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IN THE
SUPREME COURT OF CALIFORNIA

IN RE A.A., ET AL.

Persons Coming Under the Juvenile Court Law.

SACRAMENTO COUNTY
DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff and Appellant,

vs.

J.A., ET AL.

Defendants, Respondents and Petitioner.

AFTER DECISION BY THE COURT OF APPEAL
THIRD APPELLATE DISTRICT
CASE NO. C074264

ANSWER TO PETITION FOR REVIEW

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This answer by appellant Sacramento County Department of Health and Human Services (DHHS) addresses the petition for review ("petition") filed by respondent, J.A., the biological and presumed father of the children, Abbigail A. and Justin A., dependents of the Superior Court of California, County of Sacramento, sitting as the Juvenile Court ("juvenile court").

ISSUES PRESENTED

If this court grants review, appellant respectfully requests that the court reframe the issues as follows:

(1) Does the mandate in the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1921) for states to provide higher protections to a specific class of persons covered (e.g., Indian children) authorize states to broaden application of the ICWA to non-Indian children pursuant to local court rules (i.e., California Rules of Court, rule 5.482(c) and rule 5.484(c)(2))?

(2) Does the recommendation for liberal construction by the Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings (44 Fed.Reg. 67584-67595, at p. 67586 (Nov. 26, 1979) (BIA Guidelines)) require states to apply the ICWA's protections to children who do not meet the ICWA's definition of an "Indian child"?

ADDITIONAL ISSUES

If this court grants review, appellant also respectfully requests that the court consider the following additional issues:

(1) Whether ICWA coverage is based on tribal affiliation or Indian ancestry (race)?

(2) Whether California Rules of Court, rule 5.482(c) and rule 5.484(c)(2) violate equal protection under the United States Constitution by broadening application of the ICWA to non-Indian children (e.g., children who are not members but are eligible for membership, except neither biological parent is a member of a federally recognized tribe)?

(3) Whether California Rules of Court, rule 5.482(c) and rule 5.484(c)(2) violate the supremacy clause of the United States Constitution, and as such, are barred by the doctrine of federal pre-emption? If not, does adoption of the rules in question exceed the California Judicial Council's constitutional and statutory authority, as well as violate the separation of powers doctrine?

INTRODUCTION

This case raises the question of the validity of two rules of court governing the application of the ICWA: (1) California Rules of Court, rule 5.482(c), [1] which provides that if the tribe indicates the child is eligible for membership "if certain steps are followed," the juvenile court must proceed as if an Indian child is involved as well as "direct the appropriate individual or agency to provide active efforts under rule 5.484(c) *to secure tribal*

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[1] Further rule references are to the California Rules of Court.

membership for the child" (rule 5.482(c), italics added for emphasis); and (2) rule 5.484(c)(2), which provides that "[e]fforts to provide services must include pursuit of any steps necessary to *secure tribal membership* for a child if the child is eligible for membership in a given tribe...." (Rule 5.484(c)(2), italics added for emphasis.)

Petitioner contends that a conflict in case law has been created by *In re Jack C.* (2011) 192 Cal.App.4th 967 (*Jack C.*) and *In re Abbigail A., et al.* (2014) 226 Cal.App.4th 1450 (*Abbigail A.*) regarding the validity of rules 5.482(c) and 5.484(c)(2); and thus, review is necessary to resolve the alleged split of authority.

Appellant submits that review is unnecessary because the conflict between *Abbigail A., supra,* and *Jack C., supra,* is illusory; and the appellate court's decision is correct.

BACKGROUND

The opinion in *Abbigail A., supra*, 226 Cal.App.4th 1450 sets forth the relevant facts. This case involves two minors, Abbigail A. and Justin A., who are not Indian Children as defined by the ICWA (25 U.S.C. § 1903(4)) but whose paternal great-aunt and great-grandmother were affiliated with the Cherokee Nation of Oklahoma ("tribe"). (*Id.* at p. 1453.) letter from the tribe stated that neither the minors nor their biological father

are members; but that the children are descendants of tribal members and eligible for membership. (*Id.* at p. 1455.) The tribe also declined to intervene because the father was not yet enrolled as a member. (*Ibid.*)

At a combined Welfare and Institutions Code[2] sections 355 and 358 hearing in May 2013, the juvenile court found the minors subject to its jurisdiction. (*Abbigail A., supra*, 226 Cal.App.4th at p. 1453.) Pursuant to rules 5.482(c) and 5.484(c)(2), the juvenile court directed DHHS to make active efforts to secure membership for the children in the tribe. (*Ibid.*) The juvenile court also ordered application of the substantive provisions of the ICWA. (*Id.* at p. 1455.)

