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 PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

BRIEF OF *AMICA CURIAE* BIRTH MOTHER IN SUPPORT OF PETITIONERS

GREGORY G. GARRE
LORI ALVINO MCGILL
Counsel of Record
KATYA S. GEORGIEVA
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
lori.alvino.mcgill@lw.com

Counsel for Amica Curiae

QUESTIONS PRESENTED

The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963, applies to state custody proceedings involving an "Indian child." A dozen state courts of last resort are openly and intractably divided on two critical questions involving the administration of ICWA in thousands of custody disputes each year:

(1) Whether a non-custodial parent can invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law.

(2) Whether the undefined term "parent" in 25 U.S.C. § 1903(9) includes an unwed biological father who relinquished any parental rights he might have had under state law.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICA CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

THIS COURT SHOULD GRANT CERTIORARI TO PROVIDE DEFINITIVE GUIDANCE IN THIS SENSITIVE AREA WHERE CONTINUED UNCERTAINTY IS INTOLERABLE 4

A. The Current Uncertainty Surrounding ICWA's Application Destroys Stable Family Units And Undermines The Deeply Personal Individual Choices of Birth Mothers 4

B. The Questions Presented Arise With Increasing Frequency 9

C. The South Carolina Supreme Court's Interpretation Raises Grave Federalism Concerns 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

In re A.J.S.,
204 P.3d 543 (Kan. 2009)..12

In re Adoption of S.S.,
622 N.E.2d 832 (Ill. App. Ct. 1993), *rev'd*,
657 N.E.2d 935 (Ill. 1995) 12

In re Adoption of T.R.M.,
525 N.E.2d 298 (Ind. 1988), *cert. denied*, 490
U.S. 1069 (1989) 13

In re Alexandria Y.,
53 Cal. Rptr. 2d 679 (Ct. App. 1996)........................12

In re Baby Boy L.,
103 P.3d 1099 (Okla. 2004)...12

In re Burrus,
136 U.S. 586 (1890) 13

In re K.L.D.R.,
No. M2008-00897-COA-R3-PT, 2009 WL
1138130 (Tenn. Ct. App. Apr. 27, 2009).....................8

Lehman v. Lycoming County Children's Services,
458 U.S. 502 (1982) 10

Michael H. v. Gerald D.,
491 U.S. 110 (1989) 4

TABLE OF AUTHORITIES—Continued

Page(s)

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 5

Rose v. Rose,
481 U.S. 619 (1987) 13

S.A. v. E.J.P.,
571 So. 2d 1187 (Ala. Civ. App. 1990) 8, 9

State ex rel. C.D. v. State,
200 P.3d 194 (Utah Ct. App. 2008)...........................12

State ex rel. D.A.C. v. P.D.C.,
933 P.2d 993 (Utah Ct. App. 1997)...........................12

Troxel v. Granville,
530 U.S. 57 (2000) 4

STATUTES

25 U.S.C. §§ 1901-1963..i

25 U.S.C. § 1903(4) 10

25 U.S.C. § 1903(9) i

Cal. Fam. Code § 8700(f) 5

Fla. Stat. § 63.082(6)(e)...5

Vt. Stat. Ann. tit. 15A, § 2-406(b) 5

TABLE OF AUTHORITIES—Continued

Page(s)

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INTEREST OF *AMICA CURIAE*[1]

This case presents an important question of federal law that has divided the state appellate courts, implicates thousands of custody disputes every year, and has a profound effect on the deeply personal, fundamental, and lawful choices made by child-bearing women: Whether the Indian Child Welfare Act (ICWA) may be invoked to block an adoption where (1) adoption proceedings were voluntarily initiated by a non-Indian mother who had sole custody of her child; (2) the Indian unwed biological father voluntarily relinquished any parental rights he might otherwise have had under state law; and (3) the undisputed evidence overwhelmingly established that the child's best interests would be served by finalizing the adoption.

Amica curiae Birth Mother is the biological and birth mother of Baby Girl, and is the single mother of two other children. After Baby Girl's biological father learned that Birth Mother was pregnant, he refused to provide any emotional or financial support unless Birth Mother agreed to marry him. Biological Father never offered to pay any of Birth Mother's medical or living expenses, or accompany her to a single doctor's visit,

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[1] Pursuant to Supreme Court Rule 37.2(a), *Amica* timely informed all parties of her intent to file a brief in support of Adoptive Couple's petition for certiorari. All parties consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *Amica* states that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *Amica* and her counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

even though he was perfectly capable of doing so. After repeated failed attempts to get Biological Father to be involved in her pregnancy, Birth Mother ended the relationship. Shortly thereafter, she inquired again whether Biological Father wanted to support her and their child, or relinquish his parental rights. He responded via text message that he would not support her or the child and that he wanted to "give up" his parental rights. Pet. App. 89a.

