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

BRIEF OF *AMICUS CURIAE* AMERICAN ACADEMY OF ADOPTION ATTORNEYS IN SUPPORT OF WRIT OF CERTIORARI

MARY BECK
UNIVERSITY OF MISSOURI SCHOOL OF LAW
104 Hulston Hall
Columbia, MO 65211
(573) 882-7274

PHILLIP J. MCCARTHY, JR.
Counsel of Record
MCCARTHY WESTON PLLC
508 N. Humphreys St.
Flagstaff, AZ 86001
(916) 779-4252
jay@mccarthyweston.com

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF THE *AMICUS CURIAE*

The American Academy of Adoption Attorneys (Academy) is a not-for-profit organization of attorneys, judges and law professors throughout the United States and Canada, who have distinguished themselves in the field of adoption law and who are dedicated to the highest standards of practice.[1] The more than three hundred members of the Academy are versed in the complexities of adoption law. The Academy's mission is to support the rights of children to live in safe, permanent homes with loving families, to protect the interests of all parties to adoptions, and to assist in the orderly and legal process of adoption. The Academy's work includes promoting the reform of adoption laws and disseminating information on ethical adoption practices. The Academy regularly conducts seminars on the Indian Child Welfare Act (ICWA) and the rights of birth parents for attorneys and the judiciary. The Academy has been or is actively involved in legislative efforts both to amend the ICWA and to establish federal protections for putative birth parents.

The Academy is also actively involved in legislative efforts at the state level regarding state Indian Child Welfare legislation, e.g. Washington, South Dakota, California and Wisconsin, and in legislation provid-

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[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* and their counsel made such monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioners and respondents received timely notice of *amicus*' intent to file this brief and all parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

ing protections for birth parents in putative father registry statutes in states too numerous to list including Indiana, Missouri, South Carolina, Illinois, etc. Finally, the Academy actively supported and lobbied for the passage by the U.S. Congress of Public Law 110-351, Fostering Connections to Success and Increasing Adoption Act of 2008, which in pertinent part, authorizes Indian tribes to qualify for adoption subsidies to assist in the adoption of Indian children through tribal social services. The Academy also actively participated in the drafting and lobbying for the Responsible Father Registry currently before Congress as Senate Bill 3321 and House Bill 6035.

SUMMARY OF THE ARGUMENT

After this Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30 (1989), state courts remain divided over the application of the Existing Indian Family Doctrine (EIFD). The division among state appellate courts on whether the ICWA trumps state laws on birth father rights jeopardizes the constitutional rights and safety of birth mothers. The division vitiates this Court's jurisprudence on birth parents' rights and weakens state and federal legislative efforts to protect all parties to adoption. The Court should therefore grant certiorari to clarify this important area of law.

ARGUMENT

I. POST *HOLYFIELD,* STATE COURTS REMAIN DEEPLY DIVIDED OVER THE APPLICATION OF THE EXISTING INDIAN FAMILY DOCTRINE

In its enactment of the Indian Child Welfare Act (ICWA) Congress set forth a Congressional Declaration of Policy, which states:

> [I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families *by the establishment of minimum Federal standards for the removal of Indian children from their families* and the placement of such children in foster or adoptive homes . . . .

25 U.S.C.A. § 1902 (West 2012)(emphasis added). The ICWA also provides that in a termination of parental rights proceeding the following requirement must be met:

> No termination of parental rights may be ordered . . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, *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.A. §1912(f) (West 2012) (emphasis added).

The above-cited sections of the ICWA have led many state appellate courts to adopt the EIFD. The EIFD was first recognized by the Kansas Supreme Court in *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982). In adopting the EIFD, the court found that where an infant is born out-of-wedlock to a non-Indian mother and where the child had spent his entire life in the care of non-Indians and has not been removed from an Indian family, application of the ICWA would violate the intent of Congress rather than uphold the law's intended purpose. *Id.* at 175.

Since being adopted by in 1982, the EIFD has been recognized by a significant number of state appellate courts. *See In re Interest of S.A.M.*, 703 S.W.2d 603, 607-08 (Mo. Ct. App. 1986); *Claymore v. Serr,* 405 N.W.2d 650, 653-54 (S.D. 1987); *In re Adoption of*

T.R.M., 525 N.E.2d 298, 303 (Ind. 1988); *In re Adoption of Crews*, 825 P.2d 305, 309-10 (Wash. 1992)*; In the Matter of S.C.,* 833 P.2d 1249 (Okla. 1992); *Hampton v. J.A.L.,* 658 So. 2d 331, 337 (La. Ct. App. 1995); *Rye v. Weasel,* 934 S.W.2d 257, 262-64, (Ky. 1996); *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 520-21 (Ct. App. 1996); *In re Alexandria Y.,* 53 Cal. Rptr. 2d 679, 683-87 (Ct. App. 1996); *In re Morgan*, 1997 Tenn. App. LEXIS 818, *43-44 (Ct. App. 1997); *Crystal R. v. Super. Ct.,* 69 Cal. Rptr. 2d 414, 415 (Ct. App. 1997); *In re Santos Y.,* 112 Cal. Rptr. 2d 692, 715-717 (Ct. App. 2001); *In re N.J.,* 221 P.3d 1255, 1264 (Nev. 2009).

Alabama has also adopted the EIFD, but has limited its application solely to cases involving a voluntary relinquishment of parental rights for the child's adoption and where the child is born out-of-wedlock to a non-Indian mother. *See S.A. v. E.J.P.,* 571 So. 2d 1187, 1189-90 (Ala. Ct. App. 1990); *Ex parte C.L.J.,* 946 So. 2d 880, 889 (Ala. Ct. App. 2006).

