No. 16-500

In The Supreme Court of the United States

R.P. and S.P., DE FACTO PARENTS,

Petitioners,

v.

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

Respondents.

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

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF GOLDWATER INSTITUTE AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Amici Goldwater Institute and Cato Institute have received consent to file this *amicus* brief from Petitioner and from Respondents Los Angeles County Department of Children and Family Services, Minor A.P., and Father J.E., but counsel for Respondent Choctaw Nation has declined to respond to *amici*'s repeated requests for consent, thus necessitating this motion.

Amici believe the questions presented in this petition go to the heart of our constitutional protections for equal protection and due process, as well as this nation's moral obligation to ensure full and non-discriminatory protection for the rights of children of Native American ancestry. At issue is a federal law that establishes a de jure system of racial discrimination in foster care and adoption proceedings involving children who are, for biological reasons alone, eligible for membership in an Indian tribe. That system makes it harder for state child services workers to rescue children of Native American ancestry from abusive or neglectful homes, or to find them loving, permanent adoptive homes. Simply because these children have an Indian ancestor, they are deprived of the right to an individualized determination of their case, of the right to equal, non-discriminatory treatment, and of other basic constitutional rights.

WHEREFORE, the Goldwater Institute and the Cato Institute seek leave to file the accompanying brief *amicus curiae*.

DATED: November 7, 2016

Respectfully submitted,

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QUESTION PRESENTED

In *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013), this Court declared that it "would raise equal protection concerns" if the Indian Child Welfare Act were used "to override . . . the child's best interests" simply "because an ancestor – even a remote one – was an Indian." The court below ruled that the Act establishes a separate but equal – actually separate and substandard – "best interests" test in Indian child welfare cases. This means that while the child's best interest is "the paramount consideration" in foster care or adoption cases involving children of all *other* races, *In re Guardianship of Ann S.*, 202 P.3d 1089, 1106 n.19 (Cal. 2009), courts should only "take an Indian child's best interests into account as *one of the constellation of factors*" when "the best interests of an Indian child are being considered." *In re Alexandria P.*, 1 Cal. App. 5th 331, 351 (2016) (emphasis added).

Does this segregated best-interests standard violate equal protection?

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INTEREST OF *AMICI 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 papers, editorials, policy briefings and forums. 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 ("ICWA"), 25 U.S.C. § 1901, *et seq.* GI is currently litigating a civil rights case in the Arizona Federal District Court which contends that ICWA violates the fundamental requirements of equal treatment under law, respect for individual rights, and federalism. *Carter v. Washburn*, No. 15-cv-1259 (D. Ariz. July 6, 2015). GI has also represented parties in cases involving ICWA (*Gila River Indian Cmty. v. Dep't of Child Safety*, 379 P.3d 1016 (Ariz. Ct. App. 2016)), and appeared as *amicus curiae* in state and federal courts in cases involving ICWA (*see, e.g.*, *In*

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[1] Pursuant to Supreme Court Rule 37(6), counsel for *amici curiae* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *amici*, 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 the parties have consented to the filing of this brief.

re T.A.W., 2016 WL 6330589 (Wash. Oct. 27, 2016); *In re Matter of A.P.*, California Supreme Court No. S233216 (2016); *Renteria v. Shingle Springs Band of Miwok Indians*, No. 16-cv-1685 (E.D. Cal. July 21, 2016)).

GI scholars have also published ground-breaking research on the well-intentioned but profoundly flawed workings of ICWA. *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 LEG. RTS. J. ___ (forthcoming 2017).[3]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and appears as *amicus curiae* in cases of constitutional significance affecting the right of all Americans to equal treatment before the law.

[2] *Available at* http://goldwaterinstitute.org/en/work/topics/constitutional-rights/equal-protection/death-on-a-reservation-interactive-pdf/.

[3] *Available at* http://ssrn.com/abstract=2796082.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

Three years ago, this Court warned that it "would raise equal protection concerns" if ICWA, 25 U.S.C. § 1901 *et seq.*, were used as a "trump card" to "override ... the child's best interests" "solely because an ancestor – even a remote one – was an Indian." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013).

This is that case.