Birth Mother was already struggling financially as a single mother of two children. She "wanted [her] little girl to have a chance." Pet. App. 46a. Unable to provide the stable two-parent home she wished for Baby Girl, Birth Mother decided that it would be in Baby Girl's best interest to be placed with a loving adoptive family. She hand-picked petitioners, whom she met through the Nightlight Christian Adoptions Agency in Oklahoma. *Id.* at 4a-5a. Birth Mother considered other families, including families residing in Oklahoma, but she ultimately selected petitioners "because they had values similar to her own and could provide Baby Girl a stable and loving home." *Id.* at 47a.

During the final months of the pregnancy, petitioners financially supported Birth Mother, spoke to her weekly, and traveled from South Carolina to Oklahoma to visit her. *Id.* at 5a. Adoptive Couple were in the delivery room when Birth Mother delivered Baby Girl, Adoptive Father cut the umbilical cord, and the couple cared for Baby Girl as their child from that moment forward, until they were ordered to transfer custody to Biological Father when Baby Girl was 27 months old. *Id.* at 7a, 11a.

The decision below effectively negated Birth Mother's decision to place Baby Girl with Adoptive Couple, and ripped Baby Girl from the only family she has ever known, in derogation of both Birth Mother's and Baby Girl's rights and expectations under state law. Birth Mother therefore has a substantial interest in the outcome of this case. Having voluntarily relinquished her own parental rights with the expectation that *petitioners* would care for and raise Baby Girl, consistent with Baby Girl's best interests and state law, Birth Mother is uniquely situated to speak to the profound effect of the decision below on the deeply personal, fundamental, and lawful choices made by child-bearing women.

SUMMARY OF ARGUMENT

This Court's intervention is urgently needed to resolve a well-developed, apparently intractable conflict on the meaning of a federal statute that decides the fate of some of the nation's most vulnerable children and has a profound effect on the women who bear them.

A woman who places her child for adoption and selects her child's adoptive parents makes a deeply personal decision that is fundamental to her identity as a birth mother. As this case powerfully illustrates, the broad interpretation adopted by the South Carolina Supreme Court and several other state courts of last resort operates to vitiate that choice—at all costs, in derogation of the rights and expectations provided under state law, and in near-complete disregard for the best interests of the children involved. That interpretation is both at odds with the text and purpose of the statute, and raises grave federalism concerns.

The tragic outcome in this case is unfortunately not aberrational, and the familiar fact pattern present here will arise with increasing frequency as the number of mixed-race children born to unwed parents continues to climb. Unless this Court reviews the decision below and gives guidance to state courts on the correct application of ICWA's provisions, birth mothers will continue to face intolerable uncertainty when making one of the most personal and important decisions in their lives—and established, thriving, family units will continue to be ripped apart.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO PROVIDE DEFINITIVE GUIDANCE IN THIS SENSITIVE AREA WHERE CONTINUED UNCERTAINTY IS INTOLERABLE

A. The Current Uncertainty Surrounding ICWA's Application Destroys Stable Family Units And Undermines The Deeply Personal Individual Choices of Birth Mothers

1. This Court has time and again acknowledged the "sanctity … traditionally accorded to the relationships that develop within the unitary family." *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989); *see also id.* at 124 (birth father's biological link to offspring does not rise to the level of a "protected family unit under the historic practices of our society"); *Troxel v. Granville*, 530 U.S. 57, 60 (2000) (plurality op.) (state law permitting "'any person'" to petition for visitation rights and authorizing the court to grant such rights whenever "'visitation may serve the best interest of the child,'" unconstitutionally interfered with

fundamental right of a mother to raise her children (quoting state law)); *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984) (choices attending "the raising and education of children" must be protected against undue intrusion).

