No. 12-399

In The
Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF THE HONORABLE ABBY ABINANTI, CHIEF JUSTICE OF THE YUROK TRIBAL COURT AS AMICA CURIAE IN SUPPORT OF RESPONDENT BIRTH FATHER AND RESPONDENT CHEROKEE NATION

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INTEREST OF THE AMICA CURIAE[1]

The interest of the Amica Curiae in this case is the protection of the children of tribal nations within the borders of the United States. This Amica Curiae is an enrolled member of the Yurok Tribe who is the Chief Justice of the Yurok Tribe.[2] She was reportedly the first California Tribal woman to become a member of the State Bar of California and when appointed by the San Francisco Superior Court as a Commissioner in 1994, became the first California Tribal person to serve as a California judicial officer. Her assignment during her seventeen-year tenure with the San Francisco Superior Court was the United Family Law Division where her primary calendars were dependency and delinquency. She is the only tribal person to practice law in the dependency courts of California before and after passage of the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963. Prior to the passage of the ICWA, she represented tribal parents, and after the passage of the ICWA, she also represented Tribes.

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[1] Pursuant to Supreme Court Rule 37.6, amica affirms that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the amica made such a monetary contribution. All parties have consented to the filing of this brief through letters of consent on file with this Court.

[2] The largest tribe in California.

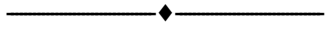
This Amica has studied and is familiar with the legal history and relationships of tribal people and the invaders who came to call themselves Californians, and she is a student of the constantly changing area of law designated Indian Law, Federal/State/Tribal. She brings to her work the responsibilities of a Yurok adult who is now an elder in a world renewal culture[3] that presupposes the obligation to protect the values of the family/village/Tribe and their world.

That obligation requires that the stories/knowledge of the time before ICWA be set forth for the consideration of the Court that will decide for the Yurok nation our relationship to our children who have suffered when parents/guardians have been overcome with the problems of sorrow and fail to meet their parental responsibilities. It is not only for Yuroks and Yurok families that the Court will decide, the Court decides for all tribal nations. While not able to speak for all Nations, the Chief Judge is not relieved of the responsibility to try to protect all. She is required to tell the story so that all may know that even if we try and fail, we did not fail to try.

[3] "We are a world renewal people. We are here to heal and renew the earth for everyone, not just Yurok people. That is our obligation." Chris Peters, Yurok Ceremonial Leader.

SUMMARY OF ARGUMENT

This Court is required by the dictates of the ICWA, the facts that led to the enactment of the Act, and the continuing bias against Indian Nations to protect the rights of the Tribe and Tribal father herein. Principles of justice and the law of this land have rightly given needed protection to Indian children; that need and those principles require the Court to continue to extend this protection to all Indian tribes, parents, and children. The Arguments concentrate on California as a "case study" of why the ICWA was needed and is still needed. The Arguments hold true for all of Indian Country.



ARGUMENT

1. The Treatment of the California Tribal People by the Invaders Seared into the Fabric of our Relationship a Pervasive Ability for the Invaders and their Heirs to "See" Tribal People as Not as Good.

Internationally, countries are struggling with reconciling their desires to see themselves as honorable when they have a history of dishonor, particularly to the original inhabitants of the lands the current residents have come to see as belonging to them.[4] California has an exceptional record of dishonor, even

[4] See particularly the work of the United Nations Permanent Forum on Indigenous Issues.

among the many states of this union, which unfortunately has resulted in actions/beliefs being woven into its justice system, creating a foundation that historically has had difficulty self-correcting. California's troubled relationship with its tribal population is chronicled in the recent work of Brendan C. Lindsay who sets out the facts commenting that "The way Euro-Americans naturalized atrocity as the way to relate to Native peoples allowed the evidence to be preserved rather than destroyed, an ironic silver lining in an otherwise dark history of the attempts to eradicate Indians in California or at least do nothing to prevent such horrors."[5]

This particular genocide depended on a confluence of negatives. California was invaded by emigrants driven to find gold. Most were disappointed in their effort and later turned to the occupations of settlers, ranchers, farmers, loggers and merchants, all of which required acquisition of lands. These invaders came with a firm belief in manifest destiny (a belief shared with the entire country) that incorporated the view that being Indian was "representative of a condition" . . . and that condition was savagery. The supposed finding of savagery was based on generalizations and assumptions of inferiority blended with greed (based on the strong belief that tribal people had a natural inability to properly exploit

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[5] Brendan C. Lindsay, *Murder State: California's Native American Genocide, 1846-1873* 359 (2012).

