No. 25-1287

In the Supreme Court of the United States

N. R. AND K. R.,

Petitioners,

v.

KEITH ELLISON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Minnesota

AMICUS CURIAE BRIEF OF FOSTER PARENTS AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

N.B. and S.B. (FOSTER PARENTS), inter-racial (but non-Indian) parents of an already large family, welcomed two-year-old C.J., Jr., into their Ohio home in January 2015. Sadly, C.J.'s biological parents continued to struggle with substance abuse, chronic homelessness, and periodic jail sentences. As a result, Foster Parents sought legal custody of C.J., who had closely bonded with and effectively become part of Foster Parents' family. Under Ohio law, the question should have been whether an award of legal custody to Foster Parents was in C.J.'s best interests. And everyone involved agreed that Foster Parents had provided C.J. with (in the words of his Guardian ad Litem) "exemplary care." But C.J. happens to have Native American ancestry, while Foster Parents have none. As a result, the Indian Child Welfare Act (ICWA) foisted upon Foster Parents burdens that are unknown in custody cases involving non-Indian children, while relegating C.J.'s interests below those of a distant Indian Tribe to which he had no connection.

Thus, before the Ohio juvenile court could determine whether placement with Foster Parents was in C.J.'s best interests, ICWA allowed the Arizona-based Gila River Indian Community to intervene as a full party in the Ohio custody matter. The tribe proposed

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[1] Pursuant to Rule 37.2, counsel for all parties received notice of intent to file this brief at least ten days prior to the due date. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, PLF's members, or Amici's counsel made a monetary contribution to its preparation or submission.

to take C.J. from Foster Parents and move him to Arizona, where he had never even visited, to live with his biological father's distant relatives, whom he had never met. Under ICWA, this race-matched placement was "preferred" to placement with his loving Foster Parents. Accordingly—because C.J. is (in part) Native American and Foster Parents are not—and despite the close bond between C.J. and Foster Parents and the "exemplary care" they had provided—Foster Parents had to prove, by clear and convincing evidence, that "good cause" existed to depart from the Gila River Indian Community's race-matched placement.

Foster Parents prevailed—but only with the pro bono assistance of Pacific Legal Foundation, who represented them, and Goldwater Institute, who represented C.J.'s Guardian in a related matter—and not until June 2020, *five and a half years* after they first welcomed C.J. into their home. Foster Parents recognize the past injustices perpetrated against Indian families that motivated the passage of ICWA, but—as Americans and parents of multi-racial children—they believe in the equal protection of the law for each individual, regardless of race, ancestry, or any other immutable characteristic. They submit this brief to highlight the perverse unintended consequences of ICWA's race-matching policies, which significantly delay, when they do not preclude, the placement of Indian children with loving families—even when these placements would unquestionably be in the children's best interests. Foster Parents emphasize the unconstitutional obstructions that non-Indian *parents* face under ICWA when they seek legal permanency for themselves and the Indian children they love.

Founded in 1973, **PACIFIC LEGAL FOUNDATION** is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF provides a voice in the courts for mainstream Americans who believe in the primacy of individual rights over collective interests. In addition to its involvement in Foster Parents' successful award of legal custody, PLF has extensive litigation experience in the areas of racial discrimination, racial preferences, and civil rights. It has served as lead counsel in lawsuits challenging race-based laws, including *Coalition for TJ v. Fairfax County School Board*, 68 F.4th 864 (4th Cir. 2023), *cert. denied* 146 S. Ct. 541 (2024), and *Boston Parent Coalition for Academic Excellence Corp. v. School Committee for City of Boston*, 89 F.4th 46 (1st Cir. 2023), *cert. denied* 145 S. Ct. 15 (2024). And PLF has participated as amicus curiae in nearly every major United States Supreme Court case involving racial classifications in the past five decades, from *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), to *Haaland v. Brackeen*, 599 U.S. 255 (2023).

