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

BRIEF FOR THE AMERICAN ACADEMY OF ADOPTION ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	2
I. THE PARAMOUNT FOCUS OF ICWA IS THE BEST INTERESTS OF THE CHILD	2
II. A CHILD'S CONSTITUTIONAL RIGHT TO A STABLE, SAFE AND PERMANENT HOME	4
III. EVOLUTION OF FEDERAL LEGISLATION AND JURISPRUDENCE ON BIRTH PARENT RIGHTS	5
IV. *LEHR* PRECIPITATED DECADES OF STATE LAWS AND JURISPRUDENCE	14
V. EVOLUTION OF STATES' LAWS AND MOTHERS' RIGHTS	19
VI. EXISTING INDIAN FAMILY DOCTRINE	24
A. The *Holyfield* Decision Does Not Address the EIFD and Does Not Require the Rejection of the EIFD	24
B. The EIFD is an Appropriate Safeguard Against the Expansion of ICWA Beyond What is Constitutionally Permissible	28

TABLE OF CONTENTS—Continued

Page

CONCLUSION 35

APPENDIX

Prenatal Abandonment Statutes and Case Law by State 1a

TABLE OF AUTHORITIES

CASES Page

Adoption of A.S., 151 Cal. Rptr. 3d 15 (Ct. App. 2012) 17-18

Adoptive Couple v. Baby Girl, 731 S.E.2d 550 (S.C. 2012) ....*passim*

Bd. of Cnty. Comm'rs v. Seber, 318 U.S. 705 (1943) 29

Beltran v. Allan, 926 P.2d 892 (Utah Ct. App. 1996) 18

C.L. v. P.C.S., 17 P.3d 769 (Alaska 2001) 3

Caban v. Mohammed, 441 U.S. 380 (1979) 7, 9

Claymore v. Serr, 405 N.W.2d 650 (S.D. 1987) 30

DeSylva v. Ballentine, 351 U.S. 570 (1956) 13

Durr v. Blue, 454 So.2d 315 (La. Ct. App. 1984) 15

Evans v. South Carolina Dep't of Soc. Serv., 399 S.E.2d 156 (S.C. 1990) 16

Ex parte C.L.J., 946 So. 2d 880 (Ala. Civ. App. 2006) 30

Ex parte J.W.B., 933 So.2d 1081 (Ala. 2005) .. 19

Friehe v. Schaad, 545 N.W.2d 740 (Neb. 1996) 18

Gregory v. Ashcroft, 501 U.S. 452 (1991) 23

Hampton v. J.A.L., 658 So. 2d 331 (La. Ct. App. 1995) 30

TABLE OF AUTHORITIES—Continued

Page

Heidbreder v. Carton, 636 N.W.2d 833 (Minn. Ct. App. 2001) 17

In re A.E., 572 N.W.2d 579 (Iowa 1997) 3

In re A.J.S., 204 P3d 543 (Kan. 2009) 25, 26, 30

In re A.N.W., 976 P.2d 365 (Colo. App. 1999) . 3

In re Adoption of A.K.S., 713 N.E.2d 896 (Ind. Ct. App. 1999) 17

In re Adoption of B.G.L., 133 P.3d 1 (Kan. 2006) 3

In re Adoption of Baade, 462 N.W.2d 485 (S.D. 1990) 26, 30

In re Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982) 25, 26

In re Adoption of Bernard A., 77 P.3d 4 (Alaska 2003) 2-3

In re Adoption of Child of Indian Heritage, 543 A.2d 925 (N.J. 1988) 30

In re Adoption of Crews, 825 P.2d 305 (Wash. 1992) 28, 30

In re Adoption of F.H., 851 P.2d 1361 (Alaska 1993) 3

In re Adoption of Halloway, 732 P.2d 962 (Utah 1986) 26-27

In re Adoption of M., 832 P.2d 518 (Wash. Ct. App. 1992) 3

In re Adoption of Reeves, 831 S.W.2d 607 (Ark. 1992) 18

TABLE OF AUTHORITIES—Continued

Page

In re Adoption of S.S., 622 N.E.2d 832 (Ill. App. Ct. 1993) 30

In re Adoption of S.S., 657 N.E.2d 935 (Ill. 1995) 30

In re Adoption of T.N.F., 781 P.2d 973 (Alaska 1989) 26, 30

In re Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988) 3, 30

In re Appeal in Maricopa Cnty. Juvenile Action No. A-25525, 667 P.2d 228 (Ariz. Ct. App. 1983) 3

In re Baby Boy C., 27 A.D.3d 34 (N.Y. App. Div. 2005) 26, 30

In re Baby Boy Doe, 849 P.2d 925 (Idaho 1993) 26, 30

In re Baby Boy L., 103 P3d 1099 (Okla. 2004) 30

In re Bird Head, 331 N.W.2d 785 (Neb. 1982) 2

In re Bridget R., 49 Cal. Rptr. 2d 507 (Ct. App. 1996) 31, 32

In re C.A.V., 787 N.W.2d 96 (Iowa Ct. App. 2010) 4

In re C.J.S., 903 P.2d 304 (Okla. 1997) 15

In re C.M.D., 287 S.W.3d 510 (Tex. App. 2009) 17

In re Crystal K., 276 Cal. Rptr. 619 (Ct. App. 1990) 30

Page

In re D.A.C., 933 P.2d 993 (Utah Ct. App. 1997) 30

In re Elliott, 554 N.W.2d 32 (Mich. Ct. App. 1996) 26

In re F.H., 283 N.W.2d 202 (N.D. 1979) 9

In re Gault, 387 U.S. 1 (1967) 5

In re Guardianship of Victoria R., 201 P.3d 169 (N.M. Ct. App. 2008) 4

In re Jasmon O., 878 P.2d 1297 (Cal. 1994) 4

In re Larch, 872 F.2d 66 (4th Cir. 1989) 34

In re Marilyn H., 851 P.2d 826 (Cal. 1993) 5

In re Morgan, 1997 Tenn. App. LEXIS 818 (Ct. App. 1997) 30

In re N.J., 221 P.3d 1255 (Nev. 2009) 30

In re N.N.E., 752 N.W.2d 1 (Iowa 2008) 21

In re Petition of N.B., 199 P.3d 16 (Colo. App. 2007) 30

In re Robert O., 80 N.Y.2d 254 (N.Y. 1992) 17, 18

In re S.A.M., 703 S.W.2d 603 (Mo. Ct. App. 1986) 29-30

In re S.C., 833 P.2d 1249 (Okla. 1992) 30

In re Santos Y., 112 Cal. Rptr. 2d 692 (Ct. App. 2001) 30, 31, 32

J.S.A. v. M.H., 863 N.E.2d 236 (Ill. 2007) 17

Jeremiah J. v. Dakota D., 285 Neb. 211 (2013) 16-17

TABLE OF AUTHORITIES—Continued

Page

L.G. v. State Dept. of Health and Soc. Servs., 14 P.3d 946 (Alaska 2000)............................ 3

Lehr v. Robertson, 463 U.S. 248 (1983)..........*passim*

Marco C. v. Sean C., 181 P.3d 1137 (Ariz. Ct. App. 2008)... 17

Michael H. v. Gerard D., 491 U.S. 110 (1989) 7, 12

Michael J. Jr. v. Michael J. Sr., 7 P.3d 960 (Ariz. Ct. App. 2000).................................... 30

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) ....*passim*

Mistretta v. United States, 488 U.S. 361 (1989) 23

Morton v. Mancari, 417 U.S. 535 (1974)......... 29

Palmore v. Sidoti, 466 U.S. 429 (1984) 3

Planned Parenthood of S.E. Penn. v. Casey, 505 U.S. 833 (1992) ....*passim*

Quilloin v. Walcott, 434 U.S. 246 (1978)........7, 9, 13

Rice v. Cayetano, 528 U.S. 495 (2000)............ 29

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 4, 7

Roe v. Norton, 422 U.S. 391 (1975).................. 11

Rose v. Rose, 481 U.S. 619 (1987).................... 7, 12

Rye v. Weasel, 934 S.W.2d 257 (Ky. 1996)....28, 30, 33

S.A. v. E.J.P., 571 So. 2d 1187 (Ala. Civ. App. 1990)... 30

Page

Stanley v. Illinois, 405 U.S. 645 (1927)....7, 8, 13, 14

State ex rel. T.A.B. v. Corrigan, 600 S.W.2d 87 (Mo. Ct. App. 1980)................................. 10, 16

