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 Writ of Certiorari to the South Carolina Supreme Court

REPLY BRIEF FOR GUARDIAN AD LITEM, AS REPRESENTATIVE OF RESPONDENT BABY GIRL, SUPPORTING REVERSAL

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Birth Father ("Father") and the Tribe make much of the conceded fact that Baby Girl is an "Indian child" under ICWA. But it is equally incontestable that that is so only because of her race—or "biolog[y]" to use ICWA's terminology. Baby Girl has no other connection to the Tribe beyond a biological link to a man who abandoned her and who is wholly without constitutional or state-law parental rights. Neither of her birth parents was a resident of or domiciled on a reservation. Baby Girl's sole link to any tribe is her 3/256ths of Cherokee blood. The central question in this case is whether that is enough to work a Copernican shift in the relationship between the parties. No one disputes that if ICWA does not apply, Baby Girl is entitled to a custody determination that focuses on *her* best interests. Yet according to the courts below and respondents supporting their judgment, under ICWA that inquiry is entirely irrelevant; she must be separated from the only family she ever knew absent a showing "beyond a reasonable doubt" that Father would inflict "serious emotional or physical damage to the child." 25 U.S.C. § 1912(f).

If ICWA really imposed those draconian consequences on Baby Girl solely because of her race, it would be plainly unconstitutional. Those supporting the judgment below attempt to defend ICWA as a political classification subject only to rational basis review. That is certainly true of the jurisdictional provision at issue in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), and may well be true of ICWA's application to those

domiciled on reservations, but it cannot be true in a case like this when the only basis for ICWA's obliteration of Baby Girl's state-law and constitutional rights is her 3/256th quantum of Cherokee blood.

Fortunately, there is a saving construction that avoids all these constitutional difficulties. Indeed, any fair reading of ICWA makes clear that it was intended to protect pre-existing Indian families and pre-existing Indian custody, not to override traditional understandings by vesting unwed fathers who had relinquished their parental rights with completely unprecedented powers to change their mind and displace the best interests standard and the constitutional rights of children, like Baby Girl.

I. The Record Makes Clear That Father Abandoned Any State-Law Parental Rights And Cannot Shift The Blame To Birth Mother Or The Guardian

Father goes to great lengths to portray the tragic disruption of Baby Girl's familial bonds as resulting not from the lower courts' application of ICWA, but from procedural missteps attributable to everyone except Father. Father's narrative is demonstrably false, but it is also irrelevant. Nothing in this effort to shift blame changes two irrefutable facts: 1) Father voluntarily relinquished his parental rights (via text and subsequent actions and inactions) under state law, and so, but for ICWA, he would have no parental rights whatsoever and no basis to interfere with Baby Girl's best interests, and 2) the one party who everyone agrees bears no responsibility for any

procedural missteps, misspellings or confusion is Baby Girl.

A. Father's Testimony and Admitted Conduct Establish Beyond Doubt That Father Intentionally Abandoned Baby Girl and Had No Legally Recognized Relationship to Her at the Time of the Adoption Proceedings

It is uncontested that in no uncertain terms, Father told six-months pregnant Birth Mother ("Mother") that he wanted to "give up" his parental rights rather than provide any financial support for the pregnancy or for Baby Girl after she was born. Pet.App.45a, 89a. Father's own testimony establishes that from that moment forward, he made no attempt to inquire about the pregnancy, the birth, or Baby Girl's well-being or whereabouts. Pet.App.48a; R.O.A.514; Tr.532, 547. And when, four months after Baby Girl's birth, he was served with papers that he believed would officially terminate his parental rights and leave Mother as Baby Girl's sole legal parent, he signed them, explaining that he did so because he did not want to "be responsible in any way for the child support or anything else as far as the child's concerned." Pet.App.46a.

