No.16-500

In the
Supreme Court of the United States

R.P. AND S.P., DE FACTO PARENTS,
Petitioners,

v.

LOS ANGELES DEPARTMENT OF CHILDREN AND FAMILY SERVICES, J.E., THE CHOCTAW NATION OF OKLAHOMA, AND ALEXANDRIA P., A MINOR UNDER THE AGE OF FOURTEEN YEARS,
Respondents.

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

BRIEF OF AMICUS CURIAE AMERICAN ACADEMY OF ADOPTION ATTORNEYS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The American Academy of Adoption Attorneys (hereinafter Academy) is a not-for-profit organization of attorneys, judges and law professors throughout the United States and Canada, who have distinguished themselves in the field of adoption law and who are dedicated to the highest standards of practice.[1] The more than three hundred members of the Academy are individuals who are versed in the complexities of adoption law. Members must maintain their practice according to the highest standards of professionalism, competence and ethics.

The Academy's mission is to support the rights of children to live in safe, permanent homes with loving families, to ensure appropriate consideration of the interests of all parties to adoptions, and to assist in the orderly and legal process of adoption. To that end, the Academy's work includes promoting the reform of adoption laws and disseminating information on ethical adoption practices. As an organization, and through its members and committees, the Academy provides pro bono assistance in selected cases and actively participates

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[1] Pursuant to this Court's Rule 37.6, *amicus* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and their counsel made such monetary contribution. While the parties were only given 7 days notice, all have consented to the filing of this brief, and there is thus no conceivable prejudice in the filing of this brief with less than 10 days notice.

in the drafting and passage of adoption legislation. The Academy publishes a newsletter, holds annual and mid-year conferences, and conducts educational seminars for its members and other interested professionals. Academy members are frequently invited to make presentations as adoption experts for organizations throughout the country. The Academy regularly conducts seminars and training on the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq. (hereinafter ICWA) for attorneys and the judiciary.

The Academy addressed issues crucial to this case when it commented on regulations the Bureau of Indian Affairs (hereinafter BIA) proposed in 2015 to control how state courts apply ICWA. In particular, the Academy explained its grave concerns about BIA's proposals to administratively "repudiate" the judicial "existing Indian family" exception to ICWA and exclude the child's best interests as a factor to be considered by courts in placement proceedings under ICWA.[2]

SUMMARY OF THE ARGUMENT

The Academy addresses the first and third issue raised by Petitioners:

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[2] 14880 Federal Register/Vol. 80, No. 54/Friday, March 20, 2015/Proposed Rules.
http://www.bia.gov/cs/groups/public/documents/text/idc1-029629.pdf

(1) Whether ICWA applies where the child has not been removed from an Indian family or community.

(3) Whether the state courts erred in holding that "good cause" to depart from ICWA's placement preferences must be proved by "clear and convincing evidence"—contrary to the text and structure of the statute and the decision of at least one other state court of last resort—or otherwise erred in their interpretation of "good cause."

State courts are deeply divided over the "existing Indian family" exception to the application of ICWA, under which courts have declined to apply ICWA provisions designed to prevent the breakup of Indian families and communities to children who never lived with an Indian family or in an Indian community. In *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013), this Court held that ICWA's parental termination provisions may not be invoked by an Indian parent who never had custody under state law but did not address the existing Indian family exception generally. The Bureau of Indian Affairs took this as an opportunity for it to act, which it did by purporting to repudiate the existing Indian family exception by administrative rule in 2016. The new regulations have only heightened the confusion over the viability of the existing Indian family exception.

State courts are also deeply divided over considering an Indian child's best interests in child custody and placement proceedings to which ICWA applies. While Congress intended to give state court judges latitude and discretion to consider all

relevant evidence in creating a "good cause" exception to ICWA's placements preferences, found in 25 U.S.C. § 1915, state courts have split on whether a court's determination of what is in an Indian child's best interests is a paramount consideration or indeed whether the child's best interests can be considered at all. Again, the new BIA regulations exacerbate confusion by entirely omitting the child's best interests as a factor the court may consider in determining whether to deviate from ICWA placement preferences. 25 CFR § 23.132.

The uncertainties created by conflicting state interpretations of ICWA, compounded by newly minted BIA regulations, creates grave risks to the stability of placements for Indian children, placing Indian children at a disadvantage and depriving them of equal protection of the law. This instability for Indian children is only getting worse, as more and more Indian children are coming from multi-racial families, and as in this case, are only distantly related to an Indian ancestor.

