No. 12-399

In the Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, a minor child under the age of fourteen years, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

On Writ of Certiorari to the South Carolina Supreme Court

BRIEF OF THE STATES OF ARIZONA, ALASKA, CALIFORNIA, COLORADO, CONNECTICUT, GEORGIA, IDAHO, ILLINOIS, MAINE, MICHIGAN, MISSISSIPPI, MONTANA, NEW MEXICO, NEW YORK, NORTH DAKOTA, OREGON, WASHINGTON AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS BIRTH FATHER AND THE CHEROKEE NATION

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INTEREST OF THE AMICI CURIAE STATES

Amici States share a compelling parens patriae interest in protecting children. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982). To advance that interest, States have enacted laws to promote the prompt establishment of paternity for children born out of wedlock and to secure adoptions for those children whose parents cannot parent them or chose to relinquish them. In cases involving Indian children as defined by the federal Indian Child Welfare Act, 25 U.S.C. §§ 1901 through 1963 (ICWA or the Act), state courts are charged with protecting the rights of Indian children and tribes and, in doing so, are tasked with interpreting and applying ICWA to child-custody proceedings.

States and tribes have collaborated to ensure that the mandates and spirit of ICWA are fulfilled. *See* U.S. Gov't Accountability Office, GAO-05-290, Indian Child Welfare Act (2005) at 28-29 (outlining various levels of cooperation among state and tribal entities regarding child-welfare policies). As of 2005, twenty-three States reported having a partnership agreement with a tribe or tribes. *Id.* at 49. The amici States are therefore interested in ensuring that state procedures for adoptions meet ICWA requirements.

In this case, the South Carolina Supreme Court held that Respondent Birth Father had met ICWA's statutory definition of "parent" and therefore had "standing to invoke the protection of ICWA." *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 559 (S.C. 2012). The court rejected the so-called "existing Indian family" exception to ICWA, *id.* at 559 n.17, and Petitioners'

claim that Father did not qualify as a "parent" under ICWA because he had not met state-law requirements for establishing paternity, *id.* at 560. The court held that Father had "met the ICWA's definition of 'parent' by both acknowledging his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for adoption and establishing his paternity through DNA testing," and thus met "all that is required under the ICWA" to acknowledge or establish paternity. *Id.* at 560.

Because the existing Indian family exception is contrary to ICWA and because allowing unwed fathers to acknowledge or establish paternity through well-accepted and prompt action is consistent with ICWA and with the States' interest in ensuring safe and stable adoptions under state law, amici States urge the Court to affirm the decision of the South Carolina Supreme Court.

SUMMARY OF THE ARGUMENT

Congress enacted ICWA to address its concerns about the removal of Indian children from their families and tribes, their placement with families not connected to the children's Indian culture, and the continued existence of tribes without access to future generations. 25 U.S.C. § 1901(3), (4). Consequently, ICWA provides "minimum Federal standards" to ensure that the rights of Indian children, their parents, and their tribes are acknowledged and respected in child-custody proceedings. 25 U.S.C. § 1902.

The judicially created existing Indian family exception to ICWA is contrary to most States' statutory

or decisional law because it cannot be squared with ICWA's language. The Act protects Indian children, their parents, and their tribes regardless of the Indian parent's custodial status. As a result, a non-Indian mother placing an Indian child for adoption must still comply with ICWA's placement preferences or demonstrate good cause to deviate from them. *See* 25 U.S.C. § 1915(a). By enacting ICWA, Congress established a presumption that placement according to ICWA's placement preferences served Indian children's best interests. The Act also affords rights to the Indian child's tribe, and a non-Indian mother cannot unilaterally abrogate those rights even when she has sole custody of the Indian child.

And the existing Indian family exception is contrary to ICWA's purpose and objectives. Thus the twenty States that have rejected the exception have recognized that Congress enacted ICWA to stem the tide of forced assimilation of Indian children. These States properly look to the tribe as the sole authority to determine whether the child is a member of the tribe or is eligible for membership.

The Act's rights are guaranteed to the "parent" of an Indian child. The Act defines parent to include an unwed father only if he has "acknowledged or established" paternity. 25 U.S.C. § 1903(9). The South Carolina Supreme Court correctly concluded that Father is a parent under ICWA. As long as a father has taken timely, affirmative steps to indicate his interest in and ability to parent his child, he has sufficiently "acknowledged or established" paternity under ICWA. Here, Father filed a written acknowledgment of paternity as soon as he realized

that Baby Girl had been placed for adoption and confirmed his biological paternity through DNA testing. By acknowledging and establishing paternity, an unwed father secures the right to a hearing to determine whether he is entitled under ICWA to have the child placed with him.

