No. 12-399

IN THE

Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

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

Respondents.

On Writ of Certiorari to the South Carolina Supreme Court

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

(1) Whether a non-custodial parent can invoke the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-63, to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law.

(2) Whether ICWA defines "parent" in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.

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Rice v. Cayetano,
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TABLE OF AUTHORITIES—Continued

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Wisconsin v. Yoder,
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S.C. Code Regs. 114-4730 33

Guidelines for State Courts;
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OTHER AUTHORITIES

Cherokee Herritage Documentation Center,
Blood Quantum,
http://tinyurl.com/bloodquantum................. 44-45

Cherokee Nation, Tribal Registration,
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Chickasaw Nation,
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Choctaw Nation of Oklahoma,
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Compact Oxford English Dictionary (1972).... 33

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Indian Child Welfare Act of 1978,
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Indian Child Welfare Act of 1978: Hearing on S. 1214 Before the H. Comm. on Interior and Insular Affairs, 95th Cong. (1978) 39

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Page(s)

Infant Adoption Training Initiative, "Frequently Asked Questions About Adoption in Oklahoma", *available at* http://www.iaatp.com/docs/FAQs-OK.pdf................................ 9

B.J. Jones et al., The Indian Child Welfare Act Handbook (ABA, 2d ed. 2008) 41

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Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology "Plus" Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 Wm. & Mary J. Women & L. 47 (2004).................... 28

Jeffrey A. Parness & Zachary Townsend, *Legal Paternity (And Other Parenthood) After* Lehr *and* Michael H., 43 U. Tol. L. Rev. 225 (2012).. 9

Shirley C. Samuels, Ideal Adoption: A Comprehensive Guide to Forming an Adoptive Family (1990)... 48

Webster's Third New International Dictionary (1961).. 33

OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported at 731 S.E.2d 550 (S.C. 2012). Pet. App. 1a. The decision of the South Carolina family court is unpublished. *Id*. 103a.

JURISDICTION

The South Carolina Supreme Court affirmed the decision of the family court on July 26, 2012. Petitioners timely filed a petition for rehearing on August 9, 2012, which the court denied on August 22, 2012. Pet. App. 132a. The petition for a writ of certiorari was filed on October 1, 2012, and granted on January 4, 2013. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901–23, is reproduced in the Appendix, *infra*, 1a-18a.

INTRODUCTION

After unceremoniously renouncing his parental rights to his unborn daughter—Baby Girl—in a text message and making no effort to see Baby Girl for months after she was born, Father stepped in at the eleventh hour to block an adoption that was lawful and in the "best interests" of Baby Girl. Father claimed the authority to break up the adoptive family because Baby Girl is a "biological child of a member of an Indian tribe" and is herself eligible for membership. 25 U.S.C. § 1903(4). The state courts determined that state law and the best interests of Baby Girl must yield to federal law, and by command of court order Baby Girl was taken from petitioners

after the family had been together for over two years. The overriding question in this case is whether Congress intended that result. It did not and could not have.

The law that purportedly required this heart-wrenching outcome is the Indian Child Welfare Act (ICWA), passed by Congress in 1978 to reduce "harm to Indian parents and their children who were involuntarily separated by decisions of local welfare authorities" and to protect "the relationship between Indian tribes and Indian children domiciled on the reservation." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34, 52 (1989). Congress found that a "high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4). ICWA "'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society' . . . by establishing 'a Federal policy that, where possible, an Indian child should remain in the Indian community.'" *Holyfield*, 490 U.S. at 37 (quoting H.R. Rep. No. 95-1386, at 23 (1978)).

The state court's application of ICWA here transformed a statute that *prevents* the removal of Indian children from their homes into a statute that *required* the removal of an Indian child from her home. The facts of this case could hardly be further from the circumstances Congress addressed through ICWA. The state court construed ICWA to dictate the formation of a new Indian family and the creation of new parents and new custodial rights in a way that

perversely broke up an existing family. The court held that an unwed biological father of Indian lineage who has abandoned a pregnant mother and child may veto the non-Indian mother's lawful decision to place her child for adoption, even though under state law the father lacked custodial rights and his consent was not required for the adoptive placement.

The statutory text, structure, and purpose preclude the state court's interpretation. ICWA applies only to those unwed biological fathers who already have parental rights. The Act's definition of "parent" does not resuscitate rights that those men have repudiated and abandoned. And even if the definition of "parent" includes any proven biological father, ICWA still would not allow the creation of new Indian families and new custodial rights. Provision after provision in ICWA apply only when there is a preexisting Indian family and preexisting custodial rights.

Doubt on any of these issues would be resolved by the canon of constitutional avoidance. The creation of parental and adoption-veto rights from whole cloth under ICWA is based on race, unmoored to any legitimate federal interest in protecting existing tribal ties, culture, or self-government. Conferring superior rights on unwed fathers and tribes would also perniciously interfere with the fundamental rights of child-bearing women who choose adoptive placements, over single parenthood, for their children. Preferential rights also would disadvantage abandoned Indian children in desperate need of secure and stable homes. And allowing substantive parental rights to originate under federal law starkly displaces the historical police power of States to protect vulnerable women and encourage the adoption of abandoned children.

We do not doubt that some fathers who initially renounce a desire to be a parent may sincerely have a change of heart about parenthood upon learning of a mother's adoptive placement. But our society has long barred unwed fathers from joining the game of child-rearing too late. The law limits the window of opportunity for unwed fathers to embrace parenthood to protect a child's paramount interest in forming immediate and stable family bonds. The necessity of prompt decision-making comes even earlier for unwed pregnant mothers. ICWA does not upset these principles and does not permit the unwed father who acts too late under state law to veto the mother's adoptive placement.

We also assume that the Tribe here is sincere in believing that any child with any amount of Indian blood should be raised in an Indian home. But ICWA struck quite a different balance that does not countenance the chaos and heartbreak that would ensue if tribes or noncustodial fathers with no right to object to an adoption could later uproot Indian children from their adoptive families. ICWA does not, as respondents contend and the court below held, impose a Kafkaesque exercise requiring mothers and prospective adoptive parents to endeavor to "rehabilitate" absentee fathers and also go in search of an Indian family to raise the child.

STATEMENT

A. ICWA Overview

ICWA applies to a "child custody proceeding," such as an "adoptive placement," that involves an "Indian child." 25 U.S.C. § 1903(1)(iv). The Act defines an "Indian child" as "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." *Id.* § 1903(4). ICWA further defines "parent" as "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." *Id.* § 1903(9).

In any contested adoption proceeding where the court knows "that an Indian child is involved," ICWA requires notice be given ten days before the adoption hearing to the parent and applicable Indian tribe. *Id.* § 1912(a). The Act also provides the tribe with the opportunity to intervene. *Id.* § 1911(c).

In order to finalize an adoption of an Indian child, state courts must find "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." *Id.* § 1912(d). A court must also apply a special federal standard under section 1912(f) for the termination of parental rights in lieu of state law. Section 1912(f) states that "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt . . . that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." The Act further provides that "[i]n any adoptive placement of an Indian child under State law, a preference 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." *Id*. § 1915(a).

B. Facts of the Case

Baby Girl's biological parents—"Mother" and "Father"—self-identify respectively as Hispanic and Indian.[1] They became engaged to be married in December 2008. Pet. App. 2a. Father was then serving in the military and was stationed at Fort Sill, Oklahoma, while Mother lived four hours away in Bartlesville, Oklahoma. *Id.* 3a. One month after the engagement, Mother informed Father in January 2009 that she was pregnant. *Id*. 2a-3a; Trial Tr. 245-46. Mother asked him to assist with medical expenses before the first doctor's visit in February; Father refused. Pet. App. 4a. He withheld any financial support throughout the pregnancy, stating that he would offer support only if he and Mother were married. Trial Tr. 249. He pressed Mother to quit her job, move to the military base with her two other children, and marry him immediately so that his military pay would increase. *Id.* 487. When Mother demurred, the couple's relationship deteriorated, and Mother broke off the engagement in May 2009. Pet. App. 3a.

In June 2009, Mother asked Father if he would rather pay child support or surrender his parental rights. Father, who had by then known about the pregnancy for five months without giving any support to Mother, responded in a text message that he

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[1] As used herein, "Indian" has its statutory meaning. 25 U.S.C. § 1903(3). Our reply brief at the petition stage (at 5-6 n.1) stated that Baby Girl is 1/16 Cherokee. We have since reviewed records from Baby Girl's paternal grandparents reflecting that Baby girl is 3/256 Cherokee.

was renouncing his parental rights. *Id*. 4a. Father expected Mother to raise the baby by herself, explaining that he did not feel "responsible as a father" unless Mother married him. Trial Tr. 547. Father never provided Mother with financial assistance for pregnancy-related expenses, despite his ability to do so. Father did not accompany her to any doctor's visits, even though he admitted he was capable of doing so. *Id*. 248, 546-47. As Father explained:

> Q: [Y]ou were prepared to sign all your rights and responsibilities away to this child just so long as the mother was taking care of the child?
>
> Father: That's correct.
>
> Q: And you would not be responsible in any way for the child support or anything else as far as the child's concerned?
>
> Father: Correct.

Id. 545.

