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.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR THE NAVAJO NATION AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Navajo Nation is a federally recognized sovereign Indian tribe within the borders of the United States of America, with its *Diné Bikéyah* (Navajoland) encompassing more than 27,000 square miles of land in the states of Utah, Arizona, and New Mexico, and with a population of over 250,000 members. The Appellant in this matter has raised issues challenging the Indian Child Welfare Act (the "**Act**") and its application among the states, which Act was promulgated in 1978 by the United States Congress on behalf of the United States of America for the benefit of hundreds of federally recognized Native American tribes residing within the borders of the country—one of which was the Navajo Nation. ICWA governs the rights of Indians and Indian tribes with regard to child welfare matters. The Navajo Nation maintains three (3) distinct intergovernmental agreements under 25 U.S.C.A. §1919 with the states of Arizona, New Mexico and Utah. As such, the Navajo Nation is directly impacted with regards to its own sovereign rights, as

[1] The parties have filed blanket consents with this Court to allow for the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than the Navajo Nation and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The Navajo Nation filed this brief on its own behalf.

well as those of its members under any determination made by this Court respecting the Act.

STATEMENT OF PERTINENT FACTS

The Navajo Nation herein adopts the statement of facts as set forth in the *Brief for the Respondent Birth Father* and the *Brief for the Cherokee Nation* on file with this Court, but draws attention to the simplistic facts at issue here.

The unmarried father of Cherokee Nation heritage (the "**Father**") and mother of Hispanic heritage (the "**Mother**") conceived a child (the "**Child**") during their relationship. Pet. App. 2a-3a. The Father desired to be married to the Mother, but the relationship was terminated by the Mother prior to the Child's birth. *Id.* The Father texted the Mother what he believed to be consent to the Mother having custody. Pet. App. 4a, 126a; Trial Tr. 488-489, 535-536.

The Mother unilaterally ceased contact with the Father, contacted an adoption agency who located a couple in South Carolina (the "**Adoptive Couple**") who were interested in adopting the Child, and did not inform the Father. Pet. App. 4a-5a, 105a, 106a. The Mother's attorney sent notice to the Cherokee Nation in accordance with 25 U.S.C.A. §1912(a); however, such notice either advertently or inadvertently (this is disputed among the parties) misspelled the Father's name and provided his wrong birth day and year, causing the Cherokee

Nation to respond that the Father was not a member, even though he was. Pet. App. 5a-6a.

South Carolina law required notification to the Father 30 days prior to the final adoption hearing, contrasting ICWA's ten (10) day notice requirement under 25 U.S.C.A. § 1912 prior to *any* hearing being held regarding the Child's custody. When the Father received this notification, the Child was approximately four (4) months old, and Mother had relinquished her rights the day after the Child's birth. Pet. App. 7a. The Father immediately took action to pursue his rights to custody of the Child. Pet. App. 7a-8a. The Cherokee Nation was also informed, acknowledged the Father and Child as members, and intervened. Pet. App. 9a-10a. The immediate action by the Father and Cherokee Nation evidences that both would have become involved at the onset if either been properly notified under §1912 prior to *any* hearing being held. *Id.* DNA testing conclusively established paternity of the Father, and he contested the adoption. Pet. App. 10a, 119a-120a.

The South Carolina court heard the matter and, rather than applying ICWA and returning the Child to the Father, undertook a lengthy process of determining whether Father should be able to exert rights under ICWA. South Carolina law dictated the Father had no right to consent to the adoption because he had not financially supported the Mother during her pregnancy. ROA 16 (*citing* S.C. CODE ANN. §63-9-310(A)(5)). ICWA dictated that Father should have custody as a natural and fit parent of

the Child. ROA 19 (ICWA provided greater rights to Father), ROA 21 (no relinquishment), ROA 22-24 (no state grounds for termination of parental rights), ROA 24, 26 (no safety risk to child).

Ultimately, the South Carolina trial court determined that the Father was a "parent" under ICWA, having both acknowledged and established paternity through the DNA testing, entitling him to custody of the Child. ROA 18-19. Father was given physical/legal custody on December 31, 2011. Pet. App. 11a. The Adoptive Couple appealed, but the South Carolina Supreme Court affirmed the award of custody to the Father under ICWA. Pet. App. 1a-100a. The matter was then taken on certiorari review by this Court.

The Adoptive Couple has raised two issues in its opening brief challenging provisions of ICWA, namely, the ICWA definition of "parent" as it relates to unwed fathers' rights, and seeking adoption of a controversial "existing Indian family" ("**EIF**") doctrine, which is followed by seven states, but has been empirically rejected by twice as many, including the inception state. Father's Resp. Br. 36, fn. 12.

