No. B270775

In the Court of Appeal of the State of California
Second Appellate District
Division Five

IN THE MATTER OF A.P.,
A Person Coming Under
Juvenile Court Law.

DEPARTMENT OF CHILDREN AND FAMILY SERVICES,
Petitioner and Respondent,
v.

T.P. and J.E.,
Defendants and Respondents,

R.P. and S.P., De Facto Parents,
Objectors and Appellants.

CHOCTAW NATION OF OKLAHOMA,
Intervenor.

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF OBJECTORS/APPELLANTS R.P., ET AL.

On Appeal From the Judgment of the Superior Court
State of California, County of Los Angeles
Hon. Rudolph Diaz, Dept. 419
Case No. CK58667

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INTRODUCTION AND SUMMARY OF ARGUMENT

In *Adoptive Couple v. Baby Girl,* 133 S. Ct. 2552, 2565 (2013), the Supreme Court noted that it "would raise equal protection concerns" if the Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq.*, (ICWA) were used "at the eleventh hour to override…the child's best interests" and interfere with a foster care or adoption proceeding "solely because an ancestor—even a remote one—was an Indian."

This is that case.

ICWA and its state analogue, Cal. Welf. & Inst. Code § 224, *et seq.*,[1] deprive children of the protections of the "best interests of the child" rule, solely on account of their racial heritage. These statutes also deprive them of other procedural and substantive legal protections promised by the Constitution, including their First Amendment freedom of association rights and their rights to individualized determinations of their cases. ICWA is often used in ways that contradict the wishes of Indian parents, and even—as in this case—in ways that do not even preserve tribal culture and customs.

In a previous decision in this dispute, this Court rejected application of the "Existing Indian Family Doctrine," *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1344 (2014). But that Doctrine was devised as a saving

[1] Unless otherwise specified, all references herein to ICWA are to both ICWA and its state analogue.

construction to avoid the constitutional problems that would arise when ICWA's language is literally applied. *In re Santos Y.*, 92 Cal. App. 4th 1274, 1303-04 (2001). But with that saving construction removed, ICWA's unconstitutionality is plain. It creates a separate and unequal system of law that applies solely on the basis of a person's race. Such "'odious'" racial classifications can find no warrant in the state or federal constitutions, *In re Bridget R.*, 41 Cal. App. 4th 1483, 1508 (1996), *cert. denied*, 519 U.S. 1060 (1997) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)), and must be struck down.

I.
THE INDIAN CHILD WELFARE ACT HARMS INDIAN CHILDREN AND OFTEN HARMS INDIAN TRIBES

A. How the ICWA Penalty Box Works

All Indian children are United States citizens, 8 U.S.C. § 1401(b), entitled to the same legal protections that apply to all other children, without regard to race. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

But ICWA sets forth a separate—and in many ways, substandard—system of rules for foster care and custody proceedings involving children who are deemed "Indian." The definition of "Indian child," is a biological one: a child who is a member of a tribe, or is eligible for membership in an Indian tribe and is the biological child of a member of a tribe. 25 U.S.C. § 1903(4); Cal. Welf. & Inst. Code § 224.1(a) and (b); Cal. Rules of Court 5.502(19). Tribes have exclusive authority to determine membership. *See,*

Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10153, B.3 (Feb. 25, 2015) ("Guidelines"). Virtually all tribes do so by reference to racial ancestry. *See, e.g.*, Miss. Band of Choctaw Indians Const. art. III, § 1; Cherokee Nation Const. art. IV, § 1; Choctaw Nation of Okla. Const. art. II, § 1; Muscogee (Creek) Nation Const. art. III, § 2; Gila River Indian Community Const. art. III, § 1; Navajo Nation Code tit. 1 § 701. Federal regulations do not impose any *minimum* amount of biological relationship. *See,* Guidelines, *supra*.

This means that any amount of Indian blood, no matter how minute—even, as in this case, where a child's closest full-blooded Indian relative is a *great-great-great-great grandparent*—is enough to place a child in what amicus calls the "ICWA Penalty Box."[2]

The following rules apply to children of *this particular ethnicity*, but not to children who are white, black, Hispanic, Asian, or of mixed ancestry (except if mixed with Indian ancestry). Being placed in the ICWA Penalty Box means a child is:

- <u>*Denied the protection of the "best interests of the child" standard.*</u> ICWA requires courts, "in the absence of good cause to the contrary," to place a child with the child's extended family, other members of the tribe, or other Indian families. 25 U.S.C. § 1915(a). Bureau of Indian Affairs (BIA) regulations make clear that "[t]he good cause determination *does not include an independent consideration of the best interest of the Indian child* because the

[2] *See* Appendix at 3.

preferences reflect the best interests of an Indian child in light of the purposes of the Act." Guidelines, *supra,* at 10158, F.4(c)(3) (emphasis added); *In re C.H.*, 997 P.2d 776, 782 (Mont. 2000) ("while the best interests of the child is an appropriate and significant factor in custody cases under state law, it is improper" in ICWA cases because "ICWA expresses the presumption that it is in an Indian child's best interests to be placed in conformance with the preferences.").

- *Deprived of any individualized determination of her fate.* ICWA requires courts to *presume* that it is in a child's best interests to be placed with a tribal member or an Indian family, except in rare circumstances. Consequently, courts make custody, foster, preadoption, and adoption decisions based on factors irrelevant to a child's individual needs and circumstances. This despite what the Ninth Circuit has called the "basic principle[]" that "[o]nce the state assumes wardship of a child, the state owes the child, as part of that person's protected liberty interest, reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child." *Lipscomb By & Through DeFehr v. Simmons*, 962 F.2d 1374, 1379 (9th Cir. 1992).

