IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO
TENTH APPELLATE DISTRICT

In The Matter of:	:	
(C.J., Jr.,		**CASE NO. 16 AP 891**
(B.F.,	:	
	:	(ACCELERATED CALENDAR)
Appellant.	:	

In The Matter of:	:	**CASE NO. 17 AP 162**
(C.J., Jr.,	:	
(S.R.,	:	(ACCELERATED CALENDAR)
Appellant.	:	

In The Matter of:	:	**CASE NO. 17 AP 191**
(C.J., Jr.,		
(B.F.,	:	(ACCELERATED CALENDAR)
	:	
Appellant.	:	

GAL's Response to Brief of *Amici Curiae* National Congress of American Indians and National Indian Child Welfare Association

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I. Amici raise immaterial issues and disregard what really matters: C.J. Jr.'s best interests.

Amici NCAI and NICWA, state that they are "deeply committed to … protect and preserve ICWA." Br. 1. However commendable that goal may be, their brief does nothing to address the best interests of C.J. Jr. as an individual under the specific circumstances of this case.

Instead, *amici* begin with a history of the circumstances leading to ICWA's passage—specifically, the "remov[al] [of] Indian children from their homes and schools based on vague allegations," *id.* at 2, and their placement in "residential schools miles away" from their homes. *Id.* That, however, is simply not at issue here. This case does not involve any allegations that the *removal* of C.J. Jr. from C.J. Sr.'s custody was wrongful; *amici*'s discussion of purported problems with *removals* of Indian children, Br. 2, 5, 6, 12, 15, is immaterial and unrelated to the issues before this Court. Nor does this case involve C.J. Jr. being placed in a residential school or moved away from his family.

On the contrary, it is *the Gila River Indian Community* that is seeking to remove C.J. Jr. from the only family he has ever known; it is *GRIC* that is trying to send him *thousands of miles* away from his home

state of Ohio to live with race-matched strangers on a reservation in another state he has never even visited—all without any assessment of C.J. Jr.'s individual best interests.

Much of the rest of the amicus brief simply recites the text of ICWA, which is not helpful. But it is notable that the brief contains *no discussion whatsoever* of C.J. Jr.'s individual best interests—beyond the blanket and unsubstantiated assertion that the differential treatment of Indian children (as opposed to black, white, Hispanic, Asian, Jewish, Japanese, etc., children) is categorically in their best interests.[1] *See, e.g.*, *id.* at 13

[1] The differential treatment involved in this case is race-based 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 and quotation marks omitted). It is not a political classification because, unlike the classification in *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974), that concerned adults who chose to be members of a tribe and who were employed by and "confined to the authority of the BIA, an agency described as '*sui generis*,'" ICWA "singles out 'identifiable classes of persons … solely because of their ancestry or ethnic characteristics.'" *Rice*, 528 U.S. at 515, 520 (citation omitted). Even if it were not a racial classification, however, it would be a national-origin-based classification, which is subject to the same strict scrutiny as racial classifications. *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117 (9th Cir. 1998). *See further* Solangel Maldonado, *Race, Culture, and Adoption: Lessons from* Mississippi Band of Choctaw Indians v. Holyfield, 17 COLUM. J. GENDER & L. 1, 27 (2008) (ICWA applies *solely* on the basis of biology, and not "social, legal, or political identification").

(asserting that treating Indian children differently from other children "protect[s] the child *as an Indian*." (emphasis added)). Of course, even if that were true, it is unconstitutional to impose blanket, one-size-fits-all rules on *any* racial category of children, even on the theory that doing so "protects the child as an African-American," or "protects the child as an Asian," etc. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 225–26 (1995) (even "benign" racial classifications are subject to strict scrutiny.)

