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 A.P., A MINOR UNDER THE AGE OF FOURTEEN YEARS,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal

BRIEF IN OPPOSITION OF THE CHOCTAW NATION OF OKLAHOMA

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QUESTIONS PRESENTED

The Indian Child Welfare Act ("ICWA") provides that "[i]n any adoptive placement of an Indian child under State law, 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 . . . ." 25 U.S.C. § 1915(a)(1). The questions presented here are:

(1) Whether the application of § 1915(a)(1) to the adoptive placement of an Indian child with her extended family is nullified by the existing Indian family doctrine, which contends that ICWA is categorically inapplicable to an Indian child who is not being removed from an existing Indian family, but has no textual basis.

(2) Whether § 1915(a)(1) applies to the adoptive placement of an Indian child with her extended family when, in order to facilitate reunification efforts with her Indian father, the child had previously been placed in foster care in compliance with the foster care placement preferences set forth in 25 U.S.C. § 1915(b).

(3) Whether "good cause" to depart from the placement preferences set forth in § 1915(a)(1) must be shown by evidence that is clear and convincing, rather than a preponderance of the evidence.

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STATEMENT

The California Court of Appeal correctly held that Petitioners had failed to show good cause to depart from the adoptive placement preference for extended families set forth in § 1915(a)(1) and its California counterpart, Cal. Welf. & Inst. Code § 361.31(c)(1), and that the Indian child in this case should be placed with her extended family, with whom she had bonded, and where she could grow up with her younger half sister, as well as develop and maintain her connection to Choctaw culture. The court's decision was based on an extensive record, including expert testimony, presented at three separate hearings on the placement of the child. The court's determination was supported by the State agency that initiated these proceedings, the Indian child's separate and independent court-appointed counsel, the child's Indian father, and the Choctaw Nation of Oklahoma. The sole objectors were Petitioners, who provided foster care to the child while reunification efforts with her father were made, and who were aware at all times that, if the reunification efforts failed, the child's extended family was the preferred adoptive placement. Petitioners now seek to unsettle the court's decision, and the child's placement. But they proffer no grounds that warrant this Court's attention.

Petitioners' principal contention is that this Court should grant review to resolve a claimed conflict over the "existing Indian family doctrine," which contends ICWA is categorically inapplicable when an "Indian child" who is subject to ICWA based on its plain text, 25 U.S.C. § 1903(4) (defining "Indian child"), is not being removed from an existing Indian family. Review is not warranted because the existing Indian family doctrine has been in steady decline since it was first fashioned in 1982, and has now been rejected by over

twenty state courts and state legislatures. Petitioners also seek review by claiming that the court below erred in applying § 1915(a)(1)'s placement preference to an Indian child who had earlier been placed in foster care in compliance with the separate foster care placement preferences set forth in § 1915(b). But that ruling does not conflict with any decision of this Court, or another court of appeals, and is rejected by the plain text of ICWA, as the court below correctly held. Further review is therefore unwarranted. Finally, Petitioners contend that the court below erred in holding, in accordance with decisions of state courts of last resort, that clear and convincing evidence is required to show good cause to depart from the placement preferences set forth in § 1915(a). The only decision on which Petitioners rely to show a conflict is a 2010 decision of the Oregon intermediate court of appeals, which gave only glancing consideration to the issue. Review is therefore unwarranted here too.

A. Statutory Background

The Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, establishes minimum federal standards for child custody proceedings that involve Indian children in state courts.[1] The Act defines "Indian child" to mean "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." *Id.* § 1903(4). The Act applies to "child custody proceedings," which expressly include

[1] ICWA's purposes are set forth in its findings, *see id.* § 1901(1)-(5), and declaration of policy, *see id.* § 1902. Petitioners incorrectly describe those purposes. Pet. 3 (misquoting 25 U.S.C. § 1901).

"foster care placements" and "adoptive placements." *Id.* § 1903(1)(i), (iv).

These separate placements are subject to separate placement preferences. Adoptive placements of Indian children are subject to the preferences set forth in § 1915(a). *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36-37 (1989) (discussing 25 U.S.C. § 1915(a)). Preference is provided by § 1915(a) for placement with a member of the child's extended family,[2] then other members of the Indian child's tribe, and then other Indian families. *Id.* Foster care placements of Indian children are subject to § 1915(b), which requires, *inter alia*, that such placements be "within reasonable proximity to [the child's] home," and provides a preference for placement with a member of the Indian child's extended family, then a foster home "licensed, approved, or specified by the Indian child's tribe," then an Indian foster home "licensed or approved by an authorized non-Indian licensing authority," and then "an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs." *Id.* Both the adoptive and foster care placement preference provisions apply "in the absence of good cause to the contrary." *Id.* § 1915(a), (b).

California incorporated the requirements of ICWA into its statutory law in 2006, S.B. 678, 2005-06 Leg., Reg. Sess. (Cal. 2006), reasserting both the applicability

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[2] The meaning of "extended family member" is defined by the "law or custom of the Indian child's tribe" or, in the absence of such law or custom, a person eighteen or older "who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent . . . ." *Id.* § 1903(2).

of ICWA to Indian child custody proceedings and the State's interest in complying with ICWA to protect "the essential tribal relations and best interest of an Indian child . . . ." Cal. Welf. & Inst. Code § 224(a)(1). S.B. 678 integrates the requirements of ICWA into state law, including the preferences applicable to foster care and adoptive placements of Indian children. *Id.* § 361.31.

B. Factual Background

A.P. is an Indian child who was removed from the custody of her mother and Indian father by the Los Angeles Department of Children and Family Services ("DCFS") when she was seventeen months old based on concerns about her parents' ability to care for her. Pet. App. 5a. She was initially placed in foster care in April 2011. Her father and her half-sister, A., are both members of the Choctaw Nation. Pet. App. 5a.[3] A.P. is now also a member of the Choctaw Nation. Pet. App. 58a n.2.

