

A06-0804

State of Minnesota
In Court of Appeals

Buddie Greene,

Appellant,

vs.

Commissioner of the Minnesota
Department of Human Services and
Aitkin County Health and Human Services,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

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LEGAL ISSUE

1. Is Buddie Greene (an Indian tribal member and a life-long, Minnesota, tax-paying resident living off reservation) considered a person under the Minnesota and United States Constitution and protected against racially discriminatory laws by a heightened scrutiny review under the Equal Protection clauses?

PROCEDURAL HISTORY

This civil appeal is from an agency decision under Minn. Stat. 256J with regard to Minnesota Family Investment Program (MFIP) Employment services program, which services are provided under a contract with the Minnesota Chippewa Tribe (MCT) under Minn. Stat. § 256J.49 and 256J.645, subd. 2(4).

The court of case origination is Aitkin County District Court. The presiding judge was the Honorable John R. Leitner who issued an Order and Memorandum dated February 21, 2006, denying Petitioner's District Court appeal of an agency decision under Minn. Stat. Ch. 256J dated May 5, 2005 by Chief Appeal Referee Kenneth M. Mentz, for the Minnesota Department of Human Services.

This appeal is authorized under Minn. Stat. Ch. 256 public assistance.

STATEMENT OF THE CASE

Appellant Buddie Greene enrolled in the MFIP program and as part of the program, she was required to participate in an employment services program sponsored by the state. Appellant was given and completed a form in which she identified herself as a member of the Minnesota Chippewa Tribe, living in Aitkin County, off reservation. Respondent Aitkin County then *referred* Greene to the MCT service provider as required by state law.¹

Appellant Greene was denied access to the *regular* Aitkin County Employment Services program available to all other resident, tax-paying citizens, whether non-Indian or *some other* Indian. Greene requested to use Aitkin County's employment service program but was informed by MCT and Respondent County that she was required to use the *Indian tribal members* program only, and if she did not use the MCT contract provider for services she could be financially sanctioned. Greene was sanctioned and appealed.

¹ See Minn. Stat. § 256J.645, subd. 4. Whereby "Indian tribal members . . . must be referred to the by the county agencies in the service area to the Indian tribe for employment services."

STATEMENT OF THE FACTS

Appellant Greene is a member of the MCT, enrolled at Leech Lake Reservation. Greene is also eligible for enrollment at Mille Lac Reservation. However, Greene does not reside on any reservation.² Four days later, Respondent Aitkin County sent an Employment Services Referral form to the MCT indicating that Greene “is being referred for employment services. He/she became *mandatory* on” on July 14, 2004.³ Greene attempted to be referred back to Respondent County for employment services however, because of the MN-MCT service provider contract Greene was informed that the “MCT is mandated to provide you service and can not refer you elsewhere.”⁴

² See copy of completed form DHS-3048 (5-02), signed and dated by Petitioner Buddie Greene July 16, 2004, attached as Exhibit 1 in the Appendix.

³ See Employment Services Referral form DHS-3166-ENG (3-04) attached as Exhibit 2 in the Appendix. (Emphasis added).

⁴ Id. Exhibit 4, also attached as Exhibit 3 in Appendix.

STANDARD OF REVIEW

“The question of whether classifying Indian tribes and their members requires strict scrutiny for purposes of an equal protection challenge under the state Constitution remains one of first impression. . . . Although Minnesota may construe its Constitution to give more protection than that given under the federal Constitution, Minnesota courts do not do so lightly.”⁵ A reviewing court is not bound by and need not give deference to a district court’s decision on a purely legal issue.⁶ As such, a de novo standard of review is warranted.

ARGUMENT

When Appellant Greene provided her personal information upon the request of the Respondent County, on their form⁷, Greene provided the private data without any knowledge or understanding that the voluntary completion of this single, agency form would *mandate* her to use the MCT contract service provider only. The record does not suggest that every MFIP applicant is given this form and Greene perceives that she was given this form because she does look like an Indian.

⁵ See Commissioner’s Memorandum in Support of the Motion for Summary Judgment dated September 14, 2006 at 15, citing *State v Davidson*, 481 N.W.2d 51 (Minn. 1992).

⁶ *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003) (citing *Frost-Benco Elec. Ass’n v. Minn. Pub. Utils. Comm’n*, 358 N.W.2d 639, 642 (Minn. 1984)).

⁷ Id.

