No. 25-1287

IN THE
Supreme Court of the United States

N.R., *ET AL.*,

Petitioners,

v.

KEITH M. ELLISON, ATTORNEY GENERAL OF MINNESOTA, *ET AL.*,

Respondents.

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

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

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INTEREST OF *AMICUS CURIAE*[1]

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 and issues; and (3) encourage government accountability to families with Indian ancestry.

Alliance is particularly concerned with the discriminatory consequences of the Indian Child Welfare Act of 1978 ("ICWA"), Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901–1963). ICWA requires the preferential placement of Indian children into foster or adoptive homes with "Indian adults." *Id.* § 1915(a). ICWA thus deprives non-Indian caretakers, who may be equally or better qualified, of the opportunity to provide and care for "Indian children." Alliance regularly files amicus briefs in state and federal courts regarding the harm ICWA causes to Indian children, including in the seminal case of *Haaland v. Brackeen*, 599 U.S. 255 (2023). *See, e.g.*, Brief of Christian Alliance for Indian Child Welfare and ICWA Children and Families as *Amici Curiae* Supporting the Brackeen and State Petitioners, *Haaland v. Brackeen*, 599 U.S. 255 (2023) (Nos. 21-376, 21-377, 21-378 & 21-380), 2022 WL 2020368 ("2023 Alliance Brief"); Brief of *Amicus Curiae* Christian Alliance for Indian Child Welfare in

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[1] No party's counsel authored this brief in whole or in part, and no person or entity, other than *Amicus Curiae* or their counsel, made a monetary contribution to fund the brief's preparation or submission. Pursuant to Rule 37.2, at least ten days before the due date, counsel for *Amicus Curiae* notified counsel of record for all parties of *Amicus Curiae*'s intention to file this brief.

Support of Petitioners, *Matter of Welfare of Child. of L.K. & A.S.*, 9 N.W.3d 174 (Minn. Ct. App. 2024) (No. A23-1762), 2024 WL 4815691.

Alliance also has serious concerns with the imminent consequences of the Minnesota Supreme Court's judgment in the case below. Pet. App. at 1a–53a. There, the Minnesota Supreme Court refused to permit Petitioners, non-Indian foster parents, to intervene in state custody proceedings for twin Indian children that Petitioners had cared for since birth because Petitioners raised constitutional challenges to ICWA and the Minnesota Indian Family Preservation Act ("MIFPA"), Minn. Stat. §§ 260.751–260.835. *See* Pet. App. at 33a–36a. This judgment is inconsistent with the Court's decision in *Brackeen* and creates a path for states to avoid review of objections to ICWA by ruling that ICWA challengers, by definition, do not act in an Indian child's best interests. *See* Pet. for Cert. at 16–17. This judgment is also inconsistent with the First Amendment rights of Petitioners, who were stripped of their rights to speak and petition the courts solely because they presented good-faith legal arguments challenging ICWA and MIFPA's constitutionality. *Id.* at 5.

SUMMARY OF ARGUMENT

This case is about Minnesota's denial of a litigant's ability to raise a good-faith legal challenge. Indian children have long suffered under ICWA, and this case represents an especially pernicious circumstance that threatens to insulate ICWA, and any other politically favored statutory regime, from judicial scrutiny.

The Court should grant certiorari to address the serious harm inflicted by ICWA. For nearly fifty

years, ICWA has imposed race-based classifications on Indian children and their families and caused tremendous individual suffering as a result.[2] At best, ICWA prioritizes tribal interests over the "best interests of the child"—traditionally, the dispositive factor in custody proceedings—often preventing Indian children from being placed or remaining in loving and safe homes. At worst, ICWA's placement preferences actively harm Indian children by placing them in unsafe custody arrangements or allowing tribal members or estranged relatives to gain control of the Indian Children, often as a means of punishing dissident, non-native parents or to obtain custody that they would otherwise be denied.

