IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re Abbigail A., *et al.*, Minor persons coming under the Juvenile Law	**CASE NO. S220187**
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Appellant,	COURT OF APPEAL NO. C074264
v.	SACRAMENTO COUNTY JUVENILE COURT NO. JD232871-2
J. A., Defendant and Respondent.	

ON APPEAL FROM THE SUPERIOR COURT OF SACRAMENTO
HONORABLE PAUL L. SEAVE PRESIDING

REPLY BRIEF ON THE MERITS

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BY APPOINTMENT OF THE
SUPREME COURT UNDER
ASSISTANCE FROM THE
CENTRAL CALIFORNIA
APPELLATE PROGRAM

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REPLY BRIEF ON THE MERITS

INTRODUCTION

Appellant and respondent-mother[1] argue the California Rules of Court, rules 5.484 and 5.482, broadly expand the ICWA definition of "Indian child" to include a class of persons never intended to be protected by federal or state law. This is not so. The rules - under authority of ICWA, BIA Guidelines and the Legislature's express intent – merely impose procedural protections in child custody

[1] Hereafter "mother."

proceedings for non-enrolled Indian children. Moreover, the rules have the effect of promoting the timely resolution of child custody matters by avoiding protracted litigation concerning the applicability of ICWA for children whose tribal membership is pending, or is perfected late in proceedings. As such, the rules are procedural rather than definitional, and are, therefore, valid.

DISCUSSION

I

APPELLANT AND MOTHER HAVE FAILED TO SHOW THAT FEDERAL LAW PREEMPTS RULES 5.482(c) AND 5.484(c)(2).

Appellant and mother argue that the central issue presented in this case is, not whether rules 5.482(c) and 5.484(c)(2) are in harmony with the goals and purposes of both Congress and the Legislature, but whether they unlawfully expand the definition of Indian child and are, therefore, preempted by federal law. (ABM[2] at p.

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[2] Appellant's Answer Brief on the Merits will be referred to as "ABM", while mother's Answer Brief on the Merits will be cited as "MABM." The Respondent's Opening Brief on the Merits will be cited as "OBM."

50.) Appellant and mother asserts that the rules are, indeed, preempted by federal law, but are mistaken.

While it is true, as appellant and mother point out, California has no independent constitutional authority with respect to Indian tribes" (*In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1317, it does have discretion in developing the procedural rubric accompanying child custody proceedings involving Indian children. (*Id.* at p. 1317) Indeed, since Congress gave great latitude to the states in developing and executing state-specific rules for conducting child custody proceedings, the procedural mandates of rules 5.482(c) and 5.484(c)(2) are within the bounds of Congressional trust power. (Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67584 (Nov. 26, 1979); see *In re A.W. and S.W.* (Iowa 2007) 741 N.W.2nd 793, 812.)

In sum, rules 5.482(c) and 5.484(c)(2) are procedural not definitional, and, therefore, mandate – not who is an Indian – but how a child custody matter should proceed in the trial court if a *potential* Indian child has been found by a tribe to be *eligible* for a political affiliation with a tribe through formal membership. Accordingly, the

preemption doctrine is not implicated.

The preemption doctrine derives from the supremacy clause of the United States Constitution which declares 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, § 2.)

"Whether federal law preempts state law 'fundamentally is a question of congressional intent....' [Citations.]" (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 147.) With respect to ICWA, while Congress intended to create a uniform system of protection for tribes and their Indian children, it did so with a clear intent to allow states broad latitude in its application in trial court custody proceedings. Indeed, jurisdiction over legal matters in family relations is traditionally reserved to the states. (*Lehman v. Lycoming County Children's Services* (1982) 458 U.S. 502, 511–512.)

Further, when addressing a preemption question, an analysis starts "with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the

clear and manifest purpose of Congress." (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516; see also *Smiley v. Citibank, supra,* 11 Cal.4th at p. 148.)

The federal law contains nothing at all by way of an express preemption provision. (*In re Brandon M.* (1997) 54 Cal.App.4th 1387, 1396.) As one court noted "it simply cannot be maintained that the ICWA in any way, manner, shape or form "occupies the field" of child custody or adoption, even as to Indian children. (*Ibid.*) Indeed, ICWA is totally devoid of any provisions dealing with, e.g., the bases on which a child may be removed from a parent's custody, when and how often hearings must be held to review a child's status, who is entitled to what reunification services and for how long, or many, many other similar issues." (*Ibid; Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32, 43 (*Holyfield*); *In re Pedro N.* (1995) 35 Cal.App.4th 183, 190; *Alone v. Into County Juvenile Court* (1991) 230 Cal.App.3d 263, 266–268.)

