NO. 12-399

In the
Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR CHILD UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

On Writ of Certiorari to the South Carolina Supreme Court

BRIEF FOR GUARDIAN AD LITEM, AS REPRESENTATIVE OF RESPONDENT BABY GIRL, SUPPORTING REVERSAL

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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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INTRODUCTION

The Guardian ad Litem is the duly appointed representative of the respondent child ("Baby Girl") in these proceedings, with standing to file this brief on Baby Girl's behalf. Baby Girl was born on September 15, 2009, to an impoverished single mother ("Birth Mother") who had two other children and felt she could not adequately care for a third child on her own. Although Birth Mother was engaged to the biological father ("Birth Father") at the time of Baby Girl's conception, he refused to assist Birth Mother with her pregnancy-related costs, and when the relationship ended six months into the pregnancy, he told Birth Mother that he wanted to relinquish his parental rights rather than support her or the child.

After hearing that news, Birth Mother contacted an adoption agency, carefully investigated potential adoptive parents, and chose Adoptive Couple to raise Baby Girl. Adoptive Couple immediately took on an active role supporting Birth Mother and preparing for the birth of Baby Girl. They were there in the delivery room and took Baby Girl home from the hospital.

Having made no efforts to inquire about Baby Girl's well-being or whereabouts, Birth Father first learned of Baby Girl's adoptive placement when, four months after Baby Girl's birth, he received and signed legal papers consenting to the adoption. Birth Father later stated that he thought he was consenting to the termination of his parental rights and did not realize until later that Baby Girl was in the custody of Adoptive Couple and would be adopted

by them rather than raised by Birth Mother on her own. At that point, Birth Father decided to attempt to block the adoption and obtain custody of Baby Girl.

It is indisputable that under state law and this Court's long line of precedent addressing the parental rights of unwed biological fathers, Birth Father's failure to support the pregnancy or show an interest in Baby Girl in the months after her birth deprived him of any legal standing to intervene in the adoption proceedings and disrupt the familial bonds that formed between Baby Girl and Adoptive Couple during Birth Father's intentional absence. In the eyes of South Carolina law and the U.S. Constitution, the window for Birth Father to establish a legally recognized child-parent relationship with Baby Girl had closed. The combination of state law and this Court's precedents effectively guaranteed that the best interests of Baby Girl would be protected.

The lower courts acknowledged all of this, but nonetheless held that because Birth Father is a member of the Cherokee Nation, he could block the adoption and obtain custody under the Indian Child Welfare Act ("ICWA"). The effect on Baby Girl and her rights was profound indeed. Under state law, Baby Girl was entitled to have her individual best interests be "the primary, paramount and controlling consideration of the court" in determining whether her adoption should be approved. *Cook v. Cobb*, 271 S.C. 136, 140 (1978). Under the lower courts' interpretation of ICWA, her best interests were not the focus—indeed they were not directly relevant at all. If ICWA applied, the only question was whether "the continued custody of the child by the parent … is

likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). In short, the question was no longer which placement would be in Baby Girl's best interests, but whether Birth Father would "serious[ly]" harm Baby Girl. Finding no such evidence, the trial court denied the adoption petition and ordered custody of Baby Girl transferred to Birth Father.

On December 31, 2011, Baby Girl, then 27 months old, was removed from the only home she had ever known—a home handpicked by Birth Mother in her capacity as Baby Girl's sole legal and physical custodian—and handed over to Birth Father, whom she had never met.

This "human tragedy" was neither mandated by ICWA nor permitted by the Constitution. Pet.App.101a. ICWA does not confer rights on biological fathers who have no legally recognized parental relationship with the child in the first place, nor does it operate to block the adoption of a child who was never domiciled on a reservation and who was never in the legal or physical custody of an Indian parent due to the Indian biological parent's express abandonment of the child in utero. These limitations on ICWA's scope are not only consistent with congressional intent, but necessary to preserve the Act's constitutionality, ensuring that the Act functions only to promote tribal sovereignty and the unique interests of Indians as tribal citizens, and not as invidious racial discrimination.

The facts of this case make this clear. Baby Girl is a predominantly Hispanic child with a 3/256th quantum of Cherokee blood she inherited from a

biological father who abandoned her before birth to the sole legal and physical custody of her non-Indian birth mother. Baby Girl was never domiciled on a reservation and had no other tribal connection. The Cherokee Nation is certainly free to deem Baby Girl eligible for tribal membership, but a sliver of genetic material absent any connection to tribal land or sovereignty cannot be enough to deprive her of her most basic rights. The effect of the federal statute, applicable only because of that genetic material, was Copernican. Instead of the legal inquiry revolving around Baby Girl and her best interests, it focused only on Birth Father and his potential to seriously harm her. The lower court's decision countenancing that result is not only a perversion of ICWA, but a violation of Baby Girl's most basic constitutional rights to equal protection and due process under the law.

STATEMENT OF THE CASE

A. State Paternity And Custody Law

The extent to which a man is legally recognized as a child's father is and always has been a function of state law. *See De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (the child-parent relationship is "a legal status" which "requires a reference to the law of the State which create[s] those legal relationships"). Before the 1980s, no accurate method existed for establishing biological parenthood, and accordingly, state paternity law historically focused on non-scientific indicators of a father-child relationship,

primarily marriage to the birth mother.[1] Consistent with this historical understanding of paternity, up until the 1970s, state law generally treated children born out of wedlock as exclusively within the legal custody of the natural mother even when paternity was uncontested. In many states, the natural mother's status as exclusive legal custodian included sole decision-making authority over whether to place the child for adoption.[2]

In 1972, this Court issued its decision in *Stanley v. Illinois*, 405 U.S. 645 (1972), the first in a series of cases identifying circumstances in which unwed fathers have a constitutionally protected interest in participating in their children's custody proceedings. *See Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v.*

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[1] *See* Karen A. Hauser, *Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny Add Up to the Need for Change*, 65 U. Cin. L. Rev. 891, 947 (1997) ("Prior to 1977, the ABO blood grouping test, when used alone, was capable of proving a false allegation of paternity about twenty to twenty-five percent of the time."); Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. Rev. 637, 644 (1993) ("During most of the last century, … biology was more often secondary [in determining paternity]. Unwed biological fathers had no right to commence paternity actions under the common law. Moreover, the common law established an irrebuttable presumption that a mother's husband was the father of her children.").

[2] *See* Karen C. Wehner, Comment, *Daddy Wants Rights Too: A Perspective on Adoption Statutes*, 31 Hous. L. Rev. 691, 693 (1994); Scott Resnik, *Seeking the Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoptions*, 20 Seton Hall Legis. J. 363, 390 (1996).

Mohammed, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978). These cases collectively hold that an unwed natural father has constitutionally recognized parental rights if, and only if, he makes a timely, affirmative effort to establish a parental relationship with the child. As the Court summarized in *Lehr*, 463 U.S. at 261-62: "[T]he mere existence of a biological link does not merit equivalent constitutional protection. … The 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. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie."

In the wake of *Stanley* and its progeny, state legislatures adjusted their paternity and custody laws to reflect the line drawn by this Court: an unwed father enjoys legally recognized parental rights, including the right to object to the child's adoption by another family, if and only if he timely "grasps that opportunity" to support and care for his child. *See, e.g.*, Ala. Code §§ 26-10A-9(a)(1), (3); Del. Code tit. 13 § 1103(a)(2); Fla. Stat. § 63.062(2)(a)(1); Haw. Rev. Stat. § 578-2(a)(5); Idaho Code § 16-1504(2); Kan. Stat. § 59-2136(h)(1); Miss. Code §§ 93-17-6(4), (5); Mont. Code Ann. §§ 42-2-610(1), (3); N.C. Gen. Stat. § 48-3-601(2)(b); Ohio Rev. Code § 3107.07(B); Okla. Stat. tit. 10, § 7505-4.2(C); S.C.

Code §§ 63-7-2570(3), (4); S.D. Codified Laws §§ 25-6-4(2), (3), (4).

Consistent with this Court's precedent, South Carolina has established "general minimum standards by which an unwed father timely may demonstrate his commitment to the child, and his desire … to assume full responsibility for his child." *Abernathy v. Baby Boy*, 313 S.C. 27, 29 (1993). In adoptions involving a child who was placed with the prospective adoptive parents more than six months after the child's birth, South Carolina recognizes an unwed father as a parent with standing to object only if he "has maintained substantial and continuous or repeated contact with the child," as demonstrated by financial support and regular communication with the child. S.C. Code § 63-9-310(A)(4). Where, as in the present case, the child was placed with the prospective adoptive parents within six months of the child's birth, the standing inquiry focuses on the birth father's actions during the pregnancy and shortly after the child's birth, requiring that:

> (a) the father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption, and the father openly held himself out to be the father of the child during the six months period; or
>
> (b) the father paid 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.

Id. § 63-9-310(A)(5).

Similar to the requirements of many other states, these provisions reflect the State's recognition of the paramount interest of young children in forming immediate and stable family attachments. Accordingly, the window for a birth father to step forward to care for his child is strictly limited—if in the birth father's absence, the child is placed with an adoptive family, even the birth father who sincerely changes his mind will not be allowed to disrupt the adoption.

