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, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF PROFESSOR JOAN HEIFETZ HOLLINGER, CENTER FOR ADOPTION POLICY, NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, AND ADVOKIDS AS AMICI CURIAE IN SUPPORT OF RESPONDENT BABY GIRL

Mark W. Mosier
Counsel of Record
Z.W. Julius Chen
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
mmosier@cov.com
(202) 662-6000

October 2012 — *Counsel for Amici Curiae*

IN THE
Supreme Court of the United States

No. 12-399

ADOPTIVE COUPLE,

Petitioners,

v.

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

Respondents.

MOTION OF JOAN HEIFETZ HOLLINGER, CENTER FOR ADOPTION POLICY, NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, AND ADVOKIDS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Professor Joan Heifetz Hollinger, the Center for Adoption Policy, the National Association of Counsel for Children, and Advokids hereby seek leave, pursuant to this Court's Rule 37.2, to file the attached brief as *amici curiae* in support of Respondent Baby Girl.

Petitioners and Respondent Baby Girl, by her guardian *ad litem*, have consented to the filing of this brief. Respondents Birth Father and the Cherokee Nation have consented to the filing of this brief so long as it is submitted in support of Petitioners, rather than in support of Respondent Baby Girl. Respondents Birth Father and the Cherokee Nation have refused to consent to the filing of this brief in support of Respondent Baby Girl

because, in their view, the guardian *ad litem* is "not empowered to act on Baby Girl's behalf at this time." Correspondence reflecting the parties' respective positions has been lodged with the Clerk.

Amici have substantial knowledge of, and experience dealing with, the adoption and child custody issues presented in this case. They have advocated on behalf of children in custody and adoption proceedings, engaged in the development and drafting of legislation and standards governing adoption, authored authoritative works on adoption law and practice, and provided research, analysis, advice, and education to practitioners and the public about current legislation and practices governing adoptions. They have also participated as *amicus curiae* in numerous state and federal cases where children's rights were at issue. Their expertise in the field of family law and adoption proceedings will assist the Court in evaluating the importance of the issues presented in this case.

Respondents Birth Father and the Cherokee Nation oppose the filing of the brief only insofar as it is submitted in support of Respondent Baby Girl, and not in support of Petitioners. *Amici* seek leave to file this brief in support of Respondent Baby Girl because resolution of the questions presented is in the best interest of both Respondent Baby Girl and other similarly situated children nationwide. *Amici* have not submitted the brief in support of Petitioners because they prefer not to choose sides in the custody dispute between Petitioners and Respondents Birth Father and the Cherokee Nation.

The reason given by Respondents Birth Father and the Cherokee Nation for denying consent—that

the guardian *ad litem* is no longer empowered to act on behalf of Respondent Baby Girl—provides no basis for denying *amici*'s motion for leave to file a brief. There can be no dispute that Baby Girl is a Respondent in this Court given that she was a party before the Supreme Court of South Carolina. *See* S. Ct. R. 12.6. Under this Court's rules, *amici*'s ability to file a brief on behalf of Respondent Baby Girl is not dependent upon the guardian *ad litem*'s authority. As a result, regardless of whether the guardian *ad litem* is empowered to act, *amici* should be permitted to file a brief in support of Respondent Baby Girl.

For the foregoing reasons, Professor Joan Heifetz Hollinger, the Center for Adoption Policy, the National Association of Counsel for Children, and Advokids should be granted leave to file the attached brief.

Respectfully submitted,

Mark W. Mosier
Counsel of Record
Z.W. Julius Chen
COVINGTON & BURLING LLP
1201 Pennsylvania Ave, NW
Washington, DC 20004-2401
mmosier@cov.com
(202) 662-6000

Counsel for Amici Curiae

October 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE

Amici are a law professor and three non-profit organizations with substantial knowledge of, and experience dealing with, the adoption and child custody issues presented in this case.[1]

Professor Joan Heifetz Hollinger is a leading American scholar on adoption law and policy. As a faculty member at the University of California, Berkeley Law School since 1993, and before that, as a Professor of Law at the University of Detroit, she has been devoted to research, teaching, and advocacy on family law issues, especially as they affect the welfare of children. She is the editor and principal author of the standard national treatise *Adoption Law and Practice* 3 vols. (Lexis\Matthew Bender Co. 1988, Supp 2012), co-editor of *Families By Law: An Adoption Reader* (NYU Press, 2004), and the author of numerous articles and conference papers, including *Interstate Jurisdiction and Choice of Law Issues in Adoption and Other Parentage Proceedings* (PLI 2010). She is the Reporter for the proposed Uniform Adoption Act, helped draft the revised Uniform Parentage Act of 2002, is an Honorary

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored the brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amici* or their counsel made such a monetary contribution. Because the parties have not consented to the filing of this brief, *amici* have filed a motion for leave to file the brief. The parties' correspondence has been lodged with the Clerk.