Father now claims that he "mistakenly thought" that he was "agreeing" only that Mother would have "full custody" of Baby Girl similar to his arrangement with his ex-wife regarding his older daughter. Father Br. 8. But when asked by his attorney whether he believed that Mother "would basically have full custody … of this child similar to the arrangement that your ex-wife has with [your older

daughter]," Father replied, "Correct, but *without me there*." Tr.535-36 (emphasis added). Indeed, "without me there" perfectly captures both Father's express relinquishment of his parental rights in June 2009 and his conduct effectuating that abandonment in the seven months that followed.

Father also seeks to blame Mother for failing to seek him out to tell him about the adoptive placement, but he does not contest that state law places full responsibility on the unwed biological father to follow up with the birth mother about the child's status. *See* Mother Br. 6. Notably, there are no allegations that Mother ever deceived Father or that Father faced even the slightest difficulty finding out about the placement. To the contrary, Father concedes that in the seven months following his text message to Mother, *he did not once ask about Baby Girl's well-being or whereabouts*.[1]

Father's efforts to portray the adoptive placement as procedurally flawed likewise are foreclosed by the record. The August 2009 letter that Mother's attorney sent the Tribe inquiring about Baby Girl's status cannot establish any procedural defect in the adoption proceedings, because no law required notification to the Tribe at that point. J.A.5-6. And although Father asserts that Mother misstated Baby Girl's race on the form submitted to

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[1] Although Father's brief suggests "conflicting testimony" on this point, Father Br. 9 n.3, Father testified himself that he made no attempt to inquire about Baby Girl either before or after her birth. Tr.490-92, 525, 532, 547.

Oklahoma to obtain permission for the adoptive placement, the relevant form unequivocally states that Baby Girl has, *inter alia*, "Native American Indian" heritage, and both Oklahoma and South Carolina signed their consent to the adoptive placement on that very form. J.A.28.

Remarkably, the only person who ever misled tribal or state authorities about Baby Girl's Indian heritage was Father, who signed a sworn legal complaint stating that he was *not* Indian and that ICWA was inapplicable. Pet.App.9a; R.O.A.708. Only when the Tribe intervened in the proceedings in March 2010 did either Mother or petitioners have any notice that Baby Girl's adoption might be thwarted because of ICWA. At that point, Baby Girl was over six months old and had been cared for by petitioners as their child her entire life. J.A.44-49.

B. Father's Accusations of Bias by the Guardian Are Baseless and Irrelevant

Father's brief includes a series of baseless and irrelevant accusations against the Guardian, in an apparent effort to paint her as biased. Father Br. 11-13. As an initial matter, these allegations are just that; they are nothing more than unsubstantiated and contested allegations by Father and his mother specifically intended to discredit the Guardian's report. *See, e.g.*, Tr.625 (Father's counsel explaining that her trial strategy involved attacking the Guardian's credibility). Not a word of that testimony was ever credited by the lower courts. *See, e.g.,* Tr.595-96 (the trial court instructing Father's counsel that "you really do need to move on" from attacking

the Guardian because "She's been appointed. She is the Guardian ad Litem.").

Indeed, these allegations not only were not credited, they were directly rebutted by the Guardian's testimony. *See, e.g.*, Tr.591-92 ("I never ever knew [petitioners] until I had been appointed to this case [in November 2009]."); Tr.626-27 (explaining that she did not initially plan to travel to Oklahoma to visit Father's home because she had already concluded from a background check and phone interviews that the home was safe and she did not want to impose unnecessary costs on Father, who would have to bear her travel expenses); Tr.645-46, 650 (explaining that she described petitioners' home to Father's family only because they asked her); Tr.640-44, 649 (explaining that Father's family described themselves as prayerful people and that she spoke about prayer with them because she could tell it was "a very tough time" for them and she wanted to be "comforting" and "an encouragement" to them); Tr.634, 636 (denying that she made any derogatory statements about Indian dances and "get togethers," and observing that her grandmother was Cherokee and that she's "very proud of that").

