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IN THE TENTH DISTRICT COURT OF APPEALS
FRANKLIN COUNTY, OHIO

In the Matter of:	**:**	
	:	**No. 16AP-891**
(Ohio Foster Child),	**:**	
	:	**(Accelerated Calendar)**
(Guardian Ad Litem,	**:**	
Appellant).	**:**	

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLANT

Respectfully submitted,

MICHAEL DEWINE (0009181)
ATTORNEY GENERAL

ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
M. RYAN HARMANIS (0093642)
Deputy Solicitor
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Michael DeWine

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I. INTRODUCTION

Ohio understands that this case involves an effort to use the Indian Child Welfare Act ("ICWA") to remove from this State an Ohio child, born to Ohio parents and raised by Ohio foster parents, based solely on his ethnicity. Ohio has not pried behind the shield for documents in this case, but based on public information, Ohio submits this amicus brief to urge the Court not to follow the ICWA. Instead, the Court should focus on the best interests of the child rather than to displace the child's interests with an unconstitutional federal statute.

Ohio recognizes that the ICWA might not apply here, such that no ICWA-based argument may wrest jurisdiction from Ohio courts to determine the best interests of the child. But if the Court finds the ICWA applies and trumps Ohio jurisdiction, this Court should hold it unconstitutional and ineffective.

The State of Ohio, like every State, governs domestic relations within its borders, including the legal relationships between parents and children. As the U.S. Supreme Court has explained, "[f]amily relations are a traditional area of state concern." *Moore v. Sims*, 442 U.S. 415,

435 (1979); *see Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (describing domestic relations as "an area that has long been regarded as a virtually exclusive province of the States").

This makes sense. States understand "'the "local" nature of domestic relations problems.'" *Zak v. Pilla*, 698 F.2d 800, 801 (6th Cir. 1982) (citation omitted). They have a "'strong interest . . . in addressing such questions without interference.'" *Id.* And they have "the expertise of local agencies and courts in monitoring and resolving domestic relations matters.'" *Id.* Thus, States have an interest, on federalism grounds alone, in protecting this area of state concern from unwarranted federal intrusion.

This interest is magnified when, as with the ICWA, the federal government has ordered the States to abandon their commitment to "'the ultimate welfare of the child, which is the polestar or controlling principle to be observed'" in child custody proceedings. *See In re Cunningham*, 59 Ohio St. 2d 100, 106 (1979) (citation omitted). Ohio, like most States, generally follows three basic principles: (1) the child's best interests are paramount; (2) the rights of parents to raise their

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children should not be displaced without good cause; and (3) the State must not discriminate by the race or ethnicity of children, parents, or prospective parents.

When children of Native American ancestry are involved, however, the federal government has ordered the States to set aside the child's best interests and focus on ethnicity. The ICWA, 25 U.S.C. § 1901 *et seq.*, orders a State to discard its usual standards and focus on the presence of Native American ancestry, no matter how minimal. That is wrong, not just because it mandates race-based decision-making, but also because it does so in a way that intrudes on the States' longstanding power over domestic relations.

Neither the Indian Commerce Clause nor anything else in the U.S. Constitution authorizes the ICWA's displacement of state authority. And the ICWA cannot constitutionally command state officers and agencies to serve as agents for federal race-based decision-making. To any extent that the ICWA is used to assert out-of-state jurisdiction or to transfer the child out of Ohio against his best interests, this Court should hold that the ICWA's invasion of state authority exceeds the federal government's

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powers under the U.S. Constitution. *Cf. McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 29 n.12 (1990) ("'Upon the [s]tate courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the [C]onstitution of the United States . . . .'" (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884)).

II. STATEMENT OF AMICUS INTEREST

The State of Ohio became aware of this case through a news article that highlighted the ICWA's intrusion on state power. *See* Shelly Schultz, *Family Fights to Keep Tribe from Taking Child*, Chillicothe Gazette (January 6, 2017), http://www.chillicothegazette.com/story/news/2017/01/06/family-fights-keep-tribe-taking-child/96164192/. The article notes that Franklin County Child Protective Services took custody of an Ohio child when he was two years old and placed him with an Ohio foster family. *Id.* In keeping with the wishes of the child's biological mother, his foster parents, and his guardian ad litem, legal custody was requested to keep the child in Ohio. *Id.* Under Ohio law, the primary consideration *should* have been whether this was in the

child's best interests. Yet, according to the article, the ICWA trumped that inquiry and allowed an Indian tribe from Arizona to claim authority over the child. *Id.*

Ohio submits this brief to defend the States' power to protect Ohio children and to urge the Court to focus on the child's best interests, rather than the federal government's unwarranted race-based mandate. Ohio understands that the particular filings in this case are not publicly available at this stage. Ohio thus proceeds on the public account, as supplemented by Ohio law and by overview discussions with counsel for the child's guardian ad litem.

