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

*Respondents*.

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

## REPLY BRIEF OF PETITIONERS


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## REPLY OF PETITIONERS

The decisions of the California state courts in this case perpetuated an entrenched and longstanding conflict among more than twenty state appellate courts, and interpreted ICWA in a way that is inconsistent with Congress' stated intent and that offends fundamental due process and equal protection principles. Respondents do not and cannot deny the persistent conflict of authority concerning what has become known as the "existing Indian family doctrine." They posit instead that the conflict will eventually disappear on its own without this Court's intervention (though it has persisted some three decades). Anything is possible. But the contours of the split have not materially changed since this Court granted certiorari to resolve it in *Adoptive Couple*. The issue was worthy of review then, and it is still worthy of review today.

Try as they might to conjure up supposed "vehicle problems," respondents cannot deny that each of the federal issues presented was addressed and decided by the courts below, and the state courts plainly viewed the federal statute as dispositive of the custody determination. Nor can they deny that in any one of several other states, ICWA would not have applied, and Petitioners' adoption of Lexi would have been finalized years ago. This is an ideal vehicle through which to resolve the acknowledged conflict.

The questions presented are exceptionally important to a growing number of multi-ethnic children and their families. The countless children and families affected by this federal statute deserve certainty, one way or another. If the law had been settled, Lexi's adoption would have been finalized (either with Petitioners or the R.s) *more than four years ago*. Instead, a terrified six-

year-old was unceremoniously ripped from her home and cut off entirely from the only family and community she has ever known. Somewhere in Utah, that little girl—fully aware of what she has lost but unable to comprehend why—will spend Christmas wondering whether she will ever see her family in California again. The persistent uncertainty in this area of law is intolerable. The Petition should be granted.

## I. THE ACKNOWLEDGED DIVISION OVER THE "EXISTING INDIAN FAMILY DOCTRINE" WARRANTS REVIEW

Respondents do not and cannot deny that the state courts have been divided for decades on whether ICWA applies to a child who has not been removed from an Indian family or community. They argue that the weight of authority is trending in their direction. But this Court granted certiorari just four years ago to resolve this conflict, over identical objections. *Adoptive Couple v. Baby Girl*, Case No. 12-399, Pet. for Certiorari, at 11-15; *Adoptive Couple v. Baby Girl*, Case No. 12-399, Brief in Opp., at 11-15 (2013). This Court ultimately did not need to reach the issue, because it concluded that Father was not entitled to invoke ICWA's parental-termination provisions for other reasons. The contours of the split have not materially changed since then.

Pointing to newly-minted regulations issued by the Bureau of Indian Affairs (BIA), Respondents argue in turns that the BIA has "settled" the law, or that the issue should be left to "percolate" further among state courts in light of the BIA's expressed views. Neither contention has merit. For decades, and until 2015, the BIA *disclaimed* any authority to issue substantive regulations

interpreting ICWA.[1] That BIA has now weighed in does not "resolve" the acknowledged split among state courts, which respondents elsewhere acknowledge. (*See* Minor Opp. at 14.) Setting aside the serious question of BIA's interpretative authority on this score, the agency certainly does not have the power to overrule state-court decisions interpreting the statute to avoid serious federal constitutional questions. Only this Court can resolve the conflict.

Further percolation is unnecessary and unwarranted. The state courts have staked out their positions, and with few exceptions have hewed to them for years. Further cogitation by the state courts that apply ICWA is unlikely to be illuminating—and it is certain to cause further harm to Indian children and the adults who care for them. Moreover, because the BIA has ignored entirely the constitutional concerns underlying many of the state-court decisions applying the EIF doctrine, the new regulations provide no basis for those courts to reconsider their constitutionally-grounded rulings.

Finally, only a miniscule fraction of ICWA cases result in a published appellate decision, even at the intermediate state-court level. This Court should decline respondents' invitation to sit idly by for another couple of decades while state courts continue to grapple with conflicting authorities, with children's lives at stake. This Court's intervention is long overdue, and a cleaner vehicle is unlikely to present itself anytime soon.

2. There are no impediments to certiorari. Largely ignoring the questions presented and the acknowledged conflict, Respondent DCFS asserts that the decision below was based on "adequate and independent state

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[1] *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67,584, 67,584-85 (1979) .

law," because it is purportedly "consistent" with California law that favors placement with relatives and siblings. DCFS Opp. 10-17. The argument is entirely meritless. The AISG doctrine applies only when the state court actually decides a state-law issue that is independently sufficient to sustain the judgment. The juvenile court here relied exclusively on ICWA in reaching its result (three times), and the Court of Appeal plainly "deem[ed] the federal question[s] to be before it," and "actually entertain[ed] and decide[d]" them. *Orr v. Orr*, 440 U.S. 268, 276 (1979); *see, e.g.*, App. 26a-28a (acknowledging the split, observing that "the continued viability of the [existing Indian family] doctrine is far from settled," App. 26a, and rejecting the argument on the merits). The AISG doctrine is therefore not implicated here. *See Orr*, 440 U.S. at 277 (Court "cannot refuse jurisdiction because the state court *might have* based its decision, consistently with the record, upon an independent and adequate non-federal ground") (emphasis added).[2]

