No. 16-

In the Supreme Court of the United States

DE FACTO PARENTS,

Petitioners,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. § 1901 *et seq.*, applies to any state custody proceeding involving an "Indian child." In *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), this Court held that the Act's parental termination provisions may not be invoked by an Indian parent who never had custody under state law. The Court further held that the Act's placement provisions—which typically require placement with a relative, a member of the child's tribe, or any "other Indian"—were inapplicable to Baby Girl's adoption proceedings, because no preferred placement had come forward at the relevant time. *Id.* at 2564. The Court recognized that a contrary reading of the Act "would raise equal protection concerns," *id.*, because it "would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian," *id.* at 2565.

Adoptive Couple thus left open a question on which more than a dozen state courts have been openly divided for decades: Whether ICWA and its placement preferences apply where the child was not removed from an existing Indian family. Here, application of the placement preferences resulted in the removal of a child from an otherwise fit adoptive home where she had resided for more than four years. The child has never been domiciled on Indian lands, and neither the child nor her parents had any preexisting connection to a tribe beyond ancestry.

The questions presented are:

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

(2) Whether ICWA's adoptive placement preferences, 25 U.S.C. § 1915(a), require removal from a foster placement made under 1915(b), for the purpose of triggering the adoptive placement preferences contained in 1915(a).

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

RULE 29.4 STATEMENT

This petition draws into question the constitutionality of certain applications of a federal statute, as interpreted by the state courts below. 28 U.S.C. § 2403(a) therefore may apply. Accordingly, this Petition is being served upon the Solicitor General of the United States.

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The California Supreme Court's order denying review is unpublished. App. 101a. The published opinions of the California Court of Appeal are reported at 1 Cal.App.5th 331 and 228 Cal.App.4th 1322, App. 1a, App. 55a, and its order granting a peremptory writ in the first instance is unpublished, App. 50a. The decisions of the Los Angeles Superior Court are unpublished. Supp.App. at 1a, 27a, 38a.

JURISDICTION

The California Supreme Court denied review on September 14, 2016. App. 101. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 1915(a) of Title 25, U.S.C., states, in relevant part:

> In 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; (2) other members of the Indian child's tribe; or (3) other Indian families.

The Fifth Amendment to the U.S. Constitution states, in relevant part, that "[n]o person shall be […] deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment to the U.S. Constitution, Section 1, states, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. I, § 8, cl. 3 of the U.S. Constitution states, in relevant part, that "The Congress shall have power to […] regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

STATEMENT

The California state courts below interpreted federal law to require a six-year-old "Indian child" to be removed from Petitioners — the only parents she had ever known, who had raised her for more than four years — and placed for adoption with a party preferred under the Indian Child Welfare Act. It did so even though ICWA's procedural and notice provisions had been followed to the letter from the outset of the case, and the Choctaw Nation had consented to the non-preferred foster placement with Petitioners. In at least four other states, ICWA would not have dictated this tragic outcome, because it has been construed as inapplicable to children who have not been removed from an Indian parent or community. State courts have been deeply divided for decades on this issue. Proper interpretation of ICWA's placement provisions lies at the heart of state courts' administration of the Act, affecting hundreds, perhaps thousands, of child custody proceedings annually.

Sadly, this case is not an outlier. Indeed, Respondents and commentators alike have acknowledged that this case involves an all-too-common ICWA fact

pattern: a child is initially placed in foster care with a non-Indian family; then many months, sometimes years later, an ICWA-preferred permanent placement is identified. Such eleventh-hour invocations of the placement preferences put Indian children uniquely at risk for repeated, damaging, disruptions in their care and custody. And state family-court judges are left in the unenviable position of having to choose among conflicting authorities to decide whether federal law requires them to tear apart established family units after a year, or two years, or—in this case—more than four years.

This Court is the only federal court in a position to interpret this federal statute and provide much-needed clarity in an area of law where the need for clear rules is paramount. This case is an ideal vehicle through which to do so. The petition should be granted.

A. Statutory Framework

Congress enacted the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et seq.*, in response to reports of high numbers of Indian children being removed from their Indian families and communities by social workers unfamiliar with, and insensitive to, Indian culture and childrearing practices. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). The Act's express purpose is to prevent the unwarranted "breakup of an Indian family." 25 U.S.C. § 1901. The Act established minimum federal standards for removal of Indian children from their families and tribes, in order to "protect the best interests of Indian children." *Id.* at § 1902.

The Act also provides "preferences" for the placement of an Indian child who is removed from her Indian family, whether into a foster care/pre-adoptive placement, or an adoptive placement. "[A] preference

shall be given in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian childs tribe; or (3) other Indian families." *Id.* at § 1915(a); *see also id.* at § 1915(b). An "Indian child" is "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.* at § 1903(4).

B. Factual Background

Alexandria P., who goes by "Lexi," is a multiethnic child who is 1/64 (approximately 1.5%) Choctaw and is an "Indian child" as defined in ICWA. App. 5a. Lexi's biological mother, Tina P., has no Indian ancestry. Tina P. has a long history of substance abuse problems and has had at least seven children removed from her care by Respondent Los Angeles County Department of Children and Family Services (DCFS). Supp.App. 2a.

The paternity of Lexi's biological father, Respondent Jay E., was confirmed through a court-ordered DNA test after Lexi was removed from her biological mother for neglect. App. 10a. Jay E. was never married to Tina P., was incarcerated during much of Lexi's life, and is not a "presumed father" under California law. *Id.* It is undisputed that Jay E. repeatedly denied having any Indian heritage during these proceedings, and had no knowledge of or connection to the Choctaw culture or community. *Id.* at 5a. After interviewing Jay E.'s mother, however, Respondent DCFS learned that Jay E. was in fact enrolled in the Choctaw Nation of Oklahoma. *Id.* The dependency court thereafter determined that ICWA was applicable, and Lexi's case was thereafter handled by the Indian Unit within the Los Angeles DCFS.

Supp.App. 2a.

Lexi's early childhood was marked by neglect, abuse, and instability. Lexi was born addicted to methamphetamine. Supp.App. 1a. As an infant, Lexi lived a "transient" lifestyle, passed around and left for days at a time with various acquaintances while her mother went out in search for more drugs. *Id.* In April 2011, 17-month-old Lexi was taken into emergency protective custody, and then placed in foster care. App. 3a.

Lexi's initial foster placements were short-lived. She spent only four months in her first foster home before she was removed due to physical abuse that left the toddler with "a black eye and a scrape on the side of her face." App. 5a. Lexi then spent about seven months with a second foster family, who decided just before Christmas that they could no longer care for her, in part due to her behavioral and developmental issues. Supp.App. 3a.

Summer and Rusty P. ("De Facto Parents") have three biological children. They have served as foster parents in Los Angeles County for years, and have cared for other children who ultimately successfully reunified with birth family. DCFS initially asked De Facto Parents to take Lexi into their home for temporary "respite" care, while her second foster family went on Christmas vacation. *Id.* But it soon became clear that Lexi's foster family was no longer willing to care for her, and Petitioners agreed to become her foster parents. *Id.*

It is undisputed that the Choctaw Nation had timely notice of Lexi's dependency case, and that DCFS and the tribe agreed at that time that there was "good cause" to place Lexi with De Facto Parents, as there were apparently no suitable extended family members or other "Indian" families available or willing to take

her. Supp.App. 23a.

Lexi's first months after being placed with De Facto Parents were difficult. She was weepy, did not want to be held, and could not differentiate between strangers and caregivers, "indiscriminately calling all adults 'mommy' or 'daddy'—signs of a 'reactive attachment, the disinhibitive type.'" App. 6a. Petitioners addressed Lexi's behavioral and developmental issues with consistency and loving care. *Id.* Over time, Lexi's "behavioral issues resolved, and she formed a strong primary bond and attachment with the entire P. family, viewing the parents as her own parents and the P. children as her siblings." *Id.*

In the meantime, Jay E.'s paternity had been confirmed through a court-ordered DNA test. App. 10a. Jay E. had been in and out of prison, having been convicted of various firearms and drugs offenses, and of having sexual intercourse with a minor. Supp.App. 2a. Despite his troubling history, DCFS requested and the court ordered reunification services for Jay E. *Id.*

Jay was incarcerated again during the reunification period. After his release, he initially complied with the reunification plan. But after missing several required drug tests, counseling, and visitation, Jay E. stated that he was no longer interested in reunification. *Id.* at 5a. Reunification services were terminated, at Jay E.'s request, in October 2012. *Id.* At that point, Lexi was three years old, had been in foster care for 18 months, had lived with De Facto Parents for nearly a year, and had grown to view them as her "mommy" and "daddy," and their biological children as her siblings. *Id.*

As Lexi grew to be an integrated part of De Facto Parents' family, her emotional health stabilized, and their familial parent-child-sibling bonds grew stronger. De Facto Parents expressed their wish to adopt Lexi,

should reunification efforts fail. *Id.* at 9a. They soon realized, however, that adoption would be a very uphill battle. The DCFS Indian Unit social worker assigned to the case made it very clear that, in DCFS's view, it was not possible for De Facto Parents to adopt Lexi, because they did not fall within ICWA's placement preferences. Petitioners' efforts to reach out to the tribe were answered with the same message.

In October 2012, after Jay E.'s reunification services were terminated, DCFS and the Tribe identified Ginger and Ken R. as Lexi's intended permanent placement. App. 6a. The R.s reside in Utah, and are non-Indian second step-cousins of Jay E. Supp.App. 6a. They had never met Lexi at the time. App. 8a. The R.s are neither blood relatives, nor eligible to enroll in any tribe. Nevertheless, the Tribe asserted that "[b]ecause Ginger R.'s uncle is [Lexi's] paternal step-grandfather," the R.s are "extended family" within the meaning of ICWA's adoptive placement preferences. App. 8a. DCFS indicated that it had been aware of the R.s and their willingness to care for Lexi for some time, but had declined to put them forward as a potential placement, or to facilitate any contact between them and Lexi, on the theory that it would somehow interfere with efforts to reunify Lexi with her biological father. Supp.App. 23a-24a.

C. Proceedings Below

Once it became clear that Lexi would not reunify with her biological parents, Rusty and Summer P. sought, and the dependency court granted, De Facto Parent status, allowing them to participate as parties in the contested placement proceedings. App. 10a. Petitioners submitted trial briefs arguing, among other things, that ICWA is unconstitutional as applied to this

case; and ICWA is inapplicable under this Court's decision in *Adoptive Couple*, because Lexi was never in the custody of an Indian parent. App. 30a.

On December 9, 2013, after a hearing on whether there was "good cause" to depart from ICWA's placement preferences, the trial court issued a written decision reluctantly concluding that ICWA compelled Lexi to be removed from her de facto parents and placed with the R.s for adoption. Supp.App. 26a. The court reasoned that De Facto Parents "were unable to meet their burden by clear and convincing evidence, that either the child currently had extreme psychological problems or would definitively have them in the future" as a result of a change in placement. Supp.App. 25a.

The court "admonished both the tribe and the Department for their respective roles in delaying contact between [Lexi] and [Respondents]" and acknowledged that, given the length of time Lexi had resided with De Facto Parents, and scientific literature concerning the way in which the trauma of losing her parents could "alter th[e] child's brain wiring," its decision was "one of the most difficult decisions that this court has ever made." App. 15a-16a; Supp.App. 22a.

On August 15, 2014, the Court of Appeal reversed, holding that the trial court had committed three legal errors in its interpretation of ICWA's good-cause exception. App. 40a-47a. The Court of Appeal rejected Petitioners' other statutory and constitutional arguments, including their arguments that ICWA's placement preferences were inapplicable, and their argument that the trial court had erroneously imposed a heightened "clear and convincing" burden of proof to demonstrate good cause. App. 21a-40a.

The Court of Appeal acknowledged that "there is a split in the appellate districts, and the continued viability

of the [existing Indian family] doctrine is far from settled." App. 26a. "Without going into an in-depth analysis," the Court sided with the courts that have rejected the existing Indian family doctrine, noting that the California legislature had expressed an "intent to prohibit state courts from continuing to apply" the doctrine. App. 26a-28a. The court found *Adoptive Couple* inapplicable, reasoning that the opinion did not include "a discussion of the ICWA's constitutionality, or whether it may constitutionally be applied in a dependency proceeding where the Indian father has a period of substantial compliance with reunification services, including unmonitored visitation." App. 29a.

Although De Facto Parents had won a remand for a new trial on "good cause," they filed a protective petition for review in the California Supreme Court on the issues decided against them, in order to preserve them for further appellate review as necessary. That petition, as well as a petition filed on Jay E.'s behalf, were denied. *See* Cal. Sup. Ct. Dkt. No. 221458.

On remand, the case was reassigned to a different bench officer at Respondents' request. Thirteen months elapsed between the Court of Appeal's remand and a retrial on placement. De Facto Parents presented extensive expert testimony and other evidence concerning the risk of serious harm to Lexi—who by then was nearly six years old—if she were removed from the only parents and family she had ever known. App. 72a. In October 2015, the court issued a written decision ordering Lexi to be transferred to the R.s in Utah. Supp.App. 27a. The court acknowledged that "the fact that [Lexi] has remained with [her *de facto* parents] throughout this process of remand and further hearings is even more compelling evidence that the court should deviate from the ICWA placement preference." App.

29a. And the court further acknowledged that if this were the "typical case" it would "clearly be in [Lexi's] 'best interests' to remain with" Petitioners. Supp.App. 29a.

In its decision, the juvenile court criticized De Facto Parents and their attorneys for having (successfully) appealed the first placement decision, and for arguing that application of ICWA raised serious constitutional concerns. Supp.App. 30a. The court further expressed disapproval of Summer P.'s perceived religious objection to participating in a sage-burning ritual at a native cultural event she attended with Lexi and her other children. Supp.App. 34a. The court concluded that De Facto Parents had not met their burden to prove by clear and convincing evidence that Lexi would "definitively" suffer from "extreme" harm if removed from their home—the same erroneous interpretation of ICWA that the Court of Appeal had already rejected in this very case. Supp.App. 36a.

De Facto Parents immediately filed a petition for a writ of supersedeas or other appropriate writ, which the Court of Appeal promptly construed as a petition for an original writ. On November 25, 2015, the Court of Appeal issued a peremptory writ in the first instance, summarily vacating the trial court's second placement decision. App. 50a.

In the meantime, after having received the Court of Appeal's notice of intent to issue a writ, the trial court held a hearing at which it reversed itself on the placement issue, ruling that Lexi would remain with De Facto Parents, and indicating that written findings would follow. 11/20/2015 Minute Order, *In the Matter of Alexandria P.*, No. CK58667.

On remand, however, the case was reassigned again (twice). The new bench officer declined to take any live

testimony or receive supplemental evidence relevant to the half-year that had elapsed since the last placement hearing. The court instead heard one hour of oral closing arguments on March 8, 2016. After a ten-minute recess, the court issued an oral ruling from the bench, ordering Lexi (by then a six-and-a-half-year-old kindergartner) removed from her *de facto* parents and placed with the R.s. Supp.App. 38a-47a.

Without addressing any of the expert testimony Petitioners had presented to the prior bench officer concerning the substantial risk of serious harm to Lexi if she were removed from her de facto family, the trial court asserted that Petitioners had not met their burden to prove "good cause" to depart from ICWA's placement preferences. Supp.App. 45a. The court also stated its belief that it was in the best interest of an "Indian child" to have "the opportunity to be raised in her culture"—though Lexi had never had an Indian culture, and would be transferred to the custody of non-Indian step-cousins who reside nowhere near the Choctaw Nation. Supp.App. 45a.

On March 18, 2016, the Court of Appeal denied *De Facto* Parents' Petition for a Writ of Supersedeas or other appropriate stay, without opinion.

Three days later, DCFS social workers removed Lexi from the arms of the man she knows as her Daddy, tears streaming down her face as she clutched a small teddy bear. The heart-wrenching scene provoked a public outcry, and prompted extensive press and other media coverage of the case.[1]

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1 Lorelei Laird, "Lawsuits Dispute Whether the Indian Child Welfare Act Is in the Best Interests of Children," ABA Law Journal (Oct. 1, 2016), available at http://www.abajournal.com/magazine/article/indian_child_welfare_t

Lexi has not been permitted to see or speak to De Facto Parents or their biological children—whom all agree she regards as her sisters and brother—since she was ripped from their home. Repeated requests for some contact—even a brief phone call—were denied. Weeks and months passed, and Petitioners' only connection to the child they loved and raised as their daughter for more than four years came in the form of a letter in late July from a court-appointed attorney. Supp.App. 48a-49a. The letter asked De Facto Parents to forward more than a dozen items that Lexi had requested, including her rollerblades, her "bunny," her "sparkly jewelry box," and her "long bedtime shirt from Grandma Jackie" (referring to Petitioner Summer P.'s grandmother). *Id.*

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ribal_lawsuits (last visited Oct. 7, 2016); Naomi Schaefer Riley, "An obsession with racial identity is put above the needs of a child," NY Post (March 27, 2016), available at http://nypost.com/2016/03/27/an-obsession-with-racial-identity-is-put-above-the-needs-of-a-child/ (last visited Oct. 7, 2016); Lindsey Bever, "'Keep Lexi home': A foster family's wrenching fight for a 6-year-old Choctaw girl," Wash. Post (March 24, 2016), available at https://www.washingtonpost.com/news/morning-mix/wp/2016/03/24/keep-lexi-home-a-foster-familys-wrenching-fight-for-a-6-year-old-choctaw-girl/ (last visited Oct. 7, 2016); A. Dynar and T. Sandefur, "For This 6-Year-Old, The Law Sees Only Race," Wall St. J., (Mar. 25, 2016), available at http://www.wsj.com/articles/for-this-6-year-old-the-law-sees-only-race-1458857982 (last visited Oct. 7, 2016); Ryan Parry, "'Food isn't worth eating. Sleep is overrated. It's all about what can we do to get Lexi home': Heartbroken white foster parents of girl, six, seized for being 1/64th Native American beg new 'family' to return her," Daily Mail (March 26, 2016), available at http://www.dailymail.co.uk/news/article-3511048/Please-right-thing-send-daughter-home-Heartbroken-white-foster-parents-girl-six-seized-1-64th-Native-American-plead-new-family-return-home-s-known.html#ixzz4MBpMkwEr (last visited Oct. 7, 2016).

After expedited briefing and oral argument, on July 8, 2016, the Court of Appeal affirmed in a published opinion. App. 56a. On August 9, 2016, Petitioners timely filed a petition for review in the California Supreme Court, which was denied on September 14, 2016. App. 101a-102a.

REASONS FOR GRANTING THE PETITION

The decisions of the California state courts in this case perpetuated an entrenched and longstanding conflict among more than twenty state appellate courts, and interpreted ICWA in a way that is inconsistent with Congress' stated intent and with fundamental principles of equal protection and due process. This Court recognized the deep, longstanding conflict of authority concerning the "existing Indian family doctrine" four years ago, when it granted review in *Adoptive Couple*. That conflict persists today, and still warrants this Court's review.

The questions presented arise most frequently in cases, such as this one, involving the nation's most vulnerable children: children placed into foster care because of abuse or neglect, for whom reunification with a parent is not an option. Under the California courts' interpretation of ICWA, an "Indian" child may (indeed, *must*) be removed from fit, long-term foster parents whom she views as her own—many months or even years down the line—in favor of a more "preferred" party for adoption. That interpretation "unnecessarily place[s] vulnerable Indian children at a unique disadvantage in finding a permanent and loving home." *Adoptive Couple*, 133 S. Ct. at 2564. If Lexi were not an "Indian child," state law would have protected her right to stability and permanence, and her best interests would have dictated her permanent placement. As the

opinions below make clear, Lexi would have been Petitioners' adoptive daughter long ago, but for application of ICWA to this case. This case is thus an ideal vehicle through which to resolve the conflict that persists in the wake of *Adoptive Couple*.

The questions presented implicate a large and growing number of cases involving multiethnic children who fall within ICWA's definition of an "Indian child." As Respondents and commentators have acknowledged, the fact pattern presented here is "re-occurring and incredibly frustrating": State courts are routinely faced with deciding whether ICWA requires them "to remove the child from the home she has been in for anywhere from one to three years." [2]

The current conflict in authority results in starkly different outcomes for similarly situated Indian children and should not be permitted to persist. And it results in dramatically unequal treatment of "Indian" children as compared to their non-Indian peers.

As the Utah Supreme Court has observed, child custody cases involving multiethnic children with Native American ancestry are "complicated by the fact that, since the ICWA was adopted in 1978, courts have struggled to apply it, often reaching inconsistent conclusions about the meaning of various terms." *State ex rel. C.D.*, 200 P.3d 194, 197 (Utah 2008). Yet, this Court has issued only two decisions interpreting the Act in the nearly forty years since it was enacted.

The questions presented are central to the

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[2] Kate Fort, "ICWA Placement Preference Decision Out of California Involving Choctaw Tribe" (Aug. 18, 2014), available at https://turtletalk.wordpress.com/2014/08/18/icwa-placement-preference-decision-out-of-california-involving-choctaw-tribe/ (last visited Oct. 7, 2016).

administration of a federal statute that affects a significant and growing number of children and families. This Court's guidance is necessary to resolve the intolerable uncertainty that persists in this sensitive area of law where certainty is most critical. The petition should be granted.

I. STATE COURTS ARE DEEPLY DIVIDED ON WHETHER ICWA APPLIES WHERE THE CHILD WAS NOT REMOVED FROM AN EXISTING INDIAN FAMILY OR COMMUNITY

In *Adoptive Couple*, this Court held that when the "child has never been in the Indian parent's legal or physical custody," "any 'breakup of the Indian family' has long since occurred," and the relevant provisions of ICWA are "inapplicable." *Adoptive Couple*, 133 S.Ct. at 2562. The Court's interpretation of those provisions obviated the need to address the division of authority regarding the "existing Indian family doctrine" more broadly. But this Court observed that application of ICWA to the case would "raise equal protection concerns." *Adoptive Couple,* 133 S. Ct. at 2565. Nor did the Court have occasion to address the proper scope and interpretation of ICWA's placement preference provisions, because it concluded that no preferred party had come forward at the relevant time. *Id.* at 2564.

