No. 12-____

IN THE

Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the South Carolina Supreme Court

PETITION FOR A WRIT OF CERTIORARI

[APPENDIX REDACTED]

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QUESTIONS PRESENTED

The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-63, applies to state custody proceedings involving an Indian child. A dozen state courts of last resort are openly and intractably divided on two critical questions involving the administration of ICWA in thousands of custody disputes each year:

(1) Whether a non-custodial parent can invoke ICWA 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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OPINIONS BELOW

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 The decision of the South Carolina family court is unpublished.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

JURISDICTION

The South Carolina Supreme Court affirmed the decision of the family court on July 26, 2012. Petitioners timely filed a petition for rehearing on August 9, 2012, which the court denied on August 22, 2012. App. 132a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 1903(9) of Title 25, U.S.C., states: "'parent' means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established."

Section 1912(f) of Title 25, U.S.C., states: "No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."

STATEMENT

With a "heavy heart," a bare majority of the South Carolina Supreme Court ordered petitioners to surrender custody of the two-year-old daughter they had raised since birth, even though petitioners were "ideal parents who have exhibited the ability to provide a loving family environment." App. 40a. The court granted custody to the child's biological father who had voluntarily relinquished his parental rights via text message while the mother was pregnant. *Id.* at 4a. Such a tragic result, the South Carolina court reasoned, was mandated by "the dictates of federal Indian law," *id*. at 40a—namely, the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-63. ICWA thus preempted state law under which petitioners' adoption of the child would have been approved.

ICWA would *not* have "dictated" this outcome, however, in at least eleven other states with a collective population of two million Native Americans. Courts in seven states have held that ICWA does not bar courts from terminating the parental rights of a non-custodial father under state law when the father abandoned his child to the sole custody of a non-Indian mother. Courts in four other states have held that an unwed, putative father must comply with state law rules to attain legal status as a "parent" under ICWA. State courts across the country have wrestled openly for decades over the meaning and operation of ICWA, and the result is two acknowledged splits on issues central to the decision below. These issues are at the heart of the administration of ICWA. And these issues potentially impact thousands of child custody cases *annually* involving Indian children with unwed, mixed-race parents.

The dissenting justices aptly described the South Carolina Supreme Court's decision a "human tragedy." App. 101a (Hearn, J., dissenting). They explained that the decision wrongly "decides the fate of a child without regard to *her* best interests and welfare." *Id.* at 41a (Kittredge, J., dissenting). Few issues have greater importance to the lives of U.S. citizens than the rights that attach to parenthood. And few issues are of greater importance than an individual's decision to raise a child. The application of ICWA in this and countless similar cases has disrupted the lives of children, their parents, extended families, the adoptive parents, and others affected by child custody and adoption proceedings. The decision below also sends a chilling message to any couple wishing to adopt a child of Native American descent. Because cases under ICWA come up through the state family court system, this Court is the only federal court in a

position to interpret this federal statute and provide much-needed clarity in an area of law where the need for clear rules is paramount.

A. Statutory Framework

Congress passed ICWA in 1978 to reduce "harm to Indian parents and their children who were *involuntarily* separated by decisions of local welfare authorities." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989) (emphasis added). Recognizing that a "high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies," 25 U.S.C. § 1901(4), Congress established "minimum Federal standards for the removal of Indian children," *id*. § 1902. ICWA thus represents a rare entry by the federal government into substantive family law, which has long been the exclusive domain of state law. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.") (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)).

The substantive provisions of ICWA apply to state child custody proceedings involving an "Indian child." The Act defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). Congress did not, however, extend federal rights under ICWA to all biological parents of Indian children. To the contrary, Congress excluded from the definition of "parent" "the unwed father where paternity has not been acknowledged or established." 25

U.S.C. § 1903(9). That provision reflects the principle that "the rights of the parents are a counterpart of the responsibilities they have assumed." *Lehr v. Robertson*, 463 U.S. 248, 257 (1983).

A state court may not terminate a "parent's" custody rights under ICWA without consent unless it determines "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). Thus, in order to finalize an adoption of an Indian child removed from the "continued custody" of her parent, state courts must apply this high federal standard in lieu of any contrary state law.