In all events, these accusations are wholly irrelevant to the proceedings before this Court—indeed, Father does not suggest otherwise. He concedes that the Guardian was appointed to determine and advocate Baby Girl's best interests, continues to represent Baby Girl before this Court, and has standing to press all of the legal arguments in the Guardian's opening brief. Father Br. 11-13.

Nor does he suggest that his allegations have any bearing on the merits. Father notes, as did the Guardian in her opening brief, that the parties agreed that the trial court would not consider "a provision" in the Guardian's report stating the Guardian's recommendation regarding which custody placement would be in Baby Girl's best interests. Tr.672; *see* Father Br. 13; Guardian Br. 22-23 n.8. But that agreement did not render the factual conclusions (as opposed to recommendations) in the Guardian's report irrelevant. What rendered the conclusions in the report, including those concerning Baby Girl's best interests, irrelevant was the lower court's fundamental misconstruction of ICWA.

* * *

The key takeaway from the record in this case is the indisputable and indeed uncontested fact that, if not for ICWA, Father would have had no standing whatsoever to participate in Baby Girl's adoption proceedings and the adoption would have been finalized as consistent with Baby Girl's best interests. The question before this Court is whether Congress intended to upend that outcome for no reason other than Baby Girl's Indian blood quantum.

II. The Lower Court's Application Of ICWA To Remove Baby Girl From Her Adoptive Home Is A Perversion Of The Act's Text And Purposes

It bears repeating: The record establishes that *every step* of the adoptive placement process complied with applicable law and that, but for ICWA, the focus of the proceedings would have been on Baby Girl and her best interests. Instead, the lower courts held

that under ICWA, Father could assert his tribal membership more than six months after Baby Girl's birth (and more than 9 months after he voluntarily relinquished his rights), and that assertion changed everything. Under this view, ICWA transformed Father from a complete stranger to the adoption proceedings into their only focus. Unless it could be shown beyond a reasonable doubt that bestowing custody on Father would cause "serious emotional or physical damage to the child," ICWA mandated overriding the judgment of her mother and destroying the only family bonds that Baby Girl had ever known. And Baby Girl lost her state-law entitlement to custody proceedings focused on her best interests based on the bare fact that she is 3/256th Indian because of a biological link to a man who, but for ICWA, would have no parental rights. Only the clearest of statutory texts would compel a court to countenance this heart-breaking result and to confront the constitutional questions it would prompt. ICWA does not come close to compelling this heartbreak. Instead, it avoids the problem entirely by presumptively excluding unwed fathers from the Act. Moreover, the provisions applied below clearly contemplate pre-existing custody by an Indian family or Indian custodian. Applying those provisions here perverts the statutory scheme and produces results, including the one sanctioned below, that Congress did not intend and would not countenance.

A. The Statutory Text Establishes That Congress Did Not Intend ICWA to Thwart Baby Girl's Adoption.

The Guardian fully agrees with and incorporates petitioners' thorough rebuttal of Father's efforts to defend the decision below as consistent with the statutory text. Pet. Reply Br. 2-15. But the problems with Father's effort at statutory construction go beyond his inability to explain away statutory terms (*e.g.*, "breakup" and "continued custody"). At a much more fundamental level, Father fails to explain how a statute that presumptively excludes unwed fathers and seeks to avoid the breakup of Indian families could command the result reached below (let alone do so constitutionally).

