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 *AMICI CURIAE* NATIONAL COUNCIL FOR ADOPTION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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

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

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

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INTEREST OF *AMICUS CURIAE*[1]

The National Council For Adoption (NCFA), founded in 1980 is an adoption advocacy nonprofit that promotes a culture of adoption through education, research, and legislative action. NCFA is an authoritative voice for adoption, passionately committed to the belief that every child deserves to thrive in a nurturing, permanent family. We serve children, birthparents, adoptive families, adult adoptees, adoption agencies, adoption professionals, U.S. and foreign governments, policy makers, media, and the general public as the authoritative voice for adoption throughout the United States. NCFA has 30 years of experience providing guidance, educating on best practices, and serving many thousands of children and families. With regards to domestic infant adoption, NCFA is especially knowledgeable as the only source that continues to count domestic adoptions on the national level. Further, since 2001 NCFA has trained more than 20,000 on how to properly counsel expectant parents on the option of adoption and created a curriculum many use to educate their communities on this issue. As a leading voice on adoption, NCFA believes its special expertise and experience regarding adoption laws, practices, and

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, Amicus Curiae affirm that no counsel for any party authored this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae and their counsel made a monetary contribution to its preparation or submission.

outcomes place it in a special position to inform the Court about the importance of the concerns in this case, including the need to represent individual children's best interests and the need for practitioners to have a clear understanding of when, how, and to whom to apply the Indian Child Welfare Act.

SUMMARY OF ARGUMENT

All children, including Indian children, require legal systems and practices that can serve the best interests of that particular child and help ensure their right to a permanent, loving family. In order to ensure child welfare practitioners and other participants in the adoption process are able to pursue the best interests of every child, they must have guidance on when, how, and to whom to apply the Indian Child Welfare Act. Children, biological and adoptive parents and others impacted by adoption need to be advised by practitioners on reasonable expectations of outcomes for the child. ICWA's implementation has been varied amongst states and tribes. Specifically, there is not a clear national understanding of whether ICWA applies when a Non-Indian parent voluntarily places a child for adoption and there is not a clear understanding of the definition of parent under ICWA with respect to unwed fathers. State courts' varied implementations of ICWA make its meaning unclear and make it difficult for practitioners to know how to properly implement and educate all those involved in and impacted by the adoption process. When this particular law's meaning is unclear, outcomes for children become unstable and unpredictable, putting at risk a child's right to a permanent, loving family which provides develop-

mentally necessary healthy attachment through consistent caretakers.

REASONS FOR GRANTING THE PETITION

I. Best Interests of the Child Should be the Ruling Priority.

In any civilized society, the way we prioritize the needs of children is a significant indicator of the values of the society. In the United States, acting in the "best interests of the child" is a universally accepted standard when determining child custody decisions, including decisions regarding placing a child in a home for the purpose of adoption. NCFA agrees that this widely held standard should always be the ruling priority by any court deciding the outcome of a child's care. There are a variety of factors that may be considered in weighing the best interests of a child. State courts may name these factors differently, but they consistently consider elements of that specific child's safety, health, and appropriate development. In a case where ICWA is applied, a child's status as an Indian tribe member or child of a tribe member becomes a significant competing factor. We hope this Court will clarify if and when it is appropriate for a child's biological connections to supersede their other interests. This biological factor, as further discussed later, seems to have been given significantly more weight than Baby Girl's other interests in this case. The South Carolina Supreme Court, explained that ICWA and the biological connection it represents were given greater weight than would be given to a case where ICWA was not invoked. Pet. App. 21a-22a n.19.

The question to answer is, whether elevating the priority of race or biology as a more significant factor protects a child's rights. Historically, children's rights were often couched in terms of parental rights, and therefore children rarely had any independent legal rights. *See e.g.*, *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944). The adoption community widely agrees with the position that a child does have a right to grow up in a loving, permanent family. *Mission*, NATIONAL COUNCIL FOR ADOPTION, https://www.adoptioncouncil.org/who-we-are/mission.html (last visited Oct. 15, 2012); *Mission & Values*, DAVE THOMAS FOUNDATION FOR ADOPTION, http://www.davethomasfoundation.org/who-we-are/ mission-and-values/ (last visited Oct. 16, 2012); *Who We Are*, CONGRESSIONAL COALITION ON ADOPTION INSTITUTE, http://www.ccainstitute.org/who-we-are/aboutus.html (last visited Oct. 16, 2012). This ability to grow up safe, provided for, and cared for is certainly amongst the rights of any American to life and liberty.

