No. 13A115

In the

Supreme Court of the United States

BIRTH FATHER and CHEROKEE NATION,
Applicants,

v.

ADOPTIVE COUPLE and BABY GIRL, a minor child under the age of fourteen years,
Respondents.

ADOPTIVE COUPLE'S RESPONSE TO STAY APPLICATION

To the Honorable John G. Roberts, Chief Justice of the United States:

Following remand from this Court to the South Carolina Supreme Court, the state court held "upon review of the record, that the adoption of Baby Girl by Adoptive Couple is in the best interests of Baby Girl," and the court accordingly ordered the family court to finalize the adoption. July 24 Order at 2. The South Carolina Supreme Court denied Birth Father's and the Cherokee Nation's request for a stay on July 24, 2013, and Birth Father and the Tribe subsequently filed their stay application in this Court. Dkt. No. 13A115. Adoptive Couple respectfully submits this response.

1. On June 25, 2013, this Court reversed the judgment of the South Carolina Supreme Court and held that because Birth Father "had never had legal or physical custody of Baby Girl," the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963, did not "require[] [Baby Girl] to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father,

who had attempted to relinquish his parental rights and who had no prior contact with the child." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2556, 2562 (2013). The Court stated that it was "undisputed" that, absent the misapplication of ICWA, "[Birth] Father would have had no right to object to [Baby Girl's] adoption under South Carolina law." *Id.* at 2559 (citing *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 644 n.19 (S.C. 2012), and Birth Father's admission at oral argument, Oral Arg. Tr. 49). This Court remanded the case to the South Carolina Supreme Court for further proceedings. At the request of Adoptive Couple, Justice Alito expedited the mandate, which issued on July 5, 2013. Dkt. No. 13A7.

2. On remand, the South Carolina Supreme Court considered lengthy submissions by all parties, including a detailed transition plan submitted by Adoptive Couple (Exhibit A) and reviewed and approved by Baby Girl's duly appointed Guardian *ad Litem* (GAL). The state court ordered that Baby Girl's adoption be finalized as a matter of South Carolina law. The court held that Birth Father's parental rights, "if any," must be terminated as a matter of state law, and that, as a result, "nothing would be accomplished by a *de novo* hearing in the Family Court, except further delay and heartache for all involved—especially Baby Girl." July 17 Order at 2; *id.* at 4-5 (analysis of state law). The state court also rejected Birth Father's reliance on 25 U.S.C. § 1915(a) to block Baby Girl's adoption by Adoptive Couple, holding that "[b]ecause no other party has sought adoptive placement in this action, § 1915 has no application in concluding this matter, nor may that section be invoked at the midnight hour to further delay the resolution of

this case." July 17 Order at 3-4. The state court noted that "Birth Mother's consent is the only consent required under" state law to finalize the adoption, and that Birth Mother expressed her intent to "revoke her consent to the adoption of Baby Girl by any other prospective adoptive parents." *Id.* at 5 n.6.

3. On July 22, 2013, Birth Father and the Tribe sought rehearing and a stay. They argued that an *ex parte* Cherokee tribal court order, entered on July 17, that purports to grant temporary guardianship of Baby Girl to Birth Father's wife and parents—a secret order reveled for the first time in the petition for rehearing—constitutes a new "impediment to the finalization of the adoption of Baby Girl" because the tribal court order purportedly transformed Paternal Grandfather into an "Indian custodian" entitled to the full panoply of ICWA rights that this Court held Birth Father lacked. Rehearing Pet. of Cherokee Nation at 3-4 & n.1. They also argued that South Carolina lacked jurisdiction over the case and that the court "overlooked" Baby Girl's best interest.