Indeed, that is *precisely* what the Supreme Court ruled unconstitutional in *Palmore v. Sidoti*, 466 U.S. 429, 433–34 (1984). There, the Court held that while a child might face discrimination if she is adopted by a mixed-race couple, that cannot justify a court in blocking such adoption, because "[t]he effects of racial prejudice, however real, cannot justify a racial classification." *Id*. at 434.

In short, while the history of U.S./tribal relations includes much that is deplorable, the crimes of the past cannot be resolved by overriding the best interests of this child, or denying him the equal treatment before the law to which he is entitled as an American citizen and an Ohioan. *See generally* Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children,* 37 CHILD. LEGAL RTS. J. 1

(2017); *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 742 (2007) (plurality opinion) ("The reasons for rejecting a motives test for racial classifications are clear enough.").

To the extent that it might be thought that such history justifies a race-conscious federal remedy, the Supreme Court has made clear that past wrongs do not automatically justify racially disparate treatment: rather, even where the government treats different races of people differently for allegedly "benign" reasons, that action must satisfy the strict scrutiny standard, *Pena*, 515 U.S. at 225–26—and any such "current burdens … must be justified by *current* needs." *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2619 (2013) (citation omitted; emphasis added).

Thus to justify treating C.J. Jr. differently from his white, black, Asian, or Jewish peers, GRIC and *amici* would have to show *at a minimum* that "wholesale removal of Indian children from their families by state and private child welfare agencies," Br. 2, is ongoing, or recent in Ohio. Yet notwithstanding *amici*'s repeated references to abuses by "state" child welfare systems, *see, e.g.*, *id.* at 4 ("widespread abuses committed by state child welfare systems"); *id.* at 5 ("state and private child welfare agencies, with the backing of many state courts"), it was the *federal* government that, through its Bureau of Indian Education program,

removed Indian children from parents on reservations.[2] *See* H.R. Rep. No. 95-1386 at 9 (1978) (emphasis added) ("The *federal boarding school and dormitory programs* … contribute[d] to the destruction of Indian family and community life."); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 22.03(1)(a) at 1397 (Nell Jessup Newton ed., 2012) ("In 1969, the federal government acknowledged that its educational policy was 'a failure of major proportions.'"); *see generally* NAOMI SCHAEFER RILEY, THE NEW TRAIL OF TEARS: HOW WASHINGTON IS DESTROYING AMERICAN INDIANS (2016).[3] Without showing that Ohio has been responsible for abusing child protection authority, or that this is a "current" problem, *Holder,* 133 S. Ct. at 2619, *amici* do not even come

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[2] Certainly Ohio child-protective-services agencies did not do so, since Ohio has no reservations.

[3] NCAI and NICWA have themselves previously referenced this fact. *See* Brief of NCAI & NICWA in *Carter v. Washburn*, No. CV-15-1259-PHX-NVW, 2017 WL 1019685 (D. Ariz. Mar. 16, 2017), Dkt. 59 at 2 ("*federal* Indian policy favored the removal of Indian children from their homes" (emphasis added)); *id.* at 3 n.2 ("*federal* boarding schools" (emphasis added)); *id.* at 4 ("mass removals had their genesis in early *federal* Indian policy" (emphasis added)); *id.* ("established practice of the *federal* government was to remove Indian children from their homes" (emphasis added)); *id.* at 5 ("*federal* Indian Adoption Project supported adopting Indian children to non-Indian households"; the Indian Adoption Project (IAP) was formed by the Bureau of Indian Affairs; the "federal policy of 'Indian extraction'" was implemented by "IAP-approved state agencies" (emphasis added)).

close to showing that the race-based differential treatment at issue here satisfies the applicable strict scrutiny.

II. C.J. Jr. is entitled to have his best interests prioritized.

The best interests of the child are the paramount consideration in a case like this. *In re Cunningham*, 59 Ohio St. 2d 100, 106, 391 N.E.2d 1034, 1038 (1979). *Amici* seek a different rule because C.J. Jr. has Native American blood in his veins. That is not constitutionally acceptable. *See Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976) ("In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption as a Per se rule that justice in a court of law may turn upon the pigmentation of skin, [or] the accident of birth."); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry" are "odious.").