Certiorari is further necessary to protect the adversarial system and correct the incredible injustice imposed on Petitioners. *First*, the Minnesota judgment is at odds with the standing decision outlined in *Brackeen*. In *Brackeen*, this Court established the standard for how a constitutional challenge to ICWA can and should be brought, specifically directing litigants to seek redress from state courts. Petitioners have met that standard. The Minnesota judgment, however, excludes them—the very litigants that *Brackeen* identified as having standing.

Second, the Minnesota Supreme Court's affirmance of Petitioners' exclusion ***because they raised a challenge to ICWA*** raises serious constitutional concerns. It should go without saying that a litigant's choice to raise a good-faith legal argument cannot rightly serve as the basis for

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[2] ICWA is also unconstitutional because it exceeds Congress's Authority under the Indian Commerce Clause. *See* 2023 Alliance Brief at 23–31.

denying them the right to speak, petition, or participate in legal proceedings. The content-based exclusion imposed by the Minnesota Supreme Court also threatens the advancement of ICWA jurisprudence, as well as the jurisprudence of any other disputed statutory scheme. Indeed, if allowed to stand, the Minnesota judgment creates a clear roadmap for how other courts may exclude politically unpopular constitutional arguments. Accordingly, not only does the Minnesota judgment systematically deprive a sizable class of litigants of legal redress—and here, a class necessarily created by ICWA—it more generally threatens any litigant advancing a politically unpopular position. Such interference in the adversarial system cannot stand.

ARGUMENT

I. The Court Should Grant Certiorari to Address the Serious Harm that ICWA Inflicts on Indian Children.

This case exemplifies the serious harm facing Indian children in Minnesota and across the country as a result of ICWA and similar state statutes. Although ICWA was passed to improve life for Indian children, ICWA more frequently creates harmful, and downright dangerous, consequences for Indian children.

Rather than enhancing life for Indian children, ICWA's placement preferences regularly conflict with the their best interests. Indeed, ICWA subordinates individual children's needs to the tribe's preferences, reducing children to tokens of governmental policy. Moreover, bad-faith actors, caring for neither the tribe's heritage nor the child's welfare, often abuse ICWA's placement preferences. Accordingly, this

Court should grant certiorari to address—once and for all—the serious harm that ICWA's placement preferences inflict on Indian children.

A. ICWA's Placement Preferences Regularly Conflict with the Best Interests of Indian Children.

ICWA's discriminatory, race-based placement preferences undoubtedly harm Indian children and their families. ICWA creates a segregated custody scheme for Indian children that demotes the "best interests of the child" standard normally prevailing in state custody proceedings. In *Brackeen*, Justice Barrett acknowledged this tension, explaining 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." *Brackeen*, 599 U.S. at 264. Indeed, ICWA subjects Indian children's needs to the preferences and desires of Indian tribes. The statute does so without care for the child's relationship to the tribe, Indian family, or non-Indian caregivers, creating an inevitable conflict between ICWA's mandates and Indian children's best interests that often leads to tragic results.

ICWA and its twin state statutes were designed "for the protection and preservation of Indian tribes and their resources," and the discriminatory placement preferences at issue reflect that prioritization. 25 U.S.C. § 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, subdiv. 2(a) ("The best interests of an Indian child are interwoven with the best interests of

the Indian child's tribe."). By its plain language, ICWA uses Indian children as a "resource" to bolster the tribal community. This cannot stand where furtherance of the tribe is directly contrary to the best interests and safety of Indian children.

Countless instances in Minnesota show how Indian children are removed from stable, supportive non-Indian homes to less ideal—or even abusive—living situations, simply to satisfy ICWA's requirements. In addition to the circumstance presented in this case, Pet. for Cert. 6–8, 13–15, take the example of Ms. Sierra Whitefeather—now an Alliance Board member and former member of the Leech Lake Tribe of Minnesota. As a child, Ms. Whitefeather found a safe, loving home that supported her native heritage. The Tribe, however, ignored Ms. Whitefeather's best interests and used ICWA to prevent non-Indian parents from adopting her. As a result, Ms. Whitefeather was shuffled between nearly thirty foster homes in which she suffered unspeakable sexual, physical, and emotional abuse.[3]