Member of many child advocacy organizations, wrote the federal *Guide to the Multiethnic Placement Act* (1998), and is at the forefront of efforts to improve the Hague Convention on Intercountry Adoption. She has appeared as *amicus curiae* on behalf of children in a number of high-profile adoption, assisted reproduction, parentage and custody cases in state and federal courts that have recognized children's legal ties to their actual parents, whether biological or non-biological.

The Center for Adoption Policy (CAP) is a New York based non-profit organization. Its mission is to provide research, analysis, advice, and education to practitioners and the public about current legislation and practices governing ethical domestic and intercountry adoption in the United States, Europe, Asia, Latin America, and Africa. CAP is an independent entity. It is not affiliated with any agency or entity involved in the placement of children.

Founded in 1977, the National Association of Counsel for Children (NACC) is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. The organization is multidisciplinary and has approximately 1800 members representing all 50 states and the District of Columbia. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented. The NACC works to strengthen the delivery of legal services to children, enhance the quality of legal services affecting children, improve courts and agencies serving children, and advance

the rights and interests of children. NACC programs serving these goals include training and technical assistance, the national children's law resource center, the child welfare attorney specialty certification program, policy advocacy, and the *amicus curiae* program. Through its *amicus curiae* program, the NACC has filed numerous briefs involving the legal interests of children in state and federal appellate courts and in the Supreme Court of the United States.

Advokids is a non-profit organization that advocates on behalf of children in the foster care system and is dedicated to promoting, protecting, and securing for every California foster child the legal rights to which they are entitled, including each child's right to safety, security, and a permanent home. While Advokids serves all California foster children, it has a special focus on infants and young children in the foster care system and the effects of insecure placements on their long-term emotional health and well-being because more than 35% of the children entering foster care are under the age of five and remain in the foster care system longer than older children. Advokids' programs include policy advocacy with respect to issues affecting children in foster care. To that end, Advokids has participated as *amicus curiae* in both state and federal court proceedings affecting the rights of children in the foster care system.

Because the Supreme Court of South Carolina's interpretation of ICWA directly affects the rights of adoptive parents and children, *amici* have a significant interest in the questions presented in this case.

STATEMENT

1. Congress enacted the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–1963, to address the "harm to Indian parents and their children who were involuntarily separated by decisions of local welfare authorities." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989). Congress determined that state governments in Indian child custody proceedings had "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families," 25 U.S.C. § 1901(5), resulting in the break up and removal of children from Indian families at "an alarmingly high" rate, *id.* § 1901(4). Accordingly, Congress "declare[d] that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families." *Id.* § 1902.

ICWA imposes certain procedural and substantive safeguards applicable in child custody proceedings involving an "Indian child."[2] In addition to affording parents notice, appointment of counsel, and a right of access to reports or documents, ICWA provides that

---

[2] An "Indian child" is "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).

> [n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Id. § 1912(f).

These rights may only be invoked by a "parent," as defined by the Act. Although, as a general matter, the term includes "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child," the term "does not include the unwed father where paternity has not been acknowledged or established." *Id.* § 1903(9).

2. In this case, as in many others, ICWA played a central and dispositive role in determining whether the Indian child would continue to live with her adoptive parents or would be placed in the custody of the biological father she had never met. Baby Girl was born on September 15, 2009, to a non-Indian mother who arranged for and consented to an adoption by a non-Indian couple within days of the birth. Pet. App. 7a. Baby Girl's biological father, a member of the Cherokee Nation, had relinquished his parental rights three months earlier and never attempted to contact his daughter. *Id.* at 4a, 8a. Petitioners filed an adoption proceeding in South Carolina family court. *Id.* at 8a. After being served with Petitioners' adoption complaint, the biological

father, joined by the tribe, opposed the adoption under ICWA. *Id.* at 8a–10a.

