Winner, Best Appellate Brief in the 2004 Native American Law Student Association Moot Court Competition

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Questions Presented for Review

1) Is there an Existing Indian Family, necessary under the Congressional Intent for the application of the Indian Child Welfare Act, where the Indian parent does not live on the reservation of the tribe in which he/she is enrolled and his/her children have never resided on the reservation and have no relationship with the culture, society, or politics of that tribe?

2) Does the disparate treatment of Indian children in state custody proceedings under the Indian Child Welfare Act, either facially or as applied here, derive from a racially-based classification which constitutes an impermissible violation of the fundamental guarantees of the Equal Protection Clause of the Fourteenth Amendment?

Opinion Below


Constitutional and Statutory Provisions Involved

1. The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.


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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 which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.


(4) "Indian child" means 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.


(c) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

Statement of the Case — Statement of the Facts

G.F. and L.F., the subjects of these neglected child proceedings, are the children of Becky and Luis. G.F. was born on November 11, 1995, and L.F. was born on August 12, 2002. The family lives in Natrona County, Wyoming [hereinafter the County].

Becky is an enrolled member of the Isstoyi Tribe, and Luis is a non-Indian. Becky lived on the Tribe’s reservation until she was 13 years old. She currently lives 1500 miles from the Isstoyi Reservation. Becky has visited the reservation only twice since she left the reservation many years ago. She has never voted in a tribal election. G.F. and L.F. are not enrolled in the Tribe. While Becky receives money from the Tribe’s gaming enterprise, she speaks only some of the language. Her children do not know any of the Tribe’s language. G.F. visited the Isstoyi Reservation only once, to attend a pow-wow. L.F. has never been to the reservation. Although their mother occasionally takes them to local pow-wows, G.F. and L.F. have had very little contact with their tribal heritage.
Last year, for the third time in five years, Luis was charged with domestic assault against Becky, G.F., and L.F.. The County removed both G.F. and L.F. from their parents’ home. The County then filed neglected child petitions with the Wyoming District Court for the Seventh Judicial District. The County sought to place G.F. and L.F. in temporary foster care.

Becky contacted Isstoyi Family Services, which filed a motion to intervene in the neglect proceedings. The Tribe challenged the jurisdiction of the Wyoming courts over the proceedings, and alleged that under the Indian Child Welfare Act (ICWA) G.F. and L.F. are Indian children, living in an Indian family. However, the Isstoyi Tribe’s Constitution states that children who are descendants of members — but who were not born on the reservation—may be entitled to membership if adopted into the Tribe by a majority vote of the Tribal Council as long as they have resided on the reservation for a period of seven years. G.F. and L.F. were not born on the reservation, and they have lived over 1500 miles from the reservation for their entire lives.

Statement of the Case — Statement of the Proceedings

The Isstoyi Tribe filed a motion to intervene based on the ICWA’s potential grant of jurisdiction to the Tribe. In a slip op decision, the Wyoming District Court for the Seventh Judicial District denied the Isstoyi Tribe’s motion to intervene. The court held that 1) the ICWA did not apply to the proceedings because there was no existing Indian family; 2) even if there was such a family, G.F. and L.F. were not eligible for membership under the provisions of the Tribe’s own constitution; and 3) even if the ICWA was applicable, and G.F. and L.F. could be considered Indian children, the ICWA violated the Fifth and Fourteenth Amendments as applied.

On appeal, the Supreme Court of Wyoming agreed with the District Court that there was no existing Indian family because Becky did not have a significant social, cultural, or political relationship with the Tribe, and agreed that to make the children eligible for membership, the Tribe would be violating its own constitution. However, the Supreme Court reversed the District Court’s holding that the ICWA was unconstitutional as applied. Petitioner, the Tribe, appeals the decision of the Wyoming Supreme Court. The County appeals the equal protection holding of the Wyoming Supreme Court only.

Summary of Argument

Tribe’s assertions, the existing Indian family doctrine, as recognized by the Wyoming courts, and in accordance with many other states’ courts, is compatible with the statutory language of the ICWA. The Wyoming state courts also do have the authority to interpret the Tribe’s constitution. Under the existing Indian family doctrine, G.F. and L.F. do not live in an existing Indian family — their Indian parent does not live on the reservation of the Tribe in which he/she is enrolled, G.F. and L.F. have never lived on the reservation themselves, and they have absolutely no relationship to the culture, society, or politics of the Tribe. Since the ICWA does not apply where there is no existing Indian family, the Wyoming courts have jurisdiction over the neglect proceedings at hand.

However, the Wyoming Supreme Court erred in holding that the ICWA was constitutional under the Fourteenth Amendment to the Constitution of the United States. The ICWA facially establishes a racially-based classification of Indian children that violates the Equal Protection Clause. As applied here, the ICWA also establishes a racially-based classification because the Tribe’s membership requirements are based on biological heritage. Because the ICWA’s disparate and sometimes disadvantageous treatment of Indian children is predicated upon a racial classification, the proper standard of review is strict scrutiny. The ICWA is unconstitutional because it serves no compelling governmental interests and is not narrowly tailored to meet any such interest. While Morton v. Mancari, 417 U.S. 535 (1974), provides a narrow exception to the Fourteenth Amendment’s equal protection requirement, that exception does not apply as applied in the instant case. The ICWA is therefore unconstitutional because it “den[ies] to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1, cl. 2.

**Argument**

*I. There Is Not an Existing Indian Family, Necessary Under the Congressional Intent for the Application of the Indian Child Welfare Act, Where the Indian Parent Does Not Live on the Reservation of the Tribe in Which They Are Enrolled and Their Children Have Never Resided on the Reservation and Have No Relationship with the Culture, Society, or Politics of that Tribe.*

the ICWA to apply, it requires both Indian children and an existing Indian family. See 25 U.S.C. § 1902 (2004) (Congress had the intent to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families"). Congress's intent was to ensure that Indian children were not taken out of Indian families — a practice which had been undermining tribal sovereignty. See, e.g., 25 U.S.C. § 1901(4) (2004) ("[A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them.").

