No.

IN THE

Supreme Court of the United States

MARY DOE,

Petitioner,

v.

ARTHUR MANN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Public Law 280 ("PL-280"), 18 U.S.C. § 1162 & 28 U.S.C. § 1360, deprives Indian tribes in PL-280 States of their exclusive jurisdiction to conduct involuntary child dependency proceedings involving Indian children domiciled on the reservation, notwithstanding the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963.

PARTIES TO THE PROCEEDINGS

The petitioner is Mary Doe (the plaintiff below). The respondents (defendants below) are: Arthur Mann, in his official capacity; Robert L. Crone, Jr., in his official capacity; Lake County Superior Court; Department of Social Services, Lake County; Mr. D.; and Mrs. D.

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Petitioner Mary Doe respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-70a) is reported at 415 F.3d 1038. The district court's opinion (App. 71a-97a) is reported at 285 F. Supp. 2d 1229.

JURISDICTION

The court of appeals entered its judgment on July 19, 2005. The court denied a petition for rehearing en banc on September 19, 2005. App. 98a-99a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, provides in relevant part:

> **§ 1901. Congressional findings**
>
> Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—
>
> . . .
>
> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are

eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions;

. . .

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

(1) "child custody proceeding" shall mean and include--

> (i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
>
> (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;
>
> (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

> (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

. . .

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

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

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

. . .

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of

their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

. . .

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

. . .

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction,

notwithstanding the residence or domicile of the child.

§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

Public Law 280 ("PL-280"), 18 U.S.C. § 1162 & 28 U.S.C. § 1360, provides in relevant part:

> **§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country**
>
> (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:
>
> State or Territory of Indian country affected
>
> | State or Territory of: | Indian Country Affected: |
> |---|---|
> | Alaska | All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended |

California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

§ 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of:	Indian Country Affected:
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation

Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

STATEMENT

The Ninth Circuit's decision in this case creates a split of authority over the interpretation of Public Law 280 ("PL-280"), 18 U.S.C. § 1162 & 28 U.S.C. § 1360, and threatens to abridge the historic right of Indian tribes in PL-280 states to determine for themselves who will raise Indian children living on Indian lands. The decision below holds that PL-280 deprives Indian tribes in PL-280 States of their exclusive jurisdiction to conduct involuntary child dependency proceedings regarding Indian children domiciled on the reservation. That decision not only contradicts the long-standing interpretation of PL-280 in at least two other jurisdictions, but also it directly undermines the Congressional policy of the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963, which was enacted to preserve existing tribal sovereignty and give Tribes greater authority over custody matters regarding Indian children. *See Guidelines for State Courts,* 44 Fed. Reg. 67,584, 67,585-86 (1979) (explaining ICWA's goals of "keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes."). Absent this Court's review, the Ninth Circuit's decision also threatens to unsettle the crucial boundary between "private civil" and "regulatory" matters articulated in this Court's own decisions interpreting PL-280, including *California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202, 209 (1987) and *Bryan v. Itasca County*, 426 U.S. 373, 384-386 (1976).

Certiorari is proper not only to ensure uniform application of federal law but also to ensure faithful enforcement of federal legislation in this nationally sensitive area.

A. Factual Background

Petitioner Mary Doe is an enrolled member of the Elem Indian Colony and the biological mother of Jane Doe. Prior to the events that gave rise to this action, Jane was domiciled on the Elem reservation. As a person eligible for membership in the Tribe, Jane is a protected "Indian child" within the meaning of ICWA. *See* 25 U.S.C. § 1903(4).