As a single mother with two other children, Mother decided in June 2009 to place Baby Girl for adoption. Pet. App. 4a. The Nightlight Christian Adoptions Agency in Oklahoma introduced Mother to petitioners ("Adoptive Parents"), who reside in Charleston, South Carolina, and had undergone seven unsuccessful attempts at in vitro fertilization. Trial Tr. 110. Adoptive Mother has a Ph.D. in developmental psychology and develops therapy programs for children with behavioral problems. Adoptive Father is a technician with Boeing. Mother selected Adoptive Parents so Baby Girl "can look up to them and they

can give her everything she needs when needed." Pet. App. 5a.

Mother had no legal obligation at that time to contact the Cherokee Nation, in which Birth Father is enrolled as a member. *Cf.* 25 U.S.C. § 1912(a) (notice required only ten days before court adjudication of custody). But to make an early determination of ICWA's applicability *vel non*, Mother's attorney wrote to the Cherokee Nation on August 21, 2009 (one month before Baby Girl's birth) to inquire about Father's tribal membership status. Mother's attorney wrote that "the baby's father is supposedly enrolled with the Cherokee Nation." JA 5. The letter provided Father's full name but misspelled his first name as "Dustin" rather than "Dusten." *Id.*; Pet. App. 6a. The letter noted that Father was "presently in the army at Fort Sill, Oklahoma." JA 6. The letter further noted that the prospective adoptive parents were not Indian. *Id.* The Cherokee Nation responded on September 3, 2009 that, based on the information provided, Father was not a member of the Cherokee Nation and that ICWA did not apply to the adoption proceeding. JA 8.[2]

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[2] Because respondents have previously imputed bad motives to the misspelling of Father's name, it bears mention that Father *himself* signed and submitted multiple documents during this litigation in which his first name was misspelled. Father's name is variously misspelled "Dustan" and "Dustin" on three checks that Father submitted in 2011. JA 70, 75, 76. Father also submitted a brief in which he was referred to as "Justen," Br. of Plaintiff at 9, *Brown v. Maldonado*, No. FP-10-13 (Okla. Dist. Ct., Wash. Cnty.), and filed a motion in which he was referred to as "Dustin," Motion for Emergency Relief at 4, Case No. 2009-DR-10-3803 (S.C. Fam. Ct. July 8, 2011); *see also* Pet. App. 98a n.71 (Kittredge, J., dissenting). The August 2009 letter also misidentifies Father's birthday. Mother did not know

Oklahoma law likewise places no obligation on mothers to inform unwed birth fathers of their adoption plans. Okla. Stat. tit. 10 §§ 7503-3.1, 7505; Infant Adoption Training Initiative, "Frequently Asked Questions About Adoption in Oklahoma" 4, *available at* http://www.iaatp.com/docs/FAQs-OK.pdf. That is typical. "Unwed mothers generally have no obligation to inform prospective fathers of pregnancies or of the post-birth whereabouts of offspring." Jeffrey A. Parness & Zachary Townsend, *Legal Paternity (And Other Parenthood) After* Lehr *and* Michael H., 43 U. Tol. L. Rev. 225, 243 (2012).

Adoptive Parents supported Mother financially and emotionally during her pregnancy and shortly after Baby Girl's birth. They spoke to Mother weekly, and Adoptive Mother traveled to visit her in Oklahoma in August 2009. They paid for medical expenses associated with the pregnancy. Pet. App. 5a.

Baby Girl was born on September 15, 2009. *Id*. 2a. Adoptive Parents were in the delivery room during the delivery, and Adoptive Father cut the umbilical cord. The next morning, Mother placed Baby Girl with Adoptive Parents and signed forms consenting to the adoption. *Id*. 7a. The adoption consent form identified Baby Girl's ethnicity as "Caucasian/Native American Indian/Hispanic." JA 19. Father sought no contact with Baby Girl in the months after her birth, despite knowing her due date. Pet. App. 8a; Trial Tr. 489-90.

When Baby Girl was placed with Adoptive Parents on September 16, 2009, Mother and Father had never

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Father's exact birthday, Trial Tr. 267, 310, and we note that in the Cherokee Nation's intervention notices, the Tribe twice listed the incorrect birth date for Baby Girl. JA 41, 54.

lived together, and Father had neither supported Mother with pregnancy-related expenses nor provided support for the child. Pet. App. 4a. Because Father "took no pro-active steps to protect his parental rights to the child" in the eight months after he became aware of Baby Girl's pending birth, *id*. 105a, Father's consent to the adoption was not required under South Carolina state law. S.C. Code § 63-9-310(A)(5). South Carolina law requires notice to putative fathers only thirty days before an adoption is finalized. S.C. Code § 63-9-730(E).

On September 16, 2009, Mother executed an Interstate Compact Placement Request form pursuant to the Interstate Compact on the Placement of Children (ICPC), Okla. Stat. tit. 10, § 577, which governs interstate adoption placements. Mother identified Father by name as Baby Girl's biological parent. JA 28. In the box titled "Ethnic Group," Baby Girl's ethnicity was reported as "Caucasian/Native American Indian/Hispanic," and Hispanic was circled by hand. *Id*. Oklahoma's ICPC administrator reviewed and signed the form on September 18, 2009, and South Carolina's ICPC administrator counter-signed the form on September 21, 2009, authorizing the interstate placement with Adoptive Parents. *Id*.; *see id*. 29 (final approval); Okla. Stat. tit. 10, § 577, art. V.

Adoptive Parents initiated adoption proceedings in South Carolina on September 18, 2009. Pet. App. 8a. They returned to South Carolina with their daughter eight days after the birth. *Id*. 7a. On January 6, 2010, Adoptive Parents served Father with notice of the pending adoption. Even though a putative father's *consent* to an adoption is unnecessary in cases where the father has abandoned the mother and child, South Carolina law requires 30-days' prior

notice to putative fathers before an adoption may be finalized. S.C. Code §§ 63-9-310(A), 63-9-730(E). When served with the complaint, Father signed and dated a formal answer, stating that he accepted service of the summons and complaint, "that he is the birth father of the minor child, Baby Girl," "and that he is not contesting the adoption." JA 37. Father later testified that when signing the form he believed that he was signing away his rights to Mother. Trial Tr. 535-36.

On January 11, 2010, Father requested a stay of the South Carolina adoption proceedings pursuant to the Servicemember's Civil Relief Act, 50 U.S.C. § 522. Pet. App. 9a. Three days later, Father filed a complaint against Mother and Adoptive Parents in Oklahoma for custody of Baby Girl. Father's verified complaint represented that "[n]either the parent nor the child[] have Native American blood. Therefore the Federal Indian Child Welfare Act . . . and the Oklahoma Indian Child Welfare Act . . . do not apply." *Id.* 50a (Kittredge, J., dissenting). The Oklahoma action was the first indication to anyone that Father intended to contest the adoption. *Id*. 9a n.10. At that time, Baby Girl was four months old, and Father had not sought any contact with her. *Id*. 8a.

By January 12, 2010, representatives of the Cherokee Nation were aware of the South Carolina proceeding and had confirmed Father's registration with the Tribe. JA 34-35. However, Adoptive Parents were not made aware of Father's Cherokee membership until around March 30, 2010, when the Tribe intervened in the Oklahoma action. JA 41-43. Adoptive Parents amended their South Carolina complaint the following day to acknowledge Father's Cherokee

status. JA 44. One week later, the Tribe intervened in the South Carolina case but did not participate in the proceedings for the next seventeen months; the Tribe entered an appearance just two days before the trial began. On April 12, 2010, the Bureau of Indian Affairs acknowledged that the "Cherokee Nation has been properly notified of the proceedings" in South Carolina. JA 52.[3]

By the time Adoptive Parents learned definitively of Father's Cherokee status in March 2010, they had raised Baby Girl as their daughter for more than six months.

C. Proceedings Below

1. The adoption proceeding was tried before a South Carolina family court in September 2011, at which point Baby Girl had been living with her Adoptive Parents for two years. Pet. App. 10a. The child's guardian *ad litem* recommended that the adoption be approved in the best interests of the child. JA 132. Mother urged the court to finalize the adoption. Trial Tr. 258.

The family court applied ICWA, denied the adoption petition, and ordered that custody of Baby Girl be transferred to Father. Pet. App. 130a. The

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[3] On March 16, 2010, the Oklahoma court granted Adoptive Parents' motion to dismiss Father's suit, and Father did not appeal. Respondents continued to contest the propriety of Baby Girl's transfer to South Carolina, but the South Carolina Supreme Court held that the Oklahoma decision "remains the law of the case." Pet. App. 20a. The court nonetheless commented that the "evidence establishes" that Baby Girl would not be in South Carolina had the Tribe received notice earlier. *Id.* 19a. We know of no law that would have blocked the transfer, and the court below identified none.

court acknowledged that application of state law would have led to the approval of the adoption and the termination of Father's parental rights. *Id*. 120a-121a. The family court ordered Adoptive Parents to surrender their daughter to Father on December 28, 2011. *Id*. 130a. Days after Christmas, and after living as a family for twenty-seven months, Adoptive Parents handed Baby Girl over to Father. *Id.* 11a.

2. A divided panel of the South Carolina Supreme Court affirmed. *Id*. 1a-40a.

The majority held that Father was a "parent" under Section 1903(9) who could invoke the Act's substantive provisions. *Id*. 22a. The majority acknowledged that "[u]nder state law, Father's consent to the adoption would not have been required." *Id*. 21a-22a n.19. The court held that the biological father's "lack of interest in or support for Baby Girl during the pregnancy and first four months of her life as a basis for terminat[ing] his rights as a parent is not a valid consideration under the ICWA." *Id*. 32a n.26.

