No. 12-399

In the Supreme Court of the United States

ADOPTIVE COUPLE, PETITIONERS

v.

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

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether the South Carolina courts properly applied the Indian Child Welfare Act of 1978, 25 U.S.C. 1901 *et seq.*, to award custody of an Indian child to her biological father over an adoptive couple, where the father acknowledged and established his paternity and no remedial measures had been taken to avoid termination of his parental rights.

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INTEREST OF THE UNITED STATES

This case involves the scope and application of the Indian Child Welfare Act of 1978, 25 U.S.C. 1901 *et seq.* (ICWA). The United States has a substantial interest in the case because Congress enacted ICWA in furtherance of "the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people." 25 U.S.C. 1901; see 25 U.S.C. 1901(3) (discussing the United States' "direct interest, as trustee"). ICWA authorizes the Secretary of the Interior to make grants for Indian child and family service programs; see 25 U.S.C. 1931-1932; 25 C.F.R. Pt. 23, and the Bureau of Indian Affairs (BIA) issued non-binding guidelines in 1979 addressing state courts' implementation of ICWA, 44 Fed. Reg. 67,584.

STATEMENT

1. In enacting ICWA in 1978, Congress determined that federal action was necessary to address "the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 32 (1989). In particular, Congress made express statutory findings that "an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies," and that the States "ha[d] often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901(4) and (5). ICWA "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." *Holyfield*, 490 U.S. at 37 (quoting H.R. Rep. No. 1386, 95th Cong., 2d Sess. 23 (1978) (House Report)).

ICWA applies to a "child custody proceeding" that involves an "Indian child," defined 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). A "child custody proceeding" is defined as including any action for "foster care placement," "termination of parental rights," "preadoptive placement," or "adoptive placement." 25 U.S.C. 1903(1).

ICWA establishes certain minimum standards for child custody proceedings in state courts. Both the

Indian child's "parent" and her Tribe are entitled to notice of such proceedings; the parent, if indigent, is entitled to court-appointed counsel; and the Tribe may intervene. 25 U.S.C. 1911(c), 1912(a) and (b). ICWA defines a "parent" as "any biological parent or parents of an Indian child," but provides that the term "does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. 1903(9).

A voluntary relinquishment of parental rights is not valid unless consent is given in writing before a court of competent jurisdiction; no purported consent to relinquishment given before or within 10 days after the child's birth is valid, and any voluntary relinquishment may be withdrawn for any reason before parental rights are formally terminated. 25 U.S.C. 1913(a) and (c). "Any party seeking" an involuntary termination of parental rights under state law must satisfy the court that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. 1912(d). In addition, a state court may not involuntarily terminate parental rights "in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. 1912(f).

When determining an adoptive placement of an Indian child, ICWA requires that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. 1915(a).

2. a. This case involves a child, Baby Girl, who was born on September 15, 2009. Her father is a registered member of the Cherokee Nation and her mother is non-Indian. Pet. App. 2a. Mother and Father became engaged in December 2008, and Mother informed Father that she was pregnant in January 2009. *Id.* at 2a-3a. Mother lived in Bartlesville, Oklahoma, while Father, actively serving in the United States Army, was stationed four hours away at Fort Sill. *Id.* at 2a-3a. After learning of the pregnancy, Father asked Mother to move up the wedding date and declined to provide any financial support until after the couple was married. *Id.* at 3a. The couple's relationship deteriorated over the following months, and Mother broke off the engagement in May 2009. *Ibid.*

In June 2009, "Mother sent a text message to Father asking if he would rather pay child support or surrender his parental rights. Father responded via text message that he would relinquish his rights." Pet. App. 4a. The parents had no further contact during the pregnancy or for several months after Baby Girl was born, and Father did not provide financial support to Mother. *Ibid.*

During the pregnancy, Mother, without informing Father, decided to place the child for adoption. Pet. App. 4a. Working through a private adoption agency, Mother selected petitioners, who live in South Carolina, as the adoptive parents. *Id.* at 5a. Petitioners attended the birth, and Mother signed forms relinquishing her parental rights and consenting to the adoption. *Id.* at 7a. Petitioners initiated adoption proceedings in South Carolina on September 18, 2009, and returned there with Baby Girl. *Id.* at 7a-8a.

Father first learned that Baby Girl was placed for adoption almost four months later, on January 6, 2010,

when he was served with legal documents concerning the adoption proceeding. Pet. App. 7a-8a. The next day, Father contacted a lawyer, and he subsequently requested a stay of the adoption proceedings. *Id.* at 9a. Father deployed to Iraq on January 18, 2010, and did not return to the United States until December 2010. *Id.* at 9a & n.11.

In April 2010, the Cherokee Nation intervened in the South Carolina action. Pet. App. 10a. In May 2010, Father's paternity was established by the South Carolina family court through DNA testing, and Father answered petitioners' amended complaint, stating that he did not consent to the adoption. *Ibid.*

b. On November 25, 2011, the family court denied petitioners' adoption petition and awarded custody to Father. Record on Appeal (ROA) 6-28.

The family court concluded that the case was governed by ICWA because it was a "child custody proceeding" involving an "Indian Child," as those terms are defined in the statute. ROA 18-19. Moreover, the court concluded that Father was a "parent" under the statute "because he has both acknowledged paternity and paternity has been conclusively established in this action through DNA testing." ROA 19.

The family court observed that, under South Carolina law, the consent of an unwed father to an adoption is not necessary if he did not either live openly with the biological mother for at least six months before the placement or financially support the child or the mother during the pregnancy. ROA 16 (citing S.C. Code Ann. § 63-9-310(A)(5)). But the court explained that "ICWA extends greater rights to the unwed Indian father." ROA 19. The court determined that Father had not voluntarily

consented to the adoption in accordance with ICWA's requirements. ROA 21 (citing 25 U.S.C. 1913).

