Nos. 02-17-00298-CV & 02-17-00300-CV

IN THE COURT OF APPEALS
FOR THE SECOND JUDICIAL DISTRICT
AT FORT WORTH, TEXAS

IN RE A.L.M., A CHILD

On Appeal from Cause Nos. 323-103401-16 & 323-105593-17
323rd District Court of Tarrant County, Texas

BRIEF OF AMICUS CURIAE GOLDWATER INSTITUTE IN SUPPORT OF APPELLANTS C.E.B. AND J.K.B.

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Goldwater Institute is a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility. Through its Scharf–Norton Center for Constitutional Litigation, the Institute litigates on behalf of clients and participates as amicus curiae in cases involving constitutional liberty. As described in the accompanying motion for leave to file, the Institute is deeply familiar with the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 *et seq.*, which is at the heart of this case, and believes its litigation experience and public policy expertise will aid this Court in its consideration of the case. Pursuant to Texas Rule of Appellate Procedure 11, amicus certifies that this brief complies with all applicable rules, and no entity other than amicus itself paid for the preparation or filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

A.L.M. is an "Indian child" within the meaning of the ICWA. 25 U.S.C. § 1903(4). As a result, the court below held that he is "required … to be taken … from the only parents [he] ha[s] ever known and handed over to [strangers] who had … no prior contact with the child," except for one brief visit. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2556 (2013). The provisions of ICWA "do not demand this result." *Id.* at 2557. On the contrary, it "raise[s] equal protection concerns." *Id.* at

2565. It also deprives the appellants and A.L.M. of rights guaranteed by the due course of law, and violates the Tenth Amendment.

More specifically, the outcome here is expressly forbidden by *In re Gomez*, 424 S.W.2d 656 (Tex. Civ. App.—El Paso 1967) (per curiam), which forbids state courts from denying adoption on the basis of race. Although it is sometimes argued that ICWA creates a political classification under *Morton v. Mancari*, 417 U.S. 535 (1974), rather than a suspect racial classification, the application of ICWA in this case does establish a race-based classification because it "singles out 'identifiable classes of persons ... solely because of their ancestry or ethnic characteristics.'" *Rice v. Cayetano,* 528 U.S. 495, 515 (2000) (citation omitted). To apply ICWA to A.L.M. based solely on his genetics, and thus deprive him of the adoptive home he needs based on "an immutable characteristic determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), is unconstitutional. This Court must not let it happen.

I. APPLYING ICWA IN THIS CASE, BASED SOLELY ON A.L.M.'S GENETIC PROFILE CREATES A RACE-BASED DISTINCTION SUBJECT TO STRICT SCRUTINY

A. The Classification Here is Racial, Not Political or Cultural

A.L.M. has no cultural or political connection to either the Navajo or Cherokee tribes. How could he? He is an infant who speaks no tribal language, observes no Native religion, participates in no tribal cultural practices, and has no

other political or cultural connection to either tribe. His sole relationship to the tribe—if "relationship" is the correct word—is biological. He is "eligible for membership" in these tribes based *exclusively* on biological factors. The Cherokee Constitution requires no political, social, or cultural factors for tribal membership—one need merely be a direct biological descendant of an original enrollee listed on the Dawes Commission Rolls. CHEROKEE CONST. art. IV § 1.[1] The Navajo Nation also imposes *only* biological qualifications for membership: one must have 25 percent Navajo blood. Navajo Nation Code Ann. tit. 1, § 701(B)–(C) (2016).[2] A person who has the required DNA is eligible for membership, without regard to any cultural or political considerations—and a person who is fully acculturated or affiliated with the tribe in a political or cultural sense is not eligible if he lacks the right type of blood in his veins. The *sole* criterion is racial.

