No. 16-500

In The Supreme Court of the United States

R.P. et ux.,

Petitioners,

v.

THE LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES et al.,

Respondents.

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

BRIEF IN OPPOSITION BY THE LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES

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BRIEF IN OPPOSITION

In their Petition for a Writ of Certiorari [hereinafter Petition], former foster parents continue a protracted custody fight over a child placed in their temporary care, to repeatedly and unsuccessfully challenge the applicability and validity of the Indian Child Welfare Act [hereinafter ICWA], despite every party in the case – the Los Angeles County Department of Children and Family Services [hereinafter DCFS], the Choctaw Nation of Oklahoma, the parent, and the ***child*** – supporting the child's tribal membership, the

ICWA's constitutionality and applicability to the matter at bar, and the child's current placement with relatives who are also the caregivers of her younger sister. Because adequate and independent state laws, applicable to all dependent children, not just Indian children, control and support the child's placement with her relatives, this case is an improper conduit by which to challenge the ICWA.

Furthermore, petitioners overstate a conflict amongst state courts regarding the ICWA's applicability in a case, such as this one, where the child, her father, her sister, and her grandmother are all members of the tribe. Invoking the Existing Indian Family Doctrine [hereinafter EIFD], petitioners urge the ICWA should apply only in cases where the family has embraced its Indian heritage. But the EIFD has slowly eroded in favor of applying the ICWA by its express terms. Indeed, the State Supreme Court that initially created the doctrine has now repudiated it as has the State of California and the Bureau of Indian Affairs. Further, new federal regulations expressly disavow the doctrine. Besides, in the matter at bar, the child's grandmother, who adopted an older sister, fully embraced her Choctaw heritage and raised the sister as a Choctaw, including teaching her the language, which makes this case an inappropriate one to debate the EIFD.

What this case truly is about is foster parents who abdicated their agreed-upon and acknowledged responsibility to help transition the child to the home of her out-of-state relatives. Instead, they involved the

child in a years-long custody battle, conflating the child's interests with their own, in contradiction to the observations and recommendations by the DCFS social workers, the child's therapists, her attorney and guardian ad litem, and an agreed-upon, court-appointed expert. Their attempts to raise the child's interests as their own should be rejected, as should their Petition.

STATEMENT OF THE CASE

The child, A.P., a member of the Choctaw Nation, was removed from parental custody by DCFS in 2011, when she was 17 months old.[1] She lived in two foster homes before her placement, at the age of two, with R.P. and S.P., petitioners herein.[2] *In re Alexandria P.*, 1 Cal. App. 5th 331, 336 (2016) [hereinafter *Alexandria II*].[3] When A.P. was placed with petitioners in December 2011, they were made aware the placement was temporary and the ICWA governed the matter. The tribe agreed to the child's temporary placement in the foster home to promote reunification with her father[4]

[1] Petitioners' assertion that the child was born addicted to methamphetamine is unsupported by the record. Pet'rs' Br. 5.

[2] While it is true that the child sustained injuries in one of the prior foster homes, petitioners' claim that the child was abused in the home is false. Pet'rs' Br. 5.

[3] A copy of the opinion is attached to the Petition as Appendix C.

[4] Genetic testing confirmed the father's paternity. At all times, he was treated as a presumed father. Contrary to petitioners' claim, when DCFS intervened, the child was in both parents'

and, if reunification efforts failed, the plan was to permanently place the child with relatives who resided in Utah. The relatives had presented themselves as a placement option at the outset, contrary to petitioners' ongoing, inaccurate assertion. *Alexandria II*, 1 Cal. App. 5th at 338-39; Pet'rs' Br. 6-7, 26.

Less than a year later, after the father failed to regain custody of A.P., DCFS and the tribe recommended the child be placed with her Utah relatives as planned. *Alexandria II*, 1 Cal. App. 5th at 341-42. Petitioners' claim that the permanent plan – adoption by the Utah relatives – arose only after reunification efforts failed, is false. Pet'rs' Br. 7-8. As stated, the relatives had presented themselves at the outset, since before the child's placement in petitioners' home, and DCFS informed them of the relative placement plan all along. *Alexandria II*, 1 Cal. App. 5th at 340-41. DCFS was prohibited by both the ICWA and state laws from placing the child outside California during the reunification period. 25 U.S.C. § 1915(b); Cal. Fam. Code § 7950; *see* Cal. Welf. & Inst. Code § 361.2(d); *but see* Cal. Welf. & Inst. Code § 361.2(g)(1).