The conflict of authority over the application of the so-called "existing Indian family doctrine" that precipitated this Court's review in *Adoptive Couple* persists today. State courts remain deeply divided as to the applicability of ICWA, including § 1915's placement preferences, to cases where the child was not removed from an existing Indian family—-either because, like Baby Girl, the child was never in the custody of an Indian parent or custodian; or because neither parent

had ever been domiciled on Indian lands or maintained any significant ties to a tribe. Some state courts have concluded that Congress did not intend ICWA to apply in such circumstances; others have reached the same conclusion as a matter of constitutional avoidance; and still others have reached the constitutional questions and held that ICWA violates fundamental principles of equal protection and due process as applied. *See, e.g., In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988); *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331, 337 (La. Ct. App. 1995); *In re Morgan*, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997); *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 715 (Cal. Ct. App. 2001); *In re Bridget R*, 41 Cal.App.4th 1483, 1509-10 (1996); *In re Alexandria Y.*, 45 Cal. Rptr. 4th 1483, 686 (1996); *Crystal R. v. Superior Court*, 59 Cal. App. 4th 703 (1997); *Matter of Adoption of Crews*, 118 Wash. 2d 561, 563, 825 P.2d 305 (1992).

By contrast, the California courts here sided with appellate courts in fourteen other states that reject the existing Indian family doctrine. The state supreme courts of Alaska, Idaho, Kansas, Montana, New Jersey, North Dakota, and South Dakota have concluded that ICWA applies even when the child never lived—and never would have lived—as part of an Indian family. *See, e.g., In re Adoption of T.N.F.*, 781 P.2d 973, 978 (Alaska 1989); *In re Baby Boy Doe*, 849 P.2d 925, 931-32 (Idaho 1993); *In re A.J.S.*, 204 P.3d 543, 547 (Kan. 2009); *In re Adoption of Riffle*, 922 P.2d 510, 515 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *In re Adoption of Baade*, 462 N.W.2d 485, 490 (S.D. 1990). Intermediate appellate courts in seven additional states concur. *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 964 (Ariz. Ct. App. 2000); *In re N.B.*, 199

P.3d 16, 21 (Colo. App. 2007); *In re Adoption of S.S.*, 622 N.E.2d 832, 840 (Ill. App. Ct. 1993), rev'd on other grounds, 167 Ill. 2d 250 (Ill. 1995); *In re Elliott*, 554 N.W.2d 32, 35 (Mich. Ct. App. 1996); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 324 (N.Y. App. Div. 2005); *Quinn v. Walters*, 845 P.2d 206, 208 (Or. Ct. App. 1993), rev'd on other grounds, 881 P.2d 795 (Or. 1994); *State ex rel. D.A.C.*, 933 P.2d 993, 998 (Utah Ct. App. 1997).

Courts and commentators are likewise divided on the impact of this Court's holding in *Adoptive Couple* on the existing Indian family doctrine.[3]

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[3] *See, e.g.*, Jones, Adoptive Couple v. Baby Girl: *The Creation of Second-Class Native American Parents Under the Indian Child Welfare Act of 197*8, 32 Law & Ineq. 421, 444 (Summer 2014) ("While the *Adoptive Couple* majority opinion did not adopt outright the 'Existing Indian Family' exception, the rationale of the majority opinion reflects a similar thought process as those state courts who adopted [it]"); Vujnich, *A Brief Overview of the Indian Child Welfare Act, State Court Responses, and Actions Taken in the Past Decade to Improve Implementation Outcomes*, 26 J. Am. Acad. Matrim. Law. 183, 205–06 (2013) (arguing that "the Court [in *Adoptive Couple*] essentially agrees with the 'existing Indian family' doctrine held by some states."); Harvard Law Review, *Indian Child Welfare Act – Termination of Parental Rights* – Adoptive Couple v. Baby Girl, 127 Harv. L. Rev. 368, 375 (Nov. 2013) (arguing that *Adoptive Couple* is more about "the Court's constitutional family law and parental rights jurisprudence" than about the ICWA or Indian children). *But see* Zug, *The Real Impact of* Adoptive Couple v. Baby Girl: *The Existing Indian Family Doctrine Is Not Affirmed, But the Future of the ICWA's Placement Preferences Is Jeopardized*, 42 Cap. U. L. Rev. 327, 327–28, 338–39, 349 (Spring 2014) (noting that "[a] close reading of the *Baby Girl* opinion supports the … position" that "the Court did not affirm the EIF [Existing Indian Family] doctrine," particularly since the EIF-like analysis applies only to §§ 1912(d) and (f) and the existence—or lack thereof—of an Indian family has no bearing on the placement preferences under § 1915, but rather on the preferred placement's legal efforts to adopt regardless of any preexisting custodial

The deep and longstanding division among state courts regarding the existing Indian family doctrine has been called "[o]ne of the most problematic inconsistencies in state court decisions regarding the ICWA's application . . . which, since 1982, has been the center of both judicial and scholarly controversy." Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 Santa Clara L. Rev. 419, 427-28 (1998); *id.* at 428 n.59 (finding it "difficult to keep an accurate tally since new states come into the controversy each year and sometimes a state changes its position").

In response to *Adoptive Couple*, the Bureau of Indian Affairs issued new non-binding "guidance," which—among other things—acknowledges the conflict that persists among state courts, and "agrees with the States that have concluded that there is no existing Indian family exception to application of ICWA." *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Fed. Reg. 10146, 10148 (Feb. 25, 2015). That "guidance" lacks the force of law, and fails to acknowledge that several state courts have adopted the doctrine as matter of constitutional avoidance. Only this Court—not the BIA—can decide the federal constitutional issues raised by the state courts' interpretation of ICWA.

This case presents an ideal vehicle through which to resolve the conflict among state courts. Application of either variant of the existing Indian family doctrine would be dispositive to the outcome of this case. It is undisputed that Lexi's biological mother is not Indian,

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relationship); Trope, *Understanding the Supreme Court's Decision in Adoptive Couple v. Baby Girl*, 61 APR Fed. L. 34, 39 (April 2014) ("Contrary to some reports, the Court did not adopt the Existing Indian Family doctrine (EIF) in the *Baby Girl* decision").

and that her biological father, Jay E., did not maintain any social or cultural ties to the tribe; indeed, he was not even aware of his Indian heritage at the outset of the dependency proceedings. App. 70a. Nor did Jay E. establish legal custody of Lexi under state law. Jay E. was never married to Lexi's mother and did not earn "presumed father" status under California law. App. 77a. Thus, as in *Adoptive Couple*, the child was not removed from the custody of an Indian parent; and her removal from her custodial parent (her biological mother) did not precipitate the "breakup of an Indian family." *Adoptive Couple*, 133 S. Ct. at 2563-64.

II. THE CALIFORNIA STATE COURTS' INTERPRETATION OF ICWA IS WRONG

A. ICWA Must Be Construed To Avoid Grave Constitutional Concerns

Federal statutes must be construed, if possible, to avoid raising a serious constitutional question. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades* Council, 485 U.S. 568, 575 (1983). As several state courts have held, ICWA must be construed as inapplicable to children who are not removed from an existing Indian family, in order to avoid grave equal protection and due process concerns.

A law that imposes differential treatment based on an individual's race or ancestry is unconstitutional unless it is narrowly tailored to serve a compelling state interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). This Court has held that legislation that "singles out Indians for particular and special treatment" may be subject to less exacting review, provided that the legislation "further[s] Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 554-55

(1974). It does not follow, however, that all legislation imposing differential treatment on "Indians" escapes meaningful scrutiny. State custody proceedings involving children who are not domiciled on Indian lands and whose parents have no substantial connection to a tribe are a far cry from the BIA hiring preference at issue in *Mancari*. In any event, there is a serious question whether ICWA as applied to children like Lexi offends equal protection principles, even under rational-basis review.

Moreover, as several state courts have recognized, applying ICWA in a manner that disrupts a child's established familial relationships raises a serious due process question, regardless of whether ICWA is regarded as race- or ancestry-based. *See, e.g.*, *In re Bridget R.*, 41 Cal.App.4th at 1502-1507 (holding that children had attained a fundamental and *constitutionally protected* interest in their relationship with the only family they have ever known); *cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984) (recognizing that the maintenance of "certain intimate human relationships" must be "secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.").

As relevant here, ICWA puts Indian children at a grave disadvantage as compared to their non-Indian counterparts. But for Lexi's status as an "Indian child," state law would have recognized her right to stability and permanence in the home where she had thrived for most of her life. *See, e.g.*, *In re Jasmon O.*, 8 Cal. 4th 398, 419 (1994 en banc) (holding that child has a fundamental right to stability and permanence once reunification fails). And Lexi's placement would have been dictated by *her* best interests, rather than by the

placement preferences.

Although Congress explicitly provided a "good cause" exception to the placement preferences that was intended to be a flexible safety valve, it has been routinely construed in a manner that renders it a virtual nullity. In some states, including California—home to the country's largest Native population—the Act's preferences are effectively mandatory in virtually every case, regardless of the consequences for the child at stake. That is, unfortunately, vividly illustrated by the tragic outcome of this case. The BIA's recent "guidelines" exacerbate this problem, as they purport to instruct state courts *not* to consider an individual child's best interests, or the bond she has formed with current caretakers, in determining whether there is "good cause." *See* 80 Fed. Reg. at 10158.

As applied to children who are removed from Indian communities, ICWA may serve a legitimate purpose. But where, as here, ICWA is applied in a manner that places a child at "a great disadvantage, solely because an ancestor—even a remote one—was an Indian," it violates fundamental equal protection and due process principles. *See, e.g., In re Santos Y.*, 112 Cal. Rptr. 2d at 715 (recognizing that application of ICWA's placement preferences to remove and re-place a minor who has "no association with the Tribe other than genetics" would violate equal protection and due process principles, and noting that "courts have . . . declined to apply the ICWA to situations in which a child is not being removed from an existing Indian family"); *In re Bridget R.*, 41 Cal.App.4th at 1509-10 (application of ICWA that is "triggered by an Indian child's genetic heritage" alone "deprives them of equal protection of the law" and violates due process); *In re Alexandria Y.*, 45 Cal. Rptr. 4th at 686 (noting "serious constitutional flaws

in the ICWA" under principles of due process, equal protection, and the Tenth Amendment); *see also Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (recognizing a strong presumption that custody determinations based on race are unconstitutional).[4]

B. ICWA Does Not Require The Removal Of An Indian Child From A Fit, Long-Term Foster Placement Made In Compliance With The Act, For The Purpose Of Applying The Adoptive Placement Preferences Contained In Section 1915(a).

The Court of Appeal further erred in interpreting the statute to require that Lexi be removed from her fit *de facto* family and transferred to an ICWA-preferred party for adoption.

As this Court recently held in *Adoptive Couple*, a party invoking a preference under § 1915 must do so "at the time" authorities consider placement with a non-preferred party. Here, Ginger and Ken R. were not proposed by Respondents when Lexi was in need of a

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[4] The Court of Appeal's alternative holding—that De Facto Parents "lacked standing" to make this argument (App. 16a)—reflects a fundamental misunderstanding of the constitutional avoidance canon. The canon of constitutional avoidance is "not a method of adjudicating constitutional questions," but rather is "a tool for choosing between competing plausible interpretations of the statutory text." *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (citations omitted). "The canon is thus a means of giving effect to congressional intent …." *Id.* Accordingly, "when a litigant invokes the canon of avoidance, he is not attempting to vindicate the constitutional right of others," but rather "seeks to vindicate his own *statutory* rights." *Clark*, 543 U.S. at 382. Were it otherwise, "every statute [would be] a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Id.*

placement. At that time, DCFS and the Tribe agreed that there was good cause to depart from the placement preferences contained in § 1915(b), and the Tribe approved of Lexi's placement with De Facto Parents.

Section 1915(a) applies principally to cases involving children voluntarily relinquished for adoption. The provision does not authorize, much less require, the *removal* of a child already placed in compliance with 1915(b) for the purpose of applying 1915(a)'s adoptive placement preferences. Rather, the placement preferences apply only when a child is in need of a placement.

The relationship between § 1915(a) and § 1915(b) must be determined by interpreting ICWA as a whole. *Adoptive Couple*, 133 S.Ct. at 2563 ("[S]tatutory construction 'is a holistic endeavor' and that '[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme.'") (quoting *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). Other provisions of ICWA make clear that § 1915(a) is not triggered by a parent's failure to reunify with a child who has been placed in foster care in compliance with 1915(b).

Section 1916(b) of ICWA provides that the placement preferences in § 1915(a) must be followed when a child "is removed" from a foster home in order to be moved to a different foster home or an adoptive home:

> Whenever an Indian child *is removed* from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the

> provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

25 U.S.C. § 1916(b) (emphasis added).

ICWA must be interpreted, if possible, to give effect to § 1916(b). *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks and citation omitted). If § 1915(a) could be invoked at any time to precipitate a removal and re-placement with a preferred party, the specific rule provided by § 1916(b)—which identifies particular circumstances in which the placement preferences may apply again after an initial foster placement—would serve no purpose.

The California state courts' contrary interpretation would allow a tribe to insist on removal of a child from a fit, stable placement, in favor of a more "preferred" party, at any point before an adoption is finalized—even at "the eleventh hour." *Adoptive Couple*, 133 S.Ct. at 2565. Congress could not have intended that result when it enacted ICWA "to protect the best interests of Indian children." 25 U.S.C. § 1902.

To be sure, Congress also enacted ICWA "to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. But interpreting § 1915(a) as inapplicable here does not interfere with that objective. If, as here, ICWA's notice provisions have been followed, the tribe will have at least one opportunity to invoke the placement preferences—at the

relevant time, from the child's perspective. That interpretation harmonizes the tribe's interests with the rights of the individual children at stake.

When Lexi became a dependent of the State of California because of severe neglect, the tribe and DCFS could have proposed a foster care placement with the R.s. Indeed, DCFS and the Tribe did just that when, during the remand proceedings in this case, Respondent Jay E. fathered another child, K.E., who was removed into protective custody at birth. Baby K.E. was placed with the R.s in Utah within days of her birth. App. 69a. But DCFS and the tribe made a different decision in 2011, when they decided that there was good cause to place Lexi in a loving foster home close to Los Angeles, to facilitate doomed "reunification" efforts with a biological father who had never had custody.

The Choctaw Nation was on notice of these proceedings from the outset, and had every opportunity to invoke a preference for the R.s at the time Lexi was in need of a home. As this Court recognized in *Adoptive Couple*, ICWA should not be interpreted as sanctioning "eleventh hour" veto power over the child's best interests. *Adoptive Couple*, 133 S. Ct. at 2565.

C. The State Courts Erred In Interpreting The "Good Cause" Exception To Require Proof By "Clear and Convincing Evidence"

The Court of Appeal also erred in holding that the good-cause exception requires proof by "clear and convincing" evidence. App. 81a. In so doing, it took sides on yet another issue that has divided the state courts. Compare, *e.g.*, *Native Village of Tununak v. State, Dept. of Health & Social Servs.*, 303 P.3d 431, 446-449 (Alaska 2013), *vacated on other grounds*, 334 P.3d 165 (overruling earlier precedent and requiring proof of

good cause by clear and convincing evidence); *People ex rel. South Dakota Dept. of Social Servs.*, 795 N.W.2d 39, 43-44 (holding that "deviations from the ICWA placement preferences require a showing of good cause by clear and convincing evidence"), with *Dept. of Human Servs. v. Three Affiliated Tribes of Fort Berthold Reservation*, 236 Or. App. 535, 552 n.17 (2010), 238 P.3d 40, 50 (holding that preponderance is the correct standard of proof). The California court's interpretation of ICWA is wrong in this respect as well.

ICWA states that in "any adoptive placement of an Indian child under State law, a preference shall be given ... to a member of the child's extended family" only "in the absence of good cause to the contrary." 25 U.S.C. § 1915(a). Section 1915 is silent on the standard of proof for establishing "good cause" to deviate from ICWA's placement preferences. As this Court has explained, such "silence is inconsistent with the view that Congress intended to require a special, heightened standard of proof." *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (interpreting federal civil statute as requiring only a preponderance of the evidence standard).

ICWA contains more than just silence; it contains a number of provisions that explicitly prescribe heightened burdens of varying degrees. *See, e.g.*, 25 U.S.C. § 1912(e) (requiring "clear and convincing evidence" that continued custody by a parent would lead to serious damage before an Indian child can be removed from the home and placed in foster care). "Where Congress includes particular language in one section of a statute but omits it in another," Congress is presumed to have acted "intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (internal quotation marks and citation omitted).

The fact that all of the relevant provisions of ICWA were enacted at the same time strengthens the force of the presumption that the omission from Section 1915 was deliberate. *See Lindh v. Murphy*, 521 U.S. 320, 330-31 (1997); *see also Field v. Mans*, 516 U.S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects."). If Congress wished to impose a clear and convincing standard for the "good cause" exception in Section 1915, it easily could have said so—and surely would have said so, given its meticulous attention to the standard of proof required in other provisions of ICWA, all of which were enacted at the same time. The Court of Appeal's interpretation is also inconsistent with Congress's clear intent to give state courts "flexibility" to depart from the placement preferences in appropriate circumstances. Sen. Rep. No. 95-597, 95th Cong., 1st Sess., p.17 (1977).

III. THE QUESTIONS PRESENTED IN THIS CASE ARE FREQUENTLY RECURRING AND CRITICAL TO A GROWING NUMBER OF CHILDREN AND FAMILIES

The issues presented in this case occur with alarming frequency and have profound, life-altering implications for the families and children involved. In the three years since this Court decided *Adoptive Couple*, dozens of ICWA cases have made headlines as state courts rendered decisions that tragically disrupted established and successful family units.[5] Scores more have been decided without fanfare—or published decisions.

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5 *See, e.g.*, "Foster child adoption halted over tribal ties," (June 19, 2014), available at

In 2014, Indian children were born outside of marriage at a rate of 66 percent, significantly higher than the national average of 40 percent. Child Trends DataBank, available at http://www.childtrends.org/?indicators =births-to-unmarried-women (last visited Oct. 7, 2016); National Vital Statistics Reports, Vol. 64 (December 23, 2015), *Births: Final Data for 2014*, available at http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_12.pdf (last visited Oct. 7, 2016). And more than 40 percent of Indian children are born to mixed-race parents. *See* Barbara Ann Atwood et al., *Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children*, 22 (2010). In September 2014, there were nearly ten thousand children in foster care identified as American Indian or Alaskan Native. Administration for Children and Families, The AFCARS Report (Preliminary FY 2014 Estimates as of July 2015), available at http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport22.pdf (last visited Oct. 7, 2016). And countless other multiethnic children with trace Native ancestry potentially fall within ICWA's purview.

These statistics suggest that there is a pressing need for this Court to resolve the questions at the heart of this case. ICWA disrupts or otherwise affects the placement and adoption of a significant and growing number of multiethnic American children, who have never been part of an Indian family or community, and

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http://www.tulalipnews.com/wp/2014/06/19/foster-child-adoption-halted-over-tribal-ties/; "Four-Month-Old Part Native American Girl Abruptly Taken From Family Under Indian Child Welfare Act: 'We Were Grief-Stricken and in Shock'" (March 25, 2016), available at http://www.people.com/article/four-month-old-part-native-american-baby-taken (last visited Oct. 7, 2016).

who may identify racially or culturally as black, Hispanic, Jewish, Asian—or none of the above. Only this Court can provide much-needed guidance to the state courts that must implement the Act's mandates. The factual paradigm presented by this case appears with startling frequency, and this Court's guidance is desperately needed to resolve the uncertainty among state courts' interpretation and application of the Act.

The fact that ICWA cases are triggered by the race and ethnicity of the participants only underscores the need for this Court's interpretation of federal law. But for her 1/64 Choctaw ancestry, Lexi would still be living in California, and De Facto Parents would have become her adoptive parents long ago.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 7, 2016

APPENDIX

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APPENDIX A

FILED 8/15/14
CERTIFIED FOR PUBLICATION

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

IN RE ALEXANDRIA P., A PERSON COMING UNDER THE JUVENILE COURT LAW.

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

PLAINTIFF AND RESPONDENT,

V.

J.E.,

DEFENDANT AND RESPONDENT;

R.P., ET AL.,

OBJECTORS AND APPELLANTS;

CHOCTAW TRIBE OF OKLAHOMA,

INTERVENER AND RESPONDENT.

B252999
(LOS ANGELES COUNTY SUPER. CT. NO. CK58667)

APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, AMY M. PELLMAN, JUDGE.
REVERSED AND REMANDED WITH DIRECTIONS

Quinn Emanuel Urquhart & Sullivan, Lori Alvino McGill; Latham & Watkins, Pamela S. Palmer, Stephanie N. Grace, Ming M. Zhu, for Objectors and Appellants.

Covington & Burling, Mark W. Mosier, David Schraub, Richard A. Jones, for Professor Joan Hollinger, Northern California Association of Counsel for Children, and AdvoKids as amici curiae on behalf of Objectors and Appellants.

John F. Krattli, County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Kim Nemoy, Senior Deputy County Counsel, for Plaintiff and Respondent.

Law Offices of Joanne Willis Newton and Joanne Willis Newton, under appointment by the Court of Appeal, for Defendant and Respondent.

Christopher Blake, under appointment by the Court of Appeal, for minor Alexandria P.

Melissa L. Middleton for Intervener and Respondent.

This case involves the placement preferences set forth in the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.).[1] At issue is whether the dependency court properly applied the ICWA in finding that the foster parents of an Indian child failed to prove good cause to deviate from the ICWA's adoptive placement

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[1] All statutory references are to 25 U.S.C., unless otherwise indicated.

preferences.