The state law only requires the county agency “to refer” Indian tribal members⁸, but the un-written practice by Respondent County is to bar *some* Indians, like Greene, from ever being able to access and use Aitkin County’s MFIP Employment Services program available to all other residents, whether non-Indian or non-MCT Indian.

The service provider contract requires the service provider (MCT in this case) to “operate a Tribal program for persons of Indian descent and eligible non-Indian members of the participant’s family who reside in RESERVATION’s service delivery area.”⁹ Incidentally, the MCT may also subcontract provision of the services¹⁰, thereby evading the Legislature’s intent¹¹ suggested by Respondent. Moreover, the service provider contract *also* does not create any obligation on the part on Greene, yet Respondent County sanctioned Greene’s financial benefits for not using the *Indian door* as directed by Respondent county.

Logically, the first MFIP Appeal Referee Catherine Moore, on March 31, 2005 found in part that:

While the statute imposes a duty upon the county to make referrals to tribal employment services when a participant is deemed eligible, there is no requirement that an eligible

⁸ Minn. Stat. § 256J.645, subd. 4. “Indian tribal members . . . must be referred to the by the county agencies in the service area to the Indian tribe for employment services.”

⁹ See State of Minnesota Reservation Grant Contract attached as Exhibit 3 in the Appendix.

¹⁰ *Id.* p. 3, item 7.

¹¹ See Commissioner’s Memorandum in Support of the Motion for Summary Judgment dated September 14, 2006 at 13-14.

participant utilize that service simply because they are eligible. Likewise, the fact that the tribal employment services programs cannot refuse to provide eligible participants services, does not in turn create a requirement that an eligible participant utilize those services. The appellant, like any other citizen of Aitkin County, should be able to access county employment services.¹²

This initial Agency Decision recognized the failing of the *non sequitur* language of the state law coupled with the MCT Contract, which is the likely reason the legislation either did or would avoid or evade the normal heightened scrutiny analysis for suspect racial classifications.

However, the Agency issued a *politically desired* Amended Conclusions and Amended Order by Chief Appeals Referee Kenneth Mentz rejecting the above legal conclusion and instead finding in part that

Both Minn. Stat. § 256J.645, subd. 4 and the contract for provision of employment services are clear. A person in appellant's circumstances must get employment services through the Minnesota Chippewa Tribe even though Aitkin County pays her cash benefits under the Minnesota Family Investment program.¹³

Here, the agency stated that Appellant is a "person" who is in particular "circumstances", which avoids having to say the Appellant, because she happens to be a particular Indian cannot use Aitkin County's MFIP

¹² See Recommended Order of Appeal Referee Catherine Moore contained in Decision of State Agency on Appeal dated March 31, 2005.

¹³ See Amended Conclusions and Amended Order by Chief Appeal Referee Kenneth M. Mentz issued May 5, 2005.

employment services.

Appellant Greene is a person.

Appellant Greene argues that she is a *person*, under the U.S. Constitution¹⁴, Minnesota Constitution¹⁵ and the Minnesota Chippewa Tribe's Constitution.¹⁶ As a person, Greene, and others similarly situated must be protected from "invidious discrimination" by the Respondents who have created a financial contract scheme of racial "purposeful discrimination" in violation of the Fourteenth Amendment Equal Protection Clause.¹⁷ The Fourteenth Amendment was enacted to protect *a person's* rights from abridgement by state governments, especially depriving people of the equal protection of the laws due to racial discrimination. Here, Respondents argue that only a rational basis test should apply because Indian tribes are a political class rather than racial/ethnic group. While that analysis

¹⁴ U.S. Const. Amend. XIV § 1. The Equal Protection Clause is a part of the Fourteenth Amendment to the United States Constitution, providing that "no state shall... deny to any person within its jurisdiction the equal protection of the laws."

¹⁵ Minn. Const., Art. 1, Sec. 2. Rights and Privileges stating that "*No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.*" (Emphasis added in FN).

¹⁶ Article XIII of MCT Constitution provides in part that "no [MCT] member shall be denied any of the constitutional rights or guarantees enjoyed by other citizens of the United States, including but not limited to freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress of grievances, and due process of law."

