IN THE SUPREME COURT OF CALIFORNIA

In re: W. B., Jr., A Person Coming Under The Juvenile Court Law.	
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	Supreme Court No. S181638
v.	Court of Appeal No. E047368
W. B., Jr., Defendant and Appellant.	Superior Court No. RIJ114127

APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE COUNTY
Honorable Christian F. Thierback, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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By Appointment of the Supreme Court, with the assistance of Appellate Defenders, Inc.

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ARGUMENT

I. CALIFORNIA'S INDIAN CHILD WELFARE LAW WAS INTENDED TO COVER ALL INDIAN CHILDREN WHO, LIKE APPELLANT, ARE AT RISK OF ENTERING FOSTER CARE

In its answer brief, respondent has declined to address the question of whether federal law preempts any attempt by the California Legislature to expand the protections established by the federal ICWA statute. Instead,

respondent has limited its argument to the claim that the California Legislature did not *intend* to extend ICWA's protections to any juvenile delinquency cases not covered by the federal statute.

As discussed below, respondent's silence on the federal preemption issue amounts to a concession that the California Legislature was not precluded by the federal statute from extending ICWA's protections to a broader range of juvenile delinquency cases, if such was its intent. Moreover, because the federal preemption holding formed the underpinning of the court of appeal's opinion in this case, respondent's silence on that issue amounts to a withholding of support for the court of appeal's opinion. Conversely, the court of appeal's opinion lends little support to respondent's arguments in this case.

In addition, respondent's interpretation of the California statute is unpersuasive. Although the plain language of the statute brings within its purview "*any* juvenile wardship proceeding if the child is at risk of entering foster care or is in foster care" (Welf. & Inst. Code, § 224.3, subd. (a) [emphasis added]), respondent insists that the word "any" in this section really means 'only those cases matching one of two specific sets of criteria

not mentioned here.' Respondent also concedes that the California Rules of Court are not consistent with its interpretation of the statute.

More importantly, however, respondent's reading of the statute cannot be reconciled with the express purpose of the legislation, and respondent never attempts to explain why the California Legislature would preserve the "adult" crime exception, adopted by Congress so as not to encroach on state sovereignty, when adopting that provision of the federal statute does nothing to further the policy goals of the California law.

Accordingly, respondent's interpretation of California's Indian Welfare law should be rejected because the law is clearly intended to apply to all juvenile court proceedings in which the child is at risk of entering foster care.

A. Respondent Tacitly Concedes That the Primary Basis for the Court of Appeal's Ruling In this Case Is Wrong

The introductory paragraph of the court of appeal's opinion in this case, in which the court summarizes its holding, states: "[W]e hold that any attempt by the State of California to expand ICWA's application to delinquencies is unauthorized under the federal preemption doctrine." (Opn. at p. 1.) Given that this introductory paragraph makes no mention of

the intent of the California Legislature, the doctrine of federal preemption constitutes the primary basis for the court of appeal's ruling in this case.

In his opening brief on the merits, appellant argued (to briefly summarize) that, contrary to the court of appeal's opinion, the federal ICWA statute does not preempt California's expansion of ICWA's protections to any delinquency case in which the child is at risk of entering foster care because the federal statute was intended to establish "minimum standards" and explicitly leaves state legislatures free to enact a higher standard of protection. (See AOB at pp. 41-50.)

In its answer brief, without acknowledgement or explanation, respondent has not responded to this argument or made any claim that federal law preempts any attempt by the California Legislature to expand the protections established by the federal ICWA.[1] Instead, respondent relies solely on the claim that "California Has Not Expanded the Reach of the ICWA so That It Applies in Cases Such as Appellant's" (RAB at pp. 4-

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[1] In the court of appeal, by contrast, respondent argued that the federal ICWA "allows states to expand ICWA protections only for the parents or custodians of Indian children and only in child custody proceedings. (25 U.S.C. § 1921.) Appellant is neither a parent of an Indian child nor an Indian custodian and his delinquency disposition hearing was not a child custody proceeding." (RB at p. 4.)

28), without commenting on whether the California Legislature was empowered to do so if such were its intent.

As an initial matter, respondent's failure to respond to appellant's federal preemption arguments effectively concedes this issue. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [respondent's failure to engage arguments operates as concession]; *People ex rel. Reisig v. Acuna* (2010) 182 Cal.App.4th 866, 879 [Every appellate brief should contain legal argument with citation of authorities on the points made; if none is furnished on a particular point, the court may treat it as waived, and pass it without consideration]; see generally 9 Witkin Cal. Procedure (5th ed. 2008) Appeal Brief, § 701 at p. 769 [Waiver of Point Not Urged].)

