No. _____

In The
Supreme Court of the United States

EFRIM RENTERIA and TALISHA RENTERIA,

Petitioners,

v.

SUPERIOR COURT OF TULARE COUNTY, CALIFORNIA; REGINA CUELLAR; and SHINGLE SPRINGS BAND OF MIWOK INDIANS aka SHINGLE SPRINGS RANCHERIA,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Child Welfare Act (25 U.S.C. §§ 1901 *et seq*.) (ICWA) establishes rules for "child custody proceeding[s]," *id.* § 1903(1), involving "Indian child[ren]," *id.* § 1903(4), in order to prevent the "unwarranted" "removal . . . of [Indian] children from [birth parents] by nontribal public and private agencies" and their "place[ment] in non-Indian foster and adoptive homes." *Id.* § 1901(4). Accordingly, this Court held in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2562 (2013), that ICWA does not apply to cases that involve no risk that an Indian family might face "breakup."

In this case, three children were orphaned when their parents were killed in a car accident. Their mother's relatives took the children in, whereupon the father's relatives, who are tribal members, sought custody. The case involves no child custody proceeding, no public or private agency, no risk of "removal" of children from parents, and no risk of placement in a foster home. The orphans have no cultural or political connection with the tribe, and have never lived on tribal lands.

The questions presented are:

1) Does ICWA apply as a statutory matter to a case that is not a "child custody proceeding," does not involve removal of an Indian child from a parent, or placement in a foster or adoptive home, or any public or private agency—and, if so,

2) Is it constitutional to apply ICWA's separate, less-protective rules to this case based solely on the race or national origin of the children or the adults?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Efrim Renteria and Talisha Renteria are relatives of the mother of the children at issue in this case. Respondent Regina Cuellar is a relative of the father of the children at issue in this case. Respondent Shingle Springs Band of Miwok Indians a/k/a Shingle Springs Rancheria is a federally-recognized Indian tribe that intervened in the trial court pursuant to 25 U.S.C. § 1911(c).

None of the parties are corporations.

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PETITION FOR WRIT OF CERTIORARI

Efrim and Talisha Renteria respectfully petition for a writ of certiorari to review the judgment of the California Court of Appeal.

OPINIONS BELOW

The opinion of the Superior Court of California for Tulare County is not reported; it appears at App.2a–5a. The California Court of Appeal denied the petition for a writ of mandate without opinion; its order denying the petition appears at App.1a. The California Supreme Court denied the petition for review without opinion; its order denying the petition appears at App.6a.

JURISDICTION

The California Supreme Court's order denying the discretionary petition for review was entered on August 30, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RULE 29.4(b) STATEMENT

The decision below calls into question the applicability and validity of federal statutes, 25 U.S.C. §§ 1901 *et seq*. Thus, 28 U.S.C. § 2403(a) may now apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions at issue are reproduced in the Appendix at App.7a–15a.

INTRODUCTION AND STATEMENT OF THE CASE

This case involves three minor children whose parents were killed in a car accident. Their *maternal* relatives took the children in, in accordance with the parents' wishes. A tug-of-war then ensued when a *paternal* relative wanted to take the children into their home, instead. If this were an ordinary case, under California law, this private family dispute would have been resolved in accordance with the best interests of the children. *See, e.g.*, *Petition of Daniels*, 2 Cal. Rptr. 243, 244 (Ct. App. 1960) ("In a contest between nonparents for guardianship of the person of a minor, the paramount consideration is the best interest of the child.").

But this is not an ordinary case, because the children fit the genetic profile required to be members of the Shingle Springs Band of Miwok Indians. Respondent Regina Cuellar, therefore, who is a tribal member, sought custody on the grounds that ICWA applies to the case and the placement preferences in Section 1915 of ICWA should apply. And although the children have no political or social connection to the tribe, and have never resided on tribal lands, the trial court ruled

that ICWA applies to this case because the children are "Indian children" based solely on their genetic profile. *See* App.5a. This is critical, because if the children are subject to ICWA, not only will ICWA's race-based placement preferences apply, but, according to California courts, the children's best interests will then *not* be the paramount consideration in their case. *See In re Alexandria P.*, 204 Cal. Rptr. 3d 617, 634 (Ct. App. 2016), *cert. denied sub nom. R. P. v. Los Angeles Cnty. Dep't of Children & Family Servs.*, 137 S. Ct. 713 (2017) (in cases involving Indian children, best interests is only "one of the constellation of factors" a court weighs).

