ARIZONA COURT OF APPEALS

DIVISION TWO

In re Dependency as to M.K.	Nos. 2 CA-JV 2025-0038, 2 CA-JV 2025-0039, and 2 CA-JV 2025-0040, Cons.
A Minor/Real Party in Interest.	Cochise County Superior Court No. JD202300032

CORRECTED BRIEF OF *AMICI CURIAE* FORT MCDOWELL YAVAPAI NATION, GILA RIVER INDIAN COMMUNITY, NAVAJO NATION, PASCUA YAQUI TRIBE, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, AND TOHONO O'ODHAM NATION IN SUPPORT OF APPELLANTS

—Filed with consent from all Parties—

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INTERESTS OF *AMICI CURIAE*

Amici curiae are six federally recognized Indian tribes—Fort McDowell Yavapai Nation, Gila River Indian Community, Navajo Nation, Pascua Yaqui Tribe, Salt River Pima-Maricopa Indian Community, and Tohono O'odham Nation—that currently have tribal member children subject to dependency proceedings in the state courts of Arizona. This Court's review of the Superior Court's decision and its interpretation of "good cause" to deviate from the Indian Child Welfare Act of 1978 (ICWA) placement preferences under 25 U.S.C. § 1915 will have a direct impact on *Amici* and their children. Moreover, *Amici* have an intimate understanding of the history behind the passage of ICWA and the 2016 Bureau of Indian Affairs (BIA) Indian Child Welfare Act Proceedings Final Rule (hereinafter 2016 Regulations) and are well situated to provide this Court with current research that confirms that ICWA's placement preferences protect Indian children's best interests.

INTRODUCTION

Congress enacted ICWA in response to a century of state and federal policies that resulted in the large-scale removal of Indian children from their homes and their placement with non-Indian families or in institutions. *Haaland v. Brackeen*, 599 U.S. 255, 297–306 (2023) (Gorsuch, J., concurring); 25 U.S.C. §§ 1901–1902. These removals threatened the continued existence of tribes and caused devastating harm to Indian families and children. *Brackeen*, 599 U.S. at 304–05 (Gorsuch, J.,

concurring) (noting that the children removed suffered "'severe distress' that 'interfere[d] with their physical, mental, and social growth and development' . . . [and] that often translated into long-lasting adverse health and emotional effects"); 25 U.S.C. § 1901(3)–(5). ICWA's placement preferences—which create a robust legal presumption that it is in an Indian child's best interests to be raised by his family, *see* 25 U.S.C. §§ 1902, 1905—are intended to protect Indian children from even well-meaning separation from their extended families and cultures.

Research conducted since ICWA's passage confirms that placement with family has significant health benefits for children and is a particularly strong protective factor for Indian children. The 2016 BIA Regulations thus confirm that family placements are strongly preferred for Indian foster youth, and that an Indian child should only be kept out of a relative's home in rare and extreme cases. While ICWA does allow for deviation from the placement preferences in limited circumstances, ordinary healthy bonding with a foster family—the type at issue in this case—cannot by itself justify deviation from ICWA's "most important substantive requirement." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

This Court should reverse the Superior Court's Order denying the Motion for change in placement because the Order fails to comply with ICWA's mandate to keep Indian children with family whenever possible.

ARGUMENT

I. A Century of State, Federal, and Private Policies that Separated Indian Children from Their Families to "Save" Them Necessitated ICWA's Passage.

Appreciating the importance of ICWA's placement preferences and understanding the extreme caution with which courts must entertain arguments that there is "good cause to deviate" from them "requires an understanding of the long line of policies that drove Congress to adopt ICWA." *Brackeen*, 599 U.S. at 297 (Gorsuch, J., concurring); *see also Gila River Indian Cmty. v. Dep't of Child Safety*, 238 Ariz. 531, 534 ¶ 13 (App. 2015) (noting that Arizona courts "find instructive the legislative history of ICWA").

ICWA did not baselessly "emerge from a vacuum. It came as a direct response to the mass removal of Indian children from their families . . . by state officials and private parties." *Brackeen*, 599 U.S. at 297. This mass removal was motivated, at least in part, by presumptions that being raised by non-Indian families would benefit the children.

A. From the 1870s to the 1970s, federal and state policies encouraged the removal of Indian children to destroy Tribes and "save" the children.

As early as the 1870s, the federal government sought to isolate Indian children from their families—or dissolve the families entirely—to force the assimilation of Indians into non-Indian culture. *Id.* at 298–99 (citing Annual Report of the

Commissioner of Indian Affairs to the Secretary of the Interior at 392 (1904)). By the 1880s, this policy was formalized in the compulsory relocation of Indian children to Indian boarding schools. *See* Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 Ark. L. Rev. 327, 356–357 (1986). The express goal of the Indian boarding schools was to "Kill the Indian, Save the Man," *id.*,[1] through a "complete isolation of the Indian child from his savage antecedents," *see* Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior at LXI (1886). The schools were systematic and brutal in their identity alteration methods. Br. of American Academy of Pediatrics and American Medical Ass'n, *Brackeen*, 599 U.S. 255, 2022 WL 3701711 (hereinafter *American Academy of Pediatrics Br.*) (citing Bryan Newland, *Federal Indian*

[1] In 1892, Captain Richard H. Pratt, founder and superintendent of the Carlisle Indian Industrial School, infamously described the goal of assimilation:

> A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.

Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, *Proceedings of the Nineteenth Annual Conference of Charities and Correction*, 46 (Isabel C. Barrows ed., Boston: Press of Geo. H. Ellis 1892), available at carlisleindian.dickinson.edu/sites/default/files/docs-resources/CIS-Resources_1892-PrattSpeech.pdf.

This explicit goal of violent assimilation was significant because "Carlisle became the model for what would become a system of 408 similar federal institutions nationwide." *Brackeen*, 599 U.S. at 299 (Gorsuch, J., concurring).

Boarding School Initiative Investigative Report at 51, 52–56, U.S. Dep't of the Interior (May 11, 2022) (hereinafter BIA Report), available at https://www.bia.gov/sites/default/files/dup/inlinefiles/bsi_investigative_report_may_2022_508.pdf).

Institutionalizing Indian children in boarding schools was incredibly expensive, so children were often required to work as part of their detention. *Brackeen*, 599 U.S. at 301 (Gorsuch, J., concurring) (citing BIA Report at 33). This, too, was rationalized as beneficial to the children. *Id.* To lower the cost to the federal government further, Indian children were later sent to live with and work for white families. *See* R. Trennert, *From Carlisle to Phoenix: The Rise and Fall of the Indian Outing System, 1878–1930*, 52 Pacific Hist. Rev. 267, 273 (1983). Supporters of this new "outing" system—described as such because Indian children were being "sent out" of the schools—expressed their hopes that the system would grow "until every Indian child was in a white home." D. Otis, *The Dawes Act and the Allotment of Indian Lands* at 68 (1973). Eventually, even this system proved too costly, and the boarding schools slowly closed their doors. *Brackeen*, 599 U.S. at 302.

As the boarding schools were closing, the private adoption system—functioning increasingly like a market—was experiencing "an increased demand for Indian children." Margaret D. Jacobs, *Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 Am. Indian Q.

136, 141 (2013). The outing system had already laid the groundwork for the mass adoption of Indian children. *Brackeen*, 599 U.S. at 302 (Gorsuch, J., concurring). And State governments saw adoption as a cost-effective opportunity: adoption of Indian children could carry on the mission of Indian boarding schools—"hopefully solv[ing] the Indian problem once and for all." Jacobs, *supra*, at 153–54; *see also Brackeen*, 599 U.S. at 303 (Gorsuch, J., concurring) (noting one state official's goal of ensuring that Indian children would be raised by "civilized people" instead of by their Indian families).

Through the 1960s and 1970s, Indian children were removed from their families and tribal communities for adoption by non-Indian families at a shocking rate. William Byler, *The Destruction of American Indian Families* at 1 (Steven Unger ed. 1977). "Surveys conducted in 1969 and 1974 showed that 'approximately 25–35 per cent of all Indian children [were] separated from their families.'" *Brackeen*, 599 U.S. at 303 (quoting Byler, *The Destruction of American Indian Families* at 1). The widely accepted estimate is that "more than 90 per cent of non-related adoptions of Indian children [were] made by non-Indian couples." *Id.* (quoting Byler, *The Destruction of American Indian Families* at 2)

B. Congress passed ICWA to protect Indian children by safeguarding their connections to family and community.

The mass relocation of Indian children from their families to non-relative non-Indian homes eventually precipitated congressional hearings that led to ICWA's

passage. These hearings, including the testimony and reports submitted, detailed the physical, mental, social, and emotional harm experienced by children who had been isolated from their families and cultures. *See Brackeen*, 599 U.S. at 304–05. Dr. Joseph Westermeyer, a social psychiatrist, testified that Indian adolescents raised in white environments experienced a crisis of identity: they were not allowed an opportunity to develop an Indian identity, but society would not treat them as white. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 n.1 (1989) (citing Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., 46). One report by the Association on American Indian Affairs warned that attempts to "make Indian children 'white'" by removing them from their Tribes "can destroy them." Byler, *The Destruction of American Indian Families* at 9; *accord Brackeen*, 599 U.S. at 305.

During the hearings, Congress also repeatedly heard from tribal leaders that the extended family is the bedrock of Indian child-rearing. A House Committee Report explained that "[t]he dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family." H.R. Rep. No. 95-1386, at 10 (1978). Senator Abourezk summarized this testimony thus: "in Indian communities throughout the Nation there is no such thing as an abandoned

child because when a child does have a need for parents . . . a relative or friend will take that child in." Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., at 473 (statement of Senator Abourezk).

