STATE OF MINNESOTA

IN THE SUPREME COURT

A23-1762

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In the Matter of the Welfare of the Children
of: L.K. and A.S., Parents.

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**BRIEF OF *AMICUS CURIAE***
**CHRISTIAN ALLIANCE FOR INDIAN CHILD WELFARE**
**IN SUPPORT OF PETITIONERS**

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## INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*[1]

Equal Protection "absolutely prohibits invidious discrimination by [the] government." *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting). The Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 ("ICWA"), and the Minnesota Indian Family Preservation Act, Minn Stat. § 260.751-835 (2022 & Supp. 2023) ("MIFPA"), defy that prohibition. Based solely on their Indian blood, ICWA and MIFPA banish Indian children to a separate custody regime that abandons the "best interests of the child" standard and allows Indian children to be placed in homes based solely on their Indian blood and/or to be used as the pawns or weapons of tribal authorities or dissatisfied family members. Under any other circumstance, such a classification would be "forbidden" as "it demeans the dignity and worth of a person to be judged by [their] ancestry." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

Christian Alliance for Indian Child Welfare ("Alliance") is a North Dakota nonprofit corporation with members in thirty-five states, including Minnesota. Alliance was formed, in part, to (1) promote human rights for all United States citizens and residents; (2) educate the public about Indian rights, laws, and issues;

[1] No party's counsel authored this brief in whole or in part, and no person or entity, other than *amicus* or their counsel, made a monetary contribution to fund the brief's preparation or submission.

and (3) encourage accountability of governments, particularly the federal government, to families with Indian ancestry.

Alliance promotes the civil and constitutional rights of all Americans, especially those of Indian ancestry, through education, outreach, and legal advocacy. In furtherance of this mission, Alliance files *amicus* briefs in cases that implicate the rights and wellbeing of Indian children. *See, e.g.*, Brief of *Amicus Curiae* Christian Alliance for Indian Child Welfare and ICWA Children and Families, *Haaland v. Brackeen*, 599 U.S. 255 (2023) ("Alliance *Amicus* Br.").

## SUMMARY OF THE ARGUMENT

This case, like so many others, is about the harm suffered by Indian children as a result of ICWA and MIFPA. Because of these statutes, Indian children and their families are subject to a discriminatory and unconstitutional custody regime that (i) violates Equal Protection, and (ii) harms Indian children, subjecting them to detrimental placements that would never be tolerated but for ICWA and MIFPA.

At the bare minimum, ICWA and MIFPA violate the constitutional guarantee of Equal Protection. The statutes impose race-based classifications that cannot survive constitutional scrutiny. That the statutes—whose scopes are defined by a child's heritage and blood quantum—are race-based classifications cannot seriously be disputed. The limited regulation of Indians as Indians that has been allowed for "political" purposes is narrow, cannot be read to justify all laws regarding Indians,

and is simply inapt here. Even assuming that the statutes impose a "political" classification (they do not) and applying a more lenient standard of scrutiny (the Court should not), ICWA and MIFPA still fail. It is undisputable that the statutes demonstrably and adversely impact Indian children and non-Indian families and must be struck down.

There is no question that ICWA and MIFPA's discriminatory placement preferences harm Indian children. The statutes eliminate for Indian children the "best interests of the child" standard normally prevailing in state custody proceedings and subject the needs of Indian children as "resources" to the needs of their tribe. The statutes therefore create an inevitable conflict between the discriminatory placement preferences mandated by ICWA and MIFPA and the best interests of Indian children, often with tragic results. The discriminatory placement preferences further subject Indian children to incredible government intrusions on their liberty. And, the discriminatory placement preferences are often used as weapons by estranged relatives or tribal authorities to control Indian children or non-Indian parents or to obtain custody that they would otherwise be denied.

## ARGUMENT

### I. ICWA AND MIFPA OFFEND CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION.

Laws that segregate "Indians" or "Native Americans" for separate treatment are generally unconstitutional and subject to strict scrutiny. *Adarand Constructors,*

*Inc. v. Pena*, 515 U.S. 200 (1995) Fifty years ago, the U.S. Supreme Court identified one exception to this general rule that extends only to laws that either treat tribes as political entities or directly pertain to tribal self-governance. *Morton v. Mancari*, 417 U.S. 535 (1974). But the Court did not intend this limited exception to serve as a constitutional carveout for all laws related to Indians. To the contrary, this "limited exception" yields to constitutional guarantees of Equal Protection and is entirely inapplicable to laws that regulate Indians as a racial class. *Rice*, 528 U.S. at 520.

ICWA and MIFPA create two unlawful race-based classifications subject to strict scrutiny. The first are their broad definitions of "Indian child," which include children unaffiliated with any tribe, wherever they may be, based on their ancestry.[2] The second are their placement preferences,[3] which—solely because of their race—

[2] Under ICWA, "'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. 1903(4); Minn. Stat. § 260.755, Subd. 8 (similar).