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custody; the juvenile court removed the child from both her mother and father and ordered DCFS to provide reunification services to the father only. *Alexandria II*, 1 Cal. App. 5th at 338-40; Pet'rs' Br. 20, 26; 1 Clerk's Tr. 201-03, 211-13; *see* Sup. Ct. R. 12(7). The father made genuine, but ultimately unsuccessful, efforts toward reunification, including having extended, unmonitored visits with the child during the reunification period, until his setback. *Alexandria II*, 1 Cal. App. 5th at 340.

In April 2013, a transition plan was crafted by all interested parties, including petitioners. But instead of helping the child transition to her relatives' home as they agreed to do, petitioners reneged and initiated a protracted custody battle. *Alexandria II*, 1 Cal. App. 5th at 341-42. This was when their interests diverged from the child's.[5]

Petitioners argued there was good cause to deviate from the relative placement preference. The child's court-appointed guardian ad litem disagreed and urged good cause did not exist to justify keeping the child from her family. After a trial, the juvenile court ordered the child placed with her relatives. Petitioners appealed. *Id.* at 336.

The California Second District Court of Appeal issued a writ of supersedeas, staying the juvenile court's order and preserving the foster placement while the appeal pended. On August 15, 2014, the Court of Appeal affirmed the ICWA's applicability and constitutionality, but remanded the matter for the juvenile court to re-determine the child's placement under the "good cause" standard outlined in *In re Alexandria P.*, 228 Cal. App. 4th 1322 (2014) [hereinafter *Alexandria I*].[6] In rendering the decision, the Court of Appeal

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[5] Amicus Curiae American Academy of Adoption Attorneys [hereinafter AAAA] wrongly asserts petitioners were a "fit adoptive home." AAAA Br. 6. As stated, petitioners never were identified as an adoptive placement, and their fitness has been called into question. *See Alexandria II*, 1 Cal. App. 5th at 357-58.

[6] A copy of the opinion is attached to the Petition as Appendix A.

noted that over a year had passed since the original placement hearing and instructed the juvenile court to consider circumstances arising since.[7] *Alexandria II*, 1 Cal. App. 5th at 336.

After remand, a new juvenile court held another trial during which it was revealed that petitioners had engaged in a pattern of alienating and isolating behaviors, including: insisting that they be present at all visits between A.P. and her relatives, even though the court had ordered the visits be unmonitored; seeking intervention from the Court of Appeal to prevent the relatives from taking the child to Disneyland; cancelling a visit with the relatives the following day because the social worker was caught in traffic and returned the child late, even though the relatives had travelled to California from Utah to see the child; interfering with A.P.'s therapy and insisting that they be present during sessions; and failing to meaningfully incorporate the child's familial and tribal culture into her life, including forbidding her from participating in tribal activities and throwing away a dream catcher she had made during a therapy session. *Alexandria II*, 1 Cal. App. 5th at 337, 342-45.

Meanwhile, the relatives maintained twice weekly video calls and monthly in-person visits with A.P.,

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[7] Petitioners filed a Petition for Review in the California Supreme Court, seeking review of the appellate court's rejection of their remaining claims. *In re Alexandria P.*, No. S221458 (Cal. Oct. 29. 2014), *rev. den*.

which the child enjoyed and enabled her to form a close relationship with them. *Id.* at 343.

A.P.'s older half-sister lived close to the relatives and usually attended the visits. A.P.'s younger half-sister, K., who was born in March 2015, was placed in the home of the Utah relatives.[8] A.P. was very fond of both sisters and during a visit to Utah, she left Post-it-Notes around the house, including one on the baby swing, so that her sister would not forget her. *Id.* at 356-57.

An agreed-upon, court-appointed expert, after reading a voluminous amount of court documents, interviewing all the parties, and observing A.P. with both families, recommended the child be placed with her relatives, as did the child's therapist and attorney/guardian ad litem. *Id.* at 356-58. In their Petition, petitioners neglect to mention the opinion of the appointed expert – whom they agreed to – and instead reference only the testimony of the expert they hired after receiving the unfavorable report from the appointed expert. Pet'rs' Br. 10.