ICWA was accordingly drafted to prioritize the preservation of Indian families: both by ensuring that Indian children will not be removed from their families of origin unless they are truly in danger, and—in those cases where a child cannot safely remain with his parents—by making use of the child's network of extended family as a bulwark against the harm caused by removal. ICWA specifically provides that in cases where an Indian child cannot safely remain in the custody of his parents, he must be placed according to the following order of preference: first, with a member of his extended family; second, with a foster home licensed or approved by his Tribe; third, with an Indian foster home; or fourth, in an institution approved by a Tribe or operated by an Indian organization, if his special needs so require. 25 U.S.C. § 1915(b). A court may only allow a deviation from these placement preferences for "good cause." *Id.* ICWA also requires that the standards to be applied in meeting the placement preferences are the "prevailing social and cultural standards of the Indian community . . . ." *Id.* § 1915(d).

As Dr. Marlene Echohawk with the National Congress of American Indians testified before Congress, ICWA codifies the Congressional policy "that it is in the

best interests of [Indian] children to be raised by their natural family and that every opportunity should be provided to maintain the integrity of the natural family." Statement at the Hearing on S.1214 Before the Senate Committee on Indian Affairs at 142 (Aug. 4, 1977); *accord* 25 U.S.C. § 1902; *see* H.R. Rep. No. 95-1386, at 23 (Congress passed ICWA to "protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society."). And the United States Supreme Court subsequently recognized that the placement preferences are ICWA's "most important substantive requirement." *Holyfield*, 490 U.S. at 36.

II. To Effect ICWA's Goal of Protecting Indian Children, "Good Cause" to Deviate from ICWA's Placement Preferences Must Be a Narrow Exception.

The legislative history of ICWA makes clear that state courts were "part of the problem [that] ICWA was intended to remedy," yet Congress created the "good cause" exception to the placement preferences to give state courts some "flexibility" in truly extraordinary cases. *Matter of Custody of S.E.G.*, 521 N.W.2d 357, 362–64 (Minn. 1994); *see* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (Nov. 26, 1979) ("1979 Guidelines"). But because ICWA did not define or explicitly limit good cause, and because the BIA Guidelines that made clear the narrowness of the exception were nonbinding, *see* 1979 Guidelines at

67584, 67594,[2] some state courts embraced a subjective evaluation of multiple factors (including whether a child had bonded with a non-preferred foster family) in the good cause analysis. The BIA responded in 2016 by issuing a binding Final Rule reiterating that the good cause exception is intended only for only "extraordinary" cases. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38777, 38839 (June 14, 2016). Research conducted since ICWA's passage confirms that ICWA's strong preference for placements with family serves the best interests of Indian children, whereas the importance of maintaining a bond with a foster family is less well supported.

A. The 2016 BIA Regulations confirm that good cause is a very limited exception to ICWA's placement preferences.

Although ICWA itself does not explicitly limit the factors that may be considered when determining whether good cause exists to deviate from the

[2] The non-binding ICWA Guidelines promulgated by the Bureau of Indian Affairs shortly after ICWA's passage limited the good cause analysis to three considerations. The 1979 Guidelines stated that a good cause determination "shall be based on one or more" of: "(i) The request of the biological parents or the child when the child is of sufficient age. (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness. (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria." 1979 Guidelines cmmty. F.3. While many states, including Arizona, relied on the Guidelines in interpreting ICWA, *see Gila River Indian Cmty. v. Dep't of Child Safety*, 238 Ariz. 531, 535 ¶ 16 (App. 2015), many also held the Guidelines to be "only persuasive and neither exclusive nor binding," *Native Village of Tununak v. State, Dep't of Health & Soc. Servs.*, 303 P.3d 431, 451 (Alaska 2013).

placement preferences, many state courts recognized after ICWA's passage that to effect the law's purpose of preserving a child's ties to extended family and culture, the good cause exception must be reserved for truly *extraordinary* circumstances. *See, e.g.*, *Matter of Custody of S.E.G.*, 521 N.W.2d at 362–66 (holding that "a finding of good cause cannot be based simply on a determination that placement outside the preferences would be in the child's best interests" and that a child's need for stability was not an extraordinary need that justified deviating from the placement preferences).

Specifically, many courts were wary of claims that permanence and stability in a non-Indian foster home were sufficient to override ICWA's key substantive provision. The Minnesota Supreme Court explained, for example, that although permanence is a legitimate concern, it must not "be defined so narrowly as to threaten or substantially reduce placements in Native American homes." *Id.* at 364 (citing 44 Fed. Reg. 67586 (1979)). Similarly, California courts held that even "extremely bonded" attachments to non-Indian foster families cannot "supersede" ICWA's placement rules. *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1336–37 (2014). Utah's Supreme Court stated that bonding "cannot be the sole yardstick by which the legality of a particular custodial arrangement is judged age." *In re Adoption of Halloway*, 732 P.2d 962, 971–92 (Utah 1986). Montana's Supreme Court similarly held that ordinary bonding is insufficient to justify a non-preferred

placement unless testimony unequivocally shows a child is "certain to develop an attachment disorder" if the child were to be moved to a preferred placement. *In re C.H.*, 997 P.2d 776, 783 (Mont. 2000). The United States Supreme Court is equally clear: courts must not "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation." *Holyfield*, 490 U.S. at 54 (quoting *Adoption of Halloway*, 732 P.2d at 972).

