No. 12-399

In The
Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A Minor Child Under the Age of Fourteen Years, BIRTH FATHER, and the CHEROKEE NATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF FOR THE INTER TRIBAL COUNCIL OF ARIZONA, AK-CHIN INDIAN COMMUNITY, COLORADO RIVER INDIAN TRIBES, FORT MCDOWELL YAVAPAI NATION, HOPI TRIBE, THE PASCUA YAQUI TRIBE OF ARIZONA, AND TOHONO O'ODHAM NATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS BIRTH FATHER AND CHEROKEE NATION

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INTEREST OF *AMICI CURIAE*[1]

The Inter Tribal Council of Arizona ("ITCA") has provided a united voice for the majority of sovereign tribal governments in the State of Arizona since 1952.

While the twenty-one federally recognized Indian tribes, nations, bands and communities which comprise the ITCA ("Arizona Tribes" or "Tribes")[2] are politically distinct bodies, they share common interests as sovereign governments in promoting the welfare of the tens of thousands of tribal members who live on their reservations or outside reservation boundaries, as well as a common interest in the welfare of children that are tribally enrolled or eligible for enrollment. ITCA supports the common interests of the

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[1] No counsel for a party authored this brief in whole or part, and no one other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. According to this Court's docket, consent to the filing of *amicus curiae* briefs has been given by all parties.

[2] The ITCA Member Tribes are: the Ak-Chin Indian Community; Cocopah Indian Tribe; Colorado River Indian Tribes; Fort McDowell Yavapai Nation; Fort Mojave Tribe; Gila River Indian Community; Havasupai Tribe; Hopi Tribe; Hualapai Tribe; Kaibab Band of Paiute Indians; Pascua Yaqui Tribe; Pueblo of Zuni; Quechan Tribe; Salt River Pima-Maricopa Indian Community; San Carlos Apache Tribe; San Juan Paiute Tribe, Tohono O'odham Nation; Tonto Apache Tribe; White Mountain Apache Tribe; Yavapai-Apache Nation; and Yavapai-Prescott Indian Tribe.

In addition to participating in this brief as Member Tribes of the ITCA, the Ak-Chin Indian Community, Colorado River Indian Tribes, Fort McDowell Yavapai Nation, Hopi Tribe, The Pascua Yaqui Tribe of Arizona, and Tohono O'odham Nation each joins this brief as *amicus curiae* in its own right.

Arizona Tribes through advocacy at the state and federal levels, and participation in judicial proceedings that have the potential to affect these common interests.

The questions presented in this case involve determinations under the Indian Child Welfare Act ("ICWA") – determinations which regularly affect the children of the Arizona Tribes, the Tribes' adult members, and the Tribes themselves. The resolution of the questions presented has the potential to affect the Arizona Tribes' right to receive notice of ICWA cases involving Indian children, and right to participate in these cases. It is essential to the interests of the ITCA and the Arizona Tribes that the ICWA be consistently interpreted and applied, now and in the future, to provide the full protections intended by Congress, and that the Tribes' rights to notice and participation are not diminished. Anything less would be detrimental to the Tribes, parents, and children – who themselves are nothing less than the Tribes' future.

SUMMARY OF THE ARGUMENT

In response to staggering and widespread abuses by state governmental and private agencies in child custody matters involving Indian children, Congress enacted the Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq.*, to provide safeguards to parents and Indian tribes involved in such proceedings. In Arizona, where Indian children suffered rates of separation

from their families far greater than the majority population, the implementation of ICWA has enabled the regular participation by tribes in hundreds of state child custody proceedings, to the benefit of Indian children and families, tribal governments, and state court proceedings.