Applying this standard, the South Carolina Supreme Court has refused to allow birth fathers to intervene in adoption proceedings if they failed to make meaningful efforts to support the birth mother or child before the initiation of the proceedings. In *Roe v. Reeves*, 392 S.C. 143 (2011), for example, the birth father had during the first trimester of the birth mother's pregnancy told the birth mother that he did not want to support the child, but then changed his mind when the birth mother was six months pregnant. *Id.* at 145-48. Although he purchased some diapers for the child and clothes for the birth mother during the last few months of the pregnancy and lodged his objection to adoptive placement immediately after the child was born, the South Carolina Supreme Court found these efforts inadequate under the state law, explaining: "The record does not support the conclusion that Father undertook a sufficient effort to make the sacrifices fatherhood demands. … The fact that he now wishes

to raise his son does not overcome his lack of support and contribution while Mother was carrying his child or after he was born. In short, he did not fully 'grasp [the] opportunity' to come forward and demonstrate a full commitment to the responsibilities of parenthood through prompt and good faith efforts." *Id.* at 155.

All fifty states have recognized the best interests of the child as the cornerstone for resolving custody disputes.[3] South Carolina in particular requires that "[t]he welfare of the child and what is in his/her best interest" be "the primary, paramount and controlling consideration of the court." *Cook*, 271 S.C. at 140; *see also Adams v. Miller*, 253 S.C. 118 (1969); S.C. Code § 63-9-1310 (declaring that the purpose of South Carolina adoption law is "to achieve the objective of the best interests of the child"). In determining the best interests of the child, South Carolina courts "consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child." *Woodall v. Woodall*, 322 S.C. 7, 11 (1996). "In addition, psychological, physical, environmental, spiritual, educational, medical, family, emotional, and recreational aspects of the child's life should be considered." *Id*.

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[3] *See* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & Fam. Stud. 337, 370 (2008) ("Today, every state has a statue requiring that the child's best interests be considered whenever decisions regarding a child's placement are made.").

B. The Indian Child Welfare Act

Congress enacted the Indian Child Welfare Act of 1978 ("ICWA") to address concerns about "an alarmingly high percentage of Indian families" being "broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. § 1901. The Act has three primary purposes.

First, the Act seeks to preserve tribal sovereignty by providing tribes with sole jurisdiction over custody proceedings involving Indian children domiciled on tribal land, *see id.* § 1911(a), and concurrent jurisdiction with state courts over custody proceedings involving Indian children who are not domiciled on tribal land, *see id.* § 1911(b); *see also Miss. Band of Choctow Indians v. Holyfield*, 490 U.S. 30, 36 (1989) (describing these provisions as "the heart of the ICWA"). In the latter category of cases, a state court custody proceeding shall upon petition by either parent or the child's tribe be transferred to tribal court unless one of the parents objects, the tribe declines transfer, or there is "good cause to the contrary." 25 U.S.C. § 1911(b). In *Holyfield*, this Court adjudicated a dispute over the meaning of domicile for the purposes of these provisions and concluded that an Indian child's domicile is determined pursuant to federal common law rather than state law. *Holyfield*, 490 U.S. at 49-53. It is uncontested in this case that neither Birth Father nor Baby Girl has ever been domiciled on tribal land and that the adoption proceedings were properly in South Carolina state court. Pet.App.15a n.16.

Second, the Act provides federal funding to establish and operate Indian child and family service programs on or near reservations. *See* 25 U.S.C. §§ 1931-33.

Third, the Act "establish[es] … minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." *Id.* § 1902. These federal standards focus primarily on establishing the rights of Indian parents and tribes in state custody proceedings. The Act defines "Indian child" as any unmarried minor who either is a member of an Indian tribe or "is the biological child of a member of an Indian tribe" and eligible for membership. *Id.* § 1903(4). The Act defines "parent" as "any biological parent or parents of an Indian child," but specifically excludes "the unwed father where paternity has not been acknowledged or established." *Id.* § 1903(9). The Act does not set forth any procedures for determining whether an unwed father's paternity has been "acknowledged or established." The House Report accompanying the Act notes, however, that this definition of "parent" "is not meant to conflict with the decision of the Supreme Court in *Stanley*." H.R. Rep. No. 95-1386, at 21 (1978), 1978 U.S.C.C.A.N. 7530, 7543.

Indian tribes and parents as defined by the Act may intervene in the state custody proceedings at any point, 25 U.S.C. § 1911(c); have rights to notification of the proceedings and the right to intervene, with 10 days' notice of any proceeding to terminate parental rights or place the child in foster care, *id.* § 1912(a); and a right to court-appointed

counsel in any removal, placement, or termination proceeding, *id.* § 1912(b). In addition, in a voluntary proceeding for termination of parental rights or adoptive placement of an Indian child, the parent's consent "may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, at which point "the child shall be returned to the parent." *Id.* § 1913(c). And in involuntary proceedings, the party seeking termination of parental rights "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." *Id.* § 1912(d). Furthermore, "[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, 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." *Id.* § 1912(f).

Finally, 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." *Id.* § 1915(a).

C. The Role Of The Guardian Ad Litem

Like many states, South Carolina provides for the appointment of a guardian ad litem to "represent[] the best interest of the child" in contested custody proceedings. S.C. Code § 63-3-

830(A)(1); *see also* Pet.App.10a-11a (explaining that the Guardian was appointed pursuant to state law "to represent[] the interests of Baby Girl" in these proceedings). The guardian may be either an attorney or layperson, but must meet specified training requirements. S.C. Code § 63-3-820. The guardian is appointed to a case by court order. *Id.* § 63-3-810(B). All parties must consent to the appointment of a guardian ad litem, but the trial court has "absolute discretion in determining who will be appointed." *Id.* §§ 63-3-810(A)(2), (B).

The guardian is responsible for "conducting an independent, balanced, and impartial investigation to determine the facts relevant to the situation of the child," including reviewing all relevant records, meeting with and observing the child, visiting the home settings, interviewing parents and caregivers, and considering the wishes of the child. S.C. Code § 63-3-830(A)(2). Based on this investigation, the guardian provides the court with "a final written report regarding the child's best interest." *Id.* § 63-3-830(A)(6); *see* 21 S.C. Jur. Children & Families § 132 (2012) ("The recommendation of an experienced, informed, and unbiased guardian ad litem will be difficult to overcome."). The guardian then participates in the proceedings as the representative of the child, with authorization to "submit briefs, memoranda, affidavits, or other documents on behalf of the child." S.C. Code § 63-3-830(B); *see also* 21 S.C. Jur. Children & Families § 123 (2012) (explaining that in custody matters, the guardian's responsibilities include "presenting the evidence and witnesses in court, and engaging in vigorous advocacy").

The guardian in this case ("the Guardian") maintains an ongoing responsibility to serve as Baby Girl's representative until the family court modifies or terminates the appointment. *See* S.C. Code § 63-3-870; Sup. Ct. R. 12.6 ("All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court."). The Guardian's representation of Baby Girl as a respondent in the proceedings before this Court is also authorized under Fed. R. Civ. P. 17(c)(2) ("A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action."). Indeed, this Court is quite familiar with the role of the guardian ad litem in pressing legal arguments, including constitutional arguments, on behalf of a child in a custody dispute. *See, e.g., Michael H.*, 491 U.S. 110 (adjudicating the guardian ad litem's argument that the decision below violated the child's due process, equal protection, and fundamental liberty interests).

D. Factual Background

Birth Mother became pregnant with Baby Girl in January 2009. At the time, she was engaged to Birth Father but they did not live together; she resided in Bartlesville, Oklahoma and he was stationed in Fort Sill, Oklahoma, approximately four hours away. Pet.App.43-a44a. Birth Father acknowledged from the outset that the child was his, but refused Birth Mother's request for financial support on the ground

that he did not believe he was "responsible as a father" unless he and Birth Mother were married. Pet.App.44a-45a. By April 2009, the relationship had deteriorated and in May 2009, Birth Mother ended the engagement. Pet.App.2a-3a. The next month, she sent him a text message asking whether he would pay child support or instead preferred to terminate his parental rights. Birth Father sent a return text message stating that he surrendered his parental rights. Pet.App.4a; R.543 ("Q. And, in fact, in June you messaged [Birth Mother] that you wanted to sign your rights away; is that correct? A: That is correct, sir."). He later testified that he chose to relinquish his parental rights over paying child support in an effort to "give [Birth Mother] time to think about" whether she should have ended their relationship. Pet.App.4a.

Impoverished and unable to afford to raise Baby Girl by herself, Birth Mother decided to pursue adoption. Pet.App.4a. Birth Mother testified that she "wanted [her] little girl to have a chance" and that she believed adoption would be in Baby Girl's best interests. Pet.App.46a. "Birth Mother took very seriously her responsibility—first to care for her unborn child, and then to secure for her a loving, stable home." Birth Mother Cert. Amicus Br. 7.