A 17-month-old Indian child was removed from the custody of her mother, who has a lengthy substance abuse problem and has lost custody of at least six other children, and her father, who has an extensive criminal history and has lost custody of one other child. The girl's father is an enrolled member of an Indian tribe, and the girl is considered an Indian child under the ICWA. The tribe consented to the girl's placement with a non-Indian foster family to facilitate efforts to reunify the girl with her father. The girl lived in two foster homes before she was placed with de facto parents at the age of two. She bonded with the family and has thrived for the past two and a half years.

After reunification efforts failed, the father, the tribe, and the Department of Children and Family Services (Department) recommended that the girl be placed in Utah with a non-Indian couple who are extended family of the father. De facto parents argued good cause existed to depart from the ICWA's adoptive placement preferences and it was in the girl's best interests to remain with de facto family. The child's court-appointed counsel argued that good cause did not exist. The court ordered the girl placed with the extended family in Utah after finding that de facto parents had not proven by clear and convincing evidence that it was a certainty the child would suffer emotional harm by the transfer.

De facto parents appeal from the placement order, raising constitutional challenges to the ICWA, which we hold they lack standing to assert. De facto parents also contend that the ICWA's adoptive placement preferences do not apply when the tribe has consented to a child's placement outside of the ICWA's foster care placement preferences. We disagree with their

interpretation of the statutory language. De facto parents further contend the court erroneously applied the clear and convincing standard of proof, rather than preponderance of the evidence, a contention we reject based upon the overwhelming authority on the issue. Finally, de facto parents contend the court erroneously interpreted the good cause exception to the ICWA's adoptive placement preferences as requiring proof of a certainty that the child would suffer emotional harm if placed with the Utah couple, and failed to consider the bond between Alexandria and her foster family, the risk of detriment if that bond was broken, and Alexandria's best interests. We agree with this last contention and reverse the placement order because the court's error was prejudicial.

For clarity, we set forth the parties before turning to the facts and procedural history. The Indian child's name is Alexandria. De facto parents, Rusty and Summer P., are appellants seeking to reverse the placement order. The P.s are supported by amici curiae Joan Hollinger, Northern California Association of Counsel for Children, and Advokids, which filed a joint brief in support of reversal. Alexandria argues we should affirm the order directing her pre-adoptive placement with Ginger and Ken R., her extended family in Utah. Alexandria's father, the Department, and the Choctaw Nation of Oklahoma (tribe) have all filed briefs in support of affirmance as well.

FACTUAL BACKGROUND

Alexandria's Family Background

Alexandria's mother is not Indian, has a history of substance abuse, including methamphetamine abuse, and lost custody of at least six other children before Alexandria was born. Alexandria's father, an enrolled

member of the tribe,[2] has a history of substance abuse and an extensive criminal history. He lost custody of Alexandria's older half-sister, Anna, an enrolled member of the tribe who currently lives in Los Angles with paternal step-grandfather, her adoptive parent. Alexandria is 1/64th Choctaw and meets the statutory definition of an Indian child.[3]

Alexandria's Child Welfare History

Alexandria was detained from her parents and placed with a foster family when she was 17 months old, based on concerns about her parents' ability to care for her in light of their histories of substance abuse, child welfare referrals, and criminal activity. Alexandria reportedly was moved to a different foster family after suffering a black eye and a scrape on the side of her face.[4] The P.s were Alexandria's third foster care placement, initially arranged in December 2011 as a

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[2] Father initially denied any Indian heritage, and the record does not contain any evidence he ever lived on a reservation or had any social, political, or cultural ties to the tribe. Alexandria's paternal grandmother alerted the Department to father's tribal membership and also reported that Alexandria's half-sister is a registered member of the Choctaw tribe.

[3] The ICWA defines an Indian child as including "any unmarried person who is under the age of eighteen and . . . is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. §1903(4).)

[4] Lauren Axline, a rebuttal witness called by the P.s, was the only witness who testified about the transfer from Alexandria's first foster family to her second placement. Department reports indicate that Alexandria's foster placement changed twice between April and December 2011, but do not provide any reason for the changes in placement.

"respite care" placement[5] that evolved into a long-term foster care placement. The P.s were aware that Alexandria was an Indian child and her placement was subject to the ICWA.

By the time Alexandria was placed with the P.s in December 2011, her extended family in Utah, the R.s, were aware of dependency proceeding and had spoken to representatives of the tribe about their interest in adopting Alexandria. The tribe agreed to initial foster placement with the P.s because it was close to father at a time when he was working on reunification. If reunification services were terminated, the tribe recommended placement with the R.s in Utah.

Alexandria's Emotional Health

Alexandria's first months after being placed with the P.s were difficult. She was weepy at times, did not want to be held, and had difficulty differentiating between strangers and caregivers, indiscriminately calling people "mommy" or "daddy." These behaviors were considered signs of a "reactive attachment, the disinhibitive type." The P.s addressed Alexandria's attachment issues with consistency and loving care. They did not ask the social worker for a therapy referral, understanding the issues to be ones they could work out on their own. After a few months, Alexandria's behavioral issues resolved, and she formed a strong primary bond and attachment with the entire P. family, viewing the parents as her own parents and the P. children as her siblings.

On September 17, 2012, Alexandria began play therapy with Ruth Polcino, a therapist with United American Indian Involvement. Sessions took place weekly in the P. home. In a December 31, 2012 letter to

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[5] The P.s agreed to care for Alexandria while her second foster family went on vacation.

the Department's social worker Javier, Polcino noted Alexandria's "happiness, playfulness, sense of safety, and positive rapport with her foster parents and siblings" and concluded that her consistent, loving experience in the foster home appears to have fostered a healthy and secure attachment. Notably, the letter concludes "Based on witnessing Alexandria in the [P.s'] household, and based on her history of repeated separation from caretakers, this therapist highly recommends that Alexandria be allowed to stay in touch with the [P.] family, even after she is placed with her Aunt [Ginger R.] in Utah. This recommendation is not intended to interfere with the current adoption, but rather to allow Alexandria to stay in touch with the [P.] family as extended family who care about her."

An April 3, 2013 report notes the significant advancements made by Alexandria during her placement with the P.s, as well as her ability to form a healthy attachment to new caretakers: "Alexandria's ability to re-attach to a new caretaker is stronger because of the stability that the [P.] family has provided for her. The behaviors that she presented with initially when placed with the [P.] family were much more indicative of a possible attachment disorder (i.e., the indiscriminate attachment she demonstrated with strangers). Since then, these behaviors have been almost entirely extinguished. In their place are more appropriate behaviors that are evidence of a more healthy and secure attachment . . . ."

Father's Reunification Efforts

Alexandria's father successfully complied with reunification services for more than six months, progressing to such an extent that he was granted unmonitored eight-hour visits. By June 2012, the Department reported a substantial probability he would

reunify with Alexandria within the next six months. Shortly thereafter, however, father's emotional state deteriorated dramatically. He separated from his new wife, left California, and did not visit Alexandria after July 28, 2012. By September 2012, he had communicated to the Department that he no longer wished to continue reunification services.

The R. Family

Because Ginger R.'s uncle is Alexandria's paternal step-grandfather, the tribe recognizes the R.s as Alexandria's extended family. The R.s have an ongoing relationship with Alexandria's half-sister, Anna, who visits the R.s on holidays and for a week or two during the summer. Anna and Alexandria have the same paternal grandmother (who has since passed away) and step-grandfather, and the step-grandfather has designated the R.s to care for Anna if he should become unable to care for Anna.

The R.s expressed their interest in adopting Alexandria as early as October 2011. They were initially told that to avoid confusing Alexandria, they should not contact her while father attempted to reunify. If reunification efforts failed, they were the tribe's first choice for adoption. The family has approval for Alexandria to be placed with them under the Interstate Compact on the Placement of Children (ICPC). The R.s first visited Alexandria shortly after the court terminated father's reunification services. Since then, they video chat with Alexandria about twice a week and have had multiple in-person visits in Los Angeles. The P.s refer to the R.s as family from Utah. At one point, when Alexandria asked if she was going to Utah, the P.s responded that they did not know for sure, but it was possible. Russell and Summer P. testified that before and following a recent visit by the R.s, most likely in

June 2013, Alexandria was upset and said she did not want to visit with the R.s and did not like it when they came to visit. Russell P. acknowledged that the change in Alexandria's feelings coincided with the birth of a new baby in the P. family and a transition to a new therapist for Alexandria.

The P. Family

Alexandria has lived with the P.s for over two and a half years, beginning in December 2011. By all accounts, they have provided her with clear and consistent rules, and a loving environment. Alexandria is bonded to the P.s, and has a healthy attachment to them. The Department consistently reminded the P.s that Alexandria is an Indian child subject to the ICWA placement preferences. At some point after father's reunification efforts failed, the P.s decided they wanted to adopt Alexandria. They discussed the issue with the Department social worker, who advised them that the tribe had selected the R.s as the planned adoptive placement.

Transition Planning

As ordered by the court on April 12, 2013, the Department arranged a conference call to discuss a transition plan in anticipation of a possible court order directing placement with the R.s. The call lasted 90 minutes and included the P.s in Los Angeles; the R.s from Utah; Ruth Polcino, Alexandria's therapist at United American Indian Involvement; Polcino's supervisor, Jennifer Lingenfelter; Alexandria's attorney, Kerri Anderson; Department social worker Roberta Javier, as well as two other Department employees. The participants agreed on a transition plan that involved a relatively short transition, with both families meeting for breakfast or at a park, explaining to Alexandria that she is going to with the R.s, who are family who love

Alexandria very much and will take good care of her. The P.s would reassure Alexandria that they love her and will always be a part of her family.

PROCEDURAL BACKGROUND

The Department filed a petition in this matter on April 25, 2011, alleging that Alexandria was at risk of physical harm due to her parents' history of substance abuse. The court appointed counsel for Alexandria and father, ordered reunification services for father, and later found father to be Alexandria's biological father based on DNA test results.[6]

On August 30, 2011, the court found that the ICWA applies and the matter was transferred to a specialized department for the ICWA cases, with Commissioner Sheri Sobel presiding. On November 3, 2011, the Department filed a Last Minute Information attaching the tribe's Notice of Intervention, which the court acknowledged and filed the same day. A later Last Minute Information filed by the Department attached a declaration of a tribal social worker acknowledging that the ICWA requirements for Alexandria's removal from parental custody had been met.[7]

On December 22, 2011, the court conducted adjudication and disposition hearings, sustaining allegations under subdivision (b) of Welfare and Institutions Code section 300 and removing Alexandria

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[6] It is unclear why the court did not find father to be a presumed father, a status father requested early on in the case.

[7] The declaration stated "active efforts have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian family and those efforts have been unsuccessful. There is clear and convincing evidence that continued custody . . . is likely to cause the Indian child serious emotional or physical damage."

from parental custody. The court ordered reunification services for father, but denied services for mother. The court granted father monitored visits at least three times a week after he was released from custody. At a progress hearing on March 22, 2012, the court granted the Department discretion to allow father unmonitored daytime visits with Alexandria. On June 21, 2012, the Department filed a report describing father's substantial compliance with reunification services and the likelihood that father would be able to reunify with Alexandria. The same day, the court ordered play therapy for Alexandria. On August 17, 2012, the court granted the Department's petition to change court order, reinstating the requirement that father's visits be supervised.

On October 4, 2012, the court terminated father's reunification services and scheduled a hearing for termination of parental rights under Welfare and Institutions Code section 366.26. At the Department's request on November 16, 2012, the court issued a request for expedited placement, identifying the R.s in Utah as the planned placement under the ICPC.

On January 17, 2013, while the ICPC request was still in process, Alexandria's guardian ad litem and court-appointed attorney requested a "Do Not Remove" order to prevent Alexandria from being moved out of state without a court order. Commissioner Sobel granted the request on January 18, 2013. Other than two continuances granted in April 2013, all later proceedings were held before Judge Amy Pellman.

Over the next six months, the court granted de facto parent status to the P.s, the ICPC request permitting Alexandria's placement with the R.s in Utah was approved, Alexandria's attorney withdrew her objection

to Alexandria's change in placement,[8] and all parties submitted briefing addressing whether good cause existed to depart from the ICWA's adoptive placement preferences.

On July 29, 2013, the court commenced a hearing that spanned five days over the course of three months to determine whether good cause existed to permit Alexandria to remain with the P.s, rather than placing her with the R.s in Utah in accordance with the ICWA's adoptive placement preferences. The court heard testimony from (1) Roberta Javier, the social worker for the Department who was assigned to the case in December 2011, around the same time Alexandria was placed with the P.s; (2) Jennifer Lingenfelter, clinical director at United American Indian Involvement, where she supervised Alexandria's first therapist, Ruth Polcino, until Polcino went on maternity leave; (3) Russell P., Alexandria's foster father; (4) Summer P., Alexandria's foster mother; (5) Ginger R., Alexandria's extended family member and proposed adoptive mother; (6) Genevieve Marquez, Alexandria's current therapist at United American Indian Involvement; (7) Amanda Robinson, a tribal social worker; (8) Lauren Axline, a foster adoption case manager at the foster agency that placed Alexandria with the P.s; and (9) Billy Stevens, a tribal elder.

The social workers and therapists who testified all agreed that Alexandria has a primary attachment and a strong bond with the P.s. She considers Russell and Summer P. her parents and the P. children her siblings. Regarding Alexandria's ability to attach with a new caregiver if her bond with the P.s is broken, Javier and

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[8] The record contains no information about the reasons for this change in position.

Lingenfelter acknowledged that a change in placement would be potentially traumatic, but that the existence of a primary bond and healthy attachment increases the likelihood that a child will successfully attach to a new caregiver. Marquez believed that with appropriate intervention and support, Alexandria would cope with a transition resiliently, characterizing the possible trauma as a loss, but not the equivalent of the death of a parent. Lingenfelter and Marquez both acknowledged that any transition would pose a risk of trauma, including the possibility of depression and anxiety. Javier did not believe Alexandria would suffer any severe trauma because she sees the R.s as family and would not feel as if she is being sent to live with strangers. Axline, on the other hand, compared the transition to the death or loss of a parent or family, because "she is being taken away from everything that is familiar to her, everything that she's known to be stability." She also believed that Alexandria would have a more difficult time adjusting to a new placement than when she first came to the P.s because of the length of time she has been living with the P.s, and because she is able to understand far more than when she transitioned to the P.s at two years of age.

On December 9, 2013, the court issued a written statement of decision, summarized below. It also granted a seven-day stay, during which the P.s filed a petition for writ of supersedeas, which this court granted, directing that Alexandria would stay with the P.s until this court decided the P.s' appeal of the court's December 9, 2013 order.

THE DEPENDENCY COURT'S DECISION

The court issued its written statement of decision on December 9, 2013, finding the P.s had not demonstrated good cause to depart from the placement preferences and ordering a gradual transition for Alexandria to move

from the P.s' home to the R.s' home. In its decision, the court reviewed the law governing the ICWA's placement preferences and concluded that the R.s were extended family entitled to preference under section 1915(a) and Welfare and Institutions Code section 361.31(h) unless the P.s demonstrated good cause to depart from that preference. The court's analysis focused primarily on "whether the significant bonding between the [P.s] and Alexandria constitute[s] good cause to deviate from the placement preferences." It perceived a conflict in California appellate law on whether a court could consider the bonding that had occurred between Alexandria and the P.s as part of its good cause analysis. (*In re A.A.* (2008) 167 Cal.App.4th 1292 (*A.A.*) [affirming good cause finding based on expert testimony that minors suffered from reactive attachment disorder and changing placement would be detrimental]; compare *In re Desiree F.* (2000) 83 Cal.App.4th 460 (*Desiree F.*) [finding the ICWA notice violation and instructing the trial court to not consider the bonding between the child and current foster family and the trauma that may result from a change in placement in determining whether good cause exists to deviate from the ICWA's placement preferences].)

The court then cited *Adoption of Halloway* (Utah 1986) 732 P.2d 962, 971 (*Halloway*) for the proposition that "courts generally agree that the psychological bond of an Indian child to a foster or adoptive parent should not be used as the sole evidence to support a finding of emotional damage." The court did not discuss *Halloway*, but did describe two other out of state cases. In the first case, the Montana Supreme Court reversed a lower court finding of good cause based on the child's strong psychological bond with foster parents, concluding instead that absent testimony demonstrating

a child was "certain to develop an attachment disorder" the child's attachment does not necessarily outweigh the placement preferences. (*In re C.H.* (Mont. 2000) 997 P.2d 776, 783 (*C.H.*).) In the second case, the county and minor's counsel appealed a decision transferring a dependency case to tribal court pursuant to section 1911. The Nebraska Supreme Court reversed, concluding that the good cause exception applied when the two special needs children had lived with their non-Indian foster family for the past seven years and two experts testified about the negative effects of a change in placement. (*Interest of C.W.* (Neb. 1992) 479 N.W.2d 105, 116-118, overruled by *In re Interest of Zylena R.* (Neb. 2012) 825 N.W.2d 173, to the extent that it permits a state court to consider the best interests of an Indian child in deciding whether there is good cause to deny a motion to transfer a proceeding to tribal court.)

The court distinguished Alexandria's situation from the facts under consideration in *A.A.*, *C.H.*, and *Interest of C.W.*, noting that "[t]he expert testimony in this case did not reach to the level of certainty that Alexandria would suffer extreme detriment from another move." The court's decision included excerpts from two articles about the effect of changes in placement on children's brains,[9] but then stated no evidence had been presented to contradict the expert testimony that a child who has successfully bonded would have an easier time bonding again and any trauma associated with a change in placement would be tempered by the stability of the earlier placement. The court noted the lack of evidence as to why introducing Alexandria to the R.s earlier would have interfered with reunification efforts, and

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[9] The articles were not placed in evidence below, nor were they the subject of expert testimony at trial.

admonished both the tribe and the Department for their respective roles in delaying contact between Alexandria and the R.s.

Ultimately, the court concluded that the P.s "were unable to meet their burden by clear and convincing evidence, that either the child currently had extreme psychological or emotional problems or would definitively have them in the future. Without that evidence, supported by experts, there is insufficient evidence to warrant a deviation from the placement preference. [Citations.] The evidence is uncontroverted that Alexandria is extremely bonded to the [P.s] and that she sees this family as her primary attachment. And while the bonding with the [P.s] is significant to this court, it does not supersede the placement preference under the ICWA. *In re Desiree F.* (2000) 83 Cal.App.4th 460[.]"

DISCUSSION

We first consider whether the adoptive placement preferences set forth in section 1915(a), and Welfare and Institutions Code section 361.31, subdivision (c), apply to Alexandria. The P.s are the only party challenging application of the placement preferences, and we conclude they lack standing to raise constitutional arguments against the ICWA's application because they do not have a constitutionally protected interest in a continued relationship with Alexandria. Even if the P.s had standing to raise their constitutional arguments, we are not persuaded they are correct on the merits. The existing Indian family doctrine applied by Division Two of this court in *In re Santos Y.* (2001) 92 Cal.App.4th 1274 (*Santos Y.*) might permit us to conclude that the ICWA does not apply in this case, but the doctrine has been called into question by other appellate courts in this state, as well as by the courts of other states. The

United States Supreme Court's recent opinion in *Adoptive Couple v. Baby Girl* (2013) ___U.S. ___, ___ [133 S.Ct. 2552, 186 L.Ed.2d 729] (*Adoptive Couple*) also does not compel a different conclusion. Next, we reject the contentions made the P.s and by amici curiae that section 1915(a)'s adoptive placement preferences do not apply because the Alexandria had already been placed in foster care with the de facto parents with the knowledge and consent of the tribe.

Concluding that the ICWA's adoptive placement preferences do apply to this case, we then review the trial court's order finding that the P.s failed to produce clear and convincing evidence of good cause to depart from those placement preferences. We determine that the court applied the correct burden of proof by requiring the P.s to prove by clear and convincing evidence that there was good cause to deviate from section 1915's placement preferences. However, the court erroneously required the P.s to prove a certainty that Alexandria would suffer harm if moved, and failed to consider Alexandria's best interests or her bond with the P.s in determining good cause.

The ICWA Background Information

Because numerous state and federal cases already review the legislative history and purpose of the ICWA and California's statutory enactments pertaining to Indian child welfare law (*see, e.g., Adoptive Couple*, *supra*, 133 S.Ct. at 2557; *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32 (*Holyfield*); *In re W.B., Jr.* (2012) 55 Cal.4th 30, 40 (*W.B.*); *In re Autumn K.* (2013) 221 Cal.App.4th 674 (*Autumn K.*)), we limit our discussion here to the law most relevant to the issues presented in this case. The ICWA was enacted based on increasing concerns about "abusive child welfare practices that resulted in the separation of

large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." (*Holyfield*, *supra*, at p. 32.) The first section of the ICWA states Congress's findings "(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe; [¶] (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and [¶] (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." (§ 1901.)

The ICWA establishes procedural and substantive standards governing the removal of Indian children from their families. (*W.B.*, *supra*, 55 Cal.4th at p. 40.) The ICWA first requires notice to the Indian child's parent, Indian custodian, and tribe or the Bureau of Indian Affairs (Bureau)whenever a court has reason to know that an Indian child is involved in a child custody proceeding. (§§ 1903(1), (4), 1912.) Once notice is given, the parent and the tribe have the right to petition to transfer the case to tribal court. (*Holyfield*, *supra*, 490 U.S. at p. 36.) If the matter is not transferred to tribal court, the ICWA imposes various procedural and substantive requirements on the proceedings. (*W.B.*, *supra*, 55 Cal.4th at p. 49 [reviewing the ICWA's

requirements in detail].) "The most important substantive requirement imposed on state courts is that of § 1915(a), which, absent 'good cause' to the contrary, mandates that adoptive placements be made preferentially with (1) members of the child's extended family, (2) other members of the same tribe, or (3) other Indian families." (*Holyfield*, *supra*, at pp. 36-37.)