Lexi has lived with Petitioners for four of the six years of her life. She has no cultural, social, or political connection to the Choctaw tribe, and has never resided or been domiciled on tribal lands. Her only connection to the tribe is biological: her great-great-great-great grandparent was a full-blooded Choctaw Indian. If Lexi were of any other ethnicity, Petitioners would be free to seek adoption, and California courts would apply the ordinary "best interests of the child" test in deciding whether to grant that petition. *C.V.C. v. Superior Court*, 29 Cal. App. 3d 909, 914 (1973) ("In adoption proceedings the child's best interest is the primary concern."). And Lexi's "fully developed interest in a stable, continuing, and permanent placement with [her] fully committed care-giver[s]" would be given extraordinary weight in the best-interests determination. *In re Guardianship of Ann S.*, 202 P.3d 1089, 1106 (Cal. 2009) (citing *Guardianship of Kassandra H.*, 64 Cal. App. 4th 1228, 1239 (1998)).

But solely on account of the DNA in her cells, ICWA subjects Lexi to a separate-but-equal set of rules

– actually, separate and substandard – that empowers the Choctaw Nation of Oklahoma to force her removal from the Petitioners, and to place her with *non-Native non-relatives* in Utah, simply because the tribal government deems that placement preferable.

In upholding that action, the California Court of Appeal ruled that the "best interests" test for Indian children is different than the "best interests" test that applies to all other children. Where black, white, Asian, or Hispanic children are concerned, their individual best interests are paramount. *In re Guardianship of Ann S.*, 202 P.3d at 1106, n.19. But "[w]hen the best interests of an *Indian child* are being considered," courts must compromise those interests, and "take an Indian child's best interests into account as *one of the constellation of factors*." *Alexandria P.*, 1 Cal. App. 5th at 351 (emphasis added). Nor is that all. ICWA mandates that state officials treat children of biological Indian ancestry differently from children of all other races. Among other things, an Indian child is:

- ***Deprived of any individualized determination of her fate.*** ICWA requires courts to presume that it is in an Indian child's best interests to be placed with families of Native American ethnicity, in all but rare circumstances. This means that custody, foster care placement, and adoption decisions are based on factors irrelevant to a child's *individual* needs. In fact, Bureau of Indian Affairs (BIA) Guidelines for the application of ICWA make clear that courts should *not* engage in "an

independent consideration of the best interest of the Indian child," because ICWA's preferences automatically "reflect the best interests of an Indian child in light of the purposes of the Act." 80 Fed. Reg. 10,146-02, 10,158, F.4(c)(3) (2015). In other words, ICWA imposes a blanket race-based presumption for all children of Native American ancestry that override an Indian child's *specific* interests.

- ***Given less protection against abuse and neglect.*** ICWA purports to protect the "welfare" of children, but actually makes it more difficult to protect them from abuse or neglect. For example, it requires state officials to make "active efforts" to return abused or neglected children to families that have mistreated them and forbids termination of parental rights unless the likelihood of abuse is established "beyond a reasonable doubt" by "expert witnesses." 25 U.S.C. § 1912. As explained below, these rules make it harder to protect Indian children from abusive families than children of any other race.

- ***Subject without notice or choice to the personal jurisdiction of Indian tribal authorities anywhere in the nation.*** A tribe is authorized under 25 U.S.C. § 1911(b) to take child custody cases out of state court and transfer them to tribal court, if the child is an "Indian child" – without any regard to whether tribal court jurisdiction satisfies the requirements of fair play and substantial

justice. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980).

- ***Required to be placed with "Indian families" because of their race.*** ICWA's foster and adoption placement preferences (25 U.S.C. § 1915) dictate a series of race-based preferences under which an Indian child must be placed with Indian families *regardless of tribe* – so that, say, a Yakima child must be placed with a Seminole family, or a Navajo child with a Ute family. These preferences are based on the racist conception of generic "Indianness" which has no foundation in history and does not serve Congress's trust obligation toward tribes. *United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring).

In a nation "founded upon the doctrine of equality," which regards "[d]istinctions between citizens solely because of their ancestry" as "odious," *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), such separate, race-based rules are intolerable. This Court should grant certiorari to review the constitutionality of ICWA's placement preferences for children racially classified as Indian.

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REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW ENTRENCHES A LITERAL SYSTEM OF SEPARATE-BUT-EQUAL FOR INDIAN CHILDREN

A. ICWA Imposes Separate Rules for "Indian Children" that Often Harm the Children it is Supposed to Protect

It goes without saying – but should not go unsaid – that the Constitution mandates equal legal treatment of all citizens, regardless of their racial ancestry.[4] *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954). ICWA, however, establishes a separate set of rules for foster care, adoption, and protection for abused or neglected children, if those children are deemed to be "Indian children" under 25 U.S.C. § 1903(4).[5]

These separate rules include, but are not limited to: different jurisdictional standards that authorize tribal courts to decide cases without the "minimum

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[4] All Native Americans are, of course, citizens of the United States. 8 U.S.C. § 1401(b).

