NO. 16-500

SUPREME COURT OF THE UNITED STATES

R. P. and S. P. , DE FACTO PARENTS, Petitioners

vs.

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, J. E., THE CHOCTAW NATION OF OKLAHOMA, and ALEXANDRIA P., A MINOR UNDER THE AGE OF FOURTEEN YEARS, Respondents

On Petition for A Writ of Certiorari
to the Court of Appeal of California

OPPOSITION OF THE MINOR, ALEXANDRIA P., TO THE PETITION FOR A WRIT OF CERTIORARI FILED BY PETITIONERS, R. P. AND S. P.

CHRISTOPHER BLAKE*
P.O. BOX 90218
SAN DIEGO, CA 92169
4455 LAMONT STREET, #B
SAN DIEGO, CA 92109
(858) 274-1772
E-mail: christopherblake@sbcglobal.net

Attorney for the Respondent Minor
ALEXANDRIA P.
(Under Appointment by the Court
of Appeal, Second Appellate District,
Division Five, of the State of California)

JENNIFER McCARTNEY
RONNIE CHEUNG
CHILDREN'S LAW CENTER OF
LOS ANGELES - ONE
201 CENTRE PLAZA DRIVE, #7
MONTEREY PARK CA 91754
(323) 980-7700
cheungr@clcla.org
mccartneyj@clcla.org

Guardian *ad litem* for Respondent Minor
(Under Appointment by the Juvenile
Court, County of Los Angeles, State of
California)

* - Attorney of Record

QUESTIONS PRESENTED

Petitioners, the former foster caregivers of the minor, A. P., a citizen of the Choctaw Nation, seek review by this Court of two decisions of the Court of Appeal, State of California, Second Appellate District, Division Five: ***In Re Alexandria P.*** (2014) 228 Cal.App.4th 1322 (***Alexandria I***) and ***In Re Alexandria P.*** (2016) 1 Cal.App.5th 331 (***Alexandria II***). The questions presented raise issues under the federal Indian Child Welfare Act (ICWA) – 25 U.S.C. §1901 *et seq.* – and its California counterpart found primarily in California Welfare and Institutions Code – §§224 *et seq.*, and, especially, §361.31, governing foster care and adoptive placement preferences for an Indian dependent child.

Petitioners identified three questions for review; all were decided by ***Alexandria I***. Petitioners have not identified any questions from ***Alexandria II***. The three questions presented are:

(1) Should ICWA apply to cases in which the child has arguably not been removed from an "Indian family or community" although the minor herself asks that ICWA be applied;

(2) Whether ICWA's adoptive placement preferences, 25 U.S.C. §1915(a), require removal from a foster placement made under §1915(b), to facilitate those adoptive placement preferences and where the minor herself favors the new placement; and

(3) Whether the state courts erred in holding that good cause to depart from ICWA's placement preferences must be proved by clear and convincing evidence even though petitioners failed to challenge the factual analysis of the lower courts.

None of these questions warrant review by this Court; they are already settled. However, before this Court can decide these questions, this Court must

first determine if petitioners, the former foster caregivers for this dependent Indian child, have standing to challenge the applicability of ICWA when they have no cognizable rights to custody under either California or federal law and when the minor has consistently rejected their arguments throughout the proceedings and is now in an approved adoptive home with her relatives and her younger sister – ***Alexandria I***, 228 Cal.App.4th at 1340-1341 – petitioners have no constitutionally cognizable interests in maintaining any relationship with their [former] foster child.). Petitioners have not advanced any arguments that their rights have been adversely affected by the decision of the trial court; hence they lack standing to maintain this petition. (*C.f.*, ***Wrath v. Seldin*** (1975) 422 U.S. 490 [90 S.Ct. 2197, 2209, 48 L.Ed.2d 343].)

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INTRODUCTION

Petitioners, R. P. and S. P., the former foster caregivers of the Indian minor, A. P., seek to invalidate substantial portions of ICWA to thwart her adoptive placement with her relatives with whom she presently resides.[1] A. P., her Tribe, her father, and the public agency charged by California law with her legal custody and providing a permanent placement for her and supervising her care all oppose Petitioners. Petitioners act as if they were the minor's "prospective adoptive parents," but they have never been accorded that status and the minor rejects their attempts to act as such.

Petitioners' position is extraordinary and unprecedented in the law. They, the former foster care givers of the minor, oppose the legal position that has been consistently advocated by the minor throughout these proceedings – namely that she should be placed with her relatives for adoption rather than with petitioners. The minor has found no published case anywhere where the former (or current) foster care givers prevailed over the minor in placement decisions; petitioners cite to none and their amici cite to none. This is true in ICWA and in regular dependency.

The California Court of Appeal, in ***Alexandria II,*** held that:

> "The [petitioners] also do not—and in our view cannot—provide an adequate response to an issue raised most effectively by minor's appellate counsel. Even though they appear before the court by virtue of their status as *de facto* parents, the [petitioners'] efforts to show good cause are motivated by their own interests. Minor's counsel, not the [petitioners], has a legal and ethical obligation to represent A.'s interests." (*Id.,* 1 Cal.App.5th at 358).

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[1] The minor does not share the same surname as petitioners. The minor uses the surname of her biological mother.

Foster care givers such as petitioners do not enjoy constitutional protection and only limited statutory/case law protection. (***Smith v. Organization of Foster Families*** (1977) 431 U.S. 816, 838-847 [97 S.Ct. 2094, 53 L.Ed.2d 14]). Foster caregivers are licensed and paid by the government. Petitioners were asked to care for the minor on a temporary basis until she could be reunited with her family, either her father or her relatives. Petitioners' employment did not include being advocates for her, being her guardians *ad litem*, or otherwise assuming the roles properly delegated to her counsel and guardian. Their petition is an attempt by them to assume the role properly assigned to the minor's guardian *ad litem* and counsel and this Court should not grant review to allow them to usurp a role that was never theirs – *see* California Welfare and Institutions Code §317(b).

Even if petitioners had standing, each of the questions on which petitioners seek review are matters of settled law that do not need intervention by this Court; any purported conflicts amongst the states are greatly inflated and have been settled by recently enacted binding federal regulations that become effective this month, December 12, 2016.

