No. 17-95

IN THE
Supreme Court of the United States

S.S. AND S.S.,

Petitioners,

v.

THE COLORADO RIVER INDIAN TRIBES, STEPHANIE H., AND GARRETT S.,

Respondents.

On Petition for Writ of Certiorari to the Arizona Court of Appeals

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTIONS PRESENTED

The Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901, *et seq.*, established "minimum federal standards for the removal of Indian children from their families." *Id.* § 1902. Before the permanent termination of a parent's rights to her child, ICWA requires (1) "active efforts" to avoid breakup of the Indian family and (2) the court to find, beyond a reasonable doubt, that continued custody of the child by the parent "is likely to result in serious emotional or physical damage to the child." *Id.* § 1912(d), (f).

The Arizona Court of Appeals affirmed application of § 1912(d) to a father's action to terminate the parental rights of the mother, but did not address § 1912(f). There is no split among state supreme courts on the applicability of those provisions to parent-initiated termination actions. Further, ICWA's plain language applies those provisions in *all* termination proceedings. Nor is there a split on the question whether ICWA violates due process or equal protection, and it is settled that Congress legislates as to "Indians" not as a discrete racial group, but rather as citizens of sovereign Tribal Nations to which the United States owes trust duties.

The questions presented are:

1. Whether a parent of an Indian child is denied the protections of 25 U.S.C. § 1912(d) and (f) when the party petitioning for termination of parental rights is the other parent.

2. Whether 25 U.S.C. § 1912(d) and (f) violate the due process and equal protection rights of Indian children.

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INTRODUCTION

Congress enacted the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901, *et seq*., "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." *Id.* § 1902. Congress concluded 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." *Id.* § 1901(3). ICWA "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes" of "the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Nearly four decades after the enactment of ICWA, the over-representation of Indian children in foster care and adoption demonstrates the continuing need for the procedural safeguards the statute provides.[1]

In this case, Garrett S. ("Father") had sole custody of petitioners S.S. and S.S. ("Children" or "petitioners")—who are currently teenagers—beginning in 2009. In 2012, he petitioned to terminate the parental rights of respondent Stephanie H.

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[1] *See*, *e.g.*, A. Summers, *Disproportionality Rates For Children of Color in Foster Care* 12 (Nat'l Council of Juvenile & Family Court Judges 2015), *available at* https://www.ncjfcj.org/sites/default/files/NCJFCJ%202013%20Dispro%20TAB%20Final.pdf; U.S. Dep't of Health & Human Servs., *Race/Ethnicity of Public Agency Children Adopted* (July 2015), *available at* https://www.acf.hhs.gov/cb/resource/race-2014.

("Mother"), thereby attempting to permanently sever her legal relationship with Children, so that his new wife Laynee S. ("Step-Mother") could adopt Children, each of whom is an "Indian child" under ICWA. Pet. App. 4a; *see* 25 U.S.C. § 1903(4). The Arizona trial court dismissed the termination petition, holding that Father failed to establish that "active efforts" had been made to "provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." Pet. App. 5a; *see* 25 U.S.C. § 1912(d). The Arizona Court of Appeals affirmed.

Petitioners[2] assert that § 1912(d)—as well as § 1912(f), a provision not relied on by the trial court or the court of appeals—is inapplicable in a "private" termination action "initiated by one birth parent against the other birth parent." Pet. i. This question does not merit review by this Court. Contrary to their claim of "an irreconcilable and acknowledged split" (Pet. 16), there is no disagreement among state courts of last resort—the only courts that matter, *see* Sup. Ct. R. 10(b)—on the applicability of § 1912(d) and (f) in parent-initiated termination proceedings. Moreover, the decision below accords with the plain text of ICWA: those provisions apply in "*any* action resulting in the termination of the parent-child relationship," 25 U.S.C. § 1903(1)(ii) (emphasis added), and to "*[a]ny*

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[2] Father has abandoned this case. He did not participate in the Arizona Court of Appeals. Pet. App. 5a n.3. And he does not now seek review. Petitioners, currently teenagers, are minors. While represented by a guardian *ad litem* ("GAL") in the trial court, no GAL is listed in the petition, *see* Pet. ii, and it appears that they now litigate in their own right before this Court. Their right to do so appears questionable, at best. Cf. Fed. R. Civ. P. 17(c)(2).

party seeking to effect a … termination of parents rights," *id.* § 1912(d) (emphasis added).