- *Subjected to race-based delays or denials of custody orders.* The federal Multiethnic Placement Act (codified as amended at 42 U.S.C. § 1996b(1)), prohibits states from denying or delaying adoption proceedings on the basis of race, with one express exception: children subject to ICWA. *See* 42 U.S.C. § 1996b(3). They are the *only* children who are denied this protection, and against whom it is legal to racially discriminate in this manner.

- *Subject without notice or choice to the personal jurisdiction of Indian tribal authorities anywhere in the nation.* A tribe is authorized under 25 U.S.C. § 1911(c) to intervene in foster care and parental rights proceedings *anywhere in the United States* if that child is "eligible for membership" in the tribe—without any regard to whether such jurisdiction constitutes due process of law. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296-97 (1980). The recently announced BIA Guidelines extend this unconstitutional jurisdiction to adoption proceedings, also. Guidelines, *supra*, at 10153-54, B.6.

- *Deprived of freedom of association rights.* Children have First Amendment rights. *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Yet ICWA strips children of their freedom of association by compelling their affiliation with a tribe, regardless of their wishes and often—as in this case—against the wishes of their loving caretakers. The Guidelines require the state to "take the steps necessary to obtain membership for the child in the tribe" if the child is not an enrolled tribal member. Guidelines, *supra*, at 10153, B.4(d)(iii).

- *Given less protection against abuse and neglect*. Shockingly, although ICWA purports to protect the "welfare" of children, it actually makes it more difficult to protect Indian children from abuse or neglect. For example, under ICWA's "active efforts" provision, states must try to reunite children with parents or guardians even where those adults have abused them. To cite just one example, in *In re Interest of Shayla H.*, 846 N.W.2d 668 (Neb. App. 2014), *aff'd* 855 N.W.2d 774 (Neb. 2014), Nebraska courts ruled against child protection officers who removed children from a sexually abusive father, because although they made reasonable efforts to rehabilitate the father, "the active efforts standard in [ICWA] requires more than the reasonable efforts standard that applies in cases not involving ICWA." *Id*. at 674. Following that ruling, the children were returned to the abusive father—only to be removed a year later by a trial court that found him "unfit by reason of debauchery or repeated lewd and lascivious behavior." *In re Interest of Shayla H.*, (Lancaster County Juvenile Court, Doc. JV13, May 1, 2015, p. 3).[3] Many other examples are detailed in Mark Flatten, *Death on A Reservation* (Goldwater Institute, 2015).[4]

In short, ICWA instructs courts to treat children of Native American ancestry differently from those of other races—indeed, it imposes a set of legal detriments on them. Among other things, children subject to ICWA face "a greater risk" than others "of being taken" from a caring foster home,

[3] *See* Appendix at 4.

[4] http://goldwaterinstitute.org/en/work/topics/constitutional-rights/equal-protection/death-on-a-reservation-interactive-pdf/.

or being denied placement with a loving adoptive family that happens to be white, black, Hispanic, Asian, or another race, which means that "the number and variety of adoptive homes that are potentially available" to them are "more limited than those available" to others. *In re Bridget R.*, 41 Cal. App. 4th at 1508. *Accord*, *Baby Girl*, 133 S. Ct. at 2564 (noting how ICWA "unnecessarily place[s] vulnerable Indian children at a unique disadvantage in finding a permanent and loving home.").

B. ICWA is Frequently Used in Ways That Do Not Serve The Interests of Indian Tribes

The tragic irony is that, because the ICWA Penalty Box deprives children of legal protections, it is frequently used in ways that not only fail to protect children's interests, but even fail to preserve tribal integrity. Often, this happens when an Indian mother who divorces the birth father of her child later remarries and the stepfather seeks to adopt her child—only to have the birth father intervene to block the adoption.

That occurred in an ongoing case in Washington State, *In re Adoption of T.A.W.*, 354 P.3d 46 (Wash. App. 2015), *rev. granted*, (No. 92127-0 (pending)). An Indian mother divorced the non-Indian birth father due to the father's addiction to drugs. She later remarried and her new husband sought to legally adopt the child. *Id.* at 48-49. At that point, the *non-Indian* birth father invoked ICWA to stop what would otherwise have been a routine stepparent adoption. Far from preserving Indian tribal

integrity, the court concluded that "an Indian child's cultural tie to a tribe *is irrelevant* as to whether ICWA applies," *id*. at 52 (emphasis added), and allowed the non-Indian birth father to prevent the Indian birth mother from making her new family legally permanent.

In an Oklahoma case, *In re Adoption of J.R.D.*, (Okla. Civ. App. No. 113,228) (unpublished) (Apr. 21, 2015),[5] a Cherokee mother and a non-Indian father separated in 2006 after two years of marriage, and in 2008, the mother ended visits between the father and child because of the father's drug use. *Id.* at 3. Two years later, she remarried, again to a non-Indian, who sought to adopt her child legally—whereupon the tribe intervened pursuant to ICWA to block the adoption. *Id.* at 4. Against the will of the *Indian* mother, and despite evidence that the birth father "did not want a parental relationship with [the] Child," *id.* at 11, the Oklahoma Court of Appeals denied the adoption and ordered that the birth father be granted custody. *Id.* at 12.

