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S220187

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
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In re ABBIGAIL A., et al.,

Persons Coming Under the Juvenile Court Law.

SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff and Appellant,

v.

JOSEPH A., et al.,

Defendants, Respondents, and Petitioner.

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

ANSWER BRIEF ON THE MERITS

JOHN F. WHISENHUNT, County Counsel
[California State Bar 89823]
LILLY C. FRAWLEY, Deputy County Counsel
[California State Bar 80060]
COUNTY OF SACRAMENTO
3331 Power Inn Road, Suite 350
Sacramento, CA 95826
Telephone: (916) 875-4395
Facsimile: (916) 875-7020
e-mail: frawleyl@saccounty.net

ATTORNEYS FOR PLAINTIFF AND APPELLANT

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STATEMENT OF ISSUES PRESENTED

By consolidating the issues stated below, this brief rephrases the issues as follows, and will contain arguments related to those issues and fairly included issues:

(1) Does the doctrine of federal preemption restrict states from broadening the Indian Child Welfare Act's (25 U.S.C. § 1901 et seq.) ("ICWA") definition of an "Indian child" (25 U.S.C. § section 1903(4)) to include a non-member child who is eligible for tribal membership but whose application for membership is still pending?

(2) Do rules 5.482(c) and 5.484(c)(2) of the California Rules of Court conflict with Welfare and Institutions Code sections 224.1, subdivision (a), 224, subdivision (c), and 224.3, subdivision (e)(1) by requiring the juvenile court to apply the ICWA protections to a non-member child who is eligible for membership but whose application for membership is still pending?

Pursuant to California Rules of Court, rule 8.520(b), the "statement of issues in the petition for review and....the answer" are quoted below.

The petition for review presented the following issue:

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

The answer to the petition for review re-stated the issues as follows:

> (1) Does the mandate in the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1921) for states to provide higher protections to a specific class of persons covered (e.g., Indian children) authorize states to broaden application of the ICWA to non-Indian children pursuant to local court rules (i.e., California Rules of Court, rule 5.482(c) and rule 5.484(c)(2))?
>
> (2) Does the recommendation for liberal construction by the Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings (44 Fed. Reg. 67584-67595, at p. 67586 (Nov. 26, 1979) (BIA Guidelines)) require states to apply the ICWA's protections to children who do not meet the ICWA's definition of an "Indian child"?

The answer also included the following request that if review is granted, the court should consider "the following additional issues":

> (1) Whether ICWA coverage is based on tribal affiliation or Indian ancestry (race)?
>
> (2) Whether California Rules of Court, rule 5.482(c) and rule 5.484(c)(2) violate equal protection under the United States Constitution by broadening application of the ICWA to non-Indian children (e.g., children who are not members but are eligible for membership, except neither biological parent is a member of a federally recognized tribe)?
>
> (3) Whether California Rules of Court, rule 5.482(c) and rule 5.484(c)(2) violate the supremacy clause of the United States Constitution, and as such, are barred by the doctrine of federal preemption? If not, does adoption of the rules in question exceed the California Judicial Council's constitutional and statutory authority, as well as violate the separation of powers doctrine?

INTRODUCTION AND SUMMARY OF ARGUMENTS

This case involves Abbigail A. (born June 18, 2008; 2 CT 298)[1] and Justin A. (born May 16, 2007; 2 CT 293), dependents of the Superior Court of California, County of Sacramento, sitting as the Juvenile Court ("juvenile court"). The children are descendants of members of the Cherokee Nation of Oklahoma ("tribe"). Although the children were not considered by the tribe to be Indian children under the federal Indian Child Welfare Act (ICWA or the Act) (25 U.S.C. § 1901 et seq.), at a combined Welfare and Institutions Code[2] sections 355 and 358 hearing on May 23, 2013, the juvenile court directed the Sacramento County Department of Health and Human Services (DHHS or appellant) to make active efforts to secure membership for the minors in the tribe pursuant to California Rules of California Rules of Court,[3] rule 5.482(c)[4]

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1 As used herein, "CT" refers to the Clerk's Transcript on Appeal; and "RT" refers to the Reporter's Transcript on Appeal.

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

3 Further rule references are to the California Rules of Court.

4 Rule 5.482(c) states:

> If after notice has been provided as required by federal and state law a tribe responds indicating that the child is eligible for membership if certain steps are followed, the court must proceed as if the child is an Indian child and direct the appropriate individual or agency to provide active efforts

and rule 5.484(c)(2),[5] and ordered that the provisions of the ICWA apply to this case. At issue in this case is the validity of these two rules.

Federal law defines who is an "Indian child" entitled to the protections of the ICWA. (25 U.S.C. § 1903(4).)[6] The federal definition is mirrored by state law. (§ 224.1, subd. (a).)[7] This case involves the question of whether the court rules must follow that definition.

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under rule 5.484(c) to secure tribal membership for the child. (Rule 5.482(c).)

5 Rule 5.484(c)(2) states in relevant part:

> In addition to any other required findings..., the court must find that active efforts have been made....
>
> (2) ...to secure tribal membership for a child if the child is eligible for membership in a given tribe.... (Rule 5.484(c)(2).)

6 25 U.S.C.A. section 1903(4) provides:

> '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. (25 U.S.C. § 1903(4).)

7 Section 224.1, subdivision (a) provides in relevant part:

> As used in this division, unless the context requires otherwise, the term[]...'Indian child[]'... shall be defined as provided in Section 1903 of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.). (§ 224.1, subd. (a).)

Respondent notes, however, that the Legislature has recently amended the definition of an "Indian child." (See Assem. Bill No. 2418

The parties agree that the Judicial Council "is empowered to 'adopt rules for court administration, practice and procedure, *not inconsistent with statute*....' (Cal. Const., art. VI, § 6.)" (*California Court Reporters Assn. v. Judicial Council of California* (1995) 39 Cal.App.4th 15, 21-22, italics added by court (*Court Reporters*).) The parties also agree that to be entitled to ICWA protections, a child must be an Indian child. (25 U.S.C. § 1903(4); § 224.1, subd. (a).)

The parties, however, dispute what constitutes a rule of court that is "not inconsistent with statute"; and whether the ICWA's active efforts requirement are applicable to a non-member Indian child who is eligible for membership but neither biological parent is a member, and the tribe has yet to enroll the child or his/her parent.

(2009-2010 Reg. Sess.) § 1.) This bill added subdivision (b) to section 224.1, which reads in full as follows:

> As used in connection with an Indian child custody proceeding, the term "Indian child" also means an unmarried person who is 18 years of age or over, but under 21 years of age, who is a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe, and who is under the jurisdiction of the dependency court, unless that person or his or her attorney elects not to be considered an Indian child for purposes of the Indian child custody proceeding. All Indian child custody proceedings involving persons 18 years of age and older shall be conducted in a manner that respects the person's status as a legal adult. (§ 224.1, subd. (b).)

In respondent's view, the ICWA does not preempt states from expanding the definition of an Indian child; and thus, rules 5.482(c) 5.484(c) are consistent with section 224.1, subdivision (a). Therefore, he contends that upon a tribe's determination that a non-member Indian child is eligible for membership, the juvenile court must order that active efforts be made by the agency to seek enrollment for the child, even though neither of the child's biological parent is a member of the tribe. (25 U.S.C. § 1912(d);[8] § 361.7, subd. (d).[9])

Appellant disagrees. Appellant contends that the ICWA established uniform standards. (See *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 43 (*Holyfield*) [explaining that, unless Congress clearly has expressed its intent that an ICWA term be given content by the

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[8] 25 U.S.C. § 1912(d) provides in pertinent part:

> Any party seeking to effect ... termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. (25 U.S.C. § 1912(d).)

[9] Section 361.7, subdivision (a) states:

> Notwithstanding Section 361.5, a party seeking an involuntary foster care placement of, or termination of parental rights over, an Indian child shall provide evidence to the court that active efforts have been made to *provide remedial services and rehabilitative programs* designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." (§ 361.7, subd. (a), italics added.)

application of state law, the Court will presume that Congress did not so intend].) In appellant's view, because Congress adopted a narrow definition of an Indian child, states cannot broaden the class of protected children under the ICWA. (*State ex rel. State Office for Services to Children and Families v. Klamath Tribe* (Or. App. 2000) 11 P.3d 701 (*Klamath Tribe*).)

Appellant contends the presenting issue may be resolved by looking at the plain words of the statutory definition of an Indian child (25 U.S.C. § 1903(4); § 224.1, subd. (a).) (See *In re Alicia S.* (1998) 65 Cal.App.4th 79, 84 italics added [wherein the court construed the plain language of the ICWA and held that the provisions of the ICWA apply to "all child custody proceedings involving an *Indian child*"] see also pp. 89-90 [noting that "[w]hen statutory language is clear and unambiguous there is no need for construction and courts should not indulge in it. [Citations omitted]."].)

Appellant acknowledges that the ICWA includes an "active efforts" requirement, but contends that active efforts are not triggered until a child is found to *be* an Indian child as defined by the ICWA;[10] that nowhere does the Act require that a public agency take steps to secure tribal membership

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[10] See *Holyfield, supra*, 490 U.S. at p. 32, italics added [noting that Congress enacted the ICWA to "establish[] federal standards that govern state-court child custody proceedings involving *Indian children*"]; accord, *Adoptive Couple v. Baby Girl* (2013) 133 S.Ct. 2552, 2557 (*Adoptive Couple*).

for a child, a decision that should be reserved for the child's family; and that in any event, the duty of the department to provide active efforts to an Indian family is specifically defined under the ICWA to include "*remedial services and rehabilitative programs* designed to prevent the breakup of the Indian family." (25 U.S.C. § 1912(d); § 361.7, subd. (a), italics added.)

Based on the foregoing, DHHS contends that the rules create a conflict with the ICWA definition of an Indian child, which was incorporated into state law by the California Legislature. (25 U.S.C. §1903(4); § 224.1, subd. (a).) To the extent that the rules 5.482(c) and 5.484(c)(2) expand the class of children to whom the ICWA applies—by requiring application of the Act to children who do not meet the Act's definition of an "Indian child"—the rules violate the supremacy clause because the rules are inconsistent with federal and state law. (See U.S. Const., art. VI, cl. 2.)

Furthermore, even if federal law does not preempt states from broadening the ICWA definition of an Indian child, DHHS contends that respondent's view violates the rules of statutory construction as well as creates a direct conflict with the definition of an "Indian child" in that the rules at issue purport to create a category of "eligible" children by: (1) requiring the juvenile court to direct the appropriate individual or entity to provide "active efforts to secure tribal membership" for an eligible child;

and by requiring the court to "proceed as if the child is an Indian child" (rule 5.482(c). Thus, the effect of the rules impermissibly broadens the definition of an Indian child, and expands application of the ICWA's protections to a child who does not meet the statutory definition of an Indian child. (25 U.S.C. § 1903(4); § 224.1, subd. (a).) As such, DHHS contends that the adoption of the rules exceeded the Judicial Council's rule-making authority. (Cal. Const., art. VI, § 6; *Court Reporters Assn.*, *supra*, 39 Cal.App.4th at pp. 21-22.)

Finally, DHHS contends that construing section 224.1, subdivision (a) as authorizing the extension of the ICWA protections to children who are not Indian children but who are merely eligible for tribal membership —when neither biological parent is a member and the tribe has yet to approve their membership application—results in the creation of an impermissible racial classification. (See *Rice v. Cayetano* (2000) 528 U.S. 495, 514 (*Rice*) [Differential treatment predicated solely on "ancestral" classification violates equal protection principles.].)

DHHS respectfully requests that this Court address the merits of the petition for review. First, the preemption issue must be decided to prevent confusion in child custody cases involving children of Indian ancestry who do not fit within the statutory definition of an Indian child. Deferring the

issue will invite litigants to seek legislative redress, which in turn, will only bring the issue back to the courts for resolution in a future case.

Second, if the children or the father, or both, should become enrolled members of the tribe pending review, that new development would not render the issue moot.[11] Application of the ICWA is at the core of every child custody case involving an Indian child.[12] Furthermore, whether rules 5.482(c) and 5.484(c)(2) can or cannot be harmonized with the state law's definition of an "Indian child" is an issue of statewide importance.[13]

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[11] As the Third District Court of Appeal noted, "the issue of the validity of the two rules…is a matter of broad public importance likely to recur in the future, yet evade review in light of the slow pace of appellate proceedings lagging behind the expedited pace of dependency proceedings." (Slip Opinion, p. 6, fn. 7, citing *In re Raymond G.* (1991) 230 Cal.App.3d 964, 967, and *In re Jody R.* (1990) 218 Cal.App.3d 1615, 1622.)

[12] See *Adoptive Couple v. Baby Girl* (2013) –U.S. –, 133 S.Ct. 2552, 2554 (*Adoptive Couple*) (conc. opn., Thomas, J.) [The ICWA applies to all "state-court child custody proceedings involving Indian children[.]").

[13] The rules at issue have been called into question by *In re C.B.* (2010) 190 Cal.App.4th 102, 134-135 [questioning whether rules 5.482(c) and 5.484(c)(2) are inconsistent with the federal ICWA].) A noted commentator has also observed that the rules "are open to substantial question." (Seiser & Kumli, Cal. Juvenile Courts Practice & Procedure (2014 ed.) § 2.125[2][b], pp. 2-362 to 2-363 ["The state is preempted from changing the definitions in 25 U.S.C. § 1903, including expanding the definition of an Indian child to any child who is eligible for membership without regard for whether a biological parent of the child is a member of the tribe [Citation]."].) As another court observed, the California Legislature has not granted authority to the juvenile court relative to tribal enrollment. (*In re Jose C.* (2007) 155 Cal.App.4th 844, 849, fn. 2 (*Jose C.*)

STATEMENT OF THE CASE

On May 23, 2013, the juvenile court directed appellant to take active efforts to enroll the minors in the tribe pursuant to rule 5.482(c) and rule 5.484(c)(2). (RT 66.) DHHS appealed, challenging the validity of two rules on a multitude of grounds. The main grounds included the following contentions: (1) federal and state law preempt the attempt by the rules at issue to extend the ICWA's protections to minors who are not *tribal* Indians, i.e., "Indian children" as defined in the federal ICWA and state law; (2) interpreting the definition of an Indian child in section 224.1, subdivision (a) to include children who are merely *ethnic* Indians would raise constitutional problems; and (3) active efforts required by federal and state law do not include providing tribal enrollment services.

Without reaching all the claims raised by appellant, the Court of Appeal, Third Appellate District filed an opinion on June 16, 2014 (*In re Abbigail A.* (C074264)) ("Slip Opn."), holding that the court rules requiring enrollment procedure are inconsistent with the definition of Indian children entitled to ICWA protections pursuant to section 224.1, subdivision (a). (Slip Opn., p. 3.) The Court of Appeal reversed, directing the juvenile court not to provide the minors any of the protections under the ICWA or state law until respondent or the minors have become enrolled members of

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["If the Legislature wanted to set forth requirements for the trial court to enroll eligible minors, it could have done so."].)

the tribe. (Slip Opn., pp. 3, 14.) The opinion was certified for publication. (*In re Abbigail A.* (2014) 226 Cal.App.4th 1450, vacated by grant of review.)

On July 28, 2014, J.A., Sr. ("respondent" or "father") filed a petition for review. This Court granted review on September 10, 2014.

STATEMENT OF FACTS

On December 4, 2012, DHHS filed a petition alleging the children come within section 300, subdivision (b) due to untreated substance abuse and other problems of the mother, A.S. (1 CT 1-5, 6-10.) The children had been voluntarily residing in the home of the maternal grandmother. (1 CT 23.)

At the hearing on December 7, 2012, the juvenile court detained the children. (1 CT 32-36.) During the hearing, mother stated that neither she nor respondent nor the children's other alleged father has American Indian ancestry. (1 CT 33.)

During the hearing on January 4, 2013, respondent informed the juvenile court that his "mother's mother is Indian" and that his aunt has the family tree. (RT 6; see also CT 90.) The court reviewed respondent's form ICWA-020 [Parental Notification of Indian Status] and ordered him to complete and return the Indian Ancestry Questionnaire. (1 CT 93-94; RT 6, 9.) Although the court found that there was insufficient evidence to

find that the children are Indian children within the meaning of the ICWA, the court ordered ICWA noticing. (RT 6, 9; 1 CT 94.)

On January 25, 2013, DHHS filed a first amended section 300 petition on behalf of each of the children. (2 CT 293-297, 298-303.) The petitions added allegation "b-3" [father has substance abuse issues] and allegation "b-4" [domestic violence allegation as to both parents]. (2 CT 295, 301.)[14]

At the paternity hearing and pre-jurisdictional status conference on January 25, 2012, the juvenile court declared respondent a presumed father, and continued the matter to allow ICWA noticing to proceed. (1 CT 311; RT 20.)

