No. 95

In The
Supreme Court of the United States

S.S. and S.S.,

Petitioners,

v.

THE COLORADO RIVER INDIAN TRIBES, STEPHANIE H., and GARRETT S.,

Respondents.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901 *et seq.*, was enacted to address the problem of unjustified removal of Indian children from their parents by "nontribal public and private agencies" and their placement in "non-Indian foster and adoptive homes and institutions." *Id.* § 1901(4). That concern is absent in a private action for termination of parental rights, which is a private dispute between birth parents, involving no government entity. Nevertheless, the court below—in conflict with other state courts of last resort, and this Court's precedent—held that ICWA Sections 1912(d) (the active-efforts provision) and 1912(f) (the termination-burden provision) apply to such private disputes.

ICWA's more onerous set of evidentiary and procedural standards, including the "active efforts" and beyond-a-reasonable-doubt requirements at issue here, apply only to cases involving "Indian child[ren]," *id.* § 1903(4)—not to cases involving children who are white, black, Hispanic, Asian, or of any other ethnic or national origin.

The questions presented are:

1) Do ICWA Sections 1912(d) and 1912(f) apply in a private severance action initiated by one birth parent against the other birth parent of an Indian child?

2) If so, does this *de jure* discrimination and separate-and-substandard treatment of Indian children violate the Due Process and Equal Protection guarantees of the Fifth and Fourteenth Amendments?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, S.S. and S.S., are minors. Respondent Stephanie H. is the birth mother of Petitioners. Respondent Garrett S. is the birth father of Petitioners. Respondent Colorado River Indian Tribes is a federally-recognized Indian tribe that intervened in the trial court pursuant to 25 U.S.C. § 1911(c).

None of the parties are corporations.

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PETITION FOR A WRIT OF CERTIORARI

S.S. (born in 2000) and S.S. (born in 2002), respectfully request this Court to grant their petition for a writ of certiorari to the Arizona Court of Appeals, Division One.

OPINIONS BELOW

The Arizona Supreme Court's order denying discretionary review is reproduced at App. 49a–50a. The decision of the Arizona Court of Appeals, Division I, *S.S. v. Stephanie H.*, 388 P.3d 569 (Ariz. App. 2017), is reproduced at App. 1a–16a. The decision of the Arizona Superior Court in and for the County of La Paz is reproduced at App. 17a–27a.

JURISDICTION

The Arizona Supreme Court filed its order denying review on April 19, 2017. App. 49a–50a. This Court has jurisdiction under 28 U.S.C. § 1257(a). This petition is timely filed.

RULE 29.4(b) STATEMENT

The decision below calls into question the validity of 25 U.S.C. §§ 1903(1)(ii), 1912(d), 1912(f). The United

States was not a party in the state-court proceedings. Thus, 28 U.S.C. § 2403(a) may now apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional and statutory provisions, namely, U.S. CONST. amends. V, XIV § 1; 25 U.S.C. §§ 1901–1903, 1912, Ariz. Rev. Stat. ("A.R.S.") §§ 8-533, 8-537, are reproduced in relevant part at App. 51a–62a.

INTRODUCTION AND STATEMENT OF THE CASE

The facts and procedural history of this case are summarized in the Court of Appeals' opinion at ¶¶ 2–8. App. 2a–5a. As relevant here, Garrett S. and Stephanie H. had two children, S.S. and S.S., petitioners here. They are "Indian child[ren]" under ICWA. 25 U.S.C. § 1903(4).[1]

Garrett S. and Stephanie H. divorced in 2005. Op. ¶ 2. App. 2a. Garrett S. filed a petition for termination of parental rights ("TPR") against Stephanie H. in December 2012, alleging abandonment and neglect. Op. ¶ 5. App. 3a. The children, Garrett, and Garrett's wife Laynee S., all want Laynee to formally adopt S.S. and

[1] No party to this case is now or ever was domiciled on a reservation.

S.S. Laynee has been every bit their mother, and in ways that Stephanie never was.

Between early- to mid-2009 and January 2016, parties engaged in protracted active efforts even though the court had awarded "continued *sole legal and physical custody*" to Garrett S. in 2009. Op. ¶¶ 4–5. App. 3a–4a (emphasis added). By the time of the trial in January 2016, Stephanie H. "had not seen the children since May 2009." Op. ¶ 5. App. 4a.