The family court awarded custody of Baby Girl to the biological father, and a sharply divided Supreme Court of South Carolina affirmed that decision. Citing the congressional findings and declaration of policy, the state supreme court reasoned that ICWA applied even though Baby Girl had never been a member of an Indian home or culture, thus rejecting the "existing Indian family doctrine." *Id.* at 17a n.17. Moreover, the court held that Baby Girl's biological father was a "parent" within the meaning of ICWA and thus eligible to invoke its parental termination protections. In the court's view, even though "[u]nder state law, Father's consent to the adoption would not have been required," ICWA superseded state parenthood laws. *Id.* at 21a n.19. "[B]y its plain terms," the court concluded, it was enough under ICWA for the biological father to have acknowledged paternity "through the pursuit of court proceedings" and to have established paternity by DNA testing. *Id.* at 22a.

This decision further deepens the conflict among state courts regarding the extent to which ICWA displaces state family law rules that would otherwise apply in these circumstances. This case provides an opportunity for the Court to provide much needed clarification on two important issues that frequently arise under ICWA and that have divided the state courts.

ARGUMENT

I. The Decision of the South Carolina Supreme Court Deepens the Division Among State Courts Regarding the Scope of ICWA.

This case presents two questions that regularly arise under ICWA when a non-Indian parent voluntarily places his or her child for adoption: (1) whether a non-custodial parent can invoke ICWA to block an adoption initiated by a non-Indian parent with custody of the child; and (2) whether an unwed biological father who is not considered a "parent" under state law is nevertheless a "parent" under ICWA. Because the decision in this case further deepens the disagreement among state courts on both questions, this Court should grant the petition and resolve the issues.

A. State Courts Are Divided over Whether ICWA Applies When a Child Being Placed for Adoption Has Never Lived in an Indian Family.

Courts in more than twenty states have addressed the first question presented in this case: whether a non-custodial parent can invoke ICWA to block an adoption where the child has never lived in an Indian family. These courts have deeply divided on this question.

Courts in at least seven states have held that ICWA does not apply in these circumstances.[3] Relying on the statutory text and purpose, these courts have concluded that ICWA applies only when the child has lived in an Indian family. These courts find support for this interpretation in the text of ICWA's involuntary termination provision, which requires a court to consider whether "the *continued* custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f) (emphasis added). Other provisions in ICWA provide further support for the view that the statute presupposes an existing Indian family. *See, e.g.*, *id.* § 1902 (discussing "the removal of Indian children from their families"); *id.* § 1901(4) (addressing the issue of Indian families being "broken up by the removal" of their children). This interpretation of ICWA is commonly referred to as the "existing Indian family doctrine." *See, e.g.*, Joan H. Hollinger, *Adoption Law and Practice*, § 15.03[2][b] (2012) ("existing Indian family doctrine" posits that "if a child, albeit an Indian, is not part of a 'genuine' or 'existing' Indian family, then the Act should not apply").

Other state court decisions, including the South Carolina Supreme Court's decision in this

---

[3] *See, e.g.*, *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990); *In re T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988); *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331, 337 (La. Ct. App. 1995); *In re S.A.M.*, 703 S.W.2d 603, 609 (Mo. Ct. App. 1986); *In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009); *In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL 1138130, at *5 (Tenn. Ct. App. Apr. 27, 2009).

case, have reached the opposite result.[4] These courts often base their holding on the view that ICWA's "core purpose" is "preserving and protecting the interests of Indian tribes in their children." *In re A.J.S.*, 204 P.3d 543, 550 (Kan. 2009) (quotation marks and citation omitted). Because the tribe has an interest in Indian children regardless of whether they have lived in an existing Indian family, courts have held that the "existing Indian family doctrine" frustrates ICWA's purpose. *Id.*; *see also* Pet. App. 17a n.17.

