No. 16-500

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 A.P., A MINOR UNDER THE AGE OF FOURTEEN YEARS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE

BRIEF IN OPPOSITION OF RESPONDENT FATHER J.E.

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BRIEF IN OPPOSITION

INTRODUCTION

The petition for a writ of certiorari should be denied because it presents no issues worthy of this Court's attention. The California Court of Appeal correctly affirmed the judgment of the juvenile court directing that this minor, A.P., who is a citizen of the Choctaw Nation of Oklahoma ("Tribe"), be moved from her foster home to the home of relatives who have been waiting to adopt her since before her foster care placement with the petitioners. Not only was the move recommended by the Los Angeles County Department of Child and Family Services ("Department"), the child welfare agency charged with her custody, it was supported by the Tribe, the minor's parents, and the minor's own counsel and guardian *ad litem*. Moreover, the

move was in accordance with the preference for extended family placements established by federal and state law, namely, 25 U.S.C. § 1915(a) and (b) and California Welfare and Institutions Code §§ 361.3(c)(1) and 361.31(b) and (c).

The petitioners became involved in this case as licensed foster parents who agreed to serve as a temporary home for A.P. while her father was engaged in reunification services in California, with full advance disclosure that A.P. was not available for adoption because the Department and the Tribe had identified extended family members in Utah to adopt the minor if reunification failed. Petitioners have fought the move for over four and a half years, with two consecutive appeals in the California Court of Appeal. *In re Alexandria P.*, 228 Cal. App. 4th 1322 (2014), *review denied* (Oct. 29, 2014) (hereinafter "*Alexandria I*"); *In re Alexandria P.*, 1 Cal. App. 5th 331 (2016), *review denied* (Sept. 14, 2016) (hereinafter "Alexandria II").

The petitioners' first appeal came on the heels of this Court's decision in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), in which the Court examined the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* ("ICWA"). This Court held in *Adoptive Couple* that: 1) the heightened evidentiary standards in ICWA, i.e., 25 U.S.C. § 1912(d) and (f), could not be invoked by a biological father in a private adoption proceeding when the father had never had legal or physical custody of the child; and 2) that the extended family placement preference set out in 25 U.S.C. § 1915(a) did not apply where the

birth father opposed the adoption petition instead of filing a competing petition for adoption. *Id.* at 2560-2565.

The petitioners relied on the *Adoptive Couple* decision to challenge the constitutionality of the application of ICWA in A.P.'s case. The California Court of Appeal correctly noted that *Adoptive Couple* had no bearing on the appeal before it because the facts were "entirely distinguishable" and, in any event, this Court did not rule on the constitutionality of ICWA in *Adoptive Couple*. *Alexandria I*, 228 Cal. App. 4th at 1344-1355.[1]

The petitioners seek to pique the interest of this Court by recasting the decision below as "an ideal vehicle through which to resolve the conflict that persists in the wake of *Adoptive Couple*," with the alleged conflict being the continued viability of the "existing Indian family exception," a judicially created rationale for avoiding the application of the ICWA in cases where the Indian child or parent does not have sufficient connections to their tribal culture or community to satisfy the court of their "Indianness." Pet. at 14. In fact, the law is settled.

This Court squarely rejected the invitation of the petitioners and numerous *amicus curiae* in *Adoptive Couple* to approve and apply the existing Indian family exception in that appeal. Appropriately so. The existing Indian family exception has fallen into disfavor in recent years, as

[1] The petitioners did not file a petition for a writ of certiorari following the first appeal. The *Adoptive Couple* decision played no role in the second appeal. *Alexandria II.,* 1 Cal. App. 5th 331.

courts have become more familiar with ICWA and its built-in flexibility for the exercise of judicial discretion, such as the "good cause" exceptions to the placement preferences and to tribal court transfer jurisdiction.[2] *See* 25 U.S.C. §§ 1911(b), 1912(a) and (b). More significantly, the agency charged with implementation of the ICWA, the Department of the Interior's Bureau of Indian Affairs, sounded the death knell for the existing Indian family exception with the issuance of amended guidelines last year for state courts implementing ICWA. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146 (2015) ("Guidelines"). The Department of the Interior put the nail in the coffin with the promulgation of amended federal regulations, which took effect on December 12, 2016.[3] 25 C.F.R. § 23.103(c). The petition makes no mention of these federal authorities. The petition also ignores earlier state authorities affirming the extinction of the existing Indian family exception in California. *In re Vincent M.*, 150 Cal. App. 4th 1247 (Ct. App. 2007); Cal. Welf. & Inst. Code § 224(a)(2) and (c). The petitioners' failure to address federal and state authorities

[2] The national decline of the existing Indian family exception is fully and well briefed in the briefs in opposition of the Department, the Tribe and the minor, which the father has herein joined in.

[3] With the amendment of the federal regulations implementing ICWA, the 2015 BIA Guidelines have been replaced by revised Guidelines. *See* U.S. Dep't of the Interior, Bureau of Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act (Dec. 2016), available at https://www.bia.gov/cs/groups/public/documents/text/idc2-056831.pdf (last visited Dec. 13, 2016). Although this Court has noted the nonbinding status of the Guidelines, it has looked to them for guidance on interpreting ICWA. *Adoptive Couple,* 133 S. Ct. at 2561. The new Guidelines "explain the statute and regulations and also provide examples of best practices for the implementation of the statute, with the goal of encouraging greater uniformity in the application of ICWA." *Id.* at 4. They include guidance on the implementation of the placement preferences in question. *Id.* at 56-63.

squarely on point amounts to a misstatement of law. Accordingly, the petition should be denied pursuant to Rule 14.4 of this Court.. Sup. Ct. R. 14.4.

