No. 17-429

In The Supreme Court of the United States

JESSICA TAVARES,

Petitioner,

v.

GENE WHITEHOUSE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE GOLDWATER INSTITUTE IN SUPPORT OF PETITIONER

TIMOTHY SANDEFUR*
ADITYA DYNAR
SCHARF–NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
**Counsel of Record*

Counsel for Amicus Curiae Goldwater Institute

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301 *et seq.*, promises certain basic legal rights to Native Americans *vis-à-vis* tribal governments. But in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), this Court held that a person whose ICRA rights have been violated may resort to federal court only via habeas corpus—meaning, only where she is subject to "detention" or punishments tantamount to detention, and not where other rights specified in ICRA have been violated. The Ninth Circuit, in acknowledged conflict with other Circuits, narrowed this requirement so that it applies more narrowly than the "custody" requirement under the federal habeas corpus statute, 28 U.S.C. § 2254. Petitioner asks this Court whether that was in error.

Amicus Goldwater Institute proposes an additional question: Should *Santa Clara Pueblo* be overruled?

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INTEREST OF *AMICUS CURIAE*[1]

The Goldwater Institute ("GI") was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, policy briefings and advocacy. Through its Scharf–Norton Center for Constitutional Litigation, GI litigates and files *amicus* briefs when its or its clients' objectives are directly implicated.

GI's Equal Protection for Indian Children project is devoted to reforming the federal and state legal treatment of Native American children subject to the Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq*. GI is currently litigating civil rights cases in federal and state courts challenging various provisions of the Indian Child Welfare Act for violating constitutional requirements. *See, e.g.*, *S.S. v. Colorado River Indian Tribes*, No. 17-95 (cert. pending); *Carter v. Washburn*, No. 17-15839 (9th Cir., pending); *Renteria v. Shingle Springs Band of Miwok Indians*, No. S243352 (Cal. Supreme Ct. July 24, 2017).

GI scholars have also published ground-breaking research on the well-intentioned but profoundly flawed

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[1] Pursuant to Supreme Court Rule 37(6), counsel for *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *amicus*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief. The parties' counsel of record received timely notice of the intent to file the brief, and all parties have consented to the filing of this brief.

workings of the Indian Child Welfare Act. *See, e.g.*, Mark Flatten, *Death on a Reservation* (Goldwater Institute 2015);[2] Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1 (2017).

The question regarding the scope of the habeas review provision of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301 *et seq.*, is of extraordinary practical significance in Indian Child Welfare Act cases in particular, because that Act often forces child welfare cases out of state court and into tribal courts, where ICRA's extremely narrow habeas corpus requirement limits the litigants' chances of obtaining federal protection of their civil rights. In other words, both Indian children and non-Indian adults are often forced into tribal courts, and thereby denied effective enforcement of basic constitutional guarantees, thanks to the limits imposed on ICRA by *Santa Clara Pueblo*. If the even *narrower* interpretation of ICRA adopted below is left undisturbed, non-Indian adoptive and foster parents who find themselves sent to tribal court under the Indian Child Welfare Act's jurisdiction-transfer provisions will have even *less* chance of obtaining federal court review if tribal courts disregard their fundamental rights to due process. *Amicus* believes its litigation experience and policy expertise will aid this Court in consideration of the petition.

[2] *Available at* https://goldwater-media.s3.amazonaws.com/cms_page_media/2015/7/8/0715-EPIC-Pamphlet%20Spreads.pdf.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the right to seek federal court protection for civil rights guaranteed against tribal governments under ICRA. Petitioner was banished from tribal lands, without process and in retaliation against Petitioner's exercise of her right to speak freely against alleged fraud and mismanagement in tribal government—a right expressly provided in ICRA. Pet. App. 5a–7a.

This case would have been easy if the Petitioner had been banished from the premises of a state capitol in retaliation for holding a lawful, peaceful protest against a state government: she would have had the opportunity to go to federal court for redress of grievances. *See, e.g.*, *Cox v. Louisiana*, 379 U.S. 536 (1965).