In a letter dated January 29, 2013, the Cherokee Nation ("tribe") indicated that neither the children nor either of their biological parents are members of the tribe; but that the children are eligible for enrollment based on the paternal great-great-grandmother's membership. (2 CT 333.) The letter also stated that the tribe "is not empowered to intervene in this matter unless the child/children or eligible parent(s) apply for and receive membership...."; and that to prevent any future delays, the tribe "recommends applying all the protections of ICWA to this...case." (*Ibid.*)

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[14] At the hearing on February 23, 2013, pursuant to DHHS's motion, the juvenile court dismissed allegation "b-3" of the first amended section 300 petition filed on January 25, 2013. (1 CT 370; RT 35.)

At the pre-jurisdictional status hearing on February 22, 2013, the juvenile court indicated that it received a declaration indicating that the Cherokee Nation of Oklahoma stated that "the children are eligible for tribal membership" but that it was "the tribe's intention...not to intervene until and if the children apply for membership." (RT 28-29.) The juvenile court expressed its intention to apply the ICWA. (2 CT 370; RT 33.)

Citing the ICWA's definition of an Indian child, Deputy County Counsel objected to application of the ICWA (RT 29); and noted that "[a]t this point finding the act applies when in fact it doesn't...changes the burden of proof" and "has a significant impact." (RT 33.) The court countered that "returning to disposition to do all that would even be more confusing"; and the juvenile court invited County Counsel to submit a brief on the issue. (RT 34.)

Father's counsel indicated that father's intention was to seek enrollment and pursue membership. (RT 39; 2 CT 370.) Acknowledging that "ICWA does not apply," counsel recommended that the "prudent thing to do" would be to apply the ICWA. (RT 31.) The juvenile court ruled that even though the ICWA did not apply at that point, "it seems likely that it will apply" in light of father's intention to apply for membership, and that "the better part of discretion is to avoid having problems later on." (RT 32.)

In a letter dated February 27, 2013, the Cherokee Nation again indicated that the children are eligible for enrollment but that neither they nor their biological parents were members of the tribe. (2 CT 390, italics added ["The connection makes the above child/children eligible for enrollment and affiliation with Cherokee Nation *when the child/children or eligible parent(s) apply and receive membership.*]) The tribe also indicated that it "is not currently empowered to intervene" but it "recommends applying all the protections of ICWA...[to] prevent any future delays...." (2 CT 390.)

At the hearing on March 15, 2013, the juvenile court ordered minors' counsel to "make reasonable efforts to ensure the children have membership in the tribe." (RT 38.) The court also ordered father's counsel "to make sure that you cooperate with the efforts...to get the children enrolled." (RT 39.)

On March 25, 2013, DHHS filed additional argument in opposition to the order directing enrollment of the children in the Cherokee tribe, and requiring application of the ICWA to the proceedings. (2 CT 415-431.) In a response filed on April 3, 2013, minors' trial counsel argued that the requirement to enroll the children did not constitute an impermissible expansion of the ICWA. (2 CT 436-438.)

At the hearing on April 5, 2013, mother was not present, and her counsel did not take a position on the issue concerning the application of rules 5.482(c) and 5.484(c)(2). (RT 45, 62.) County Counsel argued that rules 5.482(c) and 5.484(c)(2) are invalid and not binding on the court. (RT 47-50.)

The juvenile court found that the children are not Indian children as defined by the ICWA:

> [THE COURT:] So the issue in this case, we know ICWA applies, first, if the children are members of the Cherokee Nation or, two, if the children are eligible for membership and their biological parent is a member. On this record it does not appear that the children or their father are members of the tribe at this time.... (RT 50-51.)

The juvenile court nevertheless concluded that it was required to proceed under the ICWA:

> [THE COURT:] ...On this record it does not appear that the children or their father are members of the tribe at this time, but there is no dispute that the children are eligible to enroll as members....
>
> The Court concludes that California Rules of Court 5.482(c) and 5.484(c)(2) require the Court to direct the Department to make reasonable efforts to secure tribal membership for the children, and further requires [*sic*] this Court to proceed as if the children are Indian children, meaning that we proceed under the Indian Children Welfare Act. (RT 52; see also RT 52-54.)

At the conclusion of the hearing, the juvenile court directed DHHS to make active efforts to secure membership for the children in the

Cherokee Nation tribe, and confirmed its previous order directing minors' counsel to pursue membership—emphasizing that "the primary responsibility" will be placed on the department. (RT 54-56; see also 2 CT 449 [minute order denying DHHS's motion for reconsideration].) The court also ordered that the case would proceed as if the children were Indian children. (RT 55.)

At the combined jurisdictional and dispositional hearing on May 23, 2013, the juvenile court noted that "under the terms of the Indian Child Welfare Act [the children] can be covered...if the father becomes a member or if the children act on their eligibility and become members"; and the court ordered DHHS "to help the children secure membership." (RT 65 -66.) The court also indicated that it would proceed as though the ICWA is applicable. (RT 66.)

The ICWA expert, Nanette Gledhill, testified that she verified "the father is not enrolled"; that "in order for the children to become enrolled the father would have to be enrolled first"; that the tribe was not proceeding with the enrollment at the time because "[t]hey don't have enough information"; and that "they're not intervening in this matter either." (RT 75.) At the conclusion of the hearing, the juvenile court sustained the allegations of the first amended petition, declared the children dependents of the court, removed them from parental custody, and placed them in the

home of the maternal grandmother. (2 CT 454-467.1; RT 125, 127-129 [court struck proposed finding that children are not Indian children and substituted finding that "they are eligible to enroll in the Cherokee Nation as Indian children"].)

DISCUSSION

At issue is the validity of two rules adopted by the California Judicial Council to implement the ICWA. Together, the two rules in question require the "appropriate individual or social service agency" to engage in active efforts to seek tribal enrollment of eligible Indian children. (Rules 5.482(c) and 5.484(c)(2).)[15]

The parties agree that the ICWA is only applicable to "Indian children who are subject to child custody proceedings." (See RB., p. 13.) What is disputed is whether children such as those in this case are Indian children.

Respondent contends that the Cherokee Nation's response required a finding that the children are Indian children because the minors' membership "is a virtual certainty." (RB, pp. 35-36, fn. 13.) Based on this speculative premise, respondent contends that application of rules 5.482(c) and 5.484(c)(2) will not create a conflict with state law; and that state law does not preempt the rules.

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[15] See footnotes 4 and 5, *ante*.

Respondent's contention ignores the facts. Here, the juvenile court found that the children and appellant are *not* members of the tribe. (RT 52.) The court's finding was based on the tribe's determination that the children in the pending case are *not* members of the Cherokee Nation albeit they are eligible for enrollment on the record in this case (2 CT 333, 390); and that they cannot be enrolled until and unless the following condition was satisfied: "when the child/children or eligible parent[s] apply *and receive* membership" (2 CT 333, italics added; 2 CT 390 [same]).

Respondent's contention also ignores the law. First, section 224.1, subdivision (a), which defines an Indian child, does not extend "Indian child" status to a nonmember, eligible child of *nonmembers*. (§ 224.1, subd. (a).) Indian child status requires membership (political affiliation with a tribe) by either the child or one of the child's biological parents. (*Ibid.*)

Second, section 224, subdivision (c) recognizes the nature of tribal membership, by mandating that the tribe must determine that the minor is eligible for membership *and* is the biological child of a member before application of the ICWA can be triggered. (§ 224, subd. (c).)[16]

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[16] Section 224, subdivision (c) states that:

> A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in

Third, a tribe's determination that a child is or is not a member is conclusive. (§ 224.3, subd. (e)(1).)

Ignoring the statutory definition of an Indian child prescribed by section 224.1, subdivision (a)—and the fact that the definition is based on tribal affiliation—respondent contends that the definition can be broadened to include children such as those in the pending case. Notwithstanding the fact that membership in the Cherokee tribe does not require a certain percentage of blood relationship to an ancestor who is a member,[17] respondent focuses attention on the child's blood quantum, and attempts to draw the court's attention away from the statutory definition of an Indian child of the ICWA by calling the court's attention to a different provision of the ICWA:

> ...[S]ection 224, subdivision (d) and the rules interpreting it ...constitute an express statement by the Legislature that California law is designed to protect children who are eligible for tribal membership *because of a sufficient*

> 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 [ICWA] to the proceedings. (§ 224, subd. (c).)

[17] The Cherokee Nation does not require any particular degree of heritage, but instead requires proof of descent from an ancestor listed on the Dawes Rolls. (Official Cherokee Nation Website: About Citizenship, <http://www.cherokee.org/Services/TribalCitizenship/Citizenship.aspx>, (last visited January 8, 2015.)

blood quantum of Indian descent. (RB, p. 18, italics omitted and added.)[18]

Respondent's interpretation violates the rules of statutory construction and renders the ICWA's definition of an "Indian child" meaningless, turning the implementation of the ICWA on its head.

Respondent contends that the rules at issue "do not violate a uniform national standard for ICWA application because definitions of membership and eligibility are determined exclusively by the tribe." (Respondent's Opening Brief on the Merits ("RB"), p. 41, capitalization omitted; see also p. 41 ["because ICWA does not constrain how tribal 'membership' or 'eligibility' is to be defined, there is no national standard for establishing who is an 'Indian child.']; see also RB, p 42.)This contention is a red herring.

It is true that the question of membership rests with each tribe. This is a non-issue. Respondent conflates the tribe's function to determine tribal membership and the court's duty to make a legal determination of Indian

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[18] See also RB, p. 2 ["Rules 5.482(c) and 5.484(c)(2) do not conflict with statute because they do not redefine 'Indian child.' They are narrow procedural mandates which apply only after ICWA notice reveals a tribe has already determined an unenrolled child has sufficient Indian blood quantum for membership."]; RB, p. 29 ["Rules 5.482(c) and 5.484(c)(2) do not ...the reach of ICWA...[because] [the] children...have already been found by a tribe to have sufficient blood quantum to qualify for membership to have ICWA protections."]; and RB, p. 30 ["Rules 5.482(c) and 5.484(c)(2) direct the social services agency to engage in 'active efforts' to assist a child with a qualifying quantum Indian blood level to enroll."]

child status. The tribe decides eligibility but the court decides whether a child is an Indian child for purposes of the ICWA. (See Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2013 ed.) § 2.125[1], pp. 2 - 341.) The tribe's determination is simply intended to assist the court—but the court must still decide whether to the ICWA applies. (*Matter of Baby Boy Doe* (Idaho 1993) 849 P.2d 925, 931.)[19]

In support of his view that the court rules at issue are valid, respondent relies heavily on *In re Jack C., III* (2011) 192 Cal.App.4th 967 (*Jack C.*), which considered and upheld the validity of rule 5.482(c), one of the two rules at issue in this case.[20] The *Jack C.* court rejected the agency's contention that rule 5.482(c) "impermissibly expand[s] ICWA beyond its jurisdictional limits," reasoning that the rule "promotes the timely

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[19] As the Supreme Court of North Dakota explained in *In re Adoption of C.D.* (*C.D.*) (N.D. 2008) 751 N.W.2d 236, italics added: "[w]hile the Tribe has the authority to determine its own membership, it is for the state court to correlate that information to the statute, apply the law, and make the legal determination whether the child is an Indian child under 25 U.S.C. § 1903(4), thereby triggering application of ICWA. Thus, *the court* must initially determine whether a tribe has concluded that the child or parent is a member or is eligible for membership in the tribe, and that determination by the trial court is a finding of fact. [Citations.]." (*Id.* at p. 241.)

[20] Respondent broadly reads *Jack C., supra*, 192 Cal.App.4th 967 as authority for the proposition that rule 5.482(c) is not preempted by "ICWA or section 224, subdivision (a)" because the rule is "consistent with the goals and purposes of those statutes." (RB, p. 21; see also RB, p. 40 [citing *Jack C.,* at pp. 977 and 981 to support his contention that "[t]he rules do not contradict the definition of 'Indian child' adopted by our state Legislature as they do not provide ICWA protections to a class of persons never intended to be covered by the statute."].)

resolution of dependency matters by avoiding protracted litigation concerning the applicability of ICWA." (*Id.* at p. 981.) Respondent makes a similar argument: "since preventing delay and promoting tribal enrollment of eligible Indian children are both manifest intentions of the Legislature and Congress, it is impossible to see how rules 5.482(c) and 5.484(c)(2) are "'inconsistent with statute.'" (RB, pp. 39-40.)

The pronouncement by the *Jack C.* court regarding federal preemption is dicta; and in any event, the court's reasoning is flawed. Similar to respondent, the *Jack C.* court conflated the tribe's determination of membership and the court's duty to make a legal finding regarding the application of the ICWA. (*Jack C.*, *supra*, 192 Cal.App.4th at pp. 978 -979, 980.) For this and other reasons which we will explain later in this brief, respondent's heavy reliance on *Jack C.*, *supra*, is misplaced.[21]

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[21] The facts in *Jack C.*, *supra*, 192 Cal.App.4th 967 are distinguishable. In this case, letters from the tribe indicate that the children in the pending case are *not* members of the Cherokee Nation albeit they are eligible for enrollment (2 CT 333, 390; RT 50-52; cf. *Jack C.*, at p. 981 [wherein the tribe considered the minor to be an Indian child, and the tribe "did not confirm that enrollment was a prerequisite for members"]); the tribe determined that it could not intervene until and unless the following condition was satisfied: "when the child/children or eligible parent[s] apply *and receive* membership" (2 CT 333, italics added; 2 CT 390 [same]; cf. *Jack C.*, at pp. 973-974 [tribe promptly intervened]); and the juvenile court found that the children and appellant are *not* members of the tribe. (RT 52; cf. *Jack C.*, *supra*, at pp. 989-980 [evidence before court was that approval of the father's membership application would merely be a matter of "bureaucratic" requirements].)

Respondent also makes an unsubstantiated claim that "[p]arental *inaction* to enroll an eligible child in a tribe in a California child custody case is akin to the parental *action* to avoid tribal jurisdiction...." (RB, p. 34, italics in original.) Thus, he applauds the policy reasons for the adoption of the rules at issue, alleging that the rules fill a necessary void. (RB, p. 31 ["parents often" lack "time, resources and ability" to ensure tribal enrollment for a child"]; RB, p. 3 [the rules "promote enrollment, even when a parent...is not interested in protecting a child's Indian membership rights"].)

In reviewing statutes, the court cannot evaluate the policy considerations undertaken by the Legislature. (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53 ["'[T]he choice among competing policy considerations in enacting laws is a legislative function.' (Citation.]".) As this Court explained in *Blair v. Pitchess* (1971) 5 Cal.3d 258 *(Blair)*, "'[t]his court cannot..., in the exercise of its power to interpret, rewrite the statute. If this court were to insert ...provisions..., it would in no sense be interpreting the statute...but would be rewriting the statute.... That is a legislative and not a judicial function.' [Citations." (*Id.* at p. 282; see also Cal. Const., art. III, § 3.)

Respondent's view—that "accomplish[ing] tribal enrollment for a child in its care" is not an "unreasonable" "burden" on the department "as

enrollment services are nominal" (RB, p. 32)—is simplistic. Respondent completely ignores the question of whether a child is an Indian child for purposes of the ICWA, and if so, whether securing tribal enrollment is required by the ICWA.[22]

Respondent's view on this issue is also not true. The ICWA's requirements are onerous. (See *In re W.B., Jr.* (2012) 55 Cal.4th 30, 48 (*W.B.*), citing *In re S.B.* (2005) 130 Cal.App.4th 1148, 1156–1157 ["When applicable, ICWA imposes three types of requirements: notice, procedural rules, and enforcement."].) Furthermore, applying the ICWA's protections to children who do not fit within the Act's definition of an Indian child can have drastic consequences. (RB, p. 37 [noting that "the tribe [may] intervene[] and seek[] to replace a child to an Indian home, move[] to shift the case to a tribal court," etc.].)

This brings us to the real question: Can states broaden the definition of an Indian child to include an "eligible" Indian child whose membership application—or a biological parent's application—is pending? The answer requires an analysis of whether Congress intended the term "Indian child," as set forth in the ICWA, be subject to a uniform, narrow definition.

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[22] As we noted earlier, the ICWA's active efforts requirement does not mention a duty to secure tribal enrollment. (25 U.S.C. § 1912(d); § 361.7, subd. (a).)

Nowhere within the statutory definition of an Indian child is ancestry or heritage a relevant factor; nor is there any indication that eligibility for membership alone meets the requirements of the definition. (25 U.S.C. § 1903(4).) For children who are not tribal members, such as the children in this case, eligibility is but one criterion necessary for triggering application of the ICWA. (*Jose C., supra*, 155 Cal.App.4th 844 explained, "[e]ligibility is only *one* criterion necessary to be found to be an Indian child." (*Id.* at p. 849.)