INTRODUCTION AND SUMMARY OF ARGUMENT

Under well-established state law, the best interests of the child is the "paramount" consideration in every child-custody determination. *See Birch v. Birch*, 463 N.E.2d 1254, 1257 (Ohio 1984) (noting "the court's function to see that the children's best interests are protected"); *In re K.D.*, 92 N.E.3d 123, 127 (Ohio Ct. App. 2017) ("[T]he juvenile court's determination of whether to place a child in the legal custody of a parent or a relative is based solely on the best interest of

the child."); *see also* Minn. Stat. § 260C.001, subd. 2(a) ("The paramount consideration in all juvenile protection proceedings is the health, safety, and best interests of the child.").[2] State custody decisions may not be made on the basis of race. *See Palmare v. Sidoti*, 466 U.S. 429, 432 (1984) (Because race-based classifications are inherently suspect, racial classifications are "subject to the most exacting scrutiny."). And federal law expressly precludes race-matching in "adoption or foster care placements." 42 U.S.C. § 1996b(1). Noncompliance is "a violation of title VI of the Civil Rights Act of 1964." *Id.* § 1996b(2).

Except, that is, when an "Indian child" might be involved. *See* § 1996b(3) (carving out ICWA). When an Indian child is the subject of a custody matter, ICWA imposes race-matched "placement preferences," based on the law's presumption that it is "in the best interests of the [Indian] child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations." *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1355-56 (2014) (citation omitted). Accordingly, in the case below, the Minnesota Supreme Court discussed the separate and unequal placement regimes for "non-Indian children" and "Indian children[.]" *Matter of L.K.*, 32 N.W.3d 163, 177 (Minn. 2026).

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[2] The "best interests" standard is applied in the fifty States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. *See generally* Child Welfare Information Gateway, *Determining the Best Interests of the Child* (June 2020), https://tinyurl.com/4uvhc3xd.

ICWA's presumption cannot be squared with the traditional best-interests-of-the-child rule. *See Brackeen v. Haaland*, 994 F.3d 249, 319 (5th Cir. 2021) (en banc) (noting that ICWA's preferences "do in fact conflict with the otherwise applicable law of the" states), *aff'd in part, vacated in part, rev'd in part*, 599 U.S. 255 (2023); *In re W.D.H.*, 43 S.W.3d 30, 37 (Tex. Ct. App. 2001) (finding it "not possible to comply" with both state's best-interest-of-the-*child* test and ICWA's best-interest-of-the-*Indian*-child standard). Indeed, as the Montana Supreme Court noted, the best-interest standard "is *improper*" in ICWA cases because "ICWA expresses the presumption that it is in an Indian child's best interests to be placed in conformance with [its] preferences." *In re C.H.*, 997 P.2d 776, 782 (Mont. 2000) (emphasis added).

As a result, when a *non*-Indian child is the subject of a custody proceeding, state courts make placement decisions based on the individual child's best interests, but when an "Indian child" is involved, ICWA requires that state courts sacrifice the individual child's best interests for the collective interests of tribal organizations. *See, e.g.*, 25 U.S.C. § 1901(3) (Congressional finding asserting, "there is no *resource* that is more vital to the continued existence and integrity of Indian *tribes* than their children") (emphasis added). ICWA thus imposes substantial costs on both Indian children and their non-Indian families who want to care for them.

Below, Foster Parents describe the five-and-a-half-year ordeal they endured to obtain legal custody of

C.J. and the relevant provisions of ICWA's deeply distorted, race-matching process that caused this unconscionable delay.[3]

ARGUMENT

I. C.J.'s Story: The Indian Child Welfare Act Imposes Substantial Hurdles Before Non-Indian Parents Who Wish To Adopt Indian Children

A. C.J. becomes closely bonded with his Foster Parents and foster siblings

C.J. is a citizen of Ohio, where he was born in 2012. When he was two-and-a-half years old, Franklin County (Ohio) Children Services filed a complaint alleging that C.J. was a neglected, abused, and dependent child.[4] The County was given temporary custody, and he was immediately placed with Foster Parents in their Ohio home. *Matter of C.J.*, 108 N.E.3d at 681-82.

The County's intervention was prompted by the substance abuse, chronic homelessness, and periodic jail sentences of C.J.'s biological parents, who unfortunately failed to progress toward sobriety. As a result, C.J. remained with Foster Parents for an extended period. After approximately a year and a half, C.J.'s Guardian ad Litem filed a motion to terminate

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[3] Although Foster Parents finally obtained permanent custody of C.J., the parental rights of his Indian father have not been severed because of the additional hurdles placed on that process by ICWA, and the proceedings remain open, under the jurisdiction of the juvenile court in Ohio. Facts discussed here are drawn from the Ohio appellate court's published opinion, *In the Matter of C.J., Jr.*, 108 N.E.3d 677 (Ohio Ct. App. 2018).

