IN THE SUPREME COURT OF CALIFORNIA

No. _____

EFRIM RENTERIA and
TALISHA RENTERIA,

Petitioners,

v.

SUPERIOR COURT OF TULARE COUNTY,

Respondent,

REGINA CUELLAR and
SHINGLE SPRINGS BAND OF MIWOK INDIANS aka SHINGLE SPRINGS RANCHERIA,

Real Parties in Interest.

After a Summary Disposition by the Court of Fifth Appellate District (Case No. F07533)

PETITION FOR REVIEW

On Petition for Writ of Mandate from the Superior Court of Tulare County
(Case No. VPR-047731, Hon. Nathan Ide, Judge)

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ISSUES PRESENTED

1. The Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901 *et seq.*, and its California counterpart, Cal. Welf. & Inst. Code § 224.1, *et seq.*, apply to "child custody proceeding[s]" involving "Indian child[ren]." 25 U.S.C. § 1903(1), (4). "Child custody proceeding" is defined as (a) a foster care placement, (b) a case resulting in termination of parental rights, (c) a temporary placement of an Indian child in foster care after termination of parental rights but before adoptive placement, and/or (d) an adoption proceeding. This case is not one of those four things. Does ICWA apply to this case?

2. The U.S. Supreme Court has held that ICWA does not apply to a case in which there is no threat of the "breakup" of an Indian family. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2555 (2013). This case involves no risk of family "breakup"—rather, the parents were tragically killed in an accident, and the children have been taken in by relatives. Does ICWA apply?

3. If ICWA does apply here, it does so solely because the children are *genetically* classified as "Indian children" under ICWA—they have no cultural or political affiliation with the tribe, and have never lived on a reservation—meaning they are subject to the different rules that ICWA imposes solely as a result of "an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686

(1973). Does application of ICWA in these circumstances violate the Constitution?

INTRODUCTION

This case involves three minors whose parents were killed in a car accident in December, 2015. *Renteria v. Shingle Springs Band of Miwok Indians,* No. F075331, (Cal. App. 5th Dist.1 2017) (Appendix of Exhibits to Petition for Writ of Mandate ("Pet. App.")) at 011. Their father was a member of the Miwok tribe. Their mother was not a member of any tribe. *Id.* Neither the minors nor their parents ever resided on reservation. *Id.* They lived in Visalia, California. *Id.*

After the parents' deaths, the children were taken in by the mother's relatives, Efrim and Talisha Renteria, petitioners here, who are the minors' great-aunt and great-uncle, and who live in Visalia, also. *Id.* On January 5, 2016, members of the father's family appeared at the Renterias's home with a copy of an order issued by the Tribal Court of the Shingle Springs of Miwok Indians, purporting to transfer the children to the care of the father's family. *Id.* The federal district court later found that the order, and a subsequent order awarding custody to Respondent Regina Cuellar, were unenforceable as violations of due process because, among other things, Respondent Cuellar serves on the tribal council, and the tribal judge who issued the orders was therefore answerable to her. *Id.*.

The case then proceeded in Tulare County Superior Court, which was asked to decide whether the case is governed by the Indian Child Welfare Act (ICWA), 25 U.S.C § 1901 *et seq*.[1] Petitioners contend that ICWA does not apply here, because this case is not a "child custody proceeding" within the definition of ICWA, and also because it does not involve any risk of "family breakup," so that, under the U.S. Supreme Court's ruling in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), ICWA is inapplicable. ICWA was intended to redress and prevent "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes," *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989), but none of those things are present here. This case involves no public or private agency, no adoption, no foster care placement, and no termination of the rights of a parent.

The Superior Court ruled against the Petitioners and held that ICWA does apply. It acknowledged that there was no precedent in which ICWA has been applied to such circumstances, but nevertheless held that ICWA applies solely because the case is a "proceeding involving an Indian

[1] Unless otherwise specified, all references to ICWA herein include also its California law adjunct, Cal. Welf. & Inst. Code § 224.1, *et seq.*

child[.]" Tulare County Superior Court Ruling on Submitted Matter (Exhibit A, pg. 37).

Petitioners sought a peremptory writ of mandate in the Court of Appeal, which was summarily denied without opinion on July 14, 2017. (Exhibit B, pg. 38). This timely petition followed.

REASONS FOR GRANTING THE PETITION

The Court should review this case in order "to secure uniformity of decision" and to "settle . . . important question[s] of law." Cal. R. Ct. 8.500(b)(l).