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) 5

Troxel v. Granville, 530 U.S. 57 (2000)..........5, 7, 13

CONSTITUTION

U.S. Const amend. I.. 5

U.S. Const amend. II 5

U.S. Const amend. III..................................... 5

U.S. Const amend. IV 5

U.S. Const amend. V....................................... 5, 32

U.S. Const amends. VI.................................... 5

U.S. Const amend. VII.................................... 5

U.S. Const amend. VII.................................... 5

U.S. Const amend. IX 5

U.S. Const amend. X....................................... 5

U.S. Const amend. XIV.........................3, 5, 7, 11, 32

U.S. Const art. I, § 8, cl. 3............................... 28

U.S. Const art. VI, § 2..................................... 12

STATUTES

28 U.S.C. § 1738(A)(n) (2006).......................... 34

42 U.S.C. § 602(a)(7)(A)(iii) (2006) 8

Page

42 U.S.C. § 1996b(1)(a) (2006)........................ 35

Adoptions and Safe Families Act, 42 U.S.C. §§ 670-79 (2006)... 33

42 U.S.C. § 671(a)(15)(A) (2006) 33

42 U.S.C. § 671(a)(15)(B)(i) (2006).............. 33, 34

42 U.S.C. § 671(a)(16)................................. 34

42 U.S.C. § 675(1) (2006)............................. 34

42 U.S.C. § 675(5)(B) (2006)........................ 34

42 U.S.C. § 675(a)(19) (2006) 34

CAL. FAM. CODE § 175 (West 2012)................. 31

CAL. WELF. & INST. CODE § 224 (West 2012)... 31

Indian Child Welfare Act of 1978, 25 U.S.C §§ 1901-1963 ....*passim*

25 U.S.C. § 1901 (2006)............................... 29

25 U.S.C. § 1902 (2006)............................... 25

25 U.S.C. § 1903(9) (2006)........................... 13

25 U.S.C. § 1911(a)...................................... 26, 27

25 U.S.C. § 1912(f) (2006) 25

25 U.S.C. § 1913(a)...................................... 27

25 U.S.C. § 1915(a)...................................... 31

25 U.S.C. § 1915(b)...................................... 31

IOWA CODE § 232B.5(2) (West 2012)............... 31

MO. REV. STAT. § 192.016.7(1) (2012)............. 16

MO. REV. STAT. § 453.061 (2004) 16

TABLE OF AUTHORITIES—Continued

Page

N.Y. SOC. SERV. LAW § 372-c (McKinney 2013) 8

OKLA. STAT. ANN. tit. 10, § 40.1 (West 2012) .. 31

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S.C. CODE ANN. § 63-9-310(A)(5) (2012) 6

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Social Services Amendments of 1974, Pub. L. No. 93-647 .... 8, 11

VA. CODE ANN. § 63.2-1250 (2012) 16

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WIS. STAT. § 48.24 (2012) 16

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Page

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TABLE OF AUTHORITIES—Continued

Page

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H.R. 6035, 112th Congress (2012).................. 18

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S. 3321, 112th Congress (2012)....................... 18

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Page

UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997) 34

UNIF. PARENTAGE ACT § 102(17) (2000).......... 6

UNIF. PARENTAGE ACT § 204 (2000)................ 6

ARTICLES

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Page

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INTEREST OF THE *AMICUS CURIAE*

The American Academy of Adoption Attorneys (Academy) is a not-for-profit organization of attorneys, judges and law professors throughout the United States and Canada, who have distinguished themselves in the field of adoption law and who are dedicated to the highest standards of practice.[1] The Academy's mission is to support the rights of children to live in safe, permanent homes with loving families, to protect the interests of all parties to adoptions, and to assist in the orderly and legal process of adoption. The Academy's work includes promoting the reform of adoption laws and disseminating information on ethical adoption practices. The Academy regularly conducts seminars on the Indian Child Welfare Act (ICWA) and the rights of birth parents and children for attorneys and the judiciary. The Academy has been or is actively involved in legislative efforts to amend ICWA and to establish federal protections for birth parents.

SUMMARY OF THE ARGUMENT

This case calls for the Court to clearly set forth the constitutional rights of children in relationship to the statutory rights created by the Indian Child Welfare Act (ICWA) and clarify that the best interests of the child is the paramount focus of ICWA. *Adoptive*

[1] Pursuant to this Court's Rule 37.6, *amicus* affirm that no counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* and their counsel made such monetary contribution. Pursuant to this Court's Rule 37.3, counsel of record for both petitioners and respondents received timely notice of *amicus*' intent to file this brief and all parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

Couple v. Baby Girl[2] vitiates the sixty year evolution of federal and state legislation and jurisprudence in which the states developed laws protecting the rights of fathers, mothers, and children in adoption including abusive manipulation of pregnant women. Abrogating these evolved state laws undermines the cooperative federalism in which states have historically earned federal deference to state family laws.

ARGUMENT

I. THE PARAMOUNT FOCUS OF ICWA IS THE BEST INTERESTS OF THE CHILD

This case presents an opportunity to clearly establish that in cases involving ICWA, as under state laws, the best interests of the child is the paramount focus of ICWA. For example, as the Nebraska Supreme Court stated "[t]he Indian Child Welfare Act does not change the cardinal rule that the best interests of the child are paramount . . . ." *In re Bird Head*, 331 N.W.2d 785, 791 (Neb. 1982).

The Alaska Supreme Court, too, has summarized this issue in several ICWA cases. For instance, in *In re Adoption of Bernard A.*, the Alaska Supreme Court stated:

> It is the duty of the trial court to move cases expeditiously and to rule in the best interest of the child, and the perceived fairness of the result to the adults involved is necessarily of secondary, and far less, importance than the best interests of the child. As one expert in the case put it, the question is where the child's best interests lie, not which of the applicants is the most deserving.

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[2] 731 S.E.2d 550 (S.C. 2012).

77 P.3d 4, 9 (Alaska 2003). In *C.L. v. P.C.S*, the court stated: "We recognize that child adoption proceedings are highly context-sensitive, and that different adoption cases will vary factually. As we have stated previously, the best interest of the child must be paramount in these proceedings." 17 P.3d 769, 776 (Alaska 2001). As this Court has stated:

> The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. In common with most states, Florida mandates that custody determinations be made in the best interests of the children involved. The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause.

Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (citation omitted).

While many state courts have stated that the best interests of the Indian child is the paramount focus of ICWA, it is important that this Court clearly and forcefully clarifies that ICWA does not lessen this substantial governmental interest. See *L.G. v. State Dept. of Health and Soc. Servs.*, 14 P.3d 946, 955 (Alaska 2000) (citation omitted); *In re Adoption of F.H.*, 851 P.2d 1361, 1363-1364 (Alaska 1993); *In re Appeal in Maricopa Cnty. Juvenile Action No. A-25525*, 667 P.2d 228, 234 (Ariz. Ct. App. 1983); *In re A.N.W.*, 976 P.2d 365, 369 (Colo. App. 1999); *In re Adoption of T.R.M.*, 525 N.E.2d 298, 308 (Ind. 1988); *In re* A.E., 572 N.W.2d 579, 583-585 (Iowa 1997); *In re Adoption of B.G.L.*, 133 P.3d 1, 10 (Kan. 2006); *In re Adoption of M.*, 832 P.2d 518, 522 (Wash. Ct. App. 1992).

II. A CHILD'S CONSTITUTIONAL RIGHT TO A STABLE, SAFE AND PERMANENT HOME

This case calls for the Court to clearly recognize a child's constitutional right to remain in a stable, safe and permanent home, to find that ICWA does not dilute state law regarding the protection of children, and to find that ICWA does not make the child's needs a secondary consideration to the rights of an Indian tribe or parent.

This Court has recognized that "because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

Children are not simply chattel belonging to a parent, but have a fundamental interest of their own that may diverge from parental interests. *In re Guardianship of Victoria R.,* 201 P.3d 169, 174 (N.M. Ct. App. 2008) (citing *In re Jasmon O.,* 878 P.2d 1297, 1307 (Cal. 1994)).

As an Iowa appellate court stated:

> While ICWA focuses on preserving Indian culture it does not do so at the expense of a child's right to security and stability.

In re C.A.V., 787 N.W.2d 96, 104 (Iowa Ct. App. 2010).

What is glaringly absent in the South Carolina Supreme Court's decision, as well as many state appellate decisions, is recognition of the Indian child's rights. Tribal advocates may argue that the tribe's interest includes the Indian child's interests; such a position is untrue when a tribe uproots a child

firmly bonded to parent figures over extended time periods. It is clear that the outcomes of these cases have profound impacts upon the Indian children's future and familial upbringings. While it is a well-established legal principle that children have constitutionally protected rights, this is often overlooked in ICWA cases. As this Court has stated "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault,* 387 U.S. 1, 13 (1967). The Supreme Court has long recognized that children have constitutionally protected rights and liberties. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 506 (1969).

Indeed, in *Troxel v. Granville*, the Court's majority took exception to Justice Stevens' dissent and stated "[C]ontrary to Justice Stevens' accusation, our description of state nonparental visitation statutes . . . is not meant to suggest that 'children are so much chattel.'" 530 U.S. 57, 64 (2000). State court decisions have recognized the fundamental right of the child to be protected from neglect and to have a "placement that is stable, permanent, and which allows the caretaker to make a full emotional commitment to the child." *In re Marilyn H.,* 851 P.2d 826, 833 (Cal. 1993). The Academy urges the Court to seize this opportunity to finally clarify a child's rights in these highly contested cases.