This is why *Mancari* , is not applicable here. That case involved adults who chose to affiliate themselves with a tribe. Indeed, the *Mancari* Court noted that the law in that case was "not directed towards a 'racial' group consisting of 'Indians.'" 417 U.S. at 553 n.24. Similarly, in *United States v. Antelope*, 430 U.S. 641 (1977), which again applied rational basis scrutiny to a law that treated Indians differently from non-Indians, the Court noted that it was "not called on to decide" the

[1] http://www.cherokee.org/Portals/0/Documents/2011/4/308011999-2003-CN-CONSTITUTION.pdf

[2] http://www.navajonationcouncil.org/Navajo%20Nation%20Codes/V0010.pdf

constitutionality of laws that treated Indians differently on the basis of genetics alone. *Id.* at 646 n.7.[3]

In *Rice*, the Court addressed the difference between *Mancari*-type political distinctions and racial distinctions. It defined a racial classification as "that which singles out 'identifiable classes of persons ... solely because of their ancestry or ethnic characteristics.'" 528 U.S. at 515 (citation omitted). That is plainly what ICWA does—at least as applied in this case. It imposes different substantive and procedural law to cases involving children who are "eligible for membership" in a tribe, 25 U.S.C. § 1903(4), and eligibility is determined exclusively by reliance on ancestry and ethnic characteristics.[4] At least in this case, where the child has no

[3] For instance, the Court specifically withheld consideration of whether it would be constitutional to subject Indians to "differing … burdens of proof from those applicable to non-Indians charged with the same offense." *Id.* at 649 n.11. ICWA, however, specifically does impose different burdens of proof in cases involving Indian children than apply in cases involving children of other races. In cases involving white, black, Hispanic, Asian, etc., children, termination of parental rights is decided using the "clear and convincing evidence" standard required by *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982), and *In re C.H.*, 89 S.W.3d 17, 18–19 (Tex. 2002)—whereas under ICWA, the facts to establish termination of parental rights must be proven "beyond a reasonable doubt" on the testimony of expert witnesses. 25 U.S.C. § 1912(f). This difference in the burden of proof is detrimental to Indian children: as the *Santosky* Court noted, the reasonable-doubt standard "erect[s] an unreasonable barrier to state efforts to free permanently neglected children for adoption." 455 U.S. at 769.

[4] ICWA defines an "Indian child" as a child who is eligible for membership himself, and who has a "biological" parent who is a tribal member. 25 U.S.C. 1903(4). Thus adopted children do not qualify: the only criteria are ethnic/ancestral. Even if, however, ICWA depended on nationality, nationality-based distinctions are suspect classifications subject to the same strict scrutiny as race-based distinctions. *See*

political, social, or cultural connection to the tribe, the application of ICWA falls within *Rice*'s definition of a racial classification.

It is sometimes said that tribes, as sovereign entities, have authority to determine tribal membership without interference by state courts. But this argument confuses *eligibility*, which is indeed a matter of tribal law, and is not subject to constitutional limitations, *with "Indian child" status under ICWA*, which is a "conclusion of federal and state law" triggered by that eligibility. *See In re Abbigail A.*, 375 P.3d 879, 885 (Cal. 2016). The latter *is* subject to constitutional limitations—including the Constitution's nearly absolute prohibition on race-based differential treatment. The question is not whether the Navajo or Cherokee tribes may claim A.L.M. as a tribal citizen; it is whether the courts of Texas can treat him differently—by denying the adoption petition, or sending him to a different state to live with strangers—because of his race.

It is also sometimes argued that ICWA imposes a political, rather than a race-based classification because not all Native American children are subject to ICWA. A child might be racially Native American but not an "Indian child," perhaps because she has no parent enrolled in the tribe. But the *Rice* Court rejected this argument: "Simply because a class defined by ancestry does not include all members

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Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d 1117, 1120 (9th Cir. 1998).

of the race does not suffice to make the classification race neutral." 528 U.S. at 516–17. This makes sense: a law that imposed a burden on, say, all right-handed black Texans would still be a racial classification even though it did not apply to left-handed black Texans.