The Elem Indian Colony is one of the four main villages that comprised the Southeastern Pomo Nation, a matriarchal society whose California history stretches back nearly 8,000 years. Before their lands were forcibly taken by the Europeans, the Pomo civilization populated, managed, and controlled over 2 million acres of land and waterways including 50 miles of lake shoreline. Today, having lost almost 99% of their aboriginal land, the Elem Indian Colony resides on a 50-acre reservation on which 80 of the Tribe's 250 members live.[1]

Petitioner was domiciled on the Reservation for over twenty years. Her daughter Jane was domiciled on the Reservation among her family and other tribal members from the time Jane was born until 1999, when the Lake County Department of Social Services ("DSS") removed her from the Tribe's Reservation over Petitioner's objection. The State initiated proceedings in Lake County Superior Court without Petitioner's participation that resulted in (1) Jane's placement in foster care, (2) the termination of Petitioner's parental rights, and (3) Jane's eventual adoption by non-tribal parents who were selected by the State court against the Tribe's wishes.

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[1] *See* http://www.elemnation.com/historeview.htm

B. Proceedings Below

In July 2002, Petitioner filed this action in federal district court challenging Respondents' conduct in the custody proceedings. Her First Claim for Relief alleged that Respondent Lake County Superior Court lacked subject matter jurisdiction over the underlying involuntary custody proceedings in violation of ICWA. Specifically, ICWA Section 1911(a) recognizes that jurisdiction over involuntary custody proceedings rests exclusively with the Tribe, and thus the State acted outside its authority.

Respondents moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), arguing *inter alia,* that PL-280 vests PL-280 States with jurisdiction over all child custody proceedings. Petitioner argued that exclusive tribal jurisdiction over involuntary child custody proceedings was not precluded by PL-280 because, as this Court has held, PL-280 grants PL-280 States civil jurisdiction only over disputes between private citizens, not over regulatory matters, *see Cabazon,* 480 U.S. at 209, and involuntary child custody proceedings are regulatory in nature. On September 29, 2003, the district court issued an order agreeing with Petitioner that involuntary child custody proceedings are regulatory in nature. App. 87a. The district court determined, however, that ICWA's statutory scheme and the regulations promulgated to enforce its provisions effectively divested the Tribe of its exclusive jurisdiction unless the Tribe affirmatively reassumed that authority. App 88a-90a. Petitioner took an interlocutory appeal of that ruling.

On appeal, the Ninth Circuit rejected the district court's grounds for originally dismissing petitioner's claim, but affirmed on other grounds. Specifically, the Ninth Circuit ruled that California's dependency proceedings were private civil/adjudicatory matters and not regulatory matters. In its view, "[a]t the heart of the dependency proceedings is a

dispute about the status of the child, a private individual." App. 48a. The Ninth Circuit reasoned that this was sufficiently analogous to a "private legal dispute[]" to keep the State's action outside the regulatory sphere and within PL-280's grant civil adjudicatory authority to PL-280 States. App. 49a.

Petitioner petitioned for rehearing en banc in the Ninth Circuit. That petition was denied on September 19, 2005.

REASONS FOR GRANTING THE PETITION

In holding that Public Law 280 deprives Indian tribes in PL-280 States such as California of their exclusive jurisdiction to conduct involuntary child dependency proceedings involving Indian children domiciled on the reservation, the Ninth Circuit created a split of authority with respect to the interaction between PL-280 and ICWA. The Ninth Circuit's ruling also conflicts with *California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202, 209 (1987) and *Bryan v. Itasca County*, 426 U.S. 373, 384-386 (1976) – this Court's well-settled precedents concerning the scope of PL-280, and violates the bedrock "Indian canon" of construction that statutes affecting Indian tribes must, where ambiguous, be read in a manner that protects tribal sovereignty. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44, (1980) ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence."). The decision also thwarts Congress' purpose in enacting ICWA – to promote the stability and security of Indian tribes and families," *see* 25 U.S.C. § 1902, and to reduce the "alarmingly high percentage of Indian families broken up by the removal, often unwarranted, of their children from them by [the State] and

[the] alarmingly high percentage of such children . . . placed in non-Indian . . . homes." *See* 25 U.S.C. § 1901.