The need children have for a loving, permanent family does not just feel right, it is a necessity substantiated by extensive scientific evidence that attachment to permanent caretakers is developmentally necessary and that removal from a loving family can be detrimental to a child's psychological development. Attachment and the prevention of traumatic separation is not only about a child's emotional well-being – although this is certainly an important factor to consider. Permanent, consistent caretakers should be maintained whenever safely possible because healthy attachment with familiar, trusted adults is essential to healthy wholistic development. Early childhood development, and more specifically healthy brain development, relies heavily on child and care-

taker relationships. Regular exchange in relationship between young children and trusted caretakers is fundamental to the wiring of the brain. *Three Core Concepts in Early Development: Serve & Return Interaction Shapes Brain Circuitry,* CENTER ON THE DEVELOPING CHILD HARVARD UNIVERSITY, http://developingchild.harvard.edu/index.php?cID=429 (last visited Oct. 15, 2012). Removal from safe and trusted caretakers can slow development and cause negative physical impacts common to trauma and can lead to toxic stress in a child. *Three Core Concepts in Early Development: Toxic Stress Derails Healthy Development,* CENTER ON THE DEVELOPING CHILD HARVARD UNIVERSITY, http://developingchild.harvard.edu/resources/multimedia/videos/three_core_concepts/toxic_stress/ (last visited Oct. 15, 2012). We would advise the court to side with neither nature nor nurture, but instead take into consideration the complete picture of how a child's genetics and environment relate to one another and what outcome will help the child to thrive in life.

An understanding that attachment is developmentally significant can be further informed by noting that a biological connection is not necessary for healthy attachment bonds to develop. Attachment bonds develop regardless of whether a caregiver and child are linked by biology. *See* Joseph Goldstein et al., BEYOND THE BEST INTERESTS OF THE CHILD 27 (2d ed. 1979) (concluding the parent-child relationship can develop without reference to biology or formal adoption). In fact, a child can develop an attachment relationship with any adult who on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's psychical needs. *Id.* at 98; *see also*, *From Neurons to*

Neighborhoods: The Science of Early Childhood Development, NAT'L RESEARCH COUNCIL & INST. OF MEDICINE 234 (Jack P. Shonkoff & Deborah A. Phillips, Eds., 2000) ("[The c]riteria for identification of attachment figures . . . [include] provision of psychical and emotional care, continuity or consistency in the child's life, and emotional investment in the child."). Furthermore, it has been found to be the *quality* and *nature* of the interaction between parent and child, rather than any biological or legal connection, that creates and sustains these attachment relationships. Ana H. Marty, et al., *Supporting Secure Parent-Child Attachments: The Role of the Non-Parental Caregiver*, 175 EARLY CHILD DEV. & CARE 271, 273 (2005). In the facts of this case, we know that Baby Girl was consistently cared for by Adoptive Parents for more than two years in this way. Further, she was consistently cared for during the first four months of her life before Baby Girl's biological father ever acted in any way to show an interest in Baby Girl's outcome.

In addition to considering if a child's rights are best protected in this process, it is worth considering specifically whether Indian children's rights are unequally impacted. If this Court determined that prioritizing race and culture over other interests might be, at least in some cases, detrimental to a child's development, then it should be noted that this impact is, in fact, having a specifically detrimental effect on the very Indian children Congress set out to protect when they said "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3). Congressional intent did not likely include that the ICWA be interpreted so broadly that it would be applied in a way that at times might put the

wellbeing of especially Indian children at risk. Although we believe that race and culture are factors to consider, they should not be considered in a vacuum outside of the many other significant things that contribute to a child's wellbeing. It seems that, as this Court ruled on public education, it is "inherently unequal" to make separate considerations of what is in a child's best interest solely because of their race. *Brown v. Bd. Of Education*, 347 U.S. 483, 495 (1954). This court has decided before, that the 14th amendment was designed to do away with prioritizing race in cases of child custody, because classifying persons according to their race was "more likely to reflect racial prejudice than legitimate public concerns." *Palmore v. Sidote*, 466 U.S. 429, 432, (1984), *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

II. Implementation Guidance is Necessary to Properly Support Adoption, Children, Parents, and All Participants in the Adoption Process.