[5] Biology is *the* determinative factor for "Indian child" status under Section 1903. A child, who, like the historical figure Sam Houston, was adopted into the Cherokee tribe as a minor, would not qualify as an "Indian child" under ICWA because: (a) he would not be eligible for tribal membership, since he lacks a direct ancestor on the Dawes Rolls, *see* CHEROKEE CONST. art. IV § 1, and (b) because he is not a biological child of a tribal member. A child who is fully acculturated to a tribe – speaks the language, practices the religion, knows and follows the customs – is *not* an "Indian child" under ICWA if that child lacks the *biological* prerequisites.

contacts" constitutionally necessary for personal jurisdiction, *see id.* § 1911(b); rules requiring that abused and neglected children be reunited with the birth parents that have abused or neglected them, *see id.* § 1912(d); greater evidentiary burdens imposed on child protection workers who seek foster care for Indian children, *id.* § 1912(e), or to terminate parental rights in preparation for adoption, *id.* § 1912(f); and race-based placement preferences for foster care or adoption of Indian children. *Id.* § 1915(a), (b).

1. ICWA's Race-Based Jurisdictional Distinction

In all but rare circumstances, Section 1911(b) mandates that cases involving Indian children who are *not* domiciled on, or residents of, reservations be transferred out of the state courts where they would ordinarily be heard, and into tribal court. This rule applies regardless of where the child resides, and regardless of whether that child, or any adult involved, has had any of the "minimum contacts" required for the tribal forum to have personal jurisdiction. *See World-Wide Volkswagen*, 444 U.S. at 291-92. Tribal courts obviously have personal jurisdiction over cases involving children who *are* domiciled on reservation, *see Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53 (1989), but ICWA purports to go further, and to grant tribes personal jurisdiction over children who are *not* domiciled on reservation, solely in consequence of the child's genetics. This is akin to saying that Maine courts may decide California lawsuits arising from car

accidents in California between California residents, simply because the great-great-grandfather of one party was born in Maine.

Tribal courts are subject to the "minimum contacts" requirement just as other courts are. *See, e.g.*, *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 820 (9th Cir. 2011); *In re J.D.M.C.*, 739 N.W.2d 796, 811 (S.D. 2007). Yet ICWA disregards that requirement.

Thus, for instance, in a case now pending in California, the Miwok tribal court asserted jurisdiction to determine the custody of three children whose parents died in a car accident, despite the fact that neither parent, nor the children, had ever been domiciled on reservation, solely on account of the children's genetics. *See Renteria v. Shingle Springs Band of Miwok Indians*, No. 2:16-cv-01685-MCE-AC (E.D. Cal. July 21, 2016).

Due process of law simply "does not contemplate" that a court "may make binding a judgment *in personam* against an individual" who has "no contacts, ties, or relations" to that court's jurisdiction. *International Shoe Co. v. State of Wash.*, 326 U.S. 310, 319 (1945). Where a person has "carr[ied] on no activity whatsoever" in the forum, and has "avail[ed] [herself] of none of the privileges and benefits of [the forum's] law," the forum cannot exercise personal jurisdiction; to do so would fail the test of "fair play and substantial justice." *World-Wide Volkswagen*, 444 U.S. at 292, 295.

Jurisdiction based on a child's *biological ancestry* obviously fails that test, too.

2. "Active Efforts" to Reunify Abused Indian Children With Abusive Parents

California law, like the law of many states, and like the Adoption and Safe Families Act, requires that state child protection officers make "reasonable efforts" to preserve and reunify families before seeking to terminate parental rights (as required to clear a child for adoption). 42 U.S.C. § 671(a)(15); Cal. Welf. & Inst. Code § 361.5(a). "Reasonable efforts" are not required, though, when "aggravated circumstances," are present – such as serious crimes by the parent, or abandonment, or chronic abuse. *Id.* § 361.5(b); 42 U.S.C. § 671(a)(15)(D).