A key reason for this ongoing participation is the fact that Arizona courts have rejected the Existing Indian Family doctrine (EIF), a judicially created exception that limits ICWA's application to cases where a child is raised in an "Indian family," and have refused to limit ICWA's definition of "parent" to the strictures of state paternity laws. Petitioners and Respondent GAL present this Court with an interpretation of ICWA that stands in direct opposition to Arizona's precedent. Petitioners and Respondent GAL's interpretation strikes at the core of ICWA's protections, in particular undermining the tribal right to notice under 25 U.S.C. § 1912(a) and intervention under 25 U.S.C. § 1911(c). The imposition of EIF or a definition of "parent" that is dependent on state law would saddle Arizona's already overburdened child welfare system with complex and fact-intensive determinations at the outset of proceedings involving Indian children. Such determinations would be made all the more difficult with weakened tribal notice and intervention provisions, as a tribe may be excluded from the very proceedings by which it is determined whether a child is an Indian child.

Petitioners' attempts to evade the controversy surrounding EIF by limiting its purview to Indian

parents with "preexisting parental rights" ignore ICWA's extensive legislative history and the reality of tribal culture in states like Arizona, where Indian and non-Indian communities often thrive in close proximity to one another and where it may be possible for a child to maintain connections with her Indian family irrespective of her custodial placement. Petitioners' arguments simply result in more uncertainty concerning the placement of Indian children, to their detriment and the detriment of their families and tribes. This Court should reject this outcome and affirm the decision of the South Carolina Supreme Court.

ARGUMENT

I. Tribal Participation is a Fundamental Aspect of ICWA and Should Be Protected.

A. Arizona Child Welfare Proceedings Involving Indian Children Have a Continuing Need for Tribal Involvement.

The vexing injustices Congress sought to remedy in passing ICWA are well documented by Respondent Birth Father, Cherokee Nation, and other *amici* supporting affirmance, and will not be repeated at length here. It is clear, however, that prior to the enactment of the ICWA, failure by states and nongovernmental organizations to recognize and understand Indian values and customs led to an alarming displacement of Indian children from their families and tribes

throughout the United States, resulting in numerous violations of tribes' and tribal members' fundamental interests in the rearing of Indian children. *See* 25 U.S.C. § 1901(4)-(5); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-36 (1989).

The state of affairs in Arizona prior to the passage of the ICWA typified the disturbing trends seen nationally. Shortly before the ICWA was enacted, the number of Indian children in Arizona who were adopted was proportionately 4.2 times higher than the number of non-Indian children who were adopted. S. Rep. No. 95-597 at 46 (1977). One out of every 98 Indian children in Arizona was in foster care at that time – a number proportionately 2.7 times higher than that for non-Indian children. *Id.* When adoption, foster care, and federal boarding schools were accounted for, Indian children in Arizona were separated from their families 27.3 times more often than non-Indian children. *To Establish Standards for Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and For Other Purposes: Hearing on S. 1214 Before the S. Comm. on Indian Affairs*, 95th Cong. 544 (1977) (App. G – Indian Child Welfare Statistical Survey, July 1976). According to one 1977 report, "[n]early all Arizona Indian children placed in adoption in past years were sent out of state." *Id*. at 414 (App. C – Prepared Statement from Jewish Children and Family Services of Phoenix).

Congress enacted ICWA to change the bleak course that Indian children and their tribes were set

on decades ago. Since its passage, ICWA's provisions regarding notice to and involvement by Indian tribes in ICWA cases have enabled tribes to play a key role in the cases affecting their children. Tribal participation in ICWA cases is a fundamental exercise of tribal sovereignty, and allows the tribes and states to work together to achieve the best results for the children involved.

The need for tribal involvement in ICWA cases and for cooperation between the tribes and the states on these matters continues to be vital. As of September 30, 2012, the last reporting period for which data is available, 14,111 children in Arizona were living in out-of-home care. Of these, 1,041, or 7.4%, were classified by the State of Arizona as Native American. Ariz. Dep't. of Econ. Sec., Division of Children, Youth and Families, *Child Welfare Reporting Requirements, Semi-Annual Report for the Period of April 1, 2012 through September 20, 2012* (January 24, 2013), at 40, available at https://www.azdes.gov/InternetFiles/Reports/pdf/Child_Welfare_Semi_Annual_Report.pdf (last visited March 26, 2013).

B. Arizona Tribes Regularly Participate in Child Welfare Cases Involving Indian Children, to the Benefit of Indian Children, Tribes, Families, and State Court Proceedings.