No extraordinary factors justify review. To the contrary, there are extraordinary factors that justify prompt denial of the petition. A.P. just recently celebrated her seventh birthday in the home of her relatives and future adoptive parents, who are also adopting her younger half-sister. She deserves permanency without further delay. Review should be denied for this reason alone.

STATUTES AND REGULATIONS INVOLVED

The questions presented in the petition are: 1) whether the existing Indian family exception is valid; 2) whether the placement of an Indian child in a non-preferred foster placement pursuant to 25 U.S.C. § 1915(b) bars future application of the adoptive placement preferences set out in 25 U.S.C. § 1915(a); and 3) whether the standard of proof for the finding of "good cause" to depart from the ICWA's placement preferences is "clear and convincing evidence" or "preponderance of the evidence." The statutes and regulations relevant to these questions are not set out in the petition. They are therefore included in Appendix A of this brief.

JOINDER

The respondent father joins in the statement of the case and facts as well as the arguments presented by the co-respondents, the Department, the

Tribe and A.P., in their briefs in opposition to the petition. The co-respondents argue that the petition should be denied because: 1) foster parents lack standing to raise constitutional concerns on behalf of a foster child whose interests are represented by counsel and a guardian *ad litem*; 2) the existing Indian family exception is no longer viable, having fallen out of favor in most jurisdictions and having been foreclosed by 25 C.F.R. § 23.103(c); 3) the argument that once an Indian child is placed in a non-preferred foster home under 25 U.S.C. § 1915(b) she cannot be moved to a preferred placement in accordance with 25 U.S.C. § 1915(a) is without merit; and 4) the "clear and convincing evidence" standard of proof applies to determinations of whether good cause exists to depart from the placement preferences set out in 25 U.S.C. § 1915(a) and (b), as affirmed by 25 C.F.R. § 23.132(b). The respondent father respectfully submits that review should be denied for the additional reasons set forth below.

REASONS FOR DENYING THE PETITION

The petition should be denied first and foremost because petitioners are not entitled to the relief sought since they were afforded procedural due process prior to A.P.'s change in placement. Review should also be denied because this Court's suggestion in *Adoptive Couple* that the application of ICWA might "raise equal protection concerns" clearly did not contemplate the circumstances at hand. In addition, the petitioners fail to present facts and authorities essential to this Court's analysis of the issues presented.

Moreover, the arguments presented by the petitioners' amici curiae in support of review are not persuasive.

I. REVIEW SHOULD BE DENIED BECAUSE THE RELIEF SOUGHT IS UNAVAILABLE TO PETITIONERS AS FOSTER PARENTS WHO WERE AFFORDED PROCEDURAL DUE PROCESS PRIOR TO A.P.'S CHANGE OF PLACEMENT

The petitioners challenge a state court's order removing a foster child from their care. Regardless of the application of ICWA in this case, the relief sought by the petitioners is not available to them. This Court has recognized that whether or not foster parents acquire a liberty interest in the continued placement of foster children in their care, any related procedural due process procedural are satisfied by the opportunity to challenge the child's removal at a court hearing. Review should be denied because the petitioners were afforded ample opportunity to be heard, as reflected in *Alexandria I* and *Alexandria II*.

In *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 818-823 (1977) ("*Organization of Foster Families*"), this Court considered a civil rights class action brought under 42 U.S.C. § 1983 by foster parents on their own behalf and on behalf of children for whom they had provided foster care for a year or more. The appellees argued that New York statutes violated the due process and equal protection clauses of the Fourteenth Amendment in so far as they allowed the State to transfer foster children from one foster home to another and to return foster children to

their parents without affording the foster parents procedural due process. *Id.* at 819-822.

The *Organization of Foster Families* Court did not decide whether foster parents acquire a liberty interest in the continued placement of a foster child in their care after the placement continues for a year or longer. Instead, the Court assumed for the purpose of argument that such a right existed and concluded that the statutory scheme in question, which afforded foster parents a right to a hearing, satisfied procedural due process requirements. 431 U.S. at 847. However, the Court noted a number of "difficulties" with the assertion that foster parents acquire a liberty interest in continued foster care placement, emphasizing the fact that the relationship between the foster parent and foster child is a creature of contract and statute.

> [W]hatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset. While the Court has recognized that liberty interests may in some cases arise from positive-law sources, (citation omitted), in such a case, and particularly where, as here, the claimed interest derives from a knowingly assumed contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties.

Id. at 845-846.

The reluctance of the Court to address the central issue of whether parents could assert a constitutionally protected liberty interest was not shared by Justice Stewart, who delivered a concurring opinion, or by Chief Justice Burger and Justice Rehnquist, who joined in his opinion. In

concluding that the foster parents' interests were not constitutionally protected, Justice Stewart wrote:

> The foster parent-foster child relationship involved in this litigation is, of course, wholly a creation of the State. New York law defines the circumstances under which a child may be placed in foster care, prescribes the obligations of the foster parents, and provides for the removal of the child from the foster home "in [the] discretion" of the agency with custody of the child. (Citation omitted.) The agency compensates the foster parents, and reserves in its contracts the authority to decide as it sees fit whether and when a child shall be returned to his natural family or placed elsewhere..... Were it not for the system of foster care that the State maintains, the relationship for which constitutional protection is asserted would not even exist.

Id. at 856-858.