Under Oklahoma law, Birth Mother had no obligation to inform Birth Father of the adoption plans, and consistent with his express relinquishment of his parental rights, she declined to do so. Okla. Stat. tit. 10, §§ 7503-3.1, 7505; Pet.App.46a. Indeed, under Oklahoma law, Birth Father's refusal to assist with pregnancy-related

expenses and his express abdication of his parental responsibilities deprived him of any legal interest in Baby Girl's adoption process. Okla. Stat. tit. 10, §§ 7501-7505.

In June 2009, Birth Mother was introduced to Adoptive Couple through an adoption agency. Pet.App.46a. Adoptive Couple married in December 2005 and reside in Charleston, South Carolina, where Adoptive Mother works as a psychologist focusing on child development and Adoptive Father works at Boeing as an automotive body technician. Pet.App.5a. The couple had desired children for many years but struggled with infertility and ultimately decided to adopt. Pet.App.46a. Birth Mother testified that she considered families in Oklahoma, but chose Adoptive Couple to raise Baby Girl because she believed they shared her values and would provide Baby Girl a stable and loving home "where she can look up to them and they can give her everything she needs when needed." Pet.App.5a, 47a. Birth Mother also appreciated that Adoptive Couple were interested in Birth Mother continuing to have a relationship with them and Baby Girl via an open adoption. R.400-01.

During the last trimester of Birth Mother's pregnancy, she spoke to Adoptive Couple on the phone weekly, and in August 2009, they traveled to Oklahoma to visit her. Pet.App.5a, 47a. Adoptive Couple also provided financial assistance to support Birth Mother in the final months of her pregnancy and shortly after Baby Girl's birth. Pet.App.5a. When Birth Mother gave birth to Baby Girl on September 15, 2009, Adoptive Couple were in the

delivery room and Adoptive Father cut the umbilical cord. Pet.App.7a.

In the adoption papers Birth Mother completed before Baby Girl's birth, Birth Mother identified Birth Father as the biological father and noted that he had Cherokee heritage. Pet.App.5a-6a. Birth Mother also provided her attorney with Birth Father's name, his location at the army base in Fort Sill, and what she believed to be Birth Father's date of birth. Pet.App.6a, 47a. Although neither Adoptive Couple nor Birth Mother had any legal obligation to contact Birth Father or the Cherokee Nation ("the Tribe") at that time, *see* 25 U.S.C. § 1912(a); Okla. Stat. tit. 10, § 40.4, Birth Mother's attorney forwarded the information to the Tribe in a letter explaining that Birth Mother believed Birth Father to have some Cherokee heritage, and asking whether the Tribe would consider Baby Girl to be an "Indian Child" under ICWA. J.A.5-6. The letter further explained that the reason for the inquiry was that Birth Mother had chosen a non-Indian couple to adopt Baby Girl and wanted to know whether the Tribe would object. J.A.5-6.

The Tribe responded that it could not verify Birth Father's membership based on the information provided, and therefore Baby Girl was not an "Indian Child," but that "[a]ny incorrect or omitted family documentation could invalidate this determination." J.A.8. The Tribe later stated that the reason it could not verify Birth Father's membership is that the date of birth was incorrect (the letter identified the right month but not year) and that the letter misspelled Birth Father's first name as "Dustin" rather than

"Dusten."[4] Pet.App.6a, 47a. The day after Baby Girl's birth, Birth Mother signed forms relinquishing her parental rights and consenting to Baby Girl's adoption by Adoptive Couple. Pet.App.7a. Neither ICWA nor state law required notice of the adoptive placement to Birth Father or the Tribe. *See* 25 U.S.C. § 1912(a); S.C. Code § 63-9-730; Okla. Stat. tit. 10, § 40.4.

In the paperwork, Birth Mother affirmatively listed "Caucasian/Native American Indian/Hispanic" as Baby Girl's ethnicity, with "Hispanic" circled. J.A.29. Birth Mother testified that she did not circle Hispanic and did not know who had. R.388-89. In any event, whatever the provenance of the circle, Baby Girl is indeed predominantly Hispanic with some Native American and Caucasian background: Birth Mother is primarily Hispanic,[5] while Birth Father is 3/128th Cherokee, making Baby Girl 3/256th Cherokee.[6] Adoptive Couple initiated

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[4] The record indicates that Birth Father is inconsistent in spelling his name. J.A.70-76 (child support checks submitted by Birth Father during adoption proceedings spelling his name "Dustin," "Dustan," and "Dusten").

[5] Birth Mother testified that one of her great, great grandmothers may have been Cherokee, but the Tribe does not recognize Birth Mother as having any Cherokee lineage. R.390, 404.

[6] During the Guardian's investigation, Birth Father and his parents submitted a letter to the Guardian stating that Baby Girl is 3/256th Cherokee. The Guardian was also given a copy of paternal grandfather's tribal membership card stating he is 3/64th Cherokee. The Guardian will lodge these documents with the Court at the Court's request.

adoption proceedings in South Carolina three days after Baby Girl's birth, and the next week returned to South Carolina with Baby Girl. Pet.App.7a, 49a.

At no point during the pregnancy or in the months surrounding Baby Girl's birth did Birth Father provide or offer to provide any financial support to assist with Birth Mother's pregnancy-related expenses, even though he acknowledged he had the financial resources to do so. Pet.App.4a, 44a-45a & n.34. And although Birth Father knew that Baby Girl's expected due date was the first week of September, he did not make any effort to inquire about Baby Girl's well-being or whereabouts in the months following her birth. Pet.App.48a; R.513, 546-47. Birth Father also declined to inform the Cherokee Nation of Baby Girl's birth. R.551.

On January 6, 2010—approximately four months after Baby Girl's birth and seven months after Birth Father's last communication with Birth Mother expressing his intent to relinquish his parental rights—a process server presented Birth Father with legal papers stating he was not contesting the adoption of Baby Girl. Pet.App.8a-9a. Birth Father signed, later testifying that he believed the papers terminated his parental rights but that Birth Mother would still have custody of the child:

> Q: But you were prepared to sign all your rights and responsibilities away to this child just so as long as the mother was taking care of the child?
>
> A: 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?
>
> A: Correct.

Pet.App.46a.

E. Proceedings Below

Five days after signing the adoption consent papers, Birth Father requested a stay of the South Carolina adoption proceedings, and soon after filed a complaint in Oklahoma state court seeking custody of Baby Girl. Pet.App.50a. Birth Father's complaint included the following statement: "Neither parent nor the children [sic] have [sic] Native American blood. Therefore the Federal Indian Child Welfare Act … do[es] not apply." Pet.App.9a; R.708. The Complaint includes a signed, notarized statement by Birth Father that each of the statements set forth in the Complaint "are true and correct except those matters stated on information and belief and those he believes to be true." R.709.[7] Nonetheless, on March 30, 2010, the Cherokee Nation intervened in the action based on Birth Father's registration with the Tribe. J.A.40-43. The Tribe's intervention motion was the first notice that Birth Mother and Adoptive Couple received regarding Birth Father's tribal membership; at that point, Baby Girl was six

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[7] When asked to explain why he included a false sworn statement in the Complaint declaring himself not Indian, Birth Father responded that he was about to deploy and "was trying to get things taken care of as fast as possible." R.550.

and half months old and had lived with Adoptive Couple her entire life. The next day, Adoptive Couple amended their complaint in the South Carolina proceedings to acknowledge Birth Father's Indian status. J.A.44-49.

On April 19, 2010, Birth Father amended the complaint to allege that both he and Baby Girl have Native American blood and therefore ICWA does apply. Pet.App.50a. Because South Carolina was Baby Girl's home state, the complaint was dismissed on jurisdictional grounds, but Birth Father and the Tribe successfully moved to intervene in the South Carolina adoption proceedings. Pet.App.10a, 50a.

Like Oklahoma law, South Carolina law provides that Birth Father's actions during Birth Mother's pregnancy and in the four months following Baby Girl's birth—in particular his refusal to provide any financial support to Birth Mother and Baby Girl—dissolved any legal parent-child relationship that would have rendered his consent necessary to Baby Girl's adoption by Adoptive Couple. Pet.App.21a-22a; S.C. Code § 63-9-310(A)(5). Birth Father argued, however, that as a member of the Cherokee Nation, he could invoke ICWA to block the adoption. Pet.App.10a n.12.

Pursuant to South Carolina law, the trial court appointed the Guardian to "represent[] the interests of Baby Girl" in the proceedings. Pet.App.10a-11a. The Guardian then undertook an investigation to determine the best interests of Baby Girl. In addition to reviewing numerous home studies and reports, the Guardian interviewed Adoptive Couple at their home in South Carolina and observed their

interactions with Baby Girl. The Guardian also traveled to Oklahoma to meet and interview Birth Father, as well as his parents and a daughter from a previous relationship. Pet.App.71a.