The family court found that there were no state-law grounds for terminating Father's parental rights. ROA 22-24. The court also found that it had not been shown that custody of Baby Girl by Father was likely to result in serious emotional or physical damage to the child. ROA 24, 26. The court noted that "[t]here is no evidence to suggest that he would be anything other than an excellent parent to [Baby Girl]." ROA 25.[1]

Petitioners transferred Baby Girl to Father on December 31, 2011, and he travelled with her back to Oklahoma. Pet. App. 11a.

c. With two justices dissenting, the South Carolina Supreme Court affirmed. Pet. App. 1a-100a. Like the family court, the supreme court concluded that ICWA applies to this case because it is a child custody proceeding involving an Indian child. *Id.* at 13a, 20a n.18. The supreme court also concluded that Father is a "parent" within the meaning of ICWA. *Id.* at 20a-22a; accord *id.* at 58a (dissent), because Father had "both acknowledge[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." *Id.* at 22a.

The supreme court concluded that Father's parental rights should not be involuntarily terminated for two independent reasons. Pet. App. 25a-33a. First, the court noted that ICWA required as a predicate to such termination a finding that "active efforts have been made to provide remedial services and rehabilitative

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[1] The family court briefly discussed ICWA's preventive-measures provision, ROA 15 (citing 25 U.S.C. 1912(d)), but did not base its custody determination on it.

programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." *Id.* at 26a (quoting 25 U.S.C. 1912(d)). Yet petitioners "admit[ed] that the provision had not been satisfied." *Ibid.*

Second, the supreme court held that termination of Father's parental rights was separately barred by 25 U.S.C. 1912(f) because petitioners did not show that his "custody of Baby Girl would result in serious emotional or physical harm to her beyond a reasonable doubt." Pet. App. 29a. The court acknowledged that separating Baby Girl from petitioners would "cause some degree of pain," but it concluded "that Father desires to be a parent to Baby Girl, and that he and his family have created a safe, loving, and appropriate home for her." *Id.* at 32a.

Having concluded that Father's parental rights should not be terminated, the supreme court concluded that it would be in the "best interest of the child" for custody to be granted to Father. Pet. App. 34a-37a. The court observed that, consistent with the statutory policy behind ICWA, Baby Girl "has a strong interest in retaining ties to her cultural heritage" as an Indian child. *Id.* at 35a; see *id.* at 35a n.28 (noting that the record "establishes that Father's family has a deeply embedded relationship with the Cherokee Nation"). In addition, petitioners failed to "present[] evidence that Baby Girl would not be safe, loved, and cared for if raised by Father and his family." *Id.* at 37a.

Finally, the court noted that "even if [it] were to terminate Father's rights," ICWA's adoption placement preferences would still apply. Pet. App. 37a (citing 25 U.S.C. 1915(a)).

SUMMARY OF ARGUMENT

The South Carolina courts properly awarded custody of Baby Girl to Father.

A. ICWA applies to any "child custody proceeding" involving an "Indian child." 25 U.S.C. 1903(1) and (4). It is uncontested that those two predicates are satisfied here. ICWA thus governs, with each of its provisions then applying (or not) according to its particular requirements.

Petitioners advocate a judicially-invented exemption to ICWA that would render it categorically inapplicable when a court believes the statute's protections are unnecessary to protect an "existing Indian family." ICWA's plain language forecloses any such exemption, and vague appeals to statutory purpose cannot surmount that barrier. In any event, by focusing exclusively on an interest in preserving preexisting nuclear families, the purported exemption ignores Congress's emphases on both the importance of extended families in Indian culture and the profound interests of Indian Tribes in preventing loss of their children.

B. The South Carolina Supreme Court correctly determined that Father is a "parent" under ICWA. Through his state court filings and DNA testing, Father "established" and "acknowledged" paternity under both a plain-language reading of ICWA's definition of "parent" (25 U.S.C. 1903(9)) and under the relevant provisions of state law governing paternity. Petitioners' arguments to the contrary incorrectly confuse rules governing establishment of paternity and those governing consent to adoption, which play no role in ICWA's definition of "parent."

C. The South Carolina Supreme Court correctly concluded that Father's parental rights could not be termi-

nated because no remedial efforts had been taken to avoid that outcome. 25 U.S.C. 1912(d). ICWA requires such efforts, as well as a finding that they were unsuccessful, before parental rights may be terminated. Although petitioners seek to excuse the failure by pointing to Father's supposed lack of "interest in parenthood" (Pet. Br. 31), the family court found that he had amply demonstrated such an interest through the course of this litigation, even without the required remedial services. ROA 23, 25.

D. Because the judgment below may be affirmed on the basis of Section 1912(d) alone, the Court need not address the South Carolina Supreme Court's separate conclusion that Section 1912(f) also barred termination of Father's parental rights. If the Court does address that question, however, it should conclude that the state court misinterpreted the provision. Section 1912(f) requires that, in order to terminate "parental rights," there be a showing "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). Continued custody is a predicate to application of this provision, and the South Carolina Supreme Court erred by not determining whether Father in the past had physical or legal custody sufficient to trigger the provision.

E. Application of ICWA to this case presents no constitutional concerns. Congress has plenary authority over Indian affairs, and it permissibly used that authority to protect against state laws and procedures that were improperly separating Indian children from Indian communities, thus eroding Tribes' viability. Application of ICWA presents no equal-protection issue because the distinctions it draws are not racial but political—based

on membership or eligibility for membership in sovereign Indian Tribes. Finally, ICWA, which is predicated on Congress's considered judgment that application of its protections serves the best interests of Indian children and protects vital interests of their parents and Tribes, does not violate any substantive due process protections.

ARGUMENT

THE SOUTH CAROLINA COURTS PROPERLY AWARDED CUSTODY TO FATHER

The proceeding below was a "child custody proceeding" involving an "Indian child," and Father is a "parent" who "acknowledged" and "established" his paternity. 25 U.S.C. 1903(1), (4) and (9). ICWA therefore governs, and Father's parental rights could not be terminated absent showings that "preventive measures" had been taken to avoid that outcome and that they had proven unsuccessful. 25 U.S.C. 1912(d). Neither showing was made in this case, so the South Carolina courts correctly declined to terminate Father's parental rights.