Many other states have recognized that the requirements of an Indian child and an existing Indian family must be construed narrowly. See, e.g., In re Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982) (discussing and adopting for the first time the existing Indian family doctrine); accord S.A. v. E.J.P., 571 So.2d 1187, 1189 (Ala.Civ.App. 1990); In re D.S., 577 N.E.2d 572, 574 (Ind. 1991); Rye v. Weasel, 934 S.W.2d 257 (Ky. 1996). In Baby Boy L., the Kansas Supreme Court held that the ICWA should not be applied where a child had never lived in an Indian family. Baby Boy L. was an adopted child who had never met his Indian father or any of his father's Indian family, and had never lived with his father's tribe. See Baby Boy L., 643 P.2d at 201. Similarly, in this case G.F. and L.F. have never lived among the Issyoi or on the Issyoi reservation, and their mother does not have any intention to change this situation. Logically, then, G.F. and L.F. do not belong to an Indian family. In situations that do not involve Indian children, the Wyoming courts appropriately do not apply the ICWA.

While Petitioner points to Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1980), as evidence that G.F. and L.F. were part of an Indian family, Holyfield in fact proves the exact opposite. In Holyfield, this Court held that a minor's domicile is the same as his parents' domicile. There, a young Choctaw couple went off their reservation to have twin babies and tried to avoid the provisions of the ICWA in order to have their children adopted by a non-Indian couple. The adoptive parents argued that the children were never domiciled on the reservation and that the ICWA therefore did not apply. This Court stated

3. While the Tribe states that it considers the children to be eligible for enrollment, which would allow them to be classified as Indian children under the ICWA, the Supreme Court of Wyoming properly held that the Tribe would be violating its own constitution if it accepted G.F. and L.F. as members. See In the Interest of GF and LF: Issyoi Tribe v. State, Dep't of Family Servs., Natrona County Office, 13 P.4th 169 (Wyo. 2003). The Issyoi Tribe's constitution requires that G.F. and L.F. must have lived on the reservation for seven years before being adopted by a majority vote of the Tribal Council. Since both children were not born on the reservation and have never lived there, under the Tribe's own membership provisions, G.F. and L.F. are not eligible for membership. Therefore, they are not Indian children.
that for the purposes of the ICWA, the children were domiciled on the reservation because their parents were domiciled there. Courts have construed Holyfield narrowly in the context of the existing Indian family doctrine, and have applied Holyfield only to the determination of the child's domicile for purposes of establishing whether the state, or the tribe, has jurisdiction. See, e.g., S.A., 571 So.2d at 1189; In re D.S., 577 N.E.2d at 574. Under the analysis of Holyfield, G.F. and L.F.'s parents were not domiciled on the Isstoyi Reservation, and therefore G.F. and L.F. were not domiciled on the reservation. Because Becky and Luis are not domiciled on the Reservation, they have far fewer connections with the Tribe than someone who was domiciled on the Reservation. Contrary to Petitioner's assertions, therefore, Holyfield shows that G.F. and L.F. are not part of an existing Indian family. But see, e.g., Michael v. Michael, 7 P.3d 960, 963 (Ariz. 2000) (rejecting the existing Indian family doctrine outright, relying on Holyfield); In re Baby Boy Doe, 849 P.2d 925, 931 (Idaho 1993); In re Elliot, 554 N.W.2d 32, 35-36 (Mich. App. 1996).

The Wyoming Supreme Court correctly held that Becky was not sufficiently connected to the Isstoyi Tribe in any meaningful way, and that there was consequently no Indian family. The existing Indian family doctrine applies "when the Indian child's parent . . . has not maintained a significant social, cultural, or political relationship with . . . [their] tribe." In re Catholic Charities & Cmty. Servs. of the Archdiocese of Denver, Inc., 942 P.2d 1380, 1382 (Colo. 1997). Becky, the only Indian parent here, is an enrolled member of the Isstoyi Tribe. However, she has not resided on the Reservation since she was thirteen years old and has only visited twice since that time. She has taken only one of her children, G.F., to the Reservation, and that visit was never repeated. The family has chosen to live 1500 miles away from the Reservation, making frequent visits very difficult. Becky has never voted in a tribal election because eligible voters must live on the Reservation for at least three months preceding an election. Becky has no "significant social, cultural, or political relationship" with the Isstoyi Tribe. Becky has not kept enough connections with the tribe for her family to be considered an Indian family.

Congress has repeatedly made clear that the ICWA must only be applied to situations involving an Indian family. In 1987, the Senate Committee on Indian Affairs rejected proposed amendments to the ICWA that would have required the ICWA to be applied in situations where the child had not previously lived in Indian Country, in an Indian environment, or with an Indian family. See S. 1976, 100th Cong. (1st Sess. 1987) (proposed amendment to 25 U.S.C. § 1903(1)), cited in Hampton v. J.A.L., 658 So.2d 331, 335 (La. App. 2d Cir. 1995). Congress did not want the ICWA to apply to situations where a child is not part of an Indian family but simply has a parent who is a member of a tribe.

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Where there is no Indian family, the ICWA offers no protections — Congress’s purpose in enacting the ICWA was to protect Indian families. Here, G.F. and L.F. are not part of an Indian family. Without an existing Indian family, courts cannot apply the ICWA. Applying the ICWA to this case would exceed the intent and power of Congress and intrude into the power of the States. Wyoming, along with other states, has enacted more appropriate provisions regarding child neglect and foster placement which, in the absence of an Indian family, should be applied here.