The continuing importance of ICWA to the interests of the ITCA and the Arizona Tribes is demonstrated

by the Tribes' active and consistent participation in hundreds of ICWA cases affecting their members and potential members each year, and the time and resources committed to their efforts. While the Tribes' policies on involvement vary, participation in ICWA cases is widespread among the tribes in Arizona.

Arizona Tribes may assign in-house counsel and employ full-time case managers to oversee ICWA cases. They may formally intervene in cases, or participate through regular contact with the agencies and parties, through the provision of services to Indian children and families, and in locating and consulting on potential placements. Some Tribes participate in ICWA cases in dozens of states each year. Tribal participation fosters mutual respect between tribal and state child welfare departments and between the offices of tribal attorneys general and state attorneys general. For many Arizona Tribes, some of the most significant contact between tribal government and state courts occurs in the context of ICWA cases.

The Arizona Tribes' participation in ICWA cases is not dependent upon whether a parent is involved in the matter. In fact, cases in which parents are absent are frequently the cases that benefit most from tribal involvement. Tribes provide critical services to the child and foster family, search for appropriate placements pursuant to 25 U.S.C. § 1915, and in many cases, reintroduce the child to a culture that would otherwise be lost to him or her.

C. ICWA's Notice and Intervention Provisions are Essential to the Participation of Tribes in the Arizona Child Welfare System.

The Arizona Tribes would have no ability to preserve their interests and the interests of Indian children in foster care and termination proceedings without the right to notice, which, in the estimation of the Department of the Interior, constituted a "major element" of ICWA. H.R. Rep. No. 95-1386 at 31 (Report of the Department of the Interior, June 6, 1978). ICWA's sponsors were keenly aware that tribes lacked such a right under existing state law. 124 Cong. Rec. H12849 (daily ed. Oct. 14, 1978) (statement of Rep. Lagomarsino) ("Generally, there are no requirements for responsible tribal authorities to be consulted about or even informed of child removal actions by nontribal government or private agents"). Consequently, Section 1912(a) of ICWA, along with the Department of the Interior's implementing regulations at 25 C.F.R. Part 23, establish clear cut requirements that a tribe, *in addition to a parent*, be notified "where the court knows or has reason to know that an Indian child is involved" in an involuntary proceeding in state court that seeks foster care placement of, or termination of parental rights to, an Indian child. Under the regulations, notice must be provided by registered mail, return receipt requested, to the tribe. *Id*. Tribes are permitted to establish designated agents for receipt of such notice, and a list of such agents is published in the Federal Register on

an annual basis. 25 C.F.R. § 23.12. In cases where the identity of the tribe cannot be determined, notice is provided to the Secretary of the Interior through Bureau of Indian Affairs area offices, which are then charged with notifying the appropriate tribe. 25 U.S.C. § 1912(a); 25 C.F.R. 23.11(c)-(g).

Similarly, 25 U.S.C. § 1911(c) allows tribes to intervene as a matter of right "at any point" in a state court foster care placement or termination of parental rights proceeding involving a child that is a member of, or eligible for membership in, that tribe.[3] Intervention not only protects the tribe's interests, but provides an invaluable resource to state and private agencies by locating potential placements with relatives and identifying benefits (such as family assistance, college scholarships, and the ability to participate in cultural events) for the Indian child. An intervening tribe can also help educate state courts on tribal cultural and social standards that would not otherwise be apparent in the tribe's absence.

ICWA's notice and intervention provisions form the basis for all future involvement by a tribe in state child custody proceedings involving Indian children. ICWA's clear standards for notice and intervention

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[3] The authority of a tribe to determine membership criteria "has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

provide a manageable mechanism for this involvement in a child welfare system that is "overworked, understaffed, and underfunded." 5 Thomas A. Jacobs, Arizona Juvenile Law & Practice § 5:1 (2012-2013 ed.). The regular participation by the Arizona Tribes in these proceedings is a testament to this manageability. In most cases,[4] the provision of notice and the granting of intervention has become routine, allowing the tribe, the court, and the applicable agencies to efficiently identify when an Indian child is at issue, and to focus together on the welfare and best interests of that child.

