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 *AMICI CURIAE* NATIONAL LATINA/O PSYCHOLOGICAL ASSOCIATION, ASIAN-AMERICAN PSYCHOLOGICAL ASSOCIATION, ASSOCIATION OF BLACK PSYCHOLOGISTS, AND SOCIETY OF INDIAN PSYCHOLOGISTS IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the best interests of the child as properly applied supports placement of Baby Girl with Birth Father when current psychological research establishes that children are capable of and desire to form multiple bonds with adults during the first four to five years of life.

2. Whether the best interests standard for child custody determinations under the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et seq*. ("ICWA") should include cultural considerations when Congress clearly recognized the importance of Indian culture in setting adoptive preferences under ICWA and current psychological research supports the view that cultural considerations should be a key component in best interests analysis.

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INTERESTS OF THE *AMICI CURIAE*

Amici are associations of psychologists that have an abiding interest in having courts apply the most current and objective psychological theory and practice in formulating court decisions.[1] This role is particularly important in applying ICWA appropriately, both to take into account the current state of psychological theory on the best interests of the child and to apply the preferences for adoption and custody proceedings set forth in ICWA. These preferences are congruent with current theory that an appropriate application of best interests theory must take into account an expanded view of cultural aspects of child development, which is particularly important in Indian proceedings, as required by ICWA.

Amicus National Latina/o Psychological Association ("NLPA") was re-established in 2002 to create and sustain a supportive professional community that advances the psychological education and training, science, practice and organizational change to enhance the health, mental health, and well-being of Hispanic and Latina/o populations in the United States. The membership of the NLPA is made up of

[1] Pursuant to Supreme Court Rule 37.3(a), *amici curiae* state that all parties have filed blanket consents to the filing of amicus briefs in this case. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for the parties in this case authored this brief in whole or in part. No person or entity other than *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

students, researchers, and practitioners who work to improve the amount and availability of psychological research and information and to grow the base of psychology professionals equipped to serve the Latina/o population.

Amicus Asian-American Psychological Association ("AAPA") was founded in December 1972 by a group of Asian-American psychologists and other mental health professionals. The AAPA is vitally interested in Asian-American psychology and mental health issues, in the training and education of Asian-American mental health professionals, and in collaborating and networking with peers. Today, the AAPA has over 600 members, who are psychologists, psychology students, master's-level practitioners and others interested in Asian-American research and practice.

Amicus Association of Black Psychologists ("ABP") was founded in 1968 by a number of black psychologists from across the country. They united to actively address the serious problems facing black psychologists and the larger black community. The ABP is organized to promote and advance the profession of African psychology, influence and effect social change, and develop programs whereby black psychologists can assist in solving problems of black communities and other ethnic groups. The ABP has grown from a handful of concerned professionals into an independent organization of over 1400 members.

Amicus Society of Indian Psychologists ("Society") is an organization for Native American people to advocate for the mental well-being of Native peoples by increasing the knowledge and awareness of issues affecting Native mental health. The Society works to support a community of professionals, researchers, and students who seek to share ideas and disseminate knowledge and new information relevant to Native people.

SUMMARY OF ARGUMENT

Section I traces the historical development of adoption and the best interest theory. The best interest method currently used to determine child custody allows the court to weigh a number of factors at its discretion. The means utilized by the court to determine child custody is therefore continuously evolving, accounting for changes in societal norms and individual circumstances encountered. As a result, judges have looked for concrete information to balance the subjective nature of the evaluation.

The use of psychological research and evidence has recently increased in popularity, allowing the court to supplement the discretionary nature of custody determinations with objective data. Attachment Theory, a now commonly used model describing the relationship with a child and its caregivers, provides that a child forms secure attachments to

caregivers during the first four to five years of life. Studies in the area have concluded that children are capable of and desire to form multiple bonds with adults.

Cultural considerations must also be considered in conjunction with Attachment Theory, as the concept was developed for applicability to Western society and does not encompass the customs and traditions pertinent to an Indian child. The strong sense of community, shared spiritual values and large family units are unique aspects of Indian culture that cannot be ignored when determining the best placement of the child. Further, placement of an Indian child into a non-Indian family can have harmful repercussions that can be avoided by allowing the child to remain with Birth Father and develop a healthy cultural identity within the Indian community.

Section II discusses how these current concepts inform the policy determinations made by Congress in its fundamental determination in ICWA that an Indian child's best interest is to protect the child's relationship to the tribe. The statutory preferences of ICWA are presumptively in the best interests of the child. The legislative record of ICWA signals congressional intent that Indian children remain in the Indian culture. As a result, this Court need not engage in the subjective weighing of factors that motivated the passage of ICWA.