First, the expansion of ICWA to apply to a case that is not one of the four "child custody proceeding[s]" specified in that statute, 25 U.S.C. § 1903(1)—and to apply ICWA solely on the basis of the children's genetic background represents a drastic new direction for how ICWA operates in California, and a startling instance of what one Court of Appeal has labeled unconstitutional: the application of ICWA "based solely, or at least predominantly, upon race." *In re Santos Y.*, 92 Cal. App. 4th 1274, 1321 (2001) (quoting *In re Bridget R.*, 41 Cal.App.4th 1483, 1509 (1996)). That fact alone warrants this Court's review, because it so directly contradicts this Court's injunction that imposing different rules on people on account of their racial or national origin is "'illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." *Hi-Voltage Wire*

Works, Inc. v. City of San Jose, 24 Cal. 4th 537, 548 (2000) (citation omitted).

It also directly conflicts with holdings of the Fourth and Fifth District Courts of Appeal, which have both held that ICWA does not apply to cases where children are not being removed from the custody of birth parents. *In re J.B.*, 178 Cal. App. 4th 751 (2009); *In re M.R.*, 7 Cal. App. 5th 886 (2017). Both of those cases rejected the proposition that all cases involving children of Native American ancestry are *per se* governed by ICWA.

Second, the race-based application of ICWA exemplified here exacerbates a now long-standing division in the California Courts of Appeal, between the Second District—which held in *Santos Y., supra,* and *Bridget R., supra*, that such application of ICWA is unconstitutional—and other districts, which have rejected that proposition. *See, e.g., In re Alexandria P*., 228 Cal. App. 4th 1322, 1343–44 (2014) (applying ICWA on the sole basis of child's biological ancestry). It also separates California from other states, including Montana, Nebraska, and Texas, which have held that ICWA does not apply to internal family disputes. *In re Bertelson*, 617 P.2d 121, 125 (Mont. 1980); *Comanche Nation v. Fox*, 128 S.W.3d 745, 753 (Tex. App. 2004); *Cherino v. Cherino*, 176 P.3d 1184, 1186 (N.M. App. 2007).

Third, unlike other recent ICWA cases, this case presents a straightforward question of law, clean of evidentiary or factual disputes. The question is purely legal—and one of first impression, as the Superior Court noted: does ICWA apply to a case in which a child is not being removed from parents, and in which the subject children have no cultural or religious affiliation with the tribe, and have never been domiciled on reservation—*i.e.*, does ICWA apply *solely* because of the biological status of the children? And, if so, is it constitutional?

The importance of that question cannot be gainsaid. California has the second largest Native American population in the U.S. *In re Abbigail A.*, 1 Cal. 5th 83, 91 (2016). ICWA cases are routine in the lower courts. Yet this Court has provided remarkably little guidance on the application of this law, having only addressed ICWA in three cases. *In re Abbigail A., supra*.; *In re Isaiah W.*, 1 Cal. 5th 1 (2016); *In re W.B., Jr.*, 55 Cal. 4th 30 (2012). Lower courts have urged this Court to take up the questions presented here: whether it is consistent with either the Constitution or ICWA's own language to apply ICWA's separate (and less protective) rules to a case solely because of the DNA in a child's blood. *See, e.g., In re Vincent M.*, 150 Cal. App. 4th 1247, 1265 (2007). This case presents an ideal vehicle for resolving those important questions.

ARGUMENT

I.
REVIEW SHOULD BE GRANTED TO RESOLVE THE CRITICAL QUESTION OF WHETHER ICWA APPLIES TO A CASE THAT IS NOT ONE OF THE FOUR "CHILD CUSTODY PROCEEDINGS" SPECIFIED IN ICWA

ICWA, by its own terms, applies to "child custody proceedings," 25 U.S.C. § 1903(1), which it separates into four categories. A child custody proceeding is defined as (1) a "foster care placement"—which means a case seeking to "remov[e] an Indian child from its parent … for temporary placement in a foster home"; (2) a proceeding seeking termination of parental rights; (3) a "preadoptive placement," which means "the temporary placement of an Indian child in a foster home … after the termination of parental rights, but prior to or in lieu of adopti[on]"; or (4), a proceeding for adoption.

This case falls into none of those four categories. It does not involve the removal of a child, or temporary placement in a foster home; nor does it seek termination of parental rights or adoption. Instead, the parents were killed in a car accident, and the underlying petition seeks to establish the Renterias as guardians for the three orphans.

Nevertheless, the Superior Court held that ICWA applies. Recognizing that there is no precedent to this effect, it nevertheless held

that the *sole and dispositive question* is whether the children are "Indian children" within the meaning of ICWA.[2]

Such a holding directly contradicts the precedent of the Fourth and Fifth District Courts of Appeal, as well as the precedent of the U.S. Supreme Court.