Following the Court's decision in *Organization of Foster Families*, the Fifth, Sixth, and Seventh Circuits of the Federal Court of Appeal relied on the Court's reasoning to support rulings that foster parents lack a constitutionally protected liberty interest in the maintenance of the foster family relationship. *Gibson v. Merced County Dep't of Human Resources*, 799 F.2d 582, 587 (9th Cir. 1986), citing *Kyees v. County Dep't of Public Welfare*, 600 F.2d 693, 699 (7th Cir. Ind. 1979), *Drummond v. Fulton County Dep't of Family & Children's Services*, 563 F.2d 1200, 1207, (5th Cir. 1977) (en banc), *cert. denied*, 437 U.S. 910, 57 L. Ed. 2d 1141, 98 S. Ct. 3103 (1978), and *Sherrard v. Owens*, 484 F. Supp. 728, 741 (W.D. Mich. 1980), aff'd, 644 F. 2d 542, 543 (6th Cir.) (per curiam), *cert. denied*, 454 U.S. 828, 70 L. Ed. 2d 103, 102 S. Ct. 120 (1981).

In *Gibson v. Merced County Dep't of Human Resources,* the Ninth Circuit considered the issue of foster parent rights in the context of the same California statutory scheme at issue here. In that case, the licensed foster parents "knew that the arrangement was intended to be temporary," and the temporary nature of the placement did not change even though the minor remained in their home for over four years before she was moved to another foster home. *Id.* at 584, 587.

The *Gibson* court took the conservative approach adopted by the majority in *Organization of Foster Families* and skirted the issue of whether foster parents acquire a liberty interest in the continued placement of foster children in their care, finding instead that "the procedures employed by defendants in this case satisfied due process requirements." *Id.* at 588. Specifically, any due process right the foster parents had in *Gibson*, was protected by the fact that the foster parents were afforded the right to "a full court hearing" during which the foster parents were provided with an opportunity to criticize and voice any opposition to the existing plan to reunify the foster child in their care with her mother. Since the foster parents were also afforded the continuing opportunity to bring their concerns to the court, the Ninth Circuit concluded that due process did not require an additional opportunity for a full court hearing before the minor was ordered removed from their home. *Id.* at 588-589.

What *Organization of Foster Families* and its progeny make clear is that any liberty interest the petitioners may have acquired as a result of A.P.'s foster care placement in their home was duly protected by the protracted trial they were granted in 2013, described in *Alexandria I,* and the two retrials after remand described in *Alexandria II.* For this reason alone, the petition should be denied.

The ICWA issues are essentially red herrings when viewed through the broader lens of foster parents' rights to contest the removal of foster children from their homes. The petition and the amici curiae briefs submitted in support of it play on the resistance to the notion that Indian children, their parents and their Tribes have unique interests that require unique laws to protect. This Court should resist the temptation to invalidate those unique laws by affording foster parents of Indian children greater rights to challenge the removal of those foster children than they would enjoy as foster parents of non-Indian children.

II. THIS CASE DOES NOT PRESENT THE POTENTIAL CONSTITUTIONAL CONCERNS CONTEMPLATED IN ADOPTIVE COUPLE V. BABY GIRL

This case is not an appropriate vehicle by which to address the constitutional issues presented. The petition asserts that the issues presented implicate the constitutionality of "certain applications" of ICWA and cites to the Fifth and Fourteenth Amendments as well as Art. I, § 8, cl. 3 of the U.S. Constitution, more commonly known as the "Indian commerce clause." Pet. at iii, 1-2. However, in *Adoptive Couple* this Court declined the

invitation of the petitioners in that case and their *amici curiae* to declare the ICWA unconstitutional.[4] This case does not present any compelling reason for this Court to reconsider its position.

As noted in the petition, the *Adoptive Couple* decision makes only a passing reference to potential "equal protection concerns." Pet. at 16. Specifically, the Court stated:

> As the State Supreme Court read §§1912(d) and (f), a biological Indian father could abandon his child in utero and refuse any support for the birth mother — perhaps contributing to the mother's decision to put the child up for adoption — and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. *Such an interpretation would raise equal protection concerns*, but the plain text of §§1912(f) and (d) makes clear that neither provision applies in the present context. Nor do §1915(a)'s rebuttable adoption preferences apply when no alternative party has formally sought to adopt the child.

Adoptive Couple v. Baby Girl, 133 S. Ct. at 2565 (emphasis added). Cf. *Id.*, at 2584 (Sotomayor J., dissenting) ("It is difficult to make sense of this suggestion in light of our precedents, which squarely hold that classifications based on Indian tribal membership are not impermissible racial classifications. *See United States v. Antelope*, 430 U. S. 641, 645-647 (1977); *Morton v. Mancari*, 417 U. S. 535, 553-554 (1974).").

[4] The amicus curiae included the American Academy of Adoption Attorneys, which has also submitted a brief in support of the petition at hand. 2013 U.S. S. Ct. Briefs LEXIS 1000.

The Court's indirect reference to Section 1 of the Fourteenth Amendment of the U.S. Constitution's guarantee of equal protection is not only *obiter dictum* but it is squarely limited to the application of ICWA in voluntary adoption proceedings. Specifically, the Court speculated that allowing an Indian birth father who had abandoned his child to block a private adoption desired by the non-Indian birth mother would raise equal protection concerns where the father had "abandoned" the child *in utero* and waited until the eve of the adoption to act. Moreover, the Court did not engage in an analysis of whether such circumstances would in fact violate equal protections rights, it merely noted that such rights would be implicated.

Thus, contrary to the petitioners' assertion, *Adoptive Couple* did not invite constitutional challenges of the sort raised in the petition. The interests of prospective adoptive parents who have been selected by a mother to adopt her child and who have cared for the child since birth in anticipation of her adoption, such as the couple in *Adoptive Couple*, are significantly different than the interests of foster parents who agree to provide temporary care for a foster child who is slated for reunification with a parent or adoptive placement with extended family, such as the petitioners here. This Court was correct to ignore the constitutional challenges to ICWA in *Adoptive Couple* and should do so again by denying the petition at hand.

