Supremes asked to return ‘Indian’ girl to only family she’s known

1/64th Native American blood forced child into restrictive, 'race-based' adjudication

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The U.S. Supreme Court, which only a few years ago in the case “Adoptive Couple v. Baby Girl” exempted a child with Indian heritage from the onerous burdens of the federal Indian Child Welfare Act, now is being asked to ride to the rescue of another injured child, Lexi, who earlier this year as a 6-year-old was ripped by social workers from the arms of the only parents she’d ever known.

Solely because she’s 1/64th Indian.

“It goes without saying – but should not go unsaid – that the Constitution mandates equal legal treatment of all citizens, regardless of their racial ancestry,” explains a friend-of-the-court brief filed on behalf of Lexi’s case by the Goldwater Institute. “ICWA, however, establishes a separate set of rules for foster care, adoption, and protection for abused or neglected children, if those children are deemed to be ‘Indian children'” under the law.

“These separate rules include, but are not limited to: different jurisdictional standards that authorize tribal courts to decide cases without the ‘minimum contacts’ constitutionally necessary for personal jurisdiction … rules requiring that abused and neglected children be reunited with the birth parents that have abused or neglected them … greater evidentiary burdens imposed on child protection workers who seek foster care for Indian children … or to terminate parental rights in preparation for adoption.”

The brief also points out that the ICWA specifies “race-based placement preferences for foster care or adoption of Indian children.”

Lexi, now 7 years old, was separated from her birth parents by the courts based on their drug convictions while she was an infant and bounced among several fosters homes for months before arriving at the home of Rusty and Summer Page. She ultimately overcame behavioral and attachment issues there and learned to lean on them as “daddy” and “mommy.”

While initially serving as foster parents, the Pages later decided it would be in the child's best interest to be adopted. But because she was determined to be 1/64th Native American, the California courts, responding to demands from the Choctaw tribe, ordered her taken from the Pages and delivered to "non-Indian second step-cousins" of her father.

The petition asking the U.S. Supreme Court to review the case was filed after the California Supreme Court delivered an unpublished opinion in which it refused to intervene.

The Pages are being represented at the high court by Washington, D.C., attorney Lori Alvino McGill, who also worked on the "Adoptive Couple v. Baby Girl" case.

"The Pages are hopeful that the Supreme Court will stand up for Lexi's rights, and the rights of similarly situated multiethnic children," McGill said in a statement. "The state courts have struggled for decades to figure out how ICWA should apply – and if it should apply – in cases like this one, where the child has not been removed from an Indian family or community."

The law's original intent was to protect the heritage of Indian tribes by returning to the community children who previously might have been moved away. However, in Lexi's case, she's never had been an enrolled member of a tribe, never has lived on a reservation and has grown up so far without any of those influences.

"The absolute best gift we could get this holiday would be the news that the Supreme Court will hear our case and help us bring Lexi home," Rusty Page said in comments released to the media. "Lexi celebrated her seventh birthday earlier this month away from her entire family. No child should ever have to experience the heartache and trauma that Lexi has been through."

It was the Choctaw Nation of Oklahoma that successfully exercised exclusive control over the little girl's future. The tribe initially said it was working for Lexi's best interests but refused WND requests for comment.

The law establishes placement "preferences" that must be followed unless there is "good cause" to depart from them. So children determined to be Indian mostly are placed with an extended family member, a member of the tribe or another "Indian" family.

In Lexi's case, the tribe and county officials had agreed there was "good cause" to depart from ICWA and place Lexi with the Page family as a foster child when she was in need of a home.

However, when the issue of adoption arose, the tribe balked on its earlier determination.

Its leaders insisted Lexi be moved to "step-second cousins who had never met Lexi."

Now it's been more than six months that Lexi has been prevented from seeing or speaking to the family that raised her.

Court rulings have not been consistent on the application of the ICWA.

"The courts are also all over the map when it comes to determining whether the law's 'good cause' exception applies when it is clearly in the child's best interests to depart from ICWA's placement preferences. Only the U.S. Supreme Court can provide a definitive interpretation of

this federal law and prevent the arbitrary and devastating outcomes we have seen in many cases," the case filing said.

Lexi's lawyers are asking the Supreme Court, which could rule within weeks whether it will take the case, to continue its earlier review of the ICWA. At that time, the high court said the act's "parental termination provisions may not be invoked by an Indian parent who never had custody under state law." The court further held that the act's placement provisions – which typically require placement with a relative, a member of the child's tribe, or any "other Indian" – were inapplicable to baby girl's adoption proceedings, because no preferred placement had come forward at the relevant time.

