Case No. S243352

IN THE
SUPREME COURT OF CALIFORNIA

EFRIM RENTERIA AND TALISHA RENTERIA,

Petitioners,

vs.

SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF TULARE, VISALIA DIVISION

Respondent

Regina Cuellar and Shingle Springs Band

Of Miwok Indians aka Shingle Springs Rancheria

Real Parties in Interest

Petition from the Tulare County Superior Court
The Honorable Nathan Ide, Presiding
Case No. VPR047731

After Summary Disposition By The
FIFTH DISTRICT COURT OF APPEAL
Case No. F07533

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ANSWER TO PETITION FOR REVIEW BY REGINA CUELLAR, REAL PARTY IN INTEREST

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PREFACE

The Federal Congressional law, the Indian Child Welfare Act (ICWA) and the California counterparts in the Probate Code and the limited application of the Welfare and Institutions Code (W&I) apply to the California Superior Court, Tulare County, Probate guardianship case, awaiting trial. No Federal or State law, statute or Court decision mandates otherwise.

VERIFICATION

Efrim Renteria et al. v. The Superior Court for the County of Tulare (*Regina Cuellar et al.*)
Verification of Pleading (Code Civ. Proc. § 446); Declaration under Penalty of Perjury Form (Code Civ. Proc. §§ 446, 2015.5);

I, James R. Greiner, declare: I am legal counsel for the Regina Cuellar, Real Party-In-Interest in the above-entitled matter.

I have read the foregoing Answer to Petition for Review by Regina Cuellar, Real Party in Interest and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

Executed on August 11, 2017, at Folsom, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ JAMES R. GREINER
JAMES R. GREINER

INTRODUCTION SUMMARY WHY PETITION SHOULD BE DENIED

This case presents neither new legal issues undecided by the Courts nor novel legal theories of first impression. Petitioners have neither the facts nor the law correct.

Controlling United States Supreme Court Law For Denial Of Petition

Two critical overarching laws blanket all discussions and cases which involve ICWA. First critical overarching law, as the United States Supreme Court held in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56, 98 S.Ct. 167056 L.Ed.2d 106 (1978): "Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. (*Worcester v. Georgia*, 6 Pet. 515, 559, 8 L.Ed. 483 (1832); see *United States v. Mazurie, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975);* F. Cohen, Handbook of Federal Indian Law 122–123 (1945)). Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." (*United States v. Kagama*, 118 U.S. 375, 381–382, 6 S.Ct. 1109, 1112–1113, 30 L.Ed. 228 (1886). See *United States v. Wheeler,* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)). They have power to make their own substantive law in internal matters, see *Roff v. Burney,* 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442 (1897) (membership)s ..." and at page 62: "Congress also intended to promote the well-established

federal “policy of furthering Indian self-government.” (*Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974))” (citation omitted) “Thus, unless and ‘until Congress acts, the tribes retain’ their historic sovereign authority.” (United States v. Wheeler, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978))

In addition, the *United States Supreme Court in Michigan v. Mills Indian Community*, 134 S.Ct. 2024, 2030, 188 L.Ed.2d 1071, 82 USLW 4396 (2014) held: “Indian tribes are “‘domestic dependent nations'” that exercise “inherent sovereign authority.” *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (Potawatomi) (quoting Cherokee Nation v. Georgia, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)). As dependents, the tribes are subject to plenary control by Congress. See *United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) (“[T]he Constitution grants Congress” powers “we have consistently described as ‘plenary and exclusive’” to “legislate in respect to Indian tribes”). And yet they remain “separate sovereigns pre-existing the Constitution.” *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)”.

Finally, the *United States Supreme Court in Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 425, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) held: “In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141, 102 S.Ct. 894, 903, 71 L.Ed.2d 21 (1982), the Court held that tribes have

inherent sovereignty independent of that authority arising from their power to exclude. Prior to the European settlement of the New World, Indian tribes were "self-governing sovereign political communities," *United States v. Wheeler*, 435 U.S. 313, 322-323, 98 S.Ct. 1079, 1085-1086, 55 L.Ed.2d 303 (1978), and they still retain some "elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government," *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208, 98 S.Ct. 1011, 1020, 55 L.Ed.2d 209 (1978). Thus, an Indian tribe generally retains sovereignty by way of tribal self-government and control over other aspects of its internal affairs. (Citation omitted)"

Second overarching law, in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 US 30, 37; 109 S.Ct. 1597, 104 L.Ed.2d 29, 57 USLW 4409 (1989)**: "**The ICWA thus, in the words of the House Report accompanying it, "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." House Report, at 23, U.S.Code Cong. & Admin.News 1978, at 7546. It does so by establishing "a Federal policy that, where possible, an Indian child should remain in the Indian community," *ibid.*, and by making sure that Indian child welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family." *Id.*, at 23, U.S.Code Cong. & Admin.News 1978, at 7546." (Footnote omitted)

The Petition should be denied under these United States Supreme Court cases.

Controlling California Law For Denial Of The Petition

Two black letter laws govern to allow this Court to summarily deny this Petition: **1-** Petitioners have an adequate remedy at law by trial and then appeal, thus Petition for Review is unwarranted; **2-** There are no exceptional circumstances warranting this Petition for Review.

This Court in *Phelan v. Superior Court in and for the County of San Francisco*, 35 Cal.2d 363, 355 (1950) held: "The first question to be determined is whether petitioner had another adequate remedy. Section 1086 of the Code of Civil Procedure provides that the writ of mandate 'must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.' (Footnote omitted) Although the statute does not expressly forbid the issuance of the writ if another adequate remedy exists, it has long been established as a general rule that the writ will not be issued if another such remedy was available to the petitioner. (*Irvine v. Gibson*, 19 Cal.2d 14, 118 P.2d 812; *People ex rel. Smith v. Olds*, 1853, 3 Cal. 167, 58 Am.Dec. 398). The burden, of course, is on the petitioner to show that he did not have such a remedy."

A remedy will not be deemed inadequate merely because additional time and effort would be consumed by its being pursued through the ordinary course of

the law. (*Rescue Army v. Municipal Court*, 28 Cal.2d 460, 466 (1946); *Baeza v. Superior Court*, 20 Cal.App.4th 1214, 1221 (2011)) Experience has shown that most of the meritorious defenses are sustained and most of the unsubstantial constitutional or other objections are weeded out at the proper time on the proper showing during the trial or on appeal. (Ibid.) If reviewing courts made themselves routinely available to intervene by writ whenever a litigant claimed a mistake had been made in a law-and-motion department, trials would be delayed, litigants would be vexed with multiple proceedings, and judgment appeals would be kept waiting." (*Burrus v. Municipal Court*, 36 Cal.App.3d 233, 236, 111 Cal.Rptr. 539, 541-42.)

