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No. 12-399

IN THE

# Supreme Court of the United States

ADOPTIVE COUPLE,

*Petitioners,*

*v.*

BABY GIRL, A Minor Under the Age of Fourteen Years,
BIRTH FATHER, and the CHEROKEE NATION,

*Respondents.*

ON WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT

## BRIEF OF *AMICUS CURIAE* ADOPTIVE PARENTS COMMITTEE, INC. IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS CURIAE*[1]

**The Adoptive Parents Committee, Inc.** (APC) is a non-profit parent support group comprised of volunteers dedicated to improving all aspects of adoption and interim (foster) care. APC, the oldest adoptive parent group in North America, was formed in 1955 by a small group of people who shared their adoptive experiences. Today, there are more than 1,500 member families who belong to one of APC's four chapters: Long Island, New York City, New Jersey and the Connecticut/Hudson Region. Some of our members are from Florida, Virginia, Pennsylvania and other states throughout the country. APC is an advocate for humanitarian improvements in the adoption and foster care system. Our goal is to Let Every Child Eligible For Adoption Become Available for Adoption. APC is also committed to educating the public, the media and its members about current adoption issues. This brief is submitted out of shared concern that the best interests of the child was ignored by the Supreme Court of South Carolina in applying the ICWA to block the adoption of Baby Girl where neither the child nor her mother had any meaningful connection to tribal sovereignty or lands, and where the biological father had no standing as father under the ICWA or the Constitution. APC believes that unless the decision and order of the SC Supreme Court is reversed countless other children will suffer the fate

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have filed blanket waivers with the Court consenting to the submission of all *amicus* briefs.

of Baby Girl and be wrenched from the only parents and family that they know in a misguided application of the ICWA to preserve a non-existing Indian family.

## SUMMARY OF ARGUMENT

The South Carolina Supreme Court decision and order unquestionably will have a chilling effect on adoptions of children with some Indian blood throughout the country. Adoptive parents will be unwilling to open their hearts and their homes to adopt a child with any measure of Indian blood out of fear that their child can be wrenched from their care and the family disrupted by the late emergence of an unwed non-custodial biological Indian father at anytime after they have bonded to the child, and the child to them, under this misguided application of ICWA. The desired outcome of increasing tribal membership will not be the result. Instead, if this decision is allowed to stand it will signal that unwed mothers of children with any Indian blood but no ties to a tribe or tribal life, will be forced to parent their unwanted child as they are unable to find adoptive homes all in the name of preserving the non-existent Indian family.

In our view, the dissent opinion (Kitteridge, J.) more fairly depicts the facts leading to the placement of Baby Girl with appellants for adoption. Even the most liberal reading of the majority recitation of the facts reveals a determined effort to excuse and explain away the birth father's admitted abandonment of Baby Girl and to portray the adoptive parents as scheming to skirt the ICWA, neither of which are true.

## ARGUMENT

### POINT I

### THE DECISION BELOW IS CONTRARY TO THE BEST INTERESTS OF CHILDREN AND WILL PREVENT OTHERWISE DESIRABLE ADOPTIONS FROM OCCURRING.

The decision made by the South Carolina Supreme Court pays mere lip service to the best interests of children and will undoubtedly prevent the adoptions of children with Indian blood. Adoptive parents will be discouraged from opening their hearts and their homes to children in need, simply because they may have a measure of Indian heritage. Painfully aware of the heartbreak that has resulted from such misguided applications of ICWA as this, families who want to adopt a child into their homes will understandably shy away from adopting any child with even the possibility of Indian blood out of the very real fear that a previously uncommitted father or tribe can emerge at any time and break the bonds they have formed with the child. The desired outcome of increasing tribal membership will not be the result. Instead, if this decision is allowed to stand it will signal that unwed single mothers of children with any Indian blood but no ties to a tribe or tribal life, will be forced to parent their unwanted child as they are unable to find adoptive homes all in the name of preserving the non-existent Indian family.

The day should have long passed in this country when children are treated as chattels and unwed fathers can chauvinistically dictate when, and if, they deign to act as a father to their out-of-wedlock child. It is both demeaning and patronizing to hold Indian fathers less

responsible for their out-of-wedlock child than non-Indian father. Hopelessly lost in the South Carolina Supreme Court interpretation of the ICWA is the best interests of Baby Girl. Her right to a permanent, stable and loving home and her right to have her bonds of love and attachment to her adoptive parents respected and not interfered with were ignored by the South Carolina Supreme Court decision. Baby Girl's rights and interests are of constitutional dimension and should have been of paramount importance in the court's consideration of her state adoption proceeding.