[3] Under ICWA, "preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a). Under MIFPA, "Preference shall be given, in the absence of good cause to the contrary, to a placement with: (1) a noncustodial parent or Indian custodian; (2) a member of the Indian child's extended family; (3) a foster home licensed, approved, or specified by the Indian child's Tribe; (4) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (5) an institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs." Minn. Stat. § 260.773, Subd. 3.

leave Indian children and non-Indian families at a steep disadvantage in custody proceedings.

These race-based schemes bear no resemblance to the political classifications outlined by the Supreme Court and are thus unconstitutional.

### A. ICWA and MIFPA Are Race-Based Classifications Subject to Strict Scrutiny.

#### 1. Classifications Based on Indian or Tribal Status Generally Constitute Racial Classifications.

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Under the Fourteenth Amendment, the government may not "distribute[] burdens or benefits on the basis of individual racial classifications." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *see Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). The "central mandate" of equal protection "is racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904 (1995). Race-based classifications are thus "presumptive[ly] invalid[]," *Parents Involved in Cmty. Schs.*, 551 U.S. at 793, as they "demean[] the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities," *Rice*, 528 U.S. at 517; *Miller*, 515 U.S. at 911.

Since *Brown v. Board of Education*, courts have worked tirelessly to uproot invidious discrimination nested within our schools, businesses, and institutions. The cases following *Brown* reflected the constitutional ideal of eradicating "all governmentally imposed discrimination based on race." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023).

But "eliminating racial discrimination means eliminating *all of it*." *Id.* (emphasis added). For decades, ICWA and MIFPA have continued to unquestionably single out for differential treatment Indian children and non-Indian families on account of race. As noted above, the statutes apply to any "Indian child"—regardless of whether the child is domiciled or residing on a reservation, and regardless of whether the child is even a member of an Indian tribe.

The U.S. Supreme Court has repeatedly reminded lower courts that classifications based on "Indian" or "Native American" status are racial classifications. *Adarand*, 515 U.S. at 207-08, 213, 223-24 ("Native American" is a "classification based explicitly on race" and subject to strict scrutiny); *see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476, 478, 493 (1989) (plurality) (calling preferences for Indians a "race-based measure"). Moreover, their racial character is

made obvious in other circumstances, including in the federal census,[4] college admissions,[5] and for purposes of employment discrimination.[6]

To circumvent facial challenges, ICWA and MIFPA purport to limit their scope to federally recognized tribes. *See* 25 U.S.C. § 1903(7); Minn. Stat. § 260.755, Subd. 12. This hides the ball. Tribal membership in federally recognized tribes is always a function of ancestry and race. Federal law requires that tribal membership extend to individuals descended from a historically Indian tribe. 25 C.F.R. § 83.11(e) ("membership consists of individuals who descend from a historical Indian tribe"). Further, many tribes, including Minnesota tribes, impose a blood-quantum requirement for membership. *See, e.g.*, Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, Art. II, § 1(c) (requiring children to have one quarter (1/4) degree Indian blood). Thus, when Congress or the Minnesota legislature enact laws respecting federally recognized tribes, they unavoidably recognize an "Indian

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[4] *2020 Census Frequently Asked Questions About Race and Ethnicity*, US Census Bureau (Aug. 12, 2021) (collecting information about "American Indian[s]" as a major category for race and ethnicity).

[5] *See generally Students for Fair Admissions, Inc.*, 600 U.S. at 206 (discussing Harvard's "racial categories" of African-Americans, Hispanics, and "Native Americans").

[6] *See, e.g.*, *Indian and Native American Employment Rights Program*, U.S. Dept. of Labor, https://tinyurl.com/4yc22ndu; *Eakerns v. Kingman Reg'l Med. Ctr.*, No. 06-CV-3009, 2009 WL 735148, at *17 (D. Ariz. 2009) (allowing Indian plaintiff to proceed on a race discrimination claim under Title VII).

tribe" to be "a body of Indians of the same or a similar race." *United States v. Candelaria*, 271 U.S. 432, 442 (1926).

Race cannot be disentangled from ancestry and lineage. Indeed, "[d]istinctions between citizens solely because of their ancestry" are merely a proxy for "discrimination based on race alone." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). As the Supreme Court cautioned in *Rice*, "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." 528 U.S. at 517 ("Ancestral tracing . . . employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name.").

2. No Exception to This Rule Applies Here.

The Constitution grants Congress authority over Indian affairs, but that power "is not absolute." *Brackeen*, 599 U.S. at 276 (quoting *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84 (1977)). Indeed, that power is "subject to limitations inhering in such a guardianship and to *pertinent constitutional restrictions*." *United States v. Creek Nation*, 295 U.S. 103, 110 (1935) (emphasis added).