¹⁷ See *Washington v. Davis*, 426 U.S. 229 (1976). A law of official government practice must have a "discriminatory purpose," not merely a disproportionate effect on one race, in order to constitute "invidious discrimination" under the Fifth Amendment Due Process Clause or the Fourteenth Amendment Equal Protection Clause. Generally, classifications based upon race are considered "suspect" and therefore, are subjected to "strict scrutiny" under the Equal Protection Clause or Due Process Clause.

may work for some Congressional purposes, because tribes have treaties with the United States, states do not have the same unique obligations.

Strict scrutiny of statute.

Here, the state law *alone and by itself* appears innocuous by simply stating that “Indian tribal members . . . must be referred to the by the county agencies in the service area to the Indian tribe for employment services.”¹⁸ As such, even if the Legislature did give a strict scrutiny review to its new law when created, the review was incomplete and unclear without the contract language, and more particularly the Respondent County’s arbitrary and capricious application thereof to *some*¹⁹ Indians. Therefore, the statute would appear to have a rational basis, which viewed alone would likely withstand strict scrutiny with the word “referred”. Also, in reviewing 256J.645 the only requirements are on the part of the Tribe and County, with no express requirements on the individual *person*, resident, tax-paying citizen Indian tribal member who applies for MFIP.

However, as Chief Appeals Referee Mentz noted in his Amended Conclusions “both Minn. Stat. § 256J.645, subd. 4 and the contract for provision of employment services are clear” and therefore must be viewed together. Adding the MCT contract for the employment services might have

¹⁸ Minn. Stat. § 256J.645, subd. 4.

¹⁹ See copy of completed form DHS-3048 (5-02), signed and dated by Petitioner Buddie Greene July 16, 2004, attached as Exhibit 1 in the Appendix.

slipped by a strict scrutiny review as well because the MCT must “operate a Tribal program for persons of Indian descent and eligible non-Indian members of the participant’s family who reside in RESERVATION’s service delivery area . . .”²⁰ However, a closer contract review reveals that the *only* tribal members to be served must be “enrolled or eligible for enrollment in the Minnesota Chippewa Tribe [which] . . . consists of six reservations.” At this point a strict scrutiny review would see that equal treatment or equal protection fails because there are 562 federally recognized Indian tribes²¹, with tribal members living and traveling freely across the 50 states, including Minnesota. In the present case that means that the State of Minnesota is treating the Indian tribal members of the MCT (one tribe) differently than the Indian tribal members of the other 560 +/- federally recognized tribes who may reside in Minnesota or within any of the 6 reservation boundaries. To be suspect, a classification must be intentionally discriminatory, should be immutable, and have a history of purposeful inequity toward a group that has been denied access to political power. Here, the state’s law applies only to Indian tribal members (and who ever is in their immediate family) who as a group and politically have been

²⁰ See copy of the State of Minnesota Reservation Grant Contract attached as Exhibit 2 in the Appendix. For whatever reason the Administrative Record does not include a full copy (only 3 pages).

²¹ See National Indian Gaming Association, Indian Gaming Facts, posted on their webpage at <http://www.indiangaming.org/library/indian-gaming-facts/index.shtml>

denied access to political power, much like the *one drop rule*.²² Appellant Greene understood that most of the employers in Aitkin County were non-Indian. Greene wanted to the access to the same programs and services as the other resident, tax-paying, non-Indians competing for jobs with primarily non-Indian employers. Greene was told to she must use the tribal employment services--not because they were separate but equal, or better--but because Respondents had negotiated her mandatory participation with a contract service provider who was also the Indian tribe with which she was enrolled. Of course the state law did not expressly state the mandatory requirement, nor did the contract for the tribe to be a service provider. The mandatory language barring Greene from Respondent's program for all other resident, tax-paying citizens was buried in an Employment Services Referral, where the concept of *mandatory* on the part of Greene was first expressly stated. Looking behind the curtain at all of the documents it is obvious that Respondents have constructed a scheme that discriminates against *some* Indians, requiring *some* to only use the Indian door. It is unconscionable that the affected Indians are already in poverty, and have no

²² One Drop Rule: This rule was created during the time of slavery in our country. The rule basically stated that a person with as little as one drop of black blood in their heritage was to be considered black. See also Jim Crow laws; Plessy v Fergusson, 163 U.S. 537 (1896) and Brown v. Board of Education, 347 U.S. 483 (1954).

idea that their rights to public services have been contracted away by the very same governments subject to the Fourteenth Amendment.