Finally, the fact that ICWA imposes a racial, and not a political or cultural category, is made clear by the adoption preferences at issue in this case. Those preferences require that an Indian child be adopted, not necessarily by a member of the same tribe, but by "other Indian families," *regardless* of tribe. 25 U.S.C. § 1915(a)(3). As applicable in this case, ICWA's "other Indian families" preference disregards the vast cultural, linguistic, religious, and historical differences between the Cherokees and the Navajo—tribes whose ancestral homelands are as far apart as Paris is from Moscow. This is because ICWA's placement preferences do *not* depend on tribal or political or cultural affiliation; they depend on generic "Indianness." As far as ICWA Section 1915 is concerned, one tribe is as good as any other. But the concept of generic "Indian" is a *racial* category, one that originated with European settlers upon their arrival in the New World. *See* ROBERT M. UTLEY, THE INDIAN FRONTIER, 1846-1890 at 4-6 (Allen Billington et al., eds., Univ. of N.M. Press, rev. ed. 2003) (1984). These settlers overlooked the substantial distinctions between tribes, and classified the aboriginal Americans as a single race, labeled "Indian." ICWA perpetuates this "ahistorical assumption[]" by "treating all Indian

tribes as an undifferentiated mass." *United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring).

The bottom line is clear: ICWA imposes a racial category, not a political classification. As applied in this case, at least, it depends not on religious, cultural, or political tribal identity, but on genetics—and application of ICWA here results in treating this Texan child differently from his black, white, Asian, or Hispanic neighbors, based solely on his biological descent. That is unconstitutional. *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 730 (Cal. App. 2001).

B. Denying Adoption in This Case Based Solely on A.L.M.'s Genetic Profile, is a Loathsome Form of Racial Discrimination

It is obvious that if A.L.M. were black, or Chinese, or Amish, or Jewish, this case would be governed by ordinary Texas law regarding adoption and foster care. A voluntary adoption supported by his parents, where no other family has filed a petition for adoption, would be almost routine: the petitioners would need to show the grounds for termination by clear and convincing evidence, *In re C.H.*, 89 S.W.3d at 18–19, and the court would have to be satisfied that adoption is in the child's best interest. *Green v. Remling*, 608 S.W.2d 905, 908 (Tex. 1980). In such a case, it would not even cross the court's mind to limit A.L.M.'s adoption prospects to adults who share his racial, national, or religious ancestry—doing so would be illegal. *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Gomez*, 424 S.W.2d at 659; 42 U.S.C. § 1996b(1).

In *Gomez*, the Court struck down a statute prohibiting the adoption of white children by black adults, holding that the categorical presumption that it is in the best interest of a white child to be raised by whites was a form of "separate but equal" forbidden by the Constitution 424 S.W.2d at 658-59. This Court should do the same.

But solely because A.L.M.'s ancestry is "Indian," the court below applied a different, and less-protective set of rules to this case: rules that compromise A.L.M.'s best interests. Indeed, this point could not be clearer: Texas courts have declared that "the rights and welfare of the children are the paramount things to be considered in adoption and child custody cases," *McLean v. Lewis*, 376 S.W.2d 428, 430 (Tex. Civ. App.—Dallas 1964) (citation omitted), and that "the State's overriding concern is the [child's] best interest," *In re J.F.C.*, 96 S.W.3d 256, 294–95 (Tex. 2002). To apply a different rule for children of one particular ethnicity "would raise equal protection concerns," *Adoptive Couple*, 133 S. Ct. at 2565, yet cases like *In re W.D.H.*, 43 S.W.3d 30, 36 (Tex. App.—Houston 2001), have declared that for Indian children, the best-interests test "is different than the general Anglo American 'best interest of the child' standard used in cases involving non-Indian children." *See also* Paul Shunatona & Tricia Tingle, *Indian Child Welfare Act in Texas—An Overview*, 58 TEX. BAR J. 352, 355 (1995) ("ICWA's best interest standard is drastically different than the best interest test set forth in [cases involving non-Indian children].").

Given that all Indian children are citizens of the United States, 8 U.S.C. § 1401(b), the implication is clear: literally a rule of "separate but equal"—or more precisely, separate and substandard. Black, Asian, Jewish, Amish, etc., children have their cases reviewed under the ordinary "Anglo" best interest standard, while a "drastically different" and *less protective* standard is used in this case, *solely* on account of A.L.M.'s race. Shunatona & Tingle, *supra*, at 355; *In re W.D.H.*, 43 S.W.3d at 36.