Without clear expectations of what likely outcomes will be for children, ICWA can have a chilling effect on permanency for children for a variety of reasons. When practitioners do not have a clear understanding of when and to whom ICWA applies they cannot implement appropriately and they cannot fully advise expectant parents, potential adoptive parents, children, or other participants in the adoption process what to expect. The lack of clear ICWA understanding can often lead to slowed court processes and lengthy appeals which bring supplemental court costs to both governments and individuals participating in the adoption process. It also significantly impacts

a child's guarantee of permanency because of the potential of one or multiple removals from familiar caretakers and environments. Adoptive parents may be discouraged from providing needed homes to children. Particularly to children with known Indian heritage, but also to those unknown to have Indian heritage because Indian heritage could be realized later in the process and because publicized complications regarding ICWA may be interpreted as related to adoption more generally. The potential for unpredictable delays, complications, or child removals is most certainly chilling for adoptive parents. A more clear understanding of the questions presented in this case would go a long way to help clarify ICWA's intent and provide positive outcomes for children, birth and adoptive parents, and all others impacted by the adoption process.

A. State Courts are Split on How ICWA Applies When a Non-Indian Parent Voluntarily Makes an Adoption Plan for a Child

State courts are divided on how to proceed when an Indian child born to unwed parents is voluntarily relinquished by its non-Indian Mother. In six states, Alabama, Indiana, Kentucky, Louisiana, Missouri, Nevada, and Tennessee, courts have followed the rule that when a child is being removed from the existing custody of an Indian parent ICWA applies. *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990); *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331, 337 (La. Ct. App. 1995); *In re S.A.M.*, 703 S.W.2d 603, 609 (Mo. Ct. App. 1986); *In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009); *In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL

1138130, at *5 (Tenn. Ct. App. Apr. 27, 2009); *In re Adoption of T.R.M.,* 525 N.E.2d 298, 303 (Ind. 1988). When a child was placed in the care of adoptive parents at the earliest practical moment after birth, the Indiana court says it "cannot discern how the subsequent adoption proceeding constituted a 'break-up of the Indian family'" ICWA intends to prevent. *Id.* Courts commonly refer to this system of analysis as the "existing Indian family doctrine," *Rye v. Weasel*, 934. S.W.2d 257, 262 (Ky. 1996). California, Oklahoma, and Washington courts agreed with the existing Indian family doctrine, although state legislations later changed the results. *See In re Beach*, 246 P.3d 845, 848 (Wash. Ct. App. 2011); Wash. Rev. Code §§ 13.34.040[3], 26.10.034[1], 26.33.040[1]; *In re Baby Boy L.*, 103 P.3d 1099, 1105 (Okla. 2004); Okla. Stat. §§ 40.1, 40.3; Cal. Welf. & Insts. Code § 360.6.

The South Carolina Supreme Court agreed with courts in Alaska, Arizona, Colorado, Idaho, Illinois, Kansas, Michigan, Montana, New Jersey, New York, North Dakota, Oregon, and Utah who have held that ICWA applies to adoption proceedings even when the child has never lived as part of an Indian family. *In re Adoption of Baade*, 462 N.W.2d 485, 490 (S.D. 1990); *In re Adoption of T.N.F.*, 781 P.2d 973, 978 (Alaska 1989); *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 964 (Ariz. Ct. App. 2000); *In re N.B.*, 199 P.3d 16, 21 (Colo. App. 2007); *In re Baby Boy Doe*, 849 P.2d 925, 931-32 (Idaho 1993); *In re Adoption of S.S.*, 622 N.E.2d 832, 840 (Ill. App. Ct. 1993), *rev'd on other grounds*, 167 Ill. 2d 250 (Ill. 1995); *In re A.J.S.*, 204 P.3d 543, 547 (Kan. 2009); *In re Elliott*, 554 N.W.2d 32, 35 (Mich. Ct. App. 1996); *In re Adoption of Riffle*, 922 P.2d 510, 515 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 324