On appeal, DHHS raised a multitude of grounds for invalidating the rules at issue. The opinion by the appellate court included a reference to two of the grounds: Federal law preempts the attempt by the rules at issue to extend protections to children who are not Indian children; and the rules are inconsistent with the statutory definition of the class of protected children set forth by federal and state law, and therefore, the California Judicial Council exceeded its constitutional and statutory authority by adopting rules that require the application of the ICWA to non-Indian

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[2] All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

children, such as those in the pending case. (*Abbigail A.*, *supra*, 226 Cal.App.4th at p. 1454.) In a decision published on June 16, 2014, without reaching all the claims raised by DHHS, the Third District Court of Appeal reversed the juvenile court's judgment on the basis of the aforementioned second point. (*Ibid.*)[3]

LEGAL DISCUSSION

Appellant contends that the petition does not state any grounds for review.

If this court grants review, however, appellant respectfully requests that the court reframe the issues as follows: (1) does the ICWA's mandate for states to provide higher protections to a specific class of persons covered (Indian children and their tribe, parents or custodian or custodians) authorize states to broaden application of the ICWA to a non-Indian child who is eligible for membership in a tribe when neither of the child's biological parents is a member; and (2) does the BIA Guidelines' recommendation for liberal construction require states to apply the ICWA's protections even when a child does not meet the statutory definition of an "Indian child"?

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[3] Additional facts and the procedural aspects of this case are set forth in the decision of the Court of Appeal. (*Abbigail A.*, *supra*, 226 Cal.App.4th at pp. 1453-1456.)

Because the petition failed to state any grounds for review, the issue set forth in the petition should be reframed, as previously noted, if this court grants review. Furthermore, if review is granted, to decide the real issues presented, the court will need to address additional issues identified by DHHS below.

I. THERE ARE NO GROUNDS FOR SUPREME COURT REVIEW.

The petition frames the issue for review as follows:

> Are California Rules of Court, rule 5.482(c) and rule 5.484(c)(2) consistent with Welfare and Institutions Code [fn. omitted] section 224, subdivision (a)(1), when they require a juvenile court to treat as if he were an Indian under the ICWA, a child who has been found by a tribe to be eligible for tribal membership, but who has not yet obtained formal enrollment? (Petition, p. 2.)

The petition ignores the fact that neither petitioner nor the children are members of the tribe; and that the tribe's letter expressly states that the children are *not* Indian children. (2 CT 333, 390.) Equally disconcerting, petitioner's statement of the issue merely contains an isolated reference to section 224, subdivision (a)(1),[4] with no mention of the provisions setting

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[4] See fn. 5, *post.*

forth the definition of an "Indian child" in the federal ICWA, and incorporated into state law.[5]

A. The petition for review ignores the fact that the tribe has determined that the children are *not* Indian children.

Petitioner highlights only a part of the record on appeal favorable to him—that "a January 2013[] letter from the Cherokee Nation of Oklahoma[] determined that the children were *eligible* for membership in the tribe." (Petition, p. 9, italics added by petitioner.) His selective reading of the tribe's response ignores the following pivotal facts: (1) the letters from the tribe indicate that the children in the pending case are *not* members of the Cherokee Nation albeit they are eligible for enrollment (2 CT 333, 390; RT 50-52); (2) the tribe determined that it could not intervene until and unless the following condition was satisfied: "when the child/children or eligible parent[s] apply *and receive* membership" (2 CT 333, italics added for emphasis; 2 CT 390 [same]); (3) to date,

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[5] Cf., *Abbigail A.*, *supra*, 226 Cal.App.4th 1450, wherein the court clearly set forth the definition of an Indian child:

> The definition of 'Indian children' in the ICWA and state law requires that minors be either (a) members of a tribe themselves or (b) *biological children of members* of a tribe *and* eligible for tribal membership. (25 U.S.C. § 1903(4); Welf. & Inst.Code, § 224.1, subd. (a).) (*Abbigail A.*, *supra*, at pp. 1453-1454, italics added for emphasis.)

petitioner's membership application is still pending;[6] and (4) the juvenile court found that the children and petitioner are *not* members of the tribe. (RT 52.)

In short, the petition for review ignores the fact that the tribe has determined that the children are *not* Indian children; and the juvenile court found that neither they nor petitioners are members of the tribe. Thus, regardless of whether there is a true conflict between *Jack C.*, *supra*, and *Abbigail A.*, *supra*, the point remains that the children in this case are *not* Indian children, and cannot be until the Cherokee Nation has approved their father's membership application.