B. Factual Background

Baby Girl was born on September 15, 2009. App. 2a. Her biological parents ("Mother" and "Father") were engaged to be married when Baby Girl was conceived, but were not living together. *Id*. at 2a, 4a. At that time, Father, who is a registered member of the Cherokee Nation, *id.* at 10a, was actively serving in the military and was stationed at Fort Sill, Oklahoma. *Id.* at 3a. After learning of the pregnancy in January 2009, Father refused to provide any financial support until he and Mother were married. *Id*. As the parents' relationship strained over the following months, Father "wanted nothing to do with the pregnancy and related responsibilities." *Id*. at 45a (Kittredge, J., dissenting). He did not "accompany her to any doctor's visits, even though he admitted he was capable of doing so." *Id*. In June 2009, Father expressly renounced his parental rights in a text message to Mother. *Id*. at 4a. Thereafter, he made no attempt to contact or support Mother during her pregnancy, and he sought no contact with

his child in the months after her birth, despite knowing that Baby Girl would be born the first week of September. *Id.* at 8a.

As a single mother with two other children, Mother decided to place Baby Girl for adoption after Father abandoned his parental rights. *Id*. at 4a. The Nightlight Christian Adoptions Agency in Oklahoma introduced Mother to petitioners ("Adoptive Parents"), who reside in Charleston, S.C., and who decided to pursue adoption after seven unsuccessful attempts at in vitro fertilization. *Id*. at 46a (Kittredge, J., dissenting). Adoptive Mother has a Ph.D. in developmental psychology and develops therapy programs for children with behavior problems and their families. *Id*. at 5a. Adoptive Father is an automotive body technician with Boeing. *Id*.

In the weeks leading up to Baby Girl's birth, petitioners spoke to Mother weekly, and Adoptive Mother traveled to visit her in Oklahoma in August 2009. *Id*. Petitioners financially supported Mother during the final months of her pregnancy and shortly after Baby Girl's birth. *Id*. Petitioners were in the delivery room when Mother gave birth to Baby Girl. *Id*. at 7a. Adoptive Father cut the umbilical cord. *Id*. The next morning, Mother signed forms relinquishing her parental rights and consenting to the adoption. *Id*.

Adoptive Parents initiated adoption proceedings on September 18, 2009, and returned to South Carolina with their new daughter eight days after the birth. *Id*. at 7a-8a. Because Father had evaded all involvement in the pregnancy and "knowingly abandoned his parental responsibilities in every respect," *id*. at 52a (Kittredge, J., dissenting), he did not learn that Baby Girl was placed for adoption until January 6, 2010, when he was served with petition-

ers' adoption complaint. *Id*. at 8a, 49a (Kittredge, J., dissenting). On January 11, 2010, Father requested a stay of the South Carolina adoption proceedings. *Id*. at 9a. At that time, Baby Girl was four months old, and Father had not sought any contact with his daughter whatsoever. *Id*. at 8a.

C. Proceedings Below

1. The adoption proceeding was tried before a South Carolina family court in September 2011, at which point Baby Girl had been living with her Adoptive Parents for two years. *Id*. at 10a. The child's guardian *ad litem* recommended that Father's parental rights be terminated and that the adoption be approved in the best interests of the child. *Id*. at 51a (Kittredge, J., dissenting). Mother also urged the court to finalize the adoption. *Id.* at 46a (Kittredge, J., dissenting). The Cherokee Nation, which had intervened, opposed the adoption. *Id.* at 10a.

The family court denied the adoption petition and transferred custody of Baby Girl to Father. *Id*. at 11a. The court reasoned that ICWA's parental termination provision, 25 U.S.C. § 1912(f), applied to block the adoption, notwithstanding the fact that Father never had custody of the child and that Baby Girl was voluntarily placed for adoption by her non-Indian parent. App. 11a. Moreover, the court held that the South Carolina law setting forth whose consent is required for adoption, S.C. Code § 63-9-310(A)(5), was irrelevant for purposes of determining the parental status of an unwed father under ICWA. App. 21a-22a. The court acknowledged that the different treatment of unwed fathers under state law and that court's view of federal law was critical to the case. *Id*. at 22a. Thus, there was no dispute that the application of state law would have led to the approval of

the adoption and the termination of Father's parental rights.

The court held that Father was a "parent" for purposes of ICWA because Father had acknowledged and established his paternity through court-ordered DNA testing. *Id*. at 22a. The court found it irrelevant that Father had forfeited his parental rights to the child, *id*., the factor that would have been dispositive under state law in Adoptive Parents' favor.