The legal position taken in respondent's answering brief also amounts to a withholding of support for the primary basis of the court of appeal's ruling in this case. By declining to comment on whether federal law preempts any attempt by the California Legislature to expand ICWA's protections, respondent has effectively conceded appellant's argument that the federal ICWA was not intended to preclude states, including California, from extending ICWA's protections to a broader range of juvenile delinquency cases. (See *Westside Center Associates v. Safeway Stores 23,*

Inc. (1996) 42 Cal.App.4th 507, 529 [failure to address threshold question in court's ruling effectively concedes that issue].)

Conversely, respondent has tacitly conceded that the Third District Court of Appeal's opinion in *R.R. v. Superior Court* is correct in holding that, "Because ICWA sets the minimum standards for the protection of Indian children with respect to their tribal relationships, California law imposing a higher standard is not inconsistent with the purpose of the federal law, and is not preempted." (180 Cal.App.4th at p. 194.) As quoted approvingly in appellant's opening brief on the merits (AOB at pp. 42-43), the Third District held: "The language of the federal statute and Federal Guidelines indicates the states may, as California has done, pass laws that are more protective than federal law of the relationship between the Indian tribes and their children." (180 Cal.App.4th at p. 206.)

It would appear from respondent's silence on this point that respondent is (now) of the view that federal law would not preclude the California Legislature from expanding the protections established by the federal ICWA if such were the Legislature's intent. Because the court of appeal's opinion in this case is premised throughout on its federal preemption holding, that opinion cannot be viewed as lending much

support to respondent's arguments. For example, because the court of appeal concluded that the California Legislature was powerless to expand the scope of its legislation beyond that of the federal ICWA, its opinion provides little support for respondent's argument that the California Legislature did not *intend* to do so.

Respondent's tacit concession on this point has important implications for this case. First, it amounts to an acknowledgement that, with respect to Indian child welfare legislation, the U.S. Congress and the California Legislature have both overlapping and independent concerns. Although the federal and California statutes share much in terms of policy goals --as reflected in their respective preambles-- Congress was evidently mindful of longstanding principles of federalism that cautioned against encroachment into state sovereign prerogatives in relation to juvenile delinquency matters. As a result, with respect to most juvenile delinquency cases, in which state interests such as protecting the community from criminal conduct come into play, Congress opted to defer to the states to regulate such proceedings without federal interference. Such considerations are by definition of no concern to the California Legislature when drafting new laws. Thus, the California Legislature was free to

expand ICWA's protections to a broader range of juvenile delinquency cases without concerning itself with how such legislation might burden the juvenile court systems and probation departments of forty-nine other states.

This flexibility afforded the California Legislature the latitude to expand the scope of this state's Indian Child Welfare statute by implementing a standard for distinguishing delinquency cases that better serves the underlying purpose of the legislation, namely, whether the child is at risk of entering foster care, rather than preserving the federal ICWA's exclusion of any delinquency case arising from an act that would be a crime if committed by an adult. To be sure, delinquency proceedings involving "adult" crimes may implicate concerns that are not generally present in dependency proceedings. Nevertheless, the fundamental purpose of California's juvenile court system contemplates a degree of similarity between dependency and delinquency proceedings that derives from the fact that both proceedings involve a child. The degree of similarity is even greater when both proceedings involve children who are involuntarily removed from their homes and placed in foster care.

In view of respondent's tacit concession that federal law does not preclude California from extending ICWA's protections to a range of

juvenile delinquency cases not previously covered by the federal statute, the only remaining question is whether such an expansion was what the California Legislature intended. As discussed below, respondent's claim that the Legislature did not intend to expand ICWA's protections beyond the scope of the federal statute is contrary to a straightforward reading of the California statute and cannot be reconciled with the express policy goals of that legislation.

B. Respondent's Interpretation of California's Indian Child Welfare Law Is Contrary To a Straightforward Reading of the Statute

In its answer brief, respondent engages in a lengthy exercise in statutory construction in order to support its claim that the California Legislature had no intention of extending ICWA's protections to cases such as this one. The essence of respondent's argument is that, by incorporating by reference the "adult" crime exception included in the federal ICWA statute's definition of "child custody proceeding" (Welf. & Inst. Code, § 224.1, subd. (c); 25 U.S.C. § 1903(1)), the California Legislature evinced an intent to preserve that exception and exclude most juvenile delinquency cases from the scope of California's Indian Child Welfare law. (See RAB at pp. 11-21.)