Numerous amicus curiae briefs are being submitted in this matter from states, tribes, professors of law, ICWA organizations, guardians ad litem, constitutional advocates and others in support of the South Carolina trial court and South Carolina Supreme Court's decisions to grant custody to the Father under ICWA. This rallying support evidences that ICWA has been embraced as the proper means

by which to protect Indian children's rights, as well as Indian parents and tribes.

SUMMARY OF THE ARGUMENT

ICWA accomplishes its intended purposes by subjecting states to certain aspects of tribal law and culture regarding child welfare, enabling tribes to continue in perpetuity rather than being mainstreamed into United States culture. ICWA has remained substantively unchanged since its inception and has created widespread change in the United States in favor of preservation of the Indian culture unique to this land. This Court has occasioned only once to hear a matter respecting ICWA in the 35 years of its existence, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989), and such matter upheld ICWA. This Court should do likewise here. However, since provisions of ICWA before this Court herein are regularly misinterpreted, helpful clarification and guidance in the process of affirmance will be assistive in avoiding continuing or future misinterpretations.

ICWA defers to tribal law for defining any part of an Indian child's family, even extended members. This is supportive of the differing clan structure of Indian families as well as the sovereign authority to regulate their own membership, which membership directly implicates ICWA in child welfare matters. Deferring to state law on the issue of "paternity" or to define "parent" is contrary to application of ICWA, and undermines a tribe's sovereign authority.

The EIF doctrine should be abolished as contrary to ICWA. The term "custody" under ICWA is not modified (i.e. "legal," "physical," "temporary," "permanent") and generally references varying types of "parental rights." Applying it otherwise severely limits the protection ICWA was intended to provide, particularly with regard to those it was created to protect: the children and thus perpetuity of the tribes. ICWA applies to all members of federally recognized tribes, but the EIF infuses state domestic law modifiers to limit application to only those children members who recently resided with a custodial Indian parent. The Navajo Nation membership/citizenship extends to all who are one-quarter Navajo, but the EIF doctrine nearly limits ICWA's application to only full-blooded Indian children or bases it on custodial relationships, negatively impacting domestic relations cases between an Indian parent and a non-Indian parent. ICWA is not intended to impact domestic relations cases. 25 U.S.C.A. §1903(1); H.R.Rep. No. 95-1386, p. 17. It was intended to apply to all members of federally recognized tribes. The EIF doctrine would create a chilling effect on domestic relations cases if the Adoptive Couple's reading of ICWA were accepted. It should be abolished as contradictory to ICWA.

ARGUMENT

The *Brief for the Respondent Birth Father* and the *Brief for the Cherokee Nation*, as well as several of the amici, have undertaken in-depth analyses of

ICWA and its history from their differing perspectives, evidencing just how solidly the Act's precepts can be applied to benefit the children of federally recognized Indian tribes in the United States. The Navajo Nation lends its support to each of these briefs that seeks to uphold ICWA, and will not present cumulative argument on those matters since the Navajo Nation is satisfied that they have been sufficiently covered by these parties and amici.

I. ICWA HAS APPLIED SINCE THE CHILD'S BIRTH TO ANY MATTERS RESPECTING CHILD'S CUSTODY; AND THE FATHER'S PARENTAL RIGHTS REMAIN INTACT.

The Adoptive Couple's theories disregard the tremendous progress ICWA has accomplished, and its benefit to millions of lives. Some tribes may have disappeared altogether in the last 35 years without ICWA, particularly if history had not been changed. Limiting application of ICWA under the Adoptive Couple's theories could bring about such disappearance in the near future. The Adoptive Couple's argument is particular to their difficult circumstances, but should not be found attributable to ICWA. While the Navajo Nation has sympathy for their loss of custody after two (2) years with the Child, the Adoptive Couple's attempt at impugning ICWA for such circumstance is misplaced.

The ICWA §1912(a) notice was deficient to validate the Father's membership in the Cherokee Nation; however, state law adoption notice ensured that these errors could not undermine the rights of

the Father, the Child or the Cherokee Nation. ROA 16 (*citing* S.C. CODE ANN. §63-9-310(A)(5)). Upon notice, actions were immediately undertaken by the Father contesting adoption, establishing paternity, and evidencing implication of ICWA. Once ICWA applies, it has a retroactive effect of nullifying any prior actions taken inconsistent with ICWA where the Child and the Father were both members of a federally recognized tribe. *See* 25 U.S.C.A. §1914 (invalidation of actions violating §1911, §1912, and §1913). ICWA did not "resurrect" the Father's parental rights which Adoptive Couple believe had been legally taken away by South Carolina law. ICWA applied from the time of the birth of the Child, and possibly even from conception—if actions during pregnancy are legally applicable to rights.