In *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2562 (2013), this Court held that ICWA was designed to prevent the breakup of Indian families, and where no breakup was threatened, it was improper to apply ICWA. Here, no breakup is threatened, because the children are not being removed from their parents, and parental rights are not being terminated. There is also no public or private agency involved, and the case does not involve "foster care placement," "preadoptive placement," or "adoptive placement" within the definitions of Section 1903(1) of ICWA. Nevertheless, the court below held that ICWA applies because the children are "Indian children."

Thus, the questions presented are whether ICWA applies as a statutory matter, to a case that is not a "child custody proceeding," and does not involve the removal of an Indian child from a parent, or placement in a foster or adoptive home by the action of any public

or private agency—and, if so, whether it is constitutional to apply ICWA's separate, less-protective rules to this case than to others, *based solely on the race or national origin of the children and the adults*.

The late father of the children was a member of the Shingle Springs Band of Miwok Indians, but the family did not live on tribal lands. After their parents' death, the orphans were taken in by the mother's relatives—Petitioners here—who are their maternal great-aunt and great-uncle and who are non-Indians. Shortly after that, their paternal great-aunt—Respondent Regina Cuellar, who serves on the tribe's governing council—obtained an order from the tribe's court ordering the children taken from the Petitioners and turned over to her. A federal district court enjoined enforcement of that order on the grounds that it violated due process, *Renteria v. Shingle Springs Band of Miwok Indians*, No. 2:16-CV-1685-MCE-AC, 2016 WL 4597612, at *8–11 (E.D. Cal. Sept. 2, 2016), and the case then proceeded in the California state courts.

Petitioners moved to bar application of ICWA on the grounds that this case is not a "child custody proceeding" under 25 U.S.C. § 1903, and because the only basis for applying ICWA here would be the children's biological ancestry, which would violate equal protection and due process. *See In re Santos Y.*, 92 Cal. App. 4th 1274 (2001) (applying ICWA to a case solely on account of the children's genetics is unconstitutional); *In re Bridget R.*, 41 Cal. App. 4th 1483 (1996) (same).

The trial court, however, rejected this argument, holding that the case qualifies as a child custody proceeding, and that the children are "Indian children," under ICWA, and consequently that ICWA applied. App.5a. Petitioners appealed this via a petition for peremptory writ of mandate, which was summarily denied. App.1a. Petitioners then sought review in the California Supreme Court, which denied review. App.6a.

SUMMARY OF REASONS FOR GRANTING THE PETITION

If these three orphans were white, or black, or Hispanic, or Asian, their future would be determined by ordinary, race-neutral California law that would prioritize their best interests above all other considerations. *See, e.g.*, *Catherine D. v. Dennis B.*, 269 Cal. Rptr. 547, 554 (Ct. App. 1990) ("The overriding concern is and remains the best interests of the child."); *In re Stephanie M.*, 7 Cal. 4th 295, 317 (1994) (same). The best-interests inquiry has long been recognized in every state as the cornerstone of child welfare determinations. *See* Lynne M. Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337, 370 (2008) ("Today, every state has a statute requiring that the child's best interests be considered whenever decisions regarding a child's placement are made.").

But California courts have also made clear that a *different* rule governs the cases of "Indian children."[1] In *their* cases, best-interests is only "one of the constellation of factors" that a court weighs. *In re Alexandria P.*, 204 Cal. Rptr. 3d at 634. Their individual best interests are therefore compromised, and the interests of tribal governments are weighed equally with their interests. Therefore, while in child welfare cases involving children whose DNA does not qualify them for tribal membership, "the priority" is "to identify and carry out the services and placement that best serve the child's interests as swiftly as possible," *In re Josiah Z.*, 36 Cal. 4th 664, 674 (2005), that is *not* true in this case, because the children fit the genetic profile laid out by the tribe. *In re Alexandria P.*, 204 Cal. Rptr. 3d at 635.

ICWA's separate rules include race-based "placement preferences" under which a child must be placed with members of the tribe, or in "other Indian families" regardless of tribe, before they may be placed with non-Indian adults. 25 U.S.C. § 1915(a). Thus, if ICWA applies to this case, the trial court will decide the matter differently than it would under race-neutral California law. It will presume prejudicially in favor of Respondent Cuellar, and regard the children's best interests as only one among several considerations rather than as

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

the paramount concern—and all of this, solely because the children meet a genetic profile.