The "Indian best interests" standard is less protective, both because it subordinates a child's individual best interests to other considerations and because it imposes a higher burden of proof on cases seeking to rescue Indian children from abuse and neglect.

Under what *W.D.H.* called the "Anglo" best interests test, a child's best interests are considered in an inherently individualized manner: the overriding concern is the best interest of *this specific* child in *his or her unique circumstances*, *see, e.g.*, *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976) (listing factors to be considered). But under the diluted, less-protective "Indian" version of "best interests," a categorical presumption applies, under which the court assumes that the child should be placed with adults who fit the racial profile of "Indian." *See In re W.D.H.*, 43 S.W.3d at 36 (referencing "the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected").

Categorical presumptions based on ethnic ancestry are antithetical to the requirements of the individualized best-interests standard—they are *exactly* the sort of racial discrimination that the Constitution forbids. *Gomez*, 424 S.W.2d at 659. And the greater burden of proof imposed on cases involving Indian children makes it harder to protect these children from abuse or neglect, and extraordinarily difficult to find them the safe, adoptive homes they need. *See* Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1, 35-50 (2017).

"The underlying tenet of the Equal Protection Clause is that the Government must treat citizens as individuals, not simply as components of a racial, religious, sexual, or national class." *Casarez v. State*, 913 S.W.2d 468, 472–73 (Tex. Crim. App. 1994) (En Banc). Yet race-based presumption and the second-class "Indian best interests" test used below denies A.L.M. that right, and treats him as a component of a racial or national class. The court below presumed that *solely because of the blood in his veins*, A.L.M.'s adoption by loving, caring foster parents who wish to provide him the family stability he needs should be denied—and he now faces being sent out of Texas to live with strangers based solely on *their* racial ancestry.

The justification for this disparate treatment is the assumption that, regardless of his individual circumstances, "what is best for an Indian child is to maintain ties

with the Indian Tribe." *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 169 (Tex. App.—Houston 1995). But A.L.M. has no ties with an Indian tribe that can be "maintained." On the contrary, applying ICWA in this case does not *maintain* anything—it seeks to *create* ties that do not exist. And it seeks to *break* A.L.M.'s strong ties with his foster parents, in contravention to the wishes of his birth parents.

C. ICWA's Categorical Presumptions Violate Due Course of Law

Not only does the application of different law to this case based on A.L.M.'s race violate equal protection, but the presumption referenced above violates the due course of law.[5] The due course of law implicitly requires an *individualized* determination of the facts and the law in any particular case. The categorical presumption applied by the court below, however, is fundamentally incompatible with this individualized determination and with the due course of law.

In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Supreme Court invalidated an Illinois law that categorically presumed that unmarried fathers were unfit parents. The Court found that this violated due process because it was not an individualized assessment of the particular facts of the case: "Procedure by presumption is always cheaper and easier than individualized determination," observed the Court, but when a legal presumption "forecloses the determinative issues of competence and care,

[5] The Texas due course of law clause is more protective of individual rights than the federal due process of law clause. *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 86–87 (Tex. 2015).

when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child." *Id.* at 656-57. *See also Troxel v. Granville*, 530 U.S. 57, 69-70 (2000) (state law that imposed a legal presumption that visitation by grandparents was in the child's best interests, and required parents to prove the contrary, violated parents' rights because their decisions must be accorded "special weight"). Other state courts have also frowned upon presumptions in the child welfare context. *See In re J.W.T.*, 872 S.W.2d 189, 197 (Tex. 1994) ("marital presumption" is unconstitutional if it denies an unmarried father the right to overcome it); *In re K.D.*, 471 S.W.3d 147, 168–70 (Tex. App.—Texarkana 2015) (no presumption that termination of mother's rights is in the child's best interest where mother agrees to the termination because each child is entitled to an individualized determination of his or her specific needs); *In re Kelsey S.*, 823 P.2d 1216 (Cal. 1992) (presumption against unmarried fathers objecting to adoptions violated due process).

