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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Over half of the states are sharply divided regarding ICWA's application where a non-Indian parent with sole legal custody of a child voluntarily places the child for adoption. Application of *state* law below would have resulted in the adoption of Baby Girl by petitioners. This case affects deeply personal and sovereign choices about parenthood. Because ICWA cases arise in state courts, only this Court can definitively interpret ICWA. *See Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. ___ (2012) (per curiam), slip op. at 1. Respondents do not dispute these points.

Respondents instead speculate that one conflict may resolve itself and manufacture non-existent vehicle issues. They also try to distract the Court's attention from the important legal questions presented by attempting to lay blame for this tragedy on everyone except Father, not once acknowledging that he abandoned his unborn daughter and forfeited all parental rights under state law. But we are not asking the Court to lay blame on anyone. This case presents a clean vehicle to resolve two questions at the heart of a federal law that affects fundamental rights of countless individuals in similar custody disputes involving children of Native American descent. The petition asks this Court to decide those vitally important federal issues over which state courts are hopelessly and undeniably split.

ICWA's application below dramatically displaced South Carolina's parentage and custody laws. Father's consent to Baby Girl's adoption is unnecessary because he voluntarily abandoned Mother and Baby Girl emotionally and financially, forfeiting his parental rights. Respondents have it exactly backwards accusing petitioners of adopting Baby Girl by

"adverse possession" (Opp. 10, 33). State law confers on Mother the unilateral right to place her baby with an adoptive home. Pet. 23. ICWA preempted state law *solely* because of race. Had this case arisen in other states, however, ICWA would not have ripped Baby Girl from petitioners. "This case presents these important federal questions as cleanly and dramatically as any case will." GAL Br. 19.

I. THE DIVISION OVER THE EXISTING INDIAN FAMILY DOCTRINE WARRANTS REVIEW

Respondents acknowledge the crisp division among state courts over the application of the existing Indian family doctrine. Opp. 16. At least 37 published decisions in 27 states involving *two-thirds* of the nation's American Indian population have acknowledged the conflict. Pet. 13. State courts and scholars have pleaded for this Court to clarify the application of ICWA in cases like this one. *Id*. 10, 14. Absent this Court's review, the vicissitudes of the split will determine families' destinies depending upon where they live.

1. Respondents are wrong that the conflict might go away. Opp. 1. Before this case, the most recent state supreme court to weigh in *adopted* the doctrine. *In re N.J.*, 221 P.3d 1255 (Nev. 2009). Indiana and Tennessee likewise recently reaffirmed the doctrine. *In re Adoption of D.C.*, 928 N.E.2d 602 (Ind. Ct. App. 2010); *In re K.L.D.R.*, No. M2008-00897-COA-R3PT, 2009 WL 1138130 (Tenn. Ct. App. Apr. 27, 2009). In the past two decades, only one state appellate court has reversed course and rejected the existing Indian family doctrine. *In re A.J.S.*, 204 P.3d 543 (Kan. 2009). Only one state statute overturning the doc-

trine was enacted in the last five years (Opp. 16 n.7), and each state statute *preceded* Nevada's recent embrace of the doctrine. Respondents heavily quote from one law review article predicting the doctrine's future decline. *Id.* 17-18. But those "scholars" (*id.* 17) are a law student and an Indian law attorney who tout their Native American affiliations in their author biographies. Preeminent adoption expert Professor Joan Hollinger advises that "courts remain sharply divided on this issue, and will continue to struggle with the question until it is definitively resolved by this Court." Hollinger *Amici* Br. 12.

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989), cited by respondents (Opp. 17), is the extreme opposite of this case. *Holyfield* held that an Indian child's domicile for tribal jurisdiction under Section 1911(a) was not defeated by the parents' temporary removal of the child at birth from the reservation. Here, Father's abandonment severed any possible Tribal connection with Baby Girl. Thus, courts repeatedly have held that *Holyfield* addresses *preserving* tribal connections and fully comports with the existing Indian family doctrine. *E.g.*, *Rye v. Weasel*, 934 S.W.2d 257, 262-63 (Ky. 1996) (collecting cases); *Crystal R. v. Superior Ct.*, 69 Cal. Rptr. 2d 414, 426 (Cal. Ct. App. 1997) (same). Seven states have applied the doctrine after *Holyfield*. Pet. 12. The entrenched conflict will not magically disappear.

