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 SOUTH CAROLINA SUPREME COURT

AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF SOUTH CAROLINA, IN SUPPORT OF RESPONDENTS

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Bureau of Indian Affairs, U.S. Dep't of the Interior, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (Nov. 26, 1979). 29

OTHER AUTHORITIES

Arnold L. Lyslo, *Background Information on the Indian Adoption Project: 1958-1967*, *in* David Fanshel, Far From the Reservation (1972) 6

Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. Kan. L. Rev. 437 (2002) 16

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INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of South Carolina is a state affiliate of the national ACLU. In furtherance of its mission, the ACLU has supported federal laws designed to preserve Indian families and respect the cultural heritage of Indian tribes. The ACLU has also advocated in favor of children's rights and a child's interest in family integrity. The proper resolution of this case is, therefore, a matter of significant importance to the ACLU and its members.

SUMMARY OF ARGUMENT

This case presents a clash between a federal law of singular importance—the Indian Child Welfare Act of 1978 (ICWA)—and conflicting state law that threatens to eviscerate the federal statutory scheme and undermine federal policy. In enacting ICWA, Congress was responding to the widespread removal of Indian children from their families and tribes by state authorities. 25 U.S.C. § 1901 (Congressional findings); *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 32 (1989). The Act establishes "minimum Federal standards"

[1] The parties to this case have filed blanket letters of consent with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than *amici*, their members, or their counsel made any monetary contribution to the preparation or submission of this brief.

for the foster and adoptive placements of Indian children in order to protect the children's bonds with their families and tribes and to promote the stability and security of tribes. 25 U.S.C. § 1902. The Act applies only to children who are members of a federally-recognized tribe or eligible for membership and the biological child of a tribal member. 25 U.S.C. § 1903(4). Because the key statutory trigger is tribal membership and not racial or ethnic heritage, the Act falls squarely within the plenary power of Congress over Indian affairs. U.S. Const. art. 1, § 8, cl. 3; 25 U.S.C. § 1901(1); *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

In the decision below, the South Carolina Supreme Court followed the letter and spirit of ICWA in holding that the adoptive placement of Baby Girl violated the express mandates of federal law. The court's decision to affirm the order transferring custody of Baby Girl to the Father was based on the language of the Act and a careful consideration of Baby Girl's best interests. Father asserted his parental rights under ICWA immediately upon learning that Baby Girl had been placed for adoption. From that point on, beginning when Baby Girl was just four months old, Father was steadfast in his efforts to exercise his parental responsibility and assume custody of his daughter. The South Carolina Supreme Court affirmed the Family Court's assessment of Baby Girl's interests, including Father's prompt objection to the adoption, his parenting abilities, and the benefit to Baby Girl of being raised by her birth parent and extended family within the Cherokee culture. The courts below appropriately found that the bonding between Baby Girl and Petitioners that occurred during this

litigation, by itself, did not justify severance of Father's parental rights under ICWA when weighed against other considerations.

Despite the provisions of the Act and its avowed purpose, Petitioners argue that South Carolina law limiting the rights of an unwed father to object to his child's adoption should be applied to bar Father from asserting his standing as a parent under ICWA. Pet. Br. 19-29. In enacting ICWA, Congress desired to strengthen the rights of parents of Indian children and to supplant state law limitations on those rights. Father both acknowledged and established his paternity by filing appropriate documents in South Carolina Family Court and by undergoing DNA testing. These actions qualified him as a "parent" under ICWA. *See* 25 U.S.C. § 1903(9). Applying South Carolina's paternity limitations and abandonment law to exclude Father as a parent would prevent him from asserting his federal rights under ICWA and would result in uncertainty and unpredictability in the implementation of the Act. In enacting ICWA, Congress made the preemptive effect of the Act quite clear: state courts may turn to state law when it provides a higher measure of protection to a parent of an Indian child, but not when state law falls below the federal standards. *See* 25 U.S.C. § 1921.

Since Father was a "parent" within the meaning of ICWA, the adoption of Baby Girl could not go forward unless and until either a voluntary consent to the adoption was obtained in accordance with the standards of ICWA or Father's parental rights were terminated under ICWA's heightened evidentiary criteria. Congress imposed strict consent

provisions for voluntary removals to ensure that parents of Indian children would not relinquish their parental rights without full understanding of the consequences of their actions. 25 U.S.C. § 1913. As to involuntary terminations, Congress spelled out the required findings and imposed the highest burden of proof available in our legal system because of the record of unwarranted separations of Indian children from their families. 25 U.S.C. § 1912. Father did not consent to the adoption of his child as required by ICWA. Likewise, the courts below carefully considered Father's and Baby Girl's circumstances in concluding that no basis consistent with federal law existed for terminating his parental rights.

Notwithstanding the plain language and underlying purpose of ICWA, Petitioners argue that the Act's protections for Indian children, parents, and tribes do not apply because Baby Girl had never lived with an Indian family prior to her joining Father and her extended family. Pet. Br. at 29-42. The "existing Indian family doctrine" upon which Petitioners rely is a judge-made exception to ICWA that has no grounding in the statutory scheme and conflicts with the core federal policy of tribal self-determination. It has been squarely rejected by the majority of courts to consider it and repudiated by the court that created it.

ARGUMENT

I. THE INDIAN CHILD WELFARE ACT IS A CONSTITUTIONALLY VALID EXERCISE OF CONGRESSIONAL POWER THAT ESTABLISHES ESSENTIAL SAFEGUARDS FOR INDIAN CHILDREN, PARENTS, AND TRIBES.

