No. 12-399

IN THE

Supreme Court of the United States

ADOPTIVE COUPLE,
Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, *et al*.,
Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR *AMICI CURIAE* ASSOCIATION ON AMERICAN INDIAN AFFAIRS, NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, INDIAN TRIBES, AND OTHER INDIAN ORGANIZATIONS IN SUPPORT OF RESPONDENTS (*Additional Amici Listed On Inside Cover*)

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INDIAN TRIBES

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INDIAN ORGANIZATIONS

Alliance of Colonial Era Tribes, Inter-Tribal Council of Nevada, Morningstar Institute, National American Indian Court Judges Association, and the Tribal Law and Policy Institute.

QUESTIONS PRESENTED

1. Whether Congress intended a uniform federal law definition of the term "parent" in the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963, based upon the common meaning of the terms "acknowledged" and "established" set forth in that definition, so that the rights of unwed fathers of Indian children would not vary from State to State.

2. Whether ICWA should be applied, as written, to cover all "Indian children" involved in any state "child custody proceeding," or modified by a judicially-created "existing Indian family exception" which would exclude large numbers of Indian children, parents, extended families and Tribes from the Act's coverage.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTERESTS OF *AMICI CURIAE*

Amici Curiae are leading national Indian organizations and individual Tribes from throughout Indian country.[1]

The Association on American Indian Affairs ("AAIA") is a 90 year old Indian advocacy organization which began its active involvement in Indian child welfare issues in 1967. The National Congress of American Indians ("NCAI") is the largest national organization addressing Indian interests, representing more than 250 American Indian Tribes and Alaskan Native villages since 1944. The National Indian Child Welfare Association ("NICWA") is a non-profit membership organization established in 1987, which serves as a national voice for Indian children and families, including promoting compliance with the Indian Child Welfare Act ("ICWA"). The Alliance of Colonial Era Tribes, Inter-Tribal Council of Nevada, Morningstar Institute, National American Indian Court Judges Association, and Tribal Law and Policy Institute are all non-profit organizations that advocate for laws and policy that, like ICWA, support the sovereignty of Indian Tribes.

The Confederated Salish & Kootenai Tribes, Confederated Tribes of Grand Ronde, Confederated Tribes of Siletz Indians of Oregon, Confederation of Sovereign Nanticoke-Lenape Tribes, Haliwa-Saponi

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[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity other than *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket waivers with the Court consenting to the submission of all *amicus* briefs.

Indian Tribe, Kootenai Tribe of Idaho, Little River Band of Ottawa Indians, Little Traverse Band of Odawa Indians, Lummi Nation, Mississippi Band of Choctaw Indians, Nez Perce Tribe, Omaha Tribe of Nebraska, Ponca Tribe of Nebraska, Port Gamble S'Klallam Tribe, Prairie Band Potawatomi Nation, Pueblo of Laguna, Pueblo of Tesuque, Samish Indian Tribe, Santee Sioux Tribe of Nebraska, Sauk-Suiattle Tribe, Shoshone-Bannock Tribes, Sisseton Wahpeton Oyate, Spokane Tribe, The Tulalip Tribes, Upper Skagit Indian Tribe, Ute Mountain Ute Tribe, Wampanoag Tribe of Gay Head (Aquinnah), Winnebago Tribe of Nebraska, Yankton Sioux Tribe, and Yocha Dehe Wintun Nation are sovereign Indian Tribes who are vitally interested in ensuring that the ICWA is interpreted to fully protect the best interests of Indian children, families and Tribes.

SUMMARY OF ARGUMENT

The Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, was enacted in 1978 in response to a crisis affecting Indian children, families and Tribes. Studies revealed that large numbers of Indian children were being separated from their parents, extended families, and communities and placed in non-Indian homes. This was occurring both through involuntary removals of Indian children by state agencies and because of sometimes abusive practices in the voluntary adoption system. Congressional testimony documented the devastating impact this was having upon Indian children, families and Tribes. As a result, Congress enacted mandatory legal requirements to be followed by state courts who are adjudicating the rights of Indian

children and their families whose residence and domicile is outside of an Indian reservation, as defined in ICWA.

The main goals of ICWA are to:

(1) "curtail State authority" over child custody proceedings involving Indian children primarily by providing for uniform minimum federal standards that must be applied in state courts,

(2) protect the rights of biological parents and extended families as a response to the egregious violations of parental and extended family rights that had been taking place in state courts. Congress believed that protecting the relationship between children and their parents and extended families (as well as with the tribal community) was in the best interests of Indian children, and

(3) recognize the vital role of Tribes in protecting their children through the confirmation of their exclusive jurisdiction over children resident or domiciled on the reservation, as well as their right to intervene in (and in appropriate cases, seek transfer of) state child custody proceedings in order to effectuate their *parens patriae* interest in Indian children, as defined by the Act.

The provisions in ICWA were designed to address the abuses that were identified, reduce the number of out-of-home placements of Indian children, and provide protections to Indian families and children in both involuntary and voluntary proceedings.

This Court is being urged to interpret ICWA to incorporate state law definitions into the meaning of

"parent" under the Act and to adopt the so-called "existing Indian family exception" (EIF) as an appropriate interpretation of Congress' intent in enacting the ICWA. If adopted, the petitioners' legal theories would have a profound effect upon the operation of ICWA in both involuntary and voluntary settings undermining some of ICWA's key provisions and thwarting Congress' goals.