This Court should grant certiorari for two reasons:

1. ICWA was designed to prevent "the removal, often unwarranted, of [Indian] children from [their birth parents] by nontribal public and private agencies," and their placement "in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4). None of that is occurring here—the children are not being *removed* from their parents, no public or private *agency* is involved, and the children are not going to be placed in a *foster or adoptive* home. Nevertheless, the California courts held that ICWA applies, based exclusively on the children's genes. Employing ICWA in cases for which it was not designed is problematic for the reasons explained in *Adoptive Couple*, *supra*, and lower courts are divided as to whether ICWA applies to private family disputes such as this one. *See In re D.A.C.*, 933 P.2d 993, 1000 (Utah App. 1997) (describing division of authority).

2. The *sole* basis for applying ICWA to this case—resulting in different treatment of these children as opposed to their black, Hispanic, Asian, or white peers—is the children's ethnic origin; a direct violation of the basic constitutional rule that the government may not relegate children to separate legal categories based on their race. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 745–48 (2007). Lower courts are divided as to the constitutionality of applying ICWA to cases based on the children's genetic

background—a question of major constitutional significance.

REASONS FOR GRANTING THE PETITION

I. LOWER COURTS ARE DIVIDED AS TO WHETHER ICWA APPLIES TO PRIVATE FAMILY DISPUTES THAT INVOLVE NO PUBLIC OR PRIVATE AGENCIES OR REMOVAL OF A CHILD FROM AN INDIAN PARENT

A. State Courts Are in Disarray as to Whether ICWA Applies to Private Family Disputes

ICWA was written to address the concern that Native American children were being unduly removed from their parents' custody by "nontribal public and private agencies," and placed in foster homes and institutions that were not affiliated with tribes. 25 U.S.C. § 1901(4). *See Adoptive Couple*, 133 S. Ct. at 2561 (describing purposes of ICWA); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32–37 (1989) (same). But in a private family dispute such as this one, which involves no agencies, and no risk of removal of an Indian child from her parents, "the dissolution of Indian families is not implicated," and it makes no sense to apply ICWA. *Adoptive Couple*, 133 S. Ct. at 2561.

Many state courts, however, do apply ICWA even in private family disputes that do not involve the

removal of Indian children from their families—a matter on which there is an acknowledged and unresolved split. *See In re D.A.C.*, 933 P.2d at 1000 (recognizing the split).

For example, in *In re T.A.W.*, 383 P.3d 492, 503 (Wash. 2016), the Washington Supreme Court held that ICWA applied to a private termination-of-parental-rights (TPR) action brought by one parent against another, even though the plaintiff was herself an Indian parent and she was seeking to protect her child's best interests by severing the parental rights of an abusive, non-Indian, former spouse. The Arizona Court of Appeals held likewise in *S.S. v. Stephanie H.*, 388 P.3d 569 (Ariz. App. 2017), *cert. denied*, 2017 WL 3136930 (U.S. Oct. 30, 2017) (No. 17-95), declaring that ICWA applied to a private TPR case involving no public or private agencies and involving no risk of separation of an Indian child from his Indian family. The courts of Alaska and Colorado have held the same. *Bruce L. v. W.E.*, 247 P.3d 966, 974 (Alaska 2011); *In re N.B.*, 199 P.3d 16, 24 (Colo. App. 2007). As a consequence, even when Indian parents seek to advance the best interests of their Indian children, ICWA's separate legal standards stand in the way—a result that does not "serve the legislative dual purposes of protecting tribal relations and the best interests of the Indian child." *In re T.A.W.*, 383 P.3d at 510 (Madsen, C.J., dissenting).

California, Montana, Nebraska, New Mexico, Texas, Wisconsin, and Wyoming courts have disagreed.

They have found ICWA inapplicable in private family disputes. Thus, in *In re Bertelson*, 617 P.2d 121, 125 (Mont. 1980), the Montana Supreme Court held that ICWA did not apply to a dispute between grandparents and a mother over custody of a child. ICWA was written "to preserve Indian culture [*sic*] values under circumstances in which an Indian child is placed in a foster home or other protective institution," it noted, and that was not going on in that case. *Id*. Instead, that case was an "internal family" matter, and "[did] not fall within the ambit of the Indian Child Welfare Act." *Id*. at 125–26.