The South Carolina Supreme Court case at issue, *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012), places South Carolina in the company of state appellate courts who have rejected the EIFD. *Adoptive Couple v. Baby Girl,* 731 S.E.2d 550, 558 n.17 (S.C. 2012); *In re Adoption of Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Adoption of T.N.F.*, 781 P.2d 973, 976-77 (Alaska 1989); *In re Crystal K.*, 276 Cal. Rptr. 619, 624-25 (Ct. App. 1990); *In re Adoption of Baade*, 462 N.W.2d 485, 489-90 (S.D. 1990); *Adoption of Lindsay C.,* 229 Cal. App. 3d 404, 415 (Ct. App. 1991); *In re Baby Boy Doe,* 849 P.2d 925, 931-32 (Idaho 1993); *In re Adoption of S. S.*, 622 N.E.2d 832, 838-39 (Ill. App. Ct. 1993); *In re D.A.C.,* 933 P.2d 993, 997-1000 (Utah App. 1997); *In re*

Alicia S., 65 Cal. App. 4th 79, 90-92 (Ct. App. 1998); *Michael J. Jr. v. Michael J. Sr.,* 7 P.3d 960, 963-64 (Ariz. Ct. App. 2000); *In re Baby Boy L.,* 103 P.3d 1099, 1105 (Okla. 2004); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 315 (App. Div. 2005); *In re Vincent M.*, 150 Cal. App. 4th 1247, 1251 (Cal. Ct. App. 2007); *In re Petition of N.B.,* 199 P.3d 16, 20-22 (Colo. App. 2007); *In re A.J.S.*, 204 P.3d 543, 551 (Kan. 2009).

The above list of cases includes California, Kansas, Oklahoma, and South Dakota decisions, which originally adopted the EIFD, as well as these state appellate courts' subsequent post-*Holyfield* decisions rejecting the EIFD. While numerous states (California, Iowa, Oklahoma, Washington, and Wisconsin) have rejected the EIFD by passage of state statutes, it is highly unlikely these statutes can lawfully restrict state courts from interpreting the federal ICWA regarding its application. CAL. FAM. CODE § 175 (West 2012); CAL. WELF. & INST. CODE § 224 (West 2012); IOWA CODE § 232B.5(2) (West 2012); OKLA. STAT. ANN. tit. 10, §§ 40.1, 40.3 (West 2012); WASH. REV. CODE ANN. §§ 13.34.040(3) and 26.33.040(1)(a) (West 2012); WIS. STAT. ANN. § 48.028(3) (West 2012). In California, where the EIFD has been banned pursuant to legislation, (CAL. FAM. CODE § 175, CAL. WELF. & INST. CODE § 224), such legislation cannot be legally controlling given the EIFD was adopted in California based upon constitutional considerations. *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 520-21 (Cal. App. 1996).

In decisions adopting the EIFD, state appellate court decisions state that the ICWA should not be applied to cases where the child is not part of an intact Indian family and is not residing on an Indian reservation. Many of these decisions also involved

voluntary adoptions proceedings where the child was not being involuntarily removed from the child's family. As is readily apparent, a significant number of state appellate court decisions have reached the opposite conclusion and state that Congress intended the ICWA to apply to all cases involving an Indian child.

Unfortunately, now thirty years since the EIFD was first recognized in the *Baby Boy L.* decision, this Court has yet to clarify the appropriateness of the EIFD. The Court's only decision regarding the ICWA is *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). In *Holyfield*, twins were born out-of-wedlock to an Indian mother, who resided on the Choctaw reservation. *Id.* at 30. The children were born off the reservation where their mother immediately placed them from the hospital into an adoptive placement. *Id*. In *Holyfield,* this Court found that, pursuant to 25 U.S.C. section 1911(a), the tribal court had exclusive jurisdiction, and the adoption proceeding should not have occurred in Mississippi state court. *Id*. The *Holyfield* decision does not address the validity of the EIFD.

Since the 1989 *Holyfield* decision, numerous state appellate courts have rejected the EIFD finding that the *Holyfield* decision mandates the rejection of the EIFD. Based upon the *Holyfield* decision, the Kansas Supreme Court is now one of the states that have overturned its earlier holding in *Baby Boy L.* and has now rejected the EIFD. *In the Matter of A.J.S.,* 204 P.3d 543, 551 (Kan. 2009).

While the Kansas Supreme Court has now rejected the EIFD, numerous other state appellate courts continue to recognize the EIFD. As recently as 2009, the same year the Kansas Supreme Court rejected the

EIFD, the Nevada Supreme Court recognized and adopted the EIFD. *In re the Parental Rights as to N.J.,* 221 P.3d 1255, 1258 (Nev. 2009).

In rejecting its earlier recognition of the EIFD, the Kansas Supreme Court stated that the continued acceptance of the EIFD "would undermine the significant tribal interests recognized by the Supreme Court in *Holyfield.*" *In re A.J.S.,* 204 at 550.

After the *Holyfield* decision, other states rejecting the EIFD have likewise stated that implementation of the EIFD would undermine the significant tribal interests recognized by the Supreme Court in *Holyfield. In re Adoption of T.N.F.,* 781 P.2d 973, 977 (Alaska 1989); *In re Adoption of Baade,* 462 N.W.2d 485, 489-90 (S.D. 1990); *In re Baby Boy Doe,* 849 P.2d 925, 931-32 (Idaho 1993); *In re Adoption of Quinn,* 845 P.2d 206, 209 (Ore. Ct. App. 1993); *In re Elliott,* 554 N.W.2d 32, 35-36 (Mich. Ct. App. 1996); *In re Baby Boy C.,* 27 A.D.3d 34, 48 (N.Y. App. 2005).

These decisions and others have interpreted *Holyfield* as placing tribal rights on parity with those of parents and children despite the fact that tribal rights are strictly statutory in nature. These cases fail to adequately examine and discuss the constitutional aspects of this interpretation of *Holyfield*. Post *Holyfield,* other state appellate courts have rejected *Holyfield* as requiring the rejection of the EIFD. *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 520-22 (Cal. Ct. App.1996); *Rye v. Weasel,* 934 S.W.2d 257, 261-62 (Ky. 1996); *In re Morgan,* 1997 Tenn. App. LEXIS 818, *43-44 (Ct. App. 1997).