Based on this investigation, the Guardian concluded that it was in the best interests of Baby Girl to remain in the care and custody of Adoptive Couple. Pet.App.51a. She found that Baby Girl was a well-adjusted and emotionally secure child with the benefit of two loving adoptive parents. Pet.App.71a. In contrast, the Guardian expressed concerns about Birth Father's interest in establishing paternity, explaining that she found no evidence that Birth Father had been prevented from establishing his parental rights before Baby Girl's birth, or that he had attempted to be present at the child's birth or even inquired about the child or Birth Mother's health thereafter. Pet.App.71a-72a. The Guardian also found no evidence that Birth Father made reasonable efforts to provide financial support to Birth Mother or Baby Girl, or that he had developed a parenting plan that would enable him to provide for Baby Girl himself, rather than relying on his parents. Pet.App.71a-72a. Applying the traditional state-law criteria for protecting the best interests of the child, the Guardian concluded that they clearly favored leaving Baby Girl in the custody of her adoptive parents.[8]

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[8] Under S.C. Code § 63-3-830(A)(6), a guardian ad litem's report "may contain conclusions based upon the facts contained in the report" but may not make "a recommendation concerning which party should be awarded custody." Upon objection by Birth

By the time the adoption proceeding was tried in September 2011, Baby Girl was two years old and had lived with Adoptive Couple her entire life. Pet.App.10a. The Guardian testified that it was her factual finding that Baby Girl's well-being would be best served by approval of the adoption. Pet.App.51a. Birth Mother also urged the court to finalize the adoption. Pet.App.46a.

On November 25, 2011, the trial court denied the adoption petition and ordered custody of Baby Girl transferred to Birth Father. Pet.App.2a. The court acknowledged that under South Carolina law, Birth Father's abandonment of Baby Girl in utero extinguished any legal status he otherwise would have had to contest the adoption, but held that because Birth Father is Indian, he could invoke ICWA's parental termination provision to block the adoption. Pet.App.11a; 25 U.S.C. § 1912(f). The court thus ordered Adoptive Couple to surrender Baby Girl to Birth Father. Adoptive Couple and the Guardian separately moved for reconsideration, but the motions were denied. Pet.App.11a n.13.

On December 31, 2011, Adoptive Couple handed over Baby Girl, then 27 months old, to Birth Father, whom Baby Girl had never met. Pet.App.11a. It is the Guardian's understanding that Birth Father allowed Baby Girl to speak with Adoptive Couple by

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Father and the Tribe, the parties agreed that the trial court would not consider any portion of the report that constituted a "recommendation" rather than a conclusion. Pet.App.51a n.44; R.623.

telephone the following day, and then cut off all communication between them.

A fractured South Carolina Supreme Court upheld the transfer of Baby Girl's custody.[9] The majority recognized, like the trial court, that under South Carolina law, Birth Father's failure to timely support Birth Mother and Baby Girl dissolved any legal parent-child relationship that would have given him standing to contest the adoption. Pet.App.21a-22a n.19 ("Under state law, Father's consent to the adoption would not have been required."). The court agreed with the trial court, however, that Birth Father nonetheless was entitled to block the adoption under ICWA.

The court rejected Adoptive Couple's argument that Birth Father could not invoke ICWA because he does not qualify as a "parent" under the Act, which excludes from its definition of parent any "unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9); Pet.App.20a-22a. Adoptive Couple argued that because Birth Father's paternity was not "acknowledged or established" as a legal matter—i.e., because Birth Father was not a

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[9] The Guardian initially filed a brief in the South Carolina Court urging reversal of the trial court's decision to apply ICWA to the custody proceedings. She subsequently withdrew her brief after deciding that Baby Girl would be better served if the South Carolina Supreme Court were only asked to address the arguments raised by petitioners in their appeal. The Guardian's withdrawal of her brief did not have any effect on Baby Girl's status as a party in the case or the Guardian's continuing representation of Baby Girl. *See supra* p.14.

legally recognized parent of Baby Girl with standing to participate in the adoption proceedings—he did not fall within the category of Indian parents whose parental rights receive enhanced protection under ICWA. Pet.App.20a-22a.

The court disagreed, holding that although the Act "does not explicitly set forth a procedure for an unwed father to acknowledge or establish paternity," Birth Father met the Act's definition of "parent" because he had "acknowledg[ed] his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for adoption and establish[ed] his paternity through DNA testing." Pet.App.21a-22a.

Having found Birth Father to be a "parent" under ICWA, the majority held that Birth Father's "lack of interest in or support for Baby Girl during the pregnancy and first four months of her life … [was] not a valid consideration" in the adoption proceedings. Pet.App.32a n.26. The majority explained that under ICWA, Indian "parents" are free to withdraw their voluntary relinquishment of parental rights for any reason at any time prior to the entry of a final decree of termination or adoption, and upon withdrawal of consent, "the child shall be returned to the parent." 25 U.S.C. § 1913(c); Pet.App.24a. And under ICWA, an Indian parent's rights may not be involuntarily terminated unless: (1) "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and … these efforts have proved unsuccessful, 25 U.S.C. § 1912(d); and (2) there has been "a

determination supported by evidence beyond a reasonable doubt … 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," *id*. § 1912(f).

Here, the majority found, no efforts had been made to "prevent the breakup of the Indian family," Pet.App.26a, and Adoptive Parents did not "satisf[y] their burden of proving that Father's custody of Baby Girl would result in serious emotional or physical harm to her beyond a reasonable doubt," Pet.App.29a. The majority also asserted that even if Birth Father's rights were terminated, Birth Mother—a non-Indian single mother who had been told by the Cherokee Nation that the biological father who had abandoned their child also was not Indian—had violated section 1915(a) of the Act by placing Baby Girl with a non-Indian family. Pet.App.37a-39a; 25 U.S.C. § 1915(a).

The majority did not address, let alone dispute, the Guardian's findings that Baby Girl's interests would be best served through adoption by petitioners. Instead, the majority explained that "ICWA presumes that placement within its ambit is in the Indian child's best interests." Pet.App.39a.

Two of the five justices dissented. The dissenting justices criticized the majority for "decid[ing] the fate of a child without regard to *her* best interests and welfare," explaining that Congress did not intend ICWA "to be applied in derogation of the child's best interests," but instead "envisioned a symbiotic relationship between the additional protections of the Act and well-established state law

principles for deciding custody matters in accordance with the best interests of the child." Pet.App.41a. The dissenting justices accused the majority of "creating the illusion that Father's interests are in harmony with the best interests of the child," when "[t]he reality is Father purposely abandoned this child" and Birth Father's "vanishing act triggered the adoption in the first instance." Pet.App.42a. "Given the totality of the evidence," the dissenting justices observed, "placement with Father is not in Baby Girl's best interests. Father's established abandonment of parental responsibilities signifies 'that he is consciously indifferent to the rights—and emotional needs—of his infant daughter.'" Pet.App.72a (quoting *Doe v. Roe*, 386 S.C.624, 633 (2010)).

The dissenting justices also noted the testimony of Dr. Bart Saylor, a qualified expert in familial bonding, who explained that "severing the bond Baby Girl has formed with [the adoptive parents] would, beyond a reasonable doubt, be 'very traumatic,' … 'taking away everything that she had come to know and count on for her comfort and security and replac[ing] it with something that would be completely unfamiliar and strange to her … taking away what has been the very source and foundation of her security in her life." Pet.App.75a (quoting Dr. Saylor).

Finally, the dissenting justices rejected the notion that finalizing the adoption would result in the "breakup of [an] Indian family," explaining that "at the time Baby Girl was placed with Appellants, there was no indication Father had any interest in

grasping his opportunity as a parent. To the contrary, every indication from Father was that he was totally uninterested regarding Baby Girl's future and well-being and that he wished to 'give up' his parental rights." Pet.App.94a-95a. Accordingly, the dissenting justices concluded, "[t]he breakup of the Indian family does not turn on whether Baby Girl is raised by her mother or by Appellants—rather, the breakup of Father's Indian family was occasioned by Father's unwillingness to become involved in the child's life, a decision he made long before he learned of the adoption proceedings." Pet.App.91a.

SUMMARY OF ARGUMENT

"[T]he mere existence of a biological link" has never been the touchstone of parenthood or familial relationships. *Lehr*, 463 U.S. at 261. Just as this Court has long distinguished between the contribution of genetic material and the acts of caring for a child and forming a family, so too did Congress when it enacted ICWA. In interpreting the Act to prohibit the finalization of Baby Girl's adoption and require the transfer of custody to Birth Father without regard to Baby Girl's interests, the lower court misinterpreted the Act and needlessly put it on a collision course with Baby Girl's most basic constitutional rights.

As a threshold matter, the lower court erred in treating Birth Father as an Indian "parent" entitled to invoke ICWA. The Act's definition of "parent" specifically excludes any unwed biological father whose paternity is not "acknowledged or established." The lower court recognized that the Act does not set forth a procedure for acknowledging or establishing

paternity, but concluded that Birth Father "acknowledged" his paternity by intervening in the adoption proceedings and "established" his paternity through DNA testing. In so holding, the lower court ignored a much more logical reading of the statute that would explain Congress' decision to use the phrase "acknowledged or established" unelaborated and undefined: ICWA meant to incorporate state or tribal law as to when unwed father's paternity is acknowledged or established. Congress certainly could not have intended that the requirement be satisfied by DNA testing that did not even exist in 1978. Because Birth Father failed to satisfy South Carolina's definition of a "parent" with standing to participate in Baby Girl's adoption proceedings, he also failed to satisfy ICWA's definition of "parent" and should not have been allowed to invoke the Act to block Baby Girl's adoption.

