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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Father prompted this adoption by abandoning his unborn child and her pregnant mother, leaving Mother solely responsible for deciding whether to abort Baby Girl, raise her in poverty, or place her with an adoptive family. Mother chose the latter, which she had the right to do without Father's permission or involvement under state law and the Constitution. But the court below held that because Mother was impregnated by a tribal member, ICWA entitled Father to veto the adoption and wrench Baby Girl from the adoptive family who had loved and raised her for over two years since birth.

Respondents, the United States, and their amici applaud this result, arguing that any biological child of a tribal member presumptively must be raised by an Indian family. They further argue that blood connections to tribal members trump any other ethnicity or cultural heritage of the child. Their message to non-Indian adoptive parents is to leave abandoned Indian children alone, because tribes and their members control those children's destinies. Further, respondents and their amici falsely assert that Mother and Adoptive Parents improperly concealed their adoptive plans. Neither state law nor ICWA required earlier notice to Father. Father knew from the outset the only relevant fact: Mother was pregnant with his child. Under state law, that knowledge required him immediately to act like a parent. Instead, he shirked his parental responsibilities for over a year, well beyond the generous window of opportunity that state law gives unwed fathers to embrace parenthood.

Father dismisses Mother as someone who "finally and definitely relinquished her interest in Baby Girl,"

and trumpets himself as the "natural parent . . . who does want to raise the child." Br. 52. Yet Father earlier and definitely repudiated parenthood, telling Mother that Baby Girl was her sole responsibility. Recognizing Father as an ICWA "parent"—despite his utter lack of parental rights under state law or the Constitution—would be unconscionable. ICWA was not intended to create federal parental rights where none otherwise would exist. Respondents' reading of ICWA allows Indian birth fathers to pull a bait-and-switch that Congress cannot have intended. Fathers could eschew all paternal responsibility—thereby prompting the women they impregnate to place their children with adoptive parents—and at the eleventh hour claim their rights as "natural" parents under ICWA to override the rights of the mothers who acted responsibly.

Worst of all is the disgraceful impact on Baby Girl, who, after being abandoned by Father, found a loving, stable home. She represents countless children who deserve a childhood free from the chaos caused by the decision below. She deserves to be treated as a unique, multiethnic individual whose best interests are not inexorably dictated by her blood connection to a tribal member.

A. FATHER IS NOT AN ICWA "PARENT"

Section 1903(9)'s first sentence defines a "parent" as "any biological parent . . . of an Indian child," while the second sentence excludes "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). Because the first sentence encompasses all acknowledged or proven biological fathers, the second sentence excludes unwed fathers with no acknowledged or established parental rights under state law. Pet. Br. 22-23.

Before Adoptive Parents filed this proceeding—triggering ICWA's application—state law excluded Father from being a "parent" who could object to his biological child's adoption. State law did so to protect birth mothers and guarantee children immediate and stable placements. ICWA does not make "parent[s]" of irresponsible unwed fathers whom States decline to recognize as such. Congress did not pass ICWA under the offensive assumption that unwed Indian fathers who abandoned their children need extra time and incentives to reconsider their decision. Rather, Congress had the more modest goal of protecting Indian parents already recognized under state law, including certain unwed fathers, from having their children removed from preexisting custody.

1. Respondents argue that ICWA created a new federal definition of parenthood based on a biological connection alone and that Father's acknowledged and proven biological connection suffices. Father Br. 22, 26-27; U.S. Br. 15-17. Although "federal statutes are generally intended to have uniform nationwide application," *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989), Congress presumptively resorts to state law to define family law terms to avoid usurping States' traditional and exclusive authority in this area. Pet. Br. 20-22. The definition of "parent" falls within the heartland of States' authority over domestic relations. Accordingly, the Court should be particularly reluctant to infer that Congress intended Section 1903(9) as a dramatic encroachment upon State prerogatives that creates federal-law parents who would have no rights under state or constitutional law. That is presumably why the State *amici* caution that "biology may not be enough to

acknowledge or establish paternity under ICWA." Arizona Br. 23 n.14.