The family court ordered Adoptive Parents to surrender their daughter to Father on December 28, 2011. *Id*. at 11a. Days after Christmas, Adoptive Parents handed Baby Girl over to Father as ordered. *Id.*

2. A sharply divided panel of the South Carolina Supreme Court affirmed the decision of the family court. *Id*. at 1a-40a. The majority summarily dismissed the position—adopted as long-settled principle by three state courts of last resort—that ICWA's parental termination provision does not apply to the voluntary adoption of an illegitimate Indian child under the sole custody of a non-Indian parent (known as the "existing Indian family doctrine"). *Id*. at 17a-18a n.17. The majority reasoned that such an analysis "conflicts with the express purpose of the ICWA." *Id*.

The majority also held that Father was a "parent" under Section 1903(9) of ICWA and thus could invoke the special parental termination provision under Section 1912(f) applicable only to parents of Indian children. *Id*. at 21a-22a n.19. The majority reached that conclusion despite acknowledging that "[u]nder state

law, Father's consent to the adoption would not have been required." *Id*. The court thus held that the biological father's "lack of interest in or support for Baby Girl during the pregnancy and first four months of her life as a basis for terminat[ing] his rights as a parent is not a valid consideration under the ICWA." *Id*. at 32a n.26. The majority then affirmed the family court's finding that Father's prospective custody of Baby Girl was required by 25 U.S.C. § 1912(f). *Id*. at 25a-26a. The court upheld the family court's order transferring Baby Girl to the custody of the biological father. *Id*. at 40a.

The dissenting justices criticized "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." *Id*. at 54a-55a (Kittredge, J., dissenting). The dissenting justices found compelling justification to terminate Father's parental rights under the heightened restrictions of ICWA, and would have "require[d] the immediate return of Baby Girl to [Adoptive Parents]." *Id*. at 100a.

On August 22, 2012, the South Carolina Supreme Court, by a vote of 3-2, denied petitioners' request for rehearing. *Id*. at 132a.

REASONS FOR GRANTING THE PETITION

The highest court in South Carolina held that ICWA's parental termination provision, 25 U.S.C. § 1912(f), applies in the commonly recurring circumstance where a child is voluntarily placed for adoption by a non-Indian parent with sole custody over the child. That decision deepens an entrenched split among appellate courts in more than twenty states, including twelve courts of last resort. Likewise, the

court's determination that Father was a "parent" under ICWA splits with at least five other states, including two state supreme courts. The states implicated by these splits represent over two-thirds of the nation's Indian population.

These acknowledged divisions—involving over half of the country—lead to intolerable uncertainty in an area of law where certainty is needed most: adoption and custody proceedings that involve children. As the Utah Supreme Court recently observed, these child custody cases are "complicated by the fact that, since the ICWA was adopted in 1978, courts have struggled to apply it, often reaching inconsistent conclusions about the meaning of various terms. Despite these conflicts among the states, . . . the United States Supreme Court has issued only one decision interpreting the ICWA in the thirty years since it became effective." *State ex rel. C.D.*, 200 P.3d 194, 197 (Utah 2008).

This uncertainty spawns litigation that permanently and tragically disrupts established family units. The tragedy is exemplified by the facts of this case, which unfortunately recur with significant frequency. Division in state courts' application of ICWA not only significantly infringes on the fundamental rights of individuals. The division also significantly undermines each state's ability to effectuate its domestic relation laws. Those state laws protect a child's best interests, further the social values of the state, and provide for stability and permanency in this sensitive area. Only this Court can resolve two outstanding issues central to the applicability and administration of a federal statute that impacts thousands of custody cases and countless individuals affected by those proceedings.

I. STATE COURTS ARE INTRACTABLY SPLIT ON TWO ISSUES AT THE HEART OF ICWA

A. State Courts Are Divided Over Whether ICWA Applies When a Non-Indian Parent Voluntarily Places Her Child for Adoption

To terminate a parent's rights under ICWA, a court must find "evidence beyond a reasonable doubt . . . that the *continued* custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f) (emphasis added). More than twenty state courts are openly and intractably divided over whether this provision applies at all to the "familiar fact pattern"[1] presented in this case: "the voluntary relinquishment of an illegitimate Indian child by its non-Indian mother." *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990).