ICWA, however, imposes a "presumption that it is in an Indian child's best interests to be placed in an Indian home in conformance with the § 1915 placement preferences," *In re C.H.*, 997 P.2d 776, 780 ¶ 11 (Mont. 2000)—a presumption so strong that "it is improper [for a court] to apply a best interests standard" in such

cases. *Id.* 782 ¶ 22. That "presumption"[6] unconstitutionally burdens all the parties before this Court by forcing them—without regard to the "special weight" that must be given to the wishes of A.L.M.'s parents, or to the factors considered in the *Holley*-style "best interests" determination—to disprove the race-based assumption that A.L.M. should live with adults who share his ethnicity.

Because "the Government's use of race-based presumptions" is *always* subject to strict scrutiny under the Due Process Clause, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 204 (1995), and so are presumptions intruding on fundamental family rights, *Stanley, supra*, *Troxel, supra*, the express race-based presumption the trial court used here must be strictly scrutinized under the Due Course of Law Clause.

It fails that scrutiny. The categorical presumption imposed by ICWA's less-protective, watered-down "best interests" standard falls far short of the specific

[6] Actually, it is inaccurate to describe this as a "presumption." It is a *stereotype*. A *presumption* is an evidentiary inference based on probable reasoning in the absence of certainty. A *stereotype* is a formulaic relegation of an individual to a category, or an automatic generalization about an individual, based on superficial criteria, such as the person's race, gender, etc., which is held to override that individual's unique characteristics. *Cf. Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 68 (2001) (defining stereotype as "a frame of mind resulting from irrational or uncritical analysis."). The assumption that it is *automatically* in the best interest of a child whose ancestry is Native American to be placed with "other Indian[s]," 25 U.S.C. § 1915(a), is no different in character from the race-based stereotype that *Palmore* found invalid. *See* 466 U.S. at 433 ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

determination required by due course of law. In this case, that presumption means that A.L.M.—a Texan child who has lived with his preadoptive parents, C.E.B. and J.K.B., for most of his life; who loves them and has been well cared-for by them; whose adoption by C.E.B. and J.K.B. would plainly benefit him; and whose adoption by them his parents agree to—should be shipped off to a different state where he has never lived, and placed in the care of strangers he has met only once, for a three-hour period, and who have not filed an adoption petition … all because they share a certain percentage of DNA. This violates due course of law.

II. APPLYING ICWA TO THIS CASE DOES NOT SERVE THE VALID GOALS OF ICWA

ICWA was adopted in response to abuses by state governments and adoption agencies that were removing children from their birth parents, often without sufficient grounds, and placing those children with non-Indian caretakers. *See* 25 U.S.C. §1901(4).

Applying ICWA here accomplishes none of these purposes. Given A.L.M.'s lack of social, political, or cultural connection to the tribe, and the fact that he has never resided on a reservation, sending him out of Texas to live with race-matched strangers would in *no way* prevent abuses by state agencies or prevent the violation

of tribal sovereignty. There is no allegation here of wrongdoing by state agencies,[7] or any intrusion on tribal lands or interference with tribal government. There is no allegation that A.L.M. was wrongly removed from his birth parents' custody. There is no allegation that his birth parents' rights were violated. Taking him away from his foster parents would accomplish nothing. As the *Santos Y.* court noted in a similar case, taking a child who lacks any tribal connection away from the adults who love him and sending him to live in another state with tribal members "would, in the most attenuated sense, promote the stability and security of the Tribe by providing one more individual to carry on [the tribe's] cultural traditions," but would not serve ICWA's legitimate goals. 112 Cal. Rptr. 2d at 726. On the contrary, it would be treating A.L.M. as a component of a racial and national class, at the expense of his individual rights.

Nor would it undermine ICWA's goals to apply the ordinary "best interests" standard and approve the adoption by his preadoptive parents, C.E.B. and J.K.B. The "best interests" test is holistic, and evaluates all factors relevant to a child's needs, including emotional, social, cultural and educational needs. *Holley,* 544 S.W.2d at 371–72. There is no reason why the trial court cannot consider A.L.M.'s Native American roots, to the degree they are relevant to adjudicating the adoption petition.