Similarly, in *In re Micah H.*, 887 N.W.2d 859 (Neb. 2016), the Nebraska Supreme Court held that ICWA Sections 1912(d) and (f) did not apply to a private TPR petition filed by maternal grandparents against the birth father, because no "breakup" of an Indian family would result. And in *In re E.G.L.*, 378 S.W.3d 542 (Tex. App. 2012), the father's petition sought to establish his status as the child's biological father, not to remove the child from the home of his stepfather, so the court held that ICWA did not apply because the situation did not fit within any definition of "child custody proceeding." *Id.* at 547.

The same is true here: the underlying guardianship proceeding does not involve the removal of the orphans from their family; both Petitioners and Respondent are blood relatives, so the children are not threatened with removal from their family. Nor does this case involve removal of the children from their

parents, since the parents are deceased, and are not having their rights terminated.

The Wisconsin Court of Appeals held in *In re Sengstock*, 477 N.W.2d 310, 313 (Wis. App. 1991), that because "ICWA concerns cases where custody of a Native American child is to be given to someone other than either one of the parents," it "does not apply" to "an intrafamily dispute." The Texas Court of Appeals found in *Comanche Nation v. Fox*, 128 S.W.3d 745 (Tex. App. 2004), that ICWA did not apply to the modification of a conservatorship agreement in a case involving no government agency. It explained that Congress designed ICWA to "apply only to situations involving the attempts of public and private agencies to remove children from their Indian families, not to inter-family disputes." *Id*. at 753. In *Cherino v. Cherino*, 176 P.3d 1184, 1186 (N.M. App. 2007), the New Mexico Court of Appeals held that ICWA "does not apply" to "[c]hild custody disputes arising in the context of divorce or separation proceedings . . . so long as custody is awarded to one of the parents." And the Wyoming Supreme Court ruled in *In re ARW*, 343 P.3d 407, 410–12 (Wyo. 2015), that ICWA Sections 1912(d) and (f) did not apply to a TPR case in which no "breakup" of an Indian family was implicated.

Finally, the California Court of Appeal held in *In re J.B.*, 100 Cal. Rptr. 3d 679 (Cal. App. 2009), that "ICWA does not apply to a proceeding to place an Indian child with a *parent*," *id.* at 683, because ICWA was "focuse[d] on the removal of Indian children from their *homes and parents*, and placement in *foster or adoptive*

homes," and on "the removal of Indian children *from their families*," which was not at issue in a case that would result in the child being placed with a parent. *Id.* at 684. And in *In re M.R.*, 212 Cal. Rptr. 3d 807 (Cal. App. 2017), it found that ICWA did not apply to a case in which child protection officials removed children and placed them with their grandmother, and then later placed them with their birth father, because "[p]lacing a child with a parent—even a previously non-custodial parent—does not equate with removal of the child from its family, and placement in a foster or adoptive home." *Id*. at 822.

The decision below, however, held that ICWA does apply, despite the fact that the children are not being removed from their parents or placed in foster care or an adoptive home. Although the court admitted that it could not find any other case "in which both parents died at the same time and one parent was a member of a tribe," it found that ICWA applies simply because the case involves Indian children and the case "is a child custody proceeding." App.5a.

Petitioners contended below that ICWA does not apply here as a statutory matter. The California Supreme Court has in the past confirmed the narrow scope of ICWA, and held that it applies only to a "child custody proceeding" as defined in 25 U.S.C. § 1903(1). *See, e.g.*, *In re W.B., Jr.*, 55 Cal. 4th 30, 57–58 (2012); *see also In re Alejandro A.*, 74 Cal. Rptr. 3d 44, 46 (Cal. App. 2008) (case was not a "child custody proceeding" because the child was not "at risk of entering foster care"). That definition—which the courts below

ignored—is, thus, a crucial first step to deciding this case.

This case does not involve the removal of a child from a parent, or a temporary placement of a child in a foster home, *cf.* 25 U.S.C. § 1903(1)(i); is not a TPR action, *cf. id.* § 1903(1)(ii); does not involve a temporary placement, *cf. id.* § 1903(1)(i), (iii); and is not an adoption case, *cf. id.* § 1903(1)(iv). The trial court did not address this argument, but simply declared that it is a child custody proceeding. That reasoning—or, actually, lack of even so much as a cursory look at this threshold issue, App.5a—is deeply flawed.