Three appellate courts of last resort and four intermediate appellate courts in other states have held that ICWA applies only when a child is being removed from the *existing* custody of an Indian parent. Courts have rested that conclusion on both the Act's text and purpose. *See, e.g.*, *In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988). As the Supreme Court of Indiana explained, "where the child was abandoned to the adoptive [parents] essentially at the earliest practical moment after childbirth and initial hospital care, we cannot discern

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[1] Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 Emory L.J. 587, 635 (2002) (discussing *S.A. v. E.J.P.*, *infra*, and similar cases).

how the subsequent adoption proceeding constituted a 'breakup of the Indian family'" that ICWA was designed to prevent. *Id*. Courts have labeled this analysis the "existing Indian family doctrine," *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996), and appellate courts in Alabama, Kentucky, Louisiana, Missouri, Nevada, and Tennessee have all reached the same conclusion. *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990); *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331, 337 (La. Ct. App. 1995); *In re S.A.M.*, 703 S.W.2d 603, 609 (Mo. Ct. App. 1986); *In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009); *In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL 1138130, at *5 (Tenn. Ct. App. Apr. 27, 2009). Courts in California, Oklahoma, and Washington also adopted the existing Indian family doctrine, but the legislatures in those states enacted laws to supersede the results reached by the courts. *See In re Beach*, 246 P.3d 845, 848 (Wash. Ct. App. 2011); Wash. Rev. Code §§ 13.34.040[3], 26.10.034[1], 26.33.040[1]; *In re Baby Boy L.*, 103 P.3d 1099, 1105 (Okla. 2004); Okla. Stat. §§ 40.1, 40.3; Cal. Welf. & Insts. Code § 360.6.

In contrast, the South Carolina Supreme Court sided with appellate courts in fourteen other states that have rejected the existing Indian family doctrine and have held that ICWA's parental termination provision applies to the facts presented here. App. 17a-18a n.17. The state supreme courts of Alaska, Idaho, Kansas, Montana, New Jersey, North Dakota, and South Dakota have concluded that ICWA applies to adoption proceedings even when the child never lived—and never would have lived—as part of an Indian family. *In re Adoption of T.N.F.*, 781 P.2d 973, 978 (Alaska 1989); *In re Baby Boy Doe*, 849 P.2d 925, 931-32 (Idaho 1993); *In re A.J.S.*, 204 P.3d 543,

547 (Kan. 2009); *In re Adoption of Riffle*, 922 P.2d 510, 515 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *In re Adoption of Baade*, 462 N.W.2d 485, 490 (S.D. 1990). Intermediate appellate courts in seven additional states have adopted the same interpretation of ICWA. *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 964 (Ariz. Ct. App. 2000); *In re N.B.*, 199 P.3d 16, 21 (Colo. App. 2007); *In re Adoption of S.S.*, 622 N.E.2d 832, 840 (Ill. App. Ct. 1993), *rev'd on other grounds*, 167 Ill. 2d 250 (Ill. 1995); *In re Elliott*, 554 N.W.2d 32, 35 (Mich. Ct. App. 1996); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 324 (N.Y. App. Div. 2005); *Quinn v. Walters*, 845 P.2d 206, 208 (Or. Ct. App. 1993), *rev'd on other grounds*, 881 P.2d 795 (Or. 1994); *State ex rel. D.A.C.*, 933 P.2d 993, 998 (Utah Ct. App. 1997).

The state courts have acknowledged that "sister states are significantly split," *State ex rel. D.A.C.*, 933 P.2d at 998, and "sharply divided as to the propriety of" applying ICWA to the recurring fact pattern of adoptions voluntarily initiated by non-Indian mothers. *In re Adoption of S.S.*, 622 N.E.2d at 834; *see also In re Alexandria Y.*, 53 Cal. Rptr. 2d 679, 683 (Cal. Ct. App. 1996) ("There is a split on this issue, both nationally and in California."). Those noting the split also have commented that this Court has yet to resolve the conflict. *In re Baby Boy L.*, 103 P.3d at 1106 n.21 ("[A]lthough the United States Supreme Court has yet to decide the issue, a split of authority exists."); *In re A.J.S.*, 204 P.3d at 547-49 (observing that "the United States Supreme Court has not addressed the issue before us" and cataloging the split among state courts).

The division among state courts has become more deeply entrenched in recent years. In 2009, the Tennessee Court of Appeals held that ICWA was not applicable to parental termination proceedings involving voluntary adoptions initiated by a non-Indian parent, *In re K.L.D.R.*, 2009 WL 1138130, at *5, while the Kansas Supreme Court reached the opposite conclusion. *In re A.J.S.*, 204 P.3d at 547-49 (considering the split among states and reversing a prior decision of the Kansas Supreme Court).