Ms. Whitefeather is one of many Indian children to have unjustly suffered under ICWA. From 2022 to 2024 in Minnesota, "Native American children accounted for 6% of all child deaths and 17% of child maltreatment-related deaths—12 times their population share."[4] Local news stories abound with

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

[4] Sarah Font & Emily Putnam-Hornstein, *Opinion: Will a new law really give Minnesota a gold standard in child protection policies?*, Minn. Star Trib. (July 22, 2025), https://tinyurl.com/3yj2wr7e; *Children Who Have Died of Abuse*

examples of Indian children being physically and sexually abused in ICWA-mandated custody placements. For example, Jackie Black's children were taken away from her by the White Earth Reservation Indian Child Welfare Department and placed with non-family tribe 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.[5] After Wyatt Clark was convicted of felony criminal sexual conduct, two more young Indian children (five and eight years old) who had been placed with Clark's mother came forward with further disturbing allegations of sexual assault.[6]

ICWA's custody placements often compel children to live with unfit Indian family members, resulting in serious harm or death. For instance, six-year-old Remi and five-year-old Tristan Stately were stabbed and left for dead by their birth mother, a member of the Red Lake Indian Reservation. She then set the home on fire with the children inside and fled with her

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and Neglect in the United States Since 2022, Lives Cut Short, https://tinyurl.com/28nb99f6 (last visited June 15, 2026).

[5] 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; Hurley, *Mahnomen man sentenced to 30 years for sexually abusing foster kids*, Valley News Live (Apr. 5, 2022), https://tinyurl.com/3a3t9627.

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

three-year-old son.[7] One boy died from a stab wound, the other from smoke inhalation, and the three-year-old was rescued following issuance of an Amber Alert.[8]

Similarly heartbreaking, Jewel Sky Fineday passed away on Christmas Day 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.[9] Jewel's death prompted Safe Passage for Children of Minnesota—a citizens' group that publishes a yearly report on Minnesota child fatalities due to maltreatment—to question whether new mechanisms are needed to make ICWA cases more transparent.[10]

In 2024, two-year-old Indian child Niindonis Goodman passed away from fentanyl poisoning in a Minneapolis homeless shelter.[11] Niindonis was born with drugs in her system, and "spent less than two months in foster care after birth before returning to her mother. Child welfare and court oversight ended

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

[8] *Ibid.*

[9] Paul Walsh, *Grandmother guilty of neglect that led to 7-year-old girl dying on Christmas on Red Lake Reservation*, Minn. Star Trib. (May 1, 2024), https://tinyurl.com/ycxc4fsd.

[10] Richard Gehrman & Maya Karrow, Safe Passage for Child. of Minn., *Minnesota Child Fatalities from Maltreatment 2014-2022* 15–16 (2023), https://tinyurl.com/3shjjvp5; *see also* Courtney Annakin, *et al.*, Safe Passage for Child. of Minn., *Minnesota Child Fatalities from Maltreatment 2023-2024* (2026), https://tinyurl.com/yss769h9.

[11] Font & Putnam-Hornstein, *supra* note 4.

six months later."[12] No one protected Niindonis, despite her mother's drug use in the weeks before the two-year-old's death.[13] Niindonis was buried on the White Earth Indian Reservation.[14]

Five-year-old Antonio "Tony" Renova, an Indian Child with Crow heritage, went from the security of his foster parents' home in Montana—with whom he had lived since birth—to his violent death after being beaten by his biological parents and a guest at their apartment.[15] The Crow Tribal Court granted Tony's biological parents full custody, despite the fact that they were incarcerated at the time of his birth and charged with violent felonies.[16]

Not only do ICWA's placement preferences harm Indian children, but they also tear apart foster and adoptive families. As this Court has recognized, "it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family," especially when the "child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents." *Smith v. Org. of Foster Fams. for Equal. and Reform*, 431

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[12] *Ibid.*

[13] *Ibid.*

[14] Jeff Day, *Mothers charged in separate cases after 2-year-old dies from fentanyl, infant hospitalized for meth poisoning*, Minn. Star Trib. (Aug. 28, 2024), https://tinyurl.com/mpst9398.