Private TPR actions are private disputes between ex-couples. While the child protective services ("CPS") agency of a state also may initiate termination-of-parental-rights actions to protect children from abuse, abandonment, or neglect, no such state-initiated action is at issue here. In other words, this case involves the quintessential private family dispute—*not* a dispute in which any state agency is involved.

Ordinarily, a private TPR action is resolved by reference to state law that sets forth grounds therefor and the evidentiary standard by which those grounds are proven. In Arizona, A.R.S. §§ 8-533 and 8-537 specify grounds for TPR—such as neglect, abandonment, drug abuse, etc. These must be proven by clear and convincing evidence. A.R.S. § 8-537; *Kent K. v. Bobby M.*, 110 P.3d 1013, 1018 ¶ 22 (Ariz. 2005). And it must also be proven, by preponderance of the evidence, that TPR is in the child's best interests. *Id.* That is the baseline standard that applies to *all* Arizona-resident children—Indian, as well as non-Indian.

But because S.S. and S.S. are "Indian children" as defined in ICWA, the court below held that *additional* procedural and substantive rules apply to this private TPR action.

Congress enacted ICWA to address the problem of unwarranted removal of Indian children "by nontribal public and private agencies" and their placement in non-Indian foster and adoptive homes or institutions, 25 U.S.C. § 1901(4)—a concern that is *entirely absent* in a privately-initiated TPR proceeding, which is an ex-couple's private quarrel.

The court below applied ICWA to such a private quarrel. The children ask this Court whether and to what extent ICWA Sections 1912(d) and (f) apply in a privately-initiated TPR proceeding—and if so, whether the *de jure* discrimination established by applying separate and less-protective rules to this case based on the race, color, or national origin of the children violates the Constitution.

State courts are divided, creating a patchwork of non-uniform federal law. Given the lack of factual disputes here, this case is an ideal vehicle to resolve these exceptionally important questions.

PROCEDURAL HISTORY

Garrett S. filed the TPR petition in December, 2012. Op. ¶ 5. App. 3a. In January, 2016, the case came to trial. The Colorado River Indian Tribes ("CRIT")

intervened and fully participated at trial. Op. ¶ 6. App. 4a. Over the course of two days, S.S., S.S., and Garrett S. presented approximately 160 exhibits. App. 74a–85a. Stephanie H. then moved to dismiss on the grounds that ICWA's statutory grounds for TPR had not been met. Op. ¶ 7. App. 4a–5a.

The trial court granted the motion to dismiss, noting that Garrett S. *had* offered "sufficient evidence to go forward on abandonment" under state law, and *had* offered "sufficient evidence to show [TPR] would be in the best interests of the children" under *Kent K.*, *supra*, and had also offered "'at least some' evidence that continued custody by Mother was likely to result in serious emotional or physical damage to the children" under 25 U.S.C. § 1912(f), but "had not offered sufficient evidence to prove unsuccessful 'active efforts' to prevent the breakup of the family" under 25 U.S.C. § 1912(d). *Id.*

In other words, the motion to dismiss was granted solely as a consequence of ICWA. If S.S. and S.S. were not "Indian children," a different result would have followed.

The children appealed, arguing that ICWA Sections 1912(d) and (f) do not apply to private TPR actions, and if they do, they are unconstitutional. Op. ¶ 8. App. 5a. But the Arizona Court of Appeals affirmed, holding, *first*, that ICWA did apply—meaning that parties needed to engage in "informal private initiatives aimed at promoting contact by a parent with the child and encouraging that parent to embrace his or her

responsibility to support and supervise the child," and *prove* by clear and convincing evidence that such efforts were unsuccessful. Op. ¶ 22. App. 12a–13a. *Second*, the court ruled that "the additional requirements ICWA imposes" on TPR cases involving Indian children "are rationally related to the federal government's desire to protect the integrity of Indian families and tribes" and therefore do not violate the Constitution's Equal Protection guaranty. Op. ¶ 27. App. 16a. The children petitioned the Arizona Supreme Court, but it denied review. App. 49a–50a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. ICWA imposes different substantive and procedural rules on cases involving Indian children than children of other races.

The simplest way to understand what is at stake here is by imagining two boxes.

