No. 12-399

In The
Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, a minor child under the age of fourteen years, BIRTH FATHER, and THE CHEROKEE NATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF *AMICI CURIAE* LOWER SIOUX INDIAN COMMUNITY, BOIS FORTE BAND OF CHIPPEWA, PRAIRIE ISLAND INDIAN COMMUNITY, FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA, WHITE EARTH BAND OF OJIBWE, THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, THE GRAND PORTAGE BAND OF LAKE SUPERIOR CHIPPEWA, UPPER SIOUX COMMUNITY, THE LEECH LAKE BAND OF OJIBWE, THE MILLE LACS BAND OF OJIBWE, THE RED LAKE NATION, THE MINNESOTA CHIPPEWA TRIBE, AND THE INDIAN CHILD WELFARE ACT LAW CENTER IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether this Court should accept Petitioners' invitation to rewrite the statutory text of the Indian Child Welfare Act to:

(1) narrow its scope of applicability to certain "existing Indian families;" or

(2) to re-define "parent" under the Act;

despite the majority of reasoned decisions – including laws in Minnesota – that expressly provide to the contrary?

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INTEREST OF *AMICI CURIAE*[1]

Collectively, *amici* are the tribes and professionals in the state of Minnesota who are involved every day in child-custody proceedings involving Indian children. They are the on-the-ground litigants who witness the real-world consequences of the Indian Child Welfare Act ("ICWA" or "Act") and the application of state law to Indian children, their families, and their tribes. *Amici* support the South Carolina Supreme Court's decision, and the Respondents Birth Father and Cherokee Nation before this Court.

The Lower Sioux Indian Community, the Bois Forte Band of Chippewa, the Prairie Island Indian Community, the Fond du Lac Band of Lake Superior Chippewa, the White Earth Band of Ojibwe, the Shakopee Mdewakanton Sioux Community, the Grand Portage Band of Lake Superior Chippewa, the Upper Sioux Community, the Leech Lake Band of Ojibwe, the Mille Lacs Band of Ojibwe, the Red Lake Nation, and the Minnesota Chippewa Tribe (the "*Amici* Tribes") constitute every tribe that exists within Minnesota's state borders. The *Amici* Tribes are all federally recognized Indian tribes that exercise retained,

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters reflecting this blanket consent have been lodged with the Clerk.

inherent, sovereign authority over their territory and their members. Each of the *Amici* Tribes exercises governmental authority in matters involving the health and welfare of their tribal members, especially including their Indian children who are or may become involved in child-welfare proceedings in tribal, state, or federal courts. In a historic move, all eleven Minnesota tribes have joined together as *amici* before this Court, along with the Indian Child Welfare Act Law Center ("ICWA Law Center"). The ICWA Law Center is a non-profit, American Indian legal services organization located in Minneapolis, Minnesota. The ICWA Law Center advances the purposes of ICWA by (1) providing representation for Indian children and parents; (2) by advocating for systematic responses for better meeting the needs of Indian children and families through local, state, and national work groups; and (3) by training the legal and social service community about the historical necessity, practical application, and future implications of ICWA.

SUMMARY OF ARGUMENT

Before ICWA's passage, an Indian child in Minnesota was 3.9 times more likely to be placed for adoption than a non-Indian child, and 16.5 times more likely than a non-Indian child to live in foster care. S. Rep. No. 95-597, at 47 (1977) ("Senate Report"). In 1969, over 700 Minnesota foster homes were caring for Indian children; *only two* included an Indian parent. 123 Cong. Rec. 21043 (1977). These

realities resulted in Indian children losing their identities and tribes losing their future leaders at "alarming rates." 124 Cong. Rec. 38102 (1978); *see also* 25 U.S.C. § 1901.