The proper treatment of custody proceedings for Indian children is an issue of national importance deserving of this Court's attention. The Ninth Circuit's opinion wrongly strips from Tribes in PL-280 States a core aspect of tribal sovereignty, leaving custody proceedings in the hands of States with a documented record of failing to promote ICWA's purposes.

I. THE NINTH CIRCUIT'S DECISION CREATES A SPLIT OF AUTHORITY OVER WHETHER PUBLIC LAW 280 DEPRIVES INDIAN TRIBES IN PL-280 STATES OF THEIR EXCLUSIVE JURISDICTION TO CONDUCT INVOLUNTARY CHILD DEPENDENCY PROCEEDINGS INVOLVING INDIAN CHILDREN DOMICILED ON THE RESERVATION.

The Ninth Circuit held that PL-280 deprives Indian tribes of a fundamental sovereign right: to assume *sole* responsibility for assessing when the best interests of a child tribal member domiciled on tribal land requires the tribe to remove her from her family environment or otherwise involve itself in her rearing. In so holding, the Ninth Circuit created a direct conflict with prevailing law in Wisconsin and Iowa regarding Indian child custody.

Wisconsin's position on the interaction between PL-280 and ICWA has remained unchanged since 1981, when the Wisconsin Attorney General considered the precise issue considered by the Ninth Circuit in this case: whether PL-280, notwithstanding ICWA, confers state jurisdiction over both voluntary and involuntary child custody proceedings. 70 Op. Atty Gen. Wis. 237 (1981), 1981 Wisc. AG Lexis 7, *7. Wisconsin's Attorney General flatly denied that PL-280 does

so, explaining that the involuntary termination of parental rights "involve[s] some aspect of the state's regulatory jurisdiction. . . . By comparison, where the proceeding is not between the state and an individual, but rather primarily involves only private persons as in a voluntary foster care placement, state law may be applied under Pub. L. No. 280's jurisdictional grant." *Id.* Wisconsin, like the vast majority of other PL-280 States thus for decades has recognized the inherent and exclusive right of tribes to conduct these proceedings.[2]

The Iowa Supreme Court applied the same analysis and reached the same result in circumstances that are nearly identical to those raised here. At issue in *State ex rel. Department of Human Services as Next Friend to Whitebreast v. Whitebreast* was whether the State, which had assumed PL-280 jurisdiction over the Sac and Fox reservation, could institute a state court action to recover child support from a

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[2] The Ninth Circuit's assertion that Washington and Idaho have "considered the interplay between Public Law 280 and a state's authority to enforce child dependency laws in Indian country," App. 32a, is somewhat misleading. Though Washington and Idaho have statutes on the books claiming authority to implement child dependency laws, *see* Wash. Rev. Code § 37.12.010(7); Idaho Code § 67-5101(c), there is no evidence that either legislature considered the distinction between voluntary and involuntary proceedings in enacting these laws, and in any event these laws were uninformed by *Bryan v. Itasca County*, 426 U.S. 373, 388 (1976), which was issued 13 years after their enactment and which set out the proper analytic framework for assessing the extent of state civil jurisdiction under PL-280. By contrast, the Wisconsin Attorney General's 1981 opinion involved an actual analysis of the law in light of *Bryan* and ICWA, both of which are cited in that opinion. Moreover, Washington has not relied on Wash. Rev. Code § 37.12.010(7) to assert jurisdiction but has instead given tribes "exclusive jurisdiction over all issues relating to 'child dependency.'" *Confederated Tribes of Colville Reservation v. Superior Court*, 945 F.2d 1138, 1140 n.3 (9th Cir. 1991); *see also Navajo Nation v. Superior Court*, 47 F. Supp. 2d 1233, 1245 (E.D. Wash. 1999).

tribal member residing on the reservation after the state Department of Human Services had advanced support funds to the member's former wife. 409 N.W.2d 460, 460-62 (Iowa 1987). Finding itself "bound to apply the standard set by the United States Supreme Court in *Bryan*," *id.* at 464, the court disapproved of the State's exercise of jurisdiction:

> [I]f this were a truly private cause of action brought by one Indian to enforce a support order against another . . . we would not decline to adjudicate the merits of the controversy. . . .
>
> But the public character [of the legislative scheme authorizing child support recovery] . . . seems to us inescapable.