As explained in petitioners' and the Guardian's opening briefs, Section 1903(9) presumptively excludes unwed fathers. While all other biological parents of an Indian child are "parents" with certain rights under ICWA, an unwed father is excluded unless paternity is "acknowledged or established." Father offers two related principal responses. Both are flawed. First, he suggests that a DNA test has established his paternity. But ICWA pre-dated effective DNA testing and ICWA presumes a biological link and nonetheless presumptively excludes unwed biological fathers. Thus, ICWA clearly requires something more than a DNA test. Father suggests that the something more is just whatever state law requires for paternity, and criticizes petitioners and the Guardian for conflating state-law concepts of paternity and paternal rights. But in the context of ICWA and its allegedly

transformative effect on Father and Baby Girl's relative rights, it is clear that the latter concept is what matters. To be sure, it is possible to read 1903(9) as fundamentally transforming family law and treating as indistinguishable a rapist (who must pay child support if paternity is established) and a committed father who has voluntarily offered not only financial assistance but active parenting support. But it is not remotely plausible to attribute that bizarre intent to Congress when there is a far more plausible reading that comports with traditional notions of family law and ICWA's broader purposes.

The Tribe and Father would like to read ICWA as promoting the interests of the Tribes and parents of Indian children *uber alles*. But ICWA is a more modest measure designed to prevent the breakup of existing Indian families. Nothing better illustrates ICWA's more modest focus than Father's tortured efforts to fit himself into Sections 1912(d) and 1912(f), the two provisions relied upon by the lower court in transferring Baby Girl's custody. Father's effort to ignore 1912(f)'s reference to "continued custody" is a bridge too far even for the Solicitor General. Gov't Br. 25-26. Especially when read in light of 1912(e) and its identical reference to "continued custody," it is clear that both provisions establish standards that must be satisfied before removing a child from pre-existing custody with a "clear and convincing" standard when the removal is temporary (i.e., for foster care) and a "beyond a reasonable doubt" standard when removal is permanent (i.e., for adoption). Neither provision has

any application when there is no pre-existing custody to continue.

Applying Section 1912(d)'s requirement of remedial services "designed to prevent the breakup of the Indian family" when there is no Indian family to breakup is even more nonsensical. As petitioners explain, Father fails to identify any plausible application of this provision to this case. Pet. Reply Br. 7-9. Remedial consequences only underscore 1912(d)'s inapplicability in the absence of pre-existing custody. The Solicitor General seems to envision that the consequence for failing to offer entirely inapposite rehabilitative programs designed to prevent a breakup is to award Father custody he never had. That is a non sequitur. Section 1912(d) clearly envisions pre-existing custody that will continue unless and until counseling efforts are exhausted. Finally, subsections (d), (e) and (f) all need to be read *in pari materia*, and all three are clearly designed to address the breakup of pre-existing families and the discontinuation of pre-existing custody. They are not designed to *create* parental rights for unwed fathers out of whole cloth where none would otherwise exist.[2] The misfit between Section 1912 and someone like Father, with neither pre-existing custody nor any parental rights

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[2] Father and his amici suggest that ICWA was designed to protect against prejudices that favored the traditional nuclear family over extended families. That is true, but irrelevant. As a result of Father's abandonment, Baby Girl was never part of *any* Indian family, extended or otherwise. To trigger 1912(d), an Indian family need not be nuclear, just *existing*.

apart from ICWA, is highlighted by the implications of Father's argument—that he would receive initial permanent custody without a best interests determination. That is an unprecedented result that runs counter to basic principles of family law, which ensure that a child is in the custody of either birth parents who have not voluntarily relinquished their rights or someone in a position to protect the child's best interests. As long as 1912(d) and (f) apply to pre-existing families and pre-existing custody, it is appropriate to require counseling or a heightened showing of harm before a transfer. But to allow someone like Father who has no pre-existing custody and no parental rights whatsoever to obtain permanent custody based only on the absence of proof beyond a reasonable doubt of an imminent threat to safety would be wholly unprecedented. In this regard, it is telling that where ICWA expressly contemplates the return of a child to an Indian parent after a break in custody (*e.g.*, if adoptive parents terminate their parental rights), the relevant standard is "the best interests of the child." 25 U.S.C. § 1916(a).[3]

Finally, the Tribe suggests that 1915(a) is a trump card that will frustrate this adoption even if Father's 1912 arguments fail. But 1915(a) is