The issues presented in this case are emblematic of the uncertainty and division prevalent in the treatment of cases under ICWA. The Court should therefore grant review on the questions presented in the petition for writ of certiorari and clarify important issues of federal law that affect thousands of children and families annually.

ARGUMENT

I. THE STATE COURT ERRED IN FAILING TO APPLY THE EXISTING INDIAN FAMILY EXCEPTION, AND STATE COURTS REMAIN DEEPLY DIVIDED OVER THE APPLICATION OF THE EXISTING INDIAN FAMILY EXCEPTION.

After this Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) and *Adoptive Couple v. Baby Girl,* 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013), state courts remain deeply divided over the application of the existing Indian family exception. On its face, the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. § 1901 *et seq.*, applies to any state custody proceeding involving an "Indian child." In *Adoptive Couple*, this Court held that the Act's parental termination provisions, found in 25 U.S.C. § 1912, may not be invoked by an Indian parent who never had custody under state law. This Court further held that ICWA's placement provisions — which typically require placement with a relative, a member of the child's tribe, or any "other Indians" — were inapplicable to Baby Girl's adoption proceedings, because no preferred placement had come forward at the relevant time. *Id.* at 2564.

This Court went on, "As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother—perhaps contributing to the mother's decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to override the mother's

decision and the child's best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. *Such an interpretation would raise equal protection concerns, but the plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context." Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013). (emphasis added.)

But *Adoptive Couple* left unresolved the more general question on which state appellate courts have been divided for decades: whether ICWA and its placement preferences apply where the child was not removed from an existing Indian family and ICWA's laudable goals would not be furthered. This case presents that very issue. The child's mother was a non-Indian. There was no showing in the evidence below the father had any tribal affiliations. Nor was there any showing the child would be placed into an Indian home if removed from the Petitioners. However, application of the placement preferences resulted in the removal of the child from an otherwise fit adoptive home where she had resided since December 2011.

In its enactment of ICWA, Congress set forth a Congressional Declaration of Policy, which states:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families *by the establishment of minimum*

> *Federal standards for the removal of Indian children from their families* and the placement of such children in foster or adoptive homes . . . .

25 U.S.C. § 1902 (emphasis added).

The above-cited section of the ICWA has led state appellate courts to adopt the "existing Indian family" exception. They have typically done so to avoid harsh results in the application of ICWA's placement preferences, which provide that, when an Indian child is put into an adoptive placement, "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a).

The existing Indian family exception was first recognized by the Kansas Supreme Court in *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982). In *Baby Boy L.,* the court found that where an infant is born out-of-wedlock to a non-Indian mother, and where the child had spent his entire life in the care of non-Indians and has not been removed from an Indian family, application of the ICWA would violate the intent of Congress rather than uphold the law's intended purpose. *Id.* at 175.

Since being adopted by the Kansas Supreme Court in 1982, the existing Indian family exception has been recognized by a significant number of state appellate courts. *See In re Interest of S.A.M.*, 703 S.W.2d 603, 607-08 (Mo. Ct. App. 1986); *Claymore v. Serr,* 405 N.W.2d 650, 653-54 (S.D. 1987); *In re*

Adoption of T.R.M., 525 N.E.2d 298, 303 (Ind. 1988)*;* *Hampton v. J.A.L.,* 658 So. 2d 331, 337 (La. Ct. App. 1995); *Rye v. Weasel,* 934 S.W.2d 257, 262-64, (Ky. 1996); *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 520-21 (Ct. App. 1996); *In re Alexandria Y.,* 53 Cal. Rptr. 2d 679, 683-87 (Ct. App. 1996); *In re Morgan*, 1997 Tenn. App. LEXIS 818, *43-44 (Ct. App. 1997); *Crystal R. v. Super. Ct.,* 69 Cal. Rptr. 2d 414, 415 (Ct. App. 1997); *In re Santos Y.,* 112 Cal. Rptr. 2d 692, 715-717 (Ct. App. 2001); *In re Baby Boy L,* 103 P.3d 1099, 1105 (Okla. 2004); *In re N.J.,* 221 P.3d 1255, 1264 (Nev. 2009); *S.A. v. E.J.P.,* 571 So. 2d 1187, 1189-90 (Ala. Ct. App. 1990); *Ex parte C.L.J.,* 946 So. 2d 880, 889 (Ala. Ct. App. 2006); *In re Shayna L. Dougherty,* 599 N.W.2d 772, 775 (Mich. Ct. App. 1999). The Washington Supreme Court, which embraced the existing Indian family exception in *In re Adoption of Crews,* 118 Wash.2d 561, 825 P.2d 305 (1992), recently reversed course. *Matter of Adoption of T.A.W.,* No. 92127-0, 2016 WL 6330589, at *13 (Wash. Oct. 27, 2016).