Petitioners also ask this Court to review their contention that application of § 1912(d) and (f) constitutes "*de jure* discrimination" in violation of due process and equal protection guarantees. Pet. i. This question too does not warrant review. Petitioners do not contend that a split exists on this question, which they barely developed in the court of appeals. Further, the decision below accords with settled law, including this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974).

Finally, this case is a poor vehicle for addressing either question, because the case is likely moot. Step-Mother has initiated divorce proceedings against Father, which appears to obviate the reason that Father filed the termination petition. Indeed, Father has abandoned this litigation. Moreover, Father and Children have moved and now reside on the Tribe's reservation, depriving the state courts—and perhaps this Court—of jurisdiction over the dispute and also eliminating the applicability of § 1912(d) and (f) to any termination proceedings.

STATEMENT OF THE CASE

A. ICWA's Statutory Framework

Congress enacted ICWA "'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. 95-1386, at 23). The statute sets "procedural and substantive standards" for "child custody proceedings … in state court." *Id.* at 36.

Congress carefully defined the terms used in providing protections to parents of Indian children. "Parent" is defined, in relevant part, as "any biological parent or parents of an Indian child." 25 U.S.C. § 1903(9). "Indian child" means "any unmarried person who is under the age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." *Id.* § 1903(4). Finally, ICWA defines "child custody proceeding" to include four types of proceedings: (1) "foster care placement," defined as "any action removing a child from its parent … for temporary placement in a foster home or institution, or the home of a guardian or conservator … where parental rights have not been terminated"; (2) "termination of parental rights," which means "any action resulting in the termination of the parent-child relationship"; (3) "preadoptive placement," and (4) "adoptive placement." *Id.* § 1903(1).

ICWA provides parents and Indian tribes certain protections in child custody proceedings. An Indian child's parents and tribe must receive notice of any involuntary proceeding to terminate parental rights. *Id.* § 1912(a). The tribe may intervene in the proceeding at any time and request to transfer jurisdiction to tribal court, whether or not the child is domiciled on the reservation.[3] *Id.* § 1911(b), (c).

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[3] ICWA grants tribes exclusive jurisdiction over child custody proceedings with respect to children who reside in or are domiciled on the reservation, 25 U.S.C. § 1911(a); 25 C.F.R. § 23.110(a), except in states that have assumed jurisdiction over such proceedings pursuant to Public Law 83-280, 25 U.S.C.

If the child custody proceeding remains in state court, ICWA requires the party petitioning to terminate parental rights to satisfy two standards that are relevant in this case. First, "[a]ny party seeking to effect a … termination of parental rights … shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." *Id.* § 1912(d). Second, "[n]o termination of parental rights may be ordered … in the absence of a determination, supported by evidence beyond a reasonable doubt, including the testimony of a qualified expert witnesses, that the continued custody of the child by the parent … is likely to result in serious emotional or physical damage to the child." *Id.* § 1912(f).

B. Stephanie H. and Her Children

Stephanie H. and Garrett S. are the parents of petitioners, S.S. and S.S., who were born in 2000 and 2002. Mother and Father shared custody of Children until their divorce in 2005, after which Mother was awarded their "sole primary care, custody and control" until 2009. Pet. App. 2a–3a.

In 2009, Mother moved with Children from northern Arizona to a town south of Phoenix without the court's permission or notice to Father. *Id.* The court subsequently granted Father temporary custody and then sole custody of the children contingent upon Father's submission of hair follicle drug testing. *Id.* at

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§ 1322. Arizona has not assumed such jurisdiction. *See* Stephen L. Pevar, *The Rights of Indians and Tribes* 116 (4th ed. 2012).

3a. Mother's supervised visitation with the children was likewise conditioned upon her submission of hair follicle drug testing. *Id.* Mother took and passed three hair follicle tests, one in 2010 and two in 2014. *Id.* Although Mother had custody of Children from their birth until ages seven and nine, although she made child support payments to Father, and although she completed a 12-step drug and alcohol recovery program and a parenting class, Father denied all visitation to Mother. *Id.* at 3a–4a.

