. as suitable possibilities for the twins' future permanent placement.

Once a CHIPS petition is filed and children are placed in out-of-home care—as the twins were when they were placed in appellants' home—the social services agency is required to create a temporary out-of-home placement plan.[13] Minn. Stat. § 260C.212, subd. 1. For non-Indian children, the temporary out-of-home placement hierarchy prioritizes "placement with relatives in the following order":

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13. A temporary out-of-home placement plan governs, among other things, where a child will stay while the CHIPS matter is adjudicated and family reunification efforts are pursued. *See* Minn. Stat. § 260C.212, subd. 1(c).

> (1) with an individual who is related to the child by blood, marriage, or adoption, including the legal parent, guardian, or custodian of the child's sibling; or
>
> (2) with an individual who is an important friend of the child or of the child's parent or custodian, including an individual with whom the child has resided or had significant contact or who has a significant relationship to the child or the child's parent or custodian.

Id., subd. 2(a). Indian children's temporary out-of-home placement preferences are governed by ICWA and MIFPA. *See* 25 U.S.C. § 1915(b); Minn. Stat. §§ 260C.212, subd. 2(a), 260.773 (2024). "[T]he Indian child shall be placed in the least restrictive setting which most approximates a family and in which the Indian child's special needs, if any, may be met." Minn. Stat. § 260.773, subd. 1. Preference is to be given to a placement with:

> (1) a noncustodial parent or Indian custodian;
>
> (2) a member of the Indian child's extended family;
>
> (3) a foster home licensed, approved, or specified by the Indian child's Tribe;
>
> (4) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

> (5) an institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Id., subd. 3. ICWA and MIFPA also enumerate several good-cause exceptions to deviate from the enumerated placement preferences for Indian children. *See* 25 U.S.C. § 1915(b); Minn. Stat. § 260.773, subd. 10(2). The structure of CHIPS proceedings is for the child to live in the temporary out-of-home placement until either family reunification is successful—which is the preferred option—or there is an adoption, transfer of custody, or other permanency placement. *See* Minn. Stat. § 260.012 (2024).

The Minnesota Rules of Juvenile Protection Procedure specifically list who may be a party in a CHIPS matter. The parties that "shall" be included are the GAL; the legal custodian; for Indian children, the child's parents, the child's Indian custodian, and the child's tribe; and the petitioner, which here, is the County. Minn. R. Juv. Prot. P. 32.01, subd. 1(a)-(d). The rule further provides that any person who intervenes pursuant to Rule 34, is joined pursuant to Rule 35,[14] or "is deemed by the court to be important to a resolution that is in the best interests of the child," shall also be a party to the juvenile protection matter. *Id.*, subd. 1(e)-(g). As to intervention, Rule 34.01

14. The court is permitted to "join a person or entity as a party if the court finds that joinder is: (a) necessary for a just and complete resolution of the matter; and (b) in the best interests of the child." Minn. R. Juv. Prot. P. 35.

provides the child who is the subject of the CHIPS matter, grandparents, non-custodial parents, and social services agencies intervention as of right. Minn. R. Juv. Prot. P. 34.01. And Rule 34.02 allows for permissive intervention of "[a]ny person" if intervention is in the best interests of the child. Minn. R. Juv. Prot. P. 34.02. As for foster parents, Rule 33.02, subdivision 2, states that "any foster parent . . . shall have a right to be heard in any hearing regarding the child" but "does not require that a foster parent . . . be made a party to the matter." Minn. R. Juv. Prot. P. 33.02, subd. 2. Appellants moved for permissive intervention in the twins' case under Rule 34.02.

2.

On appeal, appellants assert that the district court abused its discretion when it denied their permissive intervention motion for the second time. Specifically, they allege that the district court neglected to weigh a key factor indicating that appellants' intervention would be in the best interests of the children, namely that they had familiarity with the twins' medical needs. They also assert that the district court did not give sufficient weight to their claim that judicial economy is best served by allowing them to permissively intervene, rather than pursuing separate litigation—even if their intervention might delay or broaden the proceedings. All four respondent parties argue that the district court did not abuse its discretion because the juvenile rules provide the district court with discretion to deny an intervention that does not serve the children's best interests in terms of intervention.

Rule 34.02 does not specify what the "best interests" are in terms of intervention. *See* Minn. R. Juv. Prot. P. 34.02 ("Any person may be permitted to intervene as a party if the court finds that such intervention is in the best interests of the child."); *cf.* Minn. Stat. § 260C.212, subd. 2(b) (listing 10 best-interests factors in terms of *placement*).[15] The overarching question in deciding a permissive intervention motion is whether the individual's participation as an intervenor "is in the best interests of the child." *See* Minn. R. Juv. Prot. P. 34.02. We rely on the district court's sound discretion to answer that question. *See Valentine v. Lutz*, 512 N.W.2d 868, 871 (Minn. 1994) ("We believe the decision to allow persons to intervene other than those allowed by our rule or statute is one that should remain within the sound discretion of the trial court."). In answering that question here, we hold that the district court did not abuse its discretion in denying appellants' permissive intervention motion.

Our decision in *Valentine v. Lutz*—affirming a district court's decision to deny foster parents' intervention in a CHIPS proceeding—shows the extent to which we defer to

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15. The court of appeals has addressed this issue and has not identified specific best-interests factors that should guide a Rule 34.02 permissive intervention analysis. *See In re Welfare of Child. of M.L.S.*, 964 N.W.2d 441, 452 (Minn. App. 2021) ("Rule 34.02 does not specify what circumstances a district court should consider in determining the best interests of the child in granting or denying intervention."); *L.K.*, 9 N.W.3d at 185 n.1 (recognizing that *M.L.S.* did not "endorse or prescribe *any* statutory factors for determining the best interests of a child on a motion for permissive intervention"). Likewise, the parties before us do not urge us to adopt any specific factors, and we decline to do so.

the district court in this context. *Id.* at 871. In *Valentine*, a social services agency was granted temporary custody of J.A.D. in a CHIPS proceeding. *Id.* at 869. The agency temporarily placed J.A.D. with foster parents due to J.A.D.'s significant medical needs. *Id.* J.A.D. remained with the foster parents for over three years. *Id.* At that point, the biological mother requested that the agency consider permanent placement and custody with the mother's sister and brother-in-law. *Id.* After visitation and conducting a home study at the relatives, the agency informed the foster parents of J.A.D.'s impending move to his relatives. *Id.* The foster parents responded in several ways, including moving for the right to intervene in the CHIPS proceedings involving J.A.D. and for a transfer of his custody to them. *Id.* at 869-70. The district court denied both motions. *Id.* at 870.

On appeal, the foster parents argued the court abused its discretion by denying their permissive intervention motion. *See id.* at 871. We noted that "[i]n certain circumstances, it may be appropriate for a trial court to allow foster parents to intervene, either as parties to the action or on a more limited basis." *Id.* We also pointed out that the foster parents had "provide[d] excellent care for a child [who had special medical needs] for an extended period, [and] may have information which can assist a trial court in making its decisions in a CHIPS proceeding[]." *Id.* However, we ruled against the foster parents and affirmed the denial of the motion to intervene because "the decision to allow persons to intervene other than those allowed by our rule or statute is one that should remain within the sound discretion of the trial court." *Id.*

That same analysis guides our decision here. There is no dispute that appellants provided excellent care to the twins while they were living in appellants' foster home, which the district court acknowledged in its order denying permissive intervention. And as we acknowledged in *Valentine*, foster parents often have information about the child that is helpful to a district court in making its placement decisions, which weighs in favor of their intervention. *Id.* at 871 ("Foster parents . . . may have information which can assist a trial court in making its decisions in a CHIPS proceeding[]."). But the discretion properly lies with the district court to determine whether that information would be helpful. Moreover, as respondents point out, Minnesota's child custody framework—which governs all juvenile protection cases of non-Indian and Indian children alike—mandates individualized consideration of a child's best interests. *See* Minn. Stat. § 260C.212. And for all children, the juvenile protection statutes require "preserv[ing] and strengthen[ing] the child's *family ties* whenever possible and in the child's best interest[.]" *Valentine*, 512 N.W.2d at 871 (emphasis added) (citation omitted) (internal quotation marks omitted).

Here, after the court of appeals' remand order, the district court conducted a determination of the twins' best interests specific to the question of intervention. Specifically, the district court considered both the advantages and the disadvantages that might be realized if appellants were made parties to the CHIPS case. As one advantage, it considered appellants' history with the twins—including that they "attended to the children's

physical, medical, and emotional needs tirelessly"—which might have "offered insight into the children's care, such as coping strategies and schedules that proved successful." As another advantage, it included the fact that appellants "are well seasoned parents" who "genuinely care about the children and have an attachment to them."

But the district court also considered the possible disadvantages of including appellants as parties. Notably, the district court was "concerned" that appellants being given party status would "unnecessarily encumber[]" the CHIPS proceedings, particularly because the court "has every reason to believe [appellants] would contest any placement or action taken in regard to the children other than placement with" appellants. And although the district court acknowledged that appellants "expressed an interest in supporting the children with their indigenous identity," it found that their "actions indicate a disregard for or a lack of understanding about the importance of that heritage," and so "their participation in this case would be a disadvantage."[16] Finally, the district court found that appellants' actions towards the twins' mother raised questions about their judgment, given that she was "seemingly not in a place at that time to offer a clear judgment regarding the children's placement."

Ultimately, the district court concluded that the disadvantages of appellants being permitted to intervene

16. Appellants argue that the district court disregarded their "commitment to—and plan for—raising the twins with a strong indigenous identity." But the district court acknowledged that they "expressed an interest in" doing so.

"far outweigh the possible advantages." The district court reasoned that appellants' familiarity with the twins' medical history and developmental progress—which appellants asserted should be counted in their favor—is information that could be provided to the court directly by the medical providers and the social workers' reports. It also emphasized that the CHIPS action would be overburdened if appellants intervened as parties because the twins' best interests were adequately represented by the GAL, the Tribe, and their mother. Although the court considered the information appellants provided to the court in support of their motion to intervene, it did not, on balance, find their participation to be helpful in the CHIPS proceeding because the information they could provide was largely redundant. And the district court expressed 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."[17] The district court

17. Appellants claim that it was "non-sensical" for the district court to conclude that, as appellants put it, "because of Appellants' love and commitment to the twins, it is not in the twins' best interests for them to intervene." Appellants' argument is unpersuasive. Although the district court did not doubt that appellants "genuinely care about the children and have an attachment to them," the court concluded that attachment would, on balance, lead to unnecessary delay in the resolution of the proceedings. As appellants acknowledge, the purpose of CHIPS proceedings is to serve the best interests of the children by reuniting them with their family or, failing that, to prepare them for a permanent placement with relatives or other concerned individuals. It was not an abuse of discretion for the district court

denied the motion for permissive intervention for these reasons.

In reaching its decision, the district court did not clearly "mak[e] findings unsupported by the evidence," nor did it "improperly apply[] the law." *Rodgers v. Knauff (In re N.A.K.)*, 649 N.W.2d 166, 174 (Minn. 2002). The decision to deny a nonparty's intervention—including that of the foster parents—is within the district court's purview. *See Valentine*, 512 N.W.2d at 871. Moreover, we note that the same district court judge has presided over this matter since 2022 and is intimately familiar with the parties, the appellants, and the children. We therefore hold that the district court did not abuse its discretion by denying appellants' permissive intervention motion in the twins' existing CHIPS case in juvenile court.

B.

Appellants also argue that the district court violated their First Amendment right to petition the government when it denied their intervention in the

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to conclude that appellants' "strong attachment to the children" would not serve those interests based on its finding that "they could not see the value in any other placement for the children" and "would contest any placement or action taken in regard to the children other than placement with them." *See In re Welfare of Child of R.K.*, 901 N.W.2d 156, 162 (Minn. 2017) (holding that juvenile protection proceedings "require an expeditious resolution of permanency because we will not allow children to linger in uncertainty"); *In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 5 (Minn. 2003) (stating that "child protection cases . . . in particular need to be expeditiously handled").

CHIPS proceedings. Specifically, appellants point to the district court's statement in its order denying their permissive intervention that "motion[ing] [the district] Court to find ICWA and MIFPA unconstitutional" gave support to its finding that "their participation in this case would be a disadvantage." The GAL and the County disagree and argue that the district court did not infringe on appellants' rights. We agree with respondents.

Appellants assert that the district court violated their right to petition the government by considering their assertion of their constitutional challenge to ICWA and MIFPA as among the reasons to deny intervention. "[T]he Petition Clause [of the First Amendment] protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387, 131 S. Ct. 2488, 180 L. Ed. 2d 408 (2011); *see* U.S. Const. amend. I ("Congress shall make no law . . . abridging the . . . right of the people . . . to petition the Government for a redress of grievances."); *Virginia v. Black*, 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) (applying the First Amendment to the states through the Fourteenth Amendment). We take the protection of that right seriously.

Appellants' specific argument is that the district court retaliated against them by using their challenges to ICWA and MIFPA as factors that weighed against them in their permissive intervention motion. "[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory

actions" on the basis of their constitutionally protected speech. *Hartman v. Moore*, 547 U.S. 250, 256, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006). In some circumstances, therefore, a cause of action may exist when government actors exercise authority in retaliation for exercising the right to speak or to petition the government. *See*, *e.g.*, *id.* (alleging criminal prosecution in retaliation for speech); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 281-87, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) (alleging employment action in retaliation for speech); *Goff v. Burton*, 7 F.3d 734, 736-38 (8th Cir. 1993) (alleging transfer of prisoner in retaliation for filing legal action); *Ligons v. Hagen*, No. A04-1851, 2005 Minn. App. Unpub. LEXIS 283, 2005 WL 2128619, at *4 (Minn. App. Sep. 6, 2005) (alleging disciplinary action against prisoner in retaliation for exercising "right of access to the courts"). To have a cause of action, there must be a causal connection between the exercise of the constitutional right and the retaliatory action. *Hartman*, 547 U.S. at 260. "If there is a finding that retaliation was not the but-for cause [of the government action], . . . the claim fails for lack of causal connection between unconstitutional motive and resulting harm, despite proof of some retaliatory animus in the official's mind." *Id.* That is because an official action "colored by some degree of bad motive" may not merit relief "if that action would have been taken anyway." *Id.* (citing *Crawford-El v. Britton*, 523 U.S. 574, 593, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998), and *Mt. Healthy*, 429 U.S. at 285-86). The exercise of the protected right must do more than merely "play[] a part" in the adverse action because there is no constitutional violation if the government actor "would have reached the same decision

. . . even in the absence of" the exercise of that right. *Mt. Healthy*, 429 U.S. at 285, 287.

Appellants have not drawn to our attention 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. But, assuming without deciding that such principle is valid, we conclude that there was no violation here, for two reasons.

First, it is not clear that the district court's decision denying intervention reflects retaliatory animus stemming from appellants' exercise of their right to challenge the constitutionality of ICWA and MIFPA. The district court identified two possible advantages, and four possible disadvantages, to making appellants parties to the CHIPS proceeding. One of the disadvantages was that, in the district court's view, appellants had "a disregard for or a lack of understanding about the importance of [the twins' indigenous] heritage." And in support of *that* conclusion, the district court focused its attention on actions that it perceived as denigrating "the children's tribal identity," as evidenced by their opposition, on multiple occasions, to the actions of the Tribe. It was in that context that it mentioned that appellants "motioned this Court to find ICWA and MIFPA unconstitutional." In short, it appears that the district court considered appellants' challenge to ICWA and MIFPA to be indicative of appellants' "attitude toward the importance of the children's tribal identity." We

do not perceive that determination by the district court to be evidence of retaliation.

Second, even assuming the district court's finding regarding appellants' attitude toward the twins' indigenous heritage was inappropriately affected by their challenge to ICWA and MIFPA, its order demonstrates that appellants' attitude toward tribal matters was not the decisive factor in the district court's analysis as required for relief in any claim of retaliation for protected speech. Instead, the district court emphasized its 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." Such a concern strongly supports the district court's conclusion that it would not be in the children's best interests for appellants to be parties in the CHIPS proceeding.

In short, we hold that the district court properly conducted a robust analysis of the best interests of the child as to intervention in this case, consistent with what Rule 34.02, the child custody statutes, and our case law require. We are confident that the district court's decision was guided by the applicable law, not by appellants' decision to challenge ICWA's and MIFPA's constitutionality.

* * *

In sum, the district court did not abuse its discretion when it denied appellants' permissive intervention motion.

Accordingly, appellants are not parties to the CHIPS action.

II.

Next, we turn to the issue of whether the district court erred by dismissing appellants' petition for third-party custody, which they filed into the existing CHIPS case in juvenile court. We conclude that such a petition is non-cognizable in juvenile court and that, even if we were to construe appellants' third-party custody petition as a petition for a transfer of permanent legal and physical custody—as it should be properly considered in juvenile court—it was not error for the district court to dismiss it without an evidentiary hearing because appellants are not parties to the CHIPS action. Our analysis follows.

A.

After the remand order from the court of appeals, the district court addressed the procedural question of whether appellants were allowed to file a third-party petition for custody within a juvenile protection proceeding, rather than in a separate case file in family court. The court dismissed the third-party petition for custody without holding an evidentiary hearing. Appellants assert that the district court erred by dismissing the petition without holding an evidentiary hearing. We disagree.

The question of whether the district court erred in dismissing the petition involves the interpretation and application of the relevant statutes and the Minnesota

Rules of Juvenile Protection Procedure. We review this question de novo. *In re Estate of Figliuzzi*, 979 N.W.2d 225, 231 (Minn. 2022) ("We review the interpretation and application of statutes and the rules of . . . procedure de novo."). The statute governing this CHIPS proceeding is Minnesota Statutes chapter 260C, which the Legislature has directed "may be cited as the juvenile protection provisions of the Juvenile Court Act." Minn. Stat. § 260C.001, subd. 1(a) (2024). Minnesota Statutes section 260C.101, subdivision 1 (2024), states that "[t]he juvenile court has original and exclusive jurisdiction in proceedings concerning any child who is alleged to be in need of protection or services." Subdivision 2, in turn, extends the juvenile court's "original and exclusive jurisdiction" to "[o]ther matters relating to children." *Id.*, subd. 2 (2024).

As the court of appeals reasoned in *Stern v. Stern*, the statute provides a clear and unambiguous grant of jurisdiction to the juvenile court over any permanency matters pertaining to children who are subject to protection proceedings. 839 N.W.2d at 100 (citing Minn. Stat. § 260C.101, subds. 1, 2); *see also* Minn. Stat. § 260C.001, subd. 3(2) (2024) ("The purpose of the laws relating to permanency . . . is to ensure that . . . if placement with the parents is not reasonably foreseeable, to secure for the child a safe and permanent placement. . . ."). We conclude that *Stern* correctly states the law. Because the twins are subject to protection proceedings, the juvenile court has exclusive jurisdiction over the twins' placement. Therefore, appellants' petition seeking permanent custody of the twins invokes the jurisdiction of the juvenile court

and would need to be filed in the existing juvenile court action.[18]

The juvenile protection provisions of the Juvenile Court Act provide that when an individual seeks permanent custody of a child in juvenile court, the proper procedural action is to file a petition for a transfer of legal and physical custody. Minn. Stat. § 260C.515, subd. 4(a) (2024) ("The court may order a transfer of permanent legal and physical custody to: (1) a parent . . . ; or (2) a fit and willing relative. . . ."). In contrast, the procedural mechanism used by appellants here, a third-party custody petition, is not contained within the juvenile protection provisions of the Juvenile Court Act and is thus inapplicable to this juvenile court proceeding. *See* Minn. Stat. § 257C.03, subd. 1 (a "third-party child custody proceeding may be brought by an individual other than a parent by filing a petition seeking custody[.]").

This conclusion is supported by *Stern*. In *Stern*, the grandmother-petitioner filed a petition for de facto custody in family court,[19] seeking permanent custody

18. The court of appeals directed that appellants may file their third-party custody petition in a new case file if, upon remand, the district court determined that it should not have been filed in the pending CHIPS case. *L.K.*, 9 N.W.3d at 188. That command was erroneous: there may be only one pending juvenile-court matter regarding a particular child.

19. *See* Minn. Stat. § 257C.01, subd. 2(a) (2024) (defining "[d]e facto custodian" as "an individual who has been the primary caretaker for a child who has, within the 24 months immediately preceding the filing of the petition, resided with the individual without

of her grandchildren under Minnesota Statutes section 257C.03, subdivision 6 (2012). *Stern*, 839 N.W.2d at 98. However, a CHIPS action involving the grandchildren had already been opened in juvenile court, and "the children were under the protective custody of the county." *Id.* And the grandmother had already filed a petition in the CHIPS proceeding under Minn. Stat. § 260C.515, subd. 4 (2012). *Stern*, 893 N.W.2d at 98. The family court dismissed the petition for de facto custody, concluding that it did not have concurrent jurisdiction over that petition. *Id.* at 99.

The court of appeals in *Stern* conducted a well-reasoned statutory interpretation analysis of the child welfare statutes and concluded that the juvenile court maintained exclusive original jurisdiction over the children because the CHIPS action was already pending. *Id.* at 99-104. The court of appeals observed that the Juvenile Court Act "contains numerous provisions that allow relatives and private parties to seek permanent legal and physical custody of children in CHIPS and permanency proceedings," *id.* at 104, including a petition to transfer permanent legal and physical custody under Minnesota Statutes section 260C.515, subdivision 4 (2012), *id.* at 101. Because the grandmother had *already filed* such a petition in juvenile court, the court of appeals concluded that the family court was without concurrent jurisdiction over the grandmother's petition for de facto custody and affirmed the dismissal of that petition in family court. *Stern*, 839 N.W.2d at 104.

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a parent present and with a lack of demonstrated consistent participation by a parent" for a statutorily-defined period of time).

We apply the same reasoning here. The juvenile court has original and exclusive jurisdiction in proceedings, such as those here, concerning any child who is alleged to be in need of protection or services. *See* Minn. Stat. § 260C.101, subd. 1. And those juvenile court proceedings are governed by Minnesota Statutes chapter 260C, which contains the juvenile protection provisions of the Juvenile Court Act. *See* Minn. Stat. § 260C.001, subd. 1(a). Thus, once a CHIPS proceeding has begun in juvenile court, and while juvenile court proceedings remain pending, the juvenile court has exclusive jurisdiction and the appropriate pathway to transfer permanent custody of a child is a motion to transfer permanent legal and physical custody under section 260C.515, subdivision 4. A petition for third-party custody under section 257C.03, subdivision 1, is non-cognizable in juvenile court.[20] Because appellants

20. Appellants argue that, because Minnesota Statutes section 257C.03, subdivision 1(a), allows a third-party custody proceeding to be brought "[i]n a court of this state with jurisdiction to decide child custody matters," and because the juvenile court has jurisdiction over proceedings "concerning any child" who is the subject of a CHIPS petition, Minn. Stat. § 260C.101, subd. 1, their third-party custody proceeding was properly brought in juvenile court. We disagree. Although the juvenile court had *jurisdiction* over appellants' motion, that does not necessarily mean that it was properly brought before that court. Permanency proceedings in juvenile court are governed by Minnesota Statutes section 260C.503 to 260C.521. *See* Minn. Stat. § 260C.101, subd. 2(2). Those procedures, not those in chapter 257C, are the appropriate ones for proceedings in juvenile court. Given the "numerous provisions that allow relatives and private parties to seek permanent legal and physical custody of children in CHIPS and permanency proceedings," *Stern*, 839 N.W.2d at 104, we are unpersuaded that the Legislature intended, by its language in Minn. Stat. § 257C.03,

intended to acquire legal and physical custody of the twins, any filing in juvenile court should have been construed as a petition for transfer of legal and physical custody under section 260C.515—the juvenile protection statute—rather than a third-party custody petition.

Critically, both the relevant statute and the Rules of Juvenile Protection Procedure limit who may bring a petition for transfer of legal and physical custody. Minnesota Statutes § 260C.515, subdivision 4(d), states that "[a]nother *party* to the permanency proceeding regarding the child may file a petition to transfer permanent legal and physical custody to a relative." (Emphasis added.) Similarly, Minnesota Rule of Juvenile Protection Procedure 54.03, subdivision 1, which applies to such petitions, states: "The county attorney may file a permanent placement petition in juvenile court to determine the permanent placement of a child. . . . [A]nd *any other party* may seek only termination of parental rights or transfer of permanent legal and physical custody to a relative."[21] (Emphasis added.) Both the statute and

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subd. 1(a), to authorize third-party and de facto custody petitions in juvenile court.

21. Appellants argue in their second reply brief that they should be allowed to file a petition to transfer permanent legal and physical custody to appellants as qualified "relative[s]" under Minnesota Statutes section 260C.515, subdivision 4(d), and section 260C.007, subdivision 27 (2024). The GAL moved to strike this argument as outside the scope of the appellate record. We consider "only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." *Maslowski v. Prospect Funding Partners LLC*, 994 N.W.2d

the rule therefore contemplate that petitions for custody may only be brought by parties to the CHIPS proceeding.

In turn, the Minnesota Rules of Juvenile Protection Procedure govern who is automatically included and who may be joined as a party in a juvenile court proceeding. *See* Minn. R. Juv. Prot. P. 32.01, subd. 1. Rule 35 allows the court, in its discretion, to join any party if it is "necessary for a just and complete resolution of the matter" and it is "in the best interests of the child."[22] And Rule 33.01(i), provides that "any other person who is deemed by the court to be important to a resolution that is in the best interests of the child" may participate in the juvenile protection matter.[23] Foster parents are not explicitly mentioned in any of these rules. Instead, Rule 33.02, subdivision 2, states that "any foster parent . . . shall have

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293, 302 (Minn. 2023). Because the district court did not consider a motion under this statute and because the other parties did not have a chance to address the argument, we grant the GAL's motion to strike. *See also* Minn. R. Civ. App. P. 128.02, subd. 3 (providing that an appellant's "reply brief must be confined to new matter raised in the brief of the respondent").

22. Additionally, Minnesota Rule of Juvenile Protection Procedure 34 provides that the child, grandparents, non-custodial parents, and responsible social services agencies may intervene as a matter of right, while any person may permissively intervene if the court finds intervention is in the child's best interests. Minn. R. Juv. Prot. P. 34.01, 34.02.

23. Minnesota Rule of Juvenile Protection Procedure 32.01, subdivision 1(g) also provides that persons deemed by the court to be important to a resolution shall be made a party to the juvenile protection matter.

a right to be heard in any hearing regarding the child," but "does not require that [they] . . . be made a party to the matter." In sum, foster parents such as appellants have no right to be joined as a party to a CHIPS proceeding unless the court finds it is in the best interests of the child in terms of intervention. Nonparty participants, including "current foster parents," Minn. R. Juv. Prot. P. 33.01(g), are entitled to "notice," "legal representation," "being present at hearings," and "offering information at the discretion of the court," Minn. R. Juv. Prot. P. 33.02, subd. 1, but only parties may "bring motions before the court," Minn. R. Juv. Prot. P. 32.02(e).[24]

After considering these rules, the district court found that appellants had no authority to file a permanency petition in the existing matter because they are not parties. It reiterated that appellants' joinder would provide no benefit to the court in resolving the CHIPS matter. We agree with the district court's reasoning and hold that appellants are foreclosed from filing a permanency petition in the CHIPS proceedings because they are not parties.[25]

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24. And Minnesota Statutes section 260C.515, subdivisions 4(c)-(d), is likewise clear that, aside from "[t]he responsible social services agency," only "[a]nother party to the permanency proceeding regarding the child may file a petition to transfer permanent legal and physical custody."

25. The court of appeals concluded, without analysis and in response to the GAL's alternate argument for affirmance, that Minnesota Rule of Juvenile Protection Procedure 32.02 "does not compel [the] result" that "a person must be a party to a pending CHIPS case before filing a third-party-custody petition in that

B.

Appellants also argue that they are entitled to an evidentiary hearing to establish their interested-third-party status on the merits under section 257C.03, subdivision 7. In *Lewis-Miller v. Ross*, we considered whether a petitioner in a child-custody proceeding was entitled to an evidentiary hearing to determine whether she had established interested-third-party status for the purpose of acquiring custody of her late sister's children. 710 N.W.2d at 568. We ultimately held that in order to be entitled to a hearing on the third-party custody petition, the petitioner must allege facts that, if proven, would satisfy the criteria of the interested-third-party custody statute—section 257C.03, subdivision 7. *Lewis-Miller*, 710 N.W.2d at 570.

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case." *L.K.*, 9 N.W.3d at 188. That ruling became the law of the case upon the district court and court of appeals. *See In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990) (providing that under the law-of-the-case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the *same issues* in subsequent stages in the *same case*" (citation omitted) (internal quotation marks omitted)). But the district court based its subsequent decision on grounds independent from the court of appeals' reasoning under Rule 32.02. And in any event, the law of the case doctrine in no way limits our ability to address the legal issue here. *See Peterson v. BASF Corp.*, 675 N.W.2d 57, 66 (Minn. 2004) (explaining that "[t]he law of the case doctrine does not generally bar a higher court from reviewing an earlier decision of a lower court"), *vacated on other grounds*, 544 U.S. 1012, 125 S. Ct. 1968, 161 L. Ed. 2d 845 (2005); *State v. Dahlin*, 753 N.W.2d 300, 305 n.7 (Minn. 2008) ("We are not generally barred 'from reviewing an earlier decision of a lower court'" by the law-of-the-case doctrine. (quoting *BASF*, 675 N.W.2d at 66)).

But the *Lewis-Miller* framework for determining whether a petitioner is entitled to an evidentiary hearing—which appellants argue they are entitled to—does not apply to juvenile court proceedings such as this one. *See* Minn. Stat. § 257C.03, subds. 2, 7 (establishing an interested third party's requirements for an evidentiary hearing); *Lewis-Miller*, 710 N.W.2d at 569-70 (applying the section 257C.03, subdivision 7, requirements to a *family court* third-party custody petition). Because appellants' petition is properly construed as a transfer of legal and physical custody in juvenile court, we do not reach appellants' arguments that the district court erred in dismissing their third-party custody petition without an evidentiary hearing. Third-party custody petitions under Minnesota Statutes section 257C.03 are a family court remedy, but the twins' CHIPS proceeding falls under the original and exclusive jurisdiction of the juvenile court. The district court therefore did not err in denying appellants' petition without a hearing.[26]

III.

Finally, we turn to appellants' argument that ICWA violates the equal-protection principle of the Fifth Amendment and MIFPA violates the Equal Protection Clause of the Fourteenth Amendment to the United States

26. Because we are affirming the district court's dismissal of appellants' third-party custody petition, we do not address the mother's arguments on appeal that the custody petition is invalid because it does not satisfy certain statutory notice and procedural requirements. *See* 25 U.S.C. § 1912(a); Minn. Stat. § 257C.03, subd. 3(a)(3).

Constitution. U.S. Const. amends. V, XIV, § 1; *Bolling v. Sharpe*, 347 U.S. 497, 498-99, 74 S. Ct. 693, 98 L. Ed. 884 (1954) (requiring, as part of due process, equal protection from the federal government). The Equal Protection Clause commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1, which is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). For the reasons discussed below, this issue is no longer properly before our court, nor was it proper for the court of appeals to address the issue in its opinion.

A.

The crux of appellants' constitutional challenge to ICWA and MIFPA is that those laws impermissibly "injure Appellants because their custody petition is treated differently" because they are not eligible for membership in a tribe whereas the twins are. Appellants assert that ICWA and MIFPA subject them to unequal treatment by requiring Minnesota courts to impose different, more burdensome processes on their custody petition solely because their race and national origin differ from the Indian children they seek to adopt. Appellants also argue that ICWA's and MIFPA's placement preferences provide less protection for the individual rights of Indian foster children than non-Indian foster children. This argument, however, is premised upon the notion that appellants have a proper custody petition before the court through either

their third-party custody or permissive intervention motions. We address each avenue in turn.

Regarding the third-party custody petition, when we first granted review on the constitutionality issue, the propriety of appellants' custody petition was not before us, and the court of appeals had remanded that question to the district court. But for the reasons explained above, we have now concluded that the third-party custody petition appellants filed is non-cognizable in juvenile court, and appellants, as non-parties, are likewise ineligible to file a petition for a transfer of legal and physical custody of the kind permitted in juvenile court. Moreover, the reasons why appellants are ineligible to file such a petition for custody in this juvenile court matter do not rest in any way upon ICWA or MIFPA. Given our holding that appellants have no cognizable custody petition in this juvenile court matter, there is likewise no cognizable basis for our court to address appellants' constitutional challenge to ICWA and MIFPA.

Regarding the permissive intervention motion, we need not further consider appellants' arguments because they stem from the false premise that the district court's review of appellants' permissive intervention motion considered the children's tribal eligibility. Because the child custody statutes mandate an individualized consideration of the children's needs, the district court was required to abide by that requirement regardless of whether the children or the foster parents are eligible for membership in an Indian tribe. *See* Minn. Stat. § 260C.212, subd. 1(b). Moreover, one "purpose of the laws relating to juvenile

protection proceedings is . . . to preserve and strengthen the child's family ties whenever possible and in the child's best interests." Minn. Stat. § 260C.001, subd. 2(b)(3). As discussed above, our careful review of the record indicates that the district court conducted a painstaking review of whether appellants' permissive intervention was in the best interests of the children *in terms of intervention*. In conducting that review, the court did not consider appellants' tribal eligibility as a factor. Nor is there any language in Minnesota Rule of Juvenile Procedure 34.02—which governs permissive intervention—that would require the court to consider appellants' tribal eligibility status in making its intervention decision. *See* Minn. R. Juv. Pro. P. 34.02 ("Any person may be permitted to intervene as a party if the court finds that such intervention is in the best interests of the child.").

Rather, the court appropriately considered whether appellants' intervention would provide redundant information to the court, and whether the twins' best interests were already represented by the existing parties.[27] It also found that some of appellants' interactions

27. Nor is the question of whether ICWA and MIFPA are constitutional implicated by the denial of permissive intervention to appellants. Appellants only argue that they were injured by ICWA and MIFPA in the permissive intervention context "[t]o the extent the district court believed that for Appellants merely to challenge ICWA/MIFPA's constitutionality . . . itself . . . warrants excluding them from court." But we rejected that argument for reasons already explained and concluded that the district court's decision to deny permissive intervention was guided by the applicable law, not by appellants' decision to challenge ICWA's and MIFPA's constitutionality.

with the twins' mother were concerning. It did not abuse its discretion when it determined that permissive intervention was not in the twins' best interests for adjudicating the CHIPS action. Because appellants' tribal eligibility status was not a basis for the district court's decision, we do not reach the question of whether ICWA and MIFPA are constitutional. That question is not implicated by the current procedural posture of this case.

B.

We also must consider whether it was premature for the court of appeals to consider the constitutionality of MIFPA in appellants' first appeal from the district court's order denying appellants' motion to stay temporary placement with the twins' maternal relatives and the order denying appellants' motion for intervention and dismissing the third-party custody petition. *See L.K.*, 9 N.W.3d at 191-99; *id.* at 209-10 (Reyes, J., concurring in part and dissenting in part).[28] The court of appeals majority structured its analysis by addressing and resolving appellants' issues in the following order: First, it remanded on the motion for permissive intervention. *Id.* at 183-85. Then it remanded on the dismissal of the third-party custody petition. *Id.* at 186-88. Next, it concluded that the district court did not err by finding that there was not good cause to deviate

28. The dissent disagreed with the court of appeals' holding that appellants had standing to challenge MIFPA and that the issue was properly before the court, but it agreed that if it were to reach the issue, MIFPA is subject to rational-basis review and is constitutional. *L.K.*, 9 N.W.3d at 205-10 (Reyes, J., concurring in part and dissenting in part).

from ICWA's and MIFPA's placement preferences for temporary out-of-home placement.[29] *Id.* at 188-91; *see* 25 U.S.C. § 1915(b); Minn. Stat. § 260.773, subd. 3. Finally, the majority considered whether MIFPA is constitutional. *L.K.*, 9 N.W.3d at 191-98.

Based on our careful review of the court of appeals' opinion, it is clear that MIFPA's constitutionality had no bearing on the court of appeals' determinations of whether the district court erred in the decisions it made during the pendency of the twins' CHIPS proceedings. Moreover, as we have explained, on remand, ICWA and MIFPA did not bear on the district court's decision to grant or deny permissive intervention. *See* Minn. R. Juv. Prot. P. 34.02.

Furthermore, as the court of appeals recognized, "[a] reviewing court must generally consider 'only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.'" *L.K.*, 9 N.W.3d at 192 (quoting *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)). The court of appeals likewise recognized that the district court did not rule on appellants' constitutional challenges. Nevertheless, the court of appeals considered appellants' challenge properly before it based on the principle that an appellate court may decide an argument not passed on below if the argument "could be decisive of the controversy on the merits, if the facts are undisputed, and if 'there is no possible advantage or disadvantage to either party in not having had a prior

29. We granted review of this issue in appellants' first appeal, but, as we explained, they forfeited it at oral argument and in their briefing.

ruling by the trial court on the question.'" *Id.* (quoting *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 687 (Minn. 1997)). But it clearly did not need to decide those issues in order to address the issues that were properly before it. And as the current proceedings illustrate, the constitutionality of MIFPA and ICWA was *not* decisive of the controversy.

We were faced with similar circumstances in *Pike v. Gunyou*, 491 N.W.2d 288 (Minn. 1992). In that case, we confronted a court of appeals majority that extended beyond the scope that was required to adjudicate the issues on appeal. *Id.* at 289 n.1. The court of appeals in *Pike* addressed five different issues, three of which were unnecessary for it to consider in order to determine whether a certain statute applied to the controversy at issue. *Id.* We vacated the portions of the court of appeals majority and concurrence which addressed the tangential issues, finding that the court of appeals "greatly expanded its inquiry on appeal beyond the narrow issues raised with regard to the applicability" of the statute. *Id.* Specifically, we noted that the court of appeals "consider[ed] matters unrelated to its appellate task of reviewing the exercise of the trial court's discretion." *Id.* Similarly here, we find that the court of appeals greatly expanded its scope beyond what was necessary to address the particular controversies at issue. We therefore vacate those portions of the majority and concurring opinions of the court of appeals that addressed the constitutionality of MIFPA and ICWA, and "direct that those [portions of the] opinions shall have neither dispositional nor precedential value." *Id.* at 290.