A. ICWA Applies To This Child Custody Proceeding

1. It is undisputed that Baby Girl is an "Indian child" for purposes of ICWA: she is "under age eighteen," "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). It is also undisputed that Baby Girl is the subject of a "child custody proceeding," as the case involves both "termination of parental rights" and "adoptive placement." 25 U.S.C. 1903(1). ICWA thus plainly governs this case.

2. Notwithstanding this straightforward textual command to apply ICWA, petitioners argue for a judicially-created "existing Indian family" doctrine that

would render ICWA categorically inapplicable "[w]hen an adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian mother with sole custodial rights." Br. 39; see *id.* at 39-42.

As petitioners have acknowledged, the large majority of States have rejected the "existing Indian family" doctrine, Pet. 11-12; see Br. in Opp. 16-18, and it was unanimously rejected by the South Carolina Supreme Court in this case, Pet. App. 17a-18a n.17; accord *id.* at 55a n.46 (dissent). Indeed, the Kansas Supreme Court, which first created this extra-textual exception to ICWA, *In re Adoption Baby Boy L.*, 643 P.2d 168, 175 (1982), later abandoned it, both because it is "at odds with the clear language of ICWA, which makes no [such] exception," and because the exception is contrary to the statute's core purpose of safeguarding "tribal interests in preservation of their most precious resource, their children." *In re A.J.S.*, 204 P.3d 543, 549 (2009).

That rejection of the "existing Indian family" doctrine is correct. As explained above, ICWA applies to *any* child custody proceeding involving an Indian child. And where Congress intended a categorical exemption, it provided one expressly. Congress thus excepted from the definition of a "child custody proceeding" "an award, in a divorce proceeding, of custody to one of the parents" and also a "placement" resulting from a juvenile delinquency proceeding. 25 U.S.C. 1903(1). It provided no such exception for cases that, in a family court's view, do not involve an "existing Indian family." See *Elgin* v. *Department of Treasury*, 132 S. Ct. 2126, 2135 (2012) (where Congress expressly provides one exception but not another, it "indicates that Congress intended no such exception.").

Petitioners contend (Br. 35-39) that several provisions in ICWA "apply only to parents who have a preexisting custodial relationship with an Indian child." Even if petitioners were correct about those particular provisions, it would not follow that the statute is *categorically* inapplicable absent preexisting custody. To the contrary, the plain language of those provisions dictates the scope of their applicability, and conditions on the applicability of some provisions should not indiscriminately be imported into others.

Vague appeals to statutory purpose likewise provide no basis for an extra-textual, categorical exception to ICWA. Even if the Court believed that the Congress that enacted ICWA focused on removal of children from conventionally-defined nuclear families, that would not provide license "to rewrite the statute so that it covers only what [the Court] think[s] is necessary to achieve what [it] think[s] Congress really intended." *Lewis* v. *City of Chicago*, 130 S. Ct. 2191, 2200 (2010); see *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

In any event, as this Court has explained, Congress "was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 49 (1989); see 25 U.S.C. 1901(3) (congressional finding "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children"). Congress furthered this purpose by according Tribes "numerous prerogatives * * * through the ICWA's substantive provisions * * * as a means of protecting not only the interests of individual Indian children and

families, but also of the tribes themselves." *Holyfield*, 490 U.S. at 49 (citing 25 U.S.C. 1911(a), (b) and (c); 1912(a); 1914; 1915(c) and (e); 1919). The notion that ICWA is altogether inapplicable when in the court's view there is not an "existing Indian family" is directly contrary to that core statutory purpose. *In re A.J.S.*, 204 P.3d at 550-551.

Congress also enacted ICWA against the backdrop of its understanding of "the dynamics of Indian extended families," which play a central role in Indian child-rearing, and its determination that state courts had badly "misunderstood" that dynamic. House Report 10; see 25 U.S.C. 1903(2), 1915(a)(1). The "existing Indian family" doctrine—under which ICWA applies only when a child would be separated from a nuclear Indian family—is contrary to that understanding, because it results in the separation of Indian children from their extended kinship and tribal networks.

The "existing Indian family" doctrine is particularly problematic because, as sometimes applied in the lower courts, it requires assessment of the "Indianness" of a particular parent or child. *In re A.J.S.*, 204 P.3d at 551 (citation omitted). That is a determination courts "are ill-equipped to make," and reliance on it both "frustrates" ICWA's purpose to "curtail state authorities from making child custody determinations based on misconceptions of Indian family life," *id.* at 551 (citation omitted), and encroaches on the power of Tribes to define their own rules of membership, *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 55 (1978). Understandably, petitioners disclaim reliance on this mode of analysis. Pet. Br. 40-41.

3. For substantially the same reasons, petitioners' attempt (Br. 52-54) to impose a non-textual limitation on

ICWA's placement preferences fails. Those preferences apply in "*any* adoptive placement of an Indian child," 25 U.S.C. 1915(a) (emphasis added), and there is no reference in the provision to a "preexisting Indian family," Pet. Br. 52. Indeed, those preferences are manifestly not about keeping Indian children with their parents; they come into play only when "parental rights of the Indian parent ha[ve] already been terminated." House Report 23. The placement preferences, "[t]he most important substantive requirement imposed on state courts," *Holyfield*, 390 U.S. at 36, reflect the "[f]ederal policy that, where possible, an Indian child should remain in the Indian community," House Report 23. That policy holds whether or not, prior to the adoptive placement, there was a "preexisting Indian family" (Pet. Br. 52) in the narrow sense contemplated by petitioners.[2]

B. Father Is A "Parent" Under ICWA

Petitioners argue (Br. 19-29) that Father could not invoke ICWA's protections because he is not a "parent" as the statute defines that term—"any biological parent * * * of an Indian child," with the exception of "the