The best interests of the child test is inherently individualized—it is a race-neutral test that considers the particular circumstances of the specific child in this unique case. *In re J.S.*, 12th Dist. Butler Nos. CA2016-07-141, CA2016-07-142, 2016-Ohio-7833, ¶¶ 11–13, appeal not allowed, 150 Ohio St. 3d 1409, 2017-Ohio-6964, 78 N.E.3d 909. Under this test, factors such as a child's unique upbringing are routinely taken into account as the totality of circumstances informing the best interests

of a particular child. *See* GAL Second Opening Brief 8–10 (citing and discussing relevant cases). The test allows consideration of racial, cultural, religious, etc., factors—but not a blanket presumption that all children who fit a racial profile must be treated in *this* way, while all who do not are treated *that* way. *In re Moorehead*, 75 Ohio App. 3d 711, 723, 600 N.E.2d 778, 786 (1991). C.J. Jr.'s relationship to GRIC, and his unique needs as a child with 25% Gila River blood—assuming that there are any—are entirely within the ambit of the same race-neutral best-interests determination that applies to all other Ohio children. *Amici* argue that a "tribe's input" should play a role in child custody proceedings, Br. 15, and the best-interests assessment allows for that: tribes can participate as *amici* and advise courts about any Indian child's needs. *In re Moorehead*, 75 Ohio App. 3d at 723, 600 N.E.2d at 786 ("Cultural heritage is one factor among many that may be considered in selecting an adoptive home for a child. However…[r]acial classifications are 'subject to the most exacting scrutiny' because race-based classifications are inherently suspect." (citation omitted)).[4]

[4] Foster parents, N.B. and S.B., are interested in learning about C.J. Jr.'s Native American heritage. They have also allowed his hair to grow long in accordance with the tribal culture, showing a "sincere dedication to fostering that culture." 15JU232 Transcript 11/2/2016 at p. 35.

But *amici*, like GRIC, reject the use of this individualized best-interests determination, and prefer instead a blanket, once-size-fits-all presumption that all children who are biologically eligible for tribal membership should be subjected to a different rule: specifically, that it is *per se* in the best interest of such a child to be placed in the custody of adults who have the same DNA. Br. 12–13 (quoting authorities to the effect that ICWA establishes what is in the best interests of all Indian children). Suffice it to say, decreeing by statute what is *per se* in the best interests of all children who fit a specified genetic profile is a textbook example of a racial classification that must satisfy the strictest scrutiny.[5]

This is why *amici*'s statement that state child-protective-services agencies should "utilize Indian families for placement," Br. 8, is so misguided. Franklin County Children's Services ("FCCS"), like all child-protective-services agencies, is already required to do extensive background checks and transition planning before it can re-place a child

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Moreover, their dedication to C.J. Jr.'s best interests extends to adoption when and if that option becomes available to them. *Id.* at pp. 35–36. If anything, GRIC should be welcoming and applauding these efforts of foster parents rather than treating them and C.J. Jr.'s GAL with disdain.

[5] Indeed, such race-, color-, or national-origin-matching has been firmly rejected if practiced in the cases of all other children. 42 U.S.C. § 1996b.

in foster care, guardianship, or place the child for adoption. But in a state like Ohio that does not have reservations, *amici*'s rule would force FCCS to *actively racially profile all prospective foster families*. That, too, would fail the applicable strict scrutiny test. *In re Moorehead, supra*.

The paucity of Indian foster homes in Ohio is regrettable, but also immaterial here. *Amici*'s arguments, taken to their logical endpoint, are simply unworkable as a practical matter and unacceptable as a matter of constitutional principle.