III. REVIEW SHOULD BE DENIED BECAUSE THE PETITIONERS FAIL TO PRESENT ESSENTIAL FACTS AND AUTHORITIES

"The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." Sup. Ct. R. 14.4. The petitioners fail to present with accuracy the facts and authorities essential to this Court's consideration of the issues raised in the petition. For this reason alone, review should be denied.

A. The Petitioners Fail to Accurately Present Essential Facts

The petition contains a number of factual errors and omissions that are essential to the Court's analysis of the issues presented. The misrepresentation of facts is obviously designed to obscure the reality that this case is easily distinguishable from *Adoptive Couple*.

1. A.P. Was Removed From Her Father's Custody

In *Adoptive Couple*, a fact critical to the Court's analysis was that the birth father had never had legal or physical custody of Baby Girl under either the laws of Oklahoma, where she was born, or the laws of South Carolina, where the adoption petition was filed . *Adoptive Couple v. Baby Girl,* 133 S. Ct. at 2557, 2559, 2560, 2562. The Court reasoned that the phrases "continued custody" in 25 U.S.C. § 1912(f) and "prevent the breakup of the Indian family" in § 1912(d) were consistent with a Congressional intent to protect *existing* custodial parent-child relationships. *Id.* The Court

concluded that these heightened evidentiary standards did not apply when the parent opposing the adoption had no pre-existing custodial rights.

The petitioners claim that this case is like *Adoptive Couple* because J.E. never had legal or physical or legal custody of A.P. Pet. at 4 and 20. This is untrue. In fact, the father had physical custody of A.P. prior to her detention and by his conduct established legal custody rights under California law prior to her detention.

A.P. was born in November 2009, when the mother was married to another man. J.E. and the mother began living together with A.P. at the beginning of 2010, but the relationship did not work out. J.E. filed a petition to establish a parental relationship with A.P. in December 2010, in which he sought joint legal and physical custody. When the mother became homeless at the beginning of 2011, J.E. assumed sole physical custody of A.P. 1 CT 14, 17, 82-83, 127-135.[5]

In April 2011, J.E. allowed the mother to take A.P. out on a visit, under the supervision of a family friend. When J.E. went to retrieve A.P. a few hours later, the mother objected and flagged down a passing police car to try to stop him. 1 CT 18. The officers had previous contact with J.E., who was on parole, and decided to detain A.P. when J.E. could not provide proof of paternity/custody. 1 CT 31-32. The Department recommended that A.P. not

[5] Citations to "CT" refer to the Clerk's Transcript forming part of the record on appeal in *Alexandria I,* and references to "RT" refer to the Reporters Transcripts forming part of the record on appeal in *Alexandria I*, which the Court took judicial notice of in *Alexandria II*. Citations to the record are included pursuant to rule 12.7 of the Supreme Court Rules.

be released to J.E. due to his criminal history and failure to reunify with his older daughter, A.E.[6]

J.E.'s parole officer vouched for him, submitting a letter dated May 5, 2011, in which he wrote:

> I have observed [J.E.] making great strides in taking care of his daughter and obtaining the necessary assistance to provide for her. [He] appears to care for his daughter and only wants what's best for her.
>
> There is no indication at this time, of any mistreatment or harm to the child. [J.E.] has independently been taking care of the child who also has been residing with [J.E.] for the past three months. [J.E.] claims to have been in the child's life since the age of two months until presently.
>
> [J.E.] has been participating in Anti-Narcotic Testing and has not provided any positive test….

1 CT 136. By the time of its Jurisdiction/Disposition Report dated May 6, 2011, the Department concluded that "father did attempt to parent and care for the minor since his release from prison in 01/10," that he had a "stable living arrangement and did have all the necessary items available in the home for the minor," that he appeared to have "addressed the issues that brought him to this place" and recommended reunification services for him on that basis. 1 CT 88.

Under California paternity law, an unwed biological father who publicly acknowledges paternity and receives the child into his home qualifies as a "presumed father" and as such is deemed to have legal custody of his child at birth unless and until a court decides otherwise. Cal. Fam.

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[6] A.E. was adopted by J.E.'s mother and step-father in 2007. 1 CT 17, 68, 72-73, 76.

Code §§ 3010(a) and 7611(d); *In re J.L.,* 159 Cal.App.4th 1010 (2008). J.E. publicly acknowledged paternity by initiating a parentage action in state court and received A.P. into his home by assuming physical custody and care of her. He therefore qualified as a presumed father and held legal custody until the juvenile court awarded custody to the Department.

The significance of "presumed father" status in a juvenile dependency case in California is that presumed fathers are entitled to receive reunification services. Cal. Welf. & Inst. Code § 361.5(a); *In re Zacharia D.*, 862 P.2d 751, 762, (Cal. 1993) ("[O]nly a presumed, not a mere biological, father is a "parent" entitled to receive reunification services under section 361.5."). The juvenile court did not make an express finding that J.E. was a "presumed father," but its acknowledgement of his presumed father status is implicit in the fact that the court ordered the Department to provide reunification services to J.E. even before disposition, and there was never any dispute that he qualified. *Alexandria I,* 228 Cal. App. 4th at 1333.