Beyond doubt, the Indian Child Welfare Act is one of the most significant legislative reforms enacted by Congress to implement the federal policy of promoting tribal sovereignty and self-determination. Exercising federal preemptive power, Congress established minimum standards for the foster and adoptive placements of Indian children in order to protect the children's bonds with their families and tribes and to promote the stability and security of tribes. *See* 25 U.S.C. § 1902 (Congressional declaration of policy). The Act applies only to children who are members of a federally-recognized tribe or eligible for membership and the biological child of a tribal member. 25 U.S.C. § 1903(4). Because the key statutory trigger is tribal membership and not racial or ethnic heritage, the Act falls squarely within the plenary power of Congress over Indian affairs. U.S. Const. art. 1, § 8, cl. 3; 25 U.S.C. § 1901(1); *Morton v. Mancari*, 417 U.S. 535, 552 (1974) (noting that if Congress could not make classifications regarding Indians, "an entire Title of the United States Code (25 U.S.C.) would be effectively erased."); *United States v. Antelope*, 430 U.S. 641, 646 (1977) (upholding a classification based on tribal membership in a criminal statute, and noting that such legislation "is not to be viewed as [race] legislation.")

The Act was designed to address the history of abuses by state authorities that resulted in the widespread foster and adoptive placements of Indian children in non-Indian homes and institutions. Exercising its plenary power to legislate for the benefit of American Indian tribes and tribal members, Congress enacted ICWA after extensive hearings in the 1970's that documented numerous destructive state practices. *See* 25 USC § 1901 (Congressional findings). These practices included efforts by state adoption workers to procure the "voluntary" relinquishment of Indian children without observing basic tenets of due process. *See* H.R. Rep. No. 1386, 95th Cong., 2d Sess., at 11-12 (1978) (hereinafter H.R. Rep. No. 95-1386). Well-intentioned but misguided programs by child welfare groups promoted the widespread adoption of Indian children by non-Indian families, often based on the supposed superiority of Anglo-American culture. *Id.* at 10-11; Arnold L. Lyslo, *Background Information on the Indian Adoption Project: 1958-1967*, in David Fanshel, Far From the Reservation 36 (1972). As this Court has recognized, "Congress was concerned not solely about the interests of Indian children and families but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." *Holyfield,* 490 U.S. at 49.

Congress reported that poverty, poor health, substandard housing, inadequate schools, and other socio-economic problems that plagued Indian communities contributed to a sense of "cultural disorientation" and "powerlessness" among tribal members. H.R. Rep. No. 95-1386, *supra*, at 12. That sense of alienation disrupted basic parent-child relations and, in turn, tribal affiliations. In addition,

as this Court noted in *Holyfield*, Congress wanted to protect Indian children from the harm they suffer when they lose all connection to their cultural heritage.

> [I]t is clear that Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture. Congress determined to subject such placements to the ICWA's jurisdictional and other provisions, even in cases where the parents consented to the adoption, because of concerns going beyond the wishes of individual parents.

490 U.S. at 49-50.

The complementary goals underlying the Act are "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. To implement these aims, Congress crafted jurisdictional, procedural, and substantive provisions to prevent states from improperly removing Indian children from their parents, extended families, and tribes. *See* 25 U.S.C. §§ 1911-23.

In light of the range of practices by state child welfare authorities and state courts that had been documented during the congressional hearings, Congress gave parental rights a central role in the ICWA structure. Of core relevance here, ICWA does not permit a state to terminate the rights of a parent of an Indian child unless the rigorous criteria of the

Act are met. 25 U.S.C. §§ 1912, 1913. The application of ICWA in the instant case furthers congressional goals by protecting the interests of Baby Girl, a Cherokee child, in being raised by her fit biological father within her extended family and the community of the Cherokee Nation.

A. The South Carolina Family Court Followed The Mandates Of ICWA In Considering Baby Girl's Immediate And Long-Term Welfare And Concluding That Her Best Interests Would Be Served By A Transfer Of Custody To Her Cherokee Father.

A child's best interests are an essential consideration in any ICWA proceeding that intrudes on parental rights or determines a child's out-of-home placement. At a general level, the Act furthers the best interests of Indian children by protecting their familial relations and tribal affiliations against unwarranted state interference. As this Court recognized in *Holyfield*, 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." *Holyfield*, 490 U.S. at 50 n.24. That assumption, however, is subject to rebuttal within the structure of the Act based on the child's individual circumstances.

The child's interests are always a central concern under ICWA but with varying emphases according to context. The Act directs state courts to consider the child's welfare at specific junctures. Before ordering a foster care placement or termination of parental rights, for example, courts must consider the likelihood of harm to the Indian

child in continued custody by the parent. *See* 25 U.S.C. 1912(e) & (f) (courts must decide whether "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child"). *See In re Adoption of Baade*, 462 N.W.2d 485, 490 (S.D. 1990). [2]

At the placement stage of the Act, if parental rights have been terminated, courts are to follow the placement priorities unless there is "good cause" to the contrary. 25 U.S.C. 1915 (a) & (b). The "good cause" exception gives latitude to state courts in tailoring placements to meet the individual needs of the child. Finally, 25 U.S.C. § 1916 requires that an Indian child be returned to the parent if an adoption is set aside unless it would not be in the best interests of the child—an express direction to consider a child's interests. Thus, ICWA does not establish irrebuttable presumptions but instead provides a flexible framework designed to promote the interests of Indian children, families, and tribes.