By allowing interested and able fathers to come forward and secure ICWA's protections, States further ICWA's purpose in preventing the unwarranted wholesale removal of Indian children from their tribes and families and ensuring that adoptions of Indian children cannot later be undone because of the failure to meet one of ICWA's requirements. Early and complete compliance with ICWA ensures the security and stability of adoptive families as well as tribes and Indian families. Accordingly, this Court should affirm the South Carolina Supreme Court's holding rejecting the existing Indian family exception and recognizing that Father had established and acknowledged paternity under ICWA.

ARGUMENT

I. The Act Applies to Proceedings Involving an Indian Child Regardless of the Child's Membership in an "Existing Indian Family" or the Parent's Custodial Status.

A. Twenty States Have Correctly Rejected the Existing Indian Family Exception Because It Is Inconsistent with the Language and Purpose of ICWA.

In 1982, the Kansas Supreme Court created what would come to be known as the "existing Indian family" exception to ICWA. *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982). In *Baby Boy L.*, the court interpreted ICWA to "set minimum standards for the removal of Indian children from their existing Indian environment" but not to protect "an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be." 643 P.2d at 175. Thereafter, other States adopted the exception.[1]

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[1] *See S.A. v. E.J.P.*, 571 So. 2d 1187, 1189-90 (Ala. Civ. App. 1990); *Matter of Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988); *Rye v. Weasel*, 934 S.W.2d 257, 263 (Ky. 1996); *Hampton v. J.A.L.*, 658 So.2d 331, 334-35 (La. App. 1995); *In Interest of S.A.M.*, 703 S.W.2d 603, 608-09 (Mo. App. 1986); *In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009); *Matter of Baby Boy D.*, 742 P.2d 1059, 1064 (Okla. 1985); *Claymore v. Serr*, 405 N.W.2d 650, 654 (S.D. 1987); *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880 at *16 (Tenn. App. Nov. 19, 1997); *In re Adoption of Crews*, 825 P.2d 305, 310 (Wash. 1992). However, the Alabama and Indiana courts subsequently determined that the exception did not apply when the child's mother was Indian. *See Ex parte C.L.J.*, 946 So. 2d 880, 889 (Ala. Civ. App. 2006), and *Matter of D.S.*, 577 N.E.2d 572, 574

Most States that have addressed the existing Indian family exception have rejected it from the outset, either legislatively (Iowa, Minnesota, and Wisconsin)[2] or judicially (Alaska, Arizona, Colorado, Idaho, Illinois, Michigan, Montana, New Jersey, New York, North Dakota, Oregon, and Utah).[3] The California Legislature eliminated the existing Indian family exception by statute, replacing an earlier statute that had been held unconstitutional by one division of its appellate court. Cal. Welf. & Inst. Code § 224(c), replacing Cal. Welf. & Inst. Code § 360.6(c); *see In re Santos Y.*, 112 Cal. Rptr.

(Ind. 1991), respectively. The Oklahoma and Washington legislatures abrogated the existing Indian family exception. *See* Okla. Stat. Ann. tit. 10 §§ 40.1, 40.3(B); Wash. Rev. Code Ann. § 13.34.040(3) (formerly at Wash. Rev. Code Ann. § 13.04.060), respectively. And the courts of South Dakota and Kansas rejected it through superseding court opinions. *See In re Adoption of Baade*, 462 N.W.2d 485, 489-90 (S.D. 1990); *In re A.J.S.*, 204 P.3d 543, 549 (Kan. 2009).

[2] *See* Iowa Code Ann. § 232B.5(2); Minn. Stat. Ann. § 260.771(2); Wis. Stat. Ann. § 938.028(3)(a).

[3] *See In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989); *Michael J. Jr. v. Michael J. Sr.*, 7 P.3d 960, 963-64 (Ariz. App. 2000); *In re N.B.*, 199 P.3d 16, 21 (Colo. App. 2007); *In re Baby Boy Doe*, 849 P.2d 925, 931-32 (Idaho 1993); *In re Adoption of S.S.*, 622 N.E.2d 832, 839 (Ill. App. 1993) (rev'd on other grounds by *Adoption of S.S.*, 657 N.E.2d 935 (Ill. 1995) (*S.S. II*)); *In re Elliott*, 554 N.W.2d 32, 35 (Mich. App. 1996); *In re Adoption of Riffle*, 922 P.2d 510, 514 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932-33 (N.J. 1988); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 322-23 (N.Y. App. Div. 2005); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *Quinn v. Walters*, 845 P.2d 206, 208-09 (Or. App. 1993) (*Quinn I*) (rev'd on other grounds by *Quinn v. Walters*, 881 P.2d 795 (Or. 1994) (*Quinn II*)); *D.J.C. v. P.D.C.*, 933 P.2d 993, 999 (Utah App. 1997).