C. Proceedings Below

In December 2012, Father—who had been awarded full custody of Children in 2009—filed a petition to terminate Mother's parental rights in the superior court for La Paz County, alleging abandonment and neglect under Ariz. Rev. Stat. § 8-533(B)(1) and (2). Pet. App. 3a–4a. Father sought such termination so that his new wife, Step-Mother, could adopt Children. Pet. 2–3; Pet. App. 22a. Although respondent Colorado River Indian Tribes ("Tribe") was not a party in the parents' divorce and custody proceedings, the Tribe intervened in the case after Father filed the termination petition and fully participated in the litigation thereafter. Pet. App. 4a.

The superior court held a trial in January 2016. At trial, the parties agreed that ICWA applied based on Children's enrollment in the Tribe. *Id.* After Father rested his case, Mother and the Tribe moved to dismiss the petition on multiple grounds—that Father had failed to adduce sufficient evidence of abandonment or neglect to permit the case to continue, and that Father failed to present sufficient evidence of "active efforts" to prevent the breakup of

the family, which is required by § 1912(d). Pet. App. 5a.

The court granted the motion in part. The court found that Father submitted sufficient evidence of abandonment but not neglect, and "at least some" evidence that continued custody by Mother would result in serious emotional or physical damage to Children. *Id.* at 4a–5a; *see* 25 U.S.C. § 1912(f). The court would thus have permitted the trial to proceed to respondents' presentation of evidence.[4] But the court granted the motion to dismiss because it concluded that Father failed to demonstrate "active efforts" at preventing the breakup of the family. Pet. App. 5a. This ruling did not disturb Father's continuing sole custody of Children, which continues to this day.

Petitioners (but not Father, *see id.* at 5a n.3) appealed to the Arizona Court of Appeals, which affirmed. The court of appeals rejected petitioners' argument that ICWA does not apply to a petition filed by one parent to sever the parental rights of the other parent, concluding that "ICWA's plain language does not limit its scope to proceedings brought by state-licensed or public agencies." *Id.* at 7a. The court of appeals also agreed with the trial court that Father

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[4] Petitioners err in stating that "the trial court has *already found* sufficient evidence to justify [termination of parental rights] on grounds of abandonment and that such [termination] would be in the best interests of the children." Pet. 8–9 (emphasis added). On the contrary, the trial court simply held that Father submitted sufficient evidence on these issues to *survive a motion to dismiss*, Pet. App. 4a–5a; indeed, Mother and the Tribe had not yet presented their evidence when the trial court dismissed the petition.

failed to prove that sufficient "active efforts" were undertaken. *Id.* at 15a. Finally, the court of appeals held that the application of ICWA in this case was consistent with due process and equal protection principles. *Id.* at 16a. The court concluded that ICWA's requirements for termination of parental rights involving Indian children are "not based on race, but on Indians' political status and tribal sovereignty and that those requirements are rationally related to the federal government's desire to protect the integrity of Indian families and tribes." *Id.*

Petitioners filed a petition for review with the Arizona Supreme Court, which denied the petition. Pet. App. 49a.

REASONS FOR DENYING THE PETITION

This case does not warrant this Court's review. To begin with, the case does not present any question relating to § 1912(f) because that provision was not the basis for either the trial court or court of appeals decision. Moreover, this case is a poor vehicle for addressing these legal issues, as the dispute appears to be moot for two reasons. First, the underlying basis for Father's termination petition—adoption of Children by Step-Mother—no longer exists, as Father and Step-Mother are divorcing. Indeed, Father, who initiated this litigation, has long since abandoned it. Second, it appears that petitioners now reside on the Tribe's reservation. As a result, the Tribe now has exclusive jurisdiction over any future proceedings involving petitioners—proceedings to which § 1912(d) and (f) do not apply.

In any event, petitioners' contention (Pet. 16) that there is "an irreconcilable and acknowledged split" on the application of ICWA § 1912(d) and (f) to parent-initiated termination petitions is simply incorrect. Petitioners mainly cite decisions—like the one they ask this Court to review—of intermediate state appellate courts, and the state supreme court cases they cite do not address whether those provisions apply in parent-initiated termination proceedings. Further, the plain text of ICWA unambiguously applies § 1912(d) and (f) to such terminations.