Other states have rejected the exception. *In re Adoption of Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Adoption of T.N.F.*, 781 P.2d 973, 976-77 (Alaska 1989); *In re Crystal K.*, 276 Cal. Rptr. 619, 624-25 (Ct. App. 1990); *In re Adoption of Baade*, 462 N.W.2d 485, 489-90 (S.D. 1990); *Adoption of Lindsay C.*, 229 Cal. App. 3d 404, 415 (Ct. App. 1991); *In re Baby Boy Doe*, 849 P.2d 925, 931-32 (Idaho 1993); *In re Adoption of S. S.*, 622 N.E.2d 832, 838-39 (Ill. App. Ct. 1993); *In re D.A.C.*, 933 P.2d 993, 997-1000 (Utah App. 1997); *In re Alicia S.*, 65 Cal. App. 4th 79, 90-92 (Ct. App. 1998);

Michael J. Jr. v. Michael J. Sr., 7 P.3d 960, 963-64 (Ariz. Ct. App. 2000); *In re Vincent M.*, 150 Cal. App. 4th 1247, 1251 (Cal. Ct. App. 2007); *In re Petition of N.B.,* 199 P.3d 16, 20-22 (Colo. App. 2007); *In re A.J.S.*, 204 P.3d 543, 551 (Kan. 2009); *Matter of Adoption of T.A.W.,* No. 92127-0, 2016 WL 6330589, at *13 (Wash. Oct. 27, 2016); *Thompson v. Fairfax County Department of Family Services*, 62 Va.App. 350, 747 S.E.2d 838 (Va. App., 2013); *In re Baby Boy C.,* 27 A.D.3d 34, 805 N.Y.S.2d 313, 323 (N.Y.App.Div.2005)

Some states, California, Iowa, Oklahoma, Washington, and Wisconsin, have rejected the existing Indian family exception by passage of state statutes. CAL. FAM. CODE § 175 (West 2012); CAL. WELF. & INST. CODE § 224 (West 2012); IOWA CODE § 232B.5(2) (West 2012); OKLA. STAT. ANN. tit. 10, §§ 40.1, 40.3 (West 2012); WASH. REV. CODE ANN. §§ 13.24.040(3), 26.10.034(1), 26.33.040(1) (West 2012) ; WIS. STAT. ANN. § 48.028(3) (West 2012).

Unfortunately, now thirty years since the existing Indian family exception was first recognized by the Kansas Supreme Court in the *Baby Boy L.* decision, this Court has not either confirmed or denied its correctness. The Court has considered ICWA twice. Its first decision was *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). In *Holyfield*, twins were born out-of-wedlock to an Indian mother, who resided on the Choctaw reservation. *Id.* at 30. The children were born off the reservation where their mother and father immediately placed them from the hospital into an adoptive placement. *Id.* This Court determined,

pursuant to the ICWA, that the state court did not have jurisdiction as the children's domicile, based upon the mother's residence, which was the Choctaw reservation. *Id.* In *Holyfield,* this Court found that, pursuant to 25 U.S.C. section 1911(a), the tribal court had exclusive jurisdiction, and the adoption proceeding should not have occurred in Mississippi state court. *Id.* The *Holyfield* decision does not address the validity of the existing Indian family exception.

In its other decision interpreting ICWA, *Adoptive Couple v. Baby Girl,* 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013), this Court, while leaving undecided the viability of the exception generally, held that ICWA's termination of parental rights procedural protections were not applicable to an Indian father who had abandoned his child under state law and never had physical or legal custody of the child. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2556–57, 186 L. Ed. 2d 729 (2013). While the Court did not address the existing Indian family exception generally, it did hold that some of ICWA's provisions — 1912(d) and (f)—should not be applied, apparently as a matter of constitutional avoidance:

> The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court's reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian. As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his

> child *in utero* and refuse any support for the birth mother—perhaps contributing to the mother's decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. *Such an interpretation would raise equal protection concerns, but the plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context.*

Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2565, 186 L. Ed. 2d 729 (2013) (emphasis added).