Father argues that a federal rule ensures uniformity when adopted children move across state lines. Br. 25-26; U.S. Br. 15-16. But it is implausible that Congress intended to uniformly ensure that delinquent Indian fathers who refuse to support the pregnant mother and child could obtain parental rights without following state law. Congress surely presumed that absentee Indian fathers have the same capacity as absentee non-Indian fathers to comply with state law.

Father contends that the second sentence relieves courts from identifying unwed fathers. Br. 22-23; U.S. Br. 18. But ICWA elsewhere relieves courts of that burden, 25 U.S.C. § 1912(a), leaving the second sentence superfluous under Father's view. Father's reading also assumes Congress intended to confer special privileges on deadbeat dads, sperm donors, or rapists based solely on a biological link. Congress should not be presumed to have placed those men on equal footing with fully committed unwed fathers.

The United States suggests that looking to parental rights under state law would require factual inquiry before notifying potential parents of adoption proceedings. U.S. Br. 19. But States require notice of proceedings to potential fathers even though their consent may be irrelevant. S.C. Code § 63-9-730; *Evans v. S.C. Dep't Social Servs.*, 399 S.E.2d 156, 157 (S.C. 1990). Father thus was notified of the adoption proceeding well before ICWA was invoked. Pet. Br. 10.

Father argues that because he took a DNA test that would satisfy South Carolina "paternity" proce-

dures, he is a "parent" even if ICWA incorporates state law. Br. 26-27 (citing S.C. Code §§ 63-17-10(C), 63-17-30(A)); U.S. Br. 17. As Father recognizes, however, establishing biological paternity is distinct from obtaining parental rights to consent to adoptions. Father Br. 26 & n.9; *cf.* Pet. App. 22a. Father's DNA test did not transform him into a parent with rights to object to an adoption, because he failed to embrace parenthood as state law requires. S.C. Code § 63-9-310(A)(5). Nor can ICWA plausibly be interpreted to disregard state law governing parental adoption rights in favor of incorporating inapposite state law governing proof or acknowledgement of *biological* paternity. ICWA is triggered by *adoption* proceedings and protects parents' *rights* in those proceedings.

2. Father argues that he "asserted his claim to raise his daughter literally the moment he was belatedly informed of the attempted adoption, which never would have gone forward at all had accurate information about Father and Baby Girl been provided to Oklahoma authorities and the Cherokee Nation." Br. 2. But Baby Girl was never "his daughter." She was the child Father abandoned and refused to support unless Mother married him. Pet. App. 2a-4a. Baby Girl to him was a bargaining chip to force Mother's hand. Pet. Br. 6-7; Father Br. 8. And the notion that fathers diligently preserve parental rights so long as they act immediately upon learning of a proposed adoption "fundamentally misconstrue[s] whose timetable is relevant." *Robert O. v. Russell K.*, 604 N.E.2d 99, 103 (N.Y. 1992).

> Promptness is measured in terms of the baby's life not by the onset of the father's awareness. The demand for prompt action by the father at the child's birth is neither arbitrary nor punitive,

> but instead a logical and necessary outgrowth of the State's legitimate interest in the child's need for early permanence and stability.

Id. at 103-04; Pet. Br. 25-27.

Far from "belatedly" notifying Father of the adoption, Mother went beyond what the law requires. States generally do not require birth mothers to notify fathers of their adoptive plans. Pet. Br. 9. Oklahoma, where Mother and Father live, does not even require women to notify men of pregnancy, Okla. Stat. tit. 10 § 7501-1.2(A)(5)-(6), let alone their adoption plans, *id.* § 7503-3.1. And when Mother notified Father of his impending fatherhood, Father responded that he would not parent or otherwise support Baby Girl. Pet. Br. 6-7.

Nor was the Tribe left in the dark. The courtesy letter from Mother's lawyer was exceedingly forthcoming about Baby Girl's upcoming birth, though ICWA does not require birth mothers impregnated by tribal members to inform tribes of adoptive plans. JA 5-6. The Tribe had *seventeen months*' notice of the adoption proceeding; ICWA requires ten *days*. JA 53.