"their" lands and resources). These views created a potent mixture that allowed for the extermination of people solely based upon membership in the group called Indians, rather than for the punishments/ consequences for any finding individual guilt for crimes committed.

Perhaps the most surprising revelation in the discussions presented by Lindsay are the twin facts that thousands of "Americans" coming to California hated and feared tribal people without ever seeing or interacting with a tribal person and when confronted with opposing experiences (e.g., favorable/friendly/ supportive interactions with tribal people) were unable/ unwilling to alter their hatred-fueled personal beliefs. This hatred, painful to see even from afar, was used to excuse mass murder, slavery, and the expropriation of property real and personal. Particularly germane to this discussion, it also justified the stealing/ enslaving of tribal children to serve the needs/desires of the emigrant non-tribal population. Said actions were legally and morally sanctioned.

The undisputed results of the deadly mix are starkly illustrated in the following table:

Population Estimates for California, 1848-1910[6]

Year	California Native Population	U.S. Native Population	California Non-Native Population
1848	150,000	n.d.	15,000
1850	n.d.	400,764	165,000
1860	35,000	339,421	379,994
1870	30,000	313,712	560,247
1880	20,500	306,543	864,694
1890	16,624	248,253	1,213,398
1900	15,377	237,196	1,485,053
1910	16,371	265,683	2,377,549

Inevitably it must come back to the leaders, the people who have the responsibility, to set the tone and to lead. These leaders chose not to fulfill their leadership responsibility but instead to cater to the electorate and their own perceived self-interests. The democratic institutions ALL citizens and non-citizens of this Country are encouraged to rely upon for guidance failed in moral/legal leadership by creating legal institutions that stood for and purposefully supported evil, disguised as legal precepts. Serranus C. Hastings, the first chief justice of the California State

[6] Sources: Paul Stuart, *Nations within a Nation: Historical Statistics of American Indians* 52, 54, 57 (1987); Richard S. Hyslop, Crane S. Miller, *California: The Geography of Diversity* 10 (1983); Albert L. Hurtado, *Indian Survival on the California Frontier* 194 (1988); Russell Thornton, *American Indian Holocaust and Survival: A Population History Since 1492* 109 (1987); James J. Rawls, *Indians of California: The Changing Image* 171, 214 (1984). Data exclude Native peoples of Alaska and Hawaii.

Supreme Court, its third attorney general, and considered the founder of California law and order, was one such failure. He was a wealthy man and with an endowment created Hastings School of Law in San Francisco. Today, Hastings is part of the University of California and is an active and respective institution. As to Serranus C. Hastings, Lindsay notes,

> Indeed Hastings and many others used the democratic process and the republican government to call for and execute a massive genocide of 'Indians' during the second half of the nineteenth century. Hastings and his fellows committed, directly and indirectly, some of the foulest depredations that men have committed against their fellow men in human history, and they did so openly and under the color of authority, legally, and in the name of freedom and democracy, with the countenance of the silent majority of the non-Indigenous population acting as interested by apathetic bystanders. In fact the landed interests of men like Hastings formed the central motive for genocide in California.[7]

The first governor of California Peter H. Burnett was convinced that the "inevitable destiny" of Native Americans was extermination. Equally important was his belief that to abandon the push to exterminate would be to ignore his constituency's demands upon him as the top elected representative. His

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[7] Lindsay, *supra*, at 2, endnote omitted.

approach set the tone for successive governors. Governor Burnett and his successors approved wave after wave of private militias who were fielded in supposed moves to protect settlers but who in fact engaged in massacres of unprecedented magnitude, to protect their self-interests, specifically their economic interests.

In the beginning of the Gold Rush, the lust for gold combined with a huge influx of emigrants created a workforce void; i.e., California became labor-starved. Everyone was rushing to the gold fields and no one was left to do the necessary work away from the gold fields. Those that were left demanded high wages to justify not joining the rush. Into the void the State enacted Section 20 of *An Act for the Government and Protection of Indians*, Chapter 133, Statutes of California, 1850. The Act permitted low-cost Indigenous laborers to fill the void and they became the labor force needed to run the state while the majority of emigrants were consumed with gold fever.