4. On July 24, 2013, the South Carolina Supreme Court denied rehearing and the request for a stay. The state court observed that Birth Father had filed a motion in South Carolina family court for a "de novo hearing," and the court "reiterate[d] that such a hearing is unavailable in light of th[e] Court's order dated July 17." July 24 Order at 1 n.1. Noting that Birth Father and his family had filed multiple adoption petitions in Oklahoma and Cherokee tribal court, the court held that "[t]his matter was, without objection, placed in the jurisdiction of the South Carolina courts long ago. Jurisdiction remains in South Carolina, notwithstanding

apparent actions filed in other jurisdictions." *Id.* at 1. The court also held that "Birth Father's rights, if any, are determined by the law of the state of South Carolina. . . . While th[e] [2012 decision of the South Carolina Supreme] Court was in error concerning the applicability of ICWA, we have consistently held that under state law, the Birth Father's parental rights (because of his irrefutable lack of support, interest and involvement in the life of Baby Girl) would be terminated." *Id.* (noting that all five state supreme court justices were unanimous on this point of state law). "Therefore, under state law, the Birth Father is precluded from challenging the adoption. Moreover, in light of the urgent need for this matter to be concluded, we determine, *upon review of the record, that the adoption of Baby Girl by the Adoptive Couple is in the best interests of Baby Girl*." *Id.* at 1-2 (emphasis added).

5. The stay application to this Court should be denied. There is no basis for this Court to grant plenary review—let alone "summary reversal," Stay App. 1—of the state court's holding that, in the circumstances of this case, new parties may not use Section 1915(a) "at the midnight hour" to block Baby Girl's adoption by Adoptive Couple. July 17 Order at 4. That holding is correct and would not warrant this Court's review in any event. This Court held that Section 1915(a) is "inapplicable" in this case because "Adoptive Couple was the only party that sought to adopt Baby Girl in the Family Court or the South Carolina Supreme Court." 133 S. Ct. at 2564. Only the dissent suggested that new parties might still be allowed to inject themselves into this custody matter (presumably *in* South Carolina, which

never occurred). 133 S. Ct. at 2585 (Sotomayor, J., dissenting). The Court's opinion explains that the relevant inquiry occurs "as of the time of the adoption proceedings," which has long since passed. *Id.* at 2562. Justice Breyer's concurrence is not to the contrary. Justice Breyer joined the Court's opinion in full, including its holding that Section 1915 was not applicable in *this case*. He raised the question, for future cases "*of this kind*," whether Section 1915 could be used to "allow an absentee father to re-enter the special statutory order of preference with support from the tribe, and subject to a court's consideration of 'good cause.'" 133 S. Ct. at 2571 (Breyer, J., concurring) (emphasis added). But Justice Breyer did not suggest that this was an open question *in this case*, and he joined the majority's holding that Section 1915 is not implicated by this case because—at the relevant time—only Adoptive Couple sought to adopt Baby Girl.

6. Thus, it is irrelevant that Paternal Grandparents expressed their interest in having custody of Baby Girl presumably in the event Birth Father lacked any rights under ICWA. Stay App. 13. This Court explained that the salient fact is that Paternal Grandparents "never sought custody of Baby Girl" and their mere indication of interest was insufficient to trigger Section 1915 at the relevant time. 133 S. Ct. at 2564-65. Birth Father and the Tribe also explain that Birth Father and his wife now have sought to adopt Baby Girl (albeit in a foreign jurisdiction). But to allow new parties to seek custody of Baby Girl many years after the adoption hearing both would be contrary to this Court's holding that ICWA does not bar the finalization of this adoption and would be disastrous to the orderly administration

of child custody proceedings throughout the nation. 133 S. Ct. at 2564-65 (counseling against any interpretation of ICWA that would "unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home" or cause "many prospective adoptive parents [to] surely pause before adopting any child who might possibly qualify as an Indian under the ICWA"). All children deserve swift resolution of placement determinations, and under Applicants' interpretation of ICWA, Indian children could wait in limbo indefinitely through seriatim adoption proceedings by a potentially unlimited number of prospective couples. According to Applicants, all that is required to block a lawful adoption is for one Indian person (of any tribe) willing to raise his hand minutes before a final adoption decree is signed—even if adoption by the couple who has raised the child since birth would otherwise indisputably be in the child's best interest. Finally, allowing Section 1915 to override Birth Mother's selection of Adoptive Couple would resurrect all the due process, equal protection, and federalism concerns that this Court avoided by holding that Section 1915 has no application to this case. Even apart from the constitutional rights of Indian infants and children who are abandoned by their birth fathers, ICWA cannot constitutionally interfere with the profound, life-altering, and perfectly lawful choices made by prospective adoptive parents and birth mothers under state law. That is particularly the case here, where the child has never been domiciled on a reservation, and the child's *only* custodial parent is a non-Indian Latina woman with no connection whatsoever to any tribe.