[15] Naomi Schaefer Riley, *The Indian Child Welfare Act: A Law That Paved the Way for a 5-year-old's Death*, Am. Enter. Inst. (Jan. 29, 2020), https://tinyurl.com/46exeab2.

[16] *Ibid.*

U.S. 816, 844 (1977). Foster and adoptive families are not a "mere collection of unrelated individuals." *See id.* at 844–45 (citation omitted). Foster children cultivate strong emotional bonds with their foster families over several years, becoming integrated and loved members of the family.[17] It is thus no surprise that children would be harmed by such disruption in caregiving.

This harm is even more likely for Indian Children who "spend much longer" in foster care, due to ICWA's "provisions designed to ensure Native children are only adopted by Indian families."[18] For example, in Minnesota in 2022, approximately 2,000 Indian children in Minnesota lived in foster care, but there were only approximately 400 Indian homes available for placement.[19] Due to the lack of available Indian homes in Minnesota, as of 2022, nearly 200 Indian children had been in foster care for more than three years—"a higher raw number than children of any other race."[20] Thus, due to ICWA, not only do Indian children in Minnesota already face an uphill battle in finding a permanent home, but they are far more likely to be placed with a foster family, develop strong

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[17] Mark Fiddler & Naomi Schaefer Riley, *The Case Against the Indian Child Welfare Act: Opinion*, Newsweek (Feb. 11, 2022), https://tinyurl.com/mrv83twn.

[18] *Ibid.*

[19] *Ibid.*; *Who Cares: A National Count of Foster Homes and Families*, The Imprint, https://tinyurl.com/5dfjf9b3 (last visited June 15, 2026) (analyzing Minnesota data).

[20] Fiddler & Riley, *supra* note 17.

bonds, only to be only to be ripped "away from the only family they have ever known."[21]

The trauma that arises from tearing apart foster and adoptive families—especially after Indian children spend a significant portion of their formative years bonding with these families—cannot be overstated. Simply put, removing these children "from loving families with whom they have developed secure attachments after so many years . . . is nothing short of cruel" and directly contrary to their best interests.[22]

B. ICWA's Placement Preferences Prioritize Tribal Desires over the Best Interests of Indian Children.

ICWA's placement preferences also deprive Indian children of liberty and autonomy by prioritizing the tribe over the Indian child's best interest. 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,[23] the fact of their ancestry itself allows tribes to classify them as a "resource . . . vital to the continued existence and integrity of Indian tribes." 25 U.S.C. § 1901(3); *see In re Santos Y.*, 92 Cal. App. 4th 1274, 1278, 1312–13 (Cal. Ct. App. 2001) (finding that ICWA was unconstitutional as applied to the child,

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[21] *Ibid.*

[22] *Ibid.*

[23] James G. Dwyer, *The Real Wrongs of ICWA*, 69 Vill. L. Rev. 1, 4 n.5 (2024); Elizabeth Morris, Alyce Spotted Bear & Walter Soboleff Comm'n on Native Child., *Minority Report, Commission on Native Children: to the President and Congress of the United States* 5 (2024), https://tinyurl.com/2an6x7jd.

who had merely "one-quarter Chippewa Indian blood" but was "removed from the home of the only parents" he knew); *see also Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641, 655–56 (2013) (reversing ICWA-mandated custody grant to Indian father, because such a reading of ICWA "would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian").