A. Statutory Background.

This Court has dealt with ICWA twice – ***Mississippi Band of Choctaw Indians v. Holyfield*** (1989) 490 U.S. 30, [109 S.Ct. 1597, 104 L.Ed.2d 29] (***Holyfield)*** and ***Adoptive Couple v. Baby Girl*** (2013) 570 U. S. ——, [133 S.Ct. 2552 2557, 186 L.Ed.2d 729] (***Adoptive Couple***). Both involved only federal ICWA; neither involved a state version of ICWA. Congress specifically invited the states to enact their own versions of ICWA – 25 U.S.C. §§ 1919, 1921 – an invitation California accepted in 2006 when it passed California Senate Bill 678, incorporating all of the provisions of federal ICWA

into California law and adding other provisions protecting Indian children and tribes not pertinent to the questions presented here.

Both ***Holyfield*** and ***Adoptive Couple*** were private actions to terminate parental rights and to facilitate a private adoption. Here, the minor is a dependent of the California Juvenile Court as the result of neglect by her parents, one of whom, J. E., her father, is an Indian; the other, T. P., her mother, is not and no longer has an active role in these proceedings.

In addition to the federal and state versions of ICWA, multiple sections of the California Welfare and Institutions Code setting forth the statutory framework for the dependency system are implicated here. The California Legislature has specifically recognized the preservation of a minor's extended family ties as one of the purposes of the juvenile court system – Welfare and Institutions Code §§202(a) and 16000(a).

Welfare and Institutions Code §§361.3 and 16000(a) mandate preferential consideration of relatives for placement of dependent children removed from parents; it strongly favors siblings being placed together – Welfare and Institutions Code §16002(a)(1). The minor is now in an adoptive placement with her relatives and sibling, thus meeting these goals which are independent of ICWA and pertain to all dependent minors in California. Thus, petitioners, who have not asked that this Court to invalidate California ICWA, or general provisions of California dependency law applicable to all children, Indian and non-Indian, are precluded from challenging the decisions of the California Courts because they were based on California, and not just federal, law. (***Murdock v. Memphis*** (1874) 87 U. S. 590, 636 [22 L.Ed. 429]; ***Herb v. Pitcairn*** (1945) 342 U. S. 117, 125 [65 S.Ct. 459, 89 L.Ed. 789] – Supreme Court will not interfere in the judgment of state courts that rest on adequate and independent state grounds.)

This Court set forth the policy reasons for the adoption of ICWA in the ***Holyfield*** decision and the minor fully endorses those reasons. (***Holyfield***, 490 U.S. at 36 and citations therein).

B. The Procedural and Factual History of the Case.

This account is taken from the procedural history and facts as found in the two opinions of the California Court of Appeal, and differs significantly from the "facts" presented by petitioners and their counsel who omit critical facts and misstate others. (***Alexandria I*** and ***Alexandria II****, supra*.) A. P. is a citizen of the Choctaw Nation of Oklahoma. The petitioners knew from the time that the minor was placed with them that she was an Indian child, subject to the provisions of California and federal ICWA. Petitioners acknowledged these things under oath. They also knew that, if she were to be placed for adoption, she would be placed with paternal relatives who lived in Utah. Petitioners are the only individuals opposing the application of California and federal ICWA to this case and the minor's placement with her relatives, Mr. and Mrs. R., who have been approved to adopt her under California law, both ICWA and non-ICWA.

The Court of Appeal, in ***Alexandria I****,* summarized the minor's early history as follows:

> "A. P. was detained from her parents and placed with a foster family when she was 17 months old, based on concerns about her parents' ability to care for her... The [petitioners] were A. P.'s third foster care placement, initially arranged in December 2011... The [petitioners] were aware that A. P. was an Indian child and her placement was subject to the ICWA...
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> By the time A. P. was placed with the [petitioners] in December 2011, her extended family in Utah, the R.'s, were aware of dependency pro-

> ceeding and had spoken to representatives of the tribe about their interest in adopting A P... The tribe agreed to initial foster placement with the [petitioners] because it was close to father...If reunification services were terminated, the tribe recommended placement with the R.'s in Utah...
>
> A. P.'s father successfully complied with reunification services for more than six months...By June 2012, the Department reported a substantial probability he would reunify with A. P...Shortly thereafter, however, father's emotional state deteriorated dramatically...By September 2012, he had communicated to the Department that he no longer wished to continue reunification services...
>
> At some point after father's reunification efforts failed, the [petitioners] decided they wanted to adopt A. P. They discussed the issue with the Department social worker, who advised them that the tribe had selected the R.'s as the planned adoptive placement...
>
> As ordered by the court on April 12, 2013, the Department arranged a conference call to discuss a transition plan in anticipation of a possible court order directing placement with the R.'s. The participants [including petitioners] agreed on a transition plan" (***Alexandria I***, *supra*, 228 Cal.App.4th at 1332-1333, 1343).

Several critical points must be stressed. Petitioners were always aware of the minor's Indian status and that they would never be considered for adoption; the R. family was identified as an adoptive placement **before** the petitioners became involved. Petitioners' claim that the R. family was identified only at "eleventh hour" is incorrect; they were identified from the outset of these proceedings. (*Id.* at 1342) When the juvenile court first ordered expedited placement of A. P. with the R. family in 2012, she had been in petitioners' care for only eleven months. Lastly, petitioners' claims that J.

E., the minor's father, was not involved or did not care for his daughter are false – he may have failed his reunification services but he has remained active and involved in this case and cares deeply for her future; as noted, he enjoyed unmonitored visits with her during the reunification period and the minor had a good relationship with him.[2] (***Alexandria I***, *supra*, 228 Cal.App. 4th at 1331.)