This is an important question because if ICWA applies outside of "child custody proceeding[s]" that involve "public or private agencies," it will encompass far more than what Congress had in mind when it drafted ICWA. ICWA was designed for cases involving public or private agencies removing children from parental custody and breaking up Indian families. *Adoptive Coupl*e, 133 S. Ct. at 2557–58. It was not written to override the decisions of Indian parents, as occurred in *T.A.W.*, *supra*, *S.S.*, *supra*, and similar cases. Nor was it written to establish a general family law at the federal level—a matter over which Congress has no constitutional authority, *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013)—let alone to impose a discriminatory form of family law that overrides the race-neutral laws of the states. *Cf. id.* at 2694 ("When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with

no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code."). If ICWA applies to *any* case that involves a child whose biology makes him or her eligible for tribal membership, then that Act will far exceed what Congress contemplated when passing it—and the result will be a dramatic alteration of the domestic relations law of the states, for those cases involving children of Native American ethnicity.

B. Whether ICWA Applies to Family Disputes That Do Not Involve Removal of a Child from an Indian Parent is a Question of Major Significance Beyond This Case

To understand what is at stake here, consider the rules ICWA imposes on cases involving Indian children—and how those rules differ from state law standards. Compared to California's race-neutral law of child welfare, ICWA's rules provide children with less protection and make it harder to find them the safe, loving adoptive homes they need.

Specifically at issue in this case, Respondents have contended that it is *improper* for a court to apply the "best interests of the child" standard to a case involving Indian children.[2] Most state courts that have

[2] Respondents argued in the court below that in this case: "Once ICWA applies, best interests analysis does NOT apply." Real Parties in Interest's Reply to Pet'rs' Opp'n at 12 (Dec. 19, 2016).

addressed the question do take that position. *See, e.g.*, *In re C.H.*, 997 P.2d 776, 782 (Mont. 2000); *In re Zylena R.*, 284 Neb. 834, 852 (2012); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 170 (Tex. App. 1995). The basis for this position is that ICWA's statutory mandates are said to be *per se* in the best interests of children deemed Indian.

In short, if ICWA applies to this case, the best interests of these three orphans will not receive the overriding priority that would otherwise apply under race-neutral California law; rather, ICWA's race-conscious placement preferences will govern.

There are broader implications of such a holding, too, which reveal the critical importance of this Court's review. If ICWA's different, less-protective rules can apply even to cases that do not involve the removal of Indian children from their parents, or placement in foster homes, and in which no agency is involved—but just because of the children's race—then other provisions of ICWA, which make it harder to protect Indian children from abuse and neglect, will also apply across the board to all children who are genetically eligible for tribal membership.

For instance, in TPR cases, the grounds for TPR—typically a necessary step prior to adoption—must be proven by "clear and convincing evidence," and it must be shown that TPR is in the child's best interests. *See Santosky v. Kramer*, 455 U.S. 745, 757–58 (1982). But in cases involving Indian children, ICWA imposes an *additional* requirement, that the child be at risk of

serious harm—which must be proven "beyond a reasonable doubt," on the basis of expert witness testimony. 25 U.S.C. § 1912(f). This is despite the fact that, as this Court recognized in *Santosky*, 455 U.S. at 769, such a high evidentiary standard can "erect an unreasonable barrier to state efforts to free permanently neglected children for adoption."

Also, a child of any *other* racial or national origin may be adopted by adults of *any* race, as long as the adoption is in the child's best interests. Indeed, it is against federal law to deny or delay an adoption based on the race of the parties involved. 42 U.S.C. § 1996b(1). But the rule is different for Indian children: they must be adopted by a member of the tribe, or by "other Indian families," regardless of tribe, 25 U.S.C. § 1915(a), and federal statute *does* allow the denial or delay of their adoption on the basis of race. 42 U.S.C. § 1996b(3). While this is not an adoption case, if the decision below is allowed to stand—so that ICWA applies solely on the basis of a child's genetics—the result is that ICWA's anti-adoption provisions will also be applied to Indian children due solely to their race.