In *In re J.B.*, *supra.* the Superior Court removed an Indian child from the custody of her mother and placed her with her father, instead. The mother appealed, arguing that the case was governed by ICWA and that the Superior Court was therefore required to make additional findings regarding the risk to the child. The Fifth District Court of Appeal disagreed, and held that ICWA did not apply because the case was not a "child custody proceeding." The list of four "child custody proceedings" in ICWA, it held, was exhaustive. 178 Cal. App. 4th at 757–58 ("By expressly including certain" things within the definition of "child custody proceeding," "the Legislature impliedly excluded others."). Because "a proceeding in which a dependent child is removed from one parent and placed with the other" is not on that list, ICWA does not apply. *Id.* at 757.

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[2] Real Parties in Interest also argued below that Cal. Probate Code § 1459.5 applies ICWA to these proceedings, but that is incorrect, because that section expressly does not apply where the proposed guardians—Petitioners, here—have been nominated by the birth parents pursuant to Cal. Probate Code § 1500. Petitioners provided unrebutted evidence below that they were nominated by the deceased parents to care for their children in the event of their death. The Superior Court did not address this matter.

The court found that this conclusion was compelled by ICWA's plain language, but added "for good measure" that this conclusion also was consistent with "the express purpose of ICWA," *id.* at 758, which was to prevent abusive acts by public and private child welfare agencies, or the unwarranted removal of children from their birth parents. Since none of that was present in *J.B.*, the court found ICWA inapplicable.

Similarly, in *In re M.R.*, *supra.* the Superior Court awarded custody of a child, the paternity of whom was disputed, to one of the presumed birth fathers. The mother appealed, contending that the decision was invalid because the child was an "Indian child," and tribal notification, as required by ICWA, had not occurred. The Fourth District rejected this, and held that ICWA did not apply because placement of a child with a birth parent does not trigger ICWA. 7 Cal. App. 5th at 904.

Courts in other states have issued similar rulings. *Gerber v. Eastman*, 673 N.W.2d 854 (Minn. Ct. App. 2004) (placement with birth parent is not governed by ICWA because it does not remove child from parent); *J.A.V. v. Velasco*, 536 N.W.2d 896 (Minn. Ct. App. 1995) (paternity petition is not governed by ICWA because it does not terminate parental rights); *In re. E.G.L.*, 378 S.W.3d 542 (Tex. Ct. App. 2012) (same).

As the Minnesota Supreme Court has noted, Congress carefully designed ICWA's definitions section; courts "cannot assume" that

"Congress was simply careless" in its wording, or that it meant ICWA to apply beyond the four specified types of child custody proceedings. *In re Welfare of R.S.*, 805 N.W.2d 44, 51 (Minn. 2011) ("Where a statute is clearly limited to specifically enumerated subjects, we do not extend its application to other subjects by process of construction.")

To apply ICWA in cases like this one, where there is no threat of family breakup, is also directly contrary to the U.S. Supreme Court's holding in *Adoptive Couple, supra*. There, the Court made clear that ICWA was designed to prevent the "breakup" of Indian families, and that it made no sense to apply the statute to a case in which there was no threat of "breakup." 133 S. Ct. at 2562. In that case, the birth father abandoned the child *in utero*, so that no family had formed in the first place. Consequently, when the mother put the child up for adoption, there was no threat of family breakup and thus no justification for applying ICWA. *Id.*

In the same way, this case involves no breakup of a family. The parents died in a tragic accident, and are not losing their parental rights. On the contrary, the family unit remains as intact as possible, with the children going to live with relatives, the Renterias. Whatever dispute there may be between the Renterias and the Cuellars,[3] it does not make this a case involving family "breakup."

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[3] Given that both the Renterias and the Cuellars are relatives of the children, this case is more like *In re M.R., supra*., in which the Court of

Applying ICWA to cases that falls outside the four categories specified in ICWA's text would substantially alter the way child protection, foster care, and adoption law operate in California. This Court recognized as much in *In re Abbigail A., supra*, when it found California Rule of Court 5.482(c) invalid because it effectively applied ICWA to cases outside the reach of that statute. 1 Cal. 5th at 91–96. In that case, the Rule was invalid because it applied ICWA to children who were not "Indian children," in disregard of the fact that "[n]othing" in either the statutes or the legislative history "demonstrate[d] the Legislature intended to apply ICWA's requirements" to a "whole new realm of … cases" beyond the four types specified in the Act. *Id.* at 92-93.[4] Similarly, in *In re W.B., Jr., supra,* this Court found that a juvenile delinquency proceeding is not subject to ICWA because it is not one of the four types of "child custody proceedings" to which ICWA applies. 55 Cal. 4th at 57–60.

