No. 16-

In the Supreme Court of the United States

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

V.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

KATYA S. CRONIN
TUCKER ELLIS LLP
950 MAIN AVE,
SUITE 1100
CLEVELAND, OH 44104
(216)592-5000
katya.cronin@tuckerellis.com

LORI ALVINO MCGILL
Counsel of Record
WILKINSON WALSH + ESKOVITZ LLP
1900 M STREET, NW
SUITE 800
WASHINGTON, DC 20036
(202) 847-4035
lalvinomcgill@wilkinsonwalsh.com

Counsel for Petitioners

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.

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 child's 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).

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.

Lexi's early childhood was marked by neglect, abuse, and instability. Lexi was born addicted to methamphetamine. As an infant, Lexi was passed around and left for days at a time with various acquaintances while her mother went out in search for more drugs. 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. *Id.*

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. App. 3a, 37a.

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, and had lost custody of at least one other child. Despite his troubling history, DCFS requested and the court ordered reunification services for Jay E. App. 11a.

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 8a. 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.

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. 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.

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. 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. App. 16a.

The juvenile court admonished both the tribe and DCFS for their respective roles in delaying contact between Lexi and the R.s, 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" the court had ever

made. *In the Matter of Alexandria P.*, No. CK58667, Statement of Decision, Dec. 9. 2013.

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. The court acknowledged that if this were the "typical case" it would "clearly be in [Lexi's] 'best interests' to remain with" Petitioners. *In the Matter of Alexandria P.*, No. CK58667, Statement of Decision (Nov. 3, 2015), p. 2.

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. *Id.* at 3-4. 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. *Id.* at 6. 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. *Id.* at 7.

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. *In the Matter of Alexandria P.*, No. CK58667, Mar. 9, 2016 Tr.

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. *Id.* 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. *Id.*

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_tribal_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).

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. 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).

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 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.

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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).

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 relationship); Trope, *Understanding the Supreme Court's Decision in Adoptive Couple v. Baby Girl*, 61

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

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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").

Indian, 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 replace 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.

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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.*

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 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.

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*

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

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 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,

KATYA S. CRONIN
TUCKER ELLIS LLP
950 MAIN AVE,
SUITE 1100
CLEVELAND, OH 44104
(216) 592-5000
katya.cronin@tuckerellis.com

LORI ALVINO MCGILL
Counsel of Record
WILKINSON WALSH + ESKOVITZ LLP
1900 M STREET, NW,
SUITE 800
WASHINGTON, DC 20036
(202) 847-4035
lalvinomcgill@wilkinsonwalsh.com

Counsel for Petitioners

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