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[3] Congress' express incorporation of the best interests standard in 1916(a) is also a complete answer to the spurious argument that 1912(f)'s extreme standard reflects Congress' view that it is always in a child's best interest to be placed in the custody of an Indian custodian, even when there is no pre-existing custody and no parental rights outside ICWA.

inapplicable here. It applies only to adoptive placements, and gives preferences to (1) the child's extended family; (2) other members of the tribe; or (3) "other Indian families." 25 U.S.C. § 1915. Father's theory, accepted by the Court below, is not that he should be allowed to adopt Baby Girl, but that ICWA gives him an entitlement to custody as the Father. As a consequence, Father was the only potential Indian custodian offered, and he fits into none of the three enumerated categories.

Of course, if 1915(a) were applicable here, its constitutional difficulties would be front and center. Most obviously, 1915(a)(3)'s preference for "other Indian families" from different tribes cannot be understood as anything but a stark racial preference. Indeed, it is telling that the Solicitor General omits 1915(a)(3) from an otherwise comprehensive discussion of 1915(a). Gov't Br. 30-31.

B. The Act's Purposes Establish That Congress Did Not Intend ICWA to Thwart Baby Girl's Adoption

The mismatch between Congress' purposes in enacting ICWA and the application of ICWA to remove Baby Girl from her adoptive home could not be starker. As *Holyfield* observes, ICWA "was the product of rising concern in the mid-1970s over … abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes." 490 U.S. at 32. But Father's failure to establish a parental relationship with Baby Girl was not the product of any abusive child welfare practices, but his own actions and inactions. Baby Girl's Hispanic mother had sole

custody of Baby Girl and unilateral authority to place her for adoption with petitioners because Father voluntarily abandoned Baby Girl and, under both state law and the Constitution, an unwed biological father's abandonment of his child deprives him of any parental claim to that child, regardless of his race or ancestry. Nothing in the text or purposes of ICWA purports to vest new federal parental rights in someone with no rights whatsoever under state law.

Nor would finalizing Baby Girl's adoption by petitioners remotely implicate the concerns outlined in *Holyfield* regarding the "serious adjustment problems" faced by Indian children raised in "white society." 490 U.S. at 33 & n.1. Due to Father's voluntary relinquishment of rights, petitioners were the only family Baby Girl ever knew and any serious adjustment problems would result from a transfer of custody to Father, even though the statute gives absolutely no consideration to such adjustment problems. *But cf.* 25 U.S.C. § 1916(a).

No one really disputes this; instead they choose to defend the lower court's application of ICWA to Baby Girl primarily on the ground that the custody transfer is consistent with Congress' statement that children are a vital "resource" for ensuring the tribes' continued existence. But that goes to the heart of this case and what distinguishes it from *Holyfield*. It is no mere detail that *Holyfield* involved birth parents and children domiciled on a reservation while this case does not. While the former situation implicates Congress' expressed concerns with the removal of children from Indian families and the depopulation of reservations, nothing in ICWA

supports the rather chilling prospect of gathering in children with a trace of Indian blood but no other connection to the tribe or reservation and transferring them to Indian custody without a best interests determination. Respondents' argument to the contrary "distorts the delicate balance between individual rights and group rights recognized by the ICWA," *Holyfield*, 490 U.S. at 55 (Stevens, J., dissenting), and as discussed next, needlessly puts the Act on a collision course with Baby Girl's constitutional rights.