G. and K.R. (the "R.s") are A.P.'s extended family in Utah. Pet. App. 29a-30a & n.12. They are a non-Indian couple, Pet. App. 3a, but are recognized as A.P.'s extended family by the Choctaw Nation because G.R.'s uncle is A.P.'s paternal step-grandfather, Pet. App. 8a. G.R.'s uncle is also the paternal step-grandfather and adoptive parent of A., A.P.'s older half-sister. The R.'s have an ongoing relationship with A., and G.R.'s uncle has designated the R.s to care for A. if he later becomes unable to do so. The R.s had

[3] A.P.'s paternal grandmother provided this information to the DCFS. Pet. App. 5a n.2, 8a. She was also a member of the Choctaw Nation and passed away in August 2011. Pet. App. 69a. A.P.'s paternal grandmother had a close relationship with G.R., whom she treated like a daughter. Pet. App. 69a.

expressed their interest in adopting A.P. by October 2011. They were told not to contact A.P. while her father was seeking to reunify in order to avoid confusing her, but the R.s were the Nation's first choice if reunification efforts failed. Pet. App. 8a.

R. and S.P. (the "P.s") are also a non-Indian couple. Pet. App. 3a. They were A.P.'s third foster care placement, which began in December 2011. Pet. App. 5a. They were aware that A.P. was an Indian child, Pet. App. 6a, and "knew at all times" that A.P.'s placement with them "was intended to be temporary to facilitate reunification and [that A.P.] would either reunite with her father or be placed with another family under ICWA's placement preferences." Pet. App. 25a.

The Choctaw Nation agreed to A.P.'s foster care placement with the P.s to support the Father's reunification efforts with A.P., as the P.s lived close to the Father. But if those efforts failed, the Choctaw Nation recommended placement with the R.s in Utah. Pet. App. 6a.[4] The first six months of the Father's reunification efforts were successful. He progressed to eight-hour unmonitored visits, and in June of 2012, the DCFS reported a substantial probability that he would be reunified with A.P. Pet. App. 7a-8a. But by September 2012, the Father's circumstances had changed, and he informed the DCFS that he was no longer interested in reunification services. Pet. App. 8a.

After reunification efforts failed, the Father, the Choctaw Nation, and the DCFS all recommended that A.P. be placed with her extended family, the R.s., Pet.

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[4] During A.P.'s placement with the P.s, the DCFS consistently reminded them that A.P. was an Indian child subject to ICWA's placement preferences. Pet. App. 9a.

App. 3a, and the R.s began regular visits with A.P., Pet. App. 65a. The P.s then decided they also wanted to adopt A.P., and were informed by the DCFS that the Choctaw Nation had already selected the R.s as the planned adoptive placement. Pet. App. 9a.

C. Prior Proceedings

1. On April 25, 2011, the DCFS filed a petition in the Superior Court of Los Angeles County, alleging that A.P. was at risk of physical harm because of her parents' substance abuse. The DCFS subsequently identified A.P. as an Indian child, the court determined that ICWA applied to the case on August 30, 2011, and the Choctaw Nation intervened in the proceedings on November 3, 2011. Pet. App. 10a; *see* 25 U.S.C. § 1911(c) (tribal right to intervene in state custody proceedings involving Indian children).

On December 22, 2011, the court conducted adjudication and disposition hearings, sustained the allegations made by the DCFS under Cal. Welf. & Inst. Code § 300(b), and removed A.P. from parental custody. The court also ordered reunification services for the father, which later failed, and were terminated by the court on October 4, 2012. Pet. App. 10a-11a. The father, the Choctaw Nation, and the DCFS then all recommended that A.P. be placed with the R.s, while the P.s asserted that good cause existed to deviate from § 1915(a) placement preferences, and that it was in A.P.'s best interests that she remain with them. Pet. App. 3a. In subsequent proceedings, the court granted the P.s de facto parent status,[5] and all

[5] In a juvenile dependency proceeding affecting a child, a California juvenile court may assign "de facto parent" status to a person who has "assume[d] the role of parent, raising the child in his own home" and who thereby has "acquire[d] an interest in the

parties submitted briefs to the court on whether good cause existed to depart from the placement preferences set forth in 25 U.S.C. § 1915(a). Pet. App. 11a-12a.

The good cause hearing commenced on July 29, 2013, and the court issued its decision on December 9, 2013. The court held that the R.s were A.P.'s extended family and were entitled to preference in the placement of A.P. under § 1915(a) of ICWA and Cal. Welf. & Inst. Code § 361.31(h), because the P.s had not demonstrated good cause to depart from that placement preference. The court stayed its decision for seven days, and acting on the P.s' petition, the Court of Appeal directed that A.P. stay with the P.s until the appeal was decided. Pet. App. 13a.

2. The Court of Appeal issued its decision on August 15, 2014.

a. The court held the P.s lacked standing to challenge the constitutionality of ICWA because as de facto parents under state law they did not have a right to continued custody of A.P., Pet. App. 22a (citing *In re P.L.*, 134 Cal. App. 4th 1357, 1359-62 (2005)), and thus were not aggrieved by the decision. Neither did

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'companionship, care, custody and management' of that child." *In re B.G.*, 523 P.2d 244, 253 (Cal. 1974) (footnote omitted); *see* Cal. R. Ct. 5.502(10). "De facto parents" have limited standing to appear in juvenile dependency proceedings to aid in the juvenile court's appraisal of evidence bearing on the child's best interests. *B.G.*, 523 P.2d at 253; *In re Kieshia E.*, 859 P.2d 1290, 1294 (Cal. 1993) (in bank). But their status does not imply any substantive rights, such as parental rights to "custody of the child, reunification services, or visitation." *In re Bryan D.*, 199 Cal. App. 4th 127, 146 (2011).