[2] Petitioners' asserted practical objections to application of the placement preferences under the circumstances of this case, see Br. 52-53, are beside the point because, as explained below, the South Carolina courts properly awarded custody to Father, so the preferences did not come into play. In any event, as the BIA guidelines explain (see p. 1, *supra*), family courts and adoption agencies should timely "notify the child's extended family and the Indian child's tribe that their members will be given preference in the adoption decision." 44 Fed. Reg. at 67,594. The burden thus need not fall on "mothers and adoptive parents." Pet. Br. 53. In addition, Section 1915(a) includes a "good cause" safety-valve for deviating from the preferences, and the preferences should "not * * * be read as precluding the placement of an Indian child with a non-Indian family," House Report 23, when that good cause standard is satisfied.

unwed father where paternity has not been acknowledged or established," 25 U.S.C. 1903(9). In particular, petitioners contend (Br. 24) that ICWA's definition of "parent" should be understood to "exclude[] unwed fathers who have no parental rights under state law," and they posit that Father had no such rights under South Carolina law. This contention, which was rejected by both the majority and dissent below, Pet. App. 20a-22a, 58a, is mistaken for two independent reasons.

1. First, there is no indication in ICWA that Congress intended to incorporate an entire body of state law into the definition of "parent." In fact, *Holyfield*, which interpreted the term "domicile" in ICWA, cuts strongly against such a reading. The Court there began "with the general assumption that in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law," because "federal statutes are generally intended to have uniform nationwide application," and there is a "danger that the federal program would be impaired if state law were to control." 490 U.S. at 43-44 (quotation marks and citation omitted).

The Court in *Holyfield* concluded that "the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary." 490 U.S. at 44. A central objective of the statute is to safeguard "the rights of Indian families and Indian communities vis-à-vis state authorities," and "Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of domicile." *Id.* at 45. The Court also noted that "[w]here Congress did intend that ICWA terms be defined by reference to other than federal law,

it stated this explicitly." *Id.* at 47 n.22 (citing 25 U.S.C. 1903(2) and (6)).

The case for a uniform federal definition of "parent" under ICWA is, if anything, stronger, than for "domicile" in *Holyfield*. ICWA includes no definition of "domicile," *Holyfield*, 490 U.S. at 43, thus leaving it to the courts to define the term. But ICWA does expressly define "parent," 25 U.S.C. 1903(9), and "statutory definitions control the meaning of statutory words . . . in the usual case," *Burgess* v. *United States*, 553 U.S. 124, 129-130 (2008) (citation omitted).

The Court in *Holyfield* further explained that "a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind." 490 U.S. at 46. So too here: Congress cannot have intended an individual's status as a "parent" to vary if his child is taken from one State to another.

As several state courts have held, all that an unwed father must do as a matter of federal law under ICWA to qualify as a "parent" (if he has not already been confirmed as such) is to take reasonable steps to establish or acknowledge paternity. *Bruce L.* v. *W.E.*, 247 P.3d 966, 978-979 (Alaska 2011) (collecting cases); compare *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 59 (2001) (addressing methods for U.S. citizen father to "acknowledge[]" or "establish[]" paternity under 8 U.S.C. 1409(a)(4) so as to render child a citizen); *Astrue* v. *Capato*, 132 S. Ct. 2021, 2028 (2012) (same under 42 U.S.C. 416(h)(3)(C)(i) for Social Security benefits). In this case, Father has taken such steps by acknowledging his paternity in this case and by establishing paternity through DNA testing. ROA 19; Pet. App. 22a.

2. Even if Congress intended for courts to look to state law in deciding the specific question whether an unwed father has "acknowledged or established" paternity under 25 U.S.C. 1903(9), Father complied with relevant state law here.

Petitioners contend that the relevant state law is that pertaining to consent to adoption (Br. 26 (citing S.C. Code Ann. § 63-9-310(A)(5)), but, as the South Carolina Supreme Court itself explained, that contention "collapse[s] the notions of paternity and consent." Pet. App. 22a. Distinct state laws address the specific subject of how an unwed father's "paternity" may be "acknowledged or established" (25 U.S.C. 1903(9)). *E.g.*, S.C. Code Ann. § 63-17-10(C) ("action to establish the paternity of an individual"); *id.* § 63-17-50 ("verified voluntary acknowledgement of paternity").

Indeed, just a few years before ICWA, Congress had enacted legislation requiring States participating in the Aid to Families with Dependent Children Program to adopt child-support programs that would, among other things, "establish the paternity" of certain beneficiary children "born out of wedlock." Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2354. Congress used a similar phrase here—excluding from the definition of "parent" an "unwed father where paternity has not been acknowledged or established," 25 U.S.C. 1903(9)—and there is no indication Congress intended this language to embody an entirely different concept concerning consent to adoption.

3. Petitioners contend (Br. 22-23) that "[b]ecause the first sentence [of the statutory definition of parent] already covers an unwed father whose biological link is acknowledged or established, the canon against superfluity counsels reading the second sentence to require

more than a proven biological connection." Petitioners' premise is incorrect: the first sentence includes no acknowledgement or establishment requirement. It covers *any* "biological parent" (or adoptive parent). 25 U.S.C. 1903(9). The second sentence then excludes from that definition an "unwed father where paternity has not been acknowledged or established." *Ibid.* Because the status of a person as a "parent" triggers procedural rights from the outset of the case (see 25 U.S.C. 1912(a) and (b) (right to notice, intervention, and counsel)), the second sentence serves to relieve the court in an involuntary termination proceeding of the burden of affirmatively identifying a father where paternity has not already been acknowledged or established and the steps required by 25 U.S.C. 1912(a) fail to identify the father within the time provided.[3]

4. The House Report states that the exception to the definition of "parent" for an "unwed father where paternity has not been acknowledged or established," 25 U.S.C. 1903(9), was "not meant to conflict with the decision of the Supreme Court in *Stanley* v. *Illinois*, 405 U.S. 645 (1972)," House Report 21. Petitioners suggest (Br. 27) that this statement supports the notion that Congress "made a conscious decision not to disturb * * * the State's inherent police power to limit an unwed father's rights when he has not formed a relationship with his child." That assertion is entirely unsupported. *Stanley* found unconstitutional a state dependency statute providing categorically that "an unwed father is not a 'parent.'" 405 U.S. 650; see *id.* at 657-658.