While some state courts apply the existing Indian family exception as a matter of a "purpose driven" statutory construction—*i.e.,* finding ICWA's goals would not be furthered if the child was not removed from an Indian environment[3] — some have, like this

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[3] *Baby Boy L* is typical of this approach. There, the Kansas Supreme Court held, "the underlying thread that runs throughout the entire Act to the effect that the Act is concerned with the removal of Indian children from an existing Indian family unit and the resultant breakup of the Indian family. In this case Baby Boy L. is only 5/16ths Kiowa Indian, has never been removed from an Indian family and so long as the mother is alive to object, would probably never become a part of the Perciado or any other Indian family. While it is true that this Act could have been more clearly and precisely drawn, we are of the opinion that to apply the Act to a factual situation such

Court, found that ICWA should not be applied if it would lead to an unconstitutional result. The leading proponent of this "avoidance" approach is the California Court of Appeal, Fourth Circuit:

> ….[R]ecognition of the existing Indian family doctrine is necessary in a case such as this in order to preserve ICWA's constitutionality. We hold that under the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or political relationship with their tribe.

In re Bridget R., 41 Cal. App. 4th 1483, 1492, 49 Cal. Rptr. 2d 507, 516 (1996), as modified on denial of reh'g (Feb. 14, 1996).

Of particular relevance here is *Bridget R* Court's focus on the impact of applying ICWA, so as to remove twin children from the only home they had ever known. The Court held, "the twins do have a presently existing fundamental and constitutionally

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as the one before us would be to *violate the policy and intent of Congress* rather than uphold them. *Matter of Adoption of Baby Boy L.,* 231 Kan. 199, 206, 643 P.2d 168, 175 (1982*) overruled by In re A.J.S.,* 288 Kan. 429, 204 P.3d 543 (2009)

protected interest in their relationship with the only family they have ever known." *In re Bridget R.,* 41 Cal. App. 4th 1483, 1507, 49 Cal. Rptr. 2d 507, 526 (1996), *as modified on denial of reh'g* (Feb. 14, 1996). Of concern in this case is the California Court of Appeals' rejection of Petitioners' argument that *Adoptive Couple* must be applied so as protect the child's right to equal protection by way of having her best interests being made the paramount standard in her placement hearing. As is argued below, for children of other races, the child's best interests are paramount consideration in adoptive placement proceedings. *Cf. Palmore v. Sidoti,* 466 U.S. 429, 433, (1984) (The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause). But under the muddled standard applied by the California Court of Appeals, *"[n]othing* in our opinion directed the lower court to give greater weight to any one factor [the child's best interests] over others." *In re Alexandria P.,* 204 Cal. Rptr. 3d 617, 633 (Ct. App. 2016), review denied (Sept. 14, 2016).

The application of existing Indian family exception the case below would have avoided this unconstitutional result by making ICWA, *as construed*, inapplicable. The child here would not have been put at a disadvantage — and subjected to a separate but unequal "tribe over all test" that allowed her to be forcibly removed from a stable foster home — solely because she is 1/64th degree Choctaw blood notwithstanding that neither she nor her family had any active connections with an

Indian tribe. According to the facts stated in Petitioners' brief, her mother is non-Indian, and her father, who initially denied having heritage in the early proceedings, had no knowledge or connection to the Choctaw culture or community. According to apparently unrebutted news accounts, her father has white supremacist connections.[4] Such applications of ICWA discredit its goals and promote the gaming of its provisions.

The Bureau of Indian Affairs has now weighed in on the controversy over the existing Indian family exception, repudiating the exception in regulations. 25 C.F.R. §23.103(c). This administrative regulation will compound confusion in state courts that apply existing Indian family exception, raising the question of what authority the BIA has to promulgate regulations governing state courts by overruling state judiciaries, an authority it found it lacked at the time ICWA was passed, when it stated, "[a]ssignment of supervisory authority over the courts to an administrative agency is a measure so at odds with concepts of both federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of congressional intent to that effect." Bureau of Indian Affairs Guidelines for State Courts; Indian Child

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[4] http://www.dailymail.co.uk/news/article-3505940/Biological-father-six-year-old-Lexi-torn-foster-parents-Native-American-violent-drug-addicted-criminal-bragged-white-supremacist-friends.html

Custody Proceedings, 44 Fed. Reg. 67584 (Nov. 26, 1979).