7. Even if the state court's interpretation of Section 1915 were otherwise suitable for the Court's review, this would not be the case to consider the issue. Birth Mother has consented to an adoption of her child *only* by Adoptive Couple and she has indicated her unequivocal intent to revoke her consent unless this adoption is finalized. In short, no other party may adopt Baby Girl without the *involuntary* termination of her parental rights under ICWA. 25 U.S.C. §§ 1912(d) & (f). Birth Father and the Tribe do not dispute that Birth Mother may revoke her consent to the adoption at any time, and she has vowed to do so if her wishes for Adoptive Couple to raise Baby Girl are not honored. *See* July 17 Order at 5 n.6; 25 U.S.C. § 1913(c) ("In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent."). Nor do Birth Father and the Tribe dispute that Birth Mother's parental rights cannot be terminated without satisfying the heightened standards under Sections 1912(d) and (f). Thus, the competing adoption petitions by other individuals cannot be finalized in this case even if Applicants' interpretation of Section 1915(a) were correct.

8. The stay application does *not* seek review of the state court's determination "upon the record" and "under state law" that finalization of the adoption *is* in Baby Girl's best interest. That holding also presents no federal question. The Court has held that "[i]f the natural father fails to grasp the opportunity to develop a relationship with his child, the Constitution will not

automatically compel a State to listen to his opinion of where the child's best interests lie." *Lehr v. Robertson*, 463 U.S. 256, 263 (1983). And Birth Father would be poorly positioned to press such a claim. No. 12-399 Father Br. 52 ("As for Baby Girl, this Court never has held that the Constitution incorporates a 'best interests of the child' rule."); *id.* at 53 ("[T]he law cannot be applied so as automatically to 'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.'" (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 54 (1989))); *see also* U.S. Br. 32-33.

9. In all events, the South Carolina Supreme Court did not, as Birth Father claims, reach its decision "without any inquiry into Baby Girl's current best interests." Stay App. 7. Again, the court held "upon review of the record, that the adoption of Baby Girl by Adoptive Couple is in the best interests of Baby Girl." July 24 Order at 2. Moreover, Mr. Clement's colloquy with the Court during oral argument in April 2013 is entirely consistent with that result, which was supported by the GAL's recommendations on remand. *See* GAL's Remand Br. 2 (Exhibit B) (finding that the Adoptive Couple's transition plan serves Baby Girl's current best interest). This Court did not order the South Carolina courts to receive new evidence in a best-interest determination under South Carolina law. As Birth Father told the South Carolina Supreme Court, "The majority [of the U.S. Supreme Court] offered no specific direction regarding the conduct of this remand." Birth Father Mot. (July 3, 2013) at 2. "While a mandate is controlling as to matters

within its compass, on the remand a lower court is free as to other issues." *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979).

10. The stay also should be denied because Birth Father has not established irreparable harm, certainly not when all the parties' interests are properly weighed. The most important consideration is the effect of further delay on Baby Girl, who deserves to come home after 19 long months.

11. As a preliminary matter, Birth Father does not speak for Baby Girl. Stay App. 10 (purporting to describe Baby Girl's benefit from a stay). Only the child's GAL speaks for Baby Girl, and the GAL supports the proposed transition plan as serving Baby Girl's current best interests. The GAL told the South Carolina Supreme Court that the transition plan proposed by Adoptive Couple "will serve the best interests of not only Baby Girl, but all parties involved in this case. The Guardian believes that the proposed Plan offers the best opportunity for a smooth transition for Baby Girl while also ensuring that Baby Girl is able to maintain important ties with her biological family and the Cherokee Nation." GAL Remand Br. 2 (Exhibit B). In response, the South Carolina Supreme Court held, "Consistent with their commitment to serve Baby Girl's best interests, and in recognition that the return of Baby Girl to them must be accomplished with her best interest as the controlling consideration, the Adoptive Couple has commendably proposed a thoughtful transition plan." July 24 Order at 2; *see also* July 17 Order at 2 n.3 (acknowledging GAL's brief filed in support of the transition plan).