For Indian children, however, the rules are different. ICWA requires state officials to make "*active* efforts" to reunify Indian children with their families before taking steps toward adoption. 25 U.S.C. § 1912(d). Although ICWA does not define "active efforts," courts and the BIA have declared that it means more than reasonable efforts, *see, e.g.*, *In re J.S.*, 177 P.3d 590, 593 (Okla. Civ. App. 2008); *Department of Human Servs. v. K.C.J.*, 207 P.3d 423, 425 (Or. Ct. App. 2009); *State ex rel. C.D.*, 200 P.3d 194, 205 (Utah Ct. App. 2008); *Guidelines*, 80 Fed. Reg. at 10,150-51, A.2(15), and that "active efforts" is *not* excused in cases of aggravated circumstances. *See, e.g.*, *People ex rel. J.S.B., Jr.*, 691 N.W.2d 611, 618 (S.D. 2005). *See further* Megan

Scanlon, *From Theory to Practice: Incorporating the "Active Efforts" Requirement in Indian Child Welfare Act Proceedings*, 43 ARIZ. ST. L.J. 629, 646-54 (2011).

In practical terms, this means that state officials seeking to rescue Indian children from dangerous homes must go above and beyond to return those children to the very families that have abused them – more so than in cases involving children of other ethnicities – before those officials may try to find them safe, adoptive homes. Combined with the higher evidentiary standards discussed below, this rule means that *Indian children must be more abused more consistently than children of other races before they can receive protection.*

To cite just one example, in *In re Interest of Shayla H.*, 846 N.W.2d 668 (Neb. App. 2014), *aff'd*, 855 N.W.2d 774 (Neb. 2014), Nebraska courts ruled that officials failed the "active efforts" standard when removing three Sioux teenagers from the custody of their abusive father and his abusive girlfriend. Thus the officials were forced to return the girls to the father's custody – whereupon the abuse worsened to the degree that a state court once again removed them, noting that they had "experienced lifetimes of trauma" in the interim. *In re Interest of Shayla H.*, Doc. JV13 (Juv. Ct. of Lancaster Cnty., Neb. May 1, 2015) at 18.[6] *See further* Mark Flatten, *Death on a Reservation* at

[6] *Available at* https://goldwater-media.s3.amazonaws.com/uploads/PDF7_Shayla.pdf.

24-26[7] (citing multiple cases of abuses resulting from "active efforts" requirement).

The "active efforts" provision is frequently used by ex-spouses to block adoption when a custodial parent remarries. ICWA does not apply to divorce proceedings, 25 U.S.C. § 1903(1), but a birth parent who loses custody in a divorce can later use ICWA to block adoption when the former spouse remarries, and this often happens. Indeed, Oklahoma and Washington courts have recently allowed *non-Indian* birth fathers to use ICWA to bar adoption when Indian birth mothers married and their new husbands sought to adopt the stepchildren. *In re T.A.W.*, 2016 WL 6330589; *In re Adoption of J.R.D.*, Okla. Civ. App. No. 113,228 (unpublished) (Apr. 21, 2015).[8] In step-parent adoption cases, ICWA does not prevent the breakup of Indian families – it prevents the formation of Indian families.

3. Higher Standards of Evidence for Foster Care and Termination of Parental Rights

California law, like the law of most states, provides that the evidentiary burden for establishing that a child is a dependent of the court is preponderance of the evidence. *In re Amy M.*, 232 Cal. App. 3d 849,

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[7] *Available at* https://goldwater-media.s3.amazonaws.com/cms_page_media/2015/8/14/Final%20Epic%20pamplet.pdf.

[8] *Available at* https://s3.amazonaws.com/legalbrief/JRD+Decision.pdf.

859 (1991). For Indian children, however, ICWA imposes the clear-and-convincing standard. 25 U.S.C. § 1912(e). As with "active efforts," this differential treatment makes it harder to rescue Indian children from abusive or neglectful homes.

As for proceedings to terminate parental rights – often necessary before an abused or neglected child can be adopted – California, like most states, sets clear-and-convincing as the standard of proof, *see* Cal. Welf. & Inst. Code § 366.21, but ICWA requires the state to prove *beyond a reasonable doubt, based on expert witness testimony by experts in tribal culture*, that the child is likely to suffer serious harm if parental rights are not terminated. 25 U.S.C. § 1912(f). This standard is so demanding that *it is literally easier to put a defendant on death row than to place an Indian child in a safe, permanent adoptive home*.

This is why, as California courts have acknowledged, ICWA causes "the number and variety of adoptive homes that are potentially available to an Indian child [to be] more limited than those available to non-Indian children." *In re Bridget R.*, 41 Cal. App. 4th 1483, 1508 (1996).