The Court should grant review to resolve this deeply embedded split among state courts, which has been called "[o]ne of the most problematic inconsistencies in state court decisions regarding the ICWA's application . . . which, since 1982, has been the center of both judicial and scholarly controversy." Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 Santa Clara L. Rev. 419, 427-28 (1998); *id.* at 428 n.59 (finding it "difficult to keep an accurate tally since new states come into the controversy each year and sometimes a state changes its position"). Only this Court can resolve the split over the meaning of ICWA that has divided the state courts.

This case presents an ideal vehicle to resolve the conflict. The application of the existing Indian family doctrine is dispositive to the outcome of this case. Thus, Adoptive Parents would have prevailed in all of the seven states that have embraced the doctrine. And, unlike many family court disputes, the material facts are uncontested. Given the typicality of Baby Girl's status as a child born to unmarried, mixed-race parents, a clear resolution will help guide the dozens of state courts that are hopelessly divided over the

meaning and application of ICWA to the recurring fact pattern presented in this case.[2]

B. State Courts Are Divided Over the Meaning of "Parent" under ICWA with Respect to Unwed Fathers

Congress excluded from ICWA's definition of "parent" unwed fathers "where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). The federal law is silent, however, regarding the steps unwed fathers must take to sufficiently "acknowledge" or "establish" paternity. State courts—including those states with the largest Indian populations—are deeply divided on the meaning of this silence.

Appellate courts of last resort in two states and intermediate appellate courts in three additional states have concluded that ICWA does not create parental rights for unwed fathers that do not otherwise exist. Thus, a putative father's parental status under ICWA is contingent upon compliance with state paternity laws in California, Oklahoma, Missouri, New Jersey, and Texas. *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Adoption of Baby Boy D*, 742 P.2d 1059,

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[2] As the state court observed (App. 13a, 20a-21a n.18), ICWA applies to any "child custody proceeding" involving an "Indian child." 25 U.S.C. § 1903(1), (4). The court blocked the adoption, however, based on Sections 1912(f) and 1912(d). App. 25a-33a. Those provisions would not apply under either the existing Indian family doctrine or to an unwed father who does not meet the definition of parent in Section 1903(9). The decision below also discussed ICWA's adoptive placement provision, 25 U.S.C. § 1915(a). App. 37a-39a. But that provision is irrelevant in this case because no party other than Father and petitioners has sought custody of Baby Girl.

1064 (Okla. 1985), *overruled on other grounds In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004); *In re Daniel M.*, 1 Cal. Rptr. 3d 897, 900 (Cal. Ct. App. 2003) ("[B]ecause the ICWA does not provide a standard for the acknowledgment or establishment of paternity, courts have resolved the issue under state law."); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. App. Ct. 1995); *In re S.A.M.*, 703 S.W.2d 603, 607 n.4 (Mo. Ct. App. 1986).[3]

In contrast, the South Carolina Supreme Court rejected the argument that "ICWA defers to state law" on the steps a putative father must undertake to preserve his paternal rights. App. 21a-22a. As a result, the court concluded that Father was a "parent" for purposes of ICWA, even though "[u]nder state law, [his] consent to the adoption would not have been required." *Id*. 21a-22a n.19. In so holding, South Carolina joined the Alaska Supreme Court and an Arizona court of appeals, which likewise have held that ICWA's definition of "parent" does not require compliance with state laws for establishing or acknowledging paternity. *Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011) ("We hold that even though Bruce did not comply with the Alaska legitimation statute . . ., he sufficiently acknowledged paternity of Timothy to invoke the application of ICWA."); *Jared P. v. Glade T.*, 209 P.3d 157, 160-61 (Ariz. Ct. App. 2009); *see also Michael J., Jr. v. Michael J., Sr.*, 7 P.3d

[3] The Tennessee Court of Appeals quoted approvingly the holding of the Oklahoma Supreme Court in *Baby Boy D* that an unwed father must "acknowledge[] or establish[] [paternity] through the procedures available through the tribal courts, consistent with tribal customs, or through procedures established by state law." *In re Morgan*, 02A01-9608-CH-00206, 1997 WL 716880, at *7 (Tenn. Ct. App. Nov. 19, 1997).

960, 963 (Ariz. Ct. App. 2000) (state law requirements for establishing or acknowledging paternity "are not required" under ICWA).