Minnesota was not alone. Nationwide, Indian children and tribes were faced with the devastating consequences of lost familial and tribal connections. In response to this crisis, Congress carefully crafted ICWA "to protect the rights of the Indian child as an Indian and the rights of the Indian Community and tribe in retaining its children in its society." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989) (quoting H.R. Rep. No. 95-1386, at 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530 ("House Report")). ICWA provided a clear framework on which tribes and states could rely to foster intergovernmental cooperation in the placement of Indian children. ICWA purposely limited the conduct of states in removing Indian children from their homes and emphasized the role of tribes in protecting the best interests of Indian children. ICWA recognizes the fundamental connection between Indian children, their families, and their tribes.

As Congress intended, the Minnesota experience with ICWA has resulted in intergovernmental cooperation to meet the best interests of Indian children. The state of Minnesota, tribes located within Minnesota borders, and child-welfare experts have labored together to follow ICWA's blueprint and address the disparities in Indian-child placements. In 35 years of hard-won progress, Minnesota has used ICWA as a

springboard to build state statutes, state-tribal agreements, judicial resources, and processes. Minnesota has used these experiences to evaluate collectively what works and what does not – just as Congress intended.

Through these efforts, the tribes, the state, and child welfare experts in Minnesota have already addressed both questions presented by this case. First, ICWA applies to every Indian child regardless of whether an Indian child comes from an "existing Indian family." Second, the Act governs all proceedings involving Indian children, including by providing minimal national standards that define the "parents" of those Indian children. Minnesota has determined that altering ICWA through a judicially created exception or an imported definition is at odds with the plain language and the intent of the statute.

ICWA recognizes and protects the relationship between tribes and their children – *all* of their children – and Minnesota is committed to implementing the practices that give that policy vitality child-by-child and family-by-family. While disparities in the placement of Indian children continue to plague the child welfare system, in Minnesota the tribes, the state, and child welfare experts have committed to use the ICWA framework to address these disparities and in turn ensure the best interests of Indian children. Ensuring Indian children's connection to their tribes is in the best interests of all three groups that Congress intended ICWA to protect: Indian children, their families, and Indian tribes. This Court should

not cast aside that policy and decades of intergovernmental implementation by altering ICWA.

ARGUMENT

I. ICWA provides a platform of minimum standards upon which Minnesota works to protect the best interests of Indian children, their families, and their tribes.

Minnesota's history demonstrates the "crisis . . . of massive proportions," H.R. Rep. No. 95-1386, at 9, posed by the "wholesale removal of Indian children" from their families and tribes and placement with non-Indian foster-care and adoptive homes. *Holyfield*, 490 U.S. at 32 (citing *Indian Child Welfare Program, Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93d Cong. 3 (1974) (statement of William Byler) ("1974 Hearings")). According to conservative reports, before ICWA's passage, more than one in every eight Indian children in Minnesota under the age of 21 had been adopted. Senate Report, at 46-47. Of those adoptions, 97.5% were by non-Indian families. *Id.* Indian children in Minnesota were removed from their parents and placed in foster care or in adoptive homes five times more often than non-Indian children in Minnesota. House Report, at 9; *Holyfield*, 490 U.S. at 33 (citing, generally, 1974 Hearings).

Consistent with ICWA's policies of protecting the best interests of Indian children and promoting the

stability and security of Indian tribes and families, Minnesota is working to break from its ignoble past. *See* 25 U.S.C. § 1902. ICWA compels states like Minnesota, which has eleven federally recognized tribes within its borders, to address and eliminate the disproportionate number of Indian children taken from their families and tribes that resulted in such devastating consequences for Indian children, their families, and their tribes.

In Minnesota, Indian tribes act as economic centers, self-governing bodies politic, and governments that deliver critical services to their members. Because there can be no tribes without tribal leaders, nothing "is more vital to the continued existence and integrity of Indian tribes than their children." *Id*. ICWA was designed to promote the best interests of Indian children and tribes by providing procedural protections *before* Indian children's connections to their families and tribes are severed. *See Holyfield*, 490 U.S. at 34 (citing *Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. 193 (1978)); *see also* 25 U.S.C. § 1902.