ICWA definition of an "Indian child"

The ICWA prescribes two alternate routes by which a child can meet the definition of an "Indian child." (25 U.S.C. § 1903(4).) To be an Indian child for purposes of the ICWA, the child must be a member of a federally recognized tribe; or if a child is not a member, the ICWA allows a child who is *eligible* for membership to be designated "Indian child" only if the child's biological parent is a *member* of a tribe. (25 U.S.C. § 1903(4); § 224.1, subd. (a).) Conversely, the ICWA does not extend "Indian child" status to an eligible child of a *non-member*. (*Ibid.*)

Because the definition of an Indian child recognizes only *tribal* Indians not *ethnic* Indians, proof of a child's Indian status requires more than evidence that a child is ethnically Indian, that is, has Indian ancestry (race). (*C.D., supra*, 751 N.W.2d at p. 243 ["The definition of 'Indian

child' in 25 U.S.C. § 1903(4) requires more than a showing that the child and parent have an Indian heritage."]; see also *In re R.M.W.* (Tex.App. 2006) 188 S.W.3d 831, 833 *(R.M.W.)* [assertion that a child or parent "is of Indian 'heritage' or 'blood' provides no evidence that any of the children are Indian children under the ICWA."].)

California definition of an "Indian Child"

Because of the limitation on states to legislate with regard to Indians,[23] the California Legislature imported the ICWA's definition of an Indian child by referencing and mirroring language from the federal definition. (§ 224.1, subd. (a).) California law similarly incorporates congressional recognition that the definition must be based upon political affiliation, not Indian ancestry, to avoid unconstitutionality. (See § 224, subd. (c) [tribal determination of membership based on political affiliation]; see also § 224.3, subd. (e)(1) [a tribe's determination as to whether or not a child is a member is conclusive].

In appellant's view, since the federal ICWA includes an express definition of the type of children who are governed by the ICWA, and because that definition affects jurisdiction under the Act, the state is

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[23] As the United States Supreme Court explained in *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation* (1979) 439 U.S. 463 (*Yakima*) the federal government has the constitutional authority to single out Indian tribes for special treatment, while "[s]tates do not enjoy this same unique relationship with Indians...." (*Id.* at pp. 500-501.)

powerless to expand that definition. (*State ex rel. State Office for Services to Children and Families v. Klamath Tribe* (Or. App. 2000) 11 P.3d 701, 707 (*Klamath Tribe*) ["...[O]nly Congress can define who is an Indian child."]; *In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1317 (*Santos Y.*) ["California has no independent constitutional authority with respect to Indian tribes."].)

Appellant also contends that the ICWA definition of an "Indian child" must be narrowly construed, and that the definition must be ascribed a uniform, nationwide meaning. Sanctifying the respondent's proposed marriage of the rules and governing statutes would eviscerate the statutory definition of an Indian child and stand the implementation of ICWA on its head.

Inclusion of tribal Indians and exclusion of ethnic Indians

The "ICWA is quite precise in setting out the scope of its provisions." (*W.B., supra,* 55 Cal.4th at p. 48, fn. omitted.)[24] As we noted

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[24] In rejecting the child's contention that state legislation expanded ICWA to delinquency proceedings to require notice to Indian Tribes in delinquency cases, the California Supreme Court quoted the definition of "Indian child" as prescribed by 25 U.S.C. § 1903(4):

> *ICWA is quite precise* in setting out the scope of its provision. It applies to any '"child custody proceeding"' involving an '"Indian child."' (25 U.S.C. § 1903.) An 'Indian child' is an unmarried person under 18 who is either a member of an Indian tribe or is eligible for membership and is

earlier, Congress chose to limit the definition of an Indian child to children who are tribal members or are biological children of tribal members. (25 U.S.C. § 1903(4).)

By adopting a narrow definition of an Indian child, Congress intended to protect only tribal Indian children, not children who are merely eligible for membership, such as the children in the present case. (*Santos Y.*, *supra*, 92 Cal.App.4th at p. 1299 [noting that the "congressional findings in support of the ICWA cite the interest of the United States in protecting Indian children" "who are members of or eligible for membership in an Indian tribe" as defined 25 U.S.C. § 1901(3)].) As the appellate court in this case noted in its decision, the "ICWA is very specific in limiting the definition of Indian child to children who are tribal members or are children of tribal members (25 U.S.C. § 1903(4));" and the narrow definition "was *not* an inadvertent definitional choice":

> 'The legislative history of the ICWA shows that Congress considered, but ultimately rejected, an expansive definition of "Indian child".... [A]n earlier draft of the ICWA did not define "Indian child," but rather defined "Indian" as "any person who is a member of *or who is eligible for membership in a federally recognized Indian tribe*." [Citation.] ...But the final draft of the statute limited membership [to] those children who were eligible for membership because they had a parent who is a member.' (*Nielson v. Ketchum* (10th Cir.2011) 640 F.3d 1117, 1124 (*Nielson*) [tribe cannot broaden definition of tribal members
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> the biological child of a tribe member. (25 U.S.C. § 1903(4).) (*W.B.*, *supra*, at p. 49, italics added.)

in order to invoke ICWA protections on behalf of children not otherwise within definition of Indian child]). (Slip opn., p. 7.)

Uniform definition

Even though this case does not involve a question of domicile, *Holyfield, supra*, 490 U.S 30 compels the conclusion that the definition of an Indian child must be given a uniform meaning.[25] In *Holyfield*, when asked to construe the meaning of domicile, the court began its analysis "with the general assumption that 'in the absence of a plain indication to the contrary, ...Congress when it enacts a statute is not making the application of the federal act dependent on state law.'" (*Id.* at p. 43.) One reason for this rule of construction is that federal statutes are generally intended to have uniform nationwide application, and a second reason is that there is a danger that a program established by federal law may be impaired if state law controls the definition of a key term. (*Id.* at pp. 43–44.)

In *Holyfield, supra*, 490 U.S 30, the court held that it was "beyond dispute that Congress intended a uniform federal law of domicile for the ICWA," even though the ICWA does not include a definition of "domicile." (*Id.* at p. 47.) If this is true, why would Congress expressly

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[25] Decisions of the United States Supreme Court upon federal questions, constitutional or statutory, are binding upon state courts. (*Ivanhoe Irrigation Dist. v. All Parties & Persons* (1960) 53 Cal.2d 692, 709, 715; *Urie v. Thompson* (1949) 337 U.S. 163, 173.)

define "Indian child," then leave it up to the states to individually determine who is an Indian child for purposes of the ICWA?

Rules 5.482(c) and 5.484 (c)(2); conflict with state law

By adopting rules 5.482(c) and 5.484 (c)(2), the California Judicial Council has attempted to broaden the ICWA's definition of an Indian child, doing what Congress chose *not* to do—extend the reach of the ICWA to children who are Indian by virtue of ancestry only. As such, the rules conflict with the plain language of the statutory definition of an Indian child set forth in the ICWA and incorporated by the California Legislature pursuant section 224.1, subdivision (a), as well as with section 224, subdivision (c) and section 224.3, subdivision (e)(1).

Contrary to respondent's contention, the rules of court at issue do not fill a void in the state law. The California Legislature has adopted the federal definition of an Indian child: For purposes of the ICWA, to *be* an Indian child, pursuant to the ICWA, it is not enough for a non-member Indian child to be *eligible* for membership in a tribe. To meet the requirement for being an Indian child under the alternate route, the child must also be "the biological child" of a member. (§ 224.1, subd. (a); see also § 224, subd. (c) [mandates that the tribe must determine minor eligible for membership *and* the biological child of a member for ICWA to apply].)

As such, the rules at issue create a conflict with that definition, not fill a void. (Cf. RB, p. 32 ["rules fill a necessary void"].)

Respondent contends that broadening the definition of an Indian child is permissible. Reasoning that because the ICWA permits the states to impose higher standards of protection for Indian children, "the scope of the persons covered by the ICWA in California child custody proceedings [should be] expanded to a very small group of children whose eventual tribal membership is nearly certain, but not yet perfected." (RB, p. 49.)

Respondent's broad interpretation of the term "Indian child" is an invitation to this Court to rewrite the definition prescribed by section 224.1, subdivision (a), as well as to amend section 224, subdivision (c) and section 224.3, subdivision (e)(1). This court should decline that invitation.

First, upholding the validity of the rules in order to accommodate respondent's request would constitute "rank judicial legislation." (See *Pitney–Bowes, Inc. v. State of California* (1980) 108 Cal.App.3d 307, 321.) Under the doctrine of separation of powers, this court has no authority to rewrite the definition of an "Indian child." (See Cal. Const., art. III, § 3; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630 ["The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature."].)

To accommodate respondent's broad interpretation of an Indian child, this court would have to rewrite section 224.1, subdivision (a) to provide authorization for the adoption of these rules—by creating a third category ("eligible Indian children") to the definition of an Indian child, that is, by adding a qualifying clause at the end of the definition that provides only two routes for achieving Indian child status.[26]

Second, broadening the definition of an Indian child would be inconsistent with the legislative admonition that courts "strive to...comply with the federal Indian Child Welfare Act." (§ 224, subd. (b) ["In all Indian

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[26] Respondent is in effect asking this court to create an exception for "eligible Indian children" who do not fit within the ICWA definition. To that end, this court would need to add the italicized language below, so that the revised section 224.1, subdivision (a) will read as follows:

> "Indian child" means any unmarried person who is under age eighteen and is either
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> (a) a member of an Indian tribe
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> or
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> (b) is eligible for membership in an Indian tribe
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> *and*
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> is the biological child of a member of an Indian tribe.

Notwithstanding the child's inability to meet either (a) or (b) of the above, the child is nevertheless an Indian child if the child is eligible for membership and his/her application for membership is pending.

child custody proceedings, ...the court shall... strive to...comply with the federal Indian Child Welfare Act...."].)

Third and most important, broadening the definition of an Indian child to include child who are Indian by ancestry only would present a problem of equal protection. As we noted earlier, whether or not a child is eligible for membership cannot be the litmus test. (See *Rice*, *supra*, 528 U.S. 495 at pp. 519-520 [While striking down a state voting law on equal protection grounds, the court expressed the view that a lineage requirement was simply a "proxy for race."].)

Ignoring the definition of an "Indian child"—and the constitutional implications of broadening the definition as he proposes—respondent sidetracks his focus on matters not dispositive: (1) the Bureau of Indian Affairs (BIA) Guidelines' recommendation for liberal construction of state statutes, regulations or rules promulgated to implement the ICWA (RB, pp. 13, 26); (2) the prefacing phrase, "unless the context requires otherwise," in section 224.1, subdivision (a) (RB, p. 19); (3) the general statement of findings and declarations in section 224, subdivision (a) (RB, pp. 16-17, 29); (4) the reference in section 224, subdivision (d) to "higher standards" (RB, pp. 18, 28); and (5) the Legislative Counsel's summary (RB, pp. 27-28). Respondent's reliance on these sources is misplaced.

First, respondent's citation to the BIA's call for liberal construction does not undercut our view. (RB, 26-27.) The Legislature derives its power to act from the constitution, not the BIA Guidelines. (Cal. Const., art. III, § 3 ["The powers of state government are legislative, executive, and judicial...."]; see also dicta in *In re Jose C.* (2007) 155 Cal.App.4th 844, 849, fn. 2 (*Jose C.*) [in rejecting the mother's argument that the juvenile court erred in failing to enroll the minors in a tribe, the court stated: "If the Legislature wanted to set forth requirements for the trial court to enroll eligible minors, it could have done so; having failed to do so, we are not in a position to engraft such a requirement into the statutes."].)

In any event, as respondent acknowledges, the BIA Guidelines do not have a binding effect on state courts. (RB, p. 27.) In addition, the ICWA does not apply until the tribe determines that a child is an "Indian child." (*Jack C.*, *supra*, 192 Cal.App.4th at p. 980; *Jose C.*, *supra*, 155 Cal.App.4th at p. 849.)

Respondent's call for liberal construction of the ICWA's protection cannot be a substitute for tribal approval of his or the children's application for membership. In any case involving children who are merely eligible for membership, such as the minors in this case, the children must also satisfy the "and" component of the statutory definition of an Indian child (25 U.S.C. § 1903(4))—which, with respect to the children in this case, can be

achieved only *if* the Cherokee Nation approves their membership application or the application of his/her biological parent.[27]

Second, respondent's reference to the prefacing phrase, "unless the context requires otherwise" in section 224.1, subdivision (a), does not authorize the court rules' expansion of the statutory definition of an Indian child. (RB, p. 19, fn. 11, citing *Jack C., supra*, 192 Cal.App.4th 977.) The *Jack C.* court's and respondent's reliance on that language is misplaced.

The phrase, "unless the context requires otherwise"—in section 224.1, subdivision (a)—merely makes clear the Legislature's intent for courts to avoid an overly-literal, formulaic interpretation of the term "Indian child"; and that if the term is defined differently in another law, the ICWA's definition is inapplicable.[28]

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[27] In this case, letters from the tribe confirmed that it could not intervene until and unless the following condition was satisfied: "when the child/children or eligible parent[s] apply *and receive* membership" (2 CT 333, 390, italics added.)

[28] For example, as noted by respondent, for purposes of the Indian Health Care Improvement Act of 1976 ("IHCIA"), Congress provides for another definition of "Indian." (RB, p. 14, fn. 9, italics added [inexplicably asserting that "[s]ection 1603(c) provides for another definition of 'Indian' *under the ICWA*" even though the IHCIA appears in a different part of title 25 of the United States Code (25 U.S.C. § 1601, et seq.)].)

In fact, a vast network of federal laws require that members of a federally recognized tribe satisfy the definition of "Indian" for purposes of other BIA programs. (See *Zarr v. Barlow* (9th Cir. 1986) 800 F.2d 1484, 1486, fn. 1.); see also *United States v. Bruce* (9th Cir. 2005) 394 F.3d 1215, 115, fn. 6, italics added by court [citing other examples where Congress has

Third, a narrow, uniform interpretation of the term "Indian child" is not undercut by application of title 25 United States Code section 1902, declaring that the ICWA establishes "minimum Federal standards." (25 U.S.C. § 1902.)[29] The language in this provision merely states a general legislative intent for the ICWA to establish minimum standards, once the ACT is determined to apply. The provision does not authorize states to expand federal definitions. (*Klamath Tribe*, *supra*, 11 P.3d at p. 705 ["Indian child" definition is not a minimum standard].)

Fourth, disregarding the definition of an Indian child set forth in the ICWA, and without reference to title 25 U.S.C. section 1921,[30] respondent

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defined "Indian," such as for purposes of "the Indian Arts and Crafts Act of 1990, 18 U.S.C. § 1159(c)(1) [ ], 25 U.S.C. § 305e(d)(2) [ ] (defining 'Indian' as 'any individual who is a member of an Indian tribe; *or* for the purposes of this section is certified as an Indian artisan by an Indian tribe')"].)

29 25 U.S.C. § 1902 provides:

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

30 Title 25 U.S.C. section 1921 provides:

instead repeatedly relies upon section 224, subdivision (d)[31]—which mirrors the ICWA's authorization for states to adopt a higher level of ICWA protection—to support his contention that the definition of an Indian child may be broadened by court rules. (RB, pp. 17-18, 28, 40.) The provision cited by respondent is not helpful.

By its reference to "Subchapter I" (25 U.S.C. § 1911 et seq.), title 25 U.S.C. section 1921 only permits state expansion of certain provisions of the ICWA, such as the *removal* and *placement* of Indian children;[32] and even then, places emphasis on the rights of "the *parent* or Indian *custodian* of an Indian child." (25 U.S.C. § 1921, italics added.) The provision does not address a *child's* right to tribal enrollment.

> In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard. (25 U.S.C. § 1921.)

31 Section 224, subdivision (d) provides:

> In any case in which this code or other applicable state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child, or the Indian child's tribe, than the rights provided under the Indian Child Welfare Act, the court shall apply the higher standard. (§ 224, subd. (d).)

32 See fn. 30, *ante*.

In other words, 25 U.S.C. section 1921 merely sanctions higher protections for a *specific* class of persons, *not* broader application of the protections to *more* people. (See *C.D.*, *supra*, 751 N.W.2d at p. 240 italics added ["ICWA's heightened standards for termination of parental rights apply only if an Indian child, *as defined in the Act*, is involved."]; *Santos Y.*, *supra*, 92 Cal.App.4th at p. 1300 [higher protections only apply when a child custody proceeding involves an *Indian child.*].) However, the federal law does not provide that the definition of "Indian child" itself may be expanded to protect a larger group of people. Moreover, any standard must be set by the Legislature not by a court rule, which is subordinate to a statute. (See *Court Reporters*, *supra*, 39 Cal.App.4th at p. 22.)

In any event, since the state Legislature has adopted a definition of an "Indian child" by incorporating the federal definition, rule 5.482(c) is not providing "a higher standard of protection to the rights of ... an Indian child." (25 U.S.C.A. § 1921.) Instead, the effect of the rule is to provide the same level of rights to a larger group of children.

In short, the higher standards of protection are not triggered *until and unless* a child meets the narrow, precise definition of an "Indian child" set forth in the federal ICWA, and incorporated into state law by the California Legislature. (§ 224.1, subdivision (a).)

