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 South Carolina Supreme Court

RESPONSE OF GUARDIAN AD LITEM, AS REPRESENTATIVE OF RESPONDENT BABY GIRL, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-63, applies to state custody proceedings involving an Indian child. A dozen state courts of last resort are openly and intractably divided on two critical questions involving the administration of ICWA in thousands of custody disputes each year.

(1) Whether a non-custodial parent can invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law.

(2) Whether ICWA defines "parent" in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.

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STATEMENT OF THE CASE

At issue in this case is an important question of federal law that implicates thousands of custody disputes every year: whether the Indian Child Welfare Act operates to block adoption proceedings voluntarily initiated by a non-Indian mother who has sole custody of her child due to the Indian father's failure to establish a legal parent-child relationship with the child under state law. The Guardian ad Litem, Ms. Jo M. Prowell ("the Guardian"), is the duly appointed representative of the respondent child ("Baby Girl") in these proceedings, with standing to file this brief on Baby Girl's behalf. The Guardian exhaustively considered the respondent child's best interests and concluded that they clearly would be served by allowing her adoptive parents to retain custody. But under the South Carolina Supreme Court's interpretation of the Act, the respondent child's best interests were overridden by a federal law that in this case operated solely on the basis of race, not any meaningful connection to tribal sovereignty or lands. Both because of the broader jurisprudential significance of the issues presented and because of the dramatic impact on the respondent child, it is imperative that this Court grant plenary review.

At approximately six months pregnant, the birth mother in this case ("Birth Mother") received a text message from respondent Birth Father, stating his desire to relinquish any parental rights to their unborn child, respondent Baby Girl. Pet. App. 4a. Unable to care for Baby Girl by herself, Birth Mother decided that it would be in Baby Girl's best interest

to be adopted by petitioners. *Id*. Petitioners financially supported Birth Mother during her final months of pregnancy, spoke to her weekly, and traveled from South Carolina to Oklahoma to visit her. *Id*. at 5a. Petitioners were in the delivery room when Birth Mother delivered Baby Girl and cared for Baby Girl as their child from that moment forward. *Id*. at 7a.

Following his text message, Birth Father made no attempt to contact or support Birth Mother or Baby Girl, and gave no indication that he was interested in any sort of relationship with Baby Girl, until he was served with petitioners' adoption complaint approximately four months after Baby Girl's birth. *Id*. at 8a. It is uncontested that under South Carolina state law, Birth Father's unequivocal and willful emotional and financial abandonment of Birth Mother and Baby Girl during the pregnancy and first four months of Baby Girl's life dissolved any legal parent-child relationship that would have rendered his consent necessary to finalizing Baby Girl's adoption by petitioners. *Id*. at 21-22a; S.C. Code § 63-9-310(A)(5). Birth Father argued, however, that as a member of the Cherokee Nation, he could invoke the Indian Child Welfare Act ("ICWA") to block the adoption. Pet. App. 10a n.12.

The Guardian ad Litem was appointed pursuant to state law "to represent[] the interests of Baby Girl" in the adoption proceedings. *Id*. at 10a-11a. Because the family court has not modified or terminated the Guardian's appointment, she maintains an ongoing responsibility to serve as Baby Girl's representative. South Carolina law requires the Guardian to "protect

and promote the best interests of the child until formally relieved of the responsibility by the family court." S.C. Code Ann. § 63-11-510(7); *see also id.* § 63-11-530(A)(1) ("The obligation of the guardian ad litem to the court is a continuing one and continues until formally relieved by the court."). The Guardian is specifically authorized by state law to "seek judicial review," *id.* § 63-11-510(6), "submit briefs . . . on behalf of the child," *id.* § 63-3-830(B), and to "participate in the proceedings to any degree necessary to represent the child adequately," *id.* § 63-11-530(C).

Pursuant to her appointment, the Guardian undertook an investigation to determine the best interests of Baby Girl. In addition to reviewing numerous home studies and reports, the Guardian interviewed petitioners at their home in South Carolina and observed their interactions with Baby Girl. The Guardian also traveled to Oklahoma to meet and interview the Father, as well as his parents and a daughter from a previous relationship. Pet. App. 71a.