A. Minnesota has built on ICWA to develop state statutes, intergovernmental agreements, and tools to train its judiciary.

In Minnesota, ICWA has resulted in substantial improvements in the administration of Indian-child-welfare coordination and a broader cooperation

between the state and tribes. This intergovernmental cooperation has assured that all interested parties – the state, the tribe, the parents, and the Indian child – are involved in child custody proceedings, including adoptive placements, and that all parties have an opportunity to be heard.

Following ICWA's enactment, the state of Minnesota worked with the eleven tribes within the geographical boundaries of the state and with Indian-child-welfare experts. As a result of these efforts and after nearly five years of such consultation, in 1985, the Minnesota legislature passed the Minnesota Indian Family Preservation Act ("MIFPA"). Minn. Stat. §§ 260.751-260.835 (1985). The statute mirrors and, in some cases, builds on ICWA's construct. Minnesota has continued to learn from its experiences and has amended MIFPA several times. *See, e.g.*, Minn. Stat. § 260.755 (1999); Minn. Stat. § 260.755 (2007); Minn. Stat. § 260.755 (2012).

This intergovernmental consultation also resulted in the Minnesota Tribal-State Agreement, just as ICWA contemplated. *See* 25 U.S.C. § 1919(a). The Minnesota Tribal-State Agreement established common sense procedures to apply ICWA's minimum federal standards and insured that Minnesota meets ICWA's overarching priorities in ways that work on the ground in individual cases. Minn. Tribal/State Indian Child Welfare Agreement, Minn. Dep't of Human Servs. Bulletin #99-68-11 (Aug. 25, 1999). Subsequent real-world experience prompted an amended Tribal-State Agreement in 2007 ("2007 Agreement"). 2007

Tribal/State Indian Child Welfare Agreement, *available at* http://www.icwlc.org/docs/9-icwa_2007_tribal_state_agreement_dhs-5022-eng-2-07.pdf (last visited March 6, 2013). The stated purpose of the 2007 Agreement is "to protect the long term best interests, as defined by the Tribes, of Indian children and their families, by maintaining the integrity of the Tribal family, extended family and the child's Tribal relationship." 2007 Agreement, at 2. The 2007 Agreement acknowledges that Indian children are the future of their tribes and that they are vital to their tribes' existences. *Id.* at 3. It also acknowledges the belief that Indian children are sacred and close to the creator. *Id.*

These ICWA-prompted discussions and agreements also spurred expanded coordination between the state and tribal judiciaries. Joint efforts have included education of state-court judges about tribal courts, adoption of state rules addressing the effect of tribal-court orders, creation of workable state-court jurisdictional rules that provide clarity and certainty in ICWA cases, and development of an ICWA chapter of the Minnesota Judges Juvenile Protection Benchbook ("Benchbook"). *See* Minn. Gen. R. Prac. 10; Minnesota Rules of Juvenile Protection Procedure, Rule 48 (detailing procedures for transfers of jurisdiction to tribal courts); Minnesota State Court Administrator's Office, Court Services Division, *Minnesota Judges Juvenile Protection Benchbook* (2004-2011), *available at* http://www.mncourts.gov/?page=178.

Through these efforts, the state, tribes and child-welfare experts have committed to ending violations of ICWA to protect the best interests of Indian children and to strengthen Indian families and communities.

B. Minnesota's development of state law based on and around ICWA implements Congress's recognition of the distinct interests of Indian children and tribes.