III. EVOLUTION OF FEDERAL LEGISLATION AND JURISPRUDENCE ON BIRTH PARENT RIGHTS

This dispute revolves around whether Father has rights to withhold consent to the adoption of Baby Girl. A biological father with such rights is called a "parent," "presumed father," or "consent father." Although the South Carolina Supreme Court's

majority and dissenting opinions held that Father automatically waived his consent rights under South Carolina law, it trumped its state law on Father's consent rights with an erroneous application of ICWA. See *Adoptive Couple*, 731 S.E.2d at 561; 731 S.E.2d at 669 (Kittredge, J., dissenting); S.C. CODE ANN. § 63-9-310(A)(5) (2012). This vitiated decades of federal and state legislation and jurisprudence that protects and balances constitutional rights of unwed fathers, their children, and their mothers.

Non-marital children comprised 40.8% of American births and 65.6% of American Indian births in 2010 – a substantial increase compared with 33.2% of American births in 2000.[3] See CDC, *Births: Final Data for 2010*, 61 Nat'l Vital Statistics Reports 1, 45 (2012), http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_01.pdf; CDC, *Births: Final Data for 2000*, 50 Nat'l Vital Statistics Reports 1, 9 (2002), http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_05.pdf. While the mother of a child is made clear by birth, identity of the father of a child with no presumptive father[4] is obscure and has historically depended upon mothers' identification. Distinguishing who constitutes a consent father under state law is complicated by the father who would mistreat the mother, avoid identification, and shun parental responsibilities like financial support. Such a father is at the heart of the instant case.

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[3] Data on American Indian births was not documented in 2000.

[4] A father with consent rights if often called a "presumed father," which typically means a man who is married to the mother, or has invalid marriage to the mother, or who has otherwise legally established his paternity to a child. UNIF. PARENTAGE ACT §§ 102(17), 204 (2000).

The good cause exception found in Congressional child support legislation, along with the *Stanley, Quilloin, Caban, Lehr, Roberts* and *Troxel* opinions, lay out a "biology plus" constitutional template for states to develop laws defining rights of unwed fathers commensurate with responsibilities assumed. *Rose*, *Troxel*, and *Michael H*. created the expectation that states' laws would control if they followed the template. The ICWA definition of unwed father is consistent with the template and the states' expectations.

The evolution of unwed father law began in 1950 when Congress first enacted legislation requiring states to enforce child support – a requirement necessarily dependent upon mothers identifying fathers of nonmarital children. This effort addresses the fact that nonmarital children are more likely to live in poverty, do poorly in school and experience emotional and behavioral problems. See CARMEN SOLOMON-FEARS, CONGRESSIONAL RESEARCH SERV., REPORT FOR CONGRESS (RL34756) – NONMARITAL CHILDBEARING: TRENDS, REASONS, AND PUBLIC POLICY INTERVENTIONS 4 (2008).

In 1972, when common law historically provided unwed fathers with no parental rights or obligations, this Court, citing a violation of due process and equal protection, struck down an Illinois law affording an unwed father no hearing in the dependency case of his children with whom he and their mother had lived until she died. See *Stanley v. Illinois*, 405 U.S. 645, 646, 658 (1927). With *Stanley*, the Supreme Court and Congress ideologically converged to compel and guide states to define the status of "parent" for unwed fathers.

In 1974, Congress "created specific state requirements for establishing paternity and child support . . . . and established the cooperation requirement" explicitly requiring mothers to identify unwed fathers. Jacqueline M. Fontana, *Cooperation and Good Cause: Greater Sanctions and the Failure to Account for Domestic Violence*, 15 WIS. WOMEN'S L.J. 367, 372 (2000); accord Social Services Amendments of 1974, Pub. L. No. 93-647.

In 1975, Congress enacted a good cause exemption to the cooperation requirement if identifying fathers for child support purposes would "subject the child or mother to substantial danger or physical harm or undue harassment." 121 CONG. REC. H7141 (daily ed. July 21, 1975) (statement of Rep. James Corman); see also Mary R. Mannix, *et al.*, *The Good Cause Exception to the AFDC Child Support Cooperation Requirement*, 21 CLEARINGHOUSE REV. 339, 339 (1987-88). The exemption recognized the interplay among domestic violence, unwed biological fathers, and child support and implicitly protected mothers' safety and privacy interests. The Personal Responsibility and Work Opportunity Act of 1996 maintained a state's freedom to waive mothers' required identification of fathers when screening for domestic violence. See 42 U.S.C. § 602(a)(7)(A)(iii) (2006).

In 1977, in response to *Stanley*, New York developed the first putative father registry. See N.Y. SOC. SERV. LAW § 372-c (McKinney 2013); see also *Lehr v. Robertson*, 463 U.S. 248, 251 (1983). Unwed fathers without consent rights could mail a postcard to the registry to protect their rights to notice in adoption but failure to register within thirty days of birth waived notice. *Id.* at 264. New York unwed fathers could otherwise protect these rights by

acknowledging or adjudicating paternity, marriage or invalid marriage to the mother, or assuming the responsibilities of parenting. *Id.* at 251.

In 1978, this Court upheld a Georgia law allowing a "best interests of the child" standard to trump the rights of an unwed father in the stepparent adoption of his school age son. See *Quilloin v. Walcott*, 434 U.S. 246, 254 (1978). Father had not legitimated the child, never taken custody of him, nor shouldered significant responsibility for him. *Id.* at 256. This case marks the seeding of "biology plus." See Daniel C. Zinman, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971, 976 (1992) ("Quilloin thus established that an unwed father must have more than a biological link with his child to receive constitutional protection of his parental rights – he must participate in the care of his child and accept responsibility for his child's well being.").

In 1979, this Court struck down a New York law withholding the right to consent to adoption from an unwed father who had actively reared his two young children. See *Caban v. Mohammed*, 441 U.S. 380, 394 (1979). "Biology plus" endured. In his dissent, Justice Stevens accurately predicted that states would revise their adoption statutes in light of the Courts' holdings in these cases. *Id.* at 417 (Stevens, J., dissenting).

Four months after *Caban*, North Dakota cited *Caban* in upholding the termination of parental rights of an unwed father who had not assumed parental responsibilities. See *In re F.H.*, 283 N.W.2d 202, 207 (N.D. 1979). Twelve months later, Missouri cited *Caban* in an adoption decision excusing a mother from identifying an unwed father who had

not protected his constitutional rights by asserting his paternity in the adoption of a newborn. See *State* ex rel. *T.A.B. v. Corrigan*, 600 S.W.2d 87, 93-94 (Mo. Ct. App. 1980). Thus, states promptly incorporated Supreme Court jurisprudence in defining and protecting rights of fathers in adoptions commensurate with their acceptance of responsibilities, including prenatal responsibilities, and in relieving mothers of responsibility for naming fathers.

In 1983, this Court upheld New York's registry against a man who had not received notice of the stepparent adoption petition filed for his daughter. *Lehr*, 463 U.S. at 267. Mr. Lehr had not filed with New York's putative father registry, had not supported his daughter, had rarely visited her, and filed an action to establish his paternity after the stepparent adoption was filed. *Id.* at 252. This Court's famous words have guided the states to distinguish presumed fathers with constitutionally protected rights to consent to adoption:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of the responsibility for the child's future, he may enjoy the blessings of the parent-child relationship . . . . If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.

Id. at 262.

While registries passed constitutional muster and provided a bright line rule to identify those fathers with and without notice and consent rights, *Lehr* also

created an exception to the registry law to protect certain unregistered fathers imbued with consent rights. The Court noted that: "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood . . . his interest in personal contact with his child acquires substantial protection under the due process clause." *Id.* at 261. The Court defined "full commitment" when it described what Mr. Lehr did not do: "[Lehr] has never had any significant custodial, personal, or financial relationship with Jessica, and he did not seek to establish a legal tie until after she was two years old." *Id.* at 262. This sentence gave birth to the state standards for the "plus" in "biology plus."

Lehr also discussed mothers of nonmarital children and the adoption process. This Court found that New York's conclusion that "a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees," was not arbitrary. *Id.* at 264. In the accompanying footnote[5], *Lehr* referenced *Roe v Norton*, in which this Court vacated a Connecticut contempt judgment against unmarried mothers receiving AFDC assistance who failed to name the fathers of their children and cited Public Law 93-647. See *Roe v. Norton*, 422 U.S. 391 (1975). Public Law 93-647 authorized state grants for child support and paternity establishment and listed preventing abuse of children and adults as its third purpose. See Social Services Amendments of 1974, Pub. L. No. 93-647. This linked the privacy

[5] *Lehr*, 463 U.S. at 264 n.21.

rights of mothers in withholding fathers' names to abuse.

Thus, *Lehr* announced the standard for constitutional protection for unwed fathers who had not established paternity nor filed with state registries, upheld registries and their time limitations, affirmed the privacy rights of mothers, and recognized the nexus between such rights and abuse.

In 1987, this Court decided *Rose v. Rose* in which state ordered child support was found payable from a veteran's benefits. See 481 U.S. 619, 636 (1987). This Court announced that "the whole subject of the domestic relations of . . . parent and child, belongs to the laws of the States and not to the laws of the United States" as long as it does not "do major damage to clear and substantial federal interests." *Id.* at 625 (citation omitted). The Court related the exception to Supremacy Clause pre-emption to obligations that had deeply rooted moral responsibilities and to complicated and established state procedures. *Id.* at 625, 632. Parent-child relationships and child/prenatal support statutes define individualized moral obligations and properly belong to the states.