(N.Y. App. Div. 2005); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *Quinn v. Walters*, 845 P.2d 206, 208 (Or. Ct. App. 1993), *rev'd on other grounds*, 881 P.2d 795 (Or. 1994); *State ex rel. D.A.C.*, 933 P.2d 993, 998 (Utah Ct. App. 1997).

State disagreements on the application of this federal law are significant, and may be considered more than adequate reason for this court to review this case, but implications become even more tricky when, like this case, the adoption took place across state lines. Further confusion may arise not only on which state's laws to use, but which state's interpretation of ICWA is appropriate. This creates a clear risk for Indian children who can't be guaranteed a predictable outcome and the essential permanence that comes with it.

We hope the court will grant review to resolve this dispute over whether ICWA should be applied and children should be removed when a non-Indian parent voluntarily makes an adoption plan for a child. The facts of this case are uncontested and the case is representative of a common pattern of a mixed race child, including Indian heritage, born to unmarried parents. We believe this makes it a good case for review and that your guidance is necessary to ensure practitioners can do what is right to support children, expectant parents, adoptive parents and all those involved in the adoption process.

B. State Courts are Split on the Definition of a Parent Under ICWA

A second key issue in need of clarification by this court is how parent is defined when ICWA applies to unmarried parents. Congress clearly states in its

definition of parent that it "does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). The federal law does not further explain how a father should acknowledge or establish paternity.

Courts in California, Oklahoma, Missouri, New Jersey, and Texas have interpreted the lack of explanation to mean that state paternity requirements should be applied. *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1064 (Okla. 1985), *overruled on other grounds In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004); *In re Daniel M.*, 1 Cal. Rptr. 3d 897, 900 (Cal. Ct. App. 2003); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. App. Ct. 1995); *In re S.A.M.*, 703 S.W.2d 603, 607 n.4 (Mo. Ct. App. 1986).

The South Carolina Court's decision in this case differed, finding that ICWA did not defer to state law to establish appropriate legal paternity. Instead, they follow the examples of Alaska and Arizona courts who have ruled that meeting state standards to acknowledge or establish paternity is not necessary. *Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011) and *Jared P. v. Glade T.*, 209 P.3d 157, 160-61 (Ariz. Ct. App. 2009).

We hope the court will grant review to clarify the definition of parent with regards to unmarried fathers when ICWA is applied. As with the issue of voluntary placement, the facts of this case are uncontested and the case is representative of a common fact pattern of a child being born to unmarried parents. We believe this makes it a good case for review and that your guidance is necessary to ensure practitioners can do what is right to support children,

ensure the rights of birth fathers, educate adoptive parents and advise all those involved in the adoption process.

C. ICWA's Proper Application Needs Clarification to Align with Congress' Intent

The Court's guidance is necessary to determine the proper interpretation and application of ICWA because there may be a discrepancy between the purpose of ICWA and its results. Congress passed ICWA to combat the issue of *involuntary* removal of Indian children by social services. Studies presented at Senate hearings showed that 25 to 35% of all Indian children were separated from their families and placed in foster care or adoptive families. *Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989). Indian children were eight times more likely to be placed in adoptive homes than non-Indian children. *Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989). Additionally, 90% of adopted Indian children were placed in non-Indian homes. *Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989). As a result, Indian leaders saw this epidemic as a threat to the fabric of Indian culture. *See Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989).