Consequently, because rules 5.482(c) and 5.484(c)(2) relate to the procedures required in child custody proceedings when an eligible Indian child is involved, appellant and mother claim that the ICWA

preempts rule 5.482(c) and 5.484(c)(2). The claim could only be viable if there was a patent conflict between the federal ICWA and the rules.

To ascertain whether a conflict exists here, it is necessary to look to the United States Supreme Court's approach to preemption in alleged conflicts between Indian rights and state law. That approach was set forth in *New Mexico v. Mescular Apache Tribe* (1983) 462 U.S. 324 (*Mescular)*, where the court held that the application of New Mexico's hunting and fishing laws to nonmembers of a tribe present on an Indian reservation was preempted by federal law and by the tribe's own regulatory scheme. It stated the general rule to be: "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." (*Id.* at p. 334.)

It is on the principles of *Mescular,* that appellant and mother's arguments must fail. Rules 5.482(c) and 5.484(c)(2) do not interfere, nor are incompatible, with federal law. The rules do not "broadly redefine" Indian child, as appellant and mother assert. Indeed, the

definition of Indian child in California is exactly the same as the ICWA definition, with or without the application of rules 5.482(c) and 5.484(c)(2).

If a child is eligible for membership in a tribe, rules 5.482(c) and 5.484(c)(2) provide, not that the child *is* an Indian, but that the child will be treated *as if Indian*, only for the short time it takes, with the aid of the social services agency, to perfect tribal membership. The rules, do not define ethnic Indian or tribal Indian status.

The Judicial Council enacted the rules 5.482(c) and 5.484(c)(2) to correct the problem of late perfection of tribal membership when a child has been removed from a parent for many years, and, thereby, prevent the delay in permanency and stability for an Indian child because of the need for late compliance with ICWA.

In sum, because the rules relate to procedure and not definition, they do not conflict with the federal ICWA definition of Indian as appellant and mother contend. Accordingly, there is no conflict with ICWA which gives rise to federal preemption.

Even, if it could be said there was a conflict, as appellant and mother contend, "courts should proceed on 'the conviction that the

proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted.'" (*Merrill Lynch, Pierce, Feiner & Smith, Inc. v. Ware* (1973) 414 U.S. 117, 127, 94 S.Ct. 383, 389–90, 38 L.Ed.2d 348.)

A reasonable reconciliation of ICWA, section 224.1, subdivision (a) and rules 5.482(c) and 5.484(c)(2) lead to the conclusion the rules are valid.

II

APPELLANT AND MOTHER HAVE FAILED TO REBUT THE SHOWING THAT RULES 5.482(c) AND 5.484(c)(2) ARE CONSISTENT WITH THE LANGUAGE AND GOALS OF CONGRESS AND THE LEGISLATURE TO PROTECT TRIBE-ELIGIBLE INDIAN CHILDREN.

A. The Rules of Statutory Construction Support the Validity of the Rules 5.482(c) and 5.484(c)(2).

Appellant engages in a lengthy discussion to explain that the meaning of "Indian child," under section 224.1, subdivision (a) and 25 U.S.C. § 1903, subdivision (4), is limited to only those persons who are either Indian or eligible for membership in a tribe because of either parent's membership. (ABM at pp. 70-85.) This would be a

fruitful endeavor to counter respondent's argument, if the language of rules 5.482(c) and 5.484(c)(2) *actually* redefined Indian child.

For example, if the rules included a definition that a tribe-eligible child as an "Indian child," or contained language similar to that of the Klamath Indian case where a social service agency's agreement with a tribe expanded ICWA protection to persons with merely ethnic Indian ancestry, then the arguments raised by appellant might invoke the question of whether the new terms contradicted statute. (*In re W.B., Jr.* (2012) 55 Cal.4th 30, 57; *State ex rel. State Office For Services to Children and Families. v. Klamath Tribe* (2001) 170 Or.App. 106, 110-114.)