The Petition should be denied under these California cases.

FURTHER REASONS FOR DENYING THE PETITION

There Is No Expansion Of ICWA And Its California Counter Parts – Bia Regulations

There is no expansion of ICWA in this case as Petitioners wrongly allege. ICWA, and its California counter parts, apply to this Probate guardianship. The three Tribal minors are members of the Shingle Springs Band of Miwok Indians aka Shingle Springs Rancheria (Tribe), thus, this is an Indian child custody proceeding. More specifically, both ICWA and California Probate Code §1449(c) specifically state ICWA applies to guardianship proceedings, which this case is.

Congress authorized the Department of the Interior (Department) to make rules and regulations necessary for carrying out provisions of ICWA. (25 U.S.C. § 1952). To supplement the regulations, the Department published guidelines for State courts to use in interpreting many of ICWA's requirements in Indian child custody proceedings. (80 Fed. Reg. 10146, 10147)

On December 12, 2016, the Department published Guidelines for Implementing the Indian Child Welfare Act ("2016 Guidelines"), they took effect that day and which replaced the 1979 and 2015 versions. Under each heading, the 2016 Guidelines provide the text of the regulation, guidance, recommended practices, and suggestions for implementation. The Department, through the Bureau of Indian Affairs published regulations (BIA Regulations) Indian Child Welfare Act Proceedings, Final Act, in the Federal Register, 25 CFR Part 23, Vol. 81, No.114, page 38799-37800 which reads: "The statute defines ''child custody proceeding'' to include removal of an Indian child for temporary placement in . . . the home of a **guardian** …. 25 U.S.C. 1903(1)(i)." (emphasis added)

ICWA Applies In Any Case When The Minor Child Is An Indian Child

Both this Court and the Supreme Court of Washington are in agreement, "In any given case, ICWA applies or not depending on whether the child who is the subject of the custody proceeding is an Indian child." (In re Abbigail A., 1 Cal.5th 83, 90 (2016). In Re Adoption of T.A.W., 383 P.3d 492, 499, it held: "Reading these provisions together, the heightened protections of ICWA are

triggered if (1) the child at issue is an Indian child *and* (2) the proceedings are a child custody proceeding that is not subject to either of the two express exemptions. *See* 25 U.S.C. § 1903(1), (4)."

Thus, the overriding critical first determination for any Court to make is, in a child custody case is the child Indian. If yes, as here, then ICWA – and the California ICWA counterparts – apply. The answer to this question in this case has always been the three Tribal member minors are Indian children.

ICWA Is The Indian Childrens' Political Connection To Their Tribe As Members Of Their Tribe Which Is A Self- Governing Decision Made By The Tribe – Race Is Not An Issue

Petitioners' counsel raises the issue of race to argue that the Congressional Law ICWA -- a law passed by Congress after extensive and exhaustive hearings -- is unconstitutional. This argument has never succeeded. The one lone, outlier case in California is, In re Santos Y, 92 Cal.App.4th 1274 (2001), which has never been followed.

In a case last year before this Court, In the Matter of A.P., case #S233216, Petitioners' counsel sent letter Amicus Briefs on March 24, 2016 and August 17, 2016 raising the same race unconstitutional ICWA argument. The same unsuccessful race unconstitutional ICWA argument was rejected by this Court and that petition was denied. This Petition should be denied.

There Are Two Indian Families In This Case, One Regina Cuellar And Her Tribal Member Family And Two The Tribe, Petitioners Are Non-Indians And Can Never Be An Indian Family

The two Indian Families in this case are: Respondent Tribal member Regina Cuellar and her Tribal member Indian Family and the Tribe (Tribal Indian Family). In addition, the three Tribal member minors cultural, heritage, political and religious connection with the Tribe has been continuous since birth.[1]

The break-up of the Tribal Indian Family is central in this case. Petitioners have never been, are not now and will never be members of any Federally recognized Indian Tribe. Petitioners are non-Indians. Any family Petitioners have is a non-Indian family.

Petitioners are attempting to both assimilate the three Tribal members into a non-Indian family/society and simultaneously break-up the existing Tribal Indian Family, all of which is the central and core reason why Congress passed ICWA and why California passed Senate Bill 678.

The definition of break-up of an Tribal Indian family has already been decided by the United States Supreme Court in *Adoptive Couple v. Baby Girl*, -- U.S. --, 133 S.Ct. 2552, 2562, 186 L.Ed.2d 729, 81 USLW 4590 (2013): "The

[1] This remains true through the duration of this litigation, which started in January, 2016, even with Petitioners continual, intentional and methodic attempts to eliminate all contact between the entire Tribal Indian Family. None have worked.

term “breakup” refers in this context to “[t]he discontinuance of a relationship,” American Heritage Dictionary 235 (3d ed. 1992), or “an ending as an effective entity,” Webster's 273 (defining “breakup” as “a disruption or dissolution into component parts: an ending as an effective entity”). See also Compact OED 1076 (defining “break-up” as, *inter alia,* a “disruption, separation into parts, disintegration”). Throughout this litigation, Petitioners have continually, intentionally and methodically attempted to eliminate both contact with and visits with, the Tribal Indian Family. Even faced with Superior Court Orders regarding visitation, Petitioners have willfully disregarded such Orders.

Petitioners are the very reason ICWA and its California counter-parts are the law. Assimilation into a non-Indian family/society by non-Indians is against both Federal and State law.

This petition should be denied to allow the trial to commence.

INTRODUCTION SUMMARY OF ARGUMENT

Simply, this case in the California Superior Court, Tulare County, is a Probate guardianship case, awaiting trial, governed by both the Federal Law, ICWA and California Probate Code §1449(c), 1459(a)(1), (2), and 1459.5(a)(1) and et seq., and, as stated in Probate Code §1459.5(b), to a limited extent W&I Code §§ 224.3 to 224.6, inclusive, and §§ 305.5, 361.31, 361.7, regarding three Tribal Member minors (Appendix of Exhibits to Petition for Writ of Mandate (Pet.