[4] Despite ICWA's clear standards, a 2005 review of state child welfare systems by the Administration for Children and Families for the Department of Health and Human Services revealed that, in Arizona, "compliance with ICWA is not always consistent with the intent or spirit of the law from district to district, and that efforts are not made to determine the applicability of ICWA in all cases." U.S. Gov't Accountability Office Rep. 05-290, "Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States" at 52 (April 2005), available at http://www.gao.gov/new.items/d05290.pdf (last visited March 26, 2013). As the title of the report suggests, such findings reemphasize the need for guidance to states on following ICWA's standards.

II. Adopting the Existing Indian Family Doctrine, or a State Law Based Definition of "Parent," Would Complicate Child Custody Proceedings, Interfere with the Tribes' Rights to Notice and Intervention, and Harm Indian Children.

A key reason that Indian tribes are able to be such active and constructive participants in Arizona's child welfare process is the fact that Arizona state courts have rejected the interpretation of ICWA advanced by Petitioners and Respondent GAL. In two well-reasoned decisions, the Arizona Court of Appeals rejected EIF, *Michael J. Jr. v. Michael J. Sr.*, 7 P.3d 960, 963 (Ariz. Ct. App. 2000), and interpreted ICWA's definition of "parent" to include an unwed father even in the absence of a formal action to establish paternity under state law, *see id.*; *Jared P. v. Glade T.*, 209 P.3d 157, 161 (Ariz. Ct. App. 2009). As discussed further below, these judicial decisions have allowed Arizona to avoid injecting further confusion and uncertainty into an already overburdened child welfare system.

A. Arizona's Courts Have Furthered ICWA's Goals by Rejecting the Existing Indian Family Doctrine and by Not Restricting ICWA's Definition of "Parent" to State Law.

Michael J. Jr. concerned proceedings substantially similar to the present case. Unable to care for her child, a non-Indian mother requested the involvement

of the State's child welfare agency, who initiated child custody proceedings in state court. 7 P.3d at 961. At the time of the child's birth, the father, a member of the Tohono O'odham Nation, was incarcerated and had not established paternity, although he later acknowledged paternity before the juvenile court and underwent a paternity test that confirmed him as the biological father of the child. *Id.* at 962-63. In accordance with ICWA, the Nation was notified of the proceedings and was permitted to intervene following its assertion that the child was eligible for enrollment with the Nation. *Id.* at 961. The trial court subsequently transferred the case to the Nation's tribal court, and the child's guardian ad litem appealed, arguing that that the child could not qualify as an "Indian child" under ICWA because the father never filed a paternity action or sought legal custody of the child, and because the child was not removed from an existing Indian family. *Id.* at 962-63.

Rejecting these arguments, the Arizona Court of Appeals noted that the father's acknowledgment and subsequent paternity testing, coupled with the Nation's confirmation of the child as an Indian child, provided "ample evidence to support the trial court's finding that [the child] is an 'Indian child,' and Father, his parent." *Id.* at 963. With regard to EIF, the court decided to "join a growing number of jurisdictions in rejecting this judicially created exception," in part "to support ICWA's goal not only of preserving Indian families, but also of protecting the tribe's interests in the welfare of its Indian children and the

maintenance of its culture," and because ICWA's statutory language "does not require either that the child be part of an existing Indian family or that the family be involved with the tribe." *Id*.

In *Jared P.*, the same court was again faced with the initiation of a child custody proceeding involving a father that had not strictly complied with Arizona law for establishing paternity, but who had taken steps to acknowledge paternity by, among other things, challenging the petition to terminate his parental rights, by writing a letter to the court acknowledging paternity, and by submitting to a paternity test. 209 P.3d at 162. The court found these actions were enough to comply with ICWA. *Id.*; *see also*, *Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011) (citing *Jared P.* and other state cases for the proposition that "to qualify as an ICWA parent an unwed father does not need to comply perfectly with state laws for establishing paternity, so long as he has made reasonable efforts to acknowledge paternity"); Ariz. Rev. Stat. Ann. § 8-106(I)(9) (requiring that notice to putative fathers provide that "[T]he Indian child welfare act may supersede the Arizona Revised Statutes regarding adoption and paternity").[5]

[5] The Arizona state court holdings are reinforced by the canon of construction applicable to Indian law providing that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (citing *McClanahan v. Ariz. State Tax Comm'n,* 411 U.S. 164, 174 (1973);
(Continued on following page)

B. Adopting the EIF or a Definition of "Parent" Restricted by Varying State Laws Would Complicate Cases Under ICWA and Deprive Arizona Tribes of the Opportunity to Participate in Cases Involving Indian Children.