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[8] Petitioners wrongly insist that as evidenced by K.'s immediate placement with the Utah relatives, A.P., too, could have been placed with her relatives at the outset. Pet'rs' Br. 26. But K. was differently situated and petitioners are not privy to her file. *See* Cal. Welf. & Inst. Code § 827. California law permits juvenile courts to forgo reunification efforts and fast-track to adoptive planning in cases where, for example, a parent waives reunification services or previously was offered services and failed to reunify with another child. *See* Cal. Welf. & Inst. Code § 361.5(b)(10), (11), (14).

In November 2015, the juvenile court issued a Statement of Decision, finding petitioners failed to show good cause to justify keeping the child from her family. *Alexandria II*, 1 Cal. App. 5th at 337.

Petitioners again sought a supersedeas writ to stay the child's transfer to her Utah relatives. The Court of Appeal issued a peremptory writ in the first instance to vacate the order because the written decision described petitioners' burden in the same incorrect manner as the previous court, not by the standard outlined in *Alexandria I*. *Id.* at 337. The Court of Appeal directed the juvenile court to render a new decision utilizing the correct standard and stressed it was not expressing an opinion on how placement should be resolved. *Id.*

The case was remanded and reassigned to now a third juvenile court. The juvenile court rendered a bench decision on March 8, 2016, concluded there was no good cause to keep the child from her family, and ordered the child placed with her Utah relatives. *Id.* at 338. Contrary to petitioners' claim, the juvenile court deeply considered the potential harm to the child if removed from the foster placement. *Id.*; Pet'rs' Br. 11.

Petitioners again appealed and petitioned for a writ of supersedeas, which the Court of Appeal denied.[9] In accord, DCFS executed the juvenile court's order and transferred the child to her Utah relatives, where

[9] Petitioners also petitioned the California Supreme Court for a stay and transfer, which were denied. *In re Alexandria P.*, Nos. S233216, 233315 (Cal. Mar. 30, 2016), *rev. & transfer den.*

she remains to date. On the day of the transfer and thereafter, petitioners, in violation of privacy and confidentiality laws, created a media circus that resulted in the child being filmed and public exposure of her confidential court and therapeutic information, exemplifying yet again how petitioners' interests were not aligned with the child's.[10] Cal. Welf. & Inst. Code § 827; *see* Pet'rs' Br. 12, n.1.

On July 8, 2016, the Court of Appeal affirmed the juvenile court's placement decision and analysis, and found substantial evidence – most significantly, the report and testimony of the agreed-upon, court-appointed expert and the recommendation of the child's attorney/guardian ad litem – supported the conclusion that petitioners failed to show good cause to justify keeping A.P. from her family. *Alexandria II*, 1 Cal. App. 5th at 347-59.

Petitioners sought review in the California Supreme Court, which was denied. Pet'rs' Br. 13.

[10] Petitioners claim they have had no contact with the child since her placement with the relatives. Pet'rs' Br. 13. That is accurate. But they fail to state the reasons why, which are well documented.

AAAA, citing a London tabloid, makes unnecessary comments about A.P.'s father, calling the media accounts "unrebutted" and implying, therefore, they must be true. AAAA Br. 14. To be clear, DCFS's lack of media response is based on its duty, both ethical and legal, to protect the child's privacy and confidentiality and not to engage in further exploiting her, even for the purpose of setting the record straight in the court of public opinion. *See* Cal. Welf. & Inst. Code § 827.

REASONS FOR DENYING THE PETITION

Petitioners claim that "[b]ut for her 1/64 Choctaw ancestry, [A.P.] would still be living in California, and [petitioners] would have become her adoptive parents long ago." Pet'rs' Br. 30. While their narrative may tug at heartstrings, it ignores settled California law that applies to all dependent children, Indian and non-Indian alike, favoring relative placements and placements with siblings. Cal. Welf. & Inst. Code §§ 361.2(d), (f), 361.3, 16002; Cal. Fam. Code § 7950. Thus, as the custody decision was based on adequate and independent state law, there is no compelling reason to grant the Petition, and it should be denied. *See* Sup. Ct. R. 10.

I. BOTH THE ICWA AND CALIFORNIA'S GENERAL DEPENDENCY STATUTES HARMONIOUSLY BALANCE A CHILD'S INTERESTS IN CONTINUITY OF CARE AND GROWING UP WITH KIN.

Both the ICWA and California dependency law applicable to all children under juvenile court jurisdiction, recognize the sometimes competing interests of preserving familial ties and maintaining a continuity of care, both of which must be considered and analyzed in fact-specific circumstances. *See, e.g.*, 25 U.S.C. § 1915; Cal. Welf. & Inst. Code §§ 361.3, 361.31, 366.26(k), 16002.