II. The Indian Child Welfare Act Violates the Equal Protection Clause of the Fourteenth Amendment.

The Indian Child Welfare Act, both facially and as applied in the instant case, constitutes an impermissible violation of the fundamental guarantees of the Equal Protection Clause of the Fourteenth Amendment. The ICWA on its face creates a racially-based classification of Indian children that violates the Fourteenth Amendment. Even if the ICWA does not create a racially-based classification on its face, the application of the ICWA in the instant case establishes a racially-based classification that violates the Equal Protection Clause because the Isstoyi Tribe’s membership criteria are based on biological heritage.

Under the Fourteenth Amendment, this Court has consistently subjected to strict scrutiny those government actions which provide for the disparate treatment of a group of individuals based upon a racially-based classification. To pass constitutional muster, the state must demonstrate that an action based upon such a racial classification, even one motivated by an ostensibly benign intent, is necessary to serve a truly compelling governmental interest and that the classification is narrowly tailored to achieve that compelling purpose. Because the ICWA’s racial classification is neither justified by a compelling government interest nor narrowly tailored to achieve its purported goal, it is unconstitutional.

A. On its face, the ICWA’s disparate treatment of Indian children is predicated upon a racially-based classification.

The ICWA unquestionably singles Indian children out for differential treatment in state court custody proceedings. The constitutionality of this type of state program turns on the basis of differentiating the group of individuals singled out. This Court has made clear that such disparate treatment is impermissible if based upon a racial classification. However, this Court has, in certain limited instances, found that the Constitution tolerates the differential treatment of certain members of Indian tribes where the basis of that treatment
is not a racial classification. This Court has found that differential treatment of Indians does not run afoul of the Equal Protection Clause if and only if the treatment is "not directed towards a 'racial' group consisting of 'Indians,'" but rather "only to members of federally recognized tribes." Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974). In Rice v. Cayetano, this Court clarified that Mancari implied only a "limited exception" to the protections guaranteed by the Equal Protection Clause against racially-based classification and that the Constitution tolerates differential treatment only so long as the classification emanates from the Federal Government's unique relationship with federally recognized tribes. 528 U.S. 495, 514 (2000). The Court unequivocally stated that disparate treatment predicated upon an "ancestral" classification is impermissible. Id. The question for this Court is then whether the ICWA's disparate treatment of Indian children is race-neutral.

On its face, the ICWA creates a racially-based classification of "Indian" children that serves as the basis for disparate treatment in child custody proceedings. The ICWA requires a state to conduct child custody proceedings involving Indian children differently than those involving similarly situated non-Indian children. See 25 U.S.C. §§ 1901-1923 (2004). The ICWA applies solely to a category of children defined by biological or ancestral characteristics. See 25 U.S.C. §§ 1902, 1903(4), 1912(a), 1912(b), 1912(f), 1915(a). As such, the language of the ICWA creates a racially-based classification which is impermissible under the Equal Protection Clause of the Fourteenth Amendment.

If a child is not a member of a tribe and has no substantive cultural, social, or political ties to a tribe, then the Federal Government has no grounds upon which to single that individual out for disparate treatment other than his or her biological or ancestral heritage. To the extent that the government has no "unique relationship" with Indian children vis-à-vis their actual membership or substantive relationship with a federally recognized tribe, the disparate treatment of Indian children must be predicated upon a racially-based classification.

Several state courts, other than Wyoming's, have also reached this conclusion. See In re Baby Boy L., 643 P.2d 168 (Kan. 1982); accord In re Bridget R., 49 Cal. Rptr. 2d 507 (Ct. App. 1996), cert. denied sub nom., 519 U.S. 1060 (1997); In re Santos Y., Cal. Rptr. 2d 222 (Ct. App. 2001). Although not reaching the constitutionality of the ICWA, the Kansas Supreme Court did deny an Indian tribe's motion to intervene in In re Baby Boy L. by refusing to construe the ICWA to mean that "an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother." 643 P.2d at 206. Similarly, in S.A. v. E.J.P., an Alabama court showed similar discontent with the
ICWA’s racially-based definition of Indian child and thus refused to apply the relevant provisions, noting that:

The child may be an Indian child, as defined in the act, by virtue of her biological father. However, since birth, she has either resided with her non-Indian mother or her non-Indian great-aunt and great-uncle except for a period of four weeks when she lived with her father and paternal grandmother. . . . The child has had minimal contact with her father. She has had no involvement in tribal activities or any participation in Indian culture.

571 So. 2d 1187, 1189 (Ala. Civ. App. 1990). The court concluded that because the young girl had never been a member of an Indian family, lived in an Indian home, or experienced the “Indian” social and cultural world, applying the ICWA to the case would constitute an unconstitutional construction of the statute. Instead of reaching the constitutional question then, the Alabama court instead found such an interpretation to be contrary to Congress’s intent. 4

Petitioners erroneously maintain that the ICWA creates not a racial category but a classification which is legitimately derived from the Federal Government’s “unique relationship” with Indian tribes, and which is thus “political” instead of “racial.” See Mancari, 417 U.S. at 553 n.24. Petitioners contend that the classification does not turn upon the ancestry or biological heritage of the Indian child but rather upon either the child’s actual enrollment in a tribe or his or her eligibility for enrollment. This argument, however, is only superficially appealing. The plain language of the ICWA reveals that the disparate treatment of Indian children is in fact predicated upon a racial category. Because the classification created by the ICWA does not incorporate consideration of any substantial social, cultural, or political affiliations between the child and the tribal community, the term “Indian” in the ICWA is merely a proxy for a biological or racial category. Because the classification of Indian children is predicated upon an ancestral or biological understanding of Indian rather than upon Congress’s unique obligation to federally recognized Indian tribes, the ICWA classification is an impermissible racial classification.