The fact that J.E. had both physical and legal custody of A.P. prior to her detention clearly distinguishes this case from *Adoptive Couple*, where the birth father never had legal or physical custody of his child. As this court has recognized, "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

2. The Respondent Father Disclosed His Indian Ancestry Early On in the Case

The petition incorrectly states: "It is undisputed that [J.E.] repeatedly denied having any Indian heritage during these proceedings, and had no knowledge of or connection to the Choctaw culture or community." Pet. at 4-5. It is true that J.E. initially did not disclose his or A.P.'s Indian status. 1 CT 121. However, within days of A.P.'s detention, on May 2, 2011, J.E. informed the Department of his Indian ancestry. On the same day, J.E.'s mother informed the Department that A.P.'s older sibling, A.E., whom she had adopted, was registered with the Tribe. 1 CT 68. J.E.'s mother was very proud of her heritage and her descent from two important Chiefs of the Tribe. She possessed cultural items given to her by her Tribe and maintained genealogical records. 7/30/13 RT 140- 143. In a letter to the Department dated August 9, 2011, the Choctaw Tribe confirmed that J.E. is an enrolled member of the Tribe and A.P. was eligible for membership. 1 CT 171, 175-176. *Alexandria I,* 228 Cal. App. 4th at 1329-1330.

3. A.P. Was Placed with the Petitioners to Facilitate Ongoing Efforts to Reunify Her with Her Father

The petition miscasts the timeline of events leading up to the petitioners' opposition to the extended family placement, falsely implying that J.E.'s paternity was confirmed and reunification services were ordered *after* A.P. was placed with the petitioners. Pet. at 6. J.E.'s paternity was confirmed in June 2011, and the court ordered that he receive reunification

services in August 2011. 1 CT 156-159, 190. J.E. was incarcerated on identity theft charges after June 2011 but requested and received contact and visitation with A.P. during his incarceration. He was released at the end of December 2011, within days of A.P. being placed with the petitioners for the purpose of providing respite care over the holidays to A.P.'s then foster mother. 1 CT 167, 179, 187, 223.

"The tribe agreed to initial foster placement with the P.s because it was close to father at a time when he was working on reunification." *Alexandria I.,* 228 Cal. App. 4th at 1330. "Father successfully complied with reunification services for more than six months, progressing to such an extent that he was granted unmonitored eight-hour visits. By June 2012, the Department reported a substantial probability he would reunify with Alexandria within the next six months." *Id.* at 1331.

Thus, the goal at the time of A.P.'s placement with the petitioners was to reunify A.P. with her father, and this remained the goal for over six months.[7]

4. The Minor Was Placed with the Petitioners with the Full Understanding That She Would Be Adopted By Extended Family in Utah If Reunification Failed

The petition paints a misleading picture, indicating that the Department and the Tribe identified the extended family placement in

[7] Unfortunately, about a month after the six-month review hearing, "father's emotional state deteriorated dramatically" and "[b]y September 2012, he had communicated to the Department that he no longer wished to continue reunification services." *Alexandria I.* at 1331.

October 2012, after J.E.'s reunification services were terminated and after the petitioners expressed an interest in adopting A.P. Pet. at 7. In fact, the petitioners were well aware when they agreed to provide foster care for A.P. that she was unavailable for adoption and there were relatives in Utah with whom she would be placed if the father failed to reunify with her. *Alexandria I*, at 1330-1332.

5. The Extended Family Members Established a Relationship with A.P. Before the Petitioners Opposed the Change of Placement in Court

The petition fails to reveal that at the time the petitioners pursued their challenge to the proposed change in placement, the extended family members, Mr. and Mrs. R., had an established relationship with A.P. Pet. at 7-8. Mrs. R. had been in regular contact with the Tribe and the Department since October 2011 and had sent packages to A.P. in October 2011 and June 2012.[8] 3 CT 568. When the Tribe learned that J.E. had decided to abandon reunification efforts in mid-September 2012, it promptly sought placement with Mr. and Mrs. R. in Utah. 1 CT 362-364.

Mrs. R., despite being non-Indian, has lifelong connections to the Native American community and culture and demonstrated a commitment to ensuring that A.P. would as well. Specifically, Mrs. R. spent part of her childhood on an Indian reservation, as her parents were teachers there, and she went to high school on the Indian reservation. 7/30/13 RT 139-140. Mrs.

[8] Mrs. R. is the niece of J.E.'s stepfather, who is the adoptive father of J.E.'s other daughter, A.E., making Mrs. R. J.E.'s first cousin by marriage. 2 CT 427; 3 CT 537.

R. also grew up learning about the Choctaw heritage of her aunt, J.E.'s mother. After her aunt died unexpectedly of a heart attack in May 2011, Mrs. R. acquired possession of her aunt's tribal cultural items and geneological records. Mrs. R. also contacted the Tribe for cultural information. Mrs. R. also had exposed A.P.'s sister A.E. to her Native American heritage by taking A.E. to pow wows and Indian heritage museums. 7/30/13 RT 140- 143.

Mr. and Mrs. R. first met with A.P. and the petitioners in October 2012. Thereafter, Mrs. R. emailed A.P. and the foster parents frequently. 2 CT 423-425. On November 16, 2012, the Department filed, and the court granted, a request for expedited placement under the Interstate Compact on the Placement of Children ("ICPC") of A.P. with Mr. and Mrs. R. in Utah. 2 CT 377-381. Mr. and Mrs. R. completed a 32-hour training program for foster/adoption/kinship caregivers in December 2012. 2 CT 387. Mr. and Mrs. R. spent an entire day with A.P. on January 25, 2013 and visited her again on February 1, 2013. 2 CT 423-425; 3 CT 680-681, 686.

It was not until a hearing on February 1, 2013, that the foster parents filed a De Facto Parent Request, in which they expressed concern about moving A.P. and their desire to adopt A.P. (2 CT 391-398.)