[7] Except, of course, for the state's abrupt decision to remove A.L.M. from his foster care's loving home, thereby inflicting psychological trauma on him, and extraditing him from Texas solely because of his race.

And approving adoption would in no way undermine the ability of the Navajo or Cherokee tribes to govern themselves, or to exercise jurisdiction over tribal members or activities taking place on reservation; it would not deprive the tribes of enjoying "certain dignities and attributes of sovereignty." THE FEDERALIST No. 45 at 309 (J. Cooke, ed. 1961) (James Madison).

Of course, even if imposing separate-and-unequal law on A.L.M. *did* preserve tribal sovereignty, it would be unconstitutional. Congress has no constitutional authority, even under its foreign policy powers, to subject American citizens to legal proceedings that deprive them of their right to due process and equal protection. *Reid v. Covert*, 354 U.S. 1 (1957), held that Congress could not force American citizens who happened to be married to servicemen overseas to undergo trials before military commissions that lacked full due process protections, even though Congress acted under its treaty power in doing so. *Id.* at 16-18. Notwithstanding Congress's extraordinarily broad powers to make treaties and govern the military, it could not strip civilian American citizens of legal protections and force them into a separate legal system. *Id*. at 40. The application of ICWA to this case, however—where A.L.M. has no cultural or political affiliation with a tribe—does precisely that.

A.L.M. is like any other Texan child—he just happens to be of Native American ethnicity. Depriving him of equal treatment on that basis will not remedy or prevent the abuses that ICWA was designed to address. On the contrary: it would

mark another instance of relegating Native Americans to second-class legal status based on race.

III. DENYING THE VOLUNTARY ADOPTION IN THIS CASE VIOLATES THE BIRTH PARENTS' FUNDAMENTAL RIGHT TO DIRECT THE UPBRINGING OF THEIR CHILD, THE APPELLANTS' RIGHT TO DETERMINE THEIR FAMILIAL RELATIONS, AND TEXAS POLICY FAVORING STABILITY AND PERMANENCE

A. States May Not Empower Third Parties to Interfere with the Birth Parents' Decision Regarding their Children's Best Interests without Satisfying Strict Scrutiny

Not only does applying ICWA to this case constitute racial discrimination, but it also unduly intrudes on the right of A.L.M.'s birth parents to choose the adoptive parents for their child. It is undisputed that the birth parents approve of their child being adopted by C.E.B. and J.K.B.—as the birth father testified, "I would love for him to stay with the foster parents…[b]ecause he's been with them ever since he was basically born almost … . [They are] the only parents he knows."[8]

Parents have a fundamental right to direct the upbringing of their children, guaranteed in the Constitution, *see Troxel, supra*,[9] as well as in Texas Statutes. *See* Tex. Fam. Code § 151.003. Notably, this protection is not limited to parents' *raising* children; it guarantees a parent's right to *direct* their children's upbringing—

[8] Transcript of Aug. 1, 2017 Adoption Hearing (Appellant's Appendix, Tab H) at 55:20-58:6.

[9] Although *Troxel* had no majority opinion, five justices recognized that this right is "fundamental." *See* 530 U.S. at 66 (plurality); *id*. at 80 (Thomas, J., concurring).

meaning, to make choices regarding visitation and custody. Among these choices is the fundamental right to decide to put a child up for adoption and to select the adoptive couple for his or her child. *Cf. In re H.Q.*, 330 P.3d 195, 200–01 (Wash. App. 2014) (parent's choice to terminate rights voluntarily in order to complete an adoption is fundamental); *Y.H. v. F.L.H.*, 784 So. 2d 565, 571–72 (Fla. Dist. Ct. App. 2001) (same). Government may interfere with that fundamental right, but must satisfy strict scrutiny.[10] *See further* Teri Dobbins Baxter, *Respecting Parents' Fundamental Rights in the Adoption Process: Parents Choosing Parents for Their Children*, 67 RUTGERS U. L. REV. 905, 950 (2015) ("parents have fundamental rights … specifically with respect to the biological parent's right to choose adoptive parents for their children."). Vetoing a parent's choice in this regard to accomplish

[10] The most obvious basis for overriding a parent's decision would be the child's best interests. While strict scrutiny is often thought of as insurmountable, a particularized best-interests determination easily satisfies strict scrutiny, because a child's best interest is a compelling government interest (a "paramount" interest, in fact, *McLean*, 376 S.W.2d at 430), and the *individualized determination* of a child's *specific* needs is, by definition, narrowly tailored.