they have a constitutionally protected interest in a continuing relationship with children placed in foster care with them, Pet. App. 23a (citing *Backland v. Barnhart*, 778 F.2d 1386, 1389 (9th Cir. 1985)), nor could they establish standing based on A.P.'s constitutional interest in stability and permanency as A.P.'s counsel agreed that her placement with the R.s was proper, and that good cause to deviate from that placement decision "did not exist," Pet. App. 24a-25a.

b. Even if the P.s had standing, the court held that their constitutional challenge would fail. Petitioners asserted that Congress lacked authority to apply ICWA to the case because A.P. was not removed from an existing Indian family. The court rejected that contention, joining the "growing chorus of courts" that had repudiated the doctrine since it came into being, Pet. App. 26a (quoting *Thompson v. Fairfax Cnty. Dep't of Family Servs.*, 747 S.E.2d 838, 847-48 (Va. Ct. App. 2012)), and relying on the California legislature's 2006 statutory rejection of the doctrine, Pet. App. 28a (citing *In re Vincent M.*, 150 Cal. App. 4th 1247, 1271 (2007) (Bamattre-Manoukian, J., concurring); Cal. Welf. & Inst. Code § 224(a)(2), (c)).

The court also considered this Court's ruling in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013). The court found that in *Adoptive Couple*, an Indian father who had never had legal or physical custody of the Indian child voluntarily relinquished his parental rights, and the child was then placed in a private adoption, Pet. App. 28a (citing *Adoptive Couple*, 133 S. Ct. at 2558-59). On these facts, this Court considered whether § 1912(d) and (f) of ICWA barred termination of the Indian father's parental rights unless it was shown that "'active efforts have been made to provide remedial services and rehabilitation programs' to the

father and that his continued custody of the minor 'would result in serious emotional or physical harm' to the minor." Pet. App. 28a (quoting *Adoptive Couple*, 133 S. Ct. at 2557-58 (quoting 25 U.S.C. § 1912(d), (f))). The court found that *Adoptive Couple* held that the text of these provisions "limit[ed] the scope of the statutory requirements so as to exclude a biological father who never had physical or legal custody of his child," and more specifically that § 1912(f) applies only to the "continued custody" of the minor, and that § 1912(d) applies only to efforts to prevent the "breakup" of the Indian family. Pet. App. 29a (citing *Adoptive Couple*, 133 S. Ct. at 2560-64). The court found that holding was not applicable here because it was "based entirely on interpreting the statutory language" of § 1912(d) and (f), did not discuss ICWA's constitutionality, or its applicability to a state court dependency proceeding in which the court had ordered reunification services for the Indian father, and he had substantially complied with those services for a period during which unmonitored visitation was permitted. Pet. App. 29a. The court then addressed this Court's ruling in *Adoptive Couple* that "when no party entitled to placement preference under section 1915(a) has come forward to adopt an Indian child," its preferences are inapplicable, and held that in this case "the R.s have been identified as prospective adoptive parents and are entitled to placement preference" as extended family under § 1915(a). Pet. App. 29a-30a.

Finally, the court rejected the P.s' facial attack on the constitutionality of ICWA, and further held that even if that attack was viable, it would not bar the court from applying California statutes to reach the same result. Pet. App. 30a.

c. The court then considered the P.s' "novel contention" that the Choctaw Nation had waived application of the adoptive placement preferences set forth in § 1915(a) by consenting to A.P.'s foster care placement with the P.s, outside of the placement preferences set forth in § 1915(b). The court held that the P.s had waived this argument by failing to advance it in the trial court, and that it was rejected by "the plain statutory language" of ICWA. Pet. App. 31a. ICWA separately defines "foster care placement" and "adoptive placement," and expressly provides that the former is a "temporary placement" while the latter is a "permanent placement," 25 U.S.C. § 1903(1), and also provides separate placement preferences for each, to which different considerations are relevant, as set forth in § 1915(a) and (b). Pet. App. 32a. The court further held that the P.s' related contention that a child placed in foster care under § 1915(b) is not subject to adoptive placement under the preferences set forth in § 1915(a) unless the child has first been removed from the foster placement under § 1915(b) was "unsupported by case law," and that the adoptive placement of an Indian child who had earlier been in foster care while unification efforts were made was a common occurrence. Pet. App. 33a. Accordingly, the Choctaw Nation's consent to a foster care placement outside of § 1915(b) to facilitate reunification, did not preclude the court from later applying § 1915(a)'s adoptive preferences to change the placement. Pet. App. 33a.

d. The court then considered the P.s' challenges to the trial court's rulings on the good cause exception set forth in § 1915(a). The Court of Appeal affirmed the trial court's ruling on the applicable standard of proof, holding that in accordance with "the growing number of state courts, including the Supreme Courts

of Alaska and South Dakota, [it would] apply the clear and convincing standard of proof to good cause determinations under section 1915." Pet. App. 36a-37a (citing *Native Vill. of Tununak v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 303 P.3d 431 (Alaska 2013); *People ex rel. S.D. Dep't of Soc. Servs.,* 795 N.W.2d 39, 43-44 (S.D. 2011) (per curiam); *In re Adoption of Baby Girl B.*, 67 P.3d 359, 373-74 (Okla. Civ. App. 2003)); *In re Custody of S.E.G.*, 507 N.W.2d 872, 878 (Minn. Ct. App. 1993) *rev'd on other grounds*, 521 N.W.2d 357 (Minn. 1994)).

On the meaning of "good cause" under § 1915(a), the court found that the trial court had erred and ruled that a court may find good cause exists when there is a significant risk that a child will suffer serious harm as a result of a change in placement, rather than a certainty of harm; that it was appropriate to consider the bond between A.P. and the P.s in determining good cause; and that A.P.'s best interests should be expressly addressed in the good cause determination. Pet. App. 43a-47a. The court remanded the case for a good cause determination to be made in accordance with these holdings, and emphasized that facts that had arisen after the trial court's initial determination of good cause could be considered by the trial court on remand. Pet. App. 47a-49a.