Appeal concluded that removing the child from the mother and placing it with the father was not a "child custody proceeding" under ICWA, because the child would in any event be in the custody of a birth parent: "Placing a child with a parent—even a previously non-custodial parent—does not equate with removal of the child from its family, and placement in a foster or adoptive home." 7 Cal. App. 5th at 905. For the same reason, placement of the orphans with *either* the Renterias *or* the Cuellars would be an in-family placement, and therefore would not equate with the removal of the children from their family.

[4] *Abbigail A.* involved only Cal. Welf. & Inst. Code § 224.1, *et seq.*, and expressed no opinion regarding ICWA itself but in this context there is no distinction, since Cal. Welf. & Inst. Code § 224.1(d) expressly incorporates ICWA's definition of "child custody proceeding."

Here, however, the lower court found that ICWA applies simply because the child satisfies the statutory definition of "an Indian child," without regard to the definition of "child custody proceeding"—thus doing precisely what *Abbigail A.* warned about, in a different way. Rather than applying ICWA to non-Indian children, it applies ICWA to a case that is not a child custody proceeding, based solely on the orphans' "Indian child" status.[5] Such an expansive application of ICWA radically alters how ICWA is applied, and does so in a manner inconsistent with the decisions of this Court, other Courts of Appeal, of other state courts, and the U.S. Supreme Court.

II.
THE QUESTION OF WHETHER ICWA APPLIES TO A CASE SOLELY BECAUSE OF THE CHILDREN'S ETHNICITY RAISES SIGNIFICANT CONSTITUTIONAL CONCERNS THAT DEMAND THIS COURT'S ATTENTION

A. California Courts are Divided on Whether it is Constitutional to Apply a Different Set of Standards to Cases Based on the "Indian Status" of the Children

As the Real Parties in Interest concede, the orphans in this case have no social, political, or cultural connection to the tribe[6]; they are connected

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[5] In *Abbigail A.*, this Court rightly distinguished between tribal membership—which is determined solely by tribal law—and Indian child status under ICWA, which is a matter of federal and state law and must comply with the Constitution. 1 Cal. 5th at 95. That distinction is worth keeping in mind for what follows.

[6] The Real Parties acknowledge that the minors have no cultural connection to the tribe. They claim the children "have been totaled [*sic*] isolated from" the tribe, and that any potential connection between them and the Tribe has

to the tribe only by biology: their biological parent was a tribal member, and eligibility for tribal membership is based exclusively on genetics.[7]

In *Bridget R., supra,* and again in *Santos Y., supra,* the Court of Appeal concluded that it was unconstitutional to apply ICWA to a case solely on the basis of the child's genetic profile. Where a child has no cultural, political, religious, or social affiliation with a tribe, but is deemed an "Indian child" exclusively on the basis of the blood in her veins, applying ICWA to her case would mean applying a different law to a case on account of the child's "'genetic heritage—in other words, race.'" *In re Santos Y.*, 92 Cal. App. 4th at 1308 (quoting *Bridget R.*, 41 Cal. App. 4th at

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been "totally cut off." Pet. App. at 68. Whatever one thinks of these assertions, they show that the *sole* basis for application of ICWA here is the fact that the children are *biologically* Indian.

[7] The Shingle Springs Band Enrollment Ordinance (Governance Code Title 5 § 2(A), available at http://www.shinglespringsrancheria.com/ssr/wp-content/uploads/documents/codes/Governance%20Code.pdf), specifies genetic descent as the necessary and sufficient criterion for tribal membership. It requires a person to be a "biological lineal descendant[]" of tribal members whose names appeared on the 1916 Census Roll of Indians in Sutter County. Notably, the tribe expressly *forbids* membership to children *adopted* by tribal members, no matter how culturally or politically affiliated such children might be, if the children lack the requisite pedigree. *See id.*, Title 5 § 4(A) ("Persons legally adopted by members of the Tribe are not eligible for enrollment unless they independently meet the [genetic] requirements"). Political and cultural affiliation are simply *not* factors in determining eligibility; lack of cultural affiliation does not disqualify a biologically eligible child from membership, and total affiliation would not qualify a biologically *in*eligible child. Thus the only reason the minors in this case qualify as "Indian children" subject to ICWA is that they fit the racial profile.