Based on this thorough investigation, the Guardian concluded that it was in the best interests of the respondent child to remain in the care and custody of the Adoptive Couple. *Id.* at 51a. She found that Baby Girl was a well-adjusted and emotionally secure child with the benefit of two loving adoptive parents. *See id.* at 71a. In contrast, the Guardian expressed concerns about Birth Father's interest in establishing paternity, explaining that she found no evidence that Birth Father had been prevented from establishing his

parental rights before Baby Girl's birth, or that he had attempted to be present at the child's birth or even inquired about the child or Mother's health thereafter. *See id.* at 71a-72a. The Guardian also found no evidence that the Father made reasonable efforts to provide financial support on behalf of the Mother or Baby Girl, or that he had developed a parenting plan that would enable him to provide for Baby Girl himself, rather than relying on his parents. *Id.* Applying the traditional state-law criteria for protecting the best interests of the child, the Guardian concluded that they clearly favored leaving Baby Girl in the custody of her adoptive parents.

By the time the adoption proceeding was tried in September 2011, Baby Girl was two years old and had lived with petitioners her entire life. *Id.* at 10a. The Guardian testified that it was her factual finding that Baby Girl's well-being would be best served by approval of the adoption. *See id.* at 51a. Birth Mother also urged the court to finalize the adoption. *Id.* at 46a. The Cherokee Nation intervened in support of Birth Father. *Id.* at 10a.

The family court denied the adoption petition and ordered custody of respondent Baby Girl transferred to Birth Father. *Id.* at 11a. The court acknowledged that under South Carolina state law, Birth Father's abandonment of Birth Mother and Baby Girl extinguished any legal status he otherwise would have had to contest the adoption, but held that because Birth Father was Indian, he could invoke ICWA's parental termination provision to block the adoption. *See id.*; 25 U.S.C. § 1912(f). The court thus ordered petitioners to surrender Baby Girl to Birth

Father. On December 31, 2011, petitioners handed over Baby Girl, then 27 months old, to Birth Father, whom Baby Girl had never met. Pet. App. 11a. It is the Guardian's understanding that Birth Father allowed Baby Girl to speak with petitioners by telephone the following day, and then cut off all communication between them.

A fractured South Carolina Supreme Court upheld the transfer of Baby Girl's custody.[1] The majority recognized, like the family court, that South Carolina state law would not even recognize Birth Father as a parent with standing to contest the adoption, but nonetheless found ICWA's special parental termination provision for "Indian parents" applicable to the proceedings. *Id*. at 21a-22a; *see* 25 U.S.C. § 1912(f). Under ICWA, the court explained, Birth Father's "lack of interest in or support for Baby Girl during the pregnancy and first four months of her life . . . is not a valid consideration." Pet. App.

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[1] The Guardian initially filed a brief in the South Carolina Court urging reversal of the trial court's decision to apply ICWA to the custody proceedings. She subsequently withdrew her brief after deciding that Baby Girl would be better served if the South Carolina Supreme Court were only asked to address the arguments raised by petitioners in their appeal. The Guardian's withdrawal of her brief did not have any effect on Baby Girl's status as a party in the case or the Guardian's continuing representation of Baby Girl. *See* S.C. Code Ann. § 63-11-530(A)(1) ("The obligation of the guardian ad litem to the court is a continuing one and continues until formally relieved by the court."); *id*. § 63-11-530(C) (authorizing the guardian ad litem to "participate in the proceedings to any degree necessary to represent the child adequately").

32a n.26. The majority did not even address, let alone dispute, the Guardian's findings that Baby Girl's interests would be best served through adoption by petitioners; instead, the majority explained that "ICWA presumes that placement within its ambit is in the Indian child's best interests." *Id.* at 39a.