B. The Petitioners Fail to Accurately Present Essential Authorities

The petition omits key authorities necessary for a proper analysis of the issues presented. Specifically, the petition makes no mention of the

provisions of the California Welfare and Institutions Code or the Code of Federal Regulations set out in Appendix A hereto, which are directly on point, i.e., 25 C.F.R. §§ 23.103, 23.130, 23.131, 23.132 and Cal. Welf. & Inst. Code §§ 224 and 361.31.

The facts and authorities misrepresented in or omitted from the petition are so clearly material to the issues presented that the errors and omissions amount to an attempt to mislead the Court. The petition should be denied as a result.

IV. THE SECOND QUESTION PRESENTED IN THE PETITION DOES NOT MERIT REVIEW BECAUSE THE PETITIONERS URGE AN UNTENABLE INTERPRETATION OF THE PLACEMENT PREFERENCES

The second question presented in the petition is whether an Indian child may be moved to an extended family member's home in accordance with ICWA's adoptive placement preferences, set out in 25 U.S.C. § 1915(a), when the Indian child has already been placed in a non-preferred foster care placement under 25 U.S.C. § 1915(b). Pet. at i and 23-26. There is no legal authority to support the proposition that the adoptive placement preferences set out in 25 U.S.C. § 1915(a) are essentially forfeited when an Indian child is placed in a non-preferred foster care placement pursuant to a good cause finding made under 25 U.S.C. § 1915(b).

The petition contains two sentences in support of the petitioners' argument on the second question presented that are incorrect statements of law. For example, the petition states that: "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." Pet. at 24. This sentence is not supported by a case citation, and a review of the *Adoptive Couple* opinion confirms that there is no such holding. The majority opinion imposes no such temporal limitation on the invocation of the adoptive placement preferences in 25 U.S.C. § 1915(a). In fact, the Court suggests that the father, grandparents or other preferred placement could have triggered 25 U.S.C. § 1915(a) at any time while the case was working its way through the South Carolina courts by filing an adoption petition.

> Contrary to the South Carolina Supreme Court's suggestion, §1915(a)'s preferences are inapplicable in cases where no alternative party has formally sought to adopt the child. This is because there simply is no "preference" to apply if no alternative party that is eligible to be preferred under §1915(a) has come forward.
>
> In this case, Adoptive Couple was the only party that sought to adopt Baby Girl in the Family Court *or the South Carolina Supreme Court* (citation omitted). Biological Father is not covered by §1915(a) because he did not seek to adopt Baby Girl; instead, he argued that his parental rights should not be terminated in the first place. Moreover, Baby Girl's paternal grandparents never sought custody of Baby Girl. (Citation omitted.) Nor did other members of the Cherokee Nation or "other Indian families" seek to adopt Baby Girl, even though the Cherokee Nation had notice of—and intervened in—the adoption proceedings. (Citations omitted.)

Adoptive Couple, 133 S. Ct. at 2564-2565. Contrary to the statement in the petition, the Court in *Adoptive Couple* clearly affirmed that §1915(a) comes into play when a preferred placement seeks to adopt the child, even when the child is already placed with a non-preferred placement for adoption.

The petition also contains the unsupported and incorrect statement that: "Section 1915(a) applies principally to cases involving children voluntarily relinquished for adoption." Pet. at 24. This statement flies in the face of the legislative intent of ICWA's placement preferences, which is to serve as a remedy for the Congressional finding "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions" 25 U.S.C. § 1901(4). It is nonsensical to interpret the adoptive placement preferences as applying principally to voluntary relinquishments when they were implemented to redress the unwarranted removal of Indian children and high percentage of placements in non-Indian foster and adoptive homes. The adoptive placement preferences have in fact been recognized by this Court as "[t]he most important substantive requirement imposed on state courts" by ICWA. *Mississippi Choctaw Indian Band v. Holyfield,* 490 U.S. 30, 36-37 (1989). The assertion that the adoptive placement preferences are intended to apply primarily to voluntary adoption proceedings is also inconsistent with the fact that the adoptive placement preferences are found in § 1915, which by its heading applies to the placement of Indian children generally, rather than within § 1916 which by its heading is expressly limited to voluntary termination proceedings. Furthermore, federal regulations expressly affirm

that the adoptive placement preferences apply to both voluntary and involuntary adoption proceedings. 25 C.F.R. §§ 23.104, 23.129(a) and 23.130(a).

There is no suggestion anywhere in § 1915 (a) or (b) that the adoptive placement preferences for Indian children no longer apply once an Indian child has been placed in a non-preferred foster care placement with the initial acquiescence of the child's tribe. The rules of statutory construction applicable to statutes addressing the rights of Indian tribes do not support reading a non-existent exception into § 1915 (a) or (b). "Statutes passed for the benefit of Indian tribes are to be liberally construed in favor of the tribes." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). "Any ambiguity in statutes affecting an Indian tribe must be resolved in its favor." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973).

For the foregoing reasons, the second question presented in the petition does not merit review.

V. THE ARGUMENTS IN SUPPORT OF REVIEW CONTAINED IN THE PETITIONERS' AMICI CURIAE'S BRIEFS ARE NOT PERSUASIVE

There have been two amici curiae briefs submitted in support of the petition; the first by the Goldwater Institute and the Cato Institute ("GI/CI"), and the second by the American Academy of Adoption Attorneys ("AAAA"). Neither brief is persuasive, and the arguments in both are undermined by the amici curiae's insistence on relying on key misrepresentations and

omissions in the petition that run contrary to the facts as reported in *Alexandria I* and *Alexandria II*.