4. This argument parallels the “existing Indian family doctrine” analysis. See supra Part I. To the extent that the existing Indian family doctrine is found to be consistent with Congress’s intent and the statutory language of the ICWA then there may be no reason for this Court to reach the issue of whether this particular section of the ICWA constitutes a racially-based classification on its face. However, other sections of the ICWA on their face still reveal that the disparate treatment of Indian children is predicated upon a racially-based classification.
Several sections indicate that, on its face, the ICWA does in fact rely upon a racially-based classification of Indian children. First, section 1903 defines those individuals to whom the enacting provisions will apply “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). This definition makes clear that whether a child is an enrolled member of a federally recognized tribe is not determinative of whether the requirements of the ICWA apply. Rather, section 1903(4)(b) makes clear that a child’s ancestry is decisive in determining whether the ICWA applies. As this Court has warned, “Ancestry can be a proxy for race.” Rice, 528 U.S. at 514.

Second, section 1912(a) clarifies that the ICWA applies to any child custody proceeding involving a child that the state “knows or has reason to know” is Indian. 25 U.S.C. § 1912(a). Child custody proceedings in which information arises that tends to indicate that the child involved may be Indian must proceed, at a minimum, according to the dictates of the ICWA’s notification requirements. See id. The notification process necessarily delays the child’s custody proceeding, and raises the specter of further delays resulting from protracted litigation surrounding the state’s adherence to the notification requirements or the determination as to whether the child is an Indian. An Indian child’s custody hearing may therefore be significantly delayed even before the child’s relationship with any federally recognized tribe is determined. Biologically Indian children are singled out for disparate and perhaps disadvantageous treatment during his or her custody proceedings based solely on a racial classification.

Third, section 1912(b) also reveals that the ICWA’s disparate treatment of Indian children is predicated upon a racial classification. Section 1912(b) provides that “[i]n any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding.” 25 U.S.C. § 1912(b). Section 1912(b) continues: “Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses.” Id. The plain language of this

5. The phrase “tends to indicate” is not intended to refer to any judicial determination of the burden of proof required to trigger the notification sections of the ICWA. This discussion of section 1912(b) is merely intended to highlight the fact that a child custody hearing involving a biologically Indian child will proceed differently even before the child’s relationship with any tribe is known.
section indicates that the provision of counsel is not limited to those parents or custodians that are themselves members of a federally recognized tribe. Rather, the determination as to whether the Secretary of the Interior may be obliged to provide counsel turns upon the “Indian” status of the child. Along these same lines, section 1912(d) demands that any party prosecuting an involuntary foster care placement or termination of parental rights proceeding must make efforts to prevent the breakup of the “Indian family” and certify that fact to the court. 25 U.S.C. § 1912(d). Additionally, section 1912(f) requires that “evidence beyond a reasonable doubt” be offered to terminate parental rights where an Indian child is involved. Like section 1912(b), sections 1912(d) and (f) turn not upon the enrollment status of the parent, but upon the Indian status of the child.

That sections 1912(b), (d), and (f) all depend upon the “Indian” status of the child demonstrates that the ICWA’s disparate treatment of Indian children is based upon a racial classification. These provisions of the ICWA are intended to provide an additional level of scrutiny and protection when an involuntary child custody proceeding involves an Indian child. That these sections apply in cases where an Indian child is involved regardless of whether the parent or guardian is a tribal member clearly demonstrates that the ICWA’s disparate treatment of Indian children does not turn upon the Federal Government’s unique obligation to tribes, but rather upon a racial classification. If the parent contesting the proceeding is not an Indian, for instance, then instead preserving a tribe’s cultural heritage, the ICWA acts to provide additional resources and protections to non-Indian parents simply because their child is biologically Indian. In this way, the ICWA creates a racially-based classification of Indian children.

Finally, the placement preference schedule also reveals that the ICWA on its face creates a racially-based classification. Section 1902 makes clear Congress’s intent to place Indian children “in foster or adoptive homes which will reflect the unique values of Indian culture.” 25 U.S.C. § 1902. The enacting section states that “in any adoptive placement of an Indian child under state law, a preference shall be given to . . . (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.” 25 U.S.C. § 1915(a) (emphasis added). The ICWA thus requires Indian children to be placed with “other Indian families” regardless of whether either of the adoptive or foster parents is enrolled in a federally recognized tribe or is even affiliated with the child’s or the biological parent’s tribe. This third placement preference is entirely divorced from a consideration of tribal enrollment or the child’s relationship with his or her tribe — it cannot possibly be said to arise from the Federal Government’s unique obligation to Indian tribes. Rather, the only possible basis for matching Indian children with “other
Indian families" outside their own tribe is "race-matching," a policy that is clearly predicated upon a racial classification. As Professor Carole Goldberg of the UCLA School of Law notes:

While these provisions give first priority to members of the Indian child's extended family and second priority to other members of the child's tribe, a third priority is designated for Indian members of tribes other than the child's own tribe. The Indians in this last category enjoy a preference over all non-Indian families.

Carole Goldberg, Descent into Race, 50 UCLA L. Rev. 1373, 1381 (2002). As such, the placement preference schedule does contain a "racialized vision of indigenous North Americans." Id. It is thus clear that the ICWA on its face creates a racially-based classification of Indian children.

B. The differential treatment of G.F. and L.F. under the ICWA as applied in the instant case is predicated upon an impermissible racial classification.

Even if the ICWA does not create a racially-based classification on its face, because the Isstoyi Tribe's membership criteria are based on biological heritage, the application of the ICWA in the instant case establishes a racially-based classification that violates the Equal Protection Clause.

Although not dispositive, two recent child custody cases in California have determined that application of the ICWA to children lacking substantive ties to a federally recognized tribe indicates a likely racially-based classification. The California Court of Appeal for the 2d District, in In re Bridget R., held that:

To the extent this disparate and sometimes disadvantageous treatment is based upon social, cultural or political relationships between Indian children and their tribes, it does not violate the equal protection requirements of the Fifth and Fourteenth Amendments. However, where such social, cultural or political relationships do not exist or are very attenuated, the only remaining basis for applying ICWA rather than state law in proceedings affecting an Indian child's custody is the child's genetic heritage — in other words, race.