* * *

In summary, Minnesota Rule of Juvenile Protection Procedure 34.02 provides the district court discretion to grant an individual's motion to permissively intervene in a CHIPS proceeding when the intervention is in the best interests of the child. Here, the district court did not abuse its discretion when it determined that appellants' intervention was not in the twins' best interests. Furthermore, appellants' third-party petition for permanent custody is non-cognizable in juvenile court and is instead properly construed in juvenile court as a petition for a transfer of legal and physical custody. But because appellants are not parties to the juvenile court case, they are foreclosed from bringing a petition to transfer the twins' placement or custody. Thirdly, because they are not parties, we do not address appellants' equal protection arguments regarding ICWA and MIFPA. And we further hold that it was inappropriate for the court of appeals to reach that issue.

Finally, on July 29, 2024, appellants filed a motion to stay the proceedings in district court while their appeal was pending. On August 19, 2024, we granted the stay in part and prohibited the district court from transferring this matter to tribal court until the stay is lifted. In light of our decision today, we lift the stay.

CONCLUSION

For the foregoing reasons, we affirm the district court's denial of appellants' motion for permissive intervention and its dismissal of appellants' third-party custody petition in appeal No. A24-1296. We also vacate the portions of the court of appeals majority and concurrence in appeal No. A23-1762 addressing MIFPA's constitutionality and declare them to be of neither dispositional nor precedential value. We lift the stay and remand the case to the district court for further proceedings consistent with this opinion.

Affirmed in part and vacated in part.

APPENDIX B — RECONSIDERATION ORDER OF THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF MINNESOTA IN THE COUNTY OF MARTIN, FILED JULY 24, 2024

STATE OF MINNESOTA
COUNTY OF MARTIN

IN DISTRICT COURT
FIFTH JUDICIAL DISTRICT

IN THE MATTER OF THE WELFARE
OF THE CHILDREN OF:

LUCILLE KINGBIRD,

Mother,

AND

ANTHONY SANDOVAL,

Alleged Father.

Court File No. 46-JV-22-32 (CHIPS File),
46-JV-23-128 (Permanency File)
Judge Michael D. Trushenski

Appendix B

RECONSIDERATION ORDER ON MOTION FOR INTERVENTION AND TO JOIN THIRD-PARTY CUSTODY PETITION

This matter came on for a hearing before the Honorable Michael D. Trushenski, Judge of the District Court, at the Martin County Courthouse on June 21, 2024. The hearing was held remotely via Zoom Technology. Mother Lucille Kingbird appeared and was represented by her attorney Ryan Gustafson. Assistant Martin County Attorney Amanda Heinrichs-Milburn was present and represented Faribault and Martin County Human Services (FMCHS). Red Lake Nation Representative Wahsay Poole was present. Red Lake Nation was represented by its attorney Tammy Swanson. Guardian ad Litem McKenzie Borth was present and represented by attorney Jody Alholinna. The former foster parents Kellie and Nathan Reyelts were present and represented by their attorney Mark Fiddler.

Upon the evidence and the files and record herein, the Court makes the following:

FINDINGS OF FACT

Procedural Background and Historical Facts

1. The children that are the subject of this matter are [Ki. K.] [redacted] and [Kh. K.] [redacted].

2. The children are eligible for membership with the Miskwaagamiiwi-zaaga'igan, known in English as Red Lake Nation, and ICWA and MIFPA apply.

3. A hold was placed on the children shortly after they were born because Mother tested positive for amphetamines, methamphetamine, and opiates at the hospital. She admitted to using heroin, and methamphetamine if heroin was not available, throughout her pregnancy.

4. Both children were born with serious medical conditions. [Kh. K.] spent time in the ICU at the Mayo Clinic in Mankato while he experienced withdrawal symptoms. [Ki. K.] was born not breathing. The medical staff were able to revive her, and she was airlifted to the Mayo Clinic in Rochester, where she had to be on a ventilator and put into a medically induced hypothermia cooling to reduce seizures and protect her brain. She was diagnosed with congenital cytomegalovirus and had seizures.

5. [Kh. K.] was placed with Kellie and Nathan Reyelts after he left the hospital on April 20, 2022. [Ki. K.] was placed with the Reyelts after she left the hospital on May 16, 2022.

6. For the first six months, [Ki. K.] needed medication administered twice a day and had to have weekly blood draws and weight checks to monitor her development. She was recommended to receive monthly physical therapy, quarterly occupational therapy, and quarterly early childhood specialist services. [Ki. K.] additionally needed to be seen at the Mayo NICU for follow ups every six months. [Ki. K.]'s medical team were concerned that [Ki. K.] was showing indications of hearing loss, which can be a result of CMV.

7. While with the Reyelts, [Kh. K.] experienced frequent viral and bacterial stomach and respiratory infections that required antibiotics and nebulizer treatments.

8. The Reyelts alleged that the FMCHS workers, the tribal representative, and the guardian ad litems told them they were considered the twins' permanency placement. For that reason, they considered the twins their children and encouraged the twins to refer to them as "Mom" and "Dad." They also referred to the twins as Nolan and Natalie rather than [Kh. K.] and [Ki. K.].

9. The Court reviewed all of the guardian ad litem's and FMCHS social worker's reports in this case. The guardian ad litem's reports steadfastly indicated that the children should only be in the care of the Reyelts minimally and only until they could be placed with a family that met ICWA standards. The social worker's reports additionally did not indicate that the Reyelts were ever a permanency placement; although, they did state that backup permanency options included relative/current providers.

10. On August 1, 2023, the Reyelts were informed that the children would be moved to the home of the children's relative Rayjean French. Ms. French is a member of the Tribe and has the twins' half-sister [G.] [redacted] in her care.

11. At the time the Reyelts were told, they called Mother Lucille Kingbird to inform her of the transition and

had her state her objection to the transfer to FMCHS over the phone. They then met with Mother Lucille Kingbird in person toward the end of August 2023. The visit was not scheduled with either the guardian ad litem or FMCHS, and the Reyelts scheduled and conducted this visit on their own. This was only the third time the Reyelts met with Mother, and the two previous meetings were in November and December of 2022. At that time, Mother was not responding to FMCHS regarding her case plan. She tested positive for methamphetamines regularly up until March 2023 and then refused to test after that date. She had not exercised visitation with the children since March 2023.

12. During August 2023, a number of transition plans were put in place but, for reasons unknown to the Court, those did not occur. The Tribe ultimately decided to move the children to Ms. French's care without a transition plan on September 13, 2023.

13. On September 12, 2023, the Reyelts filed an emergency motion to intervene and to stay the children's expected change of placement. The motion requested: the Reyelts be granted permissive intervention; the Reyelts be granted party status so they may file a transfer of legal custody permanency petition; stay the children's change in placement; find cause exists to place the children with the Reyelts; and issue declaratory judgments that the Minnesota Indian Family Preservation Act (Minn. Stat. §§ 260.751 to 260.835) and Indian Child Welfare Act (25 U.S.C. §§ 1901 and 1963) are unconstitutional.

14. A hearing was held on the motion to stay placement on September 13, 2023. Following the hearing, the Court ordered the change in placement occur as planned and reserved the remaining issues for a later hearing. The Court determined that the transition should occur without further delay given the children's young ages, the perceived animosity between the Tribe and the Reyelts, the distance between the two homes, and the previous failed transition plans.

15. The children were then moved to the care of their relative Rayjean French and their half-sister [G.].

16. On October 4, 2023, the Reyelts filed an amended motion requesting the Court join the Reyelts as necessary parties or, in the alternative, grant their motion for permissive intervention. The amended motion was filed concurrently with a petition to establish third-party custody. The guardian adlLitem and the Tribe filed motions requesting the Court deny the Reyelts' motions in their entirety.

17. At that time, Mother Lucille Kingbird filed an affidavit indicating that she supported the Reyelts' motion to intervene and that she favored placement of [Kh. K.] and [Ki. K.] with the Reyelts. She additionally indicated that she objected to any request that the matter be transferred to tribal court and indicated that that objection should be considered an ongoing objection to any future request to transfer.

18. Prior to the hearing, all parties agreed the Court should reserve the Reyelts' constitutional challenges until the Court decided the issues of intervention and third-party custody, because the Reyelts would not have standing until and unless they were made a party.

19. On October 31, 2023, the Court denied the Reyelts' motions for permissive intervention and third-party custody.

20. The Reyelts' appealed the Court's order. The Minnesota Court of Appeals affirmed the placement of the children with Ms. French and reversed this Court's decision regarding the Reyelts' motion for permissive intervention and petition for third-party custody. The Court of Appeals went on to give an opinion on the constitutionality of ICWA and MIFPA.

Present Circumstances

21. On June 10, 2024, the children were moved to the care of their maternal grandmother Michelle LeDoux. The move was done on emergent basis due to a change in Ms. French's household circumstances. Michelle LeDoux has the twins' half-brother [Ko. K.] [redacted] in her care. She lives near Mother Lucille Kingbird and is able to provide easier access for Mother to have supervised visits with the children. She also is in contact with Ms. French, and the children are able to maintain a relationship with Ms. French and their half-sister [G.], who is in Ms. French's care.

22. The Tribe supports the children's placement with Ms. LeDoux, and the children will be able to embrace their identity as part of the Tribe while in her care.

23. The guardian ad litem McKenzie Borth reported that the children are doing well in Ms. LeDoux's care. She noted that the twins' verbal and language skills have grown tremendously in the past six months. They appear closely connected to their grandmother, their half-brother, and their uncle. She reported Ms. LeDoux is continuing to arrange the children's medical appointments and is establishing their Help Me Grow services in the Twin Cities.

24. Mother Lucille Kingbird filed an affidavit indicating her support for the children's placement with her mother. She additionally indicated she no longer supported her children's placement with the Reyelts, their intervention motion, or their motion for third-party custody.

25. On June 21, 2024, a hearing was held on the issues of intervention and third-party custody. The Court allowed time for the parties to file affidavits and memorandum on those issues.

26. On July 1, 2024, the children's Tribe filed a motion requesting the Court transfer jurisdiction to Red Lake Tribal Court pursuant to ICWA § 1911(b). A hearing on the motion was scheduled for July 11, 2024.

27. On July 10, 2024, the Court continued the motion to transfer jurisdiction because Mother Lucille Kingbird previously filed an affidavit objecting to any future request to transfer jurisdiction to tribal court. The Court has yet to receive Mother's current opinion on the motion to transfer the matter to tribal court.

CONCLUSIONS OF LAW

Petition for Third-Party Custody

28. Under Minnesota Statute § 257C.03, a de facto or third-party custody proceeding may be brought by an individual other than a parent. The statute grants jurisdiction to de facto custodians and interested third parties to file a custody petition. Minn. Stat. § 257.03, subd. 2(5). Under Minnesota Statute § 257C.01, an interested third party does not include an individual who has a child placed in the individual's care through a court order or voluntary placement under chapter 260C. Minn. Stat. § 257C.01 subd. 3.

29. In this case, the children were placed with the Reyelts as foster parents under Minnesota Statute 260C. For this reason, the Court found Minnesota Statute § 257C.01 precluded their ability to file a custody petition. The Minnesota Court of Appeals overturned that decision finding that the children need to be in the foster parents care at that time for that exclusion to apply.

30. The Court has two issues to consider in regard to the petition: Whether the Reyelts' petition is proper procedurally, and whether the petition stands on its merits.

Procedure

31. Under Minnesota Statute § 260C.101 subd. 1, the juvenile court has exclusive jurisdiction in proceedings concerning any child who is alleged to be in need of protection or services or neglected and in foster care.

32. The Minnesota Court of Appeals addressed the issue of whether the family law court can exercise concurrent jurisdiction with the juvenile court in *Stern v. Stern.* In that case, two minor children were under the protective custody of the county in a child in need of protection or services proceeding. *Stern v. Stern,* 839 N.W.2d 96, 98 (Minn. Ct. App. 2013). While that case was pending, the children's grandmother filed a petition for de facto custody in family court. *Id.* The family court dismissed the grandmother's petition finding that it could not exercise concurrent jurisdiction with the juvenile court. *Id.* The Minnesota Court of Appeals upheld the lower court's decision finding that Minnesota Statute § 260C.101 gave the juvenile court exclusive jurisdiction in proceedings concerning children who are in need of protection or services. *Id.* at 104.

33. For these reasons, the Court finds the third-party custody petition could not have been filed in family law court.

34. However, the court in *Stern* supported its decision with the fact that "the juvenile court act contains numerous provisions that allow relatives and private parties to seek permanent legal and physical custody of the children in CHIPS and permanency proceedings." *Stern* at 104.

35. Under Juvenile Protection Procedure Rule 35, a person may be joined as a party upon motion of the court, the county attorney or another party. Under Juvenile Protection Procedure Rule 33.01, any person who is deemed by the court to be important to a resolution that is in the best interests of the children may be given participant status in a juvenile protection matter. Under Juvenile Protection Procedure Rule 34.02, any person may be permitted to intervene as a party if the court finds that such intervention is in the best interests of the child.

36. The Court finds this is an exhaustive list of the procedures available to an individual who seeks a status from which to assert a custody claim for the children or participate in a juvenile protection matter. There is no right to file a third-party petition for custody within a juvenile protection matter.

37. Furthermore, a third-party custody petition is impractical in a juvenile protection proceeding for the following reasons. Custody is generally with the responsible social services in a juvenile protection matter. The rules, procedures, and timelines in a juvenile protection matter are detailed and specific,

and those details would be in conflict with the procedure and considerations necessary to establish third-party custody. Additionally, there is simply no reason to risk a third-party custody petition disrupting a child protection matter where there are multiple avenues for a qualified individual to become a party or participant within a juvenile protection matter under the juvenile protection rules and statutes.

38. For these reasons, the Court will deny the Reyelts' petition for third-party custody.

Merits

39. This Court will speak to the merits of the petition in case this Court's procedural decision is overturned. The Court also finds that this consideration best illustrates why third-party custody petitions are incompatible with juvenile protection cases.

40. Under Minnesota Statute § 257C.03, an individual other than a parent may file a petition seeking custody of a child in the county where the court has jurisdiction over the matter.

41. The Reyelts filed their petition as "interested third parties."

42. A party commencing a third-party child custody proceeding by valid petition and supportive affidavits is entitled to an evidentiary hearing when the facts

alleged, if proven, would satisfy the criteria of statute governing procedure for petitioning for custody as an interested third party. *Lewis-Miller v. Ross,* 710 N.W.2d 565, 570 (Minn. 2006).

43. To establish that an individual is an interested third party, the individual must show by clear and convincing evidence that one of the enumerated factors exist, including that the parent has abandoned, neglected or otherwise exhibited disregard for the child's well-being to the extent that the child will be harmed by living with the parent. Minn. Stat. § 257C.03 subd.7(a)(1)(i).

    i. In this case, the children were removed from Mother Lucille Kingbird's care shortly after they were born due to Mother Lucille Kingbird having amphetamines, methamphetamine, and opiates in her system when she gave birth and due to the children's exposure to those substances while they were in utero. Her participation with the case file has been sporadic, and she has made minimal progress on her case plan. Although, she has participated in visitation more regularly since the children were placed with their maternal grandmother. The Court will find there is credible evidence that that Mother has exhibited disregard for the children's well-being to the extent that the children could be harmed by living with Mother at this time.

ii. The Court will additionally note that Mother does not have custody of the children at this time, and FMCHS has not been relieved of efforts to reunify Mother with the children.

44. To establish that an individual is an interested third party, the individual must also prove by a preponderance of the evidence that it is in the best interests of the child to be in the custody of the third party. Minn. Stat. § 257C.03 subd.7(a)(2). In order to evaluate the best interests of the children, the Court must look to the factors enumerated in Minnesota Statute § 257C.04 subd. 1. Minn. Stat. § 257C.03 subd.7(c). Those factors include:

i. **The wishes of the party or parties as to custody.**

In this case, FMCHS, the guardian ad litem, and the children's Tribe support temporary care and custody to remain with FMCHS. Mother Lucille Kingbird supports placement with the children's maternal grandmother Michelle LeDoux. No party supports the Reyelts' petition for third-party custody.

ii. **The reasonable preference of the children.**

The children are too young to express a preference.

iii. **The children's primary caretaker.**

The children's primary caretaker is their maternal grandmother Michelle LeDoux. The children have

not been in the care of the Reyelts for approximately 11 months.

iv. **The intimacy of the relationship between each party and the children.**

As this is a juvenile protection matter, it is difficult to find the children have an intimate relationship with any of the parties. Their visitation with Mother Lucille Kingbird has been inconsistent. The children presently have an intimate relationship with their maternal grandmother, who is their primary caregiver. They also have an intimate relationship with their relative Ms. French with whom they resided for approximately a year. The children were with the Reyelts from the time the children were newborns until they were a year and a half old. The relationship between the Reyelts and the children was intimate at that time. The children have not maintained a relationship with the Reyelts, and it is difficult for the Court to determine the level of intimacy that relationship has at this time.

v. **The interaction and interrelationship of the children with a party or parties, siblings, and any other person who may significantly affect the children's best interests.**

The children have a close relationship with their maternal grandmother, who is their primary caregiver. They also have a relationship with their half-brother [Ko. K.], who also resides with them.

They have a close relationship with their maternal uncle, who is frequently with them. They have a relationship with their relative Ms. French and their half-sister [G.], who is in Ms. French's care. These relationships are best preserved through their current placement, where they have been able to interact with their siblings and extended family regularly.

vi. **The children's adjustment to home, school and community.**

The children have adjusted well to their placement with their maternal grandmother. If they were removed from her care, it would be their third transition in approximately a year and would likely not be an easy transition.

vii. **The length of time the children have lived in a stable, satisfactory environment and the desirability of maintaining continuity.**

All of the children's residences have been stable and satisfactory. The Court finds it would be in their best interest to maintain continuity by remaining in the care of their maternal grandmother.

viii. **The permanence, as a family unit, of the existing or proposed custodial home.**

The children recently moved to their maternal grandmother's home, and that home is the proposed

permanent home for the children. In that home, the children will maintain relationships with both of their half-siblings and will reside with one of their siblings. They will also regularly be able to have supervised visitation with their Mother Lucille Kingbird. If the children were moved to the Reyelts' home, they would find permanency with the Reyelts and likely establish bonds with that family unit. However, they likely would not see their biological family as often as they are able to currently; although, the Reyelts indicated they would maintain those relationships for the children.

ix. **The mental and physical health of all individuals involved.**

The mental and physical health of all of the individuals in this case are not an issue. The children have some special physical and growth needs, but all of the children's placements have prioritized this care, and the children are doing well physically, emotionally and developmentally.

x. **The capacity and disposition of the parties to give the children love, affection and guidance, and to continue educating and raising the children in the children's culture and religion or creed.**

The children's maternal grandmother and the Reyelts have the capacity and disposition to give the children love, affection and guidance. The children's

maternal grandmother is in the better position to educate and raise the children in their native culture, as she maintains relationships with members of the children's Tribe.

xi. **The children's cultural background.**

The children are eligible for membership with Red Lake Nation. The children's Tribe supports placement and permanency with the children's maternal grandmother. The Tribe does not support placement or permanency with the Reyelts. Since the children have been in their grandmother's care, and Ms. French's care prior to that, the children have been able to attend tribal events and participate in tribal customs. The Reyelts indicate they will support the children's connection to their culture.

xii. **The effect on the children of the actions of an abuser, if related to domestic abuse that has occurred between the parents or the parties.**

This factor is not relevant to this case.

45. After reviewing the best interest factors, the Court finds that the facts in the Reyelts' affidavit and petition do not support that a grant of third-party custody to them would be in the children's best interests. The children's best interests are to remain with their maternal grandmother and their half-sibling. While in that home the children are able to have regular contact with their Mother Lucille Kingbird. The children will be able to see their relative Ms. French

and their half-sister [G.]. The children are receiving the developmental and medical care they require. The children are also able to embrace their native culture and heritage. In the year that the children have been out of the Reyelts' care, they have maintained minimal contact with the Reyelts.

46. To establish that an individual is an interested third party, the individual must show by clear and convincing evidence that granting the petition would not violate Minnesota Statute § 518.179.

    i. That factor is not applicable to this case, and the Court finds that granting the petition would not violate that statute.

47. The Court finds that the Reyelts' petition and affidavit do not allege sufficient facts to prove that they would satisfy the criteria to be considered an interested third-party. Since the Court found the Reyelts petition did not establish them as interested third parties, the Court was not required to consider the factors listed in Minnesota Statute § 257C.03 sub. 7(b). As such, the Court finds the Reyelts are not entitled to an evidentiary hearing on the petition, and the petition should be dismissed.

Motion for Permissive Intervention

48. Any person may be permitted to intervene as a party if the court finds that such intervention is in the best interests of the children. MN ST JUV PROT Rule 34.02.

49. In this case, the children are eligible for membership with Red Lake Nation and are protected by ICWA and MIFPA. The best interests of an Indian child means compliance with the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act. The best interests of an Indian child support the child's sense of belonging to family, extended family and tribe. The best interests of an Indian child are interwoven with the best interests of the Indian child's tribe. Minn. Stat. § 260.755 subd.2a.

50. This Court originally denied the Reyelts' request as their intervention was not in the best interests of the children as assessed under ICWA and MIFPA. The Minnesota Court of Appeals directed this Court to not consider the best interests of the children as defined by that statute, because that definition can apparently only be used to determine an Indian child's best interests in *placement.* The Court of Appeals directed this Court to analyze "the advantages and disadvantages that might be realized if appellants—the Reyelts—were parties to the CHIPS case." That court directed this Court to consider the Reyelts' familiarity with the children and their medical histories and health-care needs.

    i. **Advantages that might be realized** if **the Reyelts are made parties in the CHIPS case:**

        A. At the time of their motion, the Reyelts had the children in their care for approximately a year and a half. The Reyelts attended to the

children's physical, medical and emotional needs tirelessly, and, through their care, the children excelled. At the time of their motion, the Reyelts could have offered insight into the children's care, such as coping strategies and schedules that proved successful.

B. The Reyelts additionally have a number of other children and are well seasoned parents. They genuinely care about the children and have an attachment to them. Their participation given their insight into and affection for the children could be advantageous.

ii. **Disadvantages that might be realized if the Reyelts are made parties in the CHIPS case:**

A. The Court is concerned that the children's juvenile protection case would be unnecessarily encumbered if the Reyelts were made a party. The children's placement with Ms. French was nearly ideal. She was a relative of the children, the children's sibling lived in the home, Ms. French was a member of the children's Tribe and had the Tribe's support. No one even suggested a concern with that placement, including the Reyelts. Despite this, the Reyelts made every attempt to prevent or slow that placement. Given that behavior, the Court has every reason to believe the Reyelts would contest

any placement or action taken in regard to the children other than placement with them.

B. The Minnesota Court of Appeals order made it seem as though the Reyelts' interest in intervention was to simply provide information or insight to the Court, FMCHS, and/or any foster or permanency parent. However, in addition to their intervention motion, the Reyelts submitted a petition for third-party custody. From the petition, it can be inferred that the Reyelts' interest was in the children's placement with them or for custody of the children to be transferred to them. Given that motive, it would be a disadvantage to have the Reyelts be made a party to the protection proceeding when FMCHS and the Tribe previously determined that they were not a preferred placement option.

C. The Reyelts expressed an interest in supporting the children with their indigenous identity; however, the Reyelts' actions indicate a disregard for or a lack of understanding about the importance of that heritage. They opposed the children's placement with a relative who belonged to the Tribe. They petitioned this Court to grant them custody of the children despite the Tribe's objection to the children's placement

with them. They additionally motioned this Court to find ICWA and MIFPA unconstitutional. Their actions indicate that they believe they know what is better for the children than the children's Tribe does. Given the Reyelts' attitude toward the importance of the children's tribal identity, the Court finds their participation in this case would be a disadvantage.

D. The Court also finds the Reyelts' actions toward the children's Mother Lucille Kingbird around the time the children were moved to the care of Ms. French concerning. At that time, Ms. Kingbird had little involvement with the case plan. She was presumably continuing to use mood-altering chemicals. She had not seen the children for several months prior to that. Despite these facts, the Reyelts visited Mother with the children without FMCHS's knowledge and seemingly petitioned her to support them as a placement option for the children. Mother was seemingly not in a place at that time to offer a clear judgment regarding the children's placement and the Court questions the Reyelts' judgment in putting her in that position.

51. The Court finds intervention by the Reyelts would not be in the children's best interests. The Court's concern over the potential disadvantages it enumerated far

outweigh the potential advantages. Additionally, the first advantage the Court found is stale at this time as the children have been out of the Reyelts' care for almost a year. Ultimately, the Court is concerned the Reyelts' strong attachment to the children has created a bias that would only hinder and harm the progression of the children's protection proceeding.

52. Even if the Court performed this assessment at the time of the original motion, the Court would have arrived at the same conclusion. Even though the Reyelts undoubtedly had insight into the children's behavior and medical needs at that time, the children's medical providers were ultimately in the best position to update and inform FMCHS, the guardian ad litem, and any caregivers about those needs. The disadvantages the Court enumerated were as relevant and concerning at the time of the original motion as they are now. The Reyelts strong advocacy for the children's continued placement with them—although understandable—indicated that they could not see the value in any other placement for the children.

53. For these reasons, the Court finds the Reyelts' motion for permissive intervention should be denied.

Motion to Transfer to Tribal Court

54. At any stage in the proceedings, a child's tribe may request transfer of the juvenile protection matter to the child's tribe. MN ST JUV PROT Rule 31.01 subd. 1. The parent of the child may object to transfer of

a juvenile protection matter to the child's tribe. MN ST JUV PROT Rule 31.01 subd. 4. A hearing on the objection to transfer by parent is not required, and, upon objection, the court shall deny the request to transfer the juvenile matter to the child's tribe. MN ST JUV PROT Rule 31.01 subd.4.

55. In this case, Mother Lucille Kingbird previously filed an affidavit that objected to transfer of jurisdiction to the Tribe. The affidavit specifically stated that Mother's objection to transfer should be considered ongoing as to any future request to transfer. To date, she has not withdrawn her objection to removal.

56. Rather than deny the motion based on the objection, the Court ordered the motion hearing be continued to allow Mother Lucille Kingbird time to either recant or affirm her objection.

57. The Court received the tribal court's acceptance of jurisdiction. This Court finds that order is premature as this Court cannot transfer jurisdiction until Mother Lucille Kingbird's objection is no longer at issue.[1]

ORDER

58. The Reyelts' petition for third-party custody is DISMISSED.

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1. The motions for intervention and third-party custody were filed in the child protection File (CHIPS) 46-JV-22-32. However, issues about the transfer to tribal concern both the CHIPS file and the permanency file (46-JV-23-128), and this order should be filed in both matters.

59. The Reyelts' motion for permissive intervention is DENIED.

60. The Court will hear the Tribe's motion to transfer the matter to tribal court on August 21, 2024.

Dated: July 24, 2024

BY THE COURT:
/s/ Michael D. Trushenski
Michael D. Trushenski
Judge of District Court

APPENDIX C — OPINION OF THE COURT OF APPEALS OF THE STATE OF MINNESOTA, FILED JUNE 3, 2024

STATE OF MINNESOTA
IN COURT OF APPEALS

A23-1762

IN THE MATTER OF THE WELFARE OF
THE CHILDREN OF: L. K. AND A. S., PARENTS.

Filed June 3, 2024

OPINION

Affirmed in part, reversed in part, and remanded;
motion denied
Johnson, Judge
Concurring in part, dissenting in part, Reyes, Judge

Martin County District Court
File No. 46-JV-22-32

SYLLABUS

1. For purposes of a petition for third-party custody, a person is not excluded from the definition of "interested third party" in Minnesota Statutes section 257C.01, subdivision 3 (2022), on the ground that the person is a former foster parent of a child.

2. The placement preferences in Minnesota Statutes section 260.773, subdivision 3 (Supp. 2023), which favor

Indian persons and other placements approved by an Indian tribe, do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

OPINION

JOHNSON, Judge

This appeal concerns two Indian children, twins who now are two years old. Shortly after the children were born, Martin County commenced this child-protection case and placed the children in a foster home. When the children were 17 months old, the county decided to change the foster placement to the home of a relative of the children who lives on the Red Lake reservation and was approved by the Red Lake Nation. The original foster parents moved to stay the change of placement, moved for permissive intervention into the pending child-protection case, and requested a declaration that the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963 (2018), and the Minnesota Indian Family Preservation Act (MIFPA), Minn. Stat. § 260.751-.835 (2022 & Supp. 2023), are unconstitutional. In addition, the original foster parents later filed a petition for third-party custody. The district court denied all relief sought by the original foster parents.

We conclude that the district court erred by denying the original foster parents' motion for permissive intervention by considering factors relevant to the children's placement but not factors relevant to whether the original foster

parents should be parties to the child-protection case. We also conclude that the district court erred by dismissing the original foster parents' third-party-custody petition on the ground that they are not interested third parties. We further conclude that the district court did not err by not finding a good-cause exception to the statutory placement preferences in MIFPA. And, finally, we conclude that MIFPA's placement preferences, which favor Indian persons and foster placements approved by an Indian tribe, do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Therefore, we affirm in part, reverse in part, and remand for further proceedings on the motion for permissive intervention and the third-party-custody petition.

FACTS

In April 2022, L.K. gave birth to twins—a boy and a girl. At the time, L.K. was residing in the city of Fairmont in Martin County. L.K. had not sought or received pre-natal care during her pregnancy. While at the hospital, L.K. tested positive for amphetamines, methamphetamines, and opiates. One month earlier, in March 2022, custody of L.K.'s then-two-year-old child had been transferred to a relative.

Both of the children needed medical attention that resulted in extended hospital stays following their births. The boy remained in the hospital while suffering withdrawal symptoms. The girl was not breathing when born but was revived by medical providers and transferred to the neonatal intensive-care unit at the Mayo Clinic in

Rochester, where she was placed on a ventilator and put into "medically induced hypothermia cooling" to reduce seizures and protect her brain.

Three days after the children were born, the county, acting through an agency known as Human Services of Faribault and Martin Counties, petitioned for an order adjudicating the children as being in need of protection or services (CHIPS). Within days, the district court filed an order transferring care, custody, and control of the children to the county and granting the county authority to determine an out-of-home placement.

The boy was discharged from the hospital when he was 11 days old and was placed in the home of K.R. and N.R., who are non-Indian licensed foster-care providers. The girl was discharged when she was 37 days old and also was placed in K.R. and N.R.'s home.

The district court's emergency-protective-care order noted that the children are either enrolled or eligible for enrollment with the Red Lake Band of Chippewa Indians, also known as the Red Lake Nation, and that ICWA applies. In mid-May 2022, a representative of the Red Lake Nation filed an affidavit stating that the tribe supports an out-of-home placement.

After their placements, both children required numerous appointments at the Mayo Clinic in Rochester as well as in-home visits from medical professionals. The in-home therapy plan included monthly physical therapy, quarterly occupational therapy, and quarterly early-

childhood-specialist services. K.R. and N.R. cared for the children as foster parents for more than a year. K.R. and N.R. stated in an affidavit that the county represented to them that they were the preferred long-term placement for the children.

On August 1, 2023, the county informed K.R. and N.R. that the Red Lake Nation had stated a preference that the children be placed with R.F., who is a relative of L.K. R.F. is an enrolled member of the Red Lake Nation, lives on the Red Lake reservation, and has physical and legal custody of the children's older sibling. Throughout August 2023, the county, the Red Lake Nation, the guardian *ad litem*, and K.R. and N.R. engaged in numerous communications concerning a plan to transition the children from K.R. and N.R.'s care to R.F.'s care. The plan called for R.F. to travel with the children's older sibling to Fairmont for two weekend visits in August and September. The plan also called for the children to travel to the Red Lake reservation for a one-week visit in September. Due in part to an illness in R.F.'s home, the transition plan was not implemented.

On September 1, 2023, the Red Lake Nation informed the county, the guardian *ad litem*, and K.R. and N.R. that it wanted the children to be transitioned to R.F.'s care as soon as possible. On September 9, 2023, the county informed K.R. and N.R. that the children would be transferred to R.F.'s care on September 13, 2023.

On September 12, 2023, K.R. and N.R. filed an emergency motion for permissive intervention into the

CHIPS case, a stay of the change of placement, a finding that good cause exists to not change the placement despite the expressed preference of the Red Lake Nation, and a declaration that ICWA and MIFPA are unconstitutional.

On September 13, 2023, the district court held a hearing. The district court received oral arguments concerning whether the change of placement should be stayed and deferred other parts of K.R. and N.R.'s motion to a later date. K.R. and N.R. urged the district court to stay the placement on the grounds that the transition plan had not been implemented, that R.F. was unfamiliar with the children's medical needs, that the change of placement would result in the children being further away from L.K., and that L.K. favors continued placement with K.R. and N.R. The county argued that the children could attend their medical appointments while in R.F.'s care and that L.K. had not stated a placement preference on the record. The Red Lake Nation argued that placement of Indian children with relatives generally is preferred and that R.F. was willing and able to take the children to their medical appointments. After a brief recess, the district court orally ruled that the children should immediately go to the Red Lake reservation and that a written order would follow. On September 15, 2023, the district court filed an order in which it denied K.R. and N.R.'s motion to stay the change of placement.

On October 4, 2023, K.R. and N.R. filed an amended motion for permissive intervention and a petition for third-party custody. On the following day, the district court conducted another hearing. The district court gave

the non-moving parties an opportunity to file submissions after the hearing date. The guardian *ad litem* and the Red Lake Nation filed motions to dismiss the third-party-custody petition. On October 31, 2023, the district court filed a written order denying the motion for intervention and dismissing the third-party-custody petition. The district court did not rule on K.R. and N.R.'s request for a declaration concerning the constitutionality of ICWA and MIFPA.

K.R. and N.R. appeal.

ISSUES

I. Did the district court err by denying appellants' motion for permissive intervention?

II. Did the district court err by dismissing appellants' third-party-custody petition on the ground that appellants are excluded from the statutory definition of "interested third party" in Minnesota Statutes section 257C.01, subdivision 3(b), because they are former foster parents of the children?

III. Did the district court err by not finding a good-cause exception pursuant to Minnesota Statutes section 260.773, subdivision 10(2), to the statutory placement preferences in Minnesota Statutes section 260.773, subdivision 3?

IV. Do the placement preferences in Minnesota Statutes section 260.773, subdivision 3, which favor Indian

persons and other placements approved by an Indian tribe, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

ANALYSIS

It is undisputed that ICWA applies to this case. For a concise overview of ICWA, we refer to the following summary by the United States Supreme Court:

> In 1978, Congress enacted the Indian Child Welfare Act (ICWA) out of concern that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 92 Stat. 3069, 25 U.S.C. § 1901(4). Congress found that many of these children were being "placed in non-Indian foster and adoptive homes and institutions," and that the States had contributed to the problem by "fail[ing] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." §§ 1901(4), (5). This harmed not only Indian parents and children, but also Indian tribes. As Congress put it, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." § 1901(3) . . . .
>
> The Act thus aims to keep Indian children connected to Indian families. "Indian child" is

defined broadly to include not only a child who is "a member of an Indian tribe," but also one who is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." § 1903(4). If the Indian child lives on a reservation, ICWA grants the tribal court exclusive jurisdiction over all child custody proceedings, including adoptions and foster care proceedings. § 1911(a). For other Indian children, state and tribal courts exercise concurrent jurisdiction, although the state court is sometimes required to transfer the case to tribal court. § 1911(b). When a state court adjudicates the proceeding, ICWA governs from start to finish. That is true regardless of whether the proceeding is "involuntary" (one to which the parents do not consent) or "voluntary" (one to which they do).

Involuntary proceedings are subject to especially stringent safeguards. *See* 25 C.F.R. § 23.104 (2022); 81 Fed. Reg. 38832-38836 (2016). Any party who initiates an "involuntary proceeding" in state court to place an Indian child in foster care or terminate parental rights must "notify the parent or Indian custodian and the Indian child's tribe." § 1912(a). The parent or custodian and tribe have the right to intervene in the proceedings; the right to request extra time to prepare for the proceedings; the right to "examine all reports or other documents filed with the court"; and, for indigent parents

or custodians, the right to court-appointed counsel. §§ 1912(a), (b), (c). The party attempting to terminate parental rights or remove an Indian child from an unsafe environment must first "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." § 1912(d). Even then, the court cannot order a foster care placement unless it finds "by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." § 1912(e). To terminate parental rights, the court must make the same finding "beyond a reasonable doubt." § 1912(f).

. . . .

ICWA's placement preferences, which apply to all custody proceedings involving Indian children, are hierarchical: State courts may only place the child with someone in a lower-ranked group when there is no available placement in a higher-ranked group. For adoption, "a preference shall be given" to placements with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." § 1915(a). For

> foster care, a preference is given to (1) "the Indian child's extended family"; (2) "a foster home licensed, approved, or specified by the Indian child's tribe"; (3) "an Indian foster home licensed or approved by an authorized non-Indian licensing authority"; and then (4) another institution "approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs." § 1915(b) . . . . [F]or foster care, institutions run or approved by any tribe outrank placements with unrelated non-Indian families. Courts must adhere to the placement preferences absent "good cause" to depart from them. §§ 1915(a), (b).

Haaland v. Brackeen, 599 U.S. 255, 143 S. Ct. 1609, 1623-24, 216 L.Ed.2d 254 (2023).