The need for this Court to resolve the issue is evident from the number of cases—on both sides of the split—that involve facts almost identical to those presented here. For example:

a. In *In re T.R.M.*, 525 N.E.2d 298 (Ind. 1988), the adoptive parents took custody of the child five days after she was born, out of wedlock, to an Indian mother and unknown father. When the birth mother later tried to invoke ICWA to block the adoption, the Indiana Supreme Court held that statute did not apply. *Id.* at 303. The court concluded that the adoption proceeding would not lead to the "'breakup of the Indian family,'" given that "the child was

---

[4] *See, e.g.*, *In re Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989); *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000); *In re Baby Boy Doe*, 849 P.2d 925 (Idaho 1993); *In re Adoption of S.S.*, 622 N.E.2d 832 (Ill. 1993), *rev'd on other grounds* 657 N.E.2d 935 (Ill. 1995); *In re Elliott*, 554 N.W.2d 32 (Mich. 1996); *In re Adoption of Riffle*, 922 P.2d 510 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988).

abandoned to the adoptive mother essentially at the earliest practical moment after childbirth and initial hospital care." *Id.*

b. In *S.A. v. E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990), the child was born out of wedlock to a non-Indian mother and an Indian father who refused to acknowledge paternity and be listed on the birth certificate. After the child was placed for adoption with the mother's aunt and uncle, the father invoked ICWA. The state appellate court concluded that "the facts of this case lend themselves to an application of the 'Existing Indian Family' exception." *Id.* at 1189. The court reasoned that "[t]his child was never part of an Indian family environment," had "never been a member of an Indian family, ha[d] never lived in an Indian home, and ha[d] never experience the Indian social and cultural world." *Id.* at 1189–90. Applying ICWA would thus "be contrary to the congressional intent." *Id.* at 1190.

c. In *In re A.J.S.*, 204 P.3d 543 (Kan. 2009), the non-Indian mother of a child born out of wedlock consented to an adoption by members of her family the day after giving birth. The biological father, a member of the Cherokee Nation, invoked ICWA to block the placement. The Supreme Court of Kansas held the existing Indian family doctrine to be inapplicable because: (1) the doctrine "appears to be at odds with the clear language of ICWA, which makes no exception for children" facing the circumstance at issue; and (2) this Court's decision in *Holyfield* "underscored the central importance of the relationship between an Indian child and his or her

tribe, independent of any parental relationship." *Id.* at 547–49.[5]

d. In *In re Baby Boy Doe*, 849 P.2d 925 (Idaho 1993), the child was born out of wedlock to a non-Indian mother and Indian father, who did not maintain any contact with the mother during her pregnancy or with the child following birth. The non-Indian mother, who exercised sole custody, placed the child for adoption with a non-Indian couple shortly after the birth and consented to voluntary termination of her parental rights. Upon receiving notice of the adoption proceeding, the tribe and the father invoked ICWA to block the placement and gain custody. *Id.* at 927–28. Reversing the lower court's decision, the Supreme Court of Idaho rejected the application of the existing Indian family doctrine on the ground that "application of an Indian family requirement would allow the non-Indian mother to circumvent application of ICWA and the tribe's interest in the child by making sure that the child is kept away from the reservation and out of contact with the father and his family," thus

---

[5] This decision overruled *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982). In that case, a child was born to an unmarried non-Indian woman, who soon consented to an adoption by non-Indians. The tribe intervened in the adoption proceeding on behalf of the Indian father and invoked ICWA. The court applied the existing Indian family doctrine after conducting a "careful study of the legislative history behind the Act and the Act itself." *Id.* at 175. In its view, ICWA was not meant "to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment." *Id.*

"undermin[ing] the tribe's interest in its Indian children." *Id.* at 927–28.

In these cases, the presence or absence of an existing Indian family is often the dispositive consideration that produces disparate results in identical factual circumstances. Although state courts have had three decades to consider whether ICWA's text and history requires a child to have lived in an Indian family, no consensus has emerged. Instead, courts remain sharply divided on this issue, and will continue to struggle with the question until it is definitively resolved by this Court.

B. State Courts Are Divided over the Circumstances in Which an Unwed Father Is a "Parent" Under ICWA.

State courts have also reached conflicting views on the meaning of "parent" under ICWA. Although ICWA defines the term to include "any biological parent," the statute expressly excludes "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). The statute does not address how an unwed father's paternity is "acknowledged or established," and courts have divided over whether this question should be resolved based on state law.

This Court has long made clear that the relationship between a parent and child is entitled to protection under the U.S. Constitution. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–19 (1984). But the Court has been equally clear that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require

relationships more enduring." *Lehr v. Robertson*, 463 U.S. 248, 260 (1983) (emphasis, quotation marks, and citation omitted); *see also Astrue v. Capato*, 132 S. Ct. 2021, 2030 (2012) ("Notably, a biological parent is not necessarily a child's parent under the law."). As a result, an unwed father's parental rights are constitutionally protected only if he has "demonstrate[d] a full commitment to the responsibilities of parenthood by com[ing] forward to participate in the rearing of his child." *Lehr*, 463 U.S. at 261 (alteration in original) (quotation marks and citation omitted).