Since the Founding, the term "Indian" has encompassed both the political classification of Indians—that is, the jurisdictional characteristics of the term—as well as the clear racial, or ancestral, characteristics. *See* Addie C. Rolnick, *The*

*Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. Rev. 958 (2011) (explaining that federal "Indian" classifications are both racial and political); *id.* at 974 (calling such distinction a "legal fiction"); Gregory Ablavksy, "*With the Indian Tribes*," 70 Stan. L. Rev. 1025, 1068 (2018) ("In broad strokes, the history explored here suggests that Anglo-Americans of the late eighteenth century understood the term 'Indian' to carry both racial and jurisdictional meanings."). Indeed, in enacting the Indian Reorganization Act of 1934, Congress defined Indians as including "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction . . . and shall further include all other persons of one-half or more Indian blood." 25 U.S.C. § 5129. By recognizing both the political and racial significance of Indians as a class, Congress was not breaking new ground. Rather, it was codifying a historically understood dichotomy into law.

Accordingly, the Supreme Court has identified a narrow circumstance where presumptively racial "Indian" classifications—otherwise violative of the Fourteenth Amendment—are instead treated as political classifications. *Mancari*, 417 U.S. at 552. This "limited exception" applies only to issues of internal tribal affairs and self-governance and is inapplicable here. *Rice*, 528 U.S. at 520; *Mancari*, 417 U.S. at 552 ("Literally every piece of legislation dealing with Indian tribes and reservations" involved "tribal Indians living on or near reservations."). The panel below was wrong to hold otherwise.

In *Morton v. Mancari*, the Court examined whether a statute that provided hiring and promotion preferences to tribal members at the Bureau of Indian Affairs ("BIA") violated the Equal Protection Clause. 417 U.S. 535 (1974). Because the statute was sharply focused on providing tribes "a greater degree of self-government, both politically and economically," the Court noted the classification was "political rather than racial in nature." *Mancari*, 417 U.S. at 553 n.24. The BIA, the Court reasoned, was a "'truly *sui generis*' agency responsible for administering matters that affect Indian tribal life," and thus, the tribal hiring preference was "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive" to its constituent Indian tribes. *Id.* at 553-54; *Greene v. Comm'r of Minnesota Dep't of Hum. Servs.*, 755 N.W.2d 713, 727 (Minn. 2008) (recognizing *Mancari* permits preferences that "directly promote Indian interests in self-government").

But *Mancari* does not create a blanket constitutional carveout for all regulation of "Indian" matters. The Court was "careful to note" that its holding "was confined to the authority of the BIA." *Rice*, 528 U.S. at 520. To be sure, in *Adarand*, the Court applied strict scrutiny to a federal program that provided highway-construction contracts to minority-owned business enterprises—including those run by Indians. 515 U.S. at 205. Notwithstanding Justice Stevens citing *Mancari* in the *Adarand* dissent, the majority did not distinguish between preferences for Hispanic

and African Americans and preferences for Indians. *Id.* at 244 n.3 (Stevens, J. dissenting).

Perhaps most significantly, the Court in *Rice* rejected an invitation to expand *Mancari*'s "limited exception" when it invalidated a provision of the Hawaiian Constitution that cabined certain voting rights to those of lineal Hawaiian descent. 528 U.S. 495 (2000). Because the challenged provision "single[d] out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics,'" upholding it would unlawfully "permit a state, by racial classification, to fence out whole classes from decisionmaking in critical state affairs." *Rice*, 528 U.S. at 515, 522.

ICWA and MIFPA operate well outside the rationale of *Mancari*. Unlike *Mancari*, the challenged provisions here have nothing to do with tribal self-governance or the BIA's charge over Indian affairs. Instead, they purport to govern custody proceedings for children, many of whom have little to no connection to a tribe, reservation, or any Indian heritage. And here, like *Rice*, the Statutes "fence out whole classes" of individuals for differential treatment, namely Indian children and non-Indian families, "solely because of their ancestry and ethnic characteristics." *Id.* at 496. Indeed, these statutes go even further afield to regulate the affairs of non-Indians, which is contrary to the limited jurisdiction granted to tribes in *Montana v. United States*, 450 U.S. 544, 564 (1981). *See In re Welfare of R.S.*, 805 N.W.2d 44,

50 (Minn. 2011) (rejecting tribe's jurisdiction over termination of non-Indian parental rights proceedings).

3. ICWA and MIFPA Impose Race-Based Classifications that Violate Equal Protection.

The Statutes offend Equal Protection twice over.

*First*, the statutory definitions of "Indian Child" facially discriminate based on race. ICWA and MIFPA each define "Indian Child" as a minor who is either a member of an Indian tribe, or who eligible to become a member of an Indian Tribe. 25 U.S.C. 1903(4); Minn. Stat. § 260.755, Subd. 7. Unlike *Mancari*, which upheld statutory hiring preferences limited to "federally recognized tribes," 417 U.S. at 553 n.24, the provisions here go further—sweeping in children who, on the basis of their lineal ancestry, *may* choose to affiliate with a tribe.