[4] The abuse count was quickly dismissed.

the temporary court commitment and grant permanent custody to Foster Parents. The Guardian noted the continuing struggles of C.J.'s biological parents; and he advised the court that Foster Parents had provided "exemplary care" for C.J., who had "essentially become a member of the family" and who exhibited a "close bond" with his Foster Parents and his "foster siblings." *Matter of C.J.*, 108 N.E.3d at 682-83.

B. Gila River Indian Community intervenes to assert its collective interests, which were contrary to C.J.'s best interests under Ohio family law

Three days after the Guardian's motion was filed, the Gila River Indian Community (Tribe) intervened. *Matter of C.J.*, 108 N.E.3d at 683. This Arizona-based Tribe was allowed to intervene in C.J.'s Ohio custody proceeding because it claimed that C.J. was an "Indian child." *See* 25 U.S.C. § 1911(c) ("In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, . . . the Indian child's tribe shall have a right to intervene at any point in the proceeding.").

An "Indian child" is an unmarried person under eighteen who is "either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). The question whether C.J. was an "Indian child" was clearly a question of race and ancestry—not of political affiliation. According to the Tribe's Constitution and Bylaws, "membership" is limited to "persons of Indian blood." *Id.* art. III,

§ 1(a).[5] Children of members are entitled to membership "if they are of at least one-fourth Indian blood." *Id.* § 1(b). The Tribe claimed merely that C.J. was *eligible* for membership—and only because of his and his father's *race*. These requirements are consistent with those of most Native American tribes, which limit membership by expressly requiring a certain "blood quantum"[6] through a BIA-issued "Certificate of Degree of Indian Blood" establishing tribal ancestry.[7]

Though tribal membership may be based on ancestry instead of race,[8] *ICWA itself* makes race-matching its central goal. According to ICWA's foster-care or pre-adoptive "placement preferences" (discussed below), state courts must, absent a showing of good cause to the contrary, place an Indian child with his

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[5] *Constitution and Bylaws of the Gila River Indian Community, Arizona* (Mar. 17, 1960), https://tinyurl.com/4mxy35b7.

[6] Blood quantum requirements are generally expressed by some minimum fraction of "Indian blood" that must be established through genealogical ancestry, such as 1/4, 1/8, or 1/16 verifiable Indian heritage. *See generally* Ryan W. Schmidt, *American Indian Identity and Blood Quantum in the 21st Century: A Critical Review*, 2011 J. Anthropology 1, 6-7 (2012). For some tribes, membership eligibility is satisfied through blood-quantum ancestry in that particular tribe, while others—like the Tribe involved in C.J.'s case—are satisfied by blood-quantum ancestry in any Native American tribe. *Ibid.*

[7] *See* U.S. Dep't of the Interior, Bureau of Indian Affs., *Genealogy*, https://tinyurl.com/2y7hddtb.

[8] *See Brackeen*, 994 F.3d at 337 n.50 (discussing Cherokee Nation's membership rules). But practically speaking, almost all federally recognized tribes require either "lineal descent from someone named on the tribe's base roll" or "lineal descent from a tribal member who descends from someone whose name appears on the base roll." U.S. Dep't of the Interior, Bureau of Indian Affs., *A Guide to Tracing American Indian & Alaska Native Ancestry*, https://tinyurl.com/3924ec8k.

extended family, other members of the child's (ostensible) tribe, or *any* Indian family or *any* Indian-approved or Indian-operated institution. 25 U.S.C. § 1915(b).

C. ICWA grants extraordinary power and jurisdiction to tribal courts

Foster Parents and C.J. had to endure eighteen months of delays waiting for ICWA-imposed jurisdictional questions to be resolved—all the while, under the threat that C.J. would be removed from Foster Parents' home.