The State has an important interest in "ensuring swift, permanent placements" of newborns that "are more likely to be adopted and more readily bond with adoptive parents." *Matter of Raquel Marie X.,* 76 N.Y. 2d at 404, 406, 559 N.E.2d at 425, 559 N.Y.S.2d at 862. "Certainty and finality" are what the law seeks to achieve precisely to protect the infliction of needless harm. See *Matter of Sarah K.,* 66 N.Y.2d 223, 234, 487 N.E.2d 241, 246, 496 N.Y.S.2d 384, 389 (1985), *cert. denied sub nom. Kosher v. Stamatis*, 475 U.S. 1108 (1986). See also *Matter of Raymond AA v. Doe*, 217 A.D. 2d 757, 759, 629 N.Y.S.2d 321, 324 (3d Dept. 1995), *lv. app. denied*, 87 N.Y.2d 805, 663 N.E.2d 919, 640 N.Y.S.2d 840 (N.Y 1995) ("It is axiomatic that the State has a legitimate interest in establishing procedures which assure both a prompt adoption and the stability of the adopted child.").

Non-Indian single mothers with sole legal custody who are unable or unwilling to parent their child with any iota of Indian blood will find potential adoptive homes closed to them. The states interests in "ensuring swift, permanent placements" of newborns that "are more likely to be adopted and more readily bond with adoptive

parents" will be frustrated and the laudable goal of preservation of Indian Tribes and Indian culture will not result from this South Carolina Supreme Court decision. The non-custodial parent should not have been allowed to invoke the ICWA to block the adoption of Baby Girl that was lawfully initiated by her non-Indian custodial parent under state law. Application of the EIF would have prevented such an egregious result as occurred here.

## POINT II

## THE ICWA DOES NOT APPLY WHERE THE UNWED FATHER FAILS TO COMPLY WITH STATE LAW TO ATTAIN A CONSTITUTIONALLY PROTECTED PARENTAL INTEREST. THE DETERMINATION OF THE UNWED FATHER'S PARENTAL STATUS IS PROPERLY RESERVED TO THE STATES.

Adoptions are creatures of statute and did not exist at English common law. Therefore, the determination whether the consent of the biological father is required for the adoption of a child born-out-wedlock remains the exclusive province of the states.

Unwed fathers constitutionally protected rights do not automatically come into being. ("[T]he mere existence of a biological link does not merit [ ] constitutional protection. The actions of judges neither create nor sever genetic bonds." *Lehr*, 463 U.S. at 261). Through a series of cases including *Quilloin v. Walcott*, 434 U.S. 246 (1978), *Caban v. Mohammed*, 441 U.S. 380 (1979), *Lehr v. Robertson*, 463 U.S. 248 (1983), this Court clarified that the Constitution does not protect all unwed fathers equally and that, more importantly, the mere act of impregnating a woman does not create constitutional rights.

Considerably more is required of men than the mere act of procreation to secure constitutionally protected parental rights. As this Court explained in *Lehr*, all unwed fathers possess only an "inchoate interest" (463 U.S. at 265) which may, if they take meaningful steps to secure them, turn into constitutionally protectable rights. Whether this "interest" becomes a "right," however, depends entirely on the action or inaction of the unwed father.

The treatment accorded the unwed father varies from state to state. South Carolina, like New York, and many other states, requires, in the case of the adoption of a newborn (i.e. a infant under six months of age), that the unwed father take certain definitive action in the six months preceding the birth and placement of the child for adoption (which correctly prioritizes the emotional health of the infant over the interests of the parents), if he is to attain legal status as a parent.

The ICWA is not in conflict with these Supreme Court holdings regarding the differentiation in the status of the unwed biological Indian father. It also recognizes that mere biology is not enough so that not every unwed biological Indian father comes within its ambit. See, e.g. 25 U.S.C. 1903 (9)[2] (defining "Indian parent" as an unwed father who has established or acknowledged paternity). The ICWA denies recognition to the unwed father who does not establish or acknowledge his paternity.

2. The ICWA defines parent as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. *It does not include the unwed father where paternity has not been acknowledged or established.*" 25 U.S.C. 1903 (9) (emphasis added).