In Minnesota, a companion statute, MIFPA, was enacted in 1999. 1999 Minn. Laws ch. 139, art. 1, §§ 2-17, at 567-78. Its purposes and scope of application are similar to those of ICWA. *See* Minn. Stat. §§ 260.752, .753 (Supp. 2023). MIFPA is based on the state's acknowledgment that federally recognized Indian tribes are "sovereign political entities" with "inherent sovereign authority to pass their own laws, maintain their own systems of governance, and determine their own jurisdiction." Minn. Stat. § 260.754(a) (Supp. 2023). MIFPA accounts for the exclusive jurisdiction of tribal courts and provides for transfers of child-protection cases to tribal courts. *See* Minn. Stat. § 260.763 (Supp. 2023). MIFPA also contains

provisions for both voluntary and involuntary out-of-home placements of Indian children and includes preferences for Indian custodians and tribe-approved placements. *See* Minn. Stat. §§ 260.765, .771, .773 (Supp. 2023).

I.

Appellants first argue that the district court erred by denying their motion for permissive intervention.

Appellants seek intervention pursuant to a rule that provides, "Any person may be permitted to intervene as a party if the court finds that such intervention is in the best interests of the child." Minn. R. Juv. Prot. P. 34.02. In general, "permissive intervention should be granted liberally when doing so will advance the best interests of the child." *In re Welfare of Children of M.L.S.*, 964 N.W.2d 441, 452 (Minn. App. 2021). This court applies an abuse-of-discretion standard of review to a district court's denial of a motion for permissive intervention. *Id.* at 451. A district court may abuse its discretion in such a ruling by "making findings unsupported by the evidence or by improperly applying the law." *Id.* (quotation omitted).

In its order denying appellants' motion for permissive intervention, the district court began its discussion as follows:

> The best interests of an Indian child means compliance with the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act. The best interests of an Indian child

> support the child's sense of belonging to family, extended family and tribe. The best interests of an Indian child are interwoven with the best interests of the Indian child's tribe. Minn. Stat. § 260.755, subd. 2a.

The district court continued by noting that the children "are eligible for membership with Red Lake Nation," that they "are protected by ICWA and MIFPA," that the Red Lake Nation "approved their placement with the children's aunt," who has custody of an older sibling of the children, that the children are doing well in R.F.'s care, and that "there have been no concerns raised about [R.F.'s] home or ability to care for the children." The district court stated that appellants did not take the children to tribal events and that the Red Lake Nation "does not approve of [appellants] as the children's foster or permanency home." The district court also reasoned that allowing appellants to intervene "would only create an unnecessary delay for the finalization of the children's case."

Appellants contend that the district court erred by assessing "the best interests of the children as it relates to a *permanent placement* instead of assessing the best interests as it relates to *intervention.*" Appellants cite *M.L.S.*, in which the appellant made essentially the same argument. 964 N.W.2d at 451-52. In that case, this court noted that rule 34.02 "does not specify what circumstances a district court should consider" but stated that "whatever is considered must be relevant to determining *whether the requested intervention* is in the best interests of the child." *Id.* at 452 (emphasis added). We emphasized that, in

ruling on a motion for permissive intervention, a district court should focus on the specific issue of whether it is in a child's best interests for the movant to be a party to the case. *Id.* at 455, 457. We resolved the appellant's argument by reasoning that the district court "misapplied the best-interests test in rule 34.02 by," among other things, "focusing on [the child's] permanent placement, instead of [the child's] best interests on the intervention motion. *Id.* at 457-58. For that and other reasons, we concluded that the district court abused its discretion, and we reversed and remanded. *Id.* at 458-59.

In this case, the district court committed the same error that was committed in *M.L.S.*: considering circumstances relevant to placement but not relevant to intervention. The district court's analysis focused on ICWA and MIFPA and the statutory preferences with respect to the placement of an Indian child. *See* 25 U.S.C. § 1915; Minn. Stat. §§ 260.771, subd. 1b, .773. But ICWA and MIFPA are silent as to whether a non-Indian person may intervene in a state-court CHIPS proceeding involving an Indian child. *Cf.* 25 U.S.C. § 1911(c) (providing that Indian child, Indian child's Indian custodian, and Indian child's tribe have right to intervene in state-court proceeding for foster-care placement of or termination of parental rights to Indian child). The district court continued by stating that the Red Lake Nation had approved of the children's placement with a relative who is a member of the tribe. The district court also discussed both appellants' and R.F.'s suitability for either a foster or permanent placement. In short, the district court focused on the children's placement, not on the advantages and disadvantages that

might be realized if appellants were parties to the CHIPS case. Accordingly, the district court committed an error of law when considering appellants' motion, for the same reasons as in *M.L.S. See* 964 N.W.2d at 452-55.[1]

Appellants also contend that the district court erred by not considering the potential benefits of their being

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1. Our dissenting colleague commits the same error by dwelling on the placement preferences in ICWA and MIFPA. *See infra* C/D 2-6. Because M.L.S. made clear that "whatever is considered must be relevant to determining *whether the requested intervention* is in the best interests of the child," 964 N.W.2d at 452 (emphasis added), and that a district court errs by "focusing on [the child's] permanent placement, instead of [the child's] best interests on the intervention motion, id. at 457-58, the placement preferences in ICWA and MIFPA are not relevant to a motion for permissive intervention under rule 34.02.

Furthermore, the *M.L.S.* opinion does not endorse or prescribe *any* statutory factors for determining the best interests of a child on a motion for permissive intervention. *Cf. infra* C/D 3-5. The parties to the *M.L.S.* case had agreed that certain statutory factors should apply. 964 N.W.2d at 452 (discussing Minn. Stat. § 260C.212, subd. 2(b)). But this court described the parties' agreement as "problematic," in part because the statutory factors identified by the parties (which are not "best-interests" factors but, rather, "needs of the child" factors) were intended for a different purpose. *Id.* at 452-53 n.6. We "question[ed] the wisdom of using" the statutory factors identified by the parties but, nonetheless, discussed some of them "in the interest of completeness." *Id.* at 452-53 (citing Minn. Stat. § 260C.212, subd. 2(b)). Before concluding, we made clear that the statutory needs-of-the-child factors may be relevant to a motion for permissive intervention only to the extent that they "bear on whether it would be in the child's best interests to grant the intervention motion." *Id.* at 457.

parties to the CHIPS case. They assert that they "have the most detailed and in-depth knowledge of the children's medical history—including providers, symptoms, [and] red flags." They further assert that "this knowledge is vital to the best interests of these particular children given their adverse birth experiences, multitude of providers, and, in [the girl's] case, extraordinary medical needs that have historically been addressed by a specialized multidisciplinary team." Appellants' contention is supported by a detailed, 21-page affidavit that they filed in support of their motion, which was uncontradicted. In fact, no other party submitted any evidence into the record of the motion hearing.

Appellants are correct that the district court did not expressly consider the knowledge they possess concerning the children, including their medical histories and health-care needs. The district court did not mention the fact that the children had spent most of their lives in appellants' care, from their discharges from the hospital in April and May 2022 until the change of placement in September 2023, which was only a few weeks before the October 2023 hearing. The supreme court has recognized that former foster parents' knowledge of a child may be relevant to an intervention motion because they "may have information which can assist a trial court in making its decisions in a CHIPS proceedings." *Valentine v. Lutz*, 512 N.W.2d 868, 871 (Minn. 1994). For that reason, the supreme court stated, "In certain circumstances, it may be appropriate for a trial court to allow [former] foster parents to intervene, either as parties to the action or on a more limited basis." *Id.* By not mentioning appellants'

familiarity with the children and their medical histories and health-care needs, the district court did not consider all circumstances relevant to appellants' motion for permissive intervention.

Thus, the district court erred in its analysis of appellants' motion for permissive intervention. Therefore, we remand the motion to the district court for reconsideration.

II.

Appellants also argue that the district court erred by granting the guardian *ad litem*'s and the Red Lake Nation's motions to dismiss their third-party-custody petition.

A.

A person who is not a parent may seek custody of a child by filing a petition for third-party custody. Minn. Stat. § 257C.03, subds. 1, 2 (2022). To prevail in a third-party-custody proceeding, the petitioner first must prove certain facts to establish that he or she is an "interested third party." *Id.*, subd. 7(a). A petitioner also must persuade the district court that a third-party-custody order would be in the best interests of the child in light of certain statutory factors. *See* Minn. Stat. § 257C.04, subd. 1(a) (2022). A district court "must dismiss" a third-party-custody petition if, after an evidentiary hearing, "the petitioner does not establish at least one of the factors" necessary to establish interested-third-party status or

if "placement of the child with the petitioner is not in the best interests of the child." Minn. Stat. § 257C.03, subd. 8(a)(2)-(3); *see also Lewis-Miller v. Ross*, 710 N.W.2d 565, 568-69 (Minn. 2006).

In this case, the guardian *ad litem* and the Red Lake Nation moved to dismiss appellants' third-party-custody petition on the ground that appellants are excluded from the class of persons who may seek third-party custody: interested third parties. The statutory definition of "interested third party" provides that the term "does not include an individual who has a child placed in the individual's care" through a custody consent decree, "a court order or voluntary placement under chapter 260C," or an adoption. Minn. Stat. § 257C.01, subd. 3(b) (2022). The district court reasoned that appellants are not interested third parties because "the children *were placed* with [appellants] as foster parents under Minnesota Statutes chapter 260C." (Emphasis added.)

Appellants contend that the district court erred as a matter of law by misinterpreting and misapplying the statutory definition of the term "interested third party." They contend that the definition excludes a person who *presently* is a foster parent but does *not* exclude a person who *previously* was a foster parent. They contend that the word "has" indicates the present tense, not the past tense. In response, the guardian *ad litem* contends that the statutory definition is ambiguous and, to avoid an "absurd result," should be interpreted to exclude a person who has been a foster parent *at any time.* The Red Lake Nation contends that the phrase "has a child placed" uses

the present-perfect tense and, thus, excludes persons who are either former or present foster parents.

The parties' arguments require us to interpret the statutory definition of interested third party. A court should begin the task of statutory interpretation by seeking to determine whether the statutory language has a plain meaning based on "the common and ordinary meanings" of the words used. *See State v. Thonesavanh*, 904 N.W.2d 432, 436 (Minn. 2017). If a statute has a plain meaning, we deem the statute unambiguous and apply its plain language. *State v. Irby*, 967 N.W.2d 389, 393-94 (Minn. 2021). But if a statute is "subject to more than one reasonable interpretation" with respect to the issue on appeal, this court deems the statute ambiguous. *Id.* If a statute is ambiguous, "we may apply the canons of construction to resolve the ambiguity." *Thonesavanh*, 904 N.W.2d at 435.

In this case, the statutory language has a plain meaning. The noun clause "an individual who has a child placed in the individual's care," which appears in the exclusion to the statutory definition of interested third party, applies to a person who, at the time a third-party-custody petition is filed or is pending, has a child in his or her home for one of the reasons specified in the statute. The noun clause uses the word "has" in the present tense.[2]

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2. The noun clause in the exclusion to the statutory definition does not use the present-perfect tense. *Cf. infra* C/D 7-10. The word "has" and the word "placed," which are not adjacent to each other, do not work together to form a verb phrase. *See The Chicago Manual of Style* §§ 5.103, .104, .132 (17th ed. 2017). The words "an

It is well established that "different tenses of words in a statute can lead to different meanings" and that "different tenses exist to express differences in the time or duration of an action." *State v. Schmid*, 859 N.W.2d 816, 820 (Minn. 2015); *see also Housing & Redevelopment Auth. of St. Cloud v. Royston*, 990 N.W.2d 730, 737 (Minn. App. 2023), *rev. denied* (Minn. Aug. 22, 2023). In this case, the use of the present tense indicates that the exclusion applies only to a person who *presently* has a child in his or her care through one of the placements specified in the statute. The exclusion does *not* encompass a person who *previously* had a child in his or her home through such a placement. The exclusion is unambiguous in this respect.

It is undisputed that, when appellants filed their third-party-custody petition, the children were not placed in their home. The children were placed in appellants' home on April 20, 2022, and May 16, 2022, respectively. The children were removed from appellants' home on September 13, 2023, after the district court orally stated during the first hearing that it would deny appellants' motion to stay the change of placement. Appellants filed their third-party-custody petition on October 4, 2023. At all times when the third-party-custody petition was pending, appellants were *former* foster parents of the children. Accordingly, appellants are not within the

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individual" form the noun element of a dependent clause, the word "who" is a relative pronoun that introduces a relative clause, the word "has" is the present-tense form of the infinitive "to have," the words "a child" are the direct object of the verb "has," and the word "placed" is a past participle in an adjectival phrase that modifies the word "child." *See id.* §§ 5.19, .56, .90, .106, .129, .226.

exclusion to the statutory definition of interested third party. To be clear, this opinion expresses no view as to whether appellants can satisfy the requirements of section 257C.03, subdivision 7(a). That issue must be determined by the district court in the first instance. We conclude merely that appellants are not categorically excluded from the statutory definition of "interested third party."

B.

The guardian *ad litem* and the county make a second responsive argument: that appellants are not allowed to file a third-party-custody petition in a CHIPS case in which they are not a party. The district court did not dismiss the petition for that reason. But the guardian *ad litem* presented the argument to the district court. Consequently, the guardian *ad litem* may assert the argument as an alternative ground for affirmance. *See Day Masonry v. Independent Sch. Dist. 347*, 781 N.W.2d 321, 331 (Minn. 2010).

We begin with the question whether appellants properly filed their third-party-custody petition in juvenile court. In *Stern v. Stern*, 839 N.W.2d 96 (Minn. App. 2013), the family court dismissed a *de facto*-custody petition on the ground that the petition should have been filed in juvenile court. *Id.* at 98-99. This court affirmed, citing a statute that provides, "The juvenile court has original and exclusive jurisdiction in proceedings concerning any child who is alleged to be in need of protection or services, or neglected and in foster care." *Id.* at 100 (quoting Minn. Stat. § 260C.101, subd. 1 (2012)). Because appellants' third-

party-custody petition relates to the children, and because the children are the subjects of a pending CHIPS case, the juvenile court has jurisdiction over appellants' petition. *See In re Welfare of Child of F.J.V.*, No. A21-0522, 2021 WL 4944677, *4 (Minn. App. Oct. 25, 2021) (stating that foster parents' third-party-custody petition was properly filed in juvenile court, citing *Stern*), *rev. denied* (Minn. Nov. 29, 2023), *cert. denied*, — U.S. —, 143 S. Ct. 2683, 216 L.Ed.2d 1250 (2023); *see also* Minn. R. Civ. App. P. 136.01, subd. 1(c) (providing that nonprecedential opinions are not binding authority).

The question remains whether appellants properly filed their third-party-custody petition in this CHIPS case rather than in a new case. The guardian *ad litem* cites a rule of court providing that a party to a CHIPS case has a right to, among other things, "bring motions before the court." Minn. R. Juv. Prot. P. 32.02. The guardian *ad litem* contends that because a person must be a party to a pending CHIPS case to file a motion, a person must be a party to a pending CHIPS case before filing a third-party-custody petition in that case. The cited rule does not compel such a result. In any event, the rule does not justify the dismissal of a third-party-custody petition with prejudice. If, on remand, the district court determines that appellants' third-party-custody petition should not have been filed in the pending CHIPS case, the district court may direct appellants to file it in a new case.

The guardian *ad litem* also makes another argument in support of the district court's dismissal of appellants' third-party-custody petition: that placement with appellants would not be in the children's best interests.

See Minn. Stat. §§ 257C.03, subd. 8(a)(3), .04. Again, the district court did not dismiss the petition for that reason, even though the guardian *ad litem* presented the argument to the district court. The district court appropriately did not resolve the argument without an evidentiary hearing. *See Lewis-Miller*, 710 N.W.2d at 568-70 (holding that petitioner is entitled to evidentiary hearing with respect to criteria in section 257C.03, subdivision 7(a)). The issue should be determined in the first instance by the district court. Accordingly, we will not consider for the first time on appeal whether a placement with appellants is in the children's best interests.

Thus, the district court erred by granting the motions to dismiss appellants' third-party-custody petition on the ground that appellants previously were the children's foster parents. Therefore, we remand the matter to the district court with instructions to reinstate the petition.

III.

Appellants next argue that the district court erred by not finding a good-cause exception to the statutory placement preferences.

Both ICWA and MIFPA give preferences to certain specified foster placements. ICWA's statutory preference provides:

> In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

> (i) a member of the Indian child's extended family;
>
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
>
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
>
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

25 U.S.C. § 1915(b). A federal regulation defines the circumstances that may constitute "good cause" for an exception to the ICWA statutory preferences:

> A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:
>
> (1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
>
> (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;

> (3) The presence of a sibling attachment that can be maintained only through a particular placement;
>
> (4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;
>
> (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. . . .

25 C.F.R. § 23.132(c) (2023).

MIFPA has a similar, but not identical, preference provision:

> Preference shall be given, in the absence of good cause to the contrary, to a placement with:
>
> (1) a noncustodial parent or Indian custodian;
>
> (2) a member of the child's extended family;
>
> (3) a foster home licensed, approved, or specified by the Indian child's Tribe;

> (4) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
>
> (5) an institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Minn. Stat. § 260.773, subd. 3. MIFPA further provides that a good-cause exception to a preferred placement may be based on any of four grounds:

> (i) the reasonable request of the Indian child's parents, if one or both parents attest that they have reviewed the placement options that comply with the order of placement preferences;
>
> (ii) the reasonable request of the Indian child if the child is able to understand and comprehend the decision that is being made;
>
> (iii) the testimony of a qualified expert designated by the child's Tribe and, if necessary, testimony from an expert witness who meets qualifications of section 260.771, subdivision 6, paragraph (d), clause (2), that supports placement outside the order of placement preferences due to extraordinary physical or emotional needs of the child that require highly specialized services; or

> (iv) the testimony by the child-placing agency that a diligent search has been conducted that did not locate any available, suitable families for the child that meet the placement preference criteria.

Minn. Stat. § 260.773, subd. 10(2).

Ordinarily, if both a federal statute and a state statute apply, the federal statute supersedes the state statute. *See* U.S. Const. art. VI, § 2; *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 10-11 (Minn. 2002). But in this situation, ICWA contains a provision directing otherwise:

> In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the right of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

25 U.S.C. § 1921. At oral argument, the guardian *ad litem* argued that section 1921 requires this court to apply the MIFPA placement preferences, not those of ICWA, and appellants agreed.

Accordingly, we seek to determine whether the district court erred by rejecting appellants' arguments for good-cause exceptions to MIFPA's placement preferences. Because appellants argued that "the required order of

placement preferences not be followed," they bore "the burden of establishing by clear and convincing evidence that good cause exists to modify the order of placement preferences." Minn. Stat. § 260.773, subd. 12. We apply an abuse-of-discretion standard of review to a district court's decision concerning the good-cause exception to MIFPA's placement preferences. *See In re Custody of S.E.G.*, 521 N.W.2d 357, 363 (Minn. 1994) (reviewing application of ICWA).

In the district court, appellants sought to establish a good-cause exception to the placement preferences for two reasons: first, L.K.'s request that the children remain with appellants and, second, the children's significant medical needs.

A.

In its September 15, 2023, order, the district court rejected appellants' first reason for a good-cause exception by stating:

> As far as the Mother's preference, the Court would have to receive that request directly from the Mother. Even then, as the Court noted during the hearing, it would have to determine whether that request was reasonable. Mother has been minimally involved with this case. Additionally, there is a risk that Mother continues to be under the influence of mood-altering chemicals that can significantly compromise her decision-making capabilities.

On appeal, appellants acknowledge that, at the time of the district court's decision, L.K. had not yet filed an affidavit expressing her preference that the children remain placed with appellants. L.K. filed such an affidavit on October 3, 2023, before the district court ruled on the motions concerning permissive intervention and the third-party-custody petition. But when the district court ruled on appellants' motion to stay the change of placement, L.K.'s request had been communicated to the court only in a second-hand manner by appellants, in their 21-page affidavit. That form of evidence does not comply with the statute, which provides that "the reasonable request of the Indian child's parents" may constitute good cause "if one or both parents *attest* that they have reviewed the placement options that comply with the order of placement preferences." *See* Minn. Stat. § 260.773, subd. 10(2)(i) (emphasis added). The word "attest" generally means "[t]o bear witness," to "testify," to "affirm to be true or genuine," or "to authenticate by signing as a witness." *Black's Law Dictionary* 158 (11th ed. 2019). Thus, the statute appears to require that the parent submit his or her request to the district court in testimony or a sworn statement. Accordingly, the district court did not abuse its discretion by discounting or disregarding the evidence of L.K.'s request on the ground that she had not submitted it directly to the court.

Appellants also contend that the district court erred by reasoning that L.K.'s request might not be reasonable because she had been "minimally involved" with the CHIPS case and might be under the influence of mood-altering chemicals. Appellants contend that L.K.'s suitability to be

a custodial parent is not necessarily relevant to her ability to assert a reasonable request for a good-cause exception. Appellants also refer to a statute that provides, "If the child's birth parent explicitly requests that a specific relative not be considered for placement of the child, the court shall honor that request if it is consistent with the best interests of the child . . . ." *See* Minn. Stat. § 260C.193, subd. 3(e) (2022). But that statute must yield to MIFPA, which is the more-specific statute for purposes of this case. *See Connexus Energy v. Commissioner of Revenue*, 868 N.W.2d 234, 242 (Minn. 2015). In any event, both of appellants' contentions concerning the reasonableness of L.K.'s request are moot in light of the fact that L.K. did not express her request to the district court in the proper form.

B.

The district court rejected appellants' second reason for a good-cause exception—the children's medical needs—by stating, "There is no evidence that the relative placement will not be able to meet the children's physical or emotional needs." On appeal, appellants allude to the children's medical histories and the importance of continuity of care.

In response, the guardian *ad litem* and the Red Lake Nation argue that the relevant MIFPA exception requires "the testimony of a qualified expert designated by the child's Tribe and, if necessary, testimony from an expert witness" with certain qualifications. *See* Minn. Stat. § 260.773, subd. 10(2)(iii). Appellants do not attempt

to rebut that argument in their reply brief. Appellants submitted a letter from a physician urging continuity of medical care, but the physician did not take a position as to whether the children should be placed with appellants or with R.F. In any event, the physician's letter does not satisfy the requirements of the statute. *See id.*

Thus, the district court did not err by rejecting appellants' arguments for a good-cause exception to MIFPA's placement preferences.

IV.

Appellants last argue that ICWA's and MIFPA's placement preferences violate their federal constitutional right to the equal protection of the laws on the ground that the placement preferences are impermissibly based on race.

Appellants challenged the constitutionality of ICWA and MIFPA in the district court in the motion they filed on September 12, 2023. They sought declarations that both statutes are unconstitutional and provided approximately ten pages of briefing on the issue in a memorandum of law. At the same time, appellants gave notice of their constitutional challenges to the attorney general of Minnesota and the United States Attorney General. The district court did not receive any other briefing on the constitutional issues before filing its September 15, 2023 order denying appellants' motion to stay the change of placement. The district court did not expressly consider appellants' constitutional challenges in its September

15, 2023 order. But the district court applied MIFPA's placement preferences.

Before considering the merits of appellants' constitutional challenges, we address two threshold issues.

A.

In their respective responsive briefs, the guardian *ad litem* and the Red Lake Nation argue that appellants' constitutional challenges are not properly before this court because the district court did not rule on the issue.

The supreme court has stated, "A reviewing court must generally consider 'only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.'" *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quoting *Thayer v. American Fin. Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982)). This statement often has been cited for the proposition that a party has forfeited an argument for reversal if the party did not present the argument to the district court. *See Bedner v. Bedner*, 946 N.W.2d 921, 926 (Minn. App. 2020); *Bremer Bank, N.A. v. Matejcek*, 916 N.W.2d 688, 695 (Minn. App. 2018); *Doe 175 ex rel. Doe 175 v. Columbia Heights Sch. Dist., ISD No. 13*, 842 N.W.2d 38, 42-43 (Minn. App. 2014).

In this case, however, appellants *did* present their constitutional argument to the district court. They did so in a thorough manner by filing a motion seeking, among other things, a declaration that MIFPA "is unconstitutional under the 14th Amendment's Equal

Protection clause" and by filing a memorandum of law with legal argument. Appellants also gave proper notice to the attorney general of their constitutional challenge. No party has asserted that appellants should have done more to obtain a ruling from the district court on MIFPA's constitutionality. In similar circumstances, this court has considered an appellant's argument for reversal or has remanded it to the district court, without declaring a forfeiture. *See, e.g.*, *Gallaher v. Titler*, 812 N.W.2d 897, 901 (Minn. App. 2012), *rev. denied* (Minn. July 17, 2012); *Slindee v. Fritch Invs., LLC*, 760 N.W.2d 903, 911 (Minn. App. 2009); *Cederberg v. City of Inver Grove Heights*, 686 N.W.2d 853, 858 (Minn. App. 2004).

Even if the lack of a district court ruling is deemed a forfeiture, appellants' constitutional argument should be reviewed under the well-established exception that applies if an argument could be decisive of the controversy on the merits, if the facts are undisputed, and if "there is no possible advantage or disadvantage to either party in not having had a prior ruling by the trial court on the question." *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 687 (Minn. 1997) (quotation omitted); *see also Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 403 (Minn. 2000); *Zip Sort, Inc. v. Commissioner of Revenue*, 567 N.W.2d 34, 39 n.9 (Minn. 1997). This court has relied on this exception in prior cases in which an appellant presented an argument to a district court but the district court did not rule on it. *See SCI Minnesota Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 779 N.W.2d 865, 872-73 (Minn. App. 2010); *Singelman v. St. Francis Med. Ctr.*, 777 N.W.2d 540, 543 (Minn. App. 2010).

There are especially strong reasons to invoke the exception in this case. The factual record is sufficiently developed for purposes of analyzing the constitutional issues. Respondents elected to not file memoranda of law, even during the three-week period preceding the second hearing, during which time appellants' request for declaratory relief was pending. Respondents' decision to not brief the issue to the district court should not be allowed to frustrate appellants' pursuit of their constitutional challenges. If we were to remand the constitutional issue to the district court, this court would apply a *de novo* standard of review on a subsequent appeal. Also, a remand and subsequent appeal would prolong a resolution of the constitutional issue by at least several months, which might delay a permanent placement.

Thus, appellants' constitutional challenges are properly before the court.[3]

B.

The Red Lake Nation also argues (for the first time on appeal) that appellants lack standing to challenge the constitutionality of ICWA and MIFPA on the ground that appellants did not suffer a legally cognizable injury when the district court applied MIFPA's placement preferences and denied their motion to stay the change of placement.

3. Before the briefing period, the Red Lake Nation filed a motion to limit the scope of this appeal by striking appellants' constitutional challenges on the ground that the district court did not rule on the issue. A ruling on the motion was deferred, and the motion was referred to the merits panel. For the reasons stated in IV.A., we deny the motion.

Appendix C

"Standing is a legal requirement that a party have a sufficient stake in a justiciable controversy to seek relief from a court." *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 338 (Minn. 2011) (quotation omitted). "Standing to bring an action can be conferred in two ways: either the plaintiff has suffered some injury-in-fact or the plaintiff is the beneficiary of some legislative enactment granting standing." *In re Custody of D.T.R.*, 796 N.W.2d 509, 512 (Minn. 2011) (quotation omitted).

In their reply brief, appellants respond to the Red Lake Nation by arguing that their injury-in-fact has been recognized by the United States Supreme Court. In *Brackeen*, the petitioners asserted a constitutional argument that is practically identical to appellants' constitutional argument: that the application of ICWA's placement preferences violates the constitutional right to equal protection. 143 S. Ct. at 1625-26. In describing that argument, the Court stated:

> The individual petitioners argue that ICWA injures them by placing them on "[un] equal footing" with Indian parents who seek to adopt or foster an Indian child. Under ICWA's hierarchy of preferences, non-Indian parents are generally last in line for potential placements. According to petitioners, this "erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *The racial discrimination they allege counts as an Article III injury.*

Id. at 1638 (alteration in original) (emphasis added) (citations omitted). Despite concluding that the petitioners in *Brackeen* had suffered the requisite injury, the Court did not consider and resolve the constitutional issue because the petitioners did not sue a defendant who could implement any relief that might be granted to them, which meant that the petitioners did not satisfy the redressability requirement. *Id.* at 1638-40.

In this case, appellants are asserting a right based on federal constitutional law. The United States Supreme Court has clearly stated, as a matter of federal law, that their injury satisfies the injury-in-fact requirement. *Id.* at 1638. The nature of the alleged injury is "racial discrimination." *See id.* The petitioners in *Brackeen* asserted an equal-protection challenge to ICWA with respect to both foster placements and adoptive placements. *See id.* at 1625-26, 1638. *Brackeen* governs with respect to whether appellants have satisfied the injury-in-fact requirement.

Thus, appellants have standing to challenge the constitutionality of ICWA and MIFPA.

C.

Appellants argue that ICWA violates the equal-protection principle of the Fifth Amendment to the United States Constitution, and that MIFPA violates the Equal Protection Clause of the Fourteenth Amendment, on the ground that the statutes' placement preferences discriminate against foster parents and against children

based on race. For purposes of this case, we need consider only the challenge to MIFPA because the district court relied on MIFPA's placement preferences in denying appellants' motion to stay the change of placement.[4] *See supra* part III.

1.

The Fourteenth Amendment provides, in relevant part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. It is an elementary principle of constitutional law that the Equal Protection Clause of the Fourteenth Amendment seeks to ensure that states do not treat people differently based on their race. *See, e.g.*, *Brown v. Board of Educ.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

The Minnesota Supreme Court has prescribed a structure for analyzing equal-protection arguments. The "threshold inquiry is whether the claimant is similarly situated in all relevant respects to others whom the claimant contends are being treated differently." *State*

4. In addition, we question whether a state court may declare an act of Congress invalid on the ground that it violates the United States Constitution. To our knowledge, the power of judicial review established in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-80, 2 L.Ed. 60 (1803), has not been extended to state courts. No party has cited caselaw recognizing such a power in a state court, and we are unable in our independent research to find authority for such a power.

v. Lee, 976 N.W.2d 120, 125-26 (Minn. 2022). We conduct the threshold inquiry "by determining 'whether the law creates distinct classes within a broader group of similarly situated persons or whether those treated differently by the law are sufficiently dissimilar from others such that the law does not create different classes within a group of similarly situated persons.'" *Id.* at 126 (quoting *Fletcher Props., Inc. v. City of Minneapolis*, 947 N.W.2d 1, 22 (Minn. 2020)).

If an equal-protection argument "crosses the 'similarly situated' threshold," the next question is whether a person's "right to equal protection has been violated." *Id.* at 129. To answer that question, we must determine the level of scrutiny that should be applied to the equal-protection argument, which "depends on the nature of the challenged statute." *Id.* "If the statute involves a fundamental right or a suspect classification, then we apply a heightened level of scrutiny." *Id.* The federal strict-scrutiny test asks whether a racial classification is narrowly tailored to further a compelling governmental interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). If the challenged statute does *not* involve a fundamental right or a suspect classification, "we review whether the challenged statute has a rational basis." *Lee*, 976 N.W.2d at 129. The federal rational-basis test asks whether there is a legitimate governmental interest and whether the challenged classification is rationally related to the legitimate governmental interest. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83-84, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000).

Appendix C

The parties to this appeal do not address the "threshold inquiry," *i.e.*, whether non-Indian children or non-Indian candidates for foster placements are similarly situated in all relevant respects to Indian children or Indian candidates for foster placements. *See Lee*, 976 N.W.2d at 125-26. Rather, the parties focus their arguments on the level of scrutiny that should be applied to appellants' constitutional argument. Accordingly, we assume without deciding that appellants have satisfied the threshold inquiry, and we proceed to the next step of the constitutional analysis. We are mindful that our statutes are presumed to be constitutional, and "we will strike down a statute as unconstitutional only if absolutely necessary." *Id.* at 125 (quotation omitted).

2.

Appellants contend that MIFPA imposes placement preferences based on race, which is a suspect classification that is subject to strict scrutiny. Appellants further contend that strict scrutiny of MIFPA leads to the conclusion that the statute's placement preferences violate the Equal Protection Clause.

In response, the state attorney general—who was granted leave to intervene for purposes of defending the constitutionality of MIFPA—contends that MIFPA imposes placement preferences that are political in nature rather than racial, that such a distinction is *not* a suspect classification, and that rational-basis scrutiny applies. The attorney general further contends that applying the rational-basis test leads to the conclusion that the statute's

placement preferences do *not* violate the Equal Protection Clause. The Red Lake Nation makes essentially the same argument. The other respondents—the guardian *ad litem*, the county, and L.K.—simply join in the attorney general's argument on this issue.

In support of appellants' argument for strict scrutiny, they cite *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984), in which the Supreme Court held that a state court may not award custody to one parent on the ground that the other parent is cohabitating with a person of a different race. *Id.* at 431-34, 104 S.Ct. 1879. The *Palmore* Court noted that the state trial court made a classification based on race rather than the best interests of the child. *Id.* at 432-33, 104 S.Ct. 1879. The Court reasoned that racial classifications are "subject to the most exacting scrutiny" and that the state court's custody award did not survive that level of scrutiny. *Id.* at 432-34, 104 S.Ct. 1879. Appellants also cite *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), for the proposition that a statute is race-based if it defines a person by the quantum of blood attributable to a particular racial group. *Id.* at 4-5, 87 S.Ct. 1817 & n.4. The attorney general acknowledges the existence of caselaw aligning with appellants' argument, noting that the Supreme Court has "appl[ied] heightened scrutiny to laws or policies that benefit Native Americans as a minority race." *See, e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 143 S. Ct. 2141, 2166, 216 L.Ed.2d 857 (2023) (applying strict scrutiny to university admissions program); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478, 109 S.Ct.

706, 102 L.Ed.2d 854 (1989) (applying strict scrutiny to municipal law concerning government contracts).

But the attorney general contends that the Supreme Court also has "appl[ied] rational-basis review to laws or policies that benefit members of a federally-recognized Indian tribe." The attorney general relies primarily on *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), in which non-Indian employees of the United States Bureau of Indian Affairs challenged an executive-branch policy that granted "qualified Indians" a preference in hiring. *Id.* at 538-39, 94 S.Ct. 2474. At the outset of its analysis, the Court stated that "the instant issue turns on the unique legal status of Indian tribes under federal law." *Id.* at 551, 94 S.Ct. 2474. The Court noted that article I of the Constitution grants to Congress the power to regulate "Commerce . . . with the Indian Tribes" and that article II grants the President authority to make treaties with Indian tribes. *Id.* at 552, 94 S.Ct. 2474 (citing U.S. Const. art. I, § 8, cl. 3; art. II, § 2, cl. 2). The Court then reasoned as follows:

> [T]his preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency . . . . The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as

> members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion . . . . In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*.

Id. at 553-54. The Court concluded that "the preference is reasonably and directly related to a legitimate, nonracially based goal." *Id.* at 554, 94 S.Ct. 2474. Consequently, the Court held that the hiring preference was not unconstitutional. *Id.* at 554-55, 94 S.Ct. 2474.

The Supreme Court has cited *Mancari* in other cases concerning equal-protection challenges to statutes concerning Indians and has applied rational-basis review on the ground that the statutes are not based on race. For example, in *United States v. Antelope*, 430 U.S. 641, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977), the Court applied federal criminal law to Indians charged with crimes against non-Indians in Indian country. *Id.* at 646-47, 97 S.Ct. 1395. The Court reasoned that the application of federal law is "not based upon impermissible classifications" but, rather, "is rooted in the unique status of Indians as 'a separate people' with their own political institutions" and, thus, "is not to be viewed as legislation of a 'racial group consisting of Indians.'" *Id.* (quoting *Mancari*, 417 U.S. at 553 n.24, 94 S.Ct. 2474). To reinforce the point, the Court stated that the criminal defendants "were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe." *Id.* For that reason, the Court concluded

"that the federal criminal statutes enforced here are based neither in whole nor in part upon impermissible racial classifications." *Id.* at 647, 97 S.Ct. 1395; *see also Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-80, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) (rejecting equal-protection challenge to federal law preventing state from taxing sales of cigarettes on Indian reservation, citing *Mancari*).

The Court also has cited *Mancari* in a family-law case. In *Fisher v. District Court of Sixteenth Judicial District of Montana*, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976), the Court's primary holding was that, as a statutory matter, a tribal court had exclusive jurisdiction over an adoption case in which all parties were members of an Indian tribe. *Id.* at 383-91, 96 S.Ct. 943. Before concluding, the Court stated:

> Finally, we reject the argument that denying the [prospective adoptive parents] access to the Montana courts constitutes impermissible racial discrimination. *The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.* Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the

> congressional policy of Indian self-government. *Morton v. Mancari*, 417 U.S. 535, 551-55, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974).

Id. at 390-91, 96 S.Ct. 943 (emphasis added).

The question remains whether MIFPA is like the statutes in the cases cited by appellants, in which preferences benefitting Indians and other groups have been reviewed with strict scrutiny, or like the statutes in the cases cited by the attorney general, which were reviewed only for a rational basis. It is notable that MIFPA contains the following legislative statement of policy:

> The purposes of the Minnesota Indian Family Preservation Act are to (1) protect the long-term interests, as defined by the Tribes, of Indian children, their families as defined by law or custom, and the child's Tribe; and (2) preserve the Indian family and Tribal identity, including an understanding that Indian children are damaged if family and child Tribal identity and contact are denied. Indian children are the future of the Tribes and are vital to their very existence.

Minn. Stat. § 260.753. In addition, the manner in which the statute operates shows that it is designed to serve the interests of Indian tribes. The third placement preference is "a foster home *licensed, approved, or specified by the Indian child's Tribe*," and the fifth placement preference is "an institution for children *approved by an Indian*

Tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs." Minn. Stat. § 260.773, subd. 3(3), (5) (emphasis added). The statutory order of preferences yields to an Indian tribe's preferences "if the Indian child's Tribe has established a different order of placement preference by resolution." *Id.*, subd. 2. The statute generally provides that a county "shall defer to the judgment of the Indian child's Tribe as to the suitability of a placement." *Id.*, subd. 5. These provisions demonstrate that MIFPA benefits both Indian persons and Indian tribes.