Even assuming tribal affiliation is a political (and therefore, permissible) classification upon which to discriminate, such affiliation is entirely speculative here. An Indian child has made no decision either way regarding tribal affiliation. Accordingly, his *political* affiliation is nonexistent, begging the question whether the Statutes contemplate a political classification or, more plausibly, the Statutes purport to sanction a classification defined exclusively by ancestry and blood quantum.

These classifications strike at the core of an Indian child's personhood. Once a tribe determines that a child meets its lineal-descent requirements, it may then assign the child an identity and unilaterally assert jurisdiction over that child's

wellbeing. *Cf. Obergefell v. Hodges*, 576 U.S. 644, 651-52 (2015) ("The Constitution promises liberty to all . . . to define and express their identity."). Further, ICWA and MIFPA nakedly dispense with the widely adopted "best interests of the child standard"—a standard that would certainly account for the child's eligibility for tribal membership and relationship to a particular Tribe or heritage—and impose an inflexible and disruptive rule based on race. The Statutes thus permit tribes to "put certain vulnerable children at a great disadvantage solely because of an ancestor—even a remote one—was an Indian." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655-56 (2013).

*Second*, the Statutes' placement preferences are unlawful. At the outset, the placement preferences are triggered by the child's race, which alone is unconstitutional. But the preferences are also independently prejudicial. ICWA and MIFPA deprioritize non-Indian adoptive families in favor of Indian, or Indian-preferred candidates. *Supra* n.3. Remarkably, under both statutes, a child could be placed in an "institution for children" before a non-Indian family is even considered, provided an Indian tribe approves of the institution. *Id.* Individualized, family placements are undoubtedly preferable to such institutions—which is why the federal government incentivizes states to enact plans that prioritize adoption. 42 U.S.C. § 673(b) (providing incentive payments to states that meet target adoption rates).

To depart from these preferences requires a showing of "good cause" by "clear and convincing evidence," unless no other family is identified for placement. 25 U.S.C. § 1915(a); Minn. Stat. § 260.773, Subd. 3. Non-Indian families are deprived the right to "compete on an equal footing" because they, by definition, cannot satisfy the lineal-descent or blood-quantum requirements. *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993); *Turner v. Fouche*, 396 U.S. 346, 362 (1970) (the Equal Protection Clause secures the right of individuals "to be considered" for government positions and benefits "without the burden of invidiously discriminatory qualifications"). Further, because ICWA and MIFPA largely exclude non-Indians from their placement preferences, non-Indians are necessarily deprived of race-neutral proceedings when they seek custody of Indian children. Under this regime, "the race, not the person, dictates" whether an otherwise qualified family can assist a child in desperate need of a home. *Palmore*, 466 U.S. at 432.

Proponents of the Statutes are sure to argue that if the Court holds ICWA and MIFPA unconstitutional, other protective Indian laws will be next to fall. By their calculus, an attack on the statutes is the precursor to a full-fledged assault on federal Indian law at large. Not so. *Mancari* and its progeny have repeatedly confirmed Congress' authority to regulate Indian tribes as quasi-sovereign entities with jurisdiction over "tribal Indians living on or near reservations." 417 U.S. at 552; *see,*

*e.g.*, *Moe v. Confederated Salish & Koo-tenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 466 (1976) (preventing States from taxing "on-reservation sales"); *Fisher v. Dist. Ct. of Sixteenth Jud. Dist. of Mont.*, 424 U.S. 382, 389 (1976) (per curiam) (addressing child-custody "dispute[s] arising on the reservation among reservation Indians."). Nothing about this status quo—or the remainder of Indian law—hinges on the survival of ICWA and MIFPA's race-based classifications or placement preferences.

### B. The Statutes' Classifications Cannot Survive This Court's Scrutiny.

#### 1. ICWA and MIFPA Fail Strict Scrutiny.

Racial classifications are subject to strict scrutiny. *Adarand*, 515 U.S. at 227. Under that rubric, the classification "must serve a compelling government interest, and must be narrowly tailored to further that interest" if it is to survive. *Id.*; *Green,* 755 N.W.2d at 725. This burden is the state's to bear. *In re Linehan*, 594 N.W.2d 867 (Minn. 1999). It cannot do so.

*First*, no compelling state interest exists. The "government may treat people differently because of their race only for the most compelling reasons." *Adarand*, 515 U.S. at 227. The express purpose of both statutes is the protection and preservation of a class largely defined by ancestry. ICWA, for instance, was passed in response to "federal policy [that] consciously sought to separate Indian children from their parents." Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 Child. Legal Rts. J. 1, 7 (2020). This

painful history is shameful and worthy of condemnation, but no evidence has been offered to demonstrate that the horrific abuses of the past will return absent drastic and discriminatory measures. *See Shelby Cnty. v. Holder*, 570 U.S. 529, 553 (2013). All "race-conscious" remedial schemes of government must have "a termination point" that serves to assure "all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter." *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (quoting *Croson*, 488 U.S. at 510). Congress and the Minnesota legislature cannot rely on memories of past wrongs to justify otherwise unlawful means—especially where race-matching policies in force today result in many of the same harms that motivated the enactment of ICWA and MIFPA in the first place. *See* James G. Dwyer, *The Real Wrongs of ICWA*, 69 Vill. L. Rev. 1, 28-51 (2024).