One year after the enactment of the ICWA, the Bureau enacted guidelines concerning the implementation of the ICWA. (Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67584 (Nov. 26, 1979) (Guidelines).) According to the Guidelines, "The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and any state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these preferences. Any ambiguities in any of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is most consistent with these preferences." (*Id.* at p. 67586.)

Responding to inconsistent and sporadic application of the ICWA's requirements by California courts, the California Legislature enacted Senate Bill 678 (SB 678) in 2006. SB 678 incorporated the ICWA's requirements into California statutory law, revising several provisions of the Family, Probate, and Welfare and Institutions Codes. (*See Autumn K.*, *supra*, 221 Cal.App.4th at pp. 703-704.) According to the Senate Rules Committee, SB 678 "affirms the state's interest in protecting Indian children and the child's interest in having tribal membership and a connection to the tribal community." (Sen. Rules Com., Analysis of Sen. Bill No. 678 (2005–2006 Reg. Sess.) as amended Aug. 22, 2006, p. 1.) Similar to the ICWA, SB 678 contains a section of express

legislative findings, including findings that "[i]t is in the interest of an Indian child that the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled." (Welf. & Inst. Code, §224, subd. (a)(2).) The statute directs the court to "strive to promote the stability and security of Indian tribes and families, comply with the federal Indian Child Welfare Act, and seek to protect the best interest of the child. Whenever an Indian child is removed from a foster care home or institution, guardianship, or adoptive placement for the purpose of further foster care, guardianship, or adoptive placement, placement of the child shall be in accordance with the Indian Child Welfare Act." (*Id.* at § 224, subd. (b).) In addition, a determination that a minor is "eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act to the proceedings." (*Id.* at §224, subd. (c).)

"In certain respects, California's Indian child custody framework sets forth greater protections for Indian children, their tribes and parents than ICWA. [Citations.]" (*In re Jack C., III* (2011) 192 Cal.App.4th 967, 977.) Both federal and state law expressly provide that if a state or federal law provides a higher level of protection to the rights to the parent or Indian guardian of an Indian child, the higher standard shall prevail. (§ 1921; Welf. & Inst. Code, § 224, subd. (d) [also applying the higher standard of protection to the rights of the

child].)

The ICWA defines foster care placement and adoptive placement (§ 1903(1)(i) and (iv)), and establishes separate placement preferences and standards for each (§1915(a) and (b)). The preferences reflect the legislative goals of keeping Indian children with their families and preserving the connection between the child and his or her tribe when removal is necessary. (§§ 1901, 1902; *see also* Welf. & Inst. Code, § 224.) California's statutes governing placement of Indian children parallel those of the federal law. (Welf. & Inst. Code, §361.31; *In re Anthony T.* (2012) 208 Cal.App.4th 1019, 1029 (*Anthony T.*) [California's statute restates in large part section 1915].) The party seeking a placement outside the statutory preferences bears the burden of demonstrating good cause. (Welf. & Inst. Code, § 361.31, subd. (j); *Fresno County Dept. of Children & Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 644 (*Fresno County*).)

De Facto Parents' Challenge to the ICWA's Constitutionality

The P.s make three separate arguments challenging the constitutionality of the ICWA's application in this case.[10] They first contend that the ICWA violates equal protection because Alexandria's only connection to the tribe is biological. Second, they contend the ICWA unconstitutionally impacts their liberty interest as a "de facto family" by requiring Alexandria's removal from

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[10] The Department contends we should refuse to consider the P.s' constitutional arguments because they forfeited the issue by failing to raise it before the court. The P.s did raise their constitutional arguments before the court. Even if they did not, we retain discretion to consider questions of constitutional import, even where the parties have forfeited their right to raise the issue on appeal. (*In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1323.)

their home. Third, they contend the ICWA is invalid because Congress acted outside of its enumerated powers when it enacted the ICWA. The P.s lack standing to raise any of these issues on appeal. Even if we were to conclude they had standing, we are not persuaded by their arguments.

A. The P.s' Standing to Raise Constitutional Challenge

As de facto parents, the P.s' substantive and appellate rights are more limited than those of a presumed parent. (*See, e.g., Clifford S. v. Superior Court* (1995) 38 Cal.App.4th 747, 752-754 [de facto parents are not entitled to reunification services and therefore lack standing to appeal denial of reunification services].) Because the P.s have not identified a constitutionally protected interest in a continued relationship with Alexandria, and because Alexandria does not join their arguments, we see no basis for expanding their limited rights to include the right to appeal the ICWA's constitutionality.

"Although standing to appeal is construed liberally, and doubts are resolved in its favor, only a person aggrieved by a decision may appeal. [Citations.]" (*In re K.C.* (2011) 52 Cal.4th 231, 236.) De facto parents must have a legal right that has been aggrieved by the order being appealed. (*In re P.L.* (2005) 134 Cal.App.4th 1357, 1359-1362 [de facto parent had no right to continued custody and therefore lacked standing where the child was placed pending finding a prospective adoptive home]; *but see In re Vincent M.* (2008) 161 Cal.App.4th 943, 953 (*Vincent M.*) [foster parents who were also prospective adoptive parents had standing to challenge an order taking the case off the adoption track].)

In order to challenge the constitutionality of the court's application of the ICWA in this case, the P.s must demonstrate they have a constitutionally protected

interest at stake. Parents whose children are subjects of a dependency proceeding have constitutionally protected interests in a continued relationship with their children. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) Children also have a fundamental interest in stability and permanency deserving of constitutional protection. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.) Foster parents, on the other hand, do not enjoy the same constitutional protections. (*Backlund v. Barnhart* (9th Cir. 1985) 778 F.2d 1386, 1389 ["foster parents do not enjoy the same constitutional protections that natural parents do"].)

The P.s claim there is a constitutionally protected interest in the foster family relationship. Relying on *Smith v. Organization of Foster Families for Equality and Reform*(1977) 431 U.S. 816, 843-847 (*Smith*), the P.s argue that they and Alexandria, considered as a unit, are a de facto family[11] with an interest in stability and the right to be free from government intrusion. In *Smith*, a group of foster parents challenged the adequacy of protections against removal of foster children who had been placed with the family a year or more. (*Id.* at p. 839.) The United States Supreme Court declined to decide whether the foster parents had a constitutionally protected liberty interest, concluding instead that even if such an interest existed, the challenged procedures were constitutionally adequate. (*Id.* at p. 847.) Ultimately, the high court held the laws governing the foster family relationship were sufficient to satisfy due process, but it

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[11] The P.s attempt to frame their argument as the family's interest, rather than their interests as foster or de facto parents, ignoring the fact that their arguments about stability and Alexandria's best interests contradict those expressed by Alexandria's guardian ad litem on her behalf. We address this divergence of position later in this opinion.

did not create or recognize an independent constitutional interest in the foster family relationship. (*Id.* at p. 847.) The P.s here contend the ICWA violates both due process and equal protection. Without demonstrating that they are entitled to constitutional protections as foster parents, they cannot raise such a challenge.

The P.s also argue they have standing because Alexandria's constitutional interest in stability and permanency is intertwined with their interest in continued custody. Had Alexandria argued that the ICWA's application in this case impaired her constitutional rights, our analysis might be different. In *Santos Y.*, the court considered a constitutional challenge raised by de facto parents. The court did not address standing, but expressly noted that the de facto parents' position was consistent with minor's position, and that the de facto parents did not possess their own independent constitutional interest. (*Santos Y.*, *supra*, 92 Cal.App.4th at pp. 1315-1376 & fn. 24 ["[a]ppellants may raise the interests of the Minor, but as foster parents do not themselves possess an interest in a familial relationship with the Minor, that has been found to be fundamental for substantive due process analysis"]; *see also In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1490, fn. 2 [minors filed a responsive brief supporting position of the de facto parents challenging a change in placement under the ICWA].) Even in *Smith*, appointed counsel for the children argued that foster parents possessed no liberty interest independent of the interests of the foster children, and the best interests of those children would not be served by additional procedural protections against removal from foster families. (*Smith*, *supra*, 431 U.S. at p. 839.)

In contrast here, Alexandria's counsel and guardian ad litem never contested the ICWA's application to this

case, and agreed with the Department, father, and the tribe that the ICWA required Alexandria to be placed with the R.s for adoption and good cause did not exist to deviate from that placement decision. Thus we conclude that on the facts before us, where minor has separate counsel who has sought an outcome consistent with the ICWA's requirements, de facto parents lack standing to independently appeal the constitutionality of the ICWA's application to the case.

Our decision in *Vincent M.*, *supra*, 161 Cal.App.4th 943, recognizing that de facto parents may have standing to appeal orders that impact their right to a continued relationship with a foster child, does not require a different result. In *Vincent M.*, the minor was placed with the de facto parents when he was only four days old, and the case was immediately put on the adoption track. The biological father appeared for the first time in the action eight months later, filing a petition under Welfare and Institutions Code section 388 seeking reunification services. We held that the de facto parents had a legally cognizable interest in the planned adoption and a right to appeal an order that took the case off the adoption track. (*Id.* at p. 953.) The foster parents in *Vincent M.* were aggrieved by the order they were appealing, but they made no constitutional challenge to the trial court's order on behalf of the minor. Here, the P.s acknowledge Alexandria's placement with them was not an adoptive placement and they were consistently made aware that the ICWA's placement preferences were applicable. They knew at all times the placement was intended to be temporary to facilitate reunification and Alexandria would either reunify with her father or be placed with another family under the ICWA's placement preferences.

B. Constitutional Arguments

Even if we were to conclude the P.s had standing to challenge the ICWA's constitutionality, we find their arguments unpersuasive. The P.s' constitutional arguments emphasize that Alexandria's connection to the tribe is solely biological, and that father did not have physical or legal custody of Alexandria before the dependency case was filed. We reject the P.s' attempt to apply the existing Indian family doctrine to this case, and to expand the limited holding of the United States Supreme Court in *Adoptive Couple*, *supra*, 133 S.Ct. 2552, well beyond its intended scope. We also reject the argument that Congress acted outside of its enumerated powers in enacting the ICWA.

1. The continued viability of the existing Indian family doctrine is questionable, and it is inapplicable to this case

The existing Indian family doctrine is a judicially created exception to the ICWA for factual situations when the minor has never been a member of an Indian home or exposed to Indian culture. It was first applied by the Kansas Supreme Court in *Matter of Adoption of Baby Boy L.* (Kan. 1982) 643 P.2d 168, 175. That court has since repudiated the doctrine, as have courts in many other states. (*In re A.J.S.* (Kan. 2009) 204 P.3d 543, 548-551; *see also Thompson v. Fairfax County Dept. of Family Services* (Va.Ct.App. 2013) 747 S.E.2d 838, 847-848 [citing and joining "the growing chorus of courts that have rejected the Existing Indian Family Exception"].)

In California, there is a split in the appellate districts, and the continued viability of the doctrine is far from settled. Four of California's six appellate districts have rejected the doctrine. Most recently, the First Appellate District declared "[t]here is no question that

the existing Indian family doctrine is not viable in California." (*Autumn K.*, *supra*, 221 Cal.App.4th at p. 716.) The Sixth Appellate District rejected the doctrine in *In re Vincent M.* (2007) 150 Cal.App.4th 1247, 1265, turning away from its earlier application of the doctrine in *Crystal R. v. Superior Court* (1997) 59 Cal.App.4th 703, 718-724 (*Crystal R.*), and explicitly rejecting this district's continued application of the doctrine in *Santos Y.*, *supra*, 92 Cal.App.4th 1274. Also among those rejecting the doctrine are the Third Appellate District (*In re Adoption of Hannah S.* (2006) 142 Cal.App.4th 988, 996) and the Fifth Appellate District (*In re Alicia S.* (1998) 65 Cal.App.4th 79 (*Alicia S.*)).

Of the two California appellate districts that have upheld the doctrine, the Fourth District's decision (*In re Alexandria Y.* (1996) 45 Cal.App.4th 1483) pre-dates the enactment of Welfare and Institutions Code section 224 in 2006, codifying the California Legislature's intent to protect and encourage an Indian child's connection to the tribal community, regardless of the child's prior connection to the tribe. Only our own Second District has published an opinion rejecting the Legislature's attempt to establish the ICWA's application where a minor's sole connection to the tribe is biological. (*Santos Y.*, *supra*, 92 Cal.App.4th 1274 [not applying statute rejecting existing Indian family doctrine because California legislature has no independent constitutional authority with respect to Indian tribes].) Even if *Santos Y.*, *supra*, 92 Cal.App.4th 1274 is correct in recognizing the existing Indian family doctrine, it is distinguishable from the current case because the appellants and the minors in *Santos Y.* both sought the same result, namely continued placement with de facto parents. In contrast here, Alexandria, through her counsel, argues the court was correct in applying the ICWA, and only the P.s—

who lack an independent constitutional right—are arguing the ICWA is unconstitutional as applied. Without going into an in-depth analysis, in light of the numerous decisions within California and from other states rejecting the existing Indian family doctrine, we are inclined to agree with the Sixth District's reasoning that later California statutes indicate a clear intent to prohibit state courts from continuing to apply the existing Indian family doctrine in cases where the ICWA would otherwise apply. (*See In re Vincent M.*, *supra*, 150 Cal.App.4th at p. 1271 (conc. opn. of Bamattre-Manoukian, J.); *see also* Welf. & Inst. Code, §224, subds. (a)(2) and (c).)

2. The United States Supreme Court's analysis in Adoptive Couple does not impact this case

The most recent United States Supreme Court case addressing the ICWA only receives tangential mention in the P.s' opening brief to support their argument that the ICWA cannot constitutionally apply to a case where an Indian father never had custody of the child. The reasoning of *Adoptive Couple*, *supra*, 133 S.Ct. at pp. 2558-2559 has no impact on the case before us, because the facts of our case are entirely distinguishable.

Adoptive Couple involved an Indian father whose child was placed in a private adoption after he had voluntarily relinquished his parental rights. (*Adoptive Couple*, *supra*, 133 S.Ct. at pp. 2558-2559.) The Supreme Court addressed whether the ICWA precluded termination of the father's rights until the court found that "active efforts have been made to provide remedial services and rehabilitative programs" to the father and that his continued custody of the minor "would result in serious emotional or physical harm" to the minor. (*Id.* at pp. 2557-2558, quoting §1912 (d) and (f).) The court held that such findings were not necessary because father

never had physical or legal custody of the minor. The court interpreted statutory language referring to a parent's "continued custody" (§ 1912(f)) and efforts directed at preventing the "breakup of the Indian family" (§1912(d)) as limiting the scope of the statutory requirements so as to exclude a biological father who never had physical or legal custody of his child. (*Id.* at pp. 2560-2564.) The court's opinion is based entirely on interpreting the statutory language, in particular the phrases "continued custody" and "breakup," to arrive at the conclusion that the ICWA's protections did not apply to the father. Nowhere in the court's opinion is there a discussion of the ICWA's constitutionality, or whether it may constitutionally be applied in a dependency proceeding where the Indian father has a period of substantial compliance with reunification services, including unmonitored visitation. Justice Scalia's dissent in *Adoptive Couple* raises the question of whether visitation would be sufficient to warrant the ICWA's protections under section 1912(d) and (f). (*Id.* at pp. 2578-2579 (dis. opn. of Scalia, J.).) However, the court does not address the concern beyond noting that such parents might receive protections under state law. (*Id.* at p. 2563, fn. 8) None of the discussion affects the dependency court's application of the ICWA in the case currently under appeal.

Part IV of the United States Supreme Court's opinion does address the ICWA's placement preferences under section 1915, the provision at issue in our case. The court held that when no party entitled to placement preference under section 1915(a) has come forward to adopt an Indian child, the preferences identified under that section do not apply. (*Id.* at p. 2564.) This holding does not apply to the case at hand because the R.s have been identified as prospective adoptive parents and are

entitled to placement preference because they are considered extended family by the tribe. Nothing in the reasoning of *Adoptive Couple* leads us to conclude otherwise.

3. We need not examine the ICWA's facial constitutionality.

Appellant's final attack on the ICWA's constitutionality rests on Justice Thomas's concurrence in *Adoptive Couple*. (*Id.* at p. 2565-2571 (conc. opn. of Thomas, J).) Justice Thomas characterizes the ICWA as facially unconstitutional because it falls outside Congress's powers to "regulate Commerce . . . with the Indian Tribes." (U.S. Const., art. I, § 8, cl. 3.) This view was not adopted by any other member of the United States Supreme Court, and even if it had any viability, it would not bar the application of California statutes that parallel the ICWA. Thus, the trial court's decision would still be a legitimate application of Welfare and Institutions Code section 360.31.

Asserted Agreement by the Tribe to Alexandria's Adoptive Placement by Consenting to her Foster Care Placement with the P.s

The P.s and amici curiae make a novel contention[12] that by consenting to Alexandria's placement with a family outside of the foster care placement preferences identified in section 1915(b), the tribe waived the application of the adoptive placement preferences stated

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[12] We also decline to consider the argument, contained in footnote 6 of the P.s' opening brief, that the court erred in accepting the tribe's characterization of the R.s as extended family. (*California Ass'n of Sanitation Agencies v. State Water Resources Control Bd.* (2012) 208 Cal.App.4th 1438, 1454 [appellate court may disregard contentions not raised in a properly headed argument and not supported by reasoned argument]; Cal. Rules of Court, rule 8.204(a)(1)(B).)

in section 1915(a).[13] We reject this contention because the P.s forfeited the issue by failing to raise it before the court and also because it does not comport with the plain statutory language.

Because they failed to argue this issue to the court, the P.s are precluded from raising the argument on appeal. A claim of error is forfeited on appeal if it is not raised in the trial court. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) "The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*Ibid.*) There was an extended time frame during which the P.s argued that Alexandria should remain placed with them, but at no point did they argue that the tribe's consent to foster care placement precluded application of section 1915(a). Therefore, this issue is forfeited on appeal.

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[13] The relevant statutory text reads as follows: "(a) Adoptive placements; preferences [¶] In 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; (2) other members of the Indian child's tribe; or (3) other Indian families. [¶] (b) Foster care or preadoptive placements; criteria; preferences [¶] Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with-- [¶] (i) a member of the Indian child's extended family; [¶] (ii) a foster home licensed, approved, or specified by the Indian child's tribe; [¶] (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or [¶] (iv) 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." (§1915(a) and (b).)

Even if we did not consider the issue forfeited, we are not persuaded that Congress or the California Legislature intended to require tribes to make an election at the time of foster care placement that would prevent a change in placement for adoption, especially when the foster family is informed that they are not being considered as an adoptive placement because of the ICWA's requirements. Section 1903(1) provides separate definitions for "foster care placement" and "adoptive placement."[14] The ICWA's placement preferences are distinct for each type of placement, and different considerations apply for foster care and adoptive placements. (*See* § 1915(a) [adoptive placement preferences]; 1915(b) [foster care placement preferences].) For example, foster care placements must be within reasonable proximity to the child's home and must take a child's special needs into account. (§ 1915(b); *Anthony T.*, *supra*, 208 Cal.App.4th at pp. 1029-1032 [foster care placement was not in "reasonable proximity" to minor's home].) The same is not true for adoptive placements. (§ 1915(a).) The P.s and amici curiae argue that once an Indian child is placed in foster care under section 1915(b), the only way for a court to consider adoptive placement preferences under section 1915(a) is if the child is "removed" from the foster placement under section 1916(b).

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[14] Section 1903(1)(i) defines "foster care placement" as "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated[.]" Section 1903(1)(iv) defines adoptive placement as "the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption."

This argument is unsupported by case law and in fact, runs counter to the many published cases where a tribe or Indian parent initially consents to foster care placement that does not comply with the ICWA's placement preferences, and later asserts adoptive placement preferences, usually after reunification efforts have failed. (*See, e.g., Santos Y.*, *supra*, 92 Cal.App.4th 1274 [tribe supported placement with foster parents for two years, until it found a suitable individual qualified as a preferred adoptive placement]; *Native Village of Tununak v. State, Dept. of Health & Social Services, Office of Children's Services* (Alaska 2013) 303 P.3d 431, 434 (*Tununak*) [parties stipulated to a foster placement that departed from the ICWA's placement preferences while a search for preferred placements continued].)

The good cause exception permits a court to depart from adoptive placement preferences. (*See, e.g., Alicia S.*, *supra*, 65 Cal.App.4th at pp. 91-92 [removal from a foster home is not a foregone conclusion if the ICWA applies, because "good cause" exception may permit a different result].) However, we decline to conclude that mere consent to a foster care placement falling outside the preferences listed in section 1915(b) in order to facilitate reunification efforts precludes a court from ordering a later change in placement to comply with section 1915(a)'s adoptive placement preferences.

The Dependency Court's Decision on the Applicability of the Good Cause Exception to the ICWA's Placement Preferences

The trial court correctly required the P.s to demonstrate by clear and convincing evidence that there was good cause to depart from the ICWA's placement preferences. However, the court's application of the good cause exception to the facts before it was legally

erroneous. Because the error was prejudicial to the P.s, we reverse and remand the matter for the court to conduct further proceedings necessary to apply the good cause exception in a manner consistent with this opinion.

A. The Clear and Convincing Standard of Proof Applies to Good Cause Determinations Under Section 1915 of the United States Code.

The P.s and amici curiae contend that the trial court applied an erroneous standard of proof when it concluded they failed to show good cause by clear and convincing evidence. According to the P.s, good cause need only be shown by a preponderance of the evidence because both the state and federal statutes are silent on the applicable standard of proof. (Evid. Code, § 115 "[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"].) The Department and Alexandria both contend that the court correctly required the P.s to show clear and convincing evidence of good cause. Alexandria also contends the P.s forfeited the right to raise the issue on appeal by failing to object to the court's use of the clear and convincing standard of proof. Father and the tribe join in these arguments.