2. There are no impediments to certiorari. The decision below definitively held: "[W]e take this opportunity to reject the 'Existing Indian Family' doctrine"; "In so holding, we join the majority of our sister states." Pet. App. 17a-18a n.17. This Court reviews an issue not pressed below "so long as it has been passed upon." *United States v. Williams*, 504

U.S. 36, 41 (1992). "It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided." *Cohen v. Cowles Media Co.,* 501 U.S. 663, 667 (1991).

It rings hollow for respondents to oppose certiorari on waiver grounds after *respondents* extensively pressed the state supreme court to address the existing Indian family doctrine, expressly recognizing that the doctrine was outcome determinative. Cherokee Nation Br. 11-17 (S.C.); *id*. 17 ("Cherokee Nation has a real and vital interest in Baby Girl that can *only* be protected if this Court correctly chooses to not adopt the 'existing Indian family' doctrine . . . . Therefore, this Court *should affirm* the Family Court's decision to reject the antiquated 'existing Indian family' doctrine.") (emphases added); Birth Father Br. 39 (S.C.) (adopting Tribe's arguments). And petitioners argued that ICWA's "stated policy is to avoid breaking up Indian Families by removing children from their homes . . . . This policy is inapplicable here in that there was no family to break up." Appellants' Opening Br. 21 (S.C.).

3. No further factual inquiry is needed. Respondents acknowledge that the doctrine precludes ICWA's application when the child would not be raised in an Indian environment "absent application of ICWA." Opp. 15; *accord id.* 18 n.9; *In re N.J.*, 221 P.3d at 1264 (doctrine applies when "there is no existing Native American family, meaning the child is not, and never was, part of a Native American family or tribe"). That is this case: Baby Girl's non-Indian mother voluntarily placed her for adoption after Father abandoned them both, thereby severing any possible tribal connection to Baby Girl. Pet. App. 4a.

The Family Court erred in stating in dicta that there was an existing Indian family based on *Father's* connection to his Tribe. Opp. 15; Pet. App. 118a. The existing Indian family doctrine is determined *status quo ante* with respect to the *child*—in respondents' words, whether the child would be raised by an Indian family "absent application of ICWA." Opp. 15; Pet. 24-26. Again, respondents present the issue backwards by asserting that petitioners seek removal of an Indian child from an Indian family. Opp. 22-23. *Every* state embracing the doctrine would not apply ICWA here because Father's conduct prevented the formation of an Indian family. Pet. 14.

Respondents also misleadingly suggest this case turns on "unique facts." Opp. 32. It does not. The questions presented turn on the undisputed points that under state law Father abandoned his child and has no parental rights, making his consent to the adoption unnecessary. The dissent uttered the word "unique" only to express that Father's actions were so "unique[ly]" deplorable that his rights should have been terminated *even under ICWA*. Pet. App. 42a.[1]

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[1] Petitioners pause to correct other misstatements. The petition draws overwhelmingly from the majority, not the dissent (Opp. 4). As to Father's supposed attempts to reconcile with Mother during her pregnancy (Opp. 5-6), the majority stated that "Father did not make any meaningful attempts to contact her," Pet. App. 4a, and "Father was aware of Mother's expected due date, but made no attempt to contact or support Mother directly in the months following Baby Girl's birth," *id*. 8a. Petitioners never "conceal[ed]" (Opp. 6) Baby Girl's ethnicity. Mother's attorney contacted the Tribe to determine Father's Cherokee status. Pet. App. 6a. *Father* filed documents stating that neither he nor Baby Girl was Indian. *Id.* 9a. Mother *accurately* reported Baby Girl's ethnicity as "Hispanic" on the birth form. Opp. 7. Baby Girl is 1/2 Hispanic and 1/16 Chero-

II. THE UNSETTLED MEANING OF "PARENT" WARRANTS REVIEW

States are squarely divided over whether Section 1903(9) requires unwed fathers to comply with state paternity laws to invoke parental rights under ICWA. Pet. 15. *Compare Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. Ct. App. 1995) ("Congress intended to have the issue of acknowledgment or establishment of paternity determined by state law."), *with Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011) (applying ICWA "even though Bruce did not comply with the Alaska legitimation statute"). The state supreme court did not apply state law to determine whether Father had parental rights, instead reading ICWA to create rights that had been forfeited under state law. Pet. App. 21a-22a.