A birth mother who places her child for adoption and selects the adoptive parents makes a deeply personal decision that is fundamental to her identity as a birth mother. *See generally* Carol Sanger, *Placing the Adoptive Self, in Child, Family, and State* 58, 75-78 (Stephen Macedo & Iris Marion Young eds., 2003) (arguing that custodial authority of birth mother includes the right to choose adoptive parents). As most states recognize, the decision of a biological parent to choose permanent surrogate caretakers for her child is entitled to due respect, so long as it is consistent with the child's best interests. *See, e.g.*, Fla. Stat. § 63.082(6)(e) ("In determining whether the best interests of the child are served by transferring the custody of the minor child to the prospective adoptive parent selected by the parent, the court shall consider the rights of the parent to determine an appropriate placement for the child, the permanency offered, the child's bonding with any potential adoptive home that the child has been residing in, and the importance of maintaining sibling relationships, if possible."); Cal. Fam. Code § 8700(f) ("The relinquishing parent may name in the relinquishment the person or persons with whom he or she intends that placement of the child for adoption be made by the department, county adoption agency, or licensed adoption agency"); Vt. Stat. Ann. tit. 15A, § 2-406(b) ("A consent shall state that the parent or guardian executing the document is voluntarily and unequivocally consenting to the

transfer of legal and physical custody to, and the adoption of the minor by, a specific adoptive parent whom the parent or guardian has selected").

Recognizing the importance of this right, many of the nation's leading adoption agencies (including the many affiliates of Catholic Charities) assure women dealing with unplanned pregnancies that if they choose adoption, they will be able to select the family with whom their child will be placed. *See* Sanger, *supra*, at 77-78. Indeed, the evolution from "closed" to "open" adoptions—adoptions in which the adoptive family is chosen by, or at least known to, the birth mother—was grounded on a recognition that such openness is "central to sustaining adoption as a social institution." *Id.* at 81 & n.66.

2. When Birth Mother became pregnant, her relationship with Baby Girl's biological father quickly deteriorated. When pressed as to whether he would provide any emotional or financial support to her or the child, he informed Birth Mother via text message that he would rather surrender his parental rights. Pet. App. 4a. As a mother of two other children and a woman who barely made ends meet despite being gainfully employed, Birth Mother made the heartbreaking and selfless choice to give Baby Girl a better life than she could provide. *Id.*

Birth Mother took very seriously her responsibility—first to care for her unborn child, and then to secure for her a loving, stable home. She contacted the Nightlight Christian Adoptions Agency and, after pouring over numerous files of perspective adoptive parents and carefully examining their fitness and ability to provide a loving home to Baby Girl, she chose Adoptive Couple. *Id.* at 4a-5a. Adoptive Couple

were with her for every important stage of her pregnancy and during the delivery of Baby Girl. *Id*. at 5a-7a. From the moment Baby Girl breathed her first gasp of air, Adoptive Couple began caring for her as their own daughter, and Birth Mother felt secure in the knowledge that she had made a fully informed decision that she believed was in the best interest of her child—a decision that was hers to make under state law, as the sole custodian and only legal parent of Baby Girl. The South Carolina Supreme Court's expansive and counter-textual interpretation of ICWA entirely undermined that decision. *Id*. at 32a.

The tragic outcome in this case and countless others—a product of ancestral and geographical happenstance—is not only at odds with the plain language and purpose of ICWA, Pet. 22, 24-26, GAL Br. 8-9, but also has profoundly negative consequences for the families, including the birth mothers, involved. Unless this Court reviews the decision below and gives guidance to state courts on the correct application of ICWA's provisions, birth mothers will continue to face intolerable uncertainty when making one of the most personal and important decisions in their lives. *See* Solangel Maldonado, *Race, Culture, and Adoption: Lessons from* Mississippi Band of Choctaw Indians v. Holyfield, 17 Colum. J. Gender & L. 1, 42-43 (2008) (raising "constitutional questions concerning the reproductive freedoms of women carrying children of Indian descent" and suggesting that the current state of the law could "influence a woman's decision to terminate her pregnancy, place her child for adoption, or raise it herself").

Birth Mother might have taken a different path. She might have chosen, for example, to raise Baby Girl

herself—in near poverty, with little time or opportunity to attend to her needs, and while juggling work and responsibilities to her two other children as a single mother. Had she done so, the child's biological father, who had no parental rights under state law, would have had no right to intervene. Yet, the South Carolina Supreme Court's interpretation of ICWA negated Birth Mother's selection of Adoptive Couple—who, it is undisputed, were in all respects fit, loving, and committed parents to Baby Girl.