Petitioners and the Guardian Ad Litem contend that Baby Girl's fundamental liberties have been infringed by removing her from Petitioners' custody. Pet. Br. 49; GAL Br. 53-58. Although the scope of a child's constitutional liberty interest in familial stability and continuity is an important question, the Court need not resolve that question in this case because Baby Girl's best interests were in fact the subject of lay and expert testimony and other

[2] The meaning of "continued custody" is addressed, *infra*, at Part II(B) of this Brief.

evidence in the Family Court and were explicitly resolved in favor of custody with Father.[3]

Similarly, Birth Mother argues that her rights to due process and equal protection were violated by the courts below because Father's invocation of his parental rights under ICWA thwarted her plan to place Baby Girl with Petitioners for adoption. *See* Amica Curiae (Birth Mother) Br. 23-30. As the parent of an Indian child, Birth Mother herself could have withdrawn her consent to the adoption up until a final decree. 25 U.S.C. § 1913(a). In light of her decision to give up her parental rights, however, her standing to complain about Father's efforts to exercise his parental rights is tenuous at best. In any event, Birth Mother's argument flies in the face of the Family Court's express assessment of Baby Girl's best interests, which the court found to be promoted by custody with Father. Whatever constitutional protections are retained by a mother who relinquishes her infant for adoption, those rights do not and cannot trump the right of a fit and loving birth father to retain custody of his child when the mother is not interested in doing so.[4]

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[3] *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 132-38 (1989) (Stevens, J., concurring) (noting that Court did not need to address birth father's constitutional interests since trial court had authority under California law to consider child's best interests in ruling on birth father's request for visitation rights).

[4] In *In re T.S.W.*, 276 P.3d 133, 144-48 (Kan. 2012), by analogy, the court held that a non-Indian birth mother's wish that her Indian child be placed for adoption with a non-Indian family did not by itself override ICWA's placement preferences. The court emphasized that any adoptive placement must include a consideration of all relevant factors, including the best interests

The South Carolina Family Court in this case fully considered Baby Girl's best interests before ordering that she be placed in Father's care and custody. *See* Final Order, *Adoptive Couple v. Baby Girl*, Case No. 2009-DR-10-3803 (S. Car. Fam. Ct. Nov. 15, 2011) [hereinafter *Final Order*]. Only after receiving evidence over multiple days of hearings did the court determine that the adoption of Baby Girl could not go forward and that her best interests would be served by a transfer of custody to Father. In its Final Order, the Family Court emphasized that:

> [The birth father's] fight to gain custody of his daughter commenced when he first learned she had been placed for adoption. . . . The adoptive couple was put on notice when the child was but four months old that the birth father did not consent to the adoption, was seeking custody of his child, and the adoption would be contested. They chose to move forward with the case.

Final Order, *supra,* at 1.

Far from disregarding Baby Girl's interests, the Family Court received extensive evidence, including testimony from competing expert witnesses for Petitioners and for Father, on the child's immediate and long-term welfare. *See* Final Order, *supra*, at 2-7; *Adoptive Couple*, 731 S.E.2d at 565-66. The Family Court heard testimony explaining Father's desire to marry Birth Mother to provide a

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of the child, in deciding whether good cause exists to deviate from the placement preferences. *Id*. at 148.

home for Baby Girl, his initial hesitancy to assume parental responsibility as a single parent facing military deployment overseas, and his immediate efforts to assert his role as father once he learned of Birth Mother's adoption plans. *See* Final Order, *supra*, at 3, 17, 19. Noting that Father was stationed in Iraq for nearly one year while the adoption action was pending, the Family Court found that Father did not willfully forego his parental duties. *Id*. at 19. The Family Court credited testimony that Father "was a good father who enjoyed a close relationship with his other daughter." *Adoptive Couple*, 731 S.E.2d at 564.[5] Father and his family had "a deeply embedded relationship with the Cherokee Nation," including a proud heritage in the Wolf Clan. *Id.* at 565 n. 28. Father's expert testified that Baby Girl would "thrive" with Father's family. *Id*. at 563. While this opinion was based on the expert's experience with other Indian children who had been transitioned into Indian placements and not on statistical studies or on observations of Baby Girl or Father, the Family Court found it credible and persuasive. *Id*. at 564.

Petitioners' expert, on the other hand, testified as to the emotional trauma that Baby Girl would experience if removed from Petitioners' custody. *Id*. at 563. Based on a bonding analysis conducted with Baby Girl and Petitioners, that expert focused solely on the positive relationship Petitioners had formed with Baby Girl and the impact of removing her from

[5] A home study conducted while Father was deployed in Iraq revealed that his family's home was "clean, safe, and appropriate," with large outdoor areas for play. 731 S.E.2d at 563.

their custody. He did not assess the potential relationship Baby Girl might develop with Father and other relatives within the Cherokee Nation. *Id.* On cross-examination, Petitioners' expert agreed that a child who had bonded successfully once could bond again. *Id.* According to the Family Court, "it was not [the expert's] opinion beyond a reasonable doubt that the child would be seriously harmed or damaged if the child were returned to birth father's custody." Final Order, *supra,* at 20; 731 S.E.2d at 563.