II. THE *HOLYFIELD* DECISION HAS BEEN WIDELY MISCONSTRUED BY STATE APPELLATE COURTS AS HOLDING THAT TRIBAL RIGHTS ARE ON PARITY WITH THE CONSTITUTIONAL RIGHTS OF PARENTS AND CHILDREN

The ICWA grants Indian tribes only statutory rights, whereas, in addition to statutory rights, in these cases parents have fundamental constitutional rights. *See Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *In re N.N.E.*, 752 N.W.2d 1, 8-9 (Iowa 2008). Children have significant constitutional rights, as well as statutory rights. *See In re Gault,* 387 U.S. 1, 13 (1967); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 506-07 (1969); *In re Jasmon O.,* 8 Cal. 4th 398, 419 (Cal. 1994); *In re J.L.,* 779 N.W.2d 481, 489 (Iowa 2009). In cases addressing the EIFD, widespread misconception exists that Indian tribes have rights equal to those of parents and children. This misconception occurs because this Court's statement in *Holyfield* is taken out of context.

The *Holyfield* decision held that where Indian children were born off the tribal reservation but their unmarried mother's domicile was the Choctaw reservation, the tribal court had exclusive jurisdiction pursuant to the ICWA. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53-54 (1989). The *Holyfield* decision was limited solely to the issue of determining state court versus tribal court jurisdiction. *Id*.

In addressing exclusive tribal court jurisdiction in cases involving Indian children that reside or are domiciled on a tribal reservation, the U.S. Supreme Court cited the Utah Supreme Court decision *In re*

Adoption of Halloway, 732 P.2d 962, 969-970 (Utah 1986). *Halloway*, likewise, addressed jurisdiction involving an Indian child domiciled on an Indian reservation. *Id.* at 962.

This Court cited a portion of *Halloway* which states: "*that the tribe has an interest in the child which is distinct from but on parity with the interest of the parent.*" *Holyfield*, 490 U.S. at 52 (citing *In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986)) (emphasis added). This statement is often taken out of context and cited by those arguing that the rights of Indian tribes are equal to the rights of parents and children. This statement by this Court was addressing situations involving Indian children *who are domiciled on a reservation* and subject to exclusive tribal court jurisdiction. The complete quote from *Halloway*, as cited by this Court, states:

> To the extent that [state] abandonment law operates to permit [the child's] mother to change [the child's] domicile as part of a scheme to facilitate his adoption by non-Indians *while she remains a domiciliary of the reservation*, it conflicts with and undermines the operative scheme established by subsections [1911(a) and [1913(a)] *to deal with children of domiciliaries of the reservation* and weakens considerably the tribe's ability to assert its interest in its children. *The protection of this tribal interest* is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents. *This relationship between Indian tribes and Indian children domiciled on the reservation* finds no parallel in other ethnic cultures found in the United States. It is a relationship that many

> non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court as the exclusive forum for the determination of custody and adoption matters for reservation-domiciled Indian children, and the preferred forum for non-domiciliary Indian children. [State] abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parents.

Id. (citing *In re Adoption of Halloway*, 732 P.2d 962, 969-70 (Utah 1986)) (emphasis added). The *Holyfield* decision does not state that the rights of Indian tribes are on parity with the constitutional protections afforded to parents and children.

Holyfield, rather than clarifying the rights of Indian tribes, children and children's parents pursuant to the ICWA, has actually led to further confusion among the states regarding EIFD. This case presents an opportunity for this Court to clarify whether the EIFD furthers the intent of Congress in its enactment of the ICWA or whether such interpretation is inappropriate.

The uncertainty as to the EIFD application has a profound impact upon Indian children. The Court should grasp this opportunity to correct the widely held misconception that tribal rights are on parity with the constitutional rights of parents and children.

III. STATE COURTS ARE DIVIDED IN APPLYING ICWA TO TRUMP STATE LAWS ON BIRTH FATHER RIGHTS AND THIS JEOPARDIZES THE SAFETY OF BIRTH MOTHERS

South Carolina's decision adds it to Alaska and Arizona as states allowing ICWA to trump state law definitions of "parent." Pet. for Writ. of Cert. 16. Conversely, California, Oklahoma, Missouri, New Jersey and Texas do not allow ICWA to create unwed fathers parental rights that do not exist under state law. Pet. for Writ. of Cert. 15-16. The uncertainty created by the conflicting state interpretations of ICWA expands opportunities for abusive men to harm women pregnant with an Indian child. A putative father can refuse to assume legal or financial responsibility for a fetus or child, eliminating him as a parent under state law (*E.g.* Pet. App. 20a-23a) but still use the threat of invoking or the actual invocation of the ICWA placement preferences to manipulate the mother whose adoption decision is typically financially motivated and steered by her personal placement selection of an adoptive family. *See* App. A[2]; Leigh Gaddie, *Open Adoption*, 22 J. AM. ACAD. MATRIM. LAW. 499, 508 (2009) ("A sense of control may come with playing a part in selecting the adopting family, reinforcing that adoption was the best decision for the child.")

Such abuse occurred in the instant case where the putative Father refused Mother's request for financial support during her pregnancy unless she married

[2] Appendix A is an unpublished summary compiled by an Act of Love Adoption Agency, a Utah licensed child placing agency, on reasons cited by their last fifty relinquishing mothers for adoptive placement. Thirty-nine of fifty birth mothers listed finances as a reason for placement.

him. Pet. App. 4a, n. 4. Birth fathers' support obligations are independent of marital status as are women's support needs for medical bills, transportation, clothing, and lost wages during a pregnancy. *See* Pet. App. 67a-68a (Kittredge, J., dissenting) ("[An unwed father] must provide support regardless of whether his relationship with the mother-to-be continues or ends.") (quoting *Roe v. Reeves,* 708 S.E.2d 778, 783 (2011)); Shari Motro, *Preglimony*, 63 STAN. L. REV. 647, 653-57 (2011); Shari Motro, Op-Ed., *Responsibility Begins at Conception*, N.Y. TIMES, July 6, 2012, http://www.nytimes.com/2012/07/07/opinion/time-for-pregnancy-support-alimony.html.