Certainly if the statute and contract are read together with the Respondents' forms which express the invidious purposeful discrimination, equal protection conflicts are obvious for both non-Indians and Indians. The most obvious equal protection deception and violation comes from Respondent Aitkin County's use of the Tribal/Reservation Membership form DHS-3048 (5-02). The form seeks private data about tribal affiliation while suggesting that the purpose is to

giv[e] the county agency data it needs to decide where you can get MFIP Employment Services. Members of some Indian Tribes or Bands can get services from a Tribal program. Others can get services from the county program.²³

The words "can get" are open and appear to be the choice of the MFIP recipient expressing an alternative for which Greene might qualify.

However, in reality the unwritten, unstated meaning of "can get" means *you must and you have no choice it is mandatory*. The purpose of the form is not openly stated, but serves to facilitate the invidious discriminatory purpose of Respondent County to prevent *some* identified Indian tribal members from ever using the same agency services open to all other residents.

²³ See copy of completed form DHS-3048 (5-02), signed and dated by Petitioner Buddie Greene July 16, 2004, attached as Exhibit 1 in the Appendix.

The real question is whether the Respondents, using a third party beneficiary contract and state law for providing employment services with a tribal service provider, have violated the equal protection rights of a taxpayer citizen of the United States, of the State of Minnesota and County of Aitkin, who happens to be Indians in a particular tribe, residing in certain counties identified in the Mn/MCT Contract and Minn. Stat. § 256J.645, subd 2 (2).

The plain language of the state law only allows a contracting Indian tribe to “operate its employment services program within a geographic service area not to exceed the counties within which a border of the reservation falls.”²⁴

Therefore, Respondents are being arbitrary and capricious in their application of the MFIP laws as they relate to Indians throughout the state, which defies even a rational basis relationship of the suggested intent, goals and laws.

After Greene’s initial agency appeals and District court appeal, Respondent County’s worker informed Petitioner that “one way for you to receive a full grant is to get into compliance with Employment Services. You will need to do this using services from the Chippewa Tribe.”²⁵ This suspect scheme becomes economic coercion, preying on those obviously in

²⁴ Minn. Stat. § 256J.645, subd 2 (2).

²⁵ See copy of letter dated June 7, 2005 from Aitkin County Health and Human Services workers to Buddie Green attached as Exhibit 4 in the Appendix.

financial need of services, and all Petitioner needs to do is accept that she does not have the same equal rights and constitutional protections and guarantees as other taxpaying resident, citizens (non-Indian and *some* other Indians) in Aitkin County, Minnesota. Just go in the Indian door.

Preference v Requirement.

Respondents wrongly assert in their original memorandum that

The analyses and principles embraced by the United States Supreme Court and subsequently by the Minnesota Court of Appeals require this court to uphold the constitutionality of Minnesota Statutes, section 256J.645.²⁶

Most of the cases and their principles cited in Respondents' analysis support either federal laws singling out Indian tribes and their members²⁷, employment preferences²⁸ for Indians or rights of tribes to advocate for and govern tribal members.²⁹ Strict scrutiny applies whenever a law employs a suspect classification or substantially infringes upon a fundamental right.

Race is suspect classification even when designed to benefit racial

²⁶ See Commissioner's Memorandum in Support of the Motion for Summary Judgment dated September 14, 2006 at p. 13.

²⁷ See U.S. v. Antelope, 430 U.S. 641m 97 S. Ct. 1395 (1977). This case involved on reservation Indians and the unequal treatment of Indians going to federal court for crimes while non-Indians went to state court due to the federal Major Crimes Act.

²⁸ See Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2474, 8 Fair Empl.Prac.Cas. (BNA) 105, 7 Empl. Prac. Dec. P 9431, 41 L.Ed.2d 290 (1974). Regarding employment preference for Indians in the Bureau of Indian Affairs as rational fulfillment of congress' unique obligations to Indian tribes and their members. On the other hand, as noted by Justice Stringer's dissent, if the term "Indian" is ambiguous, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." 617 N.W.2d at 66 (Stringer, J., diss.) (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)). See also Krueth v Indep. Sch. Dist. No. 38, 496 N.W. 2d 829 (Minn. Ct. App. 1993) Regarding American Indian teacher retention policy allowing lay off of tenured non-Indian teachers to retain Indian teachers.

²⁹ Williams v. Lee, 358 U.S. 217, 220 (1959).

minorities. The 14th Amendment explicitly obligates states to provide equal protection of the laws.³⁰ Here, the State is violating equal protection by requiring *some* Indians to use the MCT employment service program, whether they live on or off the reservation.