4. A second good cause hearing was held over five days beginning in September 2015, and on November 3, 2015, the trial court held that the P.s had not proven good cause by clear and convincing evidence. Pet. App. 59a.[6] Acting on the P.s' petition, the Court of Appeal

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[6] Petitioners assert that the trial court stated that if this were the "'typical case,'" it would be in A.P.'s best interest to stay with the R.s. Pet. 10 (citation omitted). The trial court instead stated that would be so "[i]f the R.s were the typical 'late arriving

found that the trial court had applied the certainty of harm standard that the Court of Appeal had earlier rejected, and directed the trial court "to vacate its November 3, 2015 order and enter a new placement order based on" the correct standard. Pet. App. 52a-53a. The court emphasized that time was of the essence. Pet. App. 60a.

On March 8, 2016, the trial court issued its decision following remand. The court "concluded the de facto parents had not shown good cause to depart from the ICWA's placement preferences, and . . . ordered [A.P.] removed from the custody of the P.s and placed with the R.s in accordance with the ICWA." Pet. App. 61a. The P.s appealed that decision on March 9, 2016 and the next day sought a writ of supersedeas, which was denied on March 18, 2016. Pet. App. 61a.

5. The Court of Appeal decided the second appeal on July 8, 2016, holding that the trial court had correctly applied the law governing good cause, and had properly considered the bond that had developed over time between A.P. and the P.s, and other factors relating to her best interests, including "[A.P.]'s relationship with her extended family and half-siblings; the capacity of her extended family to maintain and develop her sense of self-identity, including her cultural identity and connection to the Choctaw tribal culture; and the P.s' relative reluctance or resistance to foster [A.P.]'s relationship with her extended family or encourage exploration of and exposure to her Choctaw cultural identity." Pet. App. 57a. Finding that the trial court's ruling was supported by substantial evidence, the court

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relatives.'" Statement of Decision at 3, *In re A.P.*, No. CK58667 (Cal. Super. Ct. Nov. 3, 2015).

affirmed its ruling that the "P.s did not prove by clear and convincing evidence that there was good cause to depart from the ICWA's placement preferences." Pet. App. 57a.[7]

In so holding, the Court of Appeals considered facts that had occurred after its 2014 ruling. Pet. App. 67a-74a. During that time, A.P. had become a member of the Choctaw Nation. Pet. App. 58a n.2. The court also considered A.P.'s positive relationships with A., her older half-sister, and her younger half-sister K., who was born in March 2015 and was also being cared for by the R.s. Pet. App. 69a. The court emphasized the trial court's ruling that "[A.P.] was not being placed 'into a family that is significantly unknown to the child,' but rather her placement would reinforce the bond she already had with the R.s, and would give her the 'opportunity to bond with, to live with, to grow up with' two of her siblings as well." Pet. App. 90a (quoting the trial court's ruling). These relationships also made applicable "the more general state policy favoring preservation of extended family and sibling relationships in the dependency context." Pet. App. 84a (footnote omitted). The court further found that "the R.s had been able to provide [A.P.] contact and a meaningful connection with her siblings, where the P.s had not." Pet. App. 91a.

The court also emphasized that A.P.'s separate court-appointed counsel, who has the "legal and ethical obligation to represent [A.P.]'s interests," Pet.

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[7] The court also found that California law parallels the requirements of § 1915(a), and requires the party requesting departure from ICWA's placement preferences to bear the burden of establishing good cause. Pet. App. 75a (citing Cal. Welf. & Inst. Code, § 361.31(j); *In re Anthony T.,* 208 Cal. App. 4th 1019, 1029 (2012)).

App. 93a (footnote and citation omitted), supported the application of ICWA's placement preferences, adding that "[w]e are unaware of any published case where a court has upheld a departure from the ICWA's placement preferences contrary to the position of the minor," Pet. App. 94a.

ARGUMENT

Petitioners urge that the existing Indian family doctrine makes § 1915(a) inapplicable here, but that doctrine has been in steady decline since it came into being in 1982, has been rejected by the vast majority of states to consider it (including the state court that originally fashioned the doctrine), and was properly rejected in this case. Review by this Court is therefore unwarranted. Petitioners next contend that the placement preferences set forth in § 1915(a) cannot be applied to an Indian child who had earlier been placed in foster care in compliance with § 1915(b), but the Court of Appeal's rejection of that contention does not conflict with any decision of this Court, or another court of appeals, and is correct. That ruling provides no basis for further review by this Court. Finally, Petitioners contend that the Court of Appeal erred in holding that clear and convincing evidence is required to show good cause to depart from the placement preferences set forth in § 1915(a), but they do not contend that ruling conflicts with "relevant decisions of this Court" or with "the decision of another state court of last resort or of a United States court of appeals." Sup. Ct. R. 10(b), (c). The only decision on which they rely to establish a conflict is a 2010 decision of the Oregon intermediate appellate court, which gave only glancing consideration to the issue, and which the California Court of Appeal properly

rejected based on more recent decisions of state courts of last resort. Review is therefore unwarranted.

I. THE EXISTING INDIAN FAMILY DOCTRINE FURNISHES NO BASIS FOR REVIEW BY THIS COURT BECAUSE IT HAS BEEN OVERWHELMINGLY REJECTED BY STATE COURTS.

Petitioners contend that "[s]tate courts remain deeply divided" over the application of the existing Indian family doctrine and that this Court should grant review to resolve that division. Pet. 16. Petitioners are incorrect and review by this Court is not warranted because state courts and state legislatures have overwhelmingly rejected the doctrine, holding that it is contrary to ICWA's plain text. Furthermore, this case is a poor vehicle for consideration of the existing Indian family doctrine because ICWA was held to apply to this case from the outset, a substantial reunification effort with the Indian father was made, and A.P. was placed with her extended family after that effort failed. In addition, the existing Indian family doctrine is rejected by new regulations that were not in effect when this case was before the court below, but became effective on December 12, 2016.