In addition, state officials are required in cases involving children of other races to engage in "reasonable efforts" to prevent family breakup before placing children in foster care, *see, e.g.*, 42 U.S.C. § 671(a)(15), but in cases involving Indian children, they must make "active efforts," 25 U.S.C. § 1912(d)—which requires something more than "reasonable" efforts, and is *not* excused (as "reasonable efforts" is) in cases of systematic abuse, molestation, or drug addiction. *See A.A. v.*

State, Dep't of Family & Youth Servs., 982 P.2d 256, 261 (Alaska 1999); *People ex rel. J.S.B., Jr.*, 691 N.W.2d 611, 618 (S.D. 2005). This means state child protection workers are forced to return Indian children to the families that have neglected or abused them. Children of other races enjoy stronger protections. Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1, 37–42 (2017). While this case does not involve the active efforts requirement or ICWA's evidentiary burden, these rules, too, will apply to cases in the future, if the decision below is left undisturbed.

In short, ICWA applies separate and substandard rules at almost every stage of a child welfare proceeding if the case involves an "Indian child." It gives tribal courts extensive power to order such cases transferred out of state court and into tribal court, even when the children involved are not domiciled on—or have never even visited—a reservation. *See, e.g.*, *In re Alexandria P.*, 204 Cal. Rptr. 3d at 624–41 (applying ICWA to child who had no cultural, social, or political connection to tribe and never resided on reservation). It imposes substantive legal requirements, on top of those provided by state law, on cases involving foster care or adoption of Indian children—such as the "active efforts" requirement in 25 U.S.C. § 1912(d). *See also* Sandefur, *supra*, at 36–43. It changes the burdens of proof. *See, e.g.*, *Matter of D.S.*, 577 N.E.2d 572, 575 (Ind. 1991). And it imposes race-based "placement preferences" that "dissuade some [adults] from seeking to adopt Indian children," thereby placing "vulnerable Indian children at

a unique disadvantage in finding a permanent and loving home." *Adoptive Couple*, 133 S. Ct. at 2563–64.

Vulnerable is the right word. Indian children are at greater risk of poverty, abuse, neglect, drug use, gang membership, and suicide than any other demographic in the United States. *See* NAOMI SCHAEFER RILEY, THE NEW TRAIL OF TEARS: HOW WASHINGTON IS DESTROYING AMERICAN INDIANS 145–68 (2016); *Racial and Gender Disparities in Suicide Among Young Adults Aged 18–24* (Centers for Disease Control, Sept. 2015)[3]; *Fast Facts on Native American Youth and Indian Country* (Aspen Institute, n.d.).[4] They are more likely to be in need of protection than their peers of other races—yet ICWA deprives them of that protection, solely on the basis of race. The questions presented in this petition are therefore of critical importance to one of the most vulnerable groups in American society.

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[3] https://www.cdc.gov/nchs/data/hestat/suicide/racial_and_gender_2009_2013.pdf.

[4] https://assets.aspeninstitute.org/content/uploads/files/content/images/Fast%20Facts.pdf.

II. WHETHER IT IS CONSTITUTIONAL TO SUBJECT CHILDREN TO SEPARATE, LESS PROTECTIVE LAWS BASED SOLELY ON THEIR GENETIC ANCESTRY IS A QUESTION OF MAJOR IMPORT ON WHICH LOWER COURTS ARE DIVIDED

Assuming ICWA does apply as a statutory matter, the constitutional problems created by treating children differently on the basis of race are of pressing concern—and must be addressed by this Court.

A. Lower Courts Are in Disarray Regarding the Constitutionality of ICWA's Separate-And-Substandard Legal Scheme

Lower courts have little guidance on which to rely when reviewing ICWA cases. This Court has addressed ICWA only twice—in *Adoptive Couple* and *Holyfield*.[5] The California Supreme Court has not provided much more; it has addressed ICWA in only half a dozen cases, none of which review the constitutional issues raised here. This is especially problematic, because lower California courts are divided on these constitutional issues.

In *Bridget R.*, *supra*, the court held that "there are significant constitutional impediments to applying ICWA, rather than state law, in proceedings affecting the family relationships of persons who are not

[5] Compare that with the Indian Gaming Regulatory Act or the Indian Civil Rights Act, which have been the subject of more than a dozen cases each in this Court.

residents or domiciliaries of an Indian reservation, are not socially or culturally connected with an Indian community, and, in all respects *except genetic heritage*, are indistinguishable from other residents of the state." 41 Cal. App. 4th at 1501. Such race-based differential treatment would, at a minimum, have to survive strict scrutiny analysis, which ICWA cannot. *Id.* at 1509–10.