Furthermore, MIFPA's placement preferences must be understood in the context of ICWA provisions that grant tribal courts "jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe" and require a state court to transfer jurisdiction over such a case to a tribal court. *See* 25 U.S.C. § 1911(a), (b); *see also* Minn. Stat. § 260.763, subd. 1(a). In essence, MIFPA's provisions granting Indian tribes authority to determine or influence the placement of an Indian child in a state-court proceeding are complementary of ICWA provisions concerning tribal-court jurisdiction.

The conclusion that rational-basis review applies is consistent with other Minnesota opinions that have followed Supreme Court precedent by reasoning that statutes that affect Indians differently from non-Indians are not race-based and, thus, are subject to rational-basis review. *See Greene v. Commissioner of Minnesota Dep't of Human Servs.*, 755 N.W.2d 713, 724-29 (Minn. 2008)

(concluding that rational-basis review applies to equal-protection challenge to statute reducing government benefits for Indians who do not participate in tribal program); *Krueth v. Independent Sch. Dist. No. 38*, 496 N.W.2d 829, 835-37 (Minn. App. 1993) (concluding that rational-basis review applies to equal-protection challenge to statute allowing school districts to give hiring preferences to American Indian teachers), *rev. denied* (Minn. Apr. 20, 1993).

Thus, MIFPA's placement preferences are not based on race. Rather, they are based on membership in an Indian tribe and on the sovereign or quasi-sovereign status of Indian tribes. *See Fisher*, 424 U.S. at 390-91, 96 S.Ct. 943 (citing *Mancari*, 417 U.S. at 551-55, 94 S.Ct. 2474); Minn. Stat. § 260.754. Because MIFPA's placement preferences are not based on a suspect classification, rational-basis scrutiny applies.

3.

As stated above, the federal rational-basis test asks whether there is a legitimate governmental interest and whether the challenged classification is rationally related to the legitimate governmental interest. *Kimel*, 528 U.S. at 83-84, 120 S.Ct. 631.

Appellants do not attempt to argue that MIFPA's placement preferences do not satisfy rational-basis review. The Red Lake Nation argues that ICWA is rational by pointing to its text, which "declares that it is the policy of this Nation to protect the best interests of Indian children

and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. MIFPA contains a similar provision, which states that its purposes are to

> (1) protect the long-term interests, as defined by the Tribes, of Indian children, their families as defined by law or custom, and the child's Tribe; and (2) preserve the Indian family and Tribal identity, including an understanding that Indian children are damaged if family and child Tribal identity and contact are denied. Indian children are the future of the Tribes and are vital to their very existence.

Minn. Stat. § 260.753. The attorney general argues that MIFPA's placement preferences promote MIFPA's purpose because the preferences "protect Indian children's connections to their immediate families, extended families, and Tribes" and, thus, are "a reasonable solution to promote the legitimate State interest in preventing the breakup of Indian families." We agree. Accordingly, we conclude that MIFPA is rationally related to a legitimate governmental interest.

Thus, MIFPA's placement preferences do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

DECISION

The district court erred by denying appellants' motion for permissive intervention. On remand, the district court

shall reconsider the motion in a manner consistent with part I of this opinion.

The district court erred by granting the motions to dismiss appellants' third-party-custody petition. On remand, the district court shall reinstate the petition.

The district court did not err by not finding a good-cause exception pursuant to Minnesota Statutes section 260.773, subdivision 10(2), to the statutory placement preferences in Minnesota Statutes section 260.773, subdivision 3.

The placement preferences in Minnesota Statutes section 260.773, subdivision 3, do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Affirmed in part, reversed in part, and remanded; motion denied.

Appendix C

REYES, Judge (concurring in part, dissenting in part)

I concur with the majority's conclusion that no good-cause exception exists to deviate from the placement order established under the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963 (2018) and the Minnesota Indian Family Preservation Act (MIFPA), Minn. Stat. §§ 260.751-.835 (2022 & Supp. 2023) and that MIFPA is constitutional under the rational-basis test. I respectfully dissent on the remaining issues.

This case concerns twin Indian children[5] who are eligible for enrollment in the Miskwaagamiiwi-Zaagaiganing, or Red Lake Nation, a federally recognized Indian Tribe, and whose custodial placement is governed by ICWA and MIFPA. Respondent Human Services of Faribault and Martin Counties (the county) initially placed the children with appellants N.R. and K.R. after filing a Children in Need of Protection or Services (CHIPS) proceeding against the Indian children's birthmother, L.K. Appellants are the Indian children's former foster parents who are non-Indian and not related to the Indian children. By all accounts, appellants did a commendable job of caring and providing for the Indian children. Meanwhile, the county coordinated with the new Red Lake Nation representative to find an appropriate relative placement consistent with ICWA. In August 2023, appellants were informed that the county would follow respondent Red Lake Nation's request under ICWA and

5. The children satisfy the definition for "Indian child" established by ICWA and MIFPA. *See* 25 U.S.C. § 1903(4); Minn. Stat. § 260.755, subd. 8 (2022).

MIFPA to have the Indian children placed with R.F. R.F. is the children's relative, the legal guardian of the Indian children's sibling, a member of Red Lake Nation who lives on the Tribe's reservation, and is a licensed foster-care provider. Appellants responded by filing an emergency motion for permissive intervention in the CHIPS proceeding, a petition to establish third-party custody under the theory that they are interested third parties to the CHIPS proceeding, and a motion challenging the constitutionality of both ICWA and MIFPA. The county, Red Lake Nation, and respondent the guardian ad litem (GAL) for the children, all opposed appellants' motions. On appeal, intervenor State of Minnesota opposes appellants' constitutional challenge to ICWA and MIFPA, and is joined by the county and L.K. The district court did not rule on appellants' constitutional challenges and denied each of their remaining requests.

I. The district court did not clearly abuse its discretion by denying appellants' motion for permissive intervention because it appropriately applied ICWA and MIFPA to this preadoptive CHIPS proceeding involving Indian children.

Appellants argue that the district court abused its discretion by denying their motion for permissive intervention in the CHIPS proceeding. Red Lake Nation asserts that the district court appropriately exercised its discretion by applying ICWA and MIFPA to a CHIPS proceeding involving Indian children. I agree with Red Lake Nation.

Appellate courts will reverse a district court's decision to deny permissive intervention "only when a *clear* abuse of discretion is shown." *In re Welfare of Child. of M.L.S.*, 964 N.W.2d 441, 451 (Minn. App. 2021) (emphasis added). "A district court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law, or delivering a decision that is against logic and the facts on record." *Woolsey v. Woolsey*, 975 N.W.2d 502, 506 (Minn. 2022) (quotation omitted). While in general permissive intervention is liberally granted, the district court must evaluate the best interests of the children and focus on who should participate in the case. *M.L.S.*, 964 N.W.2d at 451-53. We concluded that "[r]elevant circumstances [to evaluate a motion for permissive intervention] may include, among other things, the *movant's status as a relative*, the timeliness of the motion,[6] and any [factors] in Minn. Stat. § 260C.212, subd. 2(b) [2020], that bear on whether it would be in the child's best interests to grant the intervention motion." *Id.* at 457 (emphasis added).

Appellants' reliance on *M.L.S.* to argue that the district court abused its discretion here is misguided because *M.L.S.* is both factually and legally inapposite. In *M.L.S.*, relative-aunt moved for permissive intervention in an adoption proceeding involving a non-Indian child. *Id.* at 447. We concluded that the district court abused its discretion by denying aunt's motion because (1) aunt's status as a relative under Minn. Stat. § 260C.212, subd.

6. While timeliness was an important consideration in *M.L.S.*, it is not at issue here.

2(a)(1) (2020), weighed heavily in favor of adding her as a party in the adoption proceeding, especially when the district court's prior order found that no relative-placement options existed, and the child was placed with a nonrelative foster family and (2) it misapplied the factors in Minn. Stat. § 260C.212, subd. 2(b), by conflating the child's best interests in their final placement with their interests in aunt's motion to intervene. *See id.* at 452, 457-58.

As the district court correctly recognized, because this case involves *Indian children*, the Minnesota Rules of Juvenile Protection Procedure require the application of ICWA, which sets forth a unique framework that supplants conflicting state law provisions, including that "the best interests of the child shall be determined consistent with [ICWA]." *See* Minn. R. Juv. Prot. P. 28.05, 28.01 ("This section of these rules provides procedures for the application of ICWA . . . in juvenile protection matters concerning an Indian child."); Minn. Stat. § 257C.02 (2022) (noting that ICWA and MIFPA govern all de facto or third-party custody proceedings involving Indian children). The adoption proceeding in *M.L.S.* did not involve an Indian child and therefore did not invoke ICWA. Minn. Stat. § 260C.212 (2022) expressly incorporates ICWA and requires a different analytical framework to determine the best interests of an Indian child, rendering *M.L.S.* inapposite to this case. Specifically, section 260C.212, subdivision 2(a), has a separate provision for Indian children, which states that "*For an Indian child*, the agency *shall* follow the order of placement preferences in the Indian Child Welfare Act of 1978, United States Code,

title 25, section 1915." (Emphases added.); *see also* Minn. R. Juv. Prot. P. 28.04, subd. 5 (stating that "The [district] court shall follow the order of placement preferences required by ICWA, 25 U.S.C. section 1915, when placing an Indian child," and noting that Minnesota courts are required to apply higher standard under MIFPA in order to deviate from ICWA's order of placement). The best interests of Indian children must therefore be determined consistent with ICWA. *See* Minn. R. Juv. Prot. P. 28.05; Minn. Stat. § 260.755, subd. 2a (2022) (defining "[b]est interests of an Indian child" to mean compliance with ICWA and MIFPA "to preserve and maintain an Indian child's family").

Section 1915 of ICWA provides that "[i]n any . . . preadoptive placement, a preference shall be given, in the absence of good cause to the contrary,[7] to a placement with—(i) a member of the Indian child's extended family." 25 U.S.C. § 1915(a). The parties do not dispute that CHIPS actions are preadoptive proceedings that seek to reunite parents with their children, Minn. Stat. § 260C.001, subd. 2(b)(7) (2022); that the Indian children's relative, R.F., is "a member of the Indian child[ren]'s extended family"; or that compliance with ICWA and MIFPA requires that the Indian children remain in the custody of R.F. as the approved tribal placement. As a result, under ICWA, preadoptive placement preference must be given to R.F. Because the best-interests analysis in this case is controlled by the ICWA provision in Minn. Stat.

7. The good-cause exception to ICWA will be discussed briefly in section III. In short, I agree with the majority's analysis of that issue.

§ 260C.212, subd. 2(a), a provision which was not at issue in *M.L.S.*, the district court's analysis was not affected by the same error that caused us to reverse in *M.L.S.*

Here, the district court was required to adhere to ICWA and MIFPA to determine the best interests of the Indian children. *See* Minn. Stat. §§ 260C.212, subd. 2(a), 260.755, subd. 2a. MIFPA further provides that "[T]he best interests of an Indian child support the child's sense of belonging to family, extended family, and tribe. *The best interests of an Indian child are interwoven with the best interests of the Indian child's tribe.*" Minn. Stat. § 260.755, subd. 2a (emphasis added). Notably, in ICWA proceedings, the Indian child's tribe is automatically included as a party to the case. *See* Minn. R. Juv. Prot. P. 28.02. Here, Red Lake Nation is not only a party in this CHIPS proceeding, but they have expressed that it is in the Tribe's best interest for R.F. to retain custody of the Indian children. Because an Indian child's best interests are "interwoven" with the best interests of their Tribe, Red Lake Nation's preference for the Indian children to be placed with R.F. supports the district court's determination that it was also in the Indian children's best interests to deny appellants' motion for permissive intervention. *See* Minn. Stat. § 260.755, subd. 2a.

Furthermore, contrary to appellants' assertion, the district court appropriately determined that allowing them to permissibly intervene would be contrary to the children's best interests. The district court explicitly stated that it "finds *intervention by the [appellants] would not be in the children's best interest for the reasons detailed above*," referring to its findings. (Emphasis added.) It

made several factual findings pertinent to establishing the Indian children's best interests under ICWA and MIFPA, which in turn "bear[s] on" their best interests regarding appellant's permissive-intervention motion. *M.L.S.*, 964 N.W.2d at 457. Those findings include that: "[t]he best interests of an Indian child support the child's sense of belonging to family, extended family and tribe[;] [t]he best interests of an Indian child are interwoven with the best interests of the Indian child's tribe[,] Minn. Stat. § 260.755 subd.2a."; the children's Tribe, Red Lake Nation, disapproves of adoptive or permanent placement of the Indian children with appellants, who are not relatives, are not Indian, and are not members of the Tribe; Red Lake Nation approves of temporary placement of the Indian children with their relative R.F., during the pendency of the CHIPS proceeding because R.F. is Indian and a member of their Tribe, *see* 25 U.S.C. § 1915; R.F. also has custody of the Indian children's older sibling; the Indian children have transitioned well into R.F.'s home; R.F. is providing for the Indian children's medical needs;[8] and, while in the care of appellants, the children

8. In arguing that the district court should have granted appellants' motion for permissive intervention, appellants emphasize that they had helpful information regarding the Indian children's medical needs. But that information can and should have been provided by appellants, irrespective of their party status. Furthermore, that information could be obtained directly from the Indian children's healthcare providers. Finally, while appellants argue that the best-interests factors in Minn. Stat. § 260C.212, subd. 2(b), should not have been considered, it implicitly but extensively relies on "the medical needs of the child" factor to argue why they should be allowed to permissively intervene.

"did not attend a single tribal event," did not meet their older sister or other extended family, and did not enroll for membership with the Tribe. *See* 25 U.S.C. § 1915(b); Minn. Stat. § 260.755, subd. 2a. While appellants dispute the last finding, they cannot dispute that R.F., as the Indian children's relative and a tribal member, can bring the Indian children to the Tribe's events, have them meet their extended family, and assist in enrolling them in membership with the Tribe. Because the record supports the district court's determination that, under ICWA and MIFPA, the Indian children's best interests are already represented by Red Lake Nation, the district court did not commit a "clear abuse of discretion" by denying appellants' motion for permissive intervention in this preadoptive CHIPS proceeding. *M.L.S.*, 964 N.W.2d at 451.[9]

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9. Even under the traditional *M.L.S.* analysis for non-ICWA cases, the district court did not clearly abuse its discretion by denying appellants' permissive-intervention motion. Unlike in *M.L.S.*, 964 N.W.2d at 445-49, in which the appellant seeking permissive intervention in the adoption proceedings was an aunt of the child, movant-appellants are *not* related to the Indian children, whereas R.F. is a relative, *see* Minn. Stat. § 260C.212, subd. 2(a); R.F. has custody of the children's older sibling, *see Doren v. Doren*, 431 N.W.2d 558, 561 (Minn. App. 1988) (noting that "split custody of siblings is not favored"); *see also* Minn. Stat. § 260C.212, subd. 2(a)(1); and this is a CHIPS proceeding and not an adoption. The district court addressed the relevant best-interests-of-the-child factors through its findings that R.F. is providing for the Indian children's medical needs, they have adapted well to their new environment in R.F.'s home, placement with R.F. allows them to be better connected to their extended family and tribal community, and placement with R.F. ensures compliance with ICWA and MIFPA to preserve the Indian children's family, which is required

II. The district court correctly determined that appellants are not interested third parties to the CHIPS proceeding.

I also agree with Red Lake Nation's statutory analysis and would conclude that appellants are legally precluded from being considered "interested third part[ies]" under Minn. Stat. § 257C.01, subd. 3 (2022). That provision excludes "*an individual who has a child placed in the individual's care* . . . through a court order or voluntary placement under chapter 260C" from being considered as an interested third party. Minn. Stat. § 257C.01, subd. 3(b) (emphasis added). Here, it is undisputed that appellants had received temporary placement of the Indian children under chapter 260C (2022 & Supp. 2023).

"Statutory interpretation is a question of law that we review de novo." *Houck v. Houck*, 979 N.W.2d 907, 910 (Minn. App. 2022). "Our objective in statutory interpretation is to effectuate the intent[ ] of the legislature." *Id.* (Quotation omitted). If the legislature's intent is unambiguous and discernible from the statute's plain language, then the plain language controls. *Id.* Because "different tenses exist to express differences in

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under factor 11. *See* Minn. Stat. § 260C.212, subd. 2(b)(1-11). The district court properly exercised its discretion here. *See Valentine v. Lutz*, 512 N.W.2d 868, 871 (Minn. 1994) (concluding in non-ICWA CHIPS case that, although appellant foster parents had provided child with excellent care for extended period, "the decision to allow persons to intervene other than those allowed by our rule or statute is one that should remain within the sound discretion of the [district] court").

the time or duration of an action," the "legislature's use of a verb tense is significant in construing statutes." *Hous. And Redev. Auth. of St. Cloud v. Royston*, 990 N.W.2d 730, 737 (Minn. App. 2023) (quotations omitted), *rev. denied* (Minn. Aug. 22, 2023).

Here, the statutory exclusion is phrased in the present-perfect tense. A sentence is in present-perfect tense when it uses a form of the auxiliary verb "to have" in combination with the past participle of the principal transitive verb. *See id.*; *State v. Overweg*, 922 N.W.2d 179, 184 (Minn. 2019); *The Chicago Manual of Style* § 5.132 (17th ed. 2017). When a sentence uses the present-perfect tense, it "denotes an act, state or condition [*that is now completed from a time in the indefinite past*," *Overweg*, 922 N.W.2d at 184 (quotation omitted) (emphasis added), or a "past action that comes up to and touches the present." *Chicago Manual of Style*, § 5.132.

The phrase "has a child placed" in subdivision 3(b) uses the auxiliary verb "has" to modify "placed," which is the past participle of the principal transitive verb. Because the statutory exclusion uses the present-perfect tense, the condition it imposes, placement under chapter 260C, applies whether the placement occurred and was completed in the indefinite past or if it "comes up to and touches the present." *Chicago Manual of Style*, § 5.132. The statute's use of the present-perfect tense in this case therefore signifies that, because the children were placed with appellants under chapter 260C, they are precluded from being considered an "interested third party" under Minn. Stat. § 257C.01, subd. 3. *See State*

v. S.A.M., 891 N.W.2d 602, 606 (Minn. 2017) (noting that operative language "has convictions" required court to look to present status of conviction, while statute that took effect when defendant "has been convicted" referred to past time periods); *Overweg*, 922 N.W.2d at 184 (supreme court noting that statutory phrase "has previously been convicted" was conjugated in present-perfect tense, meaning qualifying conviction could have occurred sometime in indefinite past); *see also Barrett v. United States*, 423 U.S. 212, 217, 96 S.Ct. 498, 46 L.Ed.2d 450 (1976) (noting that, when interpreting statutes, "who is" denotes present tense while "who has" signifies present-perfect tense). The fact that the two verbs "has" and "placed" are not directly adjacent to each other does not affect the analysis. *See S.A.M.*, 891 N.W.2d at 606 (auxiliary verb "has" separated from transitive verb "convicted" by word "been"); *Overweg*, 922 N.W.2d at 184 (supreme court concluding that auxiliary verb "has" separated from transitive verb "convicted" by words "previously been" is not ambiguous). This interpretation that the phrase "has a child placed" is in the present-perfect tense is consistent with binding caselaw, follows the rules of grammar, and makes logical sense.

Furthermore, reading the 'interested third party' provision in the present-perfect tense would not make 'the individual' the subject of the sentence, as the majority suggests. That is because the provision is written in the passive voice to omit the subject, which is *the agency* placing the child with the individual. In other words, the individual is *not* the subject of the sentence, but rather is the recipient of the agency's action, as shown by the

language in the last phrase of the provision "placed in the individuals' care." Minn. Stat. § 257C.01, subd. 3(b).

Finally, appellants' position that the exclusion speaks in the present tense when it refers to "an individual who has a child placed in the individual's care" does not comport with the grammatical structure of the statute's plain language. Under chapter 260C, adopting appellants' position that "has" is the principal transitive verb would create an ambiguity because the individual in the phrase "an individual who has a child" could refer to either the birth parent or the person who receives custody of a child.

Notably, this interpretation is also consistent with the language in Minn. Stat. § 260C.212, subd. 2(a)(2), which establishes the right for foster parents who no longer have custody of a child to be considered as a placement option. That provision provides that, if there is no relative available for placement, the child "shall" be placed "with an individual who is an important friend of the child or of the child's parent or custodian, including an individual *with whom the child has resided* or had significant contact." Minn. Stat. § 260C.212, subd. 2(a)(2) (emphasis added). Just like the interested-third-party statute, the best-interests-of-the-child provision for former foster parents uses the present-perfect construction "has resided" to indicate that the condition it imposes can be satisfied whether it occurred in the indefinite past or comes up to and touches the present. *See Overweg*, 922 N.W.2d at 184 (quotation omitted); *Chicago Manual of Style*, § 5.132.

Even if I were to assume without deciding that the language in Minn. Stat. § 257C.01, subd. 3, is ambiguous,

the canons of statutory construction lend further support to the conclusion that appellants are excluded from being considered interested third parties.

When interpreting a statute, appellate courts should attempt to effectuate the legislature's intent by avoiding an interpretation that would lead to "absurd results and unjust consequences." *Am. Fam. Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277-78 (Minn. 2000). Further, appellate courts should read and construe statutory provisions in light of "surrounding sections to avoid conflicting interpretations." *Id.* at 277.

Appellants' interpretation would lead to the absurd result that only former foster parents, and not current foster parents who still have custody of the child, could be considered interested third parties under Minn. Stat. § 257C.01, subd. 3. I cannot conceive of a rational explanation for why the legislature would have intended that inconsistent result. To the contrary, it seems evident that the legislature intended to exclude both current and former foster parents from being interested third parties to prevent foster parents from increasing the adversarial nature of CHIPS proceedings by filing third-party-custody petitions, when the goal of CHIPS proceedings is to reunite the children with their parents. *See* Minn. Stat. § 260C.001, subd. 2(b)(7).

Furthermore, interpreting Minn. Stat. § 257C.01, subd. 3, to exclude former foster parents of Indian children is consistent with the Minnesota statutes that give express supremacy to ICWA and MIFPA in

CHIPS and third-party custody proceedings. *See* Minn. Stat. § 260.755, subd. 2a (stating that an Indian child's best interests must be determined according to ICWA and MIFPA in juvenile-protection cases); Minn. Stat. § 257C.02 (noting that ICWA and MIFPA govern third-party custody proceedings involving Indian children and supplant conflicting state law provisions). Because the Indian children were already in the custody of R.F., their preferred temporary placement under ICWA and MIFPA in a CHIPS proceeding, the district court's determination that appellants were not interested third parties comports with the Minnesota statutes giving deference to ICWA and MIFPA in CHIPS and third-party custody proceedings involving Indian children.

Because the plain language of Minn. Stat. § 257C.01, subd. 3, and the canons of statutory interpretation demonstrate that the legislature intended for the chapter 260C exclusion to apply even if the moving party no longer had custody of the child, I would conclude that the district court appropriately determined that appellants were not an interested party and thus are not eligible to request intervention on that basis.

III. The district court did not err by determining that appellants do not satisfy a good-cause exception to ICWA or MIFPA.

I concur with the majority that the district court did not err in its determination that appellants failed to satisfy a good-cause exception to ICWA and MIFPA.

IV. Appellants' challenge to ICWA and MIFPA is not properly before this court, they lack standing, and their challenge fails under the rational-basis test.

Appellants sought a declaratory judgment that ICWA and MIFPA violate their equal-protection rights under the U.S. Constitution based on the premise that the placement preferences expressed by those statutes *racially* discriminate against them as non-Indians. Because I would conclude that the district court appropriately denied both appellants' motion for permissive intervention and their motion to be added to the case as interested third parties, I would also conclude that it is not necessary to reach the constitutional issue. *Kimberly-Clark Corp. v. Comm'r of Revenue*, 880 N.W.2d 844, 849 (Minn. 2016) (noting that appellate courts "do not reach constitutional issues if the appeal can be resolved on other grounds").

Moreover, I would conclude that appellants' equal-protection claim has not been preserved for review and that this is not that rare case in which we should decide it for the first time on appeal. In addition, appellants lack standing to challenge ICWA and MIFPA based on the three-part test adopted by the Minnesota Supreme Court. Finally, to the extent that we even need to reach the merits of appellants' constitutional challenge, I concur with the majority's conclusion that MIFPA must be analyzed under the rational-basis test, which it undisputedly meets. I address each issue in turn.

Appendix C

A. Appellants' constitutional challenge has not been preserved for appellate review.

The GAL and Red Lake Nation argue that appellants' constitutional challenge to ICWA and MIFPA are not properly before us because the parties did not brief or argue it to the district court, nor did the district court decide the issue. I agree.

It is well-settled law that "[a] reviewing court must generally consider only those issues that the record shows were presented [to] and *considered by* the trial court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (emphasis added) (quotation omitted). In other words, even when the parties raise an issue before the district court, appellate courts will not consider the issue if the district court did not address it. *Stone v. Invitation Homes, Inc.*, 986 N.W.2d 237, 245 (Minn. App. 2023) (citing *Thiele*, 425 N.W.2d at 582), *aff'd*, 4 N.W.3d 489 (Minn. 2024). Moreover, appellate courts generally decline to address constitutional issues not decided below. *Cf. In re C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981) (refusing to consider important constitutional challenges to involuntary-termination order because arguments were not raised in district court); *Constans v. Comm'r of Pub. Safety*, 835 N.W.2d 518, 526 (Minn. App. 2013) ("We generally do not address constitutional issues raised for the first time on appeal.").

To preserve a constitutional challenge for appellate review, the party bringing the challenge must both raise the issue before the district court *and* sufficiently develop

the record on that issue to allow an appellate court to evaluate the merits of the claim. *See Erickson v. Fullerton*, 619 N.W.2d 204, 208 (Minn. App. 2000) ("But we decline to review this constitutional challenge because it was neither adequately raised nor considered in the district court and the appellate record is insufficient for review."); *State v. Odenbrett*, 349 N.W.2d 265, 269 (Minn. 1984) ("We decline, therefore, to address this [due-process claim] when it was neither adequately raised nor considered below, and where, apparently because it was not raised below, the record inadequately presents the issue.").

This is not the rare occasion in which we should review appellants' constitutional challenge under the "interest of justice" exception in Minn. R. Civ. App. P. 103.04.[10] "Appellate courts have a *limited ability* to address issues not properly preserved for appeal." *Roth v. Weir*, 690 N.W.2d 410, 413 (Minn. App. 2005) (emphasis added). Only on "rare occasions" have appellate courts invoked rule 103.04 to allow a party to proceed on an otherwise unpreserved legal argument. *Id.* (quoting *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 390 (Minn. 1992)). Factors favoring review under the "interests of justice" exception include: "the issue is a novel legal issue of first impression; the issue was raised prominently in briefing; the issue was

10. Notably, appellants do not argue that we should review their constitutional challenge under the "interest of justice" exception, even though the district court did not rule on their claim. The caselaw cited by the majority makes clear that they rely on this exception to review the issue. *See, e.g.*, *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 687-88 (Minn. 1997) (accepting review under rule 103.04).

'implicit in' or 'closely akin to' the arguments below; and the issue is not dependent on any new or controverted facts." *Id.* at 413-14 (quoting *Watson*, 566 N.W.2d at 687-88). Further, the exception is generally reserved for situations in which "there is no possible advantage or disadvantage to either party in not having had a prior ruling by the trial court on the question." *Miller v. Soo Line R.R. Co.*, 925 N.W.2d 642, 653 (Minn. App. 2019) (quotation omitted).

Several factors show that this case is not suitable for review under rule 103.04. An equal-protection challenge to ICWA on the basis of race is not a "novel" issue of first impression, *see, e.g.*, *Morton*, 417 U.S. at 553-54, 94 S.Ct. 2474, the constitutional issues are not "implicit in" or "closely akin to" appellants' motions to intervene in the CHIPS proceeding, and the constitutional issues were not "prominently" raised in the parties' briefing. *See Roth*, 690 N.W.2d at 413-14. The only constitutional argument presented to the district court was within the memorandum that appellants filed less than a day before the hearing on their motions for permissive intervention and third-party custody. As a result, none of the remaining parties had the time to brief the constitutional issues before the district court and the parties did not argue the issues before the district court. Considering the lack of full briefing by the parties, it is not surprising that the district court did not make any express findings of fact or conclusions of law on the constitutionality of either ICWA or MIFPA. *Contra Miller*, 925 N.W.2d at 653 ("Here, the issue was fully briefed by the parties in district court and on appeal.").

Additionally, all of the parties and this court would have benefitted from the opportunity to develop the record on the constitutional issues before the district court by providing more comprehensive briefing and arguments on the legal questions. For example, whether appellants had standing to challenge the constitutionality of ICWA or MIFPA is a dispositive threshold question that appellants failed to address in the district court or in their principal brief on appeal. Furthermore, neither party had the opportunity to argue the constitutionality of ICWA and MIFPA under the rational-basis test before the district court, which I agree with the majority is the appropriate review standard for this case. Because all of the parties, and ultimately this court, would have benefitted by having the chance to fully litigate and develop the record on all of the issues inherent within appellants' constitutional challenge before the district court, this case is ill-suited for review under rule 103.04. *See Miller*, 925 N.W.2d at 653. As it stands, the complete lack of a substantive record with respect to appellants' constitutional challenge precludes our review. *See Erickson*, 619 N.W.2d at 208; *Odenbrett*, 349 N.W.2d at 269; *Lewis-Miller v. Ross*, 710 N.W.2d 565, 570 (Minn. 2006) (supreme court declining to address issue "neither litigated below nor passed on by the district court").

The majority contends that we should review appellants' constitutional challenge because it could be dispositive of the entire appeal on the merits. However, even if ICWA and MIFPA did not govern the Indian children's placement, Minnesota law expresses a preference for children to be placed with relatives and

with their siblings, preferences which would also dictate that the Indian children be placed with R.F. *See* Minn. Stat. §§ 260C.221, subd. 4 (2022) ("The responsible social services agency shall consider placing a child with a relative . . . ."); 260C.212, subd. 2(d) ("Siblings should be placed together for foster care and adoption at the earliest possible time . . . ."). It is therefore doubtful that resolving appellants' constitutional questions would decide the remaining issues on the merits.

The majority also argues that the posture of this case as a CHIPS proceeding justifies invoking the "interests of justice" exception to expedite the proceedings. But as the district court found, here the Indian children are currently safely residing with their relative, R.F. *See In re Matter of Welfare of A.M.C.*, 920 N.W.2d 648, 661 (Minn. App. 2018) (concluding that reversal would not advance child's best interests by further delaying "safe and permanent placement"). Additionally, R.F. has first priority for custody of the Indian children under the preferences expressed by ICWA and MIFPA and, as the majority concludes, there are no good-cause exceptions to those preferences in appellants' case. Minn. Stat. § 260C.212, subd. 2(a); Minn. R. Juv. Prot. P. 28.04, subd. 5; 25 U.S.C. § 1915(a). I would therefore conclude that this is not the "rare occasion[ ]" in which we should decide an otherwise unpreserved argument for the first time on appeal. *Roth*, 690 N.W.2d at 413 (quotation omitted); *see Odenbrett*, 349 N.W.2d at 269; *Erickson*, 619 N.W.2d at 208.

B. Appellants lack standing to challenge ICWA and MIFPA.

Red Lake Nation argues that appellants' status as non-relative, former foster parents is insufficient to provide them with standing to challenge the constitutionality of ICWA and MIFPA in a CHIPS proceeding. Their argument has merit.

Minnesota caselaw has adopted the federal test under Article III to determine if a party has standing to bring a constitutional challenge, which requires that party to show: (1) an injury-in-fact; (2) a causal connection between the injury and conduct; and (3) that the injury is one that can likely be redressed by the court. *See In re Custody of D.T.R.*, 796 N.W.2d 509, 512 (Minn. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). "To demonstrate an injury-in-fact, the plaintiff must show a concrete and particularized invasion of a legally protected interest." *Garcia-Mendoza v. 2003 Chevy Tahoe*, 852 N.W.2d 659, 663 (Minn. 2014) (quotation omitted). "The injury . . . must be immediate, and not a possible, remote consequence, or mere possibility arising from some unknown or future contingency." *D.T.R.*, 796 N.W.2d at 513 (quotation omitted). "Moreover, the injury must be fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Garcia-Mendoza*, 852 N.W.2d at 663.

Here, appellants cannot show an injury-in-fact. They are former foster parents who seek to intervene in a CHIPS proceeding. Unlike an adoption proceeding, "a

CHIPS proceeding [is] not a permanency proceeding." *In re Welfare of Children of R.M.B.*, 735 N.W.2d 348, 352 (Minn. App. 2007), *rev. denied* (Minn. Sept. 26, 2007). Appellants contend that they have suffered an injury-in-fact because ICWA and MIFPA have deprived them of the opportunity to seek permanent placement of the Indian children with them. However, obtaining permanent placement is not a possible outcome of a preadoptive CHIPS proceeding, and, as a result, appellants' "injury" is too hypothetical to confer standing. *See D.T.R.*, 796 N.W.2d at 513; Minn. Stat. § 260C.201 (defining all potential dispositions that district courts may order in CHIPS matters).

Appellants argue that, because they have alleged that ICWA and MIFPA discriminated against them on the basis of race, *Haaland v. Brackeen*, 599 U.S. 255, 143 S.Ct. 1609, 216 L.Ed.2d 254 (2023), provides that they have suffered a cognizable Article III injury. This argument fails for two reasons. First, appellants' position ignores the salient fact that the three underlying cases appealed in *Brackeen*, including one that originated in Minnesota, involved adoption proceedings, not CHIPS proceedings. 143 S.Ct. at 1625-26. This distinction is significant because parties to an adoptive-placement proceeding have a more colorable claim of an injury considering that adoption cases take place after parental rights have been terminated and the parties are seeking to adopt the children. Conversely, the goal of a CHIPS proceedings is to reunite the children with their parents. *See* Minn. Stat. § 260C.001, subd. 2(b)(7).

Second, *merely alleging* racial discrimination by itself does not confer Article III standing to challenge ICWA or MIFPA because the Supreme Court has previously concluded that "Indian" is not a racial classification, but a political term that recognizes Indian Tribes' status as sovereign nations. *Morton*, 417 U.S. at 553-54, 94 S.Ct. 2474. Indeed, the majority acknowledges that Indians are not a racial classification in its conclusion that the rational-basis test applies to appellants' constitutional challenge, a conclusion with which I agree. Yet the majority concludes that appellants' mere allegations of racial discrimination alone are somehow sufficient to confer standing. It is patently illogical to provide Article III standing solely on the basis of a non-existent racial classification. To the contrary, it is inconsistent with the three-part test adopted by the Minnesota Supreme Court. *D.T.R.*, 796 N.W.2d at 512. Because appellants cannot show a legally protected interest, and no "concrete and particularized invasion" of that interest, their claim of an injury-in-fact fails. *See Garcia-Mendoza*, 852 N.W.2d at 663.

Appellants also cannot show redressability by this court. As noted above, it is evident from the record that appellants' ultimate goal is to adopt the Indian children. Even if this court were to remand this CHIPS case for further proceedings, given our conclusion that no good-cause exception exists to ICWA and MIFPA's placement preferences, there is no outcome of the case that would result in appellants adopting the Indian children. *See* Minn. Stat. § 260C.201.

In sum, these former foster parent appellants who seek adoption of the Indian children, despite the fact

that they are non-relatives, non-Tribal members, and do not have custody of any of the Indian children's siblings, cannot show that they have standing to challenge ICWA and MIFPA in this CHIPS proceeding. This court therefore lacks jurisdiction to address this issue.

C. To the extent that this court addresses the constitutionality of MIFPA, I concur that the rational-basis test applies to MIFPA and it clearly meets that test.

Appellants argue that both ICWA and MIFPA are unconstitutional under the strict-scrutiny test because they violate the Equal Protection Clause by imposing race-based preferences. I concur with the majority's conclusion that the rational-basis test applies to appellants' constitutional challenge to MIFPA. *See Morton*, 417 U.S. at 553-54, 94 S.Ct. 2474. Because appellants do not make any argument as to whether MIFPA meets the rational-basis test, they have waived their argument. *See In re Application of Olson for Payment of Servs.*, 648 N.W.2d 226, 228 (Minn. 2002) ("It is axiomatic that issues not 'argued' in the briefs are deemed waived on appeal."). Nevertheless, I agree with the majority that MIFPA clearly meets the rational-basis test.

In conclusion, I commend appellants for the care they provided the Indian children after they had the children temporarily placed in their care. Nevertheless, I would first conclude that the district court did not commit a "clear abuse of discretion," *M.L.S.*, 964 N.W.2d at 451, by denying appellants' motion for permissive intervention.

Minnesota law required the district court to apply ICWA and MIFPA to this preadoptive CHIPS proceeding, Minn. Stat. § 260C.212, subd. 2(a); Minn. R. Juv. Prot. P. 28.05; Minn. Stat. § 260.755, subd. 2a, and under ICWA and MIFPA, the Indian children's best interests are already represented in this case by Red Lake Nation. *See* Minn. Stat. § 260.755, subd. 2a ("The best interests of an Indian child are interwoven with the best interests of the Indian child's tribe."). Second, I would conclude that appellants do not qualify as "interested third part[ies]" under Minn. Stat. § 257C.01, subd. 3(a), because, under the plain language of subdivision 3(b), they are excluded as "an individual who has a child placed in the individual's care" under chapter 260C, which is written in the present-perfect tense. *See Overweg*, 922 N.W.2d at 184; *Chicago Manual of Style*, § 5.132.