The Arizona court decisions in *Michael J.* and *Jared P.* have ensured that ICWA provisions for determining whether a child is an Indian child, including notice to parents and tribes, apply at the outset of Arizona child custody proceedings. The arguments advanced by Petitioners and Respondent GAL would instead require Arizona's courts to either determine, at the outset of such proceedings, whether a child's family is sufficiently Indian and connected to the child to warrant ICWA's application, or to limit the application of ICWA in cases where a parent does not

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Choate v. Trapp, 224 U.S. 665, 675 (1912)). This canon is appropriately applied in ICWA cases, as "[t]he purpose of ICWA was to rectify state agency and court actions that resulted in the removal of Indian children from their Indian communities and heritage." *Doe v. Mann*, 415 F.3d 1038, 1047 (9th Cir. 2005); *see also, State ex rel. C.D.*, 200 P.3d 194, 204 (Utah Ct. App. 2008) (applying canon in interpreting ICWA). Thus, to the extent that ICWA's provisions are ambiguous, such ambiguity should be resolved in favor of Indians and Indian tribes.

As Respondent Birth Father notes (Resp't's Br. 21-22), the words "acknowledge" and "establish" as used in 25 U.S.C. § 1903(9) have ordinary and unambiguous meanings that do not require reliance on state law. Nevertheless, even if this Court were to find that these terms are ambiguous, they should be interpreted to the benefit of Birth Father and the Cherokee Nation.

take "affirmative steps to acquire parental rights" pursuant to state law. (Pet'rs' Br. 20). Respondent Cherokee Nation and other *amici* counter convincingly that such requirements, if adopted, would severely damage the interest of tribes in the welfare of Indian children and contravene Congress' intent in passing ICWA. In addition, such requirements would complicate child welfare proceedings in Arizona by saddling state court judges with time-consuming and fact-intensive threshold inquiries, by adding confusion to ICWA's notice and intervention requirements, and by limiting or eliminating a tribe's right to intervene, and a child's access to tribal benefits and familial connections. In the end, breaking from Arizona's common sense approach would create uncertainty for the placement of Indian children.

1. Applying EIF or State Law Restrictions on the Definition of "Parent" Would Burden Child Welfare Proceedings with Subjective and Fact-Intensive Determinations.

Both EIF and a definition of "parent" dependent on state law would introduce fact-intensive and burdensome determinations at the outset of a proceeding involving a potential Indian child. This is especially troublesome given that "[a]ny delays in the proceedings in juvenile court . . . would undermine . . . the process of finding permanent placement for children." *Rita J. v. Ariz. Dep't. of Econ. Sec.*, 1 P.3d 155, 158 (Ariz. Ct. App. 2000). EIF requires that a state court

only apply ICWA if, after a case specific analysis, it determines that a given child has been removed from a family that has sufficient social, cultural, or political ties to an Indian tribe. *See, e.g.*, *In re M.B.*, 176 P.3d 977, 985 (Kan. Ct. App. 2008); *In the Matter of Catholic Charities and Cmty. Servs. of the Archdiocese of Denver, Inc.*, 942 P.2d 1380, 1382 (Colo. App. 1997); *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 529 (Cal. Ct. App. 1996). The court in *Bridget R.*, in a decision cited approvingly by the Petitioners (Pet'rs' Br. 45), noted that an EIF determination must be made "as of the time of the relinquishments," and that in doing so, a trial court should consider:

> [W]hether the parents privately identified themselves as Indians and privately observed tribal customs and, among other things, whether, despite their distance from the reservation, they participated in tribal community affairs, voted in tribal elections, or otherwise took an interest in tribal politics, contributed to tribal or Indian charities, subscribed to tribal newsletters or other periodicals of special interest to Indians, participated in Indian religious, social, cultural or political events which are held in their own locality, or maintained social contacts with other members of the Tribe.