In the *first* box is an Arizona-resident American-citizen child who is white, black, Hispanic, Asian, Serbian, or Hindu. Arizona law provides that in a case involving such a child, when a parent or other private party petitions for the termination of the parent–child relationship, the petitioner must (a) establish one of the statutory grounds for TPR set forth in A.R.S. § 8-533, (b) do so by clear and convincing evidence, A.R.S. § 8-537(B), and (c) establish by a preponderance of the evidence that TPR is in the child's best interests. *Kent K. v. Bobby M.*, 110 P.3d 1013, 1018 ¶ 22 (Ariz. 2005).

In the *second* box is an Arizona-resident "Indian child" as defined in ICWA. "Indian child" means a child who is either a tribal member or who is *eligible* for tribal membership and has a parent who is a member. 25 U.S.C. § 1903(4). Eligibility is virtually always determined exclusively by biology: for example, CRIT—the tribe involved here—requires a person to have 25 percent "Indian" blood (of *any* tribe), and to be a direct descendant of a signer of the 1937–39 Colorado River Agency Census Rolls. CRIT CONST. art. II, § 1(a).[2] Political, cultural, or religious affiliation are not a factor. Nor is ICWA geographically limited. Any child anywhere who has the requisite DNA in his or her veins, is placed in this second box, and is subject to ICWA. For such a child, the party petitioning must establish the following, "*in addition* to state law requirements" from the first box, *Valerie M. v. Arizona Dep't of Econ. Sec.*, 198 P.3d 1203, 1207 ¶ 16 (Ariz. 2009) (emphasis added):

- by "clear and convincing evidence," *Yvonne L. v. Arizona Dep't of Econ. Sec.*, 258 P.3d 233, 242 ¶ 39 (Ariz. App. 2011), that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful," 25 U.S.C. § 1912(d); and
- "by evidence beyond a reasonable doubt . . . that the continued custody of the child by the parent or Indian custodian is likely to result

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[2] http://www.crit-nsn.gov/crit_contents/ordinances/constitution.pdf.

> in serious emotional or physical damage to the child." *Id.* § 1912(f).

In this case, the court below, as a matter of first impression, held that Sections 1912(d) and (f) of ICWA apply in a private TPR action. That means that S.S. and S.S., in this private dispute, are subjected to a separate-and-substandard treatment: it is harder for their birth father to take action to protect their interests than it would be, if they were of a different ethnic or national origin. That *de jure* distinction between private TPRs of Indian children and those involving all other children harms these Indian children in a manner that "raise[s] equal protection concerns." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013).

ICWA was designed to prevent and remedy harms caused by aggressive "*nontribal public and private agencies*." 25 U.S.C. § 1901(4). It was not designed to apply to a private family dispute in which an Indian parent seeks to protect the best interests of his child by severing the rights of an unfit birth parent. In *Adoptive Couple*, 133 S. Ct. at 2562–64, this Court concluded that it makes no sense to apply ICWA Sections 1912(d), (f), and 1915(a), to a case in which no Indian family was faced with "breakup." Here, too, no Indian family is faced with breakup by the action of any state entity.

There is no risk here of the sorts of abuses ICWA was meant to prevent and remediate. No Indian family is threatened with breakup; on the contrary, Garrett S. is the Indian parent, seeking the best interests of his son and daughter, and the trial court has already found

sufficient evidence to justify TPR on grounds of abandonment and that such TPR would be in the best interests of the children. Op. ¶ 7. App. 4a.

But if the parties here are placed in the ICWA penalty box, the rules are entirely different. Different burdens of proof apply, and different—and *additional*—substantive requirements must be satisfied. All to prevent an injury that is not threatened here. The only consequences of applying ICWA here are to delay proceedings, increase the burdens and costs on the parties while they comply with the nebulous, undefined duty of "active efforts," subject the parties to more onerous legal standards, and "put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Adoptive Couple*, 133 S. Ct. at 2565.

To make clearer how ICWA results in a set of different laws being applied to children on the basis of an "immutable characteristic determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), consider the following: Table 1 summarizes the difference in how Indian children are treated in Arizona as compared to how Indian children are treated in other states. Table 2 summarizes the difference in how Indian children are treated in Arizona compared to all other Arizona-resident children.

