IN THE SUPREME COURT OF CALIFORNIA

No. S243352

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)

REPLY TO ANSWER TO 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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INTRODUCTION

The questions at issue here are whether ICWA applies to a case that involves no "nontribal public [or] private agencies," 25 U.S.C. § 1901(4), and does not involve "the removal" of children from their parents, *id.*, but is instead a private dispute between relatives—and, if it does apply, whether it is constitutional. The Renterias have standing to raise these questions both on their own behalf and on behalf of their grand-nieces. And because these questions are purely legal, there is no reason to await any factual development in the trial court. On the contrary, review by this pretrial writ petition is the better course, to preserve judicial resources and avoid imposing an unnecessary burden on the Renterias and their grand-nieces.

These questions are of critical import, given how deeply they affect some of California's most vulnerable citizens. Yet the lower courts are in disarray about these questions—as the Real Parties in Interest admit. *See* Answer Br. of Shingle Springs Band of Miwok Indians ("SSB") at 21. Considering the intrinsic importance of these questions and the large number of Native American children in California—and their relatives, such as the Renterias—who are affected by them, it is critical that this Court address them. The lack of factual disputes here, and the clarity with which these questions are presented make this case ideal for resolving these matters.

ARGUMENT

I. THE RENTERIAS HAVE STANDING

Real Parties in Interest[1] claim that Petitioners Efrim and Talisha Renteria—the grand-uncle and grand-aunt of these three orphaned minors—lack standing to raise the equal protection issues at the heart of this petition. (SSB at 19-20). That is incorrect because, among other reasons, the Renterias are aggrieved by the decision below: the application of ICWA to this case will cause the trial court to apply a wholly different body of law than it would use if this case did not involve "Indian children." These differences would work to the Renterias' disadvantage—for example, the racially discriminatory placement preferences imposed by 25 U.S.C. § 1915(a) and (b) require that Indian children be placed in "an Indian foster home" or with "Indian families" rather than with families of other races, such as the Renterias. Some California courts have already found this unconstitutional. *In re Bridget R.*, 41 Cal. App. 4th 1483 (1996); *In re Santos Y.*, 92 Cal. App. 4th 1274 (2001).[2] But other California courts

[1] As the arguments of Real Parties Cuellar and Shingle Springs Band of Miwok Indians essentially overlap, Petitioners will address them together.

[2] Real Parties seek to downplay these as "early court cases" (they were decided in 1996 and 2001), and claim they merely "suggested" that ICWA "is a race-based statute." (SSB at 20.) Actually, those cases *held* that ICWA is a race-based statute and would be unconstitutional unless a saving construction (the Existing Indian Family Doctrine) were applied.

disagree. *See, e.g., In re Adoption of Hannah S.*, 142 Cal. App. 4th 988, 996 (2006). Only this Court can resolve the matter.

The Renterias therefore have standing. The injury in an equal protection case is "the denial of equal treatment" in the government's decision-making process. *Northeastern Fla. Ch. of Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The Renterias are denied equal treatment here because the legal process of determining the merits of this dispute will be biased if ICWA's racially discriminatory standards apply—those standards prejudice their effort to ensure the best interests of their grand-nieces. *See In re Vincent M.*, 161 Cal. App. 4th 943, 953 (2008) (non-relative foster parents had standing to appeal because they were aggrieved by the judgment below); *see also Crystal R. v. Superior Ct.*, 59 Cal. App. 4th 703, 711 (1997) (child's aunt and uncle had standing to challenge application of ICWA to custody case).

In *Palmore v. Sidoti*, 466 U.S. 429 (1984), when the U.S. Supreme Court held that it is unconstitutional to base child custody decisions on the race of the children and/or adults—exactly what will happen here if ICWA applies—the mother had standing because *she* was treated unequally, even aside from how her child was treated. The trial court had "not focus[ed] directly on the parental qualifications" of the parties, but focused on race, instead. *Id.* at 432. That is what will happen if ICWA applies here.