Fifth, our view is not undercut by respondent's contention that the Legislative Counsel's summary of Senate Bill No. 678 (2005-2006 Reg. Session) (SB 678), and *In re Damian C.* (2009) 178 Cal.App.4th 192, 197 (*Damian C.*) together "show[] the Legislature's intent that 'certain children,' like those identified in rules 5.482(c) and 5.484(c)(2), could qualify for ICWA protections. (RB, pp. 27-28.)

Damian C. is not relevant because the court made no reference about broadening the ICWA's protections to children who do not come within the ICWA's protections. (*Damian C.*, *supra*, at p. 197 [court made reference to broader statutory interpretation in the context of ICWA's inquiry and noticing practice].) On the other hand, "reports of legislative committees and commissions are part of a statute's legislative history and may be considered *when the meaning of a statute is uncertain.*" (*Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 465, fn. 7, italics added.)

As we noted earlier, "[i]If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.' [Citation.] 'Where the statute is clear, courts will not "interpret away clear language in favor of an ambiguity that does not exist." [Citation.]'" (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268; see also *People v. Benson* (1998) 18 Cal.4th 24,

30.) "We consider extrinsic aids, such as legislative history, only if the statutory language is reasonably subject to multiple interpretations. [Citation.]" (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 888.)

For the sake of argument, however, we will consider respondent's claim with respect to the value of the Legislative Counsel's digest regarding SB 678. We begin by acknowledging that it is generally presumed that the Legislature acted in accord with the Legislative Counsel's summary (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1170); and that in interpreting statutes, the summary is generally entitled to "great weight." (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632.) Even so, as this Court has cautioned, "[u]nder fundamental principles of separation of powers, the legislative branch of government enacts laws.... But interpreting the law is a judicial function." (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 470; see also *Marbury v. Madison* (1803) 5 U.S. 137.)

With respect to the Legislative Counsel's broad pronouncements regarding SB 678, they do not prevail over the intent of section 224.1, subdivision (a), which incorporated the ICWA definition of "Indian child." (See *Rodriguez v. United States* (1987) 480 U.S. 522, 525–526.)

Accordingly, if "a Legislative Counsel's Digest conflicts with a statute, the digest must be disregarded." (*Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1339.)

While the Legislative Counsel's summary of SB 678 described the bill as an 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]" (Legis. Counsel's Dig., Sen. Bill No. 678, 6 Stats. 2006 (2005–2006 Reg. Sess.), Summary Dig., p. 465), the comment is not dispositive, and is at best, a general reference that is not strong evidence of legislative intent with respect to the intent behind section 224.1, subdivision (a) in particular. Nothing in the digest's language indicates any intent by the California Legislature to broaden the application of the ICWA to non-Indian children. Furthermore, "'legislative intent is not gleaned solely from the preamble of a statute; it is gleaned from the statute as a whole....' [Citation.]" (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118.)

In any event, given the specific and unambiguous statutory definition of an Indian child, it is not necessary to consider legislative history to ascertain the meaning of an "Indian child." That is the end of the inquiry. ("[T]hat is the end of the matter." (See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.* (1984) 467 U.S. 837, 842; see also *People*

v. Fuhrman (1997) 16 Cal.4th 930, 937.) But if this court were to refer to legislative history, as we noted earlier, the court should look to "[t]he legislative history of the ICWA [which] shows that Congress considered, but ultimately rejected, an expansive definition of 'Indian child....'" (*Nielson*, *supra*, 640 F.3d at p. 1124.)

Based on the foregoing, the definition of an Indian child cannot be broadened by the states, and most certainly, not by court rules. (See *Court Reporters*, *supra*, 39 Cal.App.4th at p. 22 [Judicial Council's rulemaking authority subordinate to Legislature]; accord, *In re Robin M.* (1978) 21 Cal.3d 337, 346 *(Robin M.)*; see also dicta in *Jose C.*, *supra*, 155 Cal.App.4th at p. 849 [court rule cannot authorize juvenile court to require a dependent minor—who is eligible for membership in a tribe—to be enrolled in a tribe].)

The court rules at issue go beyond the ICWA by including *potential* Indian children (who are simply *eligible* for membership) within its provisions pending the tribe's adjudication of the application for membership. Because the rules attempt to broaden the definition of an Indian child based simply on genetics—despite the child's lack of political or tribal affiliation—the rules place the ICWA at risk of constitutional infirmity.

In this regard, *Adoptive Couple*, *supra*, 133 S.Ct. 2552 is instructive. There, Justice Thomas, concurring, wrote in a separate opinion that by construing the ICWA narrowly, the court avoided constitutional problems. (*Id.* at p. 3565, concur. opn., Thomas, J.) The same equal protection concerns voiced by the majority in *Adoptive Couple*, *supra*, are at stake in this case.

Application of the ICWA based solely upon a child's genetic or racial connection to the tribe, raises the same constitutional issue the majority in *Adoptive Couple*, *supra*, 133 S.Ct. 2552 avoided by interpreting a definition term in the ICWA narrowly.[33] As applied here, unless a child is a member of an Indian tribe, a tribe's determination that a child is eligible for membership is insufficient to trigger the active effort requirements because the ICWA only regulates tribal Indians. This cannot be changed by rule 5.482(c) and 5.484(c)(2) because the California Judicial Authority exceeded its authority when it adopted those rules. (See, e.g.,

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[33] In *Adoptive Couple, supra*, 133 S. Ct. 2552, the United States Supreme Court held that the ICWA was not implicated where the biological father who claimed Indian ancestry never had either physical or legal custody of the child and abandoned the child before the birth. (*Id.* at pp. 2562-2563.) Delivering the opinion for the 5-4 majority, Justice Alito noted that although the Indian Child Welfare Act was enacted "to help preserve the cultural identity and heritage of Indian tribes," a broad reading of the title 25 U.S.C. sections 1912(d) and (f) "would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." (*Id* at. p. 2465 [construing "the plain text" of 25 U.S.C. §§ 1912(d) and (f) narrowing, thereby avoiding "an interpretation [that] would raise equal protection concerns"].)

W.B., *supra*, 55 Cal.4th at p. 58, fn. 17 [declaring former rule 5.480 "overbroad"]; and *Court Reporters*, *supra*, 39 Cal.App.4th at pp. 21-22.)

In short, the issue of the validity of rules 5.482(c) and 5.484(c)(2) can be resolved by examining the plain language of the statutory definition of an Indian child. (25 U.S.C. § 1903(4); § 224.1, subd. (a).) The ICWA established uniform federal standards; and Congress adopted a narrow definition of an "Indian child." Yet, rules 5.482(c) and 5.484(c)(2) require active efforts to secure tribal membership for a child if a child is *eligible* for membership. As such, the rules employ a more expansive application of the ICWA to minors who are not Indian children as defined by the ICWA. Because the court rules employ a definition of an Indian child that conflicts with the definition prescribed by federal law, the court rules are preempted by federal law. This is a matter of statutory construction.

By applying the rules of statutory construction to decide the outcome of this case, the court will avoid having to decide the remaining issues: (1) Does the doctrine of federal preemption preclude states from broadening the ICWA definition of an Indian child? (2) Does broadening the definition of an Indian child to create a new class of children eligible for ICWA

protections on the basis of Indian ancestry (race), subject the application of the ICWA to constitutional infirmity?[34]

I

STANDARD OF REVIEW

The interpretation of statutes and court rules entails a resolution of pure questions of law, which is subject to de novo review. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *Court Reporters*, *supra*, 39 Cal.App.4th at p. 22.) The question of whether assisting with tribal enrollment is encompassed within the "active efforts" requirement under section 361.7 is also a question of law that is examined de novo. (See *In re K.B.* (2009) 173 Cal.App.4th 1275, 1286.)

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[34] See *Lyng v. Northwest Indian Cemetery Protective Ass'n* (1988) 485 U.S. 439, 445 ["A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."]; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509 [This court generally construes laws in a manner that avoids doubts about their constitutionality.].)

II

THE DOCTRINE OF FEDERAL PREEMPTION RESTRICTS STATES FROM EXPANDING THE INDIAN CHILD WELFARE ACT'S (25 U.S.C. § 1901 ET SEQ.) ("ICWA") DEFINITION OF AN "INDIAN CHILD" SET FORTH IN 25 U.S.C. § 1903(4)—AND INCORPORATED INTO STATE LAW BY WELFARE AND INSTITUTIONS CODE SECTION 224.1, SUBDIVISION (A)—TO INCLUDE A NON-MEMBER CHILD WHO IS ELIGIBLE FOR TRIBAL MEMBERSHIP BUT WHOSE APPLICATION FOR MEMBERSHIP IS STILL PENDING.

Respondent acknowledges that "federal preemption may...lie in this case if rules 5.482(c) and 5.484(c)(2) 'conflict' with one or more provisions of the ICWA." (RB, pp. 47-48.) Respondent also does not dispute that "[a]s to who is an 'Indian child,' California law employs the ICWA definition. (§ 224.1, subd. (a).)" (RB, p. 19 [expressly noting that state law incorporates by reference the federal definition set forth in 25 U.S.C. § 1903].)

Respondent nevertheless contends that "[t]he federal preemption doctrine is inapplicable to California's Indian law and rules 5.482(c) and 5.484(c)(2)." (RB, pp. 46-47, citing *In re Brandon M.* (1997) 54 Cal.App.4th 1387, 1393; *In re Pedro N.* (1995) 35 Cal.App.4th 183, 190; and *Slone v. Inyo County Juvenile Court* (1991) 230 Cal.App.3d 263, 266-268.) However, none of the cases cited by respondent are helpful because they did not construe the validity of the court rules in question.

More specifically, respondent contends that "there is simply no

'major damage' done either ICWA or Indian tribal law, custom, status or rights from application of rules 5.482(c) and 5.484(c)(2)." (RB, p. 48, citing *Rose v. Rose* (1987) 481 U.S. 619, 625 [a case allowing attachment of veterans' benefits once in the hands of the veteran for the purpose of collecting child support].)

In support of his contention, respondent notes that "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[])"; and that "while states have no authority to regulate tribes, they may exercise control over Indian, or tribe-eligible children." (RB, p. 48, citing *Yakima*, *supra*, 439 U.S. at pp. 500-501.) These contentions are erroneous and irrelevant at best. Even so, state jurisdiction over family matters involving Indian children is subject to the ICWA.

Under the Commerce Clause, Congress has plenary power over Indian affairs. (See U.S. Const., art. I, § 8, cl. 3 [granting Congress power "To regulate commerce...with the Indian tribes"]; 25 U.S.C. § 1901 [statement of Congressional recognition of "the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people"].) Thus, Congress has broad authority to legislate on matters related to Indians. (See 25 U.S.C. §§ 1901(2) ["...Congress, through statutes, treaties, and the general course

of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources."].) States have no similar powers.

One of the areas in which Congress has exercised this power is in the context of adoption and custody proceedings involving Indian children. (See 25 U.S.C. §§ 1903(1), 1911.) Thus, while states may adopt higher protections to implement the ICWA, any attempt to broaden protections must be consistent with the requirements of the federal ICWA. As explained by the *Santos Y.* court:

> California has no independent constitutional authority with respect to Indian tribes. ...While jurisdiction over matters of family relations is traditionally reserved to the states, California has no independent state interest with respect to the family relations of members of federally recognized Indian tribes. It is Congress that has a constitutionally based and unique relationship with federally recognized Indian tribes (U.S. Const., art. I, § 8, cl. 3), not the states. (*Santos Y., supra*, 92 Cal.App.4th at p. 1317.)

California law is consistent with the decisions of sister state courts. For example, in In *In re A.W. and S.W.* (Iowa 2007) 741 N.W.2d 793, the Iowa Supreme Court acknowledged the limits on a state's derivative authority to "implement[]the federal trust authority articulated in the federal ICWA":

> ...[W]hen a state acts pursuant to delegated federal Indian trust authority, it may only legislate within the bounds of the Congressional trust power, and the state's interest is

necessarily defined by these federal boundaries." (*Id.* at p. 812.)

In respondent's view, the question of conflict is easily resolved. He contends that expansion of the federal definition of an "Indian child" by the rules is "in harmony with the declared intent and express language of both the ICWA and California law" (RB, p. 9, some capitalization and bolding omitted); and that the "California rules are grounded in, and even compelled by, two expressly articulated legislative goals: 1) to correct California court's 25-year ICWA compliance failure;[35] and, 2) to promote prompt resolution of custody proceedings." (RB, p. 29.) These arguments ignore the real issue: Whether the definition of an Indian child has been preempted by federal law; and if not, whether rules 5.482(c) and 5.484(c)(2) conflict with the definition?

Misconstruing the goal of the ICWA and mischaracterizing the purpose of SB 678, respondent reaches an astonishing and mistaken notion that rules 5.482(c) and 5.484(c)(2) "are intended to remedy the 'abusive child welfare practices' which gave rise to ICWA's enactment." (RB,

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[35] See also RB, p. 2 ["Rules 5.482(c) and 5.484(c)(2) do not conflict with statute because they do not redefine 'Indian child.' ...As such, the rules enable courts to accomplish the Legislature's goal of correcting California's 25-year history of ICWA compliance failures, while simultaneously promoting prompt resolution of child custody proceedings."].

p. 30.)[36] Nothing in the ICWA's background suggests that the purpose of the legislation was to enroll children in Indian tribes.

The legislative history of SB 678 does not support respondent's contention that the California Legislature's goal was to further the enrollment of Indian children. Instead, with the passage of SB 678, "the Legislature incorporated ICWA's requirements into California statutory law. (Stats.2006, ch. 838.)" (*W.B.*, *supra*, 55 Cal.4th at p. 52; *In re Autumn K.* (2013) 221 Cal.App.4th 674, 703–704.) This was done to achieve better implementation of the ICWA. (*In re A.B.* (2008) 164 Cal.App.4th 832, 838.) Thus, to understand the purpose behind SB 678, we begin by reviewing the history of the ICWA.

Background of ICWA

Briefly, the ICWA was passed by Congress to curb "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." (*Holyfield*, *supra*, 490 U.S. at

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[36] Respondent also incorrectly cites *Marilyn H.*, *supra*, 5 Cal.4th at pp. 306-307 for the proposition that "[r]ules 5.482(c) and 5.484(c)(2) are crafted to accomplish the Legislature's long-standing goal of promoting the prompt resolution of child custody proceedings." (RB, pp. 34-35.) Nothing in the pages referenced by respondent in *Marilyn H.*, *supra*, nor anywhere else in the cited case, supports respondent's view. In fact, the case had nothing to do with the validity of the rules in question or with the general application of the ICWA.

32.)[37] The statement of Congressional purpose set forth in 25 U.S.C. § 1901(4) indicates that passage of the ICWA resulted from Congress's intent to address the removal and placement of Indian children—not to enroll children who are merely eligible for membership. (§ 1901(4).)[38]

In other words, the ICWA protects children who are already Indian children. (*Holyfield, supra*, 490 U.S. at p. 33; *In re L.B.* (2003) 110 Cal.App.4th 1420, 1427 [The ICWA is intended to safeguard the interest of the tribe with respect "only to Indian children."].) As this court noted in *W.B., supra*, 55 Cal.4th 30 the policy underlying both the state and federal statutes regarding Indian children is "'"that, where possible, an Indian child should remain in the Indian community...."' [Citation.]." (*Id.* at p. 48, citing *Holyfield, supra*, 490 U.S. at p. 37; see also § 224, subd. (a)(2); and 25 U.S.C. § 1902.)

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[37] "[N]umerous state and federal cases already review the legislative history and purpose of the ICWA and California's statutory enactments pertaining to Indian child welfare law." (*In re Alexandria P.* (2014) 228 Cal.App.4th 1322, 1337-1338; see also cases cited therein.)

[38] "[T]he primary mischief the ICWA was designed to counteract was the unwarranted *removal* of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts." (Emphasis in original.) (*Adoptive Couple, supra,* 133 S.Ct. at p. 2556; see also p. 2557 ["Congress found that 'an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.' [Citation.] This 'wholesale removal of Indian children from their homes' prompted Congress to enact the ICWA...."].)

SB 678

"In 2006, with the passage of Senate Bill No. 678 (2005–2006 Reg. Sess.), the Legislature incorporated ICWA's requirements into California statutory law. (Stats. 2006, ch. 838.)" (*W.B., supra*, 55 Cal.4th at p. 52.)

The primary impetus for the enactment of SB 678, according to the sponsor of the bill, California Indian Legal Services, was to address ICWA *noticing* violations—not tribal enrollment. (See Senate Judiciary Committee's analysis of Sen. Bill No. 678 (2005-2006 Reg. Sess.) as amended, Aug. 22, 2005, p. 6 ["The sponsor points to the myriad of appellate court decisions involving ICWA...2000," and notes that "although ICWA was enacted more than 25 years ago, state courts and county agencies in California continue to violate...the...ICWA.... Of significant concern is...fail[ure by the tribes] to be properly notified of the proceedings."].)[39]

As is relevant here, the California Legislature imported the ICWA's definition of an Indian child by referencing and mirroring language from the federal definition. (§ 224.1, subd. (a).)