Minnesota law expressly recognizes that compliance with ICWA is in the best interest of Indian children. As the Minnesota Court of Appeals has recognized, ICWA "aims to protect the best interests of Indian children, and to protect the tribes, by creating a minimum federal standard for placement proceedings." *In re Welfare of Children of C.V.*, No. A04-441, 2004 WL 2523127, at *3 (Minn. Ct. App. Nov. 9, 2004). Minnesota also recognizes the distinct interests of Indian tribes, domestic dependent sovereign governments possessing "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322 (1978). Those powers – which predate the adoption of the Constitution – include the power to manage domestic relations of tribal members, *e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980), specifically and especially including child rearing. *E.g., Wakefield v. Littlelight*, 347 A.2d 228,

234-35 (Md. 1975) (*citing Williams v. Lee*, 358 U.S. 217 (1959)).

The United States built upon these inherent powers when it adopted ICWA in fulfillment of its fiduciary obligation to Indian tribes and their members, which "has long dominated the Government's dealings with Indians." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). ICWA's principal sponsor was rightly concerned that state child-placement laws were causing tribes to be "drained of their children and, as a result, their future as a tribe." *Holyfield*, 490 U.S. at 34 n.3 (quoting 124 Cong. Rec. 38102 (1978)). In enacting ICWA, Congress recognized that "[t]he United States, as trustee for Indian tribal lands and resources, has a clear interest and responsibility to act to assist tribes in protecting their most precious resource, their children." *Id.* at 50 (quoting Senate Report at 52)); 124 Cong. Rec. 38103 (1978).

MIFPA and its amendments, the Tribal-State Agreement and subsequent 2007 Agreement, and relevant court rules and Benchbook instructions for ICWA case procedures all followed the path marked by Congress by prioritizing the best interests of Indian children and sovereign interests of tribes. This ICWA-driven intergovernmental cooperation has gone a long way toward assuring that all the interested parties in any case – the state, the tribe, the parents, and the Indian child – are involved in custody and placement proceedings (including adoptions) from the beginning and that the interests of all parties are before the court.

II. By following the plain language and policy of ICWA, Minnesota stakeholders have already resolved that ICWA applies regardless of state-law parenting rights.

Petitioners urge this Court to condition ICWA's procedural protections of Indian children and tribes on the state-law status of an Indian parent. But Minnesota stakeholders' intensive work to implement ICWA demonstrates both the necessity and the workability of following ICWA's plain definition of "Indian child." As even Petitioners acknowledge, the plain language of ICWA applies where there is an "Indian child," Pet. Br. 4 (citing 25 U.S.C. § 1903(1)(iv)); and it applies regardless of "[w]hether a non-custodial parent can invoke" ICWA. *Id.* at i. So here, once the South Carolina state court determined that the child is eligible for tribal membership (which she is) and is the biological child of an enrolled tribal member (which she is), ICWA applied (which it does).

This bright-line definition has proven effective in the Minnesota experience, where MIFPA incorporates ICWA's definition of "parent" for child custody proceedings. The two statutes use nearly identical language in defining "parent" to apply ICWA within the state. *See* Minn. Stat. § 260.755, subd. 14; 25 U.S.C. § 1903(9). MIFPA's use of ICWA's definition of "parent" makes sense. ICWA recognized that state actions and practices prior to the Act's passage had failed to recognize and protect the unique relationships between Indian children, their families, and their tribes. 25 U.S.C. § 1901(5). Thus, applying a state-law

definition of "parent" that applies to fewer people than the federal statutory definition is contrary to the text and purpose of ICWA.

Minnesota's judicial Benchbook illustrates that the MIFPA and ICWA statutory definition of "parent" is one that can easily be applied by practitioners and the judiciary. The Benchbook specifically directs the court administrator to give notice of ICWA hearings to parents whose rights have not been terminated, "including any alleged, adjudicated, presumed, or putative father who has acknowledged paternity, even if he has not legally established paternity." Benchbook, at 35-18. It further explains that the best practice is for the court to "direct the agency to continue its active efforts to notify non-custodial parents, including unwed fathers whose paternity has not been acknowledged or established." *Id.*

This bright line is important because Minnesota law explicitly recognizes that ICWA's statutory protections exist independent of parents. The 2007 Agreement similarly builds on ICWA's definition of "Indian child" and confirms that "[a] termination of parental rights does not sever the child's membership or eligibility for membership in the tribe" and that a tribe's determination that a child is a member or is eligible for membership "is conclusive." 2007 Agreement, at Part I § F(21). Thus, for any particular child, it is the tribal membership decision – not any parental decision or conduct – that triggers the protections of ICWA and MIFPA. By following the text and policy

of ICWA, Minnesota has already rejected Petitioners' argument. So, too, should this Court.