Cultural considerations are crucial to the best interests analysis under ICWA. The plain language of ICWA reveals that the "cultural and social standards" of Indian families are to be considered in Indian child custody determinations. This approach comports with prevailing psychological research, which demonstrates that raising Indian children outside of Indian homes risks severe developmental problems that can be avoided by recognizing the importance of cultural considerations.

Finally, Birth Father is a dedicated father, served honorably in the United States Armed Forces and by all accounts is devoted to the well-being of Baby Girl. Despite Petitioners' attempts to disparage Birth Father, the lower courts properly found that Baby Girl's interests would be best served by Birth Father. The factual findings of the South Carolina family court judge, who was best placed to assess the credibility of the evidence, warrant deference.

ARGUMENT

I. Psychological Considerations Must be Appropriately Evaluated to Successfully Determine Custody of a Child.

The methods that courts have used to determine custody of young children have drastically changed over the last 200 years. Throughout the nineteenth century in the United States, property laws dictated the custody of minor children and therefore all rights

were granted to the father following divorce or separation. *See* Jean Mercer, *Child Custody, Attachment Theory, and an Attachment Measure: The Science Remains Limited*, 7 Sci. Rev. Mental Health 37 (2009). The beginning of the twentieth century saw an emergence of the "Tender Years Doctrine," a theory grounded in the idea that mothers were better-suited than fathers to be caregivers. *Id.* The maternal preference was deeply ingrained in both statutes and case law and was only challenged by the dramatic rise in divorce rates beginning in the 1960s. Joan B. Kelly, *The Determination of Child Custody*, 4 Child. & Divorce 121 (1994). "Spurred on [by] fathers' claims of sex discrimination in custody decisions, constitutional concerns for equal protection, the feminist movement, and the entry of large numbers of women into the work force, which weakened the concept of a primary maternal caretaker, most states abandoned the maternal presumption by the mid 1970's." *Id.* The Uniform Marriage and Divorce Act enacted in 1970 was widely adopted by states during the same decade and, for the first time, based a custody determination on the needs and interests of the child. *Id.*

The new standard, however, was not without flaws. The introduction of subjective psychological factors to determine child custody rather than clearly stated laws forced judges to weigh and make determinations based on scientific information. *Id.* at 129. Though the manner by which courts have applied the best interest standard has changed since the concept's inception, the difficulty of applying vague and

discretionary standards to difficult situations remains. *Id.* As a result, and due to the nature of our judicial system, courts have relied heavily on precedent, leaving little room for further evolution and development of the factors applied.

Attachment Theory, a concept derived from studies of orphans following World War I, has gained considerable popularity over the last twenty years as an important factor when determining child placement. Nicola Atwool, *Attachment and Resilience: Implications for Children in Care*, 4 Child Care in Prac. 315, 316 (2006). However, similar to the legal evolution that has occurred regarding the standard to determine child custody, further research and better understanding of childhood development has expanded Attachment Theory and finely tuned the concepts first published almost a century ago. A once-narrow view of childhood development, Attachment Theory has become a complex explanation of development and experience. Unfortunately, and as repeatedly exemplified in the briefs filed in support of Petitioner, Attachment Theory is commonly mislabeled or oversimplified by the term "bonding" and fails to account for the full spectrum of relationships that can form effective bonds.

A. Modern Developments in Attachment Theory Support Baby Girl's Placement with Birth Father.

Attachment Theory was originally developed by John Bowlby and Mary Ainsworth during the early

twentieth century. Inge Brethernton, *The Origins of Attachment Theory: John Bowlby and Mary Ainsworth*, 28 Developmental Psychol. 759 (1992). The theory focuses on the ability of a young child to develop attachments to a very few special adults who are willing and capable of caring for the child. Initial experiments were carried out by the founders, exposing young children to various situations that tested the relationship between the child and caregiver and measured their emotional reactions. Atwool, *supra*, at 316. The results of initial experiments revealed that a figure of attachment played a significant role in managing the infant's anxiety. *Id.* The secure attachment achieved between the child and caregiver then creates a strong base for future relationships and allows a toddler to move toward successful independence. Eleanor Willemson & Kristen Marcel, *Attachment 101 for Attorneys: Implications for Infant Placement Decisions*, 36 Santa Clara L. Rev. 439, 440 (1996).