Nor should this Court review petitioners' constitutional argument. They do not suggest that there is a split on this question, and their argument is inconsistent with this Court's repeated determination that statutes dealing with Indians do so on the basis of membership in or affiliation with a federally recognized tribe, not on race.

I. This Case Is A Bad Vehicle For Addressing The Questions Presented.

This case is a poor vehicle for the Court's consideration of either question presented by petitioners for three reasons. For these reasons alone, the Court should deny the petition.

First, although petitioners' initial question concerns the applicability of § 1912(d) *and* (f) to this case, and their brief argues both provisions together, the applicability and constitutionality of § 1912(f)—the "serious emotional or physical damage" provision—is not actually before the Court. The trial court concluded that Father submitted sufficient evidence to *survive* the motion to dismiss on § 1912(f). Petitioners therefore did not appeal that

determination, *see* Appellant's Opening Br., Ariz. Ct. App. Div. 1 at 10, and the Arizona Court of Appeals did not address § 1912(f). As a result, Petitioners' challenge to § 1912(f) is not properly before the Court.

Second, it appears that this case is now moot. As petitioners explain, the underlying dispute arises from Father's desire that Step-Mother adopt Children. Pet. 2-3. Step-Mother can adopt them only if Mother's parental rights are terminated. But on June 23, 2017—more than six month after the decision of the court of appeals below—Step-Mother filed a petition to dissolve her marriage with Father. *See* Pet. for Dissolution of Marriage, *S[.] v. S[.]*, No. DO 2017-07198 (Super. Ct. Mohave Cty., Ariz. June 23, 2017). Father, who neither appeared on appeal nor in this Court, has not indicated that Step-Mother still intends, at some time in the future, to petition for adoption. Pet. App. 5a n.3. It is likely that Father abandoned this case precisely because it is moot as a practical matter.

Finally, respondents Tribe and Mother both understand that Children recently resumed residence on the Tribe's reservation. Accordingly, should petitioners prevail, on remand the state courts would lack jurisdiction, as ICWA provides the Tribe with exclusive jurisdiction over any child custody proceeding involving an Indian child residing on the reservation. 25 U.S.C. § 1911(a); *see supra*, at 4 n.3. Because § 1912(d) and (f) do not apply in tribal court,[5]

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[5] *See*, *e.g.*, *Oglala Sioux Tribe v. Van Hunnik*, No. CV 13-5020-JLV, 2016 WL 697845, at *4 (D.S.D. Feb. 19, 2016) ("ICWA does not govern how a tribe deals with an Indian child once tribal jurisdiction is asserted and transfer from state jurisdiction occurs."); *In re Redacted,* No. A-015-0910, 2011 WL 12885164

it would appear that this case is moot. Indeed, it is doubtful that this Court has jurisdiction over this child custody proceeding in light of § 1911(a).

II. The Question Whether § 1912(d) And (f) Apply In A Parent-Initiated Termination Proceeding Presented Does Not Warrant Review.

A. There Is No Split Among State Supreme Courts.

Petitioners contend that there is an "irreconcilable and acknowledged split" among state courts "regarding the application of ICWA in private TPR cases." Pet. 16. Petitioners are wrong; not a single state supreme court has held that § 1912(d) or (f) do not apply in parent-initiated termination proceedings.

1. In support of the claimed split, Petitioners discuss eight cases that, they suggest, hold that § 1912(d) or (f) "do not apply" in parent-initiated termination proceedings. Pet. 16–19. Five of those eight decisions, however, were issued by intermediate state appellate courts, and therefore are irrelevant for purposes of creating a split. *See* Sup. Ct. R. 10(b).

Moreover, none of the three decisions by state supreme courts cited by petitioners holds that § 1912(d) and (f) "do not apply" in parent-initiated termination proceedings. First, in *In re Micah H.*, 887

(Little Traverse C.A. Mar. 30, 2011); *In re R.F.*, No. SC-99-04, 2000 WL 33976004 (Muscogee (Creek) Jan. 8, 2000); *see also* Native American Rights Fund, *A Practical Guide to the Indian Child Welfare Act* 76 (2007) ("The ICWA applies to state court proceedings, but does not apply to tribal court proceedings unless the tribal governing body has incorporated the provisions of the ICWA into tribal law."), *available at* http://www.narf.org/nill/documents/icwa/print/all.pdf.