Once reunification services ended, petitioners obtained status as the minor's *de facto parents* and initiated this litigation to retain custody of the minor despite knowing that they had never been identified as a potential adoptive placement under either California or federal ICWA and that the Utah relatives, the R. family, were the only adoptive placement ever identified or considered. The first hearing in the trial court resulted in an order removing the minor from petitioners' care and placing her with her relatives; the minor advocated for those orders. Petitioners appealed and raised numerous issues under California and federal ICWA. Petitioners raised questions about ICWA's constitutionality as well as whether its application to this case violated the federal Constitution. That case resulted in the opinion of ***Alexandria I***, *supra*. ICWA was found to be constitutional in all aspects. The Court of Appeal rejected the "Existing Indian Family" concept, *i.e.,* that ICWA only applied to children from an "Indian" family or with an "Indian" cultural identity. The Court held that petitioners, as mere foster caregivers of the

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[2] Petitioners insinuate that J. E. did not have custody of his daughter when she was first placed in the care of respondent DCFS; that is not true. A. P. was removed from his physical custody. (***Alexandria I***, *supra*, 228 Cal.App.4th at 1328-1329). Amicus American Academy of Adoptions Attorneys, at p. 14 of their brief, claim that J. E. is a "white supremacist" but the only source it cites is a London tabloid of minimal journalistic credibility. There was never any such evidence introduced in the trial courts and the Academy's citation to a foreign tabloid is simply not appropriate.

minor, had no standing to object to the constitutionality of ICWA, and that they had no standing to argue the best interests of the minor and/or assert any constitutional rights she enjoys when the minor was represented by independent counsel and a guardian *ad litem*. The Court of Appeal specifically held that the adoptive placement preferences of ICWA governed the minor's placement. Finally, the Court held that any decision not to follow the adoptive placement preferences of ICWA had to be proved by "clear and convincing" evidence. (***Alexandria I***, *supra*, 228 Cal.App.4th at 1339-1340, 1344, 1350.)

The Court held that the trial court applied the "good cause" requirements for deviation from the adoptive placement preferences of ICWA too rigidly and reversed, directing that a new hearing be held at which new facts and evidence could be considered. (*Id.,* at 1352-1353). That new hearing was held in September, 2015. Before the hearing, the trial court appointed an expert on psychological issues, including bonding/attachment issues, whose selection was approved by all parties, **including petitioners**. (***Alexandria II***, *supra*, 1 Cal.App.5th at 344). At the conclusion of that hearing, the trial court directed that the minor be placed with her relatives; unfortunately, the trial court made the same error it had made in the first appeal regarding the application of the "good cause" requirements. (Case B268111, unpublished opinion dated November 25, 2015). The orders were summarily reversed but the Court of Appeal directed that the matter be considered by a bench officer using the record generated for case B268111. A new hearing was held on March 8, 2016. The trial court again ordered that A. P. be removed from petitioners' custody and placed with her relatives; A. P. advocated for this decision. Petitioners filed a writ of supersedeas to retain custody of the minor pending appeal; that writ was denied on March 18, 2016; on March 21, A. P. was placed with her paternal relatives in Utah where she remains. On July

8, 2016, the Court of Appeal issued its opinion in the second appeal affirming the orders of the trial court.

The Court of Appeal made a number of rulings in ***Alexandria II***, none of which petitioners are contesting in this Court, including what constitutes "good cause" within the meaning of ICWA to support a non-conforming adoptive placement. Petitioners have not challenged the ruling that they cannot argue on behalf of the minor and that the minor has consistently opposed the position of the petitioners regarding her placement and the applicability of ICWA. (***Alexandria II***, *supra*, 1 Cal.App.5th at 358.)

Petitioners claim that they are a fit and stable placement, able to protect the minor and her interests. That is belied by the opinion in ***Alexandria II***. The Court of Appeal approved the observations of the minor's therapist and the court-appointed expert, whose appointment petitioners approved, regarding the respective abilities of petitioners and the R. family to meet the minor's psychological needs – the R. family was well suited to meeting all of these needs; the petitioners were not. (***Alexandria II,*** 1 Cal.App.5th at 355, 357.)

The Court held that the R. family was far more suited to promoting a relationship between the minor and her two siblings.[3] (*Id.*, at 356-357.) The Court said "the [petitioners] were unable to carry out their role as foster parents in supporting A. P. as she developed a relationship with the R.s, whom the tribe had identified as an adoptive placement. Evidence of their resistance to increasing visitation, and evidence they insisted that visits and therapy

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[3] The younger sibling, K., is being adopted by the R. family. During a visit in the summer of 2015 to the R. home in Utah, A. P. left a series of notes around the R. home for K. so that her younger sister would not forget her. (***Alexandria II***, *supra*, 1 Cal.5th at 343.) The older sibling, A., maintains close contact with A. P. and the R. family even though she is in the legal custody of her adoptive father, the uncle of G. R., the current caregiver of the minor. (*Id.*, at 343-344.)

include [their entire] family, rather than A. P. alone, gives further support to the court's finding that A. P.'s best interests weighed in favor of a change in placement."[4] (*Id.* at 358-359). Petitioners do not rebut this. This language demonstrates that petitioners are not a "fit" placement for this minor because they will not meet her needs for continued connection to her family, especially her sisters, and her Tribe. To summarize, respondents submit that the evidence, as found to be true by the Court of Appeal and as discussed in its two opinions amply and fairly describes the factual and procedural history of this case without the emotional baggage presented by the petitioners.

REASONS FOR DENYING THE PETITION

Petitioners have exaggerated the conflict among state courts over the Existing Indian Family concept and the burden of proof to be used to govern any decision to deviate from adoptive placement preferences of ICWA. The reality is that both are now settled matters of law particularly in light of the 2015 revised Bureau of Indian Affairs [BIA] Guidelines and new regulations found in the Code of Federal Regulations effective December 12, 2016, that dispel any dispute over these issues by clearly stating that there is no "Existing Indian Family" concept and that any deviations from the adoptive placements of ICWA must be proven by clear and convincing evidence. Lastly, because

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[4] An especially odd example of petitioners' oppositional behavior to contact between the minor and the R.'s involved their reaction to a proposal by the R.'s to take the minor to Disneyland. Petitioners sought a writ of prohibition in the Court of Appeal to block the trip which was summarily denied. When respondent DCFS's social worker was late in returning the minor to petitioners' home due to traffic, petitioners refused to allow the R.'s to see the minor as scheduled the next day before they returned to Utah. (***Alexandria II***, *supra*, 1 Cal.App.5th at 342). The Court also commented on numerous examples of petitioner S. P. interfering in the minor's therapy such as refusing to follow up on suggestions from the therapist and even allowing a "dreamcatcher" that the minor had proudly made wind up in the trash. (*Id.*, at 342-343).

a court's determination of what placement is in A. P.'s best interest is inherently a fact specific weighing of multiple factors unique to each individual, the decisions in A. P.'s case do not have a "wide sweeping impact" on other cases as petitioners claim and are not appropriate for review by this Court.