2d 692 (Cal. App. 2001). Previously, California courts had been split regarding the applicability of the existing Indian family exception, with some appellate districts applying it under certain circumstances,[4] while others rejected it[5] or were split.[6] Since the legislature acted, no California court has expressly applied the existing Indian family exception, but the court has acknowledged its inapplicability. *In re Vincent M.*, 59 Cal. Rptr. 3d at 323.

The Arizona Court of Appeals explained several reasons for joining the growing number of jurisdictions that rejected the judicially created exception. *Michael J. Jr.*, 7 P.3d at 963-64. In addition to other reasons, the court found that "[a]dopting an existing Indian family exception frustrates the policy of protecting the tribe's interest in its children" and "the interests of Indian children," "the language of ICWA contains no such requirement or exception," and ICWA's legislative history supports the "decision not to impose an existing Indian family requirement." *Id.* The Arizona Court of Appeals and the other state courts and legislatures that have rejected the existing Indian family exception have correctly concluded that it is inconsistent with ICWA's language and purpose.

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[4] *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. App. 1996).

[5] *In re Alexandria Y.*, 53 Cal. Rptr. 2d 679, 686 (Cal. App. 1996); *In re Suzanna L.*, 127 Cal. Rptr. 2d 860, 868 (Cal. App. 2002).

[6] *In re Adoption of Lindsay C.*, 280 Cal. Rptr. 194, 201 (Cal. App. 1991); *In re Adoption of Hannah S.*, 48 Cal. Rptr. 3d 605, 610 (Cal. App. 2006); *In re Alicia S.*, 76 Cal. Rptr. 2d 121, 129 (Cal. App. 1998); *In re Vincent M.*, 59 Cal. Rptr. 3d 321, 323 (Cal. App. 2007).

B. The Existing Indian Family Exception Is Contrary to ICWA's Provisions that Protect Indian Children, Their Parents, and Their Tribes Regardless of the Parent's Custodial Status.

Limiting ICWA's protections to those who demonstrate that an Indian child comes from an "existing Indian family" ignores ICWA's plain-language provisions regarding rights afforded to the tribe, the child, and to the "parent" without regard for the parent's custodial status.

The Act defines an "Indian child"[7] and a "parent."[8] It does not define or use the term "Indian parent" or otherwise differentiate between the rights of the parents when one parent is Indian and the other is not. *See, e.g., In re T.S.W.*, 276 P.3d 133, 143 (Kan. 2012); *K.N. v. State*, 856 P.2d 468, 474 n.8 (Alaska 1993); *In re Jonathon S.*, 28 Cal. Rptr. 3d 495, 498 (Cal. App. 2005). It is the child's status as an "Indian child" that determines ICWA's applicability.[9]

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[7] An "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

[8] A "parent" is "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9).

[9] *See, e.g.*, 25 U.S.C. §§ 1911(a) (exclusive tribal jurisdiction for "any child custody proceeding involving an Indian child"); 1911(b),

The Indian child has rights in addition to those of his custodial parent. For example, ICWA requires that in "*any* adoptive placement of an Indian child under State law," preference must be given to a member of the child's extended family, tribe, or other Indian families, unless good cause is shown to deviate from those preferences. 25 U.S.C. § 1915(a) (emphasis added). Those placement preferences are "[t]he most important substantive requirement imposed on state courts." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989). Thus, ICWA creates a "statutory presumption that placement consistent with ICWA preferences is in the best interests of the child." *Navajo Nation v. Ariz. Dep't of Econ. Sec.*, 284 P.3d 29, 36 (Ariz. App. 2012); *accord In re C.H.*, 997 P.2d 776, 780 (Mont. 2000); *Matter of Custody of S.E.G.*, 521 N.W.2d 357, 362 (Minn. 1994); *Matter of K.R.C.*, 238 P.3d 40, 48 (Or. App. 2010); *People ex rel. A.R.*, No. 11CA1448, 2012 WL 5457416, at *3 (Colo. App. Dec. 27, 2012).