The consequence of prioritizing the tribe over a child's best interest is obvious. Children without any relationship to or experience with a tribe can be removed from the only family they have ever known and placed with unfamiliar, untrained, and potentially dangerous, tribal contacts on short notice—just like the twins in this case. Without any transition plan, the Red Lake Nation took the twins away from Petitioners, sending them to live with a maternal cousin. *See* Pet. for Cert. at 8. This cousin was not familiar with the twins' severe medical needs, resulting from their mother's prenatal drug use, and lived 350 miles away from the Mayo Clinic, where the twins were receiving lifesaving treatment. *Id.* at 6, 8. The twins were eventually removed from the cousin's care "on emergent basis" and placed with their maternal grandmother. *Id.* at 9, n.3. The twins' experience mirrors that of Ms. Whitefeather and the numerous aforementioned examples in Minnesota. In each, ICWA's placement preferences mandated that Indian children be ripped away from the strongest and healthiest relationship they had known and placed in potentially dangerous or fatal situations.[24]

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[24] *See Safe Children: How does investigation, removal, and placement cause trauma for children?* 1, 3, Casey Fam. Programs (2018) (explaining that, nationwide, "child protective interventions have the potential to do more harm than good if

At bottom, ICWA's placement preferences "compel[] states to dictate and manipulate fundamental aspects of children's private lives to serve aims other than the children's well-being."[25] Contrary to the core promises of the Constitution, ICWA "makes certain persons' intimate associations and very identity subject to the state's *police power*."[26] This allows the government to "dictate those aspects of those persons' lives in a way that subordinates their fundamental well-being to interests of other individuals and of cultural groups, or even to broad national aims like redressing past injustices."[27] Consequently, every Indian child under ICWA lacks autonomy and legal protection, with often devastating results.

C. ICWA's Placement Preferences are Often Abused by Bad-Faith Actors.

Beyond ignoring Indian children's best interests, and prioritizing the desires of Tribes, ICWA has been weaponized by bad actors for various nefarious ends. In some instances, ICWA has been invoked to control dissident tribal members who seek to leave a tribe's influence or their abusers within a tribe.

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

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they are not handled in ways that are developmentally appropriate, sensitive, and trauma-informed," especially if there are "multiple unplanned or planned moves between placements"), https://tinyurl.com/yzn3z3ku.

[25] Dwyer, *supra* note 23, at 7.

[26] *Id.* at 8.

[27] *Ibid.*

wishes and her choice ***not*** to enroll her daughter in the Tribe.[28] Upon the birth of her daughter, Ms. De La Cruz began working with Social Services and chose to live in Minnesota, away from the Tribe.[29] However, in the name of ICWA, Social Services delivered Ms. De La Cruz's daughter to the Tribe anyway.[30]

Ms. De La Cruz was barred from visiting her daughter, who was not allowed to leave the reservation.[31] Family members who were willing to take custody were not allowed to intervene, and despite years of fighting to get her daughter back, Ms. De La Cruz's parental rights were terminated without the right of appeal.[32] Ms. De La Cruz's case was so heartbreaking that a former Spirit Lake Tribal Social Services Director resigned due to "tribal politics" leading "to unethical and illegal decisions" in the case.[33] The former Tribal Services Director said that involving ICWA in the case "was probably the worst mistake" of his life.[34]

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[28] 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 (July 14, 2019), https://tinyurl.com/2j63wcbe.

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*

[32] *Ibid.*; Morris, *supra* note 23, at 91–93 (testimony from Ms. De La Cruz describing the shortcomings of ICWA and lack of due process or notice).

[33] Williams, *supra* note 28.

[34] *Ibid.*

II. The Court Should Grant Certiorari to Protect the Adversarial System and Correct the Serious Injustice Imposed on Petitioners.

The Minnesota Supreme Court's decision directly threatens the adversarial system's integrity, to the detriment of both litigants and the American judicial system. Tradition and experience establish that zealous advocacy by parties engaged in an active controversy vindicates legal rights and advances our understanding of the law. "Enforcement of those [legal] rights benefits not only individual plaintiffs but may benefit the public, since the bringing of meritorious lawsuits by private individuals is one way that public policies are advanced." *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990). By excluding Petitioners from participating in the proceedings below—based on their advancement of a good-faith legal argument, *see* Pet. for Cert. at 18–32—the Minnesota Supreme Court denied Petitioners their right to pursue their legal interests and has interfered with the development of ICWA jurisprudence. If allowed to stand, the Minnesota judgment will chill zealous advocacy not only in the ICWA context, but in all politically unpopular constitutional challenges.