Oklahoma was not deprived of "accurate information" about Baby Girl that would have prevented Adoptive Parents and Baby Girl from traveling to South Carolina. Father Br. 2. Oklahoma approved Baby Girl's transfer to South Carolina after Mother again provided more information than required. Mother disclosed Baby Girl's "Caucasian/Native American Indian/Hispanic" ethnicity on the ICPC form. JA 28. Circling "Hispanic" accurately indicated that Baby Girl is predominantly Hispanic. *Id.* The Oklahoma court's dismissal for lack of jurisdiction over Father's complaint is "law of the case."

Pet. App. 20a. Father has pointedly declined to substantiate how Mother supposedly concealed Baby Girl's Indian ethnicity or Adoptive Parents illegally transferred Baby Girl from Oklahoma. Pet. Br. 9, 10, 12 n.3.

B. SECTIONS 1912(d) AND (f) DO NOT APPLY

Respondents and their amici spill considerable ink arguing that ICWA broadly applies to adoption proceedings involving Indian children. Father Br. 28-37; Cherokee Br. 22-27; U.S. Br. 10-13. But ICWA's general applicability hardly helps Father. Even if Father is an ICWA "parent," no one disputes that he had no right to remove Baby Girl from her adoptive home unless Sections 1912(d) and 1912(f) apply to him. But only custodial parents can invoke those provisions.[1]

1. Section 1912(d) requires that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." 25 U.S.C. § 1912(d). Father argues that Section 1912(d) applies because this adoption causes a familial "breakup" in the "ordinary sense" by preventing him and his extended family from raising his biological daughter and by terminating his "legal relationship with his daughter." Br. 43; U.S. Br. 21 (adoption "break[s] his family connection to his daughter").

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[1] The United States suggests that even if Father cannot invoke ICWA, petitioners must terminate his rights under S.C. Code § 63-7-2570. U.S. Br. 26 n.6. Absent relief under ICWA, however, an adoption decree automatically terminates an absentee father's rights. *Hucks v. Dolan*, 343 S.E.2d 613, 615 (S.C. 1986); Pet. App. 21a n.19.

That is not an ordinary reading of the words "breakup of the Indian family," which presuppose the dismantling of a preexisting Indian family. A "breakup" is "[t]he discontinuance of a relationship" that already exists. American Heritage Dictionary 235 (3d ed. 1992); *accord* Father Br. 43. Only a delusional person breaks up with a girlfriend he never had. Defining "the Indian family" to include prospective relationships also conflicts with federal guidelines interpreting Section 1912(d). Remedial services under Section 1912(d) are intended to "alleviate the need to *remove* the Indian child from his or her parents," not to facilitate a *transfer* of the child *to* a biological parent. *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584, 67,592 (Nov. 26, 1979) (emphasis added); *see In re W.B., Jr.*, 281 P.3d 906, 921 n.15 (Cal. 2012); *B.R.T. v. Exec. Dir.*, 391 N.W.2d 594, 600 (N.D. 1986).

Respondents' reading is further undercut by Sections 1912(e) and (f), which, as the United States concedes (Br. 23-25), allow only custodial parents to invoke protections that apply in termination of parental rights and foster care proceedings. Sections 1912(d), (e), and (f) work in tandem, by giving parents access to remedial services under 1912(d) to avoid termination and foster care placement under the standards of Sections 1912(e) and (f). The BIA Guidelines are in accord. 44 Fed. Reg. at 67,592-93.

The illogical consequences of respondents' construction of Section 1912(d) are amply illustrated by the decision below, which held that Adoptive Parents did not satisfy Section 1912(d) because they failed to "stimulate Father's desire to be a parent." Pet. App. 26a. Father and the United States argue that the Tribe, state actors, and adoption agencies should

offer non-custodial fathers remedial services. Father Br. 43; U.S. Br. 22. No one, however, can prevent a "breakup" of a non-existent Indian family. And applying Section 1912(d) to these circumstances would create perverse results. Tribes could effectively veto adoptions by failing to provide services—and the Tribe did nothing to "rehabilitate" Father. States play no active role in private adoptions. Private agencies are unnecessary in some direct-placement adoptions, do not work for free, and may not be controllable by adoptive parents. The ultimate burden would fall on the adoptive parents.