ICWA provides only three ways in which an unwed Indian father's parental rights can be extinguished: evidence beyond a reasonable doubt supporting termination of parental rights under §1912(f), relinquishment with limited revocation rights under §1913, and the lack of "acknowledgment or establishment of paternity" by an unwed father under the defined term of "parent" in §1903(9). None of these have occurred to deprive the Father of his parental rights herein. The Adoptive Couple's consistent misapplication of South Carolina law in each of their arguments contravenes the highest authority of that state, which properly refused to apply their own state law to this matter since ICWA applies when an Indian child is involved—even when no biological parent is involved.

II. "ACKNOWLEDGMENT OR ESTABLISHMENT" OF "PATERNITY" TO DEFINE "PARENT" UNDER ICWA SHOULD BE DEFINED BY APPLICABLE TRIBAL LAW GOVERNING FAMILIAL RELATIONS, NOT STATE LAW.

The Adoptive Couple challenges Father's "parent" status seeking to eliminate application of ICWA; however, they never address ICWA's application based on the Child's eligibility for membership in a tribe. 25 U.S.C.A. §§1903(4), 1912(a). Even absent the Father's tribal status or eligibility for "parent" status under ICWA, the Cherokee Nation would still extend membership to the Child and exercise its own rights independently, both of which implicate ICWA's application. 25 U.S.C.A. §§1903(4), (5) and (8), 1911(c), and 1912(a).

Applying tribal law to "acknowledgment or establishment of paternity" for ICWA's definition of "parent" is appropriately aligned with other provisions of ICWA—and its underlying intent to infuse tribal law and customs particular to family relations—into child welfare matters involving Indian children. The Navajo Nation maintains its own tiered judicial system, with the highest court being that of the Navajo Nation Supreme Court (the "**NNSC**"). The NNSC has opined how unique Navajo culture intertwines with the judicial system to determine matters of both paternity and Indian family. The tribal concept of "parent" or "paternity" or "family" were the basis for the mandates contained under ICWA, as shown more particularly

post. In accepting the South Carolina Supreme Court's determination to apply ICWA rather than state law, tribal law is also presumptively applied.

Congress intended tribal law to be applied in defining family relations. *See, e.g.,* 25 U.S.C.A. §1903(2). Tribes are vested with sole authority to regulate membership or citizenship in their own tribes in exercise of their sovereign powers. *See, e.g., Martinez v. Southern Ute Tribe*, 249 F.2d 915, 920 (10th Cir. 1957), *cert. denied* 357 U.S. 924, 78 S.Ct. 1374, 2 L.Ed.2d 1376 (1958)("a tribe has complete authority to determine all questions of its own membership as a political entity.") The Navajo Nation's laws provide automatic membership to individuals—including children—who are at least one-quarter Navajo. *See,* 1 N.N.C. § 701. Those who marry a Navajo and reside in Navajoland are considered *hadane* or in-laws, "connected by rights and obligations" to the spouse's clan; however, "being 'hadane' does not make one Navajo." *See, Means v. Navajo Nation*, 342 F.3d 924, 927 (9th Cir. 2005)("**Means**"). Further, legal determinations of "paternity" do not require genetic testing in the absence of a dispute.

Tribes' sovereign powers to regulate membership would be frustrated if state law governed "paternity" or required an "existing Indian family" to extend any protections under ICWA. Tribal membership would no longer apply to protect a member under ICWA based on state refusal to recognize them as a "parent." States could create

laws in contravention of 25 U.S.C.A. §1921 (state law only applies if "a higher standard of protection is provided") to eliminate parental rights altogether under ICWA. Tribal membership to implicate ICWA would cease to be the prerogative of the sovereigns, extinguishing sovereign authority. If tribes cannot govern membership to an extent where federal protections are applied to those members, then Indian culture will cease. ICWA was created to avoid these domino effects.

It is thus more appropriate to apply tribal law to determine familial relations under ICWA. ICWA supports this. The only definition contained in ICWA regarding "family" is under "extended family members" which specifically defers to tribal law. 25 U.S.C.A. §1903(2)(" 'extended family member' shall be as defined by the law or custom *of the Indian child's tribe…"* (emphasis added)). When there is no tribal law or custom that applies, ICWA refuses to default to state law, instead attempting to define the term according to tribal culture. *See,* 25 U.S.C.A. §1903(2) ("…or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, neice or nephew, first or second cousin, or stepparent;…"). Why would ICWA apply tribal law or custom to determine who is an "extended family member" but not to determine who has acknowledged or established paternity to be a "parent"? It is commonsense for ICWA to defer to tribal laws on family relations, including the actions

necessary to acknowledge or establish those family relations. The NNSC maintains precedent on the determination of paternity with regard to its members and citizens. However, Navajo culture differs greatly from mainstream America and, as noted in ICWA's definition of "extended family members," the NNSC resorts to application of customs for the specific purpose of ensuring the best interests of the children are upheld and protected.