II. THE STATE COURT ERRED IN ITS INTERPRETATION OF "GOOD CAUSE" TO DEVIATE FROM ICWA'S PLACEMENT PREFERENCES BY MAKING THE CHILD'S BEST INTERESTS JUST A "CONSIDERATION," INSTEAD OF THE PARAMOUNT CONSIDERATION, AND STATE COURTS ARE DEEPLY SPLIT ON THE APPLICABLE STANDARD.

States courts are deeply split over the proper application of the "good cause" exception to ICWA's placement provision. ICWA provides that when an Indian child is placed into an adoptive placement, "a preference shall be given, in the absence of *good cause* to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a) (emphasis added). "Good cause" is not defined within ICWA. Because of the lack of definition, the simple adjective "good" is the most highly litigated word in ICWA proceedings nationwide. At present, Westlaw reports the term "good cause" under Section 1915 is discussed in 488 case decisions.

In the case below, the California Court of Appeals set out the general standard in the first appeal:

> In determining whether good cause exists to depart from the ICWA's placement preferences, the court may take a variety of considerations into account. The [Bureau of

> Indian Affairs 1979] Guidelines state "a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations: (i) The request of the biological parents or the child when the child is of sufficient age. (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness. (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria." (Guidelines, *supra, 44 Fed.Reg. at p. 67594.*)

In re Alexandria P., 228 Cal. App. 4th 1322, 1352–53, 176 Cal. Rptr. 3d 468, 492 (2014), *reh'g denied* (Sept. 4, 2014), *review denied* (Oct. 29, 2014). The Court held that Petitioners had the burden of proving good cause by clear and convincing evidence, despite the absence of such a burden of proof in the statute itself. *In re Alexandria P.,* 228 Cal. App. 4th 1322, 1348, 176 Cal. Rptr. 3d 468, 489 (2014), *reh'g denied* (Sept. 4, 2014), *review denied* (Oct. 29, 2014).

The court then attempted to enunciate the role of best interests in its opinion reversing the trial court, holding "[t]he court also committed legal error by failing to consider Alexandria's best interests as part of its good cause determination. The court's written statement of decision does not reveal whether the court considered Alexandria's best interests as *one* of the key factors in determining whether there is good cause to depart from the ICWA's placement preferences." *In re Alexandria P.,* 228 Cal. App. 4th

1322, 1355, 176 Cal. Rptr. 3d 468, 494–95 (2014), *reh'g denied* (Sept. 4, 2014), *review denied* (Oct. 29, 2014). While holding that a child's best interests is "one" of the key factors, the California Court of Appeals utterly failed to address what that standard means in the context of ICWA.

Compounding its confusion, the court then inferred the ICWA placement preferences to be an evidentiary legal *presumption*: "the *presumption* that following the placement preferences is in a child's best interest is a starting point, not the end of the inquiry into a child's best interests. *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1356, 176 Cal. Rptr. 3d 468, 495 (2014), *reh'g denied.* (Sept. 4, 2014), *review denied* (Oct. 29, 2014) (emphasis added). This holding was clumsily reaffirmed in the *third* of Petitioners' cases in the appellate courts, all of which grappled with the role of the child's best interests.[5] In the third appeal, the court held, "a child's best interest was *a* relevant factor in determining good cause, but recognized that it was just *one factor* among several that a court would take into account in determining good cause. *In re Alexandria P.,* 204 Cal. Rptr. 3d 617, 633 (Ct. App.

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[5] The second appellate decision, the issuance of a writ, followed remand to the trial court to apply the correct standard. The court held; "The written order of the dependency court, whether intentionally or through inadvertence, repeats the burden of proof rejected by this court in *Alexandria P.* *R.P. v. Superior Court*, No. B268111, 2015 WL 7572569, at *1 (Cal. Ct. App. Nov. 25, 2015).

2016), *review denied* (Sept. 14, 2016). Lest that factor be given unseemly weight, the court intoned: "*Nothing* in our opinion directed the lower court to give greater weight to any one factor over others." *Id.*

The California Court of Appeals' presumption that the preferences *by themselves* define the child's best interests—with the child's actual best interests being "a" factor—plainly means that the court considers that, whatever the child's best interests may be, they cannot be the paramount factor. The incoherence of this "test" for determining "good cause" under Section 1915 is evident in the following waffling by the California Court of Appeals:

- On the role a child's best interests play in a good cause determination, the 2015 [Bureau of Indian Affairs] *Guidelines* state "[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." … *In re Alexandria P.,* 204 Cal. Rptr. 3d 617, 632 (Ct. App. 2016), *review* denied (Sept. 14, 2016).