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[3] Of course, paternity of an Indian child may be acknowledged or established after the proceedings have convened, as occurred in this case, and the father thereby attains the status of "parent" for purposes of further proceedings.

The House Report simply makes clear that Congress intended no categorical exclusion of unwed fathers from the definition of "parent" under the statute (which would have conflicted with *Stanley*); such fathers can be parents so long as their paternity is acknowledged or established.

5. Finally, petitioners' contention that ICWA's definition of "parent" should be limited to those unwed fathers with a state-law right to object to an adoption would render other provisions of the statute unworkable. For example, under petitioners' construction, even an individual whose paternity has been formally acknowledged or established before the adoption proceedings commenced would not be entitled to the most basic protections of notice and opportunity to be heard (which are afforded to "parents") if he did not *also* satisfy the state-law requirements for a father whose affirmative consent is required for the adoption.

Moreover, a father's right to object (*i.e.*, withhold his consent) to an adoption under state law could often turn on disputed factual questions, such as whether (or how long) he lived with the mother and whether (or to what degree) he financially supported her during the pregnancy. S.C. Code Ann. § 63-9-310(A). In this case, for example, Father contended (unsuccessfully) that he had standing to object to the adoption even under state law because he attempted to provide financial support to Mother but was rebuffed. ROA 20-21. In petitioners' view, resolution of such questions would determine whether a father is even a "parent" entitled to notice and counsel at the outset. Congress plainly did not contemplate a fact-intensive analysis at the threshold of whether that status was satisfied.

C. Section 1912(d) Barred Termination Of Father's Parental Rights

Given that ICWA applies to this case and Father is a "parent," the question becomes whether his parental rights could be terminated. The South Carolina Supreme Court correctly held they could not because ICWA's "preventive measures" provision was not satisfied. Pet. App. 26a-27a.

That provision requires that, before parental rights can be terminated involuntarily, "active efforts" must be made to rehabilitate the parent. 25 U.S.C. 1912(d). At the time of ICWA's enactment, "most State laws require[d] public or private agencies involved in child placements to resort to remedial measures prior to initiating placement or termination proceedings." House Report 22. Yet such measures were "rarely" taken. *Ibid.* Accordingly, Congress decided to "impose[] a Federal requirement in that regard with respect to Indian children and families." *Ibid.*

As Congress recognized, such a requirement is hardly novel. South Carolina law itself requires efforts to "rehabilitate [a] parent" even in "extreme cases" of a parent "consciously refus[ing] to support, visit, or otherwise make a suitable environment for their child." Pet. App. 27a n.23; see generally 4 Sandra Morgan Little, *Child Custody and Visitation Law and Practice* § 28.02[1][b] (2008) (noting that courts will typically not terminate parental rights if a child welfare agency has not made "reasonable efforts" to avoid that outcome by "strengthen[ing] and encourag[ing] family relations"); 42 U.S.C. 671(a)(15)(B) (requiring States receiving federal payments for foster care and adoption assistance to make "reasonable efforts * * * to preserve and reunify families" before foster placements and "to make it pos-

sible for a child to safely return to the child's home"); *Santosky* v. *Kramer*, 455 U.S. 745, 748-749, 762 (1982).

1. By its plain terms, Section 1912(d) applies to all proceedings involving termination of parental rights to, or foster care placement of, an Indian child under state law. Two mandatory predicates must be satisfied: that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family" and "that these efforts have proved unsuccessful." 25 U.S.C. 1912(d). In this case, neither showing was made. Pet. App. 26a. Accordingly, the South Carolina Supreme Court correctly concluded that Father's parental rights could not be terminated.

Petitioners contend (Br. 30) that Section 1912(d) is inapplicable because "there is no 'Indian family' that includes the father to break up." But one of the objects of the adoption proceeding was to terminate Father's parental rights, thereby breaking his family connection to his daughter. In addition, petitioners' contention reflects a misunderstanding of the nature of the broader "Indian family" contemplated by ICWA and the preventive measures provision. ICWA embodies an understanding of family that extends as far as second cousins, or even further at election of a Tribe. 25 U.S.C. 1903(2); cf. *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 504-505 (1977) (plurality opinion) (discussing "the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family" than its "nuclear" form).

ICWA's legislative history pointed out that "the dynamics of Indian extended families are largely misunderstood" by state authorities, and that "[a]n Indian child may have scores of, perhaps more than a hundred,

relatives who are counted as close, responsible members of the family" and who may properly supervise Indian children. House Report 10. In addition to Father, Baby Girl has at least two paternal grandparents (and perhaps other relatives) who are statutorily defined as part of her "extended family." 25 U.S.C. 1903(2). A termination of Father's parental rights could break up that broader Indian family as well.[4]

2. Petitioners suggest (Br. 31) it would be "perverse" to place the obligation of pursuing remedial measures on prospective adoptive parents. But the statute places only the burden of demonstrating that such measures have been pursued on "[a]ny party" seeking to terminate parental rights. 25 U.S.C. 1912(d). The task of actually making such efforts need not fall on that party, as the provision requires only that active efforts "have been made," *ibid.*, by someone—*e.g.*, the Tribe, a state agency, or a private adoption agency. House Report 22 (citing state-law requirements for public agencies or "private agencies involved in child placements" to provide remedial services); Pet. App. 26a n.22 (Cherokee Nation could have provided such services in this case).

