PETITION FOR WRIT OF PROHIBITION

IN THE COURT OF APPEALS
STATE OF MINNESOTA

CASE TITLE:

In re Z.R. and L.R., adoptive parents, M.P. and A.F., Sr., birth parents, and Bethany Christian Services, a private child-placing agency, Petitioners, In re Petition of Z.R. and L.R. to adopt A.F., Jr.	TRIAL COURT CASE NO. 27-JV-FA-17-117 APPELLATE COURT CASE NO._____

TO: Clerk of the Appellate Courts.

Petitioners—adoptive parents Z.R. and L.R.; birth parents M.P. and A.J.F. Sr.; and Bethany Christian Services, a private child-placing agency, Minn. Stat. § 260.755, subd. 17—all jointly request a writ of prohibition, or in the alternative, a writ of mandamus, restraining the Hennepin County District Court ("District Court" or "trial court") from enforcing its orders of October 16 and 19, 2017 ("October Orders[1]"), in the case of *In re A.J.F. Jr.*, Hennepin County Court File No. 27-

[1] Addendum ("A") 1–11.

JV-FA-17-117, and alternatively mandating the trial court to finalize the adoption of Junior by Z.R. and L.R.

Petitioners also request that this Court consider this Petition as an emergency under Minn. R. Civ. App. P. 121 and expedite consideration of this proceeding because a good cause hearing is currently scheduled for December 18, 2017, and the usual writ process may not be completed in time to prohibit the harm.

Statement of Facts
Necessary to Understanding the Issues Presented

The facts are summarized in the trial court's opinion at ¶¶ 1–22, A.1–4. As relevant here, A.J.F. Jr., born on October 21, 2016, was placed by the birth mother M.P. in a "voluntary foster care placement" with Bethany Christian Services. [2]*See* Minn. Stat. § 260.765.

A.J.F., Jr., has remained in the care of adoptive parents Z.R. and L.R. since mid-December, 2016[3]. In February 2017, birth parents M.P. and A.J.F. Sr. executed a consent to the adoption of Junior by the adoptive parents, Z.R. and L.R.[4] The consents were executed at a recorded hearing in Hennepin County before Judge David Piper. *Id.* Those consents were filed into a pending adoption matter filed by

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2 A.1–2, ¶¶ 1–3.
3 A.2, ¶ 5.
4 A.2–3, ¶ 7.

Z.R. and L.R. in Meeker County. *Id.* A final adoption hearing was scheduled for April 17, 2017. *Id.*

At the time the birth parents executed the voluntary consents (February 2017), birth mother M.P. was an enrolled member of the Red Cliff Band of Lake Superior Chippewa Indians ("Red Cliff" or "Tribe")[5]. She dis-enrolled from the tribe in July 2017, while this case was pending in the trial court.[6] Birth father A.J.F., Sr., has never been an enrolled member of any federally-recognized tribe.[7] This is significant because the federal Indian Child Welfare Act ("ICWA") defines an "Indian child" as an "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*." 25 U.S.C. § 1903(4) (emphasis added). Junior has never been enrolled in any federally-recognized tribe, but at the time the consents were executed in February 2017, he was apparently "eligible for membership" in Red Cliff and was at that time the biological child of a tribal "member"—birth mother M.P.[8]

As a consequence of his mother's decision to dis-enroll, Junior is not now the biological child of a member of a tribe, and was not at the time of the trial

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5 A.3–4, ¶ 17.
6 A.2–4, ¶¶ 6, 17.
7 A.2, ¶ 6.
8 A.2, ¶ 6.

court's decision (October 2017), although Red Cliff claims he remained "eligible for enrollment."[9] In other words, after birth mother dis-enrolled, Junior ceased to be an "Indian child" within the meaning of ICWA.

Yet the trial court ruled that he remained an "Indian child" within the meaning of the Minnesota Indian Family Preservation Act ("MIFPA"), Minn. Stat. § 260.755, subd. 8. MIFPA defines "Indian child" more expansively than ICWA does. Per MIFPA's definition, "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" is an "Indian child," regardless of the birth parent's status. *Id.* Furthermore, MIFPA states that "[a] determination by a tribe that a child is … eligible for membership … is conclusive." *Id.*

Junior, however, is *not* eligible for membership in Red Cliff. That is because the Red Cliff Constitution forecloses his eligibility for membership because he is *not a child of a member*. It states:

> The following shall be members of the Red Cliff Band:
>
> Persons of Indian blood whose names appear on the official Allotment Roll of 1896 and Census Roll of 1934 of the Red Cliff Band of Lake Superior Chippewa Indians of Bayfield, Wisconsin.
>
> All children born to any member of the Red Cliff Band after the effective date of this Article II, as amended, PROVIDED, that they have been duly registered with the

[9] A.4, ¶ 18.

> Tribal Council through the Membership Committee within one year from their birth.

Red Cliff Const. art. II, § 1.[10] The *sole* argument of the Tribe in the trial court as to why Junior remains eligible for enrollment was their statement that "the child is still eligible for enrollment through his *grandmother* who is an enrolled member"[11] (emphasis added). The Tribe made this argument even though the Tribe's own Constitution has no avenue for grandparent-conferred enrollment; the *sole* avenue is *parent*-conferred enrollment.

The trial court's opinion is hopelessly confusing as to whether the court was applying ICWA or MIFPA,[12] but the trial court ultimately ordered the following.[13] It:

(1) Invalidated the February 2017 voluntary adoption consents entered by the birth parents and the court's own prior good-cause findings;

(2) Denied the adoptive parents' motion to set a final adoption hearing;

(3) Denied "other motions not specifically referenced herein"; and

(4) Set the matter for a good cause hearing pursuant to Minn. Stat. § 260.771, subd. 7.