We exercise our discretion to proceed to the merits of the P.s' argument. In a case where the placement of a young child is at issue, allocation of the burden of proof in the trial court's assessment of good cause is an issue of vital importance and sufficient magnitude to warrant relaxation of the rule of forfeiture. We conclude that in spite of the absence of express statutory language, the party asserting the good cause exception to the ICWA's placement preferences must demonstrate good cause by clear and convincing evidence.

We review de novo the question of what standard of proof applies in light of a silent or ambiguous statute.

(*In re Michael G.* (1998) 63 Cal.App.4th 700, 709-710 (*Michael G.*).) "Our primary aim in construing any law is to determine the legislative intent. [Citation.] In doing so we look first to the words of the statute, giving them their usual and ordinary meaning. [Citations.]" (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 501.) The function of a standard of proof is to instruct the finder of fact about the degree of confidence necessary for a particular type of adjudication, balancing the weight of private and public interests and reflecting a societal judgment of how the risk of error should be distributed between the parties. (*Santosky v. Kramer* (1982) 455 U.S. 745, 754-755; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 251.) Here, a lower standard of proof would likely result in more frequent exceptions to the ICWA's placement preferences, undermining "[t]he most important substantive requirement imposed on state courts" by the ICWA. (*Holyfield*, *supra*, 490 U.S. at pp. 36-37.) The Guidelines state that custody proceedings involving Indian children "shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to [the ICWA placement] preferences," and that any ambiguities in the ICWA statutes "shall be resolved in favor of a result that is most consistent with these preferences." (Guidelines, *supra*, 44 Fed. Reg. at p. 67586.) Although the Guidelines are not binding, they help inform our decision of whether the ICWA mandates a "clear and convincing evidence" standard in adoptive preferences.

Neither § 1915 nor Welfare and Institutions Code section 361.31 specify a standard of proof for the good cause exception to the placement preferences identified in the statute. This is in contrast to other provisions of the two statutory schemes, where either Congress or the

California Legislature has specified a standard of proof. (*See, e.g.*, § 1912(e) [requiring clear and convincing evidence that a parent's continued custody of a child is likely to result in harm to the child before placing the child in foster care]; Welf. & Inst. Code, § 361.7(c) [same].) The principles of statutory construction recognize that when the legislature employs a term in one place and omits it in another, the term usually should not be implied where it is absent. (*Michael G.*, *supra*, 63 Cal.App.4th at p. 710.) The same principle applies in federal law. (*Grogan v. Garner* (1991) 498 U.S. 279, 286 [legislative "silence is inconsistent with the view that Congress intended to require a special, heightened standard of proof"].) However, courts have also interpreted statutes that do not specify a standard of proof as requiring clear and convincing evidence, rather than the lower standard of preponderance of the evidence. (*See, e.g., In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1827-1829 [despite statute's silence, the Department must show clear and convincing evidence of detriment before court can deny non-custodial parent's request for placement].)

The ICWA's policy goal of promoting the stability and security of Indian tribes and families persuades us to join the growing number of state courts, including the Supreme Courts of Alaska and South Dakota, that apply the clear and convincing standard of proof to good cause determinations under section 1915. (*See, e.g., Tununak*, *supra*, 303 P.3d 431 [overruling earlier precedent and requiring clear and convincing evidence for good cause determinations]; *People ex rel. South Dakota Dept. of Social Services* (S.D. 2011) 795 N.W.2d 39, 43-44 ["deviations from the ICWA placement preferences require a showing of good cause by clear and convincing evidence"]; *In re Adoption of Baby Girl B.* (Okla.Ct.App.

2003) 67 P.3d 359, 373–74 [clear and convincing standard of proof applies to section 1915(b) determinations]; *Matter of Custody of S.E.G.* (Minn.Ct.App. 1993) 507 N.W.2d 872, 878), revd. on other grounds, (Minn. 1994) 521 N.W.2d 357 (S.E.G.) ["it is unreasonable to assume that Congress, by its silence, intended to apply the preponderance of the evidence standard when determining whether 'good cause' exists to deviate from the adoption placement preferences"].) In contrast, the P.s do not cite to any cases applying the preponderance of the evidence standard of proof to good cause exceptions to the placement preferences, and we are aware of only one published appellate court decision rejecting the clear and convincing standard of proof. (*Department of Human Services v. Three Affiliated Tribes of Ford Berthold Reservation* (Or.Ct.App. 2010) 238 P.3d 40, 50, fn. 17 [rejecting minor's contention that good cause determination must be based on clear and convincing evidence].)

Just last year, the Alaska Supreme Court examined this precise issue, and we are persuaded by its well-reasoned decision that despite the lack of explicit statutory language, a court must find clear and convincing evidence of good cause before it may deviate from the ICWA's placement preferences. *In Tununak*, *supra*, 303 P.3d at pp. 433-440, a four-month-old Indian girl was removed from her parents, who lived in Anchorage. The girl's maternal grandmother lived in a remote Alaskan town, and although she was available for placement, all parties agreed that immediate placement would hinder any efforts at reunification. Instead, the girl was placed with a non-Indian foster family in Anchorage to facilitate reunification efforts.

The tribe consented to the foster care placement. After parents failed to reunify, the lower court found

good cause by a preponderance of the evidence to deviate from a preferred placement, allowing the minor to remain with the foster family rather than placing her with maternal grandmother for adoption. (*Tununak*, *supra*, 303 P.3d at pp. 433-440.) The Alaska Supreme Court in *Tununak* conducted an in-depth examination of legislative history and cases from other jurisdictions, and also considered its own earlier decisions identifying preponderance of the evidence as the correct standard of proof for finding good cause, and reached the conclusion that its earlier decisions were erroneous and the correct standard of proof for the good cause exception was clear and convincing evidence. (*Id.* at pp. 446-449.) In light of the ICWA's policy "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . " the *Tununak* court declined to infer the appropriate standard of proof without a closer examination of Congress's intent. (§ 1902; *Tununak*, *supra*, at p. 447.) In enacting the ICWA, Congress intended to "eradicate the unwarranted removal of Indian children from their communities. Congress expressly noted the role of state courts in perpetuating this problem and sought to rein in state court discretion through the passage of mandatory federal standards, amongst which is § 1915(a)." (*Tununak*, *supra*, at pp. 447-448, fns. omitted.)

The Alaska Supreme Court looked to the United States Supreme Court's reasoning in *Holyfield*, *supra*, 490 U.S. 30, as supporting the inference that a higher evidentiary standard was warranted based on close scrutiny of Congressional intent. (*Id.* at p. 448.) In *Holyfield*, the United States Supreme Court pointed to the legislative history and purpose of the ICWA to conclude that Congress did not intend to leave definitions of critical terms such as "domicile" to state

courts because Congress perceived those courts as "partly responsible for the problem it intended to correct." (*Holyfield*, *supra*, 490 U.S. at 45.) Just as *Holyfield* considered it "beyond dispute that Congress intended a uniform federal law of domicile for the ICWA" (*id.* at p. 47), courts have almost universally concluded that Congress intended a nationally consistent standard of proof for the good cause exception. (*Tununak*, *supra*, at p. 448). As the *Tununak* court explained, "*Holyfield* instructs us that like the definition of 'domicile,' the 'good cause' standard must be interpreted according to Congress's intent. While we are mindful that Congress intended to leave the good cause determination to the states, we recognize that this discretion is not without bounds. As our foregoing analysis of the purposes and policies that drove the enactment of ICWA indicates, the clear and convincing evidence standard is most consistent with Congress's intent to maintain Indian families and tribes intact wherever possible by eradicating the unwarranted removal of Indian children from their communities." (*Ibid.*)

The *Tununak* court also pointed out that "[a] clear and convincing standard of proof for § 1915(a) good cause determinations is also more consistent with other provisions in ICWA demanding a heightened standard of proof." (*Tununak*, *supra*, 303 P.3d at p. 449, referring to §§ 1921 ["[i]n any case where State or Federal law applicable to a child custody proceeding . . . provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard"]; 1912(e) [requiring clear and convincing evidence that the continued custody of the child by the parent or Indian

custodian is likely to result in serious emotional or physical damage to the child]; and 1912(f) [requiring evidence beyond a reasonable doubt before parental rights are terminated].)

Based on principles of statutory interpretation and case law, both from California as well as other state courts, we are persuaded that even in the face of legislative silence on the question, both Congress and the California Legislature intended for courts to apply the higher clear and convincing evidence standard of proof before making a good cause exception to the placement preferences.

B. The Dependency Court's Interpretation of the Good Cause Exception was Legally Erroneous

When a party appeals a good cause determination, the appellate court usually applies a substantial evidence standard of review. (*Fresno County*, *supra*, 122 Cal.App.4th at pp. 644-646.) "Under this standard, we do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence, or reweigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if there is other evidence supporting a contrary finding. [Citations.] The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the court's findings. [Citation.]" (*In re G.L.* (2009) 177 Cal.App.4th 683, 697-698.) However, because the P.'s challenge the lower court's interpretation of the term "good cause," they raise issues of statutory interpretation, which we review de novo. (*Anthony T.*, *supra*, 208 Cal.App.4th at p. 1028.)

The court committed three legal errors in interpreting the meaning of the term "good cause" as an exception to the placement preferences identified in

section 1915. First, it erred by requiring the P.s to show that Alexandria either "currently had extreme psychological or emotional problems or would definitively have them in the future" and reasoning that the "expert testimony in this case did not reach to the level of certainty that Alexandria would suffer extreme detriment from another move." Second, while not entirely clear from the court's statement of decision, the court may have erroneously declined to consider the bond between Alexandria and the P.s, and the detriment Alexandria might suffer from an order requiring a change in placement. Third, the court failed to consider Alexandria's best interests in deciding whether the good cause exception applied.

"[T]he legislative history of the [ICWA] 'states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. [Citation.]' [Citation.]" (*In re Robert T.* (1988) 200 Cal.App.3d 657, 663.) In determining whether good cause exists to depart from the ICWA's placement preferences, the court may take a variety of considerations into account. The Guidelines state "a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations: [¶] (i) The request of the biological parents or the child when the child is of sufficient age. [¶] (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness. [¶] (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria." (Guidelines, *supra*, 44 Fed. Reg. at p. 67594.) These considerations are not exclusive, and courts are free to consider other factors.

(*Fresno County*, *supra*, 122 Cal.App.4th at pp. 642-643 [the guidelines "should be given important but not controlling significance"].)

1. Certainty requirement

In determining what evidence is required to establish good cause, the court ruled that a moving party could only show good cause by expert testimony and evidence that the child "currently had extreme psychological and emotional problems, or would definitively have them in the future." This extreme standard is not based in California law, but instead is found in an opinion by the Montana Supreme Court, which reversed a lower court's finding of good cause to deviate from the ICWA's placement preferences. (*C.H.*, *supra*, 997 P.2d 776.) In *C.H.*, the lower court determined the child had likely suffered physical abuse and placed her with non-Indian foster parents at the age of three months. When the child was fifteen months old, the lower court found good cause to deviate from the ICWA's placement preferences based in part on a finding that "as a result of [minor's] emotional bond with the [foster family] and the abuse she experienced early in life, she is at risk for developing an attachment disorder should she be removed" from her foster home. (*Id.* at p. 781.) The Montana Supreme Court reversed, pointing to the lack of any testimony that the minor "was *certain* to develop an attachment disorder if removed from" the foster family's home. (*Id.* at 783, italics added.) The court went on to explain the certainty requirement by stating "[t]he risk that a child might develop such problems in the future is simply too nebulous and speculative a standard on which to determine that good cause exists to avoid the ICWA placement preferences. Indeed, it could be said that any child who has been abused, removed from its parents'

care at a young age and placed in foster care might be at risk for developing emotional or psychological disorders. To allow such an indefinite standard to meet the good cause test for avoiding the preferences would essentially ignore the preferences set forth in §1915(a) of the ICWA." (*Id.* at p. 783.)

The decision in *C.H.*, *supra*, 997 P.2d 776 is in a distinct minority among cases interpreting the good cause requirement, as most cases do not require the party seeking a good cause exception to the placement preferences to demonstrate with certainty that a child will suffer harm. (*See, e.g., Fresno County*, *supra*, 122 Cal.App.4th at p. 640 [affirming good cause finding based on "high risk" that minor would develop an attachment order]; *A.A.*, *supra*, 167 Cal.App.4th at pp. 1329-1330 [good cause to remain in non-preferred placement because removal posed a serious risk of harm].) An Arizona appellate opinion reflects our concern about holding a moving party to such a high standard: "We disagree with *In re C.H.* interpreting ICWA to require an expert to testify that trauma is certain to result from a transfer of custody or if a certain placement is or is not made cannot be in a child's best interest. *Prediction of psychological or emotional harm is not an exact science*. All we can expect is that, given the expert's experience, there is a reasonable prospect for significant emotional harm to the child by removal from a home." (*Navajo Nation v. Arizona Dept. of Economic Sec.* (Ariz.Ct.App. 2012) 284 P.3d 29, 38 (*Navajo Nation*), italics added.)

Based on the cases discussed above, we conclude that the court incorrectly required the P.s to show a certainty that Alexandria would suffer harm if the court followed the placement preferences listed in § 1915(b). Instead, we hold that a court may find good cause when

a party shows by clear and convincing evidence that there is a significant risk that a child will be suffer serious harm as a result of a change in placement.[15] (*See, e.g., Fresno County*, *supra*, 122 Cal.App.4th at p. 640.)

2. Bonding with foster family

The court erroneously relied on *Desiree F.*, *supra*, 83 Cal.App.4th at p. 476 and *Halloway*, *supra*, 732 P.2d 962 to conclude that "while the bonding with the [P.s] is significant to this court, it does not supersede the placement preference under the ICWA." It is impossible to determine from this language whether the court considered the bond between Alexandria and the P.s as a factor, or felt compelled by *Desiree F.* to ignore the bond in determining good cause. To the extent the court relied on *Desiree F.* to exclude the bond as a factor in the good cause determination, it did so erroneously, because the facts of our case do not warrant such an exclusion. In *Desiree F.*, the social services agency was responsible for the delay in notifying the tribe of the proceedings, and the appellate court clarified that on remand, the trial court could not consider factors flowing from the agency's "flagrant violation" of the ICWA, including any bond the minor developed with the current foster family. (*Desiree F.*, *supra*, at p. 476.) In the present case, the Department acted promptly to notify

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[15] In its decision, the court emphasizes the lack of expert testimony to support application of the good cause exception. Although expert testimony is needed to establish that a child has "extraordinary physical or emotional needs" as described in the Guidelines (Guidelines, *supra*, 44 Fed. Reg. at p. 67594), courts have discretion to base their good cause determinations on factors not listed in the Guidelines. (*Fresno County*, *supra*, 122 Cal.App.4th at pp. 642-643.) Accordingly, evidence supporting a good cause finding need not be limited to expert testimony. (*Ibid.*)

the tribe, and the social worker was in communication with the tribe even before Alexandria was placed with the P.s. Thus, no ICWA violation precludes the court from considering the bond that Alexandria has with her foster family.

The social workers and therapists who testified at trial all agreed that Alexandria had a strong bond and a healthy attachment to the P.s. Testimony varied on nature of the trauma Alexandria would suffer upon the breaking of her bond with the P.s as her primary caregivers. Genevieve Marquez and Jennifer Lingenfelter, the therapist and supervisor at United American Indian Involvement, acknowledged that being removed from the P.s would cause some trauma to Alexandria, but that she was resilient and would overcome any trauma, particularly if she was able to maintain continued contact with the P.s and received therapeutic support after placement with the R.s. The Department social worker, Roberta Javier, acknowledged that the transition would be difficult for Alexandria, but that because she has a healthy attachment currently, and because she knows the R.s as family, she would be able to renegotiate a new bond that would be just as healthy. Lauren Axline, the social worker for the foster family agency, had the strongest views of the negative impact on Alexandria. It was Axline's belief that Alexandria would experience removal as the death of a parent or family "because she is being taken away from everything that is familiar to her, everything that she's known to be stability." Axline also felt that continued contact and therapeutic support would not lessen the trauma suffered by Alexandria.

In fact the bond between Alexandria and her caretakers and the trauma that Alexandria may suffer if that bond is broken are essential components of what

the court should consider when determining whether good cause exists to depart from the ICWA's placement preferences. In addition, *Halloway* does not support excluding the bond from a good cause consideration under section 1915, as it involved a different section of the ICWA concerning tribal court jurisdiction, and good cause for a court to decline to transfer a dependency case to tribal court. (*Halloway*, *supra*, 732 P.2d at pp. 971-972.)

3. Best interests

The court also committed legal error by failing to consider Alexandria's best interests as part of its good cause determination. The court's written statement of decision does not reveal whether the court considered Alexandria's best interests as one of the key factors in determining whether there is good cause to depart from the ICWA's placement preferences. "The ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource. (*In re Crystal K.* (1990) 226 Cal.App.3d 655, 661.)" (*Desiree F.*, *supra*, 83 Cal.App.4th at p. 469.) But the presumption that following the placement preferences is in a child's best interest is a starting point, not the end of the inquiry into a child's best interests. As an Arizona appellate court recently explained, courts "should start with the presumption that ICWA preferences are in the child's best interest and then balance that presumption against other relevant factors to determine whether placement outside ICWA preferences is in the child's best interest." (*Navajo Nation*, *supra*, 284 P.3d at p. 35.)

"'Good cause' often includes considerations affecting the best interests of the child, such as whether the child has had any significant contact with the tribe . . . or the

extent of the child's bonding with a prospective adoptive family. [Citations.]." (*Crystal R.*, *supra*, 59 Cal.App.4th 703, 720, fn. omitted.) Although we are unaware of any published California case holding that a court must consider a child's best interests when determining good cause, such an approach is consistent with the law in many other states and with California's emphasis on best interests in dependency proceedings. (*See, e.g., In re Lauren R.* (2007) 148 Cal.App.4th 841, 855 ["the fundamental duty of the court is to assure the best interests of the child, whose bond with a foster parent may require that placement with a relative be rejected"]; *Tununak*, *supra*, 303 P.3d at pp. 451-452 [good cause depends on many factors, including the child's best interests]; *In Interest of A.E.*(Iowa 1997) 572 N.W.2d 579, 585 [good cause depends on a fact determinative analysis consisting of many factors, including the best interests of the child]; *In re Interest of Bird Head* (Neb. 1983) 331 N.W.2d 785, 791 ["(ICWA) does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus."]; *but see S.E.G.*, *supra*, 521 N.W.2d at pp. 362-363 [holding that the good cause exception does not include the best interests of the child].) Based on the foregoing, we conclude the court erred in failing to consider whether, in light of the presumption that adherence to the placement preferences would usually be in a minor's best interests, Alexandria's best interests supported a finding of good cause.

C. The Dependency Court's Erroneous Interpretation of the Good Cause Exception was Prejudicial

Based on the evidence presented to the court at the good cause hearing, we conclude that the court's erroneous application of the good cause exception was prejudicial. (*See In re Abram L.* (2013) 219 Cal.App.4th

452, 463 [finding prejudicial error based on reasonable probability that a result more favorable to the appealing party would have been reached in the absence of error].) In this case, it is reasonably probable that the court's decision would have been different had it applied the correct good cause standard, considering risk of harm rather than requiring the P.s to show a certainty of harm, and considering Alexandria's best interests, including the strength and longevity of her bond to the P.s and the trauma she may suffer if that bond is broken.

A full year has passed since the court began its good cause hearing in July 2013, and circumstances may have changed in the interim. For example, Alexandria may have had additional opportunities to bond more strongly with the R.s, reducing the risk of detriment or trauma. Alternatively, her bond with the P.s may have become even more primary and strong. Because we reverse and remand, we emphasize that in determining whether good cause exists to depart from the placement preferences identified in section 1915(a), the court may consider facts and circumstances that have arisen since the filing of this appeal. (*See, e.g., In re B.C.* (2011) 192 Cal.App.4th 129, 150-151 [reversing and remanding with clarification that in determining child's best interests, the court may consider events arising since the filing of the appeal].)

We recognize that a final decision regarding Alexandria's adoptive placement will be further delayed as a result of our determination of the merits of this appeal. That delay is warranted by the need to insure that the correct legal standard is utilized in deciding whether good cause has been shown that it is in the best interest of Alexandria to depart from the ICWA's placement preferences.

DISPOSITION

The order transferring custody of the minor to the R.s is reversed. The cause is remanded to the dependency court with directions to determine if good cause exists to deviate from the ICWA's adoptive placement preferences in accordance with this opinion.

KRIEGLER, J.

We concur:

TURNER, P.J.
MOSK, J.

APPENDIX B

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

R.P. et al.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

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

Real Parties in Interest.

B268111

(LOS ANGELES COUNTY SUPER. CT. NO. CK58667)

ORIGINAL PROCEEDINGS; petition for writ of mandate. Anthony Trendacosta, Judge. Petition granted.

Roberto Flores; Quinn Emanuel Urquhart & Sullivan, Lori Alvino McGill, for Petitioner.

No appearance by Respondent.

Mary C. Wickham, Interim County Counsel, Kim Nemoy, Principle Deputy County Counsel, for Real Party in Interest Los Angeles County Department of Children and Family Services.

Children's Law Center of Los Angeles-CLC 1 and Jennifer M. McCartney for Real Party in Interest Minor Alexandria P.

On November 12, 2015, this court filed its notice of intent to treat de facto parents' petition for writ of supersedeas as a petition for writ of mandate in the first instance, commanding the dependency court to vacate its placement order dated November 3, 2015, and remanding the cause with direction to apply the burden of proof articulated in *In re Alexandria P.* (2014) 228 Cal.App.4th 1322, 1354 (*Alexandria P.*). This court has received and considered letter briefs from the parties. We now issue the writ in the first instance.