III. The tribe does not have "inherent" jurisdiction here.

Finally, *amici* suggest that GRIC has "inherent" jurisdiction over this case. Br. 16. This is incorrect. First, ICWA is silent as to the source of the jurisdiction it purports to grant. Second, tribal governments have no "inherent tribal jurisdiction" to adjudicate *off-reservation* cases involving children whose sole connection to the tribe is their genetic profile.

This Court should categorically reject the idea that tribal courts have "inherent" jurisdiction to adjudicate foster care and adoption proceedings of American citizens[6] who happen to be born with the requisite blood quantum to render them eligible for tribal membership. Tribal court

[6] All American Indians are citizens of the United States. 8 U.S.C. § 1401(b). C.J. Jr. is a natural born citizen of the United States and of Ohio. U.S. CONST. amend. XIV § 1.

jurisdiction must satisfy the "minimum contacts" requirement of due process, *Red Fox v. Hettich*, 494 N.W.2d 638, 645 (S.D. 1993), and it violates due process to predicate jurisdiction on "an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

The cases *amici* cite, Br. 16, do not hold otherwise. In *Fisher v. District Ct.*, 424 U.S. 382 (1976), all parties resided on reservation, and the Court found that jurisdiction was "predicate[d] … on the residence of the litigants." *Id.* at 389 n.14. By *Fisher*'s reasoning, *Ohio*'s courts—not GRIC's—have exclusive jurisdiction here. The children were also domiciled on reservation in *Wisconsin Potowatomies of Hannahville Indian Cmty. v. Houston*, 393 F. Supp. 719 (W.D. Mich. 1973), *Wakefield v. Little Light*, 347 A.2d 228 (Md. App. 1975), and *In re Buehl*, 555 P.2d 1334 (Wash. 1976). Not so here.

And in *Nevada v. Hicks*, 533 U.S. 353, 364 (2001), the Supreme Court rejected the argument that tribes have inherent authority "to regulate state officers in executing process related to the violation, off reservation, of state laws." Likewise, all matters relating to C.J. Jr.'s removal from C.J. Sr. and his placement with his foster parents related to

state laws, occurred *off-reservation*, and involved *state officers* executing *Ohio* laws that protect Ohio children like C.J. Jr.[7]

The constitutional issues at stake here—and the problems with *amici*'s brief—become clear if we imagine an analogous scenario. No Ohio court would entertain the argument if, say, Arizona or Canada or the Quaker church appeared in an ordinary child-welfare case involving an Ohio child born to Ohio parents, living with Ohio foster parents, to argue that the court should disregard his best interests and send him to live with a family he's never met in Arizona or Canada or Pennsylvania, simply because the DNA in his veins comes from people who come from Arizona or Canada or who were Quakers.

Amici are urging this Court to adopt a rule that is even *worse* than that. They want this Court to enforce a rule that depends exclusively on race—on the blood in C.J. Jr.'s veins. And they ask this Court to relinquish C.J. Jr.'s physical custody to unknown strangers who are not answerable to Ohio's courts *or even to federal courts*. And they ask that this Court transfer legal custody over him—indeed, to extradite him—to

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[7] For this reason, GAL agrees with the Attorney General that to the extent that ICWA purports to compel state child welfare officials and state judges to comply with its mandates, it unconstitutionally commandeers state officers, contrary to *Printz v. United States*, 521 U.S. 898 (1997).

a political entity that is not subject to the United States Constitution. That is unconstitutional. *Cf. Reid v. Covert*, 354 U.S. 1, 30 (1957) (Congress cannot, even under treaty power, force American citizens into a separate legal system that does not respect constitutional limits).

In short, the only "deliberate, collaborative abuse," Br. 3, 10, here is by GRIC. It seeks to lay aside the only factor that should matter here—C.J. Jr.'s best interests. This Court should say no.

Conclusion

Most of the *Amici*'s brief is beside the point. It provides little, if anything, of substance to this Court to aid it in deciding this case.

Respectfully submitted,

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