As to appellants' assertions that ICWA and MIFPA violate their equal-protection rights, I would first conclude that this court does not need to decide these constitutional challenges based on my conclusions to the first two issues raised by appellants. *See Kimberly-Clark Corp.*, 880 N.W.2d at 849. Second, I would conclude that appellants' constitutional challenge is not properly preserved for appellate review. It is well-settled that we do not address constitutional issues that, as here, were not briefed by all interested parties, were not argued before the district court, and were not decided by the district court. *See Erickson*, 619 N.W.2d at 208; *Odenbrett*, 349 N.W.2d at 269; *Thiele*, 425 N.W.2d at 582. Nor is this that "rare occasion[ ]" in which we need to decide this issue. *Roth*, 690 N.W.2d at 413 (quotation omitted). Third, I would

conclude that appellants lack standing to challenge the constitutionality of ICWA and MIFPA because they are former foster parents who seek permanent custody of the Indian children, an outcome which is not possible in a preadoptive CHIPS proceeding. *See R.M.B.*, 735 N.W.2d at 352; Minn. Stat. § 260C.201. Appellants therefore cannot show either an injury-in-fact or redressability. *D.T.R.*, 796 N.W.2d at 512.

I concur with the majority that appellants have failed to show that they meet a good-cause exception to MIFPA's placement preferences. I further concur with the majority that, to the extent that we need to reach the constitutional issues, MIFPA must be analyzed under the rational-basis test because its placement preferences are based on membership in an Indian Tribe and are not based on race. Indeed, MIFPA recognizes that "Indian children are the future of the Tribes and are vital to their very existence." Minn. Stat. § 260.753 (2023). As a result, MIFPA's laudable goals of keeping Indian children with their Tribe and of promoting Indian self-government do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

APPENDIX D — ORDER OF THE STATE OF MINNESOTA IN THE COUNTY OF MARTIN, FIFTH JUDICIAL DISTRICT COURT, DATED OCTOBER 31, 2023

STATE OF MINNESOTA
COUNTY OF MARTIN

IN THE MATTER OF THE WELFARE
OF THE CHILDREN OF:

LUCILLE KINGBIRD,

Mother,

AND

ANTHONY SANDOVAL,

Alleged Father.

IN DISTRICT COURT
FIFTH JUDICIAL DISTRICT

Court File No. 46-JV-22-32
Judge Michael D. Trushenski

ORDER ON MOTION FOR INTERVENTION AND TO JOIN THIRD-PARTY CUSTODY PETITION

This matter came on for a hearing before the Honorable Michael D. Trushenski, Judge of the District Court, at the Martin County Courthouse on October 5, 2023. The hearing was held remotely via Zoom Technology. Mother

Lucille Kingbird and her attorneys Ryan Gustafson and Marian Saksena were present. Assistant Martin County Attorney Amanda Heinrichs-Milburn was present and represented Faribault and Martin County Human Services. Faribault and Martin County Human Services supervisor Jackie Auringer was present at the hearing. Red Lake Nation Representatives Jennifer Bisson and Wahsay Poole were present. Red Lake Nation was represented by its attorney Tammy Swanson. Guardian ad Litem McKenzie Borth was present and represented by attorney Jody Alholinna. The former foster parents Kellie and Nathan Reyelt were present and represented by their attorneys Mark Fiddler and Rachel Osband.

Upon the evidence and the files and record herein, the Court makes the following:

FINDINGS OF FACT

1. The children that are the subject of this matter are [Ki. K.] [redacted] and [Kh. K.] [redacted].

2. A hold was placed on the children shortly after they were born, because Mother tested positive for amphetamines, methamphetamines and opiates at the hospital. She admitted to using heroin, and methamphetamines if heroin was not available, throughout her pregnancy.

3. The children are eligible for membership with the Miskwaagamiiwi-zaaga'igan, also known as Red Lake Nation, and ICWA applies.

4. In May 2023, the children were placed with Kellie and Nathan Reyelt for foster care. At that time, the Qualified Expert Witness for the Tribe agreed that the children should be placed in a culturally appropriate foster home until the children could be placed in relative or foster home specified by the children's Tribe.

5. On September 12, 2023, the Reyelts filed an emergency motion to intervene and to stay the children's expected change of placement. The motion requested: the Reyelts be granted permissive intervention; the Reyelts be granted party status so they may file a transfer of legal custody permanency petition; stay the children's change in placement; find cause exists to place the children with the Reyelts; and issue declaratory judgments that the Minnesota Indian Family Preservation Act (Minn. Stat. §§ 260.751 to 260.835) and Indian Child Welfare Act (25 U.S.C. §§ 1901 and 1963) are unconstitutional.

6. A hearing was held on the motion to stay placement on September 13, 2023. Following the hearing, the Court ordered the change in placement occur as planned and reserved the remaining issues for a later hearing.

7. On October 4, 2023, the Reyelts filed an amended motion requesting the Court join the Reyelts as necessary parties or, in the alternative, grant their motion for permissive intervention. The

amended motion was filed concurrently with a petition to establish third party custody.

8. On October 13, 2023, the children's Guardian ad Litem McKenzie Borth filed a motion requesting the Court dismiss the third-party petition for custody and deny the Reyelts' motion for joinder as well as permissive intervention.

9. On October 13, 2023, Red Lake Nation filed a motion requesting the Court deny the Reyelts' motion in its entirety. The motion additionally requested the Court find the Reyelts and their counsel have engaged in frivolous litigation.

10. A hearing was held on the remaining issues on October 5, 2023, other than the declaratory relief requested in ¶¶ 5 and 6 of their motion.

11. The children are currently placed with their aunt Rayjean French. The children's four-year-old half-sibling [G.] also resides in the home. Red Lake Nation approved the children's placement with Ms. French, who is a member of the Tribe. According to the Guardian ad Litem, the children have smoothly transitioned to their new placement. They display indicia of attachment to Ms. French and spend time with their sister. They've slept well, eat well and attended all of their medical appointments.

Appendix D

CONCLUSIONS OF LAW

Petition for Third-Party Custody

12. Under Minnesota Statute § 257C.03, a de facto or third-party custody proceeding may be brought by an individual other than a parent. The statute grants jurisdiction to de facto custodians and interested third parties to file a custody petition. Minn. Stat. § 257.03, subd. 2(5). Under Minnesota Statute § 257C.01, an interested third party does not include an individual who has a child placed in the individual's care through a court order or voluntary placement under chapter 260C. Minn. Stat. § 257C.01 subd. 3.

13. In this case, the children were placed with the Reyelts as foster parents under Minnesota Statute 260C. As such, they do not have the requisite jurisdiction to bring a petition under Minn. Stat. § 257C.03. For these reasons, the Court will dismiss the petition for third-party custody.

14. The Court will deny Red Lake Nation's request to find the Reyelts to be frivolous litigators at this time.

Motion for Permissive Intervention

15. Any person may be permitted to intervene as a party if the court finds that such intervention

is in the best interests of the children. MN ST JUV PROT Rule 34.02. The best interests of an Indian child means compliance with the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act. The best interests of an Indian child support the child's sense of belonging to family, extended family and tribe. The best interests of an Indian child are interwoven with the best interests of the Indian child's tribe. Minn. Stat. § 260.755 subd.2a.

16. In this case, the children are eligible for membership with Red Lake Nation and are protected by ICWA and MIFPA. The children's Tribe approved their placement with the children's aunt, who is also a member of the children's Tribe. The children's aunt has custody of the children's older sister. The children have transitioned well into their new home. Their aunt began the process of enrolling the children with their Tribe. They have attended tribal events and are able to live in the same home as their other sibling.

17. While the children were in the Reyelts' care, they did not attend a single tribal event. They never met their older sister or many of their other extended family members. They were not enrolled for membership with their Tribe. The Tribe does not approve of the Reyelts as the children's foster or permanency home.

18. Other than unfounded allegations that the children's aunt would not take the children to their medical appointments, there have been no concerns raised about Ms. French's home or ability to care for the children.

19. For these reasons, the Court finds the children's present placement is in their best interests. The Court finds intervention by the Reyelts would not be in the children's best interest for the reasons detailed above. Additionally, such intervention would only create an unnecessary delay for the finalization of the children's case.[1]

ORDER

20. The Reyelts' petition for third-party custody is DISMISSED for lack of jurisdiction.

21. The Reyelts' motion for permissive intervention is DENIED.

22. Red Lake Nation's motion to find the Reyelts are frivolous litigators is DENIED at this time.

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1. Although the Court is denying the motion to intervene by the former foster parents, the Court acknowledges they provided care to the children at a critical juncture in their lives. Foster care providers are an important and necessary part of the child protection system. However, at this point, granting their intervention would not be in the children's best interests.

Appendix D

Dated: October 31, 2023

BY THE COURT:
/s/ Michael D. Trushenski
Michael D. Trushenski
Judge of District Court

APPENDIX E — ORDER OF THE STATE OF MINNESOTA COUNTY OF MARTIN IN DISTRICT COURT FIFTH JUDICIAL DISTRICT, DATED SEPTEMBER 15, 2023

STATE OF MINNESOTA
COUNTY OF MARTIN

IN THE MATTER OF THE WELFARE
OF THE CHILDREN OF:

LUCILLE KINGBIRD,

Mother,

AND

ANTHONY SANDOVAL,

Alleged Father.

IN DISTRICT COURT FIFTH JUDICIAL DISTRICT

Court File No. 46-JV-22-32
Judge Michael D. Trushenski

ORDER FROM SEPTEMBER 13, 2023, HEARING

This matter came on for a hearing before the Honorable Michael D. Trushenski, Judge of the District Court, at the Martin County Courthouse on September 13, 2023. The hearing was held remotely via Zoom Technology. Mother Lucille Kingbird's attorney Ryan Gustafson was present.

Assistant Martin County Attorney Amanda Heinrichs-Milburn was present and represented Faribault and Martin County Human Services. Faribault and Martin County Human Services case worker Katherine Cory was present at the hearing. Red Lake Nation Representatives Jennifer Bisson and Wahsay Poole were present. Red Lake Nation was represented by its attorney Tammy Swanson. Guardian ad Litem McKenzie Borth was present and represented by attorney Jody Alholinna. The foster parents Kellie and Nathan Reyelts were present and represented by their attorneys Mark Fiddler and Rachel Osband.

Upon the evidence and the files and record herein, the Court makes the following:

FINDINGS OF FACT

1. The children that are the subject of this matter are [Ki. K.] [redacted] and [Kh. K.] [redacted].

2. On September 12, 2023, the Court received an emergency motion to intervene and stay change of placement from the foster parents. According to the motion, the children were to be moved from their placement with the foster parents to a relative placement on September 13, 2023. The motion requested additional relief, including granting the foster parents party status.

3. A hearing was held on the motion on September 13, 2023. The hearing was only to address the change

of placement. The foster parents were directed to schedule a separate hearing date for the remaining relief requested in the motion.

4. At the hearing, the Court was informed that the children would be moved to Mother Lucille Kingbird's relative RayJean French's home. Ms. French is a member of Mother's Tribe the Miskwaagamiiwi-zaaga'igan, and is the caretaker of the children's older half-sister. The Tribe approved Ms. French as the foster care home for the children, and she is a licensed foster care provider. The Court was informed that Ms. French is prepared to transport the children to any scheduled medical appointments and will ensure all future medical needs are met.

5. The Court was additionally informed that the seemingly sudden transition, rather than the slow transition that was originally planned, was decided on due to complications with scheduling a slow transition. It's not clear from the submissions and the statements during the hearing what the cause of the complications was.

6. Throughout this file the Court has found and continues to find that Faribault and Martin County Human Services (FMCHS) has made active efforts to prevent out of home placement, to reunify the children with Mother, and to finalize a permanency plan. Those specific efforts are outlined in the Court's prior dispositional review orders. They will be reviewed in more detail at the upcoming dispositional review

hearing scheduled for September 19, 2023. The Court would note that based on the information before it today, despite the active efforts of FMCHS, Mother has not corrected conditions that would allow the children to return to her care.[1] It continues to be in the best interests of the children to remain in out of home placement.

7. At the hearing, the Court ordered that the change of placement continue as planned. The Court indicated a written order would follow.

CONCLUSIONS OF LAW

8. It is in the best interest of the children for the Court to assume or continue temporary care, custody, and control of the children and delegate it to FMCHS with the authority to place the children in alternative care.

9. Under Minnesota Statute § 260C.008 subd. 1, a child placed in foster care has the right to be placed in a foster care home with the child's siblings when possible and when it is in the best interest of each sibling.

10. Under Minnesota Statute § 260C.221, subd. 4(d), any relative who requests to be a placement option for a child in foster care has the right to be considered for

1. She has not made any progress on her case plan. Specifically, she hasn't addressed chemical dependency issues, she hasn't maintained any type of stable or consistent housing, and she's not in a position to provide care for two very young children.

placement of the child unless the court finds placing the child with the relative would endanger the child.

11. Under the Indian Child Welfare Act, for any child protected by the Act, a preference shall be given, in absence of good cause to the contrary, to foster care placement with a member of the child's extended family or a foster home approved by the child's tribe. 25 U.S.C.A. § 1915.

12. Under Minnesota Statute § 260.771 subd.7, for any child protected by the Minnesota Indian Family Preservation Act, a preference shall be given to placement with a member of the child's extended family or a foster home specified by the child's Tribe. The county shall defer to the judgment of the child's Tribe as to the suitability of a placement. *Id*.

13. The court shall follow the placement preferences except where the court determines there is good cause based on: "(i) the reasonable request of the Indian child's parents, if one or both parents attest that they have reviewed the placement options that comply with the order of placement preferences; (ii) the reasonable request of the Indian child if the child is able to understand and comprehend the decision that is being made; (iii) the testimony of a qualified expert designated by the child's Tribe and, if necessary, testimony from an expert witness who meets qualifications of subdivision 6, paragraph (d), clause (2), that supports placement outside the order of placement preferences due to extraordinary

physical or emotional needs of the child that require highly specialized services; or (iv) the testimony by the child-placing agency that a diligent search has been conducted that did not locate any available, suitable families for the child that meet the placement preference criteria." Minn. Stat. § 260.771, subd.7(j).

14. In this case, the placement is with Mother's relative. She is a member of the children's Tribe and has the children's half-sister in her care. The Tribe approved of the relative as the foster home for the children. For these reasons, she is the preferred placement option under ICWA, MIFPA and the juvenile safety and placement statutes. There is no evidence that the children will be endangered in the relative placement's home.

15. At this time, the Court does not find any of the good cause factors enumerated in Minnesota Statute § 260.771 subd.7(j) exist. There is no evidence that the relative placement will not be able to meet the children's physical or emotional needs. As far as the Mother's preference, the Court would have to receive that request directly from the Mother. Even then, as the Court noted during the hearing, it would have to determine whether that request was reasonable. Mother has been minimally involved with this case. Additionally, there is a risk that Mother continues to be under the influence of mood-altering chemicals that can significantly compromise her decision-making capabilities.

16. For these reasons, the Court found and continues to find that the children's placement in the relative foster home should continue as planned.

ORDER

17. Temporary care, custody, and control of the children shall continue with Faribault and Martin County Human Services (FMCHS) with the authority to place the children in continued out of home placement.

18. As ordered at the September 13, 2023, hearing, the Court approves FMCHS placement of the children with their relative RayJean French. Placement in her home should occur as planned. The Court will hear how the children have transitioned at the September 19, 2023, Intermediate Dispositional Review hearing. The Court asks that the children's relative RayJean French attend that hearing for the purposes of updating the Court on the children.

Dated: September 15, 2023

BY THE COURT:

/s/ Michael D. Trushenski
Michael D. Trushenski
Judge of District Court

APPENDIX F — ORDER OF THE STATE OF MINNESOTA, COUNTY OF MARTIN IN THE FIFTH JUDICIAL DISTRICT COURT, DATED APRIL 18, 2022

STATE OF MINNESOTA
COUNTY OF MARTIN

DISTRICT COURT
5th JUDICIAL DISTRICT
CASE TYPE: CHIPS
COURT FILE NO. 46-JV-22-32

IN THE MATTER OF THE WELFARE
OF THE CHILD(REN) OF:

LUCILLE KINGBIRD, MOTHER;
AND ANTHONY SANDOVAL, FATHER.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FROM EMERGENCY PROTECTIVE CARE HEARING (ICWA)

The above-entitled matter came on for an Emergency Protective Care (EPC) Hearing before the undersigned Judge of District Court on April 14, 2022, at the Martin County Courthouse, Fairmont, Minnesota. The hearing was held by zoom.

Based upon all the files, records, and proceedings herein, the court makes the following:

Appendix F

FINDINGS OF FACT

1. **CHIPS Petition**. A Child in Need of Protection or Services (CHIPS) Petition was filed on April 12, 2022, alleging statutory grounds set forth in Minn. Stat. § 260C.007, Subd. 6(3), (4), (5), (8), (9) and (16),

1. **Jurisdiction and Venue.** Pursuant to Minn. Stat. § 260C.101 and § 260C.121, this juvenile court has jurisdiction over this matter, which is properly venued in Martin County.

1. **Subject of Petition.** The children who are the subjects of the Petition are:

   a. [Kh. K.] [redacted]; and

   b. [Ki. K.] [redacted].

2. **Address of Children.** The court verified that the current address of the children who are the subjects of the Petition are is NICU Mayo Rochester and ICU Mayo Mankato.

2. **Removal Date.** The children were removed from the care of the parent(s) or legal custodian(s) and placed into emergency protective care on April 11, 2022.

3. **Parentage.**

   a. Lucille Kingbird is the Mother of the children who are the subject of the Petition.

b. Mother was not married at the time of the birth of [Kh. K.] and [Ki. K.]. Mother has sole legal and physical custody of the children by operation of law and this Court has not been advised of any court order modifying Mother's custody status.

c. There is no father on record for [Kh. K.] or [Ki. K.]. Anthony Sandoval was alleged by Mother to be the father, but the Minnesota Department of Health records show there is no father named on the child's birth certificate, no one has signed a Recognition of Parentage, no one has been adjudicated the father of the child, and no one has registered with the Fathers' Adoption Registry.

3. **Service of Summons and Petition on Parties and Notice of Hearing and Petition on Participants.**

a. The summons and petition was not personally served on the mother. Personal service shall be made immediately, unless a request for alternative service is made.

b. The summons and petition was not personally served on the father. Personal service shall be made immediately, unless a request for alternative service is made.

c. The summons and petition was timely and properly served on all other parties.

4. **Review of Receipt of Hearing Notice.** At the beginning of the hearing the Court reviewed the EPC Hearing Contact List to determine whether all parties, participants, and attorneys entitled to notice of the hearing had, in fact, been informed of the hearing.

    a. The following parties, participants, and attorneys were timely and properly notified of the hearing, but did not appear: Lucille Kingbird and Anthony Sandoval.

5. **Advisory of Rights and Purpose of Proceedings and Permanency Timeline.** Pursuant to Juv. Prot. Rule 42.05, at the beginning of the hearing the Court ensured that the parties had watched the juvenile court orientation video advisory "In the Best Interests of your Child" or, if not, the Court provided the full in-court advisory regarding the following: the reasons why the child was taken into emergency protective care if the child was removed from the care of the parent; the purpose of the EPC Hearing (Juv. Prot. Rule 42.01); the purpose and scope of the hearing; the possible consequences of failure to appear at future hearings (Juv. Prot. Rule 18); possible consequences of child protection proceedings (Minn. Stat. § 260C.201 and § 260C.515); basic trial rights (Juv. Prot. Rule 49); the right of the parties and participants to legal representation (Juv. Prot. Rule 36); and the right of the parties to present evidence and cross-examine witnesses regarding whether the child should return home with or without conditions

or be placed in out-of-home placement. The court also informed the parties of the permanency timeline if the child is removed from the care of the parent, including that a permanency progress review hearing must be held no later than 6 months after removal, the county must file a permanency petition no later than 11 months after removal, and the court must commence an Admit/Deny Hearing on the permanency petition no later than 12 months after removal. (Minn. Stat. § 260C.503).

6. **Statutory Grounds and Factual Allegations.** Pursuant to Juv. Prot. Rule 42.05, at the beginning of the hearing the Court advised the parties, participants, and attorneys of the substance of the statutory grounds and the supporting factual allegations set forth in the CHIPS Petition. The Court inquired of each of the parents(s) or legal custodian(s) whether they understood the statutory grounds and factual allegations.

7. **Oath.** At the beginning of the hearing, the parent(s) or legal custodian(s), Indian custodian(s), social worker, guardian ad litem, and other parties were placed under oath for purposes of all information provided during the hearing.

8. **Legal Representation of Parents, Legal Custodians, Indian Custodians.** The parent(s), legal custodian(s), and/or Indian custodians were advised of the right to an attorney appointed at county expense. Lucille Kingbird, Mother, was appointed an attorney. Anthony Sandoval, Father, was appointed an attorney.

5. **Motions to Intervene.** No motion to intervene was filed and served.

6. **ICWA Inquiry.** Pursuant to Juv. Prot. Rule 29.01 and Rule 42.08, the court reviewed the petition and made an on-the-record inquiry of the parties, participants, and attorneys as to whether the children have Native American ancestry or heritage or may be a member or eligible for membership in any federally-recognized Native American Tribe.

7. **ICWA Applicability.** Based upon review of the petition, records, and the court's inquiry, the court finds that the protections of the ICWA apply because the child's tribe responded that the child/ren is/are a member of or eligible for membership in Red Lake Nation.

8. **Filing of ICWA Notice and Return Receipts.** Pursuant to the ICWA and Juv. Prot. Rule 30.01, if there is reason to believe a child is an Indian child, petitioner is required to serve upon the child's parents or legal custodian(s), Indian custodian(s), tribe, and BIA Regional Office the "ICWA Notice of State Court Child Custody Proceeding." A copy of each Notices and registered/certified return receipt must be filed with the court. A proceeding for foster care placement of a child (an Admit/Deny Hearing) cannot be held until copies of all Notices and return receipts have been filed with the court. Petitioner has served or will serve the Secretary of the Interior with the ICWA Notice of State Court Proceeding by registered/

certified mail, and the return receipt has not been filed with the court.

9. **Jurisdiction Over Indian Child(ren).** This court has jurisdiction to place the children because the child does not reside on or is not domiciled on an Indian reservation.

9. **ICWA Qualified Expert Witness (QEW).** The testimony of a Qualified Expert Witness (QEW) is not required for an emergency placement of an Indian child; it is required prior to placement of an Indian child in foster care. Petitioner intends to coordinate efforts with the tribe to submit the QEW testimony or affidavit prior to any foster care placement of the child.

10. **Prima Facie Finding – Juvenile Protection Matter.** The petition states a prima facie case in support of one or more statutory grounds set forth in the petition, a prima facie showing that a juvenile protection matter exists, and a prima facie showing that the children are the subject of that matter.

11. **Prima Facie Finding – Endangerment.** Pursuant to Juv. Prot. Rule 42.08 and Minn. Stat. § 260C.178, subd. 1(b), and based on the evidence, the CHIPS Petition establishes a prima facie showing that endangerment exists and the child/ren's health, safety, or welfare would be immediately endangered if the child/ren were released to the care of the parent(s) or legal custodian(s).

12. **Surrounding or Conditions..** The children are in surroundings or conditions that endanger the children's health, safety, or welfare requiring responsibility for the children's care and custody to be immediately assumed by FMCHS.

13. **Active Efforts to Prevent Removal and Reunify.**

    Pursuant to Minn. Stat. § 260C.178, subd. 1(e)(2), and Minn. Stat. § 260.072, there are no services or other efforts that could be made at the time of the hearing that could safely permit the child to remain home or to return home.

14. **Contrary to Welfare - Out-of-Home Placement.** Continued custody of the children by the parent(s) or legal custodian(s) is contrary to the welfare of the children.

15. **Best Interests – Out-of-Home Placement.** It is in the best interests of the children to remain in out-of-home placement until the parent(s) and/or legal custodian(s) are able to provide a safe environment and suitable care demonstrated through substantial compliance with the case plan and by correcting the conditions which have led to out of home placement.

16. **Least Restrictive Placement**. The placement proposed by FMCHS is the least restrictive and most home-like setting that meets the needs of the children at the present time.

17. **Transfer of Care, Custody, and Control to Agency.** It is in the best interests of the children for care, custody and control to be transferred to Faribault and Martin County Human Services (FMCHS) with authority to place the children in out-of-home placement or with the noncustodial parent.

18. **Relative Search.** The FMCHS has made the following efforts to identify and notify relatives as required under Minn. Stat. § 260C.221: The agency shall exercise due diligence to identify and notify adult maternal and paternal relatives of the family within thirty (30) days after the child's removal from the care of the parent(s) or legal custodian(s) pursuant to Minn. Stat. § 260C.221. The parent(s) or legal custodian(s) shall timely and fully cooperate in providing sufficient information to identify relatives. No later than ninety (90) days after placement, the agency shall report to the court its efforts and decisions regarding placement according to Minn. Stat. § 260C.221(d)(1) and (2). The agency shall continue to appropriately involve relatives who have responded to the notice.

19. **Parental Visitation**. It is in the best interests of the children to have visitation with the Lucille Kingbird, Mother, and Anthony Sandoval, Father. Visitation between the children and the parent(s) shall be at the reasonable discretion of FCHS, and as arranged and deemed appropriate by the FMCHS in consultation with the guardian ad litem. The agency shall determine the type of visitation (supervised or unsupervised), who is authorized to act as supervisor(s), and the

appropriate duration and frequency of visitation. If there is a disagreement on the issue of visitation, any party may bring the matter to the attention of this court.

20. **Services, Examinations, or Evaluations**. Pursuant to Minn. Stat. § 260C.178, subd. 1(l), or Minn. Stat. § 626.556, subd. 10(m), it is appropriate for the court to order the parent(s) or legal custodian(s) and children are to complete assessments, examinations, and evaluations to assist the county in preparing a case plan or updated case plan.

21. **Releases.** The agency has requested that the parent(s) or legal custodian(s) sign all necessary releases of information as requested by the responsible social services agency.

Based upon all the files, records, and proceedings herein, as well as the above Findings of Fact, the court makes the following:

CONCLUSIONS OF LAW

1. **Best Interests.** It is in the best interests of the children to remain in the protective care of the responsible social services agency for the purpose of placement with an appropriate foster care provider.

2. **ICWA**. ICWA applies because the children are an enrolled member or is eligible for enrollment with Red Lake Nation.

3. **Active Efforts.** Faribault and Martin County Human Services (FMCHS) has made active efforts to prevent out of home placement. There are no available services that would prevent the need for further placement.

4. **Emergency Removal - ICWA**. The emergency removal and placement of an Indian Child is authorized to prevent imminent physical damage or harm to the child.

5. **Services, Examinations, or Evaluations**. Pursuant to Minn. Stat. § 260C.178, subd. 1(l), it is appropriate for the court to order the parent(s) or legal custodian(s) and the children to complete assessments, examinations, and evaluations to assist the county in preparing a case plan or updated case plan.

Based upon all the files, records and proceedings herein, as well as the above Findings of Fact and Conclusions of Law, the Court makes the following:

ORDER

1. **Transfer of Care, Custody, and Control to Agency.** Care, custody and control of the children is transferred to Faribault and Martin County Human Services (FMCHS) with authority to place the children in out-of-home placement or in with the noncustodial parent.

2. **Emergency Removal - ICWA**. The emergency removal and out-of-home placement of an Indian Child is authorized to prevent imminent physical damage

or harm to the child. The responsible social service agency shall immediately notify the court and shall schedule a hearing when such removal is no longer necessary to prevent imminent physical damage or harm to the child.

3. **Application of ICWA.** ICWA applies because the children are an enrolled member or is eligible for enrollment with Red Lake Nation. The protections of the ICWA shall apply to this matter.

4. **ICWA Notice.** Because the Court knows or has reason to know the child is an Indian Child, the responsible social services agency shall serve the ICWA Notice of State Court Child Custody Proceedings upon the children's mother, father, Indian custodian, Indian tribe, and BIA Regional Office consistent with 25 U.S.C. § 1912(a); Minn. Stat. § 260.761, subd. 3; and Minn. R. Juv. Prot. Proc. 30.01.

5. **Out-of-Home Placement Plan.** The FMCHS shall file with the court and serve upon the parties(s) an Out-of-Home Placement plan for court approval outlining appropriate and available services to be offered to the parents and the children. In preparing the case plan, the agency shall give due regard to the safety, health, and well-being of the children. The case plan shall specify the conditions the parent(s) or legal custodian(s) must mitigate and the behavioral change(s) necessary for the children to be returned to the day-to-day care of the parent(s).

6. **Parental Visitation**. It is in the best interests of the children to have visitation with the parent(s). Visitation between the children and the parents or relatives shall be at the reasonable discretion of, and as arranged and deemed appropriate by, the FMCHS in consultation with the guardian ad litem. The agency shall determine the type of visitation (supervised or unsupervised), who is authorized to act as supervisors, and the appropriate duration and frequency of visitation. If there is a disagreement on the issue of visitation, any person entitled to be considered for visitation may bring the matter to the attention of the juvenile court.

7. **Relative Search.** FMCHS shall exercise due diligence to identify and notify adult maternal and paternal relatives of the family within thirty (30) days after removal pursuant to Minn. Stat. §260C.221. The agency shall continue to appropriately involve relatives who have responded to the notice. The parent(s) shall cooperate in providing sufficient information to identify relatives. No later than ninety (90) after placement, the agency shall report to the court its efforts and decisions regarding placement according to Minn. Stat. § 260C.221(d)(1) and (2).

8. **Financial Information.** The parent(s) or legal custodian(s) of the children who are shall contact FMCHS and submit financial information pursuant to their obligations under Minn. Stat. § 260C.331.

9. **Agency Authorizations.** As legal custodian of the children, FMCHS is authorized as follows:

    a. To arrange for major medical care and surgery for the children in a life threatening situation.

    b. To arrange appropriate routine medical and dental care for the children, including necessary immunizations and vaccinations.

    c. To obtain the children's educational, medical, dental, psychological, psychiatric, and social or family history records, including mental health and chemical dependency records, if any, for the purpose of meeting the children's needs. The service providers shall release records and information regarding the children to FMCHS.

    d. To approve educational or mental health services for the children as needed.

10. **Access to Records and Data.** Pursuant to Minn. Stat. § 260C.208, subd. 2, FMCHS, and any residential facility in which the children are placed, are specifically authorized to have access to the following data on the children:

    a. Medical data under Minn. Stat. § 13.384;

    b. Corrections and detention data under Minn. Stat. § 13.85;

c. Juvenile Court data under Minn. Stat. § 260C.171;

d. Court services data under Minn. Stat. § 13.84; and

e. Health records under Minn. Stat. § 144.335.

11. **Agency Access to Data.** Pursuant to Minn. Stat. § 260C.208, subd. 1, FMCHS has legal responsibility for the placement of a child and may request and shall receive all information pertaining to the children that it considers necessary to appropriately carry out its duties. That information shall include educational, medical, psychological, psychiatric, and social or family history data retained in any form by any individual or entity.

12. **Sharing Information with School.** The Commissioner of the Minnesota Department of Human Services or delegated representative or the FMCHS shall immediately share, as necessary, all relevant welfare data contained within Minn. Stat. § 13.46 concerning the children and the parents with any school district or school having responsibility for the education of the children. Data provided to a school district under this provision must be limited to those data pertinent to the school district's responsibility for caring for the children.

13. **e-Filing and e-Service**. The parties, or counsel for parties if a party is represented, shall sign up for e-filing and e-service in this matter. If not registered

for e-filing/service, please refer to the Court's website www.mncourts.gov to register. Unrepresented parties are excluded from this requirement.

14. **Permanency Deadlines and Scheduling Order for Children in Out-of-Home Placement.**

    a. A Permanency Progress Review Hearing shall be held no later than 180 days after the child's removal, which is October 11, 2022.

    b. If applicable, a permanency petition shall be filed no later than 335 days after the child's removal, which is March 11, 2023. The potential permanency dispositions are termination of parental rights and adoption, transfer of permanent legal and physical custody of the child to a relative, or transfer of permanent legal and physical custody of the child to the social services agency.

    c. If applicable, an Admit/Deny Hearing on the permanency petition shall be held no later than 365 days after the child's removal, which is April 11, 2023, pursuant to Minn. Stat. § 260C.503, subd. 1.

15. **Distribution of Order to Service Providers by County Agency**. FMCHS shall provide a copy of this order to each service provider under the case plan and such providers are authorized to share information with each other, as necessary, to carry out the intent and purpose of the case plan ordered by this court.

16. **Service of Order by Court Administration.** A copy of this order shall be served by court administration upon:

    a. all parties, or their counsel if represented, either personally at the close of the hearing or by e-service. Where a party is unrepresented, service shall be made on the party either personally at the close of the hearing or by U.S. Mail at the last known address.

17. **Effective Date of Order.** This order is effective immediately from its announcement in court on **April 14, 2022** or the date signed below, whichever is earlier.

18. **Prior Orders Remain in Effect**. All prior orders shall remain in full force and effect, unless specifically amended by this Order.

19. **Next Hearing.** This matter shall be scheduled for an Admit/Deny Hearing (ADH) on **May 17, 2022** at **3:00 p.m.** Court Administration staff shall serve a Notice of Hearing on all parties, participants, and attorneys. Even if you fail to appear at a hearing, the court may still hold the hearing without you, which may include adjudicating that the child(ren) is/are in need of protection or services and/or permanent severance of the parents' rights.

Appendix F

DATE: _____ **BY THE COURT:**

/s/ Troy Timmerman
JUDGE OF DISTRICT COURT

APPENDIX G — JUDGMENT OF THE SUPREME COURT OF THE STATE OF MINNESOTA, DATED APRIL 9, 2026

STATE OF MINNESOTA

SUPREME COURT

JUDGMENT

IN THE MATTER OF THE WELFARE OF THE CHILDREN OF: L.K., PARENT.

Appellate Court # A23-1762

Trial Court # 46-JV-22-32

Pursuant to a decision of the Minnesota Supreme Court duly made and entered, it is determined and adjudged that the decision of the Martin County District Court herein appealed from be and the same hereby is affirmed in part and vacated in part. Judgment is entered accordingly.

Dated and signed: April 9, 2026 *FOR THE COURT*

Attest: Christa Rutherford-Block
Clerk of the Appellate Courts

By: /s/ Christa Rutherford-Block
Clerk of the Appellate Courts

Appendix G

STATE OF MINNESOTA

SUPREME COURT

TRANSCRIPT OF JUDGMENT

I, Christa Rutherford-Block, Clerk of the Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the Minnesota Judicial Center,

In the City of St. Paul April 9, 2026
Dated

Attest: Christa Rutherford-Block
Clerk of the Appellate Courts

By: /s/ Christa Rutherford-Block
Clerk of the Appellate Courts

APPENDIX H — RELEVANT STATUTORY PROVISIONS

U.S. Const. amend I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, Sec. 1

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No

state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

25 U.S.C. § 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds -

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes (FOOTNOTE 1) " and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(FOOTNOTE 1) So in original. Probably should be capitalized.

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources; (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or

are eligible for membership in an Indian tribe; (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term -

(1) "child custody proceeding" shall mean and include - (i) "foster care placement" which shall mean any action

removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated; (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship; (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent; (3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 1606 of title 43; (4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an

Indian tribe; (5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts; (6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child; (7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians; (8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43; (9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established; (10) "reservation" means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation; (11) "Secretary" means the Secretary of the Interior; and (12) "tribal court" means a court with jurisdiction over child custody proceedings and which is

either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

25 U.S.C. § 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

25 U.S.C. § 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the

identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like man-ner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving

an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination,

sup-ported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time

and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termina-tion or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

25 U.S.C. § 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations Any Indian child who is the subject of any action for foster care placement or termination

of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

25 U.S.C. § 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with -

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs. (c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as pro-vided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

25 U.S.C. § 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child

is being returned to the parent or Indian custodian from whose custody the child was originally removed.

25 U.S.C. § 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

25 U.S.C. § 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession (1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things: (i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe; (ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe; (iii) the population base of the tribe, or distribution of the population in homogeneous communities or geo-graphic areas; and (iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area. (2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geo-graphic areas without regard for the reservation status of the area affected. (c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such

approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

25 U.S.C. § 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

25 U.S.C. § 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

25 U.S.C. § 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided

under this subchapter, the State or Federal court shall apply the State or Federal standard.

25 U.S.C. § 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

25 U.S.C. § 1923. Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which

was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

260.752 APPLICABILITY.

Unless otherwise stated, sections 260.751 to 260.835 and the federal Indian Child Welfare Act are applicable without exception in any child placement proceeding involving an Indian child where custody is granted to someone other than a parent or an Indian custodian. Nothing in sections 260.751 to 260.835 is intended to apply to custody actions between parents or between a parent and Indian custodian.

260.753 PURPOSES.

The purposes of the Minnesota Indian Family Preservation Act are to (1) protect the long-term interests, as defined by the Tribes, of Indian children, their families as defined by law or custom, and the child's Tribe; and (2) preserve the Indian family and Tribal identity, including an understanding that Indian children are damaged if family and child Tribal identity and contact are denied. Indian children are the future of the Tribes and are vital to their very existence.

Appendix H

260.754 POLICY ON TRIBAL-STATE RELATIONS.

(a) The state of Minnesota acknowledges federally recognized Indian Tribes as sovereign political entities that predate the existence of the United States and that have retained inherent sovereign authority to pass their own laws, maintain their own systems of governance, and determine their own jurisdiction. The sovereign authority of Tribes may only be limited by the federal government and not by any action of the state, including the state legislature and state courts.

(b) Inherently, as members of Indian Tribes recognized by the federal government, Indian people have rights and privileges as members of their Tribe which the state of Minnesota recognizes and protects.

(c) Indian people have a right to be protected from being disfranchised or deprived of any of the rights and privileges secured to any citizen in the state and to have the recognition and protection of the rights and privileges flowing from their membership in an Indian Tribe by any state action.