Moreover, even aside from its mistake in treating Birth Father as an Indian "parent," the lower court's application of ICWA must be reversed because it relied on provisions that by their own terms demonstrate that ICWA has no application to this case. Throughout ICWA, Congress included language triggered only by previous legal or physical custody by the Indian parent, or at least some sort of state action preventing the Indian parent from obtaining legal or physical custody of the child. Neither the text nor purpose of the Act allow a biological parent who abandoned a child at birth to later exploit the Act to take the child from the family that raised her in the biological parent's absence.

These limitations on ICWA's scope are not only compelled by the statutory text and congressional intent, but also necessary to preserve the Act's constitutionality, ensuring that its differential treatment of Indians operates only to promote tribal sovereignty and the unique interests of Indians as tribal citizens, and not as invidious racial discrimination. In custody proceedings involving children domiciled on a reservation or who have some other non-biological tribal connection, the application of ICWA arguably serves these legitimate purposes. Moreover, in those settings, ICWA can be understood to classify on the basis of the Tribe's unique political and sovereign status under the Constitution and not trigger heightened scrutiny. But where the statute is triggered by nothing more than a child's 3/256th of Native American blood, where neither the child nor the biological parents are domiciled on Indian land or have any other close connection to tribal land or tribal sovereignty, its classifications cannot be understood as anything other than a racial classification. And that racial classification was employed to deny Baby Girl her most basic constitutional rights.

The consequences of ICWA's application for Baby Girl could not be more dramatic. In the absence of ICWA, Baby Girl is entitled to a best interests determination focused on her own well-being. But the courts below denied her that protection for no reason other than her race—more precisely, a fraction of her race. Instead of an adoption proceeding focused on Baby Girl and her best interests, the erroneous application of ICWA shifted the focus entirely. The only dispositive question in

the adoption proceedings was whether Birth Father was likely to "serious[ly]" harm Baby Girl if he obtained custody of her. While the best interests standard fully protected Baby Girl's most fundamental liberty interests—indeed, arguably the most relevant liberty interests a 27-month old child possesses—ICWA simply changed the subject and protected her not at all. The reason for that dramatic difference was not to protect existing Indian families or to avoid children being taken from the reservation or even to protect the sovereignty of tribal courts. The reason was Baby Girl's race as contributed by a biological father whose parental status was neither acknowledged nor established under applicable state law. ICWA does not require this unconscionable result. The Constitution does not permit it. The decision below must be reversed.

ARGUMENT

I. The Indian Child Welfare Act Did Not Mandate Or Permit The Removal Of Baby Girl From Her Adoptive Home

There is no question that under state law, Birth Father's failure to timely support Baby Girl deprived him of any standing to participate in the adoption proceedings. The South Carolina Supreme Court allowed Birth Father to block the adoption and obtain custody of Baby Girl based solely on its determination that ICWA mandated that result. That determination was in error. Birth Father is not an Indian "parent" entitled to enhanced parental rights under ICWA because the Act specifically excludes from its definition of "parent" any unwed biological father whose paternity is not legally

acknowledged or recognized. It is indisputable that as a result of his absence from Baby Girl's life prior to intervening in the adoption proceedings, Birth Father lacked any legally recognized parent-child relationship with Baby Girl under state law or the U.S. Constitution. Nothing in ICWA confers rights on unwed biological fathers who otherwise have failed to establish any parental status. And interpreting ICWA to empower an "unwed father" to trump Baby Girl's rights based solely on DNA, not the kind of affirmative steps that acknowledge or establish paternal rights under state law, exacerbates the constitutional problems that inhere in the statute. The lower court compounded its basic error and invited further constitutional difficulty by relying on provisions of ICWA that by their own terms have no application to the adoption of a child who was never domiciled on Indian land or in the legal or physical custody of an Indian parent.

A. Birth Father Is Not A Legally Recognized Parent Of Baby Girl Under South Carolina Law, The U.S. Constitution, Or ICWA

According to the court below, the determinative provision of ICWA mandating the custody transfer here is section 1912(f), which provides that "[n]o termination of parental rights may be ordered … in the absence of a determination, supported by evidence beyond a reasonable doubt … 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). Applying this provision, the court

concluded that the individual best interests of Baby Girl were no longer relevant, much less the focal point of the adoption proceeding as otherwise mandated by state law. Instead, Birth Father was entitled to custody of Baby Girl because, despite his expressed desire to relinquish his parental rights and failure to show any affirmative interest in Baby Girl until he was told about the adoption proceedings, the record did not establish beyond a reasonable doubt that his custody of Baby Girl would result in serious emotional or physical damage. Pet.App.29a.

That determination fails at the threshold because Birth Father is not a "parent" within the meaning of ICWA. Section 1903(9), consistent with background legal principles and this Court's due process precedents, treats unwed fathers distinctly. That section excludes from the Act's definition of "parent" "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). The Act does not provide a federal standard or procedure for determining whether paternity has been "acknowledged or established"; this omission is not surprising because the question whether a legal child-parent relationship exists is a function of state law. *See 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."); *De Sylva*, 351 U.S. at 580. While federal law could provide a distinct definition, in the absence of any federal definition or federal procedure for acknowledging or establishing paternity the most logical inference is that Congress intended the statute to borrow the relevant state (or perhaps tribal in a case proceeding in tribal court) law. In

other words, the Act provides no rights for an "unwed father where paternity has not been acknowledged or established" under the applicable state law. The only thing ICWA is explicit about in this regard is that *not all unwed biological fathers* are "parents" entitled to invoke the Act.

The court below acknowledged that the Act "does not explicitly set forth a procedure for an unwed father to acknowledge or establish paternity," but nonetheless held as a matter of preemptive federal law that Birth Father met the Act's definition of "parent" because he "acknowledg[ed] his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for adoption and establish[ed] his paternity through DNA testing." Pet.App.21a-22a. That holding was doubly mistaken. First, by failing to apply the South Carolina law governing when an unwed birth father establishes parental status, the courts below created unnecessary conflict between federal and state law (not to mention an unnecessary override of Baby Girl's right to a best interests determination). Second, even assuming Congress intended state courts to fashion a federal law of acknowledgement and establishment of paternity, the courts below adopted the wrong rule. The decision below relies on an erroneous and anachronistic interpretation of section 1903(9) that conflicts with the plain meaning of "acknowledged or established" paternity at the time of ICWA's enactment in 1978.

This Court has long recognized that "a biological parent is not necessarily a child's parent under law." *Astrue v. Capato*, 132 S. Ct. 2021, 2030 (2012). As

explained earlier, up until the 1970s, in most states the legal status of fatherhood arose almost exclusively from a man's marriage to the child's mother. *See supra* pp.4-5. Even where paternity was uncontested, an unwed father had virtually no legal recognition as a child's parent. In the 1970s, the law began to change, largely in response to a series of decisions by this Court distinguishing between unwed fathers who made timely, affirmative efforts to support and care for their children, and those whose parental claims were based on "the mere existence of a biological link." *Lehr*, 463 U.S. at 261. This Court explained that the former have a constitutionally recognized interest in maintaining their already-established relationship with their child, while the latter, consistent with the historical treatment of unwed fathers, have no parental rights. *See Quilloin*, 434 U.S. at 248-49.

Thus, a clear principle emerges from this Court's constitutional cases: biology alone does not confer parental rights on an unwed father; he has to earn those rights by affirmative acts establishing a relationship above and beyond the biological link. *Caban*, 441 U.S. at 392 ("In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."); *Michael H.*, 491 U.S. at 142-43 (Brennan, J., dissenting) ("Though different in factual and legal circumstances, [our] cases have produced a unifying theme: although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that

child, such a link combined with a substantial parent-child relationship will do so."); *Lehr*, 463 U.S. at 261 ("[T]he mere existence of a biological link does not merit equivalent constitutional protection. … [T]he importance of the familial relationship to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association.").

In response to these cases, state legislatures adjusted their paternity and custody laws to reflect this basic principle: unwed fathers who timely seek to care for their children enjoy legally recognized parental rights, including the right to participate in custody and adoption decisions, while unwed fathers who renounce their rights or fail to promptly make such efforts do not. *See supra* pp.6-7 (citing state statutes). Reflecting the paramount interest of children in forming immediate and stable relationships with the caregivers who step forward in a birth father's absence, these laws strictly limit the window of opportunity for manifesting parental behavior. There is no grace period for birth fathers who change their mind or decide that although they were happy to terminate their rights in favor of the birth mother, they nonetheless want to block her decision that adoption is in the child's best interests.

When Congress chose in 1978 to limit the category of unwed fathers included in ICWA's definition of "parent" to those unwed fathers whose paternity was "acknowledged or established," it operated against the backdrop of the developing federal case law and state laws incorporating the principle that biology alone (or biology plus belated

interest) does not establish paternity. Timely affirmative actions were necessary for an unwed father to acknowledge or establish paternity. The House Report to the Act makes this much clear, explaining that the definition of "parent" in ICWA "is not meant to conflict with the decision of the Supreme Court in *Stanley*," the first of this Court's decisions distinguishing between unwed fathers who have taken the steps necessary to establish a legal child-parent relationship and those who have not. H.R. Rep. No. 95-1386, at 21 (1978), 1978 U.S.C.C.A.N. 7530, 7543 (citing *Stanley v. Illinois*, 405 U.S. 645 (1972)).