III. By following the plain language and policy of ICWA, Minnesota stakeholders have, like most jurisdictions, rejected the "existing Indian family" exception as inconsistent with ICWA.

The Court should also reject Petitioners' request to adopt the dying minority doctrine of the "existing Indian family exception." As Minnesota has recognized, this exception is inconsistent with the plain language of ICWA. Moreover, it is fundamentally at odds with the priorities of ICWA – the best interests of Indian children, Indian families, and Indian tribes.

A. The Tribal-State Agreement and Minnesota statutes both explicitly reject the "existing Indian family" exception.

In negotiating the terms of Minnesota's 2007 Agreement, child-custody practitioners, leaders and members of the eleven tribes, and state officials carefully considered the ramifications of applying the "existing Indian family exception." These parties considered the text of ICWA and the statute's purpose in negotiating whether and how the 2007 Agreement would treat the "exception." Their ultimate guide, however, was their desire to craft the best rule of law for Indian children in Minnesota. And their decision was unequivocal. The 2007 Agreement repeats the

definition of "Indian child" found in ICWA and continues:

> The parties agree that this statutory definition of an Indian child applies without exception in any child custody proceeding. Whether an Indian child is part of an Indian family or has established a connection to her or his tribe is not a consideration in determining the applicability of the Indian Child Welfare Act or the Minnesota Indian Family Preservation Act to an Indian child. The parties to this agreement explicitly reject any existing Indian family exception or doctrine.

2007 Agreement, at 14.

The Minnesota legislature reached the same result in considering amendments to the coordinate MIFPA statute. After hearing testimony from state and tribal leaders, the state legislature recognized that the purported "exception" disregards the continuing interest of *all* Indian children in growing up in tribal environments and entirely ignores Congress's purposeful consideration of tribes' separate interests in ICWA proceedings. *See* Minnesota Legislature, *Comm. Hearings and Actions for S.F. 1221 Before the Comm. on Health, Housing, and Family Sec.*, 85th Sess. (March 21, 2007), *available at* http://www.senate.leg.state.mn.us/schedule/unofficial_action.php?ls=85&bill_type=SF&bill_number=1221&ss_number=0&ss_year=2007. The legislature squarely rejected the exception and provided that MIFPA applies:

> to child custody proceedings involving an Indian child whether the child is in the physical or legal custody of an Indian parent, Indian custodian, Indian extended family member, or other person at the commencement of the proceedings. *A court shall not determine the applicability of this chapter or the federal Indian Child Welfare Act to a child custody proceeding based upon whether an Indian child is part of an existing Indian family or based upon the level of contact a child has with the child's Indian tribe, reservation, society, or off-reservation community.*

Minn. Stat. § 260.771, subd. 2 (2012) (emphasis added).

But even before the Minnesota statute and Tribal-State Agreement, the judiciary in Minnesota acknowledged that the "existing Indian family" exception was fundamentally at odds with ICWA's text. For example, the Minnesota Court of Appeals noted, in a published opinion, a district court's conclusion that an argument based on the existing Indian family exception was "without merit[.]" *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 152-53 (Minn. Ct. App. 2007). In short, like the majority of jurisdictions across the country, all sources of law in Minnesota have rejected the existing Indian family exception.

B. Applying the "existing Indian family" exception would contradict ICWA's text, promote defiance of its provisions, and jeopardize Minnesota's progress.