In *Santosky v. Kramer*, 455 U.S. 745 (1982), this Court refused to adopt the "beyond a reasonable doubt" test for the termination of parental rights, noting that such a stringent requirement might "erect an unreasonable barrier to state efforts to free permanently

neglected children for adoption." *Id.* at 769.[9] That concern is a reality in the case of ICWA.

A disproportionately large number of Native American children are in foster care. *See, e.g.*, John Iwasaki, *Native American, Black Kids More Likely to End Up in Foster Care*, SEATTLE POST-INTELLIGENCER, June 26, 2008.[10] This is the unfortunate but predictable consequence of the fact that ICWA makes it exceedingly difficult for Indian children to find permanent adoptive homes.

4. Race-Based Foster and Adoption Placement Preferences

Finally, ICWA imposes a set of placement mandates for Indian children subject to foster care or adoption. *See* 25 U.S.C. §§ 1915(a) and (b). These rules require that, whereas a white, black, Hispanic, or Asian child, or child of any other race, can be adopted by a permanent loving family of any race – indeed, it is illegal to deny or delay an adoption proceeding on racial grounds, *see* 42 U.S.C. § 1996b – a child deemed an

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[9] The Court observed that ICWA was the "only analogous federal statute of which we are aware" that "permits termination of parental rights solely upon 'evidence beyond a reasonable doubt,'" and that "Congress did not consider ... the evidentiary problems that would arise if proof beyond a reasonable doubt were required in all state-initiated parental rights termination hearings." *Santosky*, 455 U.S. at 749-50, 769.

[10] *Available at* https://turtletalk.wordpress.com/2008/06/26/native-american-kids-still-disproportionately-represented-in-foster-care/.

"Indian child" must be placed in foster care with: a member of extended family as designated by the child's tribe, or, failing that, with a foster home approved by the child's tribe, or, if none is available, in "an Indian foster home," and, if those options all fail, with an institution "approved by an Indian tribe." 25 U.S.C. § 1915(b). In adoption cases, courts must place a child with a member of the child's extended family, as designated by the tribe, or, failing that, with a member of the child's tribe, and if none are available, with "other Indian families." *Id.* § 1915(a).

Note that these preferences for "*an* Indian" or "*other* Indian" families apply *without regard to tribe*. ICWA thus requires that a child of, say, Yakima heritage be placed with a family of Seminole ancestry, or a Navajo child with a Ute family, rather than with white, black, Asian, or Hispanic families, regardless of the cultural differences and even historical enmity between these tribes. ICWA's preferences are predicated not on political or cultural tribal affiliation, but on the racist conception of generic "Indianness." They "treat[] all Indian tribes as an undifferentiated mass" without regard to the "varied origins ... and different patterns of assimilation and conquest" in tribal history. *Bryant*, 136 S. Ct. at 1968 (Thomas, J., concurring). But "[c]ontinuing to emphasize generic 'Indian' separateness detached from specific tribal identities and cultures ... has the effect of reviving the assumptions about fundamental racial differences that have been so profoundly harmful to the education of Indian youth." CHARLES L. GLENN, AMERICAN INDIAN/FIRST NATIONS

SCHOOLING: FROM THE COLONIAL PERIOD TO THE PRESENT 196 (2011).

B. The Segregation Imposed by ICWA is a Racial, Not Political, Distinction

In *Morton v. Mancari*, 417 U.S. 535 (1974), this Court upheld a statute that treated Indians differently from non-Indians, holding that the distinction was a political one, subject to rational basis review, rather than a racial one subject to strict scrutiny. *Id.* at 555.

This is often cited as meaning that all laws that differentiate between Indians and non-Indians are shielded from scrutiny as race-based statutes. That is incorrect. *See Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) ("We reject the notion that distinctions based on Indian or tribal status can never be racial classifications subject to strict scrutiny."); *Malabed v. North Slope Borough*, 335 F.3d 864, 868 n.5 (9th Cir. 2003) ("the Borough argues that statutes enacted for the benefit of tribal members do not violate *any* federal or state antidiscrimination law.... This argument puts more weight on *Mancari* than it can bear.").