Moreover, if Birth Mother had had the means to fully investigate the state of the law, she could have insured against this outcome by choosing an adoptive couple that resides in Tennessee, or Kentucky, or any other state in which ICWA would not have applied to block Baby Girl's adoption. *See, e.g.*, *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189-90 (Ala. Civ. App. 1990) (finding that ICWA does not apply to block the adoption because "since birth, [the child] has either resided with her non-Indian mother or her non-Indian great-aunt and great-uncle—except for a period of four weeks when she lived with her father and paternal grandmother" and therefore "was never a part of an Indian family environment"); *see also In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL 1138130, at *4 (Tenn. Ct. App. Apr. 27, 2009) (finding "that the Existing Indian Family Doctrine is recognized in Tennessee").

Of course, because the very slightest trace of Cherokee heritage will suffice to expose a child to classification as an "Indian child," many cases will arise in which the unwed birth mother with sole custody may have no idea that her placement of her child could be vitiated at the tribe's election—until it is too late to do

anything about it.[2] In either scenario, the current incentives for forum shopping, and the grave uncertainty about ICWA's application, have persisted for far too long. *See* Maldonado, *supra*, at 36, 35 (noting that "[t]he risk, or even mere perception, that adoptions of Indian children are more likely to be disrupted might dissuade some non-Indian families from adopting Indian children, even when there are no Indian families available to adopt those children"; and that adoption agencies may be "hesitant to accept a … child of Native American descent").

B. The Questions Presented Arise With Increasing Frequency

More than twenty state courts are openly and intractably divided as to whether ICWA's "parental termination" provision applies at all to the "'familiar fact pattern'" presented in this case: "the voluntary relinquishment of an illegitimate Indian child by its non-Indian mother." Pet. 11 (citation omitted); *S.A. v. E.J.P.*, 571 So. 2d at 1189. That "familiar fact pattern" continues to arise with increasing frequency.

According to the 2010 United States Census, approximately 5.2 million Americans self-identify as having some Indian heritage. Tina Norris et al., U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010*, at 1 (2012), *available at*

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[2] The Cherokee Nation has no "blood quantum" requirement for membership, provided the person can trace their descent—however remote—to the original enrollees in the Dawes Commission Rolls of 1867. Cherokee Nation Const. art. IV, § 1, *available at* http://www.cherokee.org/Docs/Org2010/2011/4/308011999-2003-CN-CONSTITUTION.pdf.

http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf. By contrast, at the time of ICWA's enactment, that number was only 1.4 million. *See* Comm. on Population, Nat'l Research Council, *Changing Numbers, Changing Needs: American Indian Demography and Public Health* 82 (Gary D. Sandefur, Ronald R. Rindfuss & Barney Cohen eds., 1996). Whether this increase is due to actual population growth, the decreased quantum of Native American heritage required to claim tribal membership, or higher rates of self-identification (due to the recent success of tribal gaming, for example), the result is the same—an increasing number of children are swept within the definition of "Indian child" in 25 U.S.C. § 1903(4).

As the number of Americans who self-identify as Native American has increased, so too has the percentage of Native Americans residing off-reservation. In 1950, only 13 percent of American Indians resided in cities; by 1990, 56 percent of the total national Indian population lived in urban areas. Alvin M. Josephy et al., *Red Power: The American Indians' Fight for Freedom* 260 (1999). That number has only continued to grow in recent years. *See* U.S. Census Bureau, *Tribal Governments Liaison Program: Handbook for Tribes and Urban American Indian and Alaska Native Populations* 1 (2009), *available at* http://www.census.gov/aian/pdf/TGLH_43009.pdf ("The 2000 Census revealed that approximately 60-64% of the AIAN population resided in urban communities living off-reservation or outside tribal jurisdictional boundaries."); Norris, *supra*, at 12-13 ("In 2010, the majority of the American Indian and Alaska Native alone-or-in-combination population (78 percent) lived outside of American Indian and Alaska Native areas.").

And Native American children living in urban areas, in particular, are more likely to have parents of mixed race and are therefore more likely to be negatively affected by state courts' erroneous applications of ICWA. *See* Jill E. Tompkins, *Finding the Indian Child Welfare Act in Unexpected Places: Applicability in Private Non-Parent Custody Actions*, 81 U. Colo. L. Rev. 1119, 1132 (2010) ("Given the relative size of the Indian population in relation to other groups in urban areas, the overwhelming percentage of potential marriage partners and co-parents are non-Indian.").

