No. 17-942

In the Supreme Court of the United States

R.K.B. AND K.A.B., PETITIONERS,

v.

E.T.

On Petition for a Writ of Certiorari to the Utah Supreme Court

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

As Respondent acknowledges (at 17), this Court granted certiorari on the question presented here in *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637 (2013), in 2012. Although the Court resolved that case on other grounds, the question presented is even more worthy of review than it was then.

Rather than offering a plausible response to that conclusion, Respondent argues that this Court's *1989* decision in *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30 (1989), eliminates any need for review. Respondent claims (at 20) that *Holyfield* "controls the legal question in this case" so clearly that, if presented with that question again, the Oklahoma and New Jersey Supreme Courts—which reached the same conclusion as Justice Lee's dissent here—would quickly reverse course. But that speculative assertion ignores that *Holyfield* had been on the books more than twenty years when the Court granted certiorari in *Baby Girl* to resolve the conflict involving those very decisions. And Respondent's argument ignores the California and Texas decisions cited in the petition, which reached the same conclusion as the Oklahoma and New Jersey decisions, *after Holyfield*.

With the Utah Supreme Court's decision, courts in most of the states with the largest Indian populations are now even more hopelessly divided on the question presented here—with courts in California, Texas, Oklahoma and New Jersey on one side of the divide, and Alaska, Arizona, South Carolina, and now Utah on the other. This deep division on whether ICWA's "acknowledge and establish" requirement turns on a

state or a federal standard is intolerable for adoptive parents, birth parents and children. Accordingly, the Court should reject Respondent's "head-in-the-sand" pleas and use this case to finish the job it started in *Baby Girl*.

A. The second question on which review was granted in *Baby Girl* remains the subject of a deep conflict.

Respondent ignores a crucial fact about *Baby Girl*: the main basis on which certiorari on the question presented here was sought in *that* case was the very conflict Petitioners rely on here. See Petition in No. 12-399 at i, 14–18. If the petition in *Baby Girl* was wrong in identifying a conflict, that would have been a sufficient reason to deny certiorari on that question. See Sup. Ct. R. 14.4. Accordingly, the Court's grant of review on that question—just six years ago—forecloses Respondent's claim that there really is no split on the question presented here, and his related claim that *Holyfield* is so clearly "controlling" that the Court needn't worry about the obvious inconsistencies among the state courts.

1. Respondent does not dispute that the Oklahoma Supreme Court's decision in *In re Adoption of Baby Boy D*, 742 P.2d 1059 (Okla. 1985), conflicts with the decision below. Nor could he, given that court's holding that Congress meant "acknowledged or established" to mean a decision reached, not through some unarticulated federal standard, but "through the procedures available through the *tribal* courts, consistent with tribal customs, or through procedures

established by *state* law." *Id.* at 1064 (emphasis added).

Rather, Respondent argues (at 16) that the Oklahoma Supreme Court's subsequent decision *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004), "indicated that [Court] would not rigidly adhere to state-law requirements under ICWA," and hence that *Baby Boy D* is no longer good law. This is flatly wrong: The dicta Respondent quotes from *Baby Boy L* are part of a discussion of what *Oklahoma law* requires, not what ICWA requires. 103 P.3d at 1107–1108. Nowhere does *Baby Boy L* suggest that *ICWA* requires the interpretation of Oklahoma law embraced in that decision. See *id.* Respondent's attempt to rewrite *Baby Boy L* to overrule *Baby Boy D* fails.

2. Respondent also contends that the New Jersey Supreme Court's decision in *In re Adoption of Child of Indian Heritage*, 543 A.2d 925, 934 (N.J. 1988), only "applied state law because it was consistent with the federal standard enacted in ICWA." Opp. 14. But that opinion disavowed any such federal standard. Instead, like the Oklahoma Supreme Court, the court held that the congressional "intent" in ICWA was "to have the acknowledgment or establishment of paternity determined by *state* law." *Child of Indian Heritage,* 543 A.2d at 935 (emphasis added). Indeed, that court explained that, in applying ICWA's "acknowledged or established" standard, "[c]ourts of other states have also looked to state law to determine whether an alleged father of an Indian child has acknowledged or established paternity." *Ibid*. The court then cited and

endorsed the Oklahoma Supreme Court's decision in *Baby Boy D. Ibid.*

In short, there is no doubt that the New Jersey Supreme Court—contrary to the Utah Supreme Court and the supreme courts of Alaska and South Carolina—relies upon state rather than federal law in applying ICWA's "acknowledged or established" standard.

