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, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF FAMILY LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS BIRTH FATHER AND CHEROKEE NATION

VERNLE C. DUROCHER, JR.
Counsel of Record
ANDREW B. BRANTINGHAM
DORSEY & WHITNEY LLP
50 South Sixth Street
Suite 1500
Minneapolis, Minnesota 55402
Telephone: (612) 340-2600
durocher.skip@dorsey.com

Counsel for Amici Curiae Family Law Professors

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE DECISION BELOW CORRECTLY APPLIED ICWA TO PROTECT THE INTERESTS OF BIRTH FATHER AND BABY GIRL 5

A. Congress Intended ICWA's Heightened Protections to Apply to Fathers in the Position of Birth Father 7

B. Application of ICWA to Birth Father is Consistent with the Constitution and the Unwed Father Cases 10

II. IT IS IN BABY GIRL'S BEST INTERESTS TO LIVE WITH HER FATHER 13

III. THE DECISION BELOW DID NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF ANY PARTY 16

A. The Birth Mother Has No Liberty Interest at Stake 17

B. Petitioners Have No Liberty Interest At Stake 19

C. The Decision Below Did Not Violate Baby Girl's Liberty Interests 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Adoptive Couple v. Baby Girl, 731 S.E.2d 550 (S.C. 2012) 20, 22

Bd. of Educ. of City Sch. Dist. of City of New York v. Harris, 444 U.S. 130 (1979) 12

Caban v. Mohammad, 441 U.S. 380 (1979) 8

Chafin v. Chafin, 568 U.S. ___, 133 S. Ct. 1017 (2013) 23

Davis v. McGraw, 92 N.E. 332 (Mass. 1910) 20

Employment Division v. Smith, 494 U.S. 872 (1990) 12

In re B.G.C., 496 N.W.2d 239 (Iowa 1992) 18

In re Kelsey S., 823 P.2d 1216 (Cal. 1992) 18

In re Kirchner, 649 N.E.2d 324 (Ill. 1995) 18

In re R.L.S., 844 N.E.2d 22 (Ill. 2006) 18

Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981) 12, 13

Lehr v. Robertson, 463 U.S. 248 (1983) 8, 9, 10, 11

Matter of Eaton, 305 N.Y. 162 (1953) 20

Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002) 12

Meyer v. Nebraska, 262 U.S. 390 (1923) 16

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) 6

Moore v. East Cleveland, 431 U.S. 494 (1977) 14

TABLE OF AUTHORITIES – Continued

Page

Parham v. J.R., 442 U.S. 584 (1979).....14

Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).....16

Prince v. Massachusetts, 321 U.S. 158 (1944) 16

Quilloin v. Walcott, 434 U.S. 246 (1978).....8, 9, 10, 11

Santosky v. Kramer, 455 U.S. 745 (1982).....12, 14

Smith v. Organization of Foster Families for Equality and Reform ("*OFFER*"), 431 U.S. 816 (1977).....19, 20, 21, 22

Stanley v. Illinois, 405 U.S. 645 (1972).....8, 9, 10

Troxel v. Granville, 530 U.S. 57 (2000).....14, 16, 23

United States v. Rizzi, 434 F.3d 669 (4th Cir. 2006).....11

Warth v. Seldin, 422 U.S. 490 (1975).....19

Wisconsin v. Yoder, 406 U.S. 205 (1972) 16

STATUTES

25 U.S.C. § 1901 .....2, 6, 14

25 U.S.C. § 1902 .....5, 13

25 U.S.C. § 1903 .....6, 7

25 U.S.C. § 1912 .....6, 13, 15

25 U.S.C. § 1913 .....15, 17

25 U.S.C. § 1915 22

TABLE OF AUTHORITIES – Continued

Page

25 U.S.C. § 1920 15

25 U.S.C. § 1921 7

S.C. Code § 63-9-310.....7

OTHER AUTHORITIES

Child Welfare Information Gateway, U.S. Dep't of Health and Human Services, *Determining the Best Interests of the Child: Summary of State Laws* (2010).....14

Child Welfare Information Gateway, U.S. Dep't of Health and Human Services, *Addressing Racial Disproportionality in Child Welfare*, Issue Brief (2011) 15