Respondent's argument amounts to the claim that a critical provision of the statute does not mean what it plainly states. It cannot reasonably be disputed that the plain language of section 224.3, subdivision (a), referring as it does to "*any* juvenile wardship proceeding if the child is at risk of entering foster care or is in foster care" (Welf. & Inst. Code, § 224.3, subd. (a) [emphasis added]) includes cases such as this one. According to respondent's interpretation, however, the reference to "any" such case in section 224.3, subdivision (a), does not really mean *any* such case, but rather only a narrow subset of such cases in which the crime is not an "adult" crime or in which foster care placement is based on something other than the crime committed by minor. (See RAB at pp. 14-15.) Simply put, according to respondent, when the California Legislature used the term "any" case in this section of the statute, it really meant 'only those cases matching one of two specific sets of criteria not mentioned here.'

Respondent's claim thus violates the very legal authority cited in its own brief: "If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.' [Citation.] 'Where the statute is clear, courts will not "interpret away clear language in favor of an ambiguity that does not

exist." [Citation.]'" (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268; *People v. Benson* (1998) 18 Cal.4th 24, 30 [quoted in RAB at p. 10].) As the Third District Court of Appeal explained: "We cannot simply ignore the language of section 224.3 requiring inquiry and notice in delinquency proceedings. Furthermore, the clear implication of this section is that all of the ICWA protections be applied in delinquency proceedings if the child is at risk of entering foster care or is in foster care." (*R.R. v. Superior Court, supra*, 180 Cal.App.4th at p. 201.)

Respondent interprets the inclusion of delinquency cases in which the child is at risk of entering foster care as limited to section 224.3, because "none of the other provisions echoes this expansion." (RAB at p. 19.) Thus, according to respondent, "none of the other rights would be conferred, as the expansion is not also included in the sections of the code which grant the substantive rights." (RAB at p. 19.) This assertion is neither accurate nor logical. The order of provisions in the California statute follows the order of events in a juvenile court proceeding. Having provided at the outset --clearly and unambiguously-- that the duty of inquiry and notice extends to delinquency cases in which the child is at risk of entering foster care (Welf. & Inst. Code, § 224.3), there was no need for

the Legislature to repeat that proviso in each and every one of the following provisions of the act (Welf. & Inst. Code, §§ 224.4 [intervention]; 224.5 [full faith and credit]; 224.6 [qualified expert witnesses]). Having set forth the expanded scope of the law in section 224.3, repeatedly inserting such language in each of the ensuing provisions would only render the statute wordy and cumbersome.

Respondent also argues that, "if the interpretation urged by appellant and upheld by the *R.R.* court were adopted, the definition of 'Indian child custody proceeding' in section 224.1, subdivision (c), would be, at best, meaningless, and, at worst, wholly inconsistent with the remaining provisions of the statutory scheme." (RAB at p. 20.) Once again, respondent's claim is neither accurate nor logical. The definition of "child custody proceeding" set forth in the federal statute is divided into five parts, and includes the definition of the terms (i) "foster care placement"; (ii) "termination of parental rights"; (iii) "preadoptive placement"; and (iv) "adoptive placement," in addition to the "adult" crime exception language. (25 U.S.C. § 1903(1).) The inclusion of delinquency proceedings in which the child is at risk of entering foster care within the scope of the California

statute does not render meaningless any of the four enumerated definitions in section 1903(1) of the federal ICWA.

Nor does it render meaningless the "adult" crime exception language; to the contrary, it merely sets forth an exception to the exception. Indeed, the California statute preserves the federal statute's exclusion of juvenile delinquency cases, save for those proceedings in which the child is at risk of entering foster care. Viewed in the context of the legislation as a whole, the language of section 224.3, subdivision (a), is straightforward and easy to apply: California's Indian Child Welfare law applies to *all* juvenile court proceedings in which the Indian child is at risk of entering foster care. Respondent's claim that this somehow renders section 224.1, subdivision (c), "meaningless," "surplusage," or "wholly inconsistent" with the rest of the statute is simply incorrect.

Respondent concedes that the California Rules of Court, which were revised in accordance with California's Indian Child Welfare legislation, are not consistent with its interpretation of the statute. (RAB at p. 24.) In rejecting the validity of the rules as drafted, respondent cites *In re Enrique O.* (2006) 137 Cal.App.4th 728, a case that predates California's Indian Child Welfare law. In *Enrique O.*, the court limited the applicability of an

old rule on the ground that it was not consistent with the federal ICWA statute on which it was based. (*Id.* at p. 733.) Respondent argues that, since the scope of the California statute should be interpreted as coterminous with the federal ICWA statute, the reasoning of *Enrique O.* "was and is correct," and applicability of the revised California Rules of Court should be subject to the same limitation. (RAB at pp. 24-25.)