Apart from these due process limitations, a parent's rights are generally determined by state law. As this Court has long acknowledged, "'[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'" *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890)). Indeed, the Court has deferred to state laws that allow other parentage presumptions to trump the claims of some fully committed biological parents. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion) (upholding against biological father's challenge California presumption that a mother and her husband are child's only legal parents when cohabiting at the time of conception and birth).

States typically protect an unwed biological father's rights by enacting laws that identify the steps he must take to demonstrate his commitment to the child. For example, many states have adopted

the Uniform Parentage Act (UPA), which provides comprehensive treatment of legal parenthood and specifies the circumstances in which an unwed father should be treated as a child's parent under the law.[6] Under the UPA, unwed biological fathers are not automatically recognized as legal parents. Instead, the UPA, like many other state laws, creates a rebuttable presumption of paternity where certain conditions are met. For instance, section 204(a)(4) of the UPA provides that a presumption of paternity does not attach to a father who is not married to the mother at the time of the child's birth *unless*: (1) the father later marries the mother, (2) the father voluntarily asserts his paternity, and (3) the father files a record of such an assertion with a state agency, appears on the child's birth certificate, or promises in a record to support the child as his own.

Courts in at least five states rely on these state laws to determine whether an unwed father has sufficiently "acknowledged" and "established" his paternity under ICWA.[7] For example, in *In re*

---

[6] First adopted in 1973, the UPA provided standards by which a biological father could establish paternity in a modern civil action. In 2000, the UPA was revised to incorporate developments relating to DNA identification, and then updated in 2002 to reflect other permutations of the parent-child relationship brought about by technological advances. *See* Parentage Act Summary, Unif. Law Comm'n, Nat'l Conf. of Comm'rs on Unif. State Laws, *at* http://www.uniformlaws.org/ActSummary.aspx?title=Parentage Act (visited Oct. 26, 2012).

[7] *See, e.g., In re Daniel M.*, 1 Cal. Rptr. 3d 897, 900 (Ct. App. 2003); *In re S.A.M.*, 703 S.W.2d 603, 607 n.4 (Mo. Ct. App. 1986); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1064 (Okla. 1985), *overruled on other grounds In re Baby* (continued…)

Adoption of Baby Boy D, 742 P.2d 1059 (Okla. 1985), *overruled on other grounds In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004), an Indian father had only intermittent contact with the non-Indian mother of his child during her pregnancy, and upon being informed of her plans to place the child for adoption, the father "made no objection or response" and "did not want to have anything to do with the mother or the child." *Id.* at 1061. After learning that the child was placed for adoption, the father claimed paternity and sought custody. The court denied the father's attempt to rely on ICWA, explaining that the phrase "acknowledged or established" in § 1903(9) must mean "through the procedures available through the tribal courts, consistent with tribal customs, or through procedures established by state law." *Id.* at 1064.

Other courts, however, have interpreted ICWA's definition of "parent" without regard to state law.[8] For example, in this case the South Carolina Supreme Court concluded that Birth Father was a "parent" under ICWA even though he had no parental rights under South Carolina law. Pet. App. 22a. In the court's view, Birth Father "met ICWA's definition of 'parent' by both acknowledging his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for

---

Boy L., 103 P.3d 1099 (Okla. 2004); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. App. Ct. 1995).

[8] *See, e.g.*, *Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011); *Jared P. v. Glade T.*, 209 P.3d 157, 160–61 (Ariz. Ct. App. 2009).

adoption and establishing his paternity through DNA testing." *Id.*

A comparison of the facts presented here with *Baby Boy D* puts the need for this Court's review into stark relief. In both cases it is undisputed that the biological fathers relinquished their parental rights or, at the very least, took none of the steps required under state law to establish paternity. Yet the Supreme Court of South Carolina—joining courts in Alaska and Arizona—held that ICWA could be invoked by Birth Father, when the Supreme Court of Oklahoma would have held otherwise. In each of these cases, the choice between these two legal standards was outcome-determinative. The Supreme Court of South Carolina's decision in this case is thus squarely in conflict with the rules applied by the Supreme Court of Oklahoma. This legal uncertainty should be resolved.