Strict scrutiny is *not* satisfied, however, by blanket race-based assumptions that, regardless of a child's specific circumstances, he or she must be placed with strangers of the same ethnicity. That is because race-matching is not a compelling government interest, *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003), and race-based determinations, almost by definition, fail narrow tailoring because they are both under-inclusive and over-inclusive. *See further Hirabayashi v. United States*, 320 U.S. 81, 101 (1943) (race-based determinations are virtually never constitutional because a person's race is almost always "irrelevant.").

goals of racial separation plainly violates the Constitution. *See Palmore*, 466 U.S. at 433-34.

The government may not elevate a third party's rights over a child above the rights of the birth parent without satisfying strict scrutiny. *Troxel*, 530 U.S. at 70. Yet in applying ICWA to this case, the trial court did this without applying the requisite strict scrutiny.

In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), the Court affirmed the use of ICWA to override the choice of tribal-member parents who left the reservation before birth in order to ensure that their child would be adopted by a non-Indian couple they selected. But in that case, the Court found that tribal courts had jurisdiction because the birth parents were domiciled on the reservation. *Id.* at 48-49. The Court did not address equal protection or due process concerns. Here, it is undisputed that neither the birth parents nor the child were domiciled on reservation. And *Holyfield* predates both *Troxel* and *Adoptive Couple*, 133 S. Ct. 2552, which concluded that the use of ICWA to block a voluntary adoption "solely because an ancestor—even a remote one—was an Indian … would raise equal protection concerns." *Id*. at 2565. It is "confounding" that, given the history of disfavored treatment meted out to Native Americans, the tribes would urge this Court to be "complicit in the perpetuation of a legal injustice." *Cherokee Nation v. Nash*, 2017 WL 3822870 at *40 (D. D.C. Aug. 30, 2017).

B. Denying These Parties The Right to Determine Their Familial Relationships Interferes with Fundamental Rights And Must Therefore Satisfy Strict Scrutiny

Not only are the birth parents' rights violated by the decision below, but the choice of C.E.B., J.K.B., and A.L.M. to form a family is a fundamental right protected by the full strength of strict scrutiny. *See Loving v. Virginia*, 388 U.S. 1 (1967). Family relationships are a form of association protected by the First Amendment and the Due Process Clause. While the state has authority to intervene to protect a child's best interests, it cannot arbitrarily intervene in a safe, healthy, voluntary family relationship for purposes unrelated to the protection of the public. Yet denying the adoption petition in this case in order to serve the interests of a third party—the tribe—violates this basic principle.

Loving invalidated anti-miscegenation statutes, declaring that depriving adults of the freedom to marry "on so unsupportable a basis as … racial classifications," violated due process of law. 388 U.S. at 12. The state's justifications for prohibiting interracial marriages were the same as in this case: namely, to preserve "racial integrity," *id.* at 7—meaning, whites should marry whites and blacks blacks, just as ICWA presumes that it is always in the best interests of Indian children to live with Indian adults. The Court found that the freedom to marry is a "fundamental" right and that the state may not restrict it on the basis of race. *Id.* The right of C.E.B.,

J.K.B., and A.L.M., to form a family as they choose may also not be restricted on so unsupportable a basis. *Id*. at 12.