1508). Such a race-based statute would invoke strict scrutiny, which the court found ICWA fails. *Id.* at 1322.

The *Bridget R.* court resolved the case by applying a saving construction to ICWA called the Existing Indian Family Doctrine. The state legislature subsequently enacted Cal. Welf. & Inst. Code § 360.6, purporting to overturn the Existing Indian Family Doctrine. *See Santos Y.*, 92 Cal. App. 4th at 1303–12 (detailing history). But because Section 360.6 simply recited the exact words of pre-existing law, *Santos Y.* found that it failed to actually overturn the Doctrine. *See id.* at 1316–17. Other Courts of Appeal have disagreed, *see e.g., In re Autumn K.*, 221 Cal. App. 4th 674, 716 (2013) (First District); *In re Alexandria P.*, 228 Cal. App. 4th at 1344 (Second District). The Courts of Appeal have repeatedly remarked on the division between the appellate courts on the continuing viability of that Doctrine, and the need for the Court's guidance. *See, e.g., id*; *In re Vincent M.*, 150 Cal. App. 4th at 1265.

But even if the Doctrine has been rendered invalid, then the constitutional question becomes all the more pressing: *is it constitutional to apply different substantive and procedural rules to a child welfare case solely on the basis of the child's genetic ancestry?*[8]

[8] *Bridget R.* considered the Existing Indian Family Doctrine "necessary … to preserve ICWA's constitutionality." 41 Cal. App. 4th at 1492. Thus if, as one Court of Appeal has declared, "there is no question" that the

The U.S. Supreme Court has indicated that the answer is no. In *Adoptive Couple*, it observed that it "would raise equal protection concerns" for a party to "play [the] ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests," and thereby "put … vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." 133 S. Ct. at 2565. That is *precisely* what is happening here.

Santos Y. court answered no. 92 Cal. App. 4th at 1318 (where "the only basis for applying ICWA … is the child's genetic heritage," such "disparate treatment … is inconsistent with the equal protection requirements of the Fifth and Fourteenth Amendments."). But other Courts of Appeal have disagreed, and have continued to apply ICWA to cases involving children with no significant cultural or social affiliation with a tribe. For example, in *In re Alexandria P., supra,* the Second District applied ICWA to a case involving a child whose sole connection to the tribe was genetic. Acknowledging the "split in the appellate districts," it not only held that ICWA applied, but rejected the argument that this is unconstitutional. 228 Cal. App. 4th at 1343–46.

Most remarkably, at a later stage of the proceedings, the *Alexandria P.* court adopted a literal rule of separate-but-equal. Whereas for children

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Doctrine is no longer the law, *In re Autumn K.*, 221 Cal. App. 4th at 716, then the question of ICWA's constitutionality cannot be avoided.

of other races, the overriding consideration is the best interests of the child, *see, e.g.*, *Catherine D. v. Dennis B.*, 220 Cal. App. 3d 922, 933 (1990), the *Alexandria P.* court held that for Indian children, a different rule applies: "a court should take an Indian child's best interests into account as *one of the constellation of factors* relevant" to the determination of *their* cases. 1 Cal. App. 5th at 351 (emphasis added).[9]

In other words, a different—literally, separate-but-equal—"best interests" test applies to cases involving children deemed "Indian children" under ICWA—and, in this case, deemed such solely on account of their biological ancestry.

Courts in other states that have addressed ICWA's constitutionality have upheld it. For instance, in *In re A.B.*, 663 N.W.2d 625, 634–37 (N.D. 2003), the North Dakota Supreme Court expressly rejected the California Court of Appeal's analyses in *Bridget R.* and *Santos Y.*, and held that ICWA is not a race-based statute, but is based on political affiliation. The New York Supreme Court Appellate Division did the same thing in *In re Baby Boy C.*, 27 A.D.3d 34, 43–51 (N.Y. 2005). Arizona and some other states have done the same. *See, e.g.*, *S.S. v. Stephanie H.*, 388 P.3d 569, 576 (Ariz. Ct. App. 2017), *review denied* (Apr. 18, 2017); *In re M.K.*, 964

[9] The Real Parties' position on this question is unambiguous: "Once ICWA applies," they say, "best interests analysis does NOT apply." Pet. App. at 306 (emphasis in original).

P.2d 241, 243–44 (Okl. Ct. App. 1998). *But see, In re A.W.*, 741 N.W.2d 793, 807–10 (Iowa 2007) (finding state version of ICWA unconstitutional because it used genetic ancestry as a proxy for race).[10]

In short, there is a division of authority over the constitutionality of ICWA between the lower California courts, as well as between the lower California courts and the courts of other states. Given the importance of the questions involved here—the best interests of vulnerable children—and the persistent conflicts between the courts, as well as the large population of people affected by ICWA, it is critical that this Court resolve these matters.