Both Livingston³¹ and Krueth³² are Indian preference cases dealing with employment, however, this is where the difference between Indians as a political (treaty) group and Indians as a suspect racial classification are more easily distinguished. In 2003, the Supreme Court of Alaska considered the differences in Malabed v. North Slope Borough.³³

The Malabed court noted that

Title VII of the Civil Rights Act of 1964 bars discrimination in employment practices, including racially discriminatory hiring practices.³⁴ The 703(i) exception appears in a section entitled "unlawful employment practices."³⁵ The exception's primary effect is to exclude employers located on or near a reservation from various equal employment requirements of the Civil Rights Act that govern "*otherwise-unlawful preferential treatment* given to Native Americans in certain employment."³⁶

The Malabed court recognized that

³⁰ U.S. Const. Amend. XIV § 1.

³¹ Livingston v Ewing, 601 F. 2d 1110 (10th Cir. 1979).

³² Krueth v Indep. Sch. Dist. No. 38, 496 N.W.2d 829 (Minn. Ct. App. 1993).

³³ Malabed v. North Slope Borough, 70 P3d 416 (AK S. Ct. 2003), was heard as a Certified Question from the United States Court of Appeals for the Ninth Circuit (SP-5692, S-9808).

³⁴ 42 U.S.C. 2000e-2(a) (1994).

³⁵ 42 U.S.C. 2000e-2(i) (1994).

³⁶ 1 Barbara Lindemann & Paul Grossman, Employment Discrimination Law 387 (Paul W. Cane, Jr., ed., 3d ed. 1996). (Emphasis added).

the Tenth Circuit's decision in Livingston v. Ewing does not support the proposition that the 703(i) exception creates a broad enough interest to allow state and local government action.³⁷ There, the Tenth Circuit allowed the City of Sante Fe to restrict vendors of handcrafted jewelry within the grounds of the Museum of New Mexico and the Palace of the Governors to members of Native American tribes,³⁸ declaring that the 703(i) exception was sufficiently broad to sustain the preference.³⁹ In so doing, the court read Morton v. Mancari⁴⁰ as holding that an employment preference is "not to be considered racial discrimination of the type generally proscribed" when it turns on "the unique legal status of Indians under federal law . . . and the assumption of guardian-ward status to legislate specially on behalf of Indian tribes."⁴¹ Applying this interpretation, the court found Mancari to be a "very strong precedent for upholding the grant of the exclusive right to the Indians in the present case based on the employment statute in 2000e-2(i) [the 703(i) exception]."⁴²

The Tenth Circuit's ruling is distinguishable from this case for important reasons. The plaintiffs in Livingston did not challenge the city's actions under state constitutional law - they based their challenge strictly on the Fourteenth Amendment to the federal constitution.⁴³ Unsurprisingly, then, the claim in Livingston gave the Tenth Circuit no reason to look beyond the "unique legal status of Indians under federal law"⁴⁴ - a status that exists and creates strong federal interests independently of the 703(i) exception.

Moreover, the state interest furthered by the preference in Livingston was a strong and specific interest in preserving New Mexico's historical and cultural traditions: the preference only extended to established Indian uses of Santa Fe's historic

³⁷ Livingston v. Ewing, 601 F.2d 1110 (10th Cir. 1979).

³⁸ Livingston at 1111, 1115. The Museum and Palace were not on a reservation and were state properties. **But see** Tafoya v. City of Albuquerque, 751 F. Supp. 1527, 1530-31 (D.N.M. 1990) (declaring unconstitutional under a strict scrutiny analysis a similar city ordinance in Albuquerque limiting vending within Old Town to Indians).

³⁹ Id. at 1114-15.

⁴⁰ Morton v Mancari, 417 U.S. 535 (1974).

⁴¹ Livingston at 1113

⁴² Id. at 1114.

⁴³ *See id.* at 1112.

⁴⁴ Id. at 1113 (emphasis in original).