Consistently, in 1989, this Court upheld a California statute that honored a presumed father's paternal status over a biological father's genetic paternity. See *Michael H. v. Gerard D.*, 491 U.S. 110 (1989). This holding confirmed the federal tradition deferring to states' laws on determination of parentage. *Id.* at 131-32.

In 1992, this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* recognized the interplay of domestic violence of mothers by

fathers, financial abuse, and pregnancy when it stated that "[t]he number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy." See 505 U.S. 833, 889 (1992). The Court also noted that the "[m]ere notification of pregnancy is frequently a flashpoint for battering." *Id*. The Court discussed fathers' control over finances to deprive women of necessary monies for herself or her children and recognized the connection between domestic violence and women's communications about pregnancy with fathers. *Id.* at 893.

In 2000, this Court's decision in *Troxel v Granville* evinced unanimous agreement that custodial parents have a constitutional right to care for, nurture, and educate a child. See 530 U.S. 57, 65-66 (2000). The plurality and dissents cite a combination of *Stanley, Quilloin* and *Lehr* in defining the boundaries of that liberty interest as it is not an enumerated constitutional right and bears state definition "elaborated with care." *Id.* at 65-66, 73 (citation omitted); *id.* at 93 (Scalia, J., dissenting); *id.* at 95 (Kennedy, J., dissenting); accord *DeSylva v. Ballentine*, 351 U.S. 570, 580-81 (1956) (deeming state law controlling in laws defining children).

Ten months after *Quilloin*, Congress enacted ICWA in November 1978 with its definition of parent which "does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9) (2006). ICWA's definition was consistent with the evolving definition of unwed fathers and is best understood within the then current lens of both Congress's push for paternity establishment and financial responsibility from unwed fathers and this Court's emerging "biology plus" jurisprudence

making rights commensurate with responsibilities assumed. This is consistent with ICWA legislative history that indicated that the ICWA definition of "parent" "was not meant to conflict" with the Supreme Court's decision in *Stanley* and not meant to create a new category of father. H.R. REP. NO. 95-1386, at 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7543.

Within five years, state courts were applying their own definitions of parent to determine if an unwed father had protected his constitutional rights involving his child in ICWA cases. See Motion for Leave to File Brief as *Amici Curiae* and Brief of Professor Joan Heifetz Hollinger, *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (2012) (No. 12-399), 2012 WL 5375610 at *14-15.

IV. *LEHR* PRECIPITATED DECADES OF STATE LAWS AND JURISPRUDENCE

The states' definitions of which fathers have consent rights in adoption are highly developed in line with this Court's "biology-plus" jurisprudence, and they include the *Lehr* standard, paternity registries, and prenatal abandonment laws. Congress has contemplated a national father registry in line with this Court's jurisprudence to connect the states in their efforts to distinguish consent fathers. Allowing *Adoptive Couple's* application of ICWA to undo such legislation for children voluntarily placed for adoption by non-Indian mothers where state law waives fathers' consent rights frustrates state and federal legislation, jurisprudence, and public policy for nonmarital children. Such public policy includes paternity establishment, prenatal child support, mothers' decisions on parenting/abortion/adoption,

protecting mothers from abuse and homicide, and reducing contested litigation destabilizing adoptive placements.

Lehr vetted "biology plus," and states immediately began reforms to protect consent rights of those fathers who met *Lehr's* standard and/or had established paternity. One year later, Louisiana cited *Lehr's* standard of full commitment to parental responsibilities in determining an unwed father's rights. See *Durr v. Blue*, 454 So.2d 315, 319 (La. Ct. App. 1984). Thirty years later, at least forty-one states report cases using the father's commitment to parenting as a standard to determine consent rights in adoption. See Ardis L. Campbell, Annotation, *Rights of Unwed Father to Obstruct Adoption of His Child by Withholding Consent*, 61 A.L.R. 5th 151 (1998). However, evincing a parental commitment is not the only way a father can protect his rights to notice, to be heard, and to consent in adoption. *Lehr*, 463 U.S. 248 at 251; e.g., *In re C.J.S.*, 903 P.2d 304, 306-07 (Okla. 1997).

The bright line rules of putative father registries and prenatal abandonment more easily distinguish those biological fathers with and without consent rights and advance the orderly processing adoptions, particularly of newborns.

Registries and prenatal abandonment laws place the burden on fathers to act affirmatively to protect their rights rather than putting pregnant women in a supplicant position vulnerable to the abuse recognized in *Planned Parenthood* by consigning mothers to both identify fathers and solicit their support. A number of states either relieve mothers of identifying unwed fathers who have "mere" biological links and no relationship with the children or provide

that intercourse serves as notice of pregnancy for purposes of adoption. See *Evans v. South Carolina Dep't of Soc. Serv.*, 399 S.E.2d 156, 157 (S.C. 1990); *State ex rel. T.A.B. v. Corrigan*, 600 S.W.2d 87; MO. REV. STAT. § 453.061 (2004); S.C. CODE ANN. § 63-9-820 (2012); WIS. STAT. § 48.24 (2012); VA. CODE ANN. § 63.2-1250 (2012); see also Campbell, *Rights of Unwed Father to Obstruct Adoption*, supra at § 15(b); Mary Beck, *Toward A National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1050 nn.76-77 (2002).

No consensus exists on the number of states with putative father registries because not all registries provide all protections. See Dale J. Gilsinger, Annotation, *Requirements and Effects of Putative Father Registries*, 28 A.L.R.6th 349 § 2 (2007) (noting the variety of protective procedures); Compare CHILD WELFARE INFO. GATEWAY, U.S. DEPT. OF HEALTH AND HUMAN SERV., THE RIGHTS OF UNMARRIED FATHERS 3 (2010), http://www.childwelfare.gov/systemwide/laws_policies/statutes/putative.cfm, with Mary Beck, *A Nat'l Putative Father Registry*, 36 CAP. U. L. REV. 295 app. at 339 (2007).[6] Effective putative father registries ensure notice to the father who registers within the state's time limit and provide consequences for failure to timely file. See Beck, *A Nat'l Putative Father Registry*, supra, at 301-02. While the consequences vary, states typically waive a father's rights to withhold consent to adoption but also create exceptions for fraud. See e.g., Gilsinger, *Requirements and Effects*, supra at §§ 8-10; MO. REV. STAT. § 192.016.7(1) (2012). *Jeremiah J. v Dakota D.*, is the

[6] None of these lists contains South Carolina's registry found at S.C. CODE ANN. § 63-9-820 (2012).

latest reported case regarding birth mother fraud. See 285 Neb. 211 (2013).

Putative father registries have been widely litigated and are uniformly found constitutional under *Lehr*'s template. See Gilsinger, *Requirements and Effects*, supra at § 2; e.g., *In re C.M.D.*, 287 S.W.3d 510, 516 (Tex. App. 2009). Courts have upheld putative father registration timelines in protecting the states' interests in promptness. See *Heidbreder v. Carton*, 636 N.W.2d 833, 840 (Minn. Ct. App. 2001) (unwed father sought relief from registry deadline where he filed one day late); *accord Marco C. v. Sean C.*, 181 P.3d 1137, 1139 (Ariz. Ct. App. 2008). New York clarified its interest in creating "adoption procedures possessed of promptness and finality." *In re Robert O.*, 80 N.Y.2d 254, 264 (N.Y. 1992).

The filing or concluding of paternity actions and executing voluntary acknowledgments of paternity may exempt a father from registry requirements or the *Lehr* standard. See Gilsinger, *Requirements and Effects*, supra at § 6; e.g., *J.S.A. v. M.H.*, 863 N.E.2d 236, 252 (Ill. 2007) (father's filing of a paternity action prior to the filing of an adoption exempted him from the registry deadline); *In re Adoption of A.K.S.*, 713 N.E.2d 896, 898 (Ind. Ct. App. 1999) (father's voluntary acknowledgment of paternity affidavit provided an exception to the registry requirement). However, even where an unwed father has established paternity, California recently elucidated the importance of prenatal abandonment upon a determination of an unwed father's consent rights in an interstate case involving a New York father and a mother who delivered in California. *Adoption of A.S.*,

151 Cal. Rptr. 3d 15 (Ct. App. 2012). The court discussed how both California and New York require an unwed father to assume responsibilities – in this case, prenatal responsibilities – in order to protect consent rights over and above biology and paternity decrees. *Id.* at 31-32.

Fathers may claim impossibility exceptions or exemptions. See *In re Robert O.*, 80 N.Y.2d at 262-63; (father sought registry exemption where he did not know of pregnancy); *Friehe v. Schaad*, 545 N.W.2d 740, 747 (Neb. 1996) (father sought registry exemption where he and mother were still discussing adoption when the filing deadline ran); *In re Adoption of Reeves*, 831 S.W.2d 607, 609-10 (Ark. 1992) (father sought exemption from registry where mother lied in stating father was unknown); *Beltran v. Allan*, 926 P.2d 892, 894-95 (Utah Ct. App. 1996) (father sought impossibility exception to registry requirement where child was conceived in California and adoption was filed in Utah). Interstate cases pose particular problems for the protection of fathers' rights. In addition to state registries, Senator Mary Landrieu has introduced a national putative father registry bill that would connect all state registries to a central database, require notice of a dependency or adoption action to a father timely registered in any state, and urge prenatal abandonment law in all states. See S. 3321, 112th Congress (2012); H.R. 6035, 112th Congress (2012).