While the initial observations and experiments conducted by Bowlby and Ainsworth were completed during the first year of life, research has expanded to demonstrate that "the preschool period, between the ages of about eighteen or twenty months and about five years, is an especially important period in the development of children's attachment relationships, and their relationship skills generally." Robert Marvin et al., *The Circle of Security Project – An Attachment-based Intervention with Caregiver – Pre-School Child Dyads*, 4 Attachment & Hum. Dev. 107,

108 (2002). Following infancy, a child has the ability to internally recognize and organize the people to whom they have become attached. *Id.* The first three years of a child's development, while forming an important foundation, do not include all aspects of secure attachment. Willemsen & Marcel, *supra*, at 456-57. During the ages of three through five, significant cognitive development occurs and provides for the acquisition of language skills, expanded social relations and verbal communication that are affected and advanced by a child's secure attachment. *Id.*

These new developments are extremely relevant to the case at hand. The Petitioners and their *amici* have argued that the secure attachment of the Baby Girl was broken at 27 months, and that "physical health, cognition, social skills and emotional competence can all face long term detriment when attachment is broken." National Council for Adoption Br. 13. The assumptions made are ill-founded, based on a narrow view of attachment and fail to address the continuing development of a child's cognitive abilities that occurs after the age the child was placed with the Birth Father. Based on the above research, current psychological theory supports the view that significant attachments can and do take place from one to five years, well within the time that Baby Girl was placed with Birth Father.

The Petitioners and their *amici* also repeatedly assert that the interaction with a caregiver can form an attachment whether that caregiver is connected to the child by legal or biological ties. National Council

for Adoption Br. 12. While this may be true, the claim does not address the true concept of attachment or consider a child's development outside of bonding with a single caregiver. Scientific evidence has shown that "all primates are born with an instinctive desire to form bonds with available adults." David E. Arrendondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness*, J. Center for Fam., Child. & Cts. 109, 111 (2000). The desire for such bonding to occur does not depend on the particular adult or behavior of that adult, but is a result of the child's genetic makeup. "It is clearly understood that children can, do and should have relationships with more than one caregiver or sets of caregivers." *Id.* at 110; *see also* Willemsen and Marcel, *supra*, at 468. Further, research shows that children afforded responsive, consistent care recover well from any temporary loss of attachment. *See generally* From Neurons to Neighborhoods: The Science of Early Childhood Development (Jack P. Shonkoff & Deborah A. Phillips, eds., 2000) (discussing how children provided with good care can fully develop new attachments). The Petitioners' view again fails to account for the larger environment in which caregivers and children interact and prevailing research on the ability of children to develop new attachment relationships.

B. Cultural Aspects Must be Considered to Ensure Healthy Placement of Baby Girl.

As research has shown the importance of the later ages of a child's development, the underlying concepts of Attachment Theory have also been scrutinized and expanded. Cultural considerations have become extremely important when examining the attachment behavior of a child and are especially significant when a child is not from a culture that follows Western child-rearing practices. Raymond Neckoway et al., *Is Attachment Theory Consistent with Aboriginal Parenting Realities?*, 3 First Peoples Child & Fam. Rev. 65 (2007); *see also* Soo See Yeo, *Bonding and Attachment of Australian Aboriginal Children,* 12 Child Abuse Review 292 (2003). As different cultures have unique parenting styles, the differences of those styles as compared to Western practices must be included in the evaluation of a child's attachment behavior to yield accurate results. Neckoway, *supra*, at 68.

Research has identified three differences in parenting styles that have an impact on Attachment Theory: first, "hypersensitive parenting," a method of very involved and intense parenting; second, "selective parenting," a less intense parenting method of meeting a child's needs; and third, "shared parenting," where multiple caregivers are involved with the raising of the child. *Id.* The Native American culture most closely resembles shared parenting, as large family units and a community environment are key

characteristics. In a study conducted in Israel within a group that valued group cohesion and social function within a community, an extremely small number of children were found to be securely attached to a particular caregiver, and instead formed bonds to multiple adults, indicating that the traditional framework for the Attachment Theory was not cross-culturally applicable. *Id.* at 69; *see also* Yeo, *supra*, at 292.

Similarly, studies conducted within Aboriginal cultures that value extended families, lineage and bloodlines have found that parenting methods resemble selective and shared parenting. Neckoway, *supra*, at 70. The kinship structure of the culture creates multi-layered and multiple bonds between children and their caregivers. While a linear relationship as traditionally formed under the Attachment Theory may not exist, children raised by multiple caregivers in these cultures can establish a "network of attachment relationships." Neckoway, *supra*, at 71. Strong bonds between children and members of their group can therefore be formed as a result of shared values of "interdependence, group cohesion, spiritual connectedness, traditional links to land, community loyalty and interassistance." Yeo, *supra*, at 298.

The results of these studies are extremely important to the case at hand, as the cultural differences noted exist within the Native American community. "An Indian child, like any child, is born to a biological family. However, unlike other children, an Indian is born into a kinship network, clan or band

. . . [and] Indian children develop a strong sense of community because individual goals intertwine with community goals." Lynn Klicker Uthe, *The Best Interests of Indian Children in Minnesota,* 17 Am. Indian L. Rev. 237, 237 (1992). The linear relationship between one caregiver and a child cannot adequately account for the community environment in which a Native American child exists. The children in these communities are strengthened by the sense of unity within the tribes that allows for the development of strong social skills as well as a healthy personal identity.