In the instant case putative Father provided no support despite Mother's request and his knowledge of the pregnancy. Such financial manipulation is typical in abusive relationships and works to force the victim to stay in the relationship, deprive her of necessary monies for herself or her children, and keep her financially dependent upon the abuser. *See Economic Abuse Fact Sheet*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE PUB. POL'Y OFFICE, http://www.uncfsp.org/projects/userfiles/File/DCE-STOP_NOW/NCADV_Economic_Abuse_Fact_Sheet.pdf ("By controlling and limiting the victim's access to financial resources, a batterer ensures that the victim will be financially limited if he/she chooses to leave the relationship."); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 888 (1992). In the instant case, Mother testified that she chose adoption because she had two other children and was struggling financially. Pet. App. 4a. Mother testified that she asked Father to either pay support or surrender his parental rights, and that Father's agreement to terminate his rights and his refusal to provide support factored into Mother's decision to relinquish the child. Pet. App. at

45a-46a (Kittredge, J., dissenting). Mother declined to marry Father, their relationship soured, and Father never provided support to Mother. Pet. App. 3a-4a. Mother carried the fetus to term assumedly relying on Father's non-support as giving her control of the child and her adoption plan as provided by South Carolina law. Pet. App. 7a.

The Father invoked ICWA – wresting control of the child from Mother and her placement choice – and transferred the child to Father's Indian family. Pet. App. 11a. Because a birth mother's selection of an adoptive family is the single factor that benefits her most in recovering from relinquishment, transferring Baby Girl to a family other than the one Mother had selected during her pregnancy and had present for delivery undermines Mother's relinquishment recovery. Mary Beck, *A National Putative Father Registry*, 36 CAP. U. L. REV. 295, 296 n. 10 (2007); Leigh Gaddie, *Open Adoption*, 22 J. AM. ACAD. MATRIM. LAW. 499, 508 (2009). Mother's testimony supports such an assumption. Pet. App. 98a (Kittredge, J., dissenting) ("Birth mother has consistently expressed her desire that Baby Girl be placed with Appellants.").

Domestic violence is characterized by coercive control of a victim through physical, sexual, psychological or financial abuse. Susan Landrum, *The Ongoing Debate About Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness*, 12 CARDOZO J. CONFLICT RESOL. 425, 430-431 (2011). Physical abuse and sexual assault are easily recognized as domestic violence; psychological and financial manipulation are less recognized by the public but nonetheless constitute abuse. *See Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 889 (1992); *Economic Abuse Fact Sheet*,

NAT'L COAL. AGAINST DOMESTIC VIOLENCE PUB. POL'Y OFFICE, http://www.uncfsp.org/projects/userfiles/File/DCE-STOP_NOW/NCADV_Economic_Abuse_Fact_Sheet.pdf. ("By controlling and limiting the victim's access to financial resources, a batterer ensures that the victim will be financially limited if he/she chooses to leave the relationship."); ELIZABETH M. SCHNEIDER ET AL., *Domestic Violence and the Law: Theory and Practice* 7, n. 1 (2d ed. 2008). The failure of the public to recognize non-physical forms of domestic violence is seen in the instant case where the South Carolina Supreme Court failed to mention as abusive Father's marriage-or-no-support ultimatum to Mother. Mother was never asked about abuse and never characterizes herself as abused at least in the part of the record that is open to these authors.

Abuse is exacerbated in pregnancy. *Planned Parenthood*, 505 U.S. at 889 ("The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy."); Donna St. George, *CDC Explores Pregnancy-Homicide Link*, WASH. POST, Feb. 23, 2005, at A05. Abusers enlist children into their manipulations to maintain control over victims. Evan Stark, *A Failure to Protect: Unraveling "The Battered Mother's Dilemma"*, 27 W. ST. U. L. REV. 29, 49 (2000); Evan Stark, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 38 (2007).

The risk of injury and death to American pregnant women is not speculative. One in four American women will experience domestic violence in her lifetime. *Domestic Violence Facts*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE PUB. POL'Y OFFICE, http://www.ncadv.org/files/domesticviolencefactsheet(national).pdf. The Center for Disease Control reports that homicide

is the second leading cause of injury related death for pregnant women and that it claims a greater proportion of pregnant than non-pregnant women. Rebekah Kratochvil, *Intimate Partner Violence During Pregnancy: Exploring the Efficacy of a Mandatory Reporting Statute*, 10 HOUS. J. HEALTH L. & POL'Y 63, 69 (2009).[3] Thirty-one percent of deaths of pregnant and postpartum women result from domestic violence and thirty-three percent of female homicides result from domestic violence. Mary Beck, *A National Putative Father Registry*, 36 CAP. U. L. REV. 295, 311 (2007).

Native American Indian families experience domestic violence at the highest rate of any group in the United States. Amanda Tucker, *The Indian Child Welfare Act's Unconstitutional Impact on the Welfare of the Indian Child*, 9 WHITTIER J. CHILD & FAM. ADVOC. 87, 109 (2009). What constitutes a shockingly high level of violence, injury, and mortality for women, particularly pregnant women, in a non-Indian family becomes noticeably greater in Indian families.

Allowing putative fathers to financially abuse women they have impregnated tacitly sanctions other forms of abuse and inescapably exposes pregnant women to the escalation of abuse and to domestic homicide.

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[3] Although the Center's reported statistics did not isolate domestic violence from other pregnancy related violence, "'in the vast majority of cases, violence against pregnant women is perpetrated by an intimate [partner].'" *Id.* (quoting Jeani Chang et al., *Homicide: A Leading Cause of Injury Deaths Among Pregnant and Postpartum Women in the United States, 1991-1999*, 95 AM. J. PUB. HEALTH 3, 471, 474 (2005)).

Census 2010 data show that "the multiracial population is overwhelmingly young, and that . . . American Indians and Native Hawaiians and Pacific Islanders are the most likely to report being of more than one race." Susan Saulny, *Census Data Presents Rise in Multiracial Population of Youths*, N.Y. TIMES, March 24, 2011, http://www.nytimes.com/2011/ 03/25/ us/25race.html?_r=0. The mixing of races in the United States, including American Indians, results in a nation increasingly multiracial. Census 2000 data show that "more than 1 in 6 adopted kids is of a different race from their parents and "about 1 in 15 marriages in the U.S. is interracial – up from 1 in 23 in 1990." Mary Wiltenburg, *All in the (Mixed-Race) Family: A U.S. Trend*, CHRISTIAN SCIENCE MONITOR, August 28, 2003, http://www.csmonitor. com/2003/08 28/p03s01-ussc.html. The ubiquitous conception of multiracial children necessarily results in children whose heritage is difficult to identify.