Other state courts, however, broadened the good cause analysis into a generalized "best interests" analysis. *See* 81 Fed. Reg. at 38782 (noting state courts "differ as to what constitutes 'good cause'"); *see, e.g.*, *Native Village of Tununak v. State, Dep't of Health & Soc. Servs.*, 303 P.3d 431, 451–52 (Alaska 2013) (holding that good cause to deviate from ICWA's placement preferences may be based on "many factors" "including the child's best interests").[3] The resulting unconstrained inquiries into what home might be "best" for an Indian child were a retreat in the direction of the reasoning that had justified many pre-ICWA removals of Indian children from their families and communities, and ignored ICWA's presumption that

[3] While Arizona's pre-2016 caselaw allowed the consideration of multiple factors in a good cause analysis, even then Arizona courts acknowledged that ICWA "is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." *Navajo Nation v. Arizona Dep't of Econ. Sec.*, 230 Ariz. 339, 344 ¶ 17 (App. 2012) (quoting *Holyfield*, 490 U.S. at 50 n.24). "In other words, absent other factors amounting to good cause to deviate from ICWA preferences, keeping a Native American child with his or her community and tribe is *presumed to be in the best interests of the child* as well as the tribe and community." *Id.* (emphasis added).

it is best for an Indian child to be raised by family. *See* 81 Fed. Reg. at 38788 (explaining that "conflicting interpretations of the statute can lead to arbitrary outcomes that threaten the rights that ICWA was intended to protect"); *id.* at 38843–44 (citing public comments that "[r]estrictions on good cause are necessary to ensure courts do not disregard ICWA's placement preferences based on a non-Indian assessment of what is 'best' for the child, such as through a generalized 'best interest' analysis; Use of 'good cause' to deviate from placement preferences has become so liberal that it has essentially swallowed ICWA's mandate; Without the rule, 'good cause' leaves so much discretion to State courts that the Tribe rarely prevails in moving a child to a preferred placement after initial placement elsewhere.").

In response to these divergent state approaches, the BIA promulgated the binding 2016 Regulations, which explicitly sought to narrow the good cause analysis. *See id*. at 38840 ("By providing clear guidance on what constitutes 'good cause' to deviate from the placement preferences, the final rule gives effect to the fact that Congress intended good cause to be a limited exception, rather than a broad category that could swallow the rule."); *id.* at 38839 ("While the [final] rule provides [state courts with] flexibility, courts should only avail themselves of it in extraordinary circumstances, as Congress intended the good cause exception to be narrow and limited in scope."); *see id.* at 38782, 38788 (noting that the 1979

"nonbinding guidelines are insufficient to fully implement Congress's goal of nationwide protections for Indian children, parents, and Tribes").[4]

The 2016 Regulations limit the good cause analysis to five considerations, including the request of a parent, the request of the child, maintaining sibling attachment, "extraordinary physical, mental, or emotional needs" of the child, and lack of a suitable preferred placement after a diligent search. 25 C.F.R. § 23.132(c). Further, the 2016 Regulations clarify that the standard of proof for good cause determinations is the exacting "clear and convincing evidence" standard. *Id.* § 23.132(b). Critically, the 2016 Regulations include neither bonding and attachment to a foster family nor stability and permanence in a foster home as circumstances that may justify deviating from ICWA's placement preferences. *See id.* § 23.132(c). And although the 2016 Regulations allow good cause to be based on the extraordinary needs of the child, those extraordinary needs must somehow render a preferred placement essentially impossible, such as in a case where "specialized

[4] Arizona has explicitly recognized the binding nature of the 2016 Regulations. *See* Ariz. R. P. Juv. Ct. 111 ("The court must apply ICWA when required by law."); Ariz. R. P. Juv. Ct. 102 (defining ICWA as the "Indian Child Welfare Act, 25 U.S.C. §§ 1901 through 1963, *and* Part 23 of Title 25 of the Code of Federal Regulations ('Regulations'), including any amendments to those provisions" (emphasis added)). Confusingly, the juvenile court referred the 2016 Regulations as the "Guidelines for Implementing the Indian Child Welfare Act of December 2026" in its May 28, 2025, Order, so it is unclear whether the juvenile court understood the distinction between the non-binding Guidelines and the binding 2016 Regulations.

treatment services [are] unavailable in the community where families who meet the placement preferences live." *Id.* § 23.132(c)(4).