There is no exception to ICWA's placement preferences for a placement selected by a non-Indian

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(c) (transfer of jurisdiction of and right of intervention in State court proceedings regarding "an Indian child"); 1912(a) (notice required in involuntary proceedings involving "an Indian child"); 1912(c) (examination of records of "proceeding[s] under State law involving an Indian child"); 1912(d) (active efforts must be made to prevent the breakup of an Indian family in any proceeding for "foster care placement of, or termination of parental rights to, an Indian child"); 1913(c) (withdrawal of consent for a voluntary termination of parental rights to an Indian child); 1915 (placement preferences for Indian children); 1922 (emergency removal of Indian children).

mother, regardless of her custodial status. *See Holyfield*, 490 U.S. at 40 n.13 (noting that the state court had failed to apply ICWA's adoptive placement preferences in a voluntary adoption proceeding). The language of the statute is clear: if the child is an "Indian child," then the party placing the child must meet the placement preferences or demonstrate good cause to deviate from them. 25 U.S.C. § 1915; *see also* The Bureau of Indian Affairs' *Guidelines for State Courts; Indian Child Custody Proceedings* (hereinafter BIA Guidelines) F.3(b), 44 Fed. Reg. 67,584, 67,594 (1979). That is true whether the State, or the unwed mother, is the legal custodian of the Indian child.[10]

A parent's preference for a particular placement is only one factor to consider in determining whether good cause exists to deviate from ICWA's placement preferences. *See* 25 U.S.C. § 1915(c); BIA Guideline F.1(c), F.1 Commentary, F.3 Commentary, 44 Fed. Reg. at 67,594. A parent's selection of a particular adoptive parent cannot by itself override ICWA's placement preferences. *See In re T.S.W.*, 276 P.3d at 145, 148; *but see In re B.B.A.*, 224 P.3d 1285, 1288 (Okla. Civ. App.

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[10] States that enacted statutes explicitly rejecting the existing Indian family exception often specify that ICWA "appl[ies] to any Indian child custody proceeding regardless of whether the Indian child is in the legal custody or physical custody of an Indian parent, Indian custodian, extended family member, or other person." *See* Wis. Stat. Ann. § 938.028(3)(a); *accord* Okla. Stat. Ann. tit. 10 §§ 40.1, 40.3(B); Minn. Stat. Ann. § 260.771(2). By so doing, States made express their disagreement with those state courts that had adopted the flawed rationale underlying the exception.

2009) (suggesting that parental preference alone may be sufficient to support a "good cause" finding).

And States cannot provide "additional protections to some parties to a child custody proceeding [that would] deprive other parties of rights guaranteed to them by the Act." BIA Guidelines, Introduction, 44 Fed. Reg. at 67,585. In this case, as long as Father has acknowledged and established paternity in accordance with ICWA,[11] he has the right to ICWA's protections as a parent of an Indian child. *See, e.g.*, 25 U.S.C. §§ 1911(b) (giving either parent the option to petition for transfer or object to a transfer of state court proceedings to tribal court); 1912(a) (providing for specific notice to the child's parent and allowing the parent additional time to prepare for pending proceedings); 1912(b) (granting an indigent parent the right to court-appointed counsel if it is in the child's best interest); 1912(e) and (f) (requiring a finding that the child's continued custody by "the parent" is likely to result in serious emotional or physical damage to the child); 1913 (outlining special considerations for a parent's voluntary consent to a foster-care placement of or termination of parental rights to an Indian child); 1914 (allowing "any parent" to petition a court to invalidate proceedings upon a showing of a violation of certain provisions); 1916 (allowing "a biological parent" to petition for return of a child after an order granting adoption of that child by another has been vacated or set aside). The existing Indian family exception ignores these protections.

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[11] See Section II of this Argument *infra*.

Similarly, ICWA affords numerous rights to the child's tribe, and those rights cannot be abrogated by the actions of one or both of the child's parents. *See Holyfield*, 490 U.S. at 49-50 (delineating tribal rights under ICWA and holding that compliance with "ICWA's jurisdictional *and other provisions*" cannot be premised on "the wishes of individual parents," but rather must take into account "the interests . . . of the tribes themselves") (emphasis added).[12]

Allowing a parent—particularly a non-Indian parent with no ties to the tribe—to preclude the tribe from any involvement in the case simply by consenting to the child's adoption does not comport with the language or the purposes of ICWA. *See Child of Indian Heritage*, 543 A.2d at 932 (holding that "the application of the ICWA to voluntary private placement adoptions is not inconsistent with the purposes of the Act, particularly in cases in which an unwed father has not consented to the adoption"). The Act requires balancing the rights of the mother against those of the child, father, and the tribe:

> while an unwed mother might have a legitimate and genuine interest in placing her child for adoption outside of an Indian environment, if

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[12] A tribe's right to notice may be limited in a voluntary adoption proceeding where a parent requests anonymity. *See* 25 U.S.C. §§ 1912(a) (providing for notice in "any *involuntary* proceeding"), 1915(c) (allowing the court to consider a consenting parent's request for anonymity when making placement determinations); BIA Guideline F.1(c), F.1 Commentary, 44 Fed. Reg. at 67,594; *Matter of Baby Boy J.*, 944 N.Y.S.2d 871, 874-75 (N.Y. Surrog. 2012).