Mancari, in fact, took care *not* to decide whether a law "directed towards a 'racial' group consisting of 'Indians'" would violate the Constitution. 417 U.S. at 553 n.24. Three years after *Mancari*, the Court again emphasized in *United States v. Antelope*, 430 U.S. 641 (1977), that it was not addressing whether the Constitution authorizes a law that applies to people based on

whether they are "racially to be classified as 'Indian[].'" *Id.* at 646 n.7. And *Rice v. Cayetano*, 528 U.S. 495 (2000), distinguished *Mancari* on the grounds that the statute at issue in *Rice* "single[d] out 'identifiable classes of persons ... solely because of their ancestry or ethnic characteristics,'" *id.* at 515 (citation omitted), rather than because of their membership in a political organization. In short, *Mancari* and its progeny held that laws that apply to adults based on their choice to join or remain members of a political institution – the tribe – impose only political classifications subject to rational basis review. Those cases expressly did *not* declare that laws that single out a racial class consisting of Indians are immune from strict scrutiny.

ICWA, unlike the laws at issue in *Mancari* and *Antelope*, applies *not* to adults or tribal members, but to children who are "eligible for membership in a tribe," and who have at least one biological parent who is a tribal member. 25 U.S.C. § 1903(4).[11] Eligibility for tribal membership is, almost without exception, determined *exclusively* by biological ancestry.[12] Thus, unlike

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[11] This means that people adopted into a tribe are *not* subject to ICWA, regardless of their cultural or political affiliation with the tribe, solely because they are not biological children of tribal members.

[12] The Choctaw Tribe of Oklahoma, from which Lexi is partly descended, requires no specific amount of Indian blood, but requires direct lineal descent from a signer of the 1906 Dawes Rolls. *See* CHOCTAW CONST. art. II § 1. Biological ancestry – DNA – is therefore the *sole* factor required for tribal citizenship. Political affinity is not a consideration.

the laws at issue in *Mancari* and *Antelope*, ICWA singles out identifiable classes of persons solely because of their ancestry, *cf. Rice*, 528 U.S. at 515, and is directed towards a racial group consisting of Indians. *Mancari*, 417 U.S. at 553 n.24.[13]

The California Supreme Court recently emphasized the distinction between tribal membership, which is wholly a matter of tribal law, and "Indian child" status under ICWA, which is a matter of *federal* law, and therefore subject to constitutional limits. *See In re Abbigail A.*, 375 P.3d 879, 885-86 (Cal. 2016). Tribes may adopt whatever membership criteria they choose, of course, including biological ones, just as private social organizations may choose to base membership on race. But the state and federal governments are constitutionally forbidden from imposing legal consequences that are triggered by such racial criteria. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *cf. Smith v. Allwright*, 321 U.S. 649, 663 (1944) (political parties may exclude racial groups, but where "statutory system for the selection of party nominees ... makes the party ... an agency of the state," such exclusion is unconstitutional).

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[13] Even if that were not clear, the fact that ICWA also requires that a child be the *biological* child of a tribal member makes undeniable that biological ancestry is the sole and dispositive criterion for ICWA's application. A child legally adopted into the tribe is not subject to ICWA.

ICWA creates a race-based, not political, classification.

II. THE NEED FOR THIS COURT'S GUIDANCE ON ICWA IS URGENT

A. Lower Courts Have Struggled Unsuccessfully to Balance the Conflicting Interests at Issue in ICWA Cases

Courts in many states – particularly California, which has the nation's largest Native American population[14] – have struggled to resolve the problems inherent in ICWA. In *Bridget R.*, *supra*, the court found ICWA unconstitutional to the degree that it applied separate rules to children of Indian ancestry who lack any social or political connection to a tribe. 41 Cal. App. 4th at 1508 ("where such social, cultural or political relationships do not exist or are very attenuated, the only remaining basis for applying ICWA rather than state law in proceedings affecting an Indian child's custody is the child's genetic heritage – in other words, race.").

But rather than declare ICWA facially unconstitutional, the court applied the "Existing Indian Family Doctrine," a saving construction whereby ICWA is interpreted as statutorily inapplicable to children who

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[14] California has more than 352,000 Native American and Alaskan Native residents. *See* 2010 Census, Table 19, American Indian and Alaska Native Tribes in the United States and Puerto Rico: 2010, http://www.census.gov/population/www/cen2010/cph-t/t-6tables/TABLE%20(19).pdf.

lack social, cultural, or political connections to a tribe. *Id.* at 1491-92. Other California courts, however, have rejected that Doctrine, *see, e.g.*, *In re Vincent M.*, 150 Cal. App. 4th 1247, 1265 (2007); *In re Adoption of Hannah S.*, 142 Cal. App. 4th 988, 996 (2006); *In re Alicia S.*, 65 Cal. App. 4th 79, 88 (1998), as have courts in several other states. *See, e.g.*, *In re A.J.S.*, 204 P.3d 543, 549-50 (Kan. 2009); *In the Matter of Baby Boy L.*, 103 P.3d 1099, 1103-06 (Okla. 2004). The California Supreme Court has repeatedly refused to consider the question, and the status of the Doctrine remains unsettled there.[15]