The Minnesota Supreme Court's decision threatens the adversarial system and harms Petitioners and similarly situated litigants in two ways. *First*, it subverts the standing framework developed by this Court in *Brackeen* by blocking foster parents who have cared for Indian children from participating in custody proceedings and challenging the constitutionality of ICWA. This denies litigants who have a right to redress from seeking it in court.

Second, the Minnesota courts specifically refused Petitioners the right to appear in the twins' custody proceedings because they challenged the constitutionality of ICWA, creating a Catch-22 for Petitioners and all similar litigants: challenge the statute, and be barred from participating in custody decisions for children that you have loved and cared for, or agree with the statute, and waive a legitimate and good-faith challenge to advance the best interests of those same children. Such a decision, if allowed to stand, would close off all legal recourse for Petitioners and anyone similarly situated. Alliance entreats the Court to rectify the harm caused to Petitioners and to all those who turn to the courts to enforce constitutional limits on statutory schemes.

A. Minnesota Has Subverted the Standing Framework Developed in *Brackeen*.

In *Brackeen*, this Court has defined the category of plaintiffs that may challenge the constitutionality of ICWA. Petitioners have met those requirements. Minnesota, however, refused to allow Petitioners to participate in custody proceedings for the Indian children that were in their care and to make their constitutional argument.

1. Petitioners Have Met the Standing Requirements Set Out in *Brackeen*.

This Court laid out a roadmap in *Brackeen* for adoptive and foster parents to meet standing requirements for ICWA litigation. There, the Court denied petitioners' Equal Protection Clause challenge because they lacked standing—ICWA is implemented by state entities and petitioners' injuries could not be redressed by the federal courts. *Brackeen*, 599 U.S. at

292. A proper litigant must therefore seek redress from "[the] state courts [that] apply the placement preferences" and request the enjoinment of the "state agencies [that] carry out the court-ordered placement." *Ibid.* (citations omitted). Petitioners, who are otherwise identical to the petitioners in *Brackeen*, therefore sought redress from the Minnesota courts in the course of a Child in Need of Protection of Services ("CHIPS") proceeding, which necessarily involves state officials. *See* Pet. for Cert. at 24. But Minnesota barred the courthouse doors—refusing to grant Petitioners' motion to intervene in the twins' CHIPS case—leaving Petitioners with no forum to present their legal arguments. Such a result cannot be correct in the wake of the *Brackeen* decision.

There is no doubt that Petitioners have standing. They are analogous to the *Brackeen* petitioners in all relevant aspects and have sought redress from the appropriate parties. Petitioners are foster parents for twin "Indian children" who, despite their prior care for the twins and other qualifications, are last in line for potential placements.[35] Petitioners, therefore, have suffered a concrete injury caused by Minnesota's enforcement of ICWA. *See* Pet. App. at 113a–115a (holding that Petitioners had standing to challenge the constitutionality of ICWA). But unlike the *Brackeen* petitioners, Petitioners have proceeded before the Minnesota courts, which have the authority and jurisdiction to address Petitioners' harm.

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[35] *Brackeen*, 599 U.S. at 334 (Kavanaugh, J., concurring) ("Courts, including ultimately this Court, will be able to address the equal protection issue when it is properly raised by a plaintiff with standing—for example, by a prospective foster or adoptive parent or child in a case arising out of a state-court foster care or adoption proceeding.").

Petitioners, under *Brackeen*, thus have standing to challenge ICWA.[36]

Standing is a judicial cornerstone. The doctrine of standing ensures that the courts only adjudicate active adversarial proceedings, and it promises litigants who clear its bar a hearing on the merits. *Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues"); *see also Minnesota Sands, LLC v. Cnty. of Winona*, 940 N.W.2d 183, 192–93 (2020). The Minnesota courts, however, have refused to allow Petitioners to intervene in the one state court proceeding that could redress their injury.

2. Minnesota Cannot Deprive Petitioners of the Means by which They Secure Standing to Challenge ICWA.

By denying Petitioners' motion to intervene in the twins' CHIPS case, the Minnesota Supreme Court created a doctrinal Catch-22, wherein Petitioners have no avenue to bring claims they otherwise have standing to assert. Specifically, the Minnesota Supreme Court affirmed the district court's determination that Petitioners would "unnecessarily encumber" the proceedings with their legal challenges and that their actions indicated "a disregard for or a lack of understanding about the importance of [Red Lake Nation] heritage." Pet. App. at 179–80. The district court further found that Petitioners' constitutional challenge to ICWA "gave support to its

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[36] Petitioners clearly have equal protection rights that can be asserted in a legal proceeding. *See Brackeen*, 599 U.S. at 294–95.

finding that their participation in this case would be a disadvantage." *Id.* at 181. In essence, the district court denied Petitioners' motion to intervene ***because*** they had brought a constitutional challenge to ICWA, a ruling the Minnesota Supreme Court affirmed. The Minnesota Supreme Court, alternatively, denied Petitioners' long-shot request for third-party custody and affirmed the district court's dismissal of that request. Pet. App. at 36a–38a. The Minnesota Supreme Court, therefore, left Petitioners with no procedural mechanism by which they could assert the constitutional claims they have standing to bring.

Alliance does not challenge the Minnesota Supreme Court's primacy over state law, but it does express grave concern at the structural paradox created by its decision. By affirming the district court, the Minnesota Supreme Court created a circumstance where Petitioners must either forego a good-faith legal argument or make the argument and lose their standing to do so. Petitioners, under *Brackeen*, have standing to challenge ICWA on equal protection grounds ***only because*** they raised the challenge in the Minnesota state courts. However, once Petitioners properly raised their constitutional challenge in the correct forum, the Minnesota courts ruled that the very fact that Petitioners had challenged ICWA rendered them ineligible to participate in the proceeding. Pet. App. at 27a–33a. Thus, according to Minnesota, making an argument thus precludes Petitioners from pursuing that argument. Read in combination with *Brackeen*, the Minnesota judgment create an absurdity that threatens the very foundation of our legal system.

In matters of federal constitutional law, this Court's ruling must take precedence, and Petitioners'

standing to challenge ICWA must defeat any state court decision that excludes Petitioners from legal proceedings solely because they made a constitutional challenge. *See Haywood v. Drown*, 556 U.S. 729, 737 (2009) ("Our cases have uniformly applied the principle that a State cannot simply refuse to entertain a federal claim . . ."). This is a necessary implication of the adversarial system, which promises all litigants with standing the right to have their claims heard on the merits. And even if that were not the case, the very fact that the Minnesota Supreme Court blocked Petitioners from bringing a good-faith challenge to ICWA in a custody proceeding in which Petitioners undoubtedly had a viable and important voice is deeply concerning, both for the rights of individual litigants and for the adversarial system.

B. Minnesota's Decision to Exclude Petitioners Solely Because They Challenged ICWA Raises Serious Constitutional Concerns.

Minnesota has set a dangerous precedent by freezing litigants out of a proceeding solely because they have challenged the operative statutory framework. This decision is fundamentally at odds with one of the core tenets of the adversarial system: the right to make any good-faith legal argument, even one that directly challenges settled law. This right is located not only in the individual's right to petition the government for redress, but it is also a necessary precondition for any self-correcting common law system. The Minnesota Supreme Court's judgment thus threatens to chill both the individuals who seek redress and the judicial system that aims to provide ever-more faithful interpretations of the law.

1. The Minnesota Supreme Court's Judgment Threatens the Right of Individual Litigants to Make Good-Faith Arguments in Litigation.

The ability to make a non-frivolous legal argument is protected by the First Amendment. "This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011). In the course of those proceedings, litigants are entitled to zealous advocacy, including the assertion of any non-frivolous argument. "[T]he First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion" *NAACP v. Button*, 371 U.S. 415, 429 (1963); *see also* Fed. R. Civ. P. 11(b)(2); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399 (1990) (approving pleadings warranted by existing law or a good faith argument for changing the law). There has been no suggestion that challenging the constitutionality of ICWA is a frivolous argument. *See generally* Pet. App. at 1a–53a.

And yet, the Minnesota courts have excluded Petitioners from the proceedings ***because*** they made a good-faith challenge to ICWA, chilling not only their advocacy but also the advocacy of any litigant contemplating a challenge to a politically favored statutory scheme. Here, although Petitioners were uniquely qualified to participate in the twins' custody proceedings, they were excluded because their legal challenge would purportedly "encumber proceedings" and demonstrated their lack of commitment to the heritage of the Red Lake Nation. *Id.* at 179–81; Pet. App. at 27a–33a; *see* pp. 18–19, *supra*. Such an

infringement of Petitioners' right to speak and petition sets a dangerous precedent for other states if allowed to stand undisturbed.

At bottom, Minnesota eliminated Petitioners' mechanism for vindicating their legal rights and advancing their legal challenge. Litigation is a well-known form of political expression for unpopular minorities who have justice, but not numbers, on their side. "Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts . . . litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." *Button*, 371 U.S. at 429–30 (citations omitted). Petitioners, locked into a statutory framework they see as unjust, have no recourse but the courts. The Minnesota courts, however, would not hear their argument—punishing Petitioners for making the argument in the first place—and Petitioners were silenced as a result.

2. The Minnesota Supreme Court's Judgment Threatens the Advancement of Jurisprudence.

By denying Petitioners—and any other non-Indian foster parent who seeks to challenge ICWA—the ability to make their constitutional argument, Minnesota has precluded the further development of ICWA jurisprudence. If this gatekeeping is allowed, it is a distinct and unsettling possibility that the constitutionality of ICWA may never be addressed on the merits.

Zealous advocacy refines the court's interpretation of the law. Nowhere is this more true than in the context of constitutional challenges to settled law. Some of the greatest advancements in American

jurisprudence have come because courts entertained such arguments. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015) ("When new insight [into the meaning of liberty] reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."); *Brown v. Board of Ed.*, 347 U.S. 483 (1954). Courts have also been called on to preserve fundamental constitutional rights in the face of evolving social norms. *See, e.g.*, *Fulton v. Philadelphia*, 593 U.S. 522 (2021). None of these seminal decisions would exist if their plaintiffs had been denied the opportunity to bring constitutional challenges simply because they raised them in the first place.

Petitioners are the latest in a long line of advocates who have helped refine the courts' understanding of the constitutionality of ICWA. In California, the Court of Appeals found that ICWA was unconstitutional as applied to a multi-ethnic child with only a genetic link to the Minnesota Chippewa Tribe. *In re Santos Y.*, 92 Cal. App. 4th at 1321 ("[T]he Minor has no association with the Tribe other than genetics . . . Whether we characterize this genetic association as racial, ethnic, or ancestry, a determination based on 'blood' on its face invokes strict scrutiny . . . We find that [this application of ICWA] does not [survive strict scrutiny]."). Even when a court has found ICWA to be constitutional, robust challenges to the statute have refined the court's understanding of its contours and application. *See, e.g.*, *Adoptive Couple*, 570 U.S. at 641–42 (limiting application of ICWA provisions where the relevant parent never had custody of the child); *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1343 (Cal. Ct. App. 2014) (rejecting application of the "Indian family doctrine" and limiting the holding of *Adoptive Couple*).

These precedents inform future would-be litigants of the validity of their claims, guide the courts' understanding of ICWA's constitutionality, and shepherd the daily application of ICWA.

By refusing to hear Petitioners because they challenged ICWA, the Minnesota courts have prevented proper litigants from raising a good-faith legal argument, shirked their duty to meet a legal challenge head-on, and interfered with the development of jurisprudence in a critical area of Indian children's rights. If allowed to stand, the Minnesota Supreme Court's judgment imperils the rights of Petitioners. It further casts a shadow over every Indian Child, every litigant's right to zealous advocacy, and over the adversarial system itself.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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