> she believes such a placement is in the child's best interests, consideration must also be given to the rights of the child's father and Congress' belief that, whenever possible, it is in an Indian child's best interests to maintain a relationship with his or her tribe.

Id., 543 A.2d at 932. "Congress determined to subject such placements to the ICWA's jurisdictional and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents." *Holyfield*, 490 U.S. at 50.

C. The Existing Indian Family Exception Frustrates Congress's Purposes and Objectives for Enacting ICWA.

As a result of increased urban employment opportunities, concerted public and private efforts at assimilation, and generations of deliberate separation of families, many Indian individuals lost ties to their tribes and reservations, effectively preventing them from creating "Indian families" as understood by the courts that have adopted that doctrine. Because Congress intended to protect "the continued existence and integrity of Indian tribes" when it enacted ICWA, 25 U.S.C. § 1901, the existing Indian family exception is inconsistent with Congress's purposes and objectives.

In 1978, Congress enacted ICWA

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards 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. . . .

25 U.S.C. § 1902. Congress did so recognizing both "that an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies," and "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3), (4).

Congress also recognized that state courts were ill-suited to determine an Indian child's affiliations. *See* 25 U.S.C. § 1901(5) (noting that "the States . . . ha[d] often failed to recognize essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families"). The BIA Guidelines noted that ICWA "ma[de] clear that the best source of information on whether a particular child is Indian is the tribe itself." BIA Guideline B.1 Commentary, 44 Fed. Reg. at 67,586.

Consequently, allowing a state court to gauge whether a child's family "existed" as an "Indian family" before applying ICWA's protections ignores the reality of generations of cultural decimation that had ensured

that children would not or could not be part of an existing Indian family. California's second appellate district thought it "almost too obvious to require articulation that 'the unique values of Indian culture' (25 U.S.C. § 1902) will not be preserved in the homes of parents who have become fully assimilated into non-Indian culture." *Bridget R.*, 49 Cal.Rptr. 2d at 526. What the court failed to take into account, however, was that it was actions precisely like those of the parents in that case—deliberately placing Indian children for adoption outside of a culture that they had been taught was inferior—that led to the "assmiliat[ion] into non-Indian culture" and threatened the continued existence of that culture and the sovereign tribes to which it belonged.

Lastly, allowing a state court to gauge whether an Indian child comes from an existing Indian family essentially negates the tribes' interests in ensuring their own survival by looking to the preservation of their ties to future generations. It gives parents—who may wish to distance themselves from their tribes for a variety of reasons—the ability to preclude the tribes from protecting their rights to their most "vital" resource. 25 U.S.C. §1901(3).

II. Allowing Unwed Fathers of Indian Children to Timely Acknowledge or Establish Paternity by Means Other than Strict Compliance with State Paternity Laws Comports with ICWA's Purpose and Objectives and Supports the States' Goal of Efficient and Stable Adoptions of Indian Children.

Under ICWA, a "parent" is "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom." 25 U.S.C. § 1903(9). The definition explicitly excludes, however, "the unwed father where paternity has not been acknowledged or established." *Id.* The Act is silent regarding how an unwed father may "acknowledge[ ] or establish[ ]" paternity.

Petitioners and their amici argue that the only way to determine whether a father meets ICWA's definition of a "parent"—as limited by the second sentence of Section 1903(9)—is to look solely to state laws delineating which fathers have adoption consent rights. (*See, e.g.,* Petitioners' Brief at 20; Brief of Adoptive Parents Committee, Inc., at 6; Brief of Birth Mother at 11-12.) But when Congress intended "that ICWA terms be defined by reference to other than federal law, it stated this explicitly." *Holyfield*, 490 U.S. at 47 n.22 (citing references in § 1903(2) and (6) to tribal law or custom and to state law). Although an unwed father who has acknowledged or established paternity under state law has clearly satisfied the requirements to be considered a "parent" under ICWA, the South Carolina Supreme Court correctly determined that ICWA's definition of "parent" does not depend on state law.

Nothing in ICWA's plain language requires an unwed father to comply with State paternity-establishment requirements in order to acknowledge or establish paternity for purposes of ICWA. "Primary responsibility for interpreting . . . language used in the Act [that is not expressly delegated to the Secretary of the Interior to interpret] rests with the courts that decide Indian child custody cases." BIA Guidelines, Introduction, 44 Fed. Reg. at 67,584. This Court recognized that the purpose of ICWA "gives no reason to believe that Congress intended to rely on state law for the definition of a critical term." *Holyfield*, 490 U.S. at 44. In that case, the Court was not confronted with interpretation of § 1903(9), but instead with the term "domicile" as it relates to the fundamental jurisdictional provisions of ICWA. The definition of "parent" is no less significant, however, as it determines to whom ICWA's rights and responsibilities apply.