The majority also rejected the "existing Indian family doctrine," which some state courts have held prevents ICWA from interfering with the voluntary adoption of an Indian child born out of wedlock under the sole custody of a non-Indian parent. *Id*. 17a-18a n.17. The majority further held that Adoptive Parents did not satisfy the Act's requirement to show that "active efforts have been made to provide [to Father] remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have provided unsuccessful," 25 U.S.C. § 1912(d). Pet. App. 26a-27a. The court explained that Adoptive Parents could have taken measures "for example, by attempting to stim-

ulate Father's desire to be a parent or to provide necessary education regarding the role of a parent." *Id*. 26a.

The majority further held that the adoption could not proceed consistent with Section 1912(f)'s requirement to show that Father's "continued custody" would be seriously detrimental to Baby Girl. The court reasoned that Adoptive Parents had not shown that Father's "prospective legal and physical custody" would seriously damage the child. *Id*. 28a-33a. The court finally observed that placement with Adoptive Parents, who are not Indian, did not comport with ICWA's "hierarchy of preferences" for adoptive placement with the child's extended family, the child's Tribe, or other Indian families absent good cause. *Id*. 37a-39a.

Two justices dissented and would have "require[d] the immediate return of Baby Girl to [Adoptive Parents]." *Id*. 100a.

SUMMARY OF ARGUMENT

I. The term "parent" under ICWA means "any biological parent . . . of an Indian child . . . . It does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). That definition includes only those unwed fathers with substantive parental rights under state law.

A. Congress intended courts to apply the definition of "parent" with reference to state law rather than federal law. Any time Congress acts, the venerable presumption is that it intends to respect the traditional boundaries between state and federal power. That presumption is at its zenith in the area of

domestic relations given the traditional responsibility of the States in such matters. This Court regularly looks to state laws that define parental status to determine the applicability of federal rights. ICWA is no different, as Congress did not intend to "oust the State from the exercise of its legitimate police powers regulating domestic relations." H.R. Rep. No. 95-1386, at 17.

B. ICWA's text precludes defining "parent" to require only a proven biological link between an unwed father and Indian child. The first sentence of Section 1903(9) already includes acknowledged or established biological parents, and thus the second sentence requires more of a parental relationship than biology alone. Moreover, Congress did not plausibly intend to extend ICWA to sperm donors and, indeed, even rapists who can prove a biological relationship to an Indian child. The second sentence is thus best read to require that unwed fathers have acknowledged or established parental *rights* under state law. Any other result would permit biological fathers of Indian children to repudiate their parental responsibilities under state law while retaining a back-pocket veto over the mother's choice to place her child for adoption.

A focus on preexisting rights is consistent with ICWA's purpose. Congress did not pass the Act to resuscitate parental rights expressly repudiated by an unwed father, but rather to protect his existing parental rights and to preserve his and his tribe's existing relationship with the Indian child. The State's paramount interest in immediately securing the welfare of the child and ensuring a reliable statutory scheme for adoption prevents the unwed

father from grasping the reins of parenthood only after he learns of the mother's adoptive plans.

II. Even if any proven biological father is a "parent" under Section 1903(9), he may not invoke Sections 1912(d) and 1912(f) to block adoptions voluntarily initiated by an Indian child's sole custodial parent.

A. By their terms, Sections 1912(d) and (f) apply only to parents who have preexisting custodial rights under state law. Where a non-Indian parent with sole custody of an Indian child decides to place the child for adoption, the subsequent adoption proceeding does not result in the "breakup of an Indian family" (which Section 1912(d) is designed to prevent) or affect the "continued custody" of the child by her Indian parent (which Section 1912(f) is designed to protect). Because there was no preexisting Indian family here, the court below twisted ICWA's text to create a new Indian family from whole cloth.

B. A myriad of other provisions in the Act confirm that Congress did not authorize courts to create new custodial rights. Those provisions also textually preclude noncustodial parents from invoking substantive protections. Those provisions more broadly show that neither fathers nor tribes can use ICWA to block an adoption in the absence of a preexisting Indian family.

C. Congress passed ICWA to stem the number of Indian children involuntarily removed from their homes by government officials and placed in foster care or adoptive homes without sufficient sensitivity to the family's cultural norms. This case could not be further from that scenario. When the adoption of an Indian child is voluntarily and lawfully initiated by a

non-Indian mother with sole custodial rights, ICWA's core purpose to prevent the involuntary removal of Indian children and dissolution of Indian families and culture is not implicated at all, much less advanced.

It is one thing to conclude from the extensive legislative history that when Indian children are ripped from their reservations or Indian homes, Congress intended that where possible those children should retain their existing tribal ties through adoptive and foster-care placements in Indian environments. But it is an entirely different matter when the Indian child *never* had a connection to an Indian family because the child was never domiciled on tribal land and the Indian father severed all ties even before the child was born. In the latter situation, neither the father nor the tribe has any legitimate interest or right to dictate how the child is raised by the non-Indian mother with sole custody. No good reason exists for inferring that Congress was hostile towards adoption of Indian children when those children otherwise would be raised in a single-parent *non-Indian* home.

III. The court's interpretation of ICWA raises grave constitutional concerns under the Equal Protection Clause, the Due Process Clause, and the Tenth Amendment.

A. Equal protection principles require that any Indian preference flow from a tribe's unique sovereign status and not from mere "ancestral" classification. *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). Where an Indian child is eligible for tribal membership simply because of her blood lineage, ICWA is triggered by the child's racial status unmoored to tribal sovereignty, culture, or politics. When ICWA is

applied consistent with its text, history, and purpose to preserve preexisting parental rights and the child's preexisting connection to the tribe, ICWA's application at least preserves the possibility of maintaining the child's connection to the tribe. But when a father through his own actions and before the child's birth renounces his parental rights and severs any possible connection between the child and the tribe, any placement preference under ICWA would occur solely on the basis of race and only for the purpose of creating a family of a particular race.

B. Interpreting ICWA to confer new custodial rights on absentee fathers significantly interferes with the substantive due process right of a mother to direct the upbringing of her child. Using the Act to create new families comes only at the cost of destroying other families—*i.e.*, the family formed between the child and an adoptive couple chosen by the mother. If ICWA forces mothers to choose between single parenthood or risking that the father who abandoned her and her child will control her child's destiny, then ICWA tramples the fundamental rights of mothers and the interests of Indian children in securing a stable and loving home.

C. Principles of federalism are also at stake. The recognition *vel non* of parents and their custodial rights has always been a matter of state law. Properly interpreted, ICWA bolsters the protection of existing parental rights that are established and recognized by the States; ICWA does not create new parents, new parental rights, and new Indian families. Due respect for the federal-state balance commands that ICWA be read to avoid such an extraordinary intrusion on state law by the federal government.

IV. Section 1915(a) establishes a hierarchy of preferences for adoption of Indian children that include a member of the child's extended family, other members of the child's tribe, or other Indian families. The state court viewed that provision as excluding Adoptive Parents, as non-Indians, from adopting Baby Girl. The court reasoned that ICWA gives a tribe an independent right to preclude non-Indians from being parents even absent a preexisting Indian family—*i.e.*, when the sole-custodial mother is non-Indian and the child's connection to the tribe is by virtue of bloodline alone.

The court's construction of Section 1915(a) would impose a *de facto* ban on interracial adoptions and punish countless abandoned Indian children in need of adoptive homes. As with ICWA's other substantive provisions, Section 1915(a) applies only if an Indian child is removed from a preexisting Indian family. At a minimum, Section 1915(a) does not apply when no party specified in the provision steps forward to adopt an Indian child. In that situation, there is no preference to apply. Because here only Adoptive Parents sought custodial placement of Baby Girl at the adoption hearing, Section 1915(a) was not implicated.

ARGUMENT

I. AN UNWED BIOLOGICAL FATHER WHO HAS NO PARENTAL RIGHTS UNDER STATE LAW IS NOT A "PARENT" UNDER SECTION 1903(9)

It is undisputed that under state law Father's consent to the adoption of Baby Girl was not required because he abandoned Mother during pregnancy and Baby Girl at birth. The South Carolina Supreme

Court nonetheless held that Father could veto the adoption under ICWA notwithstanding that state law dictated the placement of Baby Girl with Adoptive Parents. Pet. App. 21a-22a n.19; *accord id*. 120a-122a. The court reasoned that an unwed father is a "parent" under ICWA so long as he has a biological link to an Indian child and contested the adoption after receiving notice. *Id*. 22a. But ICWA does not create a new class of "parents." The Act instead protects existing parental rights that already have been acknowledged or established. The Act does not resuscitate parental rights for unwed fathers who under state law repudiated those very rights and flouted their parental responsibilities to the pregnant mother and child.

A. State Law Determines the Meaning of "Parent"

The second sentence of Section 1903(9) excludes from the definition of "parent" "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). That sentence does not refer to some ill-defined federal notion of "parent." That sentence incorporates state laws (or, where applicable, tribal law or customs) requiring fathers to take affirmative steps to acquire parental rights, including the right to object to an adoptive placement of his biological child.