Uncertainty over children's tribal heritage and over when putative fathers have rights to block an adoption in at least forty two states combined with the prevalence of abuse to pregnant women and in Indian families puts women's and fetuses' health and lives at risk and interferes with birth mothers' selections of adoptive families. Few families will agree to an adoption plan where tribal membership is indefinite and where neither state nor federal law can reliably identify putative fathers with rights to block an adoption.

IV. THE DIVISION IN STATE COURTS HOLDINGS IN APPLYING ICWA TO TRUMP STATE LAWS ON BIRTH FATHER RIGHTS VITIATES UNITED STATES SUPREME COURT JURISPRUDENCE ON BIRTH PARENTS' RIGHTS AND WEAKENS STATE AND FEDERAL LEGISLATIVE EFFORTS TO PROTECT ALL PARTIES TO ADOPTION.

Adoptive Couple v. Baby Girl, the South Carolina Supreme Court decision allowing ICWA to trump state law definitions of unwed fathers, conflicts with this Court's significant jurisprudence in the area of non-marital fathers' rights. Adoption attorneys and legislators have relied since 1972 on this Court's decision in *Stanley v. Illinois*. 405 U.S. 645 (1972).

The decision at issue is inconsistent with the Congressional intent of the ICWA, as *Stanley* (decided in 1972) and *Quilloin* (decided in January 1978) were already reported by the time ICWA defined unwed father in 25 U.S.C. § 1903(9) in November 1978. The legislative history states the ICWA definition of parent is *not* meant to conflict with the Supreme Court's decision in *Stanley v. Illinois.* H.R. Rep. No. 95-1386, at 21, 95th Cong. (1978), reprinted in 1978 U.S. Code Cong. Ad News at 7543.

In *Stanley*, this Court found that the Due Process Clause required the State of Illinois to provide a fitness hearing to a non-marital father before adjudicating his children dependents of the state after their mother's death. *Stanley*, 405 U.S. at 649. The non-marital father had lived with and supported these children their entire lives. *Id.* at 650, n. 4. The Court's holding stood for the proposition that the Constitution would protect the interests of a non-marital father who had assumed responsibilities for childrearing.

Subsequently, this Court clarified the parameters of that rule. It denied such protection to fathers who do not grasp the opportunity to parent in *Quilloin v. Walcott* and *Lehr v. Robertson* and granted protection to a father who did grasp the opportunity in *Caban v. Mohammed. See Quilloin v. Walcott*, 434 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979).

In *Quilloin*, this Court held that a father's substantive due process rights were not offended in a step-parent adoption where the putative father had not established his paternity nor shouldered significant child rearing responsibilities. 434 U.S. at 246.

In *Caban*, this Court held that a non-marital father's rights were offended where adoption was granted absent his consent. *Caban*, 441 U.S. at 394. The birth father's name appeared on the children's birth certificates, and he had supported his children and seen them frequently over their lives. *Id.* at 382. Thus, this Court protected the rights of a non-marital father who had assumed parental responsibilities.

In *Lehr*, this Court held constitutional New York's putative father registry statute, which eliminated the need to provide notice to a non-marital father who had not established his paternity nor shouldered "custodial, personal, or financial relationship" with his child. *Lehr v. Robertson*, 463 U.S. 248, 262-65 (1983). These dual *Lehr* holdings on putative father registries and constitutional protection for responsible unwed fathers have shaped the formation of legislation and case law on non-marital father rights.

The *Lehr* Court distilled the first rule as follows:

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by

> "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the due process clause.

Id. at 261 (quoting *Caban*, 441 U.S. at 392). This holding, that the Constitution protects the father who assumes parental responsibility, has guided prenatal abandonment laws like the one in the instant South Carolina case that denied the status of parent to the putative father. Pet. App. 21a-22a.

Lehr recognized that developing a relationship with a child was dependent upon the will of both parents and that New York's special statutory scheme protected non-marital fathers' rights independent of mothers' wishes. *Lehr*, 463 U.S. at 263. This Court, in upholding the New York putative father registry's constitutionality, discussed the statutory registry scheme as follows:

> After this Court's decision in *Stanley*, the New York Legislature . . . . enacted a statutory adoption scheme that automatically provides notice to seven categories of putative fathers who are likely to have assumed some responsibility for the care of their natural children. . . . The New York legislature concluded that a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers,… and impair the desired finality of adoption decrees. . . . [W]e surely cannot characterize the state's conclusion as arbitrary.

Id. at 263-64. This holding paved the way for enactment of other state registries. Mary Beck, *Putative*

Father Registries: An Overview in ADOPTION FACTBOOK V 515, 515 n. 1 (Rosman et al., ed., 2011).

Paternity registries provide a means for timely, registered non-marital fathers to guarantee notice to themselves of an adoption or dependency action where they have not established legal paternity or otherwise constitutionally protected their interests. Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1039-42 (2002). The mother of a child is easily identified because she is present at birth. *See Lehr*, 463 U.S. at 260, n. 16. The non-marital father's identity is harder to ascertain and he may be elsewhere at the time of birth. States have enacted the multi-purpose putative father registry laws so that fathers may register despite their location or fraudulent and/or antagonistic mothers. *See* Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y at 1049. Registries also protect the privacy and safety of mothers by relieving them of the requirement to notify men of pregnancy and/or adoption plans, either of which would expose them to the potential for domestic violence and/or the need to identify a rapist. *Id.* at 1052-53. South Carolina has such a putative father registry law but it was not discussed in the instant opinion. *See* S.C. CODE ANN. §§ 63-7-2530, 63-7-2550, 63-9-810, 63-9-820, 63-9-730(B) (2012).