Two of the five justices vehemently dissented, explaining that the majority had "decide[d] the fate of a child without regard to *her* best interests and welfare." *Id.* at 41a. The dissenting justices accused the majority of "creating the illusion that Father's interests are in harmony with the best interests of the child," when "[t]he reality is Father purposefully abandoned this child." *Id.* at 42a. The dissenting justices also noted the testimony of Dr. Bart Saylor, a qualified expert in familial bonding, who explained that "severing the bond Baby Girl has formed with [the adoptive parents] would, beyond a reasonable doubt, be 'very traumatic,' . . . 'taking away everything she had come to know and count on for her comfort and security and replac[ing] it with something that would be completely unfamiliar and strange to her . . . taking away what has been the very source and foundation of her security in her life." *Id.* at 75a (quoting Dr. Saylor).

REASONS FOR GRANTING THE PETITION

As Baby Girl's representative in this case, the Guardian agrees with petitioners that this Court should grant review of the South Carolina Supreme Court's decision. As the Petition explains, the questions presented are at the center of a deep and widely acknowledged conflict among state courts.

Pet. 11-17. And because the conflict concerns the interpretation of a federal law applied exclusively by state courts, this Court's review is the only hope for restoring uniformity among the hundreds of state courts tasked with applying the Indian Child Welfare Act ("ICWA"). But the need for this Court's review goes beyond resolving the typical conflict among courts on how to apply federal law. For respondent Baby Girl and others like her, the issues presented in the Petition go to the heart of their liberty interests in maintaining the only family relationship that they have ever known, and in having the benefit of a custody inquiry truly focused on their best interests. Indeed, in this case, because respondent Baby Girl's only connection to tribal sovereignty considerations were severed by Birth Father's voluntarily abandonment of her, her best interests were disregarded below based solely on her race. This case thus implicates both respondent Baby Girl's most fundamental rights and constitutional concerns of the highest order.

At the center of this case is a little girl who at 27 months old lost the only family she had ever known, her custody transferred from "ideal parents who have exhibited the ability to provide a loving family environment," Pet. App. 40a, to the biological father she had never met because he had abandoned her before birth and shown no interest in her before finding out, four months after Baby Girl was born, that the biological mother had placed her in an adoptive home, *id.* at 8a-9a. The South Carolina Supreme Court recognized that under South Carolina state law, Birth Father's abandonment of Baby Girl dissolved any legal parent-child relationship that

might have given him standing to contest her adoption. *Id.* at 21a n.19. The court nonetheless found that because Birth Father is Indian, he could invoke ICWA to block the adoption and acquire custody of Baby Girl. *Id.* at 22a. The court reached this conclusion based on an interpretation of ICWA that not only ignores the Act's plain meaning and purpose, but, if correct, would render the Act unconstitutional.

A. The South Carolina Supreme Court's Interpretation of ICWA Conflicts with the Act's Terms

According to the court, the determinative provision of ICWA mandating the custody transfer in this case is section 1912(f), which provides that "[n]o termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). Applying this provision, the court concluded that Birth Father was entitled to custody of Baby Girl because, despite his expressed desire to relinquish his parental rights and his failure to show any interest in Baby Girl until he was told about the adoption proceedings, the record did not establish beyond a reasonable doubt that his custody of Baby Girl would result in serious emotional or physical damage. Pet. App. 29a. The court acknowledged Dr. Saylor's expert testimony that the custody transfer would inflict serious emotional harm on Baby Girl,

but found that this testimony established that Baby Girl would be emotionally harmed as a result of her removal from her adoptive home, not from her placement in Birth Father's care, and therefore that conceded harm to the respondent child was simply irrelevant to the section 1912(f) inquiry. *Id*. at 29a-32a.

That determination was riddled with error. As an initial matter, the court erred in failing to recognize that Birth Father is not a "parent" within the meaning of ICWA. Section 1903(9) of the Act defines "parent" as "any biological parent or parents of any Indian child" except for "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). As explained in the Petition, in cases where an Indian man has a child with a non-Indian woman who is not his wife, he is a "parent" under ICWA only if he has established a legal parent-child relationship with the child under state law. *See* Pet. 21-27 (noting legislative history indicating Congress's intent that ICWA's definition of parenthood for unwed fathers "be limited to those who showed the requisite support under state law"). The Birth Father's express abandonment of Baby Girl should have made this an easy case: South Carolina law does not recognize Birth Father as a legal parent with standing to contest Baby Girl's adoption. Pet. App. 21a n.19. Moreover, by its own terms, section 1912(f) only applies where the Indian parent already has some level of custody over the child. *See* 25 U.S.C. § 1912(f) (discussing only the "*continued* custody" of the child by the Indian parent (emphasis added)).