*Second*, neither MIFPA nor ICWA are "narrowly tailored." To be "narrowly tailored" means to be the "least restrictive means" for furthering the Statutes' purpose. *State v. Hatch*, 962 N.W.2d 661, 664 (Minn. 2021) (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)). As discussed, the Statutes cover Indian children, on or off the reservation, who have made no decision whatsoever about their tribal affiliation. These are children who are not, and may never become, members of a tribe. Moreover, many birth mothers and fathers—otherwise eligible for enrollment—have intentionally abandoned their tribal

membership. If the regulation of tribal members is permitted due to their affiliation with "quasi-sovereign tribal entities," *Mancari*, 417 U.S. at 554, the presence of non-affiliated parents and children renders the statutes impermissibly overinclusive.

2. ICWA and MIFPA Fail this Court's Heightened Rational Basis Review.

Even easing the standard of review, the statutes fair no better. Assuming *arguendo* the classifications are political and not racial, ICWA and MIFPA still perpetuate unlawful racial classifications in practice.

Minnesota's Constitution is apprehensive of seemingly race-neutral laws that, in effect, discriminate against protected classes. Indeed, "where a law demonstrably and adversely affects one race differently than other races" the Constitution "requires more of lawmakers (actual as opposed to theoretical factual justification for a statutory classification)—and demands of this court more searching scrutiny—than does the Fourteenth Amendment." *Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1, 27 (Minn. 2020); *State v. Russell*, 477 N.W.2d 886, 890 (Minn. 1991) (striking down drug law with racially disparate impact); *State v. Frazier*, 649 N.W.2d 828, 834 (Minn. 2002) (acknowledging that a constitutional violation may be found when a "statute creates a racial classification in practice").

There is little question the laws at issue here "demonstrably and adversely" impact Indian children and non-Indian families. As evidenced by this very case, Indian children are removed from safe homes and placed in risky or harmful custody

arrangements—against the medical recommendation of the Mayo Clinic and their birth mother's wishes, Aff. of Foster Parents Supp. Mot. Intervene & Stay Change of Placement, No. 46-JV-22-32 (Martin Cnty. Dist. Ct. Oct. 4, 2023)—as a consequence of ICWA and MIFPA's placement preferences. For their part, well qualified, non-Indian families are repeatedly denied the opportunity to care for the children who need them the most. No factual justification has been provided to the statutes' statutory classifications. Yet, as discussed below, evidence demonstrating the unspoken harms to Indian children and non-Indian families continues to mount.

ICWA and MIFPA violate Equal Protection.

## II. ICWA AND MIFPA'S DISCRIMINATORY PLACEMENT PREFERENCES HARM INDIAN CHILDREN AND FAMILIES.

The race-based regime imposed by ICWA and MIFPA has profoundly harmed those within its scope. Not only do the race-based classifications within the statutes inherently harm the individuals subject to discrimination, but they also hurt Indian children and their families in real and practical ways on a daily basis.

As stated above, ICWA and MIFPA impose discriminatory placement preferences, regardless of the child's relationship to the tribe or Indian family or the child's best interest. *Supra* p. 14. The party proposing a deviation from the required order of placement preferences establish good cause "by clear and convincing evidence" "at every stage of the proceedings," and—absent certain other circumstances—the "[t]estimony of the child's bonding or attachment to a foster

family . . . shall not be considered good cause." Minn. Stat. §§ 260.771, Subd. 7(c), (d), and (g); 25 C.F.R. § 23.103(c) (2023) (forbidding consideration of participation "in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum."); *In re Adoption of M.T.S.*, 489 N.W.2d 285, 288 (Minn. Ct. App. 1992) ("[T]he fact that separation from them will be initially painful to M.T.S. is not good cause to defeat the preference created by the ICWA."). MIFPA further provides that local social service agencies have a "duty to prevent out-of-home placements and promote family reunification" for Indian children—regardless of the circumstances—and forbids an "out-of-home or permanency placement for an Indian child" absent extensive "active efforts" by local social services agencies. Minn. Stat. §§ 260.762, Subd. 3; 25 U.S.C. § 1912(d) (requiring similar "active efforts").

These preferences unquestionably harm Indian children. *First*, ICWA and MIFPA's placement preferences regularly come into direct conflict with the best interest of Indian children. *Second*, these placement preferences intrude in the care and provision for an Indian child for the benefit of the Indian tribe. And, *third*, the statutes' discriminatory placement preferences are often invoked as a strategic or offensive weapon to further personal benefit over the needs of Indian children.