B. The petition for review ignores the fact that because Congress intended a uniform definition of the terms triggering application of the ICWA, the definition of "Indian Child" must be narrowly construed.

The petition ignores the fact that because Congress intended a uniform definition of the terms triggering application of the ICWA, the definition of "Indian child" must be narrowly construed. More to the point, the petition omits any reference to either the federal or state law's definition of an "Indian child." Instead, petitioner raises a red herring: "formal *enrollment* in a tribe is not dispositive of *membership* in a tribe." (Petition,

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[6] The record does not show that an application for membership has been completed by petitioner and approved by the tribe.

p. 6, italics added by petitioner.) This is a non-issue because appellant agrees that enrollment is but one way of demonstrating tribal membership.

The ICWA does not extend "Indian child" status to an eligible child born to *non-members*. Instead, the ICWA defines an Indian child as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe *and* is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4), italics added for emphasis; *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 42 (*Holyfield*); see also § 224.1, subd. (a) [incorporating operative definitions, including definition of "Indian child," from federal ICWA].) Thus, if a child is not a member, the ICWA allows a child who is eligible for membership to be designated "Indian child" only if the child is born to a *member* of a tribe. (*Ibid.*)

Congress intended the jurisdictional terms established by the ICWA be given a consistent, uniform meaning. (See *Holyfield*, *supra*, 490 U.S. at p. 51.) In construing the meaning of "domicile" as used in the ICWA, the United States Supreme Court held that Congress intended the word be given nationwide uniformity. (*Id.* at p. 47.)[7] While domicile of the

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[7] In *Holyfield*, *supra*, 490 U.S. 30, while analyzing the meaning of domicile as used in the ICWA, the United States Supreme Court noted that Congress did not enact the ICWA with the expectation that its terms and

children is not an issue in this case, *Holyfield, supra*, instructs that the definition of an Indian child must be given the construction which provides uniformity for purposes of the ICWA.

In *In re W.B.* (2012) 55 Cal.4th 30 (*W.B.*), the California Supreme Court construed a provision of the California Rules of Court which required a delinquency court to comply with the notice provisions of ICWA when placing a delinquent in foster care. In rejecting the child's contention that state legislation expanded ICWA to delinquency proceedings to require notice to Indian tribes in delinquency cases, the court stated: The "ICWA is quite precise in setting out the scope of its provisions." (*Id.* at p. 49, fn. omitted [citing 25 U.S.C. § 1903, and quoting definition of "Indian child" as prescribed by 25 U.S.C. § 1903(4)]; see also *In re R.M.W.* (Tex.App. 2006) 188 S.W.3d 831, 833, italics added for emphasis [finding that the child was not an "Indian child" as "*narrowly* defined by the ICWA."].)

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provisions would depend on state law, and thus utilize various state-law definitions without consistency. (*Id.* at pp. 42-45.) The court reasoned that "federal statutes are generally intended to have uniform nationwide application." (*Id.* at p. 43; see also at p. 47 [wherein the court concluded that it was "beyond dispute that Congress intended a uniform federal law of domicile for the ICWA."].)

In short, the ICWA's definition of an "Indian child" is narrow and simple: The ICWA prescribes two alternate routes by which a child can meet the definition of an "Indian child." (25 U.S.C. § 1903(4).) The child must either be a member of a federally recognized tribe; or if a child is not a member, the ICWA allows a child who is *eligible* for membership to be designated "Indian child" only if the child is born to a *member* of a tribe. (*Ibid.*) Conversely, the ICWA does not extend "Indian child" status to an eligible child born to *non-members*. (*Ibid.*)

As applied to this case, it is insufficient for the children to simply *have* Indian ancestry. For children who are not tribal members, such as the children in this case, eligibility is only one criterion necessary for triggering application of the ICWA. Thus, these children in this case must also satisfy the "and" component of the statutory definition of an Indian child (25 U.S.C. § 1903(4), which can be achieved only *if* the tribe approves petitioner's membership application. This is not changed by his "higher standards" and "liberal construction" arguments, as we will explain.

1. The mandate in subchapter 1 of chapter 21 of the ICWA (25 U.S.C. § 1921) to apply higher state protections cannot be used to broaden the definition of an "Indian child," which is found in another part of the ICWA (25 U.S.C. § 1903(4)).