Palace of Governors, reportedly the oldest public building in the United States; Indian use of the site dated back to the 1680s, and the particular activities covered by the preference had been performed almost exclusively by Indians since the early 1900s.⁴⁵ The court viewed these facts as establishing a compelling state interest in "acquiring, preserving and exhibiting historical, archeological and ethnological interests in fine arts."⁴⁶

Livingston thus stands in sharp contrast to the borough's case. Nothing in the Tenth Circuit's ruling in Livingston indicates that the court viewed the 703(i) exception alone as creating affirmative interests sufficient to sustain a municipal hiring preference in favor of Native Americans. And unlike the City of Santa Fe in Livingston, the borough here advances no independently viable state interest in economically preferring one group of workers over others; the economic interests it asserts are indistinguishable from those that we found illegitimate in Enserch.⁴⁷

This is the same analysis Petitioner Greene directs this Court to recognize and use in the present case. Fortunately, the Malabed Court then went on with its analysis noting

Krueth considered a provision of Minnesota's American Indian Education Act allowing schools with ten or more American Indian students to retain American Indian teachers with less seniority over non-Indian teachers with more seniority.⁴⁸ The Minnesota legislature enacted the provision to meet "the unique educational and culturally-related academic needs of American Indian people."⁴⁹ As in Livingston, the equal protection challenge in Krueth was advanced only under the federal constitution.⁵⁰ Characterizing the challenged

⁴⁵ Id. at 1112; Livingston v. Ewing, 455 F. Supp. 825, 827-28 (D.N.M. 1978).

⁴⁶ Id. at 1115.

⁴⁷ See State, Dep'ts of Transp. & Labor v. Enserch Alaska Constr., Inc., 787 P.2d 624, 634 (Alaska 1989); see also Lynden Transport, Inc. v. State, 532 P.2d 700, 708-10 (Alaska 1975).

⁴⁸ Krueth at 833.

⁴⁹ Id. (quoting Minn. Stat. 126.46 (1990)).

⁵⁰ Id. at 835.

preference as a political classification of the kind recognized in Mancari, the court in Krueth decided to apply rational basis review in determining its constitutionality.⁵¹ Under this standard, the court upheld the statute as applied to the school district action at issue; noting that "[t]his school district is located entirely on the Red Lake Reservation and consists of a student population almost 100% American Indian," the court observed that if the challenged statute "has meaning anywhere in the State of Minnesota, it has meaning in Independent School District No. 38, Red Lake, Minnesota."⁵²

In Krueth and Livingston there were compelling government interests to give an employment preference to Indians. Here, in the present Greene case, there are no compelling state government interests being served by the MCT exercising the option of becoming an employment service program provider. More importantly, there is no preference or choice (opportunity for knowing waiver or consent) extended to the Indians themselves, instead a deprivation of civil rights is being compelled by State government against *some* Indians.

Cases involving "employment preferences" only affect the individual Indian when the person decides to apply for a job, or in the case of job retention as in Krueth. In contrast, the manner in which the State mandates that *some* Indians, in certain circumstances and geographic locations, only use MCT employment services results in a financial harm or sanction if not obeyed. This Minnesota/MCT MFIP program scheme resembles the old

⁵¹ Id. at 836, 837.

⁵² Id. at 837. Cf. Tafoya v. City of Albuquerque, 751 F. Supp. 1527, 1530-31 (D.N.M. 1990) (striking down ordinance after finding that city did not have powers similar to the federal government that would enable city to prefer members of federally recognized tribes).

separate but equal attempts for black only schools and white only schools.⁵³ Respondents cite to the Yakima decision where “state law establishing jurisdiction over reservation lands survived equal protection challenge under rational basis test.”⁵⁴ The State of Washington relied upon a federal statute⁵⁵ providing for extension of State’s jurisdiction over Indians and Indian territories or reservations. Ironically, in Yakima, the state did not assume jurisdiction over public assistance.⁵⁶

Respondents recognized that “the constitutionality of *federal* laws singling out Indian tribes and their members turns on whether the classification can be tied to the rational fulfillment of Congress’ unique obligation to Indian tribes and their members.”⁵⁷ Respondents then assert that “the classification in section 256J.645 is limited to American Indians who are members of a tribe residing *within their tribal service area*.”⁵⁸ The only “service area” is defined in the contract between Minnesota and the MCT,

⁵³ Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). A landmark decision of the United States Supreme Court which explicitly outlawed racial segregation of public education facilities.

⁵⁴ Commissioner’s Memorandum at 11 citing Washington v. Confederated Bands and Tribes of Yakima Indians, 439 U.S. 641, 97 S. Ct. 740 (1979).