Real Parties cite *In re Alexandria P.*, 228 Cal.App.4th 1322, 1340-43 (2014), in disputing the Renterias' standing, but that case held that the *foster* parents lacked standing, because there was no constitutionally protected interest in the foster family relationship. The Renterias are not foster parents, and do not seek to become foster parents. They are *direct blood-relatives*, with a constitutionally protected fundamental right to their familial relationship. *Santos Y.*, 92 Cal. App. 4th at 1306; *see also* Cal. Fam. Code § 3105 (recognizing minors' fundamental right to family relationship). Contrary to Real Parties' claim that the Renterias "do not have a constitutionally protected interest" (SSB at 20), their family relationship is a fundamentally protected constitutional right. The *only* thing California law recognizes as superior to that right is the best interests of the children, *In re Sarah S.*, 43 Cal. App. 4th 274, 287 n.13 (1996)—something that Real Party in Interest Cuellar insists the court should *not consider*.[3]

Also, the *Alexandria P.* court emphasized that the foster parents "knew at all times" that ICWA's placement preferences would apply, 228 Cal. App. 4th at 1342–43, whereas that is in dispute here.

[3] Respondent Cuellar's Reply to Petitioner's Opposition, Case No. VPR047731 (Tulare County Superior Court, filed Dec. 19, 2016) at 12 ("Once ICWA applies, best interests analysis does NOT apply.").

Real Parties also confuse "standing" with "cause of action." Standing goes to justiciability—it asks whether the parties have suffered a redressable injury. Cause of action goes to the merits—it asks whether the plaintiff has proven her entitlement to relief. As the U.S. Supreme Court explained in *Bond v. United States*, 564 U.S. 211 (2011), a party who satisfies the standing inquiry may then raise arguments relating to the constitutionality of a statute that results in the harm complained of, even if she would not have had a *cause of action* to challenge that statute in the first instance. The private citizen in *Bond* would not have had a cause of action to challenge the constitutionality of the federal chemical weapons ban on Tenth Amendment grounds, because that Amendment involves the powers of states, not the rights of citizens. But when she was prosecuted for violating the ban, she had standing because she was injured, and then could raise the Tenth Amendment argument. *Id*. at 218-19, 225-26.

Likewise, in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), the defendants had standing to argue that the government was prosecuting them using money that was unconstitutionally appropriated. Although they could not have raised that constitutional question as plaintiffs complaining of illegal conduct, the court found that because they were suffering a concrete injury that the court could redress, they could make constitutional arguments that they could not have raised *ab initio*. *Id.* at 1173-74. *See also LaRoque v. Holder*, 650 F.3d 777, 792 (D.C. Cir.

2011) (party who satisfies standing inquiry "may … pursue his 'direct interest' in the invalidation of a statute that he contends exceeds Congress's enumerated powers.").

Here, the Renterias have standing because they are aggrieved by the decision below. *Vincent M.*, 161 Cal. App. 4th at 953. They may therefore raise their constitutional arguments against ICWA.

Finally, the Renterias have third-party standing to assert the rights of their grand-nieces. The Renterias easily satisfy the two-part test for third party standing. *See City of Santa Monica v. Stewart*, 126 Cal. App. 4th 43, 61 (2005). The children face a genuine obstacle in asserting their own rights (their age), and the familial relationship is such that the Renterias are "'fully, or very nearly, as effective a proponent of the right'" as the children would be if they could assert their own rights. *Id.* (citation omitted).[4]

The Renterias can be expected to properly frame the issues and "present them with the necessary adversarial zeal," *United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1127 (9th Cir. 2004). And their interests are aligned with those of the children—moreso than the Real

[4] The *Alexandria P.* court rejected a third-party standing argument, but did so because in that case the minor's guardian ad litem took a position contrary to the foster parents'. 228 Cal. App. 4th at 1342. That is not the case here.

Parties in Interest, who, *inter alia*, urged the trial court *not* to apply the best interests of the child standard.[5]

In *Wauchope v. United States Dep't of State*, 985 F.2d 1407 (9th Cir. 1993), the plaintiffs had third-party standing to assert their mothers' equal protection rights in challenging the constitutionality of a statute because they had suffered a concrete injury; their "interests coincide[d] with those of their mothers and [were] equally as intense," and the mothers were incapable of litigating the matter themselves. *Id*. at 1411. For the same reasons, the Renterias have standing to assert their grand-nieces' rights.

The Renterias have been caring for these orphans since their parents' deaths—except for the brief, illegal interruption caused by Real Parties in Interest.[6] They have asked California courts to adjudicate this matter using non-discriminatory state law that prioritizes the children's interests. Real Parties, by contrast, have invoked a racially discriminatory law which, they contend, overrides the children's best interests and treats "Indian children" differently from their black, white, Asian, or Hispanic peers. The Renterias have standing to object to the application of ICWA both on their own behalf and on behalf of their grand-nieces.

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[5] *Ante*, note 3.

[6] Resolved in *Renteria v. Shingle Springs Band of Miwok Indians*, 2016 WL 4597612 (E.D. Cal. Sept. 2, 2016).