- "In contrast, the new regulations that the final rule will add to the Code of Federal Regulations do not contain any reference to a child's best interests in the context of determining whether good cause exists to depart from the ICWA's placement preferences." *Id.*

- "[A] good cause determination should not devolve into a standardless, free-ranging best interests inquiry." *In re Alexandria P.,* 204 Cal. Rptr. 3d 617, 633 (Ct. App. 2016), *review denied* (Sept. 14, 2016).

- "Nothing in our opinion directed the lower court to give greater weight to *any* one factor [child's best interests] over others." *Id.*

So in sum, the child's best interests are definitely "a" factor, shouldn't be an "independent consideration," and shouldn't be a "free range" consideration, and in no event should the child's best interest be controlling. It is no wonder the child has endured so much litigation.

The California Court of Appeals is not the only state court confused over the interplay between "good cause" under Section 1915 and the child's best interests.

In addition to California, Iowa adopts the "rule" that Section 1915 creates a presumption that the preferences apply, with the child's best interests merely being "one factor." *In Interest of A.E.,* 572 N.W.2d 579, 587 (Iowa 1997).

Four other states, Alaska, Kansas, Nebraska, and New Mexico adopt the rule that the child's best interests are the *paramount* factor under Section 1915. *Native Vill. of Tununak v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.,* 303 P.3d 431, 451–52 (Alaska 2013), *order vacated in part,* 334 P.3d 165 (Alaska 2014)("best interests of the child remain paramount"); *In re Adoption of*

B.G.J., 281 Kan. 552, 565, 133 P.3d 1, 10 (2006) ("best interest of the child remains the paramount consideration, with ICWA preferences an important part of that consideration"); *In re Interest of Bird Head,* 213 Neb. 741, 750, 331 N.W.2d 785, 791 (1983)(ICWA "does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus."); *State, ex rel., Children, Youth & Families Dep't v. Casey J.,* 355 P.3d 814, 821 (NM Ct App. 2015)("court must give primary consideration to the children's best interests").

Three other states, Minnesota, Montana, and Oregon, reject the child's best interests as an independent factor, finding that compliance with ICWA by itself yields the best interests of the child. *Matter of Custody of S.E.G.,* 521 N.W.2d 357, 362 (Minn. 1994)("placement of Indian children within the preferences of the Act is in the best interests of Indian children."); *In re Adoption of M.T.S.,* 489 N.W.2d 285, 288 (Minn. Ct. App. 1992)(ICWA preempts state best interests test); *In re C.H.,* 2000 MT 64, ¶ 22, 299 Mont. 62, 71, 997 P.2d 776, 782 ("[I]t is improper to apply a best interests standard when determining whether good cause exists to avoid the ICWA placement preferences, because the ICWA expresses the presumption that it is in an Indian child's best interests to be placed in conformance with the preferences.'); *Dep't of Human Servs. v. Three Affiliated Tribes of Fort Berthold Reservation,* 236 Or. App. 535, 548, 238 P.3d 40, 48 (2010)("[S]ection 1915(a) establishes a presumption that an adoptive placement in accordance with the

preference criteria is in an Indian child's best interests.").

One state, Oklahoma, follows the rule that while child's best interests may not be "overridden" by Section 1915, courts still may not apply an "anglo" best interests test. *In re M.K.T.,* 2016 OK 4, ¶ 57, 368 P.3d 771, 788, as corrected (Feb. 1, 2016). Amicus presumes this test is akin to the prohibited "free range" child's best interests test, thus putting two states in the "no-free-range" category.

The confusion in the role the child's best interests play under Section 1915 yields the tragic outcomes found in this case, results that would not occur for non-Indian children. Despite therapists agreeing the child was bonded and attached to the Petitioners and their children, the trial court moved her anyway—because it concluded she'd get over it. *In re Alexandria P.,* 204 Cal. Rptr. 3d 617, 638 (Ct. App. 2016), *review denied* (Sept. 14, 2016). As the Court found, "[Expert] Doi Fick acknowledged Alexandria's move would be difficult, but opined Alexandria has "the emotional resilience, and adaptive, adjustment, and coping skills to resolve a change in place…" Her adaptive and coping ability indicate that a positive outcome is likely and with therapeutic assistance, she would likely make a successful adjustment, especially if the [P.s] will continue to maintain a supportive relationship with her." *Id.* Only under the court's muddled Section 1915 analysis, where the child's best interests are not paramount, is it acceptable to knowingly cause emotional trauma and harm to a child, so long as an expert opines she will get over it.