The word parent "describes a legal status" that "requires a reference to the law of the State which create[s] those legal relationships." *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956). This Court thus has looked to state laws that define parental status when interpreting the applicability of federal rights. For example, state law determines whether a parent has standing to represent his child's constitutional

rights. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004) ("Newdow's parental status is defined by California's domestic relations law."). "[W]here a statute deals with a familial relationship," this Court has found it "proper, therefore, to draw on the ready-made body of state law to define the meaning of the word 'children'" under the Copyright Act. *De Sylva*, 351 U.S. at 580; *cf. Astrue v. Capato*, 132 S. Ct. 2021, 2031 (2012) (Under the Social Security Act, "[r]eference to state law to determine an applicant's status as a 'child' is anything but anomalous.").

Those precedents reflect that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)). "Because domestic relations are preeminently matters of state law, [this Court has] consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area." *Mansell v. Mansell*, 490 U.S. 581, 587 (1989). Reference to state law "avoid[s] congressional entanglement in the traditional state-law realm of family relations." *Capato*, 132 S. Ct. at 2031.

A State's traditional and exclusive domain over family affairs differentiates this case from the holding of *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). There the Court held that federal law controls the definition of "domicile" under ICWA's jurisdictional provision, Section 1911(a). The Court saw "no reason to believe that Congress intended to rely on state law for the definition of a critical term" that delineates when tribal courts have exclusive jurisdiction over custody

disputes involving an Indian child. *Id.* at 44. The Court also found it "beyond dispute that that Congress intended a uniform federal law of domicile for the ICWA." *Id*. at 47.

Those rationales do not apply to the definition of a non-jurisdictional term that has always varied state by state. The States have long possessed the ability "to retain the unique attributes of their respective bodies of family law." *Lehr v. Robertson*, 463 U.S. 248, 256 n.11 (1983). The House Report on ICWA explains that "the provisions of the bill do not oust the State from the exercise of its legitimate police powers in regulating domestic relations." H.R. Rep. No. 95-1386, at 17. Congress could not have intended that state courts would adopt a uniform federal standard of parent and paternity. There was and is no ready-made body of federal law to define parent, paternity, parental rights, or the standard for proving a biological link between a father and a child. Those concepts have no meaning without reference to state law.

B. An Unwed Biological Father Is a "Parent" Only if He Possesses Parental Rights Under State Law

1. The text of ICWA's "parent" definition requires more of an unwed father than an established or acknowledged biological connection to the child. The first sentence of Section 1903(9) defines "parent" as "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 second sentence excludes a subset of unwed biological fathers "where paternity has not been acknowledged or established." *Id*. Because the first sentence already

covers an unwed father whose biological link is acknowledged or established, the canon against superfluity counsels reading the second sentence to require more than a proven biological connection. *See United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) (statutes should "be construed in a manner that gives effect to all their provisions"). In other words, the second sentence may not be construed to be a "zero set."

As initially passed by the Senate, ICWA's definition of "parent" would have included all unwed biological fathers. This definition provided only that "[p]arent means the natural parent of an Indian child or any person who has adopted an Indian child in accordance with State, Federal, or tribal law or custom." Indian Child Welfare Act of 1977, S. 1214, § 4(i) (Nov. 8, 1977). The House of Representatives, however, added the second sentence as it currently appears. Indian Child Welfare Act of 1978, H.R. 12533, § 4(9) (May 3, 1978). By excluding from the definition of "parent" certain unwed fathers, Congress made the conscious decision not to define "parent" based on proven biology alone.

Congress's treatment of "parent" in a related statute passed within months of ICWA underscores that ICWA requires something more than an established biological connection to an Indian child. In 1978, Congress passed "An Act relating to judgment funds awarded by the Indian Claims Commission to certain Indian tribes," Pub. L. No. 95-433, 92 Stat. 1047 (codified at 25 U.S.C. § 609c), which defines "parent" as "the biological or adoptive parent or parents, or other legal guardian, of a minor." 25 U.S.C. § 609c(6). This definition mirrors the first sentence of Section 1903(9). The existence of Section 1903(9)'s

second sentence shows that not all proven biological fathers fall within ICWA's definition of "parent."

2. In order to give meaning to Section 1903(9)'s exclusion of unwed fathers "where paternity has not been acknowledged or established," this Court should look to the overall structure of the Act. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). ICWA protects parental *rights* and the parent-child *relationship*. *See* 25 U.S.C. §§ 1912-1914. The only sensible reading of the second sentence excludes unwed fathers who have no parental rights under state law. "Congress, in passing the ICWA, was concerned not so much with creating parental rights as protecting parental rights that had been recognized or established through legal provisions outside the Act." *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 938 (N.J. 1988). Thus, "Congress included a definition that excludes unwed fathers who have not taken steps to ensure that their relationship with the child would be recognized." *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. Ct. App. 1995).

This interpretation reflects the well-recognized distinction at law between unwed mothers and fathers. A "mother carries and bears the child, and in this sense her parental relationship is clear." *Nguyen v. INS*, 533 U.S. 53, 62 (2001) (quotation omitted). The same cannot be said of unwed fathers. *Id.* at 67. Congress passed ICWA with the understanding that "a biological parent is not necessarily a child's parent under law." *Capato*, 132 S. Ct. at 2030.

In *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), this Court invalidated a state statute that conclusively presumed that unwed fathers of children born out of

wedlock were unfit parents, even where the father had raised his children for years. In *Quilloin v. Walcott*, 434 U.S. 246 (1978), decided nearly a year before ICWA's enactment, the Court upheld the constitutionality of a state statute that authorized the adoption, over the objection of the biological father, of a child born out of wedlock because the father had provided little child support and had not "sought . . . actual or legal custody of his child." *Id*. at 255. While *Stanley* involved a "fully developed relationship," *Quilloin* involved only an "inchoate" one. *Lehr*, 463 U.S. at 261 n.17. In the latter situation, "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring." *Id*. at 262. *Lehr* thus upheld the constitutionality of a statute that permits adoption without prior notice to a biological father who had not "established any significant custodial, personal, or financial relationship" with his child. *Id*.

In light of these principles, South Carolina limits the parental rights of unwed fathers to those who have timely embraced parenthood. Unwed fathers may not wait until they learn of a mother's adoptive plans before expressing a desire to be a parent. "[B]ecause of the child's need for early permanence and stability in parental relationships," an unwed father's opportunity "to preserve his inchoate relationship with his child . . . is of limited duration." *Abernathy v. Baby Boy*, 437 S.E.2d 25, 28 (1993). An unwed father must provide "material assistance to the mother-to-be during the pregnancy and, the law thus assumes, to the child once it is born." *Roe v. Reeves* 708 S.E.2d 778, 783 (2011) (quotation omitted). "It is not enough that the father simply have a desire to raise the child; he must act on that interest

and make the material contributions to the child and mother during her pregnancy required of a father-to-be." *Id*. at 784. "He must not be deterred by the mother-to-be's lack of romantic interest in him, even by her outright hostility. If she justifiably or unjustifiably wants him to stay away, he must respect her wishes but be sure that his support does not remain equally distant." *Id*. at 783. In short, the unwed father who stands up only after he is notified of adoption proceedings commits too late. *Id*. at 785.

As relevant here, South Carolina law provides that the consent of the unwed biological father is not required to finalize an adoption if he failed to pay "a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses." S.C. Code § 63-9-310(A)(5). Because Father failed this test, state law dictated a final adoption decree in favor of Adoptive Parents. Pet. App. 21a-22a n.19, 120a-121a. Father consciously withheld all support, leaving Mother with the sole right to place Baby Girl with Adoptive Parents, who immediately raised Baby Girl upon her first breath. State law would have prevented the tragedy that occurred here by precluding Father from reentering the picture at the eleventh hour, vetoing Mother's decision, and uprooting Baby Girl from what should have been her stable and permanent home.

The definition of "parent" in ICWA incorporates these established principles. The second sentence of Section 1903(9) was "not meant to conflict with the decision of the Supreme Court in *Stanley*." H.R. Rep. No. 95-1386, at 21. Congress was aware of, and

made a conscious decision not to disturb, the State's inherent police power to limit an unwed father's rights when he has not formed a relationship with his child. *In re Adoption of a Child of Indian Heritage*, 543 A.2d at 934.

Congress could not plausibly have intended to preempt an entire body of state law in favor of a biological test. Nor could Congress plausibly have intended to allow putative fathers to shirk their parental responsibilities while retaining a back-pocket veto over the mother's choice for an adoptive placement of her child. The prospect of having an adopted child taken away after she and her adoptive parents have bonded would seriously chill families from adopting a child suspected of having Indian ancestry. That result punishes Indian children desperately in need of adoptive homes.

The state court's interpretation would stymie the adoption process in derogation of the "legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously." *Lehr*, 463 U.S. at 265. To allow unwed fathers a second bite at the apple would "complicate the adoption process, threaten the privacy interest of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees," all to the detriment of a State's ability to protect its most vulnerable citizens. *Lehr*, 463 U.S. at 264.

3. The state court held Father was a parent under Section 1903(9)'s second sentence because he sought custodial rights when he learned of the adoptive placement and he underwent DNA testing. Pet. App. 22a. Respondents likewise argue that under South Carolina law for "Paternity and Child Support,"

Father established his paternity through a DNA test. Br. in Opp. 27 (citing S.C. Code § 63-17-30(A)). Those contentions do not withstand scrutiny.