49 Cal. Rptr. 2d at 527 (citations omitted). The California court went on to note that "any application which is triggered by an Indian child's genetic heritage, without substantial social, cultural or political affiliations between the child's family and a tribal community, is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny under the equal protection clause." Id. The same California court found in In re Santos Y. that "application of the ICWA to an individual who is in all respects, except genetic
heritage, indistinguishable from other residents of this state violates the . . . Fourteenth Amendment[]." 110 Cal. Rptr. 2d at 33.

Because the basis for membership in the Isstoyi Tribe is completely dependent upon the ancestral heritage of the child in question, the disparate treatment of G.F. and L.F. under the provisions of the ICWA as applied in the instant case cannot be predicated upon Congress's unique political relationship with the tribe. The Isstoyi Tribe's Constitution provides that a child born to a member of the Tribe residing on the Reservation at the time of the birth of the child is entitled to enrollment. Isstoyi Tribe Const. art. II, § 1(b). In addition, the Tribe's Constitution provides that persons who are descendants of members of the Tribe but not otherwise entitled to membership may be adopted into the Tribe by a majority vote of the Tribal Council, providing that they have resided on the Reservation for a period of seven years. Id. at art. II, § 2. Petitioners have asserted that G.F. and L.F. are eligible for enrollment under this latter provision of the Constitution, as interpreted by the Tribal Council in Resolution 92-12. This Resolution provides that the Tribe considers all children of Isstoyi descent to be eligible for enrollment until such time as the Tribe actually denies enrollment.

Even if the petitioners were correct and the plain language of the ICWA does not violate the guarantees of equal protection, there can be little doubt that, as applied in the instant case, the disparate treatment of G.F. and L.F. is based upon nothing more than their Indian ancestry. Neither of the children resides on the Isstoyi reservation nor is involved in any substantive sense in the social, cultural, or political community of the Tribe. In fact, G.F. has visited the Isstoyi reservation only once, while L.F. has never visited. Thus, in no way could the application of the ICWA rather than state law to children who live nearly 1,500 miles away from the reservation and who have no substantive relationship with the Tribe be construed as deriving from the Federal Government's unique obligations to the Isstoyi Tribe.

The fact that the Isstoyi Tribe predicates membership entirely upon ancestry necessarily implies that the application of the ICWA to the case of G.F. and L.F. would constitute an impermissible racial classification. As the California court stated in Bridget:

If tribal determinations are indeed conclusive for purposes of applying ICWA, and if, as appears to be the case here, a particular tribe recognizes as members all persons who are biologically descended from historic tribal members, then children who are related by blood to such a tribe may be claimed by the tribe, and thus made subject to the provisions of ICWA, solely on the basis of their
biological heritage. Only children who are racially Indians face this possibility.

49 Cal. Rptr. at 527. Because in the instant case the ICWA is applied in such a way, its application deprives G.F. and L.F. of the equal protection of the law based upon their race.

C. The Fourteenth Amendment requires strict scrutiny of all state actions that are predicated upon a racially-based classification.

Because state-sponsored racial classifications are antithetical to the Fourteenth Amendment, all such classifications are “suspect” and must be subjected to strict scrutiny. See Adarand Construcors, Inc. v. Pena, 515 U.S. 200, 227 (1995). Strict scrutiny requires that to pass constitutional muster, disparate treatment predicated upon a racially-based classification must be motivated by a “compelling governmental interest,” and the means employed must be “narrowly tailored” to achieve that interest. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498-511 (1989). An interest is “compelling” only when it rests on a “strong basis in evidence” that government action favoring one race over another is both “necessary” and “legitimate.” Croson, 488 U.S. at 493, 500; see also Adarand, 515 U.S. at 226, 228, 236. Similarly, a classification is “narrowly tailored” only when a state action is no more “far reaching” than necessary. Id. at 226. Thus, the state may impose racial classifications only as a “last resort,” that is, only when the Federal Government has legitimately attempted or considered alternative means and determined that they do not or cannot succeed. Croson, 488 U.S. at 519.

The Fourteenth Amendment requires strict scrutiny of all state-sponsored racial classifications, and invalidates those that are not narrowly tailored to achieve a compelling state interest. See Hunt v. Cromartie, 526 U.S. 541 (1999); Adarand, 515 U.S. at 227; J.A. Croson Co., 488 U.S. at 496-97. Such classifications are “immediately” and “inherently” suspect, Korematsu v. United States, 323 U.S. 214, 216 (1944); Miller v. Johnson, 515 U.S. 900, 904 (1995), because “distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” Hirabayashi v. U.S., 320 U.S. 81, 100 (1943) (emphasis added).

Where, as here, disparate treatment premised upon a racial classification is apparent on the face of the statute, “no inquiry into legislative purpose is necessary.” Shaw v. Reno, 509 U.S. 630, 642 (1993) (“A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.”); Adarand, 515 U.S. at 229-30
("Whenever the government treats any person unequally because of his or her race, that person suffered an injury that falls squarely within the language and the spirit of the Constitution’s guarantee of equal protection."). However, even if the racial classification is intended to be “benign,” the proper standard of review is still strict scrutiny. Following Adarand, it is now firmly established that the standard of review under the Constitution does not vary based on the race of the group benefited by the classification or on a determination that the classification at issue is “benign.” 515 U.S. at 224 ("Any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."); see also J.A. Croson Co., 488 U.S. at 494 ("We thus reaffirm the view expressed by the plurality in Wygant that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.") (O’Connor, J.); id. at 520 (Scalia, J., concurring in the judgment).