The question of congressional intent on this point thus is starkly different from the question in *Holyfield*, where this Court concluded that Congress intended that the term "domicile" be applied according to federal common law rather than state law. 490 U.S. at 43-47. Unlike domicile, there is no developed federal common law defining parent-child relationships, because Congress and the federal courts have deferred to state law on this issue. *De Sylva*, 351 U.S. at 580. Thus, in the absence of any statutory definitions or procedure for establishing paternity, the most natural inference in that ICWA simply picks up the relevant state law for establishing paternity.

But in all events, even if there is to be a uniform federal rule for acknowledging and establishing paternity, as opposed to a uniform rule of borrowing the state law, there is no reason for that uniform federal rule to deviate from the dominant state practice and federal constitutional law at the time of

ICWA's passage. As this Court explained in *Reves v. Ernst & Young*, 494 U.S. 56, 78 n.* (1990), "in the absence of a federal law … or other alternative sources for discerning the applicability of [a] statutory term … we are dependent on the state common law at the time of the Act's creation as a basis for a nationally uniform answer to this 'federal question.'" *See also Holyfield*, 490 U.S. at 47 ("That we are dealing with a uniform federal rather than a state definition does not, of course, prevent us from drawing on general state-law principles to determine 'the ordinary meaning of the words used.' Well-settled state law can inform our understanding of what Congress had in mind when it employed a term it did not define.").

As a result of Birth Father's failure to timely support and care for Baby Girl, his paternity is neither acknowledged nor established by the U.S. Constitution or the laws of South Carolina, Oklahoma, and many other states. At the time that Birth Father sought to intervene in the adoption proceedings, he acknowledged that he told Birth Mother that he relinquished his parental rights and that he had made absolutely no affirmative efforts to provide any support to Birth Mother or Baby Girl or even to inquire about Baby Girl's well-being or whereabouts after her birth. Pet.App.4a, 44a-48a. Birth Father's parenting efforts thus fall far short of even the minimal efforts this Court has recognized as *inadequate* to establish a constitutionally recognized parent-child relationship. *See, e.g., Lehr*, 463 U.S. at 248-50, 269 (birth father lacked standing in adoption proceedings despite offering financial assistance to the mother and visiting the baby at the hospital after

birth and thereafter whenever birth mother permitted); *Quilloin*, 434 U.S. at 246-51 (birth father lack standing in adoption proceedings despite occasional visits, and some financial support, toys and gifts).

And as the South Carolina Supreme Court recognized, Birth Father's abandonment of Baby Girl during the pregnancy and for the first four months of her life likewise deprived him of any standing under state law to participate in her adoption proceedings. S.C. Code § 63-9-310(A)(5); Pet.App.21a-22a n.19 (acknowledging that "[u]nder state law, Father's consent to the adoption would not have been required" and his parental rights "would be terminated under state law without further inquiry").[10]

By the lower court's reasoning, none of this matters because, *after* Birth Father realized that his voluntary relinquishment of his parental rights would facilitate Baby Girl's adoption rather than leave Birth Mother solely responsible for Baby Girl's care and custody, Birth Father lodged an objection to the adoption "acknowledg[ing]" his paternity, and he subsequently "established" his biological relationship to Baby Girl through DNA testing. Pet.App.21a-22a. That interpretation of ICWA's "acknowledged or established" language is not sustainable. The notion that an unwed father can obtain the full suite of dramatic rights under ICWA (with their even more

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[10] Oklahoma law compels the same result. Okla. Stat. tit. 10, § 7505.4.2(C).

dramatic effect on the rights and fate of Baby Girl) simply by raising a hand and an objection and thereby acknowledging his paternity makes no sense. If all an unwed father needed to obtain full parental status was to assert his ICWA rights, there would have been little need for ICWA's differential treatment of unwed fathers. Nor is it plausible that Congress anticipated that DNA tests that did not even exist in 1978 would be the mechanism for "establish[ing]" paternity under ICWA. Such an interpretation would be plainly incompatible with the state of the law at the time of ICWA's enactment and antithetical to Congress' express efforts to harmonize the Act's definition of "parent" with this Court's cases. A biological link confirming acknowledged paternity has never been enough to qualify an unwed father for the benefits of paternity, and ICWA did not usher in a silent revolution in paternity rights.

Moreover, as developed more fully below, the lower court's interpretation is not just an implausible reading of a statute enacted in 1978, but also an unconstitutional one. ICWA confers powerful rights on Indian parents and tribes that come into collision with Baby Girl's own liberty interests. The federal government obviously may take steps to ensure the preservation of tribal sovereignty and accordingly has a relatively free hand to draw distinctions when it comes to Indian lands and tribal authority. But the federal government does not have any license to treat Native Americans differently from others based solely on biology and race. By (mis)interpreting ICWA to allow unwed Indian fathers—alone among all unwed fathers—to establish paternity based on

biology alone, the court below unnecessarily creates grave doubts about ICWA's constitutionality.

B. ICWA Does Not Require Removing A Child From An Adoptive Home Chosen By A Non-Indian Birth Parent Who Had Sole Legal And Physical Custody Over The Child Due To The Birth Father's Voluntary Abandonment Of The Child Before Birth

Even aside from its mistake in conferring parental status to Birth Father, the lower court's application of ICWA must be reversed because it erroneously relied on provisions that by their own terms establish that the Act has no application to the adoption of a child who was never in the legal or physical custody of an Indian parent to begin with due to the Indian parent's abandonment of the child at birth. Indeed, in the present case, Birth Father abandoned Baby Girl in utero, rendering Birth Mother, a non-Indian, her sole physical custodian and legal parent from the moment of her birth. *See* Okla. Stat. tit. 10, §§ 7501-7505. Immediately after, Birth Mother exercised her sole legal decision-making authority over Baby Girl to make what she believed was the best choice she could make for her daughter: to place her with Adoptive Couple, whom she had personally and carefully chosen to raise and care for Baby Girl. And from that moment forward through the adoption proceedings two years later, Adoptive Couple was the only family that Baby Girl knew.

By its plain terms, ICWA has no application to these circumstances. To begin with, section 1912(f),

the provision that the lower court relied on to transfer custody to Birth Father, Pet.App.28a-33a, cannot logically operate to foreclose the termination of Birth Father's parental rights because it focuses exclusively on whether "the *continued* custody of the child by the parent" will cause serious emotional or physical damage to the child. 25 U.S.C. § 1912(f) (emphasis added). The use of the word "continued" was neither inadvertent nor something that courts are free to ignore. Applying that provision in a situation like this makes nonsense of it—there is no custody to continue. And the underlying inquiry does not make sense: when an Indian parent has custody, there is an existing potential for abuse that can be meaningfully evaluated and it would make sense to remove the child from that pre-existing custody only if a substantial showing of emotional or physical damage is made. But when the Indian parent has never exercised any custody over the child, there is no reason the statute would place a strong thumb on the side of continuing custody that never existed. Nor in any but the rarest of cases will it be possible to demonstrate that serious emotional or physical damage will ensue. It is the assumption of pre-existing custody and the possibility of evidence of abuse in that relationship that makes this provision make sense. Applying it where there is no pre-existing legal or physical custody takes a provision designed to minimize transfers out of pre-exiting custody and converts it into a rule of almost automatic transfer based on race. There is no reason to think Congress countenanced this dramatic interference with the liberty interests of children like Baby Girl.

Indeed, throughout ICWA, Congress included language triggered only by previous legal or physical custody by the Indian parent, or at least some sort of state action preventing the Indian parent from obtaining legal or physical custody of the child. *See id.* § 1902 (ICWA establishes "minimum Federal standards for the *remova*l of Indian children from their families") (emphasis added); *id.* § 1901(4) (ICWA seeks to prevent Indian families from being "*broken up* by the *removal*, often unwarranted, of their children … by nontribal public and private agencies") (emphasis added); *id.* § 1912(d) (requiring provision of "remedial services … designed to *prevent the breakup* of the Indian family") (emphasis added); *id.* §1913(c) (voluntary consent to adoption may be withdrawn "for any reason … and the child shall be *returned* to the parent") (emphasis added). None of these provisions has any reasonable application where the Indian parent voluntarily abandoned the child at birth to the non-Indian parent—under these circumstances, there is no Indian family to "breakup" and no Indian parent from whom the child can be "removed."

The Bureau of Indian Affairs ("Bureau") Guidelines for Indian Child Custody Proceedings likewise reflect that at the time of ICWA's enactment, the Bureau did not envision the Act applying to children who were never domiciled on a reservation and who were always within the sole legal and physical custody of a non-Indian parent due to abandonment at birth by the Indian parent. The Bureau described section 1912(f) as providing that "[a] child may not be *removed* simply because there is someone else willing to raise the child who is likely to

do a better job …. It must be shown that it is dangerous for the child to *remain* with his or her *present* custodians." Bureau Guidelines D.3 Commentary (emphasis added). Indeed, the Guidelines recognize that the statutory standard assumes there is pre-existing custody to evaluate. *See id.* at D.4 Commentary ("[T]he issue on which qualified expert testimony is required is the question of whether or not serious damage to the child is likely to occur *if the child is not removed*.") (emphasis added).