H.R. Rep. No. 95-1386 (1978).....9

Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. Fam. L. 443 (1971).....20

Lawrence Schlam, *Third-Party Standing and Child Custody Disputes in Washington: Non-Parent Rights – Past, Present, and . . . Future?*, 43 Gonzaga L. Rev. 391 (2008) 22

Stan Watts, *Voluntary Adoptions Under the Indian Child Welfare Act of 1978, Balancing the Interests of Children, Families, and Tribes*, 63 S. Cal. L. Rev. 213 (1989).....17

Professors Annette R. Appell, Tonya L. Brito, Nancy E. Dowd, Matthew I. Fraidin, Josh Gupta-Kagan, C. Quince Hopkins, Shani M. King, Dorothy E. Roberts, Elizabeth J. Samuels, Natsu Taylor Saito, Lawrence Schlam, Tanya Washington, and Jessica Dixon Weaver submit this brief as *amici curiae* in support of Respondents Birth Father and the Cherokee Nation.[1]

INTEREST OF THE *AMICI CURIAE*

Amici are law professors who teach family law or closely related subjects and publish scholarship on children's rights, parents' rights, adoption, child custody, and child welfare systems. Annette R. Appell is Professor of Law and Co-Director of the Civil Justice Clinic at Washington University School of Law. Tonya L. Brito is Professor of Law at the University of Wisconsin Law School, and a Faculty Affiliate with the Institute for Research on Poverty at the University of Wisconsin. Nancy E. Dowd is Professor and David H. Levin Chair in Family Law at the University of Florida Levin College of Law, and also serves as the Director of the Center on Children and Families. Matthew I. Fraidin is Associate Professor of

[1] In accord with Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Each of the parties has filed with the Clerk notice of its consent to the filing of *amicus* briefs in support of either party or of neither party.

Law at the University of the District of Columbia David A. Clarke School of Law. Josh Gupta-Kagan is a Lecturer in Law at the Washington University School of Law, and Staff Attorney in the law school's Children and Family Defense Clinic. C. Quince Hopkins is Professor of Law at Florida Coastal School of Law. Shani M. King is Associate Professor of Law and Co-Director of the Center on Children and Families at the University of Florida Levin College of Law. Dorothy E. Roberts is George A. Weiss University Professor of Law and Sociology, and Raymond Pace and Sadie Tanner Mossell Alexander Professor of Civil Rights at the University of Pennsylvania Law School. Elizabeth J. Samuels is Professor of Law at the University of Baltimore School of Law. Natsu Taylor Saito is Professor of Law at Georgia State University College of Law. Lawrence Schlam is Professor of Constitutional and Child Law at Northern Illinois University College of Law. Tanya Washington is Associate Professor of Law at Georgia State University College of Law. Jessica Dixon Weaver is Assistant Professor of Law at SMU Dedman School of Law.

Several of the *amici* study Indian families and the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901 *et seq*. Most study at the intersection of race, gender, and child custody. Through their research and teaching, *amici* work to promote children's right to their family relationships through legal structures that recognize the heterogeneous nature of American families. For these reasons, *amici* have an interest in the proper interpretation and application of ICWA to

protect the rights of Indian children and families, as Congress intended.

SUMMARY OF ARGUMENT

The South Carolina Supreme Court correctly decided this case. As it recognized, the application of ICWA in this case served to protect Baby Girl's best interests through statutory provisions recognizing Birth Father as her legal parent and protecting that relationship, and it did so consistent with the Constitution.

Congress passed ICWA in response to overwhelming evidence that states were improperly removing Indian children from their families. In order to arrest this disturbing trend, ICWA establishes heightened protections for an Indian child's parent or Indian custodian, including minimum federal standards governing the termination of any parent-child relationship. Because ICWA preempts state law, if an Indian child's biological father has acknowledged or established paternity, then he is entitled to ICWA's protections in child custody proceedings. The court below correctly determined that Birth Father met the statutory definition of "parent" and correctly applied ICWA to deny the adoption and return Baby Girl to his custody.