On a concededly mixed record, with weaknesses apparent in each expert's testimony, the Family Court concluded that Petitioners had not met their burden of proof under ICWA. 731 S.E.2d at 564.[6] The court found that Petitioners had not proven that "the child will suffer physical or emotional damage if returned to the custody of her biological father," and as a result, "ICWA prohibits termination of his parental rights." *Id.* In affirming the Family Court, the South Carolina Supreme Court noted that Father had intervened early in the litigation and that most of the bonding between Baby Girl and Petitioners had occurred *after* he had filed his objection to the adoption. *Id.* The court concluded that "the bonding that occurred during litigation, without more, cannot form the basis for

[6] The Family Court mistakenly concluded that a "clear and convincing" evidentiary standard should apply to the question of terminating Father's parental rights, in light of *Santosky v. Kramer*, 455 U.S. 745 (1982), rather than the "beyond a reasonable doubt" standard established by 25 U.S.C. § 1912(f). *See* Final Order, *supra,* at 11. Nevertheless, the court found that Petitioners had failed to meet even the lower burden of proof that it deemed applicable. *Id*. at 22.

terminating Father's parental rights." *Id.* In this Court, the factual findings of the South Carolina courts on Baby Girl's best interests are surely entitled to deference and respect. Baby Girl has been living with Father since December 31, 2011. *Id.* at 552.

The human dimensions of this case are profound, and there are no villains. The delay in establishing the applicability of ICWA was apparently due to innocent mistakes by all parties, including Birth Mother. *See Adoptive Couple,* 731 S.E.2d at 554-555. Had Father's membership in the Cherokee Nation been confirmed at the outset, the custody dispute over Baby Girl could have proceeded in full compliance with ICWA and might never have been transferred to South Carolina. Final Order, *supra,* at 4-5; 731 S.E.2d at 559. But what is most significant, and undisputed, is that Father objected promptly once he did receive notice of the planned adoption and has been steadfast since then in his claim of paternity and in his desire to raise his daughter. Had Father not objected immediately upon learning of the adoption, the outcome in the courts below likely would have been quite different. When a birth father delays unreasonably in asserting parental rights until long after receiving notice of a pending adoption, courts have construed ICWA to not require that the adoption be set aside.[7] In that circumstance, the interests of the child and the

[7] *See, e.g., In re Adoption of Baade*, 462 N.W.2d 485 (S.D.1990) (where birth father knew of pending adoption and made no effort to object until child had been living with adoptive parents for over two years, court found that grant of custody to father would result in serious emotional or physical harm to child).

adoptive parents in protecting the established family may be paramount.[8] Here, however, Father acted quickly and responsibly, even as he was preparing to deploy for Iraq, when he learned for the first time that Birth Mother had relinquished Baby Girl to Petitioners for adoption. *See Adoptive Couple*, 731 S.E.2d at 555.

Moreover, in the instant case, the interests of the child, father, and tribe coincide. The Family Court found that both the interests of Father and Baby Girl would be furthered by his assuming full parental custody of the child. Final Order, *supra,* at 22. The South Carolina Supreme Court emphasized, as well, that "in transferring custody to Father and his family, Baby Girl's familial and tribal ties may be established and maintained in furtherance of the clear purpose of the ICWA, which is to preserve American Indian culture by retaining its children within the tribe." *Adoptive Couple*, 731 S.E.2d at 566.

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[8] *See In re Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988) (barring challenge by a putative Indian father who did not acknowledge or establish paternity until after the final adoption order was entered, 21 months after the child was placed for adoption); *In re Appeal in Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228 (Ariz. Ct. App. 1983) (rejecting challenge by a putative Indian father and tribe where the father did not acknowledge paternity until three years after the child's birth and just one month before a final decree of adoption was entered).

B. The Indian Child Welfare Act Is Tied To Tribal Membership And Furthers A Core Congressional Concern For The Survival Of American Indian Tribes.

In enacting ICWA's framework for protecting Indian children, families, and tribes, Congress explained that the Act was an exercise of the federal government's "plenary power over, and responsibility to, the Indian and Indian tribes," and was intended to address "the failure of state officials, agencies, and procedures to take into account the special problems and circumstances of Indian families." H. Rep. No. 95-1386 at 19. In exercising this plenary power, Congress was careful to require that an "Indian child" either be a member of a federally-recognized tribe or be eligible for membership in a federal recognized tribe and the child of a tribal member. 25 U.S.C. § 1903(4).

Tribes have diverse approaches to defining membership. The Cherokee Nation requires that members be lineal descendants of tribal members. *See* Constitution of Cherokee Nation of Oklahoma Art. III (1999). *See generally* Cohen's Handbook of Federal Indian Law 174-75 (Nell Jessup Newton ed. LexisNexis 2005); Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. Kan. L. Rev. 437 (2002). A tribe's right to define its own membership is a key element of tribal autonomy. As this Court acknowledged the same year that ICWA became law, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

In this case, Father is a member of the Cherokee Nation and Baby Girl is eligible for membership. ICWA is applicable here not because of their race but because of their political status with a federally recognized Indian tribe. For decades this Court has recognized that legislation benefitting federally recognized Indian tribes and their members is a classification based on political association rather than race and is therefore subject only to rational basis review. *See Morton v. Mancari*, 417 U.S. 535, 554 (1974). In *Morton,* this Court explained that "[t]he [BIA's hiring] preference . . . is granted to Indians, not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* The *Mancari* approach was followed in *Fisher v. District Court*, 424 U.S. 382 (1976) (per curiam), a pre-ICWA case in which the Court upheld a rule of exclusive tribal jurisdiction in an adoption dispute between tribal members. *Accord, United States v. Antelope*, 430 U.S. 641, 645-48 (1977).