Respondent also emphasizes the New Jersey Supreme Court's observation that state laws must still be "consistent with 'methods of acknowledging and establishing paternity within the general contemplation of Congress when it passed the ICWA[.]'" Opp. 15 (quoting *Child of Indian Heritage,* 543 A.2d at 935). But this does not imply that ICWA created a federal standard. As the history discussed in that decision makes clear, the *only* "methods of acknowledging and establishing paternity" when ICWA was passed arose under state law. Accordingly, all the court could have meant by its statement about "consistency" is that a new state "method" might be objectionable if it were too far outside the mainstream of methods that existed when ICWA was passed. But Utah's method is well within Congress' "general contemplation" in passing ICWA. See Petition at 5–7.

To be sure, *Child of Indian Heritage* also mentions this Court's holding in *Stanley* v. *Illinois*, 405 U.S. 645 657–658 (1972), that the federal Due Process Clause forbids states from enacting "a *blanket* denial of parental rights to all unwed fathers regardless of their fitness as parents." See 543 A.2d at 934. But that decision obviously did not create a separate federal

standard for interpreting the phrase "acknowledged or established" in ICWA, which was enacted after *Stanley*. Here again, Respondent's attempt to rewrite *Child of Indian Heritage* fails.

3. Respondent is likewise incorrect in claiming (at 20) that *Holyfield* is sufficiently "controlling" that the existing conflict will ultimately resolve itself without this Court's intervention.

First, the fact that, even *after Holyfield,* the California and Texas decisions discussed in the petition (at 15) went the other way from the (three-to-two) majority in this case demonstrates that *Holyfield* isn't going to slowly eliminate the conflict. Even courts that have agreed with Respondent on the merits after *Holyfield* have barely relied on that decision—if they have at all. See *Bruce L.* v. *W.E.*, 247 P.3d 966, 979 (Alaska 2011); *Adoptive Couple* v. *Baby Girl*, 731 S.E.2d 550, 559–560 (S.C. 2012), *reversed on other grounds*, 570 U.S. 637 (2013); *Jared P.* v. *Glade T.*, 209 P.3d 157, 160, 162 (Ariz. Ct. App. 2009).

Second, as suggested by the refusal of Respondent's allies to adopt his interpretation of *Holyfield*, Respondent's interpretation is fanciful. Contrary to Respondent's mantra, nothing in *Holyfield* articulates or even suggests a general rule that "critical undefined" terms in ICWA must be applied according to a federal standard rather than a state-law standard. Cf. Opp. 4, 12, 13. To the contrary, *Holyfield* itself only adopted a federal definition of the word "domicile" in ICWA because, unlike the unwed father provisions, the "domicile" language is a "key jurisdictional provision." 490 U.S. at 45. Moreover, as *Holyfield*

noted, "domicile" already had a well-established meaning in federal law. *Holyfield*, 490 U.S. at 48 (citing federal cases defining "domicile").

By contrast, as explained in the petition and in Justice Lee's dissent, in the adoption context the terms "acknowledged" and "established" are terms of art under *state* domestic-relations law, not federal law. And this Court has "consistently recognized" that "domestic relations are preeminently matters of state law." *Mansell* v. *Mansell*, 490 U.S. 581, 587 (1989).

The decision below (and Respondent's defense of it) thus contradicts this Court's clear deference to the States in the "realm of family relations," an area where "congressional entanglement" has traditionally been avoided. *Astrue* v. *Capato*, 566 U.S. 541, 554 (2012); see also *United States* v. *Windsor,* 570 U.S. 744, 766–767 (2013); Pet. 1–2, 7, 27. The Court should grant review to make clear that such entanglement is inappropriate in this context as well.

B. That question still demands this Court's resolution.

The Court's decision in *Baby Girl* to grant certiorari on the question presented here likewise highlights its practical importance.

