

No. 25-1287

IN THE
Supreme Court of the United States

N. R., *et al.*,

Petitioners,

v.

KEITH M. ELLISON, ATTORNEY GENERAL
OF MINNESOTA, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondents ask this Court to deny the petition as a “nothing-to-see-here” matter of state procedural law. In reality, the state courts here deployed “[n]ovel[] ... procedural requirements” in a transparent effort “to thwart review in this Court applied for by [parties] ... seek[ing] vindication in state courts of their federal constitutional rights.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958). Petitioners here have standing to raise their federal equal-protection challenge to ICWA/MIFPA under *Haaland v. Brackeen*, 599 U.S. 255 (2023); their federal equal-protection challenge warrants review, as in *Brackeen*; and the Minnesota Supreme Court’s decision not to reach their challenge violated Petitioners’ First Amendment and Due Process rights.

I. This Court granted review in *Brackeen* but did not resolve whether ICWA violates the Equal Protection Clause, and that question remains worthy of review.

The issue presented here was already ripe for review in *Brackeen*. The second and third questions presented there concerned a “serious” equal-protection challenge to ICWA.¹ 599 U.S. at 333-34 (Kavanaugh, J., concurring); *see also Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013) (observing that ICWA raises “equal protection concerns”). But while the *Brackeen* majority did not reach the merits of this issue, due to lack of standing, it clearly contemplated resolving it in a future case: “[o]f course, the individual petitioners can challenge ICWA’s

1. Cert. Petition, *Haaland v. Brackeen*, No. 18-11479, Sept. 3, 2021, *available on docket*.

constitutionality in state court.” *Id.* at 294 n.10. That is precisely what Petitioners did here.

The *Brackeen* petitioners lacked standing because, although injured by ICWA, they couldn’t have their injury redressed. *Id.* at 292. Here, the situation is different. Petitioners are non-“Indians” who were denied custody in state-court proceedings due to ICWA. They have thus suffered the *Brackeen* injury, and *can* obtain redress, because this Court can reverse and require the state courts to provide them with fair process, untainted by racial discrimination.

The equal protection issue was certworthy three years ago, and remains so. The fractured Fifth Circuit *en banc* opinion in *Brackeen* speaks for itself—indeed, that court affirmed in part on the equal protection issue, by an equally divided court. *See Brackeen v. Haaland*, 994 F.3d 249, 268 (5th Cir. 2021) (*en banc*). There’s also an entrenched division of authority among state courts. *See* Pet.33. And the state-court decisions Respondents rely on either predate, or fail to grapple with, this Court’s modern equal protection decisions, such as *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007),² or *Students for Fair Admissions v. President & Fellows of Harvard*, 143 S.Ct. 2141 (2023).³

2. “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Id.* at 748.

3. “Eliminating racial discrimination means eliminating *all of it* ... [T]he Equal Protection Clause ... is ‘universal in [its] application.’” *Id.* at 2147 (emphasis added).

Meanwhile, lower courts remain hopelessly confused about the meaning of *Morton v. Mancari*, 417 U.S. 535 (1974), notwithstanding the guidance provided by *Rice v. Cayatano*, 528 U.S. 495, 515, 522 (2000) (*Mancari* does not permit states to “single[] out [for unfavorable treatment] ‘identifiable classes of persons ... solely because of their ancestry or ethnic characteristics’.”). *Mancari*’s so-called “political distinction” test has been stretched to the breaking point in the ICWA context, and this Court’s intervention is needed to clarify its scope. Compare, e.g., *Williams v. Babbitt*, 115 F.3d 657, 663-65 (9th Cir. 1997) (finding *Mancari* limited) with *United States v. Garrett*, 122 F. App’x 628, 631-32 (4th Cir. 2005) (casting doubt on *Williams*), and *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 730 (App. 2001) (relying on *Williams* to conclude that “child custody or dependency proceedings [do not] involve uniquely Native American concerns” and thus fall outside of *Mancari*).

Resolving the relationship between equal protection and *Mancari* is crucial. Indian preferences *must* be grounded in a sounder doctrinal footing, one that sets appropriate limits on Congress’s power to legislate with regard to Indians. The future of tribal sovereignty depends on it.