III. The Lower Court's Interpretation And Application Of ICWA To Remove Baby Girl From Her Adoptive Home Must Be Rejected On Constitutional Avoidance Grounds

This is a classic case for application of constitutional avoidance principles. ICWA generally, and the provisions relied on by the courts below in particular, do not squarely apply where a biological father has neither pre-existing custody nor any parental rights under state law. And the constitutional consequences of the competing interpretations are dramatically different. Under petitioners' view, ICWA accomplishes exactly what Congress declared as its purpose: It establishes "minimum Federal standards for the removal of Indian children from their families." Under the competing view, ICWA engenders all manner of constitutional difficulties: Based on nothing more than her Indian blood quantum, it deprives Baby Girl of her most fundamental liberty interests—and more concretely, the only family she ever knew—without the benefit of a best interests determination or any

other inquiry focused on her interests, as opposed to those of a man who was a physical and legal stranger due to his intentional abandonment of her before her birth.

Those supporting the judgment below suggest that ICWA works only a political classification, and properly interpreted that may be so. But as applied here, ICWA would deprive Baby Girl of fundamental liberty interests based on race and race alone. Respondents would also deny Baby Girl any liberty interest entitled to constitutional protection whatsoever. That cannot be right. Whatever the scope of a child's liberty interest, it surely extends to provide at least some minimal protection before she loses the only family connection she has ever known.

A. The Lower Court's Interpretation and Application of ICWA Violated Baby Girl's Equal Protection Rights

Respondents and the government cannot deny that but for her 3/256th of Cherokee blood, Baby Girl would have been entitled to adoption proceedings focused on *her* best interests. Nonetheless, they defend ICWA as a mere political classification subject only to rational basis review. That argument ignores the text of ICWA, the nature of tribal membership requirements, and the reality that Baby Girl had no connection other than biology to any tribe.

As to text, ICWA does not rely solely on tribal membership or eligibility for membership. Its definition of "Indian child" is expressly based on biology. It includes both tribal members and a child who "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) (emphasis added). Thus, by its terms, ICWA would not apply to an *adopted* child of an Indian couple who was not yet a tribal member. It is not clear how this can be understood as anything other than a racial classification.

The Tribe's own membership criteria further underscore that eligibility for tribal membership itself functions as a racial proxy: It is racial heritage, and racial heritage alone, that determines eligibility for such membership. *See Rice v. Cayetano*, 528 U.S. 495, 514 (2000) ("Ancestry can be a proxy for race. It is that proxy here."). Indeed, a number of tribes, including the Cherokee Nation, automatically deem individuals to be tribal members if they satisfy blood quantum requirements. J.A.35-36 (Baby Girl was "automatically admitted as a member of the Cherokee Nation" for the first 240 days of her life); Navajo Nation Br. 10 ("The Navajo Nation's laws provide automatic membership to individuals—including children—who are at least one-quarter Navajo."). While some people with Indian heritage are excluded from tribal membership because they do not have a sufficient blood quantum to meet a particular tribe's enrollment requirements, "a class defined by ancestry" is not race-neutral simply because it "does not include all members of [the] race." *Rice*, 528 U.S. at 516-17.

Of course, tribal classifications can be political classifications subject to rational basis review, but only when the differential treatment is legitimately tied to tribal self-government. *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974). There is thus a critical

difference between a hiring preference limited to the Bureau of Indian Affairs and one that applies government-wide, *id.* at 553-54, and between the application of ICWA's jurisdictional provision in *Holyfield* and ICWA's substantive application here based on nothing beyond biology. And the threshold question—whether a classification is racial or political—is certainly not subject to deferential rational basis review. Racial classifications are far too dangerous for any classification that can rationally be described as a political classification to escape meaningful judicial scrutiny. If a classification does not serve political purposes, then it is not political—it is a racial classification subject to strict scrutiny under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). *See Williams v. Babbitt*, 115 F.3d 657, 664-65 (9th Cir. 1997) (discussing the "logical implications of *Adarand*" for determining whether an Indian preference passes constitutional muster). To hold otherwise would render the Equal Protection Clause meaningless for Baby Girl and others like her: By respondents' account, so long as the differential treatment of Baby Girl by the government is based on her tribal membership—a membership conferred on her automatically based solely on her race—neither she nor anyone else has equal protection rights to invoke.