Section 224.1, subdivision (a) defines an "Indian child" by incorporating the ICWA's definition: "As used in this division, unless the context requires otherwise, ...'Indian child[]'...*shall be defined as provided in Section 1903 of the Indian Child Welfare Act* (25 U.S.C. Sec. 1901 et seq.)." (§ 224.1, subd. (a), italics added for emphasis.) As the *Abbigail A.* court noted, "it makes as 'little sense' here as it did in *W.B.* to interpret the *express incorporation* of the ICWA definition as allowing for the application of ICWA provisions to a broader class of children. (*Abbigail A.*, *supra*, 226 Cal.App.4th at p. 1459, citing *W.B., supra*, 55 Cal.4th at pp. 50-55.)

As dicta by the court in *In re Jose C.* (2007) 155 Cal.App.4th 844 (*Jose C.*) explained, section 224, subdivision (c) mandates that the tribe must determine that the minor is eligible for membership *and* is the biological child of a member for ICWA to apply:

> ...Eligibility is only *one* criterion necessary to be found to be an Indian child. While the minors here were eligible, they were not members and they were not the biological children of a member. Their membership or the membership of one of their biological parents is a

requirement to be found to be an Indian child. (*Jose C., supra,* 155 Cal.App.4th at p. 849.)

Disregarding the definition of an Indian child set forth in the ICWA, petitioner instead cites section 224, subdivision (d) and 25 U.S.C. section 1921, which mandate application of a higher level of protection. (Petition, p. 6.)

Title 25 U.S.C. section 1921 states that higher state standards may apply to rights "provided under *this* subchapter." (25 U.S.C. § 1921, itals. added for emphasis; see also § 224, subd. (d) [state law similarly proving that higher standard of protection is applicable].) The application of 25 U.S.C. section 1921, however, is expressly limited to "this subchapter" —referring to subchapter I of chapter 21. Subchapter I in turn begins with 25 U.S.C. section 1911, et seq., which cover matters such as noticing, intervention, transfer of cases and removal of children. (25 U.S.C. § 1912(a) [noticing]; 25 U.S.C. § 1911(c) [intervention]; 25 U.S.C § 1911(b) [transfer of cases]; 25 U.S.C § 1915 [placement].)

In other words, by its express terms, the reference to "a higher standard" in 25 U.S.C. section 1921 does not apply to the definitions found in section 1903, which includes the definition of an "Indian child" found in a different part of the ICWA *preceding* subchapter 1. Thus, the heightened -standard reference in 25 U.S.C. section 1921 only applies when a child

custody proceeding involves an *Indian child.* (*In re Santos Y.* (2002) 92 Cal.App.4th 1274, 1300.) As such, the "higher standard" provision cannot be used to bootstrap a non-Indian child into the purview of the ICWA.

Simply put, 25 U.S.C. section 1921 merely sanctions higher protections for a *specific* class of persons, *not* broader application of the protections to *more* people. (See *In re Adoption of C.D.* (N.D. 2008) 751 N.W.2d 236, 240 italics added (*Adoption of C.D.*) ["ICWA's heightened standards for termination of parental rights apply only if an Indian child, *as defined in the Act*, is involved."].) This interpretation is supported by reading the provision together with 25 U.S.C. section 1902, which provides:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the *removal* of *Indian children* from their families and the *placement of such children* in foster or adoptive homes .... (25 U.S.C. § 1902, italics added.)

In short, the higher standards of protection provided by the states are not triggered until and unless a child meets the narrow, precise definition of an "Indian child" set forth in the federal ICWA and incorporated into state law by the California Legislature.

2. Liberal construction is not a substitute for meeting the definition of an "Indian child."

Petitioner contends that "ICWA, federal guidelines implementing ICWA, and any state statutes, regulation or rules promulgated to implement ICWA shall be liberally construed to effectuate its purpose and preferences." (Petition, p. 12.)

It is true that the BIA Guidelines on the ICWA urge a liberal construction of the ICWA to further its purposes. As petitioner acknowledges, however, the BIA Guidelines do not have a binding effect on state courts. (Petition, p. 12, fn. 3.) Moreover, the ICWA does not apply until the tribe determines that a child is an "Indian child." (*Jack C.*, *supra*, 192 Cal.App.4th at p. 980; *Jose C.*, *supra*, 155 Cal.App.4th at p. 849.)

In other words, the Guidelines' recommendation for "liberal construction" is not a substitute for meeting the ICWA's narrow definition of an "Indian child." (See *In re Alicia S.* (1998) 65 Cal.App.4th 79, 84 italics added [wherein the court construed the plain language of the ICWA and held that the provisions of the ICWA apply to "all child custody proceedings involving an *Indian child*"] see also pp. 89-90 [noting that "[w]hen statutory language is clear and unambiguous there is no need for construction and courts should not indulge in it. [Citations omitted]."].)