Yet, the ICWA contains no provision for determination of the status of the unwed father. It has no explication of what acts shall constitutes 'establishing' or 'acknowledging' paternity, nor the time frame for doing so. The ICWA is silent on how and when the unwed Indian father's parental status is determined. South Carolina Supreme Court should have concluded that since the Congress made no ICWA provision for the timetable or the means by which the unwed father must act to acquire parental status that the Congress intended that the state laws would control. The ICWA defers to state law to determine whether the unwed Indian father's actions are sufficiently prompt in the case of an adoption of a newborn and substantial under state law to require his consent.

In termination[3] of parental rights proceedings, the ICWA looks to State law for the grounds for termination. So too in adoption proceedings, the ICWA looks to state law to determine whose consent is required for the adoption. It is the state law that must applied in determining the status of the unwed Indian father. And while, the ICWA may impose certain procedural protocols to be followed (e.g. proof beyond a reasonable doubt in termination proceedings instead of clear and convincing evidence), it does not create rights for the unwed biological father who is not an "Indian parent." That responsibility is reserved to the state.

Insofar as the respondent father was concerned, this was not a termination of parental rights proceeding since under South Carolina adoption law the respondent's

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3. The ICWA defines 'termination of parental rights proceedings' as "any action resulting in the termination of the parent-child relationship." 25 U.S.C 1903(1)(ii).

inchoate interest never became a right worthy of constitutional recognition. No parental "right" of his was terminated. Rather, it is better understood as a proceeding to determine the respondent's status under South Carolina adoption law.

State law recognizes that the best interests of the adoptive child require an prompt determination of permanency. South Carolina does not allow any unwed father who fails to promptly establish his parental interest by performing objective acts of responsible parenthood (e.g. contributing to the financial cost of pregnancy and birth related expenses within the six months preceding the placement of the child for adoption) to block the adoption long after the birth and placement of the child for adoption. See, S.C. Code section 63-9-310(A)(5).[4]

The ICWA can only apply to unwed Indian fathers whose parental status is recognized by state law. The unwed Indian father, like every other unwed father, will have legally recognizable parental rights only by dint of his timely exercise of his parental responsibility as evidenced by contributing financial support for the pregnancy and

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4. For a child being adopted within six months of birth, the unwed father's consent is required but only if "(a) the 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 the father openly held himself out to be the father during the six month period; or (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for the 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." S.C. Code Ann. Section 63-9-310(A)(5)(2010).

birth. The disinterested, inactive, or abandoning unwed Indian father, like respondent, attains no constitutionally recognizable parental right to begin with under state law.

Respondent knew of the pregnancy and due date for Baby Girl's birth. Yet, respondent was not present for Baby Girl birth. Respondent refused to pay anything toward the pregnancy and birth related expenses. Trial Tr. 545-547. As noted by the dissent "Father failed to pay any child support until Baby Girl reached sixteen months of age and did so inconsistently and in an insubstantial amount."

> "Father made no meaningful effort to establish a relationship with Baby Girl when there was ample opportunity for him to do so. To the contrary, he avoided any rights and responsibilities to the child. As noted, on repeated occasions, Father expressed his willingness to sign away his parental rights."
>
> (Kitteridge, J. dissent)

While the respondent's various written and verbal expressions giving up his parental interest may not have been in legally binding form, they unequivocally confirm he abandoned any parental interest he had in Baby Girl. Such behavior was the antithesis of establishing or acknowledging paternity. The dissent too correctly determined that the father's actions "came too late" to defeat his abandonment.

Here, the respondent did not satisfy state adoption consent prerequisites within the critical time frame, that is the six months before the birth and placement of Baby

Girl for adoption, so as to entitle him to recognition as an Indian parent whose consent is required by South Carolina for this adoption. Therefore, since the respondent is not an Indian parent for the purpose of adoption then the ICWA should have had no application here.

The respondent's status was not a result of anything that the custodial birth mother or the adoptive parents did, nor was it the result of the meddling by the state actors in denigration of his Indian status. Respondent's non-consent status resulted pure and simply from his clear and unequivocal choice not to assume the mantel of parental responsibility toward his child who thus never became a part of an Indian family. The ICWA never should have been implicated under these facts.

The legal conclusion reached, but not followed, by the South Carolina Supreme Court that the respondent failed to acquire the legal status of a "consent father" under South Carolina law, breaks no new ground and follows well-settled principles of constitutional law governing the rights of unwed fathers. It should have been dispositive of this adoption. Instead, the SC Supreme Court allowed the respondent unwed father with no recognizable constitutional status under state law as Baby Girl's legal parent to block the adoption by invoking the ICWA with devastating effect on Baby Girl and her adoptive parents.