However, the rules at issue make no provision for a new definition of Indian child. Indeed, the application of the rules and the definition of Indian child *are separate questions*. For example, the procedural provisions of rules 5.482(c) and 5.484(c)(2) may be invoked at the same time a trial court makes a finding a child is *not* Indian. Treating a child who has already been found to be eligible for membership, as if he were Indian, for the to effectuate the inevitable need for ICWA compliance, is not a redefinition of "Indian child."

Appellant and mother also argue, relying on *Holyfield, supra,* that Congress intended a uniform definition of Indian child. They argue Congress would not want to allow each state to enact its own definition. (ABM at p. 30-31.)

However, Congressional intent also shows that the goal of ICWA is to protect Indian tribes, culture and community as well as Indian children, *and those children eligible for qualification as a member of a tribe.* 25 U.S.C. § 1901, provides, in part: "(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting *Indian children* who are members of *or are eligible for membership in* an Indian tribe." ([emphasis added].)

Likewise, does California's legislative history manifest the same goal. (Legis. Counsel's Dig., Sen. Bill No. 678, 6 Stats. 2006 (2005-2006 Reg. Sess.), Summary Dig., p. 465 [overhaul of "various provisions of state law to, among other things, apply to certain children who do not come within the definition of an Indian child [under the ICWA]".)

Appellant and mother argue this general language relating to the goals of the Legislature and Congress is inadequate to support the view that the rules are valid. (ABM at p. 63, citing *Martens v. Hewitt Associates* (1998) 508 U.S. 248, 261.) However, the aspirational language Congress identified the class of protected children as both those who were part of a tribe, and those who were merely eligible for membership in a tribe. (*Ibid.*)

B. Rule 5.482(c) and 5.484(c)(2) are Consistent With Public Policy.

Appellant and mother condemn respondent's argument rules 5.482(c) and 5.484(c)(2) effectuate the purposes of ICWA and California law because they are based on policy considerations – correcting past ICWA errors and promoting swift resolution of child custody proceedings – and not on express statutory interpretation. (ABM at p. 24.) Appellant and mother argue it does not matter what positive effects rules 5.482(c) and 5.484(c)(2) achieve if they redefine "Indian child."

However, courts have held that public policy considerations

may inform the interpretation of statutes. (*Owen v. City of Independence, Mo.* (1980) 445 U.S. 622, 650; *Mussed v. Provence* (2002) 28 Cal.4th 274, 285.) Since rules 5.482(c) and 5.484(c)(2) do not redefine Indian child, but simply provide a procedural mechanism for protecting potential Indian children, issues of public policy – why the rules were developed – may inform a consideration of their validity in light of section 224.1, subdivision (a). Applying public policy considerations to determine the meaning of the law has been a tool this court has used to interpret the law. (*Mussed v. Provence, supra,* 8 Cal.4th at p. 285 [public policy prevents the assignment of legal malpractice actions].)

Appellant and mother's reliance on *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53, to argue otherwise is misplaced. In that case, this court found it had no authority to engage in a legislative function and weigh competing policies. (*Ibid.*) There are no competing policy consideration extant in the present matter requiring resolution, as the goals of both Congress and California are certain.

Finally, the Supreme Court has determined that a statute may

be interpreted by resort to the "legislative purpose in enacting the statute and by considerations of public policy." (*Owen v. City of Independence, Mo.*, supra, 445 U.S. at p. 650.) Viewed in light of the Congress' legislative purpose and policy goals in enacting ICWA, the validity of rules 5.482(c) and 5.484(c)(2) is manifest.

C. The Judicial Council Did Not Exceed Its Authority in Promulgating Rule 5.482(c) and 5.484(c)(2).

Appellant and mother argue rule 5.482(c) and 5.484(c)(2) are an overreach of Judicial Council authority because those rules are "inconsistent with legislative intent." (ABM at pp. 92-95.) This is incorrect. The goal of the rules is to *comply with ICWA* and facilitate the prompt resolution of child custody proceedings involving children with a *verified* right claim to Indian tribal membership. Under no interpretation of rule 5.482(c) and 5.484(c)(2) would a child, *not* already having been determined by a tribe to be eligible for tribal membership, be included under their provisions. The rules only apply to children who have a recognized *right* to tribal membership. There is no intent evidenced by rule 5.482(c) and 5.484(c)(2) to expand the

ICWA "Indian child" definition.