Despite Petitioners' contentions to the contrary, Pet. Br. at 44, *Rice v. Cayetano*, 528 U.S. 495 (2000), does not support an interpretation of ICWA as race-driven but, rather, supports just the opposite conclusion. In that case, the Court struck down an electoral scheme in Hawaii that restricted certain voting rights to "Native Hawaiians" as determined by ancestry. In holding that the scheme was an impermissible racial classification in violation of the Fifteenth Amendment, the Court distinguished the many federal laws and regulations that favor members of recognized Indian tribes and, citing *Morton* and *Antelope*, reaffirmed the authority

of Congress to make precisely the type of political classifications that ICWA makes. *Id*. at 520, 530-32.

A core purpose of ICWA is to strengthen Indian tribes. The protections afforded by ICWA are triggered by tribal membership rather than race. Accordingly, the Act is constitutional because its provisions are "reasonable and rationally designed to further Indian self-government." *See Morton*, 417 U.S. at 555; *Antelope*, 430 U.S. at 645-48.

II. THE ADOPTION DISPUTE REGARDING BABY GIRL FALLS SQUARELY WITHIN THE SCOPE OF CONGRESSIONAL CONCERNS THAT PROMPTED PASSAGE OF THE INDIAN CHILD WELFARE ACT.

Fundamental goals of ICWA would be thwarted if state courts could exclude from its protections cases such as this one, involving a father who may have fallen short of the mandates of state law but nevertheless acted promptly to secure his parental rights in accordance with ICWA. Petitioners have not disputed that, for purposes of ICWA's coverage, the attempted adoption of Baby Girl in South Carolina was a "child custody proceeding," *see* 25 U.S.C. § 1903(1); that the Cherokee Nation is an "Indian tribe," *see* 25 U.S.C. § 1903(8); or that Baby Girl is an "Indian child," *see* 25 U.S.C. § 1903(4).

Similarly, Father clearly meets the definition of "parent" under ICWA. The Act defines "parent" as follows:

> "Parent" means any biological parent or parents of an Indian child or any Indian

> person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.

25 U.S.C. § 1903(9). The South Carolina courts correctly concluded that Father, who was not married to Birth Mother, was a "parent" under ICWA because he both acknowledged and established paternity (through DNA testing) and objected to the adoption of Baby Girl as soon as he became aware of Birth Mother's plan. *See Adoptive Couple*, 731 S.E.2d at 555-56.

Petitioners, however, argue that "parent" must be defined by reference to state law, and that "acknowledged or established" should similarly be read to include state law limitations, because otherwise the phrase adds no meaning to the definition. Pet. Br. 19-29. In Petitioners' view, Father was not entitled to object to his daughter's adoption under South Carolina law and should therefore be excluded from the definition of "parent" under federal law. *Id.* at 22-29. As noted by the South Carolina Supreme Court, Petitioners' arguments conflate the definition of "parent" with the restrictions on putative fathers entitled to object to adoptions. *Adoptive Couple*, 731 S.E.2d at 560. As Father both acknowledged and established his paternity, he clearly satisfied the definition of "parent" under ICWA.

A. The Meaning Of "Parent" As Used In ICWA Is A Matter Of Federal Rather Than State Law And Must Be Determined By Reference To The Statutory Definition, The Structure Of The Act, And The Underlying Congressional Goals.

In enacting ICWA pursuant to its constitutional powers under Article I, Section 8, Congress intended to protect tribal members and tribes from practices rooted in state law. *See* H.R. Rep. No. 95-1386, *supra*, at 13-14. The unique history of ICWA both explains and supports a federal remedial scheme of nationwide application, one that does not incorporate local limitations on parental status. Indeed, reliance on state law to define the meaning of the term "parent" in ICWA would undermine the purpose of the Act and frustrate the exercise of the federal rights it was meant to provide. *See Holyfield*, 490 U.S. at 43-44.

In *Holyfield,* the Court rejected the argument that the term "domicile" as used in ICWA should be defined according to state law. *Id*. at 44-47. Noting that the Act was designed to protect "the rights of Indian families and Indian communities vis-à-vis state authorities," *id*. at 45, the Court emphasized that "Congress perceived the States and their courts as partly responsible for the problem it intended to correct." *Id*. Under the circumstances, the Court found it "most improbable" that Congress meant to leave the scope of tribal jurisdiction to be determined as a matter of state law. *See also id*. at 44 ("the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary.")

Similarly, the meaning of the term "parent" must be defined according to federal standards in order to effectuate the congressional purpose. The aim of the Act was to establish "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian cultures." 25 U.S.C. § 1902. The legislative history makes clear that Congress was concerned about destructive state practices in both voluntary and involuntary proceedings. Based on the extensive testimony offered during the congressional hearings on the Act, Congress found that Indian children were often removed from Indian parents and Indian tribes with little regard for procedural safeguards. H.R. Rep. No. 95-1386, *supra*, at 11. Congress reported that "[m]any cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children." *Id.*

Having found that state law contributed to the unwarranted removals of Indian children from their families and tribes, Congress could not have intended to incorporate state laws that facilitate the severance of the rights of Indian parents in the context of adoption. In certain circumstances, South Carolina law dispenses with the requirement of parental consent of an unwed father. *See, e.g.,* S.C. Code Ann. § 63-9-310(A)(5) (consent not required if father neither lived with child's mother and acknowledged paternity nor provided financial support to birth mother). Although such a law may facilitate the adoption of children, it ignores the remedial purposes of ICWA, which was enacted expressly to halt the

state practices that were destroying Indian families and tribes. *Holyfield*, 490 U.S. at 45-46. In light of that goal, the meaning of "parent," as well as the procedural and substantive protections for parents provided by the Act, *see* 25 U.S.C. §§ 1911-16, 1921, must be read to supplant state laws that would ignore the evils that ICWA was designed to ameliorate and would weaken its safeguards.