Respondent's argument boils down to the claim that the Judicial Council misinterpreted the California statute when it promulgated the corresponding Rules of Court and those rules are therefore invalid as drafted and their application should be limited in the same manner in which the *Enrique O.* court limited the applicability of the old rule. This argument does little more than point out that the relevant California Rules of Court, as drafted, are fully consistent with appellant's (and the Third District Court of Appeal's) understanding of the California statute and would have to be altered or limited in order to bring them in line with respondent's view.

Respondent goes on to speculate that, because *Enrique O.* was decided around the same time the California Legislature was enacting California's Indian Child Welfare law, if the Legislature "actually intended

to expand the reach of the ICWA in exactly the manner *Enrique O.* said conflicted with the federal law, there would have been a clear and unambiguous signal that this was its intention." (RAB at p. 27.) But *Enrique O.* concerned a soon-to-be-defunct rule and whether it was authorized by the federal ICWA statute. In the process of drafting a new state law that would provide legislative authority for a soon-to-be-revised set of rules, why would the California Legislature pause to issue a "clear and unambiguous signal" that it would not agree with the limitation a court imposed on an old rule based on a federal statute if the same limitation were imposed on a yet-to-be promulgated rule based on state legislation still under consideration? Respondent's argument attributes unwarranted significance to the California Legislature's silence with respect to a court decision with questionable precedential significance to a new state law.

In sum, respondent's application of the cannons of statutory construction to show that the California Legislature intended to exclude cases like this one from the scope of California's Indian Child Welfare law is unpersuasive.

More importantly, however, respondent's interpretation of the law is inconsistent with the express purpose of that legislation, as discussed below.

C. Respondent's Reading of California's Indian Child Welfare Law Is Inconsistent With the Express Purpose of the Legislation

Respondent's interpretation of California's Indian Child Welfare law is inconsistent with the legislative findings and declarations set forth in the statute's opening provisions, which make clear its underlying purpose and therefore serve as the best available guide to the Legislature's intent. While insisting that the California Legislature intended to incorporate in full the federal ICWA statute's exclusion of juvenile delinquency cases involving "adult" crimes, respondent never attempts to reconcile its interpretation with the express purposes of the statute set forth in section 224 or to explain why the California Legislature would preserve the "adult" crime exclusion, originally adopted by Congress so as not to encroach on state sovereignty, when it does nothing to further the express policy goals of the California law. Respondent's answer brief is silent on this issue.

Section 224, subdivision (a)(1), declares that, "the State of California has an interest in protecting Indian children . . . [and] is committed to

protecting the essential tribal relations and best interest of an Indian child by promoting practices . . . designed to prevent the child's involuntary out-of-home placement and, whenever that placement is necessary or ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community." (Welf. & Inst. Code, § 224, subd. (a)(1).) In view of this opening provision's focus on the removal of Indian children from their homes and the importance of placing such children in a setting that reflects the unique values of the child's tribal culture, extending ICWA's protections to *all* juvenile court proceedings involving Indian children who are at risk of entering foster care aligns the scope of the act with its fundamental underlying purpose.

Accordingly, the simplest, most straightforward interpretation of California's Indian Child Welfare legislation is that the California Legislature intended to extend ICWA's protections to *all* Indian children who are at risk of entering foster care, regardless of how they enter the juvenile court system. No other interpretation of the statute --and certainly not respondent's-- so effectively harmonizes the explicit goals of the

legislation with its several provisions. The California statute thus recognizes that, once a delinquent Indian child has been placed in foster care (as opposed to locked up, for example), any distinction between that child and a child in dependency proceedings is not important enough to merit withholding ICWA's protections.[2] There is simply no reason to believe that a delinquent Indian child in foster care will not benefit equally --as will his or her Indian tribe-- from placement in a setting "that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community." (Welf. & Inst. Code, § 224, subd. (a)(1).)

In contrast, the unspoken assumption underlying respondent's interpretation of California's Indian Child Welfare legislation is that the

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[2] To observe that the California law's extension of ICWA's protections to any delinquency case in which the child is at risk of entering foster care better serves the express purpose of that legislation is by no means a criticism of the federal ICWA statute. As noted above, Congress was burdened with the need to balance its goal of protecting Indian children and Indian tribes with a regard for the sovereign prerogatives of fifty states --a burden not borne by California or any other state legislature. In the absence of that burden, however, it would make no sense for the California Legislature to exclude a group of Indian children who would both benefit from ICWA's protections and who constitute the "vital resource" of their particular tribe.