In any event, the only instigator of familial "breakup" here was Father, who already repudiated any "legal relationship" or "family connection" with Baby Girl by abandoning her. There was no "Indian family" to break up, only the loving adoptive family that existed from Baby Girl's first breath. ICWA should not be construed to allow Father to dismantle that family.

2. Father also cannot invoke Section 1912(f), which requires courts, before ordering termination of parental rights, to find that the "continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). Section 1912(e) is similarly worded for foster care placements. That language cannot apply to Father, who never had legal or physical custody over Baby Girl. Absent previous custody, courts cannot assess whether the parent's continued custody would seriously harm the child.

Father responds that "continued" has a "prospective meaning" because custody continues into the future and the court must assess future effects on the child's well-being. Br. 41-42. Father is only half-

right. The word "continued" assumes both that a condition previously existed and that it will endure prospectively—which is why even the United States concedes that the state court "assumed the word 'continued' out of the provision." Br. 24-25.

Section 1912(f)'s custodial requirement would not, as Father suggests, exclude parents of children in temporary foster care and divorced parents with visitation rights. Br. 29, 31, 46 n.19. Section 1912(f) is not limited to current custody; it covers all parents with prior custodial relationships. Courts can look to those past relationships when determining whether that parent's continued custody would harm the child. Pet. Br. 33.

Father observes that ICWA defines a "child custody proceeding" to include "termination of parental rights," *i.e.*, "any action resulting in the termination of the parent-child relationship." 25 U.S.C. § 1903(1)(ii). From that, Father infers that "Congress wanted Section 1912(f) to preclude termination of parental rights in this broad sense absent a showing that continuation of the *parent-child legal relationship* would injure the child." Br. 40. That argument conflicts with Section 1912(f)'s text, which requires that before "termination of parental rights may be ordered," the court must assess the effect on the child of "continued custody" by the parent. The text unambiguously distinguishes between termination of the parent-child relationship and continued custody. Custody does not encompass any parent-child relationship, but means "decision-making authority with respect to the child." S.C. Code Regs. 114-4730(A); Black's Law Dictionary 442 (9th ed. 2009).

Remarkably, Father also argues that his lack of prior custody is a bonus; if courts cannot assess how

his "continued custody" would affect Baby Girl, "[n]o termination of parental rights may be ordered." Br. 39. Congress surely did not confer a free-pass to non-custodial parents, or intend to treat absentee Indian fathers more favorably than Indian parents with preexisting custodial rights. Section 1912(f) applies only to parents for whom courts can make the assessment required by the text.[2]

3. The presumption throughout ICWA that a parent has custodial rights bolsters the inference that Sections 1912(d)-(f) similarly require prior custody. 25 U.S.C. §§ 1913, 1914, 1916, 1920. We do not maintain that these provisions apply here. *Cf.* Father Br. 44. But this Court should assume that Congress passed a coherent statute whose provisions work together. None of these provisions makes sense when applied to non-custodial parents. Pet. Br. 35-39.

Sections 1913(b)-(d) state that "the child shall be returned to the parent" upon a parent's revocation of consent to foster care or adoptive placement, or when consent was procured by fraud or duress. Pet. Br. 37-38. A parent must have a prior custodial relationship for the child to be *returned* to him. Compact Oxford English Dictionary 2525 (1971) ("return" means "to come or go back to a place or person"). Father misquotes the statute as providing that the child will be

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[2] Father observes that a Senate Committee report rejected a proposal to limit ICWA to cases where "at least one of the child's biological parents maintains significant social, cultural, or political affiliation with the Indian tribe." H.R. 3286, § 301 (1996); Father Br. 36-37. Even assuming that post-enactment legislative inaction illuminates congressional intent, *Bruesewitz v. Wyeth*, 131 S. Ct. 1068, 1092-93 (2011), Section 1912(f)'s unambiguous text requires a custodial parent.

"*restored* to the parent" and argues that upon a parent's revocation of consent, Congress contemplated that "the status quo ante (whatever that was) will be restored." Br. 44. But the quoted language is not in the statute, and Father's view would produce the absurd result that when Father withdrew his consent to the adoption, Baby Girl was "restored" to a condition of abandonment.