Respondent DCFS has legal custody of A. P. and the primary responsibility for her care and the selection of a permanent caregiver. In each juvenile dependency case in California, the juvenile courts are charged with ensuring that children are placed with relatives and siblings whenever possible. (Welfare and Institutions Code §§309, 361.3, 361.4, 16002, 16004; ***In Re Isabella G***. (2016) 246 Cal.App.4th 708, 720-721). Petitioners have not challenged these California authorities. Thus, review would not be proper because the decision below is based upon independent state grounds that support the lower court's decision placing the minor with her relatives, Mr. and Mrs. R. The lower courts have agreed with the minor, DCFS and the Tribe, that petitioners are not a suitable placement for this minor.

Petitioners argue that their now former status as the minor's *de facto parents* somehow overcomes this.[5] Petitioners do not have standing to represent A. P.'s interests; only her guardian *ad litem* and independent counsel have standing. Further, in California, *de facto parent* status is "a judicially created and maintained concept" (***In Re Leticia S.*** (2001) 92 Cal.App.4th 378, 383, fn. 5), which is not incorporated into the statutory scheme but is only

[5] Petitioners lost their status as *de facto parents*. On November 21, 2016, the Los Angeles County Juvenile Court terminated their status as the minor's *de facto parents*. This order is not yet final under California law. If it does become final before this Court rules on this petition, the minor will advise this Court of that fact and any potential consequences it may have on petitioners' rights to maintain this proceeding.

recognized in court rules – California Rules of Court, rules 5.502(10), 5.530(a), and 5.534(e). It is not part of the ICWA scheme, California or federal. (***In Re Brandon M.*** (1997) 54 Cal.App.4th 1387, 1390-1392, 1400).

De facto parents, under California law, do not have the same substantive rights as parents or legal guardians. (***R. H. v. Superior Court*** (2012) 209 Cal.App.4th 364, 371; ***Clifford S. v. Superior Court*** (1995) 38 Cal.App.4th 747, 751-752). *De facto parents* have no right to reunification services, visitation, **custody, or continued placement of the child**. (***In Re P. L.*** (2005) 134 Cal.App.4th 1357, 1361; *compare* ***In Re Vincent M.*** (2008) 161 Cal.App.4th 943, 953 [foster parents who were also prospective adoptive parents had standing to challenge an order taking the case off the adoption track]),[6] *De facto parent* status "merely provides a way for the *de facto parent* to stay involved in the dependency process and provide information to the court." (***In Re Bryan D.*** (2011) 199 Cal.App.4th 127, 146.). It confers on them no special powers of advocacy. In any dependency proceeding, whether under ICWA or not, custody remains, at all times, with the social services agency/department, here respondent DCFS. Nor can *de facto parents* argue for the best interests of the minor – that role, under California law, as explained by ***Alexandria I*** and ***Alexandria II***, belongs exclusively to the minor's guardian *ad litem* and her attorneys.

[6] Petitioners are not and never were the minor's prospective adoptive parents as that term is understood in California law – Welfare and Institutions Code section 366.26(n).

I.

THE "EXISTING INDIAN FAMILY" CONCEPT HAS BEEN REJECTED AND THERE IS NO REAL DISPUTE THAT IT LACKS ALL VIABILITY SO IT DOES NOT WARRANT REVIEW BY THIS COURT.

Petitioners have overstated any "conflict" between the states and fail to acknowledge the steps taken by the federal government to confirm that the Existing Indian Family concept [EIF] is no longer, and never was, a legal requirement for the application of ICWA – state or federal.

A. The Existing Indian Family Concept's Origins, Subsequent History, and Purposes Renders this Case an Inappropriate Vehicle for the Resolution of its Necessity.

The EIF holds that, as a prerequisite to the application of ICWA, the minor must be part of an existing family/community that maintains Indian culture and values. EIF was based on a belief that a child who has never been a member of a home where Indian culture and values played a significant role should be not removed from his/her primary cultural heritage and placed in an Indian environment over the express objections of his/her non-Indian parent/relatives and/or the minor himself/herself.

This minor wants to be raised in an environment that fosters her familial ties and her Tribal heritage and culture. Her father, an enrolled member of the Choctaw Nation, also wants this. Thus, even if the EIF were a viable concept, it would not apply here because **the minor desires ICWA's application** as do her father, her family, her Tribe, and the Agency responsible for her care. The only ones opposing application of ICWA are petitioners who have no legal rights regarding the minor; they were only her temporary caregivers. This Court need not enter the fray over the viability of EIF because the minor considers herself to be a member of an Indian community and desires the application of ICWA.

EIF, as a concept, was first expressed in ***Matter of Adoption of Baby Boy L.*** (1982) 231 Kan. 199, 643 P.2d 168, 175. It was controversial from the start; some states adopted it and others rejected it. The overwhelming trend, however, has been to reject it and the very court that first enunciated EIF, the Kansas Supreme Court, has since rejected it – ***In the Matter of A. J. S.*** (2009) 288 Kan. 429, 442, 204 P.3d 543. Petitioners (and their amici) failed to discuss either of these Kansas cases in any meaningful manner.

California courts were split on EIF – some accepting and some rejecting it – ***In Re Vincent M***. (2007) 150 Cal.App.4th 1247, 1265 (rejecting EIF based on California statutory amendment and overruling, in part, ***Crystal R. v. Superior Court*** (1997) 59 Cal.App.4th 703, 718-724 (accepting concept); *see also*, ***In Re Alicia S.*** (1998) 65 Cal.App.4th 79, 76; ***In Re Adoption of Hannah S.*** (2006) 142 Cal.App.4th 988, 996, both rejecting EIF; ***In Re Bridget R.*** (1996) 41 Cal.App.4th 1483, 1492, and ***In Re Santos Y.*** (2002) 92 Cal.App.4th 274 (upholding concept). Petitioners twice requested the California Supreme Court to review this issue but review was denied.