Ignoring the tribe's determination that the children in this case are not tribal members, and that his membership application has not been approved, petitioner focuses on section 224, stating:

> ...That section provides, in relevant part, 'the State of California has an interest in protecting Indian children who are members of, *or eligible for* membership in, an Indian tribe.' (§ 224, subd. (a)(1), italics added [by petitioner].) It further states in subdivision (a)(2) that 'It is the interest of an Indian child that the child's membership...and connection to the tribal community be encouraged and protected.' (Petition, p. 6.)

Petitioner's reference to section 224 is not dispositive. As the court in *In re Christina A.* (2001) 91 Cal.App.4th 1153 noted: "The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. (*Id.* at p. 1162.) "[T]o determine this intent, we begin by examining the language of the statute. [Citations.]" (*People v. Pieters* (1991) 52 Cal.3d 894, 898.)

Because "statutory language must...be construed in the context of the statute as a whole and the overall statutory scheme" (*People v. Rizo* (2000) 22 Cal.4th 681, 685), in construing section 224, one must refer to another provision not mentioned in the petition: Section 224.1, subdivision (a), which provides a clear definition of an "Indian child"—by incorporating the ICWA's definition. (§ 224.1, subd. (a).)

In short, for purposes of the ICWA, it is critical to distinguish between a *tribal* Indian child and an *ethnic* Indian child. To trigger application of the ICWA in this case, it is insufficient for the children to simply *have* Indian ancestry—or to be "eligible for enrollment." The "term 'Indian child' as defined by the ICWA means 'something more specific than merely having Native American ancestors.'" (*In re L.S.* (S.D. 2012) 812 N.W.2d 505, 508, quoting *In re Arianna R.G.* (Wis. 2003) 657 N.W.2d 363, 368.)

Here, the children are American Indian in ethnicity only. The children must also satisfy the "and" component of the statutory definition of an Indian child (25 U.S.C. § 1903(4)), which can be achieved only *if* the Cherokee Nation approves their parent's membership application. Petitioner's call for liberal construction of the ICWA's protection is not a substitute for tribal approval of petitioner's application for membership. Extending the ICWA's coverage to the children in this case, and to similarly situated children in other dependency cases, would present constitutional problems. (See discussion under heading "II.A.," *infra.*)

C. There is no true conflict between *Jack C.* and *Abbigail A.*

There is no true conflict between *Jack C.*, *supra*, 192 Cal.App.4th 967 and *Abbigail A.*, *supra*, 226 Cal.App.4th 1450. The present case

involves the validity of rules 5.482(c) and 5.484 (c)(2). The latter rule was not even at issue in *Jack C., supra*; and the *Jack C.* court's discussion of the former rule was dicta.

In *Jack C., supra*, 192 Cal.App.4th 967 the parents argued that the juvenile court erred when it found that the children were not Indian children, and when it declined to transfer the petition on the ground ICWA did not apply. (*Id.* at p. 976.) In response to notice, the tribe stated that the minors were Indian children and notified the court of its intent to intervene in the dependency proceedings. (*Id.* at p. 973; see also p. 979 ["the record shows the Band considered the children to be Indian children within the meaning of ICWA"]; pp. 779-780, italics in original [..."[T]he Band's legal expert[] stated there was 'no doubt the children were Indian children who would be enrolled in the Band' on the completion of 'bureaucratic' requirements."]; and p. 980 [there was evidence tribal court was able to take custody over children before they were enrolled].) The tribe formally intervened. (*Id.* at pp. 973-974.) The tribal representative "appeared telephonically and testified at the children's hearings." (*Id.* at p. 980.) The juvenile court nevertheless denied the tribe's petition to transfer jurisdiction. (*Id.* at p. 974.)

On appeal, the appellate court reversed the lower court's findings and order, reasoning that "the juvenile court...should have proceeded as if the children were Indian children when it considered whether to transfer jurisdiction to the tribal court. [Citation.]" (*Jack C., supra*, 192 Cal.App.4th at pp. 981-982.) The court reasoned that "[t]he Band's actions...indicated it considered the children to be Indian children within the meaning of ICWA; and that "[a] tribe's determination that a child is a member...is conclusive." (*Id.* at p. 980.) Thus, although the children involved in that case were not enrolled members of the tribe, and notwithstanding father's lack of membership in the tribe, the children were Indian children because the tribe *considered* them to be Indian children. (*Id.* at pp. 979-980.)