These delays arose because ICWA *requires* transfer, to a tribal court, of a state-court proceeding for foster-care placement of an Indian child who, like C.J., is not domiciled or residing within the reservation of the Indian child's (purported) tribe, unless one of the child's biological parents objects. 25 U.S.C. § 1911(b); *cf. Gila River Indian Cmty. v. Dep't of Child Safety*, 242 Ariz. 277, 281 (2017). After intervening, the Tribe moved to transfer the entire custody proceeding to its tribal court in Arizona. The Ohio juvenile court conducted a hearing, where C.J.'s Guardian, his biological mother's attorney, and a caseworker stated that C.J.'s best interests would be met by his remaining with Foster Parents in Ohio. The attorney for C.J.'s biological mother argued that good cause existed under § 1911(b) to deny transfer. C.J.'s Guardian did the same, noting the extraordinary physical or emotional needs of the child (as established by expert testimony); the bond between C.J. and his Foster Parents (which was among the strongest the Guardian had ever witnessed); and the psychological harm that would be caused by taking C.J. from Foster Parents' home and moving him 2,000 miles away. *See Matter of C.J.*, 108

N.E.3d at 684. The court continued the hearing but—even though C.J.'s biological mother had objected under § 1911(b)—the court later informed the parties of its intention to grant the Tribe's transfer motion. *Id.* at 685.

Two days before the Ohio hearing was to resume, the Tribe filed a "Child in Need of Care Petition" with its tribal court, which entered an *ex parte* order granting emergency temporary wardship. *Ibid.* This *ex parte* order purportedly made C.J. a ward of the tribal court and placed him under the care, custody, and jurisdiction of the Tribe's social services. *Ibid.* ICWA allows this extraordinary claim of jurisdiction. Under ICWA, if an Indian child is a ward of a tribal court, the Indian tribe "shall retain *exclusive* jurisdiction, *notwithstanding* the residence or domicile of the child." 25 U.S.C. § 1911(a) (emphasis added). The tribal court further ordered that C.J. be moved to the Tribe's Arizona reservation—where C.J. had never even visited—and placed in the physical custody of distant relatives—whom he had never met. Finally, the tribal court ordered C.J.'s biological parents to appear in the tribal court for all proceedings. *Matter of C.J.*, 108 N.E.3d at 685.

When the Ohio hearing resumed, the court ruled that the Tribe had not received proper notice of the Ohio proceeding,[9] and that the improper notice had

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[9] When a state court "knows or has reason to know" that an Indian child is involved in a custody mattery, ICWA requires notice to the child's tribe. 25 U.S.C. § 1912(a). Here, C.J.'s father initially told the County that he was of Pima heritage, but Pima is not a federally recognized tribe. (The Gila River Indian Community is made up of Pima and Maricopa peoples. *See* https://tinyurl.com/2ks7u9f7). As a result, the County sent

"so prejudiced this case that the case is null and void." The court dismissed the case in its entirety, granted the Tribe's transfer motion, and terminated the County's temporary custody of C.J. *Id.* at 686.

With the first case "null and void," C.J.'s Guardian immediately filed a second complaint in Ohio to protect C.J.'s best interests. The Ohio juvenile court, however, found no reason to deviate from BIA guidelines that require placing an Indian child in an Indian home or with an Indian relative. *Ibid.* Accordingly, on December 16, 2016—almost two years after C.J. was placed with Foster Parents—the court gave the tribal court's *ex parte* order full faith and credit and ordered that, *just two weeks later*, the Tribe would collect C.J. in Columbus and take him to Arizona. *Id.* at 687.

C.J.'s best interests—like those of Foster Parents'—were effectively ignored. Fortunately for C.J., his Guardian filed an emergency motion with the Ohio Court of Appeals, which stayed the juvenile court's orders on the day the Tribe was scheduled to take C.J. to Arizona. *Ibid.* C.J. was able to stay with Foster Parents (under the temporary custody of the County) while the Ohio juvenile and appellate courts resolved various matters.[10]

Ultimately, the appellate court reversed the juvenile court's order transferring the case to the tribal

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notice to the Bureau of Indian Affairs and the United States Department of the Interior Midwest Regional Office. Interior requested additional information, but the County did not further respond. The Tribe later became aware of the matter through C.J.'s mother's attorney. *See Matter of C.J.*, 108 N.E.3d at 682.