App.) at pages 106-109) who tragically lost both parents on December 17, 2015, who were killed by a drunk driver.

The three Tribal member minors, which they have been members prior to December 17, 2015, are both politically connected to both the Tribe and the Tribal Indian Family and connected through culture, heritage, religion and continuous and active participation in the Tribe's cultural activities. Respondent Regina Cuellar and her family are all tribal members.

CORRECTION OF FACTS AND OMITTED FACTS

The facts in the record clearly and unchallenged evidence a significant and continuous connection by the Three Tribal member minors with both the Tribal Indian Families and the Tribe. All three Tribal member minors: **1-** were born in Placerville, California, which is minutes away from the Tribe and reservation (Pet. App. pages 111-113); **2-** when they were young, the three Tribal member minors lived in El Dorado County (Pet. App. pages 163-164); **3-** the deceased parents of the three Tribal members moved and started living in El Dorado County in 2008, two years before the oldest Tribal minor was born (Pet. App. page 168); **4-** the deceased parents both worked and made a living working on the Tribe's reservation at the Red Hawk Casino, the father working worked in shipping and receiving and then to the Tribe's facilities department while the mom worked at the Red Hawk casino first at Kid's Quest and then at the buffet. (Pet. App. page 168); **5-** in August of 2009, the deceased parents attended the Tribal cultural event,

the Big Time, on the reservation with the entire Indian family (Pet. App. page 168); **6-** in July 2009, the deceased parents and the Tribal Indian family attended the All My Relations Cultural Conference in Anaheim, California; **7-** in July 2010, the deceased parents, the oldest Tribal member minor, the entire Tribal Indian family attended All My Relations Cultural Conference in Anaheim, California; **8-** in August 2010, the deceased parents, the oldest Tribal member minor and the entire Tribal Indian Family attended the Tribal cultural event, the Big Time on the Reservation (Pet. App. page 168); **9-** in August 2011, the deceased parents, the oldest Tribal member minor and the entire Tribal Indian Family attended the Tribal cultural event, the Big Time, on the reservation (Pet. App. page 168); **10**- in August 2012, the deceased parents, the oldest Tribal member minor, the middle Tribal member minor and the entire Tribal Indian Family attended the Tribal cultural event, the Big Time, on the reservation (Pet. App. page 168); **11**- in August 2013, the deceased parents, the oldest Tribal member minor, the middle Tribal member minor and the entire Tribal Indian Family attended the Tribal cultural event, the Big Time, on the reservation (Pet. App. page 168); **12-** in July 2014, the deceased parents, all three Tribal member minors with the entire Indian Family attended the Gathering of Nations Pow Wow in Albuquerque, New Mexico (Pet. App. page 168); **13-** in July 2015, the deceased parents, all three Tribal member minors with the entire Indian Family attended the Cultural Beach Trip in Santa Cruz, California (Pet. App. page 168); **14-** in July 2015, the deceased parents, all three Tribal member minors with the entire Indian Family attended the

cultural event by attending the National Museum of the American Indian in Washington D.C. (Pet. App. page 168)

The father of the three Tribal member minors was a Tribal. (Pet. App. page 106)

Because of the litigation, the three Tribal member minors have been deprived of their Tribal culture, customs, heritage, religion, language, and their Tribe by Petitioners preventing the three Tribal member minors from attending any Tribal cultural events.

PETITIONERS HAVE NO STANDING TO FILE THIS PETITION FOR REVIEW

Petitioners lack standing to file this Petition. Petitioners **do not** represent the three Tribal member minors. Petitioners allege only that they are the great aunt and great uncle of the three Tribal member minors. Petitioners legal interests are personal to themselves.

There are no facts that are alleged that Petitioners are even de facto parents. However, even if this Court were to find that Petitioners are de facto parents, which is disputed and not conceded, the law in California is settled, de facto parents have no standing to raise any of the issues raised herein. Two Appellate District Courts set forth the undisputed California law.

The most recent litigated ICWA case, the Court of Appeal, Second District, Division 5, In re Alexandria P, 228 Cal. App. 4th 1322, 1340-1341 (2014) held:

"As de facto parents, the P.s' substantive and appellate rights are more limited than those of a presumed parent. (citation omitted) Because the P.s have not identified a constitutionally protected interest in a continued relationship with Alexandria, and because Alexandria does not join their arguments, we see no basis for expanding their limited rights to include the right to appeal the ICWA's constitutionality. Although standing to appeal is construed liberally, and doubts are resolved in its favor, only a person aggrieved by a decision may appeal. [Citations.]" (In re K.C. (2011) 52 Cal.4th 231, 236 [128 Cal.Rptr.3d 276, 255 P.3d 953].) De facto parents must have a legal right that has been aggrieved by the order being appealed. (In re P.L. (2005) 134 Cal.App.4th 1357, 1359–1362 [37 Cal.Rptr.3d 6] [de facto parent had no right to continued custody and therefore lacked standing where the child was placed pending finding a prospective adoptive home]; (citation omitted) In order to challenge the constitutionality of the court's application of the ICWA in this case, the P.s must demonstrate they have a constitutionally protected interest at stake." With the denial of the Writ of Certiorari by the United States Supreme and the denial of the Petition for Review by this Court, this is the law in California. Petitioners have no standing to file this Petition.

The Court of Appeal, Third District, In re Jody R., 218 Cal.App.3d 1615, 1627-1628 (1990) held: "Moreover, even upon being permitted to participate in the dependency action, a de facto parent is not accorded standing to take part in all proceedings; rather, participation is limited to disposition and other hearings

subsequent to the jurisdiction hearing and is restricted to asserting his or her interest in the custody, companionship, care and management of the child. (In re B.G., supra, 11 Cal.3d at p. 693, 114 Cal.Rptr. 444, 523 P.2d 244; In re Joshuia S., supra, 205 Cal.App.3d at p. 122, 252 Cal.Rptr. 106.) (Footnote 5 omitted) The de facto parent is not considered a parent or guardian for purposes of the dependency law. (In re B.G., supra, 11 Cal.3d at p. 693, fn. 21, 114 Cal.Rptr. 444, 523 P.2d 244; Charles S. v. Superior Court (1985) 168 Cal.App.3d 151, 156, fn. 4, 214 Cal.Rptr. 47.) Therefore, the de facto parent is not entitled to all of the rights accorded to persons who occupy the status of parent or guardian. (Ibid.)"