Lehr clarified what paternal activities trigger constitutional protection of fathers' rights and that registries create a constitutional means of determining which fathers get notice. *Stanley*, *Quilloin*, *Caban* and *Lehr* clarified that the Constitution protects certain non-marital fathers. This collective jurisprudence has guided the development of state and

national putative father registry and prenatal abandonment law since 1972. Up to thirty-four states have enacted putative father registries although some exist without protections for putative fathers or mothers, so the number of *functional* registries is in the mid-twenties. *See* Mary Beck, *Putative Father Registries: An Overview* in ADOPTION FACTBOOK V 515, 515 n. 1 (Rosman et al., ed., 2011).[4] Twenty-three states have either enacted prenatal support laws or have judge-made standards of prenatal support.[5] Together, registries and prenatal support laws protect non-marital fathers who take affirmative steps to assert paternity as well as protecting the privacy and safety of birth mothers. *See* Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1052 (2002). The South Carolina decision abrogates this jurisprudence and weakens the protections state have erected to protect birth parents.

The protections offered by state registry and prenatal abandonment laws do not protect the non-marital father in interstate adoption/dependency actions. *See* Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y at 1033. While a father may register in the state of conception, the birth may occur in a second state, and the adoption may be filed in a third state. A father may register in

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[4] Note from Mary Beck, author of the article cited. The text of ADOPTION FACTBOOK V has misprinted that as many as 38 states have adopted putative father registries. Reference note 1 on page 515 of the same source, which explains that there are 34 states with putative father registries.

[5] *See* Appendix 2, an unpublished grid of states with prenatal abandonment standards, researched and compiled by Diamond Scott.

the conception state but be unaware of the states of birth or adoption. A national registry linking all state registries is the only way to promote the purposes of state registries for putative fathers. *Id.* at 1078. Senator Mary Landrieu wrote the Responsible Father Registry, a national bill that would link state registries and protect putative fathers and birth mothers. In 2012, Senator Landrieu introduced Senate Bill 3321 into the United States Senate and Representative Laura Richardson introduced House Resolution 6035 into the United States House of Representatives. S. 3321, 112th Congress (2012); H.R. 6035, 112th Congress (2012). The purposes of S. 3321 and H.R. 6035 (identical bills) include: to provide a national database that links the state registries, to facilitate transmission of state registrations to the national data base, to respond to authorized state search results on any woman, to require appropriate notice of adoption or dependency proceedings to timely registered fathers (S. 3321 § 2(b)(1)), to protect the rights of men in adoption, termination of rights and dependency (§ 2(a)(5)), and to protect the privacy and safety of mothers (§§ 2(a)(4), 2(b)(3)). The bill recommends that states develop prenatal abandonment laws (§ 442(a)(9)), which would create a standard by which men can protect their parental rights outside of the registry process.

State registries and prenatal abandonment laws create bright line rules about which putative fathers have consent rights in state adoptions. The federal registry is intended to link state registries and promote interstate protections for all birth parents. In the absence of guidance from this Court, ICWA is allowed to trump state laws and United States jurisprudence on putative fathers' rights in some states

and not others. Such division undercuts both federal and state efforts to protect the rights of birth parents.

CONCLUSION

This Court should review the South Carolina decision because confusion over EIFD has led to inconsistent state decisions allowing the statutory rights of Indian tribes to supersede the constitutional rights of non-Indian mothers, because the decision exposes birth mothers to abuse and abrogates stalwart state and federal efforts to protect birth parents. For the foregoing reasons and those stated in the petition, this Court should grant the writ of certiorari.

Respectfully submitted,

MARY BECK
UNIVERSITY OF MISSOURI
SCHOOL OF LAW
104 Hulston Hall
Columbia, MO 65211
(573) 882-7274

PHILLIP J. MCCARTHY, JR.
Counsel of Record
MCCARTHY WESTON PLLC
508 N. Humphreys St.
Flagstaff, AZ 86001
(916) 779-4252
jay@mccarthyweston.com

Counsel for Amicus Curiae

APPENDIX

APPENDIX A

[Logo]
A Brighter Tomorrow
For Today's Children
ALTERNATIVE OPTIONS & SERVICES
A Non-Profit Adoption Agency

October 25, 2012

Dear Ms. Beck,

At your request, Act of Love Adoption Agency is providing you with data regarding the reasons birthparents have chosen to place their babies for adoption with Act of Love. The data we are providing to you has been collected from our files for the last 50 birthparents who have placed their babies for adoption with Act of Love. The reasons we have listed have been provided directly to us by the birth parents.

Act of Love Adoption Agency is a 501 (c)(3) non-profit, licensed adoption agency, in the state of Utah. The agency provides services for those seeking to adopt a child or those considering placing a child for adoption. The primary focus of the agency is domestic infant adoptions with an emphasis on providing excellent individualized service.

Act of Love is a full-service child placing agency offering adoptive family and birth parent services. For birth parents we provide, among other services, pregnancy counseling, medical, housing, financial and legal assistance, educational resources and support before and after an adoption plan. Adoptive parent services, among others, include counseling and Adoptive Parenting Preparation Classes, home

study preparation, and placement and post-placement services.

The staff at Act of Love is comprised of loving and caring individuals. Each staff member is an adoptive parent, birth parent, adoptee or has extensive experience in adoption. Act of Love is committed to fulfilling the needs of each child, birth parent and adoptive family.

Sincerely,

Jill J. Willey, COO

/s/ Larry S. Jenkins
CC: Larry S. Jenkins

Attachment

Birth Parent	Birthparent Reason for Placing Provided directly by Birth Parents to Act of Love Adoption Agency Prepared 10/29/2012
1	financial
2	tried to raise baby - lack financial, emotional support
3	age, lack of education, financial
4	financial
5	financial, wants stable home
6	financial, lack of education, wants stable home
7	financial, lack support from birth father
8	financial, birth father in prison
9	living circumstances, financial, conception was one-night stand and doesn't know how to contact
10	financial, housing circumstance, lack of necessary resources to raise a child
11	feels adoption is in the best interest of the child/conception involved birth mom waking up next to a man in the morning
12	best interest of the child
13	financial, best interest of child
14	financial, best interest of child
15	financial, best interest of child
16	financial, not in a place to parent
17	financial, best interest of child
18	financial, best interest of child
19	living circumstances, financial, birth father not in contact since 4 months along
20	financial, wants baby to have stable parents
21	financial, chose not to name due to negative relationship & domestic dispute at

	time of conception
22	financial, desire for child be with a family that can give more opportunities
23	good home with stable parents
24	good home with stable parents, birth father incarcerated
25	raising 2 other children, financial
26	living circumstances, financial, best interest of child
27	financial, wants more opportunities for baby
28	best interest of the child/want a stable home
29	financial, living circumstances
30	best interest, baby deserves 2 parent home, birth father told her to get an abortion
31	financial reasons, 8 other children
32	financial, wants stable home
33	financial, birth father in prison
34	financial, best interest
35	rape
36	financial, best interest
37	financial, best interest
38	financial, best interest, birth father abusive
39	best interest
40	financial, emotionally not ready to parent
41	not ready to parent another child, best interest
42	tried to parent and could not - best interest of child
43	financial, not ready to parent another child
44	financial, housing circumstance, one-night stand and only knew 1st name
45	financial, best interest