[10] Sadly, during this period, C.J.'s biological mother passed away. *Matter of C.J.*, 108 N.E.3d at 687.

court because (1) C.J.'s biological mother had objected under 25 U.S.C. § 1911(b); and (2) the juvenile court failed to consider C.J.'s best interests under the "good cause" exception in § 1911(b). *See Matter of C.J.*, 108 N.E.3d at 695.[11] The court further ruled that the juvenile court's order granting full faith and credit to the tribal court denied the Ohio parties due process of law. *Id.* at 697.

Finally, the appellate court reversed the juvenile court's order transferring custody of C.J. to the Tribe's social services. The appellate court recognized the Tribe's "protectable interest in its Indian children, and that the protection of this tribal interest is at the core of the ICWA." *Matter of C.J.*, 108 N.E.3d at 698 (citations omitted). But the juvenile court's order had been issued "without any analysis" of C.J.'s best interests and without consideration of whether good cause existed to depart from ICWA's placement preferences. *Id.* at 697.

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[11] The Ohio appellate court described the extraordinary circumstances of the tribal court's order:

> The tribal court order was procured by [the Tribe] from its own tribal court before the Ohio court transferred jurisdiction, before [the original Ohio custody] case . . . was dismissed, and was procured without notice to all the parties, and purports to exercise personal jurisdiction over C.J.[']s parents as well as C.J.[], who is not and never has been domiciled on, resided in, or even visited the reservation.

Matter of C.J., 108 N.E.3d at 695. Two of the three judges on the panel argued that, if the objection to transfer by C.J.'s biological mother was valid, the juvenile court need not have considered good cause to depart from the jurisdictional requirement of § 1911(a). *See id.* at 699 (Brown, J., concurring in part and concurring in judgment); *id.* at 703 (Luper-Schuster, J., concurring in part and concurring in judgment).

While the appellate court reached the right conclusion, the delay between the Tribe's motion to transfer jurisdiction (September 2016) and the appellate court's decision (March 2018) was eighteen months. By this time, C.J. had been in Foster Parents' exemplary care for over three years—a span of time that, to say nothing more, frustrates the intention of Ohio law "to encourage the speedy placement of children into permanent homes." *In re J.B.*, 2013-Ohio-1703, ¶ 37 (Ohio Ct. App.).

D. ICWA imposes race-matched placement "preferences" that discriminate against non-Indian foster parents

The matter returned to the juvenile court, which still had to decide where to place C.J. For pre-adoptive placement, ICWA mandates that "preference shall be given" to (1) a member of the Indian child's extended family, (2) a foster home specified by the Indian child's tribe, (3) *any* Indian foster home (licensed or approved by an authorized non-Indian licensing authority), or (4) *any* institution for children approved or operated by *any* tribe. 25 U.S.C. § 1915(b). Thus, the latter three placements do not require placement with members or institutions of the child's own tribe.

Because of ICWA's mandate, Foster Parents could maintain custody of C.J. only if they could overcome these preferences with a showing of "good cause to the contrary." *Id.* § 1915(b). While Congress had established standards of proof for other parts of ICWA,[12] it

[12] *See, e.g.*, 25 U.S.C. § 1912(e) (requiring "clear and convincing evidence" to order that a child be taken from his parents and placed in a foster-care placement); *id.* § 1912(f) (requiring "evidence beyond a reasonable doubt" to terminate parental rights).

never prescribed a standard to establish "good cause" under § 1915. But under a well-established rule of statutory construction, when Congress adopts heightened standards of proof in part of a law but not others, its "silence is inconsistent with the view that Congress intended to require a special, heightened standard of proof." *Grogan v. Garner*, 498 U.S. 279, 286 (1991). Accordingly, most courts have correctly applied a preponderance-of-the-evidence standard to the § 1915 analysis. *See, e.g.*, *Dep't of Human Servs. v. Three Affiliated Tribes of Fort Berthold Rsrv.*, 238 P.3d 40, 50 (Or. Ct. App. 2010).