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Table 1: Application of ICWA in Arizona compared to its application in other states

	Arizona	**Other States**
Level of proof required to satisfy the active-efforts provision	Clear and convincing evidence (*Yvonne L., supra*)	• Preponderance of the evidence (Alaska, Illinois, Nebraska) • Clear and convincing evidence (North Dakota) • Beyond a reasonable doubt (Utah) • Beyond a reasonable doubt or clear and convincing evidence (split between Colorado intermediate appellate courts)
Do ICWA Sections 1912(d) and (f) apply in private family disputes?	Yes (*S.S. v. Stephanie H.*)	• No (California, Montana, Nebraska, New Mexico, Wisconsin, Wyoming) • Yes (Washington, Alaska, Colorado)

Table 2: *De jure* distinction between privately-initiated severances of Indian children and privately-initiated severances of all other children

	All other children	**Indian children**
Efforts to reunify child with parent	Default rule: reasonable efforts	• Active efforts, greater than reasonable efforts (Oklahoma, Oregon, Utah) • Active efforts, equivalent to reasonable efforts (Colorado) • Active efforts; silent as to whether they are greater than or equivalent to reasonable efforts (Arizona)

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	All other children	Indian children
Are efforts to reunify excused?	Yes, excused if listed aggravated circumstances are present.	Not excused if listed aggravated circumstances are present.
Abandonment in Arizona	Reasonable efforts are excused if aggravated circumstances such as abandonment are present.	Active efforts are required even in cases of abandonment.
Evidence of abandonment in Arizona	Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment. A.R.S. § 8-531(1).	Show active efforts were unsuccessful even if state law abandonment proved; active efforts were conducted in this case for *seven* years (2009–16).
Differences between state-initiated and privately-initiated severance actions in Arizona?	There are meaningful differences.	There is no meaningful difference between state-initiated and privately-initiated severance actions.
Grounds for TPR in Arizona		
Statutory grounds	Prove statutory grounds by clear and convincing evidence.	
Child's best interests	Prove child's best interests by a preponderance of the evidence.	
Additional grounds for severance	None	Prove active efforts were undertaken and were unsuccessful by clear and convincing evidence.
		Prove continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child by evidence beyond a reasonable doubt.

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There is *one* manner in which Indian children are not treated differently than their non-Indian peers in Arizona: in a private TPR action, the petitioner must prove the statutory termination grounds by clear and convincing evidence, and that severance is in the child's best interests[3] by a preponderance of the evidence.[4] But that is where the equal treatment ends. Beyond that, the procedural and substantive rules applied in the private severance action involving an Indian child are vastly different—and *substandard*.

1. Arizona law, like the laws in most states, and like the federal Adoption and Safe Families Act, requires *state child protection officers* to make "reasonable efforts" to "preserve and reunify families" before seeking to terminate parental rights. 42 U.S.C. § 671(a)(15); A.R.S. § 8-522(E)(3). These "reasonable efforts" are *not* required, though, when "aggravated circumstances," including "abandonment" are present. 42 U.S.C. § 671(a)(15)(D).

But ICWA requires "*active* efforts" rather than "reasonable efforts." This is not mere semantics. This

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[3] At least one state court has held that "ICWA provides more limited recognition of the child's best interests." *In re N.B.*, 199 P.3d 16, 24 (Colo. App. 2007).

[4] All 50 states and the District of Columbia require statutory grounds be proven by clear and convincing evidence because of this Court's holding in *Santosky v. Kramer*, 455 U.S. 745 (1982), that due process demands something more than the mere preponderance standard. The *Santosky* Court acknowledged, however, that the beyond-a-reasonable-doubt standard that ICWA imposes can "erect an unreasonable barrier to state efforts to free permanently neglected children for adoption." *Id.* at 769.

difference moves the child custody proceeding of a Native American child in a completely different direction than that of a non-Indian child. While ICWA does not define "active efforts," most courts have held that it means something *more* than reasonable efforts. *See, e.g., In re J.S.*, 177 P.3d 590, 593 ¶ 14 (Okla. App. 2008); *In re K.L.D.*, 207 P.3d 423, 425 (Or. App. 2009); *In re C.D.*, 200 P.3d 194, 205 ¶ 29 (Utah App. 2008).[5]

Furthermore, ICWA's "active efforts" requirement is *not* excused—as "reasonable efforts" is—in cases of aggravated circumstances such as abandonment. *See In re J.S.B., Jr.*, 691 N.W.2d 611, 618 ¶ 20 (S.D. 2005) ("[W]hile the presence of 'aggravated circumstances' may eliminate the need to provide 'reasonable efforts' under [state law], it does not remove [the CPS department's] requirement to provide 'active efforts' for reunification under ICWA.").