12. The request for a stay also ignores Baby Girl's obvious and paramount interest in finality and return to her *permanent* home. This Court has recognized repeatedly the importance of a month in a child's life when addressing the need for speedy resolution of custody disputes. *Cf. Chafin v. Chafin*, 133 S. Ct. 1017, 1027 (2013) ("[A] child would lose precious months when she could have been readjusting to life" in her permanent home.). As explained in greater detail below, Birth Father has exploited his current physical control over Baby Girl, which was gained only through a *mistaken application of federal law*. Although Birth Father has no rights under state law, Adoptive Couple's and Birth Mother's repeated requests for visitation have been inexplicably ignored, even well after this Court's decision and the two subsequent unequivocal orders from the South Carolina Supreme Court. (Exhibit C.) Birth Father similarly rebuffed Adoptive Couple's offer to relocate to Oklahoma temporarily to ease Baby Girl's transition. And during the pendency of this case, Birth Father's counsel threatened to seek a restraining order against Adoptive Couple should they telephone or write to inquire about Baby Girl's wellbeing. Because of Birth Father's actions, Adoptive Couple and Birth Mother have not seen or spoken with Baby Girl in nearly 19 months.

13. Birth Father proffers statements attributed to Professor Joan Hollinger published on Slate.com. Stay App. 9-10. But Professor Hollinger has since clarified that those quotations were based on a *misunderstanding* of the South Carolina court's orders—in particular, Professor Hollinger's mistaken impression, in the moments right after the July 17 order was issued, that the South Carolina

Supreme Court had ordered an *immediate physical transfer* of custody, akin to Baby Girl's experience when she was transferred to Birth Father with no transition period:

> "My statements printed on Slate.com—which were then reprinted in Birth Father's stay application dated July 25, 2013—reflected a preliminary understanding of the South Carolina Supreme Court's decision and were based on what I now realize was incomplete information. I have now reviewed the South Carolina Supreme Court's orders in more detail.
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> "I wish to clarify that I have no objection to the finalization of Baby Girl's adoption by the Adoptive Couple under state law, which the South Carolina court determined was in Baby Girl's best interest.
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> "My major concern with the South Carolina court's decision was that I believed the physical (not legal) transfer of Baby Girl to the Adoptive Couple would be abrupt and automatic, as it was last time when she was transferred to the biological father.
>
> "I now understand that the South Carolina Supreme Court did not order the immediate physical transfer of Baby Girl.
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> "I understand that a hearing has been set in South Carolina family court on July 31, 2013, to finalize the adoption and to facilitate an orderly transfer of physical custody. Moreover, I understand that the Adoptive Couple has proposed a very careful and thorough transition plan that is sensitive to Baby Girl's needs and respectful to all parties involved, and that the Adoptive Couple has expressed its commitment to maintaining contact between Baby Girl and members of the biological father's family."

Declaration of Joan H. Hollinger, dated July 29, 2013, ¶¶ 4-8 (Exhibit D).

* * *

A stay by this Court would only embolden Birth Father and the Tribe to continue to fight needlessly and further thrust Baby Girl and the relevant parties into limbo. Regrettably, Birth Father and the Tribe at every turn have responded to this Court's decision by attempting to obstruct the prompt and orderly resolution

of Baby Girl's permanent placement. For example, since this Court's decision, they filed *three* actions outside of South Carolina. *First*, despite this Court's mandate to return the case to *South Carolina*, Birth Father and his new wife inexplicably filed adoption petitions in *Oklahoma* state court, notwithstanding an earlier Oklahoma court decision holding that Oklahoma lacks jurisdiction over this matter—a decision that was not appealed and is therefore "law of the case." *Adoptive Couple*, 398 S.C. at 665 n.42; JA 68-69 (filed in No. 12-399) (Oklahoma order of dismissal). *Second*, Birth Father's parents filed a conditional petition for adoption in *tribal court*, despite the Cherokee Nation's concession that it lacks jurisdiction over this matter because Birth Mother has not consented, and never would consent, to tribal jurisdiction. Trial Tr. 366 (Cherokee Nation official testifying that the case could not and would not be transferred to tribal court over Birth Mother's objection); 25 U.S.C. § 1911(b) (no tribal court jurisdiction if parent of an Indian child objects). *Third*, Birth Father's wife and parents initiated an *ex parte*, sealed action in Cherokee tribal court for "temporary guardianship" of Baby Girl. The Cherokee Nation revealed this secret proceeding for the first time (after the fact) in its petition for rehearing in the South Carolina Supreme Court. The Tribe makes the astounding argument that Adoptive Couple may not adopt Baby Girl because the *ex parte* tribal court order makes Paternal Grandfather a newly-minted "Indian custodian," who may invoke the parental-termination provisions of ICWA that this Court just ruled *do not apply* to Birth Father. One can only wonder how any adoption of an Indian child by non-Indians can ever proceed in the Tribe's view