II. Petitioners have suffered the *Brackeen* injury—and declaring ICWA/MIFPA unconstitutional would redress that injury.

A. Petitioners have suffered an injury this Court can redress.

Respondents are right that “the most [Petitioners] would win [here] is a remand to reconsider the intervention under the [color-blind] best-interests analysis.” Opp.2. That is exactly what they are *entitled* to, and what they are asking for: a fair opportunity to participate in the proceedings, free from racial discrimination. *See Brackeen* 599 U.S. at 292. Petitioners are *not* required to show that declaring ICWA/MIFPA unconstitutional would necessarily result in them obtaining custody. *See Northeastern Chapter of Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993)) (“The ‘injury in fact’ in an equal protection case of this variety is the denial of equal treatment ... not the ultimate inability to obtain the benefit”).

Nor are they here required to show that the relief they seek would “completely” redress their injury; “it’s enough if the desired relief would lessen it.” *Inclusive Communities Project, Inc. v. Dep’t of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019). Taking ICWA/MIFPA’s nearly dispositive thumb off the scale in favor of “Indian” custodians would give Petitioners’ custody efforts at least a fighting chance. That’s all that’s required.

Notably, Respondents don’t dispute that under *Brackeen*, “[t]he racial discrimination” caused by ICWA/MIFPA—under which Petitioners must compete

“on unequal footing” in the custody case involving the twins—“counts as an Article III injury.” 599 U.S. at 292 (quotation omitted). Respondents’ silence in that regard is a tacit acknowledgment that Petitioners *do* have the same injury the *Brackeen* Court recognized as satisfying Article III standing requirements.

Nor can there be any doubt of that. After all, when the County told Petitioners why the twins were being taken away from them—the only family they had ever known—it said it was because of ICWA/MIFPA. Pet. App.314a. In particular, it cited MIFPA’s best-interests-of-the-“*Indian*-child” standard: “[T]he 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.” *Id.*

That standard literally draws a color line. *See* Pet.19-21. MIFPA explicitly creates two different best-interest standards. The first applies to children outside the biological category of “Indian child,” and it is individualized; it focuses on the *particular* child’s needs in her *own, specific* circumstances. Minn. Stat. § 260C.212, subd. 2(a)-(b). The second is exclusively for “Indian children”—a category defined by biological ancestry—and it imposes a different best-interest test, which says the child’s needs are *not* paramount, the way it is for other children; instead, “Indian” children’s interests are *conclusively presumed* to be bound up with the interests of the tribe. *Id.* § 260.755, subd. 2a.

And here, the County expressly relied on that when removing the children from Petitioners’ care, because

those laws require different (i.e., *less*) protection for “Indian” children compared with non-“Indian” children. That’s a racial- discrimination injury under *Brackeen*.

B. The statute giving relatives “consideration” in placement decisions does not negate Petitioners’ injury.

Respondents assert that, even if ICWA/MIFPA were declared invalid, Minnesota law would still result in the same outcome, i.e., placement of the twins in their grandmother’s custody, “because she is a member of their extended family.” Opp.19. That, they claim, shows Petitioners were not really injured by ICWA/MIFPA.

That is not true. While placement decisions under non-ICWA, non-MIFPA state law would indeed give the twins’ grandmother first “consider[ation],” *see* Minn. Stat. § 260C.212, subd. 2(a)(1), that *consideration* is *not* conclusive, and Petitioners would—prior to any final custody decision—have an opportunity to prove that placement with them is more aligned with the children’s individual best interests. *See id.*, subd 2(a)(2). Under that non-discriminatory *consideration* rule, the grandmother would only prevail if she and Petitioners were “equally qualified.” *See Welfare of Child. of M.L.S.*, 964 N.W.2d 441, 449 (Minn. App. 2021) (citation omitted).