1. Respondent claims (at 17) that this Court "grant[ed] the [*Baby Girl*] petition in its entirety," not because of that issue's inherent importance, but "so as not to limit the grounds on which the Court could rule." But this Court's certiorari practice always focuses on specific legal questions, not on ensuring that there are

adequate grounds to rule for a "favored" party. See Supreme Court R. 10.

Indeed, in the 2012-2013 term (when *Baby Girl* was granted), the Court granted only a limited subset of the questions presented in a petition for certiorari in seventeen different cases.[1] That pattern confirms that the Court grants certiorari on a question only when it independently satisfies the standards articulated in Rule 10.

2. Respondent also cannot deny that, in 2008—the last year for which complete data are apparently available—27,457 adopted children in the United States under age 18 were Native Americans.[2] To be sure, as Respondent notes (at 17), this represents the *total* number of children then under age 18 who were adopted at any point in their lives, rather than an annual number. But even when one divides that aggregate number by 18 (assuming Indian adoptions are evenly distributed over time), it is a fair inference that approximately 1500 Indian children are adopted each year—and thus have the potential to find themselves in a situation like the three-year-old child in this case.

While Respondent claims (at 18) that the question presented affects "only the small subset of those adoptions in which the adoption [is] contested," that reassurance ignores the fact that *any* adoption can be

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[1] *E.g. Boyer* v. *Louisiana*, 568 U.S. 936 (2012); *Cable, Telecomms., & Tech. Comm*. v. *FCC*, 568 U.S. 936 (2012).

[2] See Nat'l Council for Adoption, *Adoption Factbook V* at 109 (2011), available at https://www.adoptioncouncil.org/images/downloads/adoption-factbook-v-digital.pdf.

"contested." And decisions like those by the Utah, Alaska and South Carolina supreme courts are problematic precisely because of their chilling effect : As one amicus puts it, a vague federal standard for paternity in ICWA cases makes *all* adoptions "unreasonably risky because birth mothers may not disclose (or may not even know) that their child is an 'Indian child.'" Brief of the Utah Adoption Council at 19. This discourages potential adoptive parents from "becom[ing] involved in an adoption that could be disrupted." *Id.*

In short, if the current confusion over the question presented is not resolved by this Court, the lingering uncertainty will continue to impose an enormous toll on Indian children, their birth parents, and would-be adoptive families like Petitioners.

3. Moreover, as the *amici* point out, the Utah Supreme Court's vague "reasonableness" standard is especially pernicious because it:

- replaces "carefully drafted and comprehensive adoption procedures enacted by states" with "a vague standard," Brief of National Council for Adoption as Amicus Curiae 1, 2;
- does not ensure "an unwed father will demonstrate full commitment to care for the child," *id* at 2; and
- leaves those involved in adoptions without any clear standard as to how and when ICWA will apply, Brief of Academy of Adoption and Assisted Reproduction Attorneys as Amicus Curiae 23.

Respondent nevertheless asserts (at 23) that "[t]he Utah Supreme Court's federal standard [will] ensure[] greater certainty in cases involving the law of multiple states." But that court's "reasonableness" standard is so vague that the court itself could not even articulate how it would apply from case to case. See 58a–64a (not articulating standard); 141a–142a (dissent). And even the most intelligent of legal minds will often differ on what is "reasonable." Thus, as Justice Lee explained in dissent, the majority's "reasonableness" approach is nothing more than "a make-it-up-as-we-go standard," Pet. App. 140a–141a, one that will create even more uncertainty for potential adoptive couples.

Respondent further argues (at 12) that, under the rule urged by Justice Lee and currently in force in at least four states with substantial Indian populations, interested parties must "navigate" all fifty state paternity laws. But fifty black-letter laws are far better than the vague "reasonableness" standard the Utah Supreme Court has offered: Such a standard would force interested parties to guess what the courts of fifty states will view as "reasonable," instead of allowing them to rely on carefully defined, pre-existing state standards.

Similarly, a federal "reasonableness" standard would create ongoing instability for an adoptive couple and their adopted child. An adoption would never be truly final because, as this case shows, there would always be a risk that the birth mother's affirmation of the father's identity could be contested. Pet. 87a.