Applying state law to determine who is a parent under ICWA would undermine the intent of ICWA to curtail state authority and Congress' intent that the law be uniformly applied. The application of this theory would create a statutory scheme where a parent's rights under ICWA would vary from state to state. This would not only encourage forum shopping for adoption, but would force some unwed fathers to comply with standards in a state potentially thousands of miles from their actual residence– standards that might be dramatically different from the standards of their Tribe or the State in which they reside. These outcomes compromise Congressional goals of protecting parental rights and natural family-child relationships, and decreasing the number of Indian children adopted in non-tribal homes. For these reasons, the interpretation of "acknowledgment" and "establishment" in ICWA's definition of "parent" should, as a matter of federal law, be given their plain meanings.

The EIF is contrary to the legislative history and the language of the statute which applies when an Indian child is involved in a child custody proceeding, as both terms are defined by the Act. Petitioners have tried to create a uniform theory

about the meaning of "custody" in ICWA to argue that if a child has never been in the custody of an Indian parent none of the provisions of the Act apply. This is contrary to the intent of Congress. In fact, Congress did not adopt a proposed amendment that would have achieved exactly what petitioners are seeking. Moreover, petitioners' theory would create a gaping hole in the coverage of ICWA that would exclude large numbers of Indian children, parents and their extended families and Tribes from the protection of the Act in both voluntary and involuntary proceedings. It would also make meaningless for many parents and their children the provisions in ICWA that apply to voluntary consents. This would be an absurd result not supported by the statutory language when read in its entirety, nor is there any evidence in the legislative history that Congress intended to carve out such an exception. The EIF has been rejected by the vast majority of states considering the issue.

Amici respectfully urge this Court to confirm a uniform federal definition of parent based upon the plain meaning of the terms in the statute, apply the statute as written, and reject the EIF.

ARGUMENT

I. Congress held hearings in the 1970s in regard to a crisis in state child welfare and adoption systems—a crisis that resulted in large numbers of Indian children being separated from their parents, Tribes and extended families and placed with non-Indians.

Congress initiated its first hearing on the state of American Indian and Alaska Native (hereinafter "Indian") children in out-of-home placements in 1974. During testimony before the Senate subcommittee, William Byler, Executive Director of *amicus* Association on American Indian Affairs ("AAIA"), commented on the statistical evidence uncovered by AAIA, stating that the high rate of outplacement for Indian children was "the most tragic aspect of Indian life today." *Problems that American Indian Families Face in Raising Their Children and How These Problems are Affected by Federal Action or Inaction: Hearings Before the Subcomm. on Indian Affairs, S. Comm. on Interior and Insular Affairs*, 93rd Cong. 3 (1974) (statement of William Byler) (hereinafter "1974 Senate Hearing").

Studies by AAIA documented that Indian children were placed in foster care far more frequently than non-Indian children. Indian placement rates by state ranged from 2.4 to 22.4 times the non-Indian rate with the percentage of Indian children placed in non-Indian foster homes ranging from 53% to 97%. *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Committee on Indian Affairs*, 95th Cong.

539 (hereinafter "1977 Senate Hearing")

Nationwide, "[t]he adoption rate of . . . Indian . . . children was eight times that of non-Indian children [and] [a]pproximately 90% of the . . . Indian placements were in non-Indian homes." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 (1988). In the most extreme case, the Indian adoption rate was 18.8 times the non-Indian rate. 1977 Senate Hearing at 539. The percentage of American Indian and Alaska Native children placed in non-Indian adoptive homes ranged from 69% in Washington to 97% in Minnesota. *Id*. at 537-603. Overall, the evidence revealed that "25-35% of . . . Indian . . . children had been separated from their families and placed in foster homes, adoptive homes or institutions." *Holyfield*, 490 U.S. at 32.

Although progress has been made as a result of ICWA, recent analyses of national child welfare data indicate that the out-of-home placement of Indian children is still disproportionate to the percentage of Indian youth in the general population and that Indian children continue to be regularly placed in non-Indian homes, an indication of the continuing need for Congressional intervention in this area. *See*, *e.g.*, Alicia Summers, Steve Woods, & Jesse Russell, National Council of Juvenile and Family Court Judges, *Technical Assistance Bulletin: Disproportionality Rates for Children of Color in Foster Care* 7 (2012) (finding that although Native children make up 0.9% of the United States population they make up 1.9% of children in foster care); Rose M. Kreider, *Interracial Adoptive Families and Their Children: 2008*, *in* National Council for

Adoption Factbook V 109 (2011) (reporting that in 2008 more Indian children in adoptive placements lived in non-Indian adoptive homes than Indian adoptive homes).

A. Congress found that this extraordinary and unwarranted rate of placement in out-of-home non-Indian households was not in the best interests of Indian children, families, and Tribes.

Congress was concerned about "the placement of Indian children in non-Indian homes . . . based in part on evidence of the detrimental impact on the children themselves of such placement outside their culture." *Holyfield,* 490 U.S. at 49-50. Testimony at Congressional hearings was replete with examples of Indian children placed in non-Indian homes and later suffering from identity crises when they reached adolescence and adulthood. *See*, *e.g.*, 1974 Senate Hearing at 114. This phenomenon occurred even when the children had few memories of living as part of an Indian community. Such testimony led Congress to conclude that "[r]emoval of Indians from Indian society has serious long-and short-term effects . . . for the individual child . . . who may suffer untold social and psychological consequences." S. Rep. No. 95-597, at 43 (1977) (hereinafter "Senate Report 95-597").

In addition, Congress heard considerable testimony on the importance of the extended family in Indian cultures. As the House Committee Report explained:

> [T]he dynamics of Indian extended families are largely misunderstood. An

> Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family . . . The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childbearing.