California Legislature (1) had good reason to exclude from ICWA's protections Indian children who are at risk of entering foster care based on an act that would be a crime if committed by an adult, and (2) intended to exclude all such Indian children from ICWA's protections. Such assumptions are difficult to reconcile with the underlying purpose of the law, as articulated by the California Legislature in section 224, and in any event, respondent has made no attempt to do so.

Respondent's interpretation of the California law would also be difficult to apply --a result that was obviously not intended by the California Legislature. Respondent explains that, in some cases, "the juvenile court would need to make a finding that the placement order for that particular minor was not connected to his criminal behavior, but was rather in the best interests of the child, or was to accomplish some other purpose." (RAB at p. 17.) Thus, in such cases, if the juvenile court found that the child was in placement primarily for his or her own wellbeing, the child's tribe would be notified and the mutually beneficial relationship between child and tribe contemplated by both the federal and state statutes would be facilitated. If, on the other hand, the juvenile court found that the child was in placement primarily because of his criminal actions,

notification to the tribe would be withheld and the benefits of uniting child with tribe contemplated by the federal and California Indian child welfare laws would be avoided.

Leaving aside for the moment the question of *why* the California Legislature would approve of the second scenario, respondent's interpretation of the law mandates an all-or-nothing outcome in such cases based on what is likely to be a highly subjective assessment of the facts of the case and the relative culpability of the child --an outcome the Legislature would surely not have intended.

Respondent's interpretation also fails to take into account the fundamental purpose of juvenile delinquency proceedings: "The purpose of juvenile delinquency laws is twofold: (1) to serve the 'best interests' of the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and 'enable him or her to be a law-abiding and productive member of his or her family and the community,' and (2) to 'provide for the protection and safety of the public . . . ." (*In re Charles G.* (2004) 115 Cal.App.4th 608, 614-615 [quoting Welf. & Inst. Code, § 202, subds. (a), (b) & (d)].) Thus, respondent's contention that, in such cases, the law's application would depend on a finding by the juvenile court that the child's

placement order was not connected to his criminal behavior, but was rather in the best interests of the child, fails to recognize that both considerations come into play at some level in virtually every juvenile delinquency proceeding.

The plain wording of the statute avoids the need for such arbitrary distinctions and, by extending ICWA's protections to *all* Indian children who are at risk of entering foster care regardless of how they entered the juvenile court system, creates a framework that best serves the express purposes of the legislation and is easy for courts to apply.

In sum, by its plain language, California's Indian Child Welfare statute applies to any Indian child who is at risk of entering foster care, regardless of whether that child is in dependency or delinquency proceedings. (Welf. & Inst. Code, § 224.3, subd. (a).) All such Indian children fall within the purview of the policy goals set forth expressly in both the federal and California Indian Child Welfare statutes. All are being involuntarily removed from their homes and are at risk of being placed in foster care without regard to their Indian heritage and without regard to the cost to their Indian tribe of losing them to the world of non-Indian foster care, even if only temporarily.

Accordingly, respondent's interpretation of the California statute should be rejected. Under California law, ICWA's notice requirements apply to all juvenile delinquency cases like this one in which the child is at risk of entering foster care.

II. RESPONDENT'S CLAIM THAT APPELLANT WAS NOT AT RISK OF ENTERING FOSTER CARE IS LEGALLY WRONG AND FACTUALLY INACCURATE

Respondent asserts that appellant was never at risk of entering foster care. Respondent notes that, at a previous disposition hearing, the juvenile court warned appellant that if he got into trouble again, the court would likely send him to a locked facility. (RAB at p. 28.) With respect to the disposition hearing that is the subject of this appeal, respondent asserts: "Nothing in the record indicates that the court was considering foster care placement. The court ordered he be placed in a 'suitable public or private facility.'" (RAB at p. 29.) Finally, respondent asserts that, although the Probation Report recommended placement in foster care, the court did not adopt that recommendation; moreover, much of the minute order of appellant's disposition hearing must be discounted, according to respondent,

because it is "inconsistent with the oral pronouncement of judgment, which said nothing of foster care . . ." (RAB at p. 29.)