"The court recognized that a contrary reading of the act 'would raise equal protection concerns,' … because it 'would put certain vulnerable children at a great disadvantage solely because an ancestor – even a remote one – was an Indian," the brief explained.

But the petition notes that opinion left undecided, and lower courts have not agreed, "Whether ICWA and its placement preferences apply where the child was not removed from an existing Indian family. Here, application for the placement preferences resulted in the removal of a child from an otherwise fit adoptive home where she had resided for more than four years. The child has never been domiciled on Indian lands, and neither the child nor her parents had any pre-existing connection to a tribe beyond ancestry."

While California required the girl to be removed from her home, "in at least four other states, ICWA would not have dictated this tragic outcome, because it has been construed as inapplicable to children who have not been removed from an Indian parent or community," the petition states.

It explains Lexi's biological mother had no Indian heritage and her father, who was in jail for most of her early children, denied having any.

It was Lexi's father's mother who said he was part of the Choctaw Nation.

Goldwater experts, joined by those from the Cato Institute, asserted that under the court decisions in California, "Simply because these children have an Indian ancestor, they are deprived of the right to an individualized determination of their case, of the right to equal-non-discriminatory treatment, and of other basic constitutional rights.

"Three years ago, this court warned that it 'would raise equal protection concerns' if ICWA … were used as a 'trump card' to 'override … the child's best interests' 'solely because an ancestor – even a remote one – was an Indian,'" the group said.

"This is that case. Lexi has lived with petitioners for four of the six years of her life. She has no cultural, social, or political connection to the Choctaw tribe, and has never resided or been domiciled on tribal lands. Her only connection to the tribe is biological: her great-great-great-great grandparent was a full-blooded Choctaw Indian.

"If Lexi were of any other ethnicity, petitioners would be free to seek adoption, and California courts would apply the ordinary 'best interests of the child' test in deciding whether to grant that petition," the filing said. "And Lexi's 'fully developed interest in a stable, continuing, and

permanent placement with [her] fully committed care-giver[s]' would be given extraordinary weight in the best-interests determination."

It is only "the DNA in her cells" that calls for her to be subjected "to a separate-but-equal set of rules – actually, separate and substandard – that empowers the Choctaw Nation of Oklahoma to force her removal from the petitioners, and to place her with *non-Native non-relatives* in Utah, simply because the tribal government deems that placement preferable," the brief charged.

The filing pointed out that the ICWA provisions are based solely on race and they discourage non-Indians from becoming foster care-givers for such children.

"There is only one approved Native American foster family in all of Los Angeles County, with its population of 10 million," the brief explains.

The American Bar Association recently explained Lexi ended up with the Pages after courts removed her from her biological parents and two subsequent foster families.

On its website, the Goldwater Institute recounted the similar case of Laurynn Whiteshield and her sister, Michaela.

"Laurynn spent most of her life in a home where she was loved and protected. From the time she was nine months old, she and her twin sister, Michaela, were raised by Jeanine Kersey-Russell, a Methodist minister and third-generation foster parent in Bismarck, North Dakota. When the twins were almost three years old, the county sought to make them available for adoption. But Laurynn and Michaela were not ordinary children.

"They were Indians.

"And because they were Indians, their fates hinged on the Indian Child Welfare Act, a federal law passed in 1978 to prevent the breakup of Indian families and to protect tribal interests in child welfare cases.

"The Spirit Lake Sioux tribe had shown no interest in the twins while they were in foster care. But once the prospect of adoption was raised, the tribe invoked its powers under ICWA and ordered the children returned to the reservation, where they were placed in the home of their grandfather in May 2013.

"Thirty-seven days later, Laurynn was dead, thrown down an embankment by her grandfather's wife, who had a long history of abuse, neglect, endangerment, and abandonment involving her own children," the report says.

William Allen of the Coalition for the Protection of Indian Children and Families, who is a critic of the law, said: "I would go so far as to call the legislation a policy of child sacrifice in the interests of the integrity of the Indian tribes, meaning the end has nothing to do with the children. It has everything to do with the tribe. To build tribal integrity, tribal coherence, the law was passed in spite of the best interests of the children."

The campaigners working on behalf of Lexi have created a Save Our Lexi" website with details of the battle, where more than 127,000 people have signed a petition on her behalf. There also is posted an online ICWA fact sheet and the Supreme Court Docket for the case.