The fact that an unwed father may object when he learns of an adoptive placement is beside the point if his objection comes too late in the day to give him parental rights under state law. That is particularly so when state law explicitly denied him the right to object to the mother's adoptive placement because he renounced all obligations to mother when she was pregnant and repudiated any interest in the child. As far as DNA test results are concerned, a biological link imposes potential *obligations* on fathers to pay child support. S.C. Code §§ 63-17-10 *et seq*. A support obligation is not a parental right. Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology "Plus" Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 Wm. & Mary J. Women & L. 47, 48 (2004). Moreover, the possibility of a child support obligation is hardly relevant when, as here, the child since birth has been raised and financially supported by adoptive parents.

Any reliance on a child support obligation also cannot be squared with respondents' reading of the text to require only that unwed fathers "affirm paternity or take reasonable steps to establish paternity *as a factual matter*." Br. in Opp. 30 (emphasis added). "Paternity as a factual matter" is nothing more than a biological standard that would sweep in sperm donors and rapists. And if respondents advance a definition that requires something *beyond* a biological link, the choice is then between (a) the steps an unwed father must take under state law to acquire parental *rights* or (b) state law governing parental *obligations* when a father conceives a child.

ICWA is a child placement statute, not a child support statute. The only appropriate test is one that comports with the purposes of ICWA to protect existing familial rights. Respondents' focus on biology and parental obligations has nothing to recommend it, and a host of human tragedy, chaos, and disruption to the state adoption process to counsel against it.

II. A PARENT MUST HAVE CUSTODY OF AN INDIAN CHILD TO INVOKE SECTIONS 1912(d) AND 1912(f)

Even if the state court correctly interpreted the term "parent," reversal still is required because the court further erred in holding that ICWA creates custodial rights and creates Indian families anew—*i.e.*, when they would *not* otherwise exist under state or tribal law. Specifically, Sections 1912(d) and (f) do not permit a noncustodial father to veto the adoptive choices made by a non-Indian mother when state law confers on the mother sole custodial rights with respect to the Indian child.

A. The Statutory Text Precludes Application to Parents Without Custodial Rights

At every turn, ICWA signals Congress's intent to prevent the involuntary dissolution of an existing Indian family. Prospective parents who wish to adopt an Indian child voluntarily placed for adoption by a non-Indian mother must satisfy the court that a non-consenting father was provided programs "designed to prevent the breakup of the Indian family," and that those programs failed. 25 U.S.C. § 1912(d). Prospective parents further must show that the "continued custody" of the father would seriously

harm the child. 25 U.S.C. § 1912(f). Both of these provisions apply only when the objecting parent seeks to preserve a preexisting Indian family.

1. Section 1912(d) requires measures "designed to prevent the breakup of the Indian family"

Section 1912(d) requires that a party seeking adoptive placement "shall 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." 25 U.S.C. § 1912(d). This provision presupposes a prior custodial relationship. The provision cannot be applied to noncustodial parents consistent with the text. Prospective adoptive parents cannot satisfy a court that they offered remedial and rehabilitative efforts to a father in order "to prevent the breakup of the Indian family" when a mother who initiates the adoption has sole custody over the Indian child. In such cases, there is no "Indian family" that includes the father to break up.

This case is illustrative. The state court held that a "straightforward application of the language of Section 1912(d) requires that remedial services be offered to address any parenting issues to prevent the breakup of the Indian family—for example, by attempting to stimulate Father's desire to be a parent or to provide necessary education regarding the role of a parent." Pet. App. 26a. Such services inherently cannot be "designed to prevent the breakup of the Indian family." 25 U.S.C. § 1912(d). Father had no familial relationship with Baby Girl.

It further would be both perverse and cruel to require prospective adoptive parents, who desperately want to raise the child, to find and convince the father who abandoned that child to grasp the reins of parenthood. It is unthinkable that Congress intended to inflict this burden on adoptive parents, particularly if the prospective parents have already formed familial bonds with the child. No prospective parents would subject themselves to that gauntlet, leaving abandoned Indian children at a unique disadvantage in securing a loving home. It is also highly dubious that Congress intended to force prospective parents to conjure up ways to "to stimulate" a parental desire in someone who never demonstrated an interest in parenthood. Pet. App. 26a. As Justice Kittredge aptly explained in dissent: "I view this as requiring not merely efforts to rehabilitate a nonexistent parent-child relationship, but rather to perform a miracle." *Id*. 93a n.68.

The majority also stated that "had the tribe been properly noticed of the adoption from the outset, it would have been the tribe's prerogative to take remedial measures to reunify the Indian family." *Id*. 26a n.22. Again, there was no preexisting Indian family to "reunify," and any remedial measures likewise could not have been "designed to prevent the breakup of the Indian family" as required by Section 1912(d). Moreover, if the burden were on the *Tribe* to satisfy Section 1912(d), the Tribe could always veto an adoptive placement by refusing to offer the services. Section 1912(d) would never be satisfied unless the Tribe itself sought involuntary termination of parental rights.

Finally, ICWA does not require mothers or prospective adoptive parents to notify a tribe of their

adoptive plans so that tribes can cajole fathers to seek custodial rights in order to veto the lawful adoptive choices made by mothers and adoptive parents. Quite the contrary, ICWA requires only ten days' prior notice before an adoptive placement is made. 25 U.S.C. § 1912(a); *cf*. JA 52 (confirming that the Cherokee Nation had notice sixteen months before trial). And as discussed, state law imposes no duty on mothers to tell unwed fathers of their adoptive choices. The burden rather is on the unwed father to take affirmative steps to form a relationship with his child.

2. Section 1912(f) requires "continued custody"

State custody disputes have long been governed by the principle that courts make child custody decisions in the best interest of the child. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *Hooper v. Rockwell*, 513 S.E.2d 358, 366 (S.C. 1999). ICWA significantly deviates from state law in imposing an extraordinarily stringent standard before a court may make a custody determination over the objection of an Indian child's "parent." The text of Section 1912(f) states:

> No termination of parental rights may be ordered in [a child custody] proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the *continued custody* of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(f) (emphasis added); *see id*. § 1912(e) (requiring same finding regarding "continued cus-

tody" before ordering foster care placement of Indian children, albeit by clear and convincing evidence). A court applying Section 1912(f) thus requires prospective adoptive parents to show that the "continued custody" by the objecting parent would seriously harm the child.

The text plainly presupposes that absent termination of parental rights, the child will continue in the custody of the objecting parent. The adjective "continued" necessarily connotes a preexisting condition. "Continued" means "carried on or kept up without cessation; continual; constant" or "extended in space without interruption or breach of connection." Compact Oxford English Dictionary 538 (1972). "Continued" also can mean "resumed after interruption." Webster's Third New International Dictionary 493 (1961). Both meanings lead to the same result: custody must already exist before it can be "continued."

Given the plain meaning of "continued," a court may apply Section 1912(f) only if it can assess the effect on the child's well-being from the continued custody by her parent. Absent custody, any such inquiry is impossible. The lower court's application of Section 1912(f) again illustrates the point. At the time of the adoption proceeding, Father had no physical or legal custodial rights under state law (and he has never argued otherwise).[4] Because he had no prior parent-child relationship, Father could

[4] "[T]he custody of an illegitimate child is *solely* in the natural mother." S.C. Code § 63-17-20(B) (emphasis added); S.C. Code Regs. 114-4730 ("legal custody" means "decision-making authority with respect to the child(ren)"). Oklahoma law is the same. Okla. Stat. tit. 10, § 7800 ("the mother of a child born out of wedlock has custody of the child").

argue only that he now "desire[d] to be a parent to Baby Girl." Pet. App. 32a. For their part, Adoptive Parents could argue only that removal of Baby Girl from *their* "continued custody" would seriously harm the child. *Id*. 29a-32a; *id*. 73a-86a (Kittredge, J., dissenting). In other words, neither party could marshal the facts to fit the statutory language.

Faced with the impossibility of faithfully applying the text of the statute, the South Carolina Supreme Court ignored the notion of "continued custody" and held that Section 1912(f) "requires a showing that the *transferee* parent's *prospective* legal and physical custody is likely to result in serious damage to the Indian child." *Id*. 32a (emphases added). But "Section 1912(f) says no such thing." *Id.* 84a n.64 (Kittredge, J., dissenting). The court thus reworded the text and applied the reworded statute to find "that Father's custody of Baby Girl would [not] result in serious emotional or physical harm to her beyond a reasonable doubt." *Id*. 29a. And while the family court adhered to the statutory text, that court asked counter-factually whether "the child will suffer physical or emotional damage *if returned to the custody* of her biological father," *id*. 128a, even though Father never had legal or physical custody—indeed, he had never even met Baby Girl.

Neither the parties nor the court can apply the language of Section 1912(f) when the parent who invokes the provision has no preexisting custodial rights with respect to the child. Congress presumably did not pass a statute that can be invoked by a party with respect to whom the court cannot make the findings required by the language of the statute. It necessarily follows that Congress did not

intend noncustodial parents such as Father to invoke Section 1912(f)'s heightened protections.

B. Other Provisions of ICWA that Apply Only to Custodial Parents Confirm that the Act Does Not Create Custodial Rights

It would be bad enough to overlook the statutory language in both Sections 1912(d) and (f). But respondents' reading would cause courts to ignore the text in other provisions throughout the Act that apply only to parents who have a preexisting custodial relationship with an Indian child. Those provisions, like Sections 1912(d) and (f), confirm that the Act does not create custodial rights or mandate new Indian families but rather protects rights and families that already exist. These provisions thus show that neither fathers nor tribes can invoke ICWA to block an adoption without an existing Indian family.