A. The GI/CI Brief Lacks Merit

Amicus curiae GI/CI contend that petitioners would be free to pursue a petition to adopt A.P. if only she were non-Indian. GI/CI Brief at 3. In so doing, GI/CI reveals a fundamental flaw in their brief and in petitioners' case. Unlike the petitioners in the private adoption proceeding in *Adoptive Couple*, the petitioners here have no colorable right to adopt A.P. The Department has legal custody of A.P. and the right to make placement decisions on her behalf, subject to judicial oversight and input from her counsel and guardian *ad litem*. This distinction is significant, as noted by Justice Stewart in the *Organization of Foster Families* case:

> The family life upon which the State "intrudes" is simply a temporary status which the State itself has created. It is a "family life" defined and controlled by the law of [the State], for which [the State] pays, and the goals of which [the State] is entitled to and does set for itself.

431 U.S. at 863 (Stewart, J., concurring). By failing to acknowledge this distinction or the limited rights of foster parents pursuant to the Organization of Foster Families case, the amicus curiae GI/CI fail to overcome fundamental problems with the petition.

B. The AAAA Brief Lacks Merit

The brief of amicus curiae AAAA should be dismissed as an affront to the reputation of this Court. In a stunning departure from standards of

professionalism, if not ethics, AAAA reaches outside the record and accuses J.E. of having "white supremacist connections." AAAA describes the allegation as "apparently unrebutted news accounts," when in fact it is based solely on a report contained in a London tabloid, the Daily Mail, published after the appeal in question and A.P.'s removal from the petitioners.[9] AAAA Brief at 14, n. 4.

Amicus curiae AAAA also mischaracterize the case, in direct contravention of the facts reported in *Alexandria II*, as "the removal of the child from an otherwise fit adoptive home." AAAA Brief at 6. As previously noted above and in the statements of fact contained in the co-respondents' briefs in opposition to the petition, the petitioners were never an adoptive home; they were only and ever a temporary foster home for A.P. In addition, the record belies the assertion that but for the fact they were not a preferred placement they were "otherwise fit." The Court of Appeal noted several concerns supporting the juvenile court's conclusion that continued placement with the petitioners was not in A.P.'s best interests, such as the petitioners' failure to promote A.P.'s sibling relationships, their lack of meaningful efforts to promote a strong Choctaw cultural identity for A.P., and their inability "to carry out their role as foster parents in supporting [A.P.] as she developed a relationship with the R.s, who the tribe had identified as an adoptive

[9] The Daily Mail's reputation for defamation is notorious. *See*, *e.g.*, Julia Marsh, "The Daily Mail's reputation is so bad it can't be libeled," NY Post (Dec. 7, 2015), available at http://nypost.com/2015/12/07/the-daily-mails-reputation-is-so-bad-it-cant-be-libeled-gawker-lawyer/ (last visited Dec. 1, 2016).

placement." *Alexandria II,* 1 Cal. App. 5th at 356-358. Justice Stewart in *Organization of Foster Families* had harsh words for foster parents who, like the petitioners here, fail to respect the boundaries appropriate to their role as temporary caregivers and to prepare the foster child for return to a natural parent or a move to a permanent adoptive home:

> [U]nder New York's foster-care laws, any case where the foster parents had assumed the emotional role of the child's natural parents would represent not a triumph of the system, to be constitutionally safeguarded from state intrusion, but a failure. The goal of foster care, at least in New York, is not to provide a permanent substitute for the natural or adoptive home, but to prepare the child for his return to his real parents or placement in a permanent adoptive home by giving him temporary shelter in a family setting.

431 U.S. at 861-862.

The introduction of tabloid journalism in AAAA's brief in support of petitioners as well as the perpetuation of the myth that the petitioners were A.P.'s prospective adoptive parents undermines the arguments presented by AAAA in its amicus curiae brief.

Due to these fundamental flaws in their briefs, the amici curiae fail to present a compelling case for granting the petition.

CONCLUSION

For the reasons set out above and in the briefs in opposition submitted by the Department, the Tribe and the minor's counsel, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A
STATUTES AND REGULATIONS

25 U.S.C. § 1903 - Definitions

…

(2)"extended family member" shall be as defined *by the law or custom of the Indian child's tribe* or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

…

25 U.S.C. § 1915 - Placement of Indian children

(a) In any adoptive placement of an Indian child under State law, *a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family;* (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. *The child shall also be placed within reasonable proximity to his or her home*, taking into account any special needs of the child. In any foster care or preadoptive placement, a *preference shall be given, in the absence of good cause to the contrary, to a placement with—*

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c)Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by

resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. *Where appropriate, the preference of the Indian child or parent shall be considered*: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d)Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e)Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

25 U.S. Code § 1921 Return of Custody

…

(b)Removal from foster care home; placement procedure

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. Code § 1921 - Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

25 C.F.R. § 23.103 When does ICWA apply?

(a) ICWA includes requirements that apply whenever an Indian child is the subject of:

(1) A child-custody proceeding, including:

(i) An involuntary proceeding;

(ii) A voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand; and

(iii) A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, preadoptive, or adoptive placement, or termination of parental rights.

(2) An emergency proceeding.

(b) ICWA does not apply to:

(1) A Tribal court proceeding;

(2) A proceeding regarding a criminal act that is not a status offense;

(3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding; or

(4) A voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

(c) If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of "Indian child," then ICWA will apply to that proceeding. *In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.*

(d) If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.

25 C.F.R. § 23.130 What placement preferences apply in adoptive placements?

(a) In any adoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (b) of this section, *preference must be given in descending order, as listed below, to placement of the child with:*

(1) A member of the Indian child's extended family;

(2) Other members of the Indian child's Tribe; or

(3) Other Indian families.

(b) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply.