B. The South Carolina Supreme Court's Interpretation of ICWA Raises Serious Equal Protection Concerns

By making the application of section1912(f) to unwed fathers contingent on whether the father demonstrated sufficient interest in the child to establish a legally cognizable parent-child relationship, Congress harmonized the provision with ICWA's purpose of preventing "harm to Indian parents and their children who were *involuntarily* separately by decisions of local welfare authorities." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989) (emphasis added).[2] Equally important, if Congress had not excluded unwed fathers who fail to legally establish paternity from ICWA's protections, the Act would suffer from serious constitutional problems. *See* Pet. 26-27. As interpreted by the court below and applied in this case, ICWA overrides the best interests of the child based on one factor and one factor alone – the race of the child's birth father, thus raising serious equal protection concerns. To be sure, "Congress may

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[2] This Court's decision in *Holyfield* addressed an entirely separate provision of ICWA, section 1911(a), establishing exclusive tribal jurisdiction over child custody proceedings involving Indian children domiciled on tribal land. *See Holyfield*, 490 U.S. at 30. The question in that case was whether Indian parents domiciled on tribal land may avoid having their child domiciled on tribal land, and thus avoid tribal jurisdiction over the child's adoption placement, simply by leaving the reservation to give birth and never taking the child to the reservation. *Id.* It is undisputed that section 1911(a) has no application to this case.

fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs," *Rice v. Cayetano*, 528 U.S. 495, 519 (2000), including legislation that "single[s] out Indians for particular and special treatment" designed "to further Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974). Thus, in *Mancari*, this Court upheld a racial preference for Indians in hiring by the Bureau of Indian Affairs because that agency governs the "lives and activities" of Indians "in a unique fashion." *Id*. at 554. The Court emphasized, however, that it would be an "obviously more difficult question" if Congress were to extend that preference to other government agencies or create "a blanket exemption for Indians from all civil service examinations." *Id*.

The key to whether legislation involving Indians triggers the relaxed review of *Mancari*, or the exacting scrutiny traditionally demanded of classifications based on race, is whether the challenged legislation "relates to Indian land, tribal status, self-government or culture." *Williams v. Babbitt*, 115 F.3d 657, 664-65 (9th Cir. 1997). When a racial classification is tethered directly to tribal land or tribal self-government, the political and racial aspects of the regulation are inextricably intertwined such that treating the laws as involving ordinary racial classifications would deny the federal government its authority under the Treaty and Indian Commerce Clauses. But when tribal preferences are untethered from tribal land or tribal self-government and simply provide a naked preference based on race, strict scrutiny is imperative.

When interpreted correctly, ICWA serves the legitimate purpose of preventing the involuntary removal of Indian children from their families and, in cases involving the custody of Indian children domiciled on tribal land, ensuring the Tribe's ability to exercise its sovereignty over the custody proceedings. *See Holyfield*, 490 U.S. at 30-37 (describing purposes of ICWA). But it is another thing entirely to employ race-based preferences in adoption proceedings where the child is in the exclusive custody of a non-Indian parent who, as the only legally recognized parent of the child, has chosen to place the child for adoption. Conferring special privileges on the biological father – or more to the point, special disabilities on a child – simply because of race serves no purpose relating to "Indian self-government," *Mancari*, 417 U.S. at 555; to the contrary, the child's home is already outside the Tribe, not because the non-Indian mother decided to place the child for adoption, but because the Indian father previously abandoned the child to the non-Indian mother. Surely the application of section 1912(f) under these circumstances is exactly the sort of race-based differential treatment this Court has long understood to violate the Equal Protection Clause. *See Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (recognizing a strong presumption that custody determinations based on race are unconstitutional).