H.R. Rep. No. 95-1386, at 10, 20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530 (hereinafter "House Report 95-1386"). In some Indian cultures, all relatives have the label of parent and the same responsibility for the child. *See Holyfield*, 490 U.S. at 35, n. 4. As Mel Tonasket of the Colville Tribe, President of *amicus* National Congress of American Indians ("NCAI"), explained, "There is no such thing on my reservation as an abandoned child because even if you are a one-eighth cousin, if that child is left alone, that's like your brother or sister, or your son or daughter. It's been that way since our old people can remember." 1974 Senate Hearing at 225. *See also Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. 110 (1978) (hereinafter "1978 House Hearings"), *viz.*, ("there are no words in the Indian country, the Indian language, their hearts and minds, for an illegitimate child . . . We have no word or definition for an orphan . . . because of the extended family.") (testimony by Elizabeth Cagey of the Tacoma Indian Center); *Id.* at 256 (testimony of Governor Lewis of the Zuni Pueblo, President of the National

Tribal Chairman's Association). As Senator Abourezk summarized at the end of the 1974 Senate Hearing:

> We've had testimony here that in Indian communities throughout the Nation there is no such thing as an abandoned child because when a child does have a need for parents for one reason or another, a relative or friend will take that child in. It's the extended family concept.

1974 Senate Hearing at 473.

Thus, Congress clearly intended to acknowledge and protect a different family structure than that protected under state laws as it understood that placement of a child outside the family is a loss felt by the entire extended family and kinship network. As stated by Dr. Marlene Echohawk, on behalf of *amicus* NCAI, the thrust of ICWA "is to support the general proposition that it is in the best interests of [Indian] children to be raised by their natural family and that every opportunity should be provided to maintain the integrity of the natural family." 1977 Senate Hearing at 142. *See also* House Report 95-1386 at 19-20 (underlying principle of ICWA is the best interests of the Indian child which Congress has defined in ICWA because the legal principle itself as applied in state systems is vague and can rest on "subjective values.")

In the case of Indian Tribes, Congress found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ." 25 U.S.C. § 1901(3). Congress

heard testimony directly from tribal leaders recounting the harm being suffered by the Tribes:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.

1978 House Hearings at 193 (statement of Calvin Isaac, National Indian Tribal Chairman's Association).

This concern was also reflected in statements by the principal sponsor in the House, Rep. Morris Udall, who stated that "Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy" 124 Cong. Rec. 38102 (1978) quoted in *Holyfield,* 490 U.S. at 34, n.3 and the minority floor manager, Rep. Robert Lagomarsino, who said that "for tribes in particular, the continued wholesale removal of their children by nontribal government and private agencies constitutes a serious threat to their existence as on-going self-governing communities." 124 Cong. Rec. 38103 (1978).

B. Congress determined that a large part of the cause for this crisis was certain abusive practices taking place in state child welfare systems.

Congress found that "the States, exercising their recognized jurisdiction over American Indian and Alaska Native child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of American Indian and Alaska Native people and the cultural and social standards prevailing in American Indian and Alaska Native communities and families." 25 U.S.C. § 1901(5). The House Committee described "'the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of the Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future.'" House Report 95-1386 at 19, *cited in Holyfield,* 490 U.S. at 45, n. 18; *see also id.* ("'state courts and agencies and their procedures share a large part of the responsibility' for crisis threatening 'the future and integrity of Indian tribes and Indian families.'") (statement by Rep. Morris Udall)

There was considerable testimony about the abuses taking place in state child welfare systems. One of the most frequent complaints was the tendency of social workers to apply standards that ignored the realities of Indian societies and cultures. For example, children were often removed or threatened with removal because they were placed in the care of relatives or their homes lacked the amenities that could be found in non-Indian society. *See*, *e.g.*, 1977

Senate Hearings at 77-78, 166, 316; 1978 House Hearings at 115.

State child welfare systems operated in virtually an unfettered fashion, largely unchecked by judicial due process. In addition, "[g]enerally there . . . [were] no requirements for responsible tribal authorities to be consulted about or even informed of child removal actions by nontribal government or private agents." 124 Cong. Rec. H12849 (1978) (statement of Rep. Robert Lagomarsino). The result of this systemic failure was summarized as follows:

> (1) . . . many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.
>
> (2) The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law . . . Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children. Because of the availability of waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of

welfare departments.

(3) . . . agencies established to place children have an incentive to find children to place.

House Report 95-1386 at 10-12.

C. Congress also determined that the high rate of adoptions of Indian children was due in part to certain abusive practices in the private adoption system.

Although concerns about involuntary removals by state agencies were a major impetus for ICWA, it is clear that "voluntary" adoptions of Indian children were likewise of great concern to Congress based upon the evidence it considered. As Senator Abourezk observed, "[p]artly because of the decreasing numbers of Anglo children available for adoption and changing attitudes about interracial adoptions, the demand for Indian children has increased dramatically." 123 Cong. Rec. 21043 (1977). *See also* 1974 Senate Hearing at 146 ("[Indian] Infants under 1 year old are adopted at [a] rate . . . 139 percent greater than the rate of non-Indians in the state of Minnesota.")

Senator Abourezk's statement was an accurate reflection of the hearings which were replete with testimony about public and private agencies and private attorneys and their sometimes overzealous pursuit of Indian children for adoption by non-Indians. *See*, *e.g.*, 1974 Senate Hearing at 70 (referring to the adoption system as a "grey market" because "there's tremendous pressure to adopt Indian children, or have Indian children adopted out") (testimony of Bertram

Hirsch for *amicus* AAIA), *id.* at 161 (calling for "an investigation of agencies who deal with the Indian adoptions and make them accountable for the methods they use for transporting Indian children across the state lines and the Canadian borders") (testimony of Esther Mays, Native American Child Protection Council); 1977 Senate Hearing at 359, *viz.,*

> Private adoption . . . process involves doctors and private attorneys who arrange for adoptions of their Indian client's children to a non-Indian through their attorney directly through a court . . . All of us are aware of the adoption black market that has blossomed due to the effects of modern family planning efforts. Some people will pay thousands of dollars for a child. It is also well-known that Indian children have always been a prize catch in the field of adoption.