Section 1914 allows a collateral attack of a proceeding by "any parent or Indian custodian from whose *custody* such child was *removed*." Father argues that "from whose custody such child was removed" modifies "Indian custodian" but not "parent." Br. 45. But "Indian custodian" already incorporates a custodial relationship. 25 U.S.C. § 1903(6). And Congress throughout ICWA equates Indian custodians with custodial parents, confirming the two are indistinguishable. 25 U.S.C. §§ 1912(e), 1912(f), 1916(a), 1916(b), 1920.

Section 1916(a) refers to "return of custody." Father suggests that reference "is best understood as offering an opportunity to restore parental rights and gain legal custody," Br. 45, but that reads "return" out of the statute. Father had no custodial rights to restore. Section 1916(b), which Father ignores, refers to "where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed." Pet. Br. 37. That language is similarly nonsensical when applied to Father, who has no child who can be "returned" to him. And Section 1920 refers to "improper removal of child from custody," "return of child," "a petitioner who has improperly removed the child from custody of the parent or Indian custodian" and the state of

"returning the child to his parent or custodian." In short, custodial references permeate ICWA.

4. Respondents argue that *Holyfield* implicitly held that ICWA does not require a preexisting Indian family because the twins in that case were not "in the custody of Indian parents at the time of the child custody proceeding." Father Br. 35; Cherokee Br. 26-27. But the "sole issue" in *Holyfield* was tribal jurisdiction, 490 U.S. at 42, not the construction of Sections 1912(d), (e), or (f). In any event, *Holyfield* involved a preexisting Indian family that would have continued but for the adoption.

C. SECTION 1915(a) DOES NOT APPLY

1. Section 1915(a) provides for preferential adoptive placement of a child with the child's extended family, another member of the child's tribe, or any other Indian family. Although the provision applies to "any" child custody proceeding, in context that means any proceeding where there is a preference to apply. *Cf. Nixon v. Missouri Mun. League*, 541 U.S. 125, 132-33 (2004). But here, there was no preference to apply because only petitioners sought to adopt Baby Girl. The United States does not argue otherwise. U.S. Br. 14 n.2. There was also no alternative placement with respect to which a court could make a "good cause" determination. The court below thus compared Adoptive Parents to *Father* in finding the exception inapplicable, even though Father did not seek to adopt Baby Girl and he was not covered by Section 1915(a).

It is irrelevant that Baby Girl's paternal grandmother could have asserted rights under Section 1915(a). Father Br. 48-49; Cherokee Br. 21-22. She did not. Nor did any of the Tribe's "100 certified

adoptive homes" offer to adopt Baby Girl. Cherokee Br. 22. The Tribe's suggestion that a remand would be proper to let them now step forward invites further chaos and heartbreak in this and future proceedings. All children deserve swift resolution of placement determinations, and Indian children should not wait in limbo while tribes scramble to execute Plan B. "[A] child would lose precious months when she could have been []adjusting to life" in her permanent home. *Chafin v. Chafin*, 133 S. Ct. 1017, 1027 (2013).

Respondents also argue that Section 1915(a) is not properly before the Court. Father Br. 47; Cherokee Br. 15. The petition, however, disputed the application of Section 1915(a) (Pet. 15 n.2; Pet. Reply 7), and the division of authority with respect to the existing Indian family doctrine encompasses the application of Section 1915(a) in cases like this. Pet. Br. 52 (citing *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880, at *16-17 (Tenn. Ct. App. Nov. 19, 1997)).[3]

2. The state court held that Adoptive Parents did not meet their supposed burden to conduct a diligent search for families meeting the preference criteria.

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[3] As the Tribe observes (Br. 21 n.9), petitioners' counsel stated below that Section 1915 applied if Father could not invoke ICWA and that the "good cause" exception was satisfied here. At the petition stage, petitioners argued that Section 1915(a) was inapplicable because no one stepped forward under Section 1915. Pet. 15 n.2; Pet. Reply 7. Petitioners' merits brief reasserted that contention. Pet. Br. 51-57. Although Baby Girl's placement with petitioners undoubtedly would establish "good cause" if the provision applies, as a threshold matter Section 1915(a) requires a preferred party to petition for custody so that a child's placement can be determined at once.