In drafting the 2016 Regulations, the BIA recognized that there may be some truly exceptional cases that fall outside the five enumerated considerations but nonetheless justify deviating from the placement preferences. *See* 81 Fed. Reg. at 38839. For this reason, the 2016 Regulations state that a good cause determination "should" (not "shall") be based on one of the five enumerated considerations. 25 C.F.R. § 23.132(c). But to prevent the good cause exception from again swallowing the rule, the BIA also identified some considerations that cannot—under any circumstances—constitute good cause, including "ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA," 25 C.F.R. § 23.132(e). In so doing, the BIA recognized that bonding and attachment arguments "have serious limitations" and "may mislead courts." 81 Fed. Reg. at 38846 (citing Comments of Casey Family Programs, et al., and literature including David E. Arredondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness*, 2 J. Ctr. For Fam. Child. & Cts. 109, 110–111 (2000)); *accord Holyfield*, 490 U.S. at 54 (cautioning that courts should not "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation" (citation omitted)).

B. Research confirms placing Indian children with family is best for Indian children.

Research conducted since ICWA's passage confirms that family placements are better than non-relative foster placements for *all* children. These benefits are particularly salient for Indian children, for whom extended family relationships are frequently as close and supportive as nuclear family relationships, and for whom the process of enculturation—which is more likely to happen in family placements—can be a protective factor against both historical and personal trauma. In contrast, the importance of preserving a child's bond with a foster family is far less clear.

As the *amicus* briefs of dozens of medical organizations, psychological organizations, and child advocacy organizations—including the American Academy of Pediatrics, the largest professional association of pediatricians in the world—in *Brackeen* made clear, family placements are correlated with improved physical and mental health for foster youth. *See* American Academy of Pediatrics Br. at 1, 15–17; Br. of the American Psychological Ass'n et al., *Brackeen*, 599 U.S. 255, 2022 WL 3682219, at *5, 10–24 (hereinafter APA Br.); Br. of Casey Family Programs and Twenty-Six Other Child Welfare and Adoption Organizations, *Brackeen*, 599 U.S. 255, 2022 WL 3648364, at *23 (hereinafter Casey Br.). Children placed with relatives experience greater stability, fewer disruptions, stronger mental health, and sturdier cultural identity, as compared to children placed with non-relatives. American Academy of Pediatrics Br., 2022 WL 3701711, at *16–17 (citing, among

other research, a meta-analysis of studies covering over 600,000 children finding that children placed with family experienced better outcomes across a number of behavioral health axes); Heidi R. Epstein, *Kinship Care is Better for Children and Families*, Am. Bar Ass'n (2017); Amanda Robert, *Family Members Who Step in to Care for Children Can Get Extra Support with ABA Guidance*, ABA J. (Nov. 8, 2023); Tiffany Conway & Rutledge Hutson, *Is Kinship Care Good for Kids?*, Center for Law and Social Policy 2 (Mar. 3, 2007); Marc A. Winokur, et al., *Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes*, 89 Families in Soc'y: J. Contemp. Soc. Sciences 338, 344–45 (2008).

Although ICWA was perhaps the earliest law requiring family placements for foster care and adoption, it is now widely recognized that family placement should be the default option for *all* children. American Academy of Pediatrics Br., 2022 WL 3701711 at *4, 18–19, 23; Casey Br., 2022 WL 3648364 at *10, 16, 22–24 (highlighting that "kinship placement is a universally accepted best practice"). As such, preferences for family placements have been incorporated into numerous policies, regulations, and laws. *See id.*; Child Welfare League of America, *Standards of Excellence for Adoption Services* 1.10 (2000) ("The first option considered for children whose parents cannot care for them should be placement with extended family members . . . ."); Child Welfare League of America, *Standards of Excellence for Kinship Care Services* 1.4 (2000) ("Kinship care . . . should be the first option

considered . . . ."); National Council of Juvenile and Family Court Judges, *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* 10–11 (2000) ("An appropriate relative who is willing to provide care is almost always a preferable caretaker to a non-relative."); 42 U.S.C. § 671(a)(19) (prioritizing placement of children with relatives over non-relatives for federal assistance under the Child Abuse Prevention and Treatment Act).

For Indian children, the stakes are higher. Placement outside of family frequently means placement outside of culture. *See* Byler, *The Destruction of American Indian Families* at 1; Frank Edwards et al., *American Indian and Alaska Native Overexposure to Foster Care and Family Surveillance in the U.S.: A Quantitative Overview of Contemporary System Contact*, 149 Child & Youth Serv. Rev. 106915 (2023), available at https://www.sciencedirect.com/science/article/abs/pii/S019074092300110X (noting that, as of 2023, Indian children "continue to be separated from their families by state child welfare agencies at exceptionally high rates"). Studies show that Indian adoptees raised outside their cultures suffer lifelong grief and identity loss, and as a result, higher rates of physical and mental health problems, addiction, self-injury, and suicidality. *See* Ashley L. Landers et al., *American Indian and White Adoptees: Are There Mental Health Differences?*, 24 Am. Indian & Alaska Native Mental Health Res. 54, 56–57, 65–71 (2017); Jessica E. Simpson et al., *Longing to Belong: The Ambiguous Loss of*