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10 A.13.

11 A.4, ¶ 18.

12 A.4–8, Findings of Fact and Conclusions of Law ("FOF") ¶¶ 1–13.

13 A. 9.

The good cause hearing is now set for December 18, 2017.[14] Unless prohibited by this Court, that hearing will take place as scheduled under statutory provisions that do *not* govern the voluntary adoption, and which, if they do, are unconstitutional.

[14] A.10, ¶ 1.

Issues and Relief Sought

1. Did the trial court err in holding that the good cause, active efforts, and placement preferences provisions of ICWA and MIFPA apply in a voluntary termination-of-parental-rights (TPR) and adoption proceeding; if they do, is such application unconstitutional?

2. Did the trial court err by invalidating voluntary consents executed by birth parents and its prior good-cause findings; if not, is such invalidation unconstitutional?

3. Did the trial court err in applying ICWA to a child who, as the trial court correctly observed, is not an "Indian child" within the meaning of 25 U.S.C. § 1903(4); if not, is such application unconstitutional?

4. Did the trial court err in applying MIFPA to a child who is not an "Indian child" within the meaning of ICWA; if not, is MIFPA's definition unconstitutional?

Relief sought: An order prohibiting the trial court from preventing finalization of the voluntary adoption of A.J.F. Jr. by adoptive parents Z.R. and L.R. with voluntary, knowing, lawful consents entered in open court by birth mother M.P. and birth father A.J.F. Sr., or, in the alternative, mandating the trial court to finalize the adoption.

Reasons Why the Writ Should Issue

I. Standard for Issuing the Writ and Standard of Review

In order for a writ of prohibition to issue, three requirements must be met, all of which are met here: (1) "an inferior court or tribunal must be about to exercise judicial or quasi-judicial power"; (2) "the exercise of such power must be unauthorized by law"; and (3) "the exercise of such power must result in injury for which there is no adequate remedy." *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 208 (Minn. 1986).

This Court issues writs of prohibition "if the district court exceeded its lawful authority or so abused its discretion as to cause an injury for which no ordinary remedy is adequate" and where an appeal does not "provide[] an adequate remedy." *In re Kayachith*, 683 N.W.2d 325, 326 (Minn. App. 2004). Questions of law are "subject to de novo review." *State v. Finch*, 865 N.W.2d 696, 700 (Minn. 2015).

Here, the trial court entered orders that are unauthorized by law. As explained below, the law the trial court purported to apply to Junior's case simply does not govern such voluntary TPR-and-adoption proceedings. Purely as a statutory matter, this extension and misapplication of ICWA and MIFPA is unauthorized and this Court should intervene. Moreover, such application is also unconstitutional because it violates the Equal Protection and Due Process Clauses of the

Fifth and Fourteenth Amendments to the United States Constitution and their counterparts in the Minnesota Constitution, MINN. CONST. art. I, §§ 2, 7.

If allowed to stand, the injury to parties resulting from the trial court's decision would be irremediable. It will have the effect of voiding a voluntary and lawful consent executed by birth parents in open court. It will disregard the parents' wishes and the best interests of the child. It will disrupt Junior's continued placement with the only family he has ever known. It will subject the parties to separate and substandard treatment on account of their race, and in a manner that addresses no legitimate tribal interests. Such a miscarriage of justice is unwarranted, irremediable by an after the fact appeal— and unconstitutional.

For the reasons discussed below, this Court should issue the writ and allow Junior's adoption to be finalized pursuant to the knowing, voluntary and lawful consents executed by his birth parents.

II. The trial court exceeded its lawful authority and erred in holding that ICWA and MIFPA apply to a child who is not an "Indian child," and in holding that the good-cause, active-efforts, and placement-preferences provisions of ICWA and MIFPA apply to a voluntary TPR-and-adoption proceeding.

Congress, in enacting ICWA, created a clean distinction between voluntary and involuntary proceedings. The *voluntary* adoption process under ICWA is vastly different from the *involuntary* adoption process. *Compare* 25 U.S.C. § 1913

with id. § 1912.[15] While ICWA Sections 1912(d), (e), (f), 1915(a), and (b)[16] apply in *involuntary* proceedings, they do not apply in *voluntary* proceedings where birth parents voluntarily choose to terminate their parental rights and place their child for adoption. *Id.* §§ 1913(a), (c). In *voluntary* proceedings under ICWA, only the "consent of the parent" matters. *Id.* ICWA simply does not require consent of a tribe. *Id.* And, more importantly, it does not provide for *withdrawal* of consent *by a tribe*. *Id.* §§ 1913(c)–(d).[17]

There is no dispute here that the birth parents' consents were voluntarily entered into and validly executed in the trial court.[18] And the birth parents, who are petitioning parties here, want Minnesota courts to give full effect to those consents.

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15 The reason for this voluntary versus involuntary distinction is straightforward. Congress' concern in enacting ICWA was *forcible* "removal" of Indian children "by nontribal public and private agencies." 25 U.S.C. § 1901(4). It simply did not intend to reach private, voluntary, and knowing conduct by birth parents.

16 MIFPA provides at Minn. Stat. § 260.771, subd. 7, the counterparts to these ICWA sections. Unless prohibited by this Court, the court below has ordered an evidentiary hearing to show all of the requirements of that statute are met. A.8.

In this brief, discussion of the ICWA provisions is meant to encompass their MIFPA counterparts, and discussion of the U.S. Constitution is meant to encompass the Minnesota Constitution.

17 25 U.S.C. § 1913(d) (emphasis added) states that "*the parent* may withdraw consent."