Cultural considerations are also integral for the application of Attachment Theory to the child's later assimilation into society. "Information from the available data state [that,] in the past 20 years, suicide among Indian youth has increased [1,000] percent. There are ten times as many youth suicides now as in 1963. Indian children placed in non-Indian homes often feel rootless. In adolescence and/or when they leave the non-Indian family, many find that they are neither Indian [nor] non-Indian. These rootless (anomic) feelings often lead to acute hopeless and powerless feelings closely associated with abandonment and stressful loss. The result is a suicide rate among non-Indian adopted Native American adolescents that is twice that found on any reservation." Robert J. McCarthy, *The Indian Child Welfare Act: In the Best Interests of the Child and Tribe*, 27 Clearinghouse Rev. 864, 871 (1993). Other studies indicate that Native Americans raised in non-Native American

homes have substantial social issues, both during adolescence and adulthood.

The Petitioners and their *amici* fail to address these risks specific to Baby Girl's case, as a Native American child placed in the care of a non-Native American couple. The bond Baby Girl may have formed with Adoptive Couple is only one aspect of what Attachment Theory examines and does not account for cultural considerations essential to the child's well-being. Baby Girl clearly would benefit from a strong cultural identity to be successful both socially and emotionally. The risk of psychological harm, as demonstrated by the substantial research cited above, dictates that she should live among other Native Americans, specifically her Birth Father, to foster a sense of belonging and to decrease the risk of serious psychological difficulties.

II. The Lower Court Properly Applied an Appropriate Best Interests Analysis Informed by the Cultural Priorities of ICWA.

Native Americans have endured centuries of abuse, mistreatment, and discrimination. *See* Amanda B. Westphal, Note, *An Argument in Favor of Abrogating the Use of the Best Interests of the Child Standard to Circumvent the Jurisdictional Provisions of the Indian Child Welfare Act in South Dakota*, 49 S.D. L. Rev. 107, 107-110 (2003) (discussing historical abuses suffered by Native Americans). Among the most heart-wrenching examples of this abuse are the

countless stories of Indian children taken from their biological parents and their culture, placing the Indian way of life at risk. Patrice Kunesh-Hartman, Comment, *The Indian Child Welfare Act of 1978: Protecting Essential Tribal Interests*, 60 U. Colo. L. Rev. 131, 166 (1989). These children, separated from the very people who understand their makeup and their daily challenges and frustrations, often face developmental difficulties with lifelong consequences. *See Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 114 (1977) (statement of Drs. Carl Mindell and Alan Gurwitt, American Academy of Child Psychiatry) ("Native American children placed in off-reservation non-Indian homes are at risk in their later development. Often enough they are cared for by devoted and well-intentioned foster or adoptive parents. Nonetheless, particularly in adolescence, they are subject to ethnic confusion and a pervasive sense of abandonment."). The importance of Indian culture in the rearing of Indian children and the dangers of tearing away an Indian child's cultural foundation are clear. *See In re Custody of S.E.G.*, 521 N.W.2d 357, 358 (Minn. 1994) (stating that ICWA was enacted "to relieve the difficulties experienced by Indian children raised in non-Indian homes"). As a result, it is imperative that this Court, as did the courts below, employ the cultural priorities of ICWA to inform Indian child custody decisions.

Against this backdrop, Congress enacted ICWA "based on the fundamental assumption that it is in

the Indian child's best interest that its relationship to the tribe be protected." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 50 n. 24 (1989) (quoting *In re Appeal in Pima County Juvenile Action No. S-903*, 635 P.2d 187, 189 (Ariz. Ct. App. 1981)). Congress made several findings in connection with ICWA, including that "the 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." 25 U.S.C. § 1901. Much of the national and congressional concern centered on the use of white middle-class values to make the subjective determination regarding the best interests of the Indian child. *See Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 191-92 (1978) (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians) ("Many of the individuals who decide the fate of our children are at best ignorant of our values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit the Indian child.").

A. The ICWA Adoptive Preferences are Presumptively in the Best Interests of Baby Girl.

To ensure that the Indian identity and way of life factored into the decisions regarding Indian child custody disputes, Congress created a series of

placement preferences that govern adoptions of Indian children. 25 U.S.C. § 1915(a) ("[P]reference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."). The preferences are crucial to avoiding a repeat of the culturally biased pre-ICWA decisions of state courts. *See In re Custody of S.E.G.*, 521 N.W.2d at 363 ("The best interests of the child standard, by its very nature, requires a subjective evaluation of a multitude of factors, many, if not all of which are imbued with the values of majority culture."). Indeed, this Court has stated that the adoptive preferences requirement of § 1915(a) is "[t]he most important substantive requirement imposed on state courts" by ICWA. *Holyfield*, 490 U.S. at 36. Because the preferences are so important to avoiding biased subjectivity and because the preferences may be avoided only for good cause, there is a strong presumption that placement in accordance with the adoptive preferences is in the best interests of the child.