But under ICWA/MIFPA’s discriminatory rules—which include placement preferences that *do not allow* courts consider non-“Indian” custodians of “Indian children” on equal footing with “Indian” custodians, *cf. Brackeen*, 599 U.S. at 292—the state places a virtually dispositive thumb on the scale in favor of “Indian”

custodians. This is accomplished by, among other things, race-based placement preferences and the separate-and-unequal best-interests-of-the-“*Indian-child*” standard, which jettisons the *individualized* best-interests rule and instead conclusively presumes that “Indian” children’s interests are “interwoven” with those of the tribe. Minn. Stat. § 260.755, subd. 2a.⁴

In other words, if Minnesota’s ordinary, non-discriminatory best-interests standard were applied here, Petitioners’ non-“Indian” race would not be counted against them, and the twins would be protected by an assessment of their particular needs, *see* Minn. Stat. § 260C.212, subd. 2(a)—as well as by state law that recognizes that “foster families” are statutory relatives entitled to side-by-side consideration with blood relatives, *see M.L.S.*, 964 N.W.2d at 450 n.3, because they are “*important friend[s] of the child,*” *Welfare of Child of M.K.B.*, No. A24-1670, 2025 WL 894649, at *3 n.4 (Minn. Ct. App. Mar. 24, 2025) (quoting Minn. Stat. § 260C.007, subd. 27). Only if blood relatives were equally or more qualified could they prevail in a custody dispute. *See M.L.S.*, 964 N.W.2d at 449. But the reverse is true under ICWA/MIFPA. Under those statutes, the “consideration” is transformed into a conclusive presumption, and Petitioners, who are non-“Indian,” are thus “plac[ed] ... on ‘[un]equal footing’” because of their race. *Brackeen*, 599 U.S. at 292.

4. This Court said in *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972) that “[p]rocedure by presumption is always cheaper and easier than individualized determination. But when [it] ... forecloses the determinative issues of competence and care ... it needlessly risks running roughshod over the important interests of both parent and child.” How much worse when that presumption is race-based?

Since a “colorblind standard” would be far more equitable for Petitioners, *Students for Fair Admissions*, 600 U.S. at 210, declaring ICWA/MIFPA unconstitutional would therefore redress Petitioners’ injury. *See further* Pet.18-19.

III. The First-Amendment-violating exclusion of Petitioners is not an adequate, independent state-law ground for refusing to reach the equal-protection challenge.

Respondents’ adequate-independent-state-law arguments ignore the federal First Amendment and due-process issues. Opp.9-14. The court below refused to reach Petitioners’ equal-protection challenge *because* it affirmed the unconstitutional exclusion of Petitioners from the child-protection proceeding. Pet.App.20a. The trial court excluded Petitioners in part *because* they “motioned this Court to find ICWA and MIFPA unconstitutional,” Pet. App.76a, ¶50.ii.C—which violated the First Amendment and Due Process Clause, *see* Pet.34—and the state Supreme Court affirmed that ruling. So although denials of intervention are usually matters of state court discretion, the basis for denial here was inextricably bound up in violations of Petitioners’ federal constitutional rights. This Court should not allow state courts to so easily insulate their decisions from this Court’s review.

In *Cruz v. Arizona*, 598 U.S. 17, 25-26 (2023), this Court reiterated that a state-law procedural ruling is only adequate if it is “firmly established and regularly followed”—not where it is used in a “novel” way that “disregards” federal constitutional rights and renders it “impossible” for a party “to obtain relief” under federal

law. *Id.* at 28-29 (citations omitted). When a state court “adopt[s] a novel and unforeseeable” procedural rule “that lacks fair or substantial support in prior state law,” with the consequence of thwarting federal review of federal issues, the state-law decision is neither adequate nor independent. *Id.* at 30-31 (cleaned up).

This case is far more egregious than *Cruz*, since here, the state courts violated the First Amendment and Due Process, even aside from the merits of Petitioners’ ICWA/MIFPA claims. To penalize a party for having the effrontery to assert constitutional arguments in court—arguments several justices of this and other courts have actually endorsed—is an extraordinary violation of constitutional norms.