But the court below denied Jessica Tavares that protection because the perpetrator of the violation was a tribal government. Thus, the Ninth Circuit essentially affirmed the tribal court's self-serving order that upholds the punishment meted out to Tavares for expressing her opinion and petitioning her tribal government for redress of grievances—a right *expressly guaranteed* by ICRA, 25 U.S.C. § 1302(a)(1). It did so by holding that *banishment* does not equate to "detention" as used in the ICRA habeas provision, 25 U.S.C. § 1303, and that "detention" must be construed more narrowly than the word "custody" in the federal habeas statute, 28 U.S.C. § 2254.

That holding created a three-way circuit split:

First, the decision below falls on the lower end of the spectrum, concluding that ICRA Section 1303 is narrower than 28 U.S.C. § 2254.

Second, Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d Cir. 1996), falls in the middle, concluding that ICRA Section 1303 is coterminous with 28 U.S.C. § 2254.

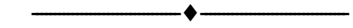
Third, *DeMent v. Oglala Sioux Tribal Ct.*, 874 F.2d 510, 515–16 (8th Cir. 1989), falls on the other end of the spectrum, concluding that ICRA Section 1303 is broader than 28 U.S.C. § 2254.

Petitioner recommends that this Court consider granting certiorari in this case to reconsider its erroneous decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and to hold that citizens whose ICRA rights have been violated by a tribal government have the same remedies in federal court that they would have under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) or 42 U.S.C. § 1983. *Santa Clara Pueblo* adopted an excessively narrow interpretation of ICRA, which gives tribal governments unchecked authority in contravention to ICRA's stated purposes, and contrary to the language of that statute—and one that deprives Tavares—who as an American citizen, 8 U.S.C. § 1401(b), is entitled to the full protection of the United States Constitution and ICRA—of *any* legal protection for the fundamental right of protesting what she believes to be the wrongful act of an American government. In other words,

because she is a member of an Indian tribe, she is literally treated as a second-class citizen.

In the alternative, this Court should review this case and adopt the third category noted above: the habeas remedy available under ICRA should be read *more* broadly than the remedy available under ordinary federal habeas. As *DeMent* made clear, such a remedy is critical to protect Americans—both those who are tribal members and those who are not—against wrongful acts by tribal governments, particularly in cases involving children subject to the Indian Child Welfare Act.

Whatever the historical reasons for the second-class treatment of Indians perpetuated by *Santa Clara Pueblo*, none of the rationales for it are "justified by *current* needs." *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2916 (2013) (emphasis added). This Court should take this case to guarantee Native American citizens the protections for fundamental human rights promised by ICRA.



REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER TO OVERRULE *SANTA CLARA PUEBLO*

A. The limits on federal review imposed by *Santa Clara Pueblo* encourage tribal government abuse and relegate American Indians to second-class status.

ICRA promises certain substantive rights to those American citizens who are also citizens of Indian tribes as well as those who are not, by absolutely prohibiting tribal governments from, among other things, depriving individuals of the right to petition for redress of grievances. 25 U.S.C. § 1302(a)(1). Nothing in ICRA's text limits these rights or says that tribal citizens will be denied a remedy in federal court in the event of a violation. Nevertheless, in *Santa Clara Pueblo*, *supra*, this Court interpreted the available remedies narrowly, to hold that the only route for federal judicial review is by habeas corpus.

That holding effectively neutered ICRA in all but rare circumstances. It runs counter to Congress's plain intent in adopting ICRA, effectively relegates tribal members and tribal-court litigants to second-class status by depriving them of civil rights guarantees that other Americans enjoy, and lacks support in the text of ICRA or the legislative history. *Santa Clara Pueblo* is "a fundamental barrier to a just legal process in Indian country," because it "creat[es] the specter of tribal powers that cannot be checked outside of the tribe."

CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 115 (1987).

Given that tribal courts are "unconstrained" by the United States Constitution, *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016), it remains an open question whether American citizens who seek redress in *tribal* court for violations of their *federal* rights, privileges, or immunities have the option of seeking review in federal court. This, of course, runs counter to the right of these Americans to seek redress in *federal* court when *states* violate their *federal* rights. And because, unlike state-court litigants, who have the option of removing cases to federal court, 28 U.S.C. § 1441, no current avenue exists for removing tribal court cases to federal court, the only way for tribal-court litigants to obtain relief from a neutral federal judge is ICRA's habeas provision.