Minnesota's rejection of the "existing Indian family" doctrine is consistent both with the text of ICWA and with its purpose of serving the best interests of Indian children while maintaining viable Indian tribes.

First, there is no provision of ICWA that limits its applicability to only Indian children with "existing Indian families." Moreover, as Respondent Birth Father explains, "the statutory language, structure, and background" preclude such an exception. F. Br. at 19; *see Dada v. Mukasey*, 554 U.S. 1, 16 (2008) ("In reading a statute we must not look merely to a particular clause, but consider in connection with it the whole statute." (internal quotation marks and citation omitted)). Congress itself rejected an earlier version of ICWA that would have sanctioned certain state-court decisions regarding tribal-court jurisdiction on whether an Indian child had "significant contacts" with his or her Indian tribe. Indian Child Welfare Act, Pub. L. No. 95-608, § 4(5), 92 Stat. 3069 (1978). Petitioners' "existing Indian family" exception would reintroduce this abandoned idea, and indeed would do so in an even broader manner than Congress contemplated by applying it to the entire statute.

Moreover, testimony surrounding ICWA's passage further reflected that *every* Indian child *has* an existing Indian family at birth – a fact to which state caseworkers applying "a white, middle-class standard" were blind. *See Holyfield*, 490 U.S. at 37 (quoting House Report, at 24). So today, a court looking for a Norman Rockwell-style portrait of a nuclear "existing Indian family" may not find one, but Congress already dismissed such myopic judgment. This Court should not adopt a judicial work-around that relies on the very idea Congress rejected. *See* Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069.

Indeed, the circumstances parties have used to argue for the "exception" usually arise only where (as in this case) compliance with ICWA's procedures has been delayed and the Indian child has been deprived of his or her familial and tribal connections. If ICWA is followed from the beginning of each case, any arguable policy justification for an "existing Indian family exception" disappears. *E.g.*, Benchbook, at 35-17 ("It is paramount that the Indian child's parent or Indian custodian and child's tribe be immediately notified of the placement proceeding and of the pending hearing."). And if litigants expect that courts will follow ICWA from the beginning of each case, as Minnesota courts have learned to do, delay and uncertainty in permanent placement decisions (as demonstrated by this case) will be avoided.

C. Petitioners' proposed revisions to ICWA invite constitutional challenges that Minnesota has avoided.

Finally, Petitioners' arguments about impermissible racial classifications are entirely backward. Congress's decision to ground ICWA's applicability on the statutory definition of an "Indian child" is constitutionally sound because it rests on sovereign tribal-membership decisions. The definition is not "triggered by the child's racial status unmoored to tribal sovereignty, culture, or politics," as Petitioners argue. Pet. Br. at 18. ICWA's protections of Indian children are "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities[.]" *See Morton v. Mancari*, 417 U.S. 535, 554 (1974).

This Court has recognized the authority of Indian tribes to determine their membership, *Santa Clara Pueblo*, 436 U.S. at 55 (citing *Roff v. Burney*, 168 U.S. 218 (1897)), and in Minnesota, those decisions may include a residency requirement instead of a blood-quantum requirement. *E.g.*, Const. of the Lower Sioux Indian Cmty. in Minn., art. III, § 1 (extending membership to "All children of any member who is a resident of the Lower Sioux Reservation at the time of the birth of said children."), *available at* http://www.lowersioux.com/pdffiles/Lower%20Sioux%20Indian%20Community%20Constitution.pdf. Minnesota law affords ICWA's procedural protections to *all* parents of Indian children – not just Indian parents –

and so has no disparate racial treatment. *See* 25 U.S.C. § 1903(9) (defining parent as "any biological parent or parents of an Indian child"); Minn. Stat. § 260.755, subd. 14.