The key to distinguishing between tribal classifications that operate as political distinctions and those that operate as racial classifications is whether there is a clear link to Indian self-government and sovereignty. Thus, for example, laws that treat Indian lands differently based on the unique implications of Indian land for state

regulatory authority are understood as political classifications, *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979), while those that simply confer advantages on tribes or tribal members more broadly should trigger strict scrutiny, *Williams*, 115 F.3d at 663-65. It is thus one thing for ICWA to protect the jurisdiction of tribal courts or to prevent the removal of children who are domiciled on Indian lands, but quite another for ICWA to impose special disabilities on children with no connection to a tribe beyond biology and to give special benefits to a tribal member who has no parental rights whatsoever outside of ICWA.

Indeed, ICWA itself seems to recognize this distinction as it preserves emergency removal authority for "an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation." 25 U.S.C. § 1922. There is no comparable preservation of authority for children permanently domiciled off the reservation. Congress could not be indifferent to those children. The most logical explanation for this omission is that Congress did not anticipate that ICWA would apply to children, like Baby Girl, who are permanently domiciled off the reservation in the sole custody of a non-Indian mother where the only connection between the child and the tribe is a birth father who has voluntarily relinquished his parental rights.

The lack of any connection between Baby Girl and tribal lands or legitimate interests in sovereignty is glaring. Baby Girl was not enrolled in any Indian tribe by her parents nor was she domiciled on a reservation. Baby Girl did not even have a legally

recognized Indian parent. Having been abandoned by Father before birth, Baby Girl had only one legal parent—a Hispanic single mother who indisputably had sole legal and physical custody of Baby Girl and unilateral parental authority under state law and the Constitution to place Baby Girl for adoption with petitioners. Baby Girl had no political, cultural, or social affiliation with any Indian tribe. She was subjected to differential treatment in her custody proceedings solely because the lower court identified her as having a 3/256th quantum of Cherokee blood that she inherited from Father and that the Tribe deemed sufficient for membership.

Respondents nonetheless perceive a link to concerns about tribal sovereignty because the transfer of Baby Girl's custody to Father served the political purpose of increasing the Tribe's active membership. But it is one thing for Congress to impose minimum requirements for the removal of Indian children from Indian lands or from Indian parents, which appears to be Congress' modest and constitutional intent, and quite another to gather in any child with the slightest percentage of Indian blood, but no other connection to the Tribe. To attempt to convert ICWA from the former into the latter based on the tribes' political interest in augmenting their membership fundamentally skews the balance of individual and group rights. *See supra* pp. 14-15. While tribes are certainly free to set their own membership requirements, the notion that they can assert a political claim mandating that such a child be raised by a tribal member "goes well beyond any reasonable limit," *Rice*, 528 U.S. at 527 (Breyer,

J., concurring), and cannot be squared with the most basic equal protection principles.

B. The Lower Court's Interpretation and Application of ICWA Violated Baby Girl's Fundamental Liberty Interests

The differential treatment inflicted on Baby Girl was not a mere hiring preference or a preference in awarding government contracts. By virtue of her 3/256th Indian blood quantum, Baby Girl was at 27 months old removed from the only parents she had ever known. But for ICWA and her race, Baby Girl's adoption indisputably would have been finalized under state law as consistent with her best interests, and those critical family bonds would have become permanent. Instead, she was transferred to a biological father who—based on his own actions and inactions—was in every sense a physical and legal stranger to her. Other than a short phone call the next day, Father never allowed Baby Girl to speak to her adoptive family again. Nor has Baby Girl had any contact with Mother, as she did via Mother's open adoption arrangement with petitioners. It is hard to imagine a more complete deprivation of the only liberty interests of consequence to a 27-month old child.