Adoptive Couple seemed to endorse the Doctrine, holding that the child's biological ancestry was not sufficient for application of ICWA where there was no Indian family in existence that might be threatened with "breakup." 133 S. Ct. at 2562. But the Court did not refer to the Doctrine by name, and, although it observed that interpreting ICWA so as to override the child's best interests "solely because an ancestor – even a remote one – was an Indian ... would raise equal protection concerns," *id.* at 2565, the Court found it unnecessary to decide whether biological ancestry is a constitutional basis for applying ICWA's separate system of law. As a result, lower courts remain in disarray as to how to apply ICWA in a constitutional manner.

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[15] In 1999, the California Legislature passed a statute apparently with the intent of overruling the Doctrine, but because that statute simply echoed ICWA's existing language word-for-word, a California court later found that it did not overrule the Doctrine, after all. *In re Santos Y.*, 92 Cal. App. 4th 1274, 1317, 1323 (2001).

In *this* case, it *is* necessary to decide that critical question.

B. Indian Children Are In Desperate Need

Native American children are at greater risk of family breakdown, poverty, addiction, and suicide than children of any other ethnicity. *See generally* NAOMI SCHAEFER RILEY, THE NEW TRAIL OF TEARS: HOW WASHINGTON IS DESTROYING AMERICAN INDIANS 145-68 (2016). But ICWA's separate system of race-based law deters would-be foster and adoptive parents from opening their homes to Indian children who need safety and shelter. Because "non-Indians who wish to adopt an Indian child" face a "considerably greater" risk of becoming involved in a lengthy court fight about adoption, "the ICWA goal of promoting their best interests may be undermined by the ICWA's other goal of ensuring tribal survival." Joan Heifetz Hollinger, *Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children*, 66 U. DET. L. REV. 451, 453 (1989). *See also Adoptive Couple*, 133 S. Ct. at 2563-64 (expressing concern that ICWA might "dissuade" people "from seeking to adopt Indian children," which would "unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home.").

Asked to foster a Native American child, non-Native parents are likely to say "Nope. Nope. Nope." Elizabeth Stuart, *Native American Foster Children Suffer Under A Law Originally Meant to Help Them*,

PHOENIX NEW TIMES, Sept. 7, 2016.[16] *See also Adoptive Couple*, 133 S. Ct. at 2563-64 (expressing concern that ICWA might "dissuade" people "from seeking to adopt Indian children," which would "unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home.").

This case is a vivid and disturbing example of this problem. The decision below gives would-be adoptive parents plenty of reasons *not* to open their doors to children of Indian ancestry. Yet the alternatives for those children are exceptionally few. *There is only one approved Native American foster family in all of Los Angeles County*, with its population of 10 million. *See* Daniel Heimpel, *L.A.'s One-And-Only Native American Foster Mom*, CHRONICLE OF SOCIAL CHANGE, June 14, 2016.[17] Nearly 9 percent of all Native American children born in California are placed in foster care before the age of 5. Puntam-Hornstein, *et al., A Birth Cohort Study of Involvement with Child Protective Services before Age 5: California* (USC Children's Data Network, 2014) at 9.[18]

These children need homes – and people like Petitioners are willing to provide them. But ICWA's various provisions impose a unique obstacle that blocks

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[16] *Available at* http://www.phoenixnewtimes.com/news/native-american-foster-children-suffer-under-a-law-originally-meant-to-help-them-8621832.

[17] *Available at* https://chronicleofsocialchange.org/news-2/l-a-s-one-native-american-foster-mom/18823.

[18] *Available at* https://s3.amazonaws.com/dvis-data/cdn/Cumulative+Risk+Reports/CDN+California.pdf.

children of Native American ancestry from finding the stability and permanence they need. A disproportionate number therefore end up in long-term foster care.[19]

This is particularly harmful to children in Lexi's position, who have a psychological need for stability. Separation from stable homes is traumatic, and can lead to problems with identity and intimacy, and a greater risk of delinquency. *See* Virginia L. Colin, *Infant Attachment: What We Know Now* at ii (U.S. Dep't of Health & Human Servs., 1991)[20] ("The importance of early infant attachment cannot be overstated. It is at the heart of healthy child development."). Foster care experts have emphasized the importance of avoiding repeated removal or transfer of foster children. *See, e.g.*, Gina Miranda Samuels, *Ambiguous Loss of Home: The Experience of Familial (Im)permanence Among*