The contrast is therefore stark. While state or federal courts are available for people whose constitutional rights are violated by a state government, the same people have *no* state or federal court remedy when their *tribal* governments violate their rights, except for that tiny fraction of cases that fit within the remedy allowed by *Santa Clara Pueblo*.

In other words, although Native Americans are citizens of the United States, and tribal governments are "dependent" sovereigns, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16–17 (1831)—unlike states, which are not "dependent"—these citizens are vulnerable to civil-rights deprivations for which they have no

recourse, so long as those deprivations do not amount to "detention." A Native American citizen can be deprived of free speech, freedom of the press, or any of the other rights *expressly guaranteed* in ICRA, and have no federal recourse.

As a result of *Santa Clara Pueblo,* "there is absolutely no guarantee that Indian tribes will provide due process or equal protection in the exercise of their governmental powers. Such a scheme is an American civil rights anomaly." *See* Bradley B. Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. PUGET SOUND L. REV. 211, 213–14 (1991). It is worse than an anomaly: it is second-class treatment.

Such treatment cannot be justified on the theory that these citizens choose to be members of a tribe and could, if they wished, surrender their tribal membership. To make a federal guarantee of their rights dependent upon their surrendering their choice to participate in tribal citizenship—a form of political association guaranteed by the First Amendment—would be an "unconstitutional condition," amounting to a requirement that tribal citizens surrender their membership in a tribe in exchange for the benefits of their U.S. citizenship. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596 (2013).

Nor can such treatment be justified on the theory that the individual rights guaranteed by ICRA are a form of western cultural imperialism; all American Indians are citizens of the United States entitled to the

same legal rights as other citizens, 8 U.S.C. § 1401(b), and ICRA by its plain words expressly protects not just Native American tribal-court litigants, but also those who do not have Native American ancestry. *See* 25 U.S.C. § 1302. "Our constitution . . . neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). The law regards "man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Id*.

B. *Santa Clara Pueblo*'s interpretation of ICRA lacks support in the statutory text and has deleterious consequences.

Santa Clara Pueblo was decided in 1978, at the height of a trend toward Indian law reform. One aspect of that trend was an expansion of tribal government autonomy. *See generally* N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 29–31 (2008). But that degree of autonomy is not to be found in ICRA itself, which declares simply that "no Indian tribe . . . shall make or enforce any law . . . abridging . . . the right of the people peaceably to assemble and to petition for a redress of grievances. . . ." 25 U.S.C. § 1302(a)(1).

The *Santa Clara Pueblo* court found, however, that the only remedy available for violations of ICRA was habeas corpus, because Section 1303 provides that "[t]he privilege of the writ of habeas corpus shall be

available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." Yet this language does not limit the rights available under Section 1302, or specify that remedies other than habeas corpus are withheld. As Justice White observed in his dissenting opinion, many of the rights specified in ICRA are not susceptible of habeas corpus review in any event—such as the right to just compensation in the case of a taking of property—which strongly implies that Congress did not intend the Section 1303 habeas provision to be the exclusive remedy for violations of rights guaranteed under Section 1302. *See* 436 U.S. at 74 n.3 (White, J., dissenting).

Nor was the legislative history relied upon by *Santa Clara Pueblo* particularly persuasive. While Congress did amend the original proposal to adopt the habeas provision, it also limited the habeas provision in Section 1303 to *criminal* proceedings, which means that its decision to change the provision says nothing whatsoever about the substantive rights referenced in Section 1302, which are not criminal in nature. Justice White also observed that there were many other reasons why Congress might have changed the original proposal, including limiting the Attorney General's authority, which say nothing about the remedy for violations of Section 1302. *See id.* at 78.[3]

[3] *Poodry* compounded that error by employing the same interpretive methodology. The *Poodry* court, like the *Santa Clara Pueblo* majority, relied on irrelevant language that *failed* in Congress to interpret the meaning of the words that did not. 85 F.3d at 882–84.

More importantly, it is plain that ICRA's purpose was "'to insure that the American Indian is afforded the broad constitutional rights secured to other Americans,'" and a federal cause of action is *absolutely necessary* for the achievement of this goal. *Id.* at 80 (quoting legislative history).