II. FURTHER FACTUAL DEVELOPMENT IS UNNECESSARY TO THE PURELY LEGAL MATTERS PRESENTED HERE

Whether ICWA applies to this case, which is not a "child custody proceeding" as defined in 25 U.S.C. §1903(1), is a purely legal question. "[T]he facts [are] not in dispute and the matter could be resolved by deciding a single legal issue…. [T]he interests of justice would not be served by requiring [the parties] to submit to trial and … reserv[e] the issue for appeal." *In re Quackenbush,* 41 Cal. App. 4th 1301, 1305 (1996). *Cf. People v. Padfield*, 136 Cal. App. 3d 218, 228 n.8 (1982) ("It would be inimical to judicial economy to require a defendant to participate in a contested trial in order to preserve his right to review of the pretrial diversion issues when he does not in fact contest his guilt but only contends that he is a proper subject to pretrial diversion.").

Using a pretrial writ to resolve purely legal questions about how trial proceedings should be conducted conserves judicial resources and is preferred. *Winston v. Superior Ct.*, 196 Cal. App. 3d 600, 603 (1987); *Byram v. Superior Ct.*, 74 Cal. App. 3d 648, 654 (1977); *People v. Superior Ct. (Steven S.)*, 119 Cal. App. 3d 162, 167 (1981). A pretrial writ petition can "spare a minor the burden" of unnecessary proceedings at trial "and thus promote justice and judicial economy." *People v. Chi Ko Wong*, 18 Cal. 3d 698, 713 (1976). Pretrial writs are particularly favored where the question is whether a certain body of law or evidentiary rule should apply

to a case, and where the questions are questions of first impression that are of statewide significance. *Oceanside Union Sch. Dist. v. Superior Ct.*, 58 Cal. 2d 180, 185 n.4 (1962); *American Mut. Liab. Ins. Co. v. Superior Ct.*, 38 Cal. App. 3d 579, 589 (1974).

Real Parties say that resolution of the purely legal questions presented here—whether ICWA applies, and if so, whether it is constitutional—should await further factual development, but they never explain why.[7] The reason is obvious: there are no facts that would further sharpen or help resolve the legal questions of whether ICWA applies outside the "child custody proceeding[s]" defined in 25 U.S.C. § 1903(1),[8] or whether it is constitutional to apply different, less-protective laws to this case because of the children's racial profile.

Real Parties have not identified *any* factual development in the trial court that would make *any* difference to the resolution of the legal

[7] On the contrary, their briefs proceed to argue the merits at great length.
[8] Real Parties misrepresent what this section says by suggesting that its definition section is only meant to be illustrative. (SSB at 14 ("From the word 'include,' it is clear that the ICWA is intended to broadly apply to proceedings where the continued custody of an Indian child is at issue.")). In fact, this Court and other state courts have held that the definition of "child custody proceedings" in ICWA is exhaustive and that ICWA should not be applied beyond the statutory boundaries without clear legislative instruction. *In re Abbigail A.*, 1 Cal. 5th 83, 92 (2016); *Gila River Indian Cmty. v. Dep't of Child Safety*, 395 P.3d 286, 289-90 (Ariz. 2017); *cf. In re Welfare of R.S.*, 805 N.W.2d 44, 50-51 (Minn. 2011) ("We cannot assume that … Congress was simply careless in using terms [in ICWA's definitions section].")

questions raised here, and it is therefore proper to consider these questions now. *Cf. Orange Cnty. Water Dist. v. Sabic Innovative Plastics, US, LLC*, 2017 WL 3326959 at *27 (4th Dist. Cal. Aug. 4, 2017).

III. WHETHER APPLYING ICWA TO THESE CHILDREN BASED SOLELY ON THEIR GENETICS IS CONSTITUTIONAL IS A QUESTION IN NEED OF THIS COURT'S RESOLUTION

Real Parties admit that there is "a split of authority in the appellate courts" on the question of ICWA's constitutionality (SSB at 21), although they wrongly claim that the question has been rendered moot. More on that below (p. 18). Here, it is important to emphasize that the question of whether this family can be subjected to a separate, less-protective set of rules than would apply to a white, black, Asian, or Hispanic family, is a matter of profound significance—and the division between the lower courts on that matter is something this Court must resolve.