2. In Arizona, efforts to reunify a parent with a child before seeking severance of the parent's rights on the statutory ground of abandonment is *not* required "in the absence of an existing parent–child relationship." *Toni W. v. Arizona Dep't of Econ. Sec.*, 993 P.2d 462, 467 ¶ 15 (Ariz. App. 1999). The absence of an existing parent–child relationship is *the definition* of

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[5] Other courts have held that active efforts are "equivalent to reasonable efforts." *In re K.D.*, 155 P.3d 634, 637 (Colo. App. 2007). Arizona courts have not yet decided this question. *See, e.g., Iona T. v. Arizona Dep't of Econ. Sec.*, No. 2 CA-JV 2009-0025, 2009 WL 3051509, at *3 ¶ 11 (Ariz. App. 2009). This lack of uniformity only highlights the need for this Court's guidance on these matters.

abandonment. *See* A.R.S. § 8-531(1) (defining "abandonment"). This Court has said that such lesser protection of a parent's rights is justified because "the mere existence of a biological link" merely gives the parent "an opportunity . . . to develop a relationship with [the] offspring"; if the parent fails to "come forward to participate in the rearing of h[er] child"—like Stephanie H. here—then the parent's constitutional rights are not violated by failing to take efforts to reunify her with the children. *Lehr v. Robertson*, 463 U.S. 248, 261, 262, 267 (1983). That is because "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Caban v. Mohammed*, 441 U.S. 380, 397 (1979).

3. There are notable differences in state-initiated and privately-initiated TPR actions—differences designed to protect the constitutional rights of parents and children. For example, it would be absurd to have state-initiated divorce proceedings; divorce actions are necessarily initiated by private parties.

But when a government agency interferes in the family relationship, greater protections are warranted. That is why, when the state intervenes to protect a child from abuse or neglect, it is considered proper for the government to undertake some efforts at reunification. But those efforts must be limited, because imposing such forcible conciliation in private TPR actions could threaten associational freedoms of the individuals involved—of the child, of the birth parents, of the stepparent. Private TPR actions are highly sensitive

family affairs—a "momentous act[] of self-definition" by the family which the government must take care to respect rather than override. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (citation omitted).

In short, applying ICWA to *private* TPR cases accomplishes no legitimate government purpose and causes extraordinary harm. It would mean that even *Indian parents* seeking termination in the best interests of *their own children* would be forced to make active efforts to reunify their children with the parent they consider unfit—a self-contradiction that would essentially force a parent to take steps she considers unsafe for her child. That simply does not secure the interests of the children or Indian tribes.

4. The Court below held that Garrett S. was required to prove *beyond a reasonable doubt, on the testimony of expert witnesses*, "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child," 25 U.S.C. § 1912(f), even though Stephanie H. lost legal and physical custody of S.S. and S.S. in 2009 pursuant to a court order that is not in dispute here. Obviously, the difference between burdens is significant. In *Santosky*, this Court refused to impose a "beyond a reasonable doubt" standard on TPR cases in light of the need to balance the rights of children with those of parents. Too high a burden of proof endangers children, especially because proof of "emotional . . . damage," 25 U.S.C. § 1912(f), is *"rarely* susceptible to proof beyond a reasonable doubt." *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (emphasis added); *Addington*

v. Texas, 441 U.S. 418, 432 (1979) (beyond-reasonable-doubt standard is "inappropriate . . . because, given the uncertainties of psychiatric diagnosis, it may impose a burden the [party] cannot meet and thereby erect an unreasonable barrier to [relief]").

II. There is an irreconcilable and acknowledged split between the courts of Arizona and those of other states regarding the application of ICWA in private TPR cases.

State courts are divided[6] on whether and to what extent ICWA applies to private severance cases.

A. State courts are in disarray regarding whether ICWA applies to private family disputes.

This Court and some state courts have held that ICWA Sections 1912(d) and (f) do not apply in certain situations. *Adoptive Couple*, *supra*, held that Sections 1912(d) and (f) do not apply where the parent of an Indian child abandoned the child so that there is no threat of the breakup of an Indian family. 133 S. Ct. at 2557. That case called Section 1912(d) "a sensible requirement when applied to *state social workers* who

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[6] ICWA is virtually always applied in state, rather than federal, courts, given that it overrides state family law on matters over which federal district courts virtually never have jurisdiction. Nor does ICWA apply in tribal courts. Therefore, in this context, a split of authority between state courts creates the same fractured, non-uniform application of federal law that a circuit split ordinarily does.

might otherwise be too quick to remove Indian children from their Indian families," but held that "[c]onsistent with the statutory text," ICWA "applies only in cases where an Indian family's 'breakup' would be precipitated by the termination of the parent's rights." 133 S. Ct. at 2562–63 (emphasis added).