A. The Unique *Diné* Culture.

It is necessary to explain the uniqueness of the Navajo culture and its impact on the governing laws in Navajoland. The Navajo culture is founded upon principles of *K'é* (respect) and *Hozho'* (harmony).

> The Navajo concept of k'é defines a peaceful and harmonious relationship which respects the present and future well being of the person. At the core of retaining k'é is maintaining respect for others, particularly respect in one's use of words in talking about others. Respectful use of one's words requires the reservation, circumspective or complete avoidance of judgmental characterizations of others which overly-broadly designate a certain negative trait across a wide timeframe, or which inaccurately and negatively characterize a single negative trait of a person to be the permanent, complete and unchanging character of a person. The understanding is that when one fails to properly exercise respect by engaging in these

> types of inaccurate characterizations of another person, he or she risks endangering the future wellbeing of the person, the person's family and the community (a network of interrelated families) creating conditions which may be conducive towards maintaining or exacerbating the existence of such characteristics.

Baldwin v. Chinle Family Court, 7 Am. Tribal Law 643, 2008 WL 5444666 (Nav. Sup. Ct. 2008). *Hozho'* is the result of living a life that promotes *k'é*, which places a responsibility upon others in dictating the way they should conduct themselves with all others in their Navajo community. *Id.* This concept protects families from being presumptively subject to future limitations on their rights based solely on inaccurate and negative characterizations, and instead engenders a focus on meeting the standard of proof required when custody issues arise. *Id.* Otherwise, it would be contrary to the concept of *k'é* and contrary to the goal of achieving *hozho'*, which is likewise contrary to the Child's best interests. Under the Navajo Nation's unique *Diné* law, "our children are the most valuable gift of creation" to our clans and overall community. 9 N.N.C. § 1702(A).

In the Navajo journey narratives, it is said that the breath of life enters the child at the moment of conception and produces the movement or *hiná*, which is the life and eventually growth of the fetus. An expectant Navajo mother is said to relive the creation story as she prepares to welcome an "earth

surface" baby girl or boy into the world. The child, even an unborn child, is described as holy or sacred, although neither of these words convey the child's status accurately. The child is considered alive at conception and the umbilical cord is the life line.

B. Cultural Influence on Tribal Laws.

Navajo common law provides a right to know precisely where one has originated. *Davis v. Means*, 7 Nav. R. 100, 103 (Nav. Sup. Ct. 1994)("**Davis**"). "Knowing one's point of origination . . . is extremely important to the Navajo People, because only then will a person know which adoone'e (clan) and dine'e (people) the person is." *Id.* These precepts are essential to a Navajo's identity and must be known for Navajo religious ceremonies to seek *hozho'* (harmony and peace), which to a child is emotional, physical and spiritual well-being. *Id.*

"Navajo common law on the family extends beyond the nuclear family to the child's grandparents, uncles, aunts, cousins and clan relationships . . . [t]he importance of his relatives to the Navajo can scarcely be exaggerated." *Davis* at 103. "In Navajo culture and tradition, children are not just the children of the parents but are children of the clan." *Goldtooth v. Goldtooth*, 3 Nav. R. 223, 227 (W.R. Dist. Ct. 1982); *see also In re Interest of J.J.S.*, 4 Nav. R. 192 (W.R. Dist. Ct. 1983). The NNSC has stated as follows:

> By "knowing one's point of origin," the Court was addressing the right of the child for

> meaningful continuation of relationships according to ak'éí (kinship). In order to know who they are and their place within the world, a child must be given the opportunity to grow up within familial and clan relationships. A child must have "meaningful contact" and "meaningful visitation" with his or her relatives, culture and people in order to know his or her place in the entire clan and extended family.

In re Guardianship of T.S.E.J., Sandoval v. John, 10 Am. Tribal Law 57, 2011 WL 3625086 (Nav. Sup. Ct. 2011)(further citations omitted)("**Sandoval**"). Parental decisions must consider "the child's relationships with other family members." *Id.* A relationship with both sets of grandparents is crucial for passing on knowledge of Navajo tradition. Navajo children are viewed as the future, ensuring the existence and survival of the Navajo people in perpetuity. *Burbank v. Clarke*, 2 Am. Tribal Law 424, 7 Nav. R. 369, 371 (Nav. Sup. Ct. 1999). "[T]he primary consideration is the child's strong relationship to members of an extended family . . . Therefore the court looks to that tradition and holds that it must consider the childrens' place in the entire extended family in order to make a judgment based upon Navajo traditional law." *Goldtooth* at 225-226.