Indigenous Fostered/Adopted Individuals, 148 Child Abuse & Neglect 1 (2024); Joaquin R. Gallegos & Kathryn E Fort, *Protecting the Public Health of Indian Tribes: the Indian Child Welfare Act*, 12 Harvard Public Health Review 1, 2–3 (Winter 2017–2018). The symptoms of culture loss are comparable to those of post-traumatic stress disorder and include anxiety, affective disorders, and substance dependence. American Academy of Pediatrics Br., 2022 WL 3701711, at *14. Many Indian adoptees continue to struggle with identity and report feelings of loneliness and isolation into adulthood. *See* Gallegos & Fort., *supra*.

Further, many of the adverse childhood experiences that cause Indian children to be placed in foster care in the first place are consequences of the United States's long-running policies of discrimination and assimilation. American Academy of Pediatrics Br., 2022 WL 3701711, at *13–14 (noting that scholars and the U.S. government have documented the connection between efforts to destroy Indian cultures, including the boarding school system, and present-day exposure to adverse childhood experiences, trauma, and mental health challenges). The effects of this intergenerational trauma can be magnified in each successive generation of children that is removed from family. *Id.* at *9, 13–14, 20–21. For Indian children, therefore, placement with non-relatives adds to the cumulative intergenerational and historical trauma that began with a century of systematic removal. Simpson, *supra*, at 2.

Indian children placed with family, on the other hand, benefit in numerous ways. One is that in many Native American cultures, "family" denotes an extensive multi-generational kinship network that reaches far beyond Western concepts of the nuclear family. American Academy of Pediatrics Br., 2022 WL 3701711, at *5, 19–20; APA Br., 2022 WL 3682219 at *19; *see* H.R. Rep. No. 95-1386, at 10 (1978) ("An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family."). A placement with extended family therefore can preserve the type of family relationships that a child had in their family of origin. Indian children placed with family are also "more likely to have contact with their parents, to be placed with siblings, and maintain family connections." Annie M. Francis, *Implementation and Effectiveness of the Indian Child Welfare Act: A Systematic Review*, 146 Child and Youth Serv. Rev. 1, 13 (2023). Maintaining these family relationships has been shown to contribute to the health and wellbeing of Indian children. American Academy of Pediatrics Br., 2022 WL 3701711, at *5.

Placement with family also furthers the process of enculturation—the process of learning about and adopting features of one's cultural heritage—because Indian people are best positioned to transmit shared norms, values, and cultural knowledge, and because relatives of Indian children are more likely to live in Indian communities. APA Br., 2022 WL 3682219, at *5, 10, 18. Placement with non-

relative non-Indians—even the most well-intentioned—is less likely to support the same positive identity formation. *See Native Village of Tununak*, 303 P.3d at 437.[5]

Strong identification with one's culture is linked to significant mental health benefits including "positive self-concept, internal motivation and optimism, and social connectedness, which all contribute to success in adulthood." American Academy of Pediatrics Br., 2022 WL 370711, at *6. Substantial data shows that a child raised in his culture has a greater chance of developing a healthy sense of independence, self-reliance, and resilience. American Academy of Pediatrics Br., 2022 WL 3701711, at *25; APA Br., 2022 WL 3682219, at *13–15. One 2006 study concluded that the *strongest* predictor of higher levels of resilience in Indian children was enculturation. APA Br., 2022 WL 3682219, at *14. Reunification with relatives and tribes after a separation has also been shown to restore long-term well-being,

[5] The Alaska Supreme Court quoted Cheryl Offt, the ICWA Director for the Association of Village Council Presidents, as saying:

> Yup'ik elders say that you are not born Yup'ik, you are raised to become Yup'ik and to become Yup'ik, you have to be raised within the context of the Yup'ik culture, you cannot become Yup'ik by taking a class in Yup'ik language. You cannot become Yup'ik by going to dance class. You cannot become Yup'ik by going to the museum. Being Yup'ik, being raised to become Yup'ik, is a lifelong process that involves things that are much deeper, activities, sayings. . . . It's a way of being in this world, being with other people, being within your environment.

Native Village of Tununak, 303 P.3d at 437 (cleaned up).

Ashley L. Landers et al., *The Hole in My Heart is Closing: Indigenous Relative Reunification Identity Verification*, 148 Child Abuse & Neglect 1, 4, 6–9 (2024), although loss of the opportunity to learn about culture from relatives during childhood may still have significant consequences, APA Br., 2022 WL 3682219, at *17, 22.