The statutory text and legislative history demonstrate that Congress intended ICWA to afford unwed Indian parents in Birth Father's position greater

protections than the minimum parental rights required by the Constitution. This Court's prior decisions concerning unwed fathers provide protection for fathers who otherwise would be precluded from child custody proceedings under state law; they do not establish requirements fathers must meet to be recognized as a "parent." The reference to one of those decisions in ICWA's legislative history indicates Congress's recognition that the Constitution affords certain minimum rights independent of ICWA's statutory definition of "parent"; it does not suggest that Congress meant to limit that definition to the constitutional minimum. Further, nothing in the Constitution or this Court's jurisprudence limits Congress's power to establish the heightened protections ICWA affords, above and beyond the constitutional minimum.

When drafting ICWA, Congress understood that Indian children, like other children, are best served by living under the care of a fit parent. This interest is heightened by Congress's goal of preserving the cultural traditions of Indian children. These notions permeate ICWA, to the extent that a separate best-interests finding is unnecessary in proceedings under the statute. The South Carolina Supreme Court's additional finding in this case that ICWA's provisions as applied were consistent with Baby Girl's best interests, though unnecessary under ICWA, only confirmed that the statutory provisions appropriately protect the rights of Indian children.

Further, the South Carolina Supreme Court's application of ICWA was fully consistent with this

Court's constitutional protection of fundamental liberty interests. Petitioners' claim that the birth mother's fundamental liberty interest was violated fails not only because they lack standing to raise the issue, but more fundamentally because the birth mother lacked any rights at all in the proceedings below; she voluntarily relinquished them. Petitioners similarly lack any relevant liberty interest. Finally, while this Court has never delineated the constitutional liberty interests of children, it has made clear that a child's best interests are served when family integrity is preserved.

In sum, the South Carolina Supreme Court applied ICWA in a manner that protected Baby Girl's right to live with her fit biological father, consistent with the intent of Congress, the child's best interests, and the Constitution.

ARGUMENT

I. THE DECISION BELOW CORRECTLY APPLIED ICWA TO PROTECT THE INTERESTS OF BIRTH FATHER AND BABY GIRL.

The express purpose of ICWA is to further "the policy of this Nation to protect the best interests of children . . . by the establishment of minimum Federal standards for the removal of Indian children from their families. . . ." 25 U.S.C. § 1902. Congress passed ICWA in response to findings that the percentage of Indian children who were being placed

in non-Indian adoptive homes and institutions after being removed from their families was "alarmingly high," and that such removals were "often unwarranted." *Id.* § 1901(4). Thus, a fundamental purpose of ICWA is to protect the rights of Indian children to remain with their families.

ICWA seeks to protect the rights of children by establishing procedural standards focused on parents. For example, it requires a determination of damage to the child based on clear and convincing evidence prior to ordering removal from the parent or Indian custodian, *id.* § 1912(e), and a determination of damage to the child based on evidence beyond a reasonable doubt prior to terminating the parental rights of a parent or Indian custodian, *id.* § 1912(f). ICWA defines "parent[s]" to include "any biological parent or parents of an Indian child," and only excludes from that definition unwed fathers "where paternity has not been acknowledged or established." *Id.* § 1903(9).

Congress also found in enacting ICWA that states "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." *Id.* § 1901(5); *see also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1989) ("[T]he congressional findings that are part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct."). Consequently, where the *minimum* federal standards provide greater protection to the parent or Indian custodian of an Indian

child than state law provides, ICWA preempts state law. *See* 25 U.S.C. § 1921.

A. Congress Intended ICWA's Heightened Protections to Apply to Fathers in the Position of Birth Father.

Because ICWA establishes minimum protections for parents of Indian children notwithstanding any contrary state law, a parent need only meet the statutory definition of "parent" under ICWA in order to be afforded its protections. Thus, an unwed father of an Indian child who has acknowledged or established his paternity – as Birth Father has done here – is a "parent" under ICWA. *Id.* § 1903(9). As such, he is entitled to the heightened protections of ICWA, including the requirement of a showing of harm to his child beyond a reasonable doubt prior to termination of his parental rights, and stringent requirements for obtaining a parent's voluntary consent to an adoption. *Id.* §§ 1912(f); 1913(a). Any state law provisions to the contrary that do not provide higher protections to the parent are preempted by ICWA. *Id.*[2]

Nothing in ICWA's legislative history or this Court's jurisprudence suggests either that Congress

[2] *Amici* adopt the reasoning of the lower courts, Birth Father, Cherokee Nation, and the United States that the state's consent-to-adoption statute, S.C. Code § 63-9-310, is irrelevant in light of Birth Father's actions to legally acknowledge and establish, via DNA evidence, his paternity.

intended to exclude a parent like Birth Father from the protections of ICWA, or that Congress lacks power to grant such a parent rights greater than those required by the Constitution. This Court's decisions recognizing certain minimum constitutional rights of unwed fathers do not prevent Congress from legislating additional rights above the constitutional floor. Congress and state legislatures remain free to establish greater protections for parent-child relationships than the minimum afforded by the Constitution.

In a series of cases beginning in 1972, this Court considered equal protection and due process challenges to state laws denying unwed fathers the protections guaranteed to unwed mothers and wed fathers. *See Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammad*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983). These decisions establish that unwed fathers who grasp the opportunity to parent their biological children have *constitutionally* protected interests equal to married parents and unwed mothers.[3] *See Stanley*, 405 U.S. at 658; *Caban*, 441 U.S. at 392. On the other hand, unwed fathers who have only a biological link to their children, and

[3] "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 responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." *Lehr*, 463 U.S. at 262.

nothing more, are *not constitutionally* entitled to the procedural protections given to married fathers and mothers. *Quilloin*, 434 U.S. at 256 (rejecting challenge to state statutory scheme denying an unwed father notice of his child's adoption); *Lehr*, 463 U.S. at 268 (rejecting a challenge to a state statutory scheme denying an unwed father the right to veto an adoption finalized without his consent).

The legislative history of ICWA indicates that Congress was aware of the Court's unwed father cases. The House Report on the bill includes the following passage:

> Paragraph (9) defines "parent". It should be noted that the last sentence is not meant to conflict with the decision of the Supreme Court in *Stanley v. Illinois*, 405 U.S. 645 (1972).

H.R. Rep. No. 95-1386, at 21 (1978). The reference to *Stanley* indicates simply that the House recognized the *constitutional* rights of all unwed fathers as established by that decision; it does not suggest any intent to make the class of parents entitled to ICWA's protections coextensive with the class of fathers constitutionally entitled procedural rights under this Court's decisions. Indeed, the legislative history indicates no intent to impose requirements on a parent beyond the express statutory definition.[4]

---

[4] It is telling that no citation to *Quilloin* appears in the legislative history. *Quilloin* was the first unwed father case after

(Continued on following page)

The statutory language and the legislative history demonstrate Congress's intent to include a wide class of unwed fathers within ICWA's definition of "parent." Birth Father met the necessary requirements. He is Baby Girl's "parent" within the meaning of ICWA, and he and Baby Girl are entitled to the statute's protections.

B. Application of ICWA to Birth Father is Consistent with the Constitution and the Unwed Father Cases.

Contrary to the contentions of Petitioners and their *amici*, nothing in the Constitution prevents Congress, through ICWA, from affording unwed fathers like Birth Father greater protections than the minimal protections the Constitution requires.

The unwed father cases delineate constitutional rights only, and, in *Quilloin* and *Lehr*, approved state laws that affected fathers who were *not* protected by the Constitution. *See Quilloin*, 434 U.S. at 256 (upholding Georgia statute that denied an unwed father who had not "legitimated" his child a right to consent to or veto an adoption); *Lehr*, 463 U.S. at 266-68 (upholding a New York law that denied notice of an adoption to unwed father who had never

---

Stanley, and the first to delineate limits on an unwed father's rights. *Quilloin*, 434 U.S. at 248. If the House had intended ICWA's definition of "parent" to limit the rights of unwed fathers, it would logically cite *Quilloin*, which did exactly that.

established a substantial relationship with his daughter). *Quilloin* and *Lehr* approved state statutory schemes that sought to balance the rights of family integrity with the state interest in facilitating speedy adoptions when necessary and appropriate. *See Lehr*, 463 U.S. at 263. These cases, therefore, gave legislators the freedom to legislate in accordance with the interest of their states; they did not prohibit legislatures from making different policy choices where the Constitution did not command otherwise.

ICWA is similarly an exercise of Congress's power to legislate consistently with constitutional rights. Its broad definition of "parent" seeks to effectuate a policy choice to strengthen and support the rights of unwed fathers in order to promote family integrity and increase the number of Indian families protected under the provisions of the statute.

While Congress clearly cannot fail to provide an unwed father who meets the "biology plus" standard established by this Court's jurisprudence with less than his constitutional guarantee, it does not follow that Congress is prohibited from statutorily providing greater protections to fathers of Indian children. *See, e.g., United States v. Rizzi*, 434 F.3d 669, 675 (4th Cir. 2006) ("The existence of a minimum constitutional protection . . . does not deny legislatures the power to provide additional, more nuanced protections, based on the wishes and habits of their constituents."). Indeed, the Court has recognized that "wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the

Constitution." *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 33 (1981). The unwed father decisions impose a *floor*, not a *ceiling*, on the rights of unwed fathers, and Congress is free to legislate above that floor.[5] This is precisely what ICWA does: in order to protect Indian children and families, it provides protections for unwed fathers (who have established and acknowledged paternity) that are not necessarily guaranteed by the Fifth or Fourteenth Amendments alone.[6]

---

[5] ICWA is just one of many instances in which Congress has legislated rights greater than the minimum rights established by the Constitution. For example, the Religious Land Use and Institutionalized Person Act of 2000 exceeds the constitutional requirements of the First Amendment, as articulated in *Employment Division v. Smith*, 494 U.S. 872 (1990). *See Mayweathers v. Newland*, 314 F.3d 1062, 1070 (9th Cir. 2002) ("RLUIPA provides additional protection for religious worship, respecting that *Smith* set only a constitutional floor – not a ceiling – for the protection of personal liberty."). As another example, in *Bd. of Educ. of City Sch. Dist. of City of New York v. Harris*, 444 U.S. 130 (1979), the Court interpreted the Emergency School Aid Act as excluding from funding eligibility educational agencies whose policies or practices had discriminatory impact, even though the Court's Equal Protection Clause jurisprudence prohibits purposeful discrimination. *See id.* at 149 ("[W]e readily conclude that the discrimination that disqualifies for funding under ESAA is not discrimination in the Fourteenth Amendment sense.").

[6] The definition of "parent" is not the only ICWA provision that establishes rights above the constitutional floor. For example, the Court has required states to prove parental unfitness by clear and convincing evidence before terminating parental rights. *See Santosky v. Kramer*, 455 U.S. 745, 748 (1982). ICWA, however, requires states to prove "beyond a reasonable doubt . . .

(Continued on following page)

II. IT IS IN BABY GIRL'S BEST INTERESTS TO LIVE WITH HER FATHER.

Congress considered the competing interests at stake in contested custody proceedings such as this, and determined that applying ICWA's protections serves Indian children's best interests. 25 U.S.C. § 1902. Thus, contrary to the contentions of the Guardian Ad Litem, the South Carolina Supreme Court's application of ICWA's heightened protections in this case was consistent with Baby Girl's best interests.

A child's best interests are part of any custody determination. The framework for that determination, however, is neither universal nor extralegal. Instead, to address the inherent subjectivity of individuals, legislatures mandate how best-interests determinations are to be made. For example, in many states, following a determination of neglect or termination of parental rights, a judge must base his or her custody decision on a list of enumerated factors that amount to the state legislature's determination of what is generally in the child's best interests.[7] By

---

[that] custody of the child by the parent . . . is likely to result in serious emotional or physical damage." 25 U.S.C. § 1912(f). Additionally, this Court has found that the right to counsel is not constitutionally required for all termination of parental rights proceedings. *See Lassiter*, 452 U.S. at 33. ICWA, however, requires counsel for parents "in any removal, placement, or termination proceeding." 25 U.S.C. § 1912(b).

[7] Common factors include a child's emotional attachments with family and household members; the parents' capacity to provide a safe home with adequate food, clothing, and medical

(Continued on following page)

contrast, under ICWA, the best-interests concept is woven into every provision protecting an Indian child's right to remain with her family or tribe.

By creating minimum federal standards to prevent the breakup of the Indian child's family, Congress recognized what this Court has long held: that it is in a child's best interests to be raised by a fit parent. *See Troxel v. Granville*, 530 U.S. 57, 68 (2000); *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Santosky*, 455 U.S. at 760-61 ("[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."). Children deserve to grow up with their biological parents when it is possible and safe for them to do so. *Cf. Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."). The problem, as Congress realized, was that states were not acting in the best interests of Indian children by *unnecessarily* removing them from fit parents at alarming rates. *See* 25 U.S.C. § 1901(4).[8]

---

care; the child's mental and physical health needs; the parents' mental and physical health; and the presence of domestic violence. *See* Child Welfare Information Gateway, U.S. Dep't of Health and Human Services, *Determining the Best Interests of the Child: Summary of State Laws* (2010), *at* www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm.

[8] This is not an unusual finding. Even today, socioeconomic factors, the availability of culturally appropriate services, and other differences in treatment lead to a disproportionate number

(Continued on following page)

ICWA's heightened protections are thus designed to ensure that Indian children are raised by a fit biological parent whenever possible. *See, e.g., Id*. (requiring active efforts to "prevent the breakup of the Indian family" prior to foster care placement or termination of parental rights); 1913(a) (requiring a judge to certify that all voluntary consents were fully understood by the parent); 1913(c) (allowing a parent to withdraw voluntary consent any time prior to the entry of a final adoption decree). As indicated above, ICWA requires the judge to make a finding, supported by the testimony of a qualified expert witness, that continued custody with the parent would result in harm to the child beyond a reasonable doubt. *Id.* § 1912(f). These protections are consistent with this Court's recognition that a child's best interests are served by being raised by her fit parent.[9]

Further, both the South Carolina Supreme Court and the family court before it agreed that it was in

---

of minority children in foster care. *See* Child Welfare Information Gateway, U.S. Dep't of Health and Human Services, *Addressing Racial Disproportionality in Child Welfare*, Issue Brief, 2-5 (2011), *at* https://www.childwelfare.gov/pubs/issue_briefs/racial_disproportionality/.

[9] ICWA also carries specific provisions about when moving a child from her current placement becomes too harmful, and thus against her best interests. *Compare* 25 U.S.C. § 1913(d) (two year time limit to invalidate adoption based on fraud or duress) *with* § 1920 (no time limit on action to return child from illegal custody).

Baby Girl's best interests to live with and be raised by her fit biological father.[10] These independent determinations serve to confirm that, by following the dictates of ICWA, the courts rendered a decision that was, both in the judgment of those courts and of Congress, in Baby Girl's best interests.

III. THE DECISION BELOW DID NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF ANY PARTY.

Parents' fundamental liberty interest in the care, custody, and control of their children is "perhaps the oldest fundamental liberty interest recognized by this Court." *Troxel*, 530 U.S. at 65 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); *see also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). This liberty interest includes the right of parents to establish a home and to direct their children's education and upbringing. *Meyer*, 262 U.S. at 400; *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925).

---

[10] Petitioners and their *amici* make much of the fact that Baby Girl was almost two years old by the time she was returned to her father's custody. But as the South Carolina Supreme Court correctly noted, it would not be fair to the father to consider the bonding that occurred during the litigation. In fact, had Adoptive Couple served Birth Father when their adoption petition was initially filed, almost no bonding would have taken place by the time Birth Father asserted his rights.

This right, however, has never included the right of a birth mother who has relinquished her own custodial rights to select an adoption placement for her child over a fit father's objection; the right of temporary custodians to maintain custody over a child who has a fit biological parent willing to assume custody; or the right of a child to stay with temporary custodians over the objection of a fit biological parent.