N.W.2d 859 (Neb. 2016), the Nebraska Supreme Court explained—contrary to petitioners' contentions—that "the applicability of ICWA … to an adoption proceeding" turns "on whether an 'Indian child' is involved." *Id.* at 867. In that case, grandparents sought to terminate the parental rights of the father, *id.* at 865, so the case does not involve "a private severance action initiated by one birth parent against the other birth parent," Pet. i. More fundamentally, the Nebraska court declined to apply § 1912(d) and (f), not because the case was a parent-initiated termination proceeding, but instead based on the completely inapposite rationale of *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), which turned on the fact that the parent whose parental rights were terminated never had custody of the child.[6] *See* 887 N.W.2d at 868–70.

Second, *In re ARW*, 343 P.3d 407 (Wyo. 2015), also is not inconsistent with the decision below. In that

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[6] In *Adoptive Couple*, this Court held that § 1912(f) "does not apply when … the relevant parent never had custody of the child," and that § 1912(d) "is inapplicable … when … the parent abandoned the Indian child before birth and never had custody of the child." 133 S. Ct. at 2557. These rationales do not apply here. The father in *Adoptive Couple* relinquished his parental rights before the child's birth, provided no financial or other support, and never had physical or legal custody. Here, by contrast, Mother had legal and physical custody of petitioners from the time of their birth continuously until ages seven and nine, and subsequently paid child support. Pet. App. 2a–4a.

The court in *Micah H.*, though declining to apply § 1912(d), applied the "active efforts" provision of state law, which had been amended after *Adoptive Couple* and "provides a higher standard of protection to the rights of the parent or Indian custodian" than does ICWA. 887 N.W.2d at 869–70.

case, the Wyoming Supreme Court affirmed the termination of a father's parental rights in an action brought by prospective adoptive parents. Like *Micah H.*, the court's decision represented a straightforward application of *Adoptive Couple*, which the court quoted at length. *Id.* at 411. The Wyoming court said not one word suggesting that § 1912(d) and (f) never apply in parent-initiated termination proceedings. Also like *Micah H.*, *ARW* was not "a private severance action initiated by one birth parent against the other birth parent," Pet. i.

Finally, petitioners cite *In re Bertelson*, 617 P.2d 121 (Mont. 1980), a case filed before ICWA's enactment but decided shortly thereafter,[7] which involved a custody dispute between a mother and Indian paternal grandparents. *Bertelson* involved no claim for termination of parental rights,[8] so neither § 1912(d) nor § 1912(f) applied at all—thus, *Bertelson* simply is not inconsistent with the holding below. *Bertelson* never addressed the text of the operative provisions of ICWA, much less reached a result inconsistent with the decision below. Nor was the case an "action initiated by one birth parent against the other birth parent," Pet. i. To be sure, the court opined that ICWA generally "is not directed at disputes between Indian families regarding custody of Indian children." *Id.* at 125. To the extent that this *dicta* is

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[7] In fact, ICWA was inapplicable in *Bertelson*. ICWA did not apply to termination proceedings—such as *Bertelson*, 617 P.2d at 124—that were "initiated" within 180 days following the statute's enactment. 25 U.S.C. § 1923.

[8] The case also did not involve a foster care placement, the other trigger for application of § 1912(d) and (f).

read broadly, it has been widely rejected and never followed by another state high court.[9]

The intermediate state appellate court cases cited by petitioners, though not relevant under Rule 10, also do not conflict with the decision below—and they certainly do not demonstrate any "disarray" (Pet. 16) among state appellate courts. *In re J.B.*, 100 Cal. Rptr. 3d 679 (Cal. App. 2009), and *In re M.R.*, 212 Cal. Rptr. 3d 807 (Cal. App. 2017), involved custody disputes between both parents, not termination of parental rights, and both cases held that the award of custody to a parent is not a "child custody proceeding" as defined in 25 U.S.C. § 1903(1). *J.B.*, 100 Cal. Rptr. at 683; *M.R.*, 212 Cal. Rptr. at 822.