To be clear: the *sole* reason that the trial court decided to apply ICWA to this case is because the children are "Indian children" as defined in 25 U.S.C. §1903(4). And what qualifies them as "Indian children" is *only* the DNA in their bloodstream—nothing more. The tribal constitution specifies genetic ancestry as the *sole* criterion—both the necessary and sufficient condition—for tribal membership. Political, social, cultural, religious, or other affiliation is not required—such affiliation will not qualify someone for membership who lacks the specified DNA, and the absence of such affiliation will not *dis*qualify someone who *has* the

required DNA. Even children adopted by tribal members are not eligible for membership if they lack the required DNA.[9] *Cf. Santos Y.*, 92 Cal. App. 4th at 1316 (unconstitutional to apply ICWA to a case because of the child's "bloodline and [tribal] enrollment based on that genetic" profile).

Of course, the tribe is entirely free to define the criteria for membership however it wishes; that is a matter of tribal law, and is not in dispute here. But the definition of "Indian child" under ICWA is "a conclusion of *federal and state* law based on the tribe's determination," *In re Abbigail A.*, 1 Cal. 5th 83, 95 (2016) (emphasis added), and *that* must meet constitutional standards. *Palmore*, 466 U.S. at 433 ("Private [racial] biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.") Thus the fact that the children's father had them enrolled in the tribe does not change the fact that their status as "Indian children" *under ICWA* depends solely on genetic—*i.e.*, racial—

[9] The Shingle Springs Band Enrollment Ordinance, Governance Code Title 5 § 2(A), http://goo.gl/NjWYev, specifies that only "biological lineal descendants of either Pamela Cleanso Adams or Annie Hill Murray Paris" are eligible for membership, and Section 4(A) specifies that there are no "exceptions of any kind," and that "[p]ersons legally adopted by members of the Tribe are not eligible for enrollment unless they independently meet the [genetic] requirements." Real Party in Interest Cuellar's claim that "[t]ribal membership has nothing to do with race," Answer of Real Party Cuellar ("Cuellar Br.") at 26, is risible. . As the Supreme Court has explained, a racial law is one "which singles out 'identifiable classes of persons ... solely because of their ancestry or ethnic characteristics'" and treats them differently on that basis. *Rice v. Cayetano*, 528 U.S. 495, 515 (2000) (citation omitted). That is what is happening here.

criteria. After all, the same was true in *Santos Y.*, which found it unconstitutional to apply ICWA even though the child was enrolled in the tribe, because that enrollment was based solely on genetics. 92 Cal. App. 4th at 1316.

Individuals, groups, and tribes, may discriminate as they please, but for California courts to treat people differently as a consequence of such criteria raises constitutional questions of major significance. *Palmore*, 466 U.S. at 433-34.

Such different treatment is detrimental to the Renterias and to the children in this case—and to Indian children throughout California. ICWA's race-based rules make it vastly more difficult to rescue abused and neglected Indian children from dangerous situations. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563-64 (2013) (noting that these provisions of ICWA "dissuade" adults "from seeking to adopt" and "place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home."). ICWA imposes a massive disadvantage on Indian children who need stable, permanent families to care for them. *Bridget R.*, 41 Cal. App. 4th at 1508 (ICWA imposes a "disadvantag[e]" on Indian children by reducing "the number and variety of adoptive homes that are potentially available.").

Most shockingly, *In re Alexandria P.*, 1 Cal. App. 5th 331 (2016), *explicitly endorsed* a "separate but equal" status for Indian children under

ICWA, by adopting two different "best interest of the child" standards. It held that while best interests is the overriding consideration for white, black, Asian, or Hispanic children, *see, e.g.*, *Catherine D. v. Dennis B.*, 220 Cal. App. 3d 922, 933 (1990)—for Indian children, best interests is only "one of the constellation of factors" courts should consider. 1 Cal. App. 5th at 351.

Thus, even if the trial court was right that ICWA applies to this case solely because the children are (in the U.S. Supreme Court's words) "racially to be classified as 'Indians,'" *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974), then the question remains whether it is constitutional to apply a different set of laws to this case based on their race and that of the Renterias. Given this Court's admonition that "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society" and should be "struck down whenever it is within the capacity of conscientious courts to see beneath their cellophane wrappers," *Hi-Voltage Wire Works v. City of San Jose*, 24 Cal. 4th 537, 548 (2000) (citations omitted), the importance of this case becomes obvious.