Petitioners lack standing. The Petition should be denied.

ICWA Applies To This Case Along With Its California Counter Parts In The Probate Code And The Limited Code Section Of The W&I

The clear and plain language of California Probate Code §1449(c) defines what an Indian child custody proceeding is: "Indian child custody proceeding" means a "child custody proceeding" within the meaning of Section 1903 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), ***including*** a … involuntary proceeding that may result in an Indian child's temporary or long-term … ***guardianship placement*** if the parent … cannot have the child returned upon demand, …." (emphasis added)

The W&I Code § 224.3(e)(1), plainly reads: "A determination by an Indian tribe that a child is … a member of … that tribe, …, ***shall*** be conclusive."

(emphasis added) The Tribe determined the three minors **are** members of the Tribe. (Pet. App. pages 107, 108, and 109). (emphasis added)

California law is settled on the application of ICWA to a probate guardianship. The Court in Guardianship of D.W., 221 Cal.App.4th 242, 249 (2013), held: "The purpose of the ICWA is, of course, to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." (25 U.S.C. § 1902; see In re Karla C. (2003) 113 Cal.App.4th 166, 173–174, 6 Cal.Rptr.3d 205.) "The ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource. [Citation.]" (Desiree F., supra, 83 Cal.App.4th at p. 469, 99 Cal.Rptr.2d 688.) The provisions of the ICWA, which are said to be the highest standard of protection for Indian children, apply to guardianship proceedings in this state. (Prob. Code, § 1459.5, subd. (a)(1); rule 7.1015(b)(1)(A).)

ICWA and its California State counter-parts applies under any analysis. Petitioners' argument that this case expands ICWA is unsupported under any analysis. There was and is no error either by the Trial Court or the Court of Appeal.

The Three Minors Are Tribal Members As Determined By The Tribe Which Is A Sovereign Political Tribal Decision About A Sovereign Political Community

The three Tribal member minors are now and always have been a part of Tribal Indian family. The three Tribal member minors prior to December 17, 2015, were and continue to be Tribal members of the Tribe, a sovereign nation. (Pet. App. pages 107, 108, and 109).

The United States Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978), 98 S.Ct. 1670, 56 L.Ed.2d 106, settled the question of Tribal membership as a political connection in: "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government. Worcester v. Georgia, 6 Pet. 515, 559, 8 L.Ed. 483 (1832); see *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975); F. Cohen, Handbook of Federal Indian Law 122–123 (1945). Although no longer 'possessed of the full attributes of sovereignty,' they remain a 'separate people, with the power of regulating their internal and social relations.' *United States v. Kagama*, 118 U.S. 375, 381–382, 6 S.Ct. 1109, 1112–1113, 30 L.Ed. 228 (1886). See *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). They have power to make their own substantive law in internal matters, see *Roff v. Burney*, 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442 (1897) (membership)s …."

The Ninth Circuit likewise has been consistent, *Williams v. Grover*, 490 F.3d 785, 789 (2007): "An Indian tribe has the power to define membership as it chooses, subject to the plenary power of Congress. (footnote omitted) Nor need

the tribe, in the absence of Congressional constraints, comply with the constitutional limitations binding on federal and state governments when it exercises this and other powers. In 1978, the Supreme Court held in *Santa Clara Pueblo v. Martinez* that '[a]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.' (footnote omitted) Even where there is some legal constraint on tribes, '"without congressional authorization," the "Indian Nations are exempt from suit."' (footnote omitted) '[T]he tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State governments.'" (footnote omitted)

California Courts follow the United States Supreme Court's directive: "As the Supreme Court observed in Martinez, "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." (*Martinez, supra*, 436 U.S. at p. 72, fn. 32, 98 S.Ct. 1670.)" (*Lamere v. Superior Court,* 131 Cal.App.4th 1059, 1065 (2005))

Further, the Administrative Office of the Courts' Bench Handbook, The Indian Child Welfare Act, (Revised 2013), page 1, reads: "The ICWA acknowledges the special political relationship between tribes and the federal

government. Federal recognition means that a tribe is formally recognized as a sovereign entity with a government-to-government relationship with the United States. See, *e.g.*, *United States v Mazurie* (1975) 419 US 544, 557, 95 S Ct 710, 42 L Ed 2d 706 (Indian tribes retain "attributes of sovereignty over both their members and their territory"); *Washington v Confederated Tribes of Colville Indian Reservation* (1980) 447 US 134, 156, 100 S Ct 2069, 65 L Ed 2d 10 ("[T]ribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other"). Therefore, an Indian child who is a member of a federally recognized tribe is a member of a quasi-sovereign entity. See *Morton v Mancari* (1974) 417 US 535, 554 n24, 94 S Ct 2474, 41 L Ed 2d 290)."

The three Tribal member minors are Tribal members based on a political connection to the Tribe. Tribal membership has nothing to do with race.

ICWA's application does not turn on a Tribal member minor's race or ancestry. ICWA applies only to child-custody proceedings involving an "Indian child," defined as a child who is a member of an Indian tribe, or who is eligible for membership and has a biological parent who is a member of an Indian tribe. (25 U.S.C. § 1903(4)). Thus, the law expressly limits its application based on political affiliation with the Tribe. There is no mention of race or ancestry.

The United States Supreme Court has flatly rejected the argument that federal laws providing for "special treatment" of Indians, and enacted in furtherance of 'Congress' unique obligation toward the Indians," are based on a racial classification. In *Morton v. Mancari*, 417 U.S. 535 (1974), a unanimous Supreme Court held that a government employment preference for qualified Indians did not run afoul of the Fifth Amendment because it was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . . ." Id. at 554, 554 n.24 ("The preference is political rather than racial in nature."). This distinction is based on tribes' unique legal status under federal law as domestic, dependent nations, and upon Congress' plenary power to "single[ ] Indians out as a proper subject for separate legislation" under, inter alia, the Indian Commerce Clause of the U.S. Constitution. Id. at 551-52; U.S. CONST. Art. II, s.2, cl.2; *Worcester v. Georgia,* 31 U.S. 515, 519 (1832) (Indian nations are "distinct, independent communities, retaining their original natural rights," and the United States may regulate relations with the tribes).