46	financial, not emotionally stable, birth father told her to get an abortion
47	financial, best interest
48	financial, best interest
49	financial, best interest, raising other children
50	best interest

APPENDIX B

Relevant Prenatal Abandonment Statutes and Case Law by State

Alabama

Ala. Code 1975 § 26-10A-9 (2012)

Wording of Statute

(a) A Consent or relinquishment required by Section 26-10A-7 may be implied by any of the following acts of a parent: (1) Abandonment of the adoptee. Abandonment includes, but is not limited to, the failure of the father, with reasonable knowledge of the pregnancy, to offer financial and/or emotional support for a period of six months prior to birth.

Colorado

C.R.S.A. § 19-5-105(C)(III) (2012)

Wording of Statute

(c) That the parent has not promptly taken substantial parental responsibility for the child. In making this determination the court shall consider, but shall not be limited to, the following: (III) Whether the birth father has failed to substantially assist the mother in the payment of the medical, hospital, and nursing expenses, according to that parent's means, incurred in connection with the pregnancy and birth of the child.

Florida

West's F.S.A. § 63.089 (2012)

Wording of Statute

(3) GROUNDS FOR TERMINATING PARENTAL RIGHTS PENDING ADOPTION. The court may enter a judgment terminating parental rights pending adoption if the court determines by clear and

convincing evidence, supported by written findings of fact, that each person whose consent to adoption is required under s. 63.062:

(d) Has been properly served notice of the proceeding in accordance with the requirements of this chapter and has failed to file a written answer or PERSONALLY appear at the evidentiary hearing resulting in the judgment terminating parental rights pending adoption;

(4) FINDING OF ABANDONMENT. A finding of abandonment resulting in a termination of parental rights must be based upon clear and convincing evidence that a parent or person having legal custody has abandoned the child in accordance with the definition contained in s. 63.032. A finding of abandonment may also be based upon emotional abuse or a refusal to provide reasonable financial support, when able, to a birth mother during her pregnancy OR ON WHETHER THE PERSON ALLEGED TO HAVE ABANDONED THE CHILD, WHILE BEING ABLE, FAILED TO ESTABLISH CONTACT WITH THE CHILD OR ACCEPT RESPONSIBILITY FOR THE CHILD'S WELFARE.

(a) In making a determination of abandonment at a hearing for termination of parental rights under this chapter, the court shall consider, among other relevant factors not inconsistent with this section:

1. Whether the actions alleged to constitute abandonment demonstrate a willful disregard for the safety or welfare of the child or the unborn child;

2. Whether the person alleged to have abandoned the child, while being able, failed to provide financial support;

3. Whether the person alleged to have abandoned the child, while being able, failed to pay for medical treatment; or

4. Whether the amount of support provided or medical expenses paid was appropriate, taking into consideration the needs of the child and relative means and resources available to the person alleged to have abandoned the child.

Georgia
Ga. Code Ann.§ 19-8-4(e1)(3)(A)(2012)

Wording of Statute

(3)(A) The biological father who is not the legal father of a child may execute a surrender of his rights to the child prior to the birth of the child for the purpose of an adoption pursuant to this Code section. A pre-birth surrender, when signed under oath by the alleged biological father, shall serve to relinquish the alleged biological father's rights to the child and to waive the alleged biological father's right to notice of any proceeding with respect to the child's adoption, custody, or guardianship. The court in any adoption proceeding shall have jurisdiction to enter a final order of adoption of the child based upon the pre-birth surrender and in other proceedings to determine the child's legal custody or guardianship shall have jurisdiction to enter an order for those purposes.

Idaho
I.C. § 16-1504(2)(b)(iii)(2012)

Wording of Statute

(2) In accordance with subsection (1) of this section, the consent of an unmarried biological father is necessary only if the father has strictly complied with the requirements of this section. (b) With regard to a

child who is under six (6) months of age at the time he is placed with adoptive parents, an unmarried biological father shall have manifested a full commitment to his parental responsibilities by performing all of the acts described in this subsection prior to the placement for adoption of the child in the home of prospective parents or prior to the date of commencement of any proceeding to terminate the parental rights of the birth mother, whichever event occurs first. The father shall: (iii) If he had actual knowledge of the pregnancy, pay a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his means, and when not prevented from doing so by the person or authorized agency having lawful custody of the child.

Iowa
I.C.A. § 600A.8(3)(2)(d)(2012)

Wording of Statute

3. The parent has abandoned the child. For the purposes of this subsection, a parent is deemed to have abandoned a child as follows: (2) In determining whether the requirements of this paragraph are met, the court may consider all of the following:(d) With regard to a putative father, whether the putative father paid a fair and reasonable sum, in accordance with the putative father's means, for medical, hospital, and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child, or whether the putative father demonstrated emotional support as evidenced by the putative father's conduct toward the mother.

Kansas
K.S.A. § 59-2136(h)(1)(D)(2012)

Wording of Statute

(h)(1) When a father or alleged father appears and asserts parental rights, the court shall determine parentage, if necessary pursuant to the Kansas parentage act, K.S.A. 23-2201 et seq., and amendments thereto. If a father desires but is financially unable to employ an attorney, the court shall appoint an attorney for the father. Thereafter, the court may order that parental rights be terminated, upon a finding by clear and convincing evidence, of any of the following: (D) the father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth.