Respondents stake out positions on *both sides* of the split. At one point they assert that "[*e*]*very* state court of last resort . . . has invoked state procedures for acknowledging and establishing paternity." Opp. 26. That is incorrect. Pet. 16-17. Four pages later, respondents abruptly reverse course, arguing "ICWA's definition of 'parent' does *not* mandate compliance with state definitions of paternity for unwed fathers." Opp. 30 (emphasis added). Respondents cannot have it both ways.

Again, the split is cleanly presented. The state supreme court rejected petitioners' argument that "ICWA defers to state law" on the steps an unwed father must undertake to have parental rights. Pet. App. 21a-22a; *id*. 12a (court's second question pre-

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kee. Respondents' insistence that Baby Girl is *only* Cherokee highlights their singular focus on bloodline.

sented). The court recognized that ICWA's displacement of state law was dispositive, explaining that "[u]nder state law, Father's consent to the adoption would not have been required." *Id*. 21a-22a n.19. In other words, absent ICWA, state law would have terminated his parental rights without further inquiry. *Id*. 58a (Kittredge, J., dissenting). The court deemed state law irrelevant because it construed ICWA to require only a biological link to the child. *Id*. 21a-22a. Compliance with the state DNA statute that respondents trumpet (Opp. 27) merely confirms that Father is the biological father, a point not disputed. But Congress did not create parental and custodial rights that unwed biological fathers do not have under state law. Pet. 22.

Respondents assert that petitioners failed to address ICWA's adoptive placement provision, 25 U.S.C. § 1915(a), which in respondents' view would block the adoption. Opp. 29-30. But no party other than Father and petitioners sought custody of Baby Girl, making Section 1915(a) irrelevant. Pet. 15 n.2. In short, if Father is not a parent under Section 1903(9), he may not invoke Section 1912(f), and state law controls. Pet. 21-24.

III. THE DECISION BELOW IS WRONG

Review is warranted independent of the merits of the decision below, given the split and the important and recurring nature of the questions presented. But in any event, the decision below is wrong. ICWA does not apply here. If it did, the law would be unconstitutional.

1. Respondents assert that "ICWA's ultimate applicability" turns "on Baby Girl's undisputed status as an 'Indian child.'" Opp. 25, 29. But the adoption

was blocked by ICWA's *parental* termination provision, 25 U.S.C. § 1912(f). Pet. 15 n.2. Father's ability to invoke *that* provision turns entirely on his parental status under Section 1903(9). "[E]ven if Baby [Girl] is an Indian child, [Father's] challenge under the Act fails" because he is not a "parent" under ICWA. *In re Adoption of Child of Indian Heritage*, 543 A.2d 925, 935-36 (N.J. 1988). Likewise, regardless of Baby Girl's status, under the existing Indian family doctrine, Father may not invoke Section 1912(f) because that provision requires a break of "*continued* custody." Pet. 25.

Respondents observe that limiting Section 1912(f) to cases where parents had "physical custody" would exclude unwed fathers who are parents under state law but lack physical custody. Opp. 21 & n.11. We agree that "custody" refers to legal custody under state law. But that observation hardly helps Father. He has no claim to physical *or* legal custody; state law gave Mother sole custody by default. S.C. Code § 63-17-20(B).

2. Principles of constitutional avoidance require reversal. Pet. 26. Father's conduct severed any connection that might otherwise have existed between Baby Girl and tribal interests. In granting Father custody over Baby Girl long after her adoptive placement, the court below applied ICWA based on race and race alone. That application of ICWA violates fundamental guarantees of equal protection and due process. And contrary to respondents' suggestion (Opp. 24), an argument in favor of statutory interpretation cannot be waived.

Properly applied, ICWA ensures that "where possible," an Indian child should not be "involuntarily separated" from an Indian community. *Holyfield*,

490 U.S. at 34, 37. Application here far exceeds any legitimate safeguarding of *existing* tribal relationships and unconstitutionally elevates race as dispositive in adoption proceedings. The decision below perniciously allowed race to trump a child's best interests and the fundamental rights of Mother and petitioners. And the decision offends Tenth Amendment principles by leaving states powerless to protect their most vulnerable citizens.