In the three-plus decades since ICWA's enactment, "the child-welfare landscape of the United States as a whole has also significantly changed." *Id.* Due to a variety of factors, an increasing number of American children are in need of placement, and children of Native American descent account for a disproportionately high percentage of those children. *See* Alfred Perez, Kasia O'Neil & Sarah Gesiriech, *Demographics of Children in Foster Care* 2 & fig. 2 (2003), *available at* http://www.unified-solutions.org/Pubs/demographics_of_children_in_foster_care.pdf. As of September 2011, there were 8,020 Alaskan Native or American Indian children in publicly supported foster care. Children's Bureau, U.S. Dep't of Health & Human Servs., The AFCARS Report (Preliminary FY 2011 Estimates as of July 2012), No. 19, at 2, *available at* http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport19.pdf (last visited Oct. 29, 2012).

The combination of these trends suggests that the "familiar fact pattern" presented in this case will continue to arise with increasing frequency. Courts and academics alike have long urged this Court to

intervene to provide guidance on the application of ICWA in the familiar fact pattern presented here.[3] Further percolation is neither warranted nor wise, in light of the high stakes involved for these children and their families.

C. The South Carolina Supreme Court's Interpretation Raises Grave Federalism Concerns

As explained in the petition for certiorari and in the brief submitted by Respondent Guardian ad Litem of Baby Girl, the South Carolina Supreme Court's interpretation of ICWA is contrary to its text and purpose, and raises grave constitutional concerns, not the least of which goes to the proper balance of the federal and state spheres. Jurisdiction over matters of family relations is traditionally reserved to the States.

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[3] *See, e.g.*, Maldonado, *supra*, at 43 (suggesting that "the time has come" for the Supreme Court to review ICWA's application); *see also State ex rel. C.D. v. State*, 200 P.3d 194, 197 (Utah Ct. App. 2008) (noting that, since ICWA's adoption, "courts have struggled to apply it, often reaching inconsistent conclusions about the meaning of various terms" without meaningful guidance from this Court); *State ex rel. D.A.C. v. P.D.C.*, 933 P.2d 993, 998 (Utah Ct. App. 1997) ("sister states are significantly split"); *In re Adoption of S.S.*, 622 N.E.2d 832, 834 (Ill. App. Ct. 1993) (noting that courts across the country are "sharply divided as to the propriety of" applying ICWA to the recurring fact pattern of adoptions voluntarily initiated by non-Indian mothers), *rev'd*, 657 N.E.2d 935 (Ill. 1995); *In re Alexandria Y.*, 53 Cal. Rptr. 2d 679, 683 (Ct. App. 1996) ("There is a split on this issue, both nationally and in California."); *In re Baby Boy L.*, 103 P.3d 1099, 1106 n.21 (Okla. 2004) (noting that "the United States Supreme Court has yet to decide the issue" despite the fact that "a split of authority exists"); *In re A.J.S.*, 204 P.3d 543, 547-49 (Kan. 2009) (observing that "the United States Supreme Court has not addressed the issue before us").

See, e.g., *Rose v. Rose*, 481 U.S. 619, 625 (1987); *Lehman v. Lycoming Cnty. Children's Servs.*, 458 U.S. 502, 511-12 (1982); *In re Burrus*, 136 U.S. 586, 593-94 (1890). Thus, where it is contended that a federal law must override state law on a matter relating to family relations, it must be shown that application of the state law in question would do "'major damage' to 'clear and substantial federal interests.'" *Rose*, 481 U.S. at 625 (citation omitted).

Interpreting ICWA to vitiate a birth mother's lawful placement of her child consistent with the child's best interests—and to *create* parental rights in a biological father where there are none under state law—invades a State's prerogative to enforce its domestic relations laws. Whatever federal interest there might be in this context—where an unwed biological father of a child who is $^1/_{16}$ Cherokee, living off reservation, never had or sought custody and affirmatively renounced any parent-child relationship—it is not sufficient to justify displacement of a State's domestic relations laws, even if the ICWA could otherwise be read that broadly. *See In re Adoption of T.R.M.*, 525 N.E.2d 298, 304 n.1 (Ind. 1988), *cert. denied*, 490 U.S. 1069 (1989) (noting that "'the Federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power'" and observing that "the Supreme Court has not yet addressed the constitutionality of the ICWA under the Tenth Amendment or general principles of federalism" (citation omitted)); *see also* H.R. Rep. No. 95-1386, at 12, 40 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7534, 7563 (DOJ expressing concern that ICWA might

violate the Tenth Amendment as applied to off-reservation custody disputes.).

CONCLUSION

The petition should be granted.

Respectfully submitted,

GREGORY G. GARRE
LORI ALVINO MCGILL
Counsel of Record
KATYA S. GEORGIEVA
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
lori.alvino.mcgill@lw.com

Counsel for Amica Curiae