Although respondents and the government seek to minimize the constitutional dimension of Baby Girl's loss, they cannot seriously contest that Baby Girl had an "intimate human relationship" with petitioners that falls squarely within the category of relationships this Court has held constitutionally safeguarded from undue government intrusion. *See* Guardian Br. 56-57. While there are certainly

situations in which a child's liberty interest will be subordinated to the parent's liberty interest in determining the child's upbringing, *see Reno v. Flores*, 507 U.S. 292, 304 (1993), that is no basis to deny the existence of a protectable liberty interest in the first place. And here, Father's abandonment of Baby Girl unequivocally deprived him of any constitutionally protected interest in Baby Girl, Guardian Br. 32-41, and Mother fully supported Baby Girl's adoption by petitioners. Thus unless Baby Girl's liberty interest is denied entirely, it was neither subordinate to any parental interest nor adequately protected in the proceedings below.

There are also circumstances where the government may and should interfere with a child's familial relationships as a matter of the child's own welfare. But that does not mean the government is free to intervene without regard to the child's liberty interests. To the contrary, the government's intervention is justified by its responsibility to protect the child's liberty interests, and when the government intervenes, the standard for ensuring that government action promotes rather than undermines those interests—going back to the earliest days of the Republic, Guardian Br. 50—is the best interests standard. Thus, when, as here, a statute is applied to deprive a child of her liberty interests without a best interests determination, it raises a serious constitutional question.

The proceedings below did not begin to account for Baby Girl's best interests. Both lower courts were very clear that, consistent with Father's argument, they believed themselves bound under 1912(f) to

transfer Baby Girl's custody to Father in the absence of evidence beyond a reasonable doubt that he was not likely to inflict "serious emotional or physical damage" to her. Pet.App.28a-33a, 122a-123a. It is hard to imagine a standard further removed from the best interests standard. Not only is the focus on Father rather than the child, but his interests are protected by the "beyond a reasonable doubt" standard. Respondents and the government argue improbably that Congress made a global judgment that an Indian child's best interests are served by transfer to an Indian father. But as already noted, *see supra* p. 12, Congress knew how to incorporate the "best interests" standard and did so in the one place it contemplated the possibility of transferring custody to an Indian custodian who did not have pre-existing custody. *See* 25 U.S.C. § 1916(a). And the whole point of the best interests standard is to consider the individualized circumstances of a particular child. A one-size-fits-all federal presumption is no substitute.

Respondents' appeal to the lower court's discussion of Baby Girl's best interests fails for the same reason. As the dissenting justices observed, the majority did not make any effort to determine Baby Girl's individual best interests, but simply declared that as an "Indian child," Baby Girl's best interests were automatically aligned with the interests of Father and the Tribe. Pet.App.28a-37a, 54a-55a. Whatever force this presumption might have when applied to children who have meaningful tribal connections, it flew in the face of Baby Girl's reality and cannot pass constitutional muster.

It is hard to grasp the loss felt by a 27-month-old who abruptly loses her parents. While there will always be circumstances where the removal of a child from her home is unavoidable or necessary, the Constitution surely protects children from the arbitrary infliction of such loss by the government, particularly on the basis of race. Baby Girl was taken from the only parents she had ever known and handed to a legal and physical stranger. In place of a determination focused on Baby Girl and her best interests, the courts below did nothing more than find the absence of evidence beyond a reasonable doubt that serious physical or emotional damage was likely. And the sole reason Baby Girl was singled out for this dramatically unfavorable treatment was a fraction of Indian blood that the Tribe deemed sufficient to assert an interest in having her raised by a tribal member. This tragedy was neither mandated by ICWA nor permitted by the Constitution. To hold otherwise would deem Baby Girl little more than chattel, a "resource" to be gathered up by the Tribe rather than a human being with individual interests and emotional commitments that transcend her racial make-up. ICWA was enacted to stop the unconscionable destruction of tribal communities by child welfare authorities who did not value the families they disintegrated. It should not be construed to sanction the unconscionable destruction of families. The decision below must be reversed.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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