C. The South Carolina Supreme Court's Interpretation of ICWA Threatens Children's Fundamental Liberty Interests

The lower court's erroneous interpretation of ICWA also presents a serious threat to Baby Girl's fundamental liberty interests. The Guardian is legally responsible for ensuring the best interests of the child and in particular determining whether her interests are best served by continuing the intimate family relationship she has already enjoyed with the adoptive couple for the first 27 months of her life. While those issues are primarily matters of state law, the best interest determination also serves to protect the federal liberty interests of children in custody proceedings. This Court has long recognized that the maintenance of "certain intimate human relationships" must be "secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). Foremost among these "intimate human relationships" is "the creation and sustenance of a family." *Id.* at 617-19. "Family relationships," this Court has observed, "involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Id.* at 619-20. These relationships are accordingly granted "a substantial measure of sanctuary from unjustified interference by the State," *id.* at 618, in which a child, no less than a parent, may seek shelter. *See*

Reno v. Flores, 507 U.S. 292, 304 (1993); *cf. Plyler v. Doe*, 457 U.S. 202, 223 (1982).

There can be no dispute that the lower court's application of ICWA in this case resulted in respondent Baby Girl's removal from the only "intimate human relationships" she had ever known. Certainly there are some circumstances – such as in cases of abuse or neglect – where the government may, indeed should, interfere with a child's family relationships in order to protect her best interests. And where, as in *Holyfield*, a Tribe's sovereignty over its own citizens is at stake, such intrusion may be warranted by such distinctly federal interests. *See Holyfield*, 340 U.S. at 54 (explaining that because Congress had granted tribes exclusive jurisdiction over custody proceedings involving children domiciled on tribal lands, "[i]t is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe – and perhaps the children themselves – in having them raised as part of the Choctaw community"). But as a general matter, the best interests standard operates to protect the liberty interests of the minor child. Thus, any federal effort to override the traditional best interest standard risks implicating constitutional concerns. While the federal role is justified in cases like *Holyfield* where there is a clear connection between the child and tribal sovereignty and tribal land, in this case and many others like it, ICWA was applied to remove the child from the only family she had ever known for no reason other than her biological father's race. It bears repeating: Baby Girl was *already* disconnected from the Tribe and her

Indian relatives well before the adoption proceedings, by virtue of *Birth Father*'s decision to abandon her. Presumably, if Birth Mother had raised the child as a single parent, Birth Father would have had no basis to interfere based on his express abandonment of his parental rights. Allowing Birth Father nonetheless to rely on his Indian heritage as a basis for blocking Baby Girl's adoption is not only a perversion of ICWA, but an unwarranted and unconstitutional intrusion on the intimate family relationships Baby Girl developed as a result of Birth Father's intentional absence from her life.

The lower court's interpretation and application of ICWA also turned the purpose of the custody proceedings on its head, focusing exclusively on Birth Father's rights as an Indian, and rendering Baby Girl's best interests wholly irrelevant. *See* Pet. App. 54a-55a (Kittredge, J., dissenting) (criticizing "the majority's approach of applying ICWA in a rigid, formulaic manner without regard to the facts of the particular case and the best interests of the Indian child"). As this Court observed in *Holyfield*, "[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." 490 U.S. at 50 n.24 (internal quotation omitted). That is all well and good when the Indian child's "relationship to the tribe" is based on something more than race. When the child has a demonstrable connection to the Tribe and tribal land, ICWA is appropriately invoked to prevent the child's removal from their home and their Tribe. But when the child has no meaningful connection to the Tribe or tribal land – because of the biological father's express relinquishment of his

parental rights and responsibilities – then an irrebuttable presumption that the child's best interests lie in placing her with the father is simply not compatible with basic principles of equal protection and due process.

Indeed, one of the most remarkable and troubling aspects of the decision below is the majority's dismissal of Dr. Saylor's expert testimony establishing that transferring Baby Girl's custody to Birth Father "would, beyond a reasonable doubt, be 'very traumatic,' . . . 'taking away everything she had come to know and count on for her comfort and security and replac[ing] it with something that would be completely unfamiliar and strange to her . . . taking away what has been the very source and foundation of her security in her life." Pet. App. 75a (quoting Dr. Saylor). The majority did not question the accuracy of the testimony, but simply found the emotional harm to Baby Girl irrelevant under ICWA because it would arise from the severance of Baby Girl's relationship with her adoptive parents and not from any abuse or neglect by Birth Father. *Id*. at 31a-32a. But the very fact that there was a pre-existing relationship with the adoptive couple should have alerted the court to the reality that this is not a typical ICWA case and that an analysis solely focused on Birth Father would not suffice. The Guardian's inquiry into the best interests of the child could hardly ignore the relationship between Baby Girl and her adoptive parents because that was the only family relationship that Baby Girl had ever known. That relationship is central to the Guardian's inquiry and to Baby Girl's liberty interests. Properly understood, ICWA does not