This is not a split that should be permitted to percolate among other state courts. The states divided over ICWA's definition of "parent" include the four states with the largest Indian populations: California, Oklahoma, Arizona, and Texas, which collectively account for 36% of the nation's Indian population. U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010* (Jan. 2012), pp. 6-7. The split also includes Alaska, which has the largest population of Native Alaskans, *see* 25 U.S.C. § 1903(3), and South Carolina, which experienced the fourth-highest percentage increase in Indian population since 2000. Census, *supra*, at 7-8. Even a two-state split on an issue of such importance to the administration of ICWA would warrant this Court's review. The fact that nearly half of the Indian population is already affected by the split only heightens the need for resolution by this Court.

As with the first question presented, this case presents an ideal vehicle for the Court to resolve this split. The court below acknowledged that had it found state law to be controlling on the question of paternity—as would be the case in New Jersey and four other states—the Adoptive Parents would have prevailed. App. 21a-22a n.19.

II. THE QUESTIONS PRESENTED IN THIS CASE ARE CRITICAL TO A LARGE AND GROWING NUMBER OF INDIVIDUALS

This case presents two recurring and important issues with profound, life-altering implications for the families and children involved. Unless this Court

grants review, thousands of adoption proceedings involving Indian children will lack equivalence and predictability—undermining the very need for uniformity and clarity that motivated Congress to enact ICWA three decades ago. Congress passed ICWA to protect against the involuntary breakup of tribal families based on prejudice. Yet the division in the state courts over the administration of ICWA concerns a set of facts that is both on the rise and is far-removed from the concerns of the Congress that passed the Act. Given the enormity of the stakes involved, this Court should not tolerate the continued uncertainty that permeates this area of the law.

A. The birthrate of Indian children outside of marriage is 65 percent, significantly higher than the 41 percent rate in the general U.S. population. Joyce A. Martin et al., *Births: Final Data for 2009*, 60 Nat'l Vital Statistics Reports 1, 8, 46 (2011). As a result, 31,812 Indian children were born to unmarried parents in 2009. *Id.* at 46. And over 40 percent of Indian children have parents of more than one race. *See* Barbara Ann Atwood et al., Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 22 (2010). Thus, conservatively, over 10,000 Indian children were born to unmarried, mixed-race parents—just like Baby Girl—in 2009 alone.

The adoption rates for Indian children are similarly striking. In 2008, 27,457 children adopted in the United States were Indian. Nat'l Council for Adoption, Adoption Factbook V 109 (2011). Based on nationwide statistics, at least half were born to unwed Indian fathers, *see* Martin et al., *supra*, at 46, thus potentially implicating the second question presented here in over 10,000 adoption proceedings.

Moreover, an additional 10,738 children adopted in the United States were designated as half-Indian in 2008—cases that would trigger the first question presented every time the Indian parent was not in the household when adoption proceedings commenced. Adoption Factbook, *supra*, at 109.

The above statistics show the pressing need for this Court to resolve two critical questions at the heart of implementation of an important federal law. ICWA impacts thousands of adoption cases involving Indian children of unwed parents. Commentators have described the circumstances of this case as a "familiar fact pattern" in the ICWA context. Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 Emory L.J. 587, 635 (2002); *see* Metteer, *supra*, 38 Santa Clara L. Rev. at 429 n.72; Wendy T. Parnell, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 San Diego L. Rev. 381, 399 (1997). Because this "factual paradigm appear[s] with particular prominence," the Court's guidance is desperately needed to resolve the divisions among state courts. Atwood, *supra*, at 626; *see* Toni H. Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D. L. Rev. 465, 479–80 (1993).

B. The fundamental rights at stake in these cases further underscore the need for immediate review. "[F]ar more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953), the right to raise children is among those liberties "essential to the orderly pursuit of happiness by free men," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *accord Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990); *Stanley v.*

Illinois, 405 U.S. 645, 651 (1972); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). This Court has emphasized the fundamental interest a parent has in rearing children. *See Troxel v. Granville*, 530 U.S. 57, 72–73 (2000); *Wisconsin v. Yoder*, 406 U.S. 205, 232–34 (1972). Similarly, the right to custody and companionship of a child has occupied a special place in the Court's jurisprudence. *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 842–847 (1977).

The present legal uncertainty that permeates child adoption proceedings under ICWA is unfair to the parents and children involved and clearly merits this Court's attention. Only this Court can definitively resolve the division in the state courts over the two interpretive questions under ICWA. The fact that ICWA cases are triggered by the race and ethnicity of the participants only underscores the need for this Court's interpretation of federal law. But for Father's ancestry, Baby Girl would still be living in South Carolina with her Adoptive Parents.