⁵⁵ Public Law 280, upon which the State of Washington relied for its authority to assert jurisdiction over the Yakima Reservation under Chapter 36, was enacted by Congress in 1953 in part to deal with the “problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.” Bryan v. Itasca County, 426 U.S. 373, 379, 96 S.Ct. 2102, 2106, 48 L.Ed.2d 710; H.R.Rep. No. 848, 83d Cong., 1st Sess., 5-6 (1953). The basic terms of Pub.L. 280, which was the first federal jurisdictional statute of general applicability to Indian reservation lands, are well known, especially in Minnesota which was one of the original 5 states under the Act.

⁵⁶ Washington v. Confederated Bands and Tribes of Yakima Indians, 439 U.S. 463, 466, 99 S. Ct. 740 (1979).

⁵⁷ Morton v Mancari, cite omitted. See also ⁵⁷ U.S. Const. Amend. XIV § 8. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

⁵⁸ Commissioner’s Memorandum at 14.

however Respondents show no authority for a tribe to govern members conduct off reservation.

The Respondents then make the ultimate leap to the conclusion that “When such a classification is coupled with the state’s *legitimate interest and unique obligation to American Indians*, the rational basis test is satisfied, and section 256J.645 survives the present equal protection challenge.⁵⁹ What is the state’s unique obligation to American Indians? The federal government’s unique obligation is derived from various treaties and other federal legislation, but Respondents fail to cite any example for state.

Finally, Respondents suggest that it is the “Legislature’s intent to allow tribal governments greater opportunity for self-government is clearly demonstrated in section 256J.645.”⁶⁰ In U.S. v Lara⁶¹, the United States Supreme Court held that the Indian Civil Rights Act recognizes and affirms in each tribe the “inherent power” to prosecute nonmember Indians.⁶² This United States Supreme Court’s declared recognition of a tribe’s authority over non-member Indians is not supported by this or any other state law, the

⁵⁹ Id.

⁶⁰ Id.

⁶¹ U.S. v Lara, 541 U.S. 193, 124 S.Ct. 1628, 158 L.Ed.2d 420, 72 USLW 4277, 04 Cal. Daily Op. Serv. 3331, 2004 Daily Journal D.A.R. 4703, 17 Fla. L. Weekly Fed. S 219

⁶² Indian Civil Rights Act of 1968 (25 U.S.C. §§ 1301-03), Section 1301(2) “powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.

Mn/MCT Contract services agreement language or Minnesota case law. It is a fiction for Respondents to suggest "greater opportunity for self government" is derived by tribal governments when any tribes' legal authority, jurisdiction and self-determination supported by federal statutes and United States Supreme Court case law are being under cut. Consequently, for Greene as a tribal member she is witnessing the selling out of the MCT's and tribal members' rights and authority, and worse Greene is mandated to accept it as a tribal member and suffer for it as an individual person, even living off the reservation. Is it any wonder Green does not wish to participate in MCT programs?

Affected by other error of law.

Respondent argues that the MCT can legally bind it's members into being obligated to accept MCT employment services in the counties where the MCT is under contract. But the MCT is bound by its own Constitution⁶³, which also provides in part for the civil rights of tribal members' providing that

All members of the Minnesota Chippewa Tribe shall be accorded by the governing body equal rights, equal protection, and equal opportunities to participate in the economic resources and activities of the Tribe, and no member shall be denied any of the constitutional rights or guarantees enjoyed by

⁶³ Revised Constitution of the Minnesota Chippewa Tribe, Minnesota, as well as the Indian Civil Rights Act and U.S. Constitution.

other citizens of the United States, including but not limited to freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress of grievances, and due process of law.⁶⁴

The MCT cannot extinguish, limit, lease or sell tribal members' various⁶⁵ constitutional rights or deprive them of their civil rights simply by engaging in an MFIP employment services program provider contract. Respondent notes but ignores that

Greene also states that the Commissioner has not "provided any documentation showing that any tribal government has created any tribal ordinance or law requiring its members to become subject to any rules, laws or other directives derived from the financial employments [sic] services contract."⁶⁶

Petitioner Greene seeks to find the law upon which Respondents rely upon to compel her *required* use of MCT services and that which also bars her use of the Aitkin County taxpayer, citizens' public employment program services. Respondent has failed to show any law compelling Petitioner to use services as *expressly* directed state law, federal law, authorized by Congress or created or enforced by the MCT.