The State of California harmonizes these interests by emphasizing family reunification and preferred placements with relatives and siblings, as well as recognizing a child's fundamental right to stability and permanency. *See* Cal. Welf. & Inst. Code §§ 361.2(d), 361.5(a), 361.3, 366.26(k), 16002; Cal. Fam. Code § 7950; *In re Jasmon O.*, 8 Cal. 4th 398, 419 (1994).

The ICWA does the same by establishing placement preferences, but allowing for deviations for good cause. *See* 25 U.S.C. § 1915. The "good cause" exception, both on its face and in practice, contradicts petitioners' assertion that the ICWA's placement preferences "are effectively mandatory in virtually every case, regardless of the consequences for the child at stake." Pet'rs' Br. 22. AAAA incorrectly argues the same. AAAA Br. 22. But Petitioners and AAAA cite to no authority for that assertion, nor can they because it is inaccurate. *See, e.g.*, *In re G.L.*, 177 Cal. App. 4th 683, 689, 698 (2009) (appellate court affirmed the juvenile court's decision against the ICWA-preferred placement); *In re A.A.*, 167 Cal. App. 4th 1292, 1329-30 (2008) (same); *Fresno County Dep't of Children & Family Servs. v. Super. Ct.*, 122 Cal. App. 4th 626, 638, 644-48 (2004) (same); *In re Alicia S.*, 65 Cal. App. 4th 79, 89 (1998) (discussing the ICWA's placement preferences and stating the good cause exception provides juvenile courts with flexibility).

Thus, A.P.'s placement in relative care with her sister was consistent with the ICWA and California law applicable to all dependent children, making her

case an inappropriate one through which to attack the ICWA.

A. California's Interpretation Of The ICWA Is Consistent With The Relative Placement Preference Applicable To All Children Under Juvenile Court Jurisdiction.

California laws governing placement decisions of dependent children strongly favor relative placements. California Welfare and Institutions Code section 361.3 gives "preferential consideration" to a relative's request for placement, meaning "that the relative seeking placement shall be the first placement to be considered and investigated." Cal. Welf. & Inst. Code § 361.3(c)(1). Here, the Utah relatives are, by definition, relatives under California Welfare and Institutions Code section 361.3, which include adults related to the child by blood, adoption, or affinity within the fifth degree of kinship. Cal. Welf. & Inst. Code § 361.3(c)(2); 2 Clerk's Tr. 427; 3 Clerk's Tr. 537. Thus, the insistence of Amicus Curiae Goldwater Institute and the Cato Institute [hereinafter Goldwater] that the Utah relatives are "*non-relatives*" is inaccurate. Goldwater Br. 4 (italics in original).

Though the statute gives placement preference only to adult siblings, grandparents, aunts, and uncles, Cal. Welf. & Inst. Code § 361.3(c)(2), "[p]lacement with a suitable relative is presumptively in the child's best interest." *In re Esperanza C.*, 165 Cal. App. 4th 1042,

1060 (2008) (citing Welf. & Inst. Code §§ 309, 319, 361.3(a), 16000(a), 16501.1(c)(1)); *but cf. In re Lauren R.*, 148 Cal. App. 4th 841, 855 (2007).

Indeed, the *In re Esperanza C.* Court expressly held there was a "best interest" presumption in a relative placement where the identified relative was a great-uncle, who by statutory definition was a relative, but not a preferred relative. *Id.* at 1050, 1060; *see also* Cal. Welf. & Inst. Code § 361.3(c)(2). That holding is consistent with other provisions of the California Welfare and Institutions Code, which prioritize placements with relatives to "preserve and strengthen a child's family ties whenever possible[.]" Cal. Welf. & Inst. Code § 16000(a); *see also* Cal. Welf. & Inst. Code § 16501.1(d)(1); Cal. Fam. Code. § 7950.

Thus, agencies must assess relatives for placement first, and juvenile courts then independently judge the placement request. Ideally, this is done before or at the disposition hearing when the court removes the child from parental custody. *In re Isabella G.*, 246 Cal. App. 4th 708, 719-20 (2016).