The California Legislature addressed the concept when it passed California's version of ICWA in 2007 as SB 678 and rejected the concept – Welfare and Institutions Code section 224(a)(2); *see also* Family Code Section 175(a)(2)(A); and Probate Code section 1459(a)(2). No California court has applied the concept since then and "[t]here is no question that the [EIF] is not viable in California." (***In Re Autumn K.*** (2013) 211 Cal.App.4th 674, 717).

There have been four cases that have considered the question of whether EIF retained any vitality in light of ***Adoptive Couple***. One is ***Alexandria I***, the second is ***Autumn K.***; the third is a Virginia case – ***Thompson v. Fairfax County Department of Family Services*** (2013) 52 Va.App. 350, 747 S.E.2d 838, a case ignored by petitioners. The fourth is a

case very recently decided by the Washington Supreme Court, ***In the Matter of the Adoption of T. A. W.*** (Wash. 2016) P.3d (92127-0 October 27, 2016); it, too, rejected the EIF. No state has adopted EIF since then although intermediate appellate courts in both Kentucky and Indiana have followed it under compulsion of earlier decisions of their own Supreme Courts.[7]

The Virginia Court in ***Thompson*** was well aware of ***Adoptive Couple*** and those California cases that had ruled on the concept. (*Id.*, at 847, fn. 11). It was also aware that other states had adopted the concept. (*See*, *e.g.*, cases cited by petitioners on p. 17 of their petition).[8] However, the court noted that the express language of ICWA made it clear that the only sort of relationship that was needed between the child and the Tribe was "membership" citing ***In Re Baby Boy C.,*** (N.Y.App.Div.2005) 27 A.D.3d 34, 805 N.Y.S.2d 313, 323. The court also noted that ***Holyfield*** held that ICWA was concerned with the impact on the tribes themselves and the wholesale alienation of dependent Indian children from their tribes and that EIF was incompatible with that approach. Lastly, the court noted the problem of assessing "Indianness," something that trial courts were ill equipped to do citing ***Baby Boy C.,*** 27 A.D.3d at 49, 805 N.Y.S.2d at 324 (quoting ***In Re Alicia S.,*** (1998) 65 Cal.App.4th 79, 91). "Since ICWA was passed, in part, to curtail state

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[7] The Kentucky case is ***S. L. C. E. v. Cabinet for Health and Family Services*** (2014 Ky Ct. of App.) 454 S.W.3d 305. The Indiana case is ***In Re the Adoption of S. W. F.*** (2016 Ind. Ct. of App.) 60 N.E.3d 1145. The Indiana case is listed as a memorandum decision and is non-published and non-citable. Neither case mentions the general trend to reject the EIF although a concurring opinion in the Indiana case noted that the EIF was a "minority" view and urged that state's Supreme Court to look again at the issue. Neither case mentioned or discussed ***Adoptive Couple*** in any meaningful manner.

[8] One of the cases petitioners cite as adopting the EIF is ***In Re Morgan*** (1997) WL 716880 (Tenn. Ct. App.); this is a non-published, non-citable opinion. The minor has been unable to find any published Tennessee case supporting the EIF.

authorities from making child custody determinations based on misconceptions of Indian family life, the [EIF], which necessitates such an inquiry, clearly frustrates this purpose.' *Id.* (citations omitted)." (***Thompson***, *supra*, at 747 S.E.2d at 847-848). The ***Thompson*** Court then cited a number of other cases and states that have rejected the concept most of which petitioners cite in their petition at pp. 17-18.

ICWA makes it clear that it is the tribes who determine whether the child is eligible for membership and what constitutes the child's "extended family" for purposes of placement. Neither decision is subject to review by the state authorities. (25 U.S.C. 1903, subdivisions (2) and (4).). If the "Existing Indian Family" concept has any validity, it is certainly arguable that it is the Tribe (and not some state court) that determines if the family in question is an Indian family. Thus, if this Court were to adopt the EIF concept, this Court would likely have to remand the matter to the trial court so the Choctaw Nation could make a determination as to whether A. P. is the product of an "Indian" family, including the fact that A. P. considers herself to be a member of that Indian community.

Thus, it is clear that the EIF no longer enjoys any significant support amongst the states and there is no need for this Court to determine the validity of the EIF; valid or not, A. P. remains subject to ICWA as she has always affirmed her ties to the Choctaw community.

B. This Court Should not Grant Review as New Guidelines issued by Bureau of Indian Affairs and Code of Federal Regulations, 25 C.F.R. 23.103, Subdivision (c) Have Abolished the EIF.

The Bureau of Indian Affairs (BIA) issued guidelines in 2015, to replace its 1979 guidelines. As petitioners acknowledge, the BIA specifically rejected EIF. (Guidelines, A.3,(b), found at (2015) 80 Fed.Reg. 10146-02. While the Guidelines may not be binding, they are instructive and are accorded

great weight. (***Fresno County Dept. of Children & Family Services v. Superior Court*** (2004) 122 Cal.App.4th 626, 642–643.) They are not to be lightly disregarded, particularly when the evidence clearly shows that a majority of the states that have considered the viability of the EIF have rejected it and no state has adopted it in some years.

More importantly, the Department of the Interior/BIA adopted new regulations in the Code of Federal Regulations. New regulation 25 C.F.R. 23.103(c) explicitly states that a "State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum." This regulation will have the force of law on December 12, 2016. Its language unmistakably rejects the EIF. Thus, there is no longer any dispute over the viability of the EIF. If there is to be a challenge to these new regulations, it would be wise for this Court to refrain from entering the fray until the various state courts have an opportunity to weigh in on them.

II.

PETITIONERS' SECOND QUESTION IS NOT A PROPER SUBJECT FOR REVIEW BY THIS COURT.

Petitioners state that there was no "need" to remove the minor from their home after reunification services were terminated for her father and then placed in the permanent adoptive home approved by respondent DCFS and her Tribe. This is a classic example of a petitioner trying to reargue the merits of the factual determinations made by the trial court and the California Court of Appeal. The decision to remove the minor from petitioners' home and to place her in the home of her relatives was a fact-intensive decision and review will not provide any useful guidance for trial courts throughout the country making

similar decisions. Each decision will be made on the facts involved as they relate to the specific child involved.