Therefore, if the ICWA is found to create a racially-based classification of Indian children it must be analyzed under strict scrutiny. Because such a racial classification would be constitutionally suspect, the ICWA must be justified by a sufficiently compelling government interest and narrowly tailored to achieve that objective, regardless of whether unique custody proceedings for Indian children are intended for the benefit of Indians and tribes or not. Unless the Federal Government fulfills this heavy burden of justification, the ICWA will be found to violate the fundamental guarantees of the Equal Protection Clause of the Fourteenth Amendment.

D. The ‘limited exception’ of Mancari is inapplicable because the ICWA is a racially-based classification and does not address an issue of unique concern to Indians.

Despite petitioners’ claims, the rational basis inquiry that this Court employed in Mancari is an inappropriate standard by which to review the ICWA. Petitioners maintain that the ICWA does not create a racial category at all but rather a classification that is legitimately derived from the Federal Government’s “unique relationship” with Indian tribes. See Mancari, 417 U.S. at 553 n.24. Petitioners contend that the ICWA creates a “political” rather than “racial” classification and therefore should not be subjected to strict scrutiny but rather to the type of rational basis inquiry conducted by this Court in Mancari. Id. This argument, however, fails to consider the limitations of the Court’s decision in Mancari and recent cases that further narrowed that ruling.

In Mancari, this Court rejected an equal protection challenge to a statutory hiring preference for Indians in the Bureau of Indian Affairs (BIA). This Court
held that these statutory preferences for Indians were predicated upon "political" rather than "racial" classifications, *id.*, and thus would be upheld "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . . ." *Id.* at 555. The opinion, however, also went on to note that the case was confined to the authority of the BIA, an agency described as "sui generis." *Rice*, 528 U.S. at 520. In approving the preference, the Court noted that a blanket exemption for Indians from all civil service examinations would pose an "obviously more difficult question." *Mancari*, 417 U.S. at 554. This Court found that the Constitution tolerated hiring preferences for Indians in the BIA because that agency was created for the express purpose of serving Indians. *Id.* ("The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."). Thus an employment regime that afforded preferential treatment to Indians not only emanated from the Congress' "unique obligation toward the Indians," but also because it was "designed to further Indian self-government." *Id.* at 555. The Court thus made clear that only in such situations would differential treatment of Indians not offend the Constitution.

Since *Mancari*, this Court has made clear that it is unwilling to "extend the limited exception of *Mancari* to a new and larger dimension." *Rice*, 528 U.S. at 520 (emphasis added). In *Rice*, this Court struck down a Hawaiian electoral scheme on Fifteenth Amendment grounds, finding that Hawaii's use of ancestry as a voter qualification to establish Native Hawaiian status was an impermissible racial classification. *Id.* The *Rice* Court rejected Hawaii's defense that the voting scheme should be upheld under *Mancari*, finding that Hawaii's ancestral classification was racially-based and that the legislation in question did not deal with uniquely Indian concerns. *Id.* In *United States v. Antelope*, the Court clarified that the limited exception of *Mancari* was applicable in only those case where the legislation in question "is rooted in the unique status of Indians as a 'separate people' with their own political institutions." 430 U.S. 641, 646 (1977).6

6. The Court's decision in *Adarand* only reinforces the argument that the limited exception is inapplicable in the present case. In *Adarand*, the Court ruled that racial classifications by the federal government are subject to strict scrutiny, and thereby overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), in part because its application of intermediate scrutiny to federal racial classifications was inconsistent with the strict scrutiny applied to state classifications. *See Adarand*, 515 U.S. at 226. In *Williams v. Babbitt*, 115 F.3d 657 (1997), the United States Court of Appeals for the Ninth Circuit went so far as to note that *Adarand* "only adds to our constitutional doubts" about the viability of *Mancari, id.* at 666, and wonder whether *Adarand* implied that "*Mancari*'s days are numbered." *Id.* at 664-65.
The limited exception of *Mancari* is thus totally inappropriate for determining the constitutionality of the ICWA. First, contrary to the hiring preference at issue there, the ICWA’s disparate treatment of Indian children is clearly a racially-based classification. *See supra* Part II.A. Second, the ICWA does not address an issue of unique concern to Indian tribes as demanded in *Mancari* and *Antelope*. This can be clearly gleaned from the fact the ICWA may, just for example, prescribe the procedures for terminating removing a child from a non-Indian mother, 25 U.S.C. § 1912, delay the placement proceedings of children eventually found to be non-Indian, *id.*, or remove a child from the custody of non-Indian foster parents because a home that more closely tracks the placement preferences of section 1915(a) is found.

Against this line of reasoning, the Tribe argues that the application of the ICWA to G.F. and L.F. itself is based upon a bilateral political relationship the same as national citizenship and not simply membership in a racial group. This line of reasoning has best been articulated by Professor Eugene Volokh of the UCLA School of Law, who has written:

> Because an Indian tribe is not just an ethnic group but a political one, the Court has viewed “preferences” for “members of federally recognized tribes” as “political rather than racial in nature.” This makes sense. The government sorts us by political allegiance in various ways: it sometimes distinguishes U.S. citizens from aliens, and Californians from out-of-state citizens. An Indian tribe is likewise a different sovereign. Tribal Indians . . . belong to a political group that’s specifically recognized by federal law and the U.S. Constitution, not merely to an ethnic group that has no independent legal standing.

Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. Rev. 1335, 1358-59 (1997) (citations omitted). Professor Volokh, however, also makes clear that, “Classifications based only on being an Indian, however, are racial; discrimination against or preference for nontribal Indians — or even for tribal Indians if the justification is their race and not their tribal status

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7. This is a classic “citizenship response” that contends that “Indian classifications are political, not racial, so long as they turn on tribal citizenship rather than on ancestry. Under this theory, Indian classifications are no different from permissible classifications based on U.S. or foreign citizenship and should be tested by the same relaxed equal protection standard.” Carole Goldberg, *American Indians and ‘Preferential’ Treatment*, 49 UCLA L. Rev. 943, 958 (2002).
— would thus violate [the Equal Protection Clause of the Fourteenth Amendment].” *Id.*

Because the ICWA, both facially and as applied, predicates disparate treatment of Indian children on a species of classification that is, as Volokh describes, justified purely in terms of the children’s race rather than tribal status, it violates the Equal Protection Clause of the Fourteenth Amendment and must be subjected to strict scrutiny.