In *Santos Y.*, the Court of Appeal reiterated that position, declaring that where the child's only connection to the tribe is a "genetic contribution from an enrolled bloodline," applying ICWA might, "in the most attenuated sense, promote the stability and security of the Tribe by providing one more individual to carry on [its] cultural traditions," but was nevertheless "constitutionally impermissible" race-based discrimination. 92 Cal. App. 4th at 1316.

Similarly, in *In re N.N.E.*, 752 N.W.2d 1 (Iowa 2008), the Iowa Supreme Court held that applying ICWA in a case that did not involve the involuntary removal of children from their parent's custody violated substantive due process because it "makes the rights of a tribe paramount to the rights of an Indian parent or child even where, as in this case, the parent who is the tribal member has no connection to the reservation and has not been deemed unfit." *Id*. at 9.

Other courts, however, have found to the contrary. While most of those courts that have upheld the application of ICWA based solely on a child's DNA have done so in a cursory or conclusory fashion, without

substantial legal analysis—*see, e.g.*, *S.S.*, 388 P.3d at 576; *In re N.B.*, 199 P.3d at 22–23; *In re D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980)—some have held that it is constitutional to apply different laws to children who are genetically Indian because such differential treatment "is based on the political status of the parents and children and the quasi-sovereign nature of the tribe," *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003), and is therefore subject to the rational-basis review established in *Morton v. Mancari*, 417 U.S. 535 (1974). *See also In re Vincent M.*, 59 Cal. Rptr. 3d 321, 335–36 (Cal. App. 2007) (relying on *Mancari*).

But *Mancari* does not answer the question here. It specifically declined to address laws that are "directed towards a 'racial' group consisting of 'Indians,'" 417 U.S. at 553 n.24, which ICWA is. And this Court distinguished *Mancari* in *Rice v. Cayetano*, 528 U.S. 495 (2000), calling it "*sui generis*," *id.* at 520 (citation omitted), and explaining that "'racial discrimination' is that which singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics,'" *id.* at 515 (citation omitted), which ICWA obviously does.[6] Because the lower court applied ICWA in this case *solely because of the orphans' ancestry or*

[6] *Vincent M.* and other cases that have upheld ICWA based on *Mancari* have emphasized that ICWA applies only to "children who are members of, or eligible for membership in, a federally recognized tribe," rather than to all Native Americans. 59 Cal. Rptr. 3d at 335. But as *Rice* explained, "[s]imply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." 528 U.S. at 516–17.

ethnic characteristics, the rational-basis standard of *Mancari* should not apply.

Exacerbating this split of authority are decisions that employed a judge-made saving construction called the "Existing Indian Family Doctrine." This Doctrine avoided constitutional problems with ICWA by interpreting it as a statutory matter to not apply to children whose sole connection to a tribe was genetic. State courts, however, are in disagreement regarding the applicability of the doctrine. Alabama, Indiana, Missouri, Kentucky, Louisiana, and Tennessee employ the doctrine, while most others do not. *See* Shawn L. Murphy, *The Supreme Court's Revitalization of the Dying "Existing Indian Family" Exception*, 46 McGeorge L. Rev. 629, 637–38 (2014) (citing cases). California courts disagree among themselves. *Compare Santos Y.*, 92 Cal. App. 4th at 1322–23 (employing the Doctrine), *with Vincent M.*, 59 Cal. Rptr. 3d at 334 (rejecting it).

The *Adoptive Couple* decision appeared to embrace the Doctrine by concluding that ICWA does not apply if, as in this case, no Indian family is threatened with dissolution, and the child's only relationship to the tribe is genetic. 133 S. Ct. at 2562–63. *See also* Murphy, *supra*, at 643–56 (arguing that *Adoptive Couple* endorsed the Doctrine). But this matter remains unresolved, and if the Doctrine is not applied, that only means that the Court must address the constitutional questions the Doctrine was designed to avoid: is it constitutional to impose a legal disadvantage on Indian children due to "their ancestry or

ethnic characteristics"? *Rice*, 528 U.S. at 515 (citation and quotation marks omitted).