The Supreme Court elaborated on these principles in *United States v. Antelope,* 430 U.S. 641, 646 (1977). There the Court rejected an equal protection challenge by two tribal members to the application of federal criminal law, rather than state law, to crimes committed by Indians in Indian country. The Court explained: The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based on impermissible racial classifications. Quite the contrary, classifications expressly

singling out Indian tribes as the subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal government's relations with Indians. Id. at 645. Moreover, Antelope establishes that *Mancari* is not a narrow holding; rather, it stands more broadly for "the conclusion that federal regulation of Indian affairs is not based on impermissible racial classifications" but rather "is rooted in the unique status of Indians as 'a separate people' with their own political institutions." Id. at 646. Indeed, the principle that Congress may "single[ ] out Indians for particular and special treatment" in order to fulfill the United States' unique obligation toward the Indians underlies much of federal Indian law and policy. (*Mancari*, 417 U.S. at 552 (noting that, if laws targeting tribal Indians "were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized").[2]

[2] Since *Mancari*, both the Supreme Court and the Ninth Circuit have consistently rejected challenges to statutes that provide different treatment of Indians as a political class. See *Fisher v. Dist. Ct. of Sixteenth Jud. Dist. of Mont.*, 424 U.S. 382, 390-91 (1976) (exclusive tribal court jurisdiction over adoption proceedings involving Indians is not racial discrimination); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-80 (1976) (tax immunity for reservation Indians is not racial discrimination); *E.E.O.C. v. Peabody Western Coal Co.*, 773 F.3d 977, 988 (9th Cir. 2014) (upholding hiring preference based on tribal affiliation as a political classification designed to further the federal government's trust obligations to the tribe); *Means v. Navajo Nation*, 432 F.3d 924, 931 (9th Cir. 2005) (rejecting equal protection challenge to statute providing tribal criminal jurisdiction over nonmember Indians); *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (Mancari applies even if statute might impose "disproportionate burdens imposed on Indians").

ICWA's provisions fall squarely within *Mancari* and its progeny. The application of ICWA depends on political affiliation with a federally recognized Indian tribe, not race.[3] (25 U.S.C. § 1903(4)). ICWA thus does not apply to proceedings involving children who may have Indian ancestry but are neither members of a tribe, nor eligible for membership and the child of a tribal member.

Petitioners' argue that the political classification of membership is, in fact, impermissible racial classification by alleging that the three Tribal member minors are "connected to the Tribe only by biology" (Petitioners brief, pages 18-19) First, the three Tribal member minors are on their own Tribal members. Second, as the *Mancari* Court recognized, the political relationship of the United States with Indian tribes is inextricably bound up in the status of those tribes as sovereigns predating the formation of the United States, and tribal members are therefore typically descendants of the indigenous peoples of this country. (417 U.S. at 552-53; see also 25 C.F.R. § 83.11) (federal acknowledgment as an Indian tribe requires "membership consist[ing] of individuals who descend from a historical Indian tribe"). Accordingly, blood descent is typically shorthand for the social,

[3] Although the definition of "Indian child" encompasses some children who are not themselves yet enrolled in a tribe, Congress reasonably determined that the political affiliation of the child could be measured through a parent's membership combined with the child's eligibility. Congress considered its authority to legislate with regard to Indians who are not enrolled members of a tribe and concluded that "[t]he constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity." H.R. REP. NO. 95-1386, at 16-17.

cultural, and communal ties a person has with a sovereign tribal entity. Per Mancari, this fact does not transform statutes that single out Indians for special treatment into racial discrimination.[4]

ICWA's provisions are also tied closely to the United States' "unique obligation" to federally-recognized Indian tribes. (Mancari, 417 U.S. at 555). Congress held extensive hearings, comprising hundreds of pages of testimony, that revealed that large numbers of Indian children were being removed from their families and tribes and placed in non-Indian family homes and that this practice seriously harmed those children, families, and tribes. (*Holyfield*, 490 U.S. at 32-35; S. REP. NO. 95-597, at 11-13 (1977)). Congress observed that most of these removals were not based on physical abuse, but rather on "ignoran[ce] of Indian cultural values and cultural norms" and the discovery of "neglect or abandonment

[4] Petitioners' view is also a gross oversimplification, as a blood quantum or lineage requirement does not equate in all cases to a "racial" requirement. Petition pages 18-19. Membership in some tribes, for example, requires proving descendancy, not as an inquiry into an individual's genetics or race, but rather as a requirement that members are related to the political entity. See, e.g. SEMINOLE NATION OF OKLAHOMA CONST., Art. II (requiring that members be descended from 1906 membership, as described on rolls from that era), available at http://www.sno-nsn.gov/government/constitution. Other tribes do not necessarily share a common tribal or ethnic ancestry, but were consolidated into a single political entity by the federal government. See Sarah Krakoff, Inextricably Political: Race, Membership, and Tribal Sovereignty, 87 WASH. L. REV. 1041, 1090-1104 (2012) (describing consolidation of Mohave, Chemeheuvi, Navajo, and Hopi individuals into the Colorado River Indian Tribes). And in some cases, Congress has imposed membership restrictions on tribes in conjunction with the restoration of tribal status. See, e.g., 25 U.S.C. § 941e (providing for compilation of base roll for Catawba Indian Tribe of South Carolina and limiting future membership in Tribe to "lineal descendant[s] of a person on the base membership roll [who] has continued to maintain political relations with the Tribe.")

where none exists." (H.R. REP. NO. 95-1386, at 9-10). Congress also concluded that Federal policies towards Indian tribes – in particular, the "Federal boarding school and dormitory programs" – "also contribute[d] to the destruction of Indian family and community life." (Id. at 9; see also id. at 12) (acknowledging that the breakdown of Indian families was caused by factors "aris[ing], in large measure, from our national attitudes as reflected in long-established Federal policy and from arbitrary acts of Government.")

Congress relied explicitly on "the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people" in enacting ICWA. (25 U.S.C. § 1901). In particular, Congress found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." (Id. at § 1901(3); H.R. REP. NO. 95-1386, at 13-15 (discussing Congress' plenary power over Indian affairs, finding that "a tribe's children are vital to its integrity and future")).