A. States Have Recognized the Acknowledgment or Establishment of Paternity for Purposes of ICWA by Means Other than Strict Compliance with State Statutes.

Considering the history and purpose of ICWA and the fundamental nature of the rights at stake, States have recognized that their statutory provisions for acknowledging or establishing paternity may not be the only ways that an unwed father may acknowledge or establish paternity sufficient to assert ICWA's protections and rights.

The Arizona Court of Appeals, for example, recognized that, because "ICWA does not . . . define how paternity can be acknowledged or otherwise detail any procedure to establish paternity," the court begins its analysis by "look[ing] to state law to determine whether paternity has been acknowledged or established." *Jared P. v. Glade T.*, 209 P.3d 157, 161 (Ariz. App. 2009). Although the father in that case had not adequately acknowledged or established paternity under methods recognized by Arizona law, the court continued its analysis and "recognized that a parent can 'acknowledge' paternity under ICWA by admission and genetic testing" even though he failed to file a formal paternity action. *Id.* (citing *Michael J. Jr.*, 7 P.3d at 961). The actions of the father in that case—challenging "the adoption agency's petition seeking to terminate his parental rights before the child was born," attempting to be present at the child's birth, filing a paternity action in Texas, writing a letter to the juvenile court, enrolling himself in the Cherokee Nation, submitting proof of his membership to the court, and complying with a court-ordered DNA test—were sufficient to constitute an acknowledgement or establishment of paternity under ICWA despite his failure to strictly comply with Arizona's paternity procedures. *Id.* at 162.

Other States have reached similar conclusions. *See Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011) ("to qualify as an ICWA parent an unwed father does not need to comply perfectly with state laws for establishing paternity, so long as he has made reasonable efforts to acknowledge paternity"); *Baby Boy Doe*, 849 P.2d at 932 (holding that the trial court had sufficient evidence to support a finding of a father's

paternity based on the father's application for the child's enrollment in the tribe and affidavit of paternity filed with the tribe as well as an affidavit filed by the father's sister that she had filed a state paternity affidavit on his behalf).[13]

However, failing to take adequate steps to assert parental rights is sufficient to defeat an unwed father's claim of parenthood under ICWA. *See Matter of Adoption of T.R.M.*, 525 N.E.2d 298, 313-14 (Ind. 1988) (noting that a father's failure to take any steps beyond writing a letter to the court objecting to his putative child's adoption and requesting counsel was insufficient to determine that he had acknowledged or established paternity).

In addition to the quality of steps taken, a father's timing in asserting his paternity is a factor that this Court and the States must consider. In *Lehr v. Robertson*, for example, the biological father took concrete steps to assert his paternity, but not until his child was two years old. *Lehr*, 463 U.S. 248, 262 (1983). A father must "[take] steps to acknowledge paternity" upon learning of his possible parenthood. *In re Baby Girl B.*, 67 P.3d 359, 366 (Okla. Civ. App.

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[13] *But see Baby Boy D.*, 742 P.2d at 1064 (defining acknowledging or establishing paternity as "acknowledged or established through the procedures available through the tribal courts, consistent with tribal customs, or through procedures established by state law"); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 172-73 (Tex. App. 1995) ("Congress intended to have the issue of acknowledgement or establishment of paternity determined by state law"); *Child of Indian Heritage*, 543 A.2d at 935 (Congress intended to defer to state or tribal standards for establishing paternity).

2003). However, the Texas appellate court rejected a tribe's contention that because ICWA uses the past tense in its requirement that a father has "acknowledged or established" his paternity, the father must have done so prior to the initiation of an adoption proceeding. *Yavapai-Apache Tribe*, 906 S.W.2d at 173-74. The court held:

> The ICWA does not set forth any time limits in which an unwed father must establish or acknowledge his paternity. . . . To hold that an unwed father must act before [court adoption or termination proceedings are initiated] or forever be prohibited from attaining parental status would dissuade such actions by biological fathers. This could not be what Congress envisioned. . . . In view of the events that were occurring at the time the ICWA was passed, and the reference to *Stanley* [*v. Illinois*, 405 U.S. 645] in the House Report [H.R. Rep. No. 95-1386 (1978), 1978 U.S.C.C.A.N. 7530], we do not accept that Congress intended to exclude unwed fathers from the definition of "parent" from the moment any action is taken by an Indian tribe concerning child custody if the fathers have not yet formally established or acknowledged their paternity. The construction of section 1903(9) suggested by [the tribe] would tend to further erode the family unit at a time when this country and Indian tribes are involved in a struggle to maintain the integrity of the family.