Appellant and mother rely for support on the holding of *California Court Reporters Assn. v. Judicial Council of California* (1995) 39 Cal.App.4th 15 (*Court Reporters*) which found a rule of court in conflict with a statute. The issue in *Court Reporters* was the implementation of a rule which would allow an electronic recording of trial court proceeding to be designated the official record of a trial. For many years the legislature provided in Code of Civil Procedure, section 269, that all oral proceedings in the courts of the state be recorded by short hand. (*Id.* at p. 19.) When an authorized pilot program for electronic recording lapsed, the Legislature did not renew it. Shortly thereafter, the Judicial Council promulgated rules which allowed for electronic recording, which court reporters challenged. (*Id.* at p. 27.) On appeal, the First District, Division Four, found the rule was in direct conflict with a stated legislative purpose.

The facts of Court Reporters is very different from that found here. In that case, the rule supplanted the express intent of the Legislature. Code of Civil Procedure, section 269, provided that proceeding in a trial court must be taken down in short hand. The

rules provided otherwise.

Here, the situation is much different. The rules 5.482(c) and 5.484(c)(2) are not inconsistent with legislative intent the way the rules were in *Court Reporters, supra.* Indeed, quite the opposite, as the rules do not directly conflict with ICWA definitions as they are procedural and not definitional. Rather than constituting an contrary definition of "Indian child" rules 5.482(c) and 5.484(c)(2) provide a procedural mechanism for a very small group of eligible children, who, have a *right* to tribal membership, but are not yet formally enrolled in a tribe, to be treated as Indians for the limited purpose of complying with ICWA and expediting child custody proceedings to which they are subject. This goal is wholly consistent with legislative intent.

Moreover, in *Court Reporters* the legislature did not adopt the rules regarding court reporter shorthand as part of an expansive incorporation of a federal statute, as did the Legislature here. Nor did that adoption of the statute requiring short hand recording, include broad provisions at both the federal and state level that any state rule effectuating the purposes of a federal statute should be read broadly.

Moreover the passage of the rules in *Court Reporters, supra,* was not designed to years of non-compliance by trial courts and social services agencies with the law.

In sum, the factual similarities between circumstances here and those found in *Court Reporters* are scant. Indeed, beyond its statements of general legal principles, *Court Reporters* has little heft here. Accordingly, because the rules do not conflict with legislative intent they are sound.

D. Appellant and Mother Have Failed to Rebut Respondent's Showing That *In re Jack C.* is correct in its Holding the Rules are Valid.

Appellant and mother attack the holding of *In re Jack C., III* (2011) 192 Cal.App.4th 967 (*Jack C.*) and respondent's reliance upon it. (ABM at pp. 22-23, 60-66.) This is unhelpful to appellant and mother's cause.

Appellant and mother attempt to limit *Jack C.*'s power, by drawing marginal factual distinctions and criticizing its logic, but these attempts do not undermine the correctness of its holding. (ABM at pp. 60-66.) Regardless of the factual and procedural differences

between this case and *Jack C.*, the fundamental principles espoused by *Jack C.*, are sound as is shown below:

In sum, the children in that case were not yet Indian children as defined by section 224.1, subdivision (a) at the time dispositional orders were made by the trial court denying transfer of the case to a tribal court. (*Jack C., supra,* 192 Cal.App.4th at p. 973.) The facts show that the trial court had before the opinion of the Bois Forte Band's attorney stating: "There is no question in my mind that these are Indian children who will ultimately be enrolled in the Bois Forte Band of Lake Superior Chippewa *upon completion by someone of the necessary paperwork.*" (*Ibid.*) So the *Jack C.* children, like those in the present case, were virtually certain to obtain membership, but were not yet formally enrolled.

Under appellant and mother's view, because the Chippewa children in *Jack C., supra,* were not yet Indian, despite the strong indication of the tribe's attorney that membership was a certainty, the juvenile court was required to do *absolutely nothing* with respect to protecting the children's ICWA rights. In other words, once the minimum had been done to comply with ICWA – tribal notice – the

juvenile court was free to: 1) ignore the fact the children would shortly be Chippewa Indians; and, 2) make orders manifestly damaging to the interests of both the children and the tribe. That is exactly what the trial court did. It refused to acknowledge the children's Indian status even though the Chippewa tribe was involved and tribal membership for the children was imminent.[3]

That result – which is the one espoused by appellant and mother here – is manifestly incongruent with the twin goals of both Congress and the Legislature which implemented ICWA to protect Indian children and promote efficiency and timeliness in child custody proceedings. Indeed, it is difficult to ascertain how a social services agency, which is tasked with protecting children, would take a position that such a result is in the best interests of children.