(statement of Don Milligan, State of Washington, Department of Social and Health Services)

Particular concerns were expressed about the failure of adoption agencies to utilize Indian families for placement. *See*, *e.g.*, 1974 Senate Hearing at 61 ("[W]elfare agencies tend to think of adoption too quickly without having other options available . . . Once you're at the point of thinking about adoption . . . welfare agencies are not making adequate use of the Indian communities themselves. They tend to look elsewhere for adoption type of homes.") (testimony of Dr. Carl Mindell, a child psychiatrist at Albany Medical College); *id.* at 116 ("The standards that have

been established by adoption agencies have created an additional burden . . . as they are white status quo oriented . . . As you well know, this automatically leaves the Indian out.") (statement of Mel Sampson, Northwest Affiliated Tribes); 1977 Senate Hearing at 271 ("Through various ways, the State of Washington public assistance and private placing agencies can completely go around the issue and place without contact to that child's tribe, until the action is completed and irreversible", noting that of 136 Colville adoptions in the last 10 years, only 20 went to Indian families and 31 were out-of-state.) (testimony of Virgil Gunn, Colville Business Council); 1974 Senate Hearing at 147 (testimony of Leon Cook).

Moreover, many "voluntary" consents are not truly voluntary. House Report 95-1386 at 11. Consents in voluntary adoption cases were sometimes "coerced" or induced by "trickery." *See*, *e.g.*, 1974 Senate Hearing at 23 and 222-23 (testimony about woman who was tricked into signing a form which she was told would allow two non-Indian women to take her child for a short visit, but which in reality was a consent to adoption, and a discussion of parents who have been "induced to waive their parental rights voluntarily without understanding the implications.") As Senator Abourezk summarized, it was asserted that "in many cases they [parents] were lied to, they were given documents to sign and they were deceived about the contents of the documents." 1974 Senate Hearing at 463.

Many of these practices continue today. State voluntary private adoption systems have been described as "inadequate" and "largely under-

regulated." *Id.* at 64, 66. Moreover, as white infants are in short supply, Debora L. Spar, *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception* 173 (2006), there is an increased demand for Indian, Asian American, or Latina babies. Pamela Anne Quiroz, *Adoption in a Color Blind Society* 5-6 (2007) (labeling this category of adoptable babies "honorary white babies.")

Thus, a recent report found that

> 1) Available data and experience indicate a minority of infant adoptions involve fathers in the process . . . Many states have established putative father registries . . . but they are often used as a means of cutting them out rather than including them;
>
> 2) In some states, attorneys paid by and representing the prospective adoptive parents also may represent the women (and men when they are involved) considering placing their children. This practice . . . raises acute ethical and practical concerns;
>
> 3) Most states do not have laws that maximize sound decision-making . . . such as required counseling, waiting periods of at least several days after childbirth before signing relinquishments, and adequate revocation periods during which birthparents can change their minds.

Evan B. Donaldson Adoption Institute, *Safeguarding*

the Rights and Well-Being of the Birth Parents in the Adoption Process 3-4 (2006).

It is not surprising that there are numerous examples of individuals seeking to effectuate an adoption who have engaged in unethical behavior, including trying to circumvent ICWA. *See*, *e.g.*, *In Re Bridget R.,* 49 Cal. Rptr. 2d 507, 517 (Cal. Ct. App. 1996) (father omitted information that he was Native American on adoption form because "the adoption would be delayed or prevented if [Father's] Indian ancestry were known"); *In the Matter of the Adoption of Infant Boy Crews*, 803 P.2d 24, 26 (Wash. Ct. App. 1991) ([Adoption counselor] advised Crews not to mention her Indian blood to anyone, stating, "What I don't hear, I don't know."); *In re Adoption of Kenton H.*, 725 N.W.2d 548 (Neb. 2007) (Mother who "was hospitalized and 'under the influence of morphine and other mind-altering medications' when she signed the relinquishment . . . " was told by a caseworker "that her only hope of keeping any of her children was to voluntarily relinquish her rights to [the one child]").

As described in section III. B., *infra*, a number of the irregularities described above took place in the attempted adoption that is the subject of this case.

II. Congress responded to this crisis by enacting the Indian Child Welfare Act to establish minimum federal standards for the separation of Indian children from their families and to provide specific protections to Indian families and Tribes.

A. The primary mechanism utilized by Congress was to "curtail state authority."

Through ICWA, Congress established minimum federal standards" to be applied in *state* child custody proceedings. 25 U.S.C. § 1902. Other than the jurisdictional sections, 25 U.S.C. §§ 1911(a), 1911(b), and the full faith and credit requirement, 25 U.S.C. § 1911(c), ICWA's provisions do not apply to tribal court proceedings. ICWA's primary purpose is to protect Indian children and families that are not resident or domiciled on the reservation and are under state jurisdiction. The Act requires state courts to utilize federal standards to determine almost all of key issues that must be decided in child custody proceedings–when a child can be removed or parental rights terminated, what constitutes consent to adoption, and placement of the child in both adoption and foster care proceedings. *See* 25 U.S.C. § 1912 (d)-(f), §1913, §1915(a),(b). Thus, as this Court has noted, the primary mechanism utilized by Congress to address this crisis was to "curtail state authority". *Holyfield,* 490 U.S. at 45, n. 17.