Id. at 463. Even though Iowa's law equated the rights of the Department with the rights of the children in need of support – indeed, it said the agency "[stood] in the shoes of the minor child" – the court held that "the status of the agency as a public body, exercising the state's duty as parens patriae is never abandoned." *Id.* (internal quotation omitted).

The Ninth Circuit's reasoning in this case directly conflicts with the Iowa Supreme Court's analysis in *Whitebreast*. Like the Iowa agency, Respondent County DSS initiated involuntary proceedings against Petitioner in state court, carrying out "duties . . . defined and shaped by a host of administrative regulations" and legislative requirements. *Id.* In doing so, the DSS never abandoned the State's "parens patriae interest in preserving and promoting the welfare of the child," *Cynthia D. v. Superior Court*, 851 P.2d 1307, 1312 (Cal. 1993). When the Ninth Circuit nevertheless failed to follow "the standard set by [this] Court in *Bryan*," *Whitebreast*, 409 N.W. 2d at 464, the Ninth Circuit created a clear split with the Iowa Supreme Court.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S WELL-SETTLED INDIAN LAW PRECEDENTS.

A. The Ninth Circuit's Decision Directly Contravenes this Court's Decisions Concerning the Scope of Public Law 280.

Despite the fact that PL-280 vests States with only limited civil jurisdiction and not "the full panoply of civil regulatory powers," *Bryan*, 426 U.S. at 388, the Ninth Circuit held that it deprived affected tribes of not only their exclusive jurisdiction to conduct private child custody proceedings (*e.g.*, voluntary adoptions between private parties), but also their exclusive sovereign jurisdiction to institute involuntary proceedings in the best interest of their children (*e.g.*, to remove an Indian child from her Indian home and either reunify the child with her parents or terminate the parental relationship and place the child with more appropriate guardians). This interpretation of PL-280 cannot be squared with this Court's settled precedents.

This Court's decisions in *Bryan* and *Cabazon* specifically address the limited scope of a State's civil authority under PL-280. In *Bryan,* this Court held that PL-280 extended state jurisdiction only to "*private* legal disputes between reservation Indians, and between Indians *and other private citizens*" – that is, "over *private* civil litigation involving reservation Indians in state court" – but did not confer "general state civil regulatory control over Indian reservations." 426 U.S. at 383, 385, 384 (emphasis added) (holding Minnesota lacked jurisdiction to tax an Indian's mobile home located on his tribe's reservation). In *Cabazon* this Court concluded that California could not apply its gambling laws to Indian tribes because (although some forms of gambling were unlawful, and some gambling disputes were

private) the State's gambling restrictions were regulatory in nature whenever the State was prohibiting certain forms of generally permitted conduct. This Court reiterated that a law that is "civil in nature . . . [is] applicable only as it may be relevant to private civil litigation in state court." 480 U.S. at 208. "[I]f the state law generally permits the conduct at issue, subject to regulation, *it must be classified as civil/regulatory* and Pub. L. 280 does not authorize its enforcement on an Indian reservation." *Id.* at 209 (emphasis added).