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[2] The suggestion that the decision below would have come out the same way under applicable state law is also demonstrably false, but Petitioners will resist the temptation to muddy the waters by responding point-by-point on issues of state law. Suffice it to say that DCFS's arguments are beyond disingenuous, and are belied by the fact that the parties have litigated this case as one that turns on the application of ICWA since 2012. DCFS asserts (at 21) that "in California, relative placements are preferred for all children." As DCFS well knows, once reunification services have been terminated, California law does not bestow a preference on relatives (even grandparents with an existing relationship to the child). Instead, generally applicable California law prioritizes a child's right to stability and permanence. *See, e.g., In re Jasmon O.*, 8 Cal.4th 398, 419 (1994); *In re Marilyn H.*, 5 Cal.4th 295, 306 (1993); Welf. & Inst. Code, § 366.26, subd. (b). And the state-law preference for placing siblings together sensibly applies only when there is an existing and significant sibling relationship to protect. It does not encourage, much less require, the *uprooting* of a child who is thriving, to be placed in a

3. Nor does the child's attorney's litigation position—that "the minor desires ICWA's application" (Minor Opp. 12) somehow divest Petitioners of standing to press each of their arguments in favor of a proper, and constitutional, interpretation of ICWA.[3] Petitioners were parties below (who prevailed twice on appeal) and are clearly "aggrieved" by the decision removing Lexi from their home, entirely independent of the harm Lexi has suffered as a result of this tragedy. Petitioners need not have suffered a constitutional injury in order to raise constitutional avoidance arguments against ICWA's application. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 382 (2005) ("when a litigant invokes the canon of avoidance, he is not attempting to vindicate the constitutional right of others," but rather "seeks to vindicate his own *statutory* rights."); Pet. 22 n.4.[4]

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different home with a new half-sibling. In any event, the opinions below are clear in their reliance on federal law.

[3] Petitioners pause to note that Respondents misleadingly suggest that Lexi's wishes have somehow been taken into account. Make no mistake, the "child's" *legal* position has nothing whatsoever to do with Lexi's wishes or her best interests as an individual child. Minor's counsel argued from the outset of this case that Lexi's individual best interests *could not be taken into account* and that ICWA dictated placement with the step-cousins identified by the Tribe. And after the Court of Appeal reversed and remanded in 2014, Lexi's trial counsel successfully *opposed* Petitioners' request that the court hear from Lexi directly, in camera. In round three, Lexi's appellate counsel admitted that she would suffer harm if removed from Petitioners, but argued that ICWA's placement preferences were mandatory, regardless of the child's best interests, unless the non-preferred placement could show definitively that she possessed "extraordinary emotional needs."

[4] Respondent DCFS attempts to distinguish *Clark v. Martinez* on the ground that there, "the petitioners sought uniform application of a law that protected them; here, petitioners seek to eradicate laws that protect the rights of others." Opp. 23. But *Clark* stands for the

Nor can minor's appellate counsel manufacture a vehicle problem where none exists by stating his counter-factual litigation position—that Lexi "considers herself to be a member of an Indian community." (Minor Opp. 12.) As the Court of Appeal recognized, neither Lexi nor her biological father was part of an Indian community when Lexi was rescued from neglect and taken into protective custody. App. 5a n.2. And Father never had legal custody of Lexi, because he was never married to her biological mother and—due to his own actions and lack thereof—failed to earn "presumed father" status under state law. App. 10a. Thus, ICWA would not have applied to Lexi in any of the states that apply *either* variant of the existing Indian family doctrine.[5]

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general proposition that constitutional avoidance is a tool of statutory construction, and one need not possess a constitutional interest in order to press constitutional avoidance in support of a proper interpretation of the statute. The state courts' erroneous application of ICWA here aggrieved Petitioners, who were indeed parties to this case. *Contra* DCFS Opp. 24. The petitioners in *Adoptive Couple* were similarly situated. They had no protected interest in a continued relationship with the child they wished to adopt; yet, they were parties clearly aggrieved by the decision removing Baby Girl from their care.

[5] Respondent DCFS suggests that this case is an "unsuitable" vehicle for resolving the split because Lexi's deceased biological grandmother (whom she never met) was allegedly not a "stranger[]" to her Choctaw roots. DCFS Opp. 26. But courts applying the doctrine sensibly consider not whether *any* biological family member, living or deceased, had a significant connection to the tribe; they consider whether the *child at issue* was removed from an Indian family. *See, e.g., In re Adoption of D.C.*, 928 N.E.2d 602, 605 (Ind. Ct. App. 2010) (noting that ICWA is "applicable when you have Indian children being removed from their existing Indian environment" and holding that because the child "has never lived with Biological Father and thus has never lived in an Indian home from which he could be removed," ICWA does not apply here); *Rye v. Weasel*, 934 S.W.2d 257, 263 (Ky. 1996) ("the ICWA was never meant to apply in those cases […] where the Indian children had

The equal protection concerns that this Court identified in *Adoptive Couple* are front and center in this case. If Lexi were not classified as an "Indian child," she would have been entitled to an individualized determination of her best interests; and, more specifically, her right to stability and continuity of her most precious and formative relationships would have been dispositive of her placement. *See In re Jasmon O.*, 8 Ca1.4th at 419. Instead, her placement was dictated by a blanket (and apparently unrebuttable) presumption based on her status as an "Indian."