Many of those laborers were child "apprentices" whose indentured status was sanctioned by law and approved by California Courts. Supposedly, apprenticeships ended at majority, but the practice was made more onerous by the 1863 repeal of Section 3 of Chapter 133. When the apprenticeship code was repealed, hundreds of Native American children were allowed to continue to live and work in white households via child guardianship laws. The information available as to how these children were placed in those white homes includes the murdering of parents

and the stealing of children from adults not able to offer armed resistance to slavers who sold such children for profit. Kidnapping and enslavement flourished because of the function of demand. There is little data available to detail the magnitude of the lost children or the lost childhoods of those who were able to return. Surviving data includes the following and should not be taken as illustrative of the depth of the problem.

Native Children Living in Non-Native Households[8]

Year	Children under 5	Children under 17
1863	n.d	4,522
1864	n.d.	5,987
1865	n.d	5,920
1866	427	1,629
1867	578	1,809
1868	324	1,558
1869	295	1,558
1870	382	1,551
1871	254	1,561
1872	247	1,526
1873	322	1,392
1874	206	1,348
1875	262	1,348
1876	290	1,405
1877	241	1,291
1878	372	1,552
1879	379	1,463

[8] Sources: Annual and biennial reports of the superintendent of public instruction of the State of California, *Journals of the Senate and Assembly of the State of California*, 1864-1880.

There are many more examples of wrongdoing on the part of California individuals and institutions, from the mass killing of unarmed Wiyots on Indian Island in Humboldt County to the failure of the Senate to ratify 18 treaties; treaties that were subsequently "hidden" and did not reemerge until 1905 to the embarrassment of the Federal Government. These points are important but they are but summaries for the grief, the grief of nations, including some who failed to survive, as documented by the anthropologist Theodora Kroeber in *Ishi in Two Worlds: A Biography of the Last Wild Indian in North America*.[9] I have never been able to read this important work as I cringe at the pain of someone who was the last of his people. To me it is an unimaginable pain. Could I have tolerated the pain of being a parent of a stolen child? Some Yurok women friends and I were talking about the numbers of children taken and the parents left behind and we knew that if the parent was present at the taking they were dead, or they became as dead. The telling of the story to the family is unimaginable. And the child who saw the parent killed . . . If I sit quietly I can hear the screams, I can hear the ancestors screaming, "Take anything, take it all, but do not take the child, not the child. Please not the child."

I know my people, my ancestors and I know what they would say. I can hear them say it. I know that

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[9] See Theodora Kroeber, *Ishi in Two Worlds: A Biography of the Last Wild Indian in North America* (1961).

some of the old people who were alive when I came to this place were there. Some of them saw or heard, some of them had family ripped apart, some of them knew slaves, knew us as slaves. And some of the old people still living knew the stories of the slaves. Some of the slaves ran away and came home. I have heard and read accounts of our ingratitude shown by running after all we were given, running home. It is not long and far away for us. We are not that sort. The pain is here in our hearts, our mountains, our high country, the River.

Our sorrows come from these times. And now these sorrows have become our failures. We now have a joint responsibility, the tribal and the non-tribal people. We each own a horrible part of the failure. Nothing I say here or anywhere is meant to abrogate personal, family, village, or our Nation's responsibility for the state of our families, or for what is currently happening to our children. But it is not solely ours. And it is incumbent on each to act with honor and responsibility as we move forward.

2. Having Survived Genocide in Tribal Homelands Across the Country, Tribal People Argue that this Court Must Not Cloak this Century's Desire for Tribal Children in False Claims.

The ICWA came into being because the United States was shamed by its treatment of Indians, more specifically Indian children in the few hundred years

since the invasion. It is a shame many would argue belongs to the past, to a time distant from all of us now living. There is no more wholesale stealing of children for slaves/indentured apprentices or holding children hostage so that families would starve if they did not surrender them to the Indian Boarding Schools. Instead in the recent decades prior to the enactment of the ICWA the arrogance/greed has remained in the guise of "the best interest of children." Best interest was defined via a cultural lens that viewed culturally based child rearing differences and poverty to be equated to neglect.