II. The Questions Presented Raise Issues of Exceptional Importance Regarding the Scope of ICWA.

This Court's review is necessary to provide clarity regarding the scope of ICWA. Defining the outer limits of ICWA is critically important given the constitutional principles at stake and the impact that the current state of uncertainty has on the lives of children and parents, both biological and adoptive.

This case presents important questions regarding the relationship between ICWA and state domestic relations law. In South Carolina, as in most states, child custody controversies are resolved based on the best interests of the child. *See, e.g.*,

Davis. v. Davis, 588 S.E.2d 102, 103–04 (S.C. 2003). The best-interest inquiry attempts to determine, based on the specific facts of a particular case, how to maximize the child's overall welfare, including his or her physical, emotional, and developmental well-being. *Id.*

Under ICWA's involuntary termination provision—the provision at issue in this case—the fact-intensive case-by-case inquiry provided by state law gives way to a categorical presumption that an Indian child's interests are best served by placing him or her in an Indian family. 25 U.S.C. § 1912(f). When an Indian parent seeks custody, this presumption may be rebutted only with proof, beyond a reasonable doubt, that the child will suffer "serious emotional or physical damage" by remaining in the custody of that parent. *Id.* As a result, while both federal and state law strive to achieve what is best for the child, ICWA's involuntary termination provision places such a heavy thumb on the scale in favor of the Indian parent that, as this case demonstrates, it can affect the child's placement.[9]

ICWA's displacement of the best-interests inquiry provided by state law raises important

---

[9] ICWA also provides that "a preference shall be given, in the absence of good cause to the contrary, to a placement with" the child's family, tribe, or other Indian families. 25 U.S.C. § 1915(a). By creating an additional presumption in favor of placing an Indian child with an Indian family, this provision further increases the likelihood that a child's placement pursuant to ICWA will differ from the placement that would result under state law.

constitutional concerns. This Court has recognized "the importance of the familial relationship, to the individuals involved and to the society," because of the "emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot(ing) a way of life' through the instruction of children, as well as from the fact of blood relationship." *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977) (internal citation omitted). This is equally true "in the absence of blood relationship," as "[a]doption, for example, is recognized as the legal equivalent of biological parenthood." *Id.* at 844 & n.51.[10] These bonds concern the "creation and sustenance of a family," an area afforded "a substantial measure of sanctuary from unjustified interference from the State." *Roberts*, 468 U.S. at 618–19.

ICWA's displacement of state law also raises important federalism concerns. This Court has long held that child custody issues are governed by "the laws of the States and not . . . the laws of the United States." *Hisquierdo*, 439 U.S. at 581 (quotation marks and citation omitted). In enacting ICWA, Congress suggested that the statute was not meant "to oust the states of their traditional jurisdiction

---

[10] Even with respect to familial arrangements short of adoption, the Court has stressed that, "where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family." *Smith*, 431 U.S. at 844.

over Indian children falling within their geographic limits." H.R. REP. NO. 95-1386, at 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7541. But, as this case demonstrates, ICWA will often have that effect.

The Court should grant the petition because, regardless of how the tension between ICWA and state law is reconciled, there is much to gain from clarity in this area of the law. Uncertainty regarding ICWA's scope has profound effects on the children and parents whose lives are affected by the statute. The uncertainty may result, as in this case, in a child's removal from the custody of the only parents she has known. It also makes prospective parents less likely to pursue adoption because they cannot be sure that a court will uphold the custodial parent's right to consent to the adoption.

When this Court last decided an ICWA case, it recognized that "[t]hree years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain." *Holyfield*, 490 U.S. at 53. And the Court noted that, without the protracted litigation, "much potential anguish might have been avoided." *Id.* at 54. The Court should grant the petition and clarify the scope of ICWA so that Indian children and their parents, both biological and adoptive, can avoid the pain of additional litigation of these issues.

CONCLUSION

For the reasons set forth above, as well as the reasons set forth in the Petition for Certiorari and in the Response of Guardian Ad Litem, as Representative of Respondent Baby Girl, *amici* respectfully request that the Court grant the petition for certiorari.

Respectfully submitted,

Mark W. Mosier
Counsel of Record
Z.W. Julius Chen
COVINGTON & BURLING LLP
1201 Pennsylvania Ave, NW
Washington, DC 20004-2401
mmosier@cov.com
(202) 662-6000

Counsel for Amici Curiae

October 2012