Petitioners did not challenge the substance of what constitutes good cause to remove a child from a foster care placement to an adoptive placement either in this petition or in either of the two appeals that are the subject of this petition. What they challenged is the burden of proof to be used in making that decision; that will be discussed *infra*. There is no challenge to the factors the California Court of Appeal used in making its decision such as the BIA guidelines, and other factors the court cited including the importance of the minor maintaining ties with both of her biological sisters; the need to maintain ties with her family; the need to maintain ties with her Tribe; and the court's explicit finding that the R. family was far more suited to meeting these needs than were petitioners. Petitioners have not challenged the "substantial evidence" analysis that the California Court of Appeal used in upholding the trial court's decision that there was no good cause to deviate from the adoptive placement preferences of ICWA. Thus, there really is no conflict that warrants review.

ICWA contemplates that there are two different kinds of placement for dependent Indian children – 25 U.S.C. §1915(a) and (b). The first is a foster placement that has, as its primary criterion, a placement that will facilitate reunification of the child with his/her parents.[9] Second, if reunification fails, then an adoptive placement must, if at all possible, be found that promotes continued contact with the child's "extended family" as defined by the Tribe,

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[9] Petitioners' claim that DCFS could have placed the minor with the R. family at the outset is incorrect. 25 U.S.C. §1915(b) requires that any foster placement be in close proximity to the residence of the parents; the R. family lives 500 miles away. Thus, any initial placement with the R. family was precluded as a matter of law. (***In Re Anthony T.*** (2012) 208 Cal.App.4th 1019, 1031-1032).

and which preserves and protects the child's ties to his/her Tribe and culture. The two placements need not be the same and, in many instances, will not and cannot be the same.

The minor's placement with the R. Family was simply deferred to enable J. E. to have his constitutionally mandated reunification services. The minor was temporarily placed with petitioners to facilitate those services. Petitioners knew, accepted, and agreed to work toward the goal of reunification of the minor either with her father or with her relatives. Once services ended, the time came for placement of the minor with the R. family; petitioners initially agreed but almost immediately reneged and began this lengthy and costly litigation that has done no one, especially the minor, any good. (***Alexandria II***, *supra*, 1 Cal.App.5th at 341 quoting ***Alexandria I****, supra,* 228 Cal.App.4th at pp. 1330–1333).

Therefore, there is no need for this Court to intervene in this matter as ICWA's goals of placement of this dependent Indian child have been met with an adoptive placement where she presently resides and which protects her ties to her sisters, her extended family and to her Tribe. To hold otherwise would return her to the foster care system which is highly undesirable and to be avoided at all costs.

III.

WHETHER "GOOD CAUSE" EXISTS TO DEVIATE FROM THE ADOPTIVE PLACEMENT PREFERENCES OF ICWA MUST BE MADE USING THE STANDARD OF "CLEAR AND CONVINCING EVIDENCE."

There is no dispute on this issue; all state courts that have considered it, except one, have now concluded that the appropriate standard to apply to any decision to deviate from the adoptive placement preferences of ICWA is "clear and convincing evidence." The Bureau of Indian Affairs agrees.

The California Court of Appeal, in ***Alexandria I***, said, "ICWA's policy goal of promoting the stability and security of Indian tribes and families persuades us to join the growing number of state courts, including the Supreme Courts of Alaska and South Dakota, that apply the clear and convincing standard of proof to good cause determinations under section 1915." (*Id.*, 228 Cal.App.4th at 1349-1350, and cases cited therein).

The only case to the contrary is a 2010 case from Oregon, the only case cited by petitioners – ***Department of Human Services v. Three Affiliated Tribes of Fort Berthold Reservation*** (2010) 235 Ore.App. 535, 552, fn.17, 236 P.3d. 40, 50, fn.17.[10] The discussion in that case was essentially a "throwaway" line in a footnote. Petitioners cited no cases decided since ***Alexandria 1*** that agreed with ***Fort Berthold***. There has been at least one case decided since then that disagreed with ***Fort Berthold*** – ***Gila River Indian Community v. Department of Child Safety*** (2015 Az.Ct.App.) 363 P.3d 148, 152, expressly noting its "throwaway" line analysis of the issue and adopting ***Alexandria 1***. ***Fort***

[10] In the "Questions Presented" portion of the petition, petitioners called this decision a "decision of a ... state court of last resort." The Oregon Court of Appeals is an intermediate appellate court; the Oregon Supreme Court is the court of "last resort" in that state.

Berthold is an outlier devoid of analysis and creates no substantial conflict in the law.

Moreover, the BIA adopted new Guidelines effective in 2015 which have explicitly adopted the "clear and convincing standard." (BIA Guidelines F.4, subdivision (b), subsection (4) found at (2015) 80 Fed.Reg. 10146-02). Furthermore, new federal regulations effective December 12, 2016, also incorporate the "clear and convincing" standard of proof for all good cause hearings held pursuant to 26 U.S.C. §1915 and its state counterparts. (Proposed 25 C.F.R. 223.132(b).) It would be best for this Court to let the issue percolate in the state and lower federal courts and let them resolve any remaining issues in light of the new proposed federal regulations on the burden of proof. At best, review of the issue is premature.

All courts, with one exception, that have considered this issue have adopted the reasoning of the California Court of Appeal as has the BIA through its guidelines, and, now, federal regulations. There is no need for this Court to review this issue; it is already settled.

IV.

AMICI MADE NO ARGUMENTS THAT WARRANT REVIEW BY THIS COURT AND THEIR ARGUMENTS FAIL TO CONSIDER THE UNIQUE SITUATION OF THE MINOR, A. P.

Amici, the Goldwater Institute and the Cato Institute, make a convoluted argument that the application of federal ICWA to the minor's situation violates the minor's constitutional rights to equal protection and due process and otherwise constitutes impermissible racial classification. Amicus American Academy of Adoptions Attorneys' (Academy) brief focuses on the arguments raised by petitioners; the minor will deal with each in turn.

However, neither of amici's briefs adds anything and do not support review in this case.

First, the minor is represented by independent counsel and a guardian *ad litem.* As noted by both ***Alexandria I*** and ***Alexandria II,*** it is the sole responsibility of the minor's legal counsel and her guardian to argue her constitutional rights and to raise such arguments as they deem appropriate to protect her rights. (***Alexandria I***, *supra*, 228 Cal.App.4th at 1339-1340, 1344, 1350; ***Alexandria II***, 1 Cal.App.5th at 358). The minor rejects the attempts of petitioners' amici to argue her constitutional rights.