The States having thus defined best interest so as to allow for the separation of Indian children from their Nations, extended family organizations (clans/villages) and families, used Indian children to again fulfill a demand for children, for our children. The demand continues. Today non-tribal people still seek our children. They want to raise our children and in doing so identify themselves as better able, better parents, and, in the instant case, better than the Indian father. By our relationship/identification with the father, he and we are portrayed as victimizing those who took his child. To justify this view, they are required to label us as bad, as less than others; who else would not deserve to have their children? That is the implication. The bias found in the emigrants who came to California, is now being played out in today's press much as it was by the press in Governor Burnett's time, as the media heaps sympathy upon the kidnappers and those who would subvert the law.

(The early apprenticeship law forbade the kidnapping of children, but there was no enforcement of that prohibition.) The bias that festered in non-tribal people in the 1800's, even when presented with experience(s) inconsistent with those beliefs, lives today in many places and underscores our relationship with non-tribal people and the governments they have formed, particularly the local state and county governments. When "facts" are viewed through the lens of bias belief systems, tribal children can be wrongfully used to fulfill the non-Indian demands for children.

Very few people, if any, will admit to allowing a negative bias to dictate their behavior. In the mind of the biased, that bias is converted into, a duty that must be discharged toward others who are less able or less willing to conform to what is seen as proper behavior. They believe that they are saviors, the right doers.

In this case, the ongoing representational case of stolen Indian children, an increasing number of Indian people know the language of the oppressors, are increasingly educated in the oppressors' schools, are demanding that our children not be "legally" kidnapped, and are fighting back.

The ICWA brought squarely to the table the fact that state social welfare systems had become the new purveyors of Indian children. Protected by law, state social welfare agencies had supplanted the vigilantes and cavalry of the last centuries, who had also been

protected by law. The goals were the same: Take the children, and take them from their parents/families/communities/Nations. All the taking was assumed to better their situations, to improve them and their lot in life, to rid them of the stigma (as much as possible) of their Indianess.

It is important to remember that we did not fight alone, we had the strength of our ancestors, who we believe guide us; the strength of our places, beliefs and practices; and the strength of our Nations. And we had new friends, friends who had taken responsibility, as humans should, and said: No More! It was a courageous stand for many, and many were disparaged for it. But in the end the ICWA became the law of the land. There is no more justification for taking our children from us now than there was in the time of prior kidnappings. Does that mean we can all parent? Of course not. The reality is that the "sorrow" has come and we must look, as all besieged nations must, toward caring for our children. But our sorrow does not allow or justify taking from us our responsibility for our children.

Many people want children but that wanting cannot be legally allowed to overwhelm the rights of Indian Nations and of those Nations' children. Tribes have and will continue to place children with friends who are not native but it is by their decision, and it is truly individualized. We are bi-cultural, and we can and will continue to make those decisions to place with non-tribal friends. It is our right to do so. It is not acceptable to Indian people to fail to see us as

Nations entitled to control our own fate. It is essential to any Nation's survival.

3. Returning to the Time Before the Indian Child Welfare Act is to Weaken Our People, Our Nations, and to Place us at the Mercy of Those Who Have an Ongoing History of Justifying Kidnapping Our Children.

I was there in a way you were not. It is my responsibility to tell you, to tell the story. It is not one I like to remember. I do not like to see humans, any humans do horrible acts, and I turn away as do all. But you must see. I was in the Courts of California and New Mexico. I saw your lawyers and your Courts. I saw/felt the tears of my people as they were subjugated. I felt my own anger, anger as a Yurok, as a lawyer, because I too had gone to school, to your law school and wanted to believe in justice. To believe that what the law deems as discrimination, usually in retrospect, only needed to be exposed in a Court for it to fade in the light of justice.