Since the tribe in *Jack C., supra*, determined that the children in that case were Indian children (*id.* at pp. 973, 979-780), the appellate court "conclude[d] they were Indian children with the meaning of the federal and state definitions of 'Indian child'" (*id.* at p. 977). Thus, it was unnecessary for the court to consider the parents' alternate argument—that "in the event the children did not meet the definition of an 'Indian child' under title 25 U.S.C. § 1903(4), the court was required to proceed as if the children were Indian children under rule 5.482(c)." (*Id.* at p. 976.) Accordingly, the

Jack C. court's pronouncement regarding the validity of rule 5.482(c) is dicta.[8] As such, there is no true conflict between *Jack C.*, *supra*, and *Abbigail A.*, *supra*, petitioner's contention to the contrary.

The pending case, which does not concern a transfer of jurisdiction, involves a completely different situation. In stark contrast to the facts in *Jack C.*, *supra*, the letters from the tribe indicate that the children in this case are not members of the tribe albeit they are eligible for enrollment. (2 CT 333, 390.) The letters, however, also state the tribe "is not empowered to intervene in this matter unless the child/children or eligible parent(s) apply *and receive* membership...." (*Ibid.*, italics added for emphasis.) Furthermore, there is no evidence in the record in this case to show that approval of the father's membership application is merely a matter of "bureaucratic" requirements. (Cf. *Jack C.*, *supra,* 192 Cal.App.4th at pp. 989-980.)

Put simply, the tribe's use of "eligible" to describe the children's enrollment status in *Jack C.*, *supra*, 192 Cal.App.4th 967 and the use of the

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[8] Dicta in *Jack C.*, *supra*, 192 Cal.App.4th 967 indicates that the state's attempt to expand the definition of "Indian child" found in 25 U.S.C. § 1903 was not preempted. (*Id.* at p. 981 [rejecting agency's contention that rule 5.482(c) "impermissibly expand[s] ICWA beyond its jurisdictional limits"].)

word by the Cherokee Nation in this case have entirely different connotations. In *Jack C., supra*, the tribe's Indian Child Welfare Supervisor testified that "the tribal court was able to take custody over children before they were enrolled...and the Band could then complete the enrollment process." (*Id.* at p. 980; see also *id.* at p. 974.) Moreover, in *Jack C., supra*, it was immaterial whether the children were eligible for enrollment, in light of the fact that the children were considered "members" by the tribe. Whereas, here, the children were not members and could not be until petitioner's application for membership was completed and approved.

In short, any conflict between *Jack C., supra*, and the appellate court's decision in this case is illusory.

II. THE APPELLATE COURT'S DECISION WAS CORRECTLY DECIDED.

Review is also not required because the appellate court's decision was correctly decided.

A. Because ICWA coverage is based on tribal affiliation, application of the ICWA to non-Indian children who are eligible for membership but whose biological parent is not a member of a federally recognized tribe, would violate equal protection under the United States Constitution.

Under the Fourteenth Amendment of the United States Constitution, children have a constitutional right to be protected against racial

discrimination. (*Brown v. Board of Education* (1954) 347 U.S. 483, 494-495; see also Cal. Const., art. I, § 7(a) [prohibiting denial of equal protection of the laws].)

In *Palmore v. Sidoti* (1984) 466 U.S. 429, the United States Supreme Court struck down the use of racial classifications to remove a child from an appropriate custody placement. (*Id.* at p. 433.) This case is no different. The children's blood quantum cannot be the sole basis for treating them differently from other similarly situated children subject to the juvenile court's dependency jurisdiction.[9] (See *In re A.W.* (Iowa 2007) 741 N.W.2d 793, 806-813 (*A.W.*) [wherein the Supreme Court of Iowa addressed this distinction between ethnic Indians and tribal Indians in the context of the ICWA).)[10]

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[9] In *In re Vincent M.* (2007) 150 Cal.App.4th 1247, the Sixth District Court of Appeal stated that ICWA recognizes the political affiliation that follows from tribal membership in a federally recognized tribe, and does not discriminate on a racial basis. (*Id.* at p. 1267; accord, *In re B.R.* (2009) 176 Cal.App.4th 773, 783 [First District Court of Appeal held that "[t]ribal membership is treated under the ICWA as a matter of political affiliation rather than racial origin."].)