All three amici, like petitioners, fail to discuss certain critical findings made by the California Courts – (1) petitioners (and their amici) have no standing to argue the minor's constitutional rights or to raise constitutional challenges to ICWA when the minor explicitly favors the application of ICWA to her case, something petitioners have not discussed (*see, generally,* ***Alexandria I,*** 228 Cal.App.4th at 1339-1340); (2) amici, like petitioners, ignore the fact that petitioners knew, from the very beginning, that placement of the minor with petitioners was only temporary and would last only as long as reunification services were being offered to her father; (3) amici, like petitioners, ignore or dismiss the fact that the minor's relatives were identified as the prospective adoptive placement, should that be needed, **before** the minor was placed with petitioners and that petitioners knew this from the very beginning; and (4) there are independent state grounds supporting the placement of the minor with her relatives.

California law, as noted *supra*, has always favored placement of dependent minors with their relatives, especially their siblings, both as a foster placement and for adoption purposes. Keeping siblings together is so important that California prohibits the termination of parental rights and adoption of dependent minors if it would substantially interfere with the relationship between

siblings – Welfare and Institutions Code section 366.26(c)(1)(B)(v). Amici, like petitioners, ignore these provisions of California law that strongly support and provide an independent basis for the placement orders at issue in this case.

Each of these facts, standing alone, demonstrate that there is no need for this Court to interfere and otherwise upset the minor's current adoptive placement with her relatives. The minor actively opposes the positions advocated by petitioners and their amici "supposedly" on her behalf. The minor is an Indian child who desires the protection of ICWA. Petitioners and their amici are entitled to their private opinions on ICWA but they may not compel the minor to accept them nor do they have the right to usurp the proper role of minor's counsel and guardian *ad litem*. The Court of Appeal specifically held that: "[t]he record demonstrates that minor's trial counsel was consistently focused on the best interests of her client A. [P.], and comported herself in a professional and ethical manner." (***Alexandria II***, *supra*, 1 Cal.5th at 358-359 and fn. 19 therein).

The parade of "horribles" and the anecdotal accounts of tragedies involving Indian children presented by amici Goldwater and Cato Institutes are not relevant to this case. The dependency system might not have worked very well in other cases and that is sad; no system is flawless and not all tragedies can be prevented. However, the system worked well in this case – the minor is in an adoptive placement that meets all of her needs including the need to be raised with her sisters and that will nurture her connections to her Tribe.

Amicus Academy advocates from the perspective of adoptions law and private actions to terminate parental rights. This is a dependency proceeding. While ICWA applies to both sets of legal proceedings, private adoptions proceedings and dependency proceedings are two entirely different proceedings with different laws and principles. Comparing one to the other is akin to

comparing apples and oranges – both may be fruits but they are hardly the same. Caution must be used in applying the principles of one to the other.

Academy acknowledges that the EIF has been generally disfavored by state courts and no state has adopted the doctrine in recent years. It acknowledges that Washington State has now rejected the concept – ***Adoption of T. A. W.*** (Wash. 2016) P.3d , (92127-0 October 27, 2016).[11] The Washington Supreme Court noted that the Washington State Legislature rejected the concept when it passed its own version of ICWA; the court was presumably aware of the "constitutional" arguments raised in cases like ***In Re Santos Y.***, *supra*, and ***In Re Bridget R.***, *supra*, but declined to follow either one. Academy's argument largely follows ***Bridget R.*** and must fail for the same reasons that were expressed by later California decisions like ***In Re Vincent M***. (2007) 150 Cal.App.4th 1247, 1265 and ***Autumn K.***, *supra*. ***Bridget R.*** has been rejected by virtually every state legislature and every state court of last resort that has considered it over the last ten to fifteen years; it and its reasoning provide no basis for granting review in this case particularly where, as here, the minor has consistently considered herself to be a member of an Indian community, the Choctaw Nation of Oklahoma, and wants to be raised in a placement that will nurture her ties to that community.

The Academy also states that the new BIA guidelines and regulations are confusing. The minor's guardian *ad litem* and her appellate counsel have reviewed them; they are well-written and clear on their face, particularly the

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[11] ***T. A. W.*** involved a private stepparent adoption wherein the Indian parent would retain her parental rights and the non-Indian parent would have his rights terminated in favor of the new non-Indian spouse of the Indian parent. There are vast differences between a stepparent adoption proceeding to which the state is not a party and a dependency proceeding in which the state (or a political subdivision thereof) is a party. The two have different goals and procedures and principles governing one cannot be translated to the other.

language regarding the EIF concept and the burden of proof needed to justify a non-compliant adoptive placement; the BIA clearly intended to abolish EIF and clearly intended to establish "clear and convincing evidence" as the burden of proof. There are no ambiguities.

The Academy also argues that the trial court misapplied the substantive test of what constitutes "good cause" under ICWA to justify a non-compliant adoptive placement under 25 U.S.C. 1915(a).[12] First, Academy ignores that the placement at issue here is also supported by independent state grounds favoring placement of all dependent minors with relatives and siblings. Second, Academy ignores that petitioners failed to challenge the "good cause" analysis in their petition and failed to challenge the "substantial evidence" analysis of the California Court of Appeal in ***Alexandria II***, which is actually the operative decision at issue in this petition. Amicus should not be allowed to raise grounds for review that have been abandoned by petitioners. Finally, the Academy is seeking to argue the "rights" of the minor. It is for the minor's counsel to argue and protect her rights – not petitioners and not their amici.

The dependency scheme, both ICWA and non-ICWA, have, as goals, the protection of minors and that, if it is necessary to remove them permanently from the care and custody of their parents, they be placed with their relatives and that they remain united with their siblings. Those goals have been accomplished in this case – A. P. is in a stable, loving adoptive placement

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[12] Academy, at p. 22 of its brief, states that "Section 1915 allowed the Choctaw Nation to put its thumb on the scales of justice to rig the outcome of the case below." The minor finds this language offensive. It ignores that the minor herself has always argued for the application of section 1915, and its California counterpart, Welfare and Institutions Code §361.31, to her case. It also suggests that the Tribe acted improperly or unethically when it asserted its rights under ICWA. If there are any "thumb prints" on the scales of justice, they belong to the minor who has merely asserted her rights under the laws and constitutions of California and the Federal Government.

with her relatives and her baby sister and with full access to her older sister. This placement is also one which promotes the goals of ICWA, which is the preservation of the minor's ties with the culture and traditions of her Tribe, the Choctaw Nation of Oklahoma, with whom she identifies.