Indeed, the *Jack C.* trial court's dispositional order rejecting patent tribal interests, is exactly the type of egregious violation of tribal political and family rights, which Congress was determined to prevent by passing ICWA. (*Holyfield, supra,* 490 U.S. at p. 32; see

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[3] While the appeal was pending the minors became enrolled in the Chippewa tribe. (*Jack C.*, at p. 974.)

also *Adoptive Couple v. Baby Girl* (2013) __ U.S. __, 133 S.Ct. 2552, 2554.) So the *Jack C.* holding is correct.

E. Rules 5.482(c) and 5.484(c)(2) Governing "Pending Court Proceedings" do not Violate ICWA or Section 224.1, Subdivision(a).

Appellant and mother take a different view from respondent on the role the "minimum Federal standards" language of 25 U.S.C. § 1921, plays in the present question. They argue rules 5.482(c) and 5.484(c)(2) are not authorized because the minimum federal standards language of § 1921 does not apply to the definitions section of the ICWA under 25 U.S.C. § 1903. (ABM at pp. 38-39.) In other words, the federal authority to expand ICWA provisions does not include expanding its fundamental definitions. This contention is unavailing.

First, as has been stated numerous times, rules 5.482(c) and 5.484(c)(2) do not expand the definition of Indian child to a class of persons not already contemplated to be included in the definition, and the rules' purposes are primarily procedural.

Second, the "minimum federal standards" language of the ICWA does expressly apply to the implementation and procedural

rules and regulations in "*Pending Court Proceedings*" under § 1912. Accordingly, a state may enact more expansive rules and procedures than those found in federal guidelines in the *conduct* of its child custody proceedings. Control over matters of family relations is traditionally reserved to the states. (*Rose v. Rose* (1987) 481 U.S. 619, 625; *Lehman v. Lycoming County Children's Services, supra,* 458 U.S. at pp. 511-512; *In re Burrus* (1890) 136 U.S. 586, 593-594.)

So while the "minimum federal language" may not apply to express definitions under ICWA, it *does* apply to how a state conducts its child custody proceedings. This is the focus of rules 5.482(c) and 5.484(c)(2). To wit: ensure that children, who are virtually certain of tribal membership, will be given the full ICWA protections *within court proceedings,* pending the satisfaction of bureaucratic requirements for tribal enrollment. Therefore, the rules can be afforded an expansive reading.

F. The Bureau of Indian Affairs Guidelines Carry Great Weight and Allow for the Implementation of State Procedural Rules, Like Rule 5.482(c) and 5.484(c)(2), Designed to Facilitate the Implementation of ICWA.

Appellant and mother dispute respondent's position that the BIA Guidelines should inform the calculus for determining rules 5.482(c) and 5.484(c)(2)'s validity. (ABM at p. 35.) They argue that any other view violates the Legislature's constitutional role as law maker and that, in any event, BIA Guidelines are not binding. (*Ibid.*)

First, the BIA Guidelines were crafted by the Bureau of Indian Affairs to assist in the procedural application of ICWA. As such, they are entitled to great weight. (*In re Brandon T., supra,* 164 Cal.App.4th at p. 1412; *In re Junious M.* (1983) 144 Cal.App.3d 786, 792, fn. 7.) Indeed, the United States Supreme Court has held that guidelines of a federal agency tasked to implement a federal statute, which are consistent with that statute, have the force of law. (*U.S. v. Booker* (2005) 543 U.S. 220, 221.)

Second, BIA Guidelines have been endorsed by California courts for decades. (See, *In re Michael G.* (1998) 63 Cal.App.4th 700, 714; *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1199.)

Third, incorporating the BIA Guidelines into California law was an express purpose of the Legislature when it engaged in its overhaul of ICWA provisions. (Sen. Rules Com. Analysis of Sen. Bill No. 678 (2005–2006 Reg. Sess.) as amended Aug. 22, 2006, p. 1 [SB 678, was designed to revise and recast "provisions of state law by codifying into state law provisions of [ICWA], [BIA] Guidelines for State Courts, and state Rules of Court"].)

In conclusion, the BIA Guidelines which have been promulgated by the federal agency tasked with facilitating the application of ICWA, approved by decades of decisional law and incorporated into California code by the Legislature are a sound basis for informing an interpretation of California rules governing potential Indian children.