The denial of such a right of action has only one result: to leave it to tribal courts themselves to decide whether or not to respect the specified rights. Yet it is a fundamental principle of justice that no person—and no entity—should be the judge in his or its own case. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905–06 (2016). The risk is heightened here, because tribal courts often operate outside of the requirements of the Constitution—most notably, without the separation of powers—meaning that the influence of tribal officials over tribal courts sometimes results in self-serving by the tribal courts.

Take, for example, *Renteria v. Shingle Springs Band of Miwok Indians*, No. 2:16-CV-1685-MCE-AC, 2016 WL 4597612 (E.D. Cal. Sept. 2, 2016), an Indian Child Welfare Act case in which the parents of three Indian children were killed in a car accident. When a dispute arose among their surviving relatives over who should take them in, the relatives who are members of a tribe obtained an order from the tribal court commanding that the children be delivered up to a Native American relative—who happened to serve on the tribal council, and therefore supervised the tribal judge who issued that order. *Id.* at *8–10. A federal court found this violated due process (in a case not

brought under ICRA), but it is far more common—given the extremely narrow opportunities for federal court review—for such cases of conflict-of-interest or other due process violations to stand undisturbed. *See* Furber, *Two Promises*, *supra*, at 213 n.9 (citing multiple government findings that tribal governments often lack sufficient separation of powers).

As Judge Canby noted, the upshot of *Santa Clara Pueblo* is that while "federal substantive standards are imposed on the tribes" in ICRA, "a violation, other than in the criminal area, is not reviewable by any federal court, including the Supreme Court." William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 10 (1987). This simply *cannot* be what Congress intended when it wrote ICRA—a statute it expressly designed to *limit* tribal sovereignty so as to protect the rights of American citizen tribal members.

Moreover, although ICRA was designed to impose a uniform baseline of protections for citizens in Indian country, the result of the judicial abdication in *Santa Clara Pueblo* was to cause confusion and disarray among tribal courts. "[A]lthough the United States Supreme Court has articulated a specific interpretation of (let's say) due process, there is nonuniformity of interpretation of 'due process' as between general society and the enclaves of Indian country. There is also nonuniformity of interpretations between different Native American communities." Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights*

Act, 69 FORDHAM L. REV. 479, 488 (2000). This doctrinal chaos robs ICRA of the force Congress meant it to have.

Santa Clara Pueblo represents an instance of judicial rewriting of a statute. In the service of broadening tribal autonomy, the court imposed limits on ICRA that Congress did not adopt. The consequence was to deprive tribal members of one of the most essential benefits of their American citizenship: the opportunity to obtain federal court protection of their civil rights. This Court should grant certiorari to reconsider that decision.

II. THIS COURT SHOULD NOT FURTHER REDUCE OPPORTUNITIES FOR FEDERAL COURT REVIEW UNDER ICRA, BUT SHOULD INSTEAD CONSTRUE ICRA HABEAS *MORE* BROADLY THAN 28 U.S.C. § 2254

The Ninth Circuit held that ICRA's habeas review is *narrower* than the federal habeas review statute. Pet. App. 3a. Petitioner asks this Court for a rule that ICRA's habeas review should be *coterminous* with federal habeas review—a question on which circuit courts are split. But this Court can go further, as some lower courts have, and confirm that ICRA's habeas review provision is *broader* than the federal habeas review provision.

This has particular relevance to cases involving Indian children, because some lower courts in Indian Child Welfare Act cases have held that ICRA's habeas review provision is *broader*, and that it allows for

habeas review in federal court of tribal court child custody cases—a category of cases in which federal habeas review is typically not available under 28 U.S.C. § 2254.

By way of background, the Indian Child Welfare Act provides for two ways in which a child custody proceeding, or part thereof, may end up in tribal court. *Compare* 25 U.S.C. § 1911(a) *with* 25 U.S.C. § 1911(b). For an Indian child domiciled *on* reservation, the child's tribe typically has jurisdiction. *Id.* § 1911(a). For an Indian child domiciled *off* reservation, the case is typically heard in state court—but state court "foster care placement" and "termination of parental rights" proceedings may usually be "transfer[red]," upon request, to a tribal court. *Id.* § 1911(b). Only where "good cause" exists to deny such transfer, or where a parent vetoes the transfer, may such a request be rejected.