However, the relative placement preference continues even if a child is not placed with a relative at the outset. When a child is not placed immediately with a relative, the relative placement preference remains throughout the entire reunification period, in consideration of a variety of factors, including whether the relative maintained an ongoing relationship with the child. *In re Joseph T.*, 163 Cal. App. 4th 787, 793-94 (2008). Given the reunification period can last for

up to two years, general California dependency statutes contemplate a child's move from foster care to relative care, even after an extended period in the foster home. *See* Cal. Welf. & Inst. Code §§ 361.5(a), 366.21(e)-(f), 366.22, 366.25.

Recently, the relative placement preference was expanded further and applied after the parent's reunification services were terminated, even though no new placement was required. *In re Isabella G.*, 246 Cal. App. 4th at 721-23. This further illustrates California's emphasis on maintaining familial ties through relative placements. Thus, regardless of the ICWA's application, A.P. rightly was placed with her relatives in accord with California dependency law. The assertion by Goldwater that but for A.P.'s Indian ancestry, "Petitioners would be free to seek adoption, and California courts would apply the ordinary 'best interests of the child' test in deciding whether to grant that petition[,]" misstates the law and the fact that petitioners were never identified as an adoptive placement. *Alexandria II*, 1 Cal. App. 5th at 339-40; Goldwater Br. 3, 22.

Moreover, California dependency statutes also strongly favor placements with siblings. California Welfare and Institutions Code section 16002, declares the intent of the State Legislature to maintain the continuity of the family unit by developing and maintaining sibling relationships and places a duty on child-protective agencies to place siblings together. Cal. Welf. & Inst. Code § 16002(a), (f). California law also demands juvenile courts, when making placement

decisions, to consider the child's best interests, including placement with relatives and siblings. Cal. Welf. & Inst. Code §§ 361.2(d), 16501.1(d)(1); Cal. Fam. Code § 7950.

California's interest in preserving sibling relationships is compatible with the ICWA. Indeed, the ICWA does not preempt a juvenile court's consideration of a sibling relationship when determining an Indian child's placement. *Fresno County Dep't of Children & Family Servs. v. Super. Ct.*, 122 Cal. App. 4th at 646. Consistent therewith, A.P.'s placement in relative care, along with her sister, complied with not just the ICWA's placement preferences, but also with independent state law.

B. The ICWA Complements California's General Dependency Statutes.

Both the language of the ICWA found in Title 25 United States Code section 1915, and the California statute incorporating it, Welfare and Institutions Code section 361.31, consistent with general dependency statutes, strike the balance between maintaining familial ties and securing permanency and stability for dependent children. The ICWA, both federal and state, divides placement preferences into two categories, adoptive and foster, each having different requirements.

For Indian children placed for adoption, the placement preferences automatically apply. However, there are additional considerations when placing Indian

children in foster care. Relevant here is the requirement that, first and foremost, the child be placed in proximity to his or her home in order to promote reunification with a parent. 25 U.S.C. § 1915(a)-(b); Cal. Welf. & Inst. Code § 361.31(a)-(c); Cal. Fam. Code § 7950. If the child can be proximately placed in accord with the ICWA preferences, that is ideal. If not, the child may be placed in a non-preferred home, then moved to a preferred placement for adoption when the proximity requirement vanishes, unless there is good cause to maintain the non-preferred placement. *See* 25 U.S.C. § 1915; Cal. Welf. & Inst. Code § 361.31.

This interpretation comports with California's general dependency statutes, which contemplate a child may spend some time in foster care before reunification with family. *See* Cal. Welf. & Inst. Code §§ 361.5(a), 366.21(e)-(f), 366.22, 366.25; *In re Isabella G.*, 246 Cal. App. 4th at 721-23; *In re Joseph T.*, 163 Cal. App. 4th at 793-94. Thus, petitioners' insistence that placement preferences be followed only when a child is in need of a new placement, ignores not just the plain language of the ICWA, but also California's emphasis on family reunification and relative placements, even after a child spends time in foster care. *See* Cal. Welf. & Inst. Code §§ 361.2(d), 361.3; Cal. Fam. Code § 7950; *In re Isabella G.*, 246 Cal. App. 4th at 721-23.

The ICWA provides for exactly the same. *See* 25 U.S.C. § 1915. Thus, the ICWA and California dependency laws recognize the value of both kinship placements and continuity of care, and give juvenile courts

flexibility to balance those interests in consideration of the specific facts presented.