1. Section 1914's reference to an Indian child unlawfully "removed" from the parent's "custody"

Section 1914 provides that "any parent . . . from whose *custody* such child was *removed* . . . may petition any court of competent jurisdiction to invalidate [a termination of parental rights under State law] upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title." 25 U.S.C. § 1914 (emphases added). For instance, if a court makes a custodial placement of an Indian child in violation of Section 1911(a) (exclusive jurisdiction in tribal courts), in violation of Section 1912(a) (lack of notice), or in violation of Section 1913(a) (improper execution of voluntary consent), a parent from whose custody the Indian child was unlawfully removed

may seek invalidation of the action under Section 1914.

Section 1914 presents the same conundrum for respondents as Sections 1912(d) and (f), which also are textually linked to a parent's preexisting custody. Either courts must ignore the textual reference in Section 1914 to "custody" and "removed" to apply that provision to noncustodial parents, or courts must interpret Section 1914 to exclude noncustodial parents. And if the latter is the case, Sections 1912(d) and (f) should be given parallel treatment and construed consistent with their text to exclude noncustodial parents.

2. *Section 1916's references to "return" of "custody" and "from whom such custody the child was originally removed"*

Section 1916(a) provides that "whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for *return of custody*." 25 U.S.C. § 1916(a) (emphasis added). The court "shall grant such petition unless there is a showing . . . that such *return of custody* is not in the best interests of the child." *Id*. (emphasis added). This provision by its terms refers only to parents who seek a return of custody. A biological parent with no custodial rights under state law either may not invoke Section 1916(a) consistent with the text, or courts would have to look beyond the text to extend the provision to noncustodial parents. This conundrum disappears when ICWA is read, consistent with its text, not to create custodial rights.

Section 1916(b) presents the same problem for respondents. That provision states that "[w]henever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with [ICWA], except in the case where an Indian child is being returned to the parent . . . from whose custody the child was originally removed." *Id.* § 1916(b). The last clause of this provision—"where an Indian child is being *returned* to the parent . . . from whose *custody* the child was *originally removed*"—refers only to the removal of Indian children from their custodial parents and ensures that ICWA will not interfere with the return of the child to her parent.

If the State places an Indian child in foster care, Section 1916(b)'s special protection for the parent would be limited to the custodial parent "from whose custody the child was originally removed," unless a court overlooks the text and extends Section 1916(b) to treat custodial and non-custodial parents alike. The more natural inference is that Congress repeatedly distinguished between custodial and non-custodial parents and granted only the former the substantive protections of ICWA.

3. *Section 1913's reference to "return to the parent"*

Section 1913(b) provides that "[a]ny parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, *the child shall be returned* to the parent or Indian custodian." 25 U.S.C. § 1913(b) (emphasis added). Section 1913(c) likewise states that "[i]n any voluntary proceeding for termination of

parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn . . . and the child *shall be returned* to the parent." *Id*. § 1913(c) (emphasis added). And Section 1913(d) requires courts to "return the child to the parent" if the parent's consent to an adoption was obtained through fraud or duress. *Id*. § 1913(d). Thus, Section 1913 throughout presupposes that the parent has a preexisting custodial relationship with an Indian child.

The state court invoked Section 1913(c) in noting that Father had withdrawn his initial consent to the adoption. Pet. App. 24a-25a. Withdrawal of consent triggers the mandate under Section 1913(c) that the child shall be "returned to the parent." But because Father never had custody, Baby Girl could not be returned to him. Once again, reading the Act to permit the creation of custodial rights does not square with the Act's repeated references to preexisting custodial rights.

4. *Section 1920's reference to "improperly removed the child from custody of the parent" and "return" to the parent*

Section 1920 provides that whenever a petitioner "has improperly *removed* the child from *custody* of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court . . . shall forthwith *return* the child to his parent." 25 U.S.C. § 1920 (emphases added). Section 1920, like all the provisions discussed above, presupposes that that ICWA parents have custodial rights and that their children can be "returned" to them. Congress's repeated references to custodial rights throughout

the Act demonstrate that ICWA does not create new custodial rights.

C. The Creation of Custodial Rights Does Not Further ICWA's Purpose To Preserve an Indian Child's Existing Tribal Connections

1. Congress did not pass ICWA to form new Indian families. Nor did it pass the statute to protect a parent who voluntarily severs his relationship with his child from the outset. Rather, the Act "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Holyfield*, 490 U.S. at 32. The "basic purpose of this legislation is to stem the outflow of Indian children from Indian homes." *Indian Child Welfare Act of 1978: Hearing on S. 1214 Before the H. Comm. on Interior and Insular Affairs*, 95th Cong. 29 (1978). Congress also noted the high number of Indian children removed from an Indian environment and placed in a non-Indian foster-care or adoptive home. *Holyfield*, 490 U.S. at 32-33. To protect the "rights of the Indian community and tribe in retaining its children in its society," ICWA establishes that "where possible, an Indian child should remain in the Indian community." *Id*. at 37 (quotation omitted).

When an adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian mother with sole custodial rights, ICWA's purpose to prevent the unwarranted removal of Indian children and the continuation of their existing Indian ties is not

implicated. No Indian family is being broken up and no Indian child is being removed from the custody of her parents. As cases applying the existing Indian family doctrine have explained, "where the child was abandoned to the adoptive [parents] essentially at the earliest practical moment after childbirth and initial hospital care," ICWA's substantive provisions do not apply because adoptive placement of the child would not cause the "breakup of the Indian family." *In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988) (quotation omitted). In other words, ICWA does not block "the voluntary relinquishment of an illegitimate Indian child by its non-Indian mother." *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990). "ICWA was never meant to apply in those cases . . . where the Indian children had lived with their non-Indian mothers." *Rye v. Weasel*, 934 S.W.2d 257, 263 (Ky. 1996); *see In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009); *In re S.A.M.*, 703 S.W.2d 603, 608 (Mo. Ct. App. 1986).

Some cases applying the existing Indian family doctrine have conditioned ICWA's application on the sufficiency of a custodial Indian parent's ties to his or her tribal heritage. *See, e.g.*, *Hampton v. J.A.L.*, 658 So. 2d 331, 336-37 (La. Ct. App. 1995); *In re Adoption of Crews*, 825 P.2d 305, 310 (Wash. 1992). Courts that have rejected the existing Indian family doctrine have criticized the propriety of examining whether a preexisting Indian family is "Indian" enough to merit protection under ICWA. *In re A.J.S.*, 204 P.3d 543, 551 (Kan. 2009); *In re D.A.C.*, 933 P.2d 993, 999 (Utah Ct. App. 1997). That criticism is not relevant here, as there is no preexisting family consisting of Father and Baby Girl. Whether or not an Indian child would be raised in an "Indian-enough" environ-

ment is accordingly not at issue, and we make no such argument that questions Father's tribal ties. Father's cultural practices and ties to his Tribe are beside the point because Father, in abandoning Baby Girl, severed any familial ties to Baby Girl and prevented any connection from forming between Baby Girl and the Tribe. Father thus removed himself from the protections of ICWA, and the Tribe may not invoke ICWA to create a new Indian family.

2. The scope of the Act also demonstrates Congress's intent to stem the outflow of Indian children from Indian homes but not to create new Indian families. "ICWA does not apply to custody disputes between parents, either as part of a divorce or non-divorce proceeding." B.J. Jones et al., The Indian Child Welfare Act Handbook 5 (ABA, 2d ed. 2008). As the Bureau of Indian Affairs explained shortly after the Act was passed, ICWA does not apply to any "domestic relations proceeding[] . . . so long as custody is awarded to one of the parents." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,587 (Nov. 26, 1979); *see Starr v. George*, 175 P.3d 50, 54 (Alaska 2008); *Application of DeFender*, 435 N.W.2d 717, 721 (S.D. 1989); *Arneach v. Reed*, 3 Cher. Rep. 9, 2000 WL 35789445, at *3 (E. Cherokee Sup. Ct. Dec. 15, 2000); *cf.* 25 U.S.C. § 1903(1). Non-custodial fathers and their tribes accordingly have no rights under ICWA if the non-Indian mother foregoes adoption and raises the child herself, regardless of whether she exposes the child to an Indian culture. For instance, had Mother, who is Hispanic, elected to raise Baby Girl as part of a "Hispanic family," neither Father nor the Tribe could invoke ICWA, much less insist Baby Girl be raised as part of an "Indian family."

When ICWA is read to protect preexisting Indian families, the Act reflects legislative neutrality as to whether a non-Indian mother with sole custody of an Indian child chooses single parenthood or adoption. Yet the court below read ICWA in a way that forces tribal affiliation only on *adopted* Indian children. When there is no net loss of an Indian family, nothing in the Act's text, history, or purpose supports the notion that Congress intended to interfere with adoptions of Indian children by non-Indian parents when those children otherwise would be raised in a single-parent non-Indian home. This Court should not read ICWA as placing a congressional thumb on the scale against adoption as a means of raising a child.

This Court's decision in *Holyfield* does not support extending ICWA beyond the protection of existing Indian families and existing ties between the child and an Indian community. *Holyfield* held that parents domiciled on a reservation could not defeat the tribal court's exclusive jurisdiction by removing the child at birth from the reservation. 490 U.S. at 53. The Court noted that the parents' attempt to circumvent tribal jurisdiction conflicted with the independent interest of the tribe in Indian children domiciled on the reservation. *Id*. at 49-53. The "sole issue" in *Holyfield* was whether the Indian children were domiciled on the reservation. *Id*. at 42. The Court did not pass on the propriety of the adoption, and on remand, the tribal courts approved the adoption. Pet. App. 41a (Kittredge, J., dissenting). Where a father abandons an Indian child in such a way that prevents the creation of an Indian family (much less one on a reservation), nothing in *Holyfield* suggests that Congress intended to create an Indian family anyway.