In another ongoing case, in Arizona, the child of a member of the Gila River Indian Community was removed at birth when the mother was found addicted to drugs. The tribe agreed to the severance of parental rights. Given repeated opportunities, the tribe was unable to identify a tribal member willing to take in the child, and the foster family produced an

[5] *See* Appendix at 6.

affidavit signed by the mother declaring that she did not want the case to be transferred to tribal court. The trial court found "good cause" to depart from ICWA's mandates and refused to transfer the case to tribal court. Nevertheless, the tribe has appealed that ruling, asserting only its own governmental interests—not the best interests of the child. *In re A.D.*, No. 1 CA-JV 16-0038 (Ariz. App. Div. 1 2016) (pending).

In *In re Santos Y., supra*, a Californian child of Indian ancestry was put up for adoption, and the tribe asserted that it would not intervene in the proceedings. Nevertheless, years later, it did intervene, seeking to remove the child from the foster family (the only family he had ever known) and send him to a reservation in Minnesota. The child had no cultural tribal affiliation, was not born on a reservation, and had "no association with the Tribe other than genetics." 92 Cal. App. 4th at 1321. Fortunately, this Court applied strict scrutiny to that race-based assertion of government authority, and found that applying ICWA to a child "whose only connection with an Indian tribe is a one-quarter genetic contribution [would] not serve the purpose for which the ICWA was enacted." *Id.* at 1322.

And in this case, the Superior Court has ordered Lexi placed with a non-Indian person whose only relationship to an Indian tribe is that he was *married* to Lexi's late grandmother. There is no evidence whatsoever that this placement will enable her to learn more about Choctaw culture. The action of the lower court thus does nothing to "promote the stability and

security of Indian tribes and families," Cal. Welf. & Inst. Code § 224(b). But it does traumatically disrupt Lexi's relationship with her loving foster family.

II.
THE INDIAN CHILD WELFARE ACT IS A FACIALLY UNCONSTITUTIONAL RACE-BASED "DOUBLE STANDARD"

A. This Court Has Not Addressed ICWA's Constitutionality Under The Due Process And Equal Protection Clauses

At a previous stage of this litigation, this Court purported to reject a constitutional challenge to ICWA, but the written opinion did not address the question at issue here. Rather, this Court (a) refused to adopt the "Existing Indian Family Doctrine," 228 Cal. App. 4th at 1343-44, (b) found that the decision in *Baby Girl* was inapplicable, *id.* at 1345, and (c) found no need to address the constitutionality of ICWA under the Commerce Clause, because doing so would not have affected the California state analogue to ICWA. *Id.* at 1345-46. Therefore this Court has not previously addressed the constitutionality of ICWA (and its state analogue) under the Due Process and Equal Protection Clauses.

The "Existing Indian Family Doctrine" is not a constitutional determination. It is instead a saving construction—a "court made doctrine" which was fashioned to avoid constitutional concerns with ICWA. Shawn L. Murphy, *The Supreme Court's Revitalization of the Dying "Existing Indian Family" Exception*, 46 McGeorge L. Rev. 629, 636 (2014). This

Court's prior refusal to embrace the Doctrine therefore did not resolve ICWA's constitutionality. On the contrary, it made resolution of that issue all the more imperative. Whatever the merits of that Doctrine, its elimination leaves the Court with a statute that *on its face* eliminates legal protections for children of one particular race, solely on account of their race. This Court must therefore address the constitutionality of ICWA and Cal. Welf. & Inst. Code § 224, *et seq.*

B. ICWA and Its State Analogue Explicitly Deprive Indian Children of Equal Protection And Due Process Rights, Solely because They Are Deemed Indian

It should go without saying that, more than half a century after *Brown*, any law that imposes different rules based expressly on a person's racial makeup—and that treats a person *worse* on that ground—is unconstitutional on its face. The California Supreme Court has called such laws "'illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society,'" and instructed lower courts to strike them down "'whenever it is within the capacity of conscientious courts to see beneath their cellophane wrappers.'" *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 548 (2000) (quoting Alexander Bickel, *The Morality of Consent* 133 (1975); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. Chi. L. Rev. 775, 792 (1979)).

ICWA is *exactly* such a law. A child subject to its provisions is *less* protected against abuse and neglect, *less* likely to find a permanent, stable

home, *less* assured that legal proceedings involving her will be based on her own individual needs, and—most shockingly—is *expressly denied* the protection of the "best interests of the child" standard that all other children enjoy.

This Court has said that the "best interests of the child" standard embodies the state's "paramount purpose." *Moon v. Moon*, 62 Cal. App. 2d 185, 186 (1944). Other courts have called it the "touchstone," *In re Marriage of Wellman*, 104 Cal. App. 3d 992, 998 (1980), and the "linchpin" of state law involving child welfare. *In re Robert L.*, 21 Cal. App. 4th 1057, 1068 (1993). But ICWA denies children whose ancestry is Indian—even by a small fraction—of that "paramount" interest, that "touchstone," and that "lynchpin," *solely* on account of their race. This plainly raises Equal Protection concerns. *Baby Girl*, 133 S. Ct. at 2565.

It also raises Due Process concerns. In *In re Santos Y., supra*, this Court found that applying ICWA to a child whose only connection to an Indian tribe was genetic violated his due process rights because it deprived him of the foster family with whom he had lived all his life, and required that he be sent to live on a reservation in another state. 92 Cal. App. 4th at 1316. This Court found that depriving him of his *de facto* family under such circumstances was not narrowly tailored to achieve a compelling government interest. *Id.*

ICWA also violates *procedural* due process rights, however. By presuming that it is in the child's best interests to be placed in accordance with its statutorily-mandated preferences, without regard to that child's individual needs, ICWA imposes a substantial legal prejudice against a child based solely on her race. The "best interests of the child" standard is inherently individualized. *See, In re Adoption of Kelsey S.*, 1 Cal. 4th 816, 845-50 (1992); *cf. In re H.K.*, 217 Cal. App. 4th 1422, 1433-34 (2013) (citing with approval *In re Adoption of Abel*, 931 N.Y.S.2d 829, 834-35 (N.Y. Fam. Ct. 2011), which held that children have a "'due process right to an individualized determination of whether this adoption is in [the child's] best interest.'"); *Dawn D. v. Superior Court (Jerry K.)*, 17 Cal. 4th 932, 965 (1998) ("a court must make an individualized determination of the child's best interest in determining the extent, if any, of [a father's] parental rights."); *People v. McCoy*, 9 Cal. App. 4th 1578, 1583 (1992) (state law "requires the court to individually assess each child's best interests in fashioning [custody] orders.").