Petitioners cite *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), to assert that California's ICWA interpretation sanctions an "'eleventh hour' veto power over the child's best interests." Pet'rs' Br. 26. That simply is not what happened here. As the record reflects, A.P.'s relatives presented themselves at the outset, since before her placement in petitioners' home. *Alexandria II*, 1 Cal. App. 5th at 340. Petitioners were well aware of the plan to first attempt reunification with the father and, if that failed, to place the child in a permanent home with her relatives. *Id.* at 341. But when the time came to do just that, petitioners reneged, which resulted in two trials where an abundance of evidence was presented. *Id.* at 341-45. Three juvenile courts weighed the evidence, including the recommendations of a neutral expert, the child's therapist, and the guardian ad litem, all of whom favored the relative placement, and did what juvenile courts are charged to do – make difficult custody decisions. *See id.* at 341-46. There is nothing for this Court to review.

C. Placing A Clear And Convincing Burden On Petitioners To Show Good Cause To Deviate From The Relative Placement Preference Is Consistent With California Law, Other States' Interpretation Of The ICWA, And Newly Implemented Federal Regulations.

Petitioners complain the California Court of Appeal incorrectly required them to show good cause by clear and convincing evidence in order to deviate from the relative placement preference. Pet'rs' Br. 27-28. Petitioners note the ICWA does not indicate the burden to show good cause and cite the general principles that (1) when a law is silent on burden, the preponderance standard applies and (2) here, the Legislature's silence is bolstered by its inclusion of the clear and convincing standard in other provisions of the ICWA. *Id*.

However, California Courts of Appeal have applied the clear and convincing standard for general placement decisions, even where the statute is silent on burden.[11] *E.g*., *In re Abram L*., 219 Cal. App. 4th 452, 461 (2013); *In re Marquis D*., 38 Cal. App. 4th at 1828-29. Besides, California Family Code section 8710, provides, "In the case of an Indian child whose foster parent or parents or other prospective adoptive parents do not fall within the placement preferences . . . the foster

[11] Goldwater wrongly implies the clear and convincing standard is used only in juvenile proceedings involving Indian children. Goldwater Br. 12-13. That is incorrect. *See, e.g*., Cal. Welf. & Inst. Code § 361(c); *In re Marquis D*., 38 Cal. App. 4th 1813, 1828-29 (1995).

parent or parents or other prospective adoptive parents shall only be considered if the court finds, supported by *clear and convincing evidence*, that good cause exists to deviate from these placement preferences." Cal. Fam. Code § 8710(b) (italics added).

Other states, almost uniformly, apply the clear and convincing standard to good cause showings as well. *See, e.g.*, *Native Vill. of Tununak v. State*, 303 P.3d 431, 442, 447-48 (Alaska 2013) (overruling precedent holding the preponderance standard applies), *vacated in part on other grounds by* 334 P.3d 165, 182-83 (2014); *People ex rel. S. Dakota Dep't of Soc. Servs.*, 795 N.W.2d 39, 43-44 (S.D. 2011) (requiring a clear and convincing showing for good cause); *Noah v. Kelly B. (In re Baby Girl B.)*, 67 P.3d 359, 373-74 (Okla. Ct. Civ. App. 2003) (same); *In re Custody of S.E.G.*, 507 N.W.2d 872, 878 (Minn. App. Ct. 1993) (same), *superseded on other grounds by* 521 N.W.2d 357, 361 (1994).

The one case stating a good cause showing may be made by a preponderance of the evidence is *Dep't of Human Servs. v. Three Affiliated Tribes of Fort Berthold Reservation*, 238 P.3d 40 (Or. App. Ct. 2010), *superseded on other grounds by statute*. It is the only case cited by petitioners, and the only case of which DCFS is aware, that applies the preponderance standard to good cause hearings. But since the decision, at least one other state has rejected its conclusion that the preponderance standard applies to good cause hearings, and instead adopted the holding in *Alexandria I*, applying the clear and convincing standard of

review. *Gila River Indian Community v. Dep't of Child Safety*, 363 P.3d 148, 152 (Ariz. App. Ct. 2015).

Thus, *Fort Berthold* stands alone in embracing the preponderance standard and did so in a footnote. *Fort Berthold*, 238 P.3d at 50, n.17. Its conclusion is weakened further by new guidelines adopted by the Bureau of Indian Affairs, which expressly state the clear and convincing standard applies at good cause hearings, as do new federal regulations. 25 C.F.R. 23.132(b); 80 F.R. 10146-02, F.4(b)(4) (2015).