B. Congress established rules protecting the rights of Indian children, their biological parents and extended families.

In enacting ICWA, Congress placed an emphasis on protecting the rights of biological parents and extended families by "promot[ing] the stability and security of Indian . . . families." 25 U.S.C. § 1902. Thus, ICWA includes a number of provisions designed to keep families together. For example, Congress:

(1) established stringent substantive standards for involuntary foster care placement of an Indian child or termination of the parental rights of a parent of an Indian child, 25 U.S.C. § 1912(e), (f), including a requirement that the need for termination be shown "beyond a reasonable doubt," the most stringent standard possible; and

(2) required active efforts to provide remedial and rehabilitative services before Indian children may be removed from the care of their parents (except in emergency situations), 25 U.S.C. §§ 1912(d) and 1922.

Indeed, Congress believed that protecting parental rights was so important that in 25 U.S.C. § 1921 it provided that where state law provides greater protections *to the parents*, then state law should apply.

Where Indian children cannot stay with their biological parents, Congress expressed a clear preference that the child be placed with extended family or other tribal families. ICWA requires (absent a different tribal standard) that all adoptive placements of Indian children under state law be made preferentially with the child's extended family, other members of the Indian child's Tribe or other Indian families, in that order, absent good cause, 25 U.S.C. § 1915(a), a provision deemed as the "most important substantive requirement imposed on state courts". *Holyfield*, 490 U.S. at 37.

In addition to the placement requirements, ICWA provides a number of other protections specifically in the context of voluntary adoptions. Thus, the ICWA prohibits relinquishment of an Indian child for adoption for at least ten days after birth. 25 U.S.C. § 1913(a). Moreover, such consents must be executed before a court of competent jurisdiction and the Court must determine that the consequences of the consent "were fully understood by the parent or Indian custodian . . ." *Id.* Perhaps most significantly, 25 U.S.C. § 1913(c) allows for a consent to adoption to be withdrawn for any reason prior to the entry of a final decree of termination or adoption—a right much more "parent-protective" than most state statutes.

As discussed in part I.A., *supra*, this Congressional emphasis on parents' rights is in accord with the best interests of the child, not in conflict with it. The collective intent of these sections was to ensure "that Indian child welfare determinations [including adoptive placements] are not based on 'a white, middle-class standard, which, in

many cases, forecloses placement with (an) Indian family.'" *Holyfield,* 490 U.S. at 37.

C. Congress strengthened the role of Tribal governments as *parens patriae* for Indian children.

Congress also intended to strengthen the role of tribal governments "in furtherance of its special relationship with Indian tribes". 25 U.S.C. § 1901. In part, the ICWA is based upon the concept that an Indian tribal government stands in the relationship of *parens patriae* to its children. *See* Senate Report 95-597 at 51. It is well-settled that *parens patriae* authority extends beyond territorial boundaries. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982) (Puerto Rico, as *parens patriae*, has right to intervene in Virginia state court to protect the health and safety of Puerto Rican workers in Virginia.); *see also State of Alaska v. Native Village of Curyung*, 151 P.3d 388, 402 (Alaska 2006) (Tribe has right as *parens patriae* to bring suit to prevent future violations of ICWA). The *parens patriae* function is a core function of any sovereign government. In addition, tribal rights are recognized in ICWA because the law "'is based upon the fundamental assumption that it is in the child's best interest that its relationship to the tribe be protected . . . '" *Holyfield,* 490 U.S. at 37. Indeed, because of the importance of this relationship, "Congress determined to subject [voluntary] placements to the ICWA's jurisdiction and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents." *Id.* at 50.

For these reasons, ICWA emphasizes tribal involvement in and, whenever possible, control over decisions involving the welfare of Indian children (as defined in the Act) in order to "promote the stability and security of Indian tribes . . . ." 25 U.S.C. § 1902. Some of the specific provisions recognize exclusive tribal jurisdiction over reservation-domiciled or resident Indian children, 25 U.S.C. § 1911(a), authorize transfer of off-reservation state court proceedings to tribal court, absent parental objection or good cause to the contrary, 25 U.S.C. § 1911(b), and provide for a tribal right of notice and intervention in child custody proceedings in state courts, 25 U.S.C. §§ 1911(c), 1912(a).

Of note, Congress believed that it was important that these protections be extended not only to children who are tribal members, but also to those who are eligible for membership. As stated in the House Committee Report:

> This minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanistic procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing therefrom . . . The constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority,

> cannot make a reasoned decision about their tribal and Indian identity.

House Report 95-1386 at 17.

Inclusion of these children is a clear indication of Congress' intent to protect Indian children who have not yet implemented their right to develop their Indian identity.

III. Father is a "parent" within the meaning of ICWA and is entitled to invoke its protections against termination of parental rights.

Under ICWA, an unwed father must either "acknowledge" or "establish" paternity in order to be considered a parent who can assert his rights under the Act. 25 U.S.C. § 1903(9). Petitioners argue that these terms must be interpreted through reference to state law. Pet. Br. at 19-29. Such an approach would be contrary to the statutory scheme and the legislative history.

A. Applying state law in this context would undermine the Congressional goal of establishing uniform federal standards in order to reduce the number of out-of-home placements of Indian children.