render that central relationship utterly irrelevant, because section 1912(f) is focused on the removal of children from pre-existing Indian family relationships and custody. But to apply ICWA to this inapposite context and then insist that all ICWA cares about is the abusiveness of a father who has no relationship with the child is doubly erroneous. Congress could not have intended such a counterintuitive result. As applied by the lower court in a case like this, section 1912(f) accomplishes nothing but "human tragedy." *Id.* at 101 (Hearn, J., dissenting).

* * * *

Faced with similar circumstances, many courts have correctly found ICWA inapplicable, explaining that the statutory text and the legislative history make clear that Congress never intended the Act to be a mechanism for disrupting the lives of already vulnerable children who are not domiciled on tribal land and have never had any tribal connection beyond biology. A number of courts have read the Act to preserve its constitutionality and to prevent it from causing trauma and tragedy in cases having nothing to do with tribal sovereignty. In *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 516 (Cal. App. 2d 1996), for example, the Second District of the California Court of Appeals interpreted ICWA as a matter of constitutional avoidance. The court explained that "any application of ICWA which is triggered by an Indian child's genetic heritage, without substantial social, cultural or political affiliations between the child's family and a tribal community, is an application based solely, or at least

predominantly, upon race and is subject to strict scrutiny under the equal protection clause," and that no compelling interest for the differential treatment exists where the biological parents lack any relationship to a tribal community. *Id.* at 1509. The court also noted that under these circumstances, the application of ICWA "can serve no purpose which is sufficiently compelling to overcome the child's fundamental right to remain in the home where he or she is loved and well cared-for, with people to whom the child is daily becoming more attached by bonds of affection and among whom the child feels secure to learn and grow." *Id.* at 1508; *see also In re Alexandria Y.*, 53 Cal. Rptr. 2d 679, 686 (Cal. App. 4th 1996) ("agree[ing] with *Bridget R.* that recognition of the existing Indian family doctrine is necessary to avoid serious constitutional flaws in the ICWA"); *In re Santos Y.*, 112 Cal. Reptr. 2d 692 (Cal. App. 2d. 2001).

* * * *

Finally, the Guardian believes this Court should grant the Petition because as rare as it is to see such a deep and widespread conflict among state courts over a question of federal law, it is equally rare to see a case of such deep and well-established family bonds utterly disregarded. This Court's primary concern is the proper interpretation of federal law. The Guardian's primary charge is to protect the best interests of Baby Girl. The decision below clearly implicates both interests. As explained above and in the Petition, the decision below deepens well-entrenched conflicts that only this Court can resolve. It also needlessly puts ICWA on a collision course

with the equal protection and due process rights of some of our country's most vulnerable children. State law entitles Baby Girl to a best interests determination that fully protects her liberty interest in maintaining the only family relationships she had ever enjoyed. As interpreted by the court below, Baby Girl's best interests and liberty interests are rendered utterly irrelevant, not by her unique connection to a Tribe or tribal land, but because of Birth Father's race. Both jurisprudential interests and the child's best interests clearly favor this Court's plenary review.

This case presents these important federal questions as cleanly and dramatically as any case will. The South Carolina Supreme Court expressly acknowledged that the statutory interpretation questions presented by petitioners are outcome determinative in this case: if ICWA does not apply, then Birth Father's abandonment of Baby Girl before the adoption proceedings extinguishes his standing to contest the adoption, and Baby Girl will be returned to and adopted by petitioners. Pet. App. 21a n.19, 24a. The Guardian urges this Court to grant the petition and to provide Baby Girl and the thousands of other children caught in the middle of this statutory mess with the clarity and certainty they deserve.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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