D. The ICWA's And California's Placement Preferences Are Congruous With The Best Interests Of Dependent Children.

AAAA supports the Petition and stresses the need to examine the interplay between the child's best interests and the ICWA's placement preferences. Though amicus acknowledges general California dependency laws favoring relative placements, it ignores that in the underlying matter, the child's guardian ad litem and attorney advocated for the relative placement. AAAA Br. 22-23. Thus, the relatives' and child's interests were aligned in the matter at bar, not in conflict.

In the case to which amicus cites, *In re Lauren R.*, the relative's placement request was inconsistent with what the child's attorney advocated – to maintain the foster placement. AAAA Br. 22-23 (citing *In re Lauren R.*, 148 Cal. App. 4th at 846-47, 852, 855-56). Here, the relative placement promoted the child's interests, as voiced by the guardian ad litem and attorney, the

child's therapists, and the court-appointed expert. It is puzzling, indeed, for amicus to support petitioners and advocate that a child's interests are paramount in a case where all of the child's advocates opposed the continued placement with petitioners.

Equally perplexing is the concern raised by Goldwater that application of the ICWA could raise equal protection concerns if used as a "trump card to override . . . the child's best interests solely because an ancestor – even a remote one – was an Indian." Goldwater Br. 3 (internal quotation marks omitted) (citing *Adoptive Couple*, 133 S. Ct. at 2565). But in California, relative placements are preferred for all children. *See In re Esperanza C.*, 165 Cal. App. 4th at 1060. And, in the matter at bar, A.P.'s attorney, consistent with the recommendations of the child's therapists and a court-appointed expert, advocated for the child's placement with her Utah relatives. *Alexandria II*, 1 Cal. App. 5th at 347-59.

DCFS is not aware of any case, certainly not in California, where a reviewing court disturbed a placement decision, citing the child's best interest, in opposition to the position taken by the child's guardian ad litem and attorney. *Alexandria II*, 1 Cal. App. 5th at 359; *see also In re E.R.*, 244 Cal. App. 4th 866, 880-81 (2016) (placement decision affirmed where all the parties and an expert supported it); *In re N.M.*, 174 Cal. App. 4th 328, 334-35 (2009) (Court of Appeal affirmed the juvenile court's placement decision, which was advocated by the child's attorney); *Paula E. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 276

P.3d 422, 426-27 (Alaska 2012); *L.G. v. State, Dep't of Health & Soc. Servs.*, 14 P.3d 946, 955 (Alaska 2000); *Matter of Baby Boy Doe*, 902 P.2d 477, 487-88 (Idaho 1995).

Thus, petitioners' assertion that the "factual paradigm presented by this case appears with startling frequency" exemplifies how the instant matter simply is not what petitioners and amici want it to be. Pet'rs' Br. 30. What makes this case unique and an inappropriate one in which to challenge the ICWA is that the child's guardian ad litem advocated for the relative placement with support from a neutral expert and the child's therapists. Petitioners' interests are not aligned with the child's. That is what makes this case an outlier. Under the circumstances, seeking a grant of certiorari is incongruous.

II. FORMER FOSTER PARENTS DO NOT HAVE THE RIGHT TO LITIGATE ON BEHALF OF A CHILD IN OPPOSITION TO THE POSITION TAKEN BY THE CHILD'S ATTORNEY AND GUARDIAN AD LITEM.

As aptly stated in *Alexandria II*: "[Petitioners] lack the right to assert [A.P.'s] interests because [A.P.] has her own counsel, who represents her interest and also acts as her guardian ad litem. [Citation.]" *Alexandria II*, 1 Cal. App. 5th at 358. Even though petitioners were granted de facto parent status, their rights were

limited, and they had no protected interest in a continued relationship with the child, who opposed their position. *In re P.L.*, 134 Cal. App. 4th 1357, 1359-62 (2005) (de facto parents have no custodial rights, only the right to participate in the proceedings); *see also In re Santos Y.*, 92 Cal. App. 4th 1274, 1314-16 & n.24 (2001) (finding the foster parents did not have a legal interest in continued custody, but allowing them to raise the interests of the child because they were aligned); *In re Bridget R.*, 41 Cal. App. 4th 1483, 1490, n.2 (1996) (where the children supported the position taken by the de facto parents with regard to the ICWA's applicability).