A. The Birth Mother Has No Liberty Interest at Stake.

Baby's Girl's birth mother is not a party to this case because she voluntarily consented to the adoption of her child and therefore has no continuing legal relationship with her.[11] As a non-party who has surrendered her parental rights, the birth mother has no legal interest in the dispute between the adoptive parents and Birth Father, much less a fundamental liberty interest. While parents have a fundamental liberty interest in the care, custody, and control of their children, they do not have a protected interest in what happens to their child once their parental rights are terminated. Furthermore, they do not have an absolute right to select adoptive parents for their children. *See* Stan Watts, *Voluntary Adoptions Under*

[11] Under ICWA, a parent may withdraw her consent to a voluntary termination of parental rights or adoption at any time prior to the final termination order or adoption decree, respectively. 25 U.S.C. § 1913(c). Birth Mother has not indicated any interest in resuming custody of her child.

the Indian Child Welfare Act of 1978, Balancing the Interests of Children, Families, and Tribes, 63 S. Cal. L. Rev. 213, 247 (1989) (citing A. Sussman & M. Guggenheim, The Rights of Parents 179-80 (1980)). Birth Father's choice to assert his rights once he discovered that the birth mother was relinquishing Baby Girl for adoption did not deprive the mother of her right to care, custody, and control of her child, because she had already surrendered any such right.

Further, as many state courts have recognized, a mother cannot unilaterally foreclose a father's opportunity to parent by, for example, preventing the father from establishing a relationship with an infant or supporting her during pregnancy, then claiming that the father fails to qualify for parental rights such as the opportunity to veto an adoption of his child. *See, e.g., In re Kelsey S.*, 823 P.2d 1216, 1236 (Cal. 1992); *In re B.G.C.*, 496 N.W.2d 239, 246 (Iowa 1992); *In re Kirchner*, 649 N.E.2d 324, 333 (Ill. 1995), *abrogated on other grounds by In re R.L.S.*, 844 N.E.2d 22 (Ill. 2006).[12] It is thus well established that, as

[12] The courts in these cases recognized rights of fathers who, because of the conduct of the mother, did not meet all the statutory requirements to contest adoption of their children. For example, in *In re Kirchner*, the father discovered 57 days after his child's birth that the child was not in fact dead, as the mother told him, but had been put up for adoption. 649 N.E.2d at 327. The court allowed the father to withhold consent to the adoption notwithstanding that the applicable statute focused on a father's connection to the child within the first 30 days after birth. *See id.* at 328.

against the father's interest in parenting, a single custodial mother has no overriding right to decide the fate of their infant child.

Even if this case implicated a cognizable liberty interest belonging to the birth mother – and it does not – the birth mother is not a party here. She accordingly can assert no such interest. Nor can Petitioners assert it on her behalf, for it is well established that litigants generally are barred "from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth v. Seldin*, 422 U.S. 490, 509 (1975). Ultimately, the birth mother's putative liberty interests have no bearing on this case.

B. Petitioners Have No Liberty Interest At Stake.

Petitioners have not raised a substantive due process claim on their own behalf. Nor could they, for this Court has never identified such a right in temporary custodians. In *Smith v. Organization of Foster Families for Equality and Reform* ("*OFFER*"), 431 U.S. 816 (1977), the Court considered a procedural due process challenge brought by an organization of foster parents alleging that the state process for removing children from their care violated their constitutional rights. The Court held that any interest of foster parents is necessarily subordinate to that of the biological parent whose rights have not been terminated. *Id.* at 847 ("Whatever liberty interest might

otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents."). Adoptions, like foster care, are creatures of statute. *See, e.g., Davis v. McGraw*, 92 N.E. 332, 332 (Mass. 1910); *Matter of Eaton*, 305 N.Y. 162, 165 (1953); Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. Fam. L. 443, 443 (1971).

In this case, Petitioners had care of Baby Girl under an order for temporary legal and physical custody, much like the foster parents in *Smith*.[13] R. at 43. *See Smith*, 431 U.S. at 827. Like the foster parents in *Smith*, Petitioners have no fundamental liberty interest at stake here, and any interest they do have is subordinate to Birth Father's.

To change the rule for pre-adoptive parents such as Petitioners would change the law of adoption with far-reaching ramifications for parents wishing to withdraw their consent, parents coerced into consent, or parents working toward reunification in the child welfare system. The Court has never recognized a fundamental right on the part of parties in Adoptive Couple's position, and it should not do so now.