If the inherent individuality of the best interests determination were not already clear from common law, section 3011 of the California Family Code specifies the factors to be considered in a best-interests determination, and they all require consideration of a child's particular needs and interests.

The best interest standard "gives the court the flexibility to make appropriately individualized determinations that focus on a particular

child's well-being." Rachel M. Colancecco, *A Flexible Solution to A Knotty Problem: The Best Interests of the Child Standard in Relocation Disputes*, 1 Drexel L. Rev. 573, 610 (2009). *Cf. Stanley v. Illinois*, 405 U.S. 645, 652-55 (1972) (parents also have a right to individualized determination under best interest standard).

But the "best interests" standard does *not* apply in cases involving Indian children, *See*, Guidelines, *supra*, at 10158, F.4(c)(3), or it is used in a perverse way that deprives children of its substantive protections. For instance, it is often claimed that ICWA employs a *different kind* of best-interest standard. *See, e.g.*, Lorie M. Graham, *Reparations, Self-Determination, And The Seventh Generation, in* Mathew L.M. Fletcher, *et al*., eds., *Facing The Future: The Indian Child Welfare Act at 30*, at 80 (2009) (ICWA "acknowledges that Indian children['s] . . . 'best interests' are in fact inextricably connected to those of their tribe."). The reality, however, is that any *per se* rule or overwhelming legal presumption that deprives a child of an individualized determination of what is in her specific interests violates her child's due process rights.

True, this Court has taken a relatively moderate view of the ICWA presumptions, rejecting the position taken by courts such as Montana's, that have viewed ICWA's presumptions as strong enough to withstand anything short of absolute certainty of harm to the child. *See*, *In re Alexandria P.*, 228 Cal. App. 4th at 1353-54. But even this more moderate form of the

ICWA presumption still establishes different rules for children (and parents, foster parents, siblings, etc.), solely on the basis of their race. A black or white or Asian child, or a child of mixed race (except if mixed Indian ancestry) is entitled to an undiluted best-interests standard—whereas a child of Indian heritage is subjected to a legal presumption based exclusively on race.

In *In re Adoption of Kelsey S.*, *supra*, the California Supreme Court warned against using blanket presumptions that fail to evaluate children's individual needs. That case involved a group of laws under which birth mothers and their husbands could object to adoptions, but unmarried fathers could not. 1 Cal. 4th at 824-25. The court found this irrational, because although the "constitutionally valid objective [was] the protection of the child's well-being," the state could not simply presume that "a child is inherently better served by adoptive parents than by a single, biological father." *Id.* at 845-46. Such a crude blanket presumption "bears no substantial relationship to protecting the well-being of children." *Id*. at 847. The court gave an example: "[a] father who is indisputably ready, willing, and able to exercise the full measure of his parental responsibilities can have his rights terminated merely on a showing that his child's best interest would be served by adoption," whereas a mother's rights were far more protected, even if she were "*un*ready, *un*willing, and *un*able" to care for the child. *Id.* The statutory distinction therefore "largely ignored" the "child's

best interest." *Id.* at 848.

But children subject to ICWA face a far more detrimental blanket presumption. Solely as a consequence of their race, the law presumes "in the abstract," *id.* at 845, that it is necessarily in their best interest to be placed in accordance with the prescriptions of 25 U.S.C. § 1915. Those presumptions, and those imposed by the Guidelines—especially the rule that bars "an independent consideration of the best interest of the Indian child because the [placement] preferences reflect the best interests of an Indian child," Guidelines, *supra*, at 10158, F.4(c)(3)—mean that a child is presumptively deprived of the chance of being adopted into a loving, permanent family such as the foster family here, because of *her and their race*. The child's best interest is largely—indeed, *explicitly*—ignored. ICWA's blanket presumption and separate rules bear no substantial relationship to protecting the well-being of children.

Worse, that blanket presumption is one the United States Supreme Court has *explicitly* found unconstitutional. In *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984), the Court unanimously ruled that "[t]he effects of racial prejudice, however real, cannot justify a racial classification" in custody determinations. But under ICWA, "the race, not the person, dictates the category." *Id.* at 432. Its presumptions, therefore, even in the mild form adopted by this Court, are a form of racial discrimination that is "'odious to

a free people.'" *In re Bridget R.*, 41 Cal. App. 4th at 1508 (quoting *Hirabayashi*, 320 U.S. at 100).

In short, ICWA imposes precisely the sort of blanket, stereotypical assumptions that are untenable in light of the state's devotion to the security and well-being of children.