Another provision that was incorporated into state law by SB 678 is section 361.7, subdivision (a), which mirrors the active efforts requirement

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[39] <http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_0651-0700/sb_678_cfa_20050824_124654_sen_comm.html>, (last visited January 8, 2015.)

in title 25 U.S.C. section 1912(d). The requirement merely mandates the provision of "remedial services" and "rehabilitative programs"—preventive measures—that are "designed to prevent the breakup of the Indian family." (25 U.S.C. § 1912(d); § 361.7, subd. (a).) Tribal enrollment is not a "remedial service" or "rehabilitative program," and tribal enrollment does not "prevent the breakup of the Indian family."

As we noted earlier, respondent is in effect asking this court to decide a policy question. His request "is best directed to the Legislature...." (*Carrisals v. Department of Corrections* (1999) 21 Cal.4th 1132, 1140 [recognizing that this court's role "is to interpret the statute[s] [as they are written], not to establish policy;" and that "[t]he latter role is for the Legislature"]; see also *Blair, supra,* 5 Cal.3d at p. 282 [A "'court, cannot...in the exercise of its power to interpret, rewrite the statute.... That is a legislative and not a judicial function.'"].)[40] Thus, this court should decline respondent's invitation to rewrite section 224.1, subdivision (a), and to expand the definition of an "Indian child" to include "a very small group of children whose eventual tribal membership is nearly certain, but not yet

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[40] In *Catholic Social Services, Inc. v. C.A.A.* (Alaska 1989) 783 P.2d 1159, the Alaska Supreme Court cautioned against interpreting ICWA in ways that extend it beyond its intended scope. (*Id* at p. 1160, italics added ["[i]n enacting [ICWA], Congress has both *created and defined tribal rights in adoption and termination proceedings*].) It is the business of Congress, not the courts, to create, define, and also limit the scope of tribal rights with regard to ICWA. (See generally, *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 56, 98.)

perfected." (RB, p. 49 [asserting that this would not constitute "a conflict with statute"].)

By ignoring the definition of an Indian child, and without recognizing the constitutional and statutory limits on the power of the State Legislature to pass laws affecting Indian children, respondent reverses his burden of proving that the appellate court's ruling below was erroneous:

> The Third District opinion, finding the subject rules inimical, offers no explanation of how the procedural benefits of the rules prejudice the tribe, the subject children, or the integrity of child custody hearings in California. The decision of the Third District should be reversed. (RB, p. 49.)

This brings us to the real issue. The question presented by this case is *not* whether this court *should* interpret the definition of an "Indian child" broadly. The question is whether broadening the statutory definition is *legally permissible.* Although this issue can be easily resolved by applying the rules of statutory construction, appellant respectfully requests this court to decide the preemption issue. Otherwise, litigants will seek state legislative redress, which only will resurrect the issue—whether the ICWA definition of an Indian Child can be broadened by the states—again.

A. Principles of Federal Preemption

The preemption doctrine originates from the supremacy clause of the United States Constitution, which states that the "Laws of the United States...shall be the supreme Law of the Land; and the Judges in every

State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., art. VI, cl. 2; *Brandon M., supra*, 54 Cal.App.4th at p. 1393.)

There are three ways in which federal law can preempt state law: (1) through the use of an express preemption clause in the federal law; (2) by "implied preemption," or an "occupation of the field" by the federal government; or (3) by virtue of a conflict between the provisions of federal and state law. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 259; *Brandon M., supra*, 54 Cal.App.4th at p. 1393; *Smiley v. Citibank* (1995) 11 Cal.4th 138, 147 (*Smiley*).) The two latter ways apply here.

The United States Supreme Court has noted that the aforementioned three categories are not "rigidly distinct," and indeed, "field preemption may be understood as a species of conflict preemption." (*English v. General Electric Co.* (1990) 496 U.S. 92, 79-80, fn. 5 (*General Electric*); accord, *Gade v. National Solid Wastes Management Ass'n* (1992) 505 U.S. 88, 104 , fn. 2, *abrogated on other grounds by Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525; *Smiley, supra*, 11 Cal.4th at p. 148, fn. 3.)[41]

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[41] As the court in *American Meat Institute v. Leeman* (2009) 180 Cal.App.4th 728 explained:

> Implied preemption applies when Congress has not explicitly addressed the preemptive effect of a statute, and may arise in several different ways. [Citation.] First, implied preemption arises when state law 'regulates conduct in a field

"[C]onflict preemption applies in two situations: when it is impossible 'to comply with both the state and federal requirements,' or 'where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citations.]" (*Jevne v. Superior Court* (2005) 35 Cal. 4th 935, 956.) Here, both situations apply.

At the outset, we noted that several out-of-state courts have construed the *Holyfield* ruling to stand for the proposition that federal law preempts state law as to the definition of "domicile." (See, e.g., *State in Interest of D.A.C.* (Utah App. 1997) 933 P.2d 993, 999; *Rye v. Weasel* (Ky. 1996) 934 S.W.2d 257, 262.) Furthermore, most analysts of the ICWA agree with this view of *Holyfield*: "'If *Holyfield* stands for anything, it is that states cannot create their own definitions for the ICWA.'" (*Christine Metteer, Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act* (1998) 38 Santa Clara L. Rev. 419, 420.) This view supports our contention that federal law preempts state law as to the definition of Indian child.

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that Congress intended the Federal Government to occupy exclusively.' [Citation.] Second, even when Congress has not exclusively occupied the field covered by the state law, '"state law is still pre-empted to the extent it actually conflicts with federal law."' [Citation.] (*Id.* at p. 746.)

Conflict preemption

As this court explained in *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929 (*Viva!*) conflict preemption will be found when "simultaneous compliance with both state and federal directives is impossible." (*Id.* at p. 936.)

Obstacle preemption

With respect to conflict preemption under the second scenario, the United States Supreme Court has found pre-emption "where state law 'stands as an obstacle to the accomplishment and execution of the *full* purposes and objectives of Congress.'" (*General Electric Co., supra*, 496 U.S. at p. 79, fn. omitted; italics added; *Viva!, supra*, 41 Cal.4th at p. 936.)

The ICWA "does not attempt to preserve a child's right to its Indian heritage under all circumstances" nor "does the Act apply to a child of an Indian if the child is not a member of a tribe or not eligible for membership in a tribe." (*Matter of Appeal in Maricopa County Juvenile Action No. A-25525* (Ariz. 1983) 667 P.2d 228, 233, fn. 6.) Thus, when considering the "full purpose and objectives" of Congress, one must take into account Congress's goals: (1) to adopt uniform definition of the critical terms that trigger application of the ICWA,[42] and a narrow definition of an "Indian

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[42] As we noted earlier, in *Holyfield, supra,* the Supreme Court held that even though ICWA did *not* define "domicile," the term had to be given uniform meaning, reasoning that Congress did not intend to leave the

child";[43] and (2) to save ICWA from constitutional infirmity.[44] Because the rules at issue work at cross-purposes of these objectives by broadly interpreting the definition of an "Indian child," the rules at issue are preempted by obstacle preemption.

As applied here, rules 5.482(c) and 5.484 (c)(2) deviate from the federal and state ICWA by purporting to broaden the ICWA's definition of an Indian child to include non-tribal Indian children within the ICWA's protection, and thus, creates a conflict in that: (1) the rules cannot be reconciled with the ICWA's definition of an "Indian child," which was incorporated into state law pursuant to section 224.1, subdivision (a); (2) the rules override section 224, subdivision (c)—which conditions a tribe's membership determination upon "a significant political affiliation" to the tribe—by creating a race-based category of Indian child for purposes of the ICWA; and (3) the rules override section 224.3, subdivision (e)(1), which requires that a tribe's determination on membership is conclusive.

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definition of a "critical term" to state courts. (*Holyfield, supra*, 490 U.S. at pp. 43–44; see also pp. 44-45 [rejecting the use of state law to define "domicile" for the purpose of determining jurisdiction under the ICWA]; accord, *Adoptive Couple, supra,* 133 S.Ct. at p. 2557.)

[43] See introductory remarks under "Discussion," see also discussion under heading "III," *infra*, and "IV.B.," *infra*, incorporated herein by reference.

[44] (*Ibid.*)

Consequently, the rules are in conflict with state law, and thus, barred by conflict preemption. (See discussion under heading "III," *infra*.)

Jack C., *supra*, 192 Cal.App.4th 967, upon which respondent relies, does not alter our view that federal law preempts states from broadening the definition of an Indian child.

B. *In re Jack C.* is distinguishable; and in any event, the court's pronouncement regarding the validity of California Rules of Court, rule 5.482(c) is dicta.

Jack C., *supra*, 192 Cal.App.4th 967 involved a juvenile court's denial of a tribe's petition to transfer jurisdiction. (*Id.* at p. 974.) The parents appealed, arguing that the juvenile court erred when it found that the children were not Indian children, and when it declined to transfer the petition on the ground ICWA did not apply. (*Id.* at p. 976.) On appeal, the appellate court reversed, even though the children were not enrolled members, and notwithstanding father's lack of membership in the tribe. (*Id.* at pp. 979-980.) The court reasoned that "[t]he Band's actions...indicated it considered the children to be Indian children"; and that "[a] tribe's determination that a child is a member…is conclusive." (*Id.* at p. 980.)

In *Jack C.*, *supra*, the agency argued that "the definition of 'Indian child' under federal law is jurisdictional"; and that "California law cannot be interpreted to authorize broader or expanded protection for a child who

is not an Indian child under the plain terms of the federal statute. (25 U.S.C. § 1903(4).)" (*Jack C., supra*, 192 Cal.App.4th at p. 977.) Reasoning that the state's attempt to expand ICWA definition of "Indian child" was not preempted, the *Jack C.* court rejected the agency's arguments. (*Id.* at p. 981.) This ruling is dicta, as we stated earlier.

Since the tribe in *Jack C., supra*, determined that the children in that case were Indian children (*id.* at pp. 973, 979-780),[45] the appellate court "conclude[d] they were Indian children within the meaning of the federal and state definitions of 'Indian child'" (*id.* at p. 977). By the time the court addressed this issue, there was further evidence that the child and his sibling had become enrolled members of the tribe. (*Id.* at p. 975.)

In light of the foregoing, it was immaterial whether the children were eligible for enrollment. Thus, it was unnecessary for the court to

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[45] In *Jack C., supra*, 192 Cal.App.4th 967, in response to notice, the tribe stated that the minors were Indian children and notified the court of its intent to intervene in the dependency proceedings. (*Id.* at p. 973; see also p. 979 ["the record shows the Band considered the children to be Indian children within the meaning of ICWA"]; pp. 779-780, italics in original [..."[T]he Band's legal expert[] stated there was '*no doubt the children were Indian children* who would be enrolled in the Band' on the completion of 'bureaucratic' requirements."]; and p. 980 [there was evidence tribal court was able to take custody over children before they were enrolled].) The tribe formally intervened. (*Id.* at pp. 973-974.) The tribe's Indian Child Welfare Supervisor testified that "the tribal court was able to take custody over children before they were enrolled...and the Band could then complete the enrollment process." (*Id.* at p. 980; see also *id.* at p. 974.)

consider the parents' alternate argument—that "the court was required to proceed as if the children were Indian children under rule 5.482(c)." (*Jack C.*, *supra*, 192 Cal.App.4th at p. 976.) As such, the court's ruling on that issue was dicta.

Jack C., *supra*, is distinguishable.[46] That case, which involved a petition to transfer dependency jurisdiction to a tribe, did not consider the validity of rule 5.484(c)(2) at issue here. Nor did *Jack C.* consider what services are envisioned by the ICWA active efforts requirement. Furthermore, alluding to section 224.3, subdivision (e)(1), the *Jack C.* court noted that "the Band did not confirm in writing that enrollment was a prerequisite for membership under tribal law or custom." (*Jack C.*, *supra*, 192 Cal.App.4th at p. 981.)

The decision conflates the tribe's authority to determine eligibility and membership with the court's duty to determine whether a child is an Indian child, and whether the ICWA is applicable. (*Jack C.*, *supra*, at p. 981.) As noted earlier in this brief, the two functions are separate. Citing *Jack C.*, respondent makes this same error:

> ...ICWA provides national uniformity for its notice procedures, but not for how tribes determine *membership* or *eligibility*. ...Contrary to the assumption of the Third District, there is no uniformity of standard in the application

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[46] See fn. 21, *ante*.

> of tribal membership, and hence the term, 'Indian child,' actually has no clear uniform definition with which rules 5.482(c) and 5.484(c)(2) could conflict. (RB, p. 42, italics in original.)[47]

In any event, the reasoning of the *Jack C.* court was flawed.

First, like respondent in this case, *Jack C.*, *supra*, incorrectly relied on the "minimum federal standards" language in title 25 U.S.C. section 1902. (*Jack C.*, *supra*, 192 Cal.App.4th at p. 976.) As noted earlier in this brief, that language merely expresses Congress's declaration of policy, and makes no mention of any intent to allow states to expand the class of protected children to include ethnic Indian children (such as those in the present case) who are eligible for membership but are not tribal Indian children. (See *Mertens v. Hewitt Associates* (1998) 508 U.S. 248, 261 ["vague notion of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration"].)

Second, in reaching its conclusion, the *Jack C.* court erroneously concluded the ICWA did not preempt rule 5.482 because the rule "promotes the timely resolution of dependency matters by avoiding

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[47] Elsewhere in his brief, respondent again conflates a tribe's prerogative to determine membership decision with the court's function to make a legal finding. (RB, p. 41 ["...[B]ecause ICWA does not constrain how tribal 'membership' or 'eligibility' is to be defined, there is no national standard for establishing who is an 'Indian child.'"].)

protracted litigation concerning the applicability of ICWA." (*Jack C.*, *supra*, 192 Cal.App.4th at p. 981.) In *Klamath Tribe*, *supra*, 11 P.3d 701, the court rejected a similar argument by the tribe—that it is permissible to alter the class of children as long as the alteration does not reduce the ICWA's reach. (*Id.* at pp. 704-705.) In considering whether the definition of "Indian child" can be extended beyond the meaning of that term under the ICWA to include members not clearly covered by the Act, the Oregon court held: "For *purposes of ICWA*, only Congress can define who is an Indian child." (*Id.* at p. 707, original italics.) The court further noted that a court cannot alter the definition of an "Indian child" or the class of persons to whom the ICWA applies. (*Id.* at p. 705 ["[N]othing in ICWA suggests that the definition of 'Indian child' under 25 USC Section 1903(4) is a 'minimum federal standard.'"].)

Third, like respondent in this case, instead of focusing on the language in the definition of an Indian child, the *Jack C.* court incorrectly analyzed the preemption issue by focusing on the ICWA's broad statement regarding higher standards of protection. (25 U.S.C. § 1921; § 224, subd. (d); *Jack C.*, *supra*, 192 Cal.App.4th at pp. 977–979, 981.) As we also noted earlier, higher standards are only applicable to the rights of parents and Indian custodians, and have no bearing on the issue of *who* is

an Indian child and whether that definition can be broadened for purposes of the ICWA.[48]

Fourth, instead of focusing on the specific definition of an Indian child, the *Jack C.* court focused instead on the prefacing language in Title 25 United States Code section 1903 ("e*xcept as may be specifically provided otherwise*"), and in section 224.1, subdivision (a) ("*unless the context requires otherwise*"). (*Jack C.*, *supra*, 192 Cal.App.4th at pp. 977 -978, original italics.) The court misinterprets the meaning of this prefacing language; and respondent adopts this error. (See introductory remarks under "Discussion," *supra*, incorporated herein by reference.)

Fifth, and again, as respondent does, the *Jack C.* court conflated a tribe's determination of membership and the court's duty to decide whether a child is an Indian child for purposes of the ICWA. (*Jack C.*, *supra*, 192 Cal.App.4th at pp. 978–979, 981.)

Last, although the *Jack C.* court mentioned section 224, subdivision (c), the court ignored the qualifying language therein, which

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[48] 25 U.S.C. section 1921 states that higher state standards may apply to rights "provided under *this* subchapter"—referring to subchapter I of chapter 21 (25 U.S.C. section 1911, et seq.). (25 U.S.C. § 1921, itals. added.) State law similarly provides that a higher standard of protection is applicable. (§ 224, subd. (d).) Thus, 25 U.S.C. section 1921 does not apply to the definitions in section 1903 (including the definition of an "Indian child"), which are found in a different part of the ICWA that which precedes subchapter 1.

restricts a tribe's determination by incorporating the ICWA definition of an Indian child. (*Jack C., supra*, 192 Cal.App.4th at p. 980.)

Jack C., supra, 192 Cal.App.4th is not controlling, and its reasoning is flawed.

In sum, viewed either as a question of federal preemption or as a matter of conflict with state law, rules 5.482(c) and 5.484(c)(2) are invalid, as we will explain more fully in the next discussion.