**E. The Federal Government lacks a sufficiently compelling interest to justify the ICWA’s racially-based classification of Indian children.**

The state lacks a sufficiently compelling interest to justify the ICWA’s racially based classification of Indian children. An interest is “compelling” only when it rests on a “strong basis in evidence” that government action favoring one race over another is both “necessary” and “legitimate.” *Croson*, 488 U.S. at 493, 500; *Adarand*, 515 U.S. at 226, 228, 236. Considering all factors, the state simply lacks a necessary and legitimate basis for singling Indian children out for disparate and sometimes disadvantageous treatment based upon their race.

Petitioners contend that the ICWA is justified as a response to the large number of Indian children that were being separated from their families and communities and placed in non-Indian adoptive homes or foster care. The Congressional findings identified in section 1901 of the ICWA identify three basic interests along these lines:

1. 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;
2. that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
3. that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.
SPECIAL FEATURES

25 U.S.C. §1901(3)-(5). While such goals may seem laudable, they are not sufficiently compelling to justify abandoning the equal protection guarantees of the Constitution.

When considering whether the state's purported interest is sufficiently compelling, this Court has held that the offsetting interests of affected parties must be considered. See Adarand, 515 U.S. at 229. Therefore, in evaluating whether the state's interests in the ICWA are compelling, courts will consider the impact that disparate treatment has upon Indian children. The provisions of the ICWA impact Indian children in several significant and disadvantageous ways. First, the placement of Indian children in non-Indian homes is not detrimental to the well-being of the child. Reviewing the significant literature on this issue, Christine Bakeis concludes that "placement of an Indian child in a non-Indian home is not harmful to the child." Christine D. Bakeis, The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe, 10 Notre Dame J.L. Ethics & Pub. Pol'y 543, 548 (1996). Bakeis notes:

Professor Elizabeth Bartholet reviewed studies undertaken to assess how well transracial adoptions work from the adoptee's viewpoint. The studies assessed the adoptees' adjustment, self-esteem, racial identity, and integration into the adoptive family as well as the community. She found that the research shows with: "astounding uniformity . . . transracial adoption [is] working well from the viewpoint of the children and the adoptive families involved. The children are doing well in terms of such factors as achievement, adjustment, and self-esteem. They seem fully integrated in their families and communities, yet have developed strong senses of racial identity. They are doing well as compared to minority children adopted inracially and minority children raised by their biological parents." Bartholet's views are also supported by Kim Forde-Mazrui, David Fanshel, and Joseph Westermeyer. Forde-Mazrui questioned the wisdom of racial-matching policies and concluded that "ignoring race when placing a [minority] child . . . would avoid the concrete harms of current policies without subjecting the child to substantial risks." Fanshel's research suggests that Indian children raised in non-Indian homes develop normally in the cognitive and emotional areas. Finally, Westermeyer's investigation revealed that Indian children raised in non-Indian homes had secure Indian cultural identities when they had relationships with other Indian children.
Id. at 548-49 (citations and footnotes omitted). Bakeis argues that the results of this research “suggest that although leaving a child with his or her natural parents is normally preferable, Indian children can develop normally in non-Indian homes. Thus, claims that placement of Indian children in non-Indian homes is damaging to their well-being may need to be re-examined.” Id. at 549.

Second, one of the most troubling aspects of the ICWA is that it actually places a greater number of Indian children at risk of abuse and neglect than similarly situated non-Indian children. This heightened risk of abuse and neglect primarily results from the fact that the ICWA permits termination of parental rights only when the evidence establishes “beyond a reasonable doubt” that continued parental custody will cause the child serious emotional or physical damage. 25 U.S.C. § 1912(f). Furthermore, the decision must be supported by the testimony of “qualified expert witnesses.” Id. at §1912(e)-(f). These standards clearly reject the “best interests of the child” standard used by most states. In fact, the Bureau of Indian Affairs’ Guidelines concerning the ICWA state that “[a] child may not be removed simply because . . . it would be ‘in the best interests of the child’ for him or her to live with someone else. . . . It must be shown that . . . it is dangerous for the child to remain with his or her present custodians.” 44 Fed. Reg. 67,584, 67,593 (Nov. 26, 1979). Bakeis again argues that “the requirements of the ICWA work against, rather than toward the promotion of [the best interests of the children]. The heightened standard of proof that the ICWA forces courts to apply when deciding a termination case may conceivably be forcing Indian children to experience more abuse and neglect. Even if these children are removed from the abusive setting in a timely manner, the standards of the ICWA require them to remain in a state of parentless limbo longer than other children in the same situation. Such a result is clearly not beneficial to children with Indian ancestry.” Bakeis, supra at 551 (emphasis added).