Respondent's arguments reflect a basic misunderstanding of how the probation department in juvenile delinquency proceedings recommends that a minor be removed from the custody of his or her parent(s) and the corresponding findings the juvenile court must adopt in order to transfer custody and supervision of the minor to the probation department for a suitable placement. Pursuant to section 727.4, subdivision (d)(2), "'at risk of entering foster care' means that conditions within a minor's family may necessitate his or her entry into foster care unless those conditions are resolved." (Welf. & Inst. Code, § 727.4, subd. (d)(2).) As discussed below, any time the juvenile court removes a child from his or her home and orders the care, custody, and control of the child to be under the supervision of the probation department, as happened in this case, the minor is "at risk of entering foster care."

The findings required to remove a child from his or her home are set forth in Welfare and Institutions Code, section 726, subdivision (a), and are mirrored in Recommendations 3 through 6 of Probation Officer's Report dated December 8, 2008:

> 3. Court make findings by clear proof that continuance in the home of the parent . . . would be contrary to the child's welfare; (CHC)
>
> 4. Court make findings that reasonable efforts have been made to prevent or eliminate the need for removal of the child from his . . . home and make it possible for the child to return to his . . . home; (REM)
>
> 5. Minor be removed from the custody of parents, [naming appellant's mother and father]; (MRCC)
>
> 6. Court make findings pursuant to Section 726[(a)(2) & (3)] of the Welfare and Institutions Code; (F726)

(C.T.II 141-142.) With reference to the required findings in Recommendation 6, above, section 726, subdivision (a)(3), states: "That the welfare of the minor requires that custody be taken from the minor's parent or guardian." (Welf. & Inst. Code, § 726, subd. (a)(3).)

Respondent concedes that all of the above-referenced recommendations were adopted by the juvenile court at appellant's disposition hearing. (RAB at p. 29; see R.T.III 142.) In view of the probation department's recommendations in this case, and the fact that these recommendations were subsequently adopted by the juvenile court at appellant's disposition hearing, respondent cannot dispute that appellant was "at risk of entering foster care" pursuant to the terms of the statute.

At appellant's disposition hearing, the juvenile court ordered that appellant "be continued a ward of the Court; that his care, custody and control be placed or continued with the Chief Probation Officer of Riverside County." (R.T.III 138-139.) The required findings having been adopted by the court (discussed above), appellant was "ordered placed in a suitable public or private facility for such a period deemed necessary by staff and the probation officer . . ." (R.T.III 140.)[3] Respondent apparently assumes that the "suitable public or private facility" referred to by the juvenile court could not possibly constitute foster care, but this assumption is baseless. Pursuant to section 727, subdivision (a), the probation officer is given the discretion to place a minor under his or her supervision in any of three types of setting, including a "suitable licensed community care facility" (Welf. & Inst. Code, § 727, subd. (a)(1)), which would be perfectly consistent with the juvenile court's order. Section 727.4, subdivision (d)(1) defines "foster care" as "residential care provided in any of the settings described in Section 11402." (Welf. & Inst. Code, § 727.7, subd. (d)(1).)

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[3] Given that these orders appear in the Reporter's Transcript, any disparities between the oral pronouncement of judgment and the minute order of appellant's disposition hearing are immaterial.

Section 11402, in turn, sets forth a variety of "settings," including a "licensed group home." (Welf. & Inst. Code, § 11402, subd. (c).)

The critical issue is whether appellant was "*at risk* of entering foster care." As discussed above, the recommended findings adopted by the court at appellant's disposition hearing allowed for the transfer of "care, custody, and control" of appellant to his probation officer (Welf. & Inst. Code, § 727, subd. (a)), who then had considerable discretion, pursuant to the statutory provisions discussed above, as to where to place appellant. Hence, the removal of appellant from his home and the transfer of supervision over his care, custody, and control to the probation department for a suitable placement put him "at risk of entering foster care," regardless of whether his ultimate destination qualified as foster care under the statute.

Respondent's observations regarding what was discussed at appellant's hearings simply have no bearing on this conclusion. It should be noted that the juvenile court's off-the-cuff remarks to appellant at a previous hearing that he would send him to a locked facility if he got into more trouble in no way foreclosed the possibility of placement in foster care at a subsequent proceeding based on a subsequently-filed petition. More importantly, however, those remarks are simply not relevant to an

assessment of whether appellant was "at risk of entering foster care." The significance respondent accords the juvenile court's remarks is entirely misplaced.

Under the terms of the statute, then, appellant was "at risk of entering foster care" regardless of where he ended up, and respondent's claim to the contrary is simply incorrect.