But once a proceeding is transferred to tribal court, litigants—including non-Indians—are deprived of the opportunity they would have had in state court to seek remedy for violations of the Bill of Rights or violations of the Indian Child Welfare Act itself (which does not apply in tribal courts, *see* 25 C.F.R. § 23.103(b)(1)). Instead, they can only assert a violation of ICRA, and only subject to the *Santa Clara Pueblo* rule. Since tribal courts are not required to afford litigants the protections provided by the Constitution, *United States v. Lara*, 541 U.S. 193, 208–09 (2004), the consequence is this: *a non-Indian adult wishing to adopt an Indian child is forced into tribal court, where she is denied a fair hearing, and has no legal recourse*.

Some early cases had held that habeas relief in federal court is not available from a tribal court order dealing with such child custody disputes. *See, e.g.*, *Weatherwax* ex rel. *Carlson v. Fairbanks*, 619 F. Supp. 294 (D. Mont. 1985); *Wells v. Philbrick*, 486 F. Supp. 807 (D.S.D. 1980). The Eighth Circuit held otherwise in *DeMent*, 874 F.2d at 515–16, which said that "habeas corpus relief is available" under ICRA "to determine . . . the appropriateness of the tribal court's exercise of jurisdiction."

The court acknowledged that ordinary federal habeas corpus under 28 U.S.C. § 2254 "has generally not been available to challenge a state decree on parental rights or child custody." 874 F.2d at 515. It nonetheless read ICRA's habeas provision *broader than* the federal habeas provision, because by "illegally . . . by making [the children] wards of the tribal court and . . . refusing to enforce the California custody decree," the tribal government had transformed the case from a "child custody battle" into "a dispute over whether a tribal court violates a non-Indian's due process rights by refusing to give full faith and credit to a state custody decree." *Id*. Because "a federal court order may be the only way to compel the tribe to return the children" the Eighth Circuit found it proper to exercise habeas jurisdiction under ICRA, even though such relief would not typically be available under the ordinary federal habeas statute. *Id.*

The Ninth Circuit itself has interpreted ICRA's habeas provision broadly, like the *DeMent* court. In *United States* ex rel. *Cobell v. Cobell*, 503 F.2d 790, 795

(9th Cir. 1974), it held that ICRA habeas review was available to review a tribal court's temporary restraining order that prevented the birth father from removing his children from the reservation.

While this Court has said that children placed in foster homes are not in "'custody' of the State" for purposes of ordinary federal habeas, *see Lehman v. Lycoming Cnty. Children's Servs. Agency*, 458 U.S. 502, 510 (1982), the Eighth and Ninth Circuits read the word "detention" in ICRA more broadly precisely because in the absence of such broad review, tribal governments would be free to abuse their powers under the Indian Child Welfare Act in ways that violated fundamental fairness and deprived vulnerable American citizens of their right to due process of law.[4]

These courts were right to broaden the availability of ICRA review in federal court. Those holdings provided a precious, much-needed protection against governmental entities that—in their dealings with the fundamental rights of American citizens—are otherwise unanswerable to and unaccountable under the United States Constitution. Limited as it may be, such habeas review is of extreme importance to litigants

[4] *Lehman* has had some ripple effect in the Ninth Circuit. While *DeMent* (1989)—decided after *Lehman* (1982)—allows ICRA habeas review in federal court in child custody cases, the Ninth Circuit has questioned, but not decided, the continued availability of such review "in a child custody dispute after *Lehman*." *Boozer v. Wilder*, 381 F.3d 931, 934 n.2 (9th Cir. 2004). The decision below appears to have abrogated *Cobell*'s broader reading of ICRA—which sharpens the circuit split and indicates why this Court's guidance is urgently needed.

who otherwise would have to proceed in tribal court with a severely proscribed ability to argue violations of federal rights, privileges, or immunities.

To put the point more bluntly: adults who wish to protect the rights of Indian children, or to adopt them, and who in any ordinary child welfare proceeding would be protected by the United Constitution in a state or federal court, are often forced into tribal court under the Indian Child Welfare Act, and then stripped of those protections by a tribal court proceeding that is not governed by the Bill of Rights, *see Lara*, *supra*—whereupon they are deprived of the opportunity to seek federal court enforcement of even those rights specified in ICRA. Or will be, if the decision below is left undisturbed.