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[19] Research on the length of time Native American children spend in foster care is sometimes misleading. Although the Department of Health & Human Services reports that Native-American children spend an average of 21-26 months in foster care, Recent Demographic Trends in Foster Care (Office of Data, Analysis, Research, & Evaluation Data Brief 2013-1, Sept. 2013), *available at* http://www.acf.hhs.gov/sites/default/files/cb/data_brief_foster_care_trends1.pdf, such numbers typically count the length of stay *per placement*, rather than the total length of a child's time in foster care. Thus if a child is moved from one foster home after, say, six months, to another foster home for three more months, this is counted as one six-month stay and one three-month stay, rather than as a single nine-month stay. Given that Indian children are often shuttled between foster homes, their average stay of foster care is likely mis-measured as a result.

[20] *Available at* https://aspe.hhs.gov/basic-report/infant-attachment-what-we-know-now.

Young Adults with Foster Care Backgrounds, 31 CHILDREN & YOUTH SERV. REV. 1229 (2009)[21] ("transitioning in and out of potential 'new' families while in foster care can create ambiguity and insecurity around their legitimate familial belonging, feelings that are often left unresolved or unaddressed both during and after their stays in foster care."); VERA I. FAHLBERG, A CHILD'S JOURNEY THROUGH PLACEMENT 23-24 (1991) ("it is crucial that the foster care system respond in ways that help the child develop attachments with their primary caregivers.... Children need ongoing relationships.").

California courts, recognizing this need, prioritize the stability and permanence of foster family relationships in the best-interests calculus – in cases involving *non*-Indian children. "The idea that children may be temporarily deposited in the hands of some bailee to be recovered at will – like an old lamp that one doesn't know what to do with, so one puts it in storage – is contradicted by the cases and common experience." *Kassandra H.*, 64 Cal .App. 4th at 1239. Thus, "[a]fter years of guardianship, the child has a fully developed interest in a stable, continuing, and permanent placement with a fully committed care-giver.... [T]he child's best interest becomes the paramount consideration after an extended period of foster care." *Ann S.*, 202 P.3d at 1106 & n.19; *see also In re Jasmon O.*, 8 Cal. 4th 398, 418-19 (1994) ("courts determining a child's best

[21] *Available at* https://www.researchgate.net/publication/46495237_Ambiguous_loss_of_home_The_experience_of_familial_impermanence_among_young_adults_with_foster_care_backgrounds.

interests ... may place great weight on evidence that after a substantial period in foster care, the severing of a bond with the foster parents will cause long-term, serious emotional damage.").

But the rules are different for children of Indian ancestry. Given the separate-and-substandard "best-interests" analysis ICWA imposes, no such "great weight" was afforded in Lexi's case. On the contrary, the court below found that treating this consideration as paramount would contradict "the overall policy behind the ICWA," and would amount to "using the best interests concept as carte blanche ... to depart from the ICWA's placement preferences." 1 Cal. App. 5th at 351-52.

What this means becomes clear by contrasting this case with a case like *Jasmon O.*, *supra*, in which the California Supreme Court terminated the birth father's parental rights over a non-Indian child who had lived in foster care for seven years, because "the severing of the bond with the foster parents would do serious, long-term emotional damage to [the child]." 8 Cal. 4th at 418. "Children, too, have fundamental rights," said the court, "including the fundamental right to ... 'a placement that is stable [and] permanent.' Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent." *Id*. at 419 (citations omitted). In Lexi's case, however, the court treated the effect of severing her bond with her *de facto* parents as of relatively less importance than "the importance of preserving the child's familial and cultural

connections [with the tribe]," 1 Cal. App. 5th at 351, and ignored her fundamental right to a placement that is stable and permanent.

And it did so *solely* because of her race.

CONCLUSION

To impose "special disabilities" on people as a consequence of "immutable characteristic[s] determined solely by the accident of birth" is to "violate 'the basic concept of our [legal] system.' " *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (citation omitted). ICWA places children like Lexi – who have no cultural, social, or political connection to an Indian tribe, but are only eligible for membership due to their DNA – into a separate category, governed by different rules, rules that deprive them of the legal protections they need and to which they are entitled as American citizens. Given the disarray in local courts as to the applicability of ICWA, this Court's guidance is desperately needed.

The petition for certiorari should be *granted*.

Respectfully submitted,

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