B. The Constitutionality of ICWA's Separate-And-Substandard Rules is a Critically Important Question for Millions of At-Risk Children and Their Families Nationwide

As *Adoptive Couple* recognized, applying ICWA in a way that "put[s] certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian . . . would raise equal protection concerns." 133 S. Ct. at 2565. That is exactly what is happening here. These three children, having been taken in by blood relatives upon the deaths of their parents, are being subjected to a lengthy, more burdensome legal process—and are likely to be removed from the Petitioners' custody and sent to live on tribal lands where they have never lived—solely on account of their race.

But this case is of importance beyond the lives of these three children. Because ICWA is triggered by eligibility for tribal membership, and tribes have different criteria for eligibility, it is impossible to even approximate how many children ICWA may apply to if it is triggered *solely* by the DNA in their blood. In this case, the tribal law is unusually explicit: tribal eligibility depends solely on whether a person is a "biological lineal descendant[ ]" of two named individuals, and expressly forbids any "exceptions of any kind." Shingle Springs Band of Miwok Indians Governance Code,

Title 5 §§ 2, 4. App.14a. It expressly excludes from membership any adopted child, regardless of how acculturated that child might be, unless the child "independently meet[s]" the genetic requirements for membership. *Id.* § 4. The tribe even explicitly bars from membership any child who is "conceived through purchased and/or donated spermatozoa or ova," unless the donor meets the genetic profile. *Id.* § 3. In other words, DNA is the necessary and sufficient criterion for tribal membership—political, cultural, social, or religious factors are simply irrelevant.

Other tribes also base eligibility on genetic factors. The Cherokee and Choctaw tribes, for example, impose no blood quantum, but require direct descent from a signer of the Dawes Rolls. *See* CHEROKEE CONST. art. IV, § 1; CHOCTAW CONST. art. II. This means that even a child like Veronica in *Adoptive Couple*—who had a tiny fraction of Cherokee blood, 133 S. Ct. at 2556, had never lived on a reservation, and had no cultural, linguistic, religious, or political affiliation with the tribe—qualifies. Meanwhile, a child who speaks a tribal language, practices a native religion, observes tribal cultural practices, and is otherwise fully acculturated with the tribe, would *not* qualify if she does not satisfy the blood quantum requirements.

There are around 5 million Americans who identify themselves as Native American or Alaskan Native.[7]

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[7] U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010* (Issued Jan. 2012), https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf. This number is not wholly reliable,

Native American children are more likely to suffer from abuse and neglect, alcoholism, drug abuse, gang membership, and suicide, than any other demographic in the United States. *See generally* RILEY, *supra*, at viii, 145–68. They are taken into foster care at a disproportionately high rate, and spend longer in foster care than most other ethnic groups. *See* U.S. Dep't of Health & Human Servs., *Recent Demographic Trends in Foster Care* (Sept. 2013).[8]

ICWA's more restrictive and burdensome rules for foster care and adoption of Native children make it harder to find them the permanent, loving homes they need. *See generally* Elizabeth Stuart, *Native American Foster Children Suffer Under a Law Originally Meant to Help Them*, PHOENIX NEW TIMES, Sept. 7, 2016.[9] ICWA "deprives [Indian children] of equal opportunities to be adopted that are available to non-Indian children and exposes them . . . to having an existing non-Indian family torn apart through an after the fact assertion of tribal and Indian-parent rights under ICWA." *In re Bridget R.*, 41 Cal. App. 4th at 1512. It also dissuades potential foster and adoptive families of caring for Native children, *Adoptive Couple*, 133 S. Ct. at 2563–64, because these families face a

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as it depends on self-identification and tribal affiliation/community attachment, *id.* at 2, neither of which are factors under ICWA.

[8] https://www.acf.hhs.gov/sites/default/files/cb/data_brief_foster_care_trends1.pdf.

[9] http://www.phoenixnewtimes.com/news/native-american-foster-children-suffer-under-a-law-originally-meant-to-help-them-8621832.

greater risk that a child they have grown to love will be taken away and placed with strangers at the behest of a tribal government. *Bridget R.*, 41 Cal. App. 4th at 1508.

If courts apply ICWA to a case like this one—which involves no agencies, no removal from a family, no termination of parental rights—solely because of the child's genetic heritage, the deleterious consequences that flow from its less-protective rules will be visited upon an even larger number of children, thus worsening an already dismal situation.

CONCLUSION

The petition for certiorari should be *granted*.

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Respectfully submitted,

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