But in 2016—almost thirty years after Congress enacted ICWA and after disclaiming authority to impose a standard—the BIA issued a regulation to require *clear and convincing evidence* to establish good cause under § 1915. *See Indian Child Welfare Act Proceedings*, 81 Fed. Reg. 38778-01, 38874 (Dec. 12, 2016); 25 C.F.R. § 23.132(b).[13]

Therefore, because C.J. was (in part) Indian and because Foster Parents had no "Indian blood," ICWA imposed a burden on Foster Parents to show—by clear and convincing evidence—"good cause" to depart from the Act's race-based placement "preferences."

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[13] For most of ICWA's existence, the BIA believed that it lacked authority to exercise "supervisory control over state or tribal courts" and that such action would be "extraordinary" and "so at odds with concepts of both federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of Congressional intent to that effect." *Guidelines for State Courts*; *Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584 (Nov. 26, 1979). And Congress never issued that express declaration.

E. Foster Parents—finally—prevail

Ultimately, Foster Parents did establish "good cause" to depart from ICWA's placement preferences, but not until May 2020—more than two years after the Ohio appellate court returned the matter to the juvenile court, and *five and a half years* after C.J. was first placed with Foster Parents.

Foster Parents almost certainly could not have afforded to overcome ICWA's "preferences" without pro bono counsel—and should never have been put in that position. But for C.J. and Foster Parents' respective races, Foster Parents' request for legal custody would have been analyzed solely under the "best interests" test that is used for every other child in Ohio's juvenile court system.

Foster Parents (again) acknowledge that ICWA was passed in response to "federal policy [that] consciously sought to separate Indian children from their parents." Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 Child. Legal Rts. J. 1, 7 (2020). *See also Brackeen*, 994 F.3d at 284-85 (discussing state abuses that led to ICWA). And Foster Parents agree with the intention of ICWA, which was to reject the idea that stereotypes—specifically, the idea that a "white" upbringing was preferred for Indian children—should be used in custody proceedings. But ICWA's race-matching preferences have resulted in a similar problem—individual Indian children are sacrificed for collective interests, under a race-based presumption that Indian children uniquely need an Indian upbringing.

But for ICWA, C.J. would almost certainly have been placed under the permanent "exemplary" care of

Foster Parents four years earlier than he was—indeed, he likely would have been adopted, which is the preferred outcome for dependent children whose birth parents have failed efforts at progress. Instead, C.J. faced years under the constant threat of being taken from Foster Parents, with whom he was closely bonded, and moved 2,000 miles away from the only state he had ever called home and away from his Foster Parents and foster siblings.

II. C.J.'s Story Is Far From Unique: ICWA Routinely Subordinates Children's Best Interests, With Potentially Devastating Consequences

Sadly, C.J.'s story is far from exceptional. Because ICWA supplants the "best interests of the child" standard that governs virtually every other custody proceeding under state law, *see supra* pp. 3-6, children subject to the Act may spend years in legal limbo, may be transferred to questionable "preferred" placements with strangers, or may even be returned to patently unfit parents—resulting in grave harm, or even death, to the child.

Begin with delay. Like C.J.—who spent five-and-a-half years under the threat of removal from the only family he had ever truly known—Indian children routinely wait years longer than other children for the permanency that state law strives to provide every child. In *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), a little girl spent the first twenty-seven months of her life with the only parents she had ever known before ICWA was invoked to remove her, and another eighteen months passed before this Court's decision allowed her adoption to proceed. As this

Court recognized, ICWA's separate rules "unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home." *Id.* at 653-54. And these delays are not aberrations but the predictable product of ICWA's design: A comprehensive survey of ICWA litigation concluded that the Act's heightened burdens, dual-preference regime, and tribal-intervention rights ensure that "the child's individualized needs" are subordinated to collective interests at every procedural stage. *See* Timothy Sandefur, *The Unconstitutionality of the Indian Child Welfare Act*, 26 Tex. Rev. L. & Pol. 55 (2022); Sandefur, *supra*, 37 Child. Legal Rts. J. at 1.