Third, the ICWA increases the risk that Indian children may be removed from the only home and family that they have ever known and placed with strangers simply on account of their race. Several state courts have found it troubling that an Indian child who has been placed in a foster or adoptive home is at a greater risk than non-Indian children of being taken from that home and placed with strangers simply because of their race. See e.g., Bridget R., 49 Cal. Rpt. at 527. The right of the tribe to intervene at any point in the child custody proceeding combined with the placement preferences of section 1915(a) create a heightened risk that Indian children may be removed after remaining with foster or adoptive parents for months or even years. This type of removal may have serious adverse psychological effects upon young children, stunting both their mental and social development. See Michele K. Bennett, Native American Children:

Fourth, the provisions of ICWA delay the placement or adoption of Indian children and thus subject them to extended stays in foster homes or state juvenile facilities. Even if the ICWA does not require the removal of an Indian child from a potential adoptive home, the additional procedures required by the ICWA create a significant delay in the placement of Indian children. The ICWA delays the placement of Indian children for several reasons. First, the notification requirements of the ICWA necessarily delay the initiation of the custody proceedings of all children that the state "has reason to know" are Indian. See 25 U.S.C. § 1912(a). Second, the placement preference provisions in section 1915(a) limit the number and variety of adoptive homes that are potentially available to an Indian child as compared to those available to non-Indian children. See Bridget R., 49 Cal. Rptr. at 527. Additionally, Bakeis notes that, "Because of these special requirements, 'caseworkers and attorneys are sometimes reluctant to accept surrenders of, or terminate parental rights to, an Indian child.' Often, this results in Indian children languishing in foster care without permanency, planning, or adoption." Bakeis, supra at 551. The ultimate consequence is that Indian children remain wards of the state for a longer period of time or are shuffled between foster homes more often than non-Indian children.

Finally, the ICWA acts to undermine the conscious efforts of parents to place their children with a specific family, in a specific familial environment, or even to avoid growing up on a reservation. As Bakeis explains, "[T]he ICWA permits tribes and courts to blatantly disregard a natural parent's deliberate and thoughtful decision to have their child adopted by a specific family of their choice. Even more frightening is the fact that under the ICWA courts and tribes can disregard a parent's conscious decision not to have their child raised in the same social setting to which they belong." Id. at 568.

For all of these reasons, the Federal Government not only lacks a sufficiently compelling interest to justify the ICWA's racially-based classification, its disparate treatment of Indian children in child custody proceedings heightens the risk of causing significant harms to those children.

F. The ICWA is an impermissible racially-based classification of Indian children because it is not narrowly tailored.

Even if this Court were to find that the state has a sufficiently compelling interest to justify a racially-based classification of Indian children, the ICWA is not narrowly tailored to achieve that purpose. This Court has found that racial classifications are "narrowly tailored" only when a state action is no more "far
reaching” than necessary. *Adarand*, 515 U.S. at 226. Thus, the state may impose racial classifications only as a “last resort,” that is, only when the Federal Government legitimately has attempted or considered alternative means and determined that they do not or cannot succeed. *Croson*, 488 U.S. at 519 (Kennedy, J., concurring). A race-conscious remedy will not be deemed narrowly tailored until less sweeping alternatives, particularly race-neutral ones, have been considered and tried. *See Associated Gen. Contractors v. City & County of S.F.*, 813 F.2d 922, 939 (9th Cir. 1987). Not only is the ICWA a racially-based and inappropriate remedy, it is also completely ineffectual. As such, it is does not meet this Court’s rigorous interpretation of the “narrowly tailored” requirement.

If the purported goal of the ICWA is to stem the tide of unwarranted removals of Indian children from their families and communities, then the ICWA is an ineffective and inappropriate response. Several commentators have noted that the ICWA has failed to achieve its stated goal. According to Robert J. McCarthy, director of the Indian Law Unit of Idaho Legal Aid Services, the ICWA is not having the impact Congress desired:

[According to the BIA,] the ICWA [has] not reduced the flow of Indian children into foster or adoptive homes. In fact, while the number of children of all races in substitute care decreased in the 1980s, the number of Indian children in care increased by 25 percent . . . . Although 63 percent of all Indian child foster placements are in homes in which at least one parent is Indian, less than half of placements made under state jurisdiction are in Indian homes.


The primary reason for ICWA’s failure is that it ignores the underlying socioeconomic cause of these removals. As Atwood points out, the true cause of the disproportionate rate of Indian removals may be the “persistence of dire socioeconomic problems on Indian reservations and among urban Indian populations and the lack of adequate resources to remedy such problems.” *Id.* Atwood elaborates: “The fact that high numbers of Indian children are living in
out-of-home placements may be more realistically explained as a function of the continuing poverty, social dysfunction, and family breakdown within Indian communities.” *Id.* Thus, so long as “[p]overty, crime, violence, domestic abuse, and substance abuse occur at higher rates among Indian populations than among any other racial minority,” a disproportionate rate of Indian children will continue to be removed from their homes and placed in foster or adoptive custody. *Id.* at 621-22.

Even more disheartening is that the ICWA seems to be not only an inappropriate response, but may actually contribute to the breakup of the “Indian family.” As some commentators have noted, the increased child welfare authority of tribes pursuant to the ICWA has actually contributed to the persistently high rates of removal. *The Indian Child Welfare Act: Unto the Seventh Generation: Conference Proceedings* 48-50 (Troy R. Johnson ed., 1993) (noting that surveys have revealed that tribally-run ICWA programs seem to be responsible for increasing rate of placements). The ICWA contributes to high removal rates because as tribes implement new programs for child protection fewer funds are available for other, more necessary social programs and thus more children are placed in substitute care. *Id.*

For all of these reasons, it is clear that the ICWA represents not only an ineffective but perhaps detrimental response. As Atwood concludes, “The appropriate response to such realities would seem to be greater funding for social services in general and child welfare services in particular and greater attention to preventive measures.” Atwood, *supra* at 622.

As a race-conscious remedy, the ICWA is neither the least sweeping alternative nor a policy of last resort. Therefore, the ICWA’s differential treatment of Indian children is an impermissible violation of the Equal Protection Clause of the Fourteenth Amendment.

**Conclusion**

For all the foregoing reasons, Respondents request that this Court AFFIRM the judgment of the Supreme Court of Wyoming that there is no Indian family in this case, so that the Indian Child Welfare Act does not apply; and REVERSE the judgment of the Supreme Court of Wyoming that the Indian Child Welfare Act is not unconstitutional facially and as applied.