III

RULES 5.482(c) AND 5.484(c)(2) OF THE CALIFORNIA RULES OF COURT CONFLICT WITH WELFARE AND INSTITUTIONS CODE SECTION 224.1, SUBDIVISION (a), SECTION 224, SUBDIVISION (c), AND SECTION 224.3, SUBDIVISION (e)(1) BY REQUIRING THE JUVENILE COURT TO APPLY THE PROVISIONS OF THE ICWA TO A NON-MEMBER CHILD WHO IS ELIGIBLE FOR TRIBAL MEMBERSHIP BUT WHOSE APPLICATION FOR MEMBERSHIP IS STILL PENDING.

The parties agree that the definition of an Indian child is set forth in the ICWA, and incorporated into state law. Respondent also acknowledges that "[a] statute to which a rule is linked must be given it's [*sic*] a [*sic*] plain and commonsense meaning. [Citation.]" (RB, p. 24.)

The parties also agree that this court "should attempt to harmonize, not presume conflicts" between the ICWA and state child custody laws. Even so, "[t]here are limits, ...to the ability of a court to save a statute through judicial construction." (*Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, 187.)

This brings us to the real issue: Are the court rules consistent with the rule-making authority of the California Judicial Council; or do they conflict with federal and state law?

To decide the issue of the validity of the rules in question, it is necessary to consider whether state law broadened the definition of "Indian child" set forth in the ICWA. We begin by applying the rules of statutory construction and examining the plain words in the definition of an "Indian child" found in section 224.1, subdivision (a), which incorporates the definition of an Indian child from 25 U.S.C. § 1903(4), the definition adopted by Congress.

Respondent contends that no conflict with statutory law is created by court rules that expand the definition of an Indian child:

> Marrying rules 5.482(c) and 5.484(c)(2) to section 224.1, subdivision (a) and the ICWA 'Indian child' definition, means, and means only, that the scope of the persons covered by the ICWA in California child custody proceedings is expanded to a very small group of children whose eventual tribal membership is nearly certain, but not yet perfected. That is not a conflict with statute. (RB, p. 49.)

In respondent's view, the "[r]ule 5.484(c)(2) remedies [the] problem [associated with a parent's inability to pursue enrollment] by providing that the social services agency, which stands in the shoes of the parent in custody proceedings, [is mandated to] accomplish tribal enrollment for a child in its care." (RB, p. 32.) Such a construction of the ICWA and

California law would be directly contrary to the policy and text of ICWA. (See *Holyfield*, *supra*, 490 U.S. at p. 43 [explaining that, unless Congress clearly has expressed its intent that an ICWA term be given content by the application of state law, the Court will presume that Congress did not so intend]; see also *Adoptive Couple*, *supra*, 133 S.Ct. 2552 at p. 2574 ["These arguments, ... are inconsistent with our recognition in *Holyfield* that Congress intended the critical terms of the statute to have uniform federal definitions."].)

Appellant contends that, together, rules 5.482(c) and 5.484(c)(2) created a new class of children covered by the ICWA: non-member children who are eligible for membership but who are not the biological child of a tribal Indian parent. As such, the rules are inconsistent with section 224.1, subdivision (a), section 224, subdivision (c), and section 224.3, subdivision (e)(1).

The rules at issue are overbroad because they require application of the ICWA to children who do not come within the precise definition of an "Indian child" adopted by Congress. No matter how altruistic its motives, the Judicial Council cannot adopt rules that are inconsistent with the governing statutes. (*In re Richard S.* (1991) 54 Cal.3d 857, 863

(*Richard S.*) [Judicial Council rules have the force of statutes so long as they are not inconsistent with legislative enactments or constitutional provisions].)

In considering the validity of administrative regulations, this court acknowledged that its "function is to inquire into the legality of the regulations, not their wisdom." (*Morris v. Williams* (1967) 67 Cal.2d 733, 737.) The same principle should apply to this court's consideration of the validity of the court rules at issue in the pending matter.

Instead of focusing on the plain language of the statutory definition of an Indian child, respondent reverses his burden on review by asserting that "the authority relied upon by the Third District fails to show how rules 5.482(c) and 5.484(c)(2) conflict with the intent of Congress or the Legislature." (RB, p. 43, some capitalization omitted.)

The definition of an Indian child in California law is modeled on the federal Act's definition. "Where, as here, California law is modeled on federal laws, federal decisions interpreting substantially identical statutes are unusually strong persuasive precedent on construction of our own laws. [Citations.]" (See *Kamen v. Lindly* (2001) 94 Cal.App.4th 197, 203; accord, *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 1308.)

A. Interpreting state law as authority to broaden the definition of an "Indian child" to include eligible children of nonmembers violates the rules of statutory construction, and creates a conflict with Welfare and Institutions Code section 224.1, subdivision (a).

The long-standing starting point for interpretation of a statute is the language of the statute itself, and its statutory context. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1216 [when interpreting a statute, courts "begin with the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context."].) In interpreting a statute, the court's "fundamental task...is to determine the Legislature's intent so as to effectuate the law's purpose." (*People v. Murphy* (2001) 25 Cal.4th 136, 142.)

Thus, to ascertain Congress's intent to narrowly define "Indian child," this court need only look to the language of the statute itself. As our high court has instructed, in the interpretation of a statute where the language is clear, its plain meaning should be followed. (*Great Lakes Properties Inc. v. City of El Segundo* (1977) 19 Cal.3d 152, 155.)

More recently, in *W.B.*, *supra*, 55 Cal.4th 30, while construing a provision of the California Rules of Court pertaining to the ICWA, the California Supreme Court ascertained the Legislature's intent, beginning its inquiry with an examination of the statutory language "because it generally provides the most reliable indication of legislative intent. [Citations.]."

(*Id.* at p. 52.) The court acknowledged: "'"If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls. [Citation.]" [Citation.] We consider extrinsic aids, such as legislative history, only if the statutory language is reasonably subject to multiple interpretations.' [Citation.]" (*Id.* at p. 52.)

Furthermore, "[c]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage. [Citation.]" (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.) Courts should also "strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous." (*Klein v. United States of America* (2010) 50 Cal.4th 68, 80; accord, *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.)

We now apply these principles to examining the definition of an "Indian child." (25 U.S.C.A § 1903(4).) The definition of an Indian child is clear, and there is no need for statutory interpretation: Construing the word "and" in 25 U.S.C. section 1904(3) as "or" would render a portion of the provision following the word "and" surplusage, or superfluous.

Respondent's narrow interpretation of the definition of "Indian child" is consistent with Congress's intent to establish a uniform definition of the terms triggering application of the ICWA. (See *Holyfield, supra*, 490 U.S. at p. 51.)

The ICWA does not extend "Indian child" status to eligible children of *nonmembers*. Instead, the ICWA prescribes two alternate routes by which a child can meet the definition of an "Indian child," that is, the child must either be a member of a federally recognized tribe; or if a child is not a member, the ICWA allows a child who is *eligible* for membership to be designated "Indian child" only if the child's biological parent is a *member* of a tribe. (25 U.S.C. § 1903(4), italics added; *Adoptive Couple*, *supra*, 133 S.Ct. at pp. 2565-2566 (J. Thomas, concurring); *Holyfield*, *supra*, 490 U.S. at p. 42.)

Put simply, an "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. (25 U.S.C.A § 1903(4); § 224.1, subd. (a), italics added.)

In regard to route "(a)," the first option—being a member—"membership criteria are the tribe's prerogative"; and a tribe's membership decision is conclusive for purposes of ICWA. (§ 224.3, subd. (e)(1);[49] *In re D.N.* (2013) 218 Cal.App.4th 1246, 1253.)

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[49] See fn. 58, *post.*

The alternative route "(b)" includes two separate requirements: (1) being eligible for membership; *and* (2) being the biological child of a tribal member. (25 U.S.C.A § 1903(4); § 224.1, subd. (a).) Thus, under the alternate route, current eligibility is required; and even so, current eligibility alone is insufficient because this option has dual components.

Ordinary meaning of "is"

Under section 224.1, subdivision (a), proof of a child's Indian status requires more than evidence that a child is ethnically Indian, that is, has Indian heritage or ancestry (race). (*C.D., supra,* 751 N.W.2d at p. 243 ["The definition of 'Indian child' in 25 U.S.C. § 1903(4) requires more than a showing that the child and parent have an Indian heritage."]; see also *R.M.W., supra,* 188 S.W.3d at p. 833 [assertion that a child or parent is of Indian 'heritage' or 'blood' provides no evidence that any of the children are Indian children under the ICWA."].)

The clear meaning of "is eligible," as used in the ICWA's definition of an "Indian child" means *presently* eligible and does not include being eligible at some time in the future, contingent on the happening of another event such as the enrollment of a biological parent. (See *Nielson, supra,* 640 F.3d at pp. 1123-1124 [adopted child was not a "member of an Indian tribe" at time of adoption and thus was not an "Indian child" under ICWA, and termination of parental rights was therefore valid].)

Similarly, evidence that the parent "has applied for enrollment with the tribe is irrelevant to the determination of Indian child status," in light of subsection (b) of 25 U.S.C. § 1903(4), which "clearly requires proof that a biological parent is *currently* a member of the tribe, not that she is *eligible* for membership or has applied for membership." (*C.D.*, *supra*, 751 N.W.2d at p. 244, italics added [noting that "ICWA's requirement of current tribal membership of at least one party to the proceedings is an outgrowth of the limits on Congressional authority in Indian legislation. Congressional authority to legislate extends only to tribal Indians, and creates a political, rather than a racial, preference."].)

Ordinary meaning of "and"

The ICWA does not apply to a child who is eligible for membership but whose parent is not a member of a federally recognized tribe. (*C.D.*, *supra*, 751 N.W.2d at p. 243 ["The definition of "Indian child" in 25 U.S.C. § 1903(4)...expressly requires either that the child be a member of a federally recognized tribe, or that the child be eligible for membership and the parent be a member of such a tribe."].) As the *Jose C.* court explained, section 224, subdivision (c) mandates that the tribe must determine that the minor is eligible for membership *and* is the biological child of a member for ICWA to apply:

> ...While the minors here were eligible, they were not members and they were not the biological children of a

> member. Their membership or the membership of one of their biological parents is a requirement to be found to be an Indian child. (*Jose C.*, *supra*, 155 Cal.App.4th at p. 849.)

Because Congress used the word "and" to connect two components under the second option, the dual requirements for being an Indian child under this scenario must be construed in the conjunctive. (See, e.g., *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861; *Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, 189 [ordinarily, the word "and" connotes a conjunctive meaning].) A contrary reading would require "one…to interpret 'and' as 'or.'" (*In re C.H.* (2011) 53 Cal.4th 94, 102.) A contrary reading would also present constitutional problems.[50]

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[50] The dual components included in the alternate route for achieving Indian child status are required to save the ICWA from constitutional infirmity. This view finds support from cases involving crimes committed by or against Indians. For example, even though "Indian" is not defined for purpose of criminal jurisdiction under the Federal Enclave Act, the United States Supreme Court in *United States v. Rogers* (1845) 45 U.S. 567 suggested a test, generally followed by the courts, which considers "(1) the degree of Indian blood; and (2) tribal or government recognition as an Indian." (*United States v. Keys* (9th Cir. 1996) 103 F.3d 758, 761; see also *U. S. v. Antelope* (1977) 430 U.S. 641, 646 [federal criminal prosecution of Indians upheld on equal protection grounds because "the term 'Indian' describes a political group or membership, not a racial group]; see also p. 647, fn. 7 ["[M]embers of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act. [Citation.]"]; and *Means v. Navajo Nation* (9th Cir. 2005) 432 F.3d 924, 929 [Under the Indian Civil Rights Act, "criminal jurisdiction of tribes over 'all Indians' recognized by the 1990 Amendments means all of Indian

In short, by the plain language of the statute, there are two alternate routes by which a child can meet the definition of an "Indian child." (25 U.S.C. § 1903(4); § 224.1, subd. (a).) If a child is not a member, the ICWA allows a child who is eligible for membership to be designated "Indian child" only if the child meets the "and" component of the statutory definition—that is, the child must *also* have a biological parent who is a member of a tribe. (*Ibid.*) As applied to children such as the minors in this case, it is insufficient for the children to simply *have* Indian ancestry—or to be "eligible for enrollment." This view is consistent with case law.

For example, in *W.B.*, *supra*, 55 Cal.4th 30, while construing the term "Indian child custody proceeding" found in section 224.1, subdivision (d), this court noted that "California's definition...thus incorporates, and is coextensive with, the definition in the federal Act." (*Id.* at p. 54.) The court also noted that "if the Legislature had wanted to make ICWA applicable to a whole new category of cases, it would have made little sense for it to incorporate a federal definition directly contradicting such an extension." (*Id.* at p. 57; see also *R.M.W., supra,* 188 S.W.3d at p. 833, italics added for emphasis [finding that child in that case was not an "Indian child" as "*narrowly* defined by the ICWA."].)

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ancestry who are also Indians by political affiliation, not all who are racially Indians."].)

Although the pending case involves the definition of a different term considered in *W.B.*, *supra*, 55 Cal.4th 30, the court's reasoning in that case is equally applicable in the pending matter. It makes as "little sense" here as it did in *W.B.* to interpret the California Legislature's *express incorporation* of the ICWA definition of an Indian child (§ 224.1, subd. (a)) as expanding the definition to include a third category of children who do not fit within the two alternative ways of achieving Indian child status under the Act. (25 U.S.C. § 1903(4).)

Our interpretation is also consistent with decisions by sister state courts.[51] For example, the South Dakota Supreme Court held that the "term 'Indian child' as defined by the ICWA means 'something more specific than merely having Native American ancestors.'" (*In re L.S.* (S.D. 2012) 812 N.W.2d 505, 508, quoting *In re Arianna R.G.* (Wis. 2003) 657 N.W.2d 363, 368.)

Similarly, in *A.W.*, *supra*, 741 N.W.2d 793, Iowa Supreme Court held that expanding the ICWA to include *ethnic* Indians ineligible for tribal membership constitutes an improper racial classification that does not

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[51] Although this court is not bound by the decision of a sister state, that decision may be helpful in reaching its own decision, especially since the sister-state decision deals with the construction of the ICWA. (See, e.g., *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 359 [wherein this court observed that "decisions of our sister states provide helpful guidance"].)

survive a strict scrutiny equal protection analysis. (*Id.* at p. 810;[52] see also, e.g., *C.D.*, *supra*, 751 N.W.2d at p. 244 [ICWA definition reflects limitation on congressional authority to tribal Indians]; and *In re A.B.* (N.D. 2003) 663 N.W.2d 625, 636 [The North Dakota Supreme Court recognized that ICWA is not premised upon racial classifications, concluding that "[t]he different treatment of Indians and non-Indians under ICWA is based on the political status of the parents and children and the quasi-sovereign nature of the tribe."].)

Respondent concedes that Congress abandoned an earlier draft of the ICWA that did not include the current definition of an "Indian child" found in 25 U.S.C. § 1903(4). (RB, p. 14, citing *Nielson*, *supra*, 640 F.3d at p. 1123.) Thus, he implicitly acknowledges that Congress "ultimately rejected" "an expansive definition of an 'Indian child.'" (*Id.* at p. 1124.)

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[52] After noting that the ICWA's focus is necessarily limited to tribal membership—and that the boundary of congressional authority over Indian affairs extends only to tribal Indians—the Iowa Supreme Court struck down the state's racial definition of Indian child on equal protection grounds. (*A.W.*, *supra*, 741 N.W.2d at pp. 810-813.) The court reasoned that the racial definition "expanded the definition 'Indian child' far beyond its federal ICWA counterpart" by including "ethnic Indian children with tribal Indian children" in its classification, which "clearly exceeds the limits of federal power over Indian affairs upon which the federal ICWA is based and from which the Iowa ICWA is derived." (*Id.* at pp. 811-812.) Further reasoning that the over-inclusive racial classification was "'hardly more than a pretense that this classification is political rather than racial,'" the court held that the statute violated both the Equal Protection Clause of the United States Constitution and the equality provision of the Iowa Constitution. (*Id.* at pp. 812-813.)

Section 224.1, subdivision (a) is clear. The term "Indian children" is limited to children who are tribal members, or alternatively, to eligible children of tribal members. Notwithstanding this lack of ambiguity, respondent contends that section 224, subdivisions (a) and (d) together evinces the Legislature's intent to broaden the scope of ICWA's application to a third category of "eligible" Indian children—those who are not biological children of a parent who is a member:

> ...[S]ection 224, subdivision (d) and the rules interpreting it ...constitute an express statement by the Legislature that California law is designed to protect children who are eligible for tribal membership *because of a sufficient blood quantum of Indian descent.* Notwithstanding the 'Indian child' defining language of section 224.1, subdivision (a), the Legislature would not have included in section 224, subdivision (a), that eligible children were also protected, if it did not mean it. (RB, pp. 28-29, citing *Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market* (2011) 52 Cal.4th 1100, 1106-1107 (*Alameda Produce Market*).)[53]

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[53] Elsewhere in his brief, appellant again bypasses the definition of an Indian child in section 224.1, subdivision (a), and diverts the reader's attention to section 224, subdivision (a) instead:

> That section specifically provides that California's version of Indian child law protect both Indian children, and children 'eligible for membership in an Indian tribe.' (§ 224, subd. (a).) It further provides that in child custody proceedings, 'other applicable law' could inform the protections designed to prevent an Indian child's involuntary out of home placement. (*Ibid.* [emphasis added].)[53] This 'other applicable law' presumably would include the California Rules of Court and the BIA Guidelines. [Citation]. (RB, p. 26.)