Pet. App. 38a.[4] The Tribe advocates a regime in which they are puppet-masters who control the lives of pregnant women bearing "their" children and prospective adoptive parents whom ICWA presumes are unfit to raise "their" children. Cherokee Br. 10, 43. But ICWA is not a federal mandate to form new Indian families or to conscript other families' children to *grow* Indian families. Pet. Br. 52. The Tribe states "that is precisely what Section 1915(a) *does* command." Br. 20; Father Br. 48 (same). Respondents tout Section 1915(a)'s "good cause" exception but simultaneously defend the decision below that rejected petitioner's reliance on the fact that Baby Girl was raised for over two years by the adoptive parents Mother hand-selected. Cherokee Br. 18-19; Father Br. 47; Pet. App. 38-39 & n.31. If Section 1915(a)'s "good cause" exception is not met here, it is hard to imagine where it would be. The grave constitutional concerns with this reading counsel in favor of construing Section 1915 either to apply only when a preferred party seeks custody or to require placement with Adoptive Parents under the "good cause" exception.

D. THE CANON OF CONSTITUTIONAL AVOIDANCE APPLIES

ICWA's text, history, and purpose reflect Congress's intent to protect existing Indian families. The interpretation below turned ICWA on its head by holding that biological fathers may invoke ICWA to

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[4] The United States notes that the BIA guidelines advise adoption agencies to timely notify a child's extended family members and tribe that they are subject to a preference. Br. 14 n.2. The United States does not specify the consequences of non-compliance, the meaning of timeliness, or what happens without an adoption agency.

veto a birth mother's adoptive choices, and that tribes presumptively control children who are eligible for tribal membership based on their race. That interpretation carries disturbing and far-reaching implications. The victims include petitioners, who welcomed Baby Girl into their family after Father abandoned her and after Mother made a profound child-rearing choice. The victims include Mother, who was manipulated by Father's change of heart. And finally, they include Baby Girl, whose life was tragically disrupted by Father's change of heart and who is being claimed by all tribes as their own based on her genetic make-up.

1. Applying ICWA beyond preexisting Indian families raises far more equal protection issues than respondents or the United States recognize. Treating Baby Girl as a font of special preferences solely because of her Indian heritage does not merely treat her differently from all non-Indian adoptees. Under respondents' view, Baby Girl's Indian blood automatically upgrades Father to an ICWA "parent" with a veto over Baby Girl's adoption, a right that no delinquent unwed father of a non-Indian child could claim. Baby Girl's Indian blood further gives Indian families of *any* tribe an absolute preference in adopting her over any non-Indian families, including petitioners.[5]

At minimum, these preferences are of dubious constitutionality. This Court has long identified "furthering Indian self-government" as the only constitu-

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[5] The United States argues (Br. 28) that petitioners fail to identify the subject of a race-based distinction. ICWA discriminates on account of the child's race. Tax breaks to parents of Asian children would be unconstitutional even though the benefit would not turn on the parent's race.

tionally legitimate justification for preferences based on tribal affiliation. *Morton v. Mancari*, 417 U.S. 535, 550 (1974); *Rice v. Cayetano*, 528 U.S. 495, 519 (2000). Such preferences reflect "the unique status of Indians as 'a separate people' with their own political institutions." *United States v. Antelope*, 430 U.S. 641, 646 (1977). The narrow scope of that interest is obvious. Indian *self*-government refers to tribal members' involvement in the tribe's own internal affairs, *Mancari*, 417 U.S. at 554, including the operation of tribal courts, *Fisher v. District Court*, 424 U.S. 382 (1975) (per curiam), taxation, *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), and regulation of Indian land and culture, *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997).