18 A.6–7, ¶ 7.

A. ICWA's placement-preferences provision does not apply because no family, besides adoptive parents, has formally sought to adopt Junior.

Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2564 (2013) (emphasis added), plainly states that ICWA Section 1915(a)'s placement preferences are "*inapplicable* in cases where no alternative party has *formally* sought to adopt the child." It is undisputed that no party—other than adoptive parents, Z.R. and L.R., of course—has formally sought to adopt Junior. That means "there simply is no 'preference' to apply." *Id.* No member of Red Cliff or "other Indian families," 25 U.S.C. § 1915(a)(3), have formally sought adoption in state court. *Adoptive Couple* called this a "critical limitation on the scope of § 1915(a)," 133 S. Ct. at 2564—a limitation that squarely applies here.

Without this "critical limitation," the Court held, "the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Id.* at 2565. A reading of ICWA that allows a tribe or its members to "play [the] ICWA trump card at the eleventh hour" "would raise equal protection concerns." *Id.*

Several courts have applied *Adoptive Couple*, and have consistently recognized limitations on the applicability of ICWA. In *Native Vill. of Tunanak v. State Dep't of Health & Soc. Servs.*, 334 P.3d 165, 174 (Alaska 2014), for example, the court held that *Adoptive Couple* "unequivocally states" that "§ 1915(a)'s preferences are

inapplicable in cases where no alternative party has formally sought to adopt the child."[19]

Red Cliff filed a notice of "[c]ontested [a]doption" in this case,[20] but *no other family* has sought to formally adopt Junior. That fact is not in dispute. That would remain true even if the Tribe tried to create a contested adoption situation by identifying a potential placement. Under *Adoptive Couple*, § 1915(a)'s placement preferences would still remain inapplicable until that potential placement "*formally* s[eeks] to adopt the child." 133 S. Ct. at 2564; *see also id.* at 2565 n.12 (same).[21]

The trial court ignored the plain holding of *Adoptive Couple*—and an unbroken line of state court authority applying that holding—and instead ordered a hearing, which unless prohibited by this Court, will force all parties to undergo a highly stressful and burdensome good cause hearing to determine whether good

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19 *See also Gila River Indian Cmty. v. Department of Child Safety*, 395 P.3d 286, 290 ¶ 18 (Ariz. 2017) ("§ 1915(a)'s rebuttable adoption preferences [do not] apply when no alternative party has formally sought to adopt the child" (bracketed text in original)); *In re KMN*, 870 N.W.2d 75, 82 (Mich. App. 2015) (same); *In re P.F.*, __ P.3d __, 2017 WL 3668103, at *7 ¶ 30 n.16 (Utah App. Aug. 24, 2017) (same); *In re J.T.*, 2014 WL 5489077, at *8 (Cal. App. Oct. 30, 2014) (unpublished) (same).

20 A.3, ¶ 10.

21 In *Adoptive Couple*, the tribe and the birth father argued that § 1915(a)'s placement preferences should apply because Baby Girl's paternal grandparents were ready, willing, and able to adopt her. *See* Br. Birth Father, *Adoptive Couple v. Baby Girl*, No. 12-399, at 48–49; Br. Cherokee Nation, *Adoptive Couple v. Baby Girl*, No. 12-399, at 21–22 (same). But the Court rejected that argument because "Baby Girl's paternal grandparents never sought custody of Baby Girl." 133 S. Ct. at 2564. If no *formal* adoption petition were required to trigger § 1915(a), *Adoptive Couple* would have come out the other way.

cause exists to deviate from placement preferences that do not apply to begin with.[22] That is absurd and does nothing to protect the constitutional rights of the individuals in this case or to advance Junior's best interests.

B. ICWA and MIFPA apply only to four narrowly-defined child custody proceedings of an "Indian child."

Furthermore, the trial court disregarded two antecedent questions. Before ICWA even applies, two threshold conditions must be satisfied: (1) the child in question must be an "Indian child" as defined in ICWA, 25 U.S.C. § 1903(4), and (2) the matter must be one of four narrowly-defined "child custody proceeding[s]." 25 U.S.C. § 1903(1). If the child is not an Indian child, *or* if the matter is not a child custody proceeding, then ICWA simply does not apply. The latter is not in dispute; the former is. Here, Junior ceased to be an Indian child when birth mother M.P. dis-enrolled from the Tribe.

It is undisputed that birth mother—the only tribal-member birth parent—dis-enrolled.[23] That act meant that Junior does not satisfy ICWA's definition of "Indian child" which requires that he be *currently* a child of a tribal member. *See* 25 U.S.C. § 1903(4) (defining Indian child as a child who is "eligible for membership in an Indian tribe and *is* the biological child of a member"). *Cf. Bonnichsen v. United States*, 367 F.3d 864, 875 (9th Cir. 2004) (in case involving federal Indian law,

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22 A.8–9.

23 A.3–4, ¶ 17.

"Congress's use of the present tense is significant."). Junior is no longer an "Indian child" within the meaning of ICWA because he is not the child of a *member* of an Indian tribe, nor is he himself enrolled.

Nor could the Tribe enroll him against his will or against the will of his parents for three reasons.

First, that violates the fundamental rights of Junior and his parents, as discussed below.

Second, it violates the Tribe's own constitution, under which Junior is not a child of a "member of the Red Cliff Band," and, in any event, has not been "duly registered … within one year from [his] birth." Red Cliff Const. art. II, § 1.[24] He is, therefore, *not* eligible for membership, despite a tribal representative's statement to the contrary.[25]

Third, a tribe's coercive attempt to automatically enroll a child as a member in order to thereby apply ICWA to the child's child-custody proceeding is impermissible. *Nielson v. Ketchum*, 640 F.3d 1117, 1124 (10th Cir. 2011) ("Congress did not intend" ICWA to authorize "this sort of gamesmanship on the part of a tribe" if the tribe confers "nonjurisdictional citizenship upon a nonconsenting person *in order to invoke ICWA*" (emphasis added)).