South Carolina Supreme Court wrongly interpreted the ICWA to afford a non-custodial unwed Indian father greater parental rights than South Carolina unwed non-Indian father. The South Carolina Supreme Court treatment of the unwed Indian father is condescending and patronizing - unwed Indian fathers are not expected

or required to act promptly as responsible fathers as are non-Indian unwed fathers. This interpretation wrongly presupposes that having a Indian father it is not important for the Indian child in the care of non-Indian single mother. It wrong headedly permits the unwed Indian father a virtually limitless amount of time in which to decide whether he wants to father his child and take the necessary steps that would establish his interest. The result is to hold the adoptive child and her single non-Indian mother hostage while the father dithers. There were no cultural barriers or unfair institutional hurdles in his way that require the ICWA remediation. The only barrier to this unwed Indian father's meeting the requirements of state law was his own obstinacy ('marry me or raise the child yourself without any help from me').

When Baby Girl was born and placed for adoption she had no "Indian parent" as defined by the ICWA. The ICWA definition of Indian parent clearly excluded the respondent. By the time he took some action, Baby Girl had already been placed in her adoptive home for four months and thriving there.

South Carolina Supreme Court wrongly ignored state adoption law and applied the ICWA in a misguided effort that allowed the unwed father virtually limitless time in which to acknowledge or establish his paternity which totally ignores the reality of Baby Girl's existence. Rather than require prompt action by the unwed father the South Carolina Supreme Court gave him a pass. Under its rationale it matters not at all how long the unwed father delays or how deleterious the effect that his delay has upon the emotional health and development of the child. This cannot be countenanced. Instead, as this Court held in

*Lehr v. Robertson*, 463 U.S. 248 (1983) ("legitimate state interests in facilitating the adoption of young children having the adoption proceeding completed expeditiously." *Lehr, Id.* at 265).

The law cares about actions of the unwed putative fathers, Indian and non-Indiana like, because actions are traceable and knowable to adoption agencies and prospective adoptive resources. This is why both the South Carolina Legislature and the ICWA require that unwed fathers promptly take visible, definitive actions in accordance with state law that establishes their parental right so that adoption agencies and prospective adoptive parents will be able to know whether the child has a Indian father whose consent to her adoption is required.

The law does not require that prospective adoptive parents take risks when they accept out-of-wedlock children with Indian blood from non-Indian custodian single parent into their homes and their hearts. States are free to fashion laws that protect the rights of unwed fathers but also advance sound public policy by encouraging unwed mothers to place children for adoption when the children are infants and also by encouraging adoptive couples to accept children into their home free from fear that months after they have bonded with their child a virtual stranger will emerge and demand "his" Indian child.

## POINT III

### A NON-CUSTODIAN UNWED FATHER MAY NOT INVOKE THE ICWA TO BLOCK A VOLUNTARY ADOPTION INITIATED BY THE NON-INDIAN CUSTODIAL MOTHER WHERE THERE IS NO EXISTING INDIAN FAMILY FROM WHICH THE CHILD IS BEING REMOVED.

This case does not involve abusive child welfare practices resulting in the removal of Indian child from her Indian home. It does not involve involuntary removal of an Indian child from her custodial Indian parent. It does not involve the termination of an Indian parent's parental rights. It does not involve defying tribal sovereignty by Indian parents leaving the reservation to give birth. Instead, it involves a non-custodial unwed father who although a registered member of the Cherokee Nation, nevertheless was not an Indian parent as defined by the ICWA.

It involves a respondent birth father who never had legal or actual custody of Baby Girl and who refused to contribute to her prenatal care, pregnancy and birth related expenses. This respondent father, in fact, agreed in word and deed that Baby Girl would be raised by her mother, a single parent with sole legal custody in a non-Indian home and not by him or his family. Prior to Baby Girl's birth and placement for adoption the respondent never established a constitutionally recognized right as Baby Girl's father. The respondent only acted to block Baby Girl's adoption by the only parents and family she had known by invoking the ICWA. Under these facts, the ICWA should not have been implicated.