Extending ICWA's preferences to Indian children who were never part of an Indian family advances none of these aspects of Indian self-government. While tribal children are undoubtedly vital to tribes, Father Br. 49-50, Cherokee Br. 35-36, Baby Girl was not part of the Tribe, and treating her otherwise ignores the fundamental difference between keeping Indian children already within Indian communities and wrenching them from their existing non-Indian homes. Interpreting ICWA to prevent children within a tribal community from leaving and "break[ing] up . . . the Indian family" regulates the internal domestic relations of tribal members. Using ICWA to claim children from non-Indian families instead controls the rights of non-Indian parents and adoptive couples in perhaps the most sensitive area of governmental regulation. "[E]fforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid'" and self-evidently do not constitute self-government. *Plains Commerce Bank v.*

Long Family Land & Cattle Co., 554 U.S. 316, 330 (2008) (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)). Expanding the concept of self-government to encompass the decision below would allow Congress to ban interracial adoption of *any* Indian child—notwithstanding the child's best interests, her parents' adoptive choices, other aspects of the child's ethnic or racial heritage, or even whether the adoptive Indian parents belonged to an entirely different Indian tribe from the child. *See* 25 U.S.C. § 1915(a)(3). ICWA should be read to avoid such a constitutionally questionable result.

Nor are ICWA's tribal preferences incidents of political self-governance merely because ICWA is triggered by tribal membership. Father Br. 49-50. Undoubtedly, defining eligibility for tribal membership furthers Indian self-government. *Id.* at 50-51. ICWA, however, is concerned with the *consequences* of tribal membership. Under respondents' reading, tribal membership allows the Tribe to dictate who may parent an "Indian child" and how that child should be raised—issues far afield from the core concerns of Indian political institutions. If any tribal preference in any sphere could be rendered constitutional through the expedient of conditioning the preference on tribal membership, the limits established by *Mancari* and *Rice* would be meaningless. Because the whole point of a tribal preference is to benefit tribal members, it is difficult to imagine *any* tribal preference that would not condition eligibility for the preference on membership. And it is equally hard to imagine any preference that would not therefore be immune from scrutiny under respondents' theory.

Stripped of any veneer of self-government, applying ICWA on these facts implements a naked racial pref-

erence. Although respondents disclaim any relationship between tribal membership and race, Cherokee Br. 32-34, ancestry is the *only* requirement for membership in many tribes, including the Cherokee Nation. Pet. Br. 44-45 & n.5. Eligibility for membership here is a "proxy for race." *Rice*, 528 U.S. at 514. And if there were any doubt, Cherokee law automatically enrolls any direct descendent of an original Dawes enrollee as a tribal member for the first 240 days of the child's life. JA 36. The Tribe recently represented that this law binds this Court in applying ICWA—and thus dictates adoptive placement based solely on blood connection, even if *neither* parent is a tribal member. Petition for a Writ of Certiorari at 7-8, *Cherokee Nation v. Ketchum*, 132 S. Ct. 2429 (2012) (No. 11-680); *cf.* Cherokee Br. 38. That is a disturbing proposition.

2. The decision below unnecessarily threatens birth mothers' fundamental right to determine how their children will be raised.[6]

A woman's constitutional right to control her child's destiny does not evaporate when she decides to pursue adoption for her unborn child. Mother, as Baby Girl's sole and unquestionably fit parent under state law, had a "fundamental right to make decisions concerning the care, custody, and control" of her child. *Troxel v. Granville*, 530 U.S. 57, 60 (2000) (plurality op.). That plainly encompasses the "recognized constitutional right to select adoptive parents for her child." *M.L. v. Superior Court*, 90 Cal. Rptr. 920, 927 (Cal. Ct. App. 2009); *Y.H. v. F.L.H.*, 784 So.

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[6] Contrary to the United States' contention (Br. 31), petitioners have "standing" to assert Mother's liberty interest under the canon of constitutional doubt. Pet. Br. 43.