IV. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING

Thousands of Indian children are born to unwed, mixed-race parents annually, and that rate is increasing. Pet. 18-19. The decision below sends a chilling message to those who might wish to adopt a child with Native American ancestry. Petitioners, after seven failed attempts at in-vitro fertilization, relied on Father's forfeiture of parental rights under state law, only to learn long after the adoptive placement that race alone triggered application of ICWA. If that is the correct interpretation of federal law, then would-be adoptive parents are entitled to a clear pronouncement from this Court that applies even-handedly across all fifty states. Moreover:

- Because ICWA trumps the "best-interest-of-the-child" test in all adoption proceedings involving an Indian child, this case "implicates both respondent Baby Girl's most fundamental rights and constitutional concerns of the highest order." GAL Br. 7.[2]

[2] The Family Court, not petitioners, appointed the Guardian *Ad Litem* to represent Baby Girl's interests. S.C. Code § 63-3-810 & 830; *id*. § 63-11-530(C). Because Baby Girl was a party

- Baby Girl's birth mother explains that, absent a decision from this Court, "birth mothers will continue to face intolerable uncertainty when making one of the most personal and important decisions in their lives." Birth Mother *Amica* Br. 7.
- The California State Association of Counties and the County Welfare Directors Association of California explain that their "responsibility for protecting juvenile dependent children with Indian ancestry has become increasingly challenging . . . and unnecessarily difficult due to confusion created by conflicting judicial interpretations of the ICWA requirements." CSAC *Amici* Br. 3. California represents our Nation's largest Indian population. *Id.*
- Adoption expert Joan Hollinger, the Center for Adoption Policy, the National Association of Counsel for Children, and Advokids concur that the current legal uncertainty "makes prospective parents less likely to pursue adoption" of Indian children. Hollinger *Amici* Br. 19.
- The American Academy of Adoption Attorneys stresses that the decision below enables men to "refuse to assume legal or financial responsibility for a fetus or child" while still invoking ICWA "to manipulate the mother['s] adoption decision." AAAA *Amicus* Br. 2, 11.
- The National Council for Adoption states that the split of authority allows "unstable and

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below, her guardian is a party in this Court. Sup. Ct. R. 12.6; *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

> unpredictable" outcomes that jeopardize "a child's right to a permanent, loving family [that] provides developmentally necessary healthy attachment through consistent caretakers." NCFA *Amicus* Br. 2-3.

Respondents weakly offer that "decisions in the Westlaw database" suggest that this case is unworthy of the Court's attention. Opp. 19. But (as respondents ultimately concede) Westlaw captures a miniscule fraction of family law orders, which are usually under seal and almost never published. And parties are exceedingly unlikely to appeal family court decisions where the law is firmly established. Westlaw also does not report the uncertainties that local governments, adoption agencies, and lawyers face in applying ICWA in the recurring fact pattern of this case. Likewise, Westlaw does not report a mother's decision whether to terminate her pregnancy, a couple's decision whether to adopt an Indian child, or ICWA's enduring impact on the lives of Indian children.

* * *

We respectfully submit that it is not necessary to invite the views of the United States. Respondents, including Baby Girl, are represented by able and experienced Supreme Court counsel, and the government may file at the merits stage. Time is of the essence for Baby Girl, not to mention all children and families who are impacted by the decision below. If certiorari is granted now, the case may be argued and decided this Term. But if the Court calls for the Solicitor General's views and ultimately grants certiorari, an additional year may pass before the case is decided. It is impossible to overstate the importance of that year in the life of Baby Girl, and the families

involved, if this Court concludes that the decision below is wrong.

Regardless of the government's views, certiorari is clearly warranted. Only this Court can resolve the conflicting interpretations of ICWA. Baby Girl and countless children similarly uprooted by ICWA's misapplication deserve resolution sooner rather than later. This Court's review will spare families and courts the costs and heartache of litigating hundreds, if not thousands, of custody proceedings. And a definitive pronouncement will promote voluntary adoptions of abandoned Native American children.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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