The South Carolina Supreme Court's application of ICWA in this case also intrudes into a realm that has from the country's founding been the province of the states. Domestic relations is a core exercise of the state's police power. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Hisquierdo*, 439 U.S. at 581 (quoting *In re Burrus*, 136 U.S. at 593-94). As discussed, the state supreme court's interpretation of ICWA preempted South Carolina's custody laws that would have permitted the adoption based on Father's abandonment of Baby Girl. This Court has exercised special care to ensure a proper balance in federal-

state relations to protect our constitutional structure and the liberty of the citizenry. *E.g., Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). The significant federalism principles raised by the decision below further counsel for this Court's review in this case.

III. THE DECISION BELOW IS WRONG

The South Carolina Supreme Court's interpretation of ICWA was wrong with respect to both questions presented.

A. The court erred on the threshold question of Father's parental status. ICWA defines "parent" to include a biological father but specifically excludes "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). That definition is best read as incorporating a state's definition of parenthood for unwed biological fathers.

This Court long has recognized that a putative father's legal status as a "parent"—and the corresponding rights and obligations that accompany that designation—requires more than "the mere existence of a biological link." *Lehr*, 463 U.S. at 261. "Notably, a biological parent is not necessarily a child's parent under law." *Astrue v. Capato*, 132 S. Ct. 2021, 2030 (2012). Because "[t]he intangible fibers that connect a parent and child have infinite variety," *Lehr*, 463 U.S. at 256, Congress has left the legal determination of parenthood for unwed fathers to the "unique attributes" of state law. *Id*. at n.11.

These principles emanate from *Stanley v. Illinois*, 405 U.S. 645 (1972), in which the Court held that a blanket denial of parental rights to all unwed fathers regardless of their fitness as parents violates due process. In a series of cases over the following

decade, the Court considered various circumstances under which a state could deny an unwed father parental status. *See In re Adoption of a Child of Indian Heritage*, 543 A.2d at 934. The Court has held that "states may constitutionally deny an unwed father parental status unless and until he manifests an interest in developing a relationship with that child, provided that the qualifications for establishing such rights are not beyond the control of an interested putative father to satisfy." *Id*. (citing *Lehr*, 463 U.S. at 264).

Congress enacted ICWA's reference to unwed fathers in the definition of "parent" against the backdrop of *Stanley*. H.R. Rep. No. 95-1386, at 21 (1978), 1978 U.S.C.C.A.N. 7530, 7543 (the definition of "parent" in ICWA "is not meant to conflict with the decision of the Supreme Court in *Stanley*"). Congress thus intended that parenthood for unwed fathers would be limited to those who showed the requisite support under state law. ICWA does not set forth any procedures by which an unwed father must sufficiently "acknowledge" or "establish" paternity to preserve his parental rights. *Supra* p. 15; *see In re Adoption of a Child of Indian Heritage*, 543 A.2d at 935 ("In light of [the development of the law after *Stanley*], and the failure of either the Act or its interpretive regulations to prescribe or define a particular method of acknowledging or establishing paternity, we infer a legislative intent to have the acknowledgment or establishment of paternity determined by state law."). After *Stanley*, states developed a variety of tests for that very purpose. For example, ten states have enacted the Uniform Parentage Act. That act includes detailed, concrete steps an unwed father must undertake *before* he enjoys a rebuttable presumption of paternity or is adjudicated

to be a "parent." *See* Uniform Parentage Act (2002), arts. 3, 6, available at http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf.

South Carolina law in effect defines parenthood by specifying the circumstances in which an unwed biological father's consent is required to proceed with an adoption that takes place within six months of a child's birth. S.C. Code § 63-9-310(A)(5). If the biological father does not satisfy the criteria of that law, he forfeits the right to object to an adoption initiated by the mother. The provision applicable here states that the consent of an unwed father is *not* required unless: "(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*.

The South Carolina Supreme Court acknowledged that Father did not satisfy either prong of this test. App. 21a-22a n.19. Thus, "[u]nder state law, Father's consent to the adoption would not have been required," *id*., and his parental rights "would be terminated under state law without further inquiry," *id*. That should have been the end of the case, and federal law should not have intervened to wrench Baby Girl from the only home she had ever known.