There are numerous differences between state statutes as to when a father is considered to have acknowledged or established paternity. *Compare, e.g.,* Nev. Rev. Stat. § 126.72 (2013) (paternity can be presumed if cohabitation or established through scientific evidence) *with* N.J. Stat. Ann. § 9:17-43

(West 2013) (unwed father must attempt marriage, provide support, or file with local registrar). Thus, if Petitioners' theory is accepted, whether an unwed father has rights under ICWA will vary from state to state. Even worse, as was the case here, a father might have to comply with the standards of a state a thousand miles or more from his home–standards that may be very different than the standards of his Tribe or the State in which he resides. For example, if petitioners' theory of state law were accepted here (a theory that was actually not accepted by either the majority opinion or the dissent in the South Carolina Supreme Court[2]), the unwed father could lose his rights to consent to an adoption because he did not pay medical expenses associated with the child's birth, *see* S.C. Code Ann. § 63-9-310(A)(5) (2013), even though this would make little sense in the tribal context since the mother could have given birth at a hospital within Cherokee territory at no cost to the parents. *See* Indian Health Service, *Indian Health Manual* Part 2 Chapter 1 (1983) (IHS services available to "a non-Indian woman pregnant with an eligible Indian's child for the duration of her

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[2] Both the majority opinion and the dissent in the South Carolina Supreme Court found that the father acknowledged and established paternity under state law. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 560 (S.C. 2012); *Id.* at 574-75 (Kittredge, J., dissent). Both opinions noted that the petitioners had "collapsed" or "conflated" two different questions in raising this issue: whether the father had acknowledged or established paternity under state law (both agreed yes under the facts here) and whether a father who has acknowledged or established paternity would be required to consent to the adoption under state law, a separate issue not relevant to the application of ICWA. *Id.* at 560; *Id.* at 574-575 (Kittredge, J., dissent).

pregnancy through post partum [usually 6 weeks].")

As was said in *Holyfield* in discussing the meaning of the term "domicile" in ICWA,

> Even if we could conceive of a federal statute under which the rules of domicile . . . applied differently to different Indian children, a statute under which different rules apply from time to time to the same child, simply as a result of his transport from one State to another, cannot be what Congress had in mind.

490 U.S. at 46. If the words "fathers" and "father" are substituted for the words "children" and "child", this quote directly applies to the definitions of "acknowledgment" and "establishment". Congress knew how to incorporate "state law" into ICWA when it wanted to incorporate state law. *See*, *e.g.*, 25 U.S.C. § 1903(6) (definition of "Indian custodian" includes legal custody under State law); 25 U.S.C. § 1921 (providing for the application of State law when it is more protective of parents' rights); 25 U.S.C. § 1922 (recognizing the validity of emergency removals of reservation-resident or domiciled Indian children under State law when they are temporarily located off the reservation). It did not do so here. If different state laws determine who is a parent for ICWA purposes, forum shopping will be encouraged.

Moreover, if Congress had deferred to the sometimes restrictive state laws pertaining to the rights of unwed fathers, this would have undermined the Congressional goal to decrease the number of adoptions of Indian children. As stated by Leroy

Wilder, attorney for *amicus* AAIA, "The bill is not designed to make the adoption of Indian children easier." 1978 House Hearing at 71. Almost 65% of Indian children are born out of wedlock. Centers for Disease Control and Prevention, *Births: Final Data for 2010*, 61 Nat'l Vital Statistics Report 1, 45 (2012). Thus, the extent to which unwed fathers have the right to assert their parental rights will have a significant impact on whether Congress' goal of reducing the disproportionate number of Indian adoptions is met.

B. ICWA protects and strengthens the rights of natural parents.

There is a wide variation between states in terms of how they balance the goals of protecting the rights of unwed fathers and facilitating adoptions. The thumb on the scale in South Carolina is in favor of adoptions by making the exercise of rights by unwed fathers more difficult. In other states, the rights of unwed fathers are given greater protection. *See*, *e.g.*, La. Child Code Ann. Art. 1137 (2013) (any alleged or adjudicated father may oppose adoption within 15 days of receiving notice). ICWA was clearly meant to err on the side of natural parents, including fathers. See, e.g., 25 U.S.C. § 1913(c) (consent to adoption may be withdrawn for any reason prior to the entry of a final decree of termination or adoption—a right much more "parent-protective" than most state statutes); 25 U.S.C. § 1921 (where state law provides greater protections to the parents, state law applies). As previously described, the legislative history is replete with observations that protecting the rights of natural parents is a key goal of ICWA and in the best

interests of Indian children.

The petitioner argues that recognizing the rights of the unwed father here and similar fathers would "punish Indian children desperately in need of adoptive homes." Pet. Br. at 27. Contrary to petitioners' assertions, however, the principle that a child's best interests are normally tied to a continuing connection with her natural parents and relatives is a central part of federal child welfare statutes that apply to all children. *See, e.g.,* 42 U.S.C. § 622(8)(A)(iv), 42 U.S.C. § 671(a)(15)(B), 671(a)(19), 671(a)(29) (requiring states who receive federal child welfare, foster care and adoption assistance funds [which all states receive] to make reasonable efforts to preserve and reunify families and to give "preference to an adult relative over a non-related caregiver when determining a placement for a child"). Similarly, the idea advanced by the *guardian ad litem* (GAL Br. at 49-53) that best interests analysis must somehow be untethered from the importance of maintaining the relationship between a child and her parents and extended family is a radical idea. Moreover, contrary to the arguments of some *amici* supporting the petitioner, the personal needs of a relinquishing parent should not automatically take primacy over the principle that is at the core of ICWA-that it is in Indian children's best interests to have continuing contact with their extended families and tribal communities. 25 U.S.C. § 1915(a); *see In re Adoption of a Child of Indian Heritage*, 543 A2d 925, 932 (N.J. 1988)

Adoption is a creature of statute. Stephen B. Presser, *The Historical Background of the American*

Law of Adoption, 11 J. Fam. L. 443, 443 (1971). In no state is there an inherent right to be an adoptive parent, nor do relinquishing parents have the absolute right to pick an adoptive couple. States generally recognize that the rights of a relinquishing parent are not co-extensive with the rights of parents who choose to raise their own children. The rights of prospective adoptive couples and relinquishing parents are always subject to whatever terms and conditions the applicable adoption law imposes to advance the best interests of the child.