By contrast, any adjudication of whether a child is part of an "existing Indian family" is fraught with constitutional problems. The existing Indian family exception requires courts to "judge whether the parent's cultural background meets [the dominant society's] view of what 'Indian culture' should be." *See In re D.A.C.*, 933 P.2d 993, 999 (Utah Ct. App. 1997); *In re A.J.S.*, 204 P.3d 543, 551 (Kan. 2009); *see also In the Matter of Baby Boy C.*, 27 A.D.3d 34 (N.Y. App. Div. 2005). Instead of letting tribes be the judge of who is "Indian," the existing Indian family exception asks courts to decide, case by case, whether the child was in a home "Indian enough" for ICWA to apply. *See, e.g.*, Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*, 23 Am. Indian L. Rev. 1, 40-41 (1998) (describing court inquiries into "a number of intrusive and, for some tribes, irrelevant factors" including whether parents voted in tribal elections, subscribed to tribal newspapers, and contributed to Indian charities). Unmoored to tribal membership criteria, state courts applying the "exception" to avoid ICWA can do so only by relying on impermissible racial and ethnic classifications. *See In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL 1138130, at *4 (Tenn. Ct. App.

Apr. 27, 2009) (attempting to judge whether an Indian child "was in a home or part of a family that recognized its Native American culture").

Federal and state courts should not be in the business of counting dream catchers or pow-wows, and Minnesota's decision to avoid such inquiries is the constitutionally sound majority approach that this Court should adopt. *See Machinists v. Street*, 367 U.S. 740, 749 (1961) (describing doctrine of statutory interpretation that requires federal statutes to be construed to avoid "serious doubt of their constitutionality").

IV. The minimum federal protections of ICWA remain important to Indian children and Indian tribes in Minnesota and should be followed.

ICWA's protections remain as necessary today as when Congress passed the statute. While tribes, states, and local governments have made undeniable progress toward the Congressional goal of protecting Indian children's connections to their tribes, there is still work to be done. *Holyfield*, 490 U.S. at 37 (citing House Report, at 23). This Court should not undo the progress that Minnesota has achieved – and prevent it from improving further – by accepting Petitioners' invitation to change the governing law.

A. Adherence to the letter and spirit of ICWA is needed to further reduce disparities.

Recent studies done on child protective actions in Minnesota present a stark picture of the additional work that is needed to achieve greater stability in maintaining connections between Indian children, their families, and their tribes. A report published by the Minnesota Department of Human Services in February of 2010 acknowledged that "American Indian children were placed in out-of-home care for one or more days in 2008 at a rate more than twice that of any other group and were 12 times more likely than a White child to spend time in placement." Minn. Dep't of Human Services, *Minnesota Child Welfare Disparities Report*, at 21, *available at* https://edocs.dhs.state.mn.us/lfserver/Public/DHS-6056-ENG. A 2007 publication by the Minnesota Department of Human Services revealed similar disparities. Minn. Dep't of Human Services, *Indian Child Welfare Act (ICWA) Active Efforts Best Practices*, at 5 (Feb. 2009), *available at* http://www.mncourts.gov/Documents/0/Public/Childrens_Justice_Initiative/ICWA_-_Active_Efforts_Best_Practices_%28MN_DHS%29_%28February_2009%29.pdf.

The detailed 2010 report provides data and research that demonstrates that a child being Indian is a relevant factor in the disparities that exist in Minnesota. Those disparities exist independent of factors including maltreatment occurrence rates and poverty.

Id. at 9-10. For example, the report admits that "tribally affiliated children are disproportionately referred by community reporters" and that "[n]ational and local research indicates that some disproportionate representation may be due to factors other than true differences in maltreatment occurrence." *Id.* It also compares relevant factors across demographic groups; the data demonstrates that American Indian children still have higher out-of-home placements than their African-American counterparts, even despite higher rates of poverty in the African-American families. *Id.* at 10, 21.