ICWA's provisions are narrowly tailored to this interest. For example, ICWA's requirement that "active efforts" were made to provide remedial services and rehabilitation programs to prevent the breakup of the Indian family is designed to ensure that Indian children are not unnecessarily removed from their parents, and responds to the extensive evidence presented to Congress that Indian children were routinely removed from their parents for vague reasons and in circumstances

that did not threaten their well-being. (25 U.S.C. § 1912(d). Petitioners presume this heightened standard harms all Indian children. But typically, efforts to keep a family together are not detrimental on their face. (*Santosky v. Kramer*, 455 U.S. 745, 765 (1982))

Petitioners also challenge the "beyond a reasonable doubt" standard of proof in termination of parental rights proceedings under ICWA because this differs from the standard in California for non-ICWA cases. But a uniform federal standard of proof cannot be objectionable, since the Supreme Court established "clear and convincing evidence" as a minimum standard in all child-welfare proceedings, rejecting a lower state standard. (Id. at 769). Nor is a higher standard of proof, as used in ICWA, impermissible. Prior to enacting ICWA, Congress heard volumes of testimony that led it to adopt the "beyond a reasonable doubt" standard for state proceedings. (H.R. REP. NO. 95-1386, at 22 (noting that removal of a child from a parent is a penalty as great, if not greater, than a criminal penalty)). While the Santosky Court did not adopt this standard as the constitutional minimum for all termination proceedings, its opinion endorses both the ICWA standard as well as higher standards set by state legislatures and courts. (Santosky, 455 U.S. at 769-70).

Additionally, Petitioners challenge the adoptive-placement preference, which requires, absent "good cause to the contrary," a preference for placement with a member of the child's extended family, other members of the child's tribe, or other Indian families. (25 U.S.C. § 1915(a)). This preference helps ensure that

Indian children are not unnecessarily removed from their families and tribes, and "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and the tribe in retaining its children in its society." (H.R. REP. NO. 95-1386, at 23). However, the determination of "good cause" to deviate from these preferences is in the discretion of the state court, and the Guidelines have consistently stated that "the extraordinary physical and emotional needs of the child" constitute "good cause." (80 Fed. Reg. at 10158 (§ F.4(c))).

Thus, ICWA imposes modest requirements on child-welfare proceedings to facilitate Congress's purpose of preventing the unwarranted removal of Indian children from their families and tribes and their placement in non-Indian homes. As a matter of law, Congress' special treatment of Indian children in ICWA "can be tied rationally to the fulfillment of Congress' unique obligations toward the Indians," and its "legislative judgment will not be disturbed." (*Mancari,* 417 U.S. at 555).

The numerous prerogatives accorded the tribes through the ICWA's substantive provisions, ..., must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves. (*Mississippi Band of Chowtaw Indians v. Holyfield,* 490 U.S. 30, 49, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989); 25 USC §1901(3)) In addition, it is clear that Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture. (footnote omitted) ... As the

1977 Final Report of the congressionally established American Indian Policy Review Commission stated, in summarizing these two concerns, "[r]emoval of Indian children from their cultural setting seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children." Senate Report, at 52. (footnote omitted) (id. at 49-50)

There Are Two Indian Families In This Case, Respondent Regina Cuellar And Respondent Tribe, Petitioners Are Non-Indians And Are A Non-Indian Family

As discussed above, the definition of break-up of an Indian family has already been decided by the United States Supreme Court in *Adoptive Couple v. Baby Girl*, -- U.S. --, 133 S.Ct. 2552, 2562, 186 L.Ed.2d 729, 81 USLW 4590 (2013).

There are two Indian families in this case as defined by ICWA and the State counter parts, they are both Respondents Regina Cuellar Tribal family and Respondent Tribe.

The petitioners are not now, have never been and will never be either *Indian* or an *Indian family* as defined under ICWA, §1903(3): ""Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 1606 of title 43". Petitioners' have never argued and do not argue and can never argue otherwise. *Petitioners are and will always be both non-Indians and a non-Indian family.*

ICWA defines the following: **Indian**: §1903(3): "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 1606 of title 43; **Indian Child**: §1903(4), means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe, …: **Child Custody Proceeding**: §1903(1), shall mean and include— "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in … the ***home of a guardian*** or conservator where the parent … cannot have the child returned upon demand, ….(emphasis added): **Placement of Indian children**: §1915(b)(1), Any child accepted for foster care … shall be placed in the least restrictive setting which most approximates a family … In any foster care … 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; ….:§1916(c), **Tribal resolution for different order of placement**: "In the case of a placement under subsection … (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.

Two items in the record are dispositive; 1- Tribal member Regina Cuellar has a Tribal licensed Foster home (Pet. App. Pages 319-321; and 2- the Tribe has passed an internal sovereign nation resolution that the Tribe's preference that guardianships be appointed to Tribally approved Foster homes. (Pet. App. Pages 322 to 324)

Without question, the three Tribal member minors are and always have been and always will be part of a Tribal Indian family – Tribal member Regina Cuellar and the Tribe -- the break-up of which is the exact and specific reason ICWA – and the State counter-parts-- was passed, to *prevent the assimilation* into a *non-Indian family/society by non-Indians*, which is by definition, what Petitioners are and always will be. Both *non-Indians* and a *non-Indian family*.

ICWA – and the California counterparts - was and are designed to prevent this break-up of the Indian family.

THE 2017 FINAL CALIFORNIA ICWA COMPLIANCE TASK FORCE REPORT TO THE BUREAU OF CHILDREN'S JUSTICE, THE BIA REGULATIONS AND THE 2007 CAL-ICWA LEGISLATION KNOWN AS SENATE BILL 678 FURTHER SUPPORT RESPONDENT'S ARGUMENT

The 2017 Final California ICWA Compliance Task Force Report to the Bureau of Children's Justice (ICWA Task Force) at pages 3-4, it reads: "ICWA applies and must be enforced regardless of tribal intervention and there must be a universal understanding that it is the Native American child that triggers ICWA. This is a critical factor which is often ignored."