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[10] It is not necessary or proper here to address the merits of the argument, but briefly, the dispute boils down to whether ICWA imposes a race-based classification subject to strict scrutiny, *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 35 (2001) (citing cases), or a political classification subject to rational-basis scrutiny. Courts that have concluded the latter have relied on *Morton v. Mancari*, 417 U.S. 535 (1974). Yet *Mancari* involved a law that was "not directed towards a 'racial' group consisting of 'Indians,'" *id*. at 553 n.24, whereas ICWA is directed to children who are "eligible" for tribal membership, and eligibility depends on genetics. *See, Santos Y.*, 92 Cal. App. 4th at 1318–22. While ICWA's definition of "Indian child" does exclude some children who are biologically Native American, the U.S. Supreme Court has made clear that "[s]imply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." *Rice v. Cayetano*, 528 U.S. 495, 516–17 (2000). Of course, even if ICWA *were* based on tribal affiliation, that would make it a form of *national-origin*-based discrimination, and therefore still subject to strict scrutiny. *See Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1120 (9th Cir. 1998).

B. The Question of Whether ICWA's Separate Rules are Constitutional is One of Critical Importance to all Californian Children of Native American Descent

The issues raised in this petition are of immense importance beyond this case. They reach crucial matters in the lives of some of the most vulnerable children—and given the large population of children affected by ICWA in California, this case is of extraordinary significance.

California has one of the largest Native American populations in the country; there are about 723,000 Native American Californians,[11] and 109 federally-recognized tribes here.[12] Meanwhile, Native American children face an extraordinarily high risk of poverty, abuse, and neglect. Michelle Sarche & Paul Spicer, *Poverty and Health Disparities for American Indian and Alaska Native Children: Current Knowledge and Future Prospects,* 1136 ANNALS N.Y. ACAD. SCI. 126-36 (2008);[13] Nat'l Ind. Child Welf. Ass'n, *A Time for Reform: A Matter of Justice for American Indian and Alaskan Native Children* 4 (2007).[14] For all of these children, ICWA's separate, and often less-protective, rules[15] are critical to their security and future happiness.

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11 U.S. Census Summary Data, 2010, at 7, http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.
12 California Courts, California Tribal Communities, http://www.courts.ca.gov/3066.htm.
13 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2567901/.
14 http://www.nicwa.org/government/time-for-reform.pdf.
15 In addition to those discussed below, ICWA also requires that agencies make "active efforts" to restore the family unit before terminating parental

Consider: ICWA imposes a higher burden of proof on termination of parental rights actions—typically a necessary step prior to adoption—than applies to children of other races. Where for other children, the "clear and convincing evidence" standard governs, *see, e.g.*, *In re Cristella C.*, 6 Cal. App. 4th 1363, 1369 (1992), for Indian children the factors for termination must be proven "beyond a reasonable doubt," 25 U.S.C. § 1912(f)—despite the fact that, as the U.S. Supreme Court has observed, the "beyond a reasonable doubt" standard can "erect an unreasonable barrier to state efforts to free permanently neglected children for adoption." *Santosky v. Kramer*, 455 U.S. 745, 769 (1982). ICWA therefore makes it harder for state protective agencies to protect Indian children than children of other ethnicities.

ICWA also requires that an Indian child be placed in foster care with either a member of the child's own tribe, or, if that is not possible, with another "Indian" family—regardless of tribe—before the child may be placed in foster care with a parent of another race. 25 U.S.C. § 1915(b).

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rights preparatory to adoption, 25 U.S.C. § 1912(d)—as opposed to the "reasonable efforts" required in cases involving children of all other ethnicities. As discussed below, this higher burden makes it more difficult to protect Indian children from abuse and neglect. But while most courts have held that "active efforts" imposes a higher standard than does "reasonable efforts," *see, e.g.*, *People ex rel. A.R.*, 310 P.3d 1007, 1015 ¶ 28 (Colo. Ct. App. 2012), California has—in conflict with the courts of almost all other states—held that "reasonable efforts" and "active efforts" are synonymous. *In re Adoption of Hannah S.*, 142 Cal. App. 4th 988, 998 (2006).