In *In re Bertelson*, 617 P.2d 121, 125 (Mont. 1980), the Montana Supreme Court held succinctly that ICWA was "not directed at disputes between Indian families regarding custody of Indian children." That case involved a dispute between grandparents and a mother over custody of a child; all parties were tribal members. *Id.* The court found that ICWA did not apply, because ICWA was written "to preserve Indian culture [*sic*] values under circumstances in which an Indian child is placed in a foster home or other protective institution," which was not the circumstance presented. *Id.* Instead, the case was an "internal family dispute," which "does not fall within the ambit of the Indian Child Welfare Act." *Id.* at 125–26.

The Texas Court of Appeals likewise found in *Comanche Nation v. Fox*, 128 S.W.3d 745 (Tex. App. 2004), that ICWA did not apply to the modification of a conservatorship agreement in a case involving no government agency. It explained that "the Act's congressional findings reveal the intent that it apply only to situations involving the attempts of public and private agencies to remove children from their Indian families, not to inter-family disputes." *Id.* at 753.

In *In re J.B.*, 100 Cal. Rptr. 3d 679 (Cal. App. 2009), the California Court of Appeal held that "ICWA does not apply to a proceeding to place an Indian child with a *parent*." *Id.* at 683. Section 1912(f) of ICWA, it held, did not apply in a dispute between two birth parents. In so holding, the court noted that such a reading "comports with the remainder of the ICWA statutory scheme and the express purpose of ICWA." *Id.*

Similarly, in *In re M.R.*, 212 Cal. Rptr. 3d 807 (Cal. App. 2017), the California Court of Appeal found that ICWA did not apply to a case in which CPS workers removed children and placed them with their grandmother, and then later placed them with their birth father. The court found that ICWA was intended to remediate "the removal of Indian children from their families and the placement of such children in foster or adoptive homes," and therefore did not apply to the case at hand because "[p]lacing 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." *Id.* at 822.

Other state courts have held the same. In *In re Micah H.*, 887 N.W.2d 859 (Neb. 2016), the Nebraska Supreme Court held that ICWA Sections 1912(d) and (f) did not apply to a private severance petition filed by maternal grandparents against the birth father, because no "breakup" of an Indian family would result. In *Cherino v. Cherino*, 176 P.3d 1184, 1186 (N.M. App. 2007), the New Mexico Court of Appeals, relying on the text of ICWA and the guidelines from the Bureau of Indian Affairs, held that ICWA "does not apply" to

"[c]hild custody disputes arising in the context of divorce or separation proceedings . . . so long as custody is awarded to one of the parents." And in *In re Sengstock*, 477 N.W.2d 310, 313 (Wis. App. 1991), the Wisconsin Court of Appeals held that because "ICWA concerns cases where custody of a Native American child is to be given to someone other than either one of the parents," it "does not apply" to "an intrafamily dispute." *See also In re ARW*, 343 P.3d 407, 410–12 (Wyo. 2015) (ICWA Sections 1912(d) and (f) do not apply to a petition to terminate a birth father's parental rights because no "breakup" would be precipitated thereby).

To the contrary, however, courts in Washington, Alaska, and Colorado, have—like the court below—rejected the distinction between severance actions initiated by state officials, and those initiated by private parties. Thus, in *In re T.A.W.*, 383 P.3d 492, 503 ¶ 50 (Wash. 2016), the Washington Supreme Court held that "ICWA offers no exceptions for privately initiated actions." In that case, an Indian mother initiated a severance action against a non-Indian birth father with a long criminal history, including physical abuse. *Id.* at 494–96. She sought termination so that her husband could adopt her child. Nevertheless, the court held that ICWA applied and that the Indian mother was required to undertake "active efforts" to reunite her child with the non-Indian birth father. *Id.*

The Supreme Courts of Alaska and Colorado have likewise held that ICWA applies to privately-initiated severance actions. *Bruce L. v. W.E.*, 247 P.3d 966, 974 (Alaska 2011); *In re N.B.*, 199 P.3d 16, 24 (Colo. App.