Respondent's reliance on *Alameda Produce Market, supra*, 52 Cal.4th 1100 is misplaced. The case did not analyze the interplay between section 224, subdivision (a) and section 224.1, subdivision (a). Nor did the case examine the validity of the court rules in question. In fact, the case had nothing to do with the ICWA.

Assuming ambiguity exists, for the sake of argument, we will examine the language in section 224, subdivisions (a) and (d).

Section 224, subdivision (a)

Section 224, subdivision (a), a general statement statute, does not define an "Indian child," which is defined in section 224.1, subdivision (a). Ignoring the clear definition of an Indian child prescribed by section 224.1, subdivision (a), respondent invites this court to engage in statutory construction, and to resolve the non-existent ambiguity in section 224, subdivision (a) by bearing in mind the BIA Guideline's recommendation for "liberal construction," and by referring to rules 5.482(c) and 5.484(c)(2) to resolve the ambiguity he attempts to create. (RB, pp. 27-28.)

Because "statutory language must...be construed in the context of the statute as a whole and the overall statutory scheme" (*People v. Rizo* (2000) 22 Cal.4th 681, 685),[54] in construing section 224, subdivision (a),

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[54] See also *Sierra Club, supra,* 57 Cal.4th 157, 165; *Marilyn H., supra,* 5 Cal.4th at p. 307 ["One section of the dependency law may not be considered in a vacuum"]; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th

one must refer to section 224.1, subdivision (a), which provides a clear definition of an "Indian child"—by incorporating the ICWA's definition. (§ 224.1, subd. (a).) Thus, the meaning of "eligible" in the former provision must be considered in the context the latter. (See *Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 844 ["In determining whether this language has a clear meaning or is susceptible of multiple interpretations, we are mindful that '"the meaning of the enactment may not be determined from a single word or sentence; the words must be construed in context...."' [Citations.]"].) This interpretation is reasonable because it "consider[s] the operation of the statute as a whole." (*Adoptive Couple*, *supra*, 133 S.Ct. at p. 2573; *W.B.*, *supra*, 55 Cal.4th pp. 53-54 [statutory provisions relating to the same subject should be harmonized].)

Respondent is attempting to manufacture ambiguity in the definition of an "Indian child" where none exists. In support of his contention that the rules at issue do not conflict with the term "Indian child" as defined in section 224.1, subdivision (a), respondent isolates the phrase "eligible for membership in an Indian tribe" from another provision, section 224,

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242, 253 [individual dependency statute "cannot properly be understood except in the context of the entire dependency process of which it is part"].

subdivision (a).[55] He then sets up a sham consistency between the rules and this latter provision with a circular argument, contending that reference to rules 5.482(c) and 5.484(c)(2) could help "inform" the reader as to the type of protections the ICWA was designed to extend to both Indian children and "children 'eligible for members in an Indian tribe.' [Citation.]" (RB, p. 52.)

Section 224, subdivision (a) might bear the construction given it by respondent if considered in isolation, but the provision cannot be divorced from the statutes it is designed to effectuate. (See *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 800.) Moreover, when a statute is capable of more than one construction, courts must attempt to harmonize and reconcile it in a manner which carries out the Legislature's intent. (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788.)

Furthermore, the doctrine of *noscitur a sociis* "declares that the meaning of a word may be ascertained by reference to the meaning of other

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[55] Respondent isolates a phrase from section 224, subdivision (a)(1), italicizes the language, and reads it in isolation to support his view:

> Among many other provisions, SB 678 added section 224 to the Welfare and Institutions Code, setting forth the following Legislative findings and declarations which mirrored ICWA: '(a)(1) There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and the State of California has an interest in protecting Indian children who are members of, *or are eligible for membership in, an Indian tribe.*' (RB, pp. 16-17, italics added by respondent.)

terms which the Legislature has associated with it in the statute, and that its scope may be enlarged or restricted to accord with those terms. [Citations.]" (*People v. Rogers* (1971) 5 Cal.3d 129, 142, conc. and dis. opn. of Mosk, J.; see also *Gifford v. J & A Holdings* (1997) 54 Cal.App.4th 996, 1004 [The doctrine of *noscitur a sociis* (the meaning is derived from context) allows courts to find the meaning of a disputed phrase by reference to the entire enactment of which the phrase is a part.].)

In short, "'[l]iteral construction should not prevail if it is contrary to the legislative intent apparent in the statute.... An interpretation that renders related provisions nugatory must be avoided [citation]....'" (*People v. Shabazz* (2006) 38 Cal.4th 55, 67–68 (*Shabazz*).) Accordingly, words or phrases common to two statutes dealing with the same subject matter must be construed "in pari material" to have the same meaning. (*Isobe v. Unemployment Ins. Appeals Bd.* (1974) 12 Cal.3d 584, 590-591; *Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 50 ["statutes relating to the same subject matter—should be construed together"].)

As applied here, the court's role is to harmonize the section 224, subdivision (a) with section 224.1, subdivision (a). (See *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 593 [when two statutes regarding the same subject matter appear in conflict, the court's task is to harmonize the statutes].) Accordingly, the phrase "eligible," as it appears in section

224, subdivision (a), must be considered in the context of the definition of an "Indian child," which is set forth in section 224.1, subdivision (a).

One last, but most important, consideration—this court's admonition in *Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379: "Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.] Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." (*Id.* at p. 1387; *People v. Jefferson* (1999) 21 Cal.4th 86, 94.) As applied here, adopting respondent's interpretation of the phrase "eligible for membership in an Indian tribe" would be tantamount to broadening the ICWA's reach to children outside the prescribed statutory definition of an Indian child, thereby creating an unconstitutional application of the ICWA, which Congress sought to avoid by rejecting a broader definition.[56]

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[56] In *Nielson, supra*, 640 F.3d 1117 the held that a child did not fit the definition of Indian child because neither the child nor the mother was enrolled in the Indian tribe. (*Id.* at p. 1124.) In reaching that conclusion, the court looked at the legislative history, and noted that a contrary finding would have violated Congress' intent. (*Ibid.*) Specifically, the court commented that "[t]he legislative history of the ICWA shows that Congress considered, but ultimately rejected, an expansive definition of 'Indian child':

> ...[A]n earlier draft of the ICWA did not define 'Indian child,' but rather defined 'Indian' as 'any person who is a

In short, the disputed language in section 224, subdivision (a) — "eligible for membership in an Indian tribe"—*in context* is clear.

Section 224, subdivision (d)

Respondent's claim that section 224, subdivision (d) expanded the definition is also without merit. That provision cannot expand the definition of an "Indian child" for purposes of applying the ICWA because states have no independent constitutional authority with respect to Indian tribes, as Indian relations are the exclusive province of federal law. (See *Santos Y.*, *supra*, 92 Cal.App.4th at p. 1317.)

Adopting respondent's expansive interpretation of the phrase "eligible for membership" in section 224, subdivision (a) would "render[]...nugatory" the definition of an Indian child found in section 224.1, subdivision (a) and incorporated into section 224, subdivision (c), as we will explain in the discussion below. (See *Shabazz*, *supra*, 38 Cal.4th at p. 68.)

> member of or *who is eligible for membership in a federally recognized Indian tribe*.' [Citation omitted, emphasis added by court].) Under this rejected definition, [the child] would have been an Indian child...because he was eligible for membership in a federally recognized tribe. But the final draft of the statute limited membership for those children who were eligible for membership because they had a parent who is a member. (*Id.* at p. 1124.)

B. Extending "Indian child" status to eligible children of nonmembers creates a conflict with Welfare and Institutions Code section 224, subdivision (c), which restricts a tribe's membership determination by requiring it to be based on "a significant political affiliation with the tribe" and the ICWA's definition of an "Indian child."

The Legislature's intent to narrowly define an Indian child for purposes of the ICWA is also gleaned from reference to section 224, subdivision (c).[57] (§ 224, subd. (c).) This provision declares that an Indian tribe's determination of a child's membership constitutes "a significant *political* affiliation with the tribe," triggering application of the ICWA; but such a determination is limited to children who are under 18 and who are members or biological children of members—i.e., the ICWA definition of Indian child. (*Ibid.*) Thus, section 224, subdivision (c) incorporates the statutory definition of an Indian child. (*Jose C.*, *supra*, 155 Cal.App.4th at p. 849 [The court explained that § 224., subd. (c) mandates that the tribe must determine that the minor is eligible for membership *and* is the biological child of a member for the ICWA to apply; and that "Eligibility is only *one* criterion necessary to be found to be an Indian child."].)

If the Legislature had intended to allow the definition of an Indian child to be broadened, it would make no sense to add this qualification. The addition further evidences the Legislature's recognition that ICWA is an appropriate regulation of solely *tribal* Indian children.

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[57] See fn. 16, *ante*.

Minors such as those in this case are "eligible" but they are not members or the biological children of a member. Thus, their membership or a biological parent's membership is an additional requirement to be found to be an Indian child under the alternative route for nonmembers prescribed by section 224.1, subdivision (a). (§ 224.1, subd. (a).) Because the rules at issue in this case eviscerate the additional requirement (membership by the child or the child's biological parent), with respect to children who are only eligible for membership, the rules purport to override section 224, subdivision (c).

C. Extending "Indian child" status to eligible children of nonmembers creates a conflict with Welfare and Institutions Code section 224.3, subdivision (e)(1), which mandates that a tribal membership determination is the sole province of the tribe, and the tribe's determination should be conclusive as to whether a child is a member of a tribe, or is eligible for membership *and* the biological child of a member.

Section 224.3, subdivision (e)(1)[58] "was enacted as a part of a comprehensive reorganization of statutes relating to application of the ICWA in California. (Stats. 2006, ch. 838, § 32.)" (*In re William K.* (2008) 161 Cal.App.4th 1, 11.)

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[58] Section 224.3, subdivision (e)(1) provides in relevant part as follows:

> A determination by an Indian tribe that a child is or is not a member of or eligible for membership in that tribe, or testimony attesting to that status by a person authorized by the tribe to provide that determination, shall be conclusive.... (§ 224.3, subd. (e)(1).)

Furthermore, state law provides that a tribe's determination of an Indian child's status is conclusive. (§ 224.3, subd. (e)(1) ["A determination by an Indian tribe that a child is or is not a member of or eligible for membership in that tribe...shall be conclusive."].) Thus, rules 5.482(c) and 5.484(c)(2) are inconsistent with state law for the additional reason that they conflict with section 224.3, subdivision (e) (1) by requiring the juvenile court to proceed as though a non-Indian child is an Indian child under the ICWA—contrary to the conclusive nature of a tribe's determination.

D. Until a child is found to be an Indian child for purposes of the ICWA, the juvenile court does not even reach the question of active efforts; and in any event, the ICWA and state law do not require active efforts by the department to enroll children in the tribes—only active efforts to provide remedial services and rehabilitative programs to prevent the break-up of the Indian family.

Appellant contends that the ICWA does not require the Department to assist the family in the tribal enrollment process, nor does the ICWA require the juvenile court to proceed as if a child is an Indian child when he is not because the ICWA only requires the provision of "remedial services" and "rehabilitative programs"—preventive measures—that are "designed to prevent the breakup of the Indian family." (25 U.S.C. § 1912(d).)[59]

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[59] See fn. 8, *ante.*

In California, the ICWA's "active efforts" requirement is implemented by section 361.7, which similarly requires "active efforts...to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family...." (§ 361.7, subd. (a);[60] see also § 366.26, subd. (c)(2)(B)(i) ["The court shall not terminate parental rights" "[i]n the case of an Indian child" if "[a]t the hearing terminating parental rights, the court has found that active efforts were not made as required in Section 361.7."].)

Appellant contends that because the minors in this case are not Indian children as defined by the ICWA, the active efforts requirement does not apply to them. (25 U.S.C. § 1912(d); § 361.7, subd. (a); see also *Holyfield*, *supra*, 490 U.S. at pp. 32-34 [holding that the statute as a whole is triggered when an Indian child is the subject of a child custody proceeding]; and *Adoptive Couple*, *supra*, 133 S.Ct. at p. 2563 [giving narrow interpretation to 25 U.S.C. §§ 1912(d) and (f)].)

As the United States Supreme Court noted in *Adoptive Couple*, *supra*, implementation of ICWA has limits. Even though the biological father in that case was Indian—and the court assumed he was a parent for purposes of the ICWA—he was found not to be entitled to any protections under

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60 See fn. 9, *ante*.

25 U.S.C. section 1912(d). (*Adoptive Couple*, *supra*, 133 S.Ct. at p. 2563.) The Court further stated that "the BIA's Guidelines confirm that remedial services under section 1912(d) are intended 'to alleviate the need to *remove* the Indian child from his or her parents or Indian custodians[]'...." (*Ibid.*, italics added by court.)

Here, the juvenile court found that the children are not Indian children as described by the ICWA. (RT 52.) In any event, tribal enrollment is not a "remedial service" or "rehabilitative program," and tribal enrollment does not "prevent the breakup of the Indian family." (§ 1912(d); § 361.7,

subd. (a).)

As this court noted in *In re Joseph B.* (1996) 42 Cal.App.4th 890, the dependency statutory scheme "is designed to assist families to '*correct problems which caused a child to be made a dependent of the juvenile court.*' [Citation.]" (*Id.* at p. 900, italics added for emphasis.)[61] Consistent with this purpose, courts have interpreted the phrase "active efforts" to provide remedial services and rehabilitative programs designed to prevent

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[61] See also Seiser & Kumli on California Juvenile Courts Practice & Procedure (2014 ed.) § 2.125[2][b], pp. 2-363, italics added ["'[A]ctive efforts' are those services and programs 'designed to prevent the breakup of the Indian family' [25 U.S.C. § 1912(d)]. '*Active efforts*' *under the ICWA do not involve the government taking steps to create a family meeting the definition of an Indian family under the ICWA.*"].

the breakup of the Indian family and that these efforts proved unsuccessful. (25 U.S.C. § 1912(d); § 366.26, subd. (c)(2)(B)(i) and § 361.7.) The ICWA "simply requires that active efforts be made to prevent the breakup of Indian families." (*Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009, 1016; see also *In re K.B.* (2009) 173 Cal.App.4th 1275, 1284.)

In short, "ICWA's procedural and substantive requirements must be followed in involuntary child custody proceedings when an 'Indian child' is involved." (*In re Jeffrey A.* (2002) 103 Cal.App.4th 1103, 1106.) One such requirement is the provision of "active efforts." (*In re C.B.* (2010) 190 Cal.App.4th 102, 134.) However, as dicta by the court in *C.B.* suggest, the statutory requirement regarding active efforts do not apply if the children are not Indian children. (*C.B.* at p. 135.)

IV

SINCE THE DEFINITION OF AN "INDIAN CHILD" IS PREMISED ON TRIBAL AFFILIATION, AND BECAUSE THE PROTECTIONS OF THE ICWA ONLY APPLY TO *TRIBAL* INDIAN CHILDREN, THE CALIFORNIA JUDICIAL COUNCIL EXCEEDED ITS AUTHORITY BY ADOPTING RULES THAT EVISCERATE THE STATUTORY DEFINITION OF AN "INDIAN CHILD" AS WELL AS OVERRIDE A TRIBE'S DETERMINATION OF MEMBERSHIP.

Respondent contends that "[r]ules 5.482(c) and 5.484(c)(2) are [] designed to 'implement the purposes of the juvenile court law by promoting uniformity in practice and procedure and by providing guidance to judicial officers, attorneys, social workers, probation officers, and others

participating in the juvenile court.' [Citation.]" (RB, p. 25.) In support of this contention, he cites rule 5.501(b), which says nothing to that effect.[62]

A. The California Judicial Council may not adopt rules that are inconsistent with a statute.

The California Judicial Council is limited to adopting "rules for court administration, practice and procedure" and it must exercise its constitutional power only in conformity with statute. (Cal. Const., art. VI, § 6, subd. (d).) In construing the authority of the California Judicial Council to adopt rules, the court in *Court Reporters, supra,* 39 Cal.App.4th 15 held that the rule permitting electronic recording of superior court proceedings conflicted with implicit legislative intent that such proceedings be stenographically recorded. (*Id.* at pp. 26-31.) The court reasoned that "the Judicial Council is empowered to 'adopt rules for court administration, practice and procedure, *not inconsistent with statute*...." [Citations.]" (*id.* at p. 22, italics added by court); but that "the Judicial Council may not adopt rules that are inconsistent with governing statutes. [Citations.]"