When a child's best interests are given short shrift, the *presumption* that a child in a stable placement should be removed and placed with an Indian family under Section 1915 becomes functionally irrebuttable. Section 1915 becomes a rigid mandate that eviscerates the court's flexibility to find "good cause." This blind presumption expresses itself in the trial court's findings, made without the benefit of an evidentiary hearing, which were upheld on appeal: "[I]t was in Alexandria's best interests to provide her with the opportunity to be raised in the Indian culture, even though she would not be living on a reservation." *In re Alexandria P.,* 204 Cal. Rptr. 3d 617, 630 (Ct. App. 2016), *review denied* (Sept. 14, 2016). This so called best interest finding was itself conclusory. Worse, it was wrong on the facts—for Alexandria was not placed in "the Indian culture," she was placed a non-Indian home in Utah, belying the claim that her best interests were rigorously considered. Instead, Section 1915 allowed the Choctaw Nation to put its thumb on the scales of justice and rig the outcome of the case below. That result must be reversed.

It might be argued this particular case is not the proper vehicle to address the role of a child's best interests, as the law favors placement with relatives, leaving aside the fact that the relatives in Utah with whom the child was placed are not biologically related. Yet this would be flatly wrong. With any non-Indian child, the child's best interests would outweigh the relative's interests. *See In re Lauren R.,* 148 Cal. App. 4th 841, 855, 56 Cal. Rptr. 3d 151, 160 (2007), *as modified on denial of reh'g* (Apr. 17,

2007) ("The overriding concern of dependency proceedings, however, is not the interest of extended family members but the interest of the child. "[R]egardless of the relative placement preference, the fundamental duty of the court is to assure the best interests of the child, *whose bond with a foster parent may require that placement with a relative be rejected.*")(emphasis added); *In re S.G.,* 828 N.W.2d 118, 125 (Minn. 2013) (same).

This case raises the same equal protection concerns this Court held should not be overridden by the plain language of the ICWA in *Adoptive Couple*. Just as Section 1912 may not be construed "to override…the child's best interests," so here Section 1915 should not be construed to allow a child's race, her connection with a distant ancestor, to dictate her future and who may adopt her. There is no interest of a higher order than the child's best interest. "The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. In common with most states, Florida law mandates that custody determinations be made in the best interests of the children involved. Fla.Stat. § 61.13(2)(b)(1) (1983). The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause." *Palmore v. Sidoti,* 466 U.S. 429, 433 (1984).

Just as this Court found in *Palmore* the "judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court," it took review and reversed a custody determination based on

"father's evident resentment of the mother's choice of a black partner," *Palmore*, 466 U.S. at 431–32, because the case "raises important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race." *Id.* So it should take review in this case.

The questions presented before the Court in this petition for certiorari will inevitably occur with increasing frequency in the United States as families become more multi-racial. According to the 2010 Census, 5.2 million people in the United States identified as American Indian and Alaskan Native, either alone *or in combination with one or more other races.*[6]

On September 30, 2014, there were an estimated 415,129 children in foster care.[7] Data show that Indian children comprise 2.1 percent population in foster care.[8] This means that approximately 8700 Indian children may be placed into foster care at a given time. Further data show that when Indian are placed, they are placed into *nonrelative* foster family homes in 46% of all cases — cases requiring courts to determine whether good cause exists for the child to be placed outside of the extended family—the top

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[6] http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf

[7] https://www.childwelfare.gov/pubPDFs/foster.pdf

[8]https://newscenter.sdsu.edu/education/csp/files/04541-FY_Disproportionality_Native_Amer.pdf

tier in Section 1915.[9] Therefore, there are approximately 4000 cases each year in which this issue arises: whether good cause exists for such placements, and what is the role of the child's best interests? This case is not an outlier.

CONCLUSION

For the foregoing reasons and those stated in the petition, this Court should issue a writ of certiorari.

Respectfully submitted,

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[9]https://www.childwelfare.gov/pubPDFs/foster.pdf