The facts of this case illustrate why Congress was determined to provide a panoply of protections to biological parents, including unwed fathers. The transfer of the child to South Carolina was based upon a document that failed to identify the child as Native American. *Baby Girl*, 731 S.E.2d at 554 and n.8. If that document had been accurate, Oklahoma would not have approved the transfer. *Id.* at 554-555. The father was not involved in the adoption plan and was not provided with notice until four months after birth—just a week before deployment to Iraq—and he signed the papers without full disclosure of their content. *Id.* at 555. There was no waiting period under state law for placing a child for adoption allowing the child to be placed at birth and no requirement for counseling. These are the types of systemic problems in the private adoption system that have been identified more generally. *See* Part I.C., *supra*.

Many Indian fathers faced with a child placement proceeding are poorly educated, do not know how to respond to such a proceeding or related

events, and may not have access to legal counsel. All of this makes it imperative to bias proceedings away from state law standards that can operate to strip Indian parents of their parental rights and in favor of protecting parental rights to the maximum extent possible consistent with the welfare of the child.

It is a mystery to *amici* how petitioner is interpreting the citation to *Stanley v. Illinois,* 405 U.S. 645 (1972) in House Report 95-1386 at 21 as endorsement for the incorporation of restrictive state laws on unwed fathers into the ICWA. Pet. Br. at 26-27. *Stanley v. Illinois* set a constitutional minimum–states cannot deprive unwed fathers who are engaged at a certain level with their children of parental rights–but there is nothing in *Stanley* that prevents states or (as here) the federal government from providing *greater* rights to unwed fathers.

Recognizing a uniform federal law definition of the meaning of "parent" based upon the plain meaning of the terms in the definition will discourage forum shopping and ensure that adoptions take place only when biological parents, including unwed fathers, have truly consented or are unfit. As Congress found, this is in the best interests of Indian children.[3]

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[3] As the Court below held, ICWA applies regardless of whether a father has acknowledged or established paternity. *Baby Girl,* 731 S.E.2d at 560; accord *id*. at 575 (Kittredge, J., dissenting). Thus, even if a father does not have rights, the tribe may assert its rights under the statute and the extended family may seek placement under the placement preferences in 25 U.S.C. § 1915.

IV. The application of ICWA is not dependent upon prior custody of an Indian child by an Indian parent; the Act is triggered by an Indian child involved in a child custody proceeding and the existing Indian family exception (EIF) should be rejected.

Petitioners urge this Court to adopt the EIF and hold that ICWA's applicability is conditioned on an Indian parent having had custody of an Indian child. Pet. Br. at 29-42. All of the Congressional interests identified in Parts I. and II. of this brief would be undermined if petitioners' argument is adopted.

Petitioners base their argument largely upon an analysis that seeks to establish a uniform meaning of the concept of "custody" throughout the statute. Yet, as Courts have opined, the meaning of the term in ICWA has a "chameleon-like quality, with its meaning changing to adapt to a particular textual context." *In re Adoption of a Child of Indian Heritage*, 543 A.2d at 937. Thus, the Court should interpret the meaning of "custody" within the context that it is used and consistent with the legislative history and the principle that "statutes are to be construed liberally in favor of the Indians . . . ." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Petitioners' specific contention that 25 U.S.C. § 1912(f) gives rise to the EIF is without merit.

First, we agree with *amicus* United States that the meaning of 25 U.S.C. § 1912(f) need not be reached by this Court as it is not relevant to the application of ICWA which requires only that an "Indian child" be involved in a "child custody

proceeding". We also agree that this adoption fails because of the lack of compliance with 25 U.S.C. § 1912(d). U.S. Brief at 10-14, 20-24.

Petitioners assert that it is "unthinkable" Congress intended a prospective adoptive parent to make active efforts to prevent the breakup of the family as required by 25 U.S.C. § 1912(d). Pet. Br. at 31. Where an adoption is truly voluntary, however, this is unnecessary. It is only necessary when an attempted voluntary adoption becomes involuntary. Thus, prospective adoptive parents do not have to actively try to encourage ("cajole") a reluctant unwed father to parent before adopting, but once it is clear that a father (or mother) wants to parent, then active efforts must be made to preserve the family before termination of parental rights can be sought. Congress tried to ensure that voluntary adoptions would occur only when both natural parents consented by enacting 25 U.S.C. § 1913. It is only petitioners' decision to pursue adoption in the face of a parental objection that has triggered this unusual application of 25 U.S.C. § 1912(d).

If this Court concludes that the interpretation of section 1912(f) is relevant to the question before the Court, however, we respectfully disagree with the United States in regard to the proper interpretation of 25 U.S.C. § 1912(f).

25 U.S.C. § 1912(f) provides standards governing Termination of Parental Rights (TPR). TPR is defined in 25 U.S.C. § 1903(1)(ii) as "any action resulting in the termination of the parent-child relationship"—which clearly contemplates a

court decision concerning a future legal relationship. It is not a concept that requires either physical custody or legal custody through a court order.

In fact, a limitation on the application of ICWA similar to what petitioners are seeking was proposed by the Department of Justice in its May 23, 1978 letter reproduced in House Report 95-1386 at 39. The Department suggested that the definition of "Indian child" be changed to require that the child be "eligible for membership in an Indian tribe *and is in the custody of a parent who is a member of an Indian tribe*" (emphasis added), rather than simply requiring that an eligible child be "the biological child of a member". Although Congress adopted 22 of the 30 amendments to the bill proposed by the Departments of Justice and Interior, including provisions such as the right of a parent to object to the transfer of an off-reservation case to tribal court, 124 Cong. Rec. 38103 (1978), it did not adopt this proposed change. Indeed, Rep. Udall responded to the complaints of DOJ regarding the application of the Act to Indian children in the custody of non-Native parents in an October 2, 1978 letter, rejecting their arguments that such children should be excluded on the basis that "foster care placement and termination of parental rights . . . are actions affecting parental, not custodial rights." *Id.* This is a clear indication that petitioners' assertion that Congress did not intend ICWA to apply when an Indian parent has not had prior custody is incorrect.