Respondents are right that such a step appears to be unprecedented. Opp.20-22.⁵ But that doesn’t insulate it from review. That the District Court inferred, from Petitioners’ constitutional challenge, that they’re culturally unfit custodians Pet.App.76a, ¶50.ii.C, despite their detailed culture plan to the contrary, Pet.App.316a-323a, cannot give the ruling a pass.⁶

5. “[T]he less support exists for a constitutional claim, the less likely it is that the claim has been raised or taken seriously before, and hence the less likely that this Court has previously rejected it. If petitioner should seek reversal of his sentence because two jurors were wearing green shirts, it would be impossible to say anything against the claim except that there is nothing to be said *for* it.” *McKoy v. North Carolina*, 494 U.S. 433, 466-67 (1990) (Scalia, J., dissenting).

6. Respondents’ argument that the District Court had discretion to disregard Petitioners’ culture plan, Opp.26, is contrary to black-letter Minnesota law. “In determining whether

If it could, state courts could *always* thwart federal constitutional rights by concluding that raising such arguments in the first place renders the litigant unfit to participate in the case. That concern is especially vital here since *Brackeen* expressly contemplated state-court review of ICWA’s constitutionality. 599 U.S. at 294 n.10.

Respondents argue that the First Amendment issue is unimportant. Opp. 22. Nonsense. The 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.” *Duryea v. Guarnieri*, 564 U.S. 379, 397 (2011). Punishing a party for raising non-frivolous legal claims is unconstitutional. *Herring v. New York*, 422 U.S. 853, 860 (1975); *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).

Respondents’ effort to defend the constitutionality of that punishment, Opp.23-28, simply talks around the issue, while ignoring it. Whether Petitioners had a “liberty interest in the state proceeding,” Opp.23, has nothing to do with whether they had a First Amendment right to petition for redress or a Due Process right to have their arguments fairly adjudicated.

This was no mere consideration of would-be custodians’ “attitudes and inclinations on subjects like medical care.”

intervention is proper, the court must accept the allegations in the pleadings as true, unless they are frivolous on their face.” *Miller v. Miller*, 953 N.W.2d 489, 494 (Minn. 2021).

Opp.25 (cleaned up). The state court here drew an adverse inference regarding Petitioners' fitness as custodians—and their ability even to participate in the judicial process—based on the content and viewpoint of their legal arguments. It is difficult to imagine a more blatant offense to Petitioners' First Amendment rights. Pet.25.

Nor is Respondents' defense of the lower court's harmless-error analysis persuasive. Opp.25-26. They cite the District Court's finding that Petitioners' "strong attachment" to the twins made them "bias[ed]," because they argued that they would be the best parents for the twins. *Id.* But *all* custody disputes are between people who believe that placing children in their custody is in the children's best interests.

Finally, Respondents do not meaningfully dispute the various ways in which the Minnesota Supreme Court departed from past practice. *Contrast* Pet.28-32 *with* Opp.9-14. For example, they ignore the fact that, just four years ago, that court refused to vacate a Court of Appeals opinion "on the merits as to issues that [it] did not address"—citing the absence of precedent for doing so, *Justice v. Marvel, LLC*, 979 N.W.2d 894, 903 n.9 (Minn. 2022)—and then proceeded to do exactly that in this case, even while *acknowledging* that "we do not address appellants' equal protection arguments." Pet.App.20a.

A state-law ground is inadequate when it's "merely a device to prevent a review of ... [a] federal ground." *Cruz*, 598 U.S. at 26 (quotation omitted). There was no reason for the court below to depart from its recently reaffirmed practice *unless* it was seeking to thwart this Court's review of ICWA/MIFPA's constitutionality. We *know* that

at least one justice had that in mind, based on comments made during oral argument. *See* Pet.26 & nn.17-18.⁷

Thus, vacated or not, this Court may review (and reverse) the Court of Appeals’ decision that ICWA is constitutional. Pet.App.110a, 115a-127a. That the state Supreme Court manufactured a state-law rationalization for avoiding weighing in on that issue cannot thwart this Court’s review of ICWA’s “equal protection concerns,” *Adoptive Couple*, 570 U.S. at 656—concerns that have been ripe for review for years, and were not resolved in *Brackeen* only due to a standing defect that is not present here.

7. Respondents’ argument that the justice’s questions reflected concern that Petitioners’ constitutional challenge was contrary to “what is best for these children,” Opp. 27, just proves Petitioners’ point.

CONCLUSION

The petition should be *granted*.

Respectfully submitted,

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