Cherino v. Cherino, 176 P.3d 1184 (N.M. App. 2007), and *In re Sengstock*, 477 N.W.2d. 310 (Wis. App. 1991), involved child custody orders entered during divorce proceedings. Both courts found ICWA inapplicable based on § 1903(1), which specifically excludes from the definition of "child custody proceeding" a "placement based … upon an award, in a divorce proceeding, of custody to one of the parents." *Cherino*, 176 P.3d at 1186; *Sengstock*, 477 N.W.2d at 312–13.

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[9] *See, e.g., State in Interest of D.A.C.*, 933 P.2d 993, 1000–01 (Utah Ct. App. 1997); *In re A.K.H.*, 502 N.W.2d 790, 794 (Minn. 1993); *In re Q.G.M.*, 808 P.2d 684, 687–88 (Okla. 1991); *In re A.B.M. v. M.H.*, 651 P.2d 1170, 1173 (Alaska 1982), *cert. denied*, 461 U.S. 914 (1983); *Talamante v. Pino*, No. CV 12-01218 MV/GBW, 2014 WL 12489764, at *6 (D.N.M. Mar. 24, 2014); *Comanche Indian Tribe v. Hovis*, 847 F. Supp. 871, 876 (W.D. Okla. 1994), *rev'd on other grounds*, 53 F.3d 298 (10th Cir. 1995).

Finally, *Comanche Nation v. Fox*, 128 S.W.3d 745 (Tex. App. 2004), involved an action to modify the conservatorship of an Indian child, not termination of parental rights. *Id.* at 753. The Texas Court of Appeals simply held that "proceedings seeking to modify conservatorship arrangements" fall outside the definition of "child custody proceeding" in ICWA. *Id.*

2. In contrast to the absence of cases denying application of § 1912(d) and (f) to parent-initiated termination petitions, state courts considering such petitions have consistently applied ICWA. *See*, *e.g.*, *In re Adoption of T.A.W.*, 383 P.3d 492, 494 (Wash. 2016); *In re C.A.V.*, 787 N.W.2d 96, 98 (Iowa Ct. App. 2010); *In re D.A.C.*, *P.D.C.*, & *S.D.C.*, 933 P.2d 993, 995–96 (Utah Ct. App. 1997); *In re Crystal K.,* 226 Cal. App. 3d 655, 662–66 (1990).

In addition to cases applying ICWA to termination petitions initiated by one parent against another, state courts have also applied ICWA to termination petitions initiated by step-parents where, as in this case, the step-parent intended to adopt the child. *See*, *e.g.*, *In re Petition of N.B.*, 199 P.3d 16, 19 (Colo. App. 2007).

B. The Arizona Court of Appeals Correctly Interpreted ICWA.

The plain language of the ICWA establishes that the Arizona Court of Appeals' holding—that ICWA applies to parent-initiated termination proceedings—is correct. Section 1912(d) expressly applies to "*[a]ny party* seeking to effect a … termination of parental rights." 25 U.S.C. § 1912(d) (emphasis added). Further, ICWA defines "termination of parental

rights" to mean "*any action* resulting in the termination of the parent-child relationship."[10] *Id.* § 1903(1)(ii) (emphasis added). As this Court has explained, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Nothing in the statute excludes application of § 1912(d) in "a private severance action instituted by one birth parent against the other birth parent," as petitioners contend, Pet. i.

Although not relevant here, the same is true with respect to § 1912(f). That provision declares, without limitation, that "[n]o termination of parental rights may be ordered in such proceeding" without the findings set forth in that provision. This language, combined with the expansive definition of "termination of parental rights," leaves no doubt about its applicability to parent-initiated termination proceedings.

C. The Proper Burden Of Proof To Prove "Active Efforts" Is Not Before The Court.

At the end of their first argument, petitioners seem to add an additional question, one not reflected in their questions presented. Specifically, petitioners assert that lower courts "disagree about the degree of

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[10] ICWA also expressly protects non-Indian parents of an Indian child. The statute defines "parent" as "*any* biological parent or parents of an Indian child or *any* Indian person who has lawfully adopted the child including adoptions under tribal law and custom." 25 U.S.C. § 1903(9) (emphasis added); *see*, *e.g.*, *T.A.W.*, 383 P.3d at 499–500.

proof necessary under ICWA's 'active efforts' provisions"—preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt. Pet. 20–21. Whatever disagreement exists among state courts on the degree-of-proof issue, this question is not properly before the Court.