C. ICWA's Constitutional Infirmities Cannot Be Dismissed as a Mere "Political Distinction"

Defenders of ICWA contend that ICWA is not *racially* discriminatory because Indian tribes are political entities rather than racial classifications, and cite *Morton v. Mancari*, 417 U.S. 535 (1974), and *United States v. Antelope*, 430 U.S. 641 (1977). *See, e.g., Application of Angus*, 655 P.2d 208, 213 (Or. 1982) (relying on these cases to reject challenge to ICWA); *In re A.B.*, 663 N.W.2d 625, 636 ¶ 36 (N.D. 2003) (same). But this is a misreading of *Mancari* and *Antelope*. The Supreme Court has never said that all statutes that distinguish between Indians and non-Indians are shielded from the strict scrutiny that applies to all other race-based classifications. In fact, it has indicated the opposite. *See* Rice *v. Cayetano*, 528 U.S. 495, 514, 516-17 (2000).

Mancari and *Antelope* expressly reserved the question relevant to ICWA's constitutionality. They upheld laws that treated adult members of tribes differently than adult non-members, because that differential treatment was a political, rather than a racial, distinction. Both cases made

a point of observing that the statutes involved were "not directed towards a 'racial' group consisting of 'Indians,'" *Mancari*, 417 U.S. at 553 n. 24, and "[did] not apply to 'many individuals who are racially to be classified as 'Indians.'"" *Antelope*, 430 U.S. at 646 n. 7.

The opposite is true here. ICWA applies to children who are *racially* classified as Indians, because it applies to those who are not just members, but *eligible* for membership—which depends on racial heritage. No case has ever held that a law that treats people differently because their racial background makes them *eligible* for tribal membership is a merely "political" as opposed to "racial" classification.

On the contrary, *Rice* struck down the effort to use "ancestry" to restrict voting in a government-run election, finding that ancestry serves as "a proxy for race" when it is used to "single[] out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.'" 528 U.S. at 496 (quoting *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987)). It found *Mancari* inapplicable because there, unlike in *Rice*, the legislation did not single out a group of people solely on the basis of their biological ancestry, which the legislation at issue in *Rice* – and here - did. *Id.* at 518-22.

ICWA's proponents have asserted that the statute uses blood quantum only as a "shorthand for the social, cultural, and communal ties a [child] has with a sovereign tribal entity." Def's Motion to Dismiss, *Carter*

v. Washburn, No. 2:15-cv-01259-PHX-NVW (Docket No. 68) at 23. But the use of ancestry as a "shorthand" for a person's "social and cultural ties" is the literal definition of racial discrimination. Indeed, the precedent that most prominently involves the use of ancestry as a "shorthand" for one's social and political connections with a sovereign entity is *Korematsu v. United States*, 323 U.S. 214 (1944), in which the federal government used race as a shorthand for the cultural affiliation of certain American citizens, and subjected them to a different, and substandard, set of rules as a consequence. The Supreme Court upheld that practice, but only after applying "the most rigid scrutiny," because "legal restrictions which curtail the civil rights of a single racial group are immediately suspect." *Id.* at 216.[6] At a minimum, therefore, ICWA should be subject to the same strict scrutiny.

III.
ICWA'S ENROLLMENT MANDATE VIOLATES THE FIRST AMENDMENT AND DUE PROCESS OF LAW

Even if this Court were to find that under *Mancari*, ICWA establishes only a political and not a racial categorization, ICWA would still be facially unconstitutional under the First Amendment and the Due Process Clause. ICWA combines these two issues in an unusual way.

[6] Although *Korematsu* has never been overruled, it is now largely viewed as regrettable, *see, e.g., Johnetta J. v. Municipal Court*, 218 Cal. App. 3d 1255, 1284 (1990). Certainly the compelling interest asserted and endorsed in *Korematsu*—wartime national security—is inapplicable here.

The First Amendment protects the right to choose whether or not to associate with a political entity. Children have First Amendment rights, *cf. In re Santos Y.*, 92 Cal. App. 4th at 1314, including the First Amendment right not to associate against their will. *Barnette*, 319 U.S. at 642. Children also have rights under the Due Process Clauses of both the California and federal constitutions, which guarantee them the right to fundamentally fair judicial proceedings. *In re Application of Gault*, 387 U.S. 1, 19-22 (1967).

ICWA violates these rights. First, it submits children to the legal jurisdiction of tribes nationwide without regard to their desires or their actions, and despite "a total absence of those affiliating circumstances that are a necessary predicate to any exercise of . . . jurisdiction." *World-Wide Volkswagen*, 444 U.S. at 295. Due process of law "does not contemplate" that any court "may make binding a judgment *in personam* against an individual" who has "no contacts, ties, or relations" to that jurisdiction. *International Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 319 (1945). By granting tribal courts such broad jurisdiction, ICWA violates the Due Process Clause.

Second, ICWA's placement preferences are designed to create a connection to a tribe, even where none previously existed. *See*, N. Bruce Duthu, *American Indians and The Law* 154 (2008) (ICWA holds "that the child's best interests are served by maintaining his or her actual *or even*

potential cultural and social links with his or her Indian tribe." (emphasis added)). Third, the Guidelines mandate that states "take the steps necessary to obtain membership for the child in the tribe" if the child is not enrolled. Guidelines, *supra*, at 10153, B.4(d)(iii). All of this is done even though children are too young to consent to join a political entity, to knowingly submit to jurisdiction, or to knowingly waive their constitutional rights.

Although no case directly answers whether a United States citizen like Lexi can be forced to apply to another sovereign for citizenship, the Supreme Court has ruled that the First Amendment forbids the government from mandating that people join political associations, *see, e.g., Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 233-35 (1977), or make political statements, *see, e.g., Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 20-21 (1986), or pledge allegiance to the government, *Barnette, supra*. ICWA, however, compels one specific class of citizens—defined by their genetic heritage—to obtain formal membership in a political unit that enjoys attributes of sovereignty, and attempts to force the formation of familial and cultural bonds with tribal members.