When the issue of placement was first addressed by the dependency court in its decision filed December 9,2013, it concluded, "In this case, the [de facto parents] were unable to meet their burden by clear and convincing evidence, that either the child currently had extreme psychological or emotional problems or would definitely have them in the future." On appeal, this court held that the dependency court erred only in its characterization of the burden on the de facto parents, and that the correct burden was proof "by clear and convincing evidence that there is a significant risk that a

child will suffer serious harm as a result of a change in placement." (*Alexandria P.*, *supra*, 228 Cal.App.4th at p. 1354.) We remanded the matter to the dependency court with directions to determine if good cause existed to deviate from the Indian Child Welfare Act's adoptive placement preferences. (*Alexandria P.*, *supra*, at p. 1357; 25 U.S.C. § 1915.)

As contemplated by our opinion, upon remand the dependency court considered additional evidence and arguments before rendering its decision. In its written decision, the court described the burden on the de facto parents in language that is identical, word-for-word, to the language we disapproved as an incorrect statement of law in the prior appeal.

The parties have presented differing views in their letter briefs on whether the dependency court applied the standard mandated by Alexandria P. Because of the lack of clarity on this issue and the emergent circumstances described in our November 12, 2015 notice, we conclude a peremptory writ should issue in the first instance on the basis that this is the "exceptional case" in which "'there is an unusual urgency requiring acceleration of the normal process.'" (*Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1223, disapproved of on another ground in *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 724, fn. 4, quoting *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.)

We reach this determination based on the following factors. The written order of the dependency court, whether intentionally or through inadvertence, repeats the burden of proof rejected by this court in *Alexandria P.* Taking into consideration the nature of the error, the already lengthy dependency in this case, and the need for a prompt and permanent resolution of the issue of

placement, we direct the court to vacate its November 3,2015 order, and enter a new placement order based on application of the burden of proof set forth in *Alexandria P.*, *supra*, 228 Cal.App.4th at page 1354.

The dependency court is directed to resolve the issue of placement in an expeditious fashion. The child in this case is entitled to a prompt resolution of the issue of placement. Absent extraordinary circumstances, the dependency court is directed to resolve the issue of placement within 30 days of issuance of the remittitur. Due to the change in dependency bench officers presiding over this case, the Presiding Judge of the Juvenile Court of Los Angeles County is directed to ensure that a judicial officer is promptly assigned to resolve the placement issue within the time frame set forth in this opinion. Absent a determination of good cause in the discretion of the dependency court, the court is not obligated to consider additional evidence on the issue of placement. (*Cf. People v. Collins* (2010) 49 Cal.4th 175, 256-257 (judge who did not preside over penalty phase of capital case may review the trial record and rule on automatic motion for modification of a verdict of death].)

Issuance of the writ of mandate in the first instance is not intended to suggest how the dependency court should resolve the issue of placement at a new hearing. The stay previously imposed in this case is vacated. The issue of whether the pending appeal is moot will be addressed by separate order of this court.

DISPOSITION

Let a peremptory writ of mandate issue, directing respondent court to vacate its placement order dated November 3,2015. In the absence of extraordinary circumstances, respondent court is to issue a new placement order within 30 days of issuance of the

remittitur applying the test set forth in *In re Alexandria P.* (2014) 228 Cal.App.4th 1322, 1354. The Presiding Judge of the Juvenile Court of Los Angeles County is directed to ensure that this case is promptly assigned to a judicial officer for resolution within the time frame set forth herein.

KRIEGLER, J.

We concur:

TURNER, P.J.

MOSK, J.

APPENDIX C

FILED 7/8/16
CERTIFIED FOR PUBLICATION

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

IN RE ALEXANDRIA P., A PERSON COMING UNDER THE JUVENILE COURT LAW.

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

PLAINTIFF AND RESPONDENT,

V.

J.E.,

DEFENDANT AND RESPONDENT;

R.P., ET AL.,

OBJECTORS AND APPELLANTS;

CHOCTAW TRIBE OF OKLAHOMA,

INTERVENER AND RESPONDENT.

B270775
(LOS ANGELES COUNTY SUPER. CT. NO. CK58667)

APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, RUDOLPH A. DIAZ, JUDGE.

AFFIRMED.

Roberto Flores; Wilkinson Walsh + Eskovitz, Lori Alvino McGill, for Objectors and Appellants.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Respondent.

Law Offices of Joanne Willis Newton, Joanne D. Willis Newton, under appointment by the Court of Appeal, for Defendant and Respondent.

Christopher Blake, under appointment by the Court of Appeal, for minor Alexandria P.

Melissa L. Middleton, for Intervenor and Respondent.

Munger, Tolles & Olson, James C. Rutten, Jordan D. Segall, Wesley T.L. Burrell, Varun Behl, for Advokids, Center for Adoption Policy and Professors Joan H. Hollinger, Elizabeth Bartholet, and Barbara Bennett Woodhouse, as Amici Curiae.

INTRODUCTION

For the third time this case comes before us on the issue of whether the lower court has correctly ordered an Indian child, Alexandria P., to be placed with her extended family, Ken R. and Ginger R. in Utah, after concluding that Alexandria's foster parents, de facto parents, Russell P. and Summer P., failed to prove by clear and convincing evidence that there was good cause to depart from the adoptive placement preferences set

forth in the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.).[1]

We have twice remanded the matter because the lower court used an incorrect standard in assessing good cause. The dependency court has now correctly applied the law governing good cause, considering the bond Alexandria has developed over time with the P.s, as well as a number of other factors related to her best interests. Those other factors include Alexandria'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 Alexandria's relationship with her extended family or encourage exploration of and exposure to her Choctaw cultural identity.

Because substantial evidence supports the court's finding 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, we affirm.

PROCEDURAL BACKGROUND

We briefly review the key procedural events that have brought this case up to the current appeal.

Initial good cause hearing and decision (Judge Pellman)

The following excerpt from our 2014 opinion (*In re Alexandria P.* (2014) 228 Cal.App.4th 1322 (*Alexandria I*)) summarizes the initial history of the case: "A 17-month-old Indian child was removed from the custody of

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[1] All statutory references are to 25 U.S.C., unless otherwise indicated.

her mother, who has a lengthy substance abuse problem and has lost custody of at least six other children, and her father, who has an extensive criminal history and has lost custody of one other child. The girl's father is an enrolled member of an Indian tribe, and the girl is considered an Indian child under the ICWA.[2] The tribe consented to the girl's placement with a non-Indian foster family to facilitate efforts to reunify the girl with her father. The girl lived in two foster homes before she was placed with de facto parents at the age of two. She bonded with the family and has thrived for the past two and a half years.

"After reunification efforts failed, the father, the tribe, and the Department of Children and Family Services (Department) recommended that the girl be placed in Utah with a non-Indian couple who are extended family of the father. The de facto parents (de facto parents) argued good cause existed to depart from the ICWA's adoptive placement preferences and it was in the girl's best interests to remain with de facto family. The child's court-appointed counsel argued that good cause did not exist. The court ordered the girl placed with the extended family in Utah after finding that de facto parents had not proven by clear and convincing evidence that it was a certainty the child would suffer emotional harm by the transfer." (*Alexandria I*, *supra*, 228 Cal.App.4th at pp. 1328-1329.) The de facto parents appealed, and this court issued a writ of supersedeas staying the court's order pending resolution of the appeal, with expedited briefing. (*In re A.P.*(Mar. 4, 2014, B252999) [order].)

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[2] At the time of our 2014 opinion, Alexandria was eligible for enrollment as a member of the Choctaw Nation of Oklahoma. Since that time, she has become an enrolled member of the tribe.

Court of Appeal opinion reversing and remanding

In an opinion filed August 15, 2014, we reversed and remanded for the lower court to determine under the appropriate standard whether de facto parents could show good cause to depart from the placement preferences of the ICWA. (*Alexandria I*, *supra*, 228 Cal.App.4th 1322.) Our opinion acknowledged that over a year had passed since the earlier good cause hearing, and the court was free to consider facts and circumstances that arose since the filing of the first appeal. (*Id.* at p. 1357.) Remittitur issued on November 7, 2014.

Additional good cause hearing and decision (Judge Trendacosta)

On remand, the case was assigned to Judge Trendacosta, who held a hearing spanning five days in September 2015 to determine whether good cause existed to depart from the ICWA's placement preferences. The parties submitted written closing arguments on September 16, 2015, and Judge Trendacosta issued a November 3, 2015 statement of decision concluding that the de facto parents had not proven good cause by clear and convincing evidence.

Peremptory writ and remand

The P.s again sought a supersedeas writ staying Judge Trendacosta's order to transfer Alexandria to the R.s' home in Utah. On November 12, 2015, we issued an order notifying the parties we were considering treating the petition for writ of supersedeas as a petition for writ of mandate, and issuing a peremptory writ in the first instance vacating the court's November 3, 2015 order and directing the court to apply the correct burden of proof. We explained the lower court's error by pointing

out that Judge Trendacosta's written decision "described the burden on the de facto parents in language that is identical, word-for-word, to the language we disapproved as an incorrect statement of law in the prior appeal." (*In re Alexandria P.* (Nov. 12, 2015, B268111) [order].) Both Judge Pellman and Judge Trendacosta stated the de facto parents had not proven by clear and convincing evidence "that either the child currently had extreme psychological or emotional problems or would [definitively] have them in the future." In contrast, our *Alexandria I* opinion clarified that de facto parents needed to show "by clear and convincing evidence that there is a significant risk that a child will suffer serious harm as a result of a change in placement." (*Alexandria I*, *supra*, 228 Cal.App.4th at p. 1354.)

After considering letter briefs filed by the parties, we directed the dependency court to vacate its November 3, 2015 order, and enter a new placement order based on application of the burden of proof set forth in *Alexandria I*, *supra*, 228 Cal.App.4th at page 1354. We considered the nature of the error, the already lengthy dependency in this case, and the need for a prompt and permanent resolution of the issue of placement. We also emphasized that time was of the essence, directing the Presiding Judge of the Juvenile Court of Los Angeles County to ensure a judicial officer was promptly assigned to the case, and directing the lower court to resolve the issue of placement within 30 days of issuance of a remittitur, absent extraordinary circumstances. We stated that we were expressing no opinion on how the issue of placement should be resolved. (*R.P. v. Superior Court* (Nov. 25, 2015, B268111) [nonpub. opn.].) On January 29, 2016, we dismissed as moot the appeal of Judge Trendacosta's

November 3, 2015 order, returning jurisdiction to the lower court.

Third good cause decision (Judge Diaz)

The case was ultimately assigned to Judge Diaz, who rendered a decision from the bench on March 8, 2016. Judge Diaz concluded the de facto parents had not shown good cause to depart from the ICWA's placement preferences, and he ordered Alexandria removed from the custody of the P.s and placed with the R.s in accordance with the ICWA.

Current Appeal

The P.s appealed on March 9, 2016, and petitioned for a writ of supersedeas the following day. This court granted a temporary stay on March 11, 2016, and on March 18, 2016, we denied the petition for writ of supersedeas. In early April, we granted calendar preference and set an expedited briefing schedule, with oral arguments taking place on June 10, 2016.[3]

FACTUAL BACKGROUND[4]

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[3] Due to the expedited schedule, the parties and this court have relied upon the exhibits filed in connection with the writ proceedings following Judge Trendacosta's decision (B268111, seven volumes of exhibits filed by minor), and the writ proceedings following Judge Diaz's decision (B270775, four volumes of exhibits filed by the P.s, plus one volume of expedited reporter's transcripts). None of the parties have raised an objection to the adequacy of the record for appellate review.

[4] When the parties present either contradictory evidence or evidence from which different inferences may be drawn, the substantial evidence standard of review requires the reviewing court to resolve all contradictions and draw all inferences in favor of the judgment or order being appealed. (*Fresno County Dept. of Children & Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 642-643 (*Fresno County*).)

A. Facts preceding first good cause hearing

In order to give adequate background information, we repeat an excerpt from our 2014 opinion summarizing the case history up to Judge Pellman's decision: "Alexandria's Child Welfare History "Alexandria was detained from her parents and placed with a foster family when she was 17 months old, based on concerns about her parents' ability to care for her in light of their histories of substance abuse, child welfare referrals, and criminal activity. Alexandria reportedly was moved to a different foster family after suffering a black eye and a scrape on the side of her face.[5] The P.s were Alexandria's third foster care placement, initially arranged in December 2011 as a 'respite care' placement[6] that evolved into a long-term foster care placement. The P.s were aware that Alexandria was an Indian child and her placement was subject to the ICWA.

"By the time Alexandria was placed with the P.s in December 2011, her extended family in Utah, the R.s, were aware of dependency proceeding and had spoken to representatives of the tribe about their interest in adopting Alexandria. The tribe agreed to initial foster placement with the P.s because it was close to father as he worked on reunification. If reunification services

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[5] "Lauren Axline, a rebuttal witness called by the P.s, was the only witness who testified about the transfer from Alexandria's first foster family to her second placement. Department reports indicate that Alexandria's foster placement changed twice between April and December 2011, but do not provide any reason for the changes in placement."

[6] "The P.s agreed to care for Alexandria while her second foster family went on vacation."

were terminated, the tribe recommended placement with the R.s in Utah.

"Alexandria's Emotional Health

"Alexandria's first months after being placed with the P.s were difficult. She was weepy at times, did not want to be held, and had difficulty differentiating between strangers and caregivers, indiscriminately calling people 'mommy' or 'daddy.' These behaviors were considered signs of a 'reactive attachment, the disinhibitive type.' The P.s addressed Alexandria's attachment issues with consistency and loving care. They did not ask the social worker for a therapy referral, understanding the issues to be ones they could work out on their own. After a few months, Alexandria's behavioral issues resolved, and she formed a strong primary bond and attachment with the entire P. family, viewing the parents as her own parents and the P. children as her siblings.

"On September 17, 2012, Alexandria began play therapy with Ruth Polcino, a therapist with United American Indian Involvement. Sessions took place weekly in the P. home. In a December 31, 2012 letter to the Department's social worker Javier, Polcino noted Alexandria's 'happiness, playfulness, sense of safety, and positive rapport with her foster parents and siblings' and concluded that her consistent, loving experience in the foster home appears to have fostered a healthy and secure attachment. Notably, the letter concludes 'Based on witnessing Alexandria in the [P.s'] household, and based on her history of repeated separation from caretakers, this therapist highly recommends that Alexandria be allowed to stay in touch with the [P.] family, even after she is placed with her Aunt [Ginger R.] in Utah. This recommendation is not intended to

interfere with the current adoption, but rather to allow Alexandria to stay in touch with the [P.] family as extended family who care about her.'

"An April 3, 2013 report notes the significant advancements made by Alexandria during her placement with the P.s, as well as her ability to form a healthy attachment to new caretakers: 'Alexandria's ability to re-attach to a new caretaker is stronger because of the stability that the [P.] family has provided for her. The behaviors that she presented with initially when placed with the [P.] family were much more indicative of a possible attachment disorder (i.e., the indiscriminate attachment she demonstrated with strangers). Since then, these behaviors have been almost entirely extinguished. In their place are more appropriate behaviors that are evidence of a more healthy and secure attachment . . . .'

"Father's Reunification Efforts

"Alexandria's father successfully complied with reunification services for more than six months, progressing to such an extent that he was granted unmonitored eight-hour visits. By June 2012, the Department reported a substantial probability he would reunify with Alexandria within the next six months. Shortly thereafter, however, father's emotional state deteriorated dramatically. He separated from his new wife, left California, and did not visit Alexandria after July 28, 2012. By September 2012, he had communicated to the Department that he no longer wished to continue reunification services.

"The R. Family

"Because Ginger R.'s uncle is Alexandria's paternal step-grandfather, the tribe recognizes the R.s as Alexandria's extended family. The R.s have an ongoing

relationship with Alexandria's half-sister, Anna, who visits the R.s on holidays and for a week or two during the summer. Anna and Alexandria have the same paternal grandmother (who has since passed away) and step-grandfather, and the step-grandfather has designated the R.s to care for Anna if he should become unable to care for Anna.

"The R.s expressed their interest in adopting Alexandria as early as October 2011. They were initially told that to avoid confusing Alexandria, they should not contact her while father attempted to reunify. If reunification efforts failed, they were the tribe's first choice for adoption. The family has approval for Alexandria to be placed with them under the Interstate Compact on the Placement of Children (ICPC, Fam. Code, § 7900 et seq.). The R.s first visited Alexandria shortly after the court terminated father's reunification services. Since then, they video chat with Alexandria about twice a week and have had multiple in-person visits in Los Angeles. The P.s refer to the R.s as family from Utah. At one point, when Alexandria asked if she was going to Utah, the P.s responded that they did not know for sure, but it was possible. Russell and Summer P. testified that before and following a recent visit by the R.s, most likely in June 2013, Alexandria was upset and said she did not want to visit with the R.s and did not like it when they came to visit. Russell P. acknowledged that the change in Alexandria's feelings coincided with the birth of a new baby in the P. family and a transition to a new therapist for Alexandria.

"The P. Family

"Alexandria has lived with the P.s for over two and a half years, beginning in December 2011. By all accounts, they have provided her with clear and consistent rules,

and a loving environment. Alexandria is bonded to the P.s, and has a healthy attachment to them. The Department consistently reminded the P.s that Alexandria is an Indian child subject to the ICWA placement preferences. At some point after father's reunification efforts failed, the P.s decided they wanted to adopt Alexandria. They discussed the issue with the Department social worker, who advised them that the tribe had selected the R.s as the planned adoptive placement.

"Transition Planning

"As ordered by the court on April 12, 2013, the Department arranged a conference call to discuss a transition plan in anticipation of a possible court order directing placement with the R.s. The call lasted 90 minutes and included the P.s in Los Angeles; the R.s from Utah; Ruth Polcino, Alexandria's therapist at United American Indian Involvement; Polcino's supervisor, Jennifer Lingenfelter; Alexandria's attorney, Kerri Anderson; Department social worker Roberta Javier, as well as two other Department employees. The participants agreed on a transition plan that involved a relatively short transition, with both families meeting for breakfast or at a park, explaining to Alexandria that she is going to live with the R.s, who are family who love Alexandria very much and will take good care of her. The P.s would reassure Alexandria that they love her and will always be a part of her family." (*Alexandria I*, *supra*, 228 Cal.App.4th at pp. 1330-1333.)

Appeal of Judge Pellman's Decision

After the good cause hearing, Judge Pellman issued a written order concluding that the P.s had not demonstrated good cause to depart from the ICWA's placement preferences. The P.s. appealed, and on

August 15, 2014, we published a decision reversing and remanding the matter for a new good cause hearing. (*Alexandria I*, *supra*, 228 Cal.App.4th 1322.)

B. Facts preceding second good cause hearing

While the P.s' first appeal of Judge Pellman's decision was pending, several disputes arose between the parties. In March 2014, the P.s insisted that they must be present for Alexandria's visits with the R.s, despite the Department clarifying that unmonitored visits were permitted. After the P.s unsuccessfully sought Court of Appeal intervention to prevent the R.s from taking Alexandria to Disneyland, Judge Pellman ordered that Alexandria's monthly visits with the R.s would remain unmonitored and would be in accordance with her schedule (around things like naptime).[7] The R.s had a four-hour visit with Alexandria at Disneyland, but after Alexandria was delayed in returning home because the social worker was stuck in traffic, the P.s refused to allow another visit the following day. In July 2014, Alexandria's therapist, Stephanie Wejbe, sought to transition Alexandria's play therapy with the P. family to individual sessions outside of the home. The therapist noted that she had been expressing concern in her written reports since October 2013 about distractions interfering with Alexandria's therapy and gave examples of Summer P. limiting or interfering with therapy. When the Department brought the matter to the court's attention, the P.s opposed any changes, arguing that the court had never ordered individual therapy for Alexandria, and sessions outside the home would cause her anxiety. Judge Pellman set the matter for a

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[7] Pursuant to Evidence Code sections 452, subdivision (d)(1), and 459, subdivision (a), we take judicial notice of minute orders dated March 19, 2014, and March 20, 2014.

subsequent hearing. Also in July 2014, the P.s, through their foster family agency, filed a report alleging Ginger R. had driven off at the beginning of a visit when Alexandria did not yet have her seat belt on. The Department did not take any action, and its reports indicate the visit went well.

After remand, the case was assigned to Judge Trendacosta, who ordered individual therapy for Alexandria in December 2014.[8] Alexandria seemed happier and less anxious in individual sessions and was much more open about discussing family. Wejbe felt that Summer P. was reluctant to implement some of the therapy tools she suggested for Alexandria in the home, and the P. family did not attend many of the cultural activities offered through United American Indian Involvement. During one session, Wejbe made a dreamcatcher with Alexandria. Summer P. testified the dreamcatcher had ended up in the trash.

Alexandria had consistent monthly visits with the R.s, and video calls with them about twice a week. The video call sessions were sometimes challenging because Alexandria would get distracted. Her in-person visits with the R.s were generally comfortable and relaxed, and Alexandria would sometimes ask to spend additional time with the R.s. In contrast to Alexandria's demeanor during visits with the R.s, the P.s reported Alexandria

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[8] The P.s assert in their brief that at the first in-chambers conference, they sought Judge Trendacosta's permission to obtain a bonding study and asked the judge to promptly set a date for a new good cause hearing, but their requests were ignored. The P.s do not support these assertions with any evidence in the record, beyond their own counsel's assertion in a later hearing. An unsworn statement of counsel is not evidence. (*In re Zeth S.* (2003) 31 Cal.4th 396, 414, fn. 11.)

would display anxious behaviors upon returning from visits, being clingy and sometimes crying.