3. Petitioners seemingly suggest (Br. 31) that the failure to pursue efforts to spur or strengthen Father's interest in assuming custody of Baby Girl can be excused because they would have been futile after he failed

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[4] The summary of this provision in the BIA guidelines, issued in 1979 to offer BIA's interpretation of ICWA's provisions, see 44 Fed. Reg. at 67,584, refers to efforts "to alleviate the need to remove the Indian child from his or her parents." *Id.* at 67,592. The guidelines' accompanying commentary suggests a focus beyond situations in which a parent previously had custody, stating that "it is clear that Congress meant a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child's emotional or physical health." *Ibid.*

to "demonstrate[] an interest in parenthood." Yet, "despite some early indications of possible lack of interest in Baby Girl," Father "not only reversed course at an early point but has maintained that course despite * * * active opposition" from petitioners. Pet. App. 27a. Upon learning that Baby Girl had been transferred to South Carolina for adoption, "he immediately instituted legal proceedings to gain custody"; "paid large sums of money in attorney fees"; began escrowing child support upon his return from Iraq, even though not required to do so; and successfully demonstrated that he is a "loving and devoted father" to his other daughter. ROA 23, 25.

Finally, involuntarily termination of Father's parental rights on the theory that his failure to support Mother during her pregnancy constituted consent cannot be reconciled with ICWA's voluntary termination provision. No consent before birth (or within 10 days after birth) is valid, 25 U.S.C. 1913(a); any consent after that time must be executed in a statutorily-prescribed manner, *ibid.*; and consent may be withdrawn "for any reason at any time" before entry of a final decree of adoption or termination of parental rights, 25 U.S.C. 1913(c). Father's pre-birth conduct therefore cannot constitute consent and, even if it could, he effectively withdrew it by seeking custody of Baby Girl.

D. The South Carolina Supreme Court Misinterpreted Section 1912(f)

The judgment of the South Carolina Supreme Court should be affirmed on the ground that the failure to comply with Section 1912(d) barred termination of Father's parental rights. Pet. App. 26a-27a. That court's subsequent discussion of Section 1912(f) as an additional bar to termination of Father's parental rights (*id.* at

28a-33a) was therefore unnecessary, and the Court need not address it. If, however, the Court does reach that question, it should conclude that the South Carolina court's application of that provision was erroneous.

1. Section 1912(f) requires that, in order to terminate "parental rights," there must be a showing "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) (emphasis added); see also 25 U.S.C. 1912(e) (no foster placement permitted absent finding by clear and convincing evidence "that the continued custody of the child by the parent * * * is likely to result in serious emotional or physical damage").

The state court failed to recognize that this provision is triggered only when a court is able to make a finding about "*continued* custody," which means there must have been some form of custody in the past that could be "continued." *Webster's Third New International Dictionary* 493 (1966) (defining "continued" as "stretching out in time or space" or "resumed after interruption").[5] While the South Carolina Supreme Court was able to determine that Father's "*prospective* legal and physical custody" would not result in "serious damage to the Indian child," Pet. App. 32a (emphasis added), that analysis assumed the word "continued" out of the provi-

[5] The BIA guidelines, see note 4, *supra*, summarize the standards of evidence under Section 1912(f) in a manner that parallels the statutory text. See 44 Fed. Reg. at 67,592. The guidelines' accompanying commentary, while not specifically opining on the words "continued custody" or stating that it addresses all possible scenarios, explains Section 1912(f) in a manner that is consistent with the requirement of some prior custody, stating that it must be shown "that it is dangerous for the child to remain with his or her present custodians." *Id.* at 67,593.

sion. Cf. *Babbitt* v. *Sweet Home Chapter of Communities for Greater Or.*, 515 U.S. 687, 698 (1995) (noting the Court's "reluctance to treat statutory terms as surplusage").

This Court has observed that Section 1912(f)'s beyond-a-reasonable-doubt standard is an unusually demanding one to apply in a proceeding for termination of parental rights. *Santosky*, 455 U.S. at 769. There is no reason to think that Congress intended to extend that heightened protection beyond the circumstance described in the provision itself, *i.e.*, where the parent has already had some form of custody that would be maintained or restored after an interruption (*e.g.*, after a period of foster care).

2. The previous "custody" required to trigger Section 1912(f) can be either "physical" or "legal" custody. *E.g.*, *D.J.* v. *P.C.*, 36 P.3d 663, 670 (Alaska 2001). That conclusion is supported by ICWA's definition of "Indian custodian" to include an Indian person who has "legal custody" and, alternatively, one who has been given temporary "physical [] custody" by a parent. 25 U.S.C. 1903(6). In Section 1912(f), Congress used just the word "custody," but there is no reason to doubt it intended to encompass both legal and physical forms. Congress surely did not contemplate that a parent with prior legal, but not physical, custody (for example because of an overseas military deployment) would lose the protections of this provision.

Whether a parent had physical or legal custody is determined by relevant state law or tribal law (or custom), as the case may be. ICWA's definition of an "Indian custodian" in Section 1903(6) is again illustrative. It provides that "legal custody" for purposes of that defini-

tion should be determined by looking to "tribal law or custom or under State law." 25 U.S.C. 1903(6).

3. The South Carolina Supreme Court never determined whether Father previously had any form of legal custody. Cf. Pet. Br. 33 & n.4. In the absence of any determination that he did, the court should not have applied Section 1912(f).

Contrary to petitioners' suggestion (Br. 35), however, ICWA is not rendered inapplicable in its entirety by the unavailability of Section 1912(f) to Father. As noted above, ICWA continues to govern because this is a child custody proceeding involving an Indian child. Other provisions, such as Section 1912(d) and the placement preferences in Section 1915(a) (neither of which require "continued custody"), would thus apply.[6]

E. Application Of ICWA In This Case Presents No Constitutional Concerns

Petitioners and respondent Guardian Ad Litem (GAL) contend that the South Carolina Supreme Court's application of ICWA in this case raises constitutional concerns. They are mistaken.