The positive impact of "cultural connectedness and family connectedness" for Native children cannot be overstated. *See* Gallegos & Fort., *supra*.. These benefits are particularly important for Indian foster youth, who have already experienced adverse childhood experiences, because "[e]nculturation contributes to the resiliency of Indian children, allowing them to better withstand difficult life events and reducing the prevalence of negative health outcomes—including depression, substance use, and suicide . . . ." APA Br., 2022 WL 3682219, at *10; American Academy of Pediatrics Br., 2022 WL 370711, at *11. In short, "[e]xperts now agree on one overriding and universally applicable principle: Children are best served by preserving and strengthening their family and community relationships to the fullest degree that safety allows." Casey Br., 2022 WL 3648364, at *8. The American Academy of Pediatrics has gone as far as to say: "The overall development and wellbeing of an [Indian] child separated from the child's parents *depends* on maintaining connection to the child's extended family and culture." American Academy of Pediatrics Br., 2022 WL 370711, at *26.

C. Research on bonding and attachment is not conclusive and does not support prioritizing foster over family placements.

In contrast, the literature does not clearly support the assertion that disrupting a child's bond with a foster family will cause long-term harm. One article, describing how formal attachment theory has been misused in child custody proceedings, explains that "[a]ttachment appeals as an intuitive, almost romantic theory" but that it has arisen "more from intuition than science. Attachment research is evolving and complex, and its findings can be contradictory[]." Pamela S. Ludolph & Milfred D. Dale, *Attachment in Child Custody: An Additive Factor, not a Determinative One*, 46 Fam. L.Q 1, 2, 3 (2012). When attachment theory is wielded in child custody cases, the arguments sometimes fail to account for rapidly evolving understandings of the social and emotional lives of young children and specifically fail to account for young children's resilience. *See id.* at 5–6. Importantly, research has not shown "a long-term link between attachment status and social and emotional outcome variables . . . ." *Id.* at 7.

"Bonding" is an even murkier concept. Bonding is "a term that is bandied about regularly but has no consensual definition within psychology." *Id.* at 17. Early theories about the importance of bonding have been debunked and "[t]here is currently no commonly used assessment tool for 'bonding' or even a common understanding of the meaning of the term." *Id.* But because bonding, like attachment, feels intuitively meaningful, the concepts of bonding and attachment can be

misleading to courts or be given undue weight. *See* Arredondo & Edwards, *supra*, at 110–11.

Scholars caution that if bonding and attachment are to be used in court, the theories should be advanced by experts who "should be able to explain how they are measuring relationship constructs, the psychometric properties of any formal measure, what the empirical support is for the approach, why the evaluator or clinician is using it in this case, and what its limitations are in this case." Ludolph & Dale, *supra,* at 39. They caution that credence should not be given to "extremely casual approaches" that lack this rigor.[6] *Id.*

While child welfare experts acknowledge that moving from one placement to another may be difficult for a child, they encourage decision-makers to balance that temporary pain against the well-documented long-term benefits of placement with family. *See* Casey Br., 2022 WL 3648364, at *31; Mikayla Jones, *Heads Held High and Hands Holding Hope: The Victory and Vulnerabilities of the Indian Child Welfare Act After* Haaland v. Brackeen, 103 Neb. L. Rev. 65, 88–89 (2024). As the

[6] Relying on evidence of bonding or attachment in analyzing whether there is good cause to deviate from ICWA's placement preferences carries the additional danger of incentivizing non-preferred placements to delay proceedings until a "safe zone" is reached, where it can be argued that ordinary bonding has somehow become strong or long-lasting enough to override ICWA. *In re Alexandria P.*, 1 Cal. App. 5th 331, 353 (2016); *Holyfield*, 490 U.S. at 54 (cautioning that courts should not "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation" (citation omitted)).

American Academy of Pediatrics has said, "A single-minded determination that a child should stay with a particular family solely because of attachment to that foster family . . . would be contrary to the current best practices for health and wellbeing and the best interests of [Indian] children." American Academy of Pediatrics Br., 2022 WL 3701711, at *26–27.

III. Ordinary Bonding, Such as the Type at Issue in this Case, is Not an Extraordinary Need Sufficient to Override Placement with Family.

The research is clear: family placement for Indian children is critical to their well-being, and assertions that an Indian child has bonded or attached to a non-relative non-Indian foster home do not change the fact that placement with family will generally be in the child's long-term best interests.[7] The law is in accord: the 2016 Regulations do *not* list bonding or attachment as factors that may be sufficient to establish good cause to deviate from the placement preferences; bonding and attachment are only mentioned in a factor that may not be considered.[8]

An Indian child's placement may, however, legitimately deviate from ICWA's placement preferences if the child has extraordinary physical, mental, or

[7] State Supreme Courts have acknowledged this research and valued it heavily when considering placements outside an Indian child's family. *See, e.g.*, *Matter of Dependency of Z.J.G.*, 196 Wash. 2d 152, 168–69 (2020) (emphasizing that Indian children raised outside their cultures experience unique identity loss and poorer long-term outcomes).