Tribal membership is not ordinary dual citizenship, of course, as Indian nations enjoy a "unique and limited" form of sovereignty, *United States v. Wheeler*, 435 U.S. 313, 323 (1978), but citizenship "denotes an association with the polity" and imposes an "unequivocal legal bond."

Ambach v. Norwick, 441 U.S. 68, 75 (1979). "One who has a dual nationality will be subject to claims from both nations, claims which at times may be competing or conflicting." *Kawakita v. United States*, 343 U.S. 717, 733 (1952).

Tribes are political associations, *Duro v. Reina*, 495 U.S. 676, 694 (1990), although they are also "a good deal more." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). Yet whether they are regarded as voluntary associations, or as full sovereign entities, or as something in between, forcing a person like Lexi to join such an institution violates her freedom of association rights.

If a tribe is a private *political organization*, like a labor union or a political party, the government could not force Lexi to join. *Abood*, 431 U.S. at 233-35; *Elrod v. Burns*, 427 U.S. 347, 355-57 (1976). A person certainly may not be compelled to join a political organization just because his or her progenitors were members of that organization. Compulsory association is unconstitutional because the First Amendment regards it as "'sinful and tyrannical'" to force people to contribute to the propagation of political, religious, or social views they do not share. *Abood*, 431 U.S. at 234 n. 31; *Keller v. State Bar of Cal.*, 496 U.S. 1, 10 (1990) (quoting Thomas Jefferson). Unlike unions or bar associations, tribes are not prohibited from using their resources for political lobbying, and unlike states, they are not barred from using resources to endorse official religions.

Native Am. Church of N. Am. v. Navajo Tribal Council, 272 F.2d 131, 135 (10th Cir. 1959) ("No provision in the Constitution makes the First Amendment applicable to Indian nations."). Being compelled to join a tribe therefore inherently includes being compelled to engage in speech, including religious speech, and association.

If tribes are regarded as *sovereigns*, the government also may not force one group of citizens, defined by race, to obtain citizenship[7] from another sovereign, where doing so alters the citizen's legal rights and obligations. Tribal membership significantly changes the legal regime that applies to a person. *See*, Duthu, *supra* at 138 ("As domestic dual citizens, American Indian members of federally recognized tribes are heirs to the American legal tradition…as well as their own tribal systems…. [T]here is clearly a tension between the two."). Tribal members are subject to tribal criminal jurisdiction in ways that non-members are not, *Oliphant v.*

[7] Tribes, of course, may grant membership to whomever they please, including by birthright. But ICWA does more than incorporate tribal citizenship; it *mandates enrollment*, an act which brings the person within both tribal jurisdiction and the "plenary" federal Indian Commerce Clause power. Congress has no authority under the Indian Commerce Clause to compel someone to do an act that brings that person within that regulatory authority in the first instance. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2587 (2012), held that Congress has no power under the Interstate Commerce Clause to "compel[] individuals to become active in commerce," if refraining from commerce fell outside Congress's regulatory power. The Indian Commerce Clause is coextensive with that provision. It therefore follows that Congress cannot compel a person to engage in an act—*i.e.*, enroll in a tribe—if refraining from that act falls outside the regulatory authority conferred by the Indian Commerce Clause.

Suquamish Indian Tribe, 435 U.S. 191, 195 (1978), and can be taxed by tribes in ways non-members cannot be. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 649-51 (2001). Tribal governments are exempt from many of the constitutional rules that protect people against other forms of government in the United States. *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 (1978) (Indian Civil Rights Act "does not prohibit the establishment of religion, nor does it require jury trials in civil cases, or appointment of counsel for indigents in criminal cases."). And the legal remedies available when tribes deprive members of their federal constitutional rights are far narrower than those available when states violate the rights of citizens. *Shenandoah v. Halbritter*, 366 F.3d 89, 92-93 (2d Cir. 2004), *cert. denied*, 544 U.S. 974 (2005).

In short, being compelled to enroll as a member of a tribe alters a person's legal rights and duties, sometimes to that person's detriment, through no act or fault of their own—thus simultaneously depriving them of freedom of association and of due process of law.

Finally, if a tribe is regarded as a *family*, the intrusion is even greater. Freedom of association is "a fundamental element of personal liberty," because "choices to enter into and maintain certain *intimate human relationships* . . . safeguard[] the individual freedom that is central to our constitutional scheme." *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984) (emphasis added). Family relationships have "an 'intrinsic'

or 'intimate' value" because they "'involve deep attachments and commitments'" to those "'few'" others with whom one shares "'a special community of thoughts, experiences, and beliefs" and the "'distinctively personal aspects of one's life.'" *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1110 (1997) (quoting *Roberts*, 468 U.S. at 620). Government may not intrude on this freedom of intimate association without meeting the test of strict scrutiny. *Roberts*, 468 U.S. at 623.

By compelling tribal membership, ICWA violates the rights of freedom of association and due process of law. And, again, this burden falls only on one class of persons, defined expressly in terms of their racial ancestry.[8]

CONCLUSION

Forcing a child who has "no association with the Tribe other than genetics" into the ICWA Penalty Box violates Due Process and Equal Protection. *In re Santos Y.*, 92 Cal. App. 4th at 1321. Doing so does not benefit the child or the tribe. It interferes with the child's federal citizenship rights, compels association, and radically alters the procedural

[8] Ironically, the notion of blood quantum controlling tribal membership originated, not with the tribes themselves, which historically had fluid notions of ethnicity and tribal membership, but with United States federal law. It was the Dawes Commission of 1907 that mandated racial categorization for Native American tribes. S. Alan Ray, *A Race or A Nation? Cherokee National Identity and the Status of Freedmen's Descendants*, 12 Mich. J. Race & L. 387, 408 (2007).

rules that are designed to protect the best interests of children—that is, children of all other races. *In re Santos Y.* was decided under the Existing Indian Family Doctrine, which California courts have now generally rejected. But that Doctrine was only a saving construction, devised to avoid the constitutional problems that arise from the unadulterated application of ICWA's literal language. The rejection of that Doctrine makes the conclusion inevitable: ICWA and its state analogue are facially unconstitutional and must be struck down.