[10] The Iowa Supreme Court held that expanding the ICWA to include *ethnic* Indians ineligible for tribal membership constitutes an improper racial classification, and thus, violates equal protection. (*A.W.*, *supra*, 741 N.W.2d at p. 812.) The court reasoned that given the limits of the state authority to legislate in favor of members of federally recognized tribes, Iowa's ICWA law's expansion of the definition of "Indian Child" to

As the North Dakota Supreme Court explained in *Adoption of C.D.*, *supra*, 751 N.W.2d 236, the "ICWA's requirement of current *tribal* membership of at least one party to the proceedings is an outgrowth of the limits on Congressional authority in Indian legislation." (*Id.* at p. 244, italics added for emphasis.) As that court further explained: "Congressional authority to legislate extends only to tribal Indians, and creates a political, rather than a racial, preference." (*Ibid.*)

B. Rules that require the juvenile court to treat children who are eligible for membership in a tribe as Indian children—even though neither the children nor the children's biological parents are members of a federally recognized tribe—violate the supremacy clause of the United States Constitution, and as such, are barred by the doctrine of federal pre-emption.

Petitioner contends that expansion of the federal definition of an Indian child" does not violate the ICWA or the preemption doctrine; and that rule 5.482(c) is "in complete harmony with the goals and purpose of ICWA." (Petition, p. 10, citing 25 U.S.C. § 1902; and *Holyfield*, *supra*, 490 U.S. at p. 37.)

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include ethnic Indians not eligible for tribal membership constituted a racial classification that does not survive a strict scrutiny equal protection analysis. (*Id.* at p. 810 [explaining that because the traditional constitutional basis for federal Indian legislation is advancement of tribal self-government, the ICWA's focus is necessarily limited to tribal membership, not the ethnic background of an individual].)

While states may adopt higher protections to implement the ICWA, any attempt to broaden protections must be consistent with the requirements of the federal ICWA. ICWA exemplifies Congress' broad constitutional power derived from the Indian Commerce Clause "to promote the stability and security of Indian tribes and families" as part of a more general mandate to act as a guardian to Indian tribes and to protect tribal self-government. (25 U.S.C. § 1902; *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1511, superseded by statute on another ground as stated in *In re Santos Y.* (2002) 92 Cal.App.4th 1274, 1311–1312.) Because rules 5.482(c) and 5.484(c)(2) conflict with the ICWA, they are preempted by the ICWA.

The preemption doctrine originates from the supremacy clause of the United States Constitution, which states that the "Laws of the United States...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., art. VI, cl. 2; *In re Brandon M.* (1997) 54 Cal.App.4th 1387, 1393.)

There are three ways in which federal law can preempt state law: (1) through the use of an express preemption clause in the federal law; (2) by "implied preemption," or an "occupation of the field" by the federal

government; or (3) by virtue of a conflict between the provisions of federal and state law. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 259.) The third principle applies here because there is a conflict between the definition of an Indian child provided in the ICWA and the attempt by the California Judicial Council to broaden that definition.

Rules 5.482(c) and 5.484 (c)(2) deviate from the federal and state ICWA by purporting to broaden the ICWA to include non-Indian children within the ICWA's protection; and the rules cannot be reconciled with the definition of an "Indian child," as defined by both the federal and state ICWA. (See discussion under heading "I.B.," *supra*, incorporated herein by reference.) As such, the rules are in conflict with the ICWA, and thus, barred by the doctrine of federal pre-emption.

C. The Judicial Council exceeded its constitutional authority as well as violated the separation of powers doctrine by adopting rules that require the juvenile court to treat non-Indian children as Indian children for purposes of the ICWA.

The Judicial Council is only authorized to adopt rules that are consistent with state law. Because the rules at issue go beyond the ICWA by requiring the juvenile court to apply the ICWA to *potential* Indian children pending the tribe's adjudication of petitioner's application for membership, the rules are invalid.

Pursuant to article VI, section 6(d) of the California Constitution, the Judicial Council is limited to adopting "rules for court administration, practice and procedure" and it must exercise its constitutional power only in conformity with statute. (Cal. Const., art. VI, § 6(d) [Constitution requires the Council to adopt rules for court administration, practice and procedure, not "inconsistent with statute."].) In construing the authority of the California Judicial Council to adopt rules, the court in *California Court Reporters Association v. Judicial Council of California* (1995) 39 Cal.App.4th 15 held that the rule permitting electronic recording of superior court proceedings conflicted with implicit legislative intent that such proceedings be stenographically recorded. (*Id.* at pp. 26-31.) The court reasoned that "the Judicial Council is empowered to 'adopt rules for court administration, practice and procedure, *not inconsistent with statute*...." [Citations.]" (*id.* at p. 22, italics added by court); but that "the Judicial Council may not adopt rules that are inconsistent with governing statutes. [Citations.]." (*Ibid.*) More recently, in *W.B.*, *supra*, 55 Cal.4th 30, the California Supreme Court reaffirmed these principles. (*Id.* at p. 58, fn. 17.)[11]