III. INTERPRETING ICWA TO CREATE NEW PARENTAL RIGHTS RAISES GRAVE CONSTITUTIONAL CONCERNS

The text, structure, and history of ICWA compel the conclusion that the interpretation adopted by the South Carolina Supreme Court cannot stand. But far more momentous forces are at play in this case. Consideration of those issues reinforces the conclusion that Congress did not intend this result.

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) (quotation omitted). "[W]hen deciding which of two plausible statutory constructions to adopt, . . . [i]f one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (quotation omitted)). "This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

A. Creation of Parental Rights Based On Indian Lineage Conflicts with Principles of Equal Protection

This Court has upheld preferential treatment for Indians where the differentiation is a consequence of Indians' unique sovereign status. *Morton v. Mancari*, 417 U.S. 535, 553 (1974). But differential treatment predicated solely on "ancestral" classification violates equal protection principles. *Rice v. Cayetano*, 528 U.S. 495, 514, 517 (2000). This careful balance reflects "the moral imperative of racial neutrality [that] is the driving force of the Equal Protection Clause," where "racial classifications are permitted only as a last resort." *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion of Kennedy, J.) (quotation omitted). "To the extent there is any doubt" over competing interpretations of a statute, this Court "resolve[s] that doubt by avoiding serious constitutional concerns under the Equal Protection Clause." *Id*. The Fifth Amendment's prohibition against race discrimination thus requires that ICWA's application be sufficiently tied to the government's interest in preserving tribal connections.

Baby Girl is an "Indian child" because she is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe," here the Cherokee Nation. 25 U.S.C. § 1903(4). Baby Girl's eligibility for membership in the Cherokee Nation depends solely upon a lineal blood relationship with a tribal ancestor. *See* Cherokee Nation, Tribal Registration, http://www.cherokee.org/Services/TribalRegistration/Default.aspx; Cherokee Heritage

Documentation Center, Blood Quantum, http://tiny url.com/bloodquantum.[5]

When the preferences under Sections 1912(d) and 1912(f) are construed to protect preexisting connections between an Indian child and her custodial parent, there is at least the possibility that the child could be exposed to Indian culture or tribal politics through her Indian parent. The same is true if Section 1903(9) includes only biological fathers with preexisting parental rights. ICWA's preferences in those circumstances at least plausibly prevent the unwarranted removal of Indian children from their families and safeguard tribal cultural and social cohesion. 25 U.S.C. § 1901.

Any legitimacy evaporates if unwed fathers with no preexisting substantive parental rights receive a statutory preference based solely on the Indian child's race. In that circumstance, "[i]f tribal determinations are indeed conclusive for purposes of applying ICWA, and if . . . a particular tribe recognizes as members all persons who are biologically descended from historic tribal members, then children who are related by blood to such a tribe may be claimed by the tribe, and thus made subject to the provisions of ICWA, solely on the basis of their biological heritage." *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 527 (Cal. Ct. App. 1996). When unequal treat-

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[5] Many tribes similarly condition eligibility for membership on ancestral lineage alone. *See, e.g.*, Choctaw Nation of Oklahoma, http://www.choctawnation.com/services/departments/enrollment-cdib-and-tribal-membership/; Chickasaw Nation, http://www.chickasaw.net/about_us/index_2288.htm; Muscogee Creek Nation, http://www.muscogeenation-nsn.gov/index.php/citizens-information/citizenshipcriteria.

ment is predicated on a status unrelated to social, cultural, or political ties, but rather blood lineage, the ancestry underpinning membership is "a proxy for race." *Rice*, 528 U.S. at 514.

The state court's decision confers on noncustodial fathers a preferential right to abandon their parental responsibilities under state law while reserving the right to veto an otherwise lawful adoption decision made by a non-Indian mother. Outside of ICWA, no other non-custodial fathers have that right. And when the father has no custodial rights under state law, the mother has the sole right to raise the Indian child with no cultural or political connection to the tribe. Under such circumstances, the creation of custodial rights is based on biology alone and solely for the purpose of creating an Indian family that would not otherwise exist but for the racial preference. That result is not sufficiently tied to "Indian self-government." *Mancari*, 417 U.S. at 555. Rather, the creation of such rights classifies citizens based solely on bloodline. *See In re Santos Y.*, 112 Cal. Rptr. 2d 692, 715 (Cal. Ct. App. 2001).

In commenting on the Act before it was passed, the Department of Justice expressed the concern that preferences unmoored to *existing* tribal ties were constitutionally problematic under equal protection principles. Judge Patricia Wald, then-Assistant Attorney General, advised Congress that exclusive tribal jurisdiction over child custody proceedings "may constitute racial discrimination" when applied to a noncustodial Indian parent. H.R. Rep. No. 95-1386, at 39. Judge Wald wrote that the Department of Justice "d[id] not think that the blood connection between the child and a biological but noncustodial parent is a sufficient basis upon which to deny the

present parents and the child access to State courts." *Id*. She further stated that the constitutionality of tribal jurisdiction should be tied to whether "a parent who is a tribal member has legal custody of a child . . . eligible for membership at the time of a proceeding." *Id.*

Similar equal protection principles are at stake when ICWA confers an Indian preference without a sufficient tribal connection between the child and the parent. Where the father has neither preexisting custodial rights over the child nor a state law right to contest an adoptive placement, the only basis for the Indian preference is blood lineage. Because at a minimum the state court's construction of ICWA raises serious equal protection issues, any doubt about the statute's meaning must be resolved by construing Sections 1903(9), 1912(d), and 1912(f) not to create new substantive parental rights.

B. Creation of Parental Rights Based On Indian Lineage Conflicts with Principles of Substantive Due Process

ICWA's application to fathers with no substantive parental rights under state law also would raise serious questions under the substantive component of the Due Process Clause. It has long been established that parenthood and child-rearing fall within the most basic and fundamental liberties protected by substantive due process. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (Opinion of O'Connor, J.); *id*. at 95 (Kennedy, J., dissenting); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849, 851 (1992) (Opinion of O'Connor, J.); *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972); *Stanley*, 405 U.S. at 650; *Prince v.*

Massachusetts, 321 U.S. 158, 166 (1944). Encompassed within parenthood and child-rearing is a sole-custodial mother's decision to place her child in an adoptive home. *Y.H. v. F.L.H.*, 784 So. 2d 565, 571-72 (Fla. Dist. Ct. App. 2001). If ICWA can be construed to avoid significantly interfering with such a fundamental liberty interest, this Court should adopt a limiting constitutional construction. *E.g.*, *Casey*, 505 U.S. at 879-80 (Opinion of O'Connor, J.).

The state court's interpretation of the Act places profound and unjustified burdens on pregnant women facing single parenthood who will have to make what is likely the most difficult decision of their lives. The court's decision paves the way for a non-custodial biological father to force a non-Indian mother into making a choice between raising her baby herself or risking that the man who abandoned her and the child will take custody of the child many months or even years after the child's birth if the mother decides that adoptive placement is best for her child. Cert. Br. Amicus Curiae AAAA, at 11. And for those women who would rather raise the child themselves than risk that the father will use ICWA to block the adoption, the state court's interpretation necessarily prevents those women from making decisions that they believe are in the best interest of their children. *See* Shirley C. Samuels, Ideal Adoption: A Comprehensive Guide to Forming an Adoptive Family 62-63 (1990). The state court's construction also will undoubtedly cause some unwed pregnant women to consider terminating the pregnancy of an unborn child conceived with a man of Indian lineage, rather than face the uncertainty whether those women can place their children in a loving adoptive home of her choice. Cert. Br. Amica

Curiae of Birth Mother, at 7. This Court should not lightly assume that Congress intended these results.

It also should go without saying that those consequences have direct, life-changing implications for Indian children. Respondents' construction of ICWA raises profound constitutional questions about "the nature of a child's liberty interests in preserving established familial or family-like bonds." *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting). "[T]his Court has not yet had occasion to elucidate the nature" of those rights. *Id.*; *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (reserving the question). If there was ever a case that might cause the Court to confront the issue, it is this one. Respondents' reading of ICWA uniquely deprives Indian children of placement determinations that serve their best interests. Their reading unquestionably chills prospective parents from adopting abandoned Indian children. And their reading means that where a mother rolls the dice and places her Indian child with an adoptive home, that child still could be ripped from the adoptive home with devastating consequences, as this case sadly illustrates. Rather than resolve the foundational liberty questions implicated by this case, the canon of constitutional avoidance strongly supports reading Sections 1903, 1912(d), and 1912(f) as limited to parents with preexisting parental rights.

C. Creation of Parental Rights Based On Indian Lineage Conflicts with Federalism Principles

This Court regularly interprets federal statutes to avoid questions over Congress's power to upset the federal-state balance. *Nw. Austin Mun. Utility Dist. v. Holder*, 557 U.S. 193 (2009); *Raygor v. Regents of*

Univ. of Minnesota, 534 U.S. 533, 544-45 (2002); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng.*, 531 U.S. 159, 174 (2001); *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 789 (2000); *Gregory v. Ashcroft*, 501 U.S. 453, 461 (1991); *United States v. Bass*, 404 U.S. 336, 349-50 (1971).