The Navajo court must always act as the parent of the child and in the best interest of the child, especially where a change of custody is

requested. *Barber v. Barber*, 5 Nav. R. 9 (Nav. Ct. App. 1984). A Navajo court must seek to serve the interests of the child as being above the interests of the adults. *Lente v. Notah*, 3 Nav. R. 72, 78-79 (Nav. Ct. App. 1982). Court involvement does not cease until the safety, well-being, and best interest factors are satisfied to provide the child meaningful contact with his or her relatives and culture. Continued and meaningful contact between the relatives and child survives a grant of custody to the parent. *See, In re A.M.C.*, 8 Nav. R. 825, 828 (Chinle Dist. Ct. 2004); *In re A.M.C.*, 8 Nav. R. 874, 884 (Chinle Dist. Ct. 2005). Visitation is provided with extended family. Courts are held responsible under the Canon Three of the Navajo Nation Code of Judicial Conduct when they fail in their duty to achieve prompt, efficient and fair resolution to disputes, particularly where a child is left to grow and form attachments to caregivers who keep them from their relatives, culture and heritage. *See, e.g., In the Matter of A.M.K.*, 9 Am. Tribal Law 191, 2010 WL 4159270 (Nav. Sup. Ct. 2010).

C. Navajo Law on "Acknowledgment or Establishment" of Paternity.

The Adoptive Couple has challenged the definition of "parent" under 25 U.S.C.A. §1903(9), seeking to define the phrase "where paternity has not been acknowledged *or* established" under state law excluding consent for lack of an unwed father's financial support during pregnancy. *Ibid.* (emphasis added). To provide this Court assistance on determination of this matter with deference to tribal

law, the NNSC maintains precedent on what it means to "acknowledge" or "establish" paternity and what is required under Navajo law.

The governing NNSC case on this matter is *Sandoval, supra*. Therein a mother passed away leaving four (4) children without a custodian. *Id.* The father, John, stipulated to Sandoval (the maternal grandmother) having custody, and John sought only visitation. *Id.* The pleadings, evidence and reports did not dispute John was the natural father, with Sandoval testifying that the children "know who their father is." *Id.* John acknowledged paternity in open court, and no other person was alleged to be the father of the children. *Id.* John's name appeared on the birth certificate of the second oldest child and on two New Mexico *Acknowledgment of Paternity* forms for the two youngest children, but he had not signed these, although they had been signed and notarized by the mother prior to her death. *Id.* Three of the four children carried John's last name. *Id.* The home study and the guardian ad litem report both identified John as the natural father, raising no safety or other issues negatively impacting his contact with the children. *Id.* The guardian ad litem recommended liberal visitation, and Social services recommended no limitation on visitation. *Id.*

However, at the final hearing but contrary to her position[2], the court-appointed guardian ad litem,

[2] Under Navajo law a guardian ad litem is not authorized to advocate on the child(ren)'s behalf as a lawyer, but is considered a "spokesperson."

who was an attorney and a former judge, advocated and insisted on genetic testing. *Id.* Sandoval testified of a telephone call between the mother and John about his refusal to claim paternity over the two youngest children, and confirmed that John's name was not on three of the children's birth certificates. *Id.* John countered that he had been advised by a criminal lawyer not to sign the acknowledgements of paternity forms, but indicated he desired to do so now. *Id.* The trial court ordered John to undergo genetic testing on all four children so paternity could be established "once and for all." *Id.* John appealed and obtained a stay of the testing pending appeal. *Id.*

The NNSC found that, "our laws do not require the use of testing in the absence of a dispute; nor do our laws prohibit temporary custody or visitation to be awarded on the basis of presumptions." *Sandoval*, *supra*. Under Navajo common law, paternity is determined under either rebuttable presumption or legal determination for temporary custody/visitation awards, or only by legal determination for permanent custody/visitation awards. *See, e.g., Sombrero v. Hon. Angela Keahnie-Sanford*, 4 Am. Tribal Law 674, 8 Nav. R. 360 (Nav. Sup. Ct. 2003). In *Sandoval* the NNSC stated that, "[a]s to an unmarried man, 'the court may apply presumptions of paternity,' and 'should weigh all the evidence presented, including rebuttals to the presumption.'" *Ibid.*, citing *Davis v. Crownpoint*, 8 Nav. R. 279, 286 (Nav. Sup. Ct. 2003)("**Crownpoint**"). "[P]resumptions may be established by looking to all

factors in the best interest of the child, such as a parent-child relationship, and other evidence." *Id.*