The Ninth Circuit's decision directly contravened these precedents. As a preliminary matter, the State is not a private citizen, and its assertion of jurisdiction over Jane Doe pursuant to sections 300(b) and (d) of the Welfare and Institutions Code ("WIC") removes its actions from the permissible realm of "private legal disputes . . . between Indians and other private citizens." *Bryan*, 426 U.S. at 383. Moreover, even if there are circumstances in which litigation maintains its private character despite the State's involvement as a litigant, those are not present here. As California's welfare code shows, and the district court found, the State exercises civil *regulatory* power in involuntary custody proceedings. The State's purpose in enacting the WIC is explicitly regulatory: "the preservation of the family as well as the safety, protection, and physical and emotional well-being of the child." Cal. Wel. & Inst. Code § 300.2. Indeed, in this case, the DSS's activities under WIC were clearly regulatory in nature: removing Jane from the reservation, referring her to the juvenile court, petitioning to have her declared a dependent, placing her in foster care, terminating her mother's parental rights, and placing her up for adoption.

The State's actions were not those of a private litigant, but of a public body ensuring the welfare of a citizen. *See* App. 87a. Each step of the way, the State in this case – whether acting through the DSS or the state court – was mandated by

statute to assess Jane's best interests and the possibility of preserving her family relationships. For example, section 358 of the WIC requires the social worker assigned to dependency proceedings to file a report with the court addressing:

> the likelihood that child protective services might solve the problems and whether these services have been offered to qualified parents;
>
> the recommended plan for returning the child to her parents, and the alternatives if reunification fails;
>
> whether the child's best interests would be served by granting visitation rights to the grandparents; and
>
> the appropriateness of maintaining the child's relationships with her siblings.

Cal. Wel. & Inst. Code § 358.1(a)-(c) & (d)(1)(B). Similarly, when a court orders a hearing to decide whether to terminate parental rights, *id.* § 366.26, the court must assess a host of factors, including:

> the "amount of and nature" of contact between the child and her parents and extended family;
>
> the "child's medical, developmental, scholastic, mental, and emotional status;"
>
> the eligibility of and the child's relationship to prospective adoptive parents;
>
> the likelihood that the child would be adopted if her parent's rights are terminated.

Id. § 361.5(g); *see also id.* § 361.5(b) (setting out criteria for determining whether reunification services should be provided to a parent or guardian).

These provisions demonstrate, contrary to the Ninth Circuit's judgment, that child custody proceedings involve far

more than a discrete adjudication of a child's "status." *See* App. 51a-52a. Rather, the dependency determination is but one step in an elaborate regulatory effort to determine how best to respond to circumstances that may threaten a child's well-being and jeopardize her family relationships. Imposing these types of regulations, which reflect state policy determinations, upon a tribe threatens to undermine tribal governance, contravening this Court's precedent by reducing tribes to "little more than private, voluntary organizations." *Bryan*, 426 U.S. at 388 (quotations omitted). As this Court has made clear, PL-280 does not confer such authority on States.

B. The Ninth Circuit's Decision Also Violates the Bedrock "Indian Canon" of Construction that Statutes Affecting Indian Tribes Must, Where Ambiguous, Be Read To Protect Tribal Sovereignty.

The Ninth Circuit's decision also violates the "eminently sound and vital canon" that "statutes passed for the benefit of . . . Indian tribes . . . are to be liberally construed," resolving ambiguities "in favor of the Indians." *Bryan*, 426 U.S. at 392 (quotations omitted); *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44, (1980) ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence."). Here, the Ninth Circuit expressly acknowledged the uncertain application of PL-280 to California's child dependency statute, conceding: "California's child dependency statute may not fit neatly into any of the Public Law 280 jurisdictional boxes [meaning criminal prohibitory, civil regulatory, or civil adjudicatory]," App. 25a. The Ninth Circuit violated this Court's precedents by failing to resolve that ambiguity regarding PL 280's application in favor of the

tribe's jurisdiction.

III. THE NINTH CIRCUIT'S DECISION MISINTERPRETS THE INDIAN CHILD WELFARE ACT AND THWARTS THE PURPOSES BEHIND IT.

In support of its conclusion that PL-280 gives States civil jurisdiction over all child dependency proceedings – voluntary and involuntary alike – the Ninth Circuit pointed to the text, structure, and "backdrop" of ICWA." App. 53a. But ICWA was clearly intended to preserve the exclusive jurisdiction of all Tribes' (PL-280 and non-PL-280 alike) over involuntary custody proceedings. So putting aside the appropriateness of using one statute (ICWA) to interpret the meaning of a different statute (PL 280) passed 25 years earlier, rather than supporting the Ninth Circuit's decision, ICWA's language and legislative history directly contradict, rather than support, the Ninth Circuit's decision.

