No. 12-399

In The Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioner,

v.

BABY GIRL, A MINOR CHILD UNDER THE AGE OF 14 YEARS, ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF AMICUS CURIAE THE NATIONAL NATIVE AMERICAN BAR ASSOCIATION SUPPORTING AFFIRMANCE

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae are state and national bar associations. The bar associations have been involved in providing legal education of Indian issues and submit this brief to inform the Court regarding the effect of the Indian Child Welfare Act as an essential tool in protecting tribal interests.

Amici National Native American Bar Association ("NNABA") is the oldest and largest association of predominantly Native American[2] attorneys in the United States. NNABA was founded in 1973 when the first group of Native American attorneys was entering the legal profession. One of the purposes of the National Native American Bar Association is to sponsor and engage in programs and activities that address the social, cultural, political, and legal issues affecting tribal nations. NNABA goals include (1) protecting the sovereignty of tribal nations; and (2) promoting the public understanding of the unique legal status of Native Americans.

Amici Indian Law Section of the Wisconsin State Bar is comprised of over 100 attorneys licensed to

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no persons or entity, other than *amici curiae* and their counsel, made a financial contribution for the preparation or submission of this brief. All parties have consented to the filing of this brief; letters reflecting this blanket consent have been lodged with the Clerk.

[2] Native American includes American Indian, Alaska Native, and Native Hawaiian.

practice law in Wisconsin who have an interest in, or work directly with, Indian law issues. The membership includes private attorneys, attorneys employed by the United States, tribal, or state governments, and public interest attorneys. The membership of the Section have identified Indian Child Welfare issues, including the federal Indian Child Welfare Act and its codification into Wisconsin law, the Wisconsin Indian Child Welfare Act, as a major issue in the practice of Indian law in Wisconsin.

SUMMARY OF ARGUMENT

The Indian Child Welfare Act provides a baseline; it affords a minimum protection Congress expressly granted to Indian Tribes as a guarantee of their sovereign relations with their tribal members in order to protect that relationship from unnecessary and detrimental state interference through family law proceedings. Failure to acknowledge the independent tribal interest that ICWA protects and a myopic focus exclusively on the parental roles, as Petitioners argue, would yield the very results for the adoption of Indian children that Congress expressly intended to end when it enacted ICWA.

ICWA requires state courts to recognize a Tribe's independent sovereign interest to intervene in custody proceedings involving its children, separate and apart from a parent's interest. Through this

mechanism, Congress sought to end this country's legacy of cultural genocide.

ARGUMENT

I. The Indian Child Welfare Act's singular purpose is to protect Tribes' sovereign interest in their citizens.

The Indian Child Welfare Act of 1978 ("ICWA") is clear on its face: it seeks to protect "the rights of the Indian community and Tribe in retaining its children in its society."[3] The text of the statute recognizes the special relationship between the United States and Indian Tribes and assumes a federal responsibility "for the protection and preservation of Indian Tribes and their resources" including the "continued existence and integrity of Indian Tribes and their children."[4] Additionally, the statute's legislative history and this Court's interpretation of the statute in *Mississippi Band of Choctaw Indians v. Holyfield* affirms its purpose to protect a Tribe's interest in maintaining political relationships with its children.[5]

Custody proceedings commonly involve individual rights protected under state laws and, in some cases,

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[3] Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.* (2012); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989) (citing H.R. REP. NO. 95-1386, at 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546).

[4] 25 U.S.C. § 1901.

[5] 490 U.S. at 34.

the independent interests of the state. However, federal law can impose additional requirements in areas otherwise dominated by state regulation. For example, states had previously issued driver's licenses and identification cards pursuant to state law. Following the passage of the REAL ID Act in 2005, however, Congress established minimum federal document requirements and issuance standards for driver's licenses and identification cards.[6] States must now meet federal standards in order for their state-issued licenses to be accepted by federal agencies such as the Transportation Security Administration.[7] Federal law also imposed additional requirements on state courts when it enacted the Adoption and Safe Families Act of 1997, designed to promote adoption and support families.[8] ICWA serves the same function by placing minimum federal requirements in all state court custody proceedings involving an Indian child.[9]

ICWA directs state judiciaries to consider additional factors in a family law proceeding that would otherwise be administered under state law.[10]

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[6] REAL ID Act of 2005, Pub. L. No. 109-13, § 202, 119 Stat. 231, 302-323 (2005).