1. The existing Indian family doctrine contends that ICWA is categorically inapplicable to cases in which an Indian child is not being removed from an existing Indian family. *In re Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982). It has no textual basis in the Act; it is instead based on the court's incorrect view of the policy of the Act. Furthermore, its application requires state courts to "make an inherently subjective factual determination as to the 'Indianness' of a particular child or the parents, which courts are

'ill-equipped to make.'" *In re N.B.*, 199 P.3d 16, 22 (Colo. App. 2007) (quoting *In re Baby Boy C.*, 27 A.D.3d 34, 49 (N.Y. App. Div. 2005) (quoting *In re Alicia C.*, 65 Cal. App. 4th 79, 90 (1998))).

Not surprisingly the vast majority of states to consider the doctrine have rejected it,[8] including the Kansas Supreme Court, *In re A.J.S.*, 204 P.3d 543, 549 (Kan. 2009), which first applied it, *Baby Boy L.*, 643 P.2d at 175. Recognizing that "the majority of our sister states who have considered the existing Indian family doctrine have rejected it," *In re A.J.S.*, 204 P.3d at 548-49, that the doctrine "appears to be at odds with the clear language of ICWA," *id.* at 549, and that it "deviat[es] from ICWA's core purpose of 'preserving and protecting the interests of Indian tribes in their children,'" *id.* at 550 (quoting *Baby Boy C.*, 27

[8] The doctrine has been rejected by twenty-one states. This was done by the courts in sixteen states. *In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989); *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 963-64 (Ariz. Ct. App. 2000); *In re N.B.*, 199 P.3d at 21; *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), *rev'd on other grounds*, 657 N.E.2d 935 (Ill. 1995); *In re A.J.S.*, 204 P.3d 543, 549 (Kan. 2009); *In re Elliott*, 554 N.W.2d 32, 35-36 (Mich. Ct. App. 1996); *In re Adoption of Riffle*, 922 P.2d 510, 513-14 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Baby Boy C.*, 27 A.D.3d at 46-47; *In re A.B.*, 663 N.W.2d 625, 635-36 (N.D. 2003); *Quinn v. Walters*, 845 P.2d 206, 208-09 (Or. Ct. App. 1993) (in banc), *rev'd on other grounds*, 881 P.2d 795 (Or. 1994); *In re Adoption of Baade*, 462 N.W.2d 485, 489-90 (S.D. 1990); *State ex rel. D.A.C.*, 933 P.2d 993, 999-1000 (Utah Ct. App. 1997); *Thompson*, 747 S.E.2d at 847; *In re Adoption of T.A.W.*, 383 P.3d 492, 505-06 (Wash. 2016) (en banc). And the state legislatures of six states have also rejected it. *See* Cal. Welf. & Inst. Code § 224(c); Iowa Code § 232B.5(2); Minn. Stat. § 260.771(2); Okla. Stat. tit. 10, §§ 40.1, 40.3(B); Wash. Rev. Code § 13.34.040(3); Wis. Stat. § 938.028(3)(a).

A.D.3d at 47), the court "overrule[d] *Baby Boy L.*, and abandon[ed] its existing Indian family doctrine," *id.* at 551 (citation omitted). In so ruling, the Kansas Supreme Court joined the many courts that had earlier rejected the doctrine, emphasizing its complete detachment from ICWA's text. *E.g.*, *Michael J., Jr.*, 7 P.3d at 963 ("the language of the Act does not require either that the child be part of an existing Indian family or that the family be involved with the tribe"); *Adoption of Baade*, 462 N.W.2d at 490 ("ICWA's application to a case is continent only upon whether an 'Indian child' is the subject of a 'child custody proceeding' as those terms are defined by the Act"). The steady decline of the existing Indian family doctrine, and its overwhelming rejection by the states, establishes that the asserted conflict over its application is not extant, and does not warrant further review by this Court.

2. Petitioners cite to decisions of four states that applied the doctrine, Pet. 17, but their holdings are based on the now thoroughly repudiated view that ICWA's text can be sidestepped based only on the court's view of the policy of the Act. *See In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988) ("the purpose of the ICWA is to protect Indian children from improper removal from their existing family units, such purpose cannot be served in the present case"); *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996) ("the true intent of Congress is not to disturb situations such as presented in this case, where the Indian child is fully integrated in a non-Indian family"); *Hampton v. J.A.L.*, 658 So. 2d 331, 337 (La. Ct. App. 1995) ("ICWA was not intended to apply to this particular set of circumstances," where adoption of the Indian child "will not cause the breakup of an existing Indian family or removal of an Indian child from an Indian

environment"); *In re Adoption of Crews*, 825 P.2d 305, 310-11 (Wash. 1992) (en banc) ("when an Indian child is not being removed from an Indian cultural setting . . . whether or when a child meets the definition of 'Indian child' under ICWA is not controlling").[9] These decisions do not support further review this court because their holdings have already been recognized as unsound. Indeed, *Crews* has been overruled since the petition was filed. *Adoption of T.A.W.*, 383 P.3d at 505-06.