without being subject to the whims of the Tribe. Neither Baby Girl's duly appointed GAL, Adoptive Couple, nor Baby Girl's Birth Mother were notified of any of these proceedings.[1]

The obstruction does not stop there. Birth Father and the Tribe refuse to abide by the South Carolina court's orders even in South Carolina. In obvious defiance of the South Carolina Supreme Court's explicit and repeated instructions to finalize the adoption without further hearings and delay, Birth Father has filed a series of frivolous and vexatious motions in the Charleston family court. For instance, he asked the family court make a new "thwarted father" finding—an argument rejected by the family court in 2011 and affirmed by the state supreme court in 2012—and he renewed his request for a "de novo best-interest hearing" without even mentioning that the South Carolina Supreme Court's orders explicitly rejected that request as inconsistent with Baby Girl's best interests and the need for finality. Worse still, Birth Father's attorneys have publicly called upon Oklahoma courts to defy the orders of the South Carolina Supreme Court; those same

[1] Once Birth Mother learned through press coverage of the "competing" adoption petitions filed in Oklahoma and tribal court, she immediately retained pro bono local counsel and moved for leave to participate as an *amicus curiae* in the South Carolina Supreme Court. She has since obtained pro bono local counsel in Oklahoma, who has filed motions to dismiss both the Oklahoma and tribal court actions, reiterating that she does not consent to the transfer of this matter to tribal court and that her consent to adoption of Baby Girl is directed at and limited to Adoptive Couple.

attorneys have ominously opined that law enforcement officers may have to enforce the return of Baby Girl to South Carolina.[2]

Perhaps with these events in mind, the South Carolina Supreme Court expressed its "fervent hope that the parties will work together in good faith and place the best interest and welfare of Baby Girl above their own desires." July 24 Order at 2. Adoptive Couple share that hope. Notwithstanding the scorched-earth strategy of obstruction by Birth Father and the Tribe over the past month in multiple jurisdictions, Adoptive Couple remain committed to preserving Birth Father's role in Baby Girl's life after the adoption is finalized. A stay is unnecessary to keep Birth Father engaged in Baby Girl's life. The choice, once again, is his to make.

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[2] *See*, *e.g.*, WMNF 88.5 FM, http://www.wmnf.org/programs/168, at 29:45-30:30 (July 28, 2013) (Birth Father's attorney, John Nichols, in a radio broadcast detailing "strategies" for avoiding enforcement of any order issued in South Carolina, stating his view that Oklahoma does not have to comply with any transfer order, and predicting that "they are gonna try to get full faith and credit, and then perhaps even get law enforcement to try to enforce whatever order may emanate from an Oklahoma state court"); *id.* (Mr. Nichols: "I can tell you right now, if we served a notice of appeal from the family court, if we did that, our court would dismiss that appeal and issue a very stern warning to us, so I don't see that as an option."); Michael Overall, *Coming Monday: Family Court Hearing in South Carolina Set for Wednesday over Baby Veronica*, Tulsa World (July 28, 2013), http://tinyurl.com/n9263fe (discussing legal strategy to avoid transition and for Veronica to remain in Oklahoma); Andrew Knapp, *Jurisdiction Questions in Baby Veronica Case Likely to Prompt Delays, Appeals to Custody Switch*, The Post & Courier (July 23, 2013), http://tinyurl.com/m38eh7y (Birth Father's attorney, Shannon Jones, quoted as saying "any ruling issued by [the South Carolina court] is not a valid ruling").

Wherefore, Adoptive Couple respectfully request that the application for a stay be denied.

July 30, 2013

Respectfully submitted,

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