49 Cal. Rptr. 2d at 531. As other courts have lamented, such an exhaustive examination is a "highly subjective one that state courts are ill-equipped to make," *In re Alicia S.*, 76 Cal. Rptr. 2d 121, 129 (Cal. Ct. App. 1998); *accord*, *In re Baby Boy C.*, 805 N.Y.S.2d 313, 324 (N.Y. App. Div. 2005). Under EIF,

however, it is a determination that would be required in hundreds of cases that courts address each year concerning Indian children.[6]

Petitioners try to skirt this factual morass by suggesting that the exposure of a child to "Indian culture or tribal politics" is only legitimate or possible through an Indian parent that possesses "preexisting parental rights" (Pet'rs' Br. 45). This flies in the face of the extensive legislative history concluding that Indian children are connected to their tribes in a myriad of ways beyond that child's custodial family. *See, e.g.*, H.R. Rep. No. 94-1386, at 10 (1978); *Holyfield*, 490 U.S. at 35 n.4. Petitioners' argument is especially inapplicable in Arizona, where the line of demarcation between tribe and municipality may merely be a city street or a riverbed, and where it is common for tribes to extend various services and resources to their off-reservation members in maintaining cultural, familial, and political connections with the tribe. An Indian child domiciled outside her tribe's reservation, whether with Indian or non-Indian parents, may in many cases continue her vital tribal connection through the provision of such resources and through

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[6] This is not to say that case-by-case determinations have no place in child custody proceedings involving Indian children. To the contrary, upon a showing of good cause, state courts may deviate from the Act's placement preferences, *see* 25 U.S.C. § 1915(a) and (b), or may deny a transfer of the proceedings to tribal court, *see* 25 U.S.C. § 1911(b).

regular contact with other tribal and family members.

Moreover, predicating the application of ICWA on a parent's establishment of "parental rights" under state law similarly introduces a whole host of potentially disputed factual issues, and does so again at the outset of a child custody proceeding. In Arizona cases not otherwise implicating ICWA, putative fathers must initiate paternity proceedings, comply with service requirements, and "proceed to judgment in the paternity action" in order to preserve parental rights. Ariz. Rev. Stat. Ann. § 8-106(G)(3), (4). Failure to comply with these provisions waives the right to notice or consent to the adoption. Ariz. Rev. Stat. Ann. § 8-106(J); *Jared P.*, 209 P.3d at 160. Petitioners argue (Pet'rs' Br. 26) that a father must also provide evidence of financial support for the child in order to trigger ICWA's requirements, thus adding yet another layer of factual complexity. *See also*, Br. of United States as *Amicus Curiae* at 19 ("Congress plainly did not contemplate a fact-intensive analysis at the threshold of whether [a father's status as a 'parent' for purposes of ICWA] was satisfied"); Barbara Ann Atwood, *Children, Tribes, and States: Adoption and Custody Conflicts Over American Indian Children* 168-69 (Carolina Academic Press 2010) (the application of state paternity laws in cases where only the father possesses Indian heritage "may interfere with the goals of ICWA").

2. Applying EIF or State Law Restrictions on the Definition of "Parent" Frustrates the Tribal Right to Notice and Intervention, to the Detriment of Arizona Tribes and Their Children.

While Petitioners and Respondent GAL concede in the present case that the child is an Indian child, and although the Cherokee Nation was permitted to intervene in the proceedings, this was *despite* "efforts to conceal [Birth Father's] Indian status," Pet. App. 6a, rather than efforts to comply with the Act. Reversing the South Carolina Supreme Court's decision in this case would only encourage such concealment and frustrate a tribe's notice and intervention rights under ICWA.