Petitioners and their Amici cannot offer those protections and cannot meet those goals. The minor is fully satisfied that her current placement meets them. Amici provide no bases on which to grant review.

CONCLUSION.

Petitioners seek review of certain matters under ICWA that are not in substantial dispute and that have been consistently resolved by the various states and the Bureau of Indian Affairs against them. The minor, while an Indian, is a dependent child of the Juvenile Court of Los Angeles County and respondent Los Angeles DCFS has and will retain the responsibility for the legal custody and care of her as long as she is a dependent and well after the proceedings in this Court are concluded; it has the responsibility (which it now shares with respondent Choctaw Nation) for the selection of a permanent placement for her now that she cannot be reunited with her parents. Both DCFS and the Tribe have chosen the R. family, and that selection was made before petitioners ever assumed any care for the minor and they were always aware of that fact.

There is no showing by petitioners that this Court can give them any relief. California law, whether the law governing ordinary dependencies or ICWA, strongly favors relative placement and placement with siblings for dependent minors. The R. family meets those criteria; the petitioners do not.

Petitioners are seeking to take over the role of the minor's guardian *ad litem* and act as her advocate when she has independent counsel and an independent guardian *ad litem*, actions without any precedent anywhere in this

country. The minor is satisfied with her current adoptive placement; it is in accord with general principles of California law and with the principles of ICWA, both federal and California. There is simply no need for this Court to intervene and upset this adoptive placement to which the minor, her Tribe, the Agency responsible for her care and custody and her parents, have all agreed.

Finally, the minor specifically joins in the opposition to this writ of certiorari that has been or will be filed by co-respondents, Los Angeles DCFS., J. E., and the Choctaw Nation of Oklahoma.

The petition should be denied.

Dated: December 9, 2016

CHRISTOPHER BLAKE,
Attorney for the Respondent Minor, A. P.
(By Appointment of the Court of Appeal,
State of California, Fifth Appellate District)

CERTIFICATE OF SERVICE

I, CHRISTOPHER BLAKE, declare:

I am a citizen of the United States, over 18 years of age, and not a party to this action. My business address is 4455 Lamont Street, #B, San Diego, California 92109. On this date, I served the required number of copies of the respondent Minor Alexandria P.'s Opposition to the Petition for a writ of certiorari on all parties that are entitled to receive copies of that document by placing in the course of Electronic Mail Service, addressed as follows, and in the course of in the course of Delivery by United States Mail, first class postage, prepaid, as follows:

PLEASE SEE ATTACHED LIST

Only those individuals with asterisks (**) after his/her name are required to be served under the Rules of this Court. They were served both via electronic mail and the United States Postal Service in the manner required by the Rules of this Court. All others were served only via electronic mail unless only a street address is indicated in which instance they were served only at that address via the United States Postal Service. They are served as a matter of courtesy only and are not parties to the case but are entitled to be served under the procedures of the California Court system.

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

Executed at San Diego, California.

Dated: December 9, 2016

_____

Christopher Blake

PARTIES SERVED

Respondent DCFS
Kim Nemoy**
Ana Maria Herrera
Office of the County Counsel
Juvenile Division
201 Centre Plaza Drive, Suite #1
Monterey Park, CA 91754
knemoy@counsel.lacounty.gov
amurray@counsel.lacounty.gov

Guardians *ad litem* for Minor)
Ronnie Cheung/Jennifer McCartney**
Children's Law Center - One
201 Centre Plaza Drive, #7
Monterey Park, CA 91754
cheungr@clcla.org
mccartneyj@clcla.org

California Appellate Project
520 S. Grand Avenue, 4th Floor
Los Angeles, CA 90071
capdocs@lacap.com
stephanie@lacap.com

Courtesy Copy
Ian Gershengorn**
Acting Solicitor General
950 Pennsylvania Avenue, NW
Washington DC 20530-001
SupremeCtBriefs@usdoj.gov

Amicus
Mark Fiddler
6800 France Avenue South, #190
Minneapolis, MN 55345
mark@fiddler-law.com

Appellants
Lori A. McGill**
Wilkinson, Walsh & Eskowitz
1900 "M" Street NW, #800
Washington, D.C. 20036
lalvinomcgill@wilkinsonwalsh.com

Respondent Father, J. E.
Joanne Willis Newton**
13223-1 Black Mountain Road, #284
San Diego, CA 92129
jwn@willisnewtonlaw.com

Respondent (Choctaw Nation)
Melissa Middleton**
Choctaw Nation of Oklahoma
P.O. Box 1210
Durant, OK 74702
mmiddleton@choctawnation.com

Amicus
Timothy Sandefur
The Goldwater Institute
500 E. Coronado Road
Phoenix, AZ 85004
tsandefur@goldwaterinstitute.org

Respondent (Choctaw Nation)
Douglas Endreson**
Frank Holleman
Sanosky, Chambers, Sachise, Endreson & Perry, LLP
1425 "K" Street NW, #600
Washington, DC 20005
dendreson@sanoksy.com
fholleman@sanosky.com

NO. 16-500

SUPREME COURT OF THE UNITED STATES

R. P. and S. P. , DE FACTO PARENTS, Petitioners

vs.

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, J. E., THE CHOCTAW NATION OF OKLAHOMA, and ALEXANDRIA P., A MINOR UNDER THE AGE OF FOURTEEN YEARS, Respondents

On Petition for A Writ of Certiorari
to the Court of Appeal of California

CERTIFICATE OF WORD COUNT.

As required by Supreme Court Rule 33.1(h), I declare that this brief in opposition to the grant of certiorari filed on behalf of the minor, A. P., contains 8,475 words, excluding those parts of the document that are exempted by Rule 33.1(d). I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 9, 2016

Christopher Blake,
Attorney for the Minor, A. P.