Apparently recognizing that these provisions cannot be applied in this case according to their plain meaning, the lower court improperly took it upon itself to re-write them. Unable to assess the impact of Birth Father's "continued custody" under section 1912(f), the lower court inquired instead whether Birth Father would likely cause serious emotional or physical harm to Baby Girl if he were to obtain custody of her in the future. Pet.App.28a-33a. And unable to determine whether the State had provided remedial services "designed to prevent the breakup of the Indian family" before removing Baby Girl from Birth Father's custody—a nonsensical, counter-factual requirement where the Indian father's voluntary abandonment of the child before birth foreclosed the initial formation of an Indian family—the lower court transformed section 1912(d) into a requirement that Birth Mother and Adoptive Couple offer "remedial services" to Birth Father after learning about his Cherokee status in an effort to convince him to change his mind about abandoning Baby Girl. Pet.App.26a-27a. And, perhaps most absurd of all, the lower court blamed Birth Mother

for failing to adhere to section 1915(a)'s placement preferences when, as a non-Indian, single pregnant woman who was told by the Tribe that the father of her unborn child was *not* a registered member, she chose Adoptive Couple to adopt Baby Girl rather than contacting the Tribe to assist her in finding a Cherokee adoptive family. Pet.App.37a-39a.

Of course, it is not the place of courts to rewrite federal statutes to fit circumstances not contemplated by Congress. If Congress had intended the Act to apply to adoption proceedings involving children who have no tribal connection beyond the genetic material of a biological father who abandoned the child before birth, it would have provided language allowing for that application. If it had provided such language, it presumably would have used the best interests of the child—rather than the absence of strong evidence of abuse—as the standard in such circumstances. And any effort to build in special advantages based on biology, rather than connections to tribal lands, would have raised serious constitutional concerns.

It is not an accident that ICWA includes no mechanisms for disrupting the adoptive placements of children who are not domiciled on tribal land and were never legally or physically part of an Indian family due to abandonment by the Indian parent. Indeed, although by 1987 numerous state courts had held that ICWA does not apply under such circumstances, the Senate Committee on Indian Affairs rejected a proposed amendment that would have extended the application of ICWA to children eligible for tribal membership regardless whether the

child previous lived on a reservation, in an Indian cultural environment, or with an Indian parent. *See* S.1976, 100th Cong., 1st Sess., 133 Cong. Rec. S18532, S18533 (daily ed. Dec. 19, 1987). Especially in light of that rejection, courts should not lightly assume that Congress intended to enter these uncharted and constitutionally problematic waters.

It is one thing, as in *Holyfield*, to recognize tribal sovereignty over custody determinations involving children who remain domiciled on tribal land despite the efforts of their birth parents to abandon them off-reservation. It is quite another matter to expand ICWA to govern the custody proceedings of children who have not even the remotest non-biological relationship to the tribe that seeks to "retain[]" them. *Holyfield*, 490 U.S. at 37. As many courts have recognized, to tear a young child away from the only parents she has ever known, for no reason other than a biological connection to an Indian parent who abandoned her at birth, does not further the purposes of the Act, but simply inflicts tragedy upon the child.

In *In Matter of Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988), for example, the Indiana Supreme Court held that where the Indian birth mother placed the child for adoption six days after birth and had almost no further contact with the child until seven years later, the birth mother could not invoke ICWA to remove the child from her adoptive family. The court explained that although "the child's biological ancestry is Indian, … her entire life of seven years to date has been spent with her non-Indian adoptive parents in a non-Indian culture.

While the purpose of the ICWA is to protect Indian children from improper removal from their existing Indian family units, such purpose cannot be served in the present case." *Id.* at 303.

Similarly, in *In the Matter of the Parental Rights as to N.J.*, 125 Nev. 835 (2009), the Nevada Supreme Court found ICWA inapplicable to a child who was placed in foster care at birth because of her non-Indian birth mother's drug use and raised by the foster family without objection from the mother until they sought to adopt the child 18 months later. The court refused to allow the non-Indian birth mother to rely on section 1912(f) to block the termination of her parental rights, explaining that "the application of the ICWA to this case would serve only one purpose: to deprive N.J. of the only home she has ever known and come to love." *Id.* at 848.[11]

So, too, here. Neither the text nor purpose of ICWA allow a biological parent who abandoned a child at birth to later exploit the Act to take the child from the family that raised her in the biological

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[11] *See also, e.g.*, S.*A. v. E.J.P & R.L.P.*, 571 So.2d 1187, 1189 (Ala. Civ. App. 1990) (rejecting birth father's attempt to use ICWA to block the adoption of a three year old child by the great-aunt and great-uncle who had raised her after the father abandoned her, explaining that because the father "never exercised his parental responsibilities and never attempted to become a part of the child's life, … [t]he child was never a part of an Indian family environment"); *In the Interest of S.A.M.*, 703 S.W.2d 603, 608 (Mo. Ct. App. 1986) (refusing to allow birth father to invoke ICWA to remove a seriously handicapped 7-year-old child from the foster parents who had raised her since birth).

parent's absence. As this Court recognized in *Quilloin*, 434 U.S. at 255, "the result of [an] adoption" under these circumstances is not to "breakup" a hypothetical family that the birth father intentionally refused to form, but "to give full recognition to a family unit already in existence."

II. The Lower Court's Erroneous Interpretation Of ICWA Raises Serious Constitutional Problems

The lower court's erroneous interpretation of ICWA is not only contrary to the statutory text and congressional intent, but also raises serious constitutional problems.

Correctly interpreted, the Act limits its application to adoption and custody proceedings involving children who are either domiciled on a reservation or have some other tribal connection beyond biology. These limitations are crucial to preserving the Act's constitutionality, ensuring that the Act's differential treatment of Indians operates only to promote tribal sovereignty and the unique interests of Indians as tribal citizens, and not as invidious racial discrimination that arbitrarily trumps Baby Girl's liberty interests. As explained in section I.A., section 1903(9)'s definition of parent, properly interpreted, avoids these difficulties by declining to give an unwed Indian father rights based on biology alone that no non-Indian unwed father enjoys. And as explained in section I.B., there is language throughout ICWA limiting the Act's application to children in the pre-existing custody of an Indian parent or other circumstances in which there is a distinct connection to tribal interests.

The lower court ignored these limitations and applied the Act to require the removal of Baby Girl from her adoptive family based solely on a sliver of genetic material inherited from a birth parent she had never met because he intentionally abandoned her before birth. The application of ICWA under these circumstances did not prevent the breakup of an Indian family, preserve any existing tribal relationships, promote tribal sovereignty, or serve any other constitutionally permissible purpose. Instead, it operated as a race-based preference for Birth Father, allowing him to invoke his Indian heritage to block the adoption of a child to whom he had no claim under state law or the Constitution. More tragically, it operated as race-based detriment for Baby Girl, extinguishing her right under state law to have *her* best interests determine whether her adoption was finalized. This outcome must be rejected as antithetical to the equal protection and due process clauses of the Constitution.

A. The Lower Court's Application Of ICWA Deprived Baby Girl Of An Adoption Determination Based On Her Best Interests

Under state law, Baby Girl and her interests were to be the focus of the adoption proceedings. She had the right to have her best interests be "the primary, paramount and controlling consideration of the court" in resolving the dispute over her adoption. *Cook*, 271 S.C. at 140. The inquiry into Baby Girl's best interests would have considered "the character, fitness, attitude, and inclinations on the part of each parent as they impact the child," as well as the

"psychological, physical, environmental, spiritual, educational, medical, family, emotional, and recreational aspects of the child's life." *Woodall*, 322 S.C. at 11.

This "best interests of the child" standard has been applied by American courts in custody proceedings for 200 years and is universally recognized by both state and federal courts as the cornerstone for resolving custody disputes. *See, e.g.*, *Finlay v. Finlay*, 240 N.Y. 429, 433 (1925) (Cardozo, J.) (in custody disputes, the judge must act "as parens patriae to do what is best for the interests of the child. He is to put himself in the position of a 'wise affectionate and careful parent,' … and [to] make provision for the child accordingly"); Joseph Story, 2 *Commentaries on Equity Jurisprudence as Administered in England and America* 675-77 (13th ed. 1886) (tracing the origins of the best interests of the child standard to the English parens patriae doctrine).

In sum, the best interests standard has "exist[ed] from time immemorial and has become the bedrock of our state custody statutory law"—it is "a right that is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental or implicit in the concept of ordered liberty.'" Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 St. Louis U. L. J. 113, 160-61 (2009) (quoting *Michael H.*, 491 U.S. at 127 n.6); *see also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The goal of granting custody based on the best interests of the child is indisputably a substantial government

interest for purposes of the Equal Protection Clause.").