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[11] In *W.B.*, *supra*, 55 Cal.4th 30, the California Supreme Court considered the validity of former rule 5.480. The court held that ICWA notice is not required in a delinquency proceeding premised on conduct that

In other words, "Judicial Council rules are subordinate to statutes." (2 Witkin, Cal. Procedure (5th ed. 2008) Courts, § 181, p. 259.) Defining an "Indian child" for purposes of the ICWA, or mandating the department to seek tribal enrollment for a non-Indian child, is an intrinsically legislative function. (See *State ex rel. State Office for Services to Children and Families v. Klamath Tribe* (Or. App. 2000) 11 P.3d at p. 707 (*Klamath Tribe*) ["For purposes of ICWA, only Congress can define who is an Indian child."].)

By adopting the rules in question, Judicial Council also violated the California Constitution's requirement that the judicial power be vested in the judiciary; and that the powers of government be separated into the executive, the legislative, and the judicial branches. (Cal. Const., art. III, § 3 ["The powers of state government are legislative, executive, and [j]udicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."]; see

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would be criminal if committed by an adult. (*Id.* at p. 55.) The court also held that because rule 5.480 "does not account for the limited applicability of ICWA in delinquency cases, the Rule of Court describing ICWA's requirements is overbroad." (*Id.* at p. 58, fn. 17 [noting that the "Rules established by the Judicial Council are authoritative only 'to the extent that they are not inconsistent with legislative enactments and constitutional provisions.' [Citation.]"].)

also *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630 ["The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature."].)

The Judicial Council has no authority to rewrite a federal statute in a manner inconsistent with Congress' intent to adopt a narrow definition of an "Indian child."

D. *Abbigail A.* is consistent with decisions by the United States Supreme Court and sister state courts.

As we noted earlier, the appellate court's decision in *Abbigail A., supra,* is supported by *Holyfield, supra*, 490 U.S. 30.[12]

Abbigail A. is also consistent with decisions by sister state courts. For example, in *Klamath Tribe, supra*, 11 P.3d 701, an Oregon court considered whether the definition of an "Indian Child" can be extended beyond the definition set forth in the federal ICWA. (*Id.* at p. 707.) The court held: "*For purposes of ICWA*, only Congress can define who is an Indian child...." (*Ibid.*, itals. in original.) The Oregon court cited *Holyfield, supra*, which explained that "unless Congress clearly has expressed its intent that an ICWA term be given content by the application of state law, the Court will presume that Congress did not so intend."

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12 See fn. 7, *ante.*

(*Klamath Tribe, supra*, at p. 707; see also e.g., *Adoption of C.D., supra*, 751 N.W.2d at p. 244 [ICWA definition reflects limitation on congressional authority to tribal Indians]; and *In re A.B.* (N.D. 2003) 663 N.W.2d 625, 636 [no equal protection violation under ICWA because classification political].)

For the foregoing reasons, the appellate court's decision was correctly decided. On this additional ground, review is unnecessary.

CONCLUSION

This court should deny father's petition for review. If this court grants review, appellant respectfully requests that the court reframe the issues as stated in this answer. Furthermore, appellant requests that the court consider the additional issues raised by appellant.

Dated: August 6, 2014

Respectfully submitted,

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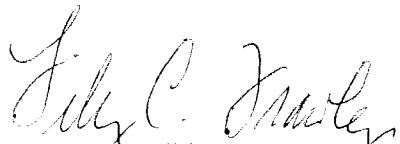
CERTIFICATION OF WORD COUNT
[CALIFORNIA RULES OF COURT, RULES 8.360(b) and 8.412(a)]

In compliance with California Rules of Court, rules 8.360(b) and 8.412(a), I certify this brief contains 6,355 words, excluding tables, calculated by the Microsoft Word processing program.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 6, 2014, at Sacramento, California.



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In re J.A., et al. **PROOF OF SERVICE BY MAIL**
S220187; C074264

I, Rhonda Severson, declare that:

I am over the age of 18 years, and not a party to the above-entitled action. I am a resident of the County of Sacramento and my business address is 3331 Power Inn Road, Suite 350, Sacramento, CA 95826.

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Rhonda Severson

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