2007) (same). The result in these cases is that even when Indian parents go to court to advance the best interests of their Indian children, and to build new families, ICWA stands in the way—a result that does not "serve the legislative dual purposes of protecting tribal relations and the best interests of the Indian child." *T.A.W.*, 383 P.3d at 510 ¶ 79 (Madsen, C.J., dissenting). *See also* Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1, 47 (2017) ("To allow a non-Indian to bar that adoption under a statute intended to prevent the breakup of Indian families is nonsensical.").

This division between the lower courts makes review by this Court imperative.

B. Lower courts also disagree about the degree of proof necessary under ICWA's "active efforts" provision.

Assuming Section 1912(d) applies, there is also a recognized split in authority about the appropriate level of proof required to satisfy the active-efforts provision.

Alaska, Illinois, and Nebraska state courts have held that the petitioner in a TPR case must prove by a *preponderance of the evidence* that active efforts were made to provide the non-moving parent with remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that those efforts were unsuccessful. *A.A. v. Department of Family*

& Youth Servs., 982 P.2d 256, 260–61 (Alaska 1999); *In re Cari B.*, 763 N.E.2d 917, 923 (Ill. App. 2002); *In re Nery V.*, 864 N.W.2d 728, 738 (Neb. App. 2015).

In Utah, by contrast, the active-efforts provision must be proven by proof *beyond a reasonable doubt*, the opposite end of the evidentiary spectrum. *In re D.A.C.*, 933 P.2d 993, 1001–02 (Utah App. 1997).

Arizona and at least one other state apply the *clear and convincing* standard here. *Yvonne L.*, 258 P.3d at 242 ¶ 39; *In re C.D.*, 751 N.W.2d 236, 239 ¶ 7 (N.D. 2008).

Remarkably, in Colorado, two divisions of the appellate court are split on whether the standard is *beyond a reasonable doubt* or *clear and convincing*. *See In re A.R.*, 310 P.3d 1007, 1013 ¶ 21 (Colo. App. 2012) (noting, but not resolving, this split).

State courts are, therefore, intractably divided on whether and how ICWA Sections 1912(d) and (f) apply in privately-initiated severance actions.

III. Lower courts need guidance regarding the constitutional problems that arise if ICWA Sections 1912(d) and (f) do apply to private TPR actions.

A. ICWA establishes separate procedural and substantive rules for children who qualify—solely on a genetic basis—as Indian children.

Since its enactment in 1978, this Court has only resolved two cases involving ICWA, *Adoptive Couple*, *supra*, and *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), both of which involved critical constitutional questions, and both of which left many others unresolved. Indeed, in *Adoptive Couple*, Justice Thomas emphasized the "significant constitutional problems" that remain in this area. 133 S. Ct. at 2565 (Thomas, J., concurring). Primary among these is the fact that ICWA imposes different—and less protective—rules to cases involving children of one racial category, and establishes literal racial segregation.

If ICWA applies here, it does so solely because S.S. and S.S. are "Indian child[ren]" as defined in Section 1903(4) of ICWA. That section defines "Indian child" as a child who is either a tribal member or *eligible* for membership in a tribe and who has a tribal member parent. Eligibility is defined by tribal law, and virtually all tribes, including CRIT, define membership by genetic origin. Political, cultural, social, or religious affiliation play no role in the definition of "Indian child." Nor does residency or domicile on a reservation. *DNA*

is all that matters. No degree of political or cultural affiliation will make a child eligible for membership if he lacks the required genes, and a child who has the requisite genes is not made *ineligible* due to lack of political or cultural affiliation. Not even legal adoption can qualify a child as "Indian" under ICWA, if the child lacks the proper DNA, because ICWA requires that the child be the *biological* child of a tribal member.

Thus, the application of Sections 1912(d) and (f) to this case would constitute a race-based classification. As used in ICWA, "Indian child" is a genetic or racial categorization subject to strict scrutiny (or, at a minimum, it is a national-origin classification, which is also subject to strict scrutiny).

Solely as a result of the DNA in their blood, S.S. and S.S.—who are, after all, citizens of the United States, entitled to "the protection of equal laws," *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)—are subjected to a separate set of rules, both procedural and substantive—rules that put them at a disadvantage relative to their white, black, Hispanic, or Asian peers. If separate is "inherently unequal," *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954), that separate treatment cannot be tolerated.