3. In any event, this case does not provide a proper vehicle for consideration of the existing Indian family doctrine for three reasons. First, the facts of this case make it unsuitable for that purpose. A.P. was removed from the custody of her mother and her Indian father by the DCFS, Pet. App. 3a, and was identified as an Indian child based on her father's status as a member of the Choctaw Nation, Pet. App. 4a-5a & n.2. ICWA was determined to be applicable to the proceeding on August 30, 2011, Pet. App. 10a, and reunification services were subsequently ordered for the father, Pet. App. 11a. His relationship with A.P. progressed to eight-hour unmonitored visits before reunification services were terminated, Pet. App. 7a, 11a, after

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[9] Oddly, Petitioners also cite to California decisions, which were distinguished by the Court of Appeal in rejecting the doctrine. Pet. App. 27a (finding that *In re Alexandria Y.*, 45 Cal. App. 4th 1483 (1996), is inapplicable because it was decided before California's 2006 legislative rejection of the doctrine, and *In re Santos Y.*, 92 Cal. App. 4th 1274 (2001) is inapplicable, assuming it correctly recognized the doctrine, because the minor and the de facto parents took the same position in that case, which is not so here). In any event, the California legislature's 2006 rejection of the doctrine confirms that "[t]here is no question that the existing Indian family doctrine is not viable in California." *In re Autumn K.*, 221 Cal. App. 4th 674, 716 (2013).

which A.P. was placed with her extended family. Pet. App. 99a. These facts make this case a very poor vehicle, at best, for consideration of the existing Indian family doctrine. Second, Petitioners lack any concrete interest in unsettling ICWA. Instead, they rely on ICWA in seeking custody of A.P., asserting that good cause exists to depart from the placement preferences set forth in § 1915(a), and for A.P. to remain with them. Furthermore, they have no right to custody of A.P. under state law, as de facto parents are not entitled to "custody of the child, reunification services, or visitation." *Bryan D.*, 199 Cal. App. 4th at 146. Third, the Bureau of Indian Affairs has since issued a final rule to govern the implementation of ICWA, *see* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 (Jun. 14, 2016), which rejects the existing Indian family doctrine, *id.* at 38,868 (codified at 25 C.F.R. § 23.103(c)), but as the new rule did not become effective until December 12, 2016, *id.* at 38,876 (codified at 25 C.F.R. § 23.143), it was not applied by the court below, Pet. App. 76a., and this case therefore does not provide a vehicle for considering it.

4. Petitioners also seek support for their position from this Court's decision in *Adoptive Couple*, Pet. 14-20, but that decision holds that the plain text of ICWA controls its interpretation, and offers no support for their position. The Court held that the plain text of 25 U.S.C. § 1912(f) shows that it applies only when "the *continued* custody of the child by the parent" is at issue, and thus does not bar termination of the parental rights of an Indian father who never had legal or physical custody of the Indian child. *Adoptive Couple*, 133 S. Ct. at 2560 (quoting 25 U.S.C. § 1912(f) (emphasis added)). Similarly, "active efforts" to prevent the "breakup of the Indian family" are not

required by § 1912(d) when the Indian child had never been in the Indian parent's legal or physical custody. *Id.* at 2562 (quoting 25 U.S.C. § 1912(d)). But no comparable condition is included in the text of § 1915(a). Instead, this Court held that § 1915(a)'s placement preferences did not apply to the Indian father because he never sought to adopt Baby Girl, and that accordingly, "there simply is no 'preference' to apply . . . ." *Adoptive Couple*, 133 S. Ct. at 2564. In this case, by contrast, "the R.s have been identified as prospective adoptive parents and are entitled to placement because they are considered extended family by the tribe." Pet. App. 29a-30a. In sum, *Adoptive Couple* provides no support for Petitioners' existing Indian family doctrine argument.[10]

Nor did this Court state in *Adoptive Couple* that "application of ICWA to the case would raise 'equal protection concerns,'" as Petitioners assert. Pet. 16 (quoting *Adoptive Couple*, 133 S. Ct. at 2565). The Court stated that equal protection concerns would have arisen if § 1912(d) and (f) were interpreted to permit an Indian father to abandon his child but later rely on those provisions to halt the private adoption of the child. *Adoptive Couple*, 133 S. Ct. at 2565. But

[10] The existing Indian family doctrine was raised in *Adoptive Couple*, but the Court declined to consider it. The lower court had explicitly rejected the doctrine, *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 558 n.17 (S.C. 2012), and petitioners argued that the Court should reverse the lower court on the grounds that § 1915(a) "requires a preexisting Indian family" according to congressional intent and the canon of constitutional avoidance, Brief for Petitioners at 52, 54-55, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399). The Court instead decided the case by relying on the text of ICWA, as shown in text above.

that interpretation was rejected based on the plain text of § 1912(d) and (f). *Id.* at 2559-64. And while the Court went on to reject the applicability of § 1915(a) to the case, that was because the father had not sought to adopt Baby Girl. *Id.* at 2564. Nor do Petitioners explain how "equal protection concerns" could arise under a preference for "a member of the child's extended family," 25 U.S.C. § 1915(a)(1), which is consistent with both California law, Pet. App. 84 & n.16, and general federal adoption policy, *see* 42 U.S.C. § 671(a)(19), and which was applied in this case to prefer the R.s, "a non-Indian couple who are extended family of the father," over the P.s, who are also a non-Indian couple, Pet. App. 3a. And finally, A.P. supported her placement with the R.s. Pet. App. 24a-25a.

5. Petitioners also urge that the Court of Appeal's holding "reflects a fundamental misunderstanding of the constitutional avoidance canon." Pet. 23 n.4. That effort fails because the Court of Appeal held that Petitioners lack standing to challenge the constitutionality of ICWA, Pet. App. 22a-25a, and that it would reject Petitioners' constitutional attack on ICWA even if they had standing, Pet. App. 26a-30a, and Petitioners do not seek review of either of those rulings.[11] In these circumstances, Petitioners have relinquished any basis on which they might claim the need for constitutional avoidance.