Prenatal Abandonment laws clarify consent rights in newborn adoptions and exist in twenty-four states. See Appendix A. As in the instant case, states divest fathers' consent rights upon prenatal abandonment, which is defined either in statute or case law. These laws inform a mother's reproductive autonomy by

determining whether a mother's liberty interest in her child is unfettered. A mother of a nonmarital child has control of placing her child for adoption where the father does not meet the state law requirements for a consent father. A father's prenatal abandonment and/or his rights to influence an adoptive placement necessarily inform mothers facing financial constraints as to the wisdom of continuing a pregnancy and/or planning an adoption.

Where prenatal abandonment law does not exist or where a court trumps it as in the instant case, a father's filing of a paternity action after abandoning his child and the mother during the pregnancy creates significant conflict and defeats a mother's planning. Establishing paternity defensively should not substitute for prenatal support:

> We should not equate the filing of "court papers" and the taking of legal positions with the establishment of human relationships. A child can be abandoned just as surely when papers have been filed with a court as when they have not been. While those papers sit in a folder in a courthouse, children grow. They are read to and tucked in at night. They are nursed to health. They are taught.

Ex parte *J.W.B.*, 933 So.2d 1081, 1092 (Ala. 2005).

V. EVOLUTION OF STATES' LAWS AND MOTHERS' RIGHTS

States have developed laws to protect birth mothers' liberty interests in their children as well as their rights to safety from abuse and manipulation. Poverty, domestic violence, and precarious financial situations characterize relinquishing mothers. EVAN

P. DONALDSON ADOPTION INST., SAFEGUARDING THE RIGHTS AND WELL-BEING OF BIRTHPARENTS IN THE ADOPTION PROCESS 26-27 (2007), http://www.adoptioninstitute.org/publications/2006BirthparentStudyrevised07.pdf [hereinafter *Evan P. Donaldson Adoption Inst.*). A birth mother's choice of adoptive parents and ongoing contact/information about her child are key factors in her post relinquishment adjustment. *Id.* at 11. A father who refuses to provide financial support to a woman pregnant with his child manipulates her physical safety and her choices among abortion, adoption, and parenting. In the instant case, Mother's victimization was further complicated by Father's Indian status.

One in every four women will experience domestic violence in her lifetime. PATRICIA TJADEN & NANCY THOENNES, U.S. DEPT. OF J., EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 9 (2000), https://www.ncjrs.gov/pdffiles1/nij/181867.pdf. Domestic violence is characterized by coercive control of a victim through physical, sexual, psychological or financial abuse. See Office on Violence Against Women, U.S. DEPT. OF J., *Domestic Violence*, http://www.ovw.usdoj.gov/domviolence.htm (last visited Feb. 20, 2013). Physical and sexual abuse are recognized forms of domestic violence; psychological and financial manipulation are less recognized but nonetheless constitute abuse. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 889 (1992); *Economic Abuse Fact Sheet*, Nat'l Coal. Against Domestic Violence, http://www.ncadv.org/files/EconomicAbuse.pdf [hereinafter *Economic Abuse Fact Sheet*].

Adoptive Couple typifies the abuse that women face during pregnancy. Father refused Mother's request for financial support by the time of her first prenatal

appointment (in time to abort) unless she married him. Petition for a Writ of Certiorari, *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (2012) (No. 12-399), 2012 WL 4502948 at *5. Such exploitation works to force the victim to stay in the relationship, deprive her of necessary monies for herself or her children, rob her of autonomy, and keep her "financially limited if . . . she chooses to leave the relationship." *Economic Abuse Fact Sheet*, supra at 1; accord *Planned Parenthood*, 505 U.S. at 888. Father texted Mother his preference to terminate his parental rights rather than pay support. Petition for a Writ of Certiorari, supra at *5. Mother then voluntarily chose adoption as the best option for her child based upon her circumstances. *Id.* Four months after the birth/placement of the child, Father invoked ICWA because Mother did not keep his baby. *Adoptive Couple*, 731 S.E.2d at 555.

After refusing all responsibility for Mother and Baby Girl during Mother's pregnancy, Father wrested control of Baby Girl from Mother, who had dedicated over nine months of her life subjecting her health and finances to a pregnancy taking responsibility for the very child for whom Father had refused to take any responsibility. Father prevailed in obtaining court ordered transfer of the child to his Indian family. Petition for a Writ of Certiorari, supra at *7. This eviscerated Mother's liberty interest in placing Baby Girl for adoption and diminished Mother's post-relinquishment recovery by voiding her choice of an adoptive family – all theoretically protected by the South Carolina legislature. E.g., *In re N.N.E.*, 752 N.W.2d 1, 9 (Iowa 2008) ("The State has no right to influence [a birth mother's] decision by preventing her from choosing a family she feels is best suited to

raise her child."); *Evan P. Donaldson Adoption Inst.*, supra at 11.

Such manipulations typify domestic abuse. Abusers' use of legal processes – in this case ICWA – to continue to control victims to return to them is often not recognized by judges. Gender Bias in the Courts Taskforce, *Gender Bias in the Courts of the Commonwealth Final Report*, 7 WM. & MARY J. WOMEN & L. 705, 751 (2001). "In fact, many abusers appear to be manipulating the court." *Id.* This is seen in the instant case in that both the majority and the dissent recite disturbing facts but do not put a name to them. *Adoptive Couple*, 731 S.E.2d at 553; *id.* at 661 (Kittredge, J., dissenting). Invisible abuse – putting a gun to a woman's head or withholding finances for rent and food – controls a woman/mother as effectively as bruising blows.

Such judicial oversight exposes pregnant women to domestic abuse and homicide. See *Planned Parenthood*, 505 U.S. at 889 ("The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy."); Donna St. George, *CDC Explores Pregnancy-Homicide Link*, WASH. POST, Feb. 23, 2005, at A05. Between 3.9% and 20% of pregnant women are abused. Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 670-71 (2006). The first or second leading cause of death for pregnant women is domestic homicide. *Id.* at 671-72; Rebekah Kratochvil, *Intimate Partner Violence During Pregnancy: Exploring the Efficacy of a Mandatory Reporting Statute*, 10 HOUS. J. HEALTH L. & POL'Y 63, 69 (2009). Abuse and homicide are inescapable terrors for pregnant women who render themselves uniquely vulnerable by the obligations

they assume in continuing pregnancies and protecting newborns. Half of American pregnancies are unintended and half of those result in abortion. Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 CONTRACEPTION 478 (2011), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3338192/ (cited by CDC, *Unintended Pregnancy Prevention*, http://www.cdc.gov/reproductivehealth/unintendedpregnancy/). When women choose to continue unintended pregnancies where unwed fathers are refusing support, they rely upon prenatal abandonment laws to escape physical and economic abuse and to provide them with an unfettered liberty interests in placing children for adoption. Withholding the protection of state prenatal abandonment laws in the name of ICWA eviscerates women's constitutional interests in parenting decisions and their unquestionable right to life.

States, each with their own domestic abuse, dependency, paternity, and dissolution laws, have highly developed adoption laws protecting mothers' constitutional rights in parenting and safety. Here, state legislatures act not as mere "junior-varsity" but as sovereign participants in cooperative federalism to protect the rights of unwed fathers, their children, and their mothers in adoption. See generally *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). This Court previously described this cooperative federalism as promoting state "innovation and responsiveness." *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991). The instant Father gave Mother a "no support or marriage" ultimatum, had his friends stalk her only to learn she was working fourteen hour days, texted her his choice to relinquish parental rights rather than

support her, declined to visit her or the child in the hospital, and used court processes to eviscerate her liberty interest in adoptive placement of her child. Transcript of Record at 482-83, *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (2012) (No. 2009-DR-10-3803). South Carolina law should have protected Mother from all of this, but its courts allowed Father to use ICWA to complete his victimization of Mother.

The Academy urges the Court to apply the South Carolina definition of parent to Father and find that he is not a parent under ICWA. To uphold the South Carolina Supreme Court's decision will decimate decades of state and federal jurisprudence, will throw into disarray the validity of state laws across the nation, and will trample the rights of single mothers.

VI. EXISTING INDIAN FAMILY DOCTRINE

In addressing the issue of the Existing Indian Family Doctrine (EIFD), the Court must determine:

1. Does the Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield* mandate the rejection of the EIFD?
2. Is the EIFD legally permissible to prevent the unwarranted expansion of ICWA in violation of the constitutional principles underlying ICWA's enactment?

A. The *Holyfield* Decision Does Not Address the EIFD and Does Not Require the Rejection of the EIFD

In its enactment of ICWA, Congress set forth a Congressional Declaration of Policy, which states:

> [I]t is the policy of this Nation to protect the best interests of Indian children and to promote

> the stability and security of Indian tribes and families *by the establishment of minimum Federal standards for the removal of Indian children from their families* and the placement of such children in foster or adoptive homes . . . .