III. LAW AND ARGUMENT

Ohio submits this brief to address the federalism aspects of this case: If the Court finds that the ICWA is otherwise implicated here, it should not apply because the U.S. Constitution does not authorize its displacement of state authority.

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A. The ICWA Invades The States' Authority In Multiple Ways.

The ICWA improperly intrudes on state authority in multiple ways, as it both interferes with an area of state concern and commandeers state officers in the process.

First, no one disputes that domestic relations, including adoption, custody, and parental rights, is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see Ex parte Burrus*, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of . . . parent and child[] belongs to the laws of the [S]tates, and not to the laws of the United States.").

The commitment of domestic relations to the States is so important that the U.S. Supreme Court has long recognized a "domestic relations exception" to diversity jurisdiction in federal courts. *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992); *cf. Zak v. Pilla*, 698 F.2d 800, 801 (6th Cir. 1982); *Mackey v. Mackey*, 95 Ohio St. 3d 396, 2002-Ohio-2429 ¶ 9. This exception goes even further than a commitment to state law over federal law. Most traditional state-law issues, such as tort or

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contract, *may* be heard in federal court in diversity cases. The domestic relations exception, on the other hand, leaves those issues to state courts *even when* they would otherwise be eligible for federal determination. Domestic relations issues are thus left to state substantive law *and* to state courts.

The ICWA, by purporting to impose certain federal, race-based standards in state courts, does not violate the domestic relations exception specifically. But the principle the ICWA embodies is worse than the harm the domestic relations exception is meant to prevent. The exception prevents federal courts from hearing and applying *state law*; if it did not exist, state substantive law would still control. Under the ICWA, *federal law* would control.

Second, to the extent the ICWA applies, federal law requires state officers to implement it. *Cf.* R.C. 3127.03(A) (acknowledging that child custody proceeding involving an Indian child as defined in the ICWA is exempt from Ohio jurisdictional provisions "to the extent that the proceeding is governed by the [ICWA]"). The ICWA's mandate that state actors do the federal government's bidding violates the anti-

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commandeering limitations on congressional power in Article I of the U.S. Constitution, as confirmed by the Tenth Amendment. *See Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). In *Printz*, the Court invalidated a federal law that ordered state officers to conduct background checks on would-be handgun buyers. 521 U.S. at 933-35. The Court justified and applied a bright-line principle: The "Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Id.* at 925.

Yet the ICWA seeks to compel the States to implement its mandates. It does not merely order state courts to apply federal law. Instead, just like the unconstitutional laws in *Printz* and other anti-commandeering cases, the ICWA orders state and local *executive* officers and employees to carry out its terms. For example, the federal government (in regulations) requires state agencies that oversee adoptions or foster care, such as children's services agencies, to seek to place those categorized as Indian children with Indian families. *See* Guidelines for State Courts and Agencies in Indian Child Custody

Proceedings, 80 Fed. Reg. 10146, 10158, F.2, F.3 (Feb. 25, 2015). Further, the federal government tells state executive officials to enroll Indian children in tribes. *Id.* at 10153, B.4(d)(iii). And if a child might be Indian, state officers may be required to trace records and prepare genealogy charts going back generations in a hunt for Indians. *Id.* at 10152, B.2(b)(1)(i).

The ICWA thus unconstitutionally orders state actors to "implement . . . [a] federal regulatory program." *Printz*, 521 U.S. at 925. By intruding upon state domestic relations law and ordering state actors to follow federal mandates, the ICWA violates limitations inherent in Congress's Article I powers (as construed against the Tenth Amendment's backdrop). And by impeding States from acting in the best interests of children—real people who need protection—the ICWA harms not only abstract "state interests," but the States' real-world efforts to help the most vulnerable among us.

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B. The ICWA Is Not Authorized By The Indian Commerce Clause Or Any Other Constitutional Provision.