Petitioners argue that the two sentences in the definition of "parent" in ICWA do not carry independent meaning unless the second sentence is interpreted as a reference to state law standards. Pet. Br. 19-29. Petitioners are mistaken in their construction of the definition and in their reading of the legislative history. The first sentence makes clear that biological parents of an Indian child as well as Indian adoptive parents are included within the definition of "parent." The second sentence is intended to exclude unmarried fathers who do not take steps to acknowledge or establish their paternity before or during any pending child custody proceeding within the meaning of ICWA. Thus, an unwed biological father whose paternity is neither established nor acknowledged is not a "parent" under ICWA.[9] Clearly, the second sentence demonstrates a deliberate decision to bar states from excluding putative fathers who, like Father here, acknowledge and establish their paternity at an early opportunity in the proceeding.

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[9] *See In re Daniel M.*, 110 Cal. App.4th 703, 1 Cal.Rptr.3d 897 (Ct. App. 4th Dist. 2003) (putative father who did not acknowledge or establish paternity did not have standing to appeal claimed violation of ICWA notice provisions).

The legislative history of ICWA shows that Congress was aware of this Court's nascent jurisprudence on the constitutional rights of unwed fathers. In the accompanying House Report, Congress explained that "the last sentence [in the definition of "parent"] is not meant to conflict with the decision of the Supreme Court in *Stanley v. Illinois*, 405 U.S. 645 (1972)." H.R. Rep. 95-1386, *supra*, at 21. In *Stanley*, the Court held that an unwed father's rights to due process and equal protection were violated when he was conclusively presumed to be an unfit parent under state law at the death of his children's mother.[10] Petitioners and Guardian Ad Litem argue that the reference to *Stanley* narrows the universe of unwed fathers eligible to invoke ICWA. Pet. Br. 24-27; GAL Br. 35-38. However, just the opposite is true. The reference to *Stanley* in the House Report shows that Congress wanted to include unwed fathers under ICWA's umbrella. It cannot possibly mean that Congress wanted to engraft this Court's post-*Stanley* precedents on to the straightforward definition of "parent" in Section 1903.[11] In this case, of course, Father is not relying on the Due Process Clause but instead on rights grounded in ICWA. Under the

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[10] The Court held that that "as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws." 405 U.S. 645, 649 (1972).

[11] The cases addressing unwed fathers' rights post-*Stanley* include *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983); and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

strict criteria of ICWA, Father did not voluntarily relinquish his daughter for adoption, nor was there a basis for involuntarily terminating his parental rights.

The text of ICWA supports the position that Congress did not intend in its definition of "parent" to incorporate state law limitations on a father's standing to object to an adoption. The statutory definition in 25 U.S.C. § 1903(9) conspicuously omits any reference to state law. Congress, however, did refer to state law in another definition. Notably, "Indian custodian" is defined to mean "any Indian person who has legal custody of an Indian child under tribal law or custom or *under State law*. . . ." 25 U.S.C. § 1903(6) (emphasis added). By having included the reference to state law in one definition but not another, Congress evinced its intent that the definition of "parent" should stand alone as a federal standard. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (selective use of language in different sections of same statute is presumed to be intentional).

Moreover, ICWA expressly refers to state law in a separate section that clarifies the intended preemptive impact of the Act. Section 1921 requires courts to apply any state or federal law that increases the protection for parental rights beyond the standards provided in the Act. *See* 25 U.S.C. § 1921 (court shall apply state or federal law that provides "a higher standard of protection to the rights of the parent . . . than the rights provided under this subchapter"). Congress thus saw ICWA as a floor but not a ceiling. Surely, a state law that cuts off an unwed Indian father's standing to assert

paternity provides a lower standard of protection for his rights than the federal Act and must be disregarded.

B. Because This Case Involved The Attempted Adoption Of An Indian Child Protected By ICWA, The Courts Below Had To Find Either That The Indian Father Voluntarily Consented To The Adoption In Accordance With ICWA Or That The Father's Parental Rights Were Subject To Termination Under ICWA.

Wanting to halt the destructive practices by state child welfare authorities, Congress imposed strict standards for the voluntary and involuntary terminations of parental rights in proceedings involving Indian children. In this case, the only "consent" document that Father ever signed was "a one-page 'Acceptance of Service'" handed to him by a process server just days before being deployed for Iraq. *Adoptive Couple*, 731 S.E.2d at 561. The courts below acted properly in concluding that the father's "consent" did not meet the requirements of the Act and that grounds for termination under ICWA similarly did not exist.

To ensure that parents of Indian children act without coercion or duress and with full understanding of the meaning of a consensual relinquishment, Congress spelled out in detail the nature of the required consent. The Act mandates that consent be in writing and recorded before a judge, that the judge certify that the terms and consequences of the consent were fully understood by the parent, and that the explanation of the consequences of the consent be in English or

interpreted into a language that the parent understood. *See* 25 U.S.C. § 1913(a). To be valid, the consent cannot be given earlier than ten days after the birth of the child. *See id.* In addition, in any voluntary proceeding for termination of parental rights or adoptive placement, a parent's consent may be withdrawn for any reason at any time prior to the final decree of termination or adoption. *See* 25 U.S.C. §1913(c). This parental prerogative applies to any parent of an Indian child, whether or not the parent is a tribal member. Thus, Birth Mother could have withdrawn her own consent to adoption up until the time of a final decree.