But while Native American youth are taken into foster care at an extraordinarily high rate, *see* Nat'l Council of Juv. & Fam. Ct. Judges, *Disproportionality Rates for Children of Color in Foster Care* 2–3 (2011),[16] and spend a disproportionately long time in foster care, *see* U.S. Dep't of Health & Hum. Servs., *Recent Demographic Trends in Foster Care* (Data Brief 2013-1, 2013),[17] there is a shortage of Indian foster families. In all of Los Angeles County, with its population of about 10 million people, there is only *one* licensed Native American foster home. *See* Daniel Heimpel, *L.A.'s One-and-Only Native American Foster Mom*, CHRON. SOC. CHANGE, June 14, 2016.[18]

This shortage means that Native American children are placed instead in what is considered "non-compliant" foster care, which means they are far more likely to be moved from one foster family to another—inflicting trauma and mental anguish on them when they bond with their

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16 https://www.ncjfcj.org/sites/default/files/Disproportionality%20TAB1_0.pdf.

17 https://www.acf.hhs.gov/sites/default/files/cb/data_brief_foster_care_trends1.pdf. The statistics here are somewhat misleading, as Native American children are often shifted from one foster family to another, which resets the clock for statistical purposes. A child who spends five years in one foster family, and then is moved to another for five more years, is counted as having spent two terms of five years, rather than one term of ten years, in foster care.

18 https://chronicleofsocialchange.org/news-2/l-a-s-one-native-american-foster-mom.

foster families and are then moved elsewhere. *See* Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children,* 37 CHILD. LEGAL RTS. J. 1, 54 n.322 (2017) (citing sources). In *Alexandria P., supra*, a six-year old southern California girl, who had lived with her foster family for four years—2/3 of her entire life—was removed from her family and sent to live out of state instead, on the demand of a tribe exercising its power under ICWA. For children of *non*-Indian ancestry, the best interests of the child are considered paramount, so that a long period in foster care will militate against removal. *See, e.g., In re Guardianship of Ann S.*, 45 Cal. 4th 1110, 1136 n.19 (2009) ("the child's best interest becomes the paramount consideration after an extended period of foster care."); *In re Stephanie M.*, 7 Cal. 4th 295, 317 (1994) (same). But in that case, the Court of Appeal held that ICWA imposes *different* rules on Indian children, and consequently, the trauma of removal was outweighed by other considerations. *Alexandria P.*, 1 Cal. App. 5th at 351. This notwithstanding the fact that the child had no cultural, political, social, religious, or other connection to the tribe—only a biological one.

Finally, ICWA also requires that Indian children be adopted by members of the tribe, or, if unavailable, by "other Indian families" *regardless of tribe*, rather than by loving, stable, families of other races. 25 U.S.C. § 1915(a). These barriers to stable foster care and permanent adoption work to the detriment of Indian children in need. *See* Elizabeth

Stuart, *Native American Foster Children Suffer Under a Law Originally Meant to Help Them*, PHOENIX NEW TIMES, Sept. 7, 2016[19]; Sandefur, *supra*, at 22-59.

Little wonder, then, that the *Bridget R.* court concluded that ICWA causes "the number and variety of adoptive homes that are potentially available to an Indian child" to be "more limited than those available to non-Indian children," and increases the risk that an Indian child in a potential adoptive home will be "taken from that home and placed with strangers." 41 Cal. App. 4th at 1508. That court found such "disparate and sometimes disadvantageous treatment" to be unconstitutional when, as in this case, it is based on "the child's genetic heritage—in other words, race." *Id*. Yet as noted above, other courts, both in California and elsewhere, have disagreed.

If, as the court below held, ICWA governs a case solely on the basis of the child's being an "Indian child"—that is, beyond the four categories of "child custody proceedings" to which ICWA by its own terms applies—then these and other separate and substandard rules will apply to children who are in need of state protection, foster care, and adoptive homes. Lower courts need this Court's guidance on this question of critical import.

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[19] http://www.phoenixnewtimes.com/news/native-american-foster-children-suffer-under-a-law-originally-meant-to-help-them-8621832.

C. This Case Is Ideal for Resolving This Critical Question

This case comes to the Court on a pure question of law, without any significant factual disputes. In addition, it comes via a pretrial petition for writ of mandate, which as this Court has said, is a preferred means of "review[ing] questions of first impression that are of general importance to the trial courts and to the profession, and where general guidelines can be laid down for future cases." *Oceanside Union Sch. Dist. v. Superior Ct. of San Diego Cnty.*, 58 Cal. 2d 180, 185 n.4 (1962); *see also Hogya v. Superior Ct. of San Diego Cnty.*, 75 Cal. App. 3d 122, 129–30 (1977) (writ proceedings are proper in "instances of a grave nature or of significant legal impact, or to review questions of first impression and … statewide importance.").