### A. The Discriminatory Placement Preferences Directly Conflict with the Best Interest of Indian Children.

There should be no question that ICWA and MIFPA's placement preferences regularly conflict with the best interests of Indian children. Writing for the seven-Justice majority in *Brackeen*, Justice Barrett acknowledged this conflict, stating that ICWA "requires a state court to place an Indian child with an Indian caretaker, if one is available. That is so even if the child is already living with a non-Indian family and the state court thinks it in the child's best interest to stay there." 599 U.S. at 264; *see id.* at 334-38 (Thomas, J., dissenting); *id.* at 372-75 (Alito, J., dissenting) ("[P]rovisions of [ICWA] compel actions that conflict with this fundamental state policy, subordinating what family-court judges—and often biological parents—determine to be in the best interest of a child to what Congress believed is in the best interest of a tribe.").

This case is a textbook example. *See* App. Br. at 2-4. Two-year-old fraternal twins K.K. and K.K. were born with severe physical disabilities due to prenatal drug use, and they required extensive, intensive, hospital care, including baby girl K.K. needing to be revived at birth and placed on a ventilator in the Natal Intensive Care Unit at the Mayo Clinic in Rochester, Minnesota. After lengthy stays at the hospital, the twins were discharged to non-Indian licensed foster parents (K.R. and N.R.), who were told that they were the preferred long-term placement for the twins. K.R. and N.R. cared for the twins for more than a year, taking them to many medical

appointments at the Mayo Clinic and facilitating in-home medical care, including physical therapy, occupational therapy, and early-childhood-specialist services.

However, without warning or apparent reason, Red Lake Nation exercised its power under ICWA and MIFPA to declare that the twins would be moved to live with a distant Indian cousin. K.R. and N.R. were informed of the twins' move date a mere four days beforehand. The twins had never met their new purported caregiver; there was no transition plan to address the twins' physical care or extensive medical needs; and the move was far distant from the twins' birth mother. This result would have never happened if the twins were not covered Indian children.

And this case is just the tip of the iceberg. In Minnesota alone, there is a disproportionately high number of Indian children in the foster care system, and a shockingly low number of approved, non-relative Indian foster homes available.[7] That is, as of 2022, there were approximately 2,000 Indian children in foster care in Minnesota and 400 Indian Natives homes available.[8] Approximately sixty percent of the Indian children in foster care in Minnesota are placed there by a tribal agency—contrary to popular misconception that Indian children are being taken

[7] Safe Passage for Children of Minnesota, *Minnesota Child Fatalities from Maltreatment 2014-2022* at 8, n.17 (Feb. 2023), https://tinyurl.com/3shjjvp5.

[8] Mark Fiddler and Naomi Schaefer Riley, *The Case Against the Indian Child Welfare Act, Opinion*, Newsweek (Feb. 11, 2022), https://tinyurl.com/5n8zd9w8.

from their heritage by non-Indians acting from racial bias—and remain in foster care for a longer period of time than their peers of other races, largely due to ICWA and MIFPA's limitations on who may adopt an Indian child.[9]

As a result, there are many instances where Indian children are placed with far-flung families who check the right racial "box." For example, Elizabeth Morris—Alliance's Chairwoman—experienced this firsthand when she and her late husband (a member of the Leech Lake Tribe of Minnesota), voluntarily took custody of four Indian grandchildren. Prior to their placement with the Morrises, the children suffered neglect and physical abuse, and, in at least one case, sexual abuse. The Tribe, desiring to place the children with an Indian family rather than the children's best interests, approved of the placement, despite moving them 1,200 miles from their community. To prevent further harm to the children, the Morrises cared for the children at great personal sacrifice and with no support or oversight from the Tribe.

And there are countless instances in Minnesota alone where Indian children are removed from stable, supportive non-Indian homes to less ideal—or downright abusive—living situations in the name of ICWA and MIFPA. For example, Ms. Sierra Whitefeather—an Alliance Board Member—is a member of the Leech Lake Tribe of Minnesota, a former Indian child, and the birth mother to an Indian child.

[9] *Id.*

When she found a safe, loving home that supported her native heritage, the Tribe ignored Ms. Whitefeather's best interests and her wishes and used ICWA to prevent her adoption by non-Indian parents. Due to the statutes, Ms. Whitefeather was shuffled between nearly thirty different foster homes by the time she was sixteen and suffered unspeakable sexual, physical, and emotional abuse.[10]

Local news stories abound with examples of Indian children being physically and sexually abused in unhealthy, but ICWA- and MIFPA-required custody placements. Jackie Black's children were taken away from her by the White Earth Reservation Indian Child Welfare Department and were placed with non-family tribal member Sheila Clark and her adult son Wyatt Clark, who was later convicted of sexually abusing Ms. Black's preteen daughters for more than three years.[11] After Wyatt Clark was convicted of felony criminal sexual conduct, two more young

[10] Jon Tevlin, *Tevlin: Sierra shares lessons on Indian adoption*, Star Tribune (Feb. 12, 2013), https://tinyurl.com/yksstdtw.