In any event, the constitutional avoidance canon is inapplicable here because it applies only to a statute that is ambiguous. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001) ("[T]he canon

[11] Petitioners' assertion that the constitutionality of a federal statute is drawn into question here, Pet. at iii, is therefore not correct, nor are the constitutional provisions referenced by Petitioners, Pet. 1-2, involved in this case.

of constitutional avoidance has no application in the absence of statutory ambiguity."); *Lewis v. United States*, 445 U.S. 55, 65 (1980) ("With the face of the statute and legislative history so clear, petitioner's argument that the statute nevertheless should be construed so as to avoid a constitutional issue is inapposite."). And there is no statutory ambiguity here, as the plain text of § 1915(a) shows when it applies.

Finally, Petitioners' constitutional avoidance argument fails because while it claims to be based on A.P.'s interests, Pet. 21-23, Petitioners do not have a constitutionally protected interest in a continuing relationship with A.P., Pet. App. 23a, and furthermore, A.P. supports the application of ICWA in this case, and her placement with the R.s under its terms, Pet. App. 24a-25a. Thus, Petitioners' effort to rely on A.P.'s interests, Pet. 21-23, also fails.

II. PETITIONERS' ASSERTION THAT § 1915(a) IS INAPPLICABLE TO AN INDIAN CHILD WHO HAD BEEN IN FOSTER CARE UNDER § 1915(b) IS MERITLESS.

Petitioners contend, Pet. 23-26, that the adoptive placement preferences set forth in § 1915(a) are inapplicable to the adoption of an Indian child who had earlier been placed in foster care in compliance with § 1915(b). The Court of Appeal held that Petitioners had forfeited that argument by failing to raise it in the trial court, and that it had no merit in any event because "it does not comport with the plain statutory language." Pet. App. 34a. That ruling does not conflict with any decision of this Court, or another court of appeals, and is correct. Further review is therefore unwarranted.

1. Petitioners' contention that A.P. was removed from foster care with the P.s for the purpose of making § 1915(a) applicable, Pet. at ii, is incorrect. The R.s had expressed their interest in adopting A.P. before she was even placed with the P.s. Pet. App. 8a. The Choctaw Nation agreed to A.P.'s foster care placement with the P.s in order to support reunification efforts with her father and recommended A.P.'s placement with the R.s if reunification efforts failed. Pet. App. 6a. The P.s "knew at all times the placement [of A.P. with them] was intended to be temporary to facilitate reunification and [that A.P.] would either reunify with her father or be placed with another family under ICWA's placement preferences." Pet. App. 25a. And after reunification efforts failed, the DCFS, the Father, and the Choctaw Nation all recommended A.P.'s placement with her extended family, the R.s. Pet. App. 3a. It was not until after reunification efforts had failed that the P.s expressed their interest in adopting A.P., at which time they were informed that the Choctaw Nation had chosen the R.s as the planned adoptive placement. Pet. App. 9a. The P.s contested that placement, asserting that good cause existed to deviate from § 1915(a)'s placement preference; A.P.'s counsel "argued that good cause did not exist." Pet. App. 3a. Ultimately, A.P. was removed from foster care with the P.s because they had failed to show good cause to depart from the placement preferences set forth in § 1915(a). Pet. App. 74a.

2. Petitioners also incorrectly state the holding of *Adoptive Couple*, asserting that the Court there held that "a party invoking a preference under § 1915 must do so 'at the time' authorities consider placement with a non-preferred party," Pet. 24, which implies that the Court held that a party seeking to invoke preference under 1915(a) must show that it had earlier invoked

preference under § 1915(b). That is not correct. In *Adoptive Couple*, the Court addressed only the applicability of § 1915(a).

3. Petitioners' argument was also properly rejected by the Court of Appeal because "it does not comport with the plain statutory language." Pet. App. 31a. A "foster care placement" is the removal of an Indian child from its parent or custodian for "temporary placement," 25 U.S.C. § 1903(1)(i), while an "adoptive placement" is the "permanent placement of an Indian child for adoption," *id.* § 1903(1)(iv). And different considerations apply to each proceeding, which are suited to their different purposes. Pet. App. 32a.[12] Accordingly, a tribe or Indian parent may consent to a foster care placement that does not comply with ICWA's placement preferences, without waiving the application of ICWA's adoptive placement preferences, as when (as occurred here) unification efforts fail. Pet. App. 33a (citing *Santos Y.*, 92 Cal. App. 4th 1274; *Tununak*, 303 P.3d at 434).

4. Finally, while Petitioners attempt to shore up their argument by turning to § 1916(b), it actually has the opposite effect. Section 1916(b) provides that whenever an Indian child is removed from a foster care placement "for the purpose of further foster care, preadoptive, or adoptive placement," the placement must be made in accordance with ICWA's terms unless

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[12] As in ICWA, the foster and adoptive placements of Indian children are treated separately under California law. Cal. Welf. & Inst. Code § 361.31(b) (applicable to "[a]ny foster care or guardianship placement of an Indian child" and requiring priority of placement to be made in conformance with § 1915(b)); *id.* § 361.31(c) (applicable to adoptive placements of Indian children, which are subject to the same adoptive placement preferences set forth in § 1915(a)).

the Indian child is being returned to the custody of the parent or Indian custodian from whose custody she was removed. *Id.* In this case, reunification efforts failed, A.P. was not returned to the custody of her Father, and § 1916(b) then required that whenever A.P. was removed from foster care, her placement comply with ICWA. And it did. The court found that the R.s were A.P.'s extended family and were entitled to preference under § 1915(a), Pet. App. 29a-30a, that good cause to depart from that preference had not been shown by the P.s, and that A.P. should be placed with the R.s. Pet. App. 86a-95a, 99a. That ruling complies with ICWA placement provisions, and thus with § 1916(b).