B. Changing ICWA as requested by Petitioners would disturb Minnesota's progress.

ICWA, this Court's decision in *Holyfield*, and the state law in Minnesota all demonstrate that applying the provisions of ICWA to child custody proceedings involving Indian children promotes the best interests of those children. 25 U.S.C. § 1902; *Holyfield*, 490 U.S. at 50 n.24; 2007 Agreement, at 2. The necessary corollary is that the opposite result – urged by Petitioners and the *amici* supporting their position – is contrary to the best interests of Indian children.

Petitioners' disappointment with a South Carolina decision in a particular case does not demonstrate *a minore ad maius* a problem with ICWA. Yes, there

is more work to be done in Minnesota to rectify the disparate treatment of Indian children in child-custody proceedings. But as the last three-and-a-half decades in Minnesota have demonstrated, that work is best undertaken within a predictable framework that fosters coordination and cooperation. Even in Minnesota, where the state, tribes, and local governments have built on ICWA's framework by implementing statutes, intergovernmental agreements, and tools for the judiciary, the need for ICWA and its protections remains. Each of these vital pieces rests on ICWA's core protections of the interests of Indian children and tribes.

Today, with the ICWA framework in place and Minnesota's implementation continuing, the experience of Indian children in Minnesota is changing. But centuries of institutionalized assault on Indian families cannot be remedied in three-and-a-half decades. Every day, tribal agencies work side-by-side with their state counterparts doing the hard work of keeping kids safe, fostering their development, and placing them with families that will continue to nurture their intellects, abilities, and identities. Consistent with ICWA, every day that they do so, their guiding star is the best interests of each individual child. ICWA ensures that these workers look for these best interests using a lens that understands that "[r]emoval of Indian children from their cultural setting seriously impacts long-term tribal survival and has

damaging social and psychological impact on many individual Indian children." *Holyfield*, 490 U.S. at 50 (quoting House Report, at 52).

Though it has taken years to refine these practices on the ground, they are now familiar in Minnesota. By providing procedural certainty to case managers, guardians ad litem, and others, the ICWA framework allows these workers – with both tribal and nontribal perspectives – to focus on the substance of what is best for particular children in particular cases instead of devoting resources to jurisdictional battles. This system is predicated on ICWA remaining in place, with full effect to all its provisions. In Minnesota, ICWA works because everyone knows the rules.

A reversal of the South Carolina Supreme Court's ruling here would change the rules in Minnesota. Accepting Petitioners' invitation to read state-law paternity standards into ICWA or to impose the "existing Indian family" exception would undermine Congress's express purpose "to protect the rights of the Indian child as an Indian and the rights of the Indian Community and tribe in retaining its children in its society." *Id.* at 37 (quoting House Report, at 23). Such a decision would also upset settled expectations in the states, frustrating the progress that ICWA has prompted thus far. Introducing state-law triggers into the application of ICWA would upset Minnesota's careful twelve-government balance of interests in the 2007 Agreement. 2007 Agreement, at

Part I § F(21). And instead of allowing caseworkers to focus on what is best for Indian children, the "existing Indian family" departure would create a case-by-case carve-out that encourages bitter litigation about which sovereign has jurisdiction and even more fundamentally about what it means to be Indian, a result that does violence to ICWA's purpose. Senate Report, at 23 (stating that ICWA addresses "[t]he need to resolve jurisdictional confusion on terms that will eliminate both the most serious gaps in service and the conflicts between State, Federal, and tribal governments that leave too many children without needed care").

Reversal here would send states like Minnesota back to square one and would once again force tribes to try to persuade state and local caseworkers of the importance of tribal connections to both children and tribes, a process that Congress recognized failed tribes and Indian children dreadfully in the past.

CONCLUSION

"The right of Indian tribes and Indian families to their children is a human right and the defense of human rights, like charity, begins at home." 124 Cong. Rec. 38103. At home in Minnesota, ICWA has formed the foundation of the work to defend the right of Indian tribes and Indian families to their children.

This Court should protect that framework by affirming the South Carolina Supreme Court's decision.

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