The NNSC found that "a father's written acknowledgement of paternity is considered a legal finding of paternity without further findings necessary" since such is sufficient to establish parentage in the Navajo Nation Office of Hearings and Appeals. *Sandoval*, *supra*, citing *Crownpoint* at 286, citing N.M.S.A. §4-11-15 (1978). "Where the alleged absent parent has voluntarily stipulated to or acknowledged paternity and the claim is not rebutted, we state uncategorically that judicial time and resources may not be unnecessarily spent in further investigation, including testing." *Id.* "Such an acknowledgement creates a presumption of parentage pursuant to which a legal determination of paternity may be made absent rebuttal." *Id.* "[W]e hereby hold that our courts are required to treat the administrative establishment of paternity as conclusive without further ado, since it is expressly provided for in our statutory law." *Id.*, *citing* 9 N.N.C. § 1701 et. seq.

The NNSC explained its position in *Sandoval* on the question of paternity as follows:

> It is in the best interest of children to have knowledge of their father and to be able to point to him as someone who desired to be their father without needless raising of questions of paternity that serve only to shake the stability of the family. Our courts must ensure a child does not consider himself or

> herself wótashke' (fatherless child). In this case, where only one man has stood up to be the children's father and, furthermore, has been taken to be the father by the mother and family, the Court has no business investigating further if the result would be to render that child fatherless.

Sandoval, *supra*. The NNSC acknowledged a similar finding in the case of *In re Parentage of Liam J.H.*, 119 Wash. App. 1019 (Wash. App. Div. 1, 2003) where the Washington appellate court nullified the paternity test that proved Sean G. was not Liam's biological father because no one disputed Sean G.'s paternity. *Id.* The Washington appellate court stated as follows:

> The best interests of the child standard does not entitle a court to presume that paternity determination is automatically in the child's best interest. Therefore, absent a showing that such determination is in fact within the child's best interests, this standard cannot be invoked on behalf of someone other than the child.

Sandoval citing *Liam* at 1031. The NNSC stated that Navajo courts should strive to keep families intact and prevent creation of situations in which a child is left without a family. *Id.*

In *Sandoval* the NNSC found that the evidence "overwhelmingly creates a presumption that Appellant is the father of the children." *Ibid.*

This presumption would be similar to an "acknowledgment" of paternity under ICWA's §1903(9). In Indian law, evidence towards a rebuttable presumption of paternity is akin to "acknowledgment" and supports an award of temporary custody and visitation. It is thus supportive of the concept that the person be afforded status as a "parent." If a legal "acknowledgment" is actually filed, it is considered a legal determination supporting permanent custody.

In *Sandoval*, John had "plainly rebutted allegations that he denies his parentage," asking permission to sign acknowledgments of paternity, and NNSC finding that he should be allowed to do so. In the instant case, the Father also plainly rebutted the allegations that his alleged text message to the Mother forfeited his parental rights to the Child, by pursuing DNA testing and pursuing an award of custody immediately upon receiving notice of the adoption.

In *Sandoval*, the NNCS cited evidence that three children carried John's last name, his name was on one birth certificate, the mother acknowledged his paternity before her death, he acknowledged his paternity in open court, and the family and the children took him to be their father. *Ibid.* The NNSC found the trial court had abused its discretion for (1) discounting this evidence of paternity, (2) requiring testing in the absence of dispute "when such a conclusive standard is not required," and (3) failing to consider "the disabilities

of being wótashke' (fatherless child)." *Id.* The use of "disabilities" connotes that a child's deprivation from a fit parent seeking custody impairs the child.

If "paternity" is utilized to limit the term "parent" under §1903(9), and thereby application of ICWA's protections to actual members of federally recognized tribes, then state law should not govern any more than it governs the sovereign right to determine membership. Tribal law should apply to determining whether "paternity" has been acknowledged and/or established without reference or subjection to limitations contained in state law. This properly supports 25 U.S.C.A. §1911(d) (providing full faith and credit be given to judicial proceedings of any Indian tribe). States should be subject to the tribal determinations of family relations, including defined terms of "parent" or "paternity" as ICWA intended.

D. Adoptive Couple's Theory Has No Basis in State Law or Tribal Law.

Section 25 U.S.C.A. §1903(9) confers the status of "parent" to an unwed father if he "acknowledges" or "establishes" paternity. The Adoptive Couple seeks an exception to this provision based on South Carolina law that pertains to consents required for adoptions. This theory is not technically based in the South Carolina paternity laws. *See,* S.C. CODE ANN. §63-17-10, et. seq. (laws governing establishment of paternity). Thus, neither South Carolina law nor ICWA supports Adoptive Couple's novel theory. Nonetheless, the Father

herein conclusively established the biological relationship through genetic testing on May 10, 2010, and it has been acknowledged by the Adoptive Couple that he is the father. Pet. App. 10a. Thus, the Father both "acknowledged" and "established" paternity, and is thus a "parent" as it pertains to ICWA, nullifying application of South Carolina law.