25 U.S.C. § 1902 (2006) (emphasis added). ICWA also states that in a termination of parental rights proceeding, the following requirement must be met:

> No termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, . . . *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.

25 U.S.C. §1912(f) (2006) (emphasis added).

The above-cited sections of ICWA have led many state courts to adopt the EIFD. Although the Kansas Supreme Court, in *In re Adoption of Baby Boy L.,* was the first court to recognize the EIFD, it rejected the doctrine after misreading *Holyfield.* See 643 P.2d 168 (Kan. 1982); *In re A.J.S.*, 204 P3d 543 (Kan. 2009). In adopting the EIFD, the court found that where an infant is born out-of-wedlock to a non-Indian mother and where the child had spent his entire life in the care of non-Indians and had not been removed from an Indian family, application of ICWA would violate the intent of Congress rather than uphold the law's intended purpose. *In re Adoption of Baby Boy L.*, 643 P.2d. at 175.

The Court's only previous decision regarding ICWA is *Mississippi Band of Choctaw Indians v. Holyfield*. 490 U.S. 30 (1989). *Holyfield* does *not* address the validity of the EIFD. In *Holyfield*, twins were born out-of-wedlock to an Indian mother, who resided on

the Choctaw reservation. *Id.* at 37. The children were born off the reservation where their mother immediately placed them from the hospital into an adoptive placement. *Id.* at 46. This Court held, pursuant to section 1911(a) of ICWA, that the tribal court had exclusive jurisdiction. *Id.* at 53 (citation omitted).

Since the 1989 *Holyfield* decision, numerous states have rejected the EIFD, finding that *Holyfield* mandates the rejection of the EIFD. As one of those states, the Kansas Supreme Court overturned its earlier holding in *Baby Boy L.* and has now rejected the EIFD. *In re A.J.S.*, 204 P.3d at 551. In rejecting its earlier recognition of the EIFD, the Kansas Supreme Court stated that the continued acceptance of the EIFD "'would undermine the significant tribal interests recognized by the Supreme Court in *Holyfield.*'" *Id.* at 550 (quoting *In re Baby Boy C.*, 27 A.D.3d 34, 48 (N.Y. App. Div. 2005)).

After *Holyfield*, states rejecting the EIFD have stated that implementation of the EIFD would undermine the significant tribal interests recognized by the Supreme Court in *Holyfield.* E.g., *In re Adoption of T.N.F.,* 781 P.2d 973, 977 (Alaska 1989); *In re Adoption of Baade,* 462 N.W.2d 485, 489-90 (S.D. 1990); *In re Baby Boy Doe,* 849 P.2d 925, 931-32 (Idaho 1993); *In re Elliott,* 554 N.W.2d 32, 35-36 (Mich. Ct. App. 1996); *In re Baby Boy C.,* 27 A.D.3d at 48.

Holyfield, in addressing exclusive tribal court jurisdiction involving Indian children that reside or are domiciled on a tribal reservation, cited the Utah Supreme Court decision *In re Adoption of Halloway*, which addressed jurisdiction involving an Indian

child domiciled on an Indian reservation. See 732 P.2d 962, 969-70 (Utah 1986).

Holyfield cites *Halloway*'s emphasis on tribal relationships with children who are domiciled on their reservations and in these situations, "the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents."' *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989) (quoting *Halloway*, 732 P.2d at 969). This statement is often taken out of context as grounds for rejecting the EIFD. The Court's cite to *Halloway* was addressing situations involving Indian children *who are domiciled on a reservation* and subject to exclusive tribal court jurisdiction. *Holyfield*'s reference to *Halloway* states:

> To the extent that [state] abandonment law operates to permit [the child's] mother to change [the child's] domicile as part of a scheme to facilitate his adoption by non-Indians *while she remains a domiciliary of the reservation*, it conflicts with and undermines the operative scheme established by subsections [1911(a)] and [1913(a)] *to deal with children of domiciliaries of the reservation* and weakens considerably the tribe's ability to assert its interest in its children. *The protection of this tribal interest* is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents. *This relationship between Indian tribes and Indian children domiciled on the reservation* finds no parallel in other ethnic cultures found in the United States.

Id. at 52-53 (quoting *Halloway*, 732 P.2d at 969-70) (emphasis added).

The *Holyfield* decision does **not** address the validity of the EIFD. See *Rye v. Weasel,* 934 S.W.2d 257, 262 (Ky. 1996) (citation omitted); *In re Adoption of Crews*, 825 P.2d 305, 310 (Wash. 1992).

The misinterpretation *Holyfield* has led to the rejection by numerous state courts of the EIFD, when in reality the EIFD is legally appropriate to prevent an unwarranted expansion of the ICWA that is not constitutionally permissible.

B. The EIFD is an Appropriate Safeguard Against the Expansion of ICWA Beyond What is Constitutionally Permissible

As part of ICWA, Congress set forth the following Congressional findings:

> *Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people*, the Congress finds—
>
> (1) that clause 3, section 8, article I of the United States Constitution provides that *"The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes"* and, through this and other constitutional authority, *Congress has plenary power over Indian affairs;*
>
> (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
>
> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that *the United States has a direct interest, as trustee*,

> in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

25 U.S.C. § 1901 (2006) (emphasis added).

The ICWA was enacted pursuant to Congress's power to regulate commerce and based upon its trustee relationship with Indian tribes. See *Bd. of Cnty. Comm'rs v. Seber,* 318 U.S. 705, 715 (1943). The constitutionality of ICWA has been upheld by lower courts citing *Morton v. Mancari*, a 1974 United States Supreme Court decision which upheld a law granting a hiring preference for Native Americans by the Bureau of Indian Affairs. See 417 U.S. 535 (1974). In that decision, the Court stated that "the preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . . ." *Id.* at 554.

The *Morton* test was also at the heart of this Court's 2000 decision invalidating a Hawaiian state constitutional provision that required trustees of the Office of Hawaiian Affairs, who administered income from land held by the state, to be "Hawaiian" and be elected only by "Hawaiians." See *Rice v. Cayetano*, 528 U.S. 495 (2000). In striking down this Hawaiian state constitutional provision, this Court emphasized that the case differed from cases, like *Morton*, involving Indian tribes. *Id.* at 518-20. This Court stated that to avoid being an unlawful racial classification the preference could not be directed to a racial group but rather members of federally recognized tribes. *Id.* at 519-20.

Since being adopted by the Kansas Supreme Court in 1982, the EIFD has been recognized by a significant number of state courts. See *In re S.A.M.*,

703 S.W.2d 603, 608-09 (Mo. Ct. App. 1986); *Claymore v. Serr*, 405 N.W.2d 650, 653-54 (S.D. 1987); *In re Adoption of T.R.M.*, 525 N.E.2d at 303; *In re Adoption of Crews*, 825 P.2d at 305; *In re S.C.,* 833 P.2d 1249 (Okla. 1992) (overruled by *In re Baby Boy L.,* 103 P.3d 1099 (Okla. 2004); *Hampton v. J.A.L.,* 658 So. 2d 331, 337 (La. Ct. App. 1995); *Rye v. Weasel,* 934 S.W.2d at 261-64; *In re Santos Y.*, 112 Cal. Rptr. 2d 692 (Ct. App. 2001) (describing the California appellate court split); *In re Morgan*, 1997 Tenn. App. LEXIS 818, *43-44 (Ct. App. 1997); *Ex parte C.L.J.*, 946 So. 2d 880, 889 (Ala. Civ. App. 2006); *S.A. v. E.J.P.,* 571 So. 2d 1187, 1189-90 (Ala. Civ. App. 1990); *In re N.J.*, 221 P.3d 1255, 1264-65 (Nev. 2009).

The South Carolina Supreme Court's decision in *Adoptive Couple v. Baby Girl* places South Carolina in the company of state courts who have rejected the EIFD. See *Adoptive Couple,* 731 S.E.2d at 558 n.17; *In re Adoption of Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Adoption of T.N.F.*, 781 P.2d at 976-77; *In re Adoption of Baade*, 462 N.W.2d at 489-90; compare *In re Santos Y.*, 112 Cal. Rptr. 2d 692 (describing the California appellate court split) with *In re Crystal K.*, 276 Cal. Rptr. 619, 624-25 (Ct. App. 1990) (adopting the existing family doctrine); *In re Baby Boy Doe*, 849 P.2d at 931-32; *In re Adoption of S.S.*, 622 N.E.2d 832, 838-39 (Ill. App. Ct. 1993) (reversed by *In re Adoption of S.S.*, 657 N.E.2d 935 (Ill. 1995)); *In re D.A.C.*, 933 P.2d 993, 997-1000 (Utah Ct. App. 1997); *Michael J. Jr. v. Michael J. Sr.*, 7 P.3d 960, 963-64 (Ariz. Ct. App. 2000); *In re Baby Boy L.*, 103 P.3d at 1105; *In re Baby Boy C.*, 27 A.D.3d at 36; *In re Petition of N.B.*, 199 P.3d 16, 20-22 (Colo. App. 2007); *In re A.J.S.*, 204 P.3d at 551.