1. ICWA does not unconstitutionally "upset the federal-state balance." Pet. Br. 49. The Constitution vests Congress with "plenary power over Indian affairs." *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522

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[6] In the absence of entitlement to the heightened protections of Section 1912(f) (and assuming compliance with Section 1912(d)), state law governing termination of parental rights would govern. *E.g.*, S.C. Code Ann. § 63-7-2570 (Supp. 2012) (enumerating grounds for termination of parental rights); *Richland Cnty. Dept. of Soc. Servs.* v. *Earles*, 496 S.E.2d 864, 868 (S.C. 1998) (clear and convincing standard). The family court found that no state-law ground for termination was present here, ROA 22-24, but the South Carolina Supreme Court did not reach that question, Pet. App. 33a.

U.S. 520, 531 n.6 (1998); see *United States* v. *Lara*, 541 U.S. 193, 200-202 (2004); *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974). The Indian Commerce Clause, Art. I, § 8, Cl. 3, expressly provides Congress with the power to "regulate Commerce with * * * the Indian Tribes." In addition, the Court has explained, the "existence of federal power to regulate and protect the Indians and their property" is also implicit in the structure of the Constitution and the duty of protection that arose from the United States' past relationship with Indian Tribes. *Board of Cnty. Comm'rs* v. *Seber*, 318 U.S. 705, 715 (1943); see *Lara*, 541 U.S. at 201-202. Thus, as the congressional findings set forth in ICWA state, "Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources." 25 U.S.C. 1901(2). As Congress further found, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," and "the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. 1901(3).

ICWA was predicated on Congress's express finding that States, "exercising their recognized jurisdiction over Indian child custody proceedings," "ha[d] often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901(5); see House Report 10-11. As a result, a disproportionate number of Indian children were separated from the Indian community and "placed in non-Indian foster and adoptive homes." 25 U.S.C. 1901(4); see *Holyfield*, 490 U.S. at 33. "[I]t is [thus] clear that Congress ha[d] full

power to enact laws to protect and preserve the future and integrity of Indian tribes by providing minimal safeguards with respect to State proceedings for Indian child custody." House Report 17.

2. Petitioners contend (Br. 47) that application of ICWA raises equal protection concerns where it "confers an Indian preference" in circumstances "[w]here the father has neither preexisting custodial rights over the child nor a state law right to contest an adoptive placement." Petitioners are incorrect.

As an initial matter, petitioners fail to articulate what purportedly race-based distinction in ICWA might run afoul of equal protection principles. They suggest (Pet. Br. 46) that their concern is with "preferential right[s]" bestowed on "noncustodial fathers," but one's status as a noncustodial father is not race-based. And both biological "parents" of Indian children—whether Indian or not—have parallel rights under ICWA. 25 U.S.C. 1903(9) (definition of "parent").

Respondent GAL suggests (Br. 55) that the relevant distinction is between Indian children as defined by ICWA and other children. But that distinction is "political rather than racial in nature" and thus not subject to heightened equal-protection scrutiny. *Mancari*, 417 U.S. at 553 n.24 (rejecting equal-protection challenge to BIA Indian-hiring preferences). The definition of "Indian child" does not comprise all children who are ethnically Indian, but rather only those who are members of federally recognized Tribes or are eligible for membership and have a biological parent who is a member of such a Tribe. 25 U.S.C. 1903(4) and (8); see *Mancari*, 417 U.S. at 553 n.24 ("The preference is not directed towards a 'racial' group consisting of 'Indians';

instead, it applies only to members of 'federally recognized' tribes.").[7]

This Court has long upheld such "legislation that singles out Indians for particular and special treatment." *Mancari*, 417 U.S. at 554-555. "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555. And where the distinction is "reasonable and rationally designed to further Indian self-government," the Court will not conclude "that Congress' classification violates due process." *Ibid.*

Here, the rational relationship test is readily satisfied. Control over matters of tribal membership and domestic relations have consistently been regarded as at the core of tribal sovereignty and self-determination. *Santa Clara Pueblo*, 436 U.S. at 55-56. Congress expressly found in ICWA that Indian children are "vital to the continued existence and integrity of Indian tribes" as political, self-governing entities. 25 U.S.C. 1901(3); see 25 U.S.C. 1902 (ICWA serves "the policy of this Nation to * * * promote the stability and security of Indian tribes"). ICWA is tailored closely to that interest by requiring that an Indian child, in order to be covered by the Act, must herself be a tribal member or eligible for membership through a parent who also is a member,

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[7] Federal law generally prohibits discrimination in adoptive or foster placements based on "race, color, or national origin," 42 U.S.C. 1996b(1), but provides that this prohibition "shall not be construed to affect the application of [ICWA]." 42 U.S.C. 1996b(3). That Congress phrased this qualification as a rule of construction, not an exception, reinforces the conclusion that it reasonably views ICWA as drawing political, not racial, distinctions.

thereby advancing the transmittal of the tribal polity to the next generation.

As *Holyfield* recognized, ICWA "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." 490 U.S. at 32. The testimony before Congress placed "considerable emphasis on the impact on the tribes themselves of the massive removal of their children." *Id.* at 34.

ICWA thus furthers one of the most critical sovereign interests of federally recognized Tribes—preventing their slow demise through loss of their children. *Holyfield*, 490 U.S. at 52-53 ("The protection of this tribal interest is at the core of [] ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents.") (citation omitted). The Court in *Holyfield* interpreted ICWA to safeguard that interest even in a case where *both* biological parents sought to circumvent it. *Id.* at 50. The case for ICWA's application here, where the biological father, a member of the Cherokee Nation, wishes to raise his child as a member of the Nation, is even stronger.

The placement preferences in ICWA Section 1915(a) present no separate equal protection issue. Cf. Pet. Br. 54. The preference for "a member of the child's extended family" (25 U.S.C. 1915(a)(1)) is plainly not racial and is consistent with generally applicable federal adoption policy. See 42 U.S.C. 671(a)(19). And the preference for "other members of the Indian child's tribe" (25 U.S.C.