But limbo can be better than ICWA's race-matched "preferred" placements with strangers. The notorious case of "Lexi" is illustrative. Lexi—a six-year-old girl who is 1/64th Choctaw—had lived with her California foster family, the Pages, since she was two years old. The Pages sought to adopt her. But because of her ancestry, the Oklahoma-based Choctaw Nation invoked ICWA's placement preferences, and Lexi—like C.J., who also faced the prospect of removal to a distant state—was taken, sobbing, from the only home she had known and sent to live with her step-grandfather's niece. *See In re Alexandria P.*, 1 Cal. App. 5th 331, 339-42 (2016). As in C.J.'s case, the question was never simply what placement served Lexi's best interests. Instead, the court presumed that her best interests aligned with ICWA's placement preferences and concluded that her foster parents failed to show good

cause otherwise by clear and convincing evidence. *Id.* at 357.[14]

And worse still, ICWA's separate-and-unequal rules have returned Indian children to demonstrably dangerous homes—with fatal results. Five-year-old Declan Stewart of Oklahoma was removed from his mother's custody after suffering a fractured skull at the hands of her live-in boyfriend. Had Declan not been an "Indian child," state officials could have placed him in a safe home. But after the Cherokee Nation invoked ICWA, the State returned Declan to his mother. Approximately one month later, her boyfriend beat Declan to death.[15]

Three-year-old Laurynn Whiteshield met a similar fate. From the age of nine months, Laurynn and her twin sister Michaela were raised by Jeanine Kersey-Russell, a Methodist minister and third-generation foster parent in Bismarck, North Dakota. When Kersey-Russell sought to adopt the girls, the Spirit Lake Sioux Tribe—which had shown no prior interest in the twins—invoked ICWA, after which the girls were removed to the reservation and placed with their grandfather, whose household included a woman with a documented history of child abuse. Less than six weeks

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[14] Lexi's removal was nationally televised. *See* Sara Sidner, Traci Tamura & Amanda Watts, *Protests, Tears as Girl in Tribal Custody Battle Removed from Foster Home*, CNN (Mar. 23, 2016), https://tinyurl.com/mv2x2kuf.

[15] Sandefur, *supra*, 26 Tex. Rev. L. & Pol. at 66-67 (describing the Stewart case); Jay F. Marks, *Edmond man convicted in 5-year-old's death*, The Oklahoman (June 10, 2009) https://tinyurl.com/4vt7998k.

later, Laurynn was dead—thrown down an embankment by the grandfather's wife. Michaela was returned to foster care.[16]

Five-year-old Antonio "Tony" Renova's death is more recent. Born with fetal alcohol syndrome to parents then in jail on violent felony charges, Tony was placed at three days old with Jeff and Christy Foster, who raised him in a loving Montana home for five years. In 2019, the Crow Tribal Court—before which the Fosters, as non-members, could not even appear—ordered Tony returned to his biological parents, both then on probation following felony convictions (the mother's including child endangerment). Within months, Tony was beaten to death; and his biological parents were charged with his murder.[17]

These tragedies are not the product of isolated errors in judgment. They are the predictable consequence of a statutory scheme that, by design, displaces the individualized best-interests inquiry whenever a child has the wrong ancestry—and then compounds that constitutional error by discriminating against potential foster and adoptive placements on the basis of *their* race. A state that *knows* a home is unsafe may nonetheless be required—by ICWA's "ac-

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[16] Timothy Sandefur, *Treat Children as Individuals, Not as Resources*, Cato Unbound (Aug. 1, 2016), https://tinyurl.com/mw64e55a; *see also* George F. Will, *The Brutal Racial Politics of the Indian Child Welfare Act*, Wash. Post (Jan. 5, 2022), https://tinyurl.com/43hthhw5 (recounting the Whiteshield and Renova cases).

[17] Naomi Schaefer Riley, *The Indian Child Welfare Act: A Law That Paved the Way for a 5-Year-Old's Death*, Am. Enter. Inst. (Jan. 16, 2020), https://tinyurl.com/3rj6an7j; *see also* Will, *supra* note 16.

tive efforts" mandate, its heightened evidentiary burdens for removal and termination, and its race-matched placement preferences—to return a child to that home, or to remove a child from a known safe and loving home to be placed with a stranger, solely because of race. 25 U.S.C. §§ 1912(d)-(f), 1915(a)-(b). C.J. was fortunate: after five and a half years, the Ohio courts ultimately protected his best interests. Declan, Laurynn, and Tony were not so fortunate. No child's safety should turn on the happenstance of ancestry—and no statute that makes it so can be squared with the Constitution's guarantee of equal protection.