Under the Supremacy Clause, Congress may give more robust protection to rights established under state law. But it is qualitatively different for the federal government to create a new class of parents, new substantive parental rights, and new families in wholesale derogation of state law. The recognition *vel non* of parents and their custodial rights is uniquely a matter of state concern and historically within the exclusive domain of the States. The state court nevertheless interpreted ICWA as creating a new federal class of parents that consists of unwed fathers holding no parental rights under state law. The court likewise read Sections 1912(d) and (f) to create custodial rights that would not exist under state law. Those holdings, either alone or in combination, create new substantive parental rights out of whole cloth. That result raises serious questions about congressional authority to upset the federal-state balance.

Since the country's founding, the whole subject of domestic relations is uniquely a state's prerogative to regulate. *See supra* p. 21. Without a preexisting Indian family or parent-child relationship under state law, insufficient federal justification exists to supplant state laws on the subject of parent-child custody and adoption. As Judge Wald advised Congress, the government was "not convinced that Congress' power to control the incidents of [ICWA]

litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause is sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising State jurisdiction over what is a traditionally State matter." H.R. Rep. No. 95-1386, at 40. According to Judge Wald, "the Federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power" by federal law in custody disputes. *Id*.

Judge Wald's comments were prescient. Congress passed ICWA to prevent the involuntary breakup of Indian families and removal of Indian children from their parents' custody based on illegitimate considerations such as prejudice or hostility to tribal culture. *Supra* pp. 39-42. But the state court's interpretation turns the foundational principles of the Act on their head by requiring the breakup of other families created by state law. The dubious constitutional validity of that enterprise strongly counsels against interpreting ICWA to seriously invade the States' control over domestic relations.

IV. ABSENT A PREEXISTING INDIAN FAMILY, A TRIBE CANNOT INVOKE SECTION 1915(a)

The state court interpreted Section 1915(a) to foreclose the adoption of an Indian child by non-Indian parents even where a sole-custodial non-Indian mother selects those parents and no other party—Indian or otherwise—seeks custody. The existing Indian family doctrine and the canon of constitutional avoidance preclude that result.

A. Section 1915(a) Requires a Preexisting Indian Family

The state court expressed the view that, regardless of Father's rights, Section 1915(a) prevents Adoptive Parents from adopting Baby Girl. Pet. App. 37a-39a. That provision states that "[i]n any adoptive placement of an Indian child under State law, a preference 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." 25 U.S.C. § 1915(a). Although Section 1915(a) may be "[t]he most important substantive requirement imposed on state courts," *Holyfield*, 390 U.S. at 36, it still requires a preexisting Indian family. Section 1915(a) means that "where possible, an Indian child should *remain* in the Indian community" to protect "the rights of the Indian community and tribe in *retaining* its children in its society." *Id.* at 36-37 (emphases added) (quoting H.R. Rep. No. 95-1386, at 23).

Like ICWA's other substantive provisions, Section 1915(a) does not authorize courts to create new Indian families. *E.g.*, *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880, at *16-17 (Tenn. Ct. App. Nov. 19, 1997). If ICWA does not create new custodial rights in biological parents, *supra* Part II, it would be passing strange to read ICWA as mandating Indian-placements in the absence of a preexisting Indian family. After all, a sole-custodial non-Indian mother could raise the child herself in a non-Indian home. *Supra* pp. 41-42.

The court faulted Adoptive Parents for not proving "the unavailability of suitable families for placement

after a diligent search has been completed for families meeting the preference criteria." Pet. App. 38a (quoting 44 Fed. Reg. at 67,594-95). The court also criticized Mother's selection of Adoptive Parents, stating that "[f]rom the outset, rather than to seek to place Baby Girl within a statutorily preferred home, Mother sought placement in an non-Indian home." *Id*. Finally, the court found Section 1915's good-cause exception was not satisfied even though Baby Girl had been raised for over two years by loving parents selected by Mother. What mattered more to the court was the *Tribe's* preference. *Id*. 38a-39a & n.31.

But ICWA does not permit tribes to manipulate *non*-Indian mothers, *non*-Indian adoptive parents, and children with *no* Indian connection other than blood. Congress could not have plausibly intended to require non-Indian mothers and adoptive parents to go searching for Indian adults to adopt their child, while at the same time stimulating the absentee father to embrace parenthood. *Id*. 26a. It is no wonder that respondents have maintained that mothers and adoptive parents should "rehabilitate" fathers and "diligently search" for Indian parents *before* the child is born.

Section 1912(a) affords tribes only ten days' notice before a custody hearing. In this case, the hearing took place *years* after Baby Girl's birth. If Congress had intended tribes to control the fundamental parenting choices made by mothers and prospective parents, ICWA would require notice to the tribe much earlier in the process and presumably while the mother is still pregnant. Moreover, had Father affirmatively consented to this adoption, the Tribe would not be entitled to any notice under Section

1912(a), which applies only to involuntary termination proceedings. It would be highly anomalous to read ICWA as requiring notice so the Tribe could invoke Section 1915(a) to insist on a preferential placement only when fathers have no rights under ICWA.

The upshot of the court's interpretation is a *de facto* ban on the interracial adoption of any child suspected of having Indian ancestry. That much was conceded by the Tribe's statement at oral argument that Adoptive Parents "would be the last people available to adopt this child." Pet. App. 96a (Kittredge, J., dissenting); *id*. ("That statement is chilling, for it demonstrates the tribe's lack of concern for the best interests of this unique child.").

B. At a Minimum, Section 1915(a) Applies Only When a Preferred Party Seeks Custody

The constitutional concerns raised by the court's construction of Section 1915(a) are even greater than those under Sections 1903(9) and 1912. The court's interpretation of Section 1915(a) raises the same equal protection, substantive due process, and federalism concerns discussed above. *Supra*, pp. 44-51. The court's interpretation also directly implicates the equal protection rights of non-Indian adoptive parents. *Palmore*, 466 U.S. at 431-32.

The canon of constitutional avoidance requires a limiting construction of Section 1915(a). As discussed, based on the Act's overall design and purpose, Congress did not intend the provision to apply absent an existing Indian family. Where, as here, the sole-custodial non-Indian mother voluntarily initiates an

adoption and selects the adoptive parents, Section 1915(a) does not apply.

At a minimum, a court may not invoke Section 1915(a) when no preferred party specified in the provision is before the family court. Tribes themselves have no right to adopt Indian children, *In re J.R.S.*, 690 P.2d 10, 17 (Alaska 1984), and the Tribe accordingly did not seek custody of Baby Girl. It is also irrelevant that Father's mother testified during the proceeding that she would have raised Baby Girl. JA 151. She did not seek custody. In the year and a half since Father and the Tribe received notice of the adoptive placement, no one else sought to adopt Baby Girl. Assuming Section 1912(d) and (f) did not apply to Father, Adoptive Parents were the only placement option. In other words, there was no preference to apply.

The family court never suggested that Section 1915(a) was relevant, much less an impediment to the adoption. The court could not have applied Section 1915(a) at all, let alone to determine whether "good cause" existed to place Baby Girl with Adoptive Parents rather than some alternative placement, such as Father's mother. The state supreme court therefore was wrong to conclude that the Tribe has an independent, free-floating right under ICWA to insist that Baby Girl be placed with someone other than Adoptive Parents.

* * *

Choices have consequences. When a biological father repudiates his parental rights and renounces his parental responsibilities, the pregnant mother must make a quick and deeply personal decision regarding if and how to raise her unborn child by

herself. States protect mothers by giving them the right to make those decisions without first notifying the men who abandoned them. And States protect children by requiring fathers to timely step forward or forever forfeit any right to object to the child's adoption by the caregivers who stepped forward in the father's absence to form a loving and stable family with the child. Yet the decision below "blames the birth mother and the adoptive couple—everyone except the Father, whose vanishing act triggered the adoption in the first instance." Pet. App. 42a (Kittredge, J., dissenting).

The notion that Congress intended the result in this case is misguided. Consistent with ICWA's purpose and history, the statutory text reaffirms again and again that the Act preserves existing Indian families and prevents the unwarranted removal of Indian children from custodial parents. Stretching ICWA to fit these facts will admittedly create more Indian families. But it will do so only at the cost of breaking up other families and of leaving abandoned Indian children to face uncertain and uniquely disadvantaged futures.

When Congress passed ICWA, it scarcely intended the Act to permit absent fathers or tribes to tear apart adoptive families in the sort of circumstances at issue here. In this case, that conclusion means that Baby Girl must be returned to her Adoptive Parents. But in a broader sense, a decision by this Court recognizing ICWA's limits means that loving adoptive families like Baby Girl and Adoptive Parents will not be broken up in the first place.

CONCLUSION

The decision below should be reversed and remanded with instructions that the adoption be approved under state law.

Respectfully submitted,

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FEBRUARY 19, 2013

APPENDIX

APPENDIX

INDIAN CHILD WELFARE ACT OF 1978

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards 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, and by providing for assistance to Indian tribes in the operation of child and family service programs.

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means 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;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means 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;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

Subchapter I—Child Custody Proceedings

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of

counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall 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.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

§ 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the

child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child

was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference 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.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of

preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the

subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance

as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

§ 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly

removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the

child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

§ 1923. Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.