Tribes' unique concept of family warrants deference by the state courts. This was the purpose for which ICWA was created and infused with tribal laws and customs, to which ICWA defers for defining family relations. Adoptive Couple tries to argue that "parent" somehow requires subjection to state law. Under most state laws, the tribal law concept of "acknowledgment" which includes evidence towards a presumption of paternity would be insufficient, particularly with regard to unwed fathers. Section 1903(9) meant to afford "parent" status with "acknowledgment" OR "establishment," but most state laws support only the latter with regard to determining paternity. Tribal law considers both, which is why ICWA considers both. Applying state law would defeat "acknowledgment" and focus only on conclusive "establishment" with strict timelines. Applying §1903(9) with reference to Cherokee Nation law would be appropriate for determination of whether the unwed Father herein had "acknowledged" or "established" paternity since it is his membership in that federally recognized tribe that implicates ICWA's application to the matter.

III. THE EIF DOCTRINE CONTRADICTS ICWA.

The EIF doctrine as created by the Kansas Supreme Court in 1982, *In re Adoption Baby Boy L.*, 643 P.2d 168, 175 (1982), and then rejected by the same court in *In re A.J.S.*, 204 P.3d 543, 549 (Kan. 2009). The core idea of the doctrine is that the Indian child needs to have recently resided with the Indian parent or in an Indian family to invoke the protections of ICWA. Adoptive Couple argues in favor of the EIF under ICWA provisions that speak about "custody," or what they perceive to be a prerequisite factor for its application. This interpretation would automatically exclude all removals from the hospitals at birth, creating a chilling effect by depriving tribes and Indian parents of added protection for all newborns, contrary to Indian customs and views of family where newborns are considered holy or sacred to their tribes.

The "custody" provisions of ICWA regarding Indian parents instead pertain to a right to exercise parental rights. The plain meaning[3] of the word "custody," is "[t]he care and control of a … person." *Black's Law Dictionary* 267 (6th ed. 1991). The term "custody of children" further adds "[t]he care, control

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[3] "In determining the meaning of a statute, 'we look first to its language, giving the words used their ordinary meaning.'" Levin v. United States, 133 S. Ct. 1224, 1231 (2013), *citing* Moskal v. United States, 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990) (citation and internal quotation marks omitted).

and maintenance of a child…" *Id.* at 287 (emphasis added). The "care" and "control" aspects are not further defined, except by the addition of outside modifiers such as "joint," "sole," "legal," "physical," "temporary," or "permanent," which then provides a definition of "custodial rights." However, "custody" rights in and of themselves are not exclusive to any one kind, but embody the entire concept of "parental rights" no matter what type of "custody" rights one maintains.

"Custody" rights, or parental rights, under ICWA are maintained by all biological parents or Indian custodians who have not (1) had their rights judicially terminated, (2) relinquished their rights, or (3) failed to acknowledge or establish them. This properly harmonizes[4] the defined term "parent" with the concept of "custody" or parental rights, as well as with the only extinguishing factors for such rights under 25 U.S.C.A. §§1903(9), 1912(f), and 1913. ICWA was meant to reach all of these "parents" of Indian children through use of the *un*modified word "custody." "Custody" rights should not be confused with "custodial rights" which require modifiers.

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[4] This Court held in Food & Drug Admin. v. Brown & Williamson Tobacco Corp. that it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall … 'symmetrical and coherent regulatory scheme,' … and 'fit, if possible, all parts into an harmonious whole…'" *Ibid.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 1301, 146 L. Ed. 2d 121 (U.S.N.C. 2000)(citations omitted).

Instead "custody" is the "right to care, control, and maintenance of a child" or more simply "the right to exercise parental rights" of differing kinds.

Adoptive Couple argues that §1912(f)'s verbiage that "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" requires a "preexisting Indian family" to have "continued" custody. The *Brief for the United States as Amicus Curiae Supporting Affirmance* (the "**U.S. Amicus**") argues that prospective legal and physical custody does not meet the criteria of "continued," which "means there must have been some form of custody in the past that could be 'continued.'" *Ibid.* at 24. The U.S. Amicus and Adoptive Couple read "custody" as "custodial rights" which requires a modifier. Such modifiers are deliberately absent in ICWA since they are based in mainstream domestic law's custodial/noncustodial or legal/physical concepts of "custody." The U.S. Amicus refuses to read §1912(f) as excluding the word "continued," but infuses modifiers for "custody" into the statute by requiring "custody" to be defined by a prior "legal/physical" determination. Nothing in ICWA resorts to these state domestic law modifiers. Requiring a preexisting legal/physical custody would automatically exclude ICWA protection for all Indian children removed at birth, as well as all noncustodial Indian parents, and ultimately tribes themselves.