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62 Rule 5.501(b) reads as follows:

> The Judicial Council adopted the rules in this division under its constitutional and statutory authority to adopt rules for court administration, practice, and procedure that are not inconsistent with statute. These rules implement the purposes of the juvenile court law by promoting uniformity in practice and procedure and by providing guidance to judicial officers, attorneys, social workers, probation officers, and others participating in the juvenile court. (Rule 5.501 (b).)

(*ibid*). More recently, in *W.B.*, *supra*, 55 Cal.4th 30, the California Supreme Court reaffirmed these principles. (*Id.* at p. 58, fn. 17.)[63]

As this court explained in *Court Reporters*, *supra*, 39 Cal.App.4th 15 a rule of court inconsistent with legislative *intent* is invalid even absent an express legislative prohibition on the promulgation of a rule on the subject; and a rule can also be inconsistent even though it can operate harmoniously with a statute. (*Id.* at pp. 23, 25–26 [rejecting Judicial Council's claim that inconsistent operation requires "more than merely inharmonious"].)

In other words, Judicial Council rules are subordinate to statutes. (*Court Reporters*, *supra*, 39 Cal.App.4th at p. 22 [Judicial Council's rulemaking authority subordinate to Legislature]; accord, *Robin M., supra,* 21 Cal.3d at p. 346.) Defining an "Indian child" for purposes of the ICWA, or mandating the department to seek tribal enrollment for a non-Indian child, is an intrinsically legislative function. (See *Klamath Tribe, supra,*

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63 In *W.B.*, *supra*, 55 Cal.4th 30, the California Supreme Court considered the validity of former rule 5.480. The court held that ICWA notice is not required in a delinquency proceeding premised on conduct that would be criminal if committed by an adult. (*Id.* at p. 55.) The court also held that because rule 5.480 "does not account for the limited applicability of ICWA in delinquency cases, the Rule of Court describing ICWA's requirements is overbroad." (*Id.* at p. 58, fn. 17 [noting that the "Rules established by the Judicial Council are authoritative only 'to the extent that they are not inconsistent with legislative enactments and constitutional provisions.' [Citation.]"].)

11 P.3d at p. 707 ["For purposes of ICWA, only Congress can define who is an Indian child."].)

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

Respondent notes that the Judicial Council has "great expertise"; that proposed rules undergo an internal review process involving standing advisory committees with field-specific expertise; and that proposed rules are also subject to public comments. (RB, pp. 22-23.) Even so, as this Court noted in *Sara M. v. Superior Court* (2005) 36 Cal.4th 998, courts are not bound by the Judicial Council's interpretation of statute:

> Ultimately, the interpretation of a statute is a legal question for the courts to decide, and an administrative agency's interpretation is not binding. [Citation.] Certainly the Judicial Council's interpretation of a statute, as reflected in the Rules of Court, is not binding on the courts, and we will invalidate a rule if it is contrary to statute. [Citation.] (*Id.* at p. 1011.)

Thus, there are often unforeseen consequences of court rules, resulting in invalidation by reviewing courts, when necessary.[64] Most recently, in *W.B.*,

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[64] In the past, California courts have invalidated court rules found to be in conflict with a statutory provision. (See, e.g., *People v. Hall* (1994) 8 Cal.4th 950, 961–962 [invalidating rule limiting aggravating factors to be

supra, 55 Cal.4th 30 this court declared former rule 5.480 "overbroad." (*Id.* at p. 58, fn. 17.)

In the pending case, despite its well-intentioned purpose, the Judicial Council failed to see the unforeseen consequence of interpreting section 224.1, subdivision (a) broadly.

Respondent's broad interpretation of state law eviscerates the ICWA's definition of an "Indian child." (§ 224.1, subd. (a).) His interpretation also reduces political affiliation to a matter of Indian heritage (race) — thereby overriding the legislative mandate in section 224, subdivision (c), rendering the ICWA unconstitutional as applied.

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considered in imposing sentence enhancements as improper attempt to narrow trial court's discretion, contrary to Legislature's intent]; *Robin M.*, *supra*, 21 Cal.3d at p. 346 [insofar as former Juvenile Court Rule violated legislative intent by permitting detention of minor beyond statutory period, rule was disapproved even though it did not expressly contradict statute]; *Sadler v. Turner* (1986) 186 Cal.App.3d 245, 249 [invalidating former rule requiring notice of motion to dismiss as being in conflict with former statute allowing ex parte motion without notice]; *Court Reporters Assn., supra,* 39 Cal.App.4th at pp. 33-34 [holding rule permitting electronic recording of superior court proceedings conflicted with implicit legislative intent that such proceedings be recorded by a stenographer]; and *Trans-Action Commercial Investors, Ltd. v. Firmaterr* (1997) 60 Cal.App.4th 352, 371 [holding former rule authorizing court to impose expenses and counsel fees "in addition to any other sanction permitted by law" conflicted with limits and conditions provided in sanctions statutes].)

B. By extending the ICWA's protections to ethnic Indian children on the basis of their ancestry (race), California Rules of Court, rules 5.482(c) and 5.484(c)(2) are overbroad; and the rules threaten the constitutionality of the ICWA, as applied.

By way of summary of the arguments presented above, appellant contends that federal law preempts state law with regards to the definition of an Indian child. Even assuming that the definition of an "Indian child" is not preempted, rules 5.482(c) and 5.484(c)(2) conflict with sections 224.1, subdivision (a), 224, subdivision (c), and 224.3, subdivision (e)(1); and thus, the California Judicial Council exceeded its authority in adopting the rules. This is a matter of statutory construction. For the sake of argument, however, we will proceed to the constitutional question that arises from respondent's broad interpretation of the definition of an Indian Child.

In *Santos Y., supra*, 92 Cal.App.4th 1274, the court cautioned that the definition of "Indian child" should be narrowly construed to avoid constitutional infirmity:

> '[A]ny application of ICWA 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.' [Citation omitted.] (*Id.* at p. 1321.)

Appellant contends that merely having Indian heritage or ancestry is not enough to qualify the child as an Indian child for purpose of the ICWA, if the child is not a member of a tribe. Inclusion of ethnic Indians (who

have no *political* affiliation with a tribe) for purposes of the ICWA results in an over-inclusive racial classification, threatening the constitutionality of the ICWA as applied. This issue, however, can be avoided.[65]

As we noted earlier, this court may and should avoid confronting the constitutional issue by examining section 224.1, subdivision (a) "for a construction that will eliminate...invalid application." (*In re Edgar M.* (1975) 14 Cal.3d 727, 736; see also *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 66 ["'It is a well-established principle'" that courts "'will not decide constitutional questions where other grounds are available and dispositive of the issues of the case.'"].)

When considering the application of 25 U.S.C. sections 1912(d) and 1912(f) in *Adoptive Couple*, *supra*, 133 S.Ct. 2552 the United States Supreme Court avoided tackling the constitutional issues by interpreting the statutory text of the ICWA. (See, e.g., *Adoptive Couple, supra,* at p. 2561 ["Biological Father's contrary reading of § 1912(f) is nonsensical."], ["Our reading of § 1912(f) comports with the statutory text."]; and at p. 2565 ["[T]he plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context."].) Nevertheless, because of its importance,

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[65] When statutory grounds dispose of an issue, constitutional questions should be avoided because of the concept of "judicial self-restraint," succinctly stated in the rule that a court does not reach constitutional questions unless absolutely required to do so to dispose of the matter before it. (*People v. Pantoja* (2004) 122 Cal.App.4th 1, 10.)

we will address the constitutional implications of acceding to respondent's request to broaden the definition of an Indian child.

Without any authority to support his view, respondent contends that the Legislature included a race-based component in defining an Indian child for the purpose of the ICWA, and thus, the rules at issue do not create a conflict with state law:

> Rules 5.482(c) and 5.484(c)(2) do not conflict with the meaning and intent of 224.1, subdivision (a) as...they encompass the recognition by the Judicial Council that the Legislature intended children...*have already been found by a tribe to have sufficient blood quantum to qualify for membership* to have ICWA protections. (RB, p. 29, italics in original.)

Respondent begs the question of whether the definition of an "Indian child," as the term is defined in the federal ICWA, can be broadened by state law without creating an impermissible racial classification.

Without question, ICWA was passed in 1978 with a laudable purpose. Appellant is also mindful that the ICWA provides minimum standards (25 U.S.C. § 1902), and that higher state standards may apply to protect the rights of an Indian child. (25 U.S.C. § 1921.) Even so, this does not mean that the states can broaden the definition of "Indian child" because the ICWA only recognizes *tribal* Indian children, and not children who are Indian in ethnicity. (25 U.S.C. § 1903(4); § 224.1, subd. (a); § 224, subd. (c).) Thus, whether or not a child is eligible for membership is

not the litmus test. (See *Rice*, *supra*, 528 U.S. 495 at pp. 519-520 [While striking down a state voting law on equal protection grounds, the court expressed the view that a lineage requirement was simply a "proxy for race."].)

For purposes of the ICWA, it is critical to distinguish between a *tribal* Indian child and an *ethnic* Indian child. "ICWA's requirement of current tribal membership of at least one party to the proceedings is an outgrowth of the limits on Congressional authority in Indian legislation. Congressional authority to legislate extends only to tribal Indians, and creates a political, rather than a racial, preference. [Citations.]" (*C.D.*, *supra*, 751 N.W.2d at p. 244 ["Congressional authority to legislate extends only to tribal Indians, and creates a political, rather than a racial, preference."]; see, *Morton v. Mancari* (1974) 417 U.S. 535, 554, fn. 24.)

Numerous California appellate courts have examined the potential constitutional problem regarding application of the ICWA; and these courts have found that broadening the definition of an Indian child would trigger an overbroad application of the ICWA in violation of equal protection. For example, in *In re Vincent M.* (2007) 150 Cal.App.4th 1247, the Sixth District Court of Appeal recognized that the ICWA's choice of political rather than racial affiliation avoids the issue of equal protection. (*Id.* at p. 1267; accord, *In re B.R.* (2009) 176 Cal.App.4th 773, 783 [First District

Court of Appeal held that "[t]ribal membership is treated under the ICWA as a matter of political affiliation rather than racial origin."].)

The tenuous constitutional footing of the ICWA most recently came to light in *Adoptive Couple*, *supra*, 133 S.Ct. 2552, when the United States Supreme Court was confronted with the question of whether an unwed biological father qualifies as a "parent" for the purposes of the ICWA. In excluding application of the ICWA to the father in that case, the court avoided "equal protection concerns." (*Id.* at p. 2556.)

The definition of "Indian child" in 25 U.S.C. § 1903(4) requires more than a showing that the child and parent have Indian heritage. In fact, in the instant case, the Cherokee Nation Tribal Registration form instructs:

> To be eligible for a Certificate of Degree of Indian Blood (CDIB) Tribal Citizenship with the Cherokee Nation, you must be able to provide documents that connect you to an enrolled lineal ancestor, who is listed on the "DAWES ROLL" FINAL ROLLS OF CITIZENS AND FREEMENT OF THE FIVE CIVILIZED TRIBES, Cherokee Nation with a blood degree.... (2 CT 340, 397.)[66]

The ICWA's requirement of current tribal membership of at least one party to the proceedings stems from the limits on Congress' authority regarding the regulation of Indians.[67] Thus, the definition of an Indian

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66 See fn. 17, *ante.*

67 Congressional "power 'to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.' [Citation.]" (*United States v. Lomayaoma* (9th Cir. 1996) 86 F.3d 142,

child found in the ICWA must be interpreted narrowly to avoid unconstitutionality.

In short, nothing in the ICWA indicates that states may expand upon the definition of an Indian child. On the contrary, interpreting the word "and" in 25 U.S.C. section 1904(3) as a conjunctive not only avoids rendering a portion of the provision meaningless, but it harmonizes section 224, subdivision (a) with section 224.1, subdivision (a), and avoids rendering the latter provision nugatory. Most important, this view saves the application of the ICWA from constitutional problems by requiring that Indian child status be based upon two factors: (1) tribal affiliation, not Indian ancestry; and (2) current membership, not a pending application. (See *Adoptive Couple*, *supra*, 133 S.Ct. 2552 [avoid unconstitutional application of the ICWA by narrowly construction of requirements].)

As applied to children such as those in the pending matter, the children must either be a member under "route (a)" or become a member under "route (b)" by satisfying the "and" component of the statutory definition of an Indian child (25 U.S.C. § 1903(4), which can be achieved only *if* the tribe approves their membership application or the application of

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145.) This power "forms the basis for the ICWA." (*In re Wanomi P.* (1989) 216 Cal.App.3d 156, 163, disagreed with on other grounds by this court in *In re Crystal K.* (1990) 226 Cal.App.3d 655, 665.) In fact, the ICWA expressly recognizes that the Commerce Clause and "other constitutional authority" provide Congress with "plenary power over Indian affairs." (25 U.S.C. § 1901(1).)

a biological parent. This is not changed by respondent's "higher standards," "liberal construction" and other arguments to the contrary.

Extending coverage of the ICWA to non-Indian children or children with mere Indian heritage or ancestry (but no tribal affiliation), such as the children in the present case, would create an impermissible racial classification that does not serve a compelling state interest. (See *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1509-1510, superseded by statute on another ground as stated in *Santos Y.*, *supra*, 92 Cal.App.4th at 1311–1312 ["any application of ICWA which is triggered by an Indian child's genetic heritage…is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny under the equal protection clause. …If ICWA is applied to such children, such application deprives them of equal protection of the law."]; see also *Santos Y.*, *supra*, at p. 1322.)

In sum, invalidation of rules 5.482(c) and 5.484(c)(2) will further the policy goals for the ICWA and promote the goals of California's dependency scheme. On the other hand, if the court upholds the validity of rules at issue, the consequences will be dramatic. By upending *Holyfield*, and ignoring its call for a uniform application of the ICWA's jurisdictional terms, this court will be writing a new chapter in ICWA jurisprudence. The unintended consequence will make the challenge of protecting the ICWA

from constitutional infirmity even more daunting for Indian rights organizations and social service agencies.

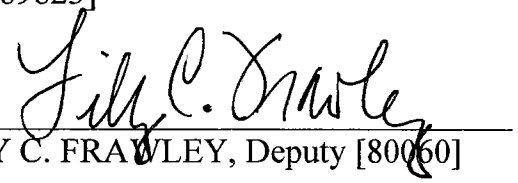
CONCLUSION

For all of the above reasons, appellant respectfully requests that this court affirm the decision by the Third District Court of Appeal in this case.

Dated: February 11, 2015

Respectfully submitted,

JOHN F. WHISENHUNT, County Counsel
Sacramento County, California
[SBN 89823]

by 
LILLY C. FRAWLEY, Deputy [80060]

Attorneys for Plaintiff/Appellant/Respondent
Sacramento County Department of Health and Human Services

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

In compliance with California Rules of Court, rules 8.360(b) and 8.412(a), I certify this brief contains 24,876 words, excluding tables, calculated by the Microsoft Word processing program.

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

Executed on February 11, 2015, at Sacramento, California.

LILLY C. PRAWLEY
Deputy County Counsel
[SBN 80060]

In re Abbigail A., et al.
S220187

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KONRAD S. LEE
ATTORNEY AT LAW
23441 GOLDEN SPRINGS DRIVE
DIAMOND BAR, CA 91765-2030

ATTORNEY FOR
RESPONDENT JOSEPH A.

REGINA QUAYNOR, ATTORNEY
CHILDREN'S LAW CENTER
OF SACRAMENTO – 1
8950 CAL CENTER DRIVE
SUITE 301B
SACRAMENTO, CA 95826

MINOR'S TRIAL COUNSEL

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO
– JUVENILE APPEALS
3341 POWER INN ROAD, RM. 314
SACRAMENTO, CA 95826

CENTRAL CALIFORNIA
APPELLATE PROGRAM
2150 RIVER PLAZA DR.,
SUITE 300
SACRAMENTO, CA 95833

ELIZABETH HANDY
ATTORNEY AT LAW
1286 UNIVERSITY AVENUE
SAN DIEGO, CA 92103

ATTORNEY FOR
RESPONDENT MOTHER

DARLENE AZEVEDO KELLY
ATTORNEY AT LAW
P.O. BOX 2169
OAKHURST, CA 93644

ATTORNEY FOR MINOR
A.A.

KIMBALL SARGEANT
ATTORNEY AT LAW
429 F STREET, SUITE 8B
DAVIS, CA 95616

ATTORNEY FOR MINOR
J.A.

DEENA C. FAWCETT
CLERK ADMINISTRATOR
THIRD DISTRICT COURT OF APPEAL
914 CAPITOL MALL, 4TH FLOOR
SACRAMENTO, CA 95814

CHEROKEE NATION OF OKLAHOMA
ATTENTION INDIAN CHILD
WELFARE ACT
P.O. BOX 948
TAHLEQUAH, OK 74465

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Rhonda Severson

RHONDA SEVERSON