A. The Ninth Circuit's Reasoning is Undermined by ICWA's Text.

ICWA refers to PL-280 in two places. First, in section 1911, it provides in part:

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law.

25 U.S.C. § 1911(a). The "existing Federal law" language clearly includes PL-280. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 n.16 (1989). Second, ICWA refers to PL-280 in the section addressing reassumption: "Any Indian tribe which became subject to

State jurisdiction pursuant to [PL-280], or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings."[3] 25 U.S.C. § 1918. The natural reading of these two provisions is: (1) Indian tribes have exclusive jurisdiction over custody proceedings involving Indian children except where PL-280 vests the States with concurrent jurisdiction over any subset of custody proceedings [§ 1911(a)]; and (2) affected tribes may petition the Department of the Interior to reassume whatever jurisdiction over custody proceedings PL-280 has extended to the States [§ 1918] (thereby putting themselves on the same footing as tribes in non-PL-280 States, whose exclusive jurisdiction is recognized in section 1911(a)).

ICWA's text thus merely maintains the *existing* federal law regarding child custody proceedings and gives tribes in PL-280 States a method of reassuming exclusive jurisdiction over those aspects of child custody (*i.e., private* proceedings affecting custody) made concurrent by PL-280. Nevertheless, the Ninth Circuit erroneously assumed that a State's jurisdiction over *any* child custody proceedings under PL-280 necessarily entails jurisdiction over *all* custody proceedings – voluntary and involuntary. Based on this flawed premise, the Ninth Circuit reasoned:

> It would be illogical to give exclusive jurisdiction back to the tribes under § 1918(a) if such jurisdiction were not part of the exception under § 1911(a).

App. 54a. However, it is only the Ninth Circuit's assumption of an all-or-nothing grant of jurisdiction that is illogical. ICWA, passed two years after *Bryan*, merely reflects that States have civil jurisdiction over *some* but not all custody

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[3] ICWA defines "child custody proceeding" in 25 U.S.C. § 1903(1).

proceedings – namely, voluntary proceedings – and section 1918 provides for reassumption over that subset of matters.

ICWA was passed specifically "to promote the stability and security of Indian tribes and families" by *curtailing* state involvement in Indian child custody proceedings. *See* 25 U.S.C. § 1902; *see also id.* § 1901. It would have been perverse for Congress *sub silentio* to alter the common understanding of *Bryan* such that PL-280 States would have a broader license to remove Indian children from their homes. *Cf. Cook County, Illinois v. United States ex rel. Chandler*, 538 U.S. 119, 133-34 (2003) ("It is simply not plausible that Congress intended to repeal municipal liability *sub silentio* by the very Act it passed to strengthen the Government's hand in fighting false claims."). The Ninth Circuit's determination that Congress did so fundamentally undermines the ICWA's purposes.

B. The Ninth Circuit Ignored the Relevant Legislative History of ICWA.

That ICWA maintained existing federal law regarding child custody proceedings and gave tribes in PL-280 States a method of reassuming exclusive jurisdiction over those aspects of child custody (*i.e., private* voluntary proceedings affecting custody) made concurrent by PL-280 is confirmed by ICWA's legislative history, the relevant aspects of which were ignored in the Ninth Circuit's opinion.

Numerous passages from the legislative record emphasize that Congress did not intend ICWA to affect, let alone broaden, PL-280's reach. For example, the Report from the Senate's Select Committee on Indian Affairs stated unequivocally: "Nothing in this Act shall be construed to either enlarge or diminish the jurisdiction over child welfare matters which may be exercised by either State or tribal courts or agencies except as expressly provided in this Act."