1915(a)(2)) is a political classification for the same reasons status as an "Indian child" is.[8]

3. Nor does ICWA as applied by the South Carolina courts violate substantive due process. Cf. Pet. Br. 47-49. Under this Court's "established method of substantive-due-process analysis," a party asserting such a right must offer a "careful description of the asserted fundamental liberty interest" and demonstrate that it is "deeply rooted in this Nation's history and tradition." *Washington* v. *Glucksberg*, 521 U.S. 702, 720-722 (1997) (internal citations and quotation marks omitted). Neither petitioners nor respondent GAL even attempt to make this demanding showing.

Petitioners contend (Br. 48) that ICWA as applied here unconstitutionally impinges on "a sole-custodial mother's decision to place her child in an adoptive home." Mother is not a party to this case, however, and petitioners do not explain why they have standing to assert any constitutional claim on her behalf. *Kowalski* v. *Tesmer*, 543 U.S. 125, 129-134 (2004). In any event, petitioners cite no authority for a substantive due process right in a parent to make an unfettered selection of someone to adopt her child, especially to the exclusion of the child's other biological parent who is actively seek-

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[8] The preference is similar to the rule that applies in intercountry adoptions under the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, art. 4, May 29, 1993. See S. Treaty Doc. No. 51, 105th Cong., 2d Sess. (1998), 1870 U.N.T.S. 167 (intercountry adoptions permissible only "after possibilities for placement of the child within the State of origin have been given due consideration"); 42 U.S.C. 14932(a)(1)(B)(i) (implementing that principle for adoptions involving emigration of child from United States to foreign country); 22 C.F.R. 96.54. That analogy underscores that the distinctions ICWA draws are political ones based on tribal membership and sovereignty.

ing custody. *Does 1, 2, 3, 4, 5, 6, & 7* v. *State*, 993 P.2d 822, 836 (Or. Ct. App. 1999) ("[A] birth mother has no fundamental right to have her child adopted."). An adoption involves relinquishment of parental rights, and it may be effectuated only with "the active oversight and approval of the state." *Ibid.* When a parent avails herself of that state process she may not claim unilateral control over its outcome.

Nor does application of ICWA violate any substantive due process right possessed by Baby Girl. Application of ICWA did not, for example, result in her placement in an unsafe home, or invade any recognized liberty interest. ROA 25 (family court's observation that "undisputed testimony" was that Father "is a loving and devoted father").

Respondent GAL contends that application of ICWA unconstitutionally deprived Baby Girl of an "inquiry focused on her best interests." GAL Br. 58; see *id.* at 49-53. But ICWA reflects Congress's judgment that adherence to its requirements *does* "protect the best interests of Indian children," 25 U.S.C. 1902. Moreover, the family court found that there was no "conflict" between Father's parental rights and the best interests of Baby Girl in this case, ROA 26, and the South Carolina Supreme Court concluded that her best interests supported her placement with Father, Pet. App. 33a-37a. In all events, this Court has declined to constitutionalize the "best interests of the child" standard, pointing out that the standard often must give way to other interests, "[s]o long as certain minimum requirements of child care are met." *Reno* v. *Flores*, 507 U.S. 292, 304 (1993).

Respondent GAL also contends (Br. 57) that the family court violated Baby Girl's substantive due process rights by removing her "from the only 'intimate

human relationships' she had ever known." But this Court has never held that "a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship." *Michael H.* v. *Gerald D.*, 491 U.S. 110, 130 (1989) (plurality opinion); see *Dawson* v. *Public Employees' Ret. Ass'n*, 664 P.2d 702, 708 (Colo. 1983) ("In no sense, therefore, can it be argued that the child's choice as to a custodial parent amounts to a fundamental constitutional right."). And while it was undoubtedly difficult for Baby Girl to be removed from petitioners' custody, GAL Br. 56, their prior custody of her could not ripen through mere passage of time into a constitutional liberty interest on her part in remaining in their care. *Holyfield*, 490 U.S. at 54 ("[T]he law cannot be applied so as automatically to reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.") (internal quotation marks omitted).

CONCLUSION

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

Respectfully submitted.

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MARCH 2013

APPENDIX

1. 25 U.S.C. 1901 provides:

Congressional findings

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

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

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

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

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high

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[1] So in original. Probably should be capitalized.

percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

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

2. 25 U.S.C. 1902 provides:

Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

3. 25 U.S.C. 1903 provides:

Definitions

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

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

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

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

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

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

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

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

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

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

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

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

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

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

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

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

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

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

4. 25 U.S.C. 1911 provides:

Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving

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

(b) Transfer of proceedings; declination by tribal court

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

(c) State court proceedings; intervention

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

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

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, rec-

ords, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

5. 25 U.S.C. 1912 provides:

Pending court proceedings

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

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

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

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

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

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

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

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

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

6. 25 U.S.C. 1913 provides:

Parental rights; voluntary termination

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

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by

the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

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

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

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

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

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the

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

7. 25 U.S.C. 1914 provies:

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

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

8. 25 U.S.C. 1915 provides:

Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other

members of the Indian child's tribe; or (3) other Indian families.

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

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

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

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

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

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

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

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the

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

(d) Social and cultural standards applicable

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

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

9. 25 U.S.C. 1916 provides:

Return of custody

(a) Petition; best interests of child

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

(b) Removal from foster care home; placement procedure

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

10. 25 U.S.C. 1917 provides:

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

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

11. 25 U.S.C. 1918 provides:

Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

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

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

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

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

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

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

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

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

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

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

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

12. 25 U.S.C. 1919 provides:

Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child

custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

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

13. 25 U.S.C. 1920 provides:

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

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

14. 25 U.S.C. 1921 provides:

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

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

15. 25 U.S.C. 1922 provides:

Emergency removal or placement of child; termination; appropriate action

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

Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

16. 25 U.S.C. 1923 provides:

Effective date

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