[8] Although Arizona appellate courts have not had an opportunity to rule on whether bonding or attachment may be considered in a good cause analysis since the 2016

emotional needs that require a non-preferred placement. 25 C.F.R. § 23.132(c)(4). But that narrow provision is not in play here: to the extent bonding was established here to any degree of scientific reliability, this case presents merely the type of ordinary bonding with a foster family that is insufficient to justify keeping an Indian child out of the home of a loving relative who can clearly meet his needs.

Courts applying the "extraordinary physical or emotional needs" exception to ICWA's placement preferences have emphasized that the Indian child's needs must be truly exceptional for good cause to exist. For example, the Alaska Supreme Court found extraordinary medical needs had been established in a case where testimony showed the only pediatric nephrologist in the state was located hours away from the preferred placement, and no other hospital could provide the dialysis required by a child's life-threatening condition. *Cora C. v. State, Dep't of Health & Soc. Servs.*, 2018 WL 2979472, at *2–4 (Alaska June 13, 2018). By contrast, the Supreme Court of Montana has held enduring but manageable health conditions—such as fetal alcohol effects or risks of attachment disorder—to be insufficient to justify deviating from ICWA's placement preferences. *In re C.H.*, 997 P.2d at 782–

Regulations went into effect, Arizona courts generally recognized even before 2016 that bonding or attachment alone was insufficient to outweigh ICWA's placement preferences. *See, e.g.*, *Gila River Indian Community*, 238 Ariz. at 536 ¶ 21 (without deciding the issue but noting with approval that the Superior Court had not solely relied on the Indian child's bond with her foster family in finding good cause to deviate from ICWA's placement preferences as bonding was just one of several factors considered).

85 (applying the "extraordinary needs" exception to the placement preferences under the 1979 Guidelines).

Exceptional medical circumstances can also be a factor in determining the suitability of a preferred placement. In *Taryn M. v. Department of Family & Community Services, Office of Children's Services*, the Indian child had a severe congenital disease and required a bone marrow transplant. 529 P.3d 523, 526 (Alaska 2023). The surgery made the child more susceptible to infection, requiring a trip to the hospital for any fever, and thus unable to attend daycare. *Id*. Neither the Office of Children's Services ("OCS") nor the preferred tribal placement could find childcare that would accommodate the child's risk of infection, so OCS placed the child in a medically trained foster home. *Id*. OCS eventually determined the preferred placement was unsuitable to care for the child after a series of concerning events, including the placement taking the child to church and giving her Tylenol to treat a fever instead of taking her to the hospital. *Id*. at 528. The Alaska Supreme Court found good cause to deviate from ICWA and deemed the preferred placement was unsuitable due to her disregard for the medical needs of the child, as "it would be clear error or abuse of discretion to rule that a person who is unwilling to abide by medical providers' recommendations for such a medically fragile child is suitable." *Id*. at 533.

In this case, M.K. does not have physical, mental, or emotional needs that are in any way extraordinary or outside the norm for foster youth. While M.K. was born substance exposed, his only supportive service need appears to be early intervention therapy sessions a few times per month, and those therapy sessions are not necessarily conducted in person. *See Intervenor Appellants' Joint Opening Br.* at 15. M.K.'s relatives live in the Phoenix area, where that need can certainly be met, and the relative placement already attends M.K.'s monthly care team meetings. *Id.* at 17. Moreover, M.K.'s relatives have experience meeting exactly this type of need: their son was born severely premature and required speech, occupational, and physical therapy sessions. *Id.* M.K. also appears to have a warm relationship with his foster parents, but that is what one would hope any foster parent would offer any foster child, so that should not be confused with an extraordinary need sufficient to keep an Indian child out of a relative's home.

M.K. has a home with relatives who love him available to him. He has been building a relationship with them for over a year and a half. *See id.* at 9–10. These relatives will keep him connected to his family and culture. His relationship with his foster parents, while important in a temporary placement, is not *extraordinary*, and does not create the type of physical, mental, or emotional need that would justify denying M.K. a chance to live with relatives and the cultural connection he will develop in such a placement.

CONCLUSION

This Court should reverse the Superior Court's order finding that M.K.'s ordinary bond with his foster family is good cause to deviate from ICWA's placement preferences. M.K. should be placed with family.

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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14(a)(1), incorporated by reference in Ariz. R.P. Juv. Ct. 607(b), the undersigned certifies that this Brief is double-spaced, uses a 14-point proportionally spaced typeface, and contains 7,086 words, excluding the tables of contents and authorities, the certificate of service, and this certificate of compliance.

/s/ Wouter Zwart
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CERTIFICATE OF SERVICE

On February 19, 2026, Attorneys on behalf of Amici Curiae e-filed their proposed Brief of *Amici Curiae* Fort McDowell Yavapai Nation, Gila River Indian Community, Navajo Nation, Pascua Yaqui Tribe, Salt River Pima-Maricopa Indian Community, and Tohono O'odham Nation in Support of Appellants with the Court of Appeals, Division Two, using e-filer, and on that same date, electronically served the same via e-filer on the following at the email address on file with the Court:

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