Respondent also claims, however, that appellant "was not placed in foster care and thus, even if the court erred in failing to notify the tribe of appellant's risk of entering foster care, the fact that that risk was never realized renders any error harmless." (RAB at p. 30.) Respondent's claim that appellant was never placed in foster care is, however, untrue. Appellant was placed at Aiming High Treatment Center III ("Aiming High"), a licensed group home for up to six children in Mentone, California, in January 2009, shortly after his disposition hearing, where he remained until June 2009.[4] Aiming High qualifies as a foster care facility

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[4] The minute order of appellant's permanency planning review/maintenance renewal six-month hearing on June 3, 2009, states that appellant "was in foster care at 16 years of age" and indicates that staff members from Aiming High were present in court at that hearing. Appellant has filed a motion to augment the record on appeal with the above-referenced minute order.

pursuant to Welfare and Institutions Code sections 727.4, subdivision (d)(1), and 11402, subdivision (c).

It should be noted that appellant's actual placement in foster care is not the determinative factor in assessing whether he was "at risk of entering foster care" for purposes of determining whether ICWA's notice provisions were triggered in his case. As discussed above, ICWA's notice provisions were triggered much earlier in his proceedings when appellant was put "at risk of entering foster care" pursuant to his removal from his home. It does show, however, that appellant was harmed --the very harm that both the federal and California Indian Child Welfare laws are intended to address-- by the superior court's failure to adhere to ICWA's notice requirements in this case.

Accordingly, respondent's claim that appellant was never placed in foster care is untrue, and its argument that any error was harmless is manifestly contradicted by the facts of this case.

III. RESPONDENT'S CLAIM THAT ANY FAILURE TO COMPLY WITH ICWA'S NOTICE REQUIREMENTS IS HARMLESS NOW THAT APPELLANT HAS TURNED 18 SHOULD BE REJECTED

Respondent contends that, even if appellant's position is correct, remand of this case with directions to the superior court to comply with ICWA's notice requirements "would simply be a waste of judicial resources" now that appellant has turned 18 and is no longer a minor. (RAB at pp. 30-32.) This claim should be rejected.

Respondent's perspective on California's Indian Child Welfare law in this respect fails to take into account the urgency of that legislation, as reflected in the legislative findings and declarations that form its preamble. (See Welf. & Inst. Code, § 224.) The statute recognizes that there is "no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . ." (Welf. & Inst. Code, § 224, subd. (a)(1).) Here, the failure to comply with ICWA's notice requirements must therefore be viewed as having withheld from appellant's tribe its most vital resource, and the proper remedy thus begins with bringing this Indian child to the notice of his tribe as soon as possible. Section 224, subdivision (a)(1), speaks of assisting the Indian child in "establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe

and tribal community." (*Ibid.*) Clearly, the Legislature did not contemplate that this relationship between the Indian child and his or her tribe would suddenly end when the child turns 18. Although the statute addresses itself to the welfare Indian children, its underlying purpose clearly encompasses the prosperity of Indian tribes as a whole, including their adult members.

Had the juvenile court and the probation department complied with ICWA's notice requirements in this case, as mandated by California law, appellant would have been brought to the attention of his Indian tribe, and he would also have benefited from the assistance and resources of the state in contacting his tribe. Without such assistance, to which he was entitled pursuant to California law, it is not clear that appellant on his own would have the wherewithal to contact his tribe. Requiring the superior court to comply with ICWA's notice requirements now that appellant has turned 18 may not serve the specific purpose it would have had the superior court complied with the law in a timely fashion, but it nevertheless stands to further the broader goals of the California Legislature as set forth in the statute. Viewed in this context, respondent's repeated references to the purported worthlessness of "notice for notice's sake" (RAB at pp. 19, 30) seem misplaced.

Moreover, given the history that prompted the enactment of both the federal ICWA and California's Indian Child Welfare legislation, the importance of adhering to these statutes plays an important symbolic role. The statutes themselves address a history of injustice that cannot now be undone, but Congress and the California Legislature have nevertheless enacted laws intended to do what can be done now. Similarly, although the harm in this case cannot be undone, appellant and his Indian tribe are entitled to a ruling that their rights under California law were violated.