This presumption does not replace the best interests analysis, but rather applies the congressional intent that the adoptive preferences are in keeping with the child's best interests. *See Navajo Nation v. Ariz. Dep't of Econ. Sec.*, 284 P.3d 29, 35 (Ariz. Ct. App. 2012) ("[T]he lodestar for a court is essentially the same as with other custody and placement issues – the best interests of the child. When compared to non-ICWA cases, the difference is

that Congress has spoken and unless good cause is shown, the presumption is that placement of the child in accordance with ICWA preferences is in the best interest of the child."); *see also In re C.H.*, 997 P.2d 776, 780 (Mont. 2000) ("ICWA expresses the presumption that it is in an Indian child's best interests to be placed in an Indian home in conformance with the § 1915 placement preferences."); *In re Custody of S.E.G.*, 521 N.W.2d at 362 ("ICWA appears to create a presumption that placement of Indian children within the preferences of the Act is in the best interests of Indian children."); *People ex rel. A.T.W.S.*, 899 P.2d 223, 224 (Colo. App. 1994) ("The ICWA is based on the presumption that the protection of an Indian child's relationship to the tribe is in the child's best interest."). As a result, this Court need not be concerned with reconciling the adoptive preferences with the litany of factors considered under a best interests analysis. A contrary finding risks re-engaging the subjective policy analysis that Congress sought to avoid. Applying the plain language of the statute, placement in accordance with the preferences, with Birth Father, is in Baby Girl's best interests.

B. Indian Cultural Considerations are Among the Most Important Factors in Best Interests Analysis Based on the ICWA Statutory Intent and Prevailing Scientific Literature.

Petitioners and their *amici* argue that the decisions of the lower courts were clearly contrary to

Baby Girl's best interests. In doing so, Petitioners and their *amici* seek to frustrate the clear Congressional intent of ICWA and ignore scientific research on the subject. Contrary to the contentions of Petitioners and their *amici*, the lower courts engaged in the proper form of best interests analysis, as modified by ICWA.

1. Statutory Intent Supports the Inclusion of Cultural Considerations in Best Interests Analysis.

It is true, as Petitioners and their *amici* maintain, that a best interests analysis is the touchstone of child custody determinations. *See, e.g.*, *Hooper v. Rockwell*, 513 S.E.2d 358, 366 (S.C. 1999) ("This Court long has tried to decide all matters involving the custody or care of children in 'light of the fundamental principle that the controlling consideration is the best interests of the child.'" (quoting *In re Doran*, 123 S.E. 501, 503 (S.C. 1924))); *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925) (Cardozo, J.) (stating that in custody disputes, the judge must act "as *parens patrioe* [sic] to do what is best for the interests of the child. He is to put himself in the position of a 'wise affectionate and careful parent,' . . . and [to] make provision for the child accordingly" (quoting *Queen v. Gyngall*, 2 Q.B.D. 232, 238 (1893)). When an Indian child is involved, however, the traditional state law formulation of best interests analysis must be applied in a manner that comports with prevailing federal law through ICWA. *See In re Mahaney*, 51 P.3d 776,

785 (Wash. 2002) ("Well-established principles for deciding custody matters should further [ICWA's] goals."). As a result, the best interests analysis must be informed by ICWA's clear statement that remaining with her tribe is in the best interests of Baby Girl's development and the preservation of the tribe's heritage.

This Court previously recognized the dangers inherent in ignoring the importance of Indian culture for child adoption and development. *See Holyfield*, 490 U.S. at 37 (stating that ICWA "'seeks to protect the rights of the Indian child as an Indian' by establishing 'a Federal policy that, where possible, an Indian child should remain in the Indian community,' and by making sure that Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.'" (quoting H.R. Rep. No. 1386, 95th Cong., 2d Sess. at 24 (1978)). Indeed, ICWA protects "'the best interests of Indian children and [promotes] the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.'" *Kickapoo Tribe of Okla. v. Rader*, 822 F.2d 1493, 1501 (10th Cir. 1987) (quoting 25 U.S.C. § 1902).

Congressional intent to include Indian cultural considerations in the best interests analysis is clear not only from the text of ICWA, but also from the

mechanics of the statute. ICWA requires a party "seeking to terminate a parent's rights over an Indian child [to] satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." *Roman-Nose v. N.M. Dep't of Human Res.*, 967 F.2d 435, 437 (10th Cir. 1992). Further, "to terminate parental rights over an Indian child, the court must make a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses,[2] that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child." *Id.* at 437-38. These requirements present significant and necessary hurdles that indicate Congress' intent to include considerations of Indian culture in the best interests analysis.

2. Child Psychology and Development Theory Support the Use of Indian Cultural Considerations in Best Interests Analysis.

The problem of white, middle-class values unfairly influencing child custody determinations is endemic.