In short, even if other state courts adopted the Utah Supreme Court's interpretation of ICWA, that

outcome would not bring greater clarity to a process already fraught with enormous risk and uncertainty for all concerned. Indeed, as the brief of the National Council for Adoption emphasizes (at 19), such an outcome would merely frighten away "prospective adoptive parents, who provide a tremendous service to children from the [Native American] community."

C. The majority reached the wrong conclusion.

Respondent also fails to undermine the showing by Justice Lee and the petition that the majority reached the wrong conclusion on the question the Court left open in *Baby Girl*.

For example, Respondent does not dispute Justice Lee's showing that "acknowledged" and "established" are terms of art in family law. Pet. 125a. Justice Lee explained that "acknowledgment" is usually a writing by a father, and "establishment" is initiated by a court filing that leads to a judicial order. Pet. 125a–127a. Because "acknowledged" and "established" are terms of art in family law, it should be assumed that Congress intended to defer to state standards unless the statute explicitly articulates a federal standard. See *Lehr* v. *Robertson*, 463 U.S. 248, 257 (1983). As shown in the petition (at 24–25), the majority's response to Justice Lee on this point fails.

Similarly, the trial court demonstrated that "acknowledged" and "established" had largely consistent meanings among states when the Act was enacted. Pet. 166a. Respondent's only response (at 22) seems to be that the Utah Supreme Court majority did

not find *satisfactory* plain meanings. But that ignores that the terms are indeed terms of art.

Respondent also virtually ignores this Court's decision in *United States* v. *Windsor*, 570 U.S. 744, 767 (2013). As the petition explains (at 26-27), the states have different rules governing not only marriage, but a host of other domestic-relations matters. As *Windsor* noted, "the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations." 570 U.S. at 767. True, as *Holyfield* held and Respondent points out (at 21), ICWA modifies that principle slightly—to prevent adoption agencies from riding roughshod over the rights of Indian parents—and therefore supplies a federal standard for determining the "domicile" of an Indian child. But Respondent's claim that ICWA requires uniform national standards dealing with domestic-relations issues that (a) are extensively regulated by state law, and (b) do not have a federal analogue, contradicts *Windsor* and the long-standing rule of deference it reaffirmed. This Court should grant review and reaffirm that rule here.

D. This is a good vehicle.

Respondent also raises a few factual issues, apparently to suggest that this case is not a good vehicle with which to resolve the question presented. Respondent is wrong.

For example, Respondent suggests (at 2, 19–20) that it was Petitioners' fault the trial court was not adequately informed of his alleged paternity. But Petitioners relied in good faith on the birth mother's original representations about the identity of the birth

father. And regardless, Utah law put the burden on Respondent to timely acknowledge his paternity. See Utah Code 78B-6-121.

Moreover, even the majority below—the court that has adopted the broadest reading of ICWA—did not rely on the birth mother's (eventual) representations about Respondent's paternity, instead relying on Respondent's own subsequent representations to the trial court. Pet. 65a. Nor did the majority fault Petitioners for relying on the birth mother's original representations and expecting all concerned to comply with settled law.

Respondent also tries to minimize the fact that, throughout the last trimester, he apparently knew the birth mother (1) was pregnant, (2) was in Utah, and eventually (3) had cut off contact with him. Pet. 5a–6a. Armed with this information, he had every reason to assume he would need to seek legal protection for his paternal rights. But he did not do so. He waited approximately *six months*—both before and after B.B.'s birth—and thus never complied with the state-law requirements for establishing paternity. And while Respondent cites the majority's decision in claiming (at 8) that he "took immediate steps to assert his parental rights," even the majority noted elsewhere that "…it is unclear from the record *what* his immediate action was." Pet. 8a (emphasis added).

In short, rather than providing reasons to deny review, Respondent's factual dodges support review: He has inadvertently shown how low a bar the Utah Supreme Court has now set for satisfying its supposed federal "reasonableness" test. Indeed, his approach to

the facts shows that, as Justice Lee predicted, the majority's position will ultimately devolve into one simple rule: birth father always wins. Pet. 143a. That is not what ICWA requires.

CONCLUSION

Just as there was when this Court granted certiorari in *Baby Girl*, there remains an important conflict among state courts on whether ICWA incorporates state standards for determining whether paternity has been "acknowledged" or "established." The petition should be granted.

Respectfully submitted,

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