(d) The state of Minnesota recognizes all federally recognized Indian Tribes as having the inherent authority to determine their own jurisdiction for any and all Indian child custody or child placement proceedings regardless of whether the Tribe's members are on or off the reservation and regardless of the procedural posture of the proceeding.

(e) The state of Minnesota has long recognized the importance of Indian children to their Tribes not only as members of Tribal families and communities, but also as the Tribe's greatest resource as future members and leaders of the Tribe. The vitality of Indian children in the state of Minnesota is essential to the health and welfare of both the state and the Tribes and is essential to the future welfare and continued existence of the child's Tribe.

(f) The state of Minnesota recognizes that the historical deprivation of rights of Indian people and Indian Tribes has led to disparate out-of-home placement of Indian children.

260.755 DEFINITIONS.

Subdivision 1.**Scope.**

As used in sections 260.751 to 260.835, the following terms have the meanings given them.

Subd. 1a.**Active efforts.**

(a) "Active efforts" means a rigorous and concerted level of effort to preserve the Indian child's family that is ongoing throughout the involvement of the child-placing agency or the petitioner with the Indian child. Active efforts require the engagement of the Indian child, the Indian child's parents, the Indian custodian, the extended family, and the Tribe in using the prevailing social and cultural values, conditions, and way of life of the Indian child's Tribe to: (1) preserve the Indian

child's family; (2) prevent placement of an Indian child; (3) if placement occurs, to return the Indian child to the Indian child's family at the earliest possible time; and (4) where a permanent change in parental rights or custody is necessary, ensure the Indian child retains meaningful connections to the Indian child's family, extended family, and Tribe.

(b) Active efforts for all Indian child placements includes this section and sections 260.012 and 260.762 and require a higher standard than reasonable efforts as defined in section 260.012 to preserve the family, prevent breakup of the family, and reunify the family. Active efforts are required for all Indian child placement proceedings and for all voluntary Indian child placements that involve a child-placing agency regardless of whether the reasonable efforts would have been relieved under section 260.012.

Subd. 2.**Administrative review.**

"Administrative review" means review under section 260C.203.

Subd. 2a.**Best interests of an Indian child.**

"Best interests of an Indian child" means compliance with the federal Indian Child Welfare Act and the Minnesota Indian Family Preservation Act to preserve and maintain an Indian child's family. The best interests of an Indian child support the Indian child's sense of belonging to family, extended family, and Tribe. The best

interests of an Indian child are interwoven with the best interests of the Indian child's Tribe.

Subd. 3.**Child placement proceeding.**

(a) "Child placement proceeding" includes a judicial proceeding which could result in:

(1) "adoptive placement," meaning the permanent placement of an Indian child for adoption, including an action resulting in a final decree of adoption;

(2) "involuntary foster care placement," meaning an action removing an Indian child from the child's parents or Indian custodian for temporary placement in a foster home, institution, or the home of a guardian. The parent or Indian custodian cannot have the Indian child returned upon demand, but parental rights have not been terminated;

(3) "preadoptive placement," meaning the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, before or instead of adoptive placement; or

(4) "termination of parental rights," meaning an action resulting in the termination of the parent-child relationship under section 260C.301.

(b) The term child placement proceeding is a domestic relations proceeding that includes all placements where Indian children are placed away from the care, custody,

and control of their parent or parents or Indian custodian that do not implicate custody between the parents. Child placement proceeding also includes any placement based upon juvenile status offenses but does not include a placement based upon an act which if committed by an adult would be deemed a crime, or upon an award of custody in a divorce proceeding to one of the parents.

Subd. 3a.**Child-placing agency.**

"Child-placing agency" means a public, private, or nonprofit legal entity: (1) providing assistance to an Indian child and the Indian child's parents or Indian custodian; or (2) placing an Indian child in foster care or for adoption on a voluntary or involuntary basis.

Subd. 3b.**Child placement.**

"Child placement" means placement of an Indian child on a voluntary or involuntary basis in foster care, preadoptive placement, or adoption by a child-placing agency, parent, parents, Indian custodian, or individual.

Subd. 4.**Commissioner.**

"Commissioner" means the commissioner of children, youth, and families.

Subd. 4a.**Custody.**

"Custody" means the physical or legal custody, or both, of an Indian child under any applicable Tribal law,

Tribal custom, or state law. A party may demonstrate the existence of custody by looking to Tribal law, Tribal custom, or state law.

Subd. 5.**Demand.**

"Demand" means a written and notarized statement signed by a parent or Indian custodian of an Indian child which requests the return of the Indian child who has been voluntarily placed in foster care.

Subd. 5a.**Emergency proceeding.**

"Emergency proceeding" means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

Subd. 5b.**Extended family member.**

"Extended family member" is as defined by the law or custom of the Indian child's Tribe or, in the absence of any law or custom of the Tribe, is a person who has reached the age of 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. For the purposes of provision of active efforts and foster care and permanency placement decisions, the legal parent, guardian, or custodian of the Indian child's sibling is not an extended family member or relative of an Indian child unless they are independently related to the Indian child or recognized by the Indian child's Tribe as an extended family member.

Subd. 6.**Family-based services.**

"Family-based services" means intensive family-centered services to families primarily in their own home and for a limited time.

Subd. 6a.**Imminent physical damage or harm.**

"Imminent physical damage or harm" means that a child is threatened with immediate and present conditions that are life threatening or likely to result in abandonment, sexual abuse, or serious physical injury.

Subd. 7.**Indian.**

"Indian" means a person who is a member of an Indian tribe or an Alaskan native and a member of a regional corporation as defined in section 7 of the Alaska Native Claims Settlement Act, United States Code, title 43, section 1606.

Subd. 8.**Indian child.**

"Indian child" means an unmarried person who is under age 18 and is:

(1) a member of an Indian tribe; or

(2) eligible for membership in an Indian tribe.

A determination by a tribe that a child is a member of the Indian tribe or is eligible for membership in the

Indian tribe is conclusive. For purposes of this chapter and chapters 256N, 260C, and 260D, Indian child also includes an unmarried person who satisfies either clause (1) or (2), is under age 21, and is in foster care pursuant to section 260C.451.

Subd. 9.**Indian child's tribe.**

"Indian child's tribe" means the Indian tribe in which an Indian child is a member or eligible for membership. In the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian child's tribe is the tribe with which the Indian child has the most significant contacts. If that tribe does not express an interest in the outcome of the actions taken under sections 260.751 to 260.835 with respect to the child, any other tribe in which the child is eligible for membership that expresses an interest in the outcome may act as the Indian child's tribe.

Subd. 10.**Indian custodian.**

"Indian custodian" means an Indian person who has legal custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody, and control has been transferred by the parent of the child.

Subd. 11.**Indian organization.**

"Indian organization" means an organization providing child welfare services that is legally incorporated as a nonprofit organization, is registered with the secretary

of state, and is governed by a board of directors having at least a majority of Indian directors.

Subd. 12.**Indian tribe.**

"Indian tribe" means an Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the secretary because of their status as Indians, including any Native group under the Alaska Native Claims Settlement Act, United States Code, title 43, section 1602.

Subd. 13.

MS 2022 [Repealed, 2024 c 115 art 17 s 56]

Subd. 14.**Parent.**

"Parent" means the biological parent of an Indian child or any person who has lawfully adopted an Indian child, including a person who has adopted an Indian child by Tribal law or custom. Parent includes a father as defined by Tribal law or custom. Parent does not include an unmarried father whose paternity has not been acknowledged or established. Paternity has been acknowledged when an unmarried father takes any action to hold himself out as the biological father of an Indian child.

Subd. 15.**Permanency planning.**

"Permanency planning" means the systematic process of carrying out, within a short time, a set of goal-oriented

activities designed to help children live in families that offer continuity of relationships with nurturing parents or caretakers, and the opportunity to establish lifetime relationships.

Subd. 15a.**Petitioner.**

"Petitioner" means one or more individuals other than a parent or Indian custodian who has filed a petition or motion seeking a grant of temporary or permanent guardianship, custody, or adoption of an Indian child.

Subd. 16.**Placement prevention and family reunification services.**

"Placement prevention and family reunification services" means services designed to help children remain with their families or to reunite children with their parents.

Subd. 16a.**Public act.**

"Public act" means an act of legislation by a political body affecting the public as a whole.

Subd. 17.

MS 2022 [Repealed, 2023 c 16 s 39]

Subd. 17a.**Qualified expert witness.**

"Qualified expert witness" means an individual who meets the criteria in section 260.771, subdivision

6, paragraph (d), and provides testimony as required by the Indian Child Welfare Act of 1978, United States Code, title 25, section 1912, and the Minnesota Indian Family Preservation Act, regarding child placement or permanency proceedings relating to an Indian child.

Subd. 18.**Reservation.**

"Reservation" means Indian country as defined in United States Code, title 18, section 1151, and any lands which are either held by the United States in trust for the benefit of an Indian tribe or individual, or held by an Indian tribe or individual subject to a restriction by the United States against alienation.

Subd. 19.**Secretary.**

"Secretary" means the secretary of the United States Department of the Interior.

Subd. 20.**Tribal court.**

"Tribal court" means a court with jurisdiction over child custody proceedings and which is either a court of Indian offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of a Tribe which is vested with authority over child custody proceedings.

Subd. 20a.**Tribal representative.**

"Tribal representative" means a representative designated by and acting on behalf of a Tribe in connection

with an Indian child placement proceeding as defined in subdivision 3. It is not required that the designated representative be an attorney to represent the Tribe in these matters. An individual appearing as a Tribal representative on behalf of a Tribe and participating in a court proceeding under this chapter is not engaged in the unauthorized practice of law.

Subd. 21.**Tribal social services agency.**

"Tribal social services agency" means the unit under authority of the governing body of the Indian tribe which is responsible for human services.

Subd. 22.**Voluntary foster care placement.**

"Voluntary foster care placement" means a decision in which there has been participation by a child-placing agency resulting in the temporary placement of an Indian child away from the home of the Indian child's parents or Indian custodian in a foster home, institution, or the home of a guardian, and the parent or Indian custodian may have the Indian child returned upon demand.

260.758 EMERGENCY REMOVAL OR PLACEMENT OF INDIAN CHILD; TERMINATION; APPROPRIATE ACTION.

Subdivision 1.**Emergency removal or placement permitted.**

Nothing in sections 260.751 to 260.835 shall be construed to prevent the emergency removal of an

Indian child from the Indian child's parent or Indian custodian, including an Indian child who is a resident of or is domiciled on a reservation but temporarily located off the reservation, or the emergency placement of the Indian child in a foster home or institution under sections 260.751 to 260.835, in order to prevent imminent physical damage or harm to the Indian child.

Subd. 2.**Temporary emergency jurisdiction of state courts.**

(a) The child-placing agency, petitioner, or court shall ensure that the emergency removal or placement terminates immediately when removal or placement is no longer necessary to prevent imminent physical damage or harm to the Indian child. The child-placing agency, petitioner, or court shall expeditiously initiate a child placement proceeding subject to the provisions of sections 260.751 to 260.835, transfer the Indian child to the jurisdiction of the appropriate Indian Tribe, or return the Indian child to the Indian child's parent or Indian custodian as may be appropriate.

(b) If the Indian child is a resident of or is domiciled on a reservation but temporarily located off the reservation, a court of this state has only temporary emergency jurisdiction until the Indian child is transferred to the jurisdiction of the appropriate Indian Tribe unless the Indian child's Tribe has expressly declined to exercise its jurisdiction, or the Indian child is returned to the Indian child's parent or Indian custodian.

Appendix H

Subd. 3.**Petition for emergency removal; placement requirements.**

A petition for a court order authorizing the emergency removal or continued emergency placement of an Indian child, or the petition's accompanying documents, must contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent imminent physical damage or harm to the Indian child. The petition or its accompanying documents must also contain the following information:

(1) the name, age, and last known address of the Indian child;

(2) the name and address of the Indian child's parents and Indian custodians, if any;

(3) the steps taken to provide notice to the Indian child's parents, Indian custodians, and Tribe about the emergency proceeding;

(4) if the Indian child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them;

(5) the residence and domicile of the Indian child;

(6) if either the residence or domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the Tribe affiliated with that reservation or village;

(7) the Tribal affiliation of the Indian child and of the Indian child's parents or Indian custodians;

(8) a specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the Indian child to take that action;

(9) if the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over Indian child custody matters, a statement of the efforts that have been made and are being made to contact the Tribe and transfer the Indian child to the Tribe's jurisdiction; and

(10) a statement of the efforts that have been taken to assist the Indian child's parents or Indian custodians so that the Indian child may safely be returned to their custody.

Subd. 4.**Emergency proceeding requirements.**

(a) The court shall hold a hearing no later than 72 hours, excluding weekends and holidays, after the emergency removal of the Indian child. The court shall determine whether the emergency removal continues to be necessary to prevent imminent physical damage or harm to the Indian child.

(b) The court shall hold additional hearings whenever new information indicates that the emergency situation has ended and must determine at any court hearing during the emergency proceeding whether the emergency

removal or placement is no longer necessary to prevent imminent physical damage or harm to the Indian child.

Subd. 5.**Termination of emergency removal or placement.**

(a) An emergency removal or placement of an Indian child must immediately terminate once the child-placing agency or court possesses sufficient evidence to determine that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the Indian child and the Indian child shall be immediately returned to the custody of the Indian child's parent or Indian custodian.

(b) An emergency removal or placement ends when the Indian child is transferred to the jurisdiction of the Indian child's Tribe, or when the court orders, after service upon the Indian child's parents, Indian custodian, and Indian child's Tribe, placement of the Indian child upon a determination supported by clear and convincing evidence, including testimony by a qualified expert witness, that custody of the Indian child by the Indian child's parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child.

(c) In no instance shall emergency removal or emergency placement of an Indian child extend beyond 30 days unless the court finds by a showing of clear and convincing evidence that: (1) continued emergency removal or placement is necessary to prevent imminent physical damage or harm to the Indian child; (2) the court has been

unable to transfer the proceeding to the jurisdiction of the Indian child's Tribal court; and (3) it has not been possible to initiate a child placement proceeding with all of the protections under sections 260.751 to 260.835, including obtaining the testimony of a qualified expert witness.

260.761 INQUIRY OF TRIBAL LINEAGE; NOTICE TO TRIBES, PARENTS, AND INDIAN CUSTODIANS; ACCESS TO FILES.

Subdivision 1.**Inquiry of Tribal lineage.**

(a) The child-placing agency or petitioner shall inquire of the child, the child's parents and custodians, and other appropriate persons whether there is any reason to believe that a child brought to the agency's attention may have lineage to an Indian Tribe. This inquiry shall occur at the time the child comes to the attention of the child-placing agency or petitioner and shall continue throughout the involvement of the child-placing agency or petitioner.

(b) In any child placement proceeding, the court shall inquire of the child, the child's parents, custodian, and any person participating in the proceedings whether the child has any American Indian heritage or lineage to an Indian Tribe. The inquiry shall be made at the commencement of the proceeding and all responses must be on the record. The court must instruct the parties to inform the court if they subsequently receive information that provides reason to believe the child is an Indian child.

(c) If there is reason to believe the child is an Indian child, but the court does not have sufficient evidence to

determine whether the child is an Indian child, the court shall:

(1) confirm with a report, declaration, or testimony in the record that the child-placing agency or petitioner used due diligence to identify and work with all of the Tribes for which there is reason to believe the child may be a member of or eligible for membership to verify whether the child is an Indian child; and

(2) proceed with the case as if the child is an Indian child until it is determined on the record that the child does not meet the definition of Indian child.

Subd. 2.**Notice of services or court proceedings involving an Indian child.**

(a) When a child-placing agency or petitioner has information that a family assessment, investigation, or noncaregiver human trafficking assessment being conducted may involve an Indian child, the child-placing agency or petitioner shall notify the Indian child's Tribe of the family assessment, investigation, or noncaregiver human trafficking assessment according to section 260E.18. The child-placing agency or petitioner shall provide initial notice by telephone and by email or facsimile and shall include the child's full name and date of birth; the full names and dates of birth of the child's biological parents; and if known the full names and dates of birth of the child's grandparents and of the child's Indian custodian. If information regarding the child's grandparents or Indian custodian is not immediately

available, the child-placing agency or petitioner shall continue to request this information and shall notify the Tribe when it is received. Notice shall be provided to all Tribes to which the child may have any Tribal lineage. The child-placing agency or petitioner shall request that the Tribe or a designated Tribal representative participate in evaluating the family circumstances, identifying family and Tribal community resources, and developing case plans. The child-placing agency or petitioner shall continue to include the Tribe in service planning and updates as to the progress of the case.

(b) When a child-placing agency or petitioner has information that a child receiving services may be an Indian child, the child-placing agency or petitioner shall notify the Tribe by telephone and by email or facsimile of the child's full name and date of birth, the full names and dates of birth of the child's biological parents, and, if known, the full names and dates of birth of the child's grandparents and of the child's Indian custodian. This notification must be provided for the Tribe to determine if the child is a member or eligible for Tribal membership, and the child-placing agency or petitioner must provide this notification to the Tribe within seven days of receiving information that the child may be an Indian child. If information regarding the child's grandparents or Indian custodian is not available within the seven-day period, the child-placing agency or petitioner shall continue to request this information and shall notify the Tribe when it is received. Notice shall be provided to all Tribes to which the child may have any Tribal lineage.

(c) In all child placement proceedings, when a court has reason to believe that a child placed in emergency protective care is an Indian child, the court administrator or a designee shall, as soon as possible and before a hearing takes place, notify the Tribal social services agency by telephone and by email or facsimile of the date, time, and location of the emergency protective care or other initial hearing. The court shall allow appearances by telephone, video conference, or other electronic medium for Tribal representatives, the Indian child's parents, or the Indian custodian.

(d) In all child placement proceedings, except for adoptive or preadoptive placement proceedings, when a court has reason to believe the child is an Indian child, the child-placing agency or petitioner shall provide notice of the proceedings and a copy of any petition to the Indian child's parents, Indian custodian, and the Indian child's Tribe and shall effect service of any notice and petition governed by sections 260.751 to 260.835 upon the parent, Indian custodian, and the Indian child's Tribe by certified mail or registered mail, return receipt requested. If the identity or location of the Indian child's parents or Indian custodian or Tribe cannot be determined, the child-placing agency or petitioner shall provide the notice required in this paragraph to the United States Secretary of the Interior, Bureau of Indian Affairs by certified or registered mail, return receipt requested. Where service is only accomplished through the United States Secretary of the Interior, Bureau of Indian Affairs, the initial hearing shall not be held until 20 days after notice upon the Tribe or the Secretary of the Interior.

(e) Notice under this subdivision must be in clear and understandable language and include the following:

(1) the child's name, date of birth, and birth place;

(2) all names known for the parents and Indian custodian, including maiden, married, former names, and aliases, correctly spelled;

(3) the dates of birth, birth place, and Tribal enrollment numbers of the Indian child, the Indian child's parents, and the Indian custodian, if known;

(4) the full names, dates of birth, birth places, and Tribal enrollment or affiliation information of direct lineal ancestors of the child, other extended family members, and custodians of the child, if known;

(5) the name of any and all Indian Tribes in which the child is or may be a member or eligible for membership in; and

(6) statements setting out:

(i) the name of the petitioner and name and address of the petitioner's attorney;

(ii) the right of any parent or Indian custodian of the Indian child, to intervene in the child placement proceedings, if not already a party;

(iii) the right of the Indian child's Tribe to intervene in the proceedings at any time;

(iv) the right of the Indian child, the Indian child's parent, and the Indian custodian to court-appointed counsel if they meet the requirements in section 611.17;

(v) the right to be granted, upon request, up to 20 additional days to prepare for the child-placement proceedings;

(vi) the right of the Indian child's parent, the Indian custodian, and the Indian child's Tribe to petition the court for transfer of the proceedings to Tribal court;

(vii) the mailing addresses and telephone numbers of the court and information related to all parental and custodial rights of the parent or Indian custodian; and

(viii) that all parties must maintain confidentiality of all information contained in the notice and must not provide the information to anyone other than their attorney.

(f) A Tribe, the Indian child's parents, or the Indian custodian may request up to 20 additional days to prepare for the initial hearing. The court shall allow appearances by telephone, video conference, or other electronic medium for Tribal representatives, the Indian child's parents, or the Indian custodian.

(g) A child-placing agency or petitioner must provide the notices required under this subdivision at the earliest possible time to facilitate involvement of the Indian child's Tribe. Nothing in this subdivision is intended to hinder

the ability of the child-placing agency, petitioner, and the court to respond to an emergency situation. Lack of participation by a Tribe shall not prevent the Tribe from intervening in services and proceedings at a later date. A Tribe may participate in a case at any time. At any stage of the child-placing agency's or petitioner's involvement with an Indian child, the child-placing agency or petitioner shall provide full cooperation to the Tribal social services agency, including disclosure of all data concerning the Indian child. Nothing in this subdivision relieves the child-placing agency or petitioner of satisfying the notice requirements in state or federal law.

(h) The court shall allow appearances by telephone, video conference, or other electronic means for Tribal representatives at all hearings and trials. The court shall allow appearances by telephone, video conference, or other electronic means for the Indian child's parents or Indian custodian for all hearings, except that the court may require an in-person appearance for trials or other evidentiary or contested hearings.

Subd. 3.**Notice of potential preadoptive or adoptive placement.**

In any adoptive or preadoptive placement proceeding, including voluntary proceedings, where any party or participant has reason to believe that a child who is the subject of an adoptive or preadoptive placement proceeding is or may be an "Indian child," as defined in section 260.755, subdivision 8, and United States Code, title 25, section 1903(4), the child-placing agency or petitioner

shall notify the Indian child's Tribe by registered mail or certified mail with return receipt requested of the pending proceeding and of the right of intervention under subdivision 6. If the identity or location of the Indian child's Tribe cannot be determined, the notice must be given to the United States Secretary of Interior in like manner. No preadoptive or adoptive placement proceeding may be held until at least 20 days after receipt of the notice by the Tribe or the secretary. Upon request, the Tribe must be granted up to 20 additional days to prepare for the proceeding. The child-placing agency or petitioner shall include in the notice the identity of the birth parents and Indian child absent written objection by the birth parents. The child-placing agency or petitioner shall inform the birth parents of the Indian child of any services available to the Indian child through the child's Tribal social services agency, including child placement services, and shall additionally provide the birth parents of the Indian child with all information sent from the Tribal social services agency in response to the notice.

Subd. 4.**Unknown father.**

If the child-placing agency, petitioner, the court, or any party has reason to believe that a child who is the subject of a child placement proceeding is or may be an Indian child but the father of the child is unknown and has not registered with the fathers' adoption registry pursuant to section 259.52, the child-placing agency or petitioner shall provide to the Tribe believed to be the Indian child's Tribe information sufficient to enable the Tribe to determine the child's eligibility for membership

in the Tribe, including, but not limited to, the legal and maiden name of the birth mother, her date of birth, the names and dates of birth of her parents and grandparents, and, if available, information pertaining to the possible identity, Tribal affiliation, or location of the birth father. If the identity or location of the Indian child's Tribe cannot be determined, the notice must be given to the United States Secretary of Interior in like manner.

Subd. 5.**Proof of service of notice upon Tribe or secretary.**

In cases where a child-placing agency or party to an adoptive placement knows or has reason to believe that a child is or may be an Indian child, proof of service upon the Indian child's Tribe or the secretary of interior must be filed with the adoption petition.

Subd. 6.**Indian Tribe's right of intervention.**

In any child placement proceeding under sections 260.751 to 260.835, the Indian child's Tribe shall have a right to intervene at any point in the proceeding.

Subd. 6a.**Indian Tribe's access to files.**

At any stage of the child-placing agency or petitioner's involvement with an Indian child, the child-placing agency or petitioner shall, upon request, give the Tribal social services agency full cooperation including access to all files concerning the Indian child. If the files contain confidential or private data, the child-placing agency or

petitioner may require execution of an agreement with the Tribal social services agency to maintain the data according to statutory provisions applicable to the data.

Subd. 7.

MS 2022 [Repealed by amendment, 2023 c 16 s 16]

Subd. 8.**Missing child notification.**

A child-placing agency or individual petitioner shall notify an Indian child's Tribe or Tribes by telephone and by email or facsimile immediately but no later than 24 hours after receiving information on a missing child as defined under section 260C.212, subdivision 13, paragraph (a).

260.7611 [Renumbered 260.7745]

260.762 DUTY TO PREVENT OUT-OF-HOME CHILD PLACEMENT, PRESERVE THE CHILD'S FAMILY, AND PROMOTE FAMILY REUNIFICATION; ACTIVE EFFORTS.

Subdivision 1.**Active efforts.**

Active efforts includes acknowledging traditional helping and healing systems of an Indian child's Tribe and using these systems as the core to help and heal the Indian child and family regardless of whether the Indian child's Tribe has intervened in the proceedings.

Subd. 2.

MS 2023 Supp [Repealed by amendment, 2024 c 115 art 17 s 19]

Subd. 2a.**Required findings that active efforts were provided.**

(a) A court shall not order a child placement, termination of parental rights, guardianship to the commissioner of children, youth, and families under section 260C.325, or temporary or permanent change in custody of an Indian child unless the court finds that the child-placing agency or petitioner demonstrated that active efforts were made to preserve the Indian child's family. Active efforts to preserve the Indian child's family include efforts to prevent placement of the Indian child to correct the conditions that led to the placement by ensuring remedial services and rehabilitative programs designed to prevent the breakup of the family were provided in a manner consistent with the prevailing social and cultural conditions of the Indian child's Tribe and in partnership with the Indian child, the Indian child's parents, the Indian custodian, extended family members, and Tribe, and that these efforts have proved unsuccessful.

(b) The court, in determining whether active efforts were made to preserve the Indian child's family for purposes of child placement or permanency, shall ensure the provision of active efforts designed to correct the conditions that led to the placement of the Indian child and shall make findings regarding whether the following

activities were appropriate and necessary, and whether the child-placing agency or petitioner ensured appropriate and meaningful services were available based upon the family's specific needs, whether listed in this paragraph or not:

(1) whether active efforts were made at the earliest point possible to inquire into the child's heritage, to identify any federally recognized Indian Tribe the child may be affiliated with, to notify all potential Tribes at the earliest point possible, and to request participation of the Indian child's Tribe;

(2) whether a Tribally designated representative with substantial knowledge of the prevailing social and cultural standards and child-rearing practices within the Tribal community was provided an opportunity to consult with and be involved in any investigations or assessments of the family's circumstances, participate in identifying the family's needs, and participate in development of any plan to keep the Indian child safely in the home, identify services designed to prevent the breakup of the Indian child's family, and to reunify the Indian child's family as soon as safety can be assured if out-of-home placement has occurred;

(3) whether the Tribal representative was provided with all information available regarding the proceeding, and whether it was requested that the Tribal representative assist in identifying services designed to prevent the breakup of the Indian child's family and to reunify the Indian child's family as soon as safety can be assured if out-of-home placement has occurred;

(4) whether, before making a decision that may affect an Indian child's safety and well-being or when contemplating placement of an Indian child, guidance from the Indian child's Tribe was sought regarding family structure, how the family can seek help, what family and Tribal resources are available, and what barriers the family faces that could threaten the family's preservation;

(5) whether a Tribal representative was consulted to determine and arrange for visitation in the most natural setting that ensures the Indian child's safety, when the Indian child's safety requires supervised visitation;

(6) whether early and ongoing efforts occurred to identify, locate, and include extended family members as supports for the Indian child and the Indian child's family;

(7) whether continued active efforts were made to identify and place the Indian child in a home that is compliant with the placement preferences in sections 260.751 to 260.835, including whether extended family members were consulted to provide support to the Indian child and Indian child's parents; to inform the child-placing agency, petitioner, and court as to cultural connections and family structure; to assist in identifying appropriate cultural services and supports for the Indian child and Indian child's parents; and to identify and serve as placement and permanency resources for the Indian child. If there was difficulty contacting or engaging extended family members, whether assistance was sought from the Tribe; the Department of Human Services; the Department of Children, Youth, and Families; or other agencies with expertise in working with Indian families;

(8) whether services and resources were provided to extended family members who are considered the primary placement option for an Indian child, as agreed upon by the child-placing agency or petitioner and the Tribe, to overcome licensing and other barriers to providing care to an Indian child. The need for services or resources shall not be a basis to exclude an extended family member from consideration as a primary placement. Services and resources include but are not limited to child care assistance, financial assistance, housing resources, emergency resources, and foster care licensing assistance and resources;

(9) whether concrete services and access to both Tribal and non-Tribal services were provided to the Indian child's parents and Indian custodian and, where necessary, members of the Indian child's extended family who provide support to the Indian child and the Indian child's parents; and whether these services were provided in an ongoing manner throughout the child-placing agency or petitioner's involvement with the Indian family to directly assist the Indian family in accessing and utilizing services to maintain the Indian family, or to reunify the Indian family as soon as safety can be assured if out-of-home placement has occurred. Services include but are not limited to financial assistance, food, housing, health care, transportation, in-home services, community support services, and specialized services; and

(10) whether visitation occurred whenever possible in the home of the Indian child's parent, Indian custodian, or extended family member or in another noninstitutional

setting in order to keep the Indian child in close contact with the Indian child's parents, siblings, and other relatives regardless of the Indian child's age and to allow the Indian child and those with whom the Indian child visits to have natural, unsupervised interaction when consistent with protecting the child's safety.

Subd. 2b.**Adoptions.**

For adoptions under chapter 259, the court may find that active efforts were made to prevent placement of an Indian child or to reunify the Indian child with the Indian child's parents upon a finding that: (1) subdivision 2a, paragraph (b), clauses (1) to (4), were met; (2) the Indian child's parent knowingly and voluntarily consented to placement of the Indian child for adoption on the record as described in section 260.765, subdivision 3a; (3) fraud was not present, and the Indian child's parent was not under duress; (4) the Indian child's parent was offered and declined services that would enable the Indian child's parent to maintain custody of the Indian child; and (5) the Indian child's parent was counseled on alternatives to adoption, and adoption contact agreements.

Subd. 3.

MS 2023 Supp [Repealed by amendment, 2024 c 115 art 17 s 19]

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260.763 JURISDICTION AND TRANSFER TO TRIBAL COURT.

Subdivision 1.**Indian Tribe jurisdiction.**

(a) An Indian Tribe has exclusive jurisdiction over all child placement proceedings involving an Indian child who resides or is domiciled within the reservation of the Tribe, except where jurisdiction is otherwise vested in the state by existing federal law. The child-placing agencies and the courts shall defer to a Tribal determination of the Tribe's exclusive jurisdiction when an Indian child resides or is domiciled within the reservation of the Tribe.

(b) Where an Indian child is a ward of the Tribal court, the Indian Tribe retains exclusive jurisdiction, notwithstanding the residence or domicile of the child unless the Tribe agrees to allow concurrent jurisdiction with the state.

(c) An Indian Tribe and the state of Minnesota share concurrent jurisdiction over a child placement proceeding involving an Indian child who resides or is domiciled outside of the reservation of the Tribe, or if the Tribe agrees to concurrent jurisdiction.

Subd. 2.**Effect of Tribal placement orders.**

The court shall give full faith and credit to Tribal court placement orders. In any case where the Tribal court orders placement and services, including but not limited to case planning services, full faith and credit

of the Tribal court's order shall be provided so long as the county of financial responsibility was provided notice and an opportunity to be heard regarding the expenses. Determination of county of financial responsibility for the placement shall be determined by the child-placing agency in accordance with section 256G.02, subdivision 4. Disputes concerning the county of financial responsibility shall be settled in the manner prescribed in section 256G.09.

Subd. 2a.**Interpretation of Tribal judicial proceedings.**

The court shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian Tribe in all proceedings under sections 260.755 to 260.835. The courts shall give deference to the Tribe's interpretation of the Tribe's own unique system of laws. If further interpretation of a Tribe's laws or order is required, the court shall transfer the proceedings to the jurisdiction of the Tribal court for interpretation of the Tribal court's order.

Subd. 3.**Indian Tribe agreements.**

The commissioner or the child-placing agency is hereby authorized to enter into agreements with Indian Tribes respecting care and custody of Indian children and jurisdiction over child placement proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between the state and an Indian Tribe.

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Subd. 4.**Transfer of proceedings.**

In any child placement proceeding, upon a motion or request by the Indian child's parent, Indian custodian, or Tribe, the court, in the absence of good cause to the contrary, shall transfer the proceeding to the jurisdiction of the Tribe absent objection by either of the Indian child's parent or the Indian custodian. The motion or request to transfer may be made by the Indian child's parent, the Indian custodian, or the Indian child's Tribe at any stage in the proceedings by: (1) filing a written motion with the court and serving the motion upon the other parties; or (2) making a request on the record during the hearing, which shall be reflected in the court's findings. A request or motion to transfer made by a Tribal representative of the Indian child's Tribe under this subdivision shall not be considered the unauthorized practice of law. The transfer is subject to declination by the Tribal court of the Tribe.

Subd. 5.**Good cause to deny transfer.**

(a) Establishing good cause to deny transfer of jurisdiction to a Tribal court is a fact-specific inquiry to be determined on a case-by-case basis. Socioeconomic conditions and the perceived adequacy of Tribal or Bureau of Indian Affairs social services or judicial systems must not be considered in a determination that good cause exists. The party opposed to transfer of jurisdiction to a Tribal court has the burden to prove by clear and convincing evidence that good cause to deny transfer exists. Opposition to a motion to transfer jurisdiction to Tribal court must be in writing and must be served upon all parties.

(b) Upon a motion or request by an Indian child's parent, Indian custodian, or Tribe, the court shall transfer jurisdiction to a Tribal court unless the court determines that there is good cause to deny transfer based on the following:

(1) the Indian child's Tribe does not have a Tribal court or any other administrative body of a Tribe vested with authority over child placement proceedings, as defined in section 260.755, subdivision 3, to which the case can be transferred, and no other Tribal court has been designated by the Indian child's Tribe; or

(2) the evidence necessary to decide the case could not be adequately presented in the Tribal court without undue hardship to the parties or the witnesses and the Tribal court is unable to mitigate the hardship by any means permitted in the Tribal court's rules. Without evidence of undue hardship, travel distance alone is not a basis for denying a transfer.

260.765 VOLUNTARY FOSTER CARE PLACEMENT.

Subdivision 1.**Determination of Indian child's Tribe.**

The child-placing agency shall follow the notice provisions in section 260.761.

Subd. 1a.**Identification of extended family members.**

Any agency considering placement of an Indian child shall make active efforts to identify and locate extended family members.

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Subd. 1b.**Access to files.**

At any subsequent stage of a child-placing agency's involvement with an Indian child, the child-placing agency shall, upon request, give the Tribal social services agency full cooperation including access to all files concerning the child. If the files contain confidential or private data, the child-placing agency or individual may require execution of an agreement with the Tribal social services agency that the Tribal social services agency shall maintain the data according to statutory provisions applicable to the data.

Subd. 2.**Notice.**

When an Indian child is voluntarily placed out of the care of the Indian child's parent or Indian custodian, the child-placing agency involved in the decision to place the Indian child shall give notice as described in section 260.761 of the placement to the Indian child's parent, parents, Indian custodian, and the Tribal social services agency within seven days of placement, excluding weekends and holidays.

If a child-placing agency makes a temporary voluntary placement pending a decision on adoption by an Indian child's parent or Indian custodian, notice of the placement shall be given to the Indian child's parents, Tribal social services agency, and the Indian custodian upon the filing of a petition for termination of parental rights or three months following the temporary placement, whichever occurs first.

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Subd. 3.**Notice of administrative review.**

In an administrative review of a voluntary foster care placement, the Tribal social services agency of the child, the Indian custodian, and the parents of the child shall have notice and a right of intervention and participation in the review.

Subd. 3a.**Court requirements for consent.**

Where any parent or Indian custodian voluntarily consents to a child placement or to termination of parental rights or adoption, the consent shall not be valid unless executed in writing and recorded before a judge and accompanied by the presiding judge's finding that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also find that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language the parent or Indian custodian understood. Any consent given prior to, or within ten days after, the birth of an Indian child shall not be valid.

Subd. 4.**Withdrawal of consent to voluntary placement; return of child in voluntary placement.**

Any parent or Indian custodian may withdraw consent to a child placement at any time and, upon the withdrawal of consent, the child shall be returned to the parent or the Indian custodian. Upon demand by the parent or Indian custodian of an Indian child, the child-placing agency that

placed the child shall return the child in voluntary foster care placement to the parent or Indian custodian within 24 hours of the receipt of the demand. If the request for return does not satisfy the requirement of section 260.755, subdivision 5, the child-placing agency shall immediately inform the parent or Indian custodian of the Indian child of the requirement.

Subd. 4a.**Withdrawal of consent to voluntary termination of parental rights or adoptive placement; return of custody.**

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

Subd. 4b.**Collateral attack; vacation of decree and return of custody; limitations.**

After the entry of a final decree of adoption of an Indian child in any state court, the Indian child's parent may withdraw consent upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate the decree. Upon a finding that consent was obtained through fraud or duress, the court shall vacate the decree and return the Indian child to the Indian child's parent. No adoption that has been effective for at least two years may be invalidated under the provisions of this subdivision unless otherwise permitted under a provision of state law.

Subd. 5.

[Renumbered subd 1a]

260.771 INVOLUNTARY CHILD PLACEMENT PROCEEDINGS.

Subdivision 1.

[Renumbered 260.763, subd 1]

Subd. 1a.**Active efforts.**

In any child placement proceeding, the child-placing agency or petitioner shall ensure that appropriate active efforts as described in section 260.762 are provided to the Indian child's parent or parents, Indian custodian, and family to support reunification and preservation of the Indian child's placement with and relationship to the Indian child's extended family.

Subd. 1b.**Placement preference.**

In any child placement proceeding, the child-placing agency or petitioner shall follow the placement preferences described in section 260.773 or, where preferred placement is not available even with the provision of active efforts, shall follow section 260.773, subdivisions 12 to 15.