These federal requirements diverge from typical state law adoption statutes in important respects. State consent statutes often require that consents simply be sworn or acknowledged, without the need to appear in court to receive a judicial explanation of the consequences. *See, e.g.,* Mass. Gen. Laws ch. 210, § 2 (requiring written consent to be attested to and subscribed before notary in presence of two witnesses); Or. Rev. Stat. § 109.312 (requiring consent to be in writing). Once validly given, consents generally cannot be withdrawn except on the grounds of undue influence, fraud, or duress. In light of the unique history endured by Indian children, parents, and tribes, Congress heightened the protections to ensure that relinquishments of Indian children would be truly voluntary and based on a full understanding of the legal consequences of the consent. In this case, the parties do not dispute that a valid consent in accordance with 25 U.S.C. § 1913(a) from Father was never obtained.

Absent a voluntary relinquishment of Father's parental rights in accordance with ICWA, the only other route to an adoption of Baby Girl was an involuntary termination of his parental rights. As the South Carolina Supreme Court found, the strict standards of ICWA for involuntary termination were not met here. *Adoptive Couple*, 731 S.E.2d at 565. *Adoptive Couple*, 731 S.E.2d at 565. In Section 1912, Congress established clear criteria to govern the "termination of parental rights," which the Act defines as "*any* action resulting in the termination of the parent-child relationship." 25 U.S.C. § 1903(i)(ii) (emphasis added). Thus, Section 1912 applies to all involuntary terminations, including those where, as here, the parent did not previously have custody of the child. Specifically, the Act bars a severance of parental rights unless and until "active efforts" have been made to prevent the breakup of the Indian family. *See* 25 U.S.C. § 1912(d). In addition, any termination of parental rights must be "supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." *See* 25 U.S.C. §1912(f).

The courts below appropriately held that ICWA's strict standards for terminating the rights of a parent of an Indian child were not met in this case.[12] No efforts were made to meet the requirement

[12] In light of its holding that ICWA's standards for terminating parental rights were not met, the South Carolina Supreme Court did not address any grounds for termination under state law. *Adoptive Couple*, 731 S.E.2d at 565. The Family Court, however, did reach the issue and concluded that Petitioners had

of Section 1912(e) to prevent the breakup of Father's relationship with his daughter. As the United States points out, that is a sufficient basis to affirm the judgment below. U.S. Br. 20-23.

In addition, Section 1912(f) elevates the standard for severance of parental rights of Indian children to proof beyond a reasonable doubt. The South Carolina courts concluded that Petitioners had failed to show that "continued custody" of Baby Girl by Father would result in harm sufficient to meet the statutory standard. *Adoptive Couple,* 731 S.E.2d at 562-65. Petitioners contend that the reference to "continued custody" requires that a parent be presently exercising custodial rights under state law in order to invoke the protections of Section 1912. Pet. Br. 33-35. Petitioners' view, apparently shared by the United States, U.S. Br. 23-26, ignores the structure of §1912 and would be an illogical interpretation of the statute. Such a construction would exclude a large category of Indian children from coverage under ICWA—a result that Congress could not have intended.[13] The only logical reading of § 1912(f) is that it applies to all termination of parental rights proceedings involving an Indian

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not established any state law grounds for severing Father's rights. *See* Final Order, *supra*, at 18-20.

[13] "It is unreasonable to suppose that Congress intended to provide no substantive standard and no burden of proof for [termination of parental rights] cases in which the parent does not have physical custody of the child." *In re Termination of Parental Rights to Vaughn R.*, 770 N.W.2d 795, 802-03 (Wis. Ct. App. 2009); a*ccord D.J. v. P.C.*, 36 P.3d 663, 670, 672 (Alaska 2001); *In re Adoption of Baade*, 462 N.W.2d 485, 490 (S.D. 1990); *In re Welfare of W.R.*, 379 N.W.2d 544, 549 (Minn. Ct. App. 1985).

child, including those who may not be in, or who may never have been in, the physical custody of the Indian parent.

If a birth mother seeks to place her child for adoption before the father has had an opportunity to establish a relationship with his son or daughter, Petitioners' reading of ICWA would foreclose the father's rights irrevocably. Surely Congress did not intend to exclude those fathers (and their children) from ICWA's protections. For that reason, "continued custody" logically refers to preexisting parental rights and responsibilities -- even in the absence of physical custody -- that a parent retains until voluntarily relinquished or judicially terminated under the standards set forth in ICWA. *See* Bureau of Indian Affairs, U.S. Dep't of the Interior, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67593 (Nov. 26, 1979) (hereinafter BIA Guidelines).

In enacting Section 1912(f), Congress intended to establish a general federal evidentiary standard for termination of parental rights as to Indian children, *see* House Rep. No. 95-1386, *supra*, at 22, and state courts interpreting ICWA have properly understood it that way. *See, e.g., Idaho Dept. of Health & Welfare v. Doe,* 275 P.3d 23 (Idaho 2012) (applying standard of § 1912 to termination of parental rights of Indian father who was serving lengthy prison sentence)*; In re M.F.,* 225 P.3d 1177 (Kan. 2010) (applying standard of § 1912 to termination of parental rights where child had been in state custody since birth due to serious medical issues).