Aside from its unconstitutional commandeering of the States, the ICWA is unconstitutional because it is not rooted in any express congressional power. The ICWA asserts that Congress has "plenary power over Indian affairs" through the Indian Commerce Clause and "other constitutional authority." 25 U.S.C. § 1901(1). But the U.S. Constitution does *not* "grant Congress [the] power to override state custody law whenever an Indian is involved." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2566 (2013) (Thomas, J., concurring).

1. The Indian Commerce Clause does not authorize the ICWA. *First*, the Court should begin (as always) with the text. The Indian Commerce Clause empowers Congress to "regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, 8, cl. 3. Notably, it is not a freestanding clause devoted to Indian Commerce, but is part of the broader Commerce Clause. This clause refers to "commerce" just once, branching to foreign, interstate, and Indian commerce: "To regulate Commerce with foreign Nations, and among the several States, and with

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the Indian Tribes." *Id.* Whatever the definition of "commerce" in the Commerce Clause, it must be consistent in each circumstance—foreign, interstate, and Indian.

With this understanding, the text alone dooms the ICWA, as *child custody* is neither "commerce" nor an arrangement with "Indian Tribes." However broad one's view of "commerce," it does not involve termination of parental rights, approving adoption, or legal custody. Congress could never regulate non-Indian custody and adoption proceedings under the guise of the Commerce Clause as applied to the States. Also, the ICWA applies to *individual* children who have not joined a tribe, and so does not invoke Congress's power to regulate "commerce" with "the Indian Tribes." From a textual perspective, then, the ICWA has no constitutional basis.

Second, case law and original meaning confirm the ICWA's unconstitutionality, as Justice Thomas explained in his concurrence in *Adoptive Couple*, 133 S. Ct. at 2565 (Thomas, J., concurring). In that case, the U.S. Supreme Court held that certain ICWA provisions did not apply, as a statutory matter, to a girl who was "classified as an Indian

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because she [was] 1.2% (3/256) Cherokee." *Id.* at 2556 (maj. op.). Because of her ancestry, the South Carolina Supreme Court had "held that certain provisions of [the ICWA] required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child." *Id.* The Court rejected that conclusion by interpreting the ICWA narrowly to not cover Baby Girl's situation. *Id.* at 2565. In doing so, the Court avoided any constitutional issues, although it noted that the rejected "interpretation would raise equal protection concerns." *Id.*

Justice Thomas explained that the Court's result was compelled by constitutional avoidance. *Id.* at 2565 (Thomas, J., concurring). In his view, "neither the text nor the original understanding of the [Indian Commerce] Clause" authorized the ICWA. *Id.* at 2567. He began with the term "commerce," which at the founding did not include economic activity like manufacturing, "let alone noneconomic activity such as adoption of children." *Id.* He then turned to the phrase "'commerce with Indian tribes[,]' [which] was invariably used during the time of the

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founding to mean 'trade with Indians.'" *Id.* (citing Robert G. Natelson, The Original Understanding of the Indian Commerce Clause, 85 Denv. U.L. Rev. 201, 215-16 & n.97 (2007); Report of Comm. on Indian Affairs (Feb. 20, 1787), in 32 Journals of the Continental Congress 1774-1789, pp. 66, 68 (R. Hill ed. 1936)) (internal quotation marks omitted).

He also carefully reviewed colonial regulations of Indian trade, the Articles of Confederation, and the drafting history of the Indian Commerce Clause at the Constitutional Convention. *Id.* at 2567-70. These materials all pointed to one conclusion: The Constitution gave Congress the "power to regulate trade with the Indians," *not* "the power to regulate all Indian affairs." *Id.* at 2569.

Justice Thomas also highlighted the textual problems described above. The ICWA concerns "child custody proceeding[s]," 25 U.S.C. § 1903(1), *not* "commerce." *Id.* at 2570. And the ICWA does "not regulate Indian tribes as tribes," but regulates individual children, "regardless of whether an Indian tribe is involved." Because custody proceedings (in *Adoptive Couple*, adoption proceedings) "involve

neither 'commerce' nor 'Indian tribes,'" Justice Thomas rightly concluded that "there is simply no constitutional basis for Congress' assertion of authority over such proceedings." *Id.* at 2571.

Finally, any other reading of the ICWA massively expands federal power. If Congress could tell States to treat Indians differently based on ethnicity alone, without regard to tribal status, it could order state courts to use different legal rules in all criminal or civil cases involving Indians. *Id.* If Congress can characterize child custody proceedings as "commerce," it could regulate all interstate adoptions under the interstate Commerce Clause. But neither of those principles or outcomes is correct as a matter of law. Nor are they the right thing for the children involved. *Cf. id.* at 2564 (maj. op.) (noting that South Carolina Supreme Court's reading of the ICWA "would, in turn, unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home . . . .").