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[2] "Experts are generally qualified through special knowledge of and sensitivity to Indian culture." *In re Welfare of L.N.B.-L.*, 237 P.3d 944, 960 (Wash. Ct. App. 2010). The expert cited by Petitioners from the family court hearing had no familiarity with Indian culture.

See Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 834 (1977) ("Studies also suggest that social workers of middle-class backgrounds, perhaps unconsciously, incline to favor continued placement in foster care with a generally higher-status family rather than return the child to his natural family, thus reflecting a bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child."). The problem is particularly pernicious for Indian adoptions. Uthe, *supra*, at 251 (discussing how substitute families are often favored over Indian families and stating that this "favoritism is due in part to misconceptions about cultures"). The application of white, middle-class values and the ignorance of Indian culture causes Indian children to be "removed [from their biological families] to be saved from their own culture." Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 Iowa L. Rev. 585, 605 (1994). Indian cultures, however, approach parenting differently than do traditional "Euro-American" families. *Id*. at 603. These differences extend to, among other aspects of parenting, child discipline and child supervision. *Id*. Further, the concept of family in Indian tribes is distinct from the typical nuclear family observed in the Euro-American tradition. *See* Ronald S. Fischer, *Protecting American Indian Children*, 25 Soc. Work 341, 343 (1980) ("American Indian extended families, by sharing the responsibilities of child rearing, mobilize effectively to protect children in peril, providing the love necessary for children's

normal development."). Instead, Indian families frequently contain parents, grandparents, aunts, uncles, and other tribe members who are directly involved in raising a child. *See* Jennifer Nutt Carleton, *The Indian Child Welfare Act: A Study in the Codification of the Ethnic Best Interests of the Child*, 81 Marq. L. Rev. 21, 28 (1997) ("On many reservations it was once enough for caseworkers to decide arbitrarily that a family was too poor to raise a child. It was overlooked that in tribal cultures the amount of care given a child often went well beyond one household. The full social and blood-tie network of parents, grandparents, relatives and neighbors was a wealth not categorized on a caseworker's clipboard of acceptable standards for child-raising." (quoting Colman McCarthy, *Reopening the Drain on Indians' Legacy*, Wash. Post, July 16, 1996, at B8)). As a result, the traditional, more limited best interests analysis cannot apply for Indian children.

Petitioners and their *amici* advance the argument that ICWA is focused on maintaining Indian culture and not child development, and as a result, is not germane to the best interests analysis. This approach, however, stands in stark contrast to congressional statements made at the time of passage, *see Holyfield*, 490 U.S. at 50 n. 24 ("In large part the concerns that emerged during the congressional hearings on the ICWA were based on studies showing recurring developmental problems encountered during adolescence by Indian children raised in a white environment."), case law, *see In re Adoption of*

T.N.F., 781 P.2d 973, 977 (Alaska 1989) ("We initially note that in enacting ICWA, Congress did not seek simply to protect the interests of individual Indian parents. Rather, Congress also sought to protect the interests of Indian tribes and communities, and the interests of the Indian children themselves."), and subsequent psychological research. *See* Robert McCarthy, *supra*, at 871 ("An environmental factor contributing to higher suicide rates among Indian youth is adoption in which Native American youth are placed in non-Indian families."); *see also* Margaret Howard, *Transracial Adoption: Analysis of the Best Interest Standard*, 59 Notre Dame L. Rev. 503, 555 (1984) ("Being raised by parents who share their child's racial, cultural, and ethnic heritage has value, and this deserves recognition."); T.D. LaFromboise et al., *Family, Community, and School Influences on Resilience Among American Indian Adolescents in the Upper Midwest*, 34 J. Community Psychol. 193, 193-209 (2006) (discussing how American Indian children living in accordance with tribal customs often have higher self-esteem). Because the literature on Indian custody holds that culture plays a crucial role in the development of Indian children, this Court should reject the contention of Petitioners and their *amici* that Indian culture and heritage are irrelevant to this case.

There is no doubt that Adoptive Couple would provide Baby Girl with a loving home, but the inquiry does not center on adequacy. Instead, the question is one of *best* interests, considering Indian culture and

the ICWA preferences. The twin aims of ICWA, protecting the best interests of the Indian child and promoting the stability of the Indian tribe, 25 U.S.C. § 1902, are served only via placement of Baby Girl with Birth Father. Given the cultural considerations both explicit and implicit in ICWA, together with the above psychological research, a contrary decision would undermine the best interests of Baby Girl, risk harm to her long-term development, and defeat the congressional intent of ICWA.

C. Petitioners and Their *Amici*'s Narrow and Constrained View of Best Interests Analysis Does Not Comport with the Current State of Psychological Theory and the Statutory Requirements of ICWA.