Id. But States have recognized the importance of taking timely assertive steps, given the rights and needs of the Indian child involved. *See Maricopa Cnty.*

Juv. Action No. A-25525, 136 Ariz. 528, 667 P.2d 228 (Ariz. App. 1983) (holding that a father's failure to acknowledge paternity until thirty-one months after the initiation of an adoption action and three years after the child's birth was inadequate).

Some States have required that an unwed father acknowledge or establish paternity before the entry of an adoption order or the termination of his parental rights. *See Child of Indian Heritage*, 543 A.2d at 933; *Quinn I*, 845 P.2d at 208. Taking some action to establish or acknowledge paternity prior to the entry of a final order of adoption recognizes the "turning point in the status of the natural and adoptive parents" prior to which "there can be no expectation on the part of the adopting parents that the legally tentative decision to place the child for adoption will not be revoked." *Child of Indian Heritage*, 543 A.2d at 939; *see also* 25 U.S.C. § 1913(c) (allowing a parent to withdraw a voluntary consent to adoption at any time prior to a final decree of adoption). Clearly some unwed fathers may lack the ability to take action prior to the entry of a termination or adoption order, often because they lacked notice of the mother's pregnancy or the pending adoption, or had otherwise been precluded from taking action. In such cases, the father should act as soon as practicable after discovering "that the mother no longer had custody of their child and that the child had been placed for adoption." *Child of Indian Heritage*, 543 A.2d at 936. Ultimately the determination of whether a father has taken timely or adequate steps to acknowledge or establish paternity is a fact-specific one best left to the state courts.

In this case, the South Carolina Supreme Court correctly concluded that Father "met the ICWA's definition of 'parent' by both acknowledging his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for adoption and establishing his paternity through DNA testing." *Adoptive Couple*, 731 S.E.2d at 560.

B. The States' Interest in Secure and Stable Adoptions Is Furthered by Recognizing that Fathers Can Acknowledge or Establish Paternity for Purposes of ICWA Even Absent Strict Compliance with Varied State Laws for Establishing Paternity.

Although States have an interest in ensuring the security and stability of adoptions of children born in a state or being effectuated in a state, Congress clearly shared that interest. *See Holyfield*, 490 U.S. at 46 (noting that "a statute under which different rules apply from time to time to the same child, simply as a result of her transport from one State to another, cannot be what Congress had in mind"). Applying different state paternity laws to proceedings that are governed by ICWA—depending on where the father, mother, child, and adoptive parent reside—could result in confusion or "an adoption brokerage business" as contemplated in *Holyfield*, 490 U.S. at 45-46 n.20. Similarly, such a reading of ICWA does nothing to further States' interests in ensuring that their children's and adoptive parents' rights are protected regardless of where a child is born, where the father resides, or where the adoption ultimately takes place.

This Court has recognized that matters of family relationships are traditionally left to the States to define and determine. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004). Nevertheless, the Federal government has conditioned States' receipt of funds on the enactment of State laws to, *inter alia*, establish "[e]xpedited administrative and judicial procedures . . . for establishing paternity." 42 U.S.C. § 666(a)(2). To that end, States have developed means by which an unwed father may assert parental rights to his biological children. Fathers may voluntarily acknowledge their paternity or establish a presumption of paternity by, for example, supporting the child, marrying the child's mother, or undergoing a DNA test resulting in confirmation of biological paternity.[14] *See* Jeffrey A. Parness, *New Federal Paternity Laws: Securing More Fathers at Birth for the Children of Unwed Mothers*, 45 Brandeis L.J. 59 (2006) (discussing various State methods for paternity establishment). In addition to formal court processes, an illegitimate child's father may secure parental rights if he openly acknowledges the child; exercises custody; and provides supervision, support, and care for the child, *see, e.g., State ex rel. T.A.B. v. Corrigan*, 600 S.W.2d 87, 91-92 (Mo. App. 1980), or "seasonably demonstrate[s] a meaningful intent and a continuing capacity to assume responsibility with respect to the supervision,

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[14] Although mere biology may not be enough to acknowledge or establish paternity under ICWA, the Act clearly contemplates its importance. Indian children often obtain their status through their biological connection to a member of an Indian tribe, 25 U.S.C. § 1903(4), evincing Congress's recognition of the importance of that biological connection. *See also In re E.G.*, 88 Cal.Rptr. 3d 871, 872-73 (Cal. App. 2009).

protection and care of the child," *State ex rel. J.D.S. v. Edwards*, 574 S.W.2d 405, 408-09 (Mo. 1978).