The Congress that enacted ICRA sought to "apply[] some basic constitutional norms to tribal governments, in the form of restrictions similar to those contained in the Bill of Rights and the Fourteenth Amendment." *Poodry*, 85 F.3d at 881. Yet by narrowing ICRA's protections even beyond the unduly strict limits imposed by *Santa Clara Pueblo*, the decision below betrays that promise—with consequences that could hardly be worse for children subject to the Indian Child Welfare Act and the adults who love them.

Indeed, the reduced protection for individual rights in tribal court has already sparked a disturbing trend of litigants strategically engaging in forum-shopping and choosing tribal fora over state or federal fora. This Court recently saw one such example: *Dollar*

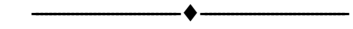
General Corp. v. Mississippi Band of Choctaw Indians, 136 S. Ct. 2159 (2016). Although the plaintiff in that case could have brought claims in state court, it chose to pursue litigation in tribal court instead because that forum presented the advantage of an incomplete guarantee of Due Process—which was outcome-determinative and worked to the disadvantage of the defendant. *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, No. 13-1496, Pet. at 6, 12.

Tribes in Indian Child Welfare Act cases, too, actively forum-shop under the guise of seeking jurisdiction transfers under 25 U.S.C. § 1911(b), in order to obtain desired outcomes in tribal courts—outcomes they could not obtain in state or federal court.

Consider the example of baby girl A.D., an Arizona Indian child who was born substance-exposed, and placed in the care of S.H. and J.H. when she was five days old. *Gila River Indian Cmty. v. Department of Child Safety*, 395 P.3d 286, 288 (Ariz. 2017). With the tribe's consent the parental rights of A.D.'s birth parents were terminated in a state court proceeding in which the tribe fully participated. *Id.* at 288–89. This meant S.H. and J.H. were free to adopt, and they filed an adoption petition. *Id.* At that point—one year after A.D. was born, and after she had bonded with her foster parents—the tribe objected to A.D.'s placement with S.H. and J.H. because they were not of Native American ethnicity—and the tribe then sought to have the case transferred to its own tribal court, in an overt effort to thwart that adoption. *Id.* This form of express forum-shopping was ultimately invalidated by the

Arizona Supreme Court, *see id.*, and a federal court even called the tribe's efforts a "frivolous" abuse of the law. *Carter v. Washburn*, No. CV-15-01259-PHX-NVW, 2017 WL 1019685, at *6 (D. Ariz. March 16, 2017). But the forum-shopping problem was quite real and—if it had succeeded—would have caused a lasting, irredeemable injury to A.D. And once in tribal court, A.D. and her parents would have had no federal remedy for violations of their due process rights.

The forum-shopping concerns caused by the unduly narrow federal review provided under ICRA are nothing new. *See, e.g.*, *Santa Ynez Band of Mission Indians v. Torres*, 262 F. Supp. 2d 1038, 1046 (C.D. Cal. 2002) (recognizing the "perverse forum shopping incentives" that result from litigants being "precluded from asserting a violation of their civil rights" in federal court). Yet the decision below worsens this problem and encourages forum-shopping by giving tribal governments a loophole where they can deprive Americans of civil rights protections that Congress promised them in ICRA.



CONCLUSION

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Yet under *Santa Clara Pueblo*'s rule, ICRA "confers federal rights for which there is no federal judicial remedy." STEPHEN

L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 247 (4th ed. 2012). Thanks to that decision, ICRA is largely rendered meaningless, and "its insertion in the fundamental law" is rendered "a vain and futile proceeding." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866).

This Court should *grant* the petition to ensure meaningful protection for civil rights in cases involving tribal courts.

Respectfully submitted,
Dated: October 2017

TIMOTHY SANDEFUR*
ADITYA DYNAR
SCHARF–NORTON CENTER FOR
CONSTITUTIONAL LITIGATION
AT THE GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
**Counsel of Record*

Counsel for Amicus Curiae Goldwater Institute