2. The arguments to the contrary are unpersuasive. *First*, to be sure, the U.S. Supreme Court has used generic language to describe federal power over Indian affairs as "plenary." *See, e.g.*, *United States*

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v. Lara, 541 U.S. 193, 200 (2004). But the actual powers at issue in every other case involved Indian *tribes* and tribal membership. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974) (upholding federal employment preference for members of Indian *tribes* against challenge that it was an impermissible racial classification because law turned on tribal membership, rather than mere ethnicity); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (describing "Indian nations" as "distinct, independent political communities" in context of regulations of federal relations with "tribes"). By contrast, the Court has never blessed a law that singled out all Indians based on ethnicity alone, as the ICWA does.

The Court's treatment of the ICWA, in particular, does not support the view that Congress has "plenary" power to regulate all Indian affairs. In one case, the Court addressed the ICWA in terms of its reach regarding "domicile" on a reservation, but did not address its application to individuals or to non-tribal members. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). Further, *Holyfield* involved provisions granting jurisdiction to tribal courts, not mandates to state agencies and courts. *Id.* at 32. And in *Adoptive Couple*, which *did*

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involve the ICWA's application to a non-tribal member based on ancestry, the Court held that the ICWA did not apply on those facts, and noted that its application would raise constitutional concerns. 133 S. Ct. at 2565. So while the Court has used the phrase "plenary power," its application has always been as to tribes and reservations, not as to individuals with Indian ancestry.

Second, any assertion that "commerce" reaches child-custody proceedings is simply incorrect. True, the "extensive case law that has developed under the Interstate Commerce Clause . . . is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). But while many substantive rules of interstate commerce do not apply to Indian commerce—including the preemption issue in *Cotton Petroleum*—the baseline *definition* of "commerce" must be the same for all three prongs of the Commerce Clause.

This is not a case where "commerce" is used in parallel provisions near one another. The Commerce Clause uses the word "commerce"

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just once, branching into three applications in the same sentence. Ohio is aware of no authority giving different meanings to *the same word in the same place* as applied to different clauses *in the same sentence*. To the contrary, at the time of the Commerce Clause's adoption, an established "rule of construction [held] that the same word normally had the same meaning when applied to different phrases in an instrument." *See* Natelson, The Original Understanding of the Indian Commerce Clause, 85 Denv. U.L. Rev. at 215 & n.96 (citing cases for the rule).

Finally, no plausible argument suggests that child-custody proceedings are part of "commerce" if they *affect* commerce. Because "commerce" in the Commerce Clause means "commerce" in every application, reading it to include child-custody proceedings would radically expand federal power and destroy the understanding that domestic relations are a state concern. *Cf. Sosna*, 419 U.S. at 404. Consider the U.S. Supreme Court's decision in *United States v. Morrison*, 529 U.S. 598 (2000), where the Court held that the Commerce Clause did not empower Congress to enact provisions of the Violence Against Women Act creating a federal civil remedy for certain gender-

based violence. *Id.* at 601-02. The Court explained that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 613. Nor are child-custody proceedings.

Morrison rejected the argument that gender-based violence "substantially affect[ed]" interstate commerce. *Id.* at 609-10. Notably, the Court said that an effects-based reasoning "will not limit Congress to regulating violence but may . . . be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." *Id.* at 615-16. The Court thus rejected the idea that "effects" on commerce could justify a federal takeover of "childrearing." So under any test, child custody proceedings are *not* "commerce" within the meaning of the Commerce Clause, and Congress's power "[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian tribes," U.S. Const. art. I, 8, cl. 3, does not extend to custody proceedings.

3. Nor does some "other constitutional authority," 25 U.S.C. § 1901(1), support the ICWA. As Justice Thomas noted, "no other

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enumerated power . . . could even arguably support Congress' intrusion into this area of traditional state authority." *Adoptive Couple*, 133 S. Ct. at 2566 (Thomas, J., concurring). He rightly concluded that the "assertion of plenary authority must, therefore, stand or fall on Congress' power under the Indian Commerce Clause." *Id.* Here, it falls.

In sum, the Indian Commerce Clause is the only source of congressional power over Indian affairs, and it does not support the ICWA's invasion of state authority over child custody proceedings. It simply does not authorize federal mandates putting "certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Id.* at 2565 (maj. op.).