Involuntary removal spurred the passage of ICWA, but Congress drafted ICWA in a manner that allowed it to apply to all removal situations. Such a position was enforced by this Court in *Mississippi Choctaw Indians v. Holyfield*. 490 U.S. 30, 34 (1989) ("Congress determined to subject such placements to the ICWA's jurisdictional and other provisions, even in cases where the parents consented to an adoption,

because of concerns going beyond the wishes of individual parents. As the 1977 Final Report of the congressionally established American Indian Policy Review Commission stated, in summarizing these two concerns, '[r]emoval of Indian children from their cultural setting seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children.'"). Attempts to clarify this issue have not gone far enough. States are still at odds on whether ICWA applies in situations where a non-Indian parent voluntary places the child for adoption. Petition for Writ, 12-13. By granting a writ of certiorari, this Court can end considerable nationwide confusion.

Inconsistent application of the law amongst the Indian tribes should also encourage this Court to hear this case. ICWA only applies to Indian children who are either a member of a tribe or are eligible for membership of the tribe. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1902, 1903(4). Each tribe's eligibility requirements vary, creating instances where there application of ICWA may be inconsistent. For example, a child is eligible for membership to the Cherokee Nation if they can prove a lineal ancestor is listed on the Dawes Roll. *Citizenship*, CHEROKEE NATION, http://www.cherokee.org/Services/TribalCitizenship/30869/Information.aspx (last visited Oct.15, 2012). Under such a rule, a child with very little Cherokee blood can qualify as a citizen of the Cherokee Nation and, therefore, would be subject to ICWA. In contrast, a child is only eligible for Navajo citizenship if they are 1/4 Navajo. *Frequently Asked Questions*, NAVAJO NATION, http://www.navajo-nsn.gov/contact.htm#roots (last visited Oct. 15, 2012). Such a requirement shrinks the pool of children subject to ICWA. Further, a tribe may change their

enlistment requirements at any time. If a tribe expands who is eligible for membership a child already placed for adoption or in foster care may become eligible after the point at which application of ICWA might normally be considered in a case. This places an unpredictable burden on those responsible for finding homes and determining if a home is appropriate for a child. These variations in tribal eligibility may result in an unpredictable and unequal implementation of ICWA.

D. Tribal Rights and the Rights of Individual Parents and Children are at Odds

ICWA makes it difficult to know whether to prioritize the rights and best interests of the tribe or the rights and best interests of the individuals involved. Parents and children's rights are arguably at odds with the rights and interest of the tribe at times. In *Troxel v. Granville*, this Court affirmed parents' fundamental right to the custody and care of the child. 530 U.S. 57, 65-66 (2000). When the parents' rights and state interest conflicted, this Court held that "so long as a parent adequately cares for his or her children (*i. e.,* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel v. Granville*, 530 U.S. 57, 69 (2000). In this instance, the mother adequately cared for Baby Girl by acknowledging that she was not best capable of supporting her newborn child and deciding that making an adoption plan was in the best interest of her child. Brief for Petitioner at 4a, *Adoptive Couple v. Baby Girl*, No. 12. The parent's

right to make this decision is arguably at odds with that of the tribe when ICWA is interpreted to apply to voluntary placements of a child.

Further, rights of the individual child, their life experiences, and the parts of them that are not Indian may be considered at odds with ICWA. Passage of ICWA as a means of remedying damage to the Indian family unit and tribe was an understandable course of action in response to the unfair history of Indian child removal. It is questionable, however, whether Congress' intent was to make secondary the many other interests of a child besides their right to participate in the tribal community and the tribe's right to have them in the community.

CONCLUSION

This case should be heard by the Court for two reasons. The best interests of that particular child should be of the utmost priority in determining any child's outcome. A ruling on this case will allow the Court an opportunity to clarify and enforce each child's right to the best loving and permanent home for them. The current unpredictable outcomes of ICWA cases threaten a child's need for stability and their healthy development through attachment to consistent, trusted caregivers.

Second, guidance is necessary to clarify when, how, and to whom ICWA should apply. Proper implementation of this law should do what is best for children first and then for all others impacted by an adoption. Practitioners need to be able to predict likely outcomes when ICWA is applied. This ensures they act in compliance with ICWA in order to provide the best support to children, ensure the rights of birth par-

ents, protect rights of Indian tribes, educate adoptive parents, and advise all those involved in the adoption process.

Respectfully submitted,

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