First, petitioners failed to present this issue in their questions presented. *See* Pet. i. Second, and more fundamentally, petitioners neither argued to the Arizona Court of Appeals that the trial court applied the wrong degree of proof (*see* Appellant's Opening Br., Ariz. Ct. App. Div. 1 at 7) nor sought to raise the issue with Arizona Supreme Court (*see* Pet. for Rev. of Op. of Court of Appeals at 2). Nor did either court address the issue. As a result, this Court lacks jurisdiction to address the question. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("[W]e will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.").

III. The Court Should Not Review Whether ICWA Unconstitutionally Discriminates Against Indian Children.

Petitioners also ask this Court to review the court of appeals' rejection of their constitutional argument. Specifically, the court held that "the additional requirements ICWA imposes … are not based on race, but on Indians' political status and tribal sovereignty and … those requirements are rationally related to the federal government's desire to protect the integrity of Indian families and tribes." Pet. App. 16a. Petitioners assert that "ICWA imposes different—and

less protective—rules to cases involving children of one racial category, and establishes literal racial segregation." Pet. 22. Based on their argument that ICWA establishes race-based classifications, Petitioners urge the Court to apply strict scrutiny and invalidate § 1912(d) and (f).

The Court should deny review. Petitioners do not contend that there is disagreement among state high courts on the constitutional issue petitioners present, and there is none. Further, the decision below accords with this Court's long-standing jurisprudence on the constitutionality of congressional legislation that identifies citizens of federally recognized tribes as "Indians." Indeed, ICWA's definition of "Indian child" leaves out many individuals who are racially "Indian" but not eligible for membership in a federally recognized Tribe, and includes individuals who are not "Indian" by race or ancestry, but have been granted citizenship in a tribe. *See*, *e.g.*, *Cherokee Nation v. Nash*, ___ F. Supp. 3d ___, No. 13-01313, 2017 WL 3822870 (D.D.C. Aug. 30, 2017) (recognizing entitlement to tribal membership of descendants of freedman of the Cherokee Tribe).

A. There Is No Split Of Authority On ICWA's Constitutionality.

Petitioners fail to present even a single state supreme court case or decision from a federal court of appeals creating a split of authority on the question of ICWA's constitutionality. Instead, Petitioners concede that courts have generally agreed that ICWA does not

offend equal protection or due process rights and that it survives rational basis review.[11] Pet. 24.

Petitioners instead cite two decisions from the intermediate California court of appeal supporting their constitutional argument. Pet. 25 (citing *In re Santos Y.*, 92 Cal. App. 4th 1274 (Cal. App. 2001), and *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. App. 1996)). Those decisions have been roundly rejected by many other courts. *See, e.g.*, *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004) (rejecting *In re Santos Y.*); *In re Vincent M.*, 59 Cal. Rptr. 3d 321 (Cal. App. 2007) (rejecting *In re Santos Y.* and *In re Bridget R.*); *In re A.B.*, 663 N.W.2d 625 (N.D. 2003) (rejecting *In re Santos Y.*); *In re Alicia S.*, 76 Cal. Rptr. 2d 121 (Cal. App. 1998) (rejecting *In re Bridget R.*); *In re Baby Boy C.*, 805 N.Y.S.2d 313 (App. Div. 2005) (rejecting *In re Bridget R.*).

B. The Arizona Court Of Appeals' Decision Is Consistent With This Court's Jurisprudence On Legislation Involving Indians.

This Court's jurisprudence on the constitutionality of legislation dealing with Indians is consistent: "benefits and disabilities" established for Indians by federal statutes do not raise due process or equal protection concerns because Congress classifies Indians "not as a discrete racial group, but, rather as members of quasi sovereign tribal entities." *United States v. Antelope*, 430 U.S. 641, 645–47 (1977). Indeed, this Court's precedent is so consistent as to

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[11] *See*, *e.g.*, *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *In re Appeal in Pima Cnty. Juvenile Action No. S-903*, 635 P.2d 187, 193 (Ariz. 1981); *In re Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980).

"leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." *Id.* at 645.