B. Lower courts need guidance regarding the racial/political character of ICWA's classification scheme.

As outlined above, the divergence between state courts means that ICWA is being applied differently

in different states—and even differently within different appellate districts within the same state. This Court alone can provide the guidance state courts need.

The court below, without discussion or analysis, ruled that ICWA's separate set of rules are triggered not by race or national origin, but by "Indians' political status and tribal sovereignty," *S.S. v. Stephanie H.*, ¶ 27. App. 16a (despite the fact that such governmental interests are neither implicated nor affected in a private severance case). On that premise, the court applied the rational basis test of *Morton v. Mancari*, 417 U.S. 535 (1974), and found ICWA "rationally related to the federal government's desire to protect the integrity of Indian families and tribes." *Id.*

Some other courts have done the same. In *In re A.B.*, 663 N.W.2d 625, 636 ¶ 36 (N.D. 2003), the North Dakota Supreme Court ruled that under *Mancari*, ICWA's differential treatment of Indian children qualified as a political classification and satisfied rational basis scrutiny. The Oregon Court of Appeals did likewise in *In re Angus*, 655 P.2d 208, 213 (Or. App. 1982), as did the Oklahoma Court of Civil Appeals, *In re M.K.*, 964 P.2d 241, 244 ¶ 7 (Okla. App. 1998), and the Illinois Court of Appeals, *In re Armell*, 550 N.E.2d 1060, 1067–68 (Ill. App. 1990).

This Court, however, has recognized that it "would raise equal protection concerns" for a state court to interpret ICWA in a way that "put[s] certain vulnerable

children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Adoptive Couple*, 133 S. Ct. at 2565. And some state courts have likewise found that ICWA is unconstitutional when applied to children whose sole connection to an Indian tribe is biological. In *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 41 Cal. App. 4th 1483, 1509 (1996), the California Court of Appeal held that "any application of [ICWA] that is triggered by an Indian child's genetic heritage, without substantial social, cultural, or political affiliations between the child's family and a tribal community, is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny under the equal protection clause"—a point it reiterated in *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 92 Cal. App. 4th 1274 (2001).

These courts have rejected reliance on *Mancari*—which, after all, does not automatically shield from judicial scrutiny all laws that treat Native Americans differently than others, *see Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) ("We reject the notion that distinctions based on Indian or tribal status can never be racial classifications subject to strict scrutiny."). They have observed, as this Court did in *Rice v. Cayetano*, 528 U.S. 495 (2000), that a law that "use[s] ancestry as a racial definition and for a racial purpose," and that "singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics,'" establishes a racial category subject to strict scrutiny. *Id.* at 515 (citation omitted).

Indeed the *Mancari* Court emphasized that it was *not* dealing with a law that was "directed towards a 'racial' group consisting of 'Indians,'" which ICWA is, 417 U.S. at 553 n.24. And *Rice* noted that the sort of "[a]ncestral tracing" involved in a case like this one "achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name." 528 U.S. at 517.

The California Court of Appeal rejected reliance on *Mancari* in an ICWA case when it noted that *Mancari* applies only where a classification involves "uniquely Native American concerns," but "child custody or dependency proceedings [do not] involve uniquely Native American concerns." *Santos Y.*, 92 Cal. App. 4th at 1320–21. It held that applying ICWA to a child whose sole relationship to a tribe is genetic would be a racial classification squarely within the ambit of *Rice*, rather than a political classification.

CONCLUSION

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

For the two children involved here, that is more than a statement of abstract principle. S.S. and S.S.'s father, Garrett, tried as a responsible parent to take the legal steps necessary to protect the best interests of his children—and if these children were of any other race, the case would have been a routine proceeding, with one clear outcome. But solely because of their ancestry, their case was decided under the different rules imposed by ICWA—and as a consequence, Garrett and his children were essentially penalized for the fact that he tried to protect them. That irrationality demonstrates the deleterious consequences flowing from the application of ICWA to private severance proceedings—for which it was not intended or designed—and from the *de jure* race-based or national-origin-based distinctions ICWA imposes. Lower courts are in disarray as to whether and how ICWA applies to cases such as this. They need this Court's guidance as much as S.S. and S.S. need this Court's protection.

The children's petition should be *granted*.

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Respectfully submitted,

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