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[24] A.13. The Tribe had, assuming it could do so lawfully, until October 21, 2017—Junior's first birthday—to register Junior as a member.
[25] A.4 ¶ 18.

As a threshold matter, therefore, ICWA is *inapplicable* to a child who, like Junior, is *not* an Indian child. That determination controls, and the court below committed fundamental error in applying ICWA to Junior's TPR-and-adoption proceeding.

Even if it did not—that is, even if this Court concludes that ICWA does apply—as discussed herein, certain provisions of ICWA still do not apply to the voluntary TPR-and-adoption scenario presented here. In other words, even if ICWA properly applied, as a statutory matter, the court below was wrong to ignore the voluntary TPR-and-adoption provisions of ICWA, 25 U.S.C. §§ 1913(a), (c), (d). Alternatively, such an application is unconstitutional.

C. ICWA Sections 1912(d) and (f) do not apply.

ICWA's active-efforts provision, 25 U.S.C. § 1912(d), and its TPR provision, *id.* § 1912(f), both "address[] the *involuntary termination* of parental rights with respect to an Indian child." *Adoptive Couple*, 133 S. Ct. at 2560 (emphasis added). Here, birth parents *voluntarily* "authorized the hospital to discharge [Junior] into the care and custody of Bethany Christian Services."[26] Junior has thrived in the home of adoptive parents since December 2016.[27] The birth parents then *voluntarily* agreed to terminate their parental rights and to place Junior for adoption with Z.R.

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26 A.2, ¶3.

27 A.2, 4, ¶¶ 5, 22.

and L.R. in February 2017, *i.e.*, roughly four months after Junior's birth.[28] Thus, Sections 1912(d) and (f) of ICWA simply do not apply.

Adoptive Couple shows why the trial court was wrong to base its reasoning on the involuntary "separation of Indian children"[29] that gave rise to ICWA. This case is a *voluntary* adoption case. *Adoptive Couple* concluded that if "the adoption of an Indian child is voluntarily and lawfully initiated by"—in this case, *both birth parents*, then "ICWA's primary goal of preventing the unwarranted removal of Indian children … is not implicated." 133 S. Ct. at 2561. Just as in *Adoptive Couple,* there is no forcible "breakup" here; no involuntary "removal"; no disruption of "continued custody" that will be precipitated by the TPR and adoption to which birth parents voluntarily and lawfully consented.

In sum, ICWA Sections 1912(d) and (f) govern *involuntary* actions against birth parents. They do not apply to a *voluntary* TPR-and-adoption. That is governed by ICWA Sections 1913(a), (c), (d)—if the child is an "Indian child" under ICWA and the proceeding is one of the four narrowly-defined "child custody proceedings." 25 U.S.C. §§ 1903(1), (4).

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28 A.2–3, ¶ 7.

29 A.4–5, FOF ¶ 1.

D. MIFPA's statutory framework

MIFPA defines "Indian child" more expansively than ICWA does. Minn. Stat. § 260.755, subd. 8. Like ICWA, it provides for placement preferences and criteria for finding good cause to deviate from those preferences, and it includes counterparts to ICWA Sections 1912(d) and (f). *See* Minn. Stat. § 260.771, subd. 7. Like ICWA § 1915(a), MIFPA's placement-preference provision applies to *involuntary* proceedings where a competing adoptive placement has *formally* sought to adopt the child. Here, this is a *voluntary* proceeding and *no* other party has formally sought to adopt the child. *Adoptive Couple*'s reasoning therefore applies just as firmly. Neither ICWA's *nor* MIFPA's placement-preference, active-efforts, or TPR provisions apply to this case. In fact, "constitutional avoidance compels this outcome." *Adoptive Couple*, 133 S. Ct. at 2565 (Thomas, J., concurring).

E. MIFPA's definition of "Indian child"

While ICWA defines an Indian child as a child who 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(4), MIFPA defines an "Indian child" as a child who is merely "eligible for membership in an Indian tribe." Minn. Stat. § 260.755, subd. 8.[30] Because

[30] It is important to keep in mind the distinction between "Indian child" status under ICWA and MIFPA on one hand, and tribal membership on the other. Tribal membership is exclusively a matter of tribal law. Indian child status is a conclusion of federal and state law, and is subject to constitutional standards. *In re Abbigail A.*, 1 Cal. 5th 83, 95 (2016).

this means that MIFPA is triggered solely by genetic ancestry, this definition violates the Equal Protection Clause.

The most on-point case is *In re A.W.*, 741 N.W.2d 793 (Iowa 2007), in which the Iowa Supreme Court struck down the definition of "Indian child" contained in the Iowa Indian Child Welfare Act, Iowa Stat. § 232B.3(6), as violating the Equal Protection Clause, because that definition depended entirely on the child's "ancestry, which is 'a proxy for race.'" 741 N.W.2d at 810 (quoting *Rice v. Cayetano*, 528 U.S. 495, 514 (2000)). Concluding that this is a racial classification and applying strict scrutiny, that court concluded that Iowa ICWA's definition was not narrowly tailored to achieve any compelling interests because it went beyond tribal membership. *Id.* at 811.

In fact, Congress itself considered but ultimately rejected an expansive definition of "Indian child." That rejected definition had defined an Indian child as "any person who is a member of or who is eligible for membership in a federally recognized Indian tribe." 123 Cong. Rec. S37223 (1977); *see also Nielson*, 640 F.3d at 1124 (discussing relevant legislative history). The final draft of ICWA "limited membership for those children who were eligible for membership *because* they had a parent who is a member." *Id.* (emphasis added). That was what, in the Tenth Circuit's view, saved ICWA's "Indian child" definition from being unconstitutional.