This is not idle speculation. Indeed, under EIF, a tribe would be entitled to notice pursuant to Section 1912(a) only "when the parent is both a 'good Indian' who is raising the child in an 'Indian family environment' . . . and a 'bad Indian' who is so lacking as a parent" that involuntary proceedings must be initiated. *In re Elliott*, 554 N.W.2d 32, 36 (Mich. Ct. App. 1996). This would "effectively allow the exception to swallow the rule." *Id.*; *see also*, *Hampton v. J.A.L.*, 658 So. 2d 331, 339 (La. Ct. App. 1995) (Stewart, J., dissenting) (under the majority's determination that EIF applied to a proceeding it was "unnecessary to notify the Indian tribe of an opportunity to intervene to protect its interest in a resource vital to its very existence"); *but see, In re Suzanna L.*, 127 Cal. Rptr. 2d 860, 867-68 (Cal. Ct. App. 2002) (assuming, without

deciding, that EIF applied to proceedings, holding that notice to a tribe would still be required under ICWA). The Existing Indian Family doctrine thus provides one more means to avoid informing tribes of child welfare proceedings involving Indian children.

Similarly, limiting ICWA's definition of "parent" by applying state law qualifications would not only preclude many putative Indian fathers from obtaining notice of child custody proceedings, but it may also preclude their tribes from obtaining notice or from participating in the proceedings. As with EIF, this is an example of the exception swallowing the rule. Under Petitioners' and Respondent GAL's reasoning, because an unwed father who has not technically preserved his parental rights pursuant to state law would not qualify as a "parent" under ICWA, an otherwise involuntary proceeding under 25 U.S.C. § 1912 would be transformed into a voluntary proceeding under 25 U.S.C. § 1913 merely by virtue of the mother's voluntary relinquishment of her parental rights to the Indian child. In such circumstances, ICWA's requirements for involuntary proceedings, including notice to the child's tribe, would arguably not apply. *Compare* 25 U.S.C. § 1912(a) *with* 25 U.S.C. § 1913.

This result – the termination of parental rights to an Indian child without notice to the child's tribe, and over the objection of the child's biological Indian parent – is clearly not what Congress intended in crafting ICWA's provisions. Rather, as this Court noted in *Holyfield*, ICWA recognizes that a tribe "has

an interest in the child which is distinct from but on a parity with the interest of the parents." 490 U.S. at 52 (quoting *In re Adoption of Halloway,* 732 P.2d 962, 969 (Utah 1986)). To allow a father's alleged non-compliance with state law to undermine a tribe's federally-recognized right to notice of such a proceeding would thwart both Congress' intent and the tribe's interest in its children.

This result also muddies the waters for state courts trying to comply with ICWA and exacerbates existing inconsistencies with ICWA compliance. *See* n.4 *supra*. At one level, the lack of a right to notice of, and to participate in, such proceedings compounds the potential for error in determining the child's status. Parties to the proceeding may not know whether a child is already enrolled (and is thus an Indian child by definition). At another level, this lack of compliance does significant harm both to Arizona tribes and Arizona Indian children. Even in cases where a parent who has "rejected Indian life and culture" and chooses to relinquish her newborn Indian child to be adopted by a non-Indian couple, "the detriment to the Tribe is quite significant – the loss of two generations of Indian children instead of just one." *Baby Boy C.*, 805 N.Y.S.2d at 324.[7] For Arizona's Indian children, this loss is felt both in terms of limitations on access to the tribal benefits and services

[7] *Baby Boy C.* concerned a child eligible for enrollment in the Tohono O'odham Nation of Arizona.

noted above, and more immediately, the uncertainty over placement and permanency that naturally stems from the additional procedural complications that would arise in Arizona if the arguments Petitioners and Respondent GAL advance are accepted.

CONCLUSION

For the reasons discussed above, ITCA, Ak-Chin Indian Community, Colorado River Indian Tribes, Fort McDowell Yavapai Nation, Hopi Tribe, The Pascua Yaqui Tribe of Arizona, and Tohono O'odham Nation respectfully request this Court to affirm the South Carolina Supreme Court decision in favor of Respondents Birth Father and the Cherokee Nation.

Respectfully submitted,

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March 28, 2013