Many times Indian parents did not even fight. Their lawyers convinced them before the hearing that they would lose so why bother; or knowing/fearing the laws they drowned in their sorrows and did not come. I was left to counsel clients, "Come, and even if you lose you will be able to say to your child, to your family, I fought, but I lost. No matter what they say I wanted you to know that I cared, that I tried, that I have and will always love you." Some of them could

not parent. Some of them could have if they had been helped by the system, as the system was supposed to have helped them and if the system had been held accountable, but it was not. And some of them did not need help. They were simply poor and/or different from the workers who therefore saw them as unfit. I saw how they were treated, the disrespect. I had judicial staffs look at me with disdain and tell me to step into the galley as the area I was in was reserved for lawyers . . . And I would say, "But I am a lawyer." I would have to show my bar card to counter their disbelief, because everyone knows that Indians are defendants/respondents not lawyers. In fact one judge said from the bench, "You can't be a lawyer, you're an Indian." This was said in words and actions in front of my clients. It was a level of disrespect that I had come to expect and know that I could not react or object, but I felt pain for myself and for my relations. The lawyers laughed at me, threatened me, demeaned me, spit on me, lied to me, lied about me and about my clients. They could and they did get away with it. It was not universal, and that is the good of it.

Some helped and some believed, as did Felix S. Cohen, a second generation Jewish American and a major legal figure in American legal history in the first half of the twentieth century. Cohen is best known for his realistic view of the law and his efforts to assist Native Americans to obtain more control over their own cultural, political and economic affairs. He authored the seminal treatise *The Handbook of*

Federal Indian Law. As Dalia Tsuk Mitchell wrote in her *Architect of Justice – Felix S. Cohen and the Founding of American Legal Pluralism*:

> Indians had taught Cohen the need to cherish cultural pluralism both because they were most discriminated against and because Indian philosophy was predicated upon respect for diverse opinions. . . . The Indian tribe is the miner's canary, and when it flutters and droops we know that the poison gasses of intolerance threaten all other minorities in our land. And who of us is not a member of some minority?[10]

Cohen was a beacon to others who stood with us during the times when new strategies were developed to take our children. We were fighting in obscure courtrooms and in Congress. We wanted our children. We wanted to protect them. We are required by our values to try and protect them.

And then came the ICWA. It was like we were heard, and we experienced the glory of being heard. I am not sure you, the Supreme Court Justices, can ever truly know the glory of being heard. I had by that time begun teaching younger lawyers, and I told them, "If you cannot bear losing, do NOT practice Indian law because you will lose most of the time. If it is not enough for you to do the right thing without

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[10] Dalia Tsuk Mitchell, *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism* 265 (2007).

winning, do not do this or it will break you." But this Act was passed. We were heard.

Social workers and Judges all thought that the findings made after countless congressional hearings were about others. It could not have been them that "caused" the law; that this indictment of them was really not about them but another judge or social worker in another court room, another county, or another state. But it was them. I knew it, the parents knew it and the Tribes knew it. And the practices began to change because of ICWA. The Courtrooms and the departments began responding to the pressure of lawyers. Judges and lawyers, some of whom had always stood with us, could now say to colleagues: It is the "law." And we tribal lawyers, and lawyers for Tribes and tribal people could say this is the law of the land now; you must protect tribal children.

I have devoted countless hours to training judicial officers, lawyers, and social workers on the Act. I began that in 1978 and continue to this day. And the trainings remain necessary because the bias that supported the views of Governor Burnett and Chief Justice Hastings still permeates the work of our systems. I see it in their faces; I hear it in their questions. It is demonstrated in their exasperation with the damn requirements of that "bloody Indian Act."

But those of us who have preferred to work at the level of the people were heartened by the ICWA, and

remain heartened by its promises. The judicial system can be unwieldy, but it can be glorious when it leads, as it should, when it remains true to its principles of justice. Just as a Yuroks are required by custom to both adhere to values, and help others adhere to our values, this Court can and should lead in the same way. It does make a difference on the ground, down here where we are. We do look to your leadership. We the Tribal people of this Country need this protection and you are the protectors charged with the ability and the responsibility to protect. Congress spoke. We needed them and we need you to remember their words, to not remove this protection. The need is still present. Our need is present. Our children, our families, our communities and our Nations are still in harm's way. It is said that our children are our greatest resource; they are not resources to us, not commodities, they are the blood of our being, we cannot exist without them, we are not whole without them. What people are? Are we so different than you? Please do not take the children; if you invalidate this law, you will be a member of the raiding party.

CONCLUSION

These words are mine, they are mine alone, they are my responsibility, and no one else's. If you take exception to them please limit your rancor to me and me alone. Whether you help or do not help know I would not take your children, even if I could take

your children. I would not because in my world that is wrong, I would not do it and if it was in my power to prevent others from doing it, I would.

Respectfully submitted,

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