After acknowledging that Father's financial and emotional abandonment of Baby Girl barred him

from being a parent under state law, the court below badly misread ICWA to create parental rights in an unwed father that do not otherwise exist. That approach conflicts with this Court's decisions that look to *state* laws defining parental status when interpreting the applicability of federal rights. For example, the meaning of "parent" under the Social Security Act "is quite clear: Congress must have meant by the term 'parent' an individual who owed to the child a *state-imposed* legal duty of support." *King v. Smith*, 392 U.S. 309, 329 (1968) (emphasis added). Likewise, state law determines whether a non-custodial parent has standing to represent his child's constitutional rights. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004) ("Newdow's parental status is defined by California's domestic relations law."); *see also De Sylva v. Ballentine*, 351 U.S. 570, 580-81 (1956) ("The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familial relationship . . . . We think it proper, therefore, to draw on the ready-made body of state law to define the meaning of the word 'children' in § 24 [of the Copyright Act].").

So, too, under ICWA state law determines whether an unwed father has taken the necessary steps to acknowledge or establish his paternity. With ICWA, Congress did not intend to create a new federal class of "parents"; rather, Congress sought only to preserve existing rights of unwed fathers already recognized as "parents" under traditional state law.

B. Even if the South Carolina Supreme Court correctly held that Baby Girl's biological father was a

"parent" under ICWA, the court separately erred in holding that ICWA's parental termination provision, 25 U.S.C. § 1912(f), can be used by a *non*-custodial Indian parent to block an otherwise voluntary adoption. Section 1912(f), which by its terms addresses only "*continued* custody," is inapplicable when the parent at issue lacks *prior* custody of the child. *See In re Morgan*, 02A01-9608-CH-00206, 1997 WL 716880, at *8 (Tenn. Ct. App. Nov. 19, 1997) ("[A]pplication of this section . . . seems inappropriate where neither the Mother nor the putative father ever had custody of the child.").

This limitation on the scope of ICWA is reinforced by the Act's express purpose: to establish "minimum Federal standards for the *removal* of Indian children from their families," 25 U.S.C. § 1902 (emphasis added), and to prevent Indian families from being "*broken up* by the removal, often unwarranted, of their children . . . by nontribal public and private agencies," *id*. § 1901(4) (emphasis added). *See also id*. § 1912(d) (requiring provision of "remedial services . . . designed to prevent the breakup of the Indian family"). Here, no Indian family is being "broken up" and no Indian child is being "removed" from the custody of her parents. Section 1912(f) thus does not apply. *In re Adoption of T.R.M.*, 525 N.E.2d at 302-03 ("ICWA should not be applied to the present case in which the purpose and intent of Congress cannot be achieved thereby."); *Rye*, 934 S.W.2d at 263 ("ICWA was never meant to apply in those cases . . . where the Indian children had lived with their non-Indian mothers."); *Hampton*, 658 So. 2d at 334-35 ("[U]pon exhaustive review of jurisprudence on this issue, the Act and its stated purpose and legislative history, we are convinced that Congress intended the Act apply only in situations involving

the removal of children from an existing Indian family and Indian environment.").

C. Equal protection principles also undermine the state court's interpretation of ICWA. This Court has sanctioned preferential treatment for Native Americans where the differentiation is a consequence of Indians' unique *sovereign* status. *Morton v. Mancari*, 417 U.S. 535, 553 (1974). But discriminatory treatment predicated on "ancestral" classification otherwise runs afoul of equal protection principles. *Rice v. Cayetano*, 528 U.S. 495, 514 (2000). The South Carolina Supreme Court's application of ICWA in these circumstances raises a serious constitutional question whether a biological father can invoke preferential custodial rights based on his blood heritage. The existing Indian family doctrine, by focusing on connections to tribal culture and sovereignty, prevents ICWA from devolving into a race-based preference for Native Americans. *See In re Santos Y.*, 112 Cal. Rptr. 2d 692, 715 (Cal. Ct. App. 2001) ("To address situations in which application of the ICWA is unwarranted or unconstitutional, courts have . . . declined to apply the ICWA to situations in which a child is not being removed from an existing Indian family."); *see also In re Alexandria Y.*, 53 Cal. Rptr. 2d at 686 (noting "serious constitutional flaws in the ICWA" under principles of due process, equal protection, and the Tenth Amendment); *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 516 (Cal. Ct. App. 1996) (limiting ICWA to avoid violating "the Fifth, Tenth, and Fourteenth Amendments to the United States Constitution").

At a minimum, given the magnitude of the stakes impacting thousands of families and the division

among state courts, this Court should grant the petition and consider the case on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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