That right is "'deeply rooted in this Nation's history and tradition.'" *In re J.B.*, 326 S.W.3d 654, 674 (Tex. App.—Dallas 2010) (citations omitted). The legal institution of adoption dates back to colonial days. Caroline B. Fleming, *The Open-Records Debate: Balancing the Interests of Birth Parents and Adult Adoptees*, 11 WM. & MARY J. WOMEN & L. 461, 463–64 (2005). Inter-racial adoption is also an ancient practice. Moses was adopted by Pharaoh's daughter. *See* Exodus 2:1-10. The Texan hero Sam Houston was adopted by a member of the Cherokee tribe. *See* MARQUIS JAMES, THE RAVEN: A BIOGRAPHY OF SAM HOUSTON 20 (Austin: University of Texas Press, 2004) (1929). Applying ICWA to this case overrides this fundamental associational right solely on the unsupportable basis of the parties' ethnicity, and solely for the purpose of keeping racial groups separated. That is unconstitutional.

C. A.L.M. Has The Right to a Stable And Permanent Home, Free of Unreasonable Government Intrusion

Texas courts have recognized that "children need permanence and stability in their lives," *In re T.M.*, 33 S.W.3d 341, 346 (Tex. App.—Amarillo 2000), and that this need "is the paramount consideration" when assessing a child's "present and future physical and emotional needs." *In re N.K.*, 99 S.W.3d 295, 301 n.9 (Tex. App.—Texarkana 2003). *See also In re S.H.A.*, 728 S.W.2d 73, 92 (Tex. App.—

Dallas 1987) (promoting stability of home is a compelling government interest). Several states, including California and Florida, have found that a child's right to stability and permanence is protected by their state constitutions. *See, e.g., In re Jasmon O.*, 8 Cal.4th 398, 419, 878 P.2d 1297 (Cal. 1994); *In re Doe*, 2008 WL 5006172, at **23-24 (Fla. Cir. Ct. Nov. 25, 2008).

It is unnecessary to decide here whether a child is legally entitled to obtain a stable home that he does not already have, because A.L.M. *has already found* a stable, loving, and healthy home. The question is whether the government may arbitrarily interfere with that—to disregard this state's "public policy" favoring stability and permanence, *In re T.M.*, 33 S.W.3d at 347—and *send a Texas child out of the state* to live with a family who are essentially strangers to him, *solely because of his race*. That is an unreasonable intrusion on this critically important interest.

IV. APPLYING ICWA TO THIS CASE VIOLATES THE TENTH AMENDMENT

Finally, applying ICWA to this case violates the Tenth Amendment. The law of foster care and adoption is quintessentially a state-law matter. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("domestic relations … has long been regarded as a virtually exclusive province of the States."); *Trahan v. Trahan*, 894 S.W.2d 113, 117 (Tex. App.—Austin 1995) (same). Federal courts do not even have jurisdiction over child custody matters. *Ankenbrandt v. Richards*, 504 U.S. 689, 703-07 (1992). The Tenth Amendment forbids Congress from forcing Texas executive officers to implement

ICWA. *See Printz v. United States* 521 U.S. 898 (1997); *Adoptive Couple*, 133 S. Ct. at 2565–71 (Thomas, J., concurring).

Certainly the federal government has no constitutional authority to impose a discriminatory domestic-relations law on the state when the state already has a *non*-discriminatory family law in place. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

Enforcing Texas's ordinary family law—including its "paramount" state interest in encouraging stability and permanence via adoption, *In re N.K.*, 99 S.W.3d at 301 n. 9, and its "overriding" concern for the best interest of the individual child, *In re J.F.C.*, 96 S.W.3d at 294–95—would do no damage whatsoever to federal interests, if any, in enacting ICWA. It would not intrude on tribal self-government or autonomy over reservations or a tribe's ability to adjudicate cases over which it has constitutionally adequate jurisdiction. It would not prevent the tribe from offering A.L.M. citizenship, or teaching him tribal culture. All it would do is to apply non-discriminatory Texas law and prioritize his individual best interests—to which he, as an American citizen and a Texan, has a right.

CONCLUSION

The decision below should be reversed, and the case remanded with instructions to grant the petition for adoption by preadoptive parents C.E.B. and J.K.B.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word count limit contained in Tex. R. App. P. 9.4(i)(2)(B) because it contains 5,847 words.

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document has been served via electronic service to all counsel of record listed below on this 30th day of October, 2017.

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