CONCLUSION

A racial classification should not survive any equal protection analysis unless a proven BENEFIT to the Indian *person* justified by law is present,

⁶⁴ *Id.* at Art. XIII.

⁶⁵ See FN 34, FN 4 and Minnesota State Constitution regarding *various* civil rights of equal protection, as well as Minnesota Human Rights Act below.

⁶⁶ Resp. Reply at p. 7.

like the Morton v. Mancari federal employment preference at the Bureau of Indian Affairs. The state is asserting a federal government policy of promoting tribal sovereignty, when it's not really the state's historically. Here, Respondents freely substitute the word *state* for *federal* (which is Congress who has the unique obligation with Indians and Indian tribes).

The disputed policy, contract and statute make it more difficult for Greene (the MCT member) to receive access to services than for a similarly situated, non-Indian beneficiary of the county program (and some other Indians). The tribal member has to travel to a different location a considerable distance away, and is in an impoverished situation while trying to do so (this being the very reason of applying for the county program in the first place, to get the workforce assistance in order to try to escape the impoverished situation.) Looked at in this context, the classification unconstitutionally discriminates against MCT tribal members in violation of the equal protection component of the due process clause of the Fifth Amendment.

Even under a completely deferential rational basis review, the classification would be irrational. Yet it calls for a more heightened scrutiny, subject to a sliding scale analysis or more, even strict scrutiny because of it being a racial classification. This Court must also take into account the

effects of a wrongful and erroneous denial of county benefits, whereby the workforce policies and purposes are not fulfilled for the intended recipient.

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws”, a clear mandate that all persons similarly situated must be treated alike. While the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest, the general rule gives way when a statute classifies by race, alienage, or national origin. Laws grounded on the distinction of race are deemed to reflect prejudice and antipathy, and are irrelevant to the achievement of any state interest. Those in the burdened class, as is the Appellant here, are treated as not as worthy or deserving as others (non-MCT members and non-Indians) who can access the county services without the additional barriers and burdens imposed.

These statutes are subject to strict scrutiny and a compelling state interest must be shown, as the discrimination is unlikely to be soon rectified by legislative means. In between “rational basis” and “strict scrutiny” the Supreme Court cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions. In this case, an impartial lawmaker may logically believe that the classification would

serve a legitimate public purpose transcending the harm to the Appellant as a member of the disadvantaged class. The word *rational* "includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially."⁶⁷ Invalidation of racial classifications has been virtually automatic, "second order" rational basis review and "heightened scrutiny" not even being necessary to determine the violation of the equal protection of the laws.

The constitutional and societal interest of the interest adversely affected and the recognized invidiousness of the of the basis upon which the particular classification is drawn makes the "strict scrutiny" level appropriate to employ in this case - that all citizens of Minnesota receive equal protection of the laws under the United States and Minnesota constitutions as far as race not being a factor in the equal access to county benefits. "The Court, for example, has never suggested that race-based classifications became any less suspect once extensive legislation had been enacted on the subject."⁶⁸ Legislation cannot eviscerate the underlying constitutional principle in this case. The statute erects an additional burden on the tribal member applying for county benefits, that can turn into a virtual

⁶⁷ Justice Stevens concurring in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) at ____.

⁶⁸ Id.

barrier in fact, and is inconsistent with the principle of equality embedded in the Fourteenth Amendment.

Permissible distinctions between persons must bear a reasonable relationship to relevant characteristics of the persons, and race is per se never relevant. Careful identification of the interest at stake, the access to county services on an impartial basis as the other citizens of the State of Minnesota, and recognition that the classification is per se invidious supports the assertion that it be found to be in violation of the equal protection of the laws.

Moreover, a consistent pattern of racial discrimination is not a necessary predicate to a violation of the Equal Protection Clause. A single discriminatory act is not immunized by the absence of such discrimination in the making of other comparable decisions. However, in this case the Court could perhaps take judicial notice that the policy has been applied to other tribal members, thereby burdening them on a different basis than other non-Indian or non-MCT member citizens, and it has been applied discriminatorily in those counties having a policy to restrict MCT members to the tribal program under the unconstitutional statute and non-consensual agreements. As such, Respondents have violated Greene's civil rights and liberties derived from the Minnesota and United States Constitution and its

Amendments, and the District Court decision giving deference and presumed constitutionality to Respondents must be reversed.

Date: 8-21-6

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).