Subd. 1c.**Identification of extended family members.**

Any child-placing agency or petitioner considering placement of an Indian child shall ensure active efforts are

made to identify and locate siblings and extended family members and to explore placement with extended family members and ensure the Indian child's relationship with the Indian child's extended family and Tribe.

Subd. 1d.**Notice of hearings.**

The notice provisions in section 260.761 apply to all involuntary child placement proceedings under this section. An Indian child ten years of age and older, the Indian child's parent or parents, the Indian custodian, and the Indian child's Tribe shall have notice of the right to participate in all hearings regarding the Indian child.

Subd. 2.**Court determination of Tribal affiliation of child.**

In any child placement proceeding, the court shall establish whether an Indian child is involved and the identity of the Indian child's Tribe. Sections 260.751 to 260.835 and the federal Indian Child Welfare Act are applicable without exception in any child placement proceeding involving an Indian child. Sections 260.751 to 260.835 apply to child placement proceedings involving an Indian child whether the child is in the physical or legal custody of an Indian parent or parents, Indian custodian, Indian extended family member, or other person at the commencement of the proceedings. A court shall not determine the applicability of sections 260.751to 260.835 or the federal Indian Child Welfare Act to a child placement proceeding based upon whether an Indian child is part of an existing Indian family or based upon the level of contact

a child has with the child's Indian Tribe, reservation, society, or off-reservation community.

Subd. 2a.**Right of intervention.**

In any state court child placement proceeding of an Indian child, the Indian child's Tribe, parent or parents, and Indian custodian shall have the right to intervene at any point in the proceeding.

Subd. 2b.**Appointment of counsel.**

(a) In any state court child placement proceeding, including but not limited to any proceeding where the petitioner or another party seeks to temporarily or permanently remove an Indian child from the Indian child's parent or parents or Indian custodian, the Indian child's parent or parents or Indian custodian shall have the right to be represented by an attorney. If the parent or parents or Indian custodian cannot afford an attorney and meet the requirements of section 611.17, an attorney will be appointed to represent them.

(b) In any state court child placement proceeding, any Indian child ten years of age or older shall have the right to court-appointed counsel. The court may appoint counsel for any Indian child under ten years of age in any state court child placement proceeding if the court determines that appointment is appropriate and in the best interest of the Indian child.

(c) If the court appoints counsel to represent a person pursuant to this subdivision, the court shall appoint

counsel to represent the person prior to the first hearing on the petition, but may appoint counsel at any stage of the proceeding if the court deems it necessary. The court shall not appoint a public defender to represent the person unless such appointment is authorized by section 611.14.

Subd. 2c.**Examination of reports or other documents.**

Each party to a proceeding under this section involving an Indian child shall have the right to examine all the reports or other documents filed with the court upon which any decision with respect to the action may be based.

Subd. 2d.**Tribal access to files and other documents.**

At any subsequent stage of the child-placing agency or petitioner's involvement with an Indian child, the child-placing agency or petitioner shall, upon request, give the Tribal social services agency full cooperation including access to all files concerning the Indian child. If the files contain confidential or private data, the child-placing agency or petitioner may require execution of an agreement with the Tribal social services agency specifying that the Tribal social services agency shall maintain the data according to statutory provisions applicable to the data.

Subd. 2e.**Participation of Indian child's Tribe in court proceedings.**

(a) In any child placement proceeding that involves an Indian child, any Tribe that the Indian child may be

eligible for membership in, as determined by the Tribe, is a party to the proceedings without the need to file a motion.

(b) An Indian child's Tribe, Tribal representative, or attorney representing the Tribe:

(1) may appear remotely at hearings by telephone, video conference, or other electronic medium without prior request;

(2) is not required to use the court's electronic filing and service system and may use United States mail, facsimile, or other alternative method for filing and service;

(3) may file documents with the court using an alternative method that the clerk of court shall accept and file electronically;

(4) is exempt from any filing fees required under section 357.021; and

(5) is exempt from the pro hac vice requirements of Rule 5 of the Minnesota General Rules of Practice.

Subd. 3.

[Renumbered 260.763, subd 4]

Subd. 3a.

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[Renumbered 260.763, subd 5]

Subd. 4.

(a) [Renumbered 260.763, subd 2]

(b) [Renumbered 260.763 subd 2a]

Subd. 5.

[Renumbered 260.763, subd 3]

Subd. 6.**Qualified expert witness and evidentiary requirements.**

(a) In any involuntary placement proceeding, the court must determine by clear and convincing evidence, including testimony of a qualified expert witness, that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional damage or serious physical damage to the Indian child.

In a termination of parental rights proceeding, the court must determine by evidence beyond a reasonable doubt, including testimony of a qualified expert witness, that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional damage or serious physical damage to the Indian child.

In an involuntary permanent transfer of legal and physical custody, permanent custody to the agency, temporary custody to the agency, or other permanency

proceeding, the court must determine by clear and convincing evidence, including testimony of a qualified expert witness, that the continued custody of the Indian child by the Indian child's parent or parents or Indian custodian is likely to result in serious emotional damage or serious physical damage to the Indian child. Qualified expert witness testimony is not required where custody is transferred to the Indian child's parent.

Testimony of a qualified expert witness shall be provided for involuntary child placement and permanency proceedings independently.

(b) The child-placing agency, petitioner, or any other party shall make diligent efforts to locate and present to the court a qualified expert witness designated by the Indian child's Tribe. The qualifications of a qualified expert witness designated by the Indian child's Tribe are not subject to a challenge in Indian child placement proceedings.

(c) If a party cannot obtain testimony from a Tribally designated qualified expert witness, the party shall submit to the court the diligent efforts made to obtain a Tribally designated qualified expert witness.

(d) If clear and convincing evidence establishes that a party's diligent efforts cannot produce testimony from a Tribally designated qualified expert witness, the party shall demonstrate to the court that a proposed qualified expert witness is, in descending order of preference:

(1) a member of the Indian child's Tribe who is recognized by the Indian child's Tribal community as knowledgeable in Tribal customs as they pertain to family organization and child-rearing practices; or

(2) an Indian person from an Indian community who has substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and contemporary and traditional child-rearing practices of the Indian child's Tribe.

If clear and convincing evidence establishes that diligent efforts have been made to obtain a qualified expert witness who meets the criteria in clause (1) or (2), but those efforts have not been successful, a party may use an expert witness, as defined by the Minnesota Rules of Evidence, rule 702, who has substantial experience in providing services to Indian families and who has substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community. The court or any party may request the assistance of the Indian child's Tribe or the Bureau of Indian Affairs agency serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.

(e) The court may allow alternative methods of participation and testimony in state court proceedings by a qualified expert witness, such as participation or testimony by telephone, video conference, or other electronic medium.

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Subd. 7.

[Renumbered 260.773]

Subd. 8.**Guardians ad litem for Indian children.**

Guardians ad litem shall be specifically trained in the provision of services to Indian children, parent or parents, and Indian custodians under relevant federal and state laws and rules of court pursuant to section 480.35, subdivision 2, clause (3).

260.773 PLACEMENT OF INDIAN CHILDREN.

Subdivision 1.**Least restrictive setting.**

In all proceedings where custody of the Indian child may be removed from the Indian child's parent or Indian custodian, the Indian child shall be placed in the least restrictive setting which most approximates a family and in which the Indian child's special needs, if any, may be met. The Indian child shall also be placed within reasonable proximity to the Indian child's home, taking into account any special needs of the Indian child.

Subd. 2.**Tribe's order of placement recognized.**

In the case of a placement under subdivision 3 or 4, if the Indian child's Tribe has established a different order of placement preference by resolution, the child-placing agency or petitioner and the court shall recognize the Indian child's Tribe's order of placement in the form provided by the Tribe.

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Subd. 3.**Placement preferences for temporary proceedings.**

Preference shall be given, in the absence of good cause to the contrary, to a placement with:

(1) a noncustodial parent or Indian custodian;

(2) a member of the Indian child's extended family;

(3) a foster home licensed, approved, or specified by the Indian child's Tribe;

(4) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(5) an institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Subd. 4.**Placement preferences for permanent proceedings.**

In any adoptive placement, transfer of custody placement, or other permanency placement of an Indian child, a preference shall be given, in the absence of good cause to the contrary, to a placement with:

(1) the Indian child's noncustodial parent or Indian custodian;

(2) a member of the Indian child's extended family;

(3) other members of the Indian child's Tribe; or

(4) other persons or entities recognized as appropriate to be a permanency resource for the Indian child, by the Indian child's parent or parents, Indian custodian, or Indian Tribe.

Subd. 5.**Suitability of placement.**

The child-placing agency and petitioner shall defer to the judgment of the Indian child's Tribe as to the suitability of a placement.

Subd. 6.**Preference of Indian child or parent.**

The court shall consider the preference of the Indian child or parent.

Subd. 7.**Standards applied to preference requirements.**

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

Subd. 8.**Removal of Indian child from placement.**

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, the placement

shall be in accordance with the placement preferences, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the Indian child was originally removed.

Subd. 9.**Record required.**

A record of each such placement of an Indian child under state law shall be maintained by the county in which the placement was made and by the Department of Children, Youth, and Families evidencing the efforts to comply with the order of preference specified in this section. The record shall be made available at any time upon the request of the Secretary of the Interior or the Indian child's Tribe.

Subd. 10.**Exceptions to placement preferences.**

The court shall follow the placement preferences in subdivisions 1 to 9, except as follows:

(1) where a parent evidences a desire for anonymity, the child-placing agency or petitioner and the court shall give weight to the parent's desire for anonymity in applying the preferences. A parent's desire for anonymity does not excuse the application of sections 260.751 to 260.835; or

(2) where the court determines there is good cause based on:

(i) the reasonable request of the Indian child's parents, if one or both parents attest that they have reviewed the

placement options that comply with the order of placement preferences;

(ii) the reasonable request of the Indian child if the Indian child is able to understand and comprehend the decision that is being made;

(iii) the testimony of a qualified expert designated by the Indian child's Tribe and, if necessary, testimony from an expert witness who meets qualifications of section 260.771, subdivision 6, paragraph (d), clause (2), that supports placement outside the order of placement preferences due to extraordinary physical or emotional needs of the Indian child that require highly specialized services; or

(iv) the testimony by the child-placing agency or petitioner that a diligent search has been conducted that did not locate any available, suitable families for the Indian child that meet the placement preference criteria.

Subd. 11.**Factors considered in determining placement.**

Testimony of the Indian child's bonding or attachment to a foster family alone, without the existence of at least one of the factors in subdivision 10, clause (2), shall not be considered good cause to keep an Indian child in a lower preference or nonpreference placement. Ease of visitation and facilitation of relationship with the Indian child's parents, Indian custodian, extended family, or Tribe may be considered when determining placement.

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Subd. 12.**Burden of establishing good cause to modify order of placement preferences.**

A party who proposes that the required order of placement preferences not be followed bears the burden of establishing by clear and convincing evidence that good cause exists to modify the order of placement preferences.

Subd. 13.**Court written findings.**

If the court finds there is good cause to place the Indian child outside the order of placement preferences, the court must make written findings.

Subd. 14.**Good cause finding; active efforts.**

A good cause finding under this subdivision must consider whether active efforts were provided to extended family members who are considered the primary placement option to assist them in becoming a placement option for the Indian child as required by section 260.762.

Subd. 15.**Placement outside order of placement preferences; ongoing assessment.**

When an Indian child is placed outside the order of placement preferences, good cause to continue this placement must be determined at every stage of the proceedings.

Appendix H

260.774 IMPROPER REMOVAL OF CHILD, DECLINATION OF JURISDICTION, INVALIDATION, RETURN OF CUSTODY.

Subdivision 1.**Improper removal.**

In any proceeding where custody of the Indian child was improperly removed from the parent or Indian custodian or where the petitioner has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over the petition and shall immediately return the Indian child to the Indian child's parent or Indian custodian unless returning the Indian child to the Indian child's parent or Indian custodian would subject the Indian child to a substantial and immediate danger or threat of such danger.

Subd. 2.**Invalidation.**

(a) Any order for child placement, transfer of custody, termination of parental rights, or other permanent change in custody of an Indian child shall be invalidated upon a showing, by a preponderance of the evidence, that a violation of any one of the provisions in section 260.761, 260.762, 260.763, 260.765, 260.771, 260.773, or 260.7745 has occurred.

(b) The Indian child, the Indian child's parent or parents, guardian, Indian custodian, or Indian Tribe may file a petition or motion to invalidate under this subdivision.

(c) Upon a finding that a violation of one of the provisions in section 260.761, 260.762, 260.763, 260.765, 260.771, 260.773, or 260.7745 has occurred, the court shall:

(1) dismiss the petition without prejudice;

(2) return the Indian child to the care, custody, and control of the parent or parents or Indian custodian, unless the Indian child would be subjected to imminent physical damage or harm; and

(3) determine whether the Indian child's parent or Indian custodian has been assessed placement costs and order reimbursement of those costs.

(d) Upon a finding that a willful, intentional, knowing, or reckless violation of one of the provisions in section 260.761, 260.762, 260.763, 260.765, 260.771, 260.773, or 260.7745 has occurred, the court may consider whether sanctions, reasonable costs, and attorney fees should be imposed against the offending party.

Subd. 3.**Return of custody following adoption.**

(a) Whenever a final decree of adoption of an Indian child has been vacated, set aside, or there is a termination of the parental rights of the adoptive parents to the Indian child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant the petition unless there is a showing, in proceedings subject to the provision of sections 260.751 to 260.835, that the return of custody is not in the best interests of the Indian child.

(b) The county attorney, Indian child, Indian child's Tribe, Indian custodian, or an Indian child's parent whose parental rights were terminated under a previous order of the court may file a petition for the return of custody.

(c) A petition for return of custody may be filed in court when:

(1) the parent or Indian custodian has corrected the conditions that led to an order terminating parental rights;

(2) the parent or Indian custodian is willing and has the capability to provide day-to-day care and maintain the health, safety, and welfare of the Indian child; and

(3) the adoption has been vacated, set aside, or termination of the parental rights of the adoptive parents to the Indian child has occurred.

(d) A petition for reestablishment of the legal parent and child relationship for an Indian child who has not been adopted must meet the requirements in section 260C.329.

Appendix H

Minnesota Juvenile Court Act – Excerpts

260C.001 TITLE, INTENT, AND CONSTRUCTION.

….

Subd. 2.**Juvenile protection proceedings.**

(a) The paramount consideration in all juvenile protection proceedings is the health, safety, and best interests of the child. In proceedings involving an American Indian child, as defined in section 260.755, subdivision 8, the best interests of the child must be determined consistent with sections 260.751 to 260.835 and the Indian Child Welfare Act, United States Code, title 25, sections 1901 to 1923.

….

Subd. 3.**Permanency, termination of parental rights, and adoption.**

….

The paramount consideration in all proceedings for permanent placement of the child under sections 260C.503 to 260C.521, or the termination of parental rights is the best interests of the child. In proceedings involving an American Indian child, as defined in section 260.755, subdivision 8, the best interests of the child must be determined consistent with the

Appendix H

Indian Child Welfare Act of 1978, United States Code, title 25, section 1901, et seq.

260C.007 DEFINITIONS.

….

Subd. 20.**Indian.**

"Indian," consistent with section 260.755, subdivision 7, means a person who is a member of an Indian tribe or who is an Alaskan native and a member of a regional corporation as defined in section 7 of the Alaska Native Claims Settlement Act, United States Code, title 43, section 1606.

Subd. 21.**Indian child.**

"Indian child," consistent with section 260.755, subdivision 8, means an unmarried person who is under age 18 and is:

(1) a member of an Indian tribe; or

(2) eligible for membership in an Indian tribe.

….

Subd. 26b.**Relative of an Indian child.**

"Relative of an Indian child" means a person who is a member of the Indian child's family

as defined in the Indian Child Welfare Act of 1978, United States Code, title 25, section 1903, paragraphs (2), (6), and (9), and who is an extended family member as defined in section 260.755, subdivision 5b, of the Minnesota Indian Family Preservation Act.

….

Subd. 27.**Relative.**

"Relative" means a person related to the child by blood, marriage, or adoption; the legal parent, guardian, or custodian of the child's siblings; or an individual who is an important friend of the child or of the child's parent or custodian, including an individual with whom the child has resided or had significant contact or who has a significant relationship to the child or the child's parent or custodian.

260C.212 CHILDREN IN PLACEMENT.

….

Subd. 2.**Placement decisions based on best interests of the child.**

(a) The policy of the state of Minnesota is to ensure that the child's best interests are met by requiring an individualized determination of the needs of the child in consideration of

paragraphs (a) to (f), and of how the selected placement will serve the current and future needs of the child being placed. The authorized child-placing agency shall place a child, released by court order or by voluntary release by the parent or parents, in a family foster home selected by considering placement with relatives in the following order:

(1) with an individual who is related to the child by blood, marriage, or adoption, including the legal parent, guardian, or custodian of the child's sibling; or

(2) with an individual who is an important friend of the child or of the child's parent or custodian, including an individual with whom the child has resided or had significant contact or who has a significant relationship to the child or the child's parent or custodian.

For an Indian child, the agency shall follow the order of placement preferences in the Indian Child Welfare Act of 1978, United States Code, title 25, section 1915.

(b) Among the factors the agency shall consider in determining the current and future needs of the child are the following:

(1) the child's current functioning and behaviors;

(2) the medical needs of the child;

(3) the educational needs of the child;

(4) the developmental needs of the child;

(5) the child's history and past experience;

(6) the child's religious and cultural needs;

(7) the child's connection with a community, school, and faith community;

(8) the child's interests and talents;

(9) the child's current and long-term needs regarding relationships with parents, siblings, relatives, and other caretakers;

(10) the reasonable preference of the child, if the court, or the child-placing agency in the case of a voluntary placement, deems the child to be of sufficient age to express preferences; and

(11) for an Indian child, the best interests of an Indian child as defined in section 260.755, subdivision 2a.

When placing a child in foster care or in a permanent placement based on an individualized determination of the child's needs, the agency must not use one factor in this paragraph to the exclusion of all others, and the agency shall

consider that the factors in paragraph (b) may be interrelated.

(c) Placement of a child cannot be delayed or denied based on race, color, or national origin of the foster parent or the child.

260C.511 BEST INTERESTS OF THE CHILD.

(a) The "best interests of the child" means all relevant factors to be considered and evaluated. In the case of an Indian child, best interests of the child includes best interests of an Indian child as defined in section 260.755, subdivision 2a.

(b) In making a permanency disposition order or termination of parental rights, the court must be governed by the best interests of the child, including a review of the relationship between the child and relatives and the child and other important persons with whom the child has resided or had significant contact.

260C.515 PERMANENCY DISPOSITION ORDERS.

….

Subd. 4.**Transfer of permanent legal and physical custody.**

….

(d) Another party to the permanency proceeding regarding the child may file a petition to transfer permanent legal and physical custody to a relative. The petition must include facts upon which the court can make the determinations required under paragraph (b), including suitability of the proposed custodian and, if completed, a summary of results from required background studies completed under section 245C.33 or 260C.209. If background studies have not been completed at the time of filing the petition, they must be completed and a summary of results provided to the court prior to the court granting the petition or finalizing the order according to paragraph (e). The petition must be filed no later than the date for the required admit-deny hearing under section 260C.507; or if the agency's petition is filed under section 260C.503, subdivision 2, the petition must be filed not later than 30 days prior to the trial required under section 260C.509.

Rules of Juvenile Protection Procedure – Excerpt

Rule 34.02.Permissive Intervention

Any person may be permitted to intervene as a party if the court finds that such intervention is in the best interests of the child.

APPENDIX I — MOTION OF PETITIONERS TO THE STATE OF MINNESOTA IN THE COUNTY OF MARTIN OF THE FIFTH JUDICIAL DISTRICT, DATED OCTOBER 3, 2023

STATE OF MINNESOTA
COUNTY OF MARTIN

DISTRICT COURT
FIFTH JUDICIAL DISTRICT
JUVENILE COURT DIVISION

IN THE MATTER OF THE WELFARE
OF THE CHILD(REN) OF:

LUCILLE KINGBIRD, MOTHER,

AND

ANTHONY SANDOVAL, FATHER.

Court File No. 46-JV-22-32

AMENDED NOTICE OF MOTION AND MOTION TO INTERVENE

TO: The Court and Parties of record.

Please take notice that foster parents, Nathan and Kellie Reyelts, at a hearing scheduled by the Court on October 5, 2023, 9:00 a.m., through the undersigned legal counsel, will move the Court for an Order as follows:

Appendix I

1. Joining the Reyelts as "necessary" parties to the above-captioned proceedings under Minn. R. Juv. P. P. 35 based upon their status as petitioners for legal custody, and because joinder is (a) necessary for a just and complete resolution of the matter; and (b) in the best interests of the child. The competing interests of the adult litigants and the best interests of the children will be best served by the joinder of the contested issues in one court at one time. *Stern v. Stern*, 839 N.W.2d 96, 103 (Minn. App. 2013)(citing *In re E. A. Q. D.,* 405 N.W.2d 262 (Minn. App. 1987)).

2. In the alternative, granting them permissive intervention in the above-captioned case under Minn. R. Juv. P. 34.02.

3. Granting them party status so they may file an alternate transfer of legal custody permanency petition.

4. Finding that "good cause" exists under 25 U.S.C. § 1915 (b) to place the children with foster parents due to (a) the parent's preference for placement with them and (b) the children's extraordinary attachment and medical needs.

5. Issuing a declaratory judgment that the Minnesota Indian Family Preservation Act, Minn. Stat. §§ 260.751 to 260.835, is unconstitutional under the 14th Amendment's Equal Protection clause, except as to certain provisions which may be deemed severable.

6. Issuing a declaratory judgment that the Indian Child Welfare Act, 25 U.S.C. §§ 1901 to 1963, is unconstitutional under the 5th Amendment's incorporated Equal Protection guarantees, except as to certain provisions which may be deemed severable.

7. For any such further relief the Court deems just and fair.

This motion is made upon all the files, records, and proceedings, arguments of counsel, the verified Petition to Establish Third Party Custody of Nathan and Kellie Reyelts, the Affidavit of Nathan and Kellie Reyelts, and the Memorandum of Law of the undersigned counsel.

Respectfully submitted,

DATED: October 3, 2023

FIDDLER OSBAND FLYNN LLC

/s/ *Mark D. Fiddler*
/s/ *Rachel L. Osband*
Mark D. Fiddler, #0197853
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Attorneys for the Reyelts

APPENDIX J — MEMORANDUM OF LAW OF STATE OF MINNESOTA IN THE COUNTY OF MARTIN, FIFTH JUDICIAL DISTRICT, JUVENILE COURT DIVISION, DATED SEPTEMBER 12, 2023

STATE OF MINNESOTA
COUNTY OF MARTIN

DISTRICT COURT
FIFTH JUDICIAL DISTRICT
JUVENILE COURT DIVISION

IN THE MATTER OF THE WELFARE
OF THE CHILD(REN) OF:

LUCILLE KINGBIRD, MOTHER,

AND

ANTHONY SANDOVAL, FATHER.

Court File No. 46-JV-22-32

MEMORANDUM OF LAW

STATEMENT OF FACTS[1]

The children at issue in this matter are twin brother and sister, [Kh. K.] and [Ki. K.], who were born on [redacted], in Mankato to Lucille "Lucy" Kingbird. Foster

1. Based upon the sworn affidavit of Kellie and Nathan Reyelts filed in support of this memorandum.

Parents, Nathan and Kellie Reyelts, are the only parents the twins have ever recognized and known as mom and dad.

[Kh. K.] and [Ki. K.] had extremely adverse prenatal and birth experiences resulting in significant medical and developmental needs. Lucy abused alcohol, opiates, and amphetamines during her pregnancy and did not have any prenatal care. The twins were born via an emergency C-section at 37 weeks. Both infants were diagnosed with intrauterine growth restriction as a direct result of the prenatal drug use, poor nutrition, and lack of prenatal care. [Ki. K.] was born with an initial APGAR score of zero, meaning that she was clinically dead at birth. NICU professionals were able to revive her after twenty minutes of chest compressions. They then had to keep her body cold for several days to protect her brain and organs from the consequences of her birth trauma. In addition to her encephalopathy (brain disease that alters function and/or structure), she suffered seizures and congenital cytomegalovirus (CMV). [Ki. K.] was required to stay in the NICU in Rochester for 37 days following her birth. During this time, [Ki. K.] was basically alone in an empty, dark room for much of the time due to COVID restrictions and the demands on the nursing staff. [Kh. K.] endured extreme drug withdrawals post-birth and remained in the Mankato hospital for 11 days. To say that these children are medically fragile is an understatement.

Foster Parents accepted placement of the twins knowing that they were medically fragile and at extremely high risk for significant ongoing health and developmental

needs. Both twins were discharged from the hospital to the Reyelts' care. They brought [Kh. K.] home from the hospital on April 20, 2022. He continued to exhibit physical withdrawal symptoms after discharge. The Reyeltses were able to visit [Ki. K.] in the hospital on May 7, 2022, bringing [Kh. K.] with them to be reunited with his sister. At that hospital visit, they completed all necessary education for her to be discharged nine days later, on May 16, 2022. At that time, Ms. Reyelts met with all of [Ki. K.]'s many specialists to learn about the CMV symptoms and associated treatment plan along with being educated on her seizures and seizure treatment plan. She was also taught how to dose, time, and administer her feedings and medicines. While she was learning, [Kh. K.] and [Ki. K.] were able to cuddle together. [Ki. K.] was finally discharged that day and was brought home with her brother.

Since their discharges from the hospital, the Reyeltses have dedicated themselves to the twins' care, which has required substantial time and commitment. [Ki. K.], in particular, has an extraordinary level of needs. [Ki. K.] was treated for her congenital CMV and seizures for the first six months of her life, requiring administration of medicine at a set time both morning and night as well as weekly blood draws and weight checks to monitor her vital organs and growth. [Ki. K.] required a specialized high-calorie formula to promote growth and development for her premature and low birth weight status. [Ki. K.] has also required in-home monthly physical therapy, quarterly occupational therapy, and quarterly early childhood specialist services since August 2022. [Ki. K.]

is seen regularly at the NICU Follow-Up Clinic at Mayo in Rochester to be assessed and evaluated by a multi-disciplinary team to closely track her progress as well as her ongoing risks and needs. The Reyeltses facilitate all the therapeutic and medical visits.

[Kh. K.] likewise needed close monitoring of his growth and development due to his premature status. He too required a specialized formula for both his low birth weight and his sensitive stomach. [Kh. K.] also participates in the in-home therapy with [Ki. K.].

The Reyeltses have never once waivered in their commitment to the twins despite the intensity of their needs. For the past 16 months, since placement, Faribault and Martin County Health and Human Services ("FMCHHS") workers repeatedly represented to the Reyeltses that they were the preferred long-term placement for the twins with the goal of adoption. Two ICWA Guardians ad Litem have also maintained this support for permanent placement. The twins' birth mother, Lucy, has also repeatedly stated to the Reyeltses, and workers, that she supports placement with the Reyeltses. The Reyeltses met with Lucy in person three times over the past year, and she has remained consistent in this request. Relying on these representations and Lucy's stated preference, the Reyeltses seamlessly incorporated the twins into their family. The twins call them "Mom" and "Dad." They are incredibly close with their other children, who all participate in the twins' care and play. Their favorite words are "Mom" and "Dad," and both are starting to say the other kids' names. The twins have attached to the

Reyeltses as their primary caregivers – seeking them out for reassurance, love, support, and safety. Their home is what the twins recognize as home. [Ki. K.] and [Kh. K.] have bonded fiercely with their foster siblings.

Then, suddenly, on August 1, 2023 FMCHHS social worker, Kat Kory, and her supervisor, Jackie Auringer, informed the Reyeltses that the Tribe now supports an alternate permanency plan. They were informed that now the twins are allegedly no longer "medically fragile" (without disclosing who had made that determination), Lucy's cousin, RayJean French was willing to take the twins. This would require the twins to move to the Red Lake Reservation – hours from the people they recognize as their parents, the only home they know, and all their regular providers. Ms. Auringer explained that there would be a Tribal "transition plan" where the twins would have two weekend visits with Ms. French, and one full week trial visit, all before moving permanently on September 4, 2023. Both county workers stated that they did not agree with the permanency plan but were deferring to the Tribe.

Ms. French has custody of Lucy's older daughter, [G.]. Lucy specifically stated, as recently as August 22, 2023, that she wants the twins to be permanently with the Reyeltses via a transfer of custody and that she absolutely does not want them placed with Ms. French. Lucy was shocked to hear of the new plan, as no one had informed her of it or asked for her approval. Lucy shared that the twins and [G.] are biracial and have many physical traits that align with their alleged African American heritage.

Lucy shared that she feels that [G.] has been isolated and subjected to bullying due to her biracial status while in Ms. French's care on the Red Lake Reservation. She worries about the twins being subjected to the same situation.

Now, counsel for the Tribe is requesting that there be no transition plan at all and that the twins should just be moved immediately. This plan completely ignores the reality of the twins' ongoing needs and the importance of continuity of care with their myriad providers. As detailed in the accompanying affidavit and exhibits, the twins' early adverse experiences have long-term medical, behavioral, development, and emotional consequences that cannot just be swept under the rug because of the progress the twins have shown because of the diligent care the Reyeltses have provided.

The twins have had the same in-home therapists since the time their services began, in August 2022. Wendy White is the physical therapist, Stephanie Johnson is the occupational therapist, and Jamie Haisman is the teacher/specialist. [Ki. K.] knows them well and is very comfortable with them, allowing her to fully participate in therapy. As noted above, [Ki. K.] has regular evaluations at the NICU Follow-Up Clinic every six months, with recommended additional provider visits in between. At the most recent visit on August 22, 2023, [Ki. K.] was assessed by a multidisciplinary team, including the following specialists: NICU follow-up RN, Social Worker, Speech Therapist, Pediatric Nutritionist/Dietician, and Pediatric Neurologist. [Ki. K.] continues to need a specialized calorie-dense diet. Her treating neurologist

referred her for an EEG, scheduled for September, and noted that "[s]he is at risk of developmental stagnation and delay given her history. Right now, with developmental surveillance and therapies she is continuing to make developmental progress." The speech and language evaluation resulted in a conclusion that [Ki. K.] "is at high risk for ongoing speech and language delays" and a diagnosis of "Speech/Language Delay." The assessor recommended ongoing early intervention services with home practice, regular monitoring, and re-evaluation at the Clinic in six months as well as detailed home practice protocols. Kari Johnson, LICSW, performed [Ki. K.]'s psychosocial assessment. She diagnosed [Ki. K.] with two DSM-V diagnoses: "Small For Gestational Age Newborn Without Malnourished 1000 to 1249 Grams" and "Neonatal Encephalopathy Unspecified." It was recommended that [Ki. K.] return to the NICU Follow Up Clinic in 6 months for team assessment, including a full Bayley evaluation (a comprehensive assessment tool for determining developmental delays in children).

Dr. Fine, the treating pediatric neurologist, wrote in a letter attached to the affidavit as Exhibit A that [Ki. K.] "will require ongoing close developmental surveillance with repeated evaluations by a pediatric neurologist or developmental pediatrician over the next several years," in addition to other ongoing therapies (PT, OT, and speech). Ex. A, p. 18. Dr. Fine further advised:

> Given [Ki. K.]'s history of neonatal encephalopathy, CPR at birth, seizures, and congenital infection, she is at high risk for

> seizure recurrence later in life. She should be followed regularly by a pediatric neurologist who can oversee he developmental progression as well as monitor for seizures. Currently an EEG or electroencephalogram is planned for evaluation of spells to determine if they represent seizure. [Ki. K.] will likely need repeat EEG studies in the future depending on how she is doing and if she subsequently develops epilepsy. *I highly recommend that [Ki. K.] continues with familiar physicians for continuity of care due to her complex history.*
>
> *[Ki. K.] has extraordinary physical, mental and emotional needs as well as needs for specialized treatments that are unavailable in the community where her family that meets placement preferences life.* [Ki. K.] has been making excellent progress in a supportive environment. *She is at significant risk for developmental stagnation if she does not continue to receive ongoing therapies and close monitoring of her development.* She will need to be followed regularly by a pediatric neurologist likely through childhood.

This letter was signed by the Department Chair of the NICU Follow Up Clinic, Dr. Nevenka Radakovic.

[Ki. K.] has more appointments currently scheduled. On September 29, she has an Auditory Brainstem Response (ABR) Hearing Test with Dr Emily Thompson, Audiologist

in Rochester, MN at the Mayo Clinic. On October 4, she has Audiology Testing with Dr Abigail Bross, Audiologist, at 8:45 am and a consultation with Dr Sharon Libi, ENT, at 10:30 am in Rochester at the Mayo Clinic. Ms. French was provided with the information for the 2 upcoming appointments for [Ki. K.], but never responded to the request for her attendance.

In making the request for an abrupt removal of the twins from the Reyeltses' home to the Red Lake Reservation, the Tribe has never requested information on the twins' actual current needs or diagnoses, much less addressing the significant concerns that may arise from a total disruption of caregivers and providers. Ms. French has never met the twins in person. She has never requested information on their health history or developmental needs. She has never spoken with their providers. The proposal further purposefully ignores the immensely detrimental effect on the [Ki. K.] and [Kh. K.] of suddenly eliminating their parental and sibling relationships (from the twins' perspectives), shattering their attachments and stability.

The Reyeltses therefore bring this *emergency request* because an attorney for the Red Lake Nation, Tammy Swanson, has informed FMCHHS that an abrupt change of placement is scheduled to take place this Wednesday, September 13, 2023 without any actual transition planning, input from their biological mother, or individualized assessment of the needs and best interests of the children.

Appendix J

ARGUMENT

This case is a poster child for how ICWA may be egregiously misapplied to override the best interests of children. Yet nothing in ICWA demands the unjust result proposed by the Tribe here—ripping medically fragile twins from the only home they have ever known, placing them with an unprepared stranger, and far from their caring and expert medical support community of Mayo Clinic. When Congress passed ICWA in 1978, it declared:

> that it is the policy of this Nation, ***to protect the best interests of Indian children and*** to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing assistance to Indian tribes in the operation of children and family service programs.

25 U.S.C. §1902 (emphasis added). Minnesota appellate courts, too, recognize "[T]he *paramount* concern in any child-welfare proceeding is the best interests of the child." Minn. Stat. § 260C.301, subd. 7 (2008). And Minnesota law requires that the best interests of Indian children be determined consistent with ICWA. *In re Welfare of the Children of R. A. J.*, 769 N.W.2d 297, 304 (Minn. App. 2009).

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Based on Section 1902, a majority of courts have held that the "*best interests*" of Indian children is the **paramount** focus of ICWA. *See In re Interest of Bird Head*, 331 N.W. 2d 785,791 (Neb. 1983); *Matter of Appeal in Maricopa County*, 667 P.2d 228, 233-234 (Ariz. App.1983); *In the Interest of J.R.H.*, 358 N.W.2d 311, 317 (Iowa 1984); *Matter of Adoption of D.M.J.*, 741 P.2d 1386 (Okla. 1985); *In re Adoption of K.L.R.F.*, 515 A.2d 33, 34 (Pa. Super. 1986); *Matter of Adoption of Halloway,* 732 P.2d 962, 971 (Utah 1986); *Matter of Adoption of T.R.M.,* 525 N.E.2d 298, 308 (Ind. 1988); *In re Robert T.*, 246 Cal. Rptr. 168, 175 (Cal. App 6 Dist. 1988); *In re Crystal K.*, 276 Cal. Rptr. 619, 622 (Cal. App. 3 Dist. 1990); *In re R.M.S.*,128 P.3d 783 (Colo. 2006). Even the United States Supreme Court has stated, ICWA may not be applied as a "trump card at the eleventh hour to override the mother's decision and the child's best interests." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013).

The Reyelts' detailed affidavit states a compelling example of how the twins' individualized best interests have been disregarded by the county's mistaken application of ICWA. Nothing in ICWA requires that children with special emotional and medical needs must sacrifice those needs to meet the requirements of ICWA. Indeed, if properly interpreted, ICWA provides courts with flexibility in its placement preferences to meet the child's individual best interests.

Appendix J

1. ICWA contains "good cause" exceptions designed to protect the children's best interests.

ICWA provides that Indian children should be placed into foster or adoptive placements, whenever possible, with families according to the following preferences:

> (b) Foster care or preadoptive placements; criteria; preferences
>
> Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within *reasonable proximity to his or her home, taking into account any special needs of the child*. In any foster care or preadoptive placement, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with -
>
> (i) a member of the Indian child's extended family;
>
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
>
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

25 U.S.C. § 1915 (b) (emphasis added). Under the plain language of ICWA, this Court must make the children's special needs paramount. The tribe has not offered any explanation of how an abrupt placement change is appropriate where experts from Mayo Clinic state that a change could be life threatening due to the twins' special needs. Nor does the Tribe account for the fact that placement of the twins on the Red Lake reservation is not a placement within "reasonable proximity" of the mother's home, where mother resides in Minneapolis. Moreover, the "good cause" exception allows the Court to order an *otherwise* non-compliant placement with a non-Indian foster family. The term "'good cause' was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." *In re Child of T.T.B.*, 724 N.W.2d 300, 305 (Minn. 2006).

Recently promulgated binding federal regulations define good cause as follows:

> (c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:

> (1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
>
> (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
>
> (3) The presence of a sibling attachment that can be maintained only through a particular placement;
>
> (4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live.

25 CFR 23.132.

Here, the Reyeltses argue the Court may deviate from the placement preferences under parens 1 and 4.

a. Good cause exists to deviate from the placement preferences based upon mother's wishes.