As detailed in Part I(A) of this Brief, the thoughtful assessment of Baby Girl's interests by the Family Court, based on an extensive factual record, support the conclusion that the rigorous standards of Section 1912 were not satisfied.

C. The "Existing Indian Family Doctrine," A Judge-Made Exception To ICWA That Has Been Losing Support In State Courts In Recent Years, Is Inconsistent With The Language And Purpose Of The Indian Child Welfare Act And Was Properly Rejected In This Case By The South Carolina Courts.

The plain language of ICWA makes it clear that the attempted adoption of Baby Girl by Adoptive Couple is governed by the Act. Petitioners urge, however, that the Act should not be applied as written because Baby Girl was born to a non-Indian mother who chose to relinquish the child for adoption at birth. In that regard, Petitioners rely on a version of the "existing Indian family doctrine." Pet. Br. 51-54. The doctrine is a judge-made exception to ICWA that has no support in the language or legislative history of the Act and is inconsistent with the fundamental policy of tribal self-determination.

Petitioners do not dispute that Baby Girl is an "Indian child" within the meaning of ICWA. *See* 25 U.S.C. § 1903(4) ("Indian child" means any unmarried person under the age of eighteen who is either a member of an Indian tribe or is eligible for membership and is the biological child of a member). Nevertheless, Petitioners urge that the Act does not apply because Baby Girl was born to a non-Indian

mother and placed for adoption at birth, and thus was never a member of an Indian family.

Nothing in ICWA requires that a child be part of an ongoing Indian family unit, or actively involved in tribal life, before the Act governs. The definitional sections turn on tribal membership—or eligibility for membership—and do not impose additional requirements. *See* 25 USC §§ 1903(4) ("Indian child"); 1903(9) ("parent"). Because Congress carefully defined the nature of the relationship between an Indian child and a tribe required to trigger application of the Act, "judicial insertion of an additional criterion for applicability is plainly beyond the intent of Congress." *In re A.J.S.,* 204 P.3d 543, 550 (Kan. 2009), quoting *Baby Boy C.*, 27 A.D.3d 34, 47 (N.Y. App. Div. 2005). Moreover, while Congress was primarily focused on involuntary separations of Indian children from their Indian families, it also acknowledged that under prevailing practices some Indian children would never experience their tribal culture. H. R. Rep. No. 95-1386, *supra*, at 20. Congress wanted to protect Indian children who, as minors, lacked the capacity themselves to initiate an enrollment process and take advantage of the cultural and property benefits flowing from enrollment. *Id*. at 17.

In the few courts that continue to apply the existing Indian family doctrine, its contours are ill-defined. Some courts use an inherently subjective test to determine whether the child and parents lack a "significant social, cultural or political relationship with their tribe." *See In re Bridget R.*, 41 Cal. App. 4th 1483, 1492 (Cal. App. 2d Dist. 1996). Others have limited it to cases in which an unmarried non-

Indian mother voluntarily relinquishes the child. *See, e.g., Ex Parte C.L.J.*, 946 So.2d 880 (Ala. Civ. App. 2006). Still others have applied the doctrine when neither the Indian parent nor tribe contests the child's placement. *In re Parental Rights as to N.J.,* 221 P.3d 1255, 1264 (Nev. 2009). The Kansas Supreme Court, which created the "existing Indian family doctrine" in *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982), overruled that decision in *In re A.J.S.,* 204 P.3d 543 (Kan. 2009). Concluding that the doctrine was illogical and inconsistent with the statutory text and purpose, the court announced that abandonment of the doctrine was "the wisest future course." *Id*. at 549.

The legislative history of ICWA lends no support to the "existing Indian family doctrine." Congress recognized that a young Indian child who loses all connection with his or her tribe cannot retrieve it in adulthood; it is gone forever. H.R. Rep. No. 95-1386, *supra*, at 17. Indian children, by virtue of their childhood, cannot voice a desire to become full and active members of their tribes. As adults, tribal members have the right to leave the tribal community if they so desire, but that is their choice. The existing Indian family doctrine takes that choice from the child irrevocably.[14]

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[14] Significantly, Congress rejected an earlier version of ICWA that would have required that an Indian child not living on a reservation have "significant contacts" with the tribe. *See* Indian Child Welfare Act, S. 1214, 95th Cong., 1st Sess., § 102(c) (1977), *cited in* S.Rep. No. 95-597, 95th Cong., 1st Sess., at 4 (1977); *Michael J. v. Michael J.*, 7 P.3d 960, 964 (Ariz. Ct. App. 2000).

The "existing Indian family doctrine" is fundamentally at odds with a tribe's right to determine its own membership, a key element of tribal sovereignty and tribal self-determination. A tribe sustains its cultural and political identity through the power to define and maintain membership criteria. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). A state court that presumes to assess the "Indianness" of a child for purposes of applying ICWA is intruding on a core element of tribal self-determination,[15] and is acting in a manner wholly inconsistent with the overarching purposes of ICWA.

By affirming the South Carolina Supreme Court, this Court can send an important message to the states that the protections of ICWA for Indian children, families, and tribes do not depend on the vagaries of state law or the unpredictable contours of a judge-made exception to the Act.

[15] According to the BIA Guidelines, "[i]t is the tribe's prerogative to determine membership criteria and to decide who meets those criteria," and a tribe's determination that a child is a member or eligible for membership should be deemed "conclusive." *See* BIA Guidelines for State Court, *supra*, at 67586.

CONCLUSION

The judgment below should be affirmed.

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