Reading the term "custody" as "parental rights" throughout the provisions raised by the

Adoptive Couple upholds the Congressional intent as well as the historical application of ICWA. Section 1912(f) would read "the continued [parental rights] by the parent or Indian custodian [are] likely to result in serious emotional or physical damage to the child." Given §1912(f) applies to terminations, this supports the underlying concept of a permanent severance of the parent-child relationship.

Adoptive Couple interprets 25 U.S.C.A. §1913(b) for voluntary withdrawals of consents to foster care placements to apply only to preexisting custodial parents where it states "the child shall be returned to the parent or Indian custodian." However, "parent" includes unwed fathers who have acknowledged/established paternity, not just preexisting legal/physical custodians. 25 U.S.C.A. §1903(9). If one parent voluntarily consented to placement in foster care, another fit "parent" as defined in §1903(9) could come forward and exert their rights to custody.

25 U.S.C.A. § 1914 says "any parent or Indian custodian from whose custody the child is removed" may invoke that section to overturn prior orders or actions that violated §1911, §1912, or §1913. The proper definition of "custody" provides that any infringement upon the parental rights of "any parent or Indian custodian" as those terms are defined could seek relief thereunder. The Adoptive Couple's analysis to exclude noncustodial parents would severely impact tribal members, and allow ICWA to effectuate changes in domestic relations cases

involving an Indian parent, which ICWA was not intended to affect. 25 U.S.C.A. §1903(1); H.R.Rep. No. 95-1386, p. 17. The Adoptive Couple's argument to exclude noncustodial parents would alter not only ICWA application, but also domestic law and child welfare. Acknowledging the plain meaning of the word "custody" avoids this widespread impact that Congress did not intend.

Under 25 U.S.C.A. §1916, the plain meaning of "custody" provides that, whenever an adoption has been overturned, "a biological parent or prior Indian custodian may petition for return of [parental rights]…" Section 1916 also limits application of any state law to this provision by indicating these provisions are "[n]otwithstanding State law to the contrary…" so application of a domestic law modifier to the concept of "custody" would be contrary and thus not applicable. *Ibid.*

Under 25 U.S.C.A. §1916(b), adoptive placement preferences apply "except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed." A proper reading applies this section to those whose parental rights have been infringed upon by removal. Adoptive Couple's reading would place a fit noncustodial parent as a nonpreferential placement, leaving children in foster care if they could never be returned to the previously "custodial" parent. This is not providing greater protection. Similarly, under 25 U.S.C.A. §1920, clarification of "custody" would apply its precepts to

all Indian parents and Indian custodian where improper infringement upon parental rights has occurred.

The EIF contradicts ICWA and creates limitations on its application that would have chilling effects upon ICWA and domestic law cases contrary to Congress' stated intention. 25 U.S.C.A. §1903(1); H.R.Rep. No. 95-1386, p. 17. This Court should bring an end to further application of the EIF, just as its creators have, through clarification of the word "custody" in the provisions mentioned *supra* so as to avoid future misinterpretations affecting millions of lives.

IV. FEDERAL RECOGNITION OF INDIAN STATUS IS POLITICAL.

This Court has held, in the context of Indian employment preferences by the federal government, that "federal statutory recognition of Indian status is 'political rather than racial in nature.'" *Means, supra* at 932, citing *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). "Legislation that singles out Indians for particular and special treatment is in a special category because of the historical relationship of the United States with the Indians and the Indian Commerce Clause, and 'as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.'" *Id.* at 932-933, citing *Mancari,* 417 U.S. at 551-55, 94 S.Ct. 2474. *Means* noted that courts are bound by *Mancari* even outside its context. *Id.*

ICWA "singles out Indians for particular and special treatment" with that treatment rationally tied to Congress' obligation towards ensuring that Indian tribes do not become nonexistent. *Means* at 932-933. The Adoptive Family raises no viable analysis that supports abrogation of this Court's prior precedent.

CONCLUSION

WHEREFORE, based upon the foregoing, the Navajo Nation respectfully requests this Court decline to grant the relief requested by Adoptive Couple and uphold ICWA as constitutional, while providing guidance to the state courts on its proper application in circumstances such as these.

DATED this 26th day of March, 2013.

Respectfully submitted,

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