Most States have established putative father registries, through which an unwed father can claim his offspring prior to or shortly after the child's birth by filing a written notice with the State.[15] In most cases, by filing a notice with the registry, the father establishes his claim and is thereby entitled to notice of any adoption proceeding regarding his child. Similarly, fathers may file voluntary acknowledgements of paternity to secure their parental rights.[16]

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[15] *See* Ala. Code § 26-10C-1; Ariz. Rev. Stat. Ann. § 8-106.01; Ark. Code Ann. § 20-18-702; Colo. Rev. Stat. § 19-5-105; Conn. Gen. Stat. Ann. § 46b-172a; Fla. Stat. Ann. § 63.054; Ga. Code Ann. § 19-11-9; Haw. Rev. Stat. Ann. § 578-2(d)(5); Idaho Code Ann. § 16-1513; 750 Ill. Comp. Stat. Ann. 50/12.1; Ind. Code. Ann. § 31-19-5-1 to -25; Iowa Code Ann. § 144.12A; La. Rev. Stat. Ann. § 9:400; Mass. Gen. Laws Ann. ch. 210, § 4A; Mich. Comp. Laws Ann. § 710.33; Minn. Stat. Ann. § 259.52; Mo. Ann. Stat. § 192.016; Mont. Code Ann. § 42-2-202; Neb. Rev. Stat. Ann. § 43-104.01; N.H. Rev. Stat. Ann. § 170-B:6(I)(b); N.M. Stat. § 32A-5-20; N.Y. Soc. Serv. Law § 372-c; Ohio Rev. Code Ann. § 3107.062; Okla. Stat. Ann. tit. 10 § 7506-1.1; Or. Rev. Stat. § 109.096; 23 Pa. Cons. Stat. Ann. § 5103; Tenn. Code Ann. § 36-2-318; Tex. Fam. Code Ann. § 160.401; Utah Code Ann. § 78B-15-402; Vt. Stat. Ann. tit. 15A, § 1-110; Wis. Stat. Ann. § 48.025; Wyo. Stat. Ann. § 1-22-117.

[16] *See, e.g.,* Ala. Code § 26-11-2; Ariz. Rev. Stat. Ann. § 25-812; Ark. Code Ann. § 20-18-408; Idaho Code Ann. § 7-1106; Ind. Code Ann. § 16-37-2-2.1(b)(1)(B); 750 Ill. Comp. Stat. Ann. 45/5(a)(3); Md. Code Ann., Fam. Law § 5-1028(v)-(vii); Miss. Code Ann. § 93-9-28; Tex. Fam. Code Ann. § 160.301.

The State's ultimate goal is served when unwed fathers of Indian children are able to acknowledge or establish paternity by taking affirmative steps which may or may not exactly meet state-law requirements for acknowledging or establishing paternity. This facilitates the permanency and stability of Indian children's adoptions by requiring immediate ICWA compliance to prevent placement-disrupting litigation. A father who asserts his rights in a timely, meaningful way secures the status of a "parent" under ICWA. This does not mean that such a father is entitled to immediate custody or that the child's adoption by the proposed adoptive parent is foreclosed.[17] It simply means that the father is entitled to notice of the proceedings (25 U.S.C. § 1912(a)) and a hearing to determine whether his custody of the child is likely to result in serious emotional or physical damage to the child (§ 1912(e), (f)) and whether the continued placement with the adoptive parent meets ICWA's placement preferences or there is good cause to deviate from them (§ 1915).[18] When a capable father takes

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[17] Petitioners and their amici cite scenarios where fathers fail to assume any paternal responsibility or mistreat the mothers of Indian children. (*See, e.g.,* Petitioners' Brief at 25-27; Brief of American Academy of Adoption Attorneys at 19-24). But in those cases, it is likely that the child's adoption will proceed as anticipated by the mother who consents. In such cases, fathers will continue to fail to avail themselves of means of acknowledging or establishing paternity—rendering them unable to claim the status of "parent" under either ICWA or state law—or the courts will deny them custody of their children and terminate their rights based on their inability to safely parent the child.

[18] Just as the actions of a custodial non-Indian mother cannot unilaterally abrogate the Indian child's tribe's right to notice, an

concrete steps to gain custody of a wanted child, his interests will not be foreclosed merely because he has not successfully complied with the requirements for establishing paternity in a state with which he may have no contacts other than his child's presence there.

Indian child's father's action or inaction with respect to the establishment or acknowledgment of paternity does not affect the tribe's rights regarding the Indian child and the application of ICWA.

CONCLUSION

For the foregoing reasons, this Court should affirm the holding of the South Carolina Supreme Court in favor of Respondents Birth Father and the Cherokee Nation.

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