[11] Bailey Hurley, *I want justice for my babies.; Biological mother of victims in Mahnomen alleged sexual abuse case speaks out*, Valley News Live (Apr. 6, 2022), https://tinyurl.com/3kerthc8; Bailey Hurley, *Mahnomen man sentenced to 30 years for sexually abusing foster kids*, Valley News Live (Apr. 5, 2022), https://tinyurl.com/3a3t9627.

Indian children (five and eight years' old, respectively) who had been placed with Clark's mother came forward with further disturbing allegations of sexual assault.[12]

ICWA and MIFPA also often require the placement with or return of Indian children to unfit Indian family members. Indian children Remi and Tristan Stately (six and five years' old, respectively) were stabbed and left for dead in their burning home by their birth mother—a member of the Red Lake Indian Reservation—who fled with her three-year-old son after she set her home on fire in March of this year. One boy died from a stab wound, and the other from smoke inhalation, and the third, three-year-old son was rescued following issuance of an Amber Alert.[13]

Similarly, Jewel Sky Fineday passed away due to severe criminal neglect—including prolonged starvation, severe lice infestation, and isolation from medical treatment—by her grandmother and birth father on the Red Lake Indian Reservation.[14] Jewel's case in particular has prompted Safe Passage for Children of Minnesota—a citizens' group that publishes a yearly report on Minnesota child

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[12] Bailey Hurley, *Two more foster children come forward with sexual assault allegations against Mahnomen man*, Valley News Live (Mar. 7, 2023), https://tinyurl.com/53wz3bfj.

[13] Kim Hyatt, *Red Lake mom who set off Amber Alert charged in sons' killings*, Star Tribune (May 6, 2024), https://tinyurl.com/4z68kcmu.

[14] Paul Walsh, *Grandmother guilty of neglect that led to 7-year-old girl dying on Christmas on Red Lake Reservation*, MSN (May 1, 2024), https://tinyurl.com/j86wduzb.

fatalities due to maltreatment—to question whether new mechanisms are needed to make ICWA cases (like Jewel's) more transparent, including by making records available and requiring tribes to issue a fatality report.[15]

### B. The Discriminatory Placement Preferences Intrude on the Indian Child's Liberty and Autonomy.

ICWA and MIFPA's placement preferences create an unprecedented intrusion by the government into the care and provision for an Indian Child *for the benefit* of their tribe. That is, even though most Indian children do not live in a tribal community, have no meaningful relationship to a tribe, and have more non-Indian than Indian ancestry,[16] the fact of their ancestry turns them into a "resource . . . vital to the continued existence and integrity of Indian tribes." 25 U.S.C. § 1901(3). The statutes were, by design, created "for the protection and preservation of Indian tribes and their resources," and the discriminatory placement preferences at issue reflect that prioritization. *Id.* § 1901(2); *see* Minn. Stat. § 260.753 ("protect the long-term interests, as defined by the tribes, of Indian children, their families as defined by law or custom, and the child's tribe"); *id.* § 260.755, Subd. 2(a) ("The best interests of an Indian child are interwoven with the best interests of the Indian child's tribe.").

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[15] Safe Passage for Children of Minnesota, *Minnesota Child Fatalities from Maltreatment 2014-2022* 15-16 (Feb. 2023), https://tinyurl.com/3shjjvp5.

[16] Dwyer at 4 n.5; Minority Report at 5, For the Alyce Spotted Bear and Walter Soboleff Commission on Native Children (Feb. 27, 2024), https://tinyurl.com/2an6x7jd ("Minority Report").

ICWA and MIFPA stand alone in allowing children to be used as a resource of a government body. The treatment of and reference to children—or any other vulnerable group—as a "resource" should raise an immediate red flag for all equality-minded citizens. Indeed, it would be absurd and offensive if similar legal or custodial placement requirements were imposed on an "Indian woman" or an "Indian mentally disabled adult." *See* Dwyer at 3-4 (discussing such hypothetical legislation). The statutes' unprecedented placement preferences should receive the same rejection.

The immediate consequence of prioritizing the tribe and tribal affiliations over a child's personal relationships is obvious. As this case shows, children with no relationship to or experience with a tribe can be removed from the only family they have ever known and placed with unfamiliar and untrained tribal contacts on only a few days' notice. Or, in the case of Ms. Whitefeather, Indian children can be ripped away from the strongest and healthiest relationship they have known and placed in dangerous situations.

At bottom, ICWA and MIFPA's placement preferences are untenable because they "compel[] states to dictate and manipulate fundamental aspects of children's private lives to serve aims other than the children's well-being." Dwyer at 7-9. Contrary to the very core promises of the Constitution, ICWA and MIFPA "make[] certain persons' intimate associates and very identity subject to the state's *police*

*power*," allowing the government to "dictate those aspects of those persons' lives in a way that subordinates their fundamental well-being to interests of other individual and of cultural groups, or even to broad national aims like redressing past injustices." *Id.* Under the statutes, the individual needs of an Indian child do not matter when it comes to custodial placement. As a consequence, every Indian child under such a regime lacks autonomy and legal protection, some (as discussed above) with devastating and final results.