III. ICWA Violates The Rights Of Non-Indian Foster, Adoptive Placements, And The "Best Interests" Of Children

A. Non-Indian placements face greater placement hurdles solely because of their race

As C.J. and Foster Parents' ordeal makes clear—ICWA discriminates against *both* Indian children *and* non-Indian families seeking custody of Indian children.

ICWA's placement preferences are triggered by a child's race. And once they apply to a state custody proceeding, all non-Indian individuals or families seeking foster or adoptive placements find themselves at a grave disadvantage throughout the remainder of the process—solely due to their race. ICWA's placement preferences treat *any* Indian placements, provided they are a member of *any* Indian tribe, as preferable to a non-Indian placement. Indeed, for foster care placements, ICWA prefers Indian-approved or

-operated *orphanages* over non-Indian foster *families*. ICWA thus deprioritizes non-Indian placement options based on the law's presumption that placing an Indian child with Indian families (or orphanages) is *always* in an Indian child's best interests.

Because ICWA disregards all social and cultural connections of the individuals involved, its placement preferences can only be understood as relying on the ancestry and/or race of the proposed foster and adoptive parents. And because ICWA categorically excludes non-Indians from its placement preferences, non-Indians are necessarily deprived of race-neutral proceedings when they seek custody of Indian children.

If Foster Parents had Native American ancestry, they would have been "preferred placements" for C.J. Instead, only because of their races, Foster Parents were forced to prove, by clear and convincing evidence, good cause to depart from ICWA's race-matching "preferences." In this way, ICWA discriminated against loving, bonded foster parents, solely because they lack Native American ancestry.

B. ICWA demotes the best interest of individual children

If there is one universal principle in child-protection laws across the country, it is that the child's individual and fundamental rights take precedence over any state or collective. *See* Sandefur, *supra*, 26 Tex. Rev. L. & Pol. at 89 (compiling cases referring to the best interests of the child as the "'bedrock,' the 'lodestar,' the 'guiding principle,' the 'guiding light,' the 'primary consideration,' the 'foremost concern,' and—naturally—the 'gold standard'") (footnotes omitted).

To be sure, before ICWA, state courts often relied on racist premises to hold that the best interests of an Indian child were served by placement with a white family. ICWA now requires state courts to operate under a different—but equally unacceptable—presumption that placement with an Indian family (or institution) is always in an Indian child's best interests.

ICWA thus subordinates the rights of individual Indian children to the collective interests of tribes. ICWA's congressional findings refer to children not as individual children in need of special protection, but as tribal "resource[s]." 25 U.S.C. § 1901(3). ICWA's proponents embrace the collectivist notion that tribal rights are more important than the safety and happiness of individual Indian children, and rely on racist stereotypes for justification. *But see* Bonnie Cleaveland, *Split Feather: An Untested Construction Indian Child Welfare Act* (Mar. 2015) (discussing flaws in study purporting to show that Indian children—by virtue of their race—have a unique need for tribal connection).[18]

And because ICWA's placement preferences are designed to override the state-law best-interests analysis, it necessarily means that, when ICWA applies, a child's individual needs and desires are relegated to a lesser status, and she is deprived of an inquiry into her best interests. As detailed in Parts I and II, this disregard for the well-being of the individual child can lead to pernicious outcomes.

The individual well-being and happiness of American citizens is therefore undermined to appease the wishes of a distant tribal sovereign with which the

[18] https://tinyurl.com/4br257n8.

child may have no connection whatsoever. This is precisely backwards. The Constitution conclusively declares that equality under the law must prevail. *See* Federalist No. 45 (James Madison) ("[A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter.").

CONCLUSION

Foster Parents are thankful that the Ohio juvenile court ultimately found that it was in C.J.'s best interests to remain in their care. They submit, however, that the process imposed by ICWA—imposed only because C.J. is (partly) Indian and Foster Parents are not—caused unnecessary delay and emotional turmoil for both C.J. and Foster Parents. They endured a five-and-a-half-year ordeal constantly under the threat that C.J., whom they welcomed into their home and who truly became a member of the family, could be taken away at any moment. Foster Parents ask the Court to grant certiorari and end ICWA's race-matching placement preferences.

Respectfully submitted,

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JUNE 2026