The R.s would usually include Alexandria's older half-sister, Anna, in the visits. Alexandria first met Anna during a July 2013 visit, when Anna was about 12 years old. Anna lived with the R.s for a time, but by September 2015, she had moved down the street from the R.s. Alexandria's younger half-sister Kayla was born in March 2015, and was being cared for by R.s. Alexandria responded to Kayla positively during Alexandria's first overnight visit with the R.s in April 2015. On a visit to Utah, Alexandria left Post-its around the house, including one on Kayla's swing, because she did not want her sister to forget her.

Ginger R. had a close relationship with Alexandria's paternal grandmother, Sharon L., who was married to Ginger's uncle. Sharon was Choctaw, with a close connection to her tribe, and considered Ginger like a daughter, sharing stories with her. Ginger also grew up in a community with many ties to Native American culture. Ginger has been in contact with the Choctaw tribe since Sharon's death in August 2011, and communicates with the tribe at least monthly, but often weekly.

The P.s have described efforts they made to incorporate Native American culture into their lives. Summer P. has Southern Tuscarora heritage, but the tribe is not enrolling new members and is not a federally recognized tribe. They have painted one wall of their kitchen "Navajo Blue," and are members of the Autry Museum, participating in Native American arts and crafts activities. They attend an annual pow-wow, and shortly before the September 2015 good cause hearing, Summer and Alexandria attending a sage burning

ceremony. However, Summer declined to participate in a part of the activity, and did not encourage Alexandria to participate.

Alexandria began overnight weekend visits with the R.s in April 2015, staying with them from Friday to Sunday in southern California. In July 2015, she had a weeklong visit in Utah with the R.s. A social worker traveled with her, observed her transition to the R.s, and reported that Alexandria was excited about the visit and appeared to be comfortable in the R. home. On the return trip, Alexandria told the social worker she had a great time and would like to visit her sister and the R.s again. The P.s felt that Alexandria was too young for overnight visits, noting that they would not let their son of the same age stay with someone overnight.

On March 26, 2015, the court appointed Linda Doi Fick to conduct an evaluation under Evidence Code 730.[9] All parties agreed to Doi Fick as a neutral evaluator. She spent over 25 hours on interviews, observations, and consultations, plus another 20 hours reviewing case records in order to write her report, so she was familiar with the history of the case and Alexandria's relationship with the P.s. During Doi Fick's time observing Alexandria and her interactions

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[9] Doi Fick is a licensed marriage and family therapist with a master's degree in human development. She has been a member of the court's 730 Expert Panel since 1991. Evidence Code section 730 states, in relevant part: "When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required."

with the P.s and the R.s, Alexandria had three separate overnight visits with the R.s, and Doi Fick met with Alexandria and/or the R.s during or at the end of each visit. She was also able to observe in her office how Alexandria was able to transition from a visit with the R.s back to the P.s, and spoke by phone with the P.s about their concerns with Alexandria's behavior and demeanor after visits with the R.s. Doi Fick commented that Alexandria appeared to have a good rapport with minor's counsel Jennifer McCartney, who during one visit informed Alexandria of changes to the schedule, which Alexandria easily accepted.

After Doi Fick's report was completed on June 25, 2015, the P.s asked the court to approve an independent evaluator for a bonding study, emphasizing it was necessary for the good cause hearing. Minor's counsel opposed the request. At a hearing on July 8, 2015, the court explained that Doi Fick, in her capacity as an Evidence Code section 730 expert who was well-known to the court, was acting as an independent evaluator, but the court would permit the P.s to retain an expert to review Doi Fick's report. The P.s retained Deena McMahon, whose initial report included observations and conclusions based not only on her review of Doi Fick's report and information provided to her by the P.s, but also observations of and interviews with the P. family and Alexandria.

McMahon's report was faxed to the parties on August 17, 2015. On August 20, 2015, minor's counsel filed a motion in limine to exclude the report and sought sanctions on the grounds that the court had not authorized and the P.s' attorney never obtained permission for McMahon to speak with Alexandria. On the first day of the scheduled good cause hearing, the court heard argument on minor's motion to exclude the

McMahon report, and decided it would strike the report, but permit the P.s to proffer the expert on the limited basis of her review of Doi Fick's report only.

The court's good cause hearing commenced on September 1, 2015, and continued over five separate days. During the hearing, the P.s presented testimony from the following witnesses: (1) Russell P.; (2) Summer P.; (3)McMahon, a bonding and attachment expert; (4) Dr. Michael Ward, a member of the court's Evidence Code section 730 panel; and (5) Lauren Axline, a social worker from their foster family agency. Minor's counsel called the following witnesses: (1)Doi Fick, the expert appointed by the court under Evidence Code section 730; (2)Ginger R.; (3)minor's therapist Wejbe; and (4)Dr. Carrie Johnson, a licensed clinical psychologist who is a director of Seven Generations at United American Indian Involvement and an expert on cultural identity. The Choctaw tribe called tribal social worker Amanda Robinson. Counsel for the Department and father participated in argument and cross-examined witnesses, but did not call any witnesses. The Department offered into evidence reports from January 31, 2013 through August 17, 2015, and asked the court to take judicial notice of all prior findings and orders. The only documents received into evidence from the P.s that are part of our record on appeal are (1) a second report by McMahon,[10] which does not include any information or conclusions gleaned from her observations of or interactions with Alexandria, and (2) a packet of e-mail correspondence involving the P.s' possible Indian heritage and their efforts to arrange visits with Alexandria's half-sister Anna.

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[10] McMahon's original report is included as an exhibit on appeal, but it was not admitted into evidence by the trial court.

As explained in the procedural background section of this opinion, Judge Trendacosta issued a ruling on November 3, 2015 deciding that the P.s had not proven good cause to depart from the ICWA's placement preferences, and ordering that Alexandria be placed with the R.s. The ruling was then stayed by peremptory writ, and the matter remanded on January 29, 2016.

C. Facts preceding third good cause hearing

The case was assigned to Judge Diaz on February 2, 2016. On February 5, 2016, Judge Diaz requested all counsel to verify that he had the complete record to review before making a decision. The P.s filed a request to present additional evidence on February 19, 2015. The court deferred ruling on the request because it had not yet reviewed the entire file, but emphasized that it was hesitant to permit testimony because it would cause a delay, and the appellate court had not given any specific direction about reopening the case for further testimony.

On February 26, 2016, the P.s asked the court to either permit them to cross-examine the Department's social worker Orisco Wilson, or in the alternative, for the court to decline to review the reports submitted by the Department. The court deferred ruling on the request. When minor's counsel pointed out that the 30-day deadline set by this court was only three days away, Judge Diaz found that additional time was necessary to review all the evidence.

On March 8, 2016, the court began by explaining that it would not be appropriate to take additional evidence, given that it was not directed by the appellate court, and would cause more delay. The parties argued their positions and the court issued its ruling from the bench without an accompanying written decision. It found the P.s had not met their burden of proving by

clear and convincing evidence that there was a significant risk of serious harm as a result of a change in placement. The court acknowledged Alexandria was bonded to the P.s, and noted that it would be an "easy call" if Alexandria was going to be "removed from a family who has the strength of the bond and place[d] into a family that is significantly unknown . . . ." In contrast, Alexandria had bonded with the R.s and she had an opportunity to bond with and grow up with her half-siblings as well. The court also found it was in Alexandria's best interests to provide her with the opportunity to be raised in the Indian culture, even though she would not be living on a reservation. The court ordered Alexandria to be placed with the R.s and imposed a seven-day stay, after which Alexandria would be moved without a transition plan.

The P.s filed a notice of appeal, and also sought another writ of supersedeas to stay Alexandria's transfer. We denied the writ petition on March 18, 2016.[11]

DISCUSSION

The key question on appeal is whether the dependency court's decision to place Alexandria with the R. family in Utah in accordance with the ICWA's placement preferences is supported by substantial evidence. The P.s raise a number of collateral issues as well. After reviewing the law governing good cause determinations, we address the following issues: (a) law of the case and the scope of remand; (b) good cause as a

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[11] The parties have attempted to call the court's attention to a number of facts that occurred after the Notice of Appeal was filed, most of which relate to Alexandria's transfer to the R.s. We find the post-appeal facts to be irrelevant to our review, and therefore decline to consider them.

matter of law; (c) the substantial evidence supporting the court's finding of no good cause; and (d) the court's evidentiary rulings.

A. The ICWA placement preferences and good cause exception

The oft-discussed history and overall requirements and presumptions of the ICWA are discussed in *Alexandria I*, *supra*, 228 Cal.App.4th at pages 1337 through 1340. Most relevant to the current discussion is the good cause exception to the ICWA's placement preferences. The ICWA provides that when an Indian child is put into an adoptive placement, "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." (§ 1915(a).) California law parallels these federal requirements, and also clarifies that the party requesting departure from the ICWA's placement preferences bears the burden of establishing the existence of good cause. (Welf. & Inst. Code, §361.31, subd. (j); *see also In re Anthony T.* (2012) 208 Cal.App.4th 1019, 1029.)

Our earlier opinion referenced guidelines enacted by the Department of the Interior, Bureau of Indian Affairs (Bureau) in 1979, which provided nonbinding guidance on implementation of the ICWA. (44 Fed.Reg. 67584 (Nov. 26, 1979); *Alexandria I*, *supra*, 228 Cal.App.4th at p. 1339.) In 2015, the Bureau issued an updated set of Guidelines for State Courts and Agencies in Indian Child Custody Proceedings (80 Fed.Reg. 10146 (Feb. 25, 2015) (Guidelines)) to replace the 1979 guidelines. The Guidelines are instructive or advisory, not mandatory. (*Fresno County Dept. of Children &Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 642-643

(*Fresno County*).) The Bureau also subsequently issued a final rule[12] to govern the ICWA implementation. (81 Fed.Reg. 38778 et seq. (June 14, 2016).) The rule does not directly affect the current proceeding because it does not take effect until December 12, 2016.[13] We mention the new rule here, however, because the continued relevance and viability of the 2015 Guidelines once the rule takes effect is not entirely clear. The language and substance of the rule differ from the 2015 Guidelines in ways that we will discuss in detail later in this opinion, but nothing in the rule states that it supersedes the Guidelines. Instead, the new rule states, "In some cases, the [Bureau] determined that particular standards or practices are better suited to guidelines; the [Bureau] anticipates issuing updated guidelines prior to the effective date of this rule (180 days from issuance)." (81 Fed.Reg., *supra*, at p. 38780.) Updated guidelines have not yet been issued, but the new rule

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[12] The regulations contained in the rule will appear in Title 25 of Code of Federal Regulations as "Subpart I-Indian Child Welfare Act Proceedings." Section 23.101 states "The regulations in this subpart clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families." (81 Fed.Reg., *supra*, at p. 38868.)

[13] Section 23.143 of the rule states, "None of the provisions of this subpart affects a proceeding under State law for foster-care placement, termination of parental rights, preadoptive placement, or adoptive placement that was initiated prior to December 12, 2016, but the provisions of this subpart apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child." (81 Fed.Reg., *supra*, at p. 38876.)

does contain provisions that will be relevant to good cause determinations in future cases.

The portion of the 2015 Guidelines outlining what courts should consider in determining good cause cautions against giving weight to ordinary bonding that may occur in a placement that does not comply with the ICWA.[14] (Guidelines, 80 Fed.Reg., *supra*, at p. 10158.) The new final rule provides that "[a] placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA." (81 Fed.Reg., *supra*, at p. 38875; 25 C.F.R. § 132(e), effective Dec. 12, 2016.) The Bureau explains the distinction between the Guidelines's reference to a "placement that does not comply with ICWA" and the rule's reference to a "placement that was made in violation of ICWA" as follows: "The comments reflected some confusion regarding what constitutes a 'placement that does not comply with ICWA.' For clarity, the final rule instead references a 'violation' of ICWA to emphasize that there needs to be a failure to comply with specific statutory or regulatory mandates. The determination of whether there was a violation of ICWA will be fact specific and tied to the requirements of the statute and this rule. For example, failure to provide the required notice to the Indian child's Tribe for a year, despite the Tribe having been clearly identified at the

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[14] Guidelines Part IV, section F.4, subdivision (c)(3) provides that a finding of good cause could be based on the extraordinary physical or emotional needs of the child, but that "extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with the Act." (Guidelines, 80 Fed.Reg., *supra*, at p. 10158.)

start of the proceeding, would be a violation of ICWA. By comparison, placing a child in a non-preferred placement would not be a violation of ICWA if the State agency and court followed the statute and applicable rules in making the placement, including by properly determining that there was good cause to deviate from the placement preferences." (81 Fed.Reg., *supra*, at p. 38846.)

On the role a child's best interests play in a good cause determination, the 2015 Guidelines state "[t]he good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child in light of the purposes of the Act." (Guidelines, 80 Fed.Reg., *supra*, at p. 10158.) In contrast, the new regulations that the final rule will add to the Code of Federal Regulations do not contain any reference to a child's best interests in the context of determining whether good cause exists to depart from the ICWA's placement preferences. When the Notice of Proposed Rulemaking that led to the final rule was available for public comment, commenters either approved of the omission of any reference to best interests, or objected to the omission. (*See* 81 Fed.Reg., *supra*, at p. 38847.) The Bureau's response to the comments emphasizes the risk present if courts were to use a best interests analysis as a less rigorous proxy for determining good cause in accordance with the final rule: "ICWA and this rule provide objective mandates that are designed to promote the welfare and short- and long-term interests of Indian children. Congress enacted ICWA to protect the best interests of Indian children. However, the regulations also provide flexibility for courts to appropriately consider the particular circumstances of the individual children and to protect

those children. For example, courts do not need to follow ICWA's placement preferences if there is 'good cause' to deviate from those preferences. The 'good cause' determination should not, however, simply devolve into a free-ranging 'best interests' determination. Congress was skeptical of using 'vague standards like "the best interests of the child,"' H.R. Rep. No. 95-1386[,2d Sess., p. 19 (1978)], and intended good cause to be a limited exception, rather than a broad category that could swallow the rule." (81 Fed.Reg., *supra*, at p. 38847.)

Although our decision is not subject to or controlled by these provisions of the new final rule, the Bureau's issuance of the rule makes us even more reticent to rely on the non-binding 2015 Guidelines as persuasive authority. The final rule clarifies the Bureau's intent in including the "ordinary bonding or attachment" statement in Part IV, section F.4 of the 2015 Guidelines, and no party contends that Alexandria's initial placement with the P.s was a "placement in violation of ICWA" (81 Fed.Reg., *supra*, at p. 38875)—and for good reason. The Choctaw tribe consented to the placement to facilitate efforts to reunify Alexandria with her father, and the P.s were informed that Alexandria was an Indian child subject to adoptive placement in accordance with the placement preferences.

We do observe, however, that our earlier opinion (and our analysis here) is fully consistent with the final rule's observation that a good cause determination should not devolve into a standardless, free-ranging best interests inquiry. We held that a child's best interest was a relevant factor in determining good cause, but recognized that it was one factor among several that a court would take into account in determining good cause. (*Alexandria I*, *supra*, 228 Cal.App.4th at pp. 1355-1356.) Our citations to cases from other states made this point

clear. (*Native Village of Tununak v. State, Dept. of Health & Social Services, Office of Children's Services* (Alaska 2013) 303 P.3d 431, 451-452 [good cause depends on many factors, including the child's best interests]; *In Interest of A.E.* (Iowa 1997) 572 N.W.2d 579, 585 [good cause depends on a fact determinative analysis consisting of many factors, including the best interests of the child]; *In re Interest of Bird Head* (1983) 213 Neb. 741, 750 [331 N.W.2d 785, 791] ["[The ICWA] does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus"].) Nothing in our opinion directed the lower court to give greater weight to any one factor over others. A court tasked with determining good cause will consider a constellation of factors in determining whether a party has proven good cause by clear and convincing evidence. Among those factors will be the Indian child's best interests and whether the child is at significant risk of suffering serious harm as a result of a change in placement, including the effect of breaking a child's existing attachments. (*Alexandria I*, *supra*, 228 Cal.App.4th at pp. 1352-1356.)

B. The court's decision did not exceed the scope of remand or disregard the law of the case.

We reject the P.s' contentions that the lower court exceeded the scope of the remand stated in our August 15, 2014 opinion, or that it violated the law of the case established by that opinion. The opinion concluded that Judge Pellman's 2013 decision had applied an incorrect standard for determining whether the P.s had demonstrated good cause to depart from the ICWA's placement preferences. Recognizing that circumstances might have changed in the one-year interim between Judge Pellman's ruling and our decision to reverse and remand, we emphasized "that in determining whether

good cause exists to depart from the placement preferences identified in section 1915(a), the court may consider facts and circumstances that have arisen since the filing of this appeal. (*See, e.g., In re B.C.* (2011) 192 Cal.App.4th 129, 150-151 [reversing and remanding with clarification that in determining child's best interests, the court may consider events arising since the filing of the appeal].)" (*Alexandria I*, *supra*, 228 Cal.App.4th at p. 1357.) The dependency court could consider the evidence that had already been presented, plus any new evidence it deemed relevant to the good cause determination, and decide whether the P.s had proven by clear and convincing evidence that there was good cause to depart from the ICWA's placement preferences, based partly on whether there was "a significant risk that [Alexandria] will suffer serious harm as a result of a change in placement." (*Id.* at p. 1354.) We noted that "the bond between Alexandria and her caretakers and the trauma that Alexandria may suffer if that bond is broken are essential components of what the court should consider when determining whether good cause exists to depart from the ICWA's placement preferences." (*Id.* at p. 1355.) We also concluded Judge Pellman should have given appropriate consideration to facts relevant to Alexandria's best interests. (*Id.* at pp. 1355-1356.)[15]

Consistent with our earlier holding, the P.s could discharge their burden to show, by clear and convincing evidence, good cause to depart from the ICWA's placement preferences by demonstrating there was a significant risk that Alexandria would suffer serious

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[15] Because the Guidelines are not binding (and of dubious vitality following the final rule in any event), we decline to consider whether our prior holding is affected by the issuance of those Guidelines.

harm as a result of a change in placement. (*Alexandria I*, *supra*, 228 Cal.App.4th at p. 1354, fn. omitted.)

The P.s complain that Judge Diaz's decision does not comply with this court's 2014 opinion because he did not make an individualized determination of Alexandria's best interests. They also argue the dependency court impermissibly expanded the scope of its inquiry—thereby exceeding the scope of this court's remand—by considering the impact on Alexandria's cultural identity if she were to remain with the P.s. Implicit in their claims is an argument that when conducting a best interests inquiry in the context of deciding whether good cause exists to depart from the ICWA's placement preferences, a court should not weigh considerations like cultural identity or connection to extended family, because those considerations are already incorporated into the presumption that placement in accordance with the ICWA is in an Indian child's best interests. We disagree.

The court's inquiries into substantial risk of serious harm and best interests are intertwined, fact-specific, and not susceptible to strict boundaries. When the best interests of an Indian child are being considered, the importance of preserving the child's familial and cultural connections often cannot be separated from other factors. The 2015 Guidelines cautioned against courts conducting "an *independent* consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child in light of the purposes of the Act." (Guidelines, 80 Fed.Reg., *supra*, at p. 10158, italics added.) The regulations added by the recently issued final rule, which are intended to be binding on future state court determinations of good cause, are silent on what role a child's best interests will play in such a determination. While we reaffirm our

earlier holding that a court should take an Indian child's best interests into account as one of the constellation of factors relevant to a good cause determination, we reject the P.s' argument that the best interests inquiry should exclude consideration of her connection to extended family or her cultural identity. We also caution against using the best interests concept as carte blanche to seize upon any showing as sufficient reason to depart from the ICWA's placement preferences.

Judge Trendacosta and Judge Diaz considered Alexandria's best interests as part of their good cause determinations. Judge Diaz reviewed all of the testimony and evidence presented to Judge Trendacosta, and his ruling from the bench reflected his familiarity with the relevant facts. By considering details specific to Alexandria's circumstances, he conducted a best interests analysis. In the absence of any evidence that either Judge Trendacosta or Judge Diaz intentionally disregarded this court's directions on remand, we hold the court's March 8, 2016 decision complies with both the law of the case and our directions on remand.

C. Good cause does not exist as a matter of law.

We reject any argument that the facts before the court constituted good cause as a matter of law. The P.s frame the issue as compelling a particular result because Alexandria has been a part of their family for over four years. In their view, because Alexandria had a strong primary bond to the family—which all parties and the court concede she did—she would inevitably suffer trauma if that bond was broken, and so good cause exists as a matter of law. They support their argument by citing to cases and a statute where a minor's interest in stability and permanency prevailed over a biological

parent's interests. (*See, e.g.*, Fam. Code, §3041, subd. (c); *In re Jasmon O.* (1994) 8 Cal.4th 398, 419 [recognizing child's right to stability and permanence based on risk of serious harm from severing bond to de facto parents]; *In re Marilyn H.* (1993) 5 Cal.4th 295, 306; *Guardianship of Zachary H.* (1999) 73 Cal.App.4th 51, 64.)