[7] *Id.*

[8] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

[9] 25 U.S.C. §§ 1902-03, 1911, 1915.

[10] *Id.* at § 1902 ("Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards

(Continued on following page)

In custody proceedings involving an Indian child as defined by ICWA, Congress acted to protect a Tribe's interest in the placement of its citizens.[11] Congress acted to protect a Tribe's interest by recognizing tribal courts' exclusive jurisdiction over children domiciled on the reservation and requiring notice to Tribes of custody proceedings.[12] Furthermore, ICWA allows for tribal intervention in state custody proceedings and provides for tribal law to determine the placement of Indian children.[13] ICWA requires state courts to take tribal interests into consideration, in order to prevent lasting and permanent repercussions to Tribes.[14]

A. ICWA's plain language protects tribal interests in state court proceedings.

In interpreting a statute, the Court "start[s] with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."[15] Courts must assume that Congress "says in a statute what it means and means in a statute what it says

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for the removal of Indian children from their families and the placement of such children in foster or adoptive homes. . . .").

[11] *Id.* at § 1903(4).

[12] *Id.* at §§ 1911-12.

[13] *Id*. at § 1911; *Holyfield*, 490 U.S. at 51.

[14] *Holyfield*, 490 U.S. at 50 (citing S. REP. NO. 95-597, at 52 (1977) ("Removal of Indian children from their cultural setting seriously impacts a long-term tribal survival. . . .").

[15] *Id.* at 47 (citing *Richards v. United States*, 369 U.S. 1, 9 (1962)).

there."[16] Congress could not have been clearer in its findings.[17] ICWA protects a Tribe's interest in the custody proceedings of its tribal citizens or potential citizens.[18] The plain language of ICWA emphasizes that it seeks to protect children as tribal resources "vital to the continued existence and integrity of Indian tribes."[19] Congress assumed responsibility for "the protection and preservation of Indian tribes and their resources," and as such, "has a direct interest . . . in protecting Indian children who are members of or are eligible for membership in an Indian tribe."[20] The statutory text continuously protects a Tribe's sovereign interest by requiring state courts to consider the independent tribal interest to maintain a relationship with its minor citizens in the course of custody proceedings.

1. Tribal citizenship triggers ICWA's application in custody proceedings.

The statute's triggering mechanism requires tribal citizenship of either the Indian child or one of the child's parents.[21] For ICWA to apply to a custody

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[16] *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

[17] 25 U.S.C. § 1901.

[18] *Id.* at § 1902.

[19] *Id.* at § 1901(3).

[20] *Id.*

[21] *Id.* at § 1903(4).

action, a child must qualify under ICWA's definition of "Indian child."[22] Under ICWA, an "Indian child" means any minor who is either "(a) a *member* of an Indian tribe or (b) eligible for *membership* in an Indian tribe and is the biological child of a *member* of an Indian tribe."[23] The definition of "Indian child" requires an existing political relationship with the Tribe in order for ICWA to apply.[24] If the child is not a member of an Indian Tribe, then at least one biological parent must be a member.[25] It is not sufficient that an Indian child's parent is merely eligible for tribal membership; the parent must be a *current* member of an Indian Tribe.[26] Furthermore, throughout ICWA, "Indian" refers to "a member of an Indian tribe."[27]

ICWA's tribal membership requirement is consistent with its purpose to protect a Tribe's sovereign interest in its citizens.[28] The tribal membership requirement focuses exclusively on a child's relationship with his or her Tribe.[29] Unless a child is eligible for tribal citizenship, he or she does not fall under the protections of ICWA irrespective of any Indian

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[22] *Id.*

[23] *Id*. (emphasis added).

[24] *Id.*

[25] *Id*.

[26] *Id.*

[27] *Id.* at § 1903(3).

[28] *Id.* at §§ 1902, 1903(4).

[29] *Id.* at § 1903(4).

ancestry the child may have.[30] If Congress intended for ICWA to focus on the familial relationship, rather than the independent interest of the Tribes in their minor citizens, it could have drafted a broader triggering mechanism that only requires a racial ancestry component. Instead, Congress focused exclusively on tribal citizenship.

2. ICWA protects tribal interests throughout a custody proceeding.

The provisions stemming from ICWA's triggering mechanism ensure that a *Tribe's* independent interests in its citizens are protected.[31] Notably, Section 1912 requires notice to the Indian child's Tribe for any involuntary proceeding in a state court.[32] In a custody matter where the involuntary placement of an Indian child would otherwise occur under state law, a state court must not only notify the Indian child's parents, but also the child's Tribe.[33] Following notice, ICWA requires the state court to delay the custody proceedings until at least ten days after receipt of notice in order to provide an opportunity for the

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[30] *Id.*

[31] *Id.* at §§ 1911-12, 1914-15, 1917-19.

[32] *Id.* at § 1912(a).

[33] *Id.* (failure to give proper notice to a Tribe renders the proceedings null and void); *In re Morris*, 815 N.W.2d 62, 83 (Mich. 2012) (proper remedy for ICWA notice violations is to conditionally reverse and remand to restore the notice requirements).

Tribe to intervene.[34] Even in voluntary proceedings, where Indian parents have consented to an adoption, ICWA provides minimum standards and allows Tribes to intervene to contest the adoption, as this Court recognized in *Holyfield*, in the event of a failure to comply with these standards.[35]

ICWA's notice requirements are essential to protecting a Tribe's sovereign interest in its citizens. A Tribe must always receive notice.[36] Limiting ICWA's triggering mechanism to parental engagement, as Adoptive Parents argue in this matter, runs the risk that a biological parent's bad behavior will deny a Tribe the notice necessary to assert and protect its independent interests.[37] Accepting the Petitioners' arguments would permit a parent to effectively nullify a Tribe's independent sovereign interest in its citizens without any notice, thereby denying the Tribe's ability to invoke the protections guaranteed by ICWA.

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[34] 25 U.S.C. § 1912(a).

[35] *Id.* at § 1914; *see also Holyfield*, 490 U.S. at 36.

[36] 25 U.S.C. § 1912(a) (note that all provisions directed at a parent may also apply to Indian custodians); *In re H.D.*, 729 P.2d 1234, 1241 (Kan. App. 1986) (failure to notify Tribe invalidated termination of parental rights); *In re B.R.*, 176 Cal. App. 4th 773 (Ca. App. 2009) (reversal based on failure to provide notice to Tribe).

[37] *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-314 (1950) ("This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.").

B. ICWA's legislative history confirms Congress' intent to protect tribal interests.

While ICWA clearly sets forth its purpose, the legislative history further demonstrates that Congress intended to preserve a Tribe's independent sovereign interest in its citizens. In enacting ICWA, lawmakers understood that "[i]f tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right . . . to provide for the care and upbringing of its young, *a sine qua non* to the preservation of its identity."[38] In the years since Congress passed ICWA, Congress has continued to recognize the statute's purpose to protect tribal interests in state custody proceedings.[39]

Removing children from their homes constitutes an unfortunate part of this country's tragic history of colonizing Indian Tribes. From legalized enslavement to forcible assimilation, states that deprived Tribes of their children were acting through a familiar form of cultural genocide. For example, the Virginia colony enslaved Indian children as a matter of law.[40]

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[38] S. REP. NO. 95-597, at 50 (quoting *Wisconsin Potowatomies of Hannahville Indian Cmty. v. Houston*, 393 F. Supp. 719, 730 (W.D. Mich. 1973)).

[39] 149 CONG. REC. E2282 (daily ed. Nov. 7, 2003); S. REP. NO. 105-156, at 26 (1997).

[40] *See* Law of Oct. 22, 1720, ch. IV, § XXII, 1720 Acts of the General Assembly of the Commonwealth of Va., ch. 4, 22 ("[W]here any . . . Indian . . . shall, during the Time of her Servitude, have any Child born of her Body, every such Child shall serve the Master or Masters of such . . . Indian.").

Post-independence and more than 150 years later, the federal government still sought control of Indian children – this time through forcibly assimilating them in boarding schools.[41] Official federal policy sought to destroy what was left of tribal cultures and found that "the eventual civilization of Indians may be reached through the education of their children; and further, that it could be brought about more speedily by that method than by any other."[42] In order to accomplish this policy, the government urged "[s]uch education can be given only to children removed from the example of their parents."[43]

The detrimental trend of removing Indian children from their homes continued well into the next century, and was only finally addressed by lawmakers with the passage of ICWA. Congressional hearings leading up to the passage of ICWA demonstrated the damaging effect that removal of Indian children had on Indian Tribes.[44] Lawmakers directly noted the concern that "Indian cultures are being destroyed by this practice [of removing Indian children from tribes]

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[41] ANNUAL REP. TO THE SEC'Y OF THE INTERIOR ON THE OPERATIONS OF THE DEP'T FOR THE FISCAL YEAR ENDED JUNE 30, 1878, REP. OF THE COMM'R OF INDIAN AFFAIRS at 439 (1878).

[42] *Id.* at 458.

[43] *Id.* at 439.

[44] S. REP. NO. 95-597, at 50, 52.

since so many Indian children are learning non-Indian ways."[45]

Congress confirmed what tribal leaders already knew: that "our children are our greatest resource, and without them we have no future."[46] In finding that "there can be no greater threat to 'essential tribal relations' and no greater infringement on the right of the . . . tribe to govern [itself] than to interfere with tribal control over the custody of [its] children," the House of Representatives recognized that "a tribe's children are vital to its integrity and future."[47] Leading senators who backed ICWA emphasized the need to protect and strengthen tribal communities. Senator Abourezk stated, "[o]fficials seemingly would rather place Indian children in non-Indian settings where their Indian culture, their Indian traditions and, in general, their entire Indian way of life is smothered. . . . This course can only weaken rather than strengthen the Indian child, the family, and the

[45] 123 CONG. REC. 21,043-44 (1977) (statement of Sen. Abourezk, Chairman, Senate Select Committee on Indian Affairs (quoting Mr. Phyllis Fast Wolf, an Oneida living in Chicago)).

[46] *Indian Child Welfare Act of 1978: Hearing Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 78 (1978) (statement of Faye La Pointe, Coordinator of Social Service for Child Welfare, Puyallup Tribe of Washington).

[47] H.R. REP. NO. 95-1386, at 15 (1978) (quoting *Wakefield v. Little Light*, 347 A.2d 228 (Md. 1975)).

community."[48] While "the Federal Government purports to be working to help strengthen Indian communities," Senator Abourezk noted ongoing attempts to annihilate tribal cultures.[49] "It has been called cultural genocide."[50] Through ICWA's enactment, Congress provided Tribes a mechanism to protect tribal interests in their citizens by restoring "jurisdiction over the welfare of a precious resource: their youth."[51]

In the years following ICWA's enactment, Congress repeatedly emphasized an Indian Tribe's interest in its children. It strongly emphasized that Tribes have "a *parens patriae* relationship with all children who are members of the tribe or who are eligible for tribal membership and who are children of tribal members."[52] The doctrine of *parens patriae*, literally meaning "parent of his or her country" in Latin, is ordinarily used to describe the sovereign power of the state to act as a guardian for those who are unable to

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[48] *Indian Child Welfare Act of 1977: Hearing Before the United States S. Select Comm. on Indian Affairs*, 95th Cong. 2 (1977) (opening remarks of Sen. Abourezk).

[49] *Id.*

[50] *Id.*

[51] *Indian Child Welfare Act of 1978, Hearing Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 154 (1978) (statement of Trilby Beauprey, Director, Alternative Living Arrangements Program, Great Lakes Inter-Tribal Council, Inc.).

[52] S. REP. NO. 105-156, at 26 (1997).

care for themselves, namely children.[53] On the 25th anniversary of ICWA, Alaskan Congressman Don Young expanded upon the *parens patriae* relationship between Indian Tribes and Indian children, finding that it

> supersedes any like interest of the States. . . . Accordingly, the law enhances the sovereign right of Tribes to determine, under tribal law, whether and under what circumstances children require out-of-home placement.[54]

Thus, ICWA's text and legislative history affirms that an Indian Tribe has a sovereign right to act on behalf of its children.

C. This Court recognizes ICWA's principle purpose to protect tribal interests.

In *Mississippi Band of Choctaw Indians v. Holyfield*, this Court found that Congress made clear that ICWA "seeks to protect the rights of the Indian child as an Indian *and the rights of the Indian community and tribe in retaining its children in its society*."[55] While the dissent incorrectly argued that the most important provisions of ICWA are those setting

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[53] BLACK'S LAW DICTIONARY (9th ed. 2009).

[54] 149 CONG. REC. E2282 (daily ed. Nov. 7, 2003) (statement of Rep. Young).

[55] 490 U.S. at 37 (1989) (citing H.R. REP. NO. 95-1386, at 23 (1978), *reprinted in* 1978 U.S.C.C.A.N 7530, at 7546) (emphasis added).

"minimum standards . . . to insure that parental rights are protected,"[56] ICWA and its separate protections of tribal interests in Indian children would not apply but for an already existing tribal citizen relationship with either the child or at least one of the child's parents.[57] The statute does not provide mechanisms for Tribes to intervene on behalf of parents, and this Court never ascribed such a purpose in *Holyfield*. Instead, the majority in *Holyfield* held that Congress intended for ICWA's jurisdictional and notice provisions to apply even in cases where the parents consented to an adoption "because of concerns going beyond the wishes of individual parents. . . ."[58] Otherwise, parents, Indian or non-Indian, could undermine the independent tribal sovereign interest protected under federal law by ICWA, as the biological mother attempted to do in *Holyfield*.[59]

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[56] *Id.* at 55 (Stevens, J., dissenting).

[57] 25 U.S.C. § 1903(4).

[58] 490 U.S. at 50 (finding that the removal of Indian children from their cultural setting seriously impacts a Tribe's long-term survival).

[59] *See id*. at 49 (quoting 25 U.S.C. § 1901(3) on how "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children" and 25 U.S.C. § 1902 on ICWA's purpose to "promote the stability and security of Indian tribes").

II. ICWA's purpose to protect Tribes' interests in their children is distinct from individual parental interests.

The core tenet underlying ICWA protects a Tribe's independent sovereign interest in its children.[60] Tribes depend on Indian children, a vital tribal asset, to transmit tribal culture. Congress recognized that depriving any tribal government of its citizens and potential leaders constituted an act of ethnocide, if not genocide, which it sought to stop.[61] A focus on parentage instead of citizenship undermines the independent tribal sovereign interest that Congress sought to protect when it enacted ICWA.[62]

ICWA protects a Tribe's interest in its children and the children's right to be tribal citizens. In *Holyfield*, this Court emphasized "that the tribe has an interest in the child which is distinct from but *on a parity* with the interest of the parents."[63] Indian

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[60] *Id.* at 52 (quoting *In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986)); *see also* BIA Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67585-86 (November 26, 1979) (outlining Congress' "clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes").

[61] *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs, Comm. on Interior and Insular Affairs*, 93rd Cong. 2 (1974) (opening remarks of Sen. Abourezk).

[62] 25 U.S.C. § 1902.

[63] 490 U.S. at 52 (emphasis added) (quoting *Halloway*, 732 P.2d at 969).

children have a corresponding interest in maintaining a relationship with the Tribe, even if the parents do not share that interest.[64] This Court found that a Tribe's interest in its children may trump a parent's adoption decision.[65]

Without the protections of ICWA, Indian children would continue to be placed in homes that would deprive these children of their right to be citizens within their Tribes. Tribes would also lose their ability to convey their culture, customs, language, and origin stories to the next generation of their potential members. Congress protects these interests in the text of the statute.[66] For example, if an Indian child is born to a non-Indian parent and has always resided with the non-Indian parent, ICWA still applies to protect the rights of the Tribe.[67] ICWA's purpose of protecting a Tribe's sovereign interest in its citizens ensures tribal integrity and survival.

Sovereigns commonly exercise authority over adoptive proceedings, especially where there are concerns over the best interests of children. The independent tribal interests protected in ICWA parallel those of the United States in outgoing adoptive proceedings with foreign countries. The United States

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[64] *Id.* at 49-50.

[65] *See Holyfield*, 490 U.S. at 50.

[66] 25 U.S.C. § 1902.

[67] *See Adoption of Lindsay C.*, 229 Cal. App. 3d 404, 415-416 (Cal. App. 1991).

is a party to the Hague Convention on Adoption.[68] As part of a United States outgoing adoptive case, the adoptive service provider must make reasonable efforts to recruit or make a placement with prospective adoptive parents within the United States through a diligent search prior to an international placement, with limited exceptions.[69] The Convention Preamble echoes this policy: " . . . inter-country adoption may offer the advantage of a permanent family to a child *for whom a suitable family cannot be found in their State of origin.*"[70] ICWA serves an identical function within the adoptive placements of Indian children, preferring family, tribal, and cultural placements above non-Indian placements.[71] Both the Convention and ICWA acknowledge and protect the sovereign's citizenship interests in adoptive proceedings and recognize that the relationship between the sovereign and the child is mutually beneficial and in the child's best interest.

ICWA provides a baseline; it affords a minimum protection to Tribes as a guarantee of their sovereign relations with their tribal members in order to protect that relationship from unnecessary and

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[68] 42 U.S.C. § 14901 (2000).

[69] 22 C.F.R. § 96.54 (2012).

[70] Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, Mar. 31, 1994, Intercountry Adoption Universal Accreditation Act of 2012, 42 U.S.C. § 14901 (2000) (emphasis added).

[71] 25 U.S.C. § 1915.

detrimental state interference.[72] Failure to acknowledge the independent tribal interest that ICWA protects in Indian child adoptions, and a myopic focus exclusively on parental roles, as Petitioners argue, would yield the very results that Congress expressly intended to end when it enacted ICWA.[73]

III. The purported existing Indian family doctrine exception to ICWA conflicts with ICWA's purpose of protecting Tribes' independent sovereign interest in their citizens.

The existing Indian family doctrine, relied upon by the Petitioners, is an exception invented by state courts to avoid the application of federal law, and conflicts with language and purposes of ICWA and this Court's decision in *Holyfield*.[74] Although sixteen states had used the existing Indian family doctrine, as of 2013, only six states continue to apply the

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[72] *Id.* at § 1902.

[73] *See id.* at § 1901(4)-(5) (acknowledging the "alarmingly high percentage" of non-Indian adoptions of Indian children and states' historical failure to acknowledge tribal interests in adoption proceedings); 25 U.S.C. § 1902 (declaring Congress' policy "to protect the best interests of Indian children" and promote tribal interests).

[74] *See* 490 U.S. at 49-50 (1989); *see also* Lorie M. Graham, *"The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 36 (1998) (noting that the existing Indian family doctrine undermines tribal sovereignty).

doctrine.[75] Nineteen states have either judicially or legislatively expressly rejected the doctrine.[76] State courts that continue to use the doctrine inaccurately contend that ICWA is only applicable in cases where an Indian child is removed from a setting in which the court determines that an existing Indian family will be disrupted.[77] In *Holyfield*, the children whose adoption was at issue had not lived in any Indian

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[75] *See, e.g.*, *Ex Parte C.L.J.*, 946 So. 2d 880, 889 (Ala. Civ. App. 2006); *In re Adoption of D.C.*, 928 N.E.2d 602, 605 (Ind. App. 2010) (citing *In re T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988)); *C.E.H. v. L.W.M.*, 837 S.W.2d 947, 952 (Mo. App. 1992) (citing *In re Crews*, 825 P.2d 305, 308 (Wash. 1992)); *Rye v. Weasel*, 934 S.W.2d 257, 263 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331, 334-335 (La. Ct. App. 1995) (citing *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982)); *In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL 1138130, at *4-5 (Tenn. App. Apr. 27, 2009) (citing *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880, at *16 (Tenn. App. Nov. 19, 1997)); Dan Lewerenz & Padriac McCoy, *The End of "Existing Indian Family" Jurisprudence: Holyfield at 20, in the Matter of A.J.S., and the Last Gasps of a Dying Doctrine*, 36 WM. MITCHELL L. REV. 684, 687 (2010).

[76] *See* Lewerenz & McCoy at 687; *see, e.g.*, Wis. Stat. § 938.028(3)(a) (2012) (denying the court the ability to determine the application of ICWA based on whether the juvenile Indian is part of an existing Indian family); *In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989) (refusing to adopt the existing Indian family doctrine, and noting the congressional intent to protect tribal interests).

[77] *See, e.g.*, *In re Adoption of Baby Boy L.*, 643 P.2d at 174-175 (Kan. 1982) (noting the court's reasoning for the adoption of the existing Indian family doctrine, as "the maintenance of the family and tribal relationships existing in Indian homes"), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

family since birth.[78] Nevertheless, this Court firmly rejected the notions behind an existing Indian family doctrine exception and instead agreed with the Supreme Court of Utah finding "the protection of this tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from . . . the interest of parents."[79] Thus, the few states that continue to follow the so-called existing Indian family exception are disregarding the precise holding of this Court's decision in *Holyfield* and evading their legal obligations under ICWA.

A. ICWA's language does not support the existing Indian family doctrine.

The plain language of ICWA does not support the existing Indian family doctrine. ICWA's congressional findings acknowledge that (1) Congress, as part of its trust responsibilities, has a duty to protect Indian Tribes and their resources, and (2) Indian children are the most vital resource to the continued existence of Tribes.[80] Proponents incorrectly argue that the congressional declaration of policy establishes ICWA's primary goal as the maintenance of existing Indian

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[78] *Holyfield*, 490 U.S. at 48-49.

[79] *Id.* at 52 (citing *In re Adoption of Halloway*, 732 P.2d 962, 969-970 (Utah 1986)).

[80] 25 U.S.C. § 1901(2)-(3).

families.[81] On the contrary, ICWA expressly states that the purpose of the statute is to promote "the stability and security of Indian tribes and families."[82] This notion is reflected in ICWA's placement preferences, where both immediate *and extended* family members are eligible placement candidates, as well as a member of the Indian child's Tribe.[83] The placement consideration illustrates the congressional intent to maintain ties with the Tribe through suitable adoptive placements, rather than a specific family unit.

The existing Indian family doctrine imposes requirements not contemplated by Congress.[84] Congress would have defined "existing Indian family" had they intended an existing Indian family exception to apply to ICWA. Congress passed ICWA to remedy the state's imposition of its cultural values when child custody proceedings involve Indian children. ICWA sought to foreclose this exact type of state infringement of tribal interests and sovereignty that

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[81] *See, e.g.*, *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

[82] 25 U.S.C. § 1902.

[83] 25 U.S.C. § 1917.

[84] Charmel L. Cross, *The Existing Indian Family Exception: Is It Appropriate to Use A Judicially Created Exception to Render the Indian Child Welfare Act of 1978 Inapplicable?*, 26 CAP. U. L. REV. 847, 849 (1997).

proponents of the existing family doctrine seek to advance.[85]

B. ICWA does not invoke a racial classification.

ICWA does not violate the Equal Protection Clause of the Constitution because the statute protects the interests of a political tribal entity.[86] Congress clearly intended to avoid equal protection claims by drafting a triggering mechanism dependent on an individual's *citizenship*, not based on race or lineage.[87] Without an existing relationship between a tribal citizen and a Tribe, the provisions of ICWA do not apply to a state adoption action.[88] ICWA does apply in this case because Baby Girl is *eligible for membership* in the Cherokee Nation.[89]

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[85] S. REP. NO. 104-335, at 14 (1996) (rejecting the existing family exception doctrine as "completely contrary to the ICWA").

[86] *See* 25 U.S.C. § 1901; *see also United States v. Antelope*, 430 U.S. 641, 645 (1977) ("[F]ederal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications.").

[87] 25 U.S.C. § 1903(4); *see also Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 89-91 (1973) (holding that discrimination based on citizenship does not violate equal protection and further finding that Congress discriminates based on citizenship).

[88] 25 U.S.C. § 1903(3).

[89] *See Antelope* at 646; *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 635 (S.C. 2012).

The core issue in this case turns on the citizenship of Baby Girl, not on race.[90] Petitioners improperly treat Indian classifications as if they were racial and not political by focusing on individual parental rights.[91] The language of the statute simply does not support such an interpretation.[92] ICWA only applies when an Indian child (1) is an enrolled tribal member or (2) is eligible for enrollment and her parent is an enrolled tribal member.[93] Congress clearly intended to avoid a racial application of "Indian" in the statute's operating provision.[94] Petitioners' mischaracterization of ICWA and its coverage formula perpetuate a race-based notion of "Indian" – ignoring Indian Tribes as separate polities with fundamental sovereign interests in their citizens. The Court should follow congressional direction established in ICWA and recognize the Cherokee Nation's separate and independent sovereign interest in its citizens.[95]

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[90] *Espinoza*, 414 U.S. at 89-91.

[91] Brief for Petitioner at 3, *Adoptive Couple v. Baby Girl*, No. 12-399 (Feb. 19, 2013) ("The creation of parental and adoption-veto right from whole cloth under ICWA is based on race, unmoored to any legitimate federal interest in protecting existing tribal ties, culture, or self-government.").

[92] 25 U.S.C. § 1903(3)-(4).

[93] *Id.*

[94] *Id.* at § 1903(4).

[95] *See Talton v. Mayes*, 163 U.S. 376, 382-383 (1896) (holding that the source of Cherokee Nation's authority over its citizens was not federally delegated authority but a Tribe's inherent sovereignty).

CONCLUSION

Congress plainly recognized that Indian children are an essential resource to the survival of Indian Tribes. As such, Congress passed ICWA to ensure that Tribes retain an interest in Indian children entirely separate from that of individual parents. ICWA's plain language and legislative history leave no room for doubt that Tribes have a protected interest in any child custody proceeding, regardless of individual circumstances. Thus, the judgment of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

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