S. Rep. No. 95-597, at 6 (Nov. 3, 1977). "To the extent the act provides for jurisdictional division between States and tribes, it is declarative of law as developed by judicial decision." *Id.* at 10. Likewise, the House Report states, with respect to section 1911: "The provisions on exclusive tribal jurisdiction confirms [*sic*] the developing Federal and State case law holding that the tribe has exclusive jurisdiction when the child is residing or domiciled on the reservation." H.R. Rep. No. 95-1386, at 21 (July 24, 1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7543-44; *see also* 124 Cong. Rec. H38,108 (daily ed. Oct. 14, 1978) (statement of Rep. Lagomarsino) ("[S]ection [1911(a)] . . . states existing law with respect to tribal jurisdiction.").

If ICWA's language and legislative history have anything to say about the question presented by this case, it is that Congress did not intend through ICWA to alter the scope of PL-280 as it existed prior to ICWA's passage, and subject to this Court's interpretation in *Bryan.*

IV. THE PROPER TREATMENT OF CUSTODY PROCEEDINGS FOR INDIAN CHILDREN IS AN ISSUE OF NATIONAL IMPORTANCE DESERVING OF THIS COURT'S ATTENTION.

The question of who has jurisdiction over custody proceedings involving Indian children is one of national importance. A review of cases in PL-280 States reveals that PL-280 State courts consistently fail to apply the safeguards of ICWA *See, e.g., In re I.G.*, 35 Cal. Rptr. 3d 427, 432-33 (Cal. 2005) (criticizing courts for repeatedly failing to properly apply ICWA) *In re: T.D. and D.D. v. Dept. of Children and Fam. Services,* 890 So.2d 473, 475 (Fla. 2004) (holding that ICWA was not adequately invoked in termination of parental rights proceeding and noting that "had its procedures been properly followed, the great expenditure

of scarce judicial resources . . . could have been avoided."); *In re: R.E.K.F.*, 698 N.W.2d 147, 150 (Iowa 2005) (holding State failed to adequately comply with the notice provisions of the Iowa ICWA); *In re Phoebe S. and Rebekah S. v. Regina S.*, 664 N.W.2d 470 (Neb. 2003) (holding that the State had not met ICWA's heightened "beyond a reasonable doubt" standard sufficient to terminate mother's parental rights); *State ex. rel. Juvenile Dept. of Lane County v. Shuey*, 850 P.2d 378, 381 (Or. 1993) (remanding on basis that ICWA required trial court to grant tribe's motion to intervene); *In re Dependency of T.L.G.*, 108 P.3d 156, 162 (Wash. 2005) (holding that trial court erred in failing to ensure that notice of termination proceedings was given to the tribe or the BIA). Indeed, a California appeals court recently complained of a "virtual epidemic of cases where reversals have been required because of noncompliance with ICWA" by juvenile courts and social service agencies. *In re I.G.*, 35 Cal. Rptr. 3d at 432-33. The appeals court noted that in addition to dozens of published cases, there were "72 unpublished cases statewide in this year alone reversing, in whole or in part, because of noncompliance with ICWA." *Id.*

Given state courts' poor record of compliance with ICWA, who has jurisdiction over custody proceedings involving Indian children is a matter of great significance. It is evident from the actions of the juvenile court and social services agency in this case and from myriad other state court cases that PL-280 States routinely fail to adhere to the provisions of ICWA. As a result, thousands of Indian children are permanently removed from their Indian families and from their tribal communities in spite of Congress' clear efforts, through ICWA, to preserve the unity of Indian families. As Congress noted in passing ICWA, however, "there can be no greater threat to 'essential tribal relations,' and no greater infringement on the right of the . . . tribe to govern themselves

than to interfere with tribal control over the custody of their children." H.R. REP. NO. 95-1386, at 14-15.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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