Also, given that this case comes on a pretrial writ, it would conserve judicial resources to resolve the legal question now, before the lower courts engage in further proceedings on what Petitioner contends is a faulty reading of the law. *Cf. People v. Vasquez*, 39 Cal. 4th 47, 68–69 (2006) (where defendant did not seek pretrial writ, there was no way for post-trial review to conserve judicial resources; "in a pretrial motion or review thereof a prospective likelihood of unfairness suffices.").

There can be no question that this case presents a question of statewide importance. If ICWA and its state adjunct apply to a case solely on the basis of a child's status as an "Indian child," that principle will affect

countless child welfare, foster care, and adoption matters statewide. Nor can there be any dispute that longstanding conflict on the question of whether it is constitutional to apply ICWA in circumstances such as these is a matter warranting this Court's resolution. Given that there is "no factual dispute and the matter presents a purely legal question," *City of Alhambra v. Cnty. of Los Angeles*, 55 Cal. 4th 707, 718 (2012), this case presents an excellent vehicle for resolving the issues presented.

CONCLUSION

The petition for review should be *granted*.

Respectfully submitted,

/s/ Timothy Sandefur

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CERTIFICATION OF LENGTH
(Cal. Rules of Court, Rule 8.504(d))

I, Timothy Sandefur, attorney for Petitioners, certify pursuant to the California Rules of Court, that the word count for this documents is 5,912 words, excluding tables, this certificate, and any attachment permitted under Rule 8.504(e), according to the word-count feature of Microsoft Word. I declare under penalty of perjury that the foregoing is true and correct.

Executed at Phoenix, Arizona on July 24th, 2017.

/s/ Timothy Sandefur
Timothy Sandefur

PROOF OF SERVICE

I, Kristine Schlott, am employed by the Goldwater Institute in the county of Maricopa, AZ. I am over the age of 18 and not a party to the within action; my business address is 500 E. Coronado Rd., Phoenix, AZ 85004. On July24, 2017, all counsel were served via email. On July 24, 2017, I served the foregoing document described as **PETITION FOR REVIEW** on the interested parties in this action, as listed in the attached Service List via first-class mail.

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

Executed this 24th day of July, 2017,

/s/ Kristine Schlott
Kristine Schlott

THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA FOR THE COUNTY OF TULARE
221 W. Mooney Blvd.
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Respondent

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FILED
TULARE COUNTY SUPERIOR COURT
VISALIA DIVISION

FEB 03 2017

LARAYNE CLEEK, CLERK
BY: Lisa Weisenborn

In the Matter of Cuellar, Angelina Jessie Porras

Case No. **VPR047731**

CLERK'S CERTIFICATE OF SERVICE BY MAIL

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

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

LARAYNE CLEEK,
CLERK OF THE SUPERIOR COURT
COUNTY OF TULARE

By _____
Deputy Clerk

Names and Mailing Address of Person(s) Served:

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF TULARE

FILED
TULARE COUNTY SUPERIOR COURT
VISALIA DIVISION

FEB 03 2017

LARAYNE CLEEK, CLERK
BY: Lisa Weisenborn

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

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

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

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

As explained by a recent Court

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

> According to the Senate Rules Committee, Senate Bill 678 "affirms the state's interest in protecting Indian children and the child's interest in having tribal membership and a connection to the tribal community." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 678 (2005–2006 Reg. Sess.) as amended Aug. 22, 2005, p. 1.) Similar to the ICWA, Senate Bill 678 contains a section of express legislative findings, including findings that "[i]t is in the interest of an Indian child that the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled." (Welf. & Inst. Code, § 224, subd. (a)(2).) The statute directs the court to "strive to promote the stability and security of Indian tribes and families, comply with the federal Indian Child Welfare Act, and seek to protect the best interest of the child. Whenever an Indian child is removed from a foster care home or institution, guardianship, or adoptive placement for the purpose of further foster care, guardianship, or adoptive placement, placement of the child shall be in accordance with the Indian Child Welfare Act." (*Id.*, § 224, subd. (b).) In addition, a determination that a minor is "eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act to the proceedings." (*Id.*, § 224, subd. (c).)"

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

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

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

The Court finds that ICWA is applicable to these proceedings.

TULARE COUNTY ★ SUPERIOR COURT ★ CALIFORNIA

Dated: February 3, 2017

Nathan D. Ide
Judge of the Superior Court

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIFTH APPELLATE DISTRICT

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

BY THE COURT:*

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

Hill, P.J.

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