As stated above, this ICWA Task Force statement is confirmed controlling law in both California and Washington State, by their respective Supreme Courts. (In re Abigail A, 1 Cal.5th 83, 90 (2016); In Re Adoption of T.A.W., 383 P.3d 492, 499)

In addition, the ICWA Task Force, at pages 5-6, reads: "Congress determined that Native American children who are placed for adoption into non-native homes frequently encounter problems in adjusting to cultural environments much different than their own. (footnote omitted) Such problems include being stereotyped into social and cultural identities which they know little about, and a corresponding lack of acceptance into non-Native American society. (footnote omitted) Due in large part to states' failures to recognize the different cultural standards of Native American tribes and the tribal relations of Native American people, Congress concluded that the Native American child welfare crisis was of massive proportions and that Native American families faced vastly greater risks of involuntary separation than are typical for our society as a whole. (footnote omitted) These involuntary separations created social chaos within tribal communities. The emotional problems embedded in Native American children hampered their ability as adults to positively contribute to tribal communities, and left families in extended mourning mode, significantly impairing their ability to meet their tribal citizenship responsibilities. Congress passed the ICWA in an attempt to remedy the above. (footnote omitted) The ICWA is meant to fulfill an

important aspect of the federal government's trust responsibility to tribes by protecting the significant political, cultural and social bonds between Native American children and their tribes. In doing so, the ICWA ultimately is civil rights legislation which protects the interests of Native American children and the existence of Native American tribes and families (footnote omitted)"

Also supporting this legal concept that ICWA focus on its application on the status of the minor – Indian child -- are the BIA Regulations. Congress authorized the Department to make rules and regulations necessary for carrying out provisions of ICWA. (25 U.S.C. § 1952) To supplement the regulations, the Department published guidelines for State courts to use in interpreting many of ICWA's requirements in Indian child custody proceedings. (80 Fed. Reg. 10146, 10147) On December 12, 2016, the Department published Guidelines for Implementing the Indian Child Welfare Act ("2016 Guidelines"), which replaced the 1979 and 2015 versions.

The BIA Regulations at page 38799, reads: "As discussed in more depth below, the final rule also removes from the regulatory text an explicit mention by name of the so-called ''existing Indian family'' (EIF) exception: A judicially created exception to ICWA's applicability that has since been rejected by the court that created it. Although the reference to the EIF exception by name was removed, the final rule makes clear that the inquiry into whether ICWA applies to a case turns solely on whether the child is an ''Indian child'' under the statutory

definition. The rule, consistent with the Act, thus focuses exclusively on a child's political membership with a Tribe, rather than any particular cultural affiliation. The commenters who asserted that various ICWA provisions are inapplicable to some children who have ''assimilated into mainstream American culture'' are wrong under a plain reading of the statute. In order to make this clear, the final rule prohibits consideration of listed factors because they are not relevant to the inquiry of whether the statute applies. The inclusion of this prohibition prevents application of any EIF exception, which both ''frustrates'' ICWA's purpose to ''curtail state authorities from making child custody determinations based on misconceptions of Indian family life,'' (*In re A.J.S.,* 204 P.3d at 551) (citation omitted), and encroaches on the power of Tribes to define their own rules of membership."

Further, ICWA **does** apply to **inter-family disputes**, as the BIA Regulations at page 38800, reads: "The statute and final rule exclude custody disputes between parents (*see* next response), but can apply to other types of intra-family disputes, assuming that such disputes otherwise meet the statutory and regulatory definitions. ICWA can apply to other types of intra-family disputes because the statute makes only two exceptions, neither of which are for intra-family disputes other than parental custody disputes. 25 U.S.C. 1903(1) (ICWA does not apply to the custody provisions of a divorce decree or to delinquency proceedings). While at least one court held that ICWA excludes intra-family

disputes (*see In re Bertelson*, 617 P.2d 121, 125–26 (Mont. 1980)), several subsequent court decisions have ruled to the contrary. *See*, *e.g.*, *Starr* v. *George*, 175 P.3d 50 (Alaska 2008); *In re Custody of A.K.H.*, 502 N.W.2d 790, 794 (Minn. Ct. App. 1993); *In re Q.G.M.*, 808 P.2d 684, 687–88 (Okla. 1991); *In re S.B.R.*, 719 P.2d 154, 156 (Wash. Ct. App. 1986); *A.B.M.* v. *M.H.*, 651 P.2d 1170, 1173 (Alaska 1982). BIA has concluded that, if the intra-family dispute meets the definition of a ‘‘child-custody proceeding,’’ the provisions of this rule would apply.”

Regarding Senate bill 678, effective January 1, 2007 – which is after the Appellate Court decisions in: In re Santos Y. (2001), In re Bridget R. (1996), In re Cristella C. (1992), and In re Stephanie M. (1994) – this Court, in In re Abigail A., supra, at page 92 held: “As we have explained, “[t]he primary objective of Senate Bill No. 678,” which incorporated ICWA's requirements and definitional provisions into California statutory law, “was to *increase compliance* with ICWA.” (*In re W.B., supra,* 55 Cal.4th at p. 52, 144 Cal.Rptr.3d 843, 281 P.3d 906, italics added; see Assem. Com. on Judiciary, Analysis of Sen. Bill No. 678 (2005–2006 Reg. Sess.) June 20, 2006, p. 1 [bill believed “necessary to increase compliance with ICWA”]; see also Welf. & Inst.Code, §§ 224–224.6; *id.*, § 224.1, subd. (a) [definitions]).)”

Thus, the California counter-parts to ICWA strengthens California’s commitment to comply with ICWA.

CONCLUSION

ICWA applies to this California probate guardianship case under both Federal and State law. The three Tribal member minors are Indian children under ICWA and they are Tribal members of the Tribe.

Petitioners are non-Indians and their family is non-Indian family.

Petitioners are attempting to both assimilate the three Tribal member minors into a non-Indian family/society and breakup the Tribal Indian family by eliminating all contact and relationship with what Congress has determined is the most valuable asset of the Tribal Indian family, the Indian children.

The Petition should be denied.

Dated: August 11, 2017

/s/ JAMES R. GREINER
JAMES R. GREINER
Attorney for Real Party in Interest
Regina Cuellar

CERTIFICATION OF COMPLIANCE

CALIFORNIA RULES OF COURT RULE 8.504(d)

I, James R. Greiner, attorney for **Respondent, Real Party in Interest, Regina Cuellar,** certify pursuant to the California Rules of Court, Rule 8.504(d), that the word court for this document is **8,231** excluding tables, this certificate and any attachments permitted under California Rules of Court, Rule 8.504(e) according to the Word Count Feature of Microsoft Word.

I declare under penalty of perjury that the foregoing is true and correct executed this 11th day of August 2017, at Folsom, California.

/s/ JAMES R. GREINER
JAMES R. GREINER

PROOF OF SERVICE

I, JAMES R. GREINER, am over the age of 18 years old, and not a party to the within legal lawsuit. My business address is 1024 Iron Point Road, Folsom, California, 95630.