There can be no doubt that the erroneous application of ICWA in this case profoundly transformed the nature and outcome of Baby Girl's adoption proceedings. The change worked by the courts' application of ICWA was not subtle. It was Copernican. Instead of a proceeding focused on Baby Girl and her best interests, the lower courts shifted the inquiry entirely to Birth Father and whether he posed an affirmative danger. Having wrongly determined that ICWA governed the custody dispute, the lower courts replaced the traditional best interests inquiry with a federal rule mandating her transfer to Birth Father—a man she had never met and who had no parental rights under state law or the Constitution—so long as it did not appear likely that Birth Father would inflict "serious emotional or physical damage" on Baby Girl. Pet.App.28a-33a; *see also* Pet.App.54a-55a (criticizing "the majority's approach of applying ICWA in a rigid, formulaic manner without regard to the facts of the particular case and the best interests of the Indian child").

In stark contrast to the best interests standard, the federal rule eliminated any consideration of Birth Father's "lack of interest or support for Baby Girl" before the adoption proceedings, Pet.App.32a n.26, or Baby Girl's emotional attachment to the adoptive family that had cherished and cared for her since the moment of her birth and provided her a loving, stable home during Birth Father's intentional absence from her life, Pet.App.75a. None of that mattered to the lower court—as an "Indian child," Baby Girl's best

interests were deemed automatically aligned with the Tribe's interest in having her raised by a tribal member, and the only dispositive question was whether Birth Father was likely to "serious[ly]" harm Baby Girl if he obtained custody of her. Pet.App.28a-37a. And having determined that such serious damage was unlikely to occur, the trial court ordered Baby Girl, then 27 months old, removed from the only family she had ever known and sent to live with a man who, due to his own conduct, was a stranger to her. In short, an outcome that would have been unthinkable under the traditional best interests inquiry was, by the lower court's reasoning, mandated by federal law.

To be sure, in custody proceedings involving children domiciled on a reservation or who have some other non-biological tribal connection, federal rules designed to prevent the breakup of the Indian family may legitimately "further Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). As this Court explained in *Holyfield*, because tribes have exclusive jurisdiction over custody proceedings involving children domiciled on tribal lands, "[i]t is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe—and perhaps the children themselves—in having them raised as part of the Choctaw community." *Id.* at 54.

But none of that has anything to do with this case. Baby Girl is a predominantly Hispanic child with a 3/256th quantum of Cherokee blood she inherited from a biological father who abandoned her

at birth to the sole legal and physical custody of her non-Indian birth mother. Neither Birth Father, Birth Mother, nor Baby Girl was domiciled on a reservation and Baby Girl had no other tribal connection beyond a sliver of genetic material. To deprive Baby Girl of her right to an individual best interests inquiry based solely on her race—or more precisely, a tiny fraction of her race—is exactly the sort of invidious discrimination and deprivation of liberty this Court has long held prohibited by our Constitution.

B. The Lower Court's Application Of ICWA To Remove Baby Girl From Her Adoptive Home Violated Baby Girl's Equal Protection Rights

The Equal Protection Clause protects adults and children alike from differential treatment based on race or ancestry. *See Brown v. Board of Education*, 347 U.S. 483 (1954). In *Palmore*, 466 U.S. at 434, this Court struck down the use of racial classifications to remove a child from an appropriate custody placement. This case is no different. Baby Girl's Indian blood quantum was the sole reason the lower court ordered her removed from the loving, stable home she had lived in since birth and placed with a biological father whose failure to timely care for her extinguished any parental rights he might otherwise have had under state law or the Constitution. This Court "has consistently repudiated [such] distinctions between citizens solely because of their ancestry as being odious to a free people whose institutions are founded upon the

doctrine of equality." *Regents of University of California v. Bakke*, 438 U.S. 265, 294 (1979).

Of course, this Court has sanctioned differential treatment of Indians arising out of Congress' treaty obligations and responsibilities to the tribes as sovereign entities, *see Rice v. Cayetano*, 528 U.S. 495, 519 (2000), including legislation that "singles out Indians for particular and special treatment" designed "to further Indian self-government," *Mancari*, 417 U.S. at 554-55. Thus, in *Mancari*, this Court upheld a racial preference for Indians in hiring by the Bureau of Indian Affairs because that agency governs the "lives and activities" of Indians "in a unique fashion." *Id.* at 554. The Court emphasized, however, that it would be an "obviously more difficult question" if Congress were to extend that preference to other government agencies or create "a blanket exemption for Indians from all civil service examinations." *Id.*

The key to whether legislation involving Indians triggers the relaxed review of *Mancari*, or the exacting scrutiny traditionally demanded of classifications based on race, is whether the challenged legislation "relates to Indian land, tribal status, self-government or culture." *Williams v. Babbitt*, 115 F.3d 657, 664-65 (9th Cir. 1997). When a racial classification is tethered directly to tribal land or tribal self-government, the political and racial aspects of the regulation are inextricably intertwined, such that treating the laws as involving ordinary racial classifications would deny the federal government its authority under the Treaty and Indian Commerce Clauses. But when tribal

preferences are untethered from tribal land or tribal self-government and simply provide a naked advantage (or disadvantage) based on race, strict scrutiny is imperative.

When interpreted correctly, ICWA serves the legitimate purpose of preventing the involuntary removal of Indian children from their families and, in cases involving the custody of Indian children domiciled on tribal land, ensuring the tribe's ability to exercise its sovereignty over the custody proceedings. *See Holyfield*, 490 U.S. at 30-37 (describing purposes of ICWA). But it is another thing entirely to employ race-based preferences in adoption proceedings where the child is in the exclusive custody of a non-Indian parent who, as the only legally recognized parent of the child, has chosen to place the child for adoption and where the unwed father—were he of any other race—would have no rights whatsoever. Conferring special privileges on the biological father—or more to the point, special disabilities on a child—simply because of race serves no purpose relating to "Indian self-government," *Mancari*, 417 U.S. at 555; to the contrary, the child's home is already outside the tribe, not because the non-Indian mother decided to place the child for adoption, but because the Indian father previously abandoned the child to the non-Indian mother. Surely the application of ICWA under these circumstances is exactly the sort of race-based differential treatment this Court has long understood to violate the Equal Protection Clause.

C. The Lower Court's Application Of ICWA To Remove Baby Girl From Her Adoptive Home Violated Baby Girl's Fundamental Liberty Interests

The lower court's erroneous interpretation of ICWA also violated Baby Girl's fundamental liberty interests. This Court has long recognized that the maintenance of "certain intimate human relationships" must be "secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). Foremost among these "intimate human relationships" is "the creation and sustenance of a family." *Id.* at 617-19. And "to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation." *Troxel v. Granvill*e, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting). Indeed, it is hard to imagine what liberty interest is more important to a 27-month old child than maintaining the only family bonds she has ever known, absent a strong showing of necessity. And precisely because a 27-month old is not well-positioned to assert those liberty interests, the courts, and guardians ad litem, vindicate those liberty interests through the time-tested best interests standard. Rendering that standard irrelevant based on nothing more than race surely raises grave constitutional difficulties.

This Court has also long recognized that "biological relationships are not the exclusive determination of the existence of a family"; instead, "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association. … No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship." *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 843-44 (1977). These relationships are accordingly granted "a substantial measure of sanctuary from unjustified interference by the State," *Roberts*, 468 U.S. at 618, in which a child, no less than a parent, may seek shelter. *See Reno v. Flores*, 507 U.S. 292, 304 (1993); *cf. Plyler v. Doe*, 457 U.S. 202, 223 (1982).

There can be no dispute that the lower court's application of ICWA in this case resulted in Baby Girl's removal from the only "intimate human relationships" she had ever known. Certainly there are some circumstances—such as in cases of abuse or neglect—where the government may, indeed should, interfere with a child's family relationships in order to protect her best interests. And where, as in *Holyfield*, a tribe's sovereignty over its own citizens is at stake, such intrusion may be warranted by such distinctly federal interests. *See Holyfield*, 340 U.S. at 54. But as a general matter, the best interests standard operates to protect the liberty interests of the child. Thus, any federal effort to override the traditional best interest standard risks implicating

constitutional concerns and any effort to do so based on race alone would have to satisfy strict scrutiny.

That latter point makes this case fundamentally unlike *Holyfield* where there was a clear connection between the children and tribal sovereignty and tribal land. In those circumstances, federal law can be understood to classify on a basis other than race. Not so here. ICWA applied here solely because of race and the effects were dramatic. But for Birth Father's race (and the courts' misinterpretation of ICWA), he would have no parental rights at all. But for Baby Girl's race (and the courts' misinterpretation of ICWA), she would have been entitled to a proceeding focused on her best interests and fully protective of her liberty interests. No compelling interest could justify this remarkable reversal of the focus and equities. This case is not about whether race can be a tie-breaker in determining which company receives a highway contract. It is a case about whether race, and race alone, can convert someone from a complete stranger to the custody proceedings to the person with a virtual guarantee of custody, and whether race, and race alone, can deprive a young girl of an inquiry focused on her best interests and ultimately deprive her of the only home she has ever known.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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