Petitioners' due process and equal protection argument turns on ICWA's definition of the term "Indian child." As discussed above, "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." 25 U.S.C. § 1903(4). Petitioners' argument is premised on the broad and mistaken assumption that "virtually all tribes, including the Tribe, define membership by genetic origin," and that "*DNA is all that matters*" to be deemed "Indian child" under ICWA. Pet. 22–23. Petitioners' argument is wrong and ignores decisions of this Court upholding legislative classifications of Indian people on the basis of political affiliation, not race.

In *Morton v. Mancari*, 417 U.S. 535 (1974), this Court upheld an Indian preference in hiring within the Bureau of Indian Affairs ("BIA") provided in the Indian Reorganization Act of 1972. To be eligible for this hiring preference, the BIA required that an individual be "one-fourth or more degree Indian blood and a member of a federally-recognized tribe." *Id.* at 555 n.24. The Court's decision turned on the fact that BIA's hiring preference was not "directed towards a 'racial' group consisting of 'Indians'; instead it applies only to members of federally recognized tribes, which excludes many individuals who are racially to be classified as 'Indians.'" *Id.* The Court emphasized that legislation with respect to tribes "has repeatedly been

sustained by this Court against claims of unlawful racial discrimination." *Id.* at 554. In fact, the Court in *Mancari* specifically cautioned: "If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Id.* at 552–53 (internal citations omitted).

Other federal statutes dealing with Indians have withstood constitutional scrutiny as well, even when Congress's disparate treatment of Indians resulted in deprivations that non-Indians do not face. For example, in *Fisher v. District Court*, 424 U.S. 382 (1976), this Court rejected an equal protection challenge to the Indian Reorganization Act of 1934. In doing so, the Court upheld the exclusive jurisdiction of the Northern Cheyenne Tribal Court over the adoption of an Indian child. *Id.* at 388. The Court found that denial of access to state courts to the putative adoptive couple, who were Indian, did not constitute impermissible racial discrimination. The Court reasoned that, "even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified" and "does not derive from the race of the plaintiff, but rather from the quasi-sovereign status of Northern Cheyenne Tribe under federal law." *Id.* at 390–91. *See also Antelope*, 430 U.S. at 645 (rejecting an equal protection and due process challenge by two Indians convicted of first-degree murder under the Major Crimes Act where the prosecution would have faced a

higher evidentiary burden for conviction had they been tried in state court).

The fact that some—but not all—tribes use blood quantum as an element of some of their criteria for tribal membership does not change the constitutional analysis. After all, BIA's hiring preference in *Mancari* required at least a quarter Indian blood. 417 U.S. at 555 n.24. Further, petitioners err in contending (Pet. 22–23) that tribal membership depends on race. Many tribes do not require any blood quantum for tribal membership.[12] With respect to tribes for which blood quantum is an element, the requisite ancestral relationship is with a *federally recognized tribe*, not with Indians as a *racial* group. With respect to the Tribe, for example, blood quantum is relevant to only two of the six methods of obtaining membership.[13] For those two methods, the blood requirement is non-racial; having Indian blood alone does not qualify. Instead, the Tribe requires a one-quarter blood relationship with the Tribe or with other federally recognized tribes.[14] In short, because any required blood relationship is not with Indians as a racial

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[12] *E.g.*, Const. of the Oglala Sioux Tribe, Art. II, § 1(b) (requiring birth to a tribal member), *available at* http://www.narf.org/nill/constitutions/oglala_sioux/oglalaconst.pdf; Const. of Mohegan Tribe of Indians of Conn., Art. V, § 1 (lineal descendants of all people listed on the May 11, 2002 census), *available at* https://library.municode.com/tribes_and_tribal_nations/mohegan_tribe/codes/code_of_laws?nodeId=PTICO.

[13] *See* Const. of Colorado River Indian Tribes, Art. II, § 1, *available at* http://www.crit-nsn.gov/crit_contents/ordinances/constitution.pdf.

[14] *See* http://www.crit-nsn.gov/critenrollment/.

group, but with a federally recognized tribe, it represents a *political*, not racial, classification.

In sum, as in *Mancari*, *Antelope*, and *Fisher*, when a court deems a child an "Indian child" under ICWA, it does so based on the child's political affiliation with a tribe through membership or eligibility for membership. The court of appeals' reasoned decision faithfully adheres to this Court's precedent and does not warrant review.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted.

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