### C. The Discriminatory Placement Preferences Are Used as a Weapon to Further Personal or Tribal Gain.

Separate and apart from the harms inflicted on individual Indian children, ICWA and MIFPA's discriminatory placement preferences are also often used as a weapon to further some private or tribal end. For example, as the most recent ICWA cases to reach the U.S. Supreme Court have shown, ICWA is regularly invoked by tribes or tribal members to *prevent* adoption by non-Indian parents. In *Brackeen*, two children whom the plaintiffs had sought to adopt were declared by tribes to be members *only after* they learned that the children were in the care of non-Indian families, seemingly without a request by the children's parents to confer membership and even though the children's parents *were not tribal members*. 599 U.S. at 668-69. Indeed, the White Earth Band of Chippewa had determined that one such child *was not eligible for membership* and it was only after *seven* placements and the beginning of adoption proceedings that the Tribe reversed its earlier membership

determination and sought to intervene. *Matter of Welfare of Child of S.B.*, No. A19-0225, 2019 WL 6698079, at *1 (Minn. Ct. App. Dec. 9, 2019). Similarly, in *Adoptive Couple*, the Indian child was removed, as a consequence of ICWA, from the non-Indian adoptive home where she had lived since birth. This was despite the fact that she was a mere 1.2% Cherokee, had no interaction with any Cherokee community, and her biological father (who had no prior contact with her) had agreed to relinquish all parental rights until he learned of her pending adoption. 570 U.S. at 641.

In some circumstances, ICWA has been invoked to control dissident tribal members who leave a tribe's influence. For example, ICWA was invoked against Nina De La Cruz—a member of the Spirit Lake Tribe of North Dakota and mother to an Indian child—despite her wishes and her choice *not* to enroll her daughter in the Tribe. Ms. De La Cruz began working with Social Services upon the birth of her daughter and chose to live in Minnesota, away from the Tribe. However, in the name of ICWA, Social Services delivered Ms. De La Cruz's daughter to the Tribe anyway. Ms. De La Cruz was not allowed to visit her daughter, and her daughter was not allowed to leave the reservation. Family members who were willing and able to take custody were not allowed to intervene, and despite her positive life changes and

years of fighting to get her daughter back, Ms. De La Cruz's parental rights were terminated without ability to appeal.[17]

ICWA and MIFPA have also been used to undermine the rights of non-Indian parents or to obtain access to a child that otherwise would not be available. For example, the Shakopee Mdewakanton Sioux Community of Minnesota has, in several circumstances, deprived non-Indian fathers of their procedural rights and returned young children to Indian birth mothers despite the mothers' lengthy histories of domestic violence, drug addiction, multiple overdoses, and failed treatment programs.[18] But for the statutes, these women would have long ago lost their parental rights and their children would be safely cared for by their non-Indian fathers.

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The stories described here are merely a sampling of the children who have been harmed—and will continue to be harmed—by ICWA and MIFPA's

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[17] Tess Williams, '*I just want to be a mother to my kids': Mother says fight for child on Spirit Lake felt hopeless*, Grand Forks Herald (Jul. 14, 2019), https://tinyurl.com/2j63wcbe; Minority Report at 91-93.

[18] Alliance Amicus Br. at 12, 20 (describing stories from Andrew Bui and James Nguyen); *Nguyen v. Foley*, Case No. 21-3735 (8th Cir. Mar. 20, 2022) (Mr. Nguyen's suit regarding the legal deprivations suffered in child custody proceedings).

discriminatory provisions.[19] Instead of helping families, the statutes effectively eliminate any requirement to consider a child's best interests, placing the tribe's needs over any Indian child's. As a consequence, Indian children are, at best, used as political fodder or are discarded in the custody system. At worst, due to ICWA and MIFPA, Indian children are placed at great personal risk, are prevented from loving and supportive homes, and are deprived of their autonomy. Equal Protection does not permit any discrimination based on racial classifications, let alone the harmful discrimination and gross abuses described here.

## CONCLUSION

For the foregoing reasons, this Court should rule in favor of Petitioners.

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Respectfully Submitted,

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[19] *See, e.g.*, Naomi Schaefer Riley, *On Indian reservations, storm clouds gather over law enforcement*, Am. Enter. Inst. (Sept. 10, 2020), https://tinyurl.com/ms4m8mv3; Mark Flatten, *Death on a Reservation*, Goldwater Inst. (June 10, 2015), https://tinyurl.com/488ay89u; Dwyer at 43-53 (ICWA (1) leav[es] children in harmful home environments, (2) delay[s] permanency, (3) worse[ns] living situations, and (4) destroy[s] children's secure attachments).

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## CERTIFICATE OF COMPLIANCE

Pursuant to Minn. R. Civ. P. 132.01, I hereby certify that Alliance's Brief of Amicus Curiae contains 6,984 words (exclusive of the caption, tables, and signature blocks) as computed by the word processing program used to prepare this document, Microsoft Word, using Times New Roman, font size 14.

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