The arguments of Petitioners and their *amici* also fail because they take an inappropriately narrow view of bonding and attachment. The proper analysis should not be so narrowly focused. South Carolina courts, for example, recognize that the best interests inquiry must consider a long list of factors. *Woodall v. Woodall*, 471 S.E.2d 154, 157 (S.C. 1996) (requiring a best interests inquiry to include "the character, fitness, attitude, and inclinations on the part of each parent as they impact the child," and the "psychological, physical, environmental, spiritual, educational, medical, family, emotional, and recreational aspects of the child's life"). By inflating the importance of bonding and attachment in best interests analysis,

Petitioners and their *amici* risk missing the forest for the trees. Bonding and attachment are relevant, but only for one aspect of the analysis. *See In re Adoption of Halloway*, 732 P.2d 962, 971-72 (Utah 1986) ("While stability in child placement should be a paramount value, it cannot be the sole yardstick by which the legality of a particular custodial arrangement is judged."). Further, while bonding and attachment are relevant, it is clear, as discussed above, that the position of Petitioners and their *amici* on the impact of bonding and attachment in this case is not correct under the prevailing scientific literature on child psychology and development.

In light of the fact that Indian culture must play an important role in best interests analysis under ICWA, bonding and attachment, or indeed any other isolated best interests factor, should not by definition be determinative. *See In re C.H.*, 997 P.2d at 783 ("The emotional attachment between a non-Indian custodian and an Indian child should not necessarily outweigh the interests of the Tribe and the child in having that child raised in the Indian community."); *see also In re Adoption of M.T.S.*, 489 N.W.2d 285, 288 (Minn. Ct. App. 1992) ("Under [the ICWA] standards, placing [Indian child] with [Indian grandmother] is presumptively in his best interests. Although the record indicates that the Nelsons provided [Indian child] with a loving foster home, the fact that separation from them will be initially painful to [Indian child] is not good cause to defeat the preference created by the ICWA."). The argument that bonding

and attachment should not be afforded undue weight in the best interests analysis is strengthened in the context of Indian child custody determinations. *See* Judy C. Pearson & Jeffrey T. Child, *A Cross-Cultural Comparison of Parental and Peer Attachment Styles among Adult Children from the United States, Puerto Rico, and India*, 36 J. Intercultural Comm. Res. 15, 16 (2007) ("Attachment does not generalize across all co-cultures: relationships among attachment, and gender, ethnicity, and sexual orientation have been discovered."); *see also* Neckoway et al., *supra*, at 68 ("A number of researchers have pointed out that attachment theory makes assumptions, based on Western ideologies, regarding ideal dyadic relationships and preferred developmental outcomes based on the mother-infant bond. For instance, not all cultures expect mothers to be the sole caregiver nor do all cultures interpret the child's needs in the same way or have the same reactions to emotional expression, such as the meaning of an infant's cry. What surely must come into question then, is the universal applicability of attachment theory.").

Petitioners and their *amici* also argue for a reversal of the lower court's opinion on grounds that bonding and attachment should be afforded such weight as to be determinative in child custody cases. *See* Child Advocacy Organizations Br. 9-13; National Council for Adoption Br. 11-14. Such a reversal of the South Carolina court's decision also risks creating precedent that could lead to absurd results by focusing disproportionately on bonding and attachment.

Consider for example, a child kidnapped immediately after birth. The child lives with the kidnapper for seven years, presumably bonding with the kidnapper, who is then discovered. At this point, society would surely say that the child should be taken away from the kidnapper, but the intractable adherence of Petitioners and their *amici* to bonding and attachment would invalidate any attempts to remove the child from the kidnapper's custody. Furthermore, a reversal of the lower court's decision would create an incentive for parties to deliberately ignore the purposes of ICWA and to engage in protracted litigation. In the present case, Birth Mother and Adoptive Couple declined to observe the requirements of ICWA, and instead moved to place Baby Girl with non-Indian parents in clear contradiction of ICWA preferences, despite Birth Mother's acknowledgement that she knew of Birth Father's Indian heritage. Thus, by failing even the preliminary requirements of ICWA, Adoptive Couple was afforded the opportunity to bond with Baby Girl over the course of the ensuing litigation. It would be an inequitable result to reward Adoptive Couple by relying on any attachment that may have occurred during the pending litigation. Such reliance would promote more and longer lawsuits in an area, child custody and parental rights, where litigation is often least desired. As a result, a reversal would reward parties for turning a blind eye to the requirements of federal law and would encourage more litigation. Surely such an outcome could not be within Congress' intent, and such an outcome

would not be a practical and reasonable decision by this Court.

D. The Decisions of the Lower Courts Were in the Best Interests of Baby Girl and the Factual Findings of the Family Court are Entitled to Deference.