The above summary of cases includes California, Kansas, Oklahoma, and South Dakota decisions, which originally adopted the EIFD, as well as these states' appellate courts' subsequent post-*Holyfield* decisions rejecting the EIFD. While numerous states (California, Iowa, Oklahoma, Washington, and Wisconsin) have rejected the EIFD by passage of state statutes (see e.g., CAL. FAM. CODE § 175 (West 2012); CAL. WELF. & INST. CODE § 224 (West 2012); IOWA CODE § 232B.5(2) (West 2012); OKLA. STAT. ANN. tit. 10, §§ 40.1, 40.3 (West 2012); WASH. REV. CODE ANN. §§ 13.34.040(3), 26.33.040(1)(a) (West 2012); WIS. STAT. ANN. § 48.028(3) (West 2012)), it is highly unlikely these statutes can lawfully restrict state courts from interpreting ICWA regarding its application. In California, where the EIFD has been banned pursuant to legislation, (CAL. FAM. CODE § 175, CAL. WELFARE & INST. CODE § 224), such legislation cannot be legally controlling given the EIFD was adopted in California based upon constitutional considerations. See *In re Santos Y.*, 112 Cal. Rptr. 2d at 726-27; *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 520-21 (Ct. App. 1996).

Congress's overriding concern in its enactment of ICWA was to strengthen relationships between existing Indian families and to ensure Indian children are exposed to their Native American heritage. In its passage of ICWA, Congress specifically stated that the Act and in particular 25 U.S.C. 1915(a) and (b), regarding placement preferences, "is *not* to be read as precluding placement of the Indian child with a non-Indian family." H.R. REP. NO. 95-1386 (1978); 1978 WL 8515, at *23 (1978) (emphasis added).

In decisions adopting the EIFD, state appellate courts have stated that ICWA should not be applied to cases where the child is not part of an intact Indian family and is not residing on an Indian reservation. Many of these decisions also involved voluntary adoption proceedings where the child was *not* involuntarily removed from the child's family. For example, in upholding the EIFD, California appellate courts have stated:

> Any application of ICWA which is triggered by an Indian child's genetic heritage, without substantial social, cultural or political affiliations between the child's family and a tribal community, is an application based solely, or at least predominantly upon race and is subject to strict security under the equal protection clause . . . . The facts upon which we relied in concluding that application of the ICWA to this Minor constituted a violation of substantive due process lead to the conclusion that application of the ICWA to the Minor constitutes a violation of equal protection of the laws under the Fifth and Fourteenth Amendments to the United States Constitution.

In re Santos Y., 112 Cal. Rptr. 2d at 719, 730 (quoting in part *In re Bridget R.*, 49 Cal. Rptr. 2d at 528).

Likewise, the Kentucky Supreme Court, addressing the validity of the EIFD, stated:

> [T]he Existing Indian Family Doctrine is not really a judicially created exception, but rather that the ICWA was never meant to apply in those cases . . . where the Indian children had

> lived with their non-Indian mothers for seven and six years respectively.

Rye v. Weasel, 934 S.W.2d at 263.

Since 1978 and the enactment of ICWA, the legal landscape regarding the protection of children is radically different. Our nation has enacted numerous laws to further protect children, their familial relationships and parental rights. Over thirty-two states now have laws that legally recognize the benefits of open adoptions. See CHILD WELFARE INFO. GATEWAY, U.S. DEPT. OF HEALTH AND HUMAN SERV., POSTADOPTION CONTACT AGREEMENTS BETWEEN BIRTH AND ADOPTIVE FAMILIES 2 (2011), https://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperative.pdf. Open adoptions promote appropriate post-adoption contact and the sharing of information between adoptive families, the child and the child's birth parent(s). Such laws involving Native American children, as well as other children, allow the child to learn of their ancestral heritage and, in many situations, participate in cultural events.

In 1997 Congress enacted the Adoptions and Safe Families Act (ASFA), 42 U.S.C. §§ 670-79 (2006). ASFA mandates that in all cases where county or state social service agencies involuntarily remove a child from her home, the court must find that it is contrary to the child's welfare to remain in the home of her parents or custodian. See 42 U.S.C. § 671(a)(15)(A) (2006). See 42 U.S.C. § 671(a)(15)(B)(i) (2006). ASFA also mandates that social service

agencies develop a case plan that involves the child's parents with a goal of reunification of the child with their parents. *Id.* at §§ 671(a)(16), 675(1). AFSA mandates a periodic review by the court, at least every six months, of each case to determine

> the safety of the child, the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care and, to project a likely date by which the child may be returned to and safely maintained in the home or placed for adoption or legal guardianship.

Id. at § 675(5)(B). AFSA also requires in all cases, including those involving an Indian child, a preference for the child's placement with a relative. *Id.* at § 675(a)(19).

Since the enactment of ICWA, the Uniform Child Custody Jurisdiction and Enforcement Act has been enacted in all fifty states. This Act is important, especially in termination of parental rights proceedings for determining which state has jurisdiction.

As more fully discussed *supra*, numerous states have enacted laws establishing putative father registries. See Beck, *A Nat'l Putative Father Registry*, supra, app. at 339.

In 1980, Congress passed the Parental Kidnapping Prevention Act (PKPA). This federal law in part, requires states to enforce their sister states' custody orders and refrain from modifying orders already issued by another state or an Indian tribe. See 28 U.S.C. § 1738(A)(n) (2006); *In re Larch*, 872 F.2d 66 (4th Cir. 1989).

Finally, in 1994 Congress enacted the Multiethnic Placement Act (MEPA). MEPA prohibits a person or government entity involved in adoption or foster care placements from denying any individual the opportunity to be an adoptive or foster parent on the basis of the race, color, or national origin of the individual or the child involved. 42 U.S.C. § 1996b(1)(a) (2006).

Given the scope of constitutional authority for the enactment of ICWA, the post 1978 legislation affording greater protections for all children and families, and the constitutional rights of children and parents impacted in these cases, the EIFD is an appropriate check on the unwarranted expansion of ICWA.

CONCLUSION

The decision of the South Carolina courts should be reversed and the case remanded with instructions for the adoption to proceed pursuant to the Court's ruling herein.

Respectfully submitted,

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APPENDIX

APPENDIX

Prenatal Abandonment Statutes and
Case Law by State

STATE	STATUTE/CASE LAW
Alabama	ALA. CODE § 26-10A-9 (2012)

Wording of Statute

(a) A Consent or relinquishment required by Section 26-10A-7 may be implied by any of the following acts of a parent: (1) Abandonment of the adoptee. Abandonment includes, but is not limited to, the failure of the father, with reasonable knowledge of the pregnancy, to offer financial and/or emotional support for a period of six months prior to birth.

California	*Adoption of Kelsey S.*, 49 P.2d 1216, 1236-37 (Cal. 1992)

"If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent. Absent such a showing, the child's well-being is presumptively best served by continuation of the father's parental relationship. Similarly, when the father has come forward to grasp his parental responsibilities, his parental rights are entitled to equal protection as those of the mother. A court should consider all factors relevant to that determination. The father's conduct both before and after the child's birth must be considered. Once he knows or reasonably should know of the pregnancy, he must promptly attempt to

assume his parental responsibilities as fully as the mother will allow and his circumstances permit. In particular, the father must demonstrate "a willingness himself to assume full custody of the child—not merely to block adoption by others." (Raquel Marie, *supra*, 76 N.Y.2d at p. 408, 559 N.E.2d at p. 428, 559 N.Y.S.2d at p. 865.) A court should also consider the father's public acknowledgement of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child"

Colorado	COLO. REV. STAT. § 19-5-105(3.1)(c)(III) (2012)

Wording of Statute

(c) That the parent has not promptly taken substantial parental responsibility for the child. In making this determination the court shall consider, but shall not be limited to, the following: (III) Whether the birth father has failed to substantially assist the mother in the payment of the medical, hospital, and nursing expenses, according to that parent's means, incurred in connection with the pregnancy and birth of the child.

Florida	FLA. STAT. § 63.089(3-4) (2012)

Wording of Statute

(3) Grounds for terminating parental rights pending adoption. The court may enter a judgment terminating parental rights pending adoption if the court determines by clear and convincing evidence, supported by written findings of fact, that each person whose consent to adoption is required under s. 63.062:

(d) Has been properly served notice of the proceeding in accordance with the requirements of this chapter and has failed to file a written answer or personally appear at the evidentiary hearing resulting in the judgment terminating parental rights pending adoption;

(4) Finding of abandonment. A finding of abandonment resulting in a termination of parental rights must be based upon clear and convincing evidence that a parent or person having legal custody has abandoned the child in accordance with the definition contained in § 63.032. A finding of abandonment may also be based upon emotional abuse or a refusal to provide reasonable financial support, when able, to a birth mother during her pregnancy or on whether the person alleged to have abandoned the child, while being able, failed to establish contact with the child or accept responsibility for the child's welfare.

(a) In making a determination of abandonment at a hearing for termination of parental rights under this chapter, the court shall consider, among other relevant factors not inconsistent with this section:

1. Whether the actions alleged to constitute abandonment demonstrate a willful disregard for the safety or welfare of the child or the unborn child;

2. Whether the person alleged to have abandoned the child, while being able, failed to provide financial support;

3. Whether the person alleged to have abandoned the child, while being able, failed to pay for medical treatment; and

4. Whether the amount of support provided or medical expenses paid was appropriate, taking into consideration the needs of the child and relative means and resources available to the person alleged to have abandoned the child.