(c) *The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.*

25 C.F.R. § 23.131 What placement preferences apply in foster-care or preadoptive placements?

(a) In any foster-care or preadoptive placement of an Indian child under State law, including changes in foster-care or preadoptive placements, the child *must* be placed in the least-restrictive setting that:

(1) Most approximates a family, taking into consideration sibling attachment;

(2) Allows the Indian child's special needs (if any) to be met; and

(3) *Is in reasonable proximity to the Indian child's home, extended family, or siblings.*

(b) In any foster-care or preadoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (c) of this section, *preference must be given, in descending order as listed below, to placement of the child with:*

(1) A member of the Indian child's extended family;

(2) A foster home that is licensed, approved, or specified by the Indian child's Tribe;

(3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

(c) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child, as provided in paragraph (a) of this section.

(d) *The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent.*

25 C.F.R. § 23.132 How is a determination of "good cause" to depart from the placement preferences made?

…

(b) The party seeking departure from the placement preferences should bear the burden of proving *by clear and convincing evidence* that there is "good cause" to depart from the placement preferences.

(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and *should* be based on one or more of the following considerations:

(1) *The request of one or both of the Indian child's parents*, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;

(2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;

(3) *The presence of a sibling attachment* that can be maintained only through a particular placement;

(4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;

(5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located…

…

(e) *A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.*

Cal. Welf. & Inst. Code § 224. Legislative findings and declarations; Indian child custody proceedings

(a) The Legislature finds and declares the following:

(1) There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and the State of California has an interest in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe. The state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) and other applicable law, designed to prevent the child's involuntary out-of-home placement and, whenever that placement is necessary or ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community.

(2) It is in the interest of an Indian child that the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected, *regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled*.

(b) In all Indian child custody proceedings, as defined in the federal Indian Child Welfare Act the court shall consider all of the findings contained in subdivision (a), strive to promote the stability and security of Indian tribes and families, comply with the federal Indian Child Welfare Act, and seek to protect the best interest of the child. Whenever an Indian child is removed from a foster care home or institution, guardianship, or adoptive placement for the purpose of further foster care, guardianship, or adoptive placement, placement of the child shall be in accordance with the Indian Child Welfare Act.

(c) A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe *shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act to the proceedings.*

(d) In any case in which this code or other applicable state or federal law

provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child, or the Indian child's tribe, than the rights provided under the Indian Child Welfare Act, the court shall apply the higher standard.

(e) Any Indian child, the Indian child's tribe, or the parent or Indian custodian from whose custody the child has been removed, may petition the court to invalidate an action in an Indian child custody proceeding for foster care or guardianship placement or termination of parental rights if the action violated Sections 1911, 1912, and 1913 of the Indian Child Welfare Act.

Cal. Welf. & Inst. Code § 361.31. Placement of children with Indian ancestry; considerations; priority of placement in adoptions; record of foster care

(a) In any case in which an Indian child is removed from the physical custody of his or her parents or Indian custodian pursuant to Section 361, the child's placement shall comply with this section.

(b) Any foster care or guardianship placement of an Indian child, or any emergency removal of a child who is known to be, or there is reason to know that the child is, an Indian child shall be in the least restrictive setting which most approximates a family situation and in which the child's special needs, if any, may be met. *The child shall also be placed within reasonable proximity to the child's home*, taking into account any special needs of the child. *Preference shall be given to the child's placement with one of the following, in descending priority order:*

(1) A member of the child's extended family, as defined in Section 1903 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(2) A foster home licensed, approved, or specified by the child's tribe.

(3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority.

(4) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) *In any adoptive placement of an Indian child, preference shall be given to a placement with one of the following, in descending priority order:*

(1) A member of the child's extended family, as defined in Section 1903 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(2) Other members of the child's tribe.

(3) Another Indian family.

(d) Notwithstanding the placement preferences listed in subdivisions (b) and (c), if a different order of placement preference is established by the child's tribe, the court or agency effecting the placement shall follow the order of preference established by the tribe, so long as the placement is the least restrictive setting appropriate to the particular needs of the child as provided in subdivision (b).

(e) *Where appropriate, the placement preference of the Indian child, when of sufficient age, or parent shall be considered*. In applying the preferences, a consenting parent's request for anonymity shall also be given weight by the court or agency effecting the placement.

(f) The prevailing social and cultural standards of the Indian community in which the parent or extended family members of an Indian child reside, or with which the parent or extended family members maintain social and cultural ties, or the prevailing social and cultural standards of the Indian child's tribe shall be applied in meeting the placement preferences under this section. A determination of the applicable prevailing social and cultural standards may be confirmed by the Indian child's tribe or by the testimony or other documented support of a qualified expert witness, as defined in subdivision (c) of Section 224.6, who is knowledgeable regarding the social and cultural standards of the Indian child's tribe.

(g) Any person or court involved in the placement of an Indian child shall use the services of the Indian child's tribe, whenever available through the tribe, in seeking to secure placement within the order of placement preference established in this section and in the supervision of the placement.

(h) The court may determine that good cause exists not to follow placement preferences applicable under subdivision (b), (c), or (d) in accordance with subdivision (e).

(i) When no preferred placement under subdivision (b), (c), or (d) is available, active efforts shall be made to place the child with a family committed to enabling the child to have extended family visitation and participation in the cultural and ceremonial events of the child's tribe.

(j) The burden of establishing the existence of good cause not to follow placement preferences applicable under subdivision (b), (c), or (d) shall be on the party requesting that the preferences not be followed.

(k) A record of each foster care placement or adoptive placement of an Indian child shall be maintained in perpetuity by the State Department of Social Services. The record shall document the active efforts to comply with the applicable order of preference specified in this section.