## II. THE OTHER QUESTIONS PRESENTED ALSO WARRANT REVIEW

Minor's counsel (at 16-17) attempts to recast the second question presented in the Petition as a challenge to "factual determinations" made by the courts below. The charge is baffling. It is undisputed that ICWA was followed to the letter when Lexi was placed with Petitioners in 2011. Whether Section 1915(a)'s adoptive placement preferences require removal and re-placement of a child who has already been placed under 1915(b) is a clean and recurring legal question. Petitioners and amici pressed this argument on appeal, and the Court of Appeal addressed it on the merits. App. 32a-33a. This issue lies at the heart of ICWA's administration, and if the interpretation pressed by Petitioners and their amici is correct, that would significantly mitigate the grave

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lived with their non-Indian mothers" and were never part of an Indian family). Lexi was not—both because one cannot be "removed" from a parent who never had custody, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2562 (2013), and because neither she nor her biological father had a connection to the Choctaw Nation beyond ancestry.

constitutional concerns raised by ICWA's placement preferences.[6]

As to the third question presented—whether "good cause" must be proved by "clear and convincing evidence"–Respondents weakly offer that other California state courts "have applied the clear and convincing standard even where the statute is silent on burden." Opp. 18. That may or may not be true; it is irrelevant. Under well settled principles of federal statutory construction, Congress's silence on this point means that "good cause" may be proved by a preponderance of the evidence. Pet. 26. That conclusion is bolstered by Congress's meticulous attention to the issue of burdens throughout the statute. Congress imposed various heightened standards in other provisions of ICWA, such as "clear and convincing" and "beyond a reasonable doubt." Its decision to omit such language from the placement provisions must be presumed to have been intentional. *Id.*

The application of an erroneously heightened standard here was prejudicial. Each of the juvenile court judges expressed the view that this was an exceedingly close case. Judge Pellman referred to her decision as "as one of the most difficult" she had ever made—though Lexi was just four years old at the time (Dec. 9, 2013 Statement of Decision); Judge Trendacosta stated that absent the ICWA overlay, this would "not even be a close case and it would clearly be in Alexandria's best interests to remain with" Petitioners. (Nov. 5, 2015 Statement of Decision.)

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[6] Equally baffling is Minor's assertion that "Petitioners did not challenge the substance of what constitutes good cause … either in this petition or in either of the two appeals that are the subject of this petition." (Minor Opp. 17.) The "substance of what constitutes good cause" was a principal issue in each appeal, and was in fact the ground on which the trial court was reversed—twice.

Indeed, Judge Trendacosta reversed himself on the placement decision just days after he issued his initial decision, before he was replaced by yet another judge. Pet. 11.

The state courts' interpretation of ICWA as requiring "clear and convincing" proof of "good cause" is plainly erroneous under well-established principles of statutory interpretation. Pet. 27-28. This Court should grant review on this issue, too, so that it may restore the "good cause" exception to the flexible safety valve Congress envisioned.

## III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING

The questions presented arise with alarming frequency. Thousands of Indian children are born to unwed, mixed-race parents annually, and that number only continues to rise. As Amici Goldwater Institute and Cato Institute point out (at 22-23), a disproportionate number of such children end up in foster care in California—the state with the greatest American Indian population. There are few if any suitable foster homes available that would satisfy ICWA's placement preferences; yet the decision below sends a chilling message that is sure to deter would-be foster and adoptive parents from opening their hearts and homes to them. Those children—and would-be adoptive parents—are entitled to a clear pronouncement that will apply uniformly across all fifty states.

* * * * *

As in *Adoptive Couple*, Petitioners respectfully submit that it is not necessary to invite the views of the United States at the certiorari stage. Time is of the essence for Petitioners and, critically, for the child whose

life has been turned upside down by the unlawful decision below. Acutely aware of that fact, Petitioners sought and obtained extraordinarily expedited appellate review, and filed the Petition just days after the judgment below became final. If certiorari is granted now, the case may be heard and decided this Term. A call for the views of the Solicitor General at this stage would impose a substantial and unwarranted delay in these circumstances. Regardless of the views of the United States, certiorari is clearly warranted in light of the decades-long intractable division among state courts.

Respondent DCFS implies that the Petition is somehow engineered to "tug at heartstrings"—as if that were a defect. DCFS Opp. at 10. The Department would do well to remember that Lexi is a living, breathing, seven-year-old child—not simply a "resource" to be allocated. The removal of this child from her entire world—the people she has grown to know as her parents, her sisters, her brother, her grandparents, her aunts and uncles, her schoolmates, her teachers, everything—was unfathomably cruel, entirely unnecessary, and unconstitutional. The Court should grant certiorari not just to right this unconscionable wrong, but to provide certainty in this area of law so that other Indian children may be spared a similar fate.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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