Petitioners cite *Clark v. Martinez*, 543 U.S. 371 (2005), to assert rights where they have none. *See* Pet'rs' Br. 23, n.4. *Clark* involved the interpretation of a statute pertaining to undocumented immigrants and held that because the law did not distinguish between different types of undocumented immigrants, it must be applied equally to all of them. *Clark*, 543 U.S. at 371, 373, 377-82. But in *Clark*, the petitioners sought uniform application of a law that protected them; here, petitioners seek to eradicate laws that protect the rights of others. *Clark*, 543 U.S. 371, 377-82; *see also* 25 U.S.C. § 1915; *In re Esperanza C.*, 165 Cal. App. 4th at 1060.

Petitioners' citation to *Adoptive Couple*, 133 S. Ct. 2552, also is not persuasive. Pet'rs' Br. 23. As noted in *Alexandria I*, that opinion was based on statutory interpretation of the ICWA, not the Act's constitutionality or application in a juvenile dependency case. *Alexandria I*, 228 Cal. App. 4th at 1344-45. This Court

should decline the invitation to address those issues now, in a case where no party, particularly not the child, challenges the ICWA's constitutionality or application.

III. THE ICWA APPLIES IN JUVENILE DEPENDENCY MATTERS WHERE THE SUBJECT CHILD, HER FATHER, GRANDMOTHER, AND SISTER ARE MEMBERS OF THE TRIBE.

By its express terms, the ICWA applies in child custody proceedings involving an Indian child, defined as a child who is a member of a federally recognized tribe or eligible for membership and the biological child of a tribal member. 25 U.S.C. § 1903. There is no dispute that juvenile dependency proceedings are child custody proceedings, that the Choctaw Nation of Oklahoma is a federally recognized tribe, and that the child and father are both tribal members. Thus, by its plain terms, the ICWA governed the matter at bar.

Petitioners invoke a doctrine, the EIFD, to question the ICWA's applicability. Pet'rs' Br. 16-20. The EIFD was created by the Kansas Supreme Court in 1982, which held the ICWA did not apply to a family who had no substantial ties to the tribe. *Matter of Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982). However, the Kansas Supreme Court later repudiated the doctrine, noting the majority of states have rejected it, and other states that once adopted it have since abandoned it. *In re A.J.S.*, 204 P.3d 543, 548-49 (Kan.

2009). California is one of those states. Cal. Welf. & Inst. Code § 224(a)(2); *In re Autumn K.*, 211 Cal. App. 4th 674, 717 (2013).[12]

Furthermore, new federal regulations eliminate the EIFD: "State court[s] may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum." 25 C.F.R. 23.103(c).

AAAA suggests the new regulations will "compound confusion" on the issue. AAAA Br. 14. But given the regulations just went into effect on December 12, 2016, it is premature to debate the continuing viability of the EIFD before states have an opportunity to react to the new regulations.

Moreover, the facts in the underlying case make it a curious choice to question the ICWA's applicability under the EIFD standards. Though it is true that A.P.'s father did not embrace his tribal heritage, A.P.'s grandmother was a very proud Choctaw woman, who regaled

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[12] Goldwater's claim that the viability of the EIFD remains unsettled in California is inaccurate. Goldwater Br. 20. It cites to 1999 legislation and *In re Santos Y.*, 92 Cal. App. 4th at 1305-10, a 2001 case finding the 1999 legislation did not override the EIFD. Goldwater Br. 20, n.15. But Goldwater fails to mention the 2006 curing legislation and that every California case addressing the issue since has refused to apply the EIFD. *See Alexandria I*, 228 Cal. App. 4th at 1343-44; *In re Autumn K.*, 211 Cal. App. 4th at 717; *In re Vincent M.*, 150 Cal. App. 4th 1247, 1265 (2007).

the family, in particular the relatives with whom A.P. is placed, with stories of her heritage, including being a direct descendant of two great Choctaw chiefs. Tr. of Record of Oral Proceedings at 140-43, 145, 153 (July 30, 2013). The grandmother adopted A.P.'s older sister and raised her in the ways of the Choctaw people, including teaching her the language. *Id*. Thus, A.P.'s family members were not strangers to their Choctaw roots,[13] making this matter unsuitable for a grant of certiorari in order to question the ICWA's application based on the EIFD.

[13] Goldwater's and AAAA's assertions that the family's only connection to the tribe is biological is not accurate. Goldwater Br. 3; AAAA Br. 13-14.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, DCFS respectfully requests the Petition be denied.

Respectfully submitted,

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