When the preferences apply, the Court may deviate from them for "good cause" where, for example, the birth parent objects to placement according to the preferences. Courts have found good cause to deviate from the

placement preferences where one parent in a voluntary termination case expressed a desire to place his or her child with a non-Indian family. *See In re Adoption of Keith M.W.*, 79 P.3d 623, 63031 (Alaska 2003) ("The superior court's reliance on Andrea's preference to have Keith adopted by the Wilsons was central to its decision and 'was an appropriate factor for the superior court to consider in its finding of good cause.'" (citation omitted)); *In the Matter of the Adoption of F.H.*, 851 P.2d 1361, 1364 (Alaska 1993) ("ICWA and the Guidelines indicate that courts may consider parental preference when determining whether there is good cause to deviate from ICWA preferences."); *In re Baby Girl A*, 230 Cal. App. 3d 1611, 1620-21, 282 Cal. Rptr. 105, 111 (1991) (noting several ways a parent's rights are greater than tribe's rights under the ICWA); *In the matter of Baby Boy Doe*, 127 Idaho 452, 461, 902 P.2d 477, 486 (1995) ("[t]he trial court did not err as a matter of law by giving weight to the mother's preference to place the child with the adoptive parents"); *In re Adoption of T.R.M.*, 525 N.E.2d 298, 313 (Ind. 1988); *In re Adoption of B.G.J.*, 281 Kan. 552, 133 P.3d 1, 10 (2006) ("good cause not to follow the ICWA statutory preferences can be based on parental preference."). *See also Adoption of M.*, 832 P.2d 518, 522 (Wash. App 1992); *Matter of Adoption of F.H.*, 851 P.2d 1361, 1364-1365 (Alaska 1993); *In the Matter of the Adoption of Bernard A.*, 77 P.3d 4, 10 (Alaska 2003); *In the Matter of B.B.A.,* 224 P.3d 1285 (Okla. Civ. App. 2009).

ICWA itself states that "[w]here appropriate, the preference of the Indian child or parent shall be considered: Provided, that where a consenting parent evidences a desire for anonymity, the court or agency shall

give weight to such desire in applying the preferences." 25 U.S.C. § 1915(c) (emphasis added). Emphasizing the importance of parental choice, in *In re N.N.E.*, 752 N.W.2d 1 (Iowa 2008), the Iowa Supreme Court struck down an Iowa state statute that precluded deviation from its state law Indian child preference provisions based on a birth parent's request to place with a non--Indian family. The court said the statute violated the parent's due process rights under the United States Constitution because "[t]he statute ***makes the rights of a tribe paramount to the rights of an Indian parent*** *or child* even where, as in this case, the parent who is the tribal member has no connection to the reservation and has not been deemed unfit to parent." 752 N.W.2d at 8-9 (emphasis added). The Iowa Supreme Court stated further that:

> The State has no right to influence [the birth mother's] decision by preventing her from choosing a family she feels is best suited to raise her child. Moreover, we do not believe the federal ICWA condones state law curtailing a parent's right in this manner. . . . [The birth mother's] fundamental right to make decisions concerning the care of her child is not lessened because she intended to terminate her [parental] rights to [her child].

Id. at 16, 17.

Consistent with the Iowa Supreme Court's ruling, the United States Supreme Court has held the Due Process Clause of the Fourteenth Amendment protects

the fundamental right of parents to make parenting decisions concerning the care, custody, and control of their children. *Troxel v. Granville,* 530 U.S. 57, 66, 120 S. Ct. 2054, 2060, 147

L. Ed. 2d 49 (2000). There, the Court held:

> [O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations … The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

442 U.S., at 602, 99 S. Ct. 2493 (alteration in original) (internal quotation marks and citations omitted). *Troxel* 530 U.S. at 68, 120 S. Ct. at 2061.

This case is no different by virtue of being a child protection matter. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are

strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Lucy Kingbird has a right to say where her twins should be placed. The Tribe's proposed placement runs roughshod over those rights.

b. Good cause to deviate exists because of the twins' "extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live." 25 CFR 23.132(c)(4).

In 2016, the Bureau of Indian Affairs promulgated binding federal regulations governing state court ICWA proceedings. The BIA stated that "Congress, through ICWA's placement preferences, and the Department, through this regulation, *continue to treat the physical, mental, and emotional needs of the Indian child as paramount. See, e.g.,* FR § 23.132(c), (d). These physical, mental, and emotional needs include retaining contact, where possible, with the Indian child's extended family, community, and Tribe. If there are circumstances in which an individual child's extraordinary physical, mental, and emotional needs could not be met through a preferred placement, then good cause may exist to deviate from those preferences. *See* FR § 23.132(c)(4)." 81

FR 38778, 38839. The dire situation of the twins plainly meets this "good cause" exception.

The question, then becomes who can testify that these needs exist? The BIA states, "The legislative history of the qualified expert witness provisions emphasizes that the qualified expert witness should have particular expertise. Congress noted that "[t]he phrase 'qualified expert witnesses' is meant to apply to expertise beyond the normal social worker qualifications." H.R Rep. No. 95-1386, at 22. In addition, a prior version of the legislation called for testimony by "qualified professional witnesses" or a "qualified physician." *See* S. Rep. No. 95-597, at 21. 81 FR 38778, 38829.

The BIA regulations do not require that a qualified expert witness (QEW) with cultural knowledge testify to establish good cause to deviate from the placement preferences. Indeed, it has even suggested that when terminating parental rights, a QEW may not be required. It states, "while a qualified expert witness should normally be required to have knowledge of Tribal social and cultural standards, *that may not be necessary if such knowledge is plainly irrelevant* to the particular circumstances at issue in the proceeding." 81 FR 38778, 38830. Such is the case here. The Court must hear from experts with knowledge of the twins' medical needs. Several experts from the Mayo Clinic can provide the Court with evidence of the children's special medical and developmental needs, and specific cultural knowledge is not relevant to the question of the medical and developmental needs.[2]

2. Although it should be noted that one of the providers, Kari Johnson, LICSW, who performed [Ki. K.]'s recent

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In the event this matter is set for an evidentiary hearing on the twins' permanent placement, the Tribe may object that it has not approved of the Reyeltses' proposed expert witnesses, who would include several medical professionals from the Mayo Clinic. See Minn. Stat. § 260.773, subd. 7 (b)(iii) (requiring "the testimony of a qualified expert *designated by the child's Tribe* and, if necessary, testimony from an expert witness who meets qualifications of subdivision 6, paragraph (d), clause (2), that supports placement outside the order of placement preferences due to extraordinary physical or emotional needs of the child that require highly specialized services")[3]. If the Tribe will stipulate that treating medical professionals from Mayo Clinic are qualified experts who can testify to the children's medical needs, then a fight over this issue becomes moot. And focus would rightly be on the children's best interests.

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psychosocial assessment at Mayo explained that her care team reached out to the Native American liaison at the Clinic and "took time to reflect on the care that the family has been able to provide patient and her brother while in their care." (**Ex. A**, p. 19).

3. Likewise, Minn. Stat. § 260.773, subd. 6 (b) demands," The local social services agency or any other party shall make diligent efforts to locate and present to the court a qualified expert witness *designated by the Indian child's tribe.* The qualifications of a qualified expert witness designated by the child's tribe are not subject to a challenge in Indian child custody proceedings."

i. If the Tribe objects to Foster Parents' witnesses as not "approved" by the Tribe, Foster Parents argue that Minn. Stat. § 260.773, subd. 7 (b)(3) is unconstitutional as a violation of the separation of powers.

If, however, the Tribe objects to Foster Parents' witnesses from Mayo as not "approved" by the Tribe, Foster Parents argue that Minn. Stat. § 260.773, subd. 7 (b)(3) is unconstitutional as it violates the separation of powers as a legislative statute encroaching on the power of the judiciary to make rules qualifying experts. The Tribe would be interfering with the Court's power to determine the manner of how witnesses are qualified, which is an exclusively judicial function. *See, e.g., Seisinger v. Siebel,* 220 Ariz. 85, 87 (holding legislature may change *substantive law* but not otherwise encroach on the power of court to establish expert qualifications under Rule 702). Accord *McDougall v. Schanz*, 461 Mich. 15, 18 (Mich. 1999)(Because Michigan Statute § 2169 (regulating medical expert testimony) and Mich. R. Evid. 702 clearly conflicted, the court had to determine whether the statute impermissibly infringed upon the court's constitutional authority to enact rules governing practice and procedure. The court concluded § 2169 was an enactment of substantive law, thus it did not impermissibly infringe the court's constitutional rule-making authority over "practice and procedure."). Here, the Minnesota Legislature failed to change any *substantive law* regarding ICWA witness qualification when it enacted a requirement that only "tribally designated" witnesses be qualified as expert

witnesses in ICWA placement matters. Indeed, it totally delegated and surrendered to the Tribe the power to designate expert witnesses—and even thwart challenges to those it did not approve without any ability of the judiciary to exercise its constitutional power to determine the manner in which witnesses are qualified.

2. The Indian Child Welfare Act and the Minnesota Indian Family Preservation Act violate the 14th Amendment's guarantee of equal protection by imposing race-based placement preferences.

This case is about a separate and unequal child welfare regime that discriminates against children and foster parents in the child welfare system on the basis of race. The Reyeltses were chosen as the permanent placement by FMCHHS and by all accounts the children have been thriving in the placement. Yet the Red Lake Band is attempting to remove the medically fragile twins and place them at the 11th hour with a virtual stranger. This removal is being proposed solely on account of the children's race, and because the Foster Parents are of a different race. The proposed new Tribal placement completely ignore the birth mother's express wishes and overrides the children's individual best interests. This case represents a violation of the simple commandment of the Equal Protection Clause, located at the end of Section 1 of the Fourteenth Amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*

U.S. Const. amend. XIV (emphasis added). Unlike the Fourteenth Amendment, the text of the Fifth Amendment does not contain an equal protection clause. But courts "employ the same test to evaluate alleged equal protection violations under the Fifth Amendment as under the Fourteenth Amendment." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

The United States Supreme Court recently upheld ICWA against constitutional attack, but on other grounds. In *Haaland v. Brackeen,* 143 S. Ct. 1609, 1616, the Court held the Indian Child Welfare Act did not exceed Congress's Article I power as that authority was plenary, and the active efforts requirement of 25 U.S.C.S. § 1912 did not violate the Tenth Amendment. Importantly, it declined to address plaintiffs' argument that ICWA violated equal protection, on standing grounds only, not on the merits. As Justice Kavanaugh wrote in a concurring opinion:

> *I join the Court's opinion in full. I write separately to emphasize that the Court today does not address or decide the equal protection issue that can arise when the Indian Child Welfare Act is applied in individual foster care*

> *or adoption proceedings. See ante, at 29, 32, n. 10. As the Court explains, the plaintiffs in this federal-court suit against federal parties lack standing to raise the equal protection issue. So the equal protection issue remains undecided.*
>
> *In my view, the equal protection issue is serious. Under the Act, a child in foster care or adoption proceedings may in some cases be denied a particular placement because of the child's race—even if the placement is otherwise determined to be in the child's best interests. And a prospective foster or adoptive parent may in some cases be denied the opportunity to foster or adopt a child because of the prospective parent's race. Those scenarios raise significant questions under bedrock equal protection principles and this Court's precedents. See Palmore v. Sidoti, 466 U. S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984).* ***Courts, including ultimately this Court, will be able to address the equal protection issue when it is properly raised by a plaintiff with standing—for example, by a prospective foster or adoptive parent or child in a case arising out of a state-court foster care or [*1662] adoption proceeding****. See ante, at 29, 32, n. 10.*

Haaland v. Brackeen, 143 S. Ct. 1609, 1661-1662 (Kavanaugh, J., concurring). This is the very scenario contemplated by Justice Kavanaugh.

The twins could be abruptly removed from Reyeltses' home on September 13 because the County assumes it has a legal *duty* to defer to the judgment of the Tribe as to the suitability of the Ms. French under Minn. Stat. § 260C.215, subd. 6 (b).[4] But this "duty" flagrantly defies equal protection standards. The premise that state agencies should abdicate decision-making about the suitability of a placement and wholly defer to the Tribe without question solely because the child is of Indian ancestry, violates equal protection.

ICWA's placement preferences, which apply to a foster, adoption, or preadoptive placement of an "Indian child," 25 U.S.C. § 1915(a)–(b), impose a naked preference for "Indian families" over families of any other race. It further puts non-Indian families who wish to adopt an "Indian child" to the burden of demonstrating by clear and convincing evidence (a higher standard than typically employed in non-ICWA cases) good cause to depart from the placement preferences. *See* Minn. Stat. § 260.771, subd. 6. An Indian family on the other hand would enjoy a categorical *presumption* that the adoption or preadoptive placement is in the child's best interests. ICWA and MIFPA's classification of Indians and non-Indians, and its discrimination against non-Indians, is based on race and

4. "In determining the suitability of a proposed placement of an Indian child, the standards to be applied must be the prevailing social and cultural standards of the Indian child's community, and the agency *shall defer to tribal judgment as to suitability of a particular home* when the tribe has intervened pursuant to the Indian Child Welfare Act." Minn. Stat. § 260C.215, subd. 6 (b) (emphasis added).

ancestry. This violates the equal protection component of the Fifth Amendment of the United States Constitution, which mandates the equal treatment of people of all races without discrimination or preference. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497, 498–99, 74 S. Ct. 693, 98 L. Ed. 884 (1954), *supplemented sub nom; Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

a. THE INDIAN CHILD WELFARE ACT AND THE MINNESOTA INDIAN FAMILY PRESERVATION ACT DISCRIMINATE ON THE BASIS OF RACE IN VIOLATION OF EQUAL PROTECTION.

At the outset of any state child-welfare or placement proceeding, a State must categorize the child as an "Indian" or a non-Indian and use the child's category to determine the substantive legal standards that will guide her placement. If she is a non-Indian, state law applies, and the state court will make a decision in accordance with an *individualized* consideration of her best interests under Minn. Stat. § 260C.212, subd. 2. If, however, she is an "Indian child," this state-law best-interests determination is supplanted by ICWA's placement preferences, 25 U.S.C. § 1915, that "push state courts, as here, to place Indian children with Indian families," *Doe v. Piper*, 165 F. Supp. 3d 789, 794 (D. Minn. 2016), in furtherance of Congress's explicitly racial vision that "Indian children" should be raised by the "Indian community." H.R. Rep. No. 95-1386, at 23. Indeed, Minnesota law goes even farther than ICWA, by making a child's best interests categorically the

same as the tribes. Minn. Stat. § 260.755, subd. 2a ("[t]he best interests of an Indian child are interwoven with the best interests of the Indian child's tribe). This separate and unequal system offends equal protection.

Just six years after ICWA's enactment in 1978, the United States Supreme Court made clear that state courts may not use racial considerations to make child-custody determinations. *See Palmore v. Sidoti*, 466 U.S. 429, 433–34, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984). ICWA's preference for placing Indian children with Indian families, and Minnesota statutes enforcing that command, are no more constitutional than the *Palmore* state court's belief that Caucasian children should be placed with Caucasian (not mixed-race) parents.

ICWA's definitions of "Indian children" and "Indian families" are racial classifications. Membership in an Indian tribe depends on lineal descent from historical tribal rolls, and in nearly all cases includes a blood quantum requirement. As the Supreme Court has recognized, "[a]ncestry can be a proxy for race," *Rice v. Cayetano*, 528 U.S. 495, 514, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000), and discrimination "solely because of … ancestry" "is racial discrimination," *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582 (1987).

It is often argued by ICWA's defenders, based on *Morton v. Mancari*, 417 U.S. 535, 553–54 & n.24, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974), that all classifications based on tribal membership are "political" in nature and subject

only to rational basis review. This cannot be sustained. The Supreme Court explicitly rejected that broad reading of *Mancari* in *Rice*, 528 U.S. at 519–20, and it implicitly rejected *Mancari's* application to ICWA when it observed that ICWA raised "equal protection concerns." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013).

Instead, *Rice* and *Mancari* together make clear that a classification based on tribal membership can be regarded as "political" only when it relates to the tribes' self-governance. Arguably, BIA's hiring preference at issue in *Mancari* related to tribal self-governance because BIA has a "sui generis" role in regulating Indian tribes as governmental units, defining tribes' powers of self-government. But ICWA's directives concerning state courts' placement of children do not bear on Indian tribes' self-governance. ICWA regulates "Indian children" even if they are not members of an Indian tribe at all. ICWA's classifications of Indian children and Indian families are based on race, not politics.

Because ICWA's classifications are based on race, this Court must apply strict scrutiny, and there is no serious argument that they can survive that most exacting standard. Whatever governmental interest defendants might articulate, ICWA and MIFPA's blunt racial preferences cannot possibly be described as narrowly tailored.

b. ICWA's Classifications of Indian Children and Indian Families Are Racial Classifications.

ICWA defines an "Indian" as "any person who is a member of an Indian tribe," and an "Indian child" as a minor that is "either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(3)-(4).

Many tribes and bands have explicit blood quantum requirements. *See* Pub. L. No. 112-157, 126 Stat. 1213 (2012) (membership in the Ysleta del sur Pueblo Tribe is based on "Indian blood"); White Earth Band of Ojibwe Const. ch. 2, art. 1. Scholars thus have concluded that tribal membership criteria overwhelmingly are defined by "lineal descent" and "blood-quantum" rules. Kirsty Gover, Kirsty Gover, *Genealogy As Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 Am. Indian L. Rev. 243, 247 (2009). "[T]he context of tribal rules that condition membership on the existence of tribal blood … shows that biology, above all else, makes a person Indian under ICWA." Solangel Maldonado, Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 Colum. J. Gender & L. 1, 40 (2008).

ICWA's definition of "Indian child" is even more explicitly based on lineal descent. It sweeps in not only children who are enrolled members of an Indian tribe,

but any "biological child of a member of an Indian tribe" who is *eligible* for tribal membership. 25 U.S.C. § 1903(4)(b) (emphasis added). As the California Court of Appeals explained, because many tribes "recognize[] as members all persons who are biologically descended from historic tribal members," "children who are related by blood to such a tribe may be claimed by the tribe, and thus made subject to the provisions of ICWA, solely on the basis of their biological heritage." *In re Bridget R.*, 41 Cal. App. 4th 1483, 49 Cal. Rptr. 2d 507, 527 (1996), *as modified on denial of reh'g* (Feb. 14, 1996).

Rice establishes that "[a]ncestry can be a proxy for race," *Rice*, 528 U.S. at 514–15U.S. at 514, and ICWA's placement preferences demonstrate that ICWA's tribal membership classification "is that proxy here." *Id.* And the Supreme Court has recognized that when a state uses an ancestral qualification to identify a "common culture" and "preserve that commonality," it is "us[ing] ancestry as a racial definition and for a racial purpose." *Rice*, 528 U.S. at 514-15. "Ancestral tracing of this sort… employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name" and is every bit as "odious to a free people whose institutions are founded upon the doctrine of equality." *Id.* at 517.

The record here reflects precisely this racial stereotyping through the defining and "essentializing"[5]

5. *See* Professor Barbara Ann Atwood's post-modern critique of ICWA's stereotyping: "The approach of the Montana court *essentializes* the young girl involved in that case such that she becomes *every* Indian child, whose interests will be

each of the twins as an "Indian child" based on race (while completely ignoring their African American descent).

In any event, *Mancari* has been effectively overruled by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). *Mancari* involved "a preference in appointment, promotion, and training" at BIA for persons that had "one-fourth or more degree Indian blood" and were "a member of a Federally recognized tribe." 417 U.S. at 553 n.24. However one characterizes a classification based on tribal membership, the blood- quantum requirement is, by definition, racial. *Rice*, 528 U.S. at 519 (*Mancari's* "classification had a racial component"); see also *Loving v. Virginia*, 388 U.S. 1, 5 n.4, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (quoting statutes defining races by blood quantum). Under *Adarand*, "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc.*, 515 U.S. at 227. Whatever exception from equal protection principles *Mancari* might have carved out for laws respecting Indian blood quantum, *Adarand* ended it, as Justice Stevens' dissent in *Adarand* recognized. *See id.* at 244–45 (Stevens, J., dissenting) (arguing that the majority's reasoning undermined the "special preferences that the National Government has provided to Native Americans"); *see also Williams v.*

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best served by removal from the only home she has known and placement with strangers on a distant reservation." Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward A New Understanding of State Court Resistance*, 51 Emory L.J. 587, 656 (2002)

Babbitt, 115 F.3d 657, 665 (9th Cir. 1997) ("If Justice Stevens is right about the logical implications of *Adarand, Mancari's* days are numbered.").

Mancari never has stood for the blanket proposition that *all* classifications based on tribal membership are political and none are "suspect racial classifications." The Supreme Court expressly disapproved that broad reading of *Mancari* in *Rice*. See 528 U.S. at 519-520; *see Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) ("We reject the notion that distinctions based on Indian or tribal status can never be racial classifications subject to strict scrutiny."). Instead, *Rice* confirms that *Mancari* established, at most, a "limited exception" that is "confined to the authority of the BIA," 528 U.S. at 520, and that, according to *Mancari* itself, is applicable only when the classification is limited to tribal members and "further[s] Indian self-government," 417 U.S. at 555. That "limited exception," "confined" to the workings of a "sui generis" agency, *Rice*, 528 U.S. at 520, cannot be stretched to encompass ICWA's classifications of Indian children and families. As the Supreme Court's recent identification of ICWA's "equal protection concerns" strongly suggests, *Adoptive Couple*, 570 U.S. at 655–56, ICWA's classifications are not subject to mere rational basis review. Strict scrutiny applies.

ICWA's defenders argue that *Rice* is inapposite because Hawaii's statute did not involve federally-recognized tribes, but the Supreme Court made clear that its holding would have been the same even if native Hawaiians were a federally-recognized tribe. In *Rice*,

the United States argued that *Mancari* "squarely held those distinctions based on the United States' unique trust relationship with indigenous people should not be equated with distinctions based on race that are prohibited by the Constitution." U.S. Br. 14, *Rice v. Cayetano*, 1999 WL 569475 (U.S. Amicus. Brief, 1999). In rejecting that argument, the Court assumed, arguendo, the proposition that Native Hawaiians were equivalent to a federally-recognized tribe, holding that "***[e]ven" if*** it "were … to" consider "native Hawaiians as tribes," the classification was impermissible. *Rice*, 528 U.S. at 519; *see also id.* at 524 (Breyer,J., concurring in result) (majority opinion "assumes without deciding that the State could 'treat Hawaiians or Native Hawaiians as tribes'").

As the Reyelts' case vividly illustrates, the placement preferences often apply to Indian children who have never resided on Indian lands – and whose birth parents have similarly not resided on Indian lands. ICWA's placement preferences are plainly not tethered to Indian self-government of tribal lands or their residents. Instead, ICWA unabashedly imposes its placement preferences in the "critical state affair[ ]" (*Rice*, 528 U.S. at 522) of state-court proceedings concerning the welfare and placement of vulnerable children. These proceedings do not touch upon "the internal affair[s] of a quasi sovereign," *id.* at 520, but instead implicate and vindicate state interests "of the highest order." *Palmore,* 466 U.S. at 433. By imposing a parallel legal regime for Indian children that establishes a preference for "Indian families" over "non-Indian families," ICWA operates to "fence out" these disfavored families from a quintessential "state affair[]." *Rice,* 528 U.S. at 522. *Rice* forbids that result.

That ICWA's classifications are based on race is powerfully confirmed by the United States Supreme Court's recent decision in *Adoptive Couple*, which recognized that ICWA raises "equal protection concerns." 570 U.S. at 656. In that case, the Court observed that if a tribal member could "play [the] ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests," then "many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA." *Id.* This, the Court recognized, "would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Id.* at 655–56. A more "eleventh hour" application of the ICWA trump card could not be imagined than in the case at bar.

CONCLUSION

Foster parents Kellie and Nathan Reyelts respectfully request the Court grant their motion to intervene and stay the imminent change of placement proposed by Red Lake Nation and blindly acquiesced to by FMCHHS. They only request to be heard at an evidentiary hearing to determine whether placement of the twins with them is in *the children's* best interests. They have presented herein a substantial case on the merits that good cause exceptions exist to deviate from ICWA's placement preferences based on both the mother's wishes and the twins' serious medical needs. They also argue the Court should issue a declaratory judgment that finds MIFPA and ICWA unconstitutional under the Equal Protection Clause.

Appendix J

The 14th Amendment's language could not be simpler, or more majestic:

No State shall…deny to any person within its jurisdiction the equal protection of the laws. The Reyeltses only ask this Court to make that commandment mean what it says. Under any fair reading of the non-ICWA statutory best interest factors applied to every other non-Indian child, placement with the Reyelts in in the children's best interests and such placement should be ordered. To the extent that ICWA and MIFPA command a contrary result, those laws must be struck down.

Separate child welfare laws for children of Indian descent like [Ki. K.] and [Kh. K.] are, like separate schools, inherently unequal. *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 495, 74 S. Ct. 686, 692, 98 L. Ed. 873 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955). This separateness must be banned.

Between the seriousness of the issues presented; the high risk of severe detrimental consequences of an abrupt change of placement on the twins' medical, developmental and emotional health; the lack of time for birth mother to submit her position on the proposed move, and the lack of any serious safety concern by the County and Tribe to support sudden removal, the Court has more than ample grounds to justify a stay pending an evidentiary hearing. The Reyeltses simply ask that the Court set the matter on for a motion hearing with a stay of placement in place. If after hearing the Court finds a question of fact exists as

to the twins' best interests, an evidentiary hearing should be scheduled at which the Reyeltses have party status.

Respectfully submitted,

DATED:
September 12, 2023

Fiddler Osband Flynn LLC.

/s/ *Mark D. Fiddler*
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Attorneys for Foster Parents

APPENDIX K — MOTION OF PETITIONERS TO THE STATE OF MINNESOTA IN THE COUNTY OF MARTIN OF THE FIFTH JUDICIAL DISTRICT COURT, DATED SEPTEMBER 12, 2023

STATE OF MINNESOTA
COUNTY OF MARTIN

DISTRICT COURT
FIFTH JUDICIAL DISTRICT
JUVENILE COURT DIVISION

IN THE MATTER OF THE WELFARE
OF THE CHILD(REN) OF:

LUCILLE KINGBIRD, MOTHER,

AND

ANTHONY SANDOVAL, FATHER.

Court File No. 46-JV-22-32

**NOTICE OF MOTION AND
EMERGENCY MOTION
TO INTERVENE AND FOR
STAY CHANGE OF PLACEMENT**

TO: The Court and Parties of record.

Please take notice that foster parents, Nathan and Kellie Reyelts, at a hearing yet to be scheduled by the Court, through the undersigned legal counsel, will move the Court for an Order as follows:

1. Granting them permissive intervention in the above-captioned case under Minn. R. Juv. P. 34.02.

2. Granting them party status so they may file an alternate transfer of legal custody permanency petition.

3. **Immediately and upon an ex parte basis staying the County and Red Lake Nation plan to change in placement at 10:00 a.m., Wednesday, September 13, 2023 until such time that foster parents may be heard.**

4. Finding that "good cause" exists under 25 U.S.C. § 1915 (b) to place the children with foster parents due to (a) the parent's preference for placement with them and (b) the children's extraordinary medical needs.

5. Issuing a declaratory judgment that the Minnesota Indian Family Preservation Act , Minn. Stat. §§ 260.751 to 260.835, is unconstitutional under the 14th Amendment's Equal Protection clause, except as to certain provisions which may be deemed severable.

6. Issuing a declaratory judgment that the Indian Child Welfare Act, 25 U.S.C. §§ 1901 to 1963, is unconstitutional under the 5th Amendment's incorporated Equal Protection guarantees, except as to certain provisions which may be deemed severable.

7. For any such further relief the Court deems just and fair.

This motion is made upon all the files, records, and proceedings, the Affidavit of Nathan and Kellie Reyelts, and the Memorandum of Law of the undersigned counsel.

Respectfully submitted,

DATED: September 12, 2023

FIDDLER OSBAND FLYNN LLC

/s/ *Mark D. Fiddler*
/s/ *Rachel L. Osband*

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Attorneys for the Reyelts

APPENDIX L — EXHIBIT B TO AFFIDAVIT OF PETITIONERS, MARTIN COUNTY ATTORNEY EMAIL, DATED AUGUST 18, 2023

Exhibit B

August 18, 2023 at 12:30 PM

Amanda HeinrichsMilburn

RE: Letters for RaeJean

To: kelliereyelts@gmail.com Reyelts <kelliereyelts@gmail.com> & 4 more

Hi Kellie!

You are reading that correctly, however it is unfortunately not that simple. In the legal word, words like "may" are very flimsy and ICWNMIFPA des not contain the most clear language. When referencing deviating from placement preference, ICWA states: Deviation from following placement preferences exists only if there is *good cause,* and the good cause standard is applied" "Consideration should be given to Indian children or their parents' preferred placement, **but not the sole consideration** when contemplating foster care or pre-adoptive placements. Tribal input in these decisions should be given consideration, as well. (emphasis added)." "Placements cannot depart from the preferences based on socioeconomic status of any placement relative to another placement; also based solely on ordinary bonding or attachment that flowed from time spent in a nonpreferred

placement made in violation of ICWA". Indian children's tribal order of preference by resolution, public acts, records or judicial proceedings must be followed by agencies or court effecting placement as long as a placement is the least restrictive setting appropriate to particular needs of a child. [25 U.S.C. § 1915(c)].

It is also necessary for us to abide by the best interest of the Children. Minn. Stat.§ 260.755, subd. 2(a). provides "Best interests of an Indian child" means compliance with the Indian Child·Welfare Act and the Minnesota Indian Family Preservation Act to preserve and maintain an Indian child's family. The best interests of an Indian child support the child's sense of belonging to family, extended family, and tribe. The best interests of an Indian child are interwoven with the best interests of the Indian child's tribe"

Prior to July 31, the tribe and the GAL had indicated to FMCHS that they supported you as the permanency option. Since July 31, 2023, the tribe has made it clear that the permanency option is Rayjean French. The tribe gave FMCHS no indication prior to July 31 that this would happen. The tribe has jurisdiction and at any point can pull this case into tribal court. FMCHs is attempting to work with Red Lake Nation to ensure the best interests of the children are met. According to ICWA/MIFPA and Minnesota statutes, the children's best interest are interwoven with the best interest of their tribe, and the tribe has indicated it is in the tribe's best interest for the children to be placed in the home of their half-sister and relative tribal member.

Please let me know if I can answer further clarifying questions of ICWA/MIFPA. Thank you,

Amanda

AMANDA HEINRICHS-MILBURN
Assistant County Attorney
Martin County Attorney's Office
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APPENDIX M — EXHIBIT E TO AFFIDAVIT OF PETITIONERS, NATIVE AMERICAN CULTURAL PLAN, REDACTED

EXHIBIT E

NATIVE AMERICAN CULTURAL PLAN

Names, birthdates, and address of prospective custodial parents:

Nathan and Kellie Reyelts
Nathan [redacted], Kellie [redacted]
[redacted] Fairmont, MN 56031

Name and birthdate of children:

[Ki. K.] [redacted]
[Kh. K.] [redacted]

Name of children's Tribe and address:

Red Lake Nation
15484 Migizi Drive
Red Lake, MN 56671

1. **How will you talk to the children about their biological family?**

The twins will know the story of their biological family in an open and honest manner at an age appropriate level. Currently, we refer to their birth mom as "Bama Lucy" and speak of her often. We have a picture of Lucy holding

the twins printed in their rooms. She will always be spoken about in a positive light. The children will know that if love was enough to stop addiction, there would be no addiction. Lucy loves them, and is so good with them on their visits. She notices the small details in their features, she adores them, and enjoys taking lots of photos of them. We have saved many pictures of Lucy, along with their supposed Dad, and will create an album for them.

2. How will you develop a plan to maintain contact with the children's Tribe?

Red Lake Nation has a well updated website with easy to find contact information. It includes addresses, phone numbers and emails, up to date current events and proposed referendums. They have a well equipped human service program. We have subscribed to multiple Red Lake Facebook groups to stay up to date on events and community engagement matters and activities (Red Lake Chit Chat, Red Lake Nation Pow Wows, Red Lake Nation Community Engagement, etc.) We will also stay up to date on current news via the Red Lake Nation Newspaper and WRLN Red Lake Nation Radio. We would hope to be assigned a cultural advisor or mentor from the Anishinaabe community and develop a close working relationship with them. Nathan would love to be able to volunteer with the Red Lake health services on an annual basis if possible.

3. How will you develop a plan to maintain contact with the child's extended family and siblings:

Family is at the heart of all we do. We would love to obtain contact information with their extended family so that we could visit when we attend Pow Wows, cultural training, or other events. As we have provided foster care to the twins, we have made it known to the county that Lucy's family is always welcome to visit our home, call, or text at any time. The twins will know that they are loved by two families. We would love to establish regular gatherings with relatives. Social media and e-mail would allow for easily staying up to date with each other's families. We have experience with open adoptions in our extended family and have seen first hand what a beautiful relationship can be built between both the adoptive and the extended birth families.

4. What are your plans for learning the children's cultural history, traditions, and values?

While meeting with their birth mom, Lucy, we inquired about what traditions and cultural practices she would like our family to start doing with the twins. Her only request was to practice smudging. We quickly inquired about this to their ICWQ Guardian Ad Litem (GAL) as Lucy was not able to explain it to us. We learned some from the GAL, and quickly bought what was needed and asked the twins tribal representative to teach us more and perform this sacred ritual for the twins at our home. Since that time we have practiced this ritual on a regular basis.

We would hope to introduce them to the Ojibwe language as early and often as possible. So far, we have been listening to words and recordings on ojibwe.net. In the future, we would seek out a paid tutor to help them further their language skill.

The Red Lake Nation website has a written history dating back to the 17th century. We have read all the history written on their website. There are several Culture and Heritage centers throughout MN that we will visit.

As stated above, we would hope to be assigned a cultural advisor or mentor from the Anishinaabe community and develop a close working relationship with them so that our entire family can learn and grow.

Red Lake Ombimindwaa offers person-centered cultural resources and services that we would utilize. According to their pamphlet, they are "intergenerational services rooted in Anishinaabe worldview, language, knowledge, history, teachings, and technology"...that equip learners with "a unique set of skills and qualifications that emphasize Anishinaabe way of life."

5. **How do you plan to integrate your family's cultural traditions with that of the children's culture?**

The seven grandfather teachings of the Anishinaabe family are: love, truth, honesty, bravery, wisdom, respect, and humility. These are important values already in our home and will continue to be taught to all our children.

Appendix M

Our family is very close with both sides of our extended family and we gather together as a family unit often. We share stories and are able to laugh and learn from our past experiences. We have explored our families ancestry and have fun going back and tracing our relatives and their traditions and finding ways that stories, songs, and values have been passed along from generation to generation. Family, culture, and traditions will continue to be valued from each family member.

6. What type of cultural activities do you hope to share with your child?

In the sixteen months that the twins have lived with us, we have already immersed them into many cultural activities. For example, we read stories, try a variety of foods, listen to songs of many genres/languages, listen to drumming, watched Pow Wows online, attended large family reunions, played all sorts of musical instruments, vacationed, visited a museum, planted and harvested garden produce and flowers, acted out plays where the twins were included, danced, made crafts with their hand and foot prints, and gone to many live theater shows, musicals, and concerts. We are an active family that loves to learn, be together, and have fun! In the future we would love to attend Pow Wows in person, get them involved in a drum group, teach them native crafts, learn to make native food dishes, and any other activities that they show interest in.

7. How will cultural traditions be a part of your way of life rather than a one-time event?

Our family spends time in nature and has respect for the earth and all its creatures. We live on 33 beautiful acres in southern MN. Over 25 of these acres have been restored back to native trees, grasses, and pollinator plants. There are many walking paths all throughout the prairie and we work very hard to maintain this area. Our property includes a small wetland and a large access to Sager Lake where we can fish, canoe, kayak, and enjoy all that nature has to offer. We raise honeybees and extract the honey, have a 3200 sq ft garden where we grow and harvest vegetables to be enjoyed all year long (as well as some to share) and raise chickens for their eggs. Our passion is to live a healthy and harmonious way of life. We take care of our bodies, we love to learn, and are passionate about teaching others and sharing our gifts. We find that our way of living, learning, and caring for creation mimics the values of the Ojibwe people. We are spiritual beings and enjoy attending church each week. Nathan is a physician assistant and is passionate about helping others find healing through functional medical practices.

8. What are your plans for teaching your children their cultural history, traditions, and values through the different stages of the children's development?

As stated above, the twins are already immersed in learning their cultural background as much as age appropriate. While they may not understand or grasp it

all, they love dancing to the drums and music, watching the Pow Wows, reading books, and playing musical instruments.

As they grow older, we will utilize our cultural mentor, attend family gatherings where they will learn traditions and values that may not have been learned from our other resources. Our family is excited and passionate about growing and learning with them!

9. How will you deal with your child's Indian-identity when he/she becomes a teenager?

Teenages want to fit in, they want to know they have purpose and know they are valued and are important. The twin's Indian-identity will not be "dealt with" when they become a teenager, rather it will be a part of who they are before they even reach that age. Our desire is for them to have a strong sense of belonging to their history and culture, be proud of their traditions, and confident in who they are. Hopefully we will be able to maintain a relationship with our cultural mentor, along with biological relatives, who will pour into their lives and encourage and uplift them during their teenage years.

10. How will you prepare your children to appropriately deal with any prejudice they may experience?

The twins will have a strong support system both within our immediate and extended families, along with friend groups. Race, and the harmful effects of racism are

something that we will talk about and strategize with the kids from an early age. We will teach them age appropriate ways to handle potential discrimination. During the preschool years they will be taught right and wrong and learn about fairness. They will learn to love everyone. During the school-age years, we may use practical examples or role playing to help increase their empathy and awareness along with teaching them to stand up for others. During the pre-teen and teen years, the topics that we discuss could get a lot tougher, but applying the seven grandfather teachings of love, truth, honesty, bravery, wisdom, respect, and humility, will help us brainstorm and get through tough situations. We will be a safe place to share feelings and be eager to listen. Counseling will always be available if needed or wanted.