C. On the Reported Facts, Ohio Has Exclusive Jurisdiction Over The Custody Proceeding, Which Should Focus On The Best Interests Of The Child.

1. Because the ICWA is unconstitutional, Ohio law governs this case even if the ICWA otherwise would apply. Ohio enacted the Uniform Child Custody Jurisdiction and Enforcement Act ("the Uniform Act") to determine jurisdiction in a child custody proceeding involving another state, a foreign nation, or an Indian tribe. *See* R.C. 3127 *et seq.*

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As the ICWA purports to require Ohio courts to follow its provisions, Ohio enacted the model statutory provision and corresponding regulations addressing it. *See* R.C. 3127.03(A); Ohio Admin. Code 5101:2-53 *et seq.*

Under the statute, "[a] child custody proceeding that pertains to an Indian child as defined in the [ICWA]" is not subject to Ohio's normal jurisdictional considerations in the Uniform Act "*to the extent that the proceeding is governed by the [ICWA]*." R.C. 3127.03(A) (emphasis added). But this language is conditional: The Uniform Act's provisions, as codified in Ohio law, do not apply "to the extent" the ICWA displaces them. Since the ICWA is unconstitutional, however, the Uniform Act's jurisdictional provisions *do* apply. And, barring facts of which Ohio is unaware, Ohio would have exclusive jurisdiction in a case involving an Ohio child, Ohio parents, and Ohio foster parents.

On the reported facts, Ohio had initial jurisdiction because it was "the home state of the child on the date of the commencement of the proceeding." R.C. 3127.15(A)(1). Further, Ohio has "exclusive, continuing jurisdiction over the [child custody] determination until the

court or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state." R.C. 3127.16. According to the article, the child still resides here. So on the known facts, Ohio has exclusive, continuing jurisdiction over this custody proceeding. *Id.*

If Ohio has exclusive jurisdiction, the tribe could not claim jurisdiction here. Further, Ohio recognizes and enforces a child custody determination of another state—or a tribe, R.C. 3127.03(B)—only if the state (or tribe) "exercised jurisdiction in substantial conformity with" the Uniform Act. R.C. 3127.33; *see* R.C. 3127.03(C). If Ohio has *always* had jurisdiction, and if the child has always lived in Ohio with either Ohio biological or foster parents, an *Arizona* tribe could not have jurisdiction. And Ohio would not recognize any tribal custody determination because it would *not* be "in substantial conformity with the jurisdictional standards" in the Uniform Act. R.C. 3127.03(C).

That is not to say Indian tribes have no recourse in custody proceedings. Even without the ICWA, Ohio law treats an Indian tribe as a State for purposes of the Uniform Act. R.C. 3127.03(B). And Ohio

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must "recognize[] and enforce[]" a child custody determination by a tribe "under factual circumstances in substantial conformity with the jurisdictional standards" of the Uniform Act. R.C. 3127.03(C). So *if* a tribe meets these jurisdictional provisions, it could claim jurisdiction and Ohio would recognize its custody determinations. Here, however, the State knows of no basis—aside from the ICWA, which exceeds Congress's constitutional powers—by which the tribe could claim jurisdiction. If Ohio was the home state of the child when this proceeding began, and if the child, his parents, and his foster parents still reside here, Ohio retains continuing, exclusive jurisdiction. R.C. 3127.15(A)(1), 3127.16.

2. Under Ohio statutory law, the focus would return to where it belongs: the best interests of the child. *See In re Cunningham*, 59 Ohio St. 2d 100, 105-06 (1979). "[T]he time-honored precedent in this state [is] that the 'best interests' of the child are the primary consideration in questions of possession or custody of children." *Id.* (collecting cases supporting the proposition); *cf. In re Schaefer*, 111 Ohio St. 3d 498, 2006-Ohio-5513. Moreover, the Court should give full consideration to

the position of the child's guardian ad litem, whose role "is to protect the interests of the child." *In re C.T.*, 119 Ohio St. 3d 494, 2008-Ohio-4570 ¶ 14 (citing R.C. 2151.281). In sum, the Court should look to the child's best interests in this case.

IV. CONCLUSION

The State of Ohio respectfully submits that the Court should look to the child's best interests in this case, unfettered by the ICWA.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General

/s/ Eric E. Murphy
ERIC E. MURPHY*(0083284)
State Solicitor
**Counsel of Record*
M. RYAN HARMANIS (0093642)
Deputy Solicitor
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Michael DeWine

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