This argument ignores the multifaceted analysis that precludes reducing a good cause determination to a single question. The longevity of a child's foster placement may sometimes be relevant to deciding whether good cause exists to depart from the ICWA's placement preferences, but it cannot be the sole deciding factor. (*See, e.g., Matter of Adoption of Halloway* (Utah 1986) 732 P.2d 962, 971-972 [acknowledging that placement stability is a paramount value, but it is not "the sole yardstick" for judging the validity of a child's placement].) The United States Supreme Court has cautioned that courts should not "'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation,' [Citation.]" (*Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 54.) In addition, making the longevity of Alexandria's placement with the P.s a determinative factor would ignore not just the overall policy behind the ICWA, but also the more general state policy favoring preservation of extended family and sibling relationships in the dependency context.[16]

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[16] For example, California's dependency statutes require social workers to investigate and locate relatives who may be potential caretakers for children who are removed from their parents, and requires courts to consider relative placement as an option. (Welf. & Inst. Code, §§ 309, 319.) Other statutes underscore the importance of ensuring that siblings are placed together in foster

A holding that the facts before us constituted good cause as a matter of law would circumvent the policies favoring relatives and siblings, and it would incentivize families who knowingly accept temporary foster placements to delay an Indian child's ultimate adoptive placement in the hope that as time passes, the family will reach a "safe zone" where harm to a child from disrupting his or her primary attachment is presumed as a matter of law. It is unwise and unnecessary to stretch the bounds of California law in that manner. We also reject the P.s' contention that the federal Adoption and Safe Families Act of 1997 (the Act) (Pub.L. No. 105-89 (Nov. 19, 1997) 111 Stat. 2115) requires a finding of good cause as a matter of law. The Act encourages child welfare agencies to engage in concurrent planning, meaning that while reunification services for parents are proceeding, the agencies concurrently identify and approve qualified families for adoptive placement if reunification efforts fail. Here, the Department and the tribe identified and approved the R.s as Alexandria's proposed adoptive placement by late 2012. This case is therefore unlike *In the Matter of M.K.T.*, 2016OK 4, ¶¶ 67-72 [368 P.3d 771, 791-792], where a tribe opposed a good cause finding even though it had no available adoptive placement two and a half years after the state had assumed custody of the minor. The only delay to Alexandria's adoptive placement has been ongoing litigation over the good cause exception to the ICWA's

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care, unless such arrangements are contrary to a minor's safety or well-being. (Welf. & Inst. Code, §§ 361.2, subd. (f)(3), 361.3, subd. (a)(4), 16002, subd. (a)(1).) In addition, the Bureau's new regulations include "the presence of a sibling relationship that can be maintained only through a particular placement" as a consideration upon which a determination of good cause can be based. (81 Fed.Reg., *supra*, at p. 38874; 25 C.F.R. § 23.132(c)(3).)

placement preferences. There is no need to find good cause as a matter of law to avoid a conflict with the Act.

D. There is substantial evidence to support the court's conclusion that the P.s have not shown good cause to depart from the ICWA preferences.

Substantial evidence standard of review

In evaluating whether there is substantial evidence to support the court's finding that there was no good cause to depart from the ICWA's placement preferences, we apply the standard of review stated in Alexandria I.[17] "When a party appeals a good cause determination, the appellate court usually applies a substantial evidence standard of review. (*Fresno County*, *supra*, 122 Cal.App.4th at pp. 644-646.) 'Under this standard, we do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence, or reweigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if there is other evidence supporting a contrary finding. [Citations.] The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the court's findings. [Citation.]' (*In re G.L.* (2009) 177 Cal.App.4th 683, 697-698.)" (*Alexandria I*, *supra*, 228 Cal.App.4th at p. 1352.)

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[17] We acknowledge the P.s seek an abuse of discretion standard of review, because a court making a good cause determination must make factual findings and then apply the facts to legally relevant factors. The County recommends a hybrid approach used by some courts when reviewing application of the beneficial parental relationship exception to termination of parental rights under Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i). Having reviewed the record on appeal, we would affirm under either standard. (*See, e.g., In re G.B.* (2014) 227 Cal.App.4th 1147, 1166, fn. 7.)

Substantial evidence supports a finding of no good cause

The P.s focus on what they characterize as uncontradicted expert testimony that Alexandria would definitely suffer significant harm if her primary attachment to the P.s was broken. They argue that because the Evidence Code section 730 expert Doi Fick gave no opinion on that topic, the court's finding of no good cause lacked evidentiary support. They also claim there was no evidence to support the court's assumptions that the tribe would be available to support Alexandria's transition, and that Alexandria saw the R.s as family.

The absence of a report contradicting the opinion of the P.s' retained expert and the fact that the court drew inferences from evidence about Alexandria's access to a support system in Utah does not lead to the inevitable conclusion that there was no substantial evidence to support the court's ruling. Instead, viewing the record as a whole and in the light most favorable to the court's finding, we conclude that the evidence presented by minor's counsel, the Department, and the tribe regarding Alexandria's ability to navigate and develop new attachments; the benefits of preserving the connection to her extended family, half-siblings, and her cultural identity; and the adverse effects of the P.s' unwillingness or inability to support Alexandria's relationship with the R.s, constitute substantial evidence that good cause did not exist to depart from the ICWA's placement preferences.

The P.s primarily rely on four cases they contend establish that the risks of harm to a child removed from a long term placement are sufficient to establish good cause: *In re N.M.* (2009) 174 Cal.App.4th 328, 335; *In re*

A.A. (2008) 167 Cal.App.4th 1292; *Fresno County*, *supra*, 122 Cal.App.4th 626; and *In re Brandon M.* (1997) 54 Cal.App.4th 1387. In each of these cases the lower court found that good cause had been proven, and the appellate court upheld the determination. Our case comes to us in the opposite procedural posture. The P.s were the party with the burden of proof, needing to demonstrate good cause by clear and convincing evidence. (*Alexandria I*, *supra*, 228 Cal.App.4th at pp. 1348-1352.) To establish that the lower court's decision was erroneous, they would need to demonstrate that viewing the evidence in the light most favorable to the court's finding, no judge could reasonably reach the same conclusion. (*See, e.g., In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

We understand the court's decision was not an easy one. When an Indian child has been in a stable foster placement for a long period of time, a court's inquiry into whether good cause exists to depart from the ICWA's placement preferences is one of the most difficult determinations a court can make. The pertinent inquiry on appeal is whether substantial evidence supports the finding, not whether a contrary finding might have been made. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

The most significant evidence in support of the court's finding is the report and testimony by Doi Fick. According to Doi Fick, "Alexandria has formed a safe, secure, primary attachment to the [P.s]. She has formed sibling attachments to the [P.s'] children . . . . These attachments have made it possible for Alexandria to form collateral attachments to other meaningful people." Alexandria had been able to form meaningful and affectionate collateral attachments to the R.s and her half-sisters, Anna and Kayla. Doi Fick noted that if

Alexandria were to lose her strong sibling relationship with Anna, it would shake her sense of identity. Both Doi Fick and Alexandria's therapist Wejbe felt the R.s would be supportive of a continued relationship between Alexandria and the P.s. Both also expressed concern that the P. family would be unable to support a continuing relationship between Alexandria and the R.s and her half-sisters, Anna and Kayla. The R.s were also better able to provide Alexandria with a connection to her cultural identity, as Ginger previously had a close relationship with Alexandria's paternal grandmother, Sharon L.

In the section of her report titled, "Opinion and insight on Alexandria's mental and/or emotional health if relationship and/or attachment she has with the P. family is broken," Doi Fick proffered that there need not be a break in Alexandria's relationship with the P.s, and that continuing to maintain some sort of relationship would benefit Alexandria: "Alexandria is a resilient child who has developed coping and adjustment skills. Change is not without reaction. Many of the behaviors and/or anxiety symptoms described by the [P.s] are due to lack of support within their home, conflicted emotions stimulated by the other children, or issues commonly addressed by therapists when such changes are occurring." Doi Fick was concerned that a continued loyalty conflict, where Alexandria felt the need to please both the P.s and the R.s, would affect Alexandria negatively.

Doi Fick acknowledged Alexandria's move would be difficult, but opined Alexandria has "the emotional resilience, and adaptive, adjustment, and coping skills to resolve a change in place." Doi Fick believed that with therapeutic assistance, Alexandria would be able to adjust and form a new primary attachment with the R.s.

"Her adaptive and coping ability indicate that a positive outcome is likely and with therapeutic assistance, she would likely make a successful adjustment, especially if the [P.s]will continue to maintain a supportive relationship with her."

The P.s argue that because Doi Fick did not directly state an opinion on whether Alexandria was at significant risk of substantial harm based on a move to Utah, her opinion lacks the weight and specificity necessary to counter their own expert's opinion that Alexandria would suffer trauma if her primary attachment to the P.s was broken. The lack of a direct correlation between the two expert opinions is not a basis to ignore Doi Fick's observations and conclusions. Doi Fick testified that because Alexandria had a strong collateral bond with the R.s, looking to them for nurturance, structure, and cooperation, and was able to form that collateral bond based on her strong primary bond with the P.s, she would be able to transition to custody with the R.s. She also explained that children are able to have multiple primary attachments in situations with divorced parents or a caretaker who cares for a child from a young age. The P.s' emphasis on possible trauma to Alexandria resulting from a move away from the P.s ignores the strength of her connection to the R.s. The court in its ruling emphasized Alexandria was not being placed "into a family that it 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.

The P.s disagree with the premise of Doi Fick's report that placement with the R.s does not necessarily mean that Alexandria's bond with the P.s must be

broken. Dependency law, however, recognizes that unusual arrangements are occasionally crafted to serve the best interests of a child. For example, a parent who is unable to provide day-to-day care for a child may sometimes be permitted to maintain a relationship with the child, while another adult takes up permanent guardianship. (*See, e.g.*, Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i); *In re Scott B.* (2010) 188 Cal.App.4th 452, 470 [applying parent-child relationship exception to conclude that guardianship, rather than adoption, was the correct permanent plan].)

Additional evidence weighing against a good cause finding is that the R.s offer Alexandria a better opportunity to maintain a relationship with two of her siblings, Anna and Kayla. Fourteen-year-old Anna has known the R.s most of her life, and for a time was living with them. Infant Kayla was placed with the R.s sometime shortly after her birth in March 2015. Alexandria first met her during a visit with the R.s when Kayla was just three weeks old, and had seen Kayla on all her visits with the R.s up to the September 2015 good cause hearing. At trial, the P.s relied heavily on e-mails to demonstrate that they had attempted to arrange visits between Alexandria and Anna, but evidence of these unsuccessful efforts does not negate the fact that the R.s had been able to provide Alexandria contact and a meaningful connection with her siblings, where the P.s had not. The P.s also argue on appeal that there was no substantial evidence to support Judge Diaz's statement that placement with the R.s would give Alexandria the "opportunity to bond with, to live with, [and] to grow up with" her siblings. While the P.s' brief speculates about whether Anna has continued contact with the R.s and whether Kayla remained with them after the September 2015 hearing, there is no evidence supporting the

speculation. The evidence from the September 2015 hearing established that Anna was living down the street from the R.s, and that Kayla had lived with the R.s since her birth in March 2015 until the hearing. Both Anna and Kayla have come with the R.s to visit Alexandria, and Alexandria visited with both on a visit to Utah. The most reasonable inference from the evidence is that the R.s can best facilitate a continuing relationship between Alexandria and Anna, as well as ensuring that Alexandria and Kayla develop a relationship as they both grow older. Because there was substantial evidence that Alexandria's relationship with her siblings was meaningful and significant, it was reasonable for the trial court to consider the potential long-term benefit of preserving these relationships in weighing Alexandria's best interests.[18]

The P.s also attempt to paint the record as lacking in hard evidence of the R.s' ties to Choctaw culture. Ginger R.'s testimony on this point is sufficient to support a reasonable inference that she will be more effective than the P.s with giving Alexandria access to her cultural identity.

The P.s argue that the lower court and respondents placed too great an emphasis on the P.s' knowledge, when they accepted Alexandria into their home, that the placement was temporary and the ICWA's placement preferences applied. They ask us to view the bond from Alexandria's perspective, noting that a two-year-old cannot be asked to understand the concept of a

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[18] In fact, under the new regulations that will take effect in December this year, the preservation of such sibling relationships is an explicit consideration when a court is deciding whether good cause exists to depart from the ICWA's placement preferences. (81 Fed.Reg., *supra*, at p. 38874.)

"temporary placement." However, this argument does not adequately respond to an issue raised by the evidence, which is a concern about the extent to which the P.s were unable to carry out their role as foster parents in supporting Alexandria as she developed a relationship with the R.s, who the tribe had identified as an adoptive placement. Evidence of their resistance to increasing visitation, and evidence they insisted that visits and therapy include the entire P. family, rather than Alexandria alone, gives further support to the court's finding that Alexandria's best interests weighed in favor of a change in placement.

Taken together, the evidence and testimony presented at the September 2015 hearing provide substantial evidence to support the court's decision that the P.s did not carry their burden of proving good cause to depart from the ICWA's placement preferences.

Opposing positions of the P.s and minor's counsel

The P.s also do not—and in our view cannot—provide an adequate response to an issue raised most effectively by minor's appellate counsel. Even though they appear before the court by virtue of their status as de facto parents, the P.s' efforts to show good cause are motivated by their own interests. Minor's counsel, not the P.s, has a legal and ethical obligation to represent Alexandria's interests.[19] (*In re Josiah Z.* (2005) 36

[19] We cannot agree with the statement in the P.s' opening brief that "Minor's trial counsel, who vigorously represented the interests of the R.s, consistently fought the premise of this Court's remand." The record demonstrates that minor's trial counsel was consistently focused on the best interests of her client Alexandria, and comported herself in a professional and ethical manner.

Cal.4th 664, 675-677.) The P.s lack the right to assert Alexandria's interests because Alexandria has her own counsel, who represents her interests and also acts as her guardian ad litem. (*In re Zamer G.* (2007) 153 Cal.App.4th 1253, 1263-1271 [discussing the role of minor's counsel and guardian ad litem and explaining "it is the attorney's role to make a reasonable independent determination of the minor's best interests, notwithstanding the minors' preferences"]; *see also* Welf. & Inst. Code, §§317, subd. (e)(1) ["[c]ounsel shall be charged in general with the representation of the child's interests"] and 326.5 [child's guardian ad litem may be an attorney or a court-appointed special advocate]; Cal. Rules of Court, rules 5.660 and 5.662.) In this case, Alexandria's trial counsel, who replaced prior counsel in October 2014, had visited the minor in multiple settings and established a good rapport with her. For example, when it became necessary to inform Alexandria about a change in plans for a visit with the R.s, requiring an unexpected transition back to the P.s for a family barbeque, minor's counsel informed Alexandria of the change. The court's Evidence Code section 730 expert expressed surprise at the ease with which Alexandria accepted the change in plans, and when she asked Alexandria who explained it to her, Alexandria confidently replied "Jennifer [minor's counsel] explained it. She's nice."

We recognize that the P.s are claiming that Alexandria's best interests are served by a finding of good cause, but their argument is undermined by the fact that minor's counsel argued just the opposite. We 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. In other words, in every published case upholding a good

cause finding, counsel for the minor either advocated for the finding, was aligned with the party advocating for a finding of good cause, or was silent. (*See, e.g., In re N.M.*, *supra*, 174 Cal.App.4th at p. 334 [affirming good cause finding in case where father, the tribe, and the Department all favored the ICWA-compliant placement with the paternal grandmother, while minor's counsel favored departure from the ICWA and placement with non-relative]; *In re A.A.*, *supra*, 167 Cal.App.4th at pp. 1329-1330 [affirming good cause finding against tribe and relatives advocating moving minors into an ICWA-compliant placement from their stable foster placement, where minor's counsel was silent]; *Fresno County*, *supra*, 122 Cal.App.4th at p. 632 [affirming good cause finding where minor's attorney opposed recommendation by tribe, Department, and mother to follow the ICWA's placement preferences].) The P.s fail in their attempt to analogize this case to others where minor's counsel supported a non-ICWA-compliant placement as being in a child's best interests, because here, minor's counsel supported an ICWA-compliant placement, presented evidence, and argued against a good cause finding.

E. The court's evidentiary rulings were not an abuse of discretion.

We review the lower court's evidentiary decisions for abuse of discretion. (*In re Roberto C.* (2012) 209 Cal.App.4th 1241, 1249.)

Exclusion of McMahon's initial report

The P.s claim that the court erred when it initially deferred their request to conduct a bonding study, and then erred again when it excluded the full report prepared by their bonding and attachment expert, McMahon. The error, if any, was harmless.

First, while the P.s claim they were prejudiced by the court's delay in appointing a bonding expert, there is no admissible evidence of an earlier request in the record. Instead, the P.s cite to the argument of their own counsel in July 2015, after the Evidence Code section 730 expert had completed her report.

Second, the court had before it ample evidence about the extent to which Alexandria had bonded to the P.s, and the extent to which a change in placement would create a significant risk of serious harm. Well in advance of the September 2015 good cause hearing, the court appointed a neutral evaluator, Doi Fick, under Evidence Code section 730. The court's appointment order directed Doi Fick to examine Alexandria, the P.s, and the R.s, and to speak with Alexandria's therapist Wejbe, as well as any other person she deemed necessary and appropriate. The order directed Doi Fick to prepare a report containing her opinions, findings and conclusions on nine different issues, including Alexandria's attachment to the P.s and the R.s, "the trauma or impact on Alexandria's mental and/or emotional health" if her attachment with the P. family was broken, and how open the P.s and the R.s were to discussing her psychological and emotional well-being. To the extent the P.s believed Doi Fick had not adequately addressed the required topics in her report, they did not raise an objection. More importantly, no party argued that Alexandria was not bonded to the P.s, and the only portion of McMahon's report that was removed pertained to her observations of and interactions with Alexandria.

Third, the court's decision to exclude portions of McMahon's report were based on counsel's failure to advise the expert of the limitations the court had placed on her activities. The court had wide discretion on this issue, and even if it was error to exclude the report, any

error was harmless because it was undisputed that Alexandria had a strong, primary attachment to the P. family. McMahon testified at the good cause hearing and gave her opinion about the importance of stability and the likelihood Alexandria would suffer trauma. The fact that portions of her report based on her observations of Alexandria had to be removed before her report was admitted into evidence does not rise to the level of prejudicial error.

Cross-examination of social worker

Relying on his discretion under Evidence Code section 352, Judge Trendacosta denied the P.s' request to call Wilson, the Department social worker, as a witness. Later, the P.s sought to either cross-examine Wilson or have Wilson's reports excluded. Judge Diaz did not take any new testimony, and so did not grant either request.

The P.s argue that it was an abuse of discretion per se to consider the reports without allowing them to cross-examine the author, citing to *In re Matthew P.* (1999) 71 Cal.App.4th 841, 851-852. The facts here are more analogous to those at issue in *In re Damion B.* (2011) 202 Cal.App.4th 880. In that case, medically-fragile twins had lived with de facto parents since they were six months old, and the social service agency recommended that the children be returned to their mother. De facto parents opposed the recommendation, and sought an evidentiary hearing. The dependency court noted that it had appointed counsel to represent de facto parents, and had considered evidence in the form of caretaker information forms, but it would not permit de facto parents to cross-examine the social worker. (*Id.* at pp. 883-887.) The Court of Appeal affirmed because de facto parents had ample opportunity to make their

position known to the court, unlike the parents in In re Matthew P., who had been denied any opportunity to fully present their position. In the hearing before Judge Trendacosta, the P.s had ample opportunity to present evidence, testimony, and argument. The P.s called five witnesses, including a social worker and two experts who were critical of Doi Fick's report. The court hearing took place over five separate days, with a total of ten witnesses. The court reasonably exercised its discretion, because any testimony by Wilson would be cumulative of testimony already before the court. As Judge Trendacosta made clear when he denied the request to have Wilson on call to testify, the P.s had already "testified at some length about their communication, or . . . lack thereof, with the Department," and the hearing was not focused on what the Department did or did not do. Similarly, Judge Diaz did not abuse his discretion in denying the P.s' motion to either exclude the Department reports or permit examination of Wilson.

Request to present additional evidence or testimony

The P.s argue that a court cannot make credibility determinations or assign relative weight to evidence without hearing live testimony. We disagree. Judge Diaz was following our peremptory writ in assuring that the matter was resolved as promptly as possible, and permitting live testimony would only delay a decision. In our peremptory writ, we specifically directed, "Absent a determination of good cause in the discretion of the dependency court, the court is not obligated to consider additional evidence on the issue of placement." (*R.P. v. Superior Court* (Nov. 25, 2015, B268111) [nonpub. opn.].)

We also directed the court to resolve the issue of placement within 30 days. Although the P.s requested to

present additional testimony, they did not establish that there was good cause to do so. Their only argument was that a half-year had passed, and additional evidence, including testimony from Alexandria and her kindergarten teacher, would assist the court in making its decision. Simply put, since Judge Diaz was well aware of our November 25, 2015 order and the need to resolve the good cause issue expediently, he did not abuse his discretion in denying the request for additional testimony.

To the extent the P.s are arguing that the court could not make credibility determinations without live testimony, they are essentially arguing that Judge Diaz should have conducted a new good cause hearing, rather than reviewing the court records and the earlier hearing transcripts to make his determination. That was never our intent. Principles of appellate review constrain the appellate courts from making credibility determinations through transcripts alone. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 494.) But there is no bar to a judge reviewing the record to reach a determination, even in a criminal case. (*See, e.g., People v. Collins* (2010) 49 Cal.4th 175, 257-258 [not a denial of due process for a judge other than the original trial judge to review the record and rule on a motion under Penal Code section 190.4, subdivision (c), for an automatic application to modify a death penalty verdict].)

DISPOSITION

The court's order finding no good cause to depart from the ICWA's adoptive placement preferences and directing Alexandria to be placed with the R.s is affirmed.

KRIEGLER, J.

We concur:

TURNER, P.J.
BAKER, J.

APPENDIX D

Seal: Supreme Court FILED
Sept. 14, 2016
Frank A. McGuire Clerk, Deputy

Court of Appeal, Second Appellate District, Division Five – No. B270775
S236462

IN THE
SUPREME COURT OF CALIFORNIA

EN BANC

IN RE ALEXANDRIA P., A PERSON COMING UNDER THE JUVENILE COURT LAW.

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

PLAINTIFF AND RESPONDENT,

V.

J.E.,

DEFENDANT AND RESPONDENT;

R.P., ET AL.,

OBJECTORS AND APPELLANTS;

CHOCTAW TRIBE OF OKLAHOMA,

INTERVENER AND RESPONDENT.

The request to appear as counsel pro hac vice, filed by Lori Alvino McGill, is granted.

The motion to strike attachments to the *amicus curiae* letter in support of petition for review is granted.

The petition for review is denied.

Corrigan, J., was absent and did not participate.

Seal: Cantil-Sakauye
Chief Justice