Moreover, when juvenile court proceedings are in violation of ICWA, both the federal ICWA and California's Indian Child Welfare law confer on the Indian child, the child's parent, and the Indian tribe the right to petition to have those proceedings invalidated. (25 U.S.C. § 1914; Welf. & Inst. Code, § 224, subd. (e).) Without a ruling that the superior court failed to comply with ICWA's notice requirements in this case, however, appellant and his tribe will be unable to exercise their rights pursuant to these statutory provisions.[5]

As this court has recognized, "if a pending case poses an issue of

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[5] And thus, any consideration of the practical or symbolic benefits that might be obtained by petitioning to invalidate appellant's juvenile court proceedings is premature.

broad public interest that is likely to recur, the court may exercise an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot." (*In re William M.* (1970) 3 Cal.3d 16, 23.) The issue presented in this case is likely to recur in other cases and involves an issue of broad public interest because it affects all Indian children in delinquency proceedings who are at risk of entering foster care. As in this case, due to the expedited nature of juvenile court proceedings, "appellate courts may be unable to obtain the appellate record and briefing by the parties in time to decide this important issue before it becomes moot in a particular case." (*In re Christina A.* (2001) 91 Cal.App.4th 1153, 1158.)

Moreover, there is a danger in allowing the superior court and the probation department to disregard ICWA's notice requirements in cases in which the minor is approaching his or her eighteenth birthday. In a juvenile court system that presumably deals with thousands of minors who are within a year or two of their eighteenth birthday, there may be a (subtle) temptation to shrug aside the necessary effort and paperwork knowing that the minor will "age out" before his or her appeal can be heard.

Accordingly, this court should remand this case with instructions to the superior court to comply with ICWA's notice requirements as set forth in California's Indian Child Welfare law.

CONCLUSION

California's Indian Child Welfare law extends ICWA's notice requirements to juvenile delinquency cases like this one in which the minor is at risk of entering foster care. This requirement reflects the California Legislature's goal of protecting Indian children and empowering the Indian child's tribe in relation to any proceeding in which an Indian child is at risk of entering foster care, regardless of whether that child has entered the juvenile court system by way of dependency or delinquency proceedings.

Accordingly, this Court should reverse the Court of Appeal and hold that, under California law, ICWA's notice requirements apply to all juvenile delinquency cases in which the child is at risk of entering foster care. Consistent with such holding, this Court should reverse the superior court's dispositional order, invalidate appellant's section 602 proceedings below, and remand the case with directions to the superior court to comply with all federal and state ICWA notice requirements.

Respectfully Submitted,

Dated: February 23, 2011

JONATHAN E. DEMSON
Attorney at Law
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IN THE SUPREME COURT OF CALIFORNIA

In re: W. B., Jr., A Person Coming Under The Juvenile Court Law.	
THE PEOPLE OF THE STATE OF CALIFORNIA,	Supreme Court No. S181638
Plaintiff and Respondent,	Court of Appeal No. E047368
v.	
W. B., Jr.,	Superior Court No. RIJ114127
Defendant and Appellant.	

CERTIFICATE OF WORD COUNT

Pursuant to rule 8.360(b)(1) of the California Rules of Court, appellant certifies that Appellant's Reply Brief On The Merits filed in connection with the above-captioned matter consists of approximately 7,071 words, as determined by using the "word count" feature of the Microsoft Word program used in drafting the brief.

Respectfully Submitted,

Dated: February 23, 2011

JONATHAN E. DEMSON
Attorney for Appellant

DECLARATION OF SERVICE

In re: W. B., Jr. Supreme Court No. S181638

I hereby declare that I am a citizen of the United States, am over eighteen years of age, and am not a party in the above-entitled action. I reside in the County of Los Angeles and my business address is 1158 26th Street #291, Santa Monica, CA 90403.

On February 23, 2011, I served the attached document described as APPELLANT'S REPLY BRIEF ON THE MERITS on the parties in the above-named case by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon. I then delivered the envelopes to the U.S. Postal Service in Los Angeles, California, addressed as follows:

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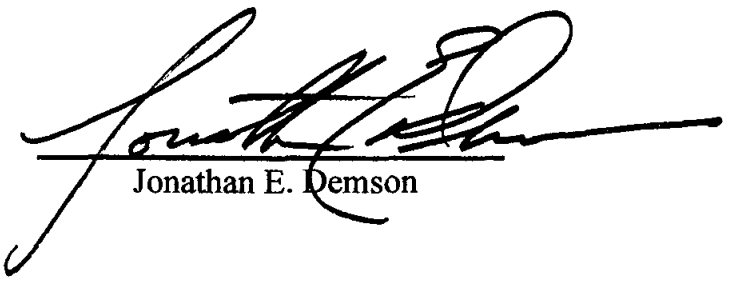
I mailed an additional copy to appellant W.B., Jr.

I, Jonathan E. Demson, declare under penalty of perjury that the foregoing is true and correct.

Executed on February 23, 2011 at Los Angeles, California.



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