---

[13] In this case Adoptive Couple did not even obtain a court order for temporary custody until May 2010 – five months after Birth Father filed a stay in the South Carolina custody proceeding. R. at 43; *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 555 (S.C. 2012).

C. The Decision Below Did Not Violate Baby Girl's Liberty Interests.

Baby Girl is another constitutional stakeholder whose interests must be separately taken into account. Children may have a fundamental liberty interest in determinations about their custody. *See Smith*, 431 U.S. at 840-41. The contours of that interest are ill-defined, however. The potential liberty interest of Baby Girl, as articulated by Petitioners and their *amici*, offers no reason for reversal.

While one *amicus* argues that children have a constitutional right in "developed family relationships," and to "a custody decision guided by her best interests," Brief of Child Advocacy Organizations as *Amici Curiae* in Support of Baby Girl Supporting Reversal 5, 18, another discusses "a child's constitutional right to a stable, safe, and permanent home," Brief for the American Academy of Adoption Attorneys as *Amicus Curiae* in Support of Petitioners 4. Similarly, the Guardian Ad Litem refers to "certain intimate human relationships," Brief for Guardian Ad Litem, As Representative of Respondent Baby Girl, Supporting Reversal 56, and Petitioners claim that Baby Girl had a right to preserve her "familial or family-like bonds." Brief for Petitioners 49.

These arguments ignore, however, that the child's primary interest is in a relationship with her fit biological father. Indeed, the South Carolina Supreme Court awarded Birth Father custody on the

ground that he could in fact provide a safe home and developed family relationships. *Baby Girl*, 731 S.E.2d at 566 ("Appellants have not presented evidence that Baby Girl would not be safe, loved, and cared for if raised by Father and his family."). Moreover, these arguments ignore that ICWA, by providing that the statutory preferences for adoption placements may be avoided for "good cause," 25 U.S.C. § 1915(a), already accounts for what liberty interests the child may have.[14]

In any event, it cannot be said that Baby Girl, who had only been placed with the prospective adoptive couple for four months before Birth Father came forward to parent, had such a relationship or attachment. *Cf.* Lawrence Schlam, *Third-Party Standing and Child Custody Disputes in Washington: Non-Parent Rights – Past, Present, and . . . Future?*, 43 Gonzaga L. Rev. 391, 414 (2008) (discussing "meaningful nonparent-child bonding" over four-*year* period). This Court's precedent indicates that even where attachments with non-parent custodians may exist, any interest in them is subordinate to the child's interest in a continued relationship with her fit parent. *See Smith*, 430 U.S. at 846-47.

---

[14] *Amici* agree fully with Birth Father and the Cherokee Nation that there was no violation of Baby Girl's liberty interests in this case. *Amici* note, however, that custody cases may arise in which children's constitutional rights are significant, and even dispositive.

Whatever the constitutional import of children's interests, any failure to respect the child's emotional attachments in this case resulted primarily from the slow pace of litigation. Recognizing a constitutional right in the fallout of that failure would be an ill-advised foray into the "treacherous field" of substantive due process. *Troxel*, 530 U.S. at 76 (Souter, J., concurring) (quotation marks and citation omitted). A constitutional right in a relationship created by the slow pace of litigation following a temporary custody award would simply incentivize delay tactics and could create conflict between a child's "best interests" and her constitutional interests.[15]

Ultimately, while *amici* agree that children may have constitutional interests in their custody determinations, there is no basis to conclude that any such interest was violated here.

[15] *Cf. Chafin v. Chafin*, 568 U.S. ___, 133 S. Ct. 1017, 1027-28 (2013) ("[C]ourts can and should take steps to decide [cases under the International Child Abduction Remedies Act] as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation.").

CONCLUSION

For the reasons set forth above, *amici* respectfully urge the Court to affirm the judgment of the South Carolina Supreme Court.

Respectfully submitted,

VERNLE C. DUROCHER, JR.
Counsel of Record
ANDREW B. BRANTINGHAM
DORSEY & WHITNEY LLP
50 South Sixth Street, Suite 1500
Minneapolis, Minnesota 55402
Telephone: (612) 340-2600
durocher.skip@dorsey.com

Counsel for Amici Curiae
Family Law Professors