The decision of the Superior Court must be *reversed*, with instructions to enter judgment in favor of the Objectors and Appellants.

DATED: April 22, 2016.

Respectfully submitted,

/s/ Timothy Sandefur

Timothy Sandefur
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Attorneys for Amicus Curiae Goldwater Institute

CERTIFICATE OF COUNSEL PURSUANT TO RULE 14(C)

Pursuant to California Rule of Court 14(c)(1), I hereby certify that the foregoing BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE, excluding the tables and certificate, contains 6208 words, as stated in the word count of the computer program used to prepare the brief.

DATED: April 22, 2016

__/s/ Timothy Sandefur_____
TIMOTHY SANDEFUR

DECLARATION OF SERVICE

I, Timothy Sandefur, counsel for Amicus Curiae Goldwater Institute, am over the age of 18 and not a party to this action. My business address is 500 E. Coronado Rd., Phoenix, AZ 85004, and my email address is tsandefur@goldwaterinstitute.org.

On April 22, 2016, I served the foregoing Motion electronically by agreement of the parties, to the persons at the electronic addresses listed below.

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

Executed this 22nd day of April 2016, at Phoenix, AZ.

/s/ Timothy Sandefur

No. B270775

In the Court of Appeal of the State of California
Second Appellate District
Division Five

IN THE MATTER OF A.P.,
A Person Coming Under
Juvenile Court Law.

DEPARTMENT OF CHILDREN AND FAMILY SERVICES,
Petitioner and Respondent,
v.

T.P. and J.E.,
Defendants and Respondents,

R.P. and S.P., De Facto Parents,
Objectors and Appellants.

CHOCTAW NATION OF OKLAHOMA,
Intervenor.

APPENDIX TO BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF OBJECTORS/APPELLANTS R.P., ET AL.

On Appeal From the Judgment of the Superior Court
State of California, County of Los Angeles
Hon. Rudolph Diaz, Dept. 419
Case No. CK58667

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ICWA PENALTY BOX

	ARIZONA LAW	ICWA
Jurisdiction	State Court	Transfer to tribe, absent good cause (25 U.S.C. § 1911 (b))
Foster care / Termination of parental rights – Efforts to reunify	Reasonable efforts to reunify	Active efforts to reunify (25 U.S.C. § 1912 (d))
Foster care burden of proof	Reasonable grounds / Probable cause / Preponderance of the evidence	Clear and convincing evidence (25 U.S.C. §1912 (e))
Termination of parental rights burden of proof	Clear and convincing evidence / Best interest by preponderance	Beyond a reasonable doubt (25 U.S.C. § 1912 (f))
Foster / Preadoptive placement preferences	Reasonable evidence / Best interests of the child	Clear and convincing evidence / Extended family, tribe, any Indian family, unless good cause (25 U.S.C. §1915 (b))
Adoption placement preferences	Reasonable evidence / Significant relationship / Best interests of the child	Clear and convincing evidence / Extended family, tribe, any Indian family, unless good cause (25 U.S.C. § 1915 (a))

IN THE SEPARATE JUVENILE COURT OF LANCASTER COUNTY, NEBRASKA

THE STATE OF NEBRASKA IN THE INTEREST OF **SHAYLA HERNANDEZ,** **SHANIA HERNANDEZ** **TANYA HERNANDEZ,** JUVENILES.	))))))))))	ORDER TERMINATING THE PARENTAL RIGHTS OF MR. DAVID HERNANDEZ AND MS. TANYA HERNANDEZ TO SHAYLA, SHANIA, AND TANYA HERNANDEZ PURSUANT TO NEB. REV. STAT. §43-292 Doc. JV13 Page 061

The above-entitled matter came on for hearing on January 26, 27, 28, and 29, 2015, on the Motion for Termination of Parental Rights of David Hernandez filed by Ms. Joy Shiffermiller, Guardian ad Litem for the juveniles, on December 19, 2013.

Further, the above-entitled matter came on for hearing on March 24 and 27, 2015, for hearing on the Motion for Termination of Parental Rights of Tanya Hernandez filed by Ms. Ashley Bohnet, Deputy Lancaster County Attorney, on December 24, 2014.

Records of both proceedings were kept by Ms. Shannon Clausen.

Motion for Termination of Parental Rights of David Hernandez

The following parties appeared for formal hearing on the Motion for Termination of Parental Rights of David Hernandez:

Ms. Ashley Bohnet, Deputy Lancaster County Attorney, appeared.

Ms. Joy Shiffermiller, Attorney at Law, appeared as Guardian ad Litem for the juveniles.

Mr. David Hernandez appeared with his counsel, Mr. Patrick Carraher, Legal Aid.