On **August 11, 2017**, I caused to be served the **Answer by Regina Cuellar**, **Real Party in Interest,** either by depositing with the United States Postal Service on the same day as this declaration, or on Counsel of record by e mail and e mail attachment or both as noted, in an envelope, sealed and with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail in Folsom, California on the following:

FIRST CLASS MAIL SERVICE

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For the County of Tulare
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Visalia, California 93291
Respondent

The State of California Court of Appeal
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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct to the best of my knowledge and belief.

DATED: **August 11, 2017**

/s/ JAMES R. GREINER

JAMES R. GREINER

EXHIBIT A

Fifth Appellate District Order

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIFTH APPELLATE DISTRICT

EFRIM RENTERIA et al., Petitioner, v. THE SUPERIOR COURT OF TULARE COUNTY, Respondent; REGINA CUELLAR et al., Real Parties in Interest.	F075331 (Tulare Super. Ct. No. VPR047731) **ORDER**

BY THE COURT:*

The "Petition for Writ of Mandate and/or Other Appropriate Relief …," filed on March 23, 2017, is denied.

Hill, P.J.

* Before Hill, P.J., Poochigian, J., and Smith, J.

EXHIBIT B

2017 February 3, 2017 Superior Court Ruling ICWA Applies

SUPERIOR COURT OF CALIFORNIA
COUNTY OF TULARE
Visalia Division
221 S Mooney Blvd
Room 303
Visalia, CA 93291
(559) 730-5000

FILED
TULARE COUNTY SUPERIOR COURT
VISALIA DIVISION

FEB 03 2017

LARAYNE CLEEK, CLERK
BY: Lisa Weisenborn

In the Matter of Cuellar, Angelina Jessie Porras

Case No. **VPR047731**

CLERK'S CERTIFICATE OF SERVICE BY MAIL

I certify that I am not a party to this cause.

I certify that I placed the Ruling filed February 3, 2017 for collection and mailing on the date shown, so as to cause it to be mailed in a sealed envelope with postage fully prepaid on that date following standard court practices to the persons and addresses shown. The mailing and this certification occurred at Visalia, California on February 3, 2017.

LARAYNE CLEEK,
CLERK OF THE SUPERIOR COURT
COUNTY OF TULARE

By_____
Deputy Clerk

Names and Mailing Address of Person(s) Served:

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1024 Iron Point Road
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SUPERIOR COURT OF CALIFORNIA

COUNTY OF TULARE

FILED
TULARE COUNTY SUPERIOR COURT
VISALIA DIVISION

FEB 03 2017

LARAYNE CLEEK, CLERK
BY: Lisa Weisenborn

In the Matter of Angelina Porras-Cuellar Petitioner vs. Joshua Portillo, Respondent.	Case No. VPR047731 Department 8 RULING ON SUBMITTED ISSUES Date: January 17, 2017

The Parties in this matter have not stipulated as to whether or not the Indian Child Welfare Act (ICWA) applies to this matter. The Renterias argue that it does not, and the Cuellars argue that it does. Therefore, the Court set a hearing on the matter for January 17, 2017. Having reviewed the briefs of the parties, the evidence submitted, the documents on file with the Court, and taking argument from the Parties, the Court rules as follows:

The Renterias rely on *Adoptive Couple v. Baby Girl* (2013) 133 S.Ct. 2552 to support their contention that the ICWA does not apply to this action. *Adoptive Couple* is distinguishable and is not applicable to this action. *Adoptive Couple* involved an Indian father who sought custody of his 2 year old daughter. That Father had voluntarily relinquished his parental rights to the child at birth and had never had custody or prior contact with the child. The Supreme Court found on these facts the ICWA did not apply as there was no Indian family being broken up.

The facts here differ markedly. At issue in this matter is a custody dispute over minor children whose biological parents both died in a tragic accident. It is undisputed that father here was a member of an Indian tribe. It is also undisputed that the children are members of a tribe or eligible to be members of a tribe. 25 U.S.C. 1903(4). Finally, there is no dispute that father maintained contact and custody of the children from birth until his untimely death.

As explained by a recent Court

> "Responding to inconsistent and sporadic application of the ICWA's requirements by California courts, the California Legislature enacted Senate Bill No. 678 (2005–2006 Reg. Sess.) (Senate Bill 678) in 2006. Senate Bill 678 incorporated the ICWA's requirements into California statutory law, revising several provisions of the Family, Probate, and Welfare and Institutions Codes. (See *Autumn K., supra*, 221 Cal.App.4th at pp. 703–704.)

> According to the Senate Rules Committee, Senate Bill 678 "affirms the state's interest in protecting Indian children and the child's interest in having tribal membership and a connection to the tribal community." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 678 (2005–2006 Reg. Sess.) as amended Aug. 22, 2005, p. 1.) Similar to the ICWA, Senate Bill 678 contains a section of express legislative findings, including findings that "[i]t 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." (Welf. & Inst. Code, § 224, subd. (a)(2).) The statute directs the court to "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." (*Id.*, § 224, subd. (b).) In addition, a determination that a minor is "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." (*Id.*, § 224, subd. (c).)"

(*In re Alexandria P.* (2014) 228 Cal.App.4th 1322, 1339.)

Furthermore, applicable federal guidelines specify the ICWA applies whenever an Indian child is the subject of a child custody proceeding (25 CFR section 23.103 (June 14, 2016 regulations). The current matter is a child custody proceeding as defined by ICWA.

The Court understands that the Rentarias believe ICWA was not designed with the current factual situation in mind. Indeed, neither party has been able to direct the Court to a case in which both parents died at the same time and one parent was a member of a tribe. It follows that no case has been published where two great-aunts then compete for guardianship of the minors. However, the Court believes that the argument regarding the purpose of ICWA is not the starting point in analyzing whether or not ICWA applies. The proper point to begin an analysis as to the applicability of ICWA is as stated above – does this proceeding involve an Indian Child? It does. Is the current matter within the various definitions of an custody proceeding involving an Indian Child? The Court finds that it is. The Renterias have pointed to no case that says the provisions of ICWA are eliminated upon the death of an Indian parent.

The Court finds that ICWA is applicable to these proceedings.

TULARE COUNTY ★ SUPERIOR COURT ★ CALIFORNIA

Dated: February 3, 2017

Nathan D. Ide
Judge of the Superior Court