Nebraska
Neb. Rev. St. § 43-104.22(7)(2012)

Wording of Statute

At any hearing to determine the parental rights of an adjudicated biological father or putative biological father of a minor child born out of wedlock and whether such father's consent is required for the adoption of such child, the court shall receive evidence with regard to the actual paternity of the child and whether such father is a fit, proper, and suitable custodial parent for the child. The court shall determine that such father's consent is not required for a valid adoption of the child upon a finding of one or more of the following: (7)The Father had knowledge of the pregnancy and failed to provide reasonable support for the mother during pregnancy.

Nevada
N.R.S. § 129.012(1) (2011)

Wording of Statute

Abandonment of a child means any conduct of one or both parents of a child which evinces a settled purpose on the part of one or both parents to forego all parental custody and relinquish all claims to the child.

New Jersey
N.J.S.A. § 9:3-46(2012)

Wording of Statute

In determining whether a parent has affirmatively assumed the duties of a parent, the court shall consider, but is not limited to consideration of, the fulfillment of financial obligations for the birth and care of the child, demonstration of continued interest in the child, demonstration of a genuine effort to maintain communication with the child, and demonstration of the establishment and maintenance of a place of importance in the child's life.

New Mexico
N.M.S.A. 1978, § 32A-5-3(4)(a)(2012)

Wording of Statute

(4) has openly held out the adoptee as his own child by establishing a custodial, personal or financial relationship with the adoptee as follows:(a) for an adoptee under six months old at the time of placement: 1) has initiated an action to establish paternity; 2) is living with the adoptee at the time the adoption petition is filed; 3) has lived with the mother a minimum of ninety days during the two-hundred-eighty-day period prior to the birth or placement of the adoptee; 4) has lived with the adoptee within the

ninety days immediately preceding the adoptive placement; 5) has provided reasonable and fair financial support to the mother during the pregnancy and in connection with the adoptee's birth in accordance with his means and when not prevented from doing so by the person or authorized agency having lawful custody of the adoptee or the adoptee's mother; 6) has continuously paid child support to the mother since the adoptee's birth in an amount at least equal to the amount provided in Section 40-4-11.1 NMSA 1978, or has brought current any delinquent child support payments; or 7) any other factor the court deems necessary to establish a custodial, personal or financial relationship with the adoptee.

New York
McKinney's DRL Sec. § 111(1)(e)(iii)(2012)

Wording of Statute

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows: (e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if: (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child.

Ohio
R.C. § 3107.07(B)(1)(c)(2011-2012)

Wording of Statute

(B) The putative father of a minor if either of the following applies: (1) The putative father fails to register as the minor's putative father with the putative father registry established under section 3107.062 of the Revised Code not later than thirty days after the minor's birth; (c) The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first.

Oklahoma
10 O.S. Supp. § 1998 60.6 (2012)

Wording of Statute

C. Consent to adoption is not required from a father or putative father of a minor born out of wedlock if: 1. The minor is placed for adoption within ninety (90) days of birth, and the father or putative father fails to show he has exercised parental rights or duties towards the minor, including, but not limited to, failure to contribute to the support of the mother of the child to the extent of his financial ability during her term of pregnancy.

South Carolina
Code 1967 § 63-9-310(5)(b)(2011)

(A) Consent or relinquishment for the purpose of adoption is required of the following persons: (5) the father of a child born when the father was not married to the child's mother, if the child was placed with the prospective adoptive parents six months or less after the child's birth but only if: (b) the father paid a

fair and reasonable sum, based on the father's financial ability, but for the support of the child or for expenses incurred in connect with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses.

South Dakota
T.C.A. § 36-1-102(1)(A)(iii)(2012)

(A) Consent or relinquishment for the purpose of adoption is required of the following persons: (5) the father of a child born when the father was not married to the child's mother, if the child was placed with the prospective adoptive parents six months or less after the child's birth, but only if: (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses.

Tennessee
V.T.C.A. Family Code § 161.001 (2011)

Wording of Statute

A biological or legal father has either willfully failed to visit or willfully failed to make reasonable payments toward the support of the child's mother during the four (4) months immediately preceding the birth of the child; provided, that in no instance shall a final order terminating the parental rights of a parent as determined pursuant to this subdivision (1)(A)(iii) be entered until at least thirty (30) days have elapsed since the date of the child's birth.

Texas

U.C.A. § 1953 78B-6-121(3)(d)(i)-(iii)(2012)

Wording of Statute

The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence: H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth.

Utah

15 V.S.A. § 3-504(a)(1)(B)(2012)

Wording of Statute

(3) Except as provided in Subsections (6) and 78B-6-122(1), and subject to Subsection (5), with regard to a child who is six months of age or less at the time the child is placed with prospective adoptive parents, consent of an unmarried biological father is not required unless, prior to the time the mother executes her consent for adoption or relinquishes the child for adoption, the unmarried biological father: (d) offered to pay and paid, during the pregnancy and after the child's birth, a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his financial ability, unless:(i) he did not have actual knowledge of the pregnancy;(ii) he was prevented from paying the expenses by the person or authorized agency having lawful custody of the child; or (iii) the mother refuses to accept the unmarried

biological father's offer to pay the expenses described in this Subsection (3)(d).

Vermont
In re Infant Child Skinner, 982 P.2d 670
(Wash. Ct. App. 1999)

Wording of Statute

(1) In the case of a minor under the age of six months at the time the petition is filed, the respondent did not exercise parental responsibility once he or she knew or should have known of the minor's birth or expected birth. In making a determination under this subdivision, the court shall consider all relevant factors, which may include the respondent's failure to:

(A) pay reasonable prenatal, natal, and postnatal expenses in accordance with his or her financial means.

Washington
W.Va. Code § 48-22-306(b)(2)(2012)

Case law makes prenatal support of mother a determinative factor in whether or not the father has abandoned the child. Father's failure to support shows he did not make reasonable efforts despite mother cutting off ties with him.

West Virginia
W.S.A. § 48.415(6)(B)(2011)

Wording of Statute

Abandonment of a child less than 6 months shall be presumed if the birth father: (2) fails to contribute within his means toward the expense of prenatal and postnatal care of the mother and postnatal care of the child.

Wisconsin

Wording of Statute

"(b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy."