GOLDWATER
INSTITUTE
*Where freedom wins.*

March 24, 2016

Honorable Tani Cantil-Sakauye, Chief Justice,
And Honorable Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re: *In re: Matter of A.P.*, No. S233216

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Goldwater Institute ("GI") respectfully files this letter as amicus curiae pursuant to Rule 8.500(g) of the California Rules of Court in support of the Petition for Writ of Supersedeas or Other Appropriate Writ in the above-referenced case.

## I. INTEREST OF AMICUS CURIAE

GI was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research papers, editorials, policy briefings, and forums. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates and files amicus briefs when its or its clients' objectives are directly implicated.

GI has experience with the constitutional issues relating to the Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq*. ("ICWA"). GI attorneys are currently attorneys of record in a federal lawsuit challenging ICWA's constitutionality, *Carter v. Washburn*, No. 2:15-cv-01259-PHX-NVW (D. Ariz., filed July 6, 2015), and in a proceeding in the Arizona Court of Appeals on the same issue. *Gila River Indian Cmty. v. Dep't of Child Safety,* No. 1-CA-JV 16-0038 (Ariz. App., pending). GI staff have also published groundbreaking investigative research on the application of ICWA. *See* Mark Flatten, *Death on A Reservation*, July 7, 2015.[1] GI believes its public policy and litigation experience will provide this Court with a valuable and unique perspective on the issues raised in the Petition for Writ of Supersedeas or Other Appropriate Writ filed by the Appellants and Objectors in this matter.

[1] Avail. at https://goldwater-media.s3.amazonaws.com/cms_page_media/2015/8/14/Final%20Epic%20pamplet.pdf.

The Petition asks this Court to stay the abrupt and meritless removal and placement of the minor Lexi P. and to review the merits of the case, and particularly to consider whether ICWA and affiliated state statutes, including Calif. Welf. & Inst. Code §§ 361.31, 361.7, are constitutional. *See* Pet. at 46-47. These are matters of pressing importance nationwide, and particularly in California, where lack of guidance from this Court has led to substantial uncertainty as to the constitutionality of ICWA's rules for adoption and foster care—rules that deprive Indian children of the legal protections afforded to all other children in the United States, and do so exclusively on the basis of their race.

GI supports the Petition because this case raises important questions of constitutional law, not just for the more than 723,000 Californians who identify as Native American,[2] but for the literally countless other Californian children who are "eligible for membership" in a tribe—and thus subject to ICWA's disadvantageous mandates, 25 U.S.C. § 1903(4)—on the basis of even a tiny fraction of Indian ancestry.

## II.
## ICWA SUBJECTS CHILDREN OF ONE PARTICULAR RACE TO A SEPARATE AND DISADVANTAGEOUS SET OF LEGAL RULES

This case presents a vivid and heart-rending example of the problems arising from a 40-year-old statute that, as the U.S. Supreme Court recently observed, "put[s] certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013). Lexi is 1/64th Choctaw, and has only the remotest connection to any Indian tribe. Yet pursuant to ICWA, she has been taken away from the loving foster family with whom she has lived for 2/3rds of her life, and sent to live with non-Indian non-relatives in another state—solely as a consequence of her race.

### A. How The ICWA "Penalty Box" Works

The root of this problem is ICWA, a federal statute that establishes a separate and unequal system of law for children who are "eligible for membership" in an Indian tribe. 25 U.S.C. § 1903(4); Cal. Welf. & Inst. Code § 224.1(b).

Virtually all Indian tribes determine eligibility for membership on the basis of biological ancestry. *See, e.g.,* Miss. Band of Choctaw Indians Const. art. III, § 1; Cherokee Nation Const. art. IV, § 1; Choctaw Nation of Okla. Const. art. II, § 1; Muscogee (Creek) Nation Const. art. III, § 2; Gila River Indian Community Const. art. III, § 1; Navajo Nation Code tit. 1 § 701. Federal rules do not require any minimum amount of biological relationship to a tribe. *See* Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10153, B.3 (Feb. 25, 2015) (Tribes have exclusive authority to determine membership).

---

[2] *See* U.S. Census Summary Data, 2010 at 7, http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf. Though it may seem obvious, it bears emphasizing that *all Indian children are citizens of the United States at birth*, 8 U.S.C. § 1401(b), and are just as entitled to the protections of the Constitution as are children of any other ethnic background.

This means that any amount of Indian blood, no matter how minute—even, as in Lexi's case, where a child's closest full-blooded Indian relative is a great-great-great-great grandparent—is enough to place a child in the "ICWA Penalty Box."[3] The following rules apply to children of this particular ethnicity, but not to children who are white, black, Hispanic, Asian, or descended from any other race. Being placed in this box means a child is:

- *Denied the protection of the "best interests of the child" standard.* ICWA requires courts, "in the absence of good cause to the contrary," to place children subject to ICWA with the child's extended family, other members of the tribe, or other Indian families. 25 U.S.C. § 1915(a). Bureau of Indian Affairs (BIA) regulations make clear that "[t]he good cause determination *does not include an independent consideration of the best interest of the Indian child* because the preferences reflect the best interests of an Indian child in light of the purposes of the Act." 80 Fed. Reg. at 10158, F.4(c)(3) (emphasis added).

- *Deprived of any individualized determination of her fate.* ICWA requires courts to presume that it is in a child's best interests to be placed with a tribal member or an Indian family, except in rare circumstances. Consequently, courts make custody, foster, placement, and adoption decisions based on factors irrelevant to a child's individual needs and circumstances. This despite what the Ninth Circuit has called the "basic principle[]" that "[o]nce the state assumes wardship of a child, the state owes the child, as part of that person's protected liberty interest, reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child." *Lipscomb By & Through DeFehr v. Simmons*, 962 F.2d 1374, 1379 (9th Cir. 1992).

- *Subject without notice or choice to the personal jurisdiction of Indian tribal authorities anywhere in the nation.* A tribe is authorized under 25 U.S.C. § 1911(b) to intervene in foster care, parental rights, and adoption proceedings *anywhere in the United States* if that child is "eligible for membership" in the tribe—without any regard to whether such jurisdiction constitutes due process of law. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296-97 (1980).

- *Deprived of freedom of association rights.* Children have First Amendment rights. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Yet ICWA strips children of their freedom of association by assigning them to tribal custody in an effort to compel their association with a tribe, regardless of their wishes and often—as in this case—against the wishes of their loving caretakers. Indeed, BIA regulations require the state to "take the steps necessary to obtain membership for the child in the tribe" if the child is not an enrolled tribal member. 80 Fed. Reg. at 10153 B.4(d)(iii).

- *Given less protection against abuse and neglect*. Shockingly, although ICWA purports to protect the "welfare" of children, it actually makes it more difficult to protect children subject to it from abuse or neglect. For example, 25 U.S.C. §1912(f) forbids the termination of parental rights unless the likelihood of abuse is established "beyond a reasonable doubt" by "expert witnesses." Children of all other races are subjected to the

[3] *See* Appendix A (tabulating the bullet points below).

lower standard of clear and convincing evidence. *See In re Angelia P.*, 28 Cal. 3d 908, 921 (1981). This inevitably makes it harder to protect Indian children from abusive families than children of any other race.

In short, ICWA requires courts to treat children of Native American ancestry differently from those of other races, with the result that "the number and variety of adoptive homes that are potentially available" to them are "more limited than those available" to others, and that children subject to ICWA face "a greater risk" than others "of being taken" from a caring foster home, or being denied placement with a loving adoptive family that happens to be white, black, Hispanic, Asian, or another race. *In re Bridget R.*, 41 Cal. App. 4th 1483, 1508 (1996), *cert. denied*, 519 U.S. 1060 (1997).

**B. ICWA Imposes A Race-Based Classification, Not A Political Classification**

Defenders of ICWA contend that this is not *racially* discriminatory treatment because Indian tribes are political entities rather than racial classifications, and cite *Morton v. Mancari*, 417 U.S. 535 (1974), and *United States v. Antelope*, 430 U.S. 641 (1977), but those cases expressly reserved the question relevant to ICWA's constitutionality. Those cases upheld laws that treated *members* of tribes differently than non-members, finding that such differential treatment was a political, rather than a racial, distinction. Both cases explicitly declined to address whether a law that, like ICWA, treats people differently because of their Indian blood, and *not* because of tribal membership, would be constitutional. *See Mancari*, 417 U.S. at 553 n. 24 (statute constitutional because it "is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to *members* of 'federally recognized' tribes"); *Antelope*, 430 U.S. at 646 n. 7 (statute at issue "[did] not apply to 'many individuals who are racially to be classified as 'Indians,'" and parties were "enrolled members of the…Tribe.").

ICWA does not apply to children who are *members* of tribes—it applies to children who are *eligible* for membership. Eligibility for membership is almost universally determined on the basis of biological ancestry. Thus, a child lands in the ICWA "Penalty Box" solely as a consequence of her racial background.[4] No case has ever held that a law that treats people differently because their racial background makes them *eligible* for tribal membership is a merely "political" as opposed to "racial" classification. *Cf. Baby Girl*, 133 S. Ct. at 2565 (noting that the racial element of ICWA "raise[s] equal protection concerns.").

ICWA's proponents have also asserted that the statute uses blood quantum as a "shorthand for the social, cultural, and communal ties a [child] has with a sovereign tribal entity." Def's Motion to Dismiss, *Carter v. Washburn*, No. 2:15-cv-01259-PHX-NVW (Docket No. 68) at 23. But the use of ancestry as a "shorthand" for a person's "social and cultural ties" is the literal definition of racial discrimination.

Remarkably, ICWA has even been used—and is being used here—in a manner that does not even achieve its statutory objective of preserving tribal integrity.

---

[4] Note that the Multi-Ethnic Placement Act (codified as amended at 42 U.S.C. § 1996b(1)), which makes it illegal to deny or delay an adoption proceeding on the basis of race, contains one express exception: children subject to ICWA do *not* enjoy the protections of the Multi-Ethnic Placement Act. 42 U.S.C. § 1996b(3).

In *Baby Girl, supra*, a tribal member who fathered a child relinquished his parental rights before the child was born. But four months after her birth, when a couple sought to adopt the child, the father asserted rights to intervene under ICWA, and custody was awarded to him when she was more than two years old, despite her having never met him before. 133 S. Ct. at 2558-59. The Court described this as the father "play[ing] his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests." *Id.* at 2565.

An Oklahoma case, *In re Adoption of J.R.D.,* (Okla. Civ. App. No. 113,228) (unpublished) (Apr. 21, 2015),[5] involved a Cherokee mother and a non-Indian father. The couple separated in 2006 after two years of marriage, and in 2008, the mother ended visits between the father and child because of the father's drug use. Two years later, she remarried, to a non-Indian, who sought to adopt her child legally—whereupon the tribe intervened pursuant to ICWA to object to the adoption. Against the will of the Indian mother, and despite evidence that the birth father "did not want a parental relationship with [the] Child," *id.* at 11, the Oklahoma Court of Appeals denied the adoption and ordered that the birth father be granted custody.

In an ongoing case in Washington, *In re Adoption of T.A.W.*, 354 P.3d 46 (Wash. App. 2015), *rev. granted*, (No. 92127-0 (pending)), an Indian mother divorced the non-Indian birth father due to the father's addiction to drugs. She later remarried and her new husband sought to legally adopt the child. *Id.* at 48-49. At that point, the *non-Indian* birth father invoked ICWA to stop what would otherwise have been a routine stepparent adoption. Far from preserving Indian tribal integrity, the court concluded that "an Indian child's cultural tie to a tribe *is irrelevant* as to whether ICWA applies," *id.* (emphasis added), and allowed the non-Indian birth father to prevent the Indian birth mother from making her new family legally permanent.

And in this case, the court has ordered Lexi placed with a person whose only relationship to an Indian tribe is that he was *married* to Lexi's late grandmother. There is no evidence whatsoever that this placement will enable her to learn more about Choctaw culture. The action of the lower courts fails to achieve even ICWA's stated purposes, but traumatically disrupts Lexi's relationship with her loving foster family.

## III.
## CALIFORNIA COURTS NEED GUIDANCE REGARDING ICWA'S CONSTITUTIONALITY

These considerations are why the Court of Appeal in *In re Santos Y.*, 92 Cal. App. 4th 1274, 1314-23 (2001), concluded that ICWA violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The court recognized that "ICWA unquestionably requires Indian children who are dependents of the juvenile court to be treated differently from court dependents who are not Indian children," *id.* at 1317, and that those differences often result in " disadvantageous treatment." *Id.* at 1308 (quoting *Bridget R.*, 41 Cal. App. 4th at 1508).

The *Bridget R.* court sought to avoid the question of ICWA's constitutionality by using the "Existing Indian Family Doctrine," a theory which holds that ICWA does not apply to

---

[5] *See* Appendix B.

children who have no connection to a tribe other than biological. *Id.* at 1517. But other courts of appeal have disagreed with *Bridget R.*, including the Second District in this case, *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1344 (2014). *See also In re Vincent M.*, 150 Cal. App. 4th 1247, 1265 (2007) (Sixth District); *In re Adoption of Hannah S.*, 142 Cal.App.4th 988, 996 (2006) (Third District); *In re Alicia S.*, 65 Cal.App.4th 79, 88 (1998) (Fifth District). Although the Legislature evidently intended to overrule the Doctrine by statute in 1999, the *Santos Y.* court found that the statute did not cure the constitutional defects in ICWA. 92 Cal. App. 4th at 1317, 1323.

This Court has so far not resolved the question of the "Existing Indian Family Doctrine," although Courts of Appeal have urged it to do so. *See, e.g., In re Vincent M.*, 150 Cal. App. 4th at 1265. But the *Santos Y.* decision is correct that, regardless of whether that Doctrine is adopted *or* rejected, it remains necessary to resolve the constitutionality of ICWA's race-based Penalty Box. Even if a child does have an "existing Indian family," the constitutionality of the various disadvantages that ICWA imposes on that child solely by virtue of her ancestry must be judicially resolved.

In *Baby Girl,* the U.S. Supreme Court found that it would "raise equal protection concerns" if ICWA were used to "override… child's best interests" and take a child from a caring home "at the eleventh hour" simply "because an ancestor—even a remote one—was an Indian." 133 S. Ct. at 2565. *This is that case.* Lexi's race has been used as the *sole* determinative factor in taking her from secure custody with the family she has lived with for 2/3rds of her life—custody to which the Tribe at one time agreed—and placing her with a *non-Indian family* in another state, which has no evident connection with an Indian tribe.

## CONCLUSION

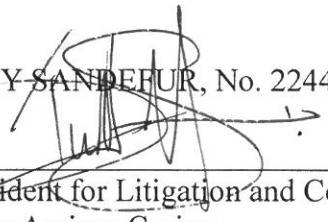
This case cries out for extraordinary relief and a full consideration of the merits.

Laws that establish a separate and disadvantageous system of rules for people of a particular ancestry—rules that deny them the protections afforded to people of any other race—are "'illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society,'" and should be "'struck down whenever it is within the capacity of conscientious courts to see beneath their cellophane wrappers.'" *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 548 (2000) (quoting Alexander Bickel, *The Morality of Consent* 133 (1975); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. Chi. L.Rev. 775, 792 (1979)). This is especially true in cases involving children. *Brown v. Board of Education,* 347 U.S. 483, 494 (1954).

Time is of the essence. Even one year is an eternity in a child's life. Resolution of ICWA's constitutionality has been postponed for decades. During that time, countless children have been subjected to its separate and unequal legal standards. It is "intolerable" that this "dual system" of race-based classifications is allowed to persist. *Green v. Cnty. Sch. Bd. of New Kent Cnty., Va.*, 391 U.S. 430, 438 (1968).

This Court should grant the requested relief, stall all proceedings, and hear the full constitutional matter on the merits as rapidly as possible.

Respectfully submitted,



TIMOTHY SANDEFUR, No. 224436

By: _____
Vice President for Litigation and Counsel of Record for Amicus Curiae
Goldwater Institute Scharf-Norton Center for Constitutional Litigation