It is also incorrect because of the impact of such an interpretation. It is a principle of interpretation that statutes should be interpreted to avoid absurd

results. *See, e.g., Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring). The interpretation that petitioners are asking the Court to adopt would lead to absurd results that Congress could not have intended, results utterly inconsistent with the Congressional intent to increase protections for biological parents and extended families and protect tribal prerogatives.

If ICWA is interpreted to require physical custody for its application, then it would exclude in both voluntary and involuntary proceedings:

- Almost all unwed fathers, particularly in the case where the mother has placed the child at birth
- All mothers or fathers who have legal rights and visitation, but not physical custody
- All parents whose children have been placed in foster care
- All parents in the military overseas or in prison

If legal custody through a court order is required, it would exclude:

- Almost all unwed fathers, particularly in the case where the mother has placed the child at birth
- All mothers or fathers who have visitation rights, but not joint legal custody
- Almost all parents whose children have been placed in foster care, since the parents would not have physical custody and the state routinely assumes legal custody

Petitioners' interpretation would deprive an unwed

father who has a fully developed relationship with the child (and many others as well) of any remedy if the provisions ensuring that consents are truly voluntary in section 1913 are violated or ignored.

Under Petitioners' theory not only would these parents be unable to assert their rights, but so would the extended families of these children and the Tribe because Petitioners are asserting that when there is no prior custodial relationship ICWA does not apply, even in involuntary proceedings. This result is contrary to the Congressional goal of protecting the relationship extended families and Tribes have with their children.

No state statute anywhere would deprive these classes of parents from the coverage of its termination statutes. In fact, it would be unconstitutional to do so. *Stanley v. Illinois,* 401 U.S. 645.

Moreover, if Congress intended to create two classes of parents of Indian children, one that is subject to ICWA TPR standards and one that is subject to state law, it certainly would have done something this significant more explicitly and directly. *See* 25 U.S.C. § 1903(1) (Congress excluded divorce and certain juvenile justice proceedings from the coverage of the Act, an indication that it knew how to exclude certain proceedings when it wanted to do so.) Moreover, there is absolutely no legislative history to support such an approach as much of the testimony before Congress involved children removed because they had been left with relatives (no physical custody) or TPR proceedings that took place long

after removal (no physical or "court-recognized" legal custody). House Report 95-1386 at 11, 20. In addition, it is critical to note that the term "parent" in ICWA does not differentiate between Indian and non-Indian parents of Indian children in terms of the exercise of rights under the statute, 25 U.S.C. § 1903(6), an approach inconsistent with Petitioners' assertion that Congress intended that the very application of ICWA itself turn upon whether or not the custodial parent of an Indian child is Indian. Similarly, the definition of "extended family member" does not differentiate between "Indian" and "non-Indian" extended families, 25 U.S.C. § 1903(2), further evidence that Petitioners' theory here is discordant with the statutory scheme.

In short, limiting the application of ICWA to situations where an Indian parent has had prior custody would lead to absurd results that Congress could not have intended, results contrary to the explicit legislative history relating to this issue and every legislative goal that Congress was trying to achieve.

In addition, although petitioners seem to have abandoned an argument based upon the version of the EIF that requires that the parent or child have sufficient contacts with the Tribe, Pet. Br. at 40-41, they still cite cases based upon this theory. Thus, *amici* note that the legislative history clearly reveals that Congress also rejected proposals to include a "significant contacts" test as part of the ICWA. The original bill that passed the Senate included certain restrictions in its application based upon whether a child had "significant contacts" with a Tribe. The

House's final version of the bill (which became law) deleted this requirement and simply applied its provisions to all Indian children as defined by the Act. *See* Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction and the Indian Child Welfare Act,* 79 Iowa L. Rev. 585, 608-609 (March 1994).

Finally, the *guardian ad litem* has alluded to the failure of Congress to adopt legislation overturning the EIF as evidence that Petitioners' interpretation of the Act is correct. GAL Br. at 45-46. This is a spurious argument. The legislation cited addressed numerous ICWA issues, of which the exception was just one. *See* 133 Cong. Rec. S18538 (1987) (statement of Senator Evans). There is no evidence that the Congressional viewpoint about the EIF had anything to do with Congress' failure to enact the proposed amendments. Indeed, as noted in *Crystal R. v. Superior Court*, 69 Cal.Rptr.2d 414, 423, n. 10 (Cal. Ct. App. 1997), there have been a number of bills introduced by both "proponents of the existing Indian family doctrine as well as by those opposing the doctrine . . . without success (citing five bills introduced in the Senate or House)." Respondent Father's brief discusses the decisive rejection of EIF legislation by the Senate committee of jurisdiction in 1996. Resp. Father Br. at 36-37. In the end, it is Congress' clear intent that ICWA cover all Indian children in child custody proceedings that governs this case. As this Court has stated, "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Central Bank of Denver v. First Interstate Bank*, 511

U.S. 164, 187 (1994).

For all of these reasons, as summarized in Respondent Father's brief, Resp. Father Br. at 36, the vast majority of states have rejected application of the EIF. *Amici* respectfully urge this court to likewise reject the EIF in all of its manifestations.

CONCLUSION

We respectfully request that this Court adopt a federal standard for the meaning of "parent" in ICWA, reject the EIF, and affirm the decision of the South Carolina Supreme Court.

Respectfully submitted.

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