The lower courts properly applied the best interests analysis, and the decisions of the lower courts are in the best interests of Baby Girl. Despite attempts by Petitioners to characterize Birth Father as uninterested and disinclined to be an effective parent, the facts indicate quite the opposite. An analysis of those factors typically considered, including the character, fitness, and inclinations of the parent, and the psychological, physical, environmental, spiritual, educational, medicinal, family, emotional, and recreational needs of the child, *see Woodall*, 471 S.E.2d at 157, yields the conclusion that remaining with Birth Father would be in Baby Girl's best interests.

Birth Father "was excited to learn of the pregnancy and urged [Birth Mother] to move the wedding date forward" so that "she and the unborn child would have military health coverage during and after the pregnancy." Pet. App. 105a.[3] The relationship,

[3] This brief cites to the family court opinion that is reprinted in the sealed petition appendix. Like the opinion of the South Carolina Supreme Court, this brief uses only pseudonyms in referring to the parties and contains no personal identifying information.

however, became strained and Birth Mother "broke off the engagement . . . via text message." *Id*. at 3a. Birth Mother "sent a text message to [Birth] Father asking if he would rather pay child support or surrender his parental rights." *Id*. at 4a. Birth Father responded "that he would relinquish his rights," but Birth Father testified that he thought that he was relinquishing his rights to Birth Mother and not that he was consenting to adoption. *Id*. at 4a. At this point, "[a]ll attempts to contact [Birth Mother] by [Birth Father] and his family members were refused by [Birth Mother]." *Id*. at 106a. After Birth Father's attempts to contact Birth Mother were rebuffed, there was no further communication until "days before [Birth] Father was scheduled to deploy to Iraq," when Birth Father was served with legal papers declaring that "he was not contesting the adoption of Baby Girl." Pet. App. 8a-9a. Realizing that Birth Mother had relinquished her rights to Petitioners, Birth Father sought a stay of the adoption proceeding and initiated a custody action. *Id*. at 9a. Though the downfall of the relationship was perhaps bitter and difficult, these facts indicate that Birth Father wanted to be involved in the life of his child, and when faced with the prospect of Baby Girl being adopted, Birth Father immediately acted to preserve his right to love and care for his child.

Additionally, Birth Father is a responsible individual who is fit to be a loving father. Birth Father "was deployed to Iraq, where he served this country honorably during Operation Iraqi Freedom for a

period of nearly one year." *Id.* at 108a. The family court noted that Birth Father "is the father of another daughter," *id*. at 126a-127a, so he has experience with the demands of parenting. "The undisputed testimony is that [Birth Father] is a loving and devoted father. Even [Birth Mother] herself testified that [Birth Father] was a good father." *Id*. Clearly, Birth Father is well-qualified to provide the loving care that Baby Girl deserves. The South Carolina Supreme Court agreed, stating that "we cannot say that Baby Girl's best interests are not served by the grant of custody to [Birth Father], as Appellants have not presented evidence that Baby Girl would not be safe, loved, and cared for if raised by [Birth Father] and his family." *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 566 (S.C. 2012).

The facts of this case clearly support Birth Father's fitness to raise Baby Girl in a happy, loving home. The family court determined as much, and the Court should not disregard the findings of the family court, which occupies a "superior position to make credibility determinations." *Id*. at 637 (citing *Lewis v. Lewis*, 709 S.E.2d 650, 651, 654 (S.C. 2011)); *see also Lewis*, 709 S.E.2d at 652 ("The . . . standard of review does not relieve an appellant from demonstrating error in the trial court's findings of fact.")); *see also In re Welfare of L.N.B.-L*, 237 P.3d 944, 965 (Wash. Ct. App. 2010) ("We place 'very strong reliance' on the juvenile court's determination of what would be in the child's best interests." (quoting *In re Interest of Pawling*, 679 P.2d 916, 921 (Wash. 1984))). Additionally,

this Court has repeatedly held that "concurrent findings of fact by two courts below," as in the present case, will not be reviewed "in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *see also Exxon Co. v. Sofec*, 517 U.S. 830, 840 (1996) (finding mere "tension" in the findings of the courts below to be inadequate to meet the "obvious and exceptional" standard for the review of concurrent factual findings of the lower courts); *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944) ("It must be a strong case in which this court will set aside these concurrent findings of two courts."). In light of the compelling facts indicating Birth Father's fitness to care for Baby Girl, neither Petitioners nor their *amici* have succeeded in "demonstrating error," *Lewis*, 709 S.E.2d at 652, in the findings of fact of the Family Court, which was in a "superior position to make credibility determinations." *Adoptive Couple*, 731 S.E.2d at 637. Because Birth Father has the ability, and is likely, to provide loving care to Baby Girl, along with the fact that Baby Girl's interests are furthered by remaining in her culture, to remove Baby Girl from Birth Father would cause irreparable harm.

CONCLUSION

The decision of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

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