2d 565, 571-72 (Fla. Dist. Ct. App. 2001). The United States correctly but irrelevantly observes that the Constitution does not endow birth mothers with an inalienable right "to have [their] child adopted." U.S. Br. 32 (quoting *Does 1, 2, 3, 4, 5, 6, & 7 v. State*, 993 P.2d 822, 836 (Or. Ct. App. 1999)). Nor does the Constitution guarantee mothers that their children will have friends or access to private schools. But the Constitution certainly gives mothers the right to choose who may associate with their children, *Troxel*, 530 U.S. at 60, and which school will educate them, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

It can hardly be maintained that the Constitution gives a mother no say whatsoever over the profound decision as to which prospective adoptive couple will raise her child to adulthood, inculcate her religion and values, and involve the mother in the child's life as she grows. The United States notes that adoption is not subject to a mother's "unilateral control over the outcome." U.S. Br. 32. States undoubtedly can insist that a mother's adoptive choice further her child's best interest. But the accommodation of multiple perspectives hardly justifies extinguishing a birth mother's role in the most momentous decision for her and her child's future. The Constitution gives mothers a voice, if not an outright veto.

Respondents' construction of ICWA tramples this liberty interest and penalizes women for bearing Indian children and choosing the adoptive couple who will raise them. Respondents erroneously portray Mother as having signed away all rights to determine Baby Girl's fate the moment she agreed to the adoption—leaving the door open for Father to unilaterally unwind Baby Girl's adoption through ICWA.

Father Br. 52; Cherokee Br. 47.[7] That view converts the exercise of a constitutional right into an invitation for a bait-and-switch. Worse, this case vividly illustrates how ICWA can be wielded as a threat to circumscribe mothers' choices yet further. Mother was told that she could either raise Baby Girl as an impoverished single parent—or that Father, backed by ICWA's preference scheme, would block Mother's chosen adoptive couple from raising Baby Girl. Respondents' view shamefully signals to vulnerable mothers of Indian children that their fundamental reproductive and parenting choices are in the hands of men and tribes. To believe that ICWA was intended to express congressional hostility towards vulnerable women and solicitude towards absentee fathers and their tribes is highly dubious. More dubious is congressional interference with a mother's choice between abortion, single parenthood, and adoptive placement with a loving couple who embraces open adoptions. Most dubious of all is that Congress required non-Indian sole-custodial mothers to obtain tribal permission before they secure a bright, stable future for their children.

3. The decision below raises serious federalism concerns by creating ICWA-only "parent[s]" with no rights under state law, and by supplanting States' best-interest determinations in adoption proceedings with a presumption that Indians alone should adopt Indian children. Father dismisses those concerns as an inconsequential incident of Congress's "plenary and exclusive" authority over Indian affairs. Br. 51

[7] Mother's rights have not been terminated because the adoption was never finalized. Further, Mother consented to an adoption *by Adoptive Parents*. She certainly did not relinquish her rights to Father.

(quoting *United States v. Lara*, 541 U.S. 193, 200 (2004)). That authority is plenary, however, with respect to Congress's ability to adjust the boundaries of Tribes' authority as *dependent* sovereigns. *Lara*, 541 U.S. at 203-04. That authority affords no license to rewrite the powers of independent sovereign States. *Id*. at 205.

When States' traditional regulatory powers run headlong into core elements of tribal self-government—*e.g.*, taxation, criminal law, and education—Congress may compel state law to give way. Cherokee Br. 53. Congress can arguably even alter the calculus States apply to adoptions if ordinary state procedures risk breaking up existing Indian families. But Congress cannot extend to tribes the power to dictate the lives of non-Indian parents and adoptive couples. States, not tribes, ordinarily govern non-Indian individuals' rights. States, not tribes, ultimately bear responsibility for abandoned children within their borders, whatever their heritage. And unlike tribal members, non-Indian parents and non-Indian adoptive couples never consented to tribal governance. Judge Wald correctly warned that the federal interest under such circumstances is "so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power" in custody disputes. H.R. Rep. No. 95-1386, at 40 (1978).

* * *

That petitioners have not seen their daughter in over a year is a tragedy, not a reason to affirm the flawed decision below. Father Br. 53. Future tragedies can be averted if unwed fathers are not permitted to abandon Indian children with impunity and to upend the lives of birth mothers, adoptive

parents, and children. Reversal will leave ICWA as Congress intended, protecting tribal families and their tribes. All the future requires is that unwed Indian fathers—like all other fathers—appreciate that their choices have consequences and that some decisions cannot be undone. Too much is at stake for the children involved to demand any less.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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