III

BRIEFING AND ARGUMENT IN THIS MATTER SHOULD BE CONFINED TO THE ISSUES INCLUDED IN THE GRANT OF THE PETITION FOR REVIEW AS DEFINED BY RULE 8.520(b)(3).

Appellant, County of Sacramento, requested in its Answer to

the Petition for Review that if review was granted the issues for this court's consideration should include other issues not raised by respondent in the petition for review. This court declined appellant's invitation in its September 10, 2014, order granting review.

Because the court did not specify the issues to be briefed and argued, pursuant to rule 8.516, the parties are required in the briefing on the merits, to limit their briefs and arguments to the issue raised by the petition for review and any issues fairly included in them. (See rule 8.520(b)(3) ["briefs on the merits must be limited to the issues stated" in the petition for review]; rule 8.516(b)(1)["The Supreme Court may decide any issues that are raised or fairly included in the petition or answer"].)

Accordingly, respondent respectfully argues briefing and argument this matter be confined to the issues included in the grant of the petition for review as defined by rule 8.520(b)(3).

Nevertheless, should this court wish to consider appellant's requested arguments, respondent provides the following rebuttal:

A. Rules 5.482(c) and 5.484(c)(2) Do Not Expand the Definition of the Indian Child to Include Merely Ethnic Indians Who Are Not Entitled to a Political Affiliation to a Federally-Recognized Tribe.

Appellant argues rules 5.482(c) and 5.484(c)(2) impermissibly broadens the definition of "Indian child" to include a child who is merely an ethnic Indian. (ABM at pp. 96-102.) The argument goes that rules 5.482(c) and 5.484(c)(2) trigger application of ICWA based solely on a child's *ethnic Indian* status and, therefore, subjects ICWA to a strict scrutiny analysis required by the equal protection clause. Appellant suggests this threatens the constitutionality of ICWA because Congress only has power to create political, not racial preferences. (ABM at p. 99; see *In re C.D., supra,* 751 N.W.2d at p. 244.) Therefore, to save ICWA from unconstitutionality, rules 5.482(c) and 5.484(c)(2) should be rejected, as per the caution of the court in *In re Santos Y., supra,* 91 Cal.App.4th at p. 1317, which narrowly interpreted ICWA to avoid reaching constitutional questions. (ABM at pp. 44, 100-101.)

However, this argument is unavailing because it is based upon a false premise – that the rules in question expand the definition of

Indian to include ethnic Indian children. In fact, the rules state they apply only to tribe-eligible children. Tribal eligibility is a political affiliation. Indeed, once the tribe reviews Indian lineage and make a determination a child is eligible for membership, the relationship between the tribe and the eligible Indian child becomes more than an ethnic or racial one.

It becomes a political association at the point the tribe determines eligibility, because then the child has *more* than mere shared ancestry with the tribe, he or she has a political right of membership. (See, § 224, subd. (c) ["a determination that a minor is "eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe *shall constitute a significant political affiliation with the tribe* and shall require the application of the federal Indian Child Welfare Act to the proceedings"].) That is, only after a tribe has made a finding the child is eligible for membership – a political, not a racial, affiliation – do rules 5.482(c) and 5.484(c)(2) become active.

The determination of tribal membership necessarily carries with it a lineage component, that is certain, but that is only one factor

in the constellation of factors a tribe uses to determine political affiliation eligibility. (II CT 340, 397.)

As such, rules 5.482(c) and 5.484(c)(2) do not broaden the definition of "Indian child" to include a child who is merely an ethnic Indian.

IV

MOTHER HAS FAILED TO SHOW HOW RULE 5.482(c) AND 5.484(c)(2) VIOLATE CALIFORNIA STATUTORY LAW.

Mother, in addition to joining the appellant, County of Sacramento's arguments, takes the additional position that rules 5.482(c) and 5.484(c)(2) fail to "further any goal of ICWA" and are, therefore, invalid. (MABM at p. 13.)

First, that position is mistaken, because the rules do further the goals of the Legislature. (See OBM at pp. 29-34.)

Second, mother's position in this matter illustrates precisely why rules 5.482(c) and 5.484(c)(2) need to remain in place. As discussed in the Opening Brief, a parent – like mother here – may be hostile to the interests of the tribe, her own eligible Indian children

and the Indian spouse and, therefore take a position against ICWA application. If a non-Indian custodial parent refuses to enroll tribe-eligible children into the tribe to which they belong, because of animosity to the goals and purposes of ICWA, then the intent of Congress is frustrated. The rule 5.484(c)(2) requirement that a social service agency assist in enrolling the eligible child with a tribe, removes all such conflicts in child custody proceedings. (See OBM at p. 33.)