But no such saving construction is available here, because the only tribal-member parent has dis-enrolled from the Tribe, meaning that the *sole* basis for classifying Junior as Indian, and subjecting him to a different law than would apply if he were white, or black, or Asian, is his genetic ancestry. Such an expansive definition of "Indian child" would, as the *In re. A.W.* court noted, represent "pure racism." 741 N.W.2d at 811 (quoting John Robert Renner, *The Indian Child Welfare Act and Equal Protection Limitations on the Federal Power Over Indian Affairs*, 17 AM. INDIAN L. REV. 129, 167 n.237 (1992)). That reasoning is directly applicable here and will be fully discussed in Part IV below.

III. The trial court exceeded its lawful authority and erred by invalidating voluntary and lawful consents executed by birth parents, and by vacating its prior good-cause findings.

It is important to remember that "invalidation" is a term of art that specifically refers to 25 U.S.C. § 1914. That section states:

> 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.

Id. At least three things are plain:

1) *Only* a violation of ICWA Sections 1911, 1912 or 1913, if proved, leads to invalidation under Section 1914. In other words, a purported violation of ordinary *state law* or of *MIFPA* does *not* give rise to invalidation under Section 1914.

2) There is no such thing as invalidation for a purported violation of *Section 1915*. Only a violation of Sections 1911, 1912 or 1913 trigger invalidation under Section 1914.

3) To grant invalidation, as explained below, (a) there must be a nexus between the purported violation and the portion of the child custody proceeding sought to be invalidated, and (b) the invalidation determination should take into account the child's best interests. Invalidation under ICWA, in other words, only invalidates *some* portions of a case; it does not invalidate all prior orders entered in a case.

Ignoring this plain mandate, the Tribe argued in the trial court that violations of "both statutes"—that is, ICWA and MIFPA—trigger invalidation. *See* Tribe's Mem. Supporting Mot. to Vacate and Invalidate (May 22, 2017)[31], p. 2 ("May 22 Tribe Memo"). The trial court adopted that as its holding without comment. That was error.

Also revealing of the hollowness of the Tribe's 1914-invalidation argument is the fact that its May 22 Memo is altogether silent as to Section 1914—the only

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31 A.16.

section in ICWA and MIFPA combined that allows invalidation. Specifically, the Tribe asked the trial court to invalidate the "consents of the birth parents … and the good cause findings to deviate from the ICWA/MIFPA placement preferences."[32] But that argument is specious on all fronts. First, there was no allegation in the Tribe's briefing (because there could be none) that provisions of ICWA Sections 1913(a) and (c)—the "consent of the birth parents" provision—was violated. Nor was there an allegation (for there can be none) that ICWA Section 1915(a)—the provision governing good cause findings to deviate from ICWA's placement preferences—was violated. Nor can the Tribe argue for invalidation for an alleged violation of MIFPA, because ICWA Section 1914 does not allow that. So invalidation was not available under 25 U.S.C. § 1914 in this case, and the trial court's contrary conclusion was in error.

Even if there were an avenue to seek invalidation, the court below exceeded its lawful authority by invalidating the knowing, lawful, and voluntary consents entered in open court by the birth parents. It also exceeded its authority by ordering re-litigation (by way of an evidentiary hearing) of the Section 1915 good-cause determination to deviate from the placement preferences—a provision that does not apply to a voluntary proceeding where no competing party has formally sought to adopt.

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[32] A.33.

In *In re S.W.*, 727 N.W.2d 144, 151–52 (Minn. App. 2007), a tribe moved for invalidation based on four alleged violations of ICWA. This Court had no trouble rejecting that, because "'Section 1914 ... 'does not provide for invalidation of a valid separate action because of an invalid prior one.'" *Id*. at 152 (citations omitted).

Similarly, in *In re J.W.*, 528 N.W.2d 657 (Iowa App. 1995), a parent requested invalidation under Section 1914 for an alleged violation of the qualified-expert-witness requirement of Section 1912(e). The court refused, because Section 1914 "'does not provide for invalidation of a valid separate action because of an invalid prior one.'" *Id.* at 661 (quoting *In re M.E.M.*, 679 P.2d 1241, 1243 (Mont. 1984)). This meant that notwithstanding the claimed violation of Section 1912(e), the termination-of-parental-rights order which had been properly entered was *not* subject to invalidation, because no impropriety *with regard to termination* had occurred.

In *In re M.E.M.*, *supra*, the party seeking Section 1914 invalidation alleged five violations of ICWA in the temporary legal custody proceedings, and argued that they required invalidation of both the temporary and permanent custody determinations. 679 P.2d at 1243. But there was no allegation that Sections 1911, 1912 or 1913 had been violated in the permanent custody proceedings, however, *id.*, so the Montana Supreme Court held that the alleged violation in *temporary* custody proceedings did *not* require invalidation of the subsequent *permanent* custody proceedings which resulted in the termination of parental rights. *Id.*

All these cases establish the need for a nexus between the purported violation of Sections 1911, 1912 or 1913, and the portion of the child custody proceeding sought to be invalidated.

In addition, the focus of an invalidation inquiry must be on the practical consequences of such invalidation on the best interests of the child. *In re Brooke C.*, 25 Cal. Rptr. 3d 590, 595 (Cal. App. 2005). In *Brooke C.*, the party seeking invalidation asked the court to invalidate the whole proceeding based on an alleged violation of Section 1912(a) of ICWA (the provision requiring notice to the tribe in involuntary proceedings). That case was an involuntary proceeding where a state agency took a child into protective custody based on the parents' unfitness. The court found that the effect of invalidation would have been the "immediate return of the child to the parents whose fitness was in doubt." *Id.* So the court, looking at the child's best interests, rejected the argument that the *removal* determination could be invalidated based on a Section 1912(a) violation. *Id*. And, looking for a proper nexus, it invalidated only that portion of the proceeding that involuntarily terminated the parents' rights so that only that portion of the proceeding could be re-litigated with the tribe's participation. *Id.*

Those two factors—nexus and child's best interests—counsel against invalidation of *any* portion of the trial court proceeding here. The adoption here is voluntary, with the full, knowing, lawful consent[33] of the birth parents, and with a formal adoption petition filed by the adoptive parents currently pending. As discussed above, assuming ICWA and MIFPA even apply here, no violation of ICWA Sections 1913(c) or 1913(d) occurred below.

Junior has lived with the adoptive parents since December 2016. Theirs is the only family he has ever known. He is a well-adjusted child, and the adoptive parents are fit in *every* respect to be his parents. Finalizing the adoption is in Junior's best interests. Thus the trial court stepped beyond its lawful authority and abused its discretion by invalidating prior orders entered in the case. It is appropriate for this Court to prohibit that overstepping of authority by reversing the trial court's decision.

[33] If there were any doubt that this proceeding was undertaken with the full consent of the birth parents, the mother's extraordinary decision to leave her tribe in an effort to ensure that the adoption would proceed as planned is proof enough.

IV. ICWA and MIFPA are unconstitutional if they apply in a voluntary TPR-and-adoption situation.

To be clear: if this Court concludes that the relevant ICWA and MIFPA sections do not apply here, that ends the case, and there is no need to reach the remaining issues. But if this Court determines that these sections do apply, applying them in this case is unconstitutional on multiple grounds.

A. Equal Protection

There is no dispute that ICWA and MIFPA establish a separate set of rules that treat children (and adults) differently in child-custody proceedings involving Indian children. Whether such differential treatment is constitutional depends on whether the classification of "Indian children" (versus all other children) is a racial classification, invoking strict scrutiny, or a political classification, involving rational-basis review. Here, the classification is based on the race or national origin of the child or the adult litigants, and therefore must satisfy strict scrutiny.

Were Junior not an "Indian child," the court below would simply have analyzed whether the voluntary TPR-and-adoption is in his best interests. *See* Minn. Stat. § 260C.301, Subds. 1(a), 7. In such a case, *no* "active efforts" determination of the type called for by 25 U.S.C. § 1912(d) would be conducted. *No* TPR determination like the one required by 25 U.S.C. § 1912(f) occurs in such a case. *No* placement-preference provision applies in a manner that requires race- or national-origin-matching of the child to adoptive parents. 25 U.S.C. § 1915(a). And there is

no such thing as a *third party invalidating or withdrawing consent* when a voluntary, knowing, and lawful consent was entered in open court by the birth parents—like the tribe is attempting here—in a case involving a white, black, Asian, or Hispanic child. Such consent is unquestionably the birth parent's exclusive right to give and the birth parent's exclusive right to withdraw.

But because the court below found that Junior is an "Indian child,"[34] it required birth parents, adoptive parents, and Bethany Christian Services to participate in a costly—and unwarranted—evidentiary hearing and to show that the requirements of ICWA (25 U.S.C. §§ 1912(d), (f), 1915(a)), and MIFPA are satisfied. In other words, because Junior is an "Indian child" according to the Tribe, his TPR-and-adoption petition should be decided not based on his individual best interests but by ICWA's standards that do not protect his best interests.

This inherently unequal treatment is unconstitutional. If ICWA and/or MIFPA apply here, they do so solely because Junior is purportedly an "Indian child." But under either ICWA or MIFPA, Junior's purported *eligibility* for membership in Red Cliff is determined exclusively by *genetic origin*. *See* Red Cliff Const. art II, § 1[35] ("[p]ersons of Indian blood"). The *sole* criterion is lineal descent from a

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[34] It is unclear whether the Tribe continues to argue whether Junior is an "Indian child" within the meaning of both ICWA and MIFPA, or only within the meaning of MIFPA. The constitutionality analysis remains the same, either way.

[35] A.13.

person of Indian blood whose name appears on an official list. Political, cultural, social, or religious affiliation play *no role* in the definition of "Indian child." Nor does residency or domicile on a reservation. *DNA is all that matters*. No degree of political or cultural affiliation will make a child eligible for tribal membership if he lacks the required genes, and a child who has the requisite genes is not made *ineligible* due to lack of political or cultural affiliation. Not even legal adoption can qualify a child as "Indian" under ICWA or Red Cliff's constitution, because both require that a child be the *biological* child of a tribal member. *See* 25 U.S.C. § 1903(4) ("biological child of a member"); Red Cliff Const. art. II, § 1[36] ("children *born* to any member") (emphasis added).

If Congress had passed a law that subjected petitions to adopt African-American children to a set of placement preferences favoring African-Americans, *cf.* 25 U.S.C. § 1915(a), there would be no doubt that that was a race-based classification subject to strict scrutiny under the Equal Protection Clause—even if Congress claimed that doing so was in the best interests of African-Americans. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (strict scrutiny applies even to "benign" racial classifications); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (invalidating the use of racial classifications to make child custody determinations).

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[36] A.13.

But solely as a result of the DNA in his blood, Junior—who is, after all, a citizen of the United States—is being subjected to a separate set of rules, both procedural and substantive—rules that put him at a disadvantage relative to his white, black, Hispanic, or Asian peers. If separate is "inherently unequal," *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954), that separate treatment cannot be tolerated.

It is sometimes claimed that ICWA is not race-based, because in *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court used rational basis review to uphold a law that treated adult members of tribes differently from other citizens, on the grounds that the distinction was political, not racial—the law was "not directed towards a 'racial' group consisting of 'Indians.'" *Id.* at 553 n.24. And in *United States v. Antelope,* 430 U.S. 641 (1977), it again applied rational basis review to a similar law, holding that the difference in treatment resulted from the status of tribes as "political institutions" rather than on racial status. *Id.* at 646.

But in *Rice*, the Court held that a law that "singles out 'identifiable classes of persons … solely because of their ancestry or ethnic characteristics,'" establishes a racial category and is subject to strict scrutiny. 528 U.S. at 515 (citation omitted). *Rice* distinguished *Mancari*—calling it "limited" and "*sui generis*." *Id.* at 520.

This case plainly falls into the *Rice* category rather than the *Mancari* category. The court applied a separate set of rules to Junior based *not* on political affiliation

with a tribe—since none exists—but solely based on Junior's genetic ancestry, which is "an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Indeed, here, the application of ICWA/MIFPA's different rules does just what the laws in *Mancari* and *Antelope* did *not* do: its application here was "directed towards a 'racial' group consisting of 'Indians,'" *Mancari*, 417 U.S. at 553 n.24, and it "subjected [the parties] to differing … burdens of proof from those applicable to non-Indians." *Antelope*, 430 U.S. at 649 n.11. As the California Court of Appeal has concluded, applying ICWA to children whose *sole* connection to an Indian tribe is biological, "is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny." *In re Bridget R.*, 41 Cal. App. 4th 1483, 1509 (1996); *accord, In re Santos Y.*, 838 P.2d 204, 214 (Cal. 2001).

In *Adoptive Couple*, the Supreme Court recognized that it "would raise equal protection concerns" for a state court to interpret ICWA in a way that "put[s] certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." 133 S. Ct. at 2565. That is what the trial court did here, and it is unconstitutional.[37]

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[37] Even if eligibility for tribal membership were not a race-based classification, it still qualifies as a *national-origin*-based classification, *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1120 (9th Cir. 1998), which is just as "suspect," and as strictly scrutinized, as racial classifications. *Jana-Rock Constr., Inc. v. New York State Dep't of Econ. Dev.*, 438 F.3d 195, 204–05 (2d Cir. 2006).

ICWA Sections 1912(d), (f), 1914, and 1915(a), and their MIFPA counterparts, do not regulate tribal land or property. Nor do they otherwise touch on tribal self-government. Rather, like the statute struck down in *Rice*, those provisions operate to "fence out" Junior, birth parents, and adoptive parents, from the quintessentially "state affair[]" of voluntary TPR-and-adoption proceedings. *Rice*, 528 U.S. at 520. Because these statutory provisions do not fit into *Mancari*'s "limited exception," their application in this case constitutes a "racial classification" subject to strict scrutiny. *Id.* at 522.

Child-custody proceedings administered by state agencies and adjudicated by state courts, even those involving Indian children, are patently a "state affair" and not "the internal affair of a quasi sovereign." *Rice*, 528 U.S. at 520, 522; *cf. Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (child-custody proceedings and domestic relations matters are a "virtually exclusive province of the States"). Unlike a law that governs adoption of Indian children domiciled *on tribal lands*, which can be said to be the internal affair of a tribe, *see Fisher v. District Court*, 424 U.S. 382, 390–91 (1976), a law that governs adoption of children *in Minnesota state court* involving birth parents, adoptive parents, and a child who all reside *off* reservation, has *no* impact

on how the tribe governs itself.[38] The ICWA/MIFPA sections at issue here therefore cannot be said to address tribes as quasi-sovereigns, or otherwise implicate tribal self-government. As applied here, they accord separate-and-substandard treatment based on the race or national origin of the child and adult litigants. *See also In re N.N.E.*, 752 N.W.2d 1 (Iowa 2008) (striking as unconstitutional Iowa ICWA's placement-preferences provision as applied to voluntary TPR-and-adoption proceedings).

Three other features of ICWA/MIFPA confirm that the classification at issue is racial, not political.

First, because children like Junior, who are merely *eligible* for membership are subject to this statutory scheme, the scheme reaches beyond persons who are *members* of tribes—the only classification *Mancari* upheld—and sweeps in those who are merely eligible for *biological* reasons.

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[38] As the *Santos Y.* court observed, blocking a voluntary adoption like this one "would, in the most attenuated sense, promote the stability and security of the Tribe by providing one more individual to carry on Minnesota Chippewa cultural traditions," but doing so "solely because of the child's … Minnesota Chippewa Tribe genetic heritage, [would] be a constitutionally impermissible application of the statute." 112 Cal. Rptr. 2d at 726. Of course, even if it did have such an impact, the birth mother has "the clear and God-given right to withdraw from [her] tribe" and live subject to general state and federal law. *United States v. Crook*, 25 F. Cas. 695, 699 (C.C.D. Neb. 1879). The birth mother has exercised that right, and it is unconstitutional to interfere with her choices in a manner that disregards her decisions regarding the upbringing of her child, *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality), or that interfere with her intimate family decisions. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

Second, Congress and the Minnesota legislature have both recognized the race-based nature of ICWA's classifications by exempting ICWA from prohibitions on race-based discrimination. *Compare* 42 U.S.C. § 1996b(1) *with* 42 U.S.C. § 1996b(3); *compare* Minn. Stat. §§ 260C.193, subd. 3(f), 260C.212, subd. 2(c) *with* Minn. Stat. §§ 260C.193, subd. 3(h), 260C.212, subd. 2(a).

Third, the placement preferences are not limited to the Indian child's own tribe, but grant preference to "*other* Indian families," *regardless* of tribe. 25 U.S.C. § 1915(a)(3) (emphasis added). That provision—which accords preference to *any* "Indian famil[y]" from *any* one of the 500-plus federally-recognized tribes across the United States' 3.8 million square miles—proves that the placement preferences are *not* based on political affiliation.

Junior has no political affiliation with Red Cliff, much less so with any other federally-recognized tribe. Any political affiliation the birth mother had is now non-existent. Yet if the placement preferences apply here, they mandate that Junior, who is of Chippewa ancestry, be placed with, say, a Lakota or Dakota family before he can be placed in a non-Indian home like that of the adoptive parents who love and care for him already. This is obviously a "preference [that] is … directed towards a 'racial' group consisting of 'Indians'" and falls outside *Mancari*'s limited exception. *Mancari*, 417 U.S. at 553 n.24.

In sum, ICWA/MIFPA, if applied here, impose a separate and substandard set of rules on Junior due *solely* to his genetic ancestry. This scheme is "by [its] very nature odious to a free people whose institutions are founded upon the doctrine of equality," *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), and cannot withstand the applicable strict scrutiny.

B. Due Process

The Fourteenth Amendment precludes a state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. "The doctrine of substantive due process protects unenumerated fundamental rights," *Gallagher v. City of Clayton*, 699 F.3d 1013, 1017 (8th Cir. 2012) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)), including intimate family rights of association.

Like many of the rights associated with parenting, the right to privacy is not expressly enumerated within the Constitution, but the Supreme Court held in *Troxel v. Gransville* that "[t]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make *decisions* concerning the care, custody, and control of their children." 530 U.S. 57, 66 (2000) (emphasis added). It reasoned that:

> [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.

Id. at 68. Thus, it is well-established law that fit, biological parents have a fundamental right to make decisions about the upbringing and education of their children. *See also In re N.N.E.*, 752 N.W.2d at 8–9 (relying on *Troxel* to hold that Iowa's Indian Child Welfare Act placement provisions violated the Due Process Clause of the Iowa Constitution when applied to a voluntary adoption proceeding).

In this case, the birth parents' immensely private decision to place their child with the Adoptive Parents, because they believed that to be in their child's best interests, is at least as private, if not more so, than parents choosing how to educate their children. *See Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (compulsory public education encroaches fundamental right of parents to direct their children's education). "Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68-69. Any state restriction that prevents or otherwise interferes with

two, fit, biological parents freely choosing whom to place their children with for adoption, must be subject to strict scrutiny.

Legislation that infringes upon a fundamental right must be "narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 721 (additional citation omitted). "Under both the Due Process and Equal Protection Clauses, interference with a fundamental right warrants the application of strict scrutiny." *Bostic v. Schaefer*, 760 F.3d 352, 375 (4th Cir. 2014) (citing *Glucksberg*, 521 U.S. at 719-20). "Under strict scrutiny, the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests." *Johnson v. California*, 543 U.S. 499, 505 (2005) (internal quotation omitted); *c.f. Rosenbrahn v. Daugaard*, 61 F. Supp. 3d 862, 874 (D.S.D. 2015) ("Defendants bear the burden of demonstrating that South Dakota's laws banning same-sex marriage meet this exacting standard.") (citing *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013)).

In this case, the State's overbroad burden on Indian children is not narrowly tailored to satisfy any legitimate governmental interest. Accordingly, the ICWA/MIFPA provisions in question violate the birth parents' constitutional right to due process.

Conclusion

The holding of the court below irreparably injures petitioners, and disregards Junior's best interests. It injures birth parents, who voluntarily and lawfully consented to the adoption of Junior by adoptive parents. It infringes on their rights in a manner that is difficult to reconcile with any norm of constitutionality, individual worth and dignity, or decency. It injures adoptive parents and Bethany Children's Services, who have meticulously followed all voluntary TPR-and-adoption procedures under Minnesota law and under ICWA, to the extent it applies—only to have the tribe "play [the] ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests." *Adoptive Couple*, 133 S. Ct. at 2565.

The impending trial and subsequent appeal is inadequate to remedy a problem like that presented here, which stems from a *pretrial matter* that will inform how the trial is conducted, and the elements required to be proved in such a trial. For example, in *State v. Deal*, 740 N.W.2d 755, 770 (Minn. 2007), the Supreme Court issued the writ of prohibition because the district court's "erroneous ruling on the state's request to stay discovery" would have irreparably injured parties such that waiting for parties to undergo trial and then review "through normal appellate procedures" was not an adequate remedy. Pretrial orders, such as the one at issue here, are prohibited by this Court because the irreparable harm in such cases is a

trial going "beyond the scope" of what is permissible under a statute or the state or federal constitutions. *Id.*

"[E]xercise of such power" that is "unauthorized by law" that "result[s] in injury for which there is no adequate remedy," *Minneapolis Star*, 392 N.W.2d at 208, is precisely the type of situation where a writ of prohibition should issue. The "vice" that is easily preventable if this Court "pass[es] upon the question presented" is that the "pretrial decision" challenged here will "in the normal course, only reach [this Court] upon an appeal following a trial." *Brooks Realty, Inc. v. Aetna Ins. Co.*, 128 N.W.2d 151, 155 (Minn. 1964). In such situations, this Court has ruled that "[i]t would not be consistent with the proper administration of justice for us to wait to correct the error of law" upon regular post-trial appeal because "[s]uch relief could hardly be regarded as affording … an adequate remedy" to petitioners. *Id.* That is emphatically the case here.

The Writ should be *granted*.

Respectfully submitted this 21st day of November, 2017,

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