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Upon consideration of the evidence, the Court finds:

1. Summons and notice of this proceeding have been duly given to all parties.

2. The following allegations of the Motion for Termination of Parental Rights of David Hernandez are true by clear and convincing evidence: David Hernandez is unfit by reason of debauchery or repeated lewd and lascivious behavior which conduct this Court finds to be seriously detrimental to the health, morals, and well-being of Shayla, Shania, and Tanya Hernandez; David Hernandez has subjected another juvenile to aggravated circumstances, specifically, sexual abuse; Shayla, Shania, and Tanya Hernandez have been in an out-of-home placement for fifteen or more of the most recent twenty-two months; and termination of the parental rights of David Hernandez to Shayla, Shania, and Tanya Hernandez is in the best interest of said juveniles. The Court further finds by proof beyond a reasonable doubt that continued custody of Shayla, Shania, and Tanya Hernandez with David Hernandez would likely to result in serious emotional or physical damage to said juveniles. The Court also finds by clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative program designed to prevent the breakup of the Indian family, and these efforts have proved unsuccessful in this case. All in Lancaster County, Nebraska.

Motion for Termination of Parental Rights of Tanya Hernandez

The following parties appeared for formal hearing on the Motion for Termination of Parental Rights of Tanya Hernandez:

Ms. Ashley Bohnet, Deputy Lancaster County Attorney, appeared.

Ms. Joy Shiffermiller, Attorney at Law, appeared as Guardian ad Litem for the juveniles.

Mr. David Hernandez appeared with his counsel, Mr. Patrick Carraher, Legal Aid.

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

IN THE MATTER OF THE ADOPTION OF J.R.D., A MINOR CHILD:	)	
DERICK PRICE HASSELL,	)	
Appellant,	)	
vs.	)	Case No. 113,228
JUSTIN RYAN DUKE,	)	
Appellee,	)	
and	)	
THE CHEROKEE NATION,	)	
Intervenor/Appellee.	)	

APPEAL FROM THE DISTRICT COURT OF
ROGERS COUNTY, OKLAHOMA

HONORABLE DAVID SMITH, TRIAL JUDGE

AFFIRMED

Nancy Nesbitt Blevins,
Paul E. Blevins,
Emily Blevins McLean,
BLEVINS LAW OFFICE, INC.,
Pryor, Oklahoma,

For Appellant,

¶3 In January 2004, Mother and Father were married, and in September 2004, Child was born. In February 2006, they divorced. Pursuant to the divorce decree, Father was ordered to pay monthly child support payments to Mother. He was granted visitation with Child supervised by Father's mother on alternating weekends and some holidays. After the first visitation, Father did not visit Child at his mother's home. Instead, Mother arranged for her and Child to meet Father for visitation once or twice a month for thirty minutes to an hour and a half.

¶4 In February 2007, Father enlisted in the Navy. Mother, Father, Child, and Father's father spent the weekend with Father in Chicago following his basic training graduation there. In June 2007, Father visited with Child twice before he traveled to his new duty station. This was the last time Father had any physical contact with Child. He sent Child gifts for Thanksgiving and Christmas 2007, and for Valentine's Day 2008.

¶5 In June 2008, Father was discharged from the Navy. Mother informed Father she would not bring Child to visit him because she believed he was using drugs and that Child would not be safe around him. She told him if he wanted to visit with Child, he would have to get a court order requiring

visitation. Father did not commence any court proceedings, nor did he request visitation with Child.

¶6 In June 2010, Mother married Petitioner. On September 10, 2012, Petitioner filed his Petition for Adoption and his Application for Adoption without Consent. On March 5, 2013, the trial court granted Petitioner's Application for Adoption without Consent. It ruled:

> [W]e can . . .not prevent this child from moving forward in his life. He has been put on hold for far too long while he waits for his natural father to get his life in order, and he deserves to be adopted by the man that has been put in the position of his father. Therefore, this Court grants and sustains the application that his adoption may proceed without the consent of the natural father.

¶7 The Cherokee Nation (Nation) intervened, objecting to the adoption of Child by Petitioner. On June 10, 2014, following briefing and oral arguments, the trial court determined that §1912(d) and §1912(f) of ICWA are applicable to this case. Title 25 U.S.C. §1912(d) provides:

> Any party seeking to effect a foster care placement of, or termination of parental rights to an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Section 1912(f) provides:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by

¶25 During cross-examination, Ms. Chalmers agreed with counsel that people can and do overcome the negative effects of an insecure attachment given the right circumstances. To form attachments besides parental attachments, which Child has formed with Mother and to a degree with Petitioner, regression is not required.

¶26 Counsel stated that it had been suggested that Father is seeking "some kind of relationship" with Child. He asked Ms. Chalmers what kind of relationship a parent would be seeking if he stated he wanted "some kind of relationship."

¶27 Ms. Chalmers responded that Father did not want a parental relationship with Child, but that he wanted Child to have knowledge of him. She testified, "[Father] wanted a relationship where [Child] knew who he was, knew that he cared about him, and that he was someone who felt for him, felt love for him, and he wanted him to have that awareness is what it was expressed early on in the time line, I believe."

¶28 Counsel asked if Ms. Chalmers could state "... with any degree of certainty that establishing some kind of relationship with [Father] is going to cause [Child] to suffer a regression." She replied, "I'm uncertain about that, given both parties' willingness to do that."

¶29 After reviewing the record, this Court finds that Petitioner did not prove beyond a reasonable doubt that Father's continued custody of Child is likely to result in serious emotional damage to Child. Therefore, we find the trial court's decision sustaining Father's demurrer to the evidence as to §1912(f) to be correct. *Jackson v. Jones,* 1995 OK 131, ¶4.

¶30 Because this Court affirms the trial court's sustention of Father's demurrer to the evidence as to §1912(f), we find it is not necessary for us to consider also whether the trial court erred in sustaining Father's demurrer to the evidence as to §1912(d).

¶31 AFFIRMED.

BUETTNER, J., and BELL, J., concur.