Some lower courts have tried to avoid direct confrontation with ICWA's race-based rules by employing the saving construction known as the Existing Indian Family Doctrine. This has caused a longstanding division in the Courts of Appeal. *See In re Suzanna L.*, 104 Cal. App. 4th

223 (2002) (citing cases). The Fifth District (*In re Alicia S.*, 65 Cal. App. 4th 79 (1998)), the Third District (*Hannah S.*, 142 Cal. App. 4th at 994–96), the Sixth District (*In re Vincent M.*, 150 Cal. App. 4th 1247 (2007)), and the First District (*In re Autumn K.*, 221 Cal. App. 4th 674, 716 (2013)) have rejected it, while the Second District (*Santos Y.*, 92 Cal. App. 4th at 1278; *Bridget R.*, 41 Cal. App. 4th at 1501–2), and Fourth (*In re Alexandria Y.*, 45 Cal. App. 4th 1483, 1493-95 (1996)), have endorsed it.[10]

Real Parties assert that the Doctrine's validity has been rendered moot by regulations issued by the Bureau of Indian Affairs, 81 Fed. Reg. 38778, 38802 (June 14, 2016), that purport to nullify the Doctrine. That regulation, however, only doubles down on the constitutional concerns raised by ICWA, for two reasons.

First, the Doctrine is a saving construction—so its nullification would only make it more imperative that this Court address the constitutional flaws in ICWA that the Doctrine was devised to avoid.

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[10] The First District declared in a conclusory fashion in *Autumn K*, 221 Cal. App. 4th at 716, that there was "no question" that enactment of Cal. Welf. & Inst. Code §360.6 rendered the Doctrine void, but in *Santos Y.*, 92 Cal. App. 4th at 1311-12, the Second District found that that statute had no such effect. And the Sixth District in *Vincent M.* did not expressly overrule its earlier *Crystal R.* decision, but rejected application of the Doctrine on the same grounds, with a concurring opinion which declared that "[w]hile I still believe that the reasons supporting the existing Indian family doctrine serve the best interests of the child … I am constrained to defer to the clear legislative intent of Welfare and Institutions Code section 360.6 to eliminate this doctrine." 150 Cal. App. 4th at 1271 (Bamattre-Manoukian, J., concurring).

Second, the Regulation cannot bind California courts, because federal regulations may not constitutionally commandeer state judicial officers into the enforcement of a federal program. *Printz v. United States*, 521 U.S. 898, 928 (1997). Certainly the Bureau of Indian Affairs has no authority to dictate to state courts what they "may not consider" in child welfare proceedings involving state citizen children—matters that are foremost among those reserved to the states under our constitutional system. *Santos Y.*, 92 Cal. App. 4th at 1322; *Bridget R.*, 41 Cal. App. 4th at 1510. The California Court of Appeal has already held that ICWA does not preempt California law on this question. *In re Brandon M.*, 54 Cal. App. 4th 1387, 1396–98 (1997).

Of course, to the extent that this case is governed by the *California state* version of ICWA (Cal. Welf. & Inst. Code § 224 *et seq*.), the BIA Regulations have no direct application to those, and are, at most, advisory. Therefore, the Regulations cannot nullify the Existing Indian Family Doctrine. The only entity that can determine the Doctrine's continuing validity is this Court.

CONCLUSION

This case is about three young children who are and always have been California citizens, who have never resided on tribal lands, and who are entitled to the equal protection of the laws and to due process of law—

and who are entitled to be treated as individuals, not as representatives of government-defined racial categories.[11]

Real Parties have already sought to abuse their power with the tribal government to unjustly bias the legal system for their own advantage, in violation of the Constitution. *See Renteria,* 2016 WL 4597612 at *9. Now they are trying to take these children from the Renterias' home through a law that establishes an unequal proceeding based solely on their race and the race of their grand-nieces. That cannot be allowed.

Real Party Cuellar expatiates on the importance of tribal sovereignty, but that sovereignty cannot override the constitutional rights of either the Renterias or their grand-nieces. As the First District has observed, "[w]e do not believe that any 'major damage' can or will be done to either federal law or Indian tribal law, custom, status or rights" by resolving this case pursuant to the non-discriminatory family law that would unquestionably apply if these children were white, Asian, black, or Hispanic. *In re Brandon M.*, 54 Cal. App. 4th at 1397.

The petition should be *granted.*

[11] Real Party in Interest Cuellar's lengthy and unproven factual assertions are irrelevant. It is undisputed that these children are Californians who never resided on tribal land.

Respectfully submitted,

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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 document is 3,990 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 August 17th, 2017.

/s/ Timothy Sandefur
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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 August 16, 2017, all counsel were served via email. On August 16, 2017, I served the foregoing document described as **REPLY TO ANSWER TO 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 17th day of August, 2017,

/s/ Kristine Schlott
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