Idaho	IDAHO CODE ANN. § 16-1504(2)(b)(iii) (West 2012)

Wording of Statute

(2) In accordance with subsection (1) of this section, the consent of an unmarried biological father is necessary only if the father has strictly complied with the requirements of this section. (b) With regard to a child who is under six (6) months of age at the time he is placed with adoptive parents, an unmarried biological father shall have manifested a full commitment to his parental responsibilities by performing all of the acts described in this subsection prior to the placement for adoption of the child in the home of prospective parents or prior to the date of commencement of any proceeding to terminate the parental rights of the birth mother, whichever event occurs first. The father shall: (iii) If he had actual knowledge of the pregnancy, pay a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his means, and when not prevented from doing so by the person or authorized agency having lawful custody of the child.

Iowa	IOWA CODE § 600A.8(3)(a)(2)(d) (2012)

Wording of Statute

3. The parent has abandoned the child. For the purposes of this subsection, a parent is deemed to

have abandoned a child as follows: (a)(2) In determining whether the requirements of this paragraph are met, the court may consider all of the following: (d) With regard to a putative father, whether the putative father paid a fair and reasonable sum, in accordance with the putative father's means, for medical, hospital, and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child, or whether the putative father demonstrated emotional support as evidenced by the putative father's conduct toward the mother.

Kansas	KAN. STAT. ANN. § 59-2136(h)(1)(D) (West 2012)

Wording of Statute

(h)(1) When a father or alleged father appears and asserts parental rights, the court shall determine parentage, if necessary pursuant to the Kansas parentage act, K.S.A. 23-2201 *et seq*., and amendments thereto. If a father desires but is financially unable to employ an attorney, the court shall appoint an attorney for the father. Thereafter, the court may order that parental rights be terminated, upon a finding by clear and convincing evidence, of any of the following: (D) the father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth.

Michigan	MICH. COMP. LAWS § 710.39(2) (2012)

Wording of Statute

(2) If the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance

with the putative father's ability to provide such support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA.

Mississippi	*John Doe v. Attorney W.*, 410 So.2d 1312, 1317 (Miss. 1982)

"Doe allowed the natural mother to bear all the physical, mental and financial burdens of pregnancy and childbirth without at any time assisting her financially. At this time, according to the record, he has not offered her any aid for the child. Upon such a record, we cannot hold that the lower court erred in finding that Doe's parental rights to the child were terminated in part on the ground of abandonment of the child."

Montana	*In the Matter of the Adoption of D.J.V.*, 796 P.2d 1076, 1079 (Mont. 1990)

"By Kent's own admission, he has not paid any expenses of Carolyn's pregnancy or hospitalization, or any child support since the birth of D.J.V. This is not a case where the father is suffering financial hardship. Thus, there is ample 'clear and convincing evidence' to support the District Court's termination of Kent's parental rights."

New Jersey N.J. Stat. Ann. § 9:3-46(a) (West 2012)

Wording of Statute

In determining whether a parent has affirmatively assumed the duties of a parent, the court shall consider, but is not limited to consideration of, the fulfillment of financial obligations for the birth and care of the child, demonstration of continued interest in the child, demonstration of a genuine effort to maintain communication with the child, and demonstration of the establishment and maintenance of a place of importance in the child's life.

New Mexico N.M. STAT. ANN. § 32A-5-3(F)(4)(a) (West 2012)

Wording of Statute

(4) has openly held out the adoptee as his own child by establishing a custodial, personal or financial relationship with the adoptee as follows: (a) for an adoptee under six months old at the time of placement: 1) has initiated an action to establish paternity; 2) is living with the adoptee at the time the adoption petition is filed; 3) has lived with the mother a minimum of ninety days during the two-hundred-eighty-day period prior to the birth or placement of the adoptee; 4) has lived with the adoptee within the ninety days immediately preceding the adoptive placement; 5) has provided reasonable and fair financial support to the mother during the pregnancy and in connection with the adoptee's birth in accordance with his means and when not prevented from doing so by the person or authorized agency having lawful custody of the adoptee or the adoptee's mother; 6) has continuously paid child support to the mother since the adoptee's birth in an amount at

least equal to the amount provided in Section 40-4-11.1 NMSA 1978, or has brought current any delinquent child support payments; or 7) any other factor the court deems necessary to establish a custodial, personal or financial relationship with the adoptee;

New York	N.Y. DOM. REL. LAW § 111(1)(e)(iii) (McKinney 2008)

Wording of Statute

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows: (e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if: (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child.

North Dakota	*In the Interest of F.H.*, 283 N.W.2d 202, 214 (N.D. 1979)

"We conclude the record, by clear and convincing evidence, supports a finding that William abandoned his child. His failure to discharge the obligations of a parent, both before and after the birth of the child, demand that his parental rights over the child be terminated. We cannot allow the welfare and happiness of the child in this case to be destroyed in

the name of protecting rights which have never been exercised and of which corresponding obligations have never been fulfilled."

Ohio	OHIO REV. CODE ANN. § 3107.07(B)(2)(c) (West 2012)

Wording of Statute

(B) The putative father of a minor if either of the following applies: (2)(c) The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first.

Oklahoma	OKLA. STAT. tit. 10 § 7505-4.2(C)(1) (2012)

Wording of Statute

C. Consent to adoption is not required from a father or putative father of a minor born out of wedlock if: 1. The minor is placed for adoption within ninety (90) days of birth, and the father or putative father fails to show he has exercised parental rights or duties towards the minor, including, but not limited to, failure to contribute to the support of the mother of the child to the extent of his financial ability during her term of pregnancy; or

South Carolina	S.C. CODE ANN. § 63-9-310(A)(5)(b) (West 2012)

Wording of Statute

(A) Consent or relinquishment for the purpose of adoption is required of the following persons: (5) the father of a child born when the father was not married to the child's mother, if the child was placed

with the prospective adoptive parents six months or less after the child's birth, but only if: (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses.

Tennessee	Tenn. Code Ann. § 36-1-102(1)(A)(iii) (West 2012)

Wording of Statute

A biological or legal father has either willfully failed to visit or willfully failed to make reasonable payments toward the support of the child's mother during the four (4) months immediately preceding the birth of the child; provided, that in no instance shall a final order terminating the parental rights of a parent as determined pursuant to this subdivision (1)(A)(iii) be entered until at least thirty (30) days have elapsed since the date of the child's birth;

Texas	TEX. FAM. CODE § 161.001.1(H) (2012)

Wording of Statute

The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence: (1) that the parent has: (H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of

the child, and remained apart from the child or failed to support the child since the birth.

Utah	UTAH CODE ANN. § 78B-6-121(3) (West 2012)

Wording of Statute

(3) Except as provided in Subsections (6) and 78B-6-122(1), and subject to Subsection (5), with regard to a child who is six months of age or less at the time the child is placed with prospective adoptive parents, consent of an unmarried biological father is not required unless, prior to the time the mother executes her consent for adoption or relinquishes the child for adoption, the unmarried biological father: (d) offered to pay and paid, during the pregnancy and after the child's birth, a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his financial ability, unless: (i) he did not have actual knowledge of the pregnancy; (ii) he was prevented from paying the expenses by the person or authorized agency having lawful custody of the child; or (iii) the mother refuses to accept the unmarried biological father's offer to pay the expenses described in this Subsection (3)(d).

Vermont	VT. STAT. ANN. tit. 15A § 3-504(a)(1)(A) (West 2012)

Wording of Statute

(1) In the case of a minor under the age of six months at the time the petition is filed, the respondent did not exercise parental responsibility once he or she knew or should have known of the minor's birth or expected birth. In making a

determination under this subdivision, the court shall consider all relevant factors, which may include the respondent's failure to: (A) pay reasonable prenatal, natal, and postnatal expenses in accordance with his or her financial means;

Washington	*In re Infant Child Skinner*, 982 P.2d 670, 678 (Wash. Ct. App. 1999)

"There is no evidence that Williams provided emotional or financial support for Skinner during her pregnancy or attempted to take responsibility for the support of the child. Indeed, Skinner testified that she contacted New Hope because she did not believe she had adequate support to raise the child . . . As discussed above, the record supports the court's findings that Williams did not take responsibility for the child and did not have any concrete plans for his future employment or the child's support. Moreover, Williams himself testified that he had stopped attending classes at the Clallam Bay facility and was fired from his job. He also testified that he was willing to take parenting classes at the Clallam Bay facility, but he did not indicate that he had taken such classes already. We conclude that Williams's challenges to the court's findings and conclusions are without merit, and we affirm the order terminating his parental rights."

West Virginia	W.VA. CODE § 48-22-306(b)(2) (2012)

Wording of Statute

Abandonment of a child less than 6 months shall be presumed when the birth father: (2) fails to contribute within his means toward the expense of

prenatal and postnatal care of the mother and postnatal care of the child.

Wisconsin	WIS. STAT. § 48.415(6)(b) (2011)

Wording of Statute

(b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.