III. PETITIONERS' CLAIM OF CONFLICT OVER THE CLEAR AND CONVINCING EVIDENCE STANDARD OF PROOF IS PATENTLY INSUFFICIENT.

Petitioners contend, Pet. 27-28, that the Court of Appeal erred in holding that good cause to depart from the presumptive placement preferences set forth in § 1915(a) must be shown by clear and convincing evidence. But the Court of Appeal's ruling is entirely consistent with decisions of the Supreme Courts of Alaska and South Dakota on the same issue, and Petitioners do not contend that it conflicts with "relevant decisions of this Court" or with "the decision of another state court of last resort or of a United States court of appeals." Sup. Ct. R. 10(b), (c). Instead they rely solely on a decision of Oregon's intermediate appellate court, *Dep't of Human Servs. v. Three Affiliated Tribes of Fort Berthold Reservation*, 238 P.3d 40 (Or. Ct. App. 2010), which gave only glancing consideration to the issue at the suggestion of the children, *id.* at 50 n.17, who supported the finding of

good cause, *id.* at 47. *Three Affiliated Tribes* does not establish a conflict worthy of this Court's attention.

1. In the first place, the standard of proof for establishing good cause under § 1915(a) was not urged in an effort to invalidate the good cause determination in *Three Affiliated Tribes*. The children supported the finding that good cause existed to deviate from ICWA's placement preferences, and only "suggest[ed] in passing that a 'good cause' determination must be based on clear and convincing evidence." *Id.* at 50 n.17.

Nor does the *Three Affiliated Tribes* court's very limited consideration of the children's suggestion establish any meaningful conflict, much less one worthy of this Court's attention. The court first pointed to the absence of an express statement of the applicable standard in § 1915(a), which it contrasted with § 1912(e) and (f), which set out such standards. 238 P.3d at 50 n.17. But that statement simply poses the issue to be resolved; it does not decide it. "Where Congress does not indicate the proper standard of proof, [the court's] task 'is one of discerning congressional intent.'" *Tununak*, 303 P.3d at 447 & n.66 (quoting *Steadman v. S.E.C.*, 450 U.S. 91, 106 n.10 (1981)). The court then pointed out that "at least one state looked to its own law in determining the standard of proof that applies to a 'good cause' determination," 238 P.3d at 50 n.17 (citing *In re Adoption of F.H.*, 851 P.2d 1361, 1363 (Alaska 1993)), and stated that "[e]ven if we were to do that here, a heightened standard of proof would be inappropriate" under Oregon law, *id.* (citations

omitted).[13] That observation furnishes no basis for review by this Court.

2. Furthermore, the Court of Appeal decision is correct, and accords with "the growing number of state courts, including the Supreme Courts of Alaska and South Dakota," as well as state appellate courts in Oklahoma and Minnesota, "that apply the clear and convincing standard of proof to good cause determinations under section 1915." Pet. App. 36a-37a (citing *Tununak*, 303 P.3d at 431; *People ex rel. S.D. Dep't of Soc. Servs.*, 795 N.W.2d at 43-44; *Baby Girl B.*, 67 P.3d at 373-74; *Custody of S.E.G.*, 507 N.W.2d at 878).[14] The court found that § 1915(a) is "'[t]he most important substantive requirement imposed on state courts'" by ICWA and held that a lower standard of proof would "undermine" its protections by producing more frequent exceptions to its placement preferences. Pet. App. 35a (quoting *Holyfield*, 490 U.S. at 36-37). That is manifestly correct. Congress passed ICWA to "eradicate the unwarranted removal of Indian children from their communities," in part by reining in the discretion of state courts "through the passage of mandatory federal standards . . . ." *Tununak*, 303 P.3d at 447. Applying the clear and convincing standard is consistent with that purpose by restricting the number of Indian children removed from their parents or Indian guardians. *Id.* at 449 (overturning earlier

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[13] Further, the Alaska state court decision to which the Oregon court cited was overruled in *Tununak*, 303 P.3d at 449 ("We conclude that our prior decisions holding that the preponderance of the evidence standard applies to ICWA § 1915(a) good cause determinations were originally erroneous.").

[14] Although Petitioners had forfeited this issue by failing to raise it in the trial court, the court considered it because of its importance to "the placement of a young child." Pet. App. 34a.

Alaska precedent to the contrary as wrongly decided); *accord People ex rel. S.D. Dep't of Soc. Servs.*, 795 N.W.2d at 44 (the standard "is consistent with . . . the congressional intent in adopting ICWA"); *Baby Girl B.*, 67 P.3d at 373 (this standard "will foster the policy of the []ICWA and the preferences stated therein"); *Custody of S.E.G.*, 507 N.W.2d at 878. If instead the presumptive placement preferences set forth in § 1915(a) could be avoided by establishing good cause based on a preponderance of the evidence, the litigants would "share the risk of error in a roughly equal fashion," *Santosky v. Kramer*, 455 U.S. 745, 755 (1982), the preference mandated by § 1915(a) would be meaningless, and the congressional objectives of ICWA, which are to address "the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians," and "the placement of Indian children in non-Indian homes . . . based in part on evidence of the detrimental impact on the children themselves of such placements," *Holyfield*, 490 U.S. at 49-50, would be defeated.

3. Finally, even if the standard of proof to be applied under § 1915(a) might warrant review at a later point in time, this case does not provide an appropriate opportunity to do so for two reasons. First, the brief discussion of the issue in *Three Affiliated Tribes* is insufficient to illuminate the issue. Second, the Bureau of Indian Affairs has issued a final rule to govern the implementation of ICWA, *see* 81 Fed. Reg. 38,778, which became effective on December 12, 2016, *id.* at 38,876 (codified at 25 C.F.R. § 23.143), and thus was not applied in this case. Pet. App. 76a. The new regulations explicitly provide that "[t]he party seeking departure from the placement preferences [set forth in § 1915] should bear the burden of proving by clear and convincing evidence that there is 'good cause' to depart from the placement preferences." *Id.* at 38,874 (codified

at 25 C.F.R. § 23.132(b)). This Court should ensure that the lower courts have a full opportunity to consider the new rule so that this Court has the benefit of their analysis before deciding whether to grant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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