In sum, rules 5.484 and 5.482, impose procedural protections for non-enrolled Indian children in child custody proceedings. (See § 224.3, subd. (e)(1).) Those rules do not impermissibly expand ICWA beyond its jurisdictional limits by redefining the term "Indian child." (*Jack C.*, at p. 981.) Rather, in accordance with ICWA and BIA Guidelines' expressly permission that state or federal law may provide a higher standard of protection to the rights of the Indian child and his or her parent or Indian guardian than the protection of rights provided under ICWA provisions, (25 U.S.C. § 1921), rules 5.484 and 5.482 merely promote the timely resolution of juvenile dependency matters by avoiding protracted litigation concerning the

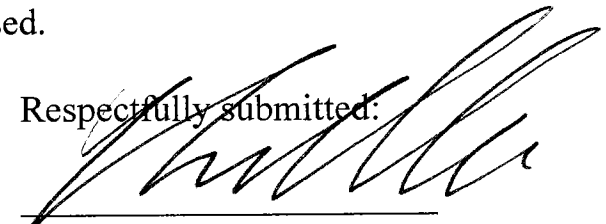
applicability of ICWA for non-enrolled, but tribe-eligible children. (*Jack C.*, at p. 981.) To reiterate, rules 5.482(c) and 5.484(c)(2) are procedural and do not redefine section 224.1, subdivision (a) in any respect.

CONCLUSION.

For the foregoing reasons, the Court should conclude rules 5.482(c) and 5.484(c)(2) are in harmony with the declared intent and express language of both the ICWA and California law. The decision of the Third District should be reversed.

Dated: 30 March 2015.

Respectfully submitted:



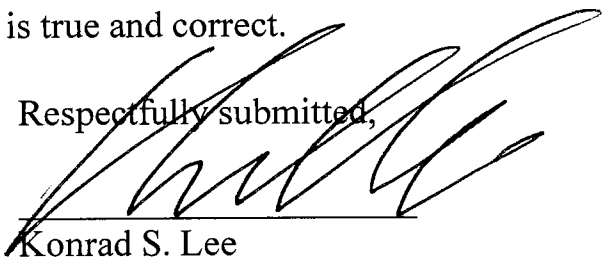
Konrad S. Lee

CERTIFICATE OF NUMBER OF WORDS

I, Konrad S. Lee, counsel for respondent, verify pursuant to the California Rules of Court, that the word count for this document is 5555 words, excluding the tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in Wordperfect, and this is the word count generated by the program for this document. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: 30 March 2015.

Respectfully submitted,



Konrad S. Lee

PROOF OF SERVICE
(Rule 8.25(a)(1) & (2), By Mail)

I, the undersigned, say that I am over the age of 18 years and not a party to the within action or proceeding; that my business address is 23441 Golden Spring Drive, Diamond Bar, California, 91765. That on 30 March 2015, I personally served a copy of the papers to which this proof of service is attached, namely:

REPLY BRIEF ON THE MERITS

by mailing a copy thereof, by depositing said copy enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box addressed as follows:

JOSEPH A. (Petitioner) Address of Record.

THIRD DISTRICT COURT OF APPEAL,
621 Capital Mall, 10th Floor, Sacramento, CA 95814

CENTRAL CALIFORNIA APPELLATE PROGRAM
2407 J Street, Suite 301, Sacramento, CA 95816.

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3331 Power Inn Road, Suite 350, Sacramento, CA 95826.

SACRAMENTO JUVENILE COURT
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REGINA QUAYNOR (Minors' Attorney)
8950 Cal Center Drive, Suite 301B, Sacramento, CA 95826.

ELIZABETH HANDY (Respondent Mother)
1286 University Avenue, San Diego, CA 92103.

KIMBALL SARGEANT (Minors' Attorney in the Supreme Court)
216 F Street, #148, Davis, CA 95616-4320.

CHEROKEE NATION OF OKLAHOMA (Tribe)
ATTENTION INDIAN CHILD WELFARE ACT, P. O. Box 948, Tahlequah, OK 74465.

Executed 30 March 2015, I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Konrad S. Lee