**The Existing Indian Family Doctrine Remains Viable and Dispositive in this Case.**

The SC Supreme Court determination to reject the Existing Indian Family doctrine ("EIF") out of hand because it contradicts the purpose of ICWA is plainly wrong as EIF actually supports the purpose of that statute. The ICWA's stated purpose is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and <u>families</u> by the establishment of minimum Federal Standards for the <u>removal of Indian children from their families</u> ***". 25 U.S.SC. 1902 [emphasis supplied]. Thus the plain text of the statute itself refers to existing "Indian***families" and the removal of Indian children from existing Indian families. 25 U.S.C. 1902. Congress also intended for the various state courts to determine when the ICWA should apply to a particular case. *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587, 591 (10th Cir.1985) (refusing to review state court's determination that ICWA did not apply under *res judicata* and full faith and credit principles).

The legislative history of the statute, as well as its words, confirm that the 'overriding concern of the ICWA is the maintenance of existing Indian familial and tribal relationships and to set minimum standards for the removal of Indian children from existing Indian environments. Courts in other states have followed this sound reasoning in cases where there is no existing Indian family from which the adoptive child is being removed. [cite cases from Petition for cert].

A number of courts in other states have applied the EIF in cases where there is no existing Indian family

from which the adoptive child is being removed. See, e.g. *In re Santos,* 92 Cal. App. 4th 1274, 112 Cal.Rptr.2d 692 (Cal. Ct. App., 2nd Dist. 2002) (California); *In re Crystal R.,* 59 Cal.App.4th 703, 69 Cal.Rptr.2d 414 (Cal. Ct. App., 6th Dist. 1998) (California); *In re Bridget* R., 41 Cal.App.4th 1483, 49 Cal.Rptr.2d 507 (Cal. Ct. App., 2nd Dist.1996) (California); *In re Alexandria Y.,* 45 Cal.App.4th 1483, 53 Cal.Rptr.2d 679 (Cal. Ct. App.1998) (California); *In re Interest of D.C.C.,* 971 S.W.2d 843 (Mo.Ct. App. 1998) (Missouri); *S.S. v. E.J.P. and R.L.P.*, 571 So.2d 1187 (Ala. Civ.App. 1990) (Alabama)*; Rye v. Weasel,* 934 S.W.2d 257(Kent.1996) (Kentucky); *Hampton v. J.A.L.,* 658 So.2d 331 (La. Ct. App. 1995) (Louisiana); *Matter of Crews,* 118 Wash.2d 561, 825 P.2d 305 (Wash.1992) (Washington); *In re Morgan,* 1997 WL 716880 (Tenn. Ct. App. 1997) (Tennessee). As the Court in *Matter of T.R.M.* stated, the recognition of EIF is entirely sensible, as there can be no "breakup of an Indian family", which Congress intended to prevent with the ICWA, where no such Indian family already exists. *T.R.M.*, 535 N.E.2d at 3030. Other state courts have reached a different conclusion and refused to apply the EIF. *Baby Boy C.*, 805 N.Y. S. 2d (1st Dept. 2005) at 322 n. (collecting cases).

**The ICWA is Unconstitutional Unless the EIF Exception is Recognized.**

Without the EIF exception, the ICWA is unconstitutional because the ICWA implicates suspect racial classifications and violates a child's due process rights. The South Carolina Supreme Court concluded that the Nation's interests, not the child's fundamental rights, were paramount. But, there is no authority for the proposition that when there is no existing Indian family

and the child has no cultural, social, or political ties to a tribe, the ICWA preference is nothing more than the type of racial preference prohibited by the Constitution. Baby Girl has rights protected by the Constitution[5] with respect to this effort to sever her familial relationship with her Adoptive Parents. State courts must recognize the EIF exception to the ICWA to protect the constitutional rights of children like Baby Girl who have no ties, other than blood, to an Indian tribe. The EIF is a necessary part of acknowledging the principle that children are not mere chattels and have their own fundamental interests of a Constitutional dimension.

The California Court of Appeals decision in *Bridget R.*, is the leading case on this issue. *Bridget R.* involved two adopted twin children who were children of a non-Indian mother and a part-Indian father. *Bridget R.,* 41 Cal.App.4th at 14919. The birth parents initially consented to the children's adoption, but after the father's tribe became involved, they initiated proceedings to invalidate their consent under the ICWA. *Id.* There was "substantial doubt" whether the Indian parent had ever participated in tribal life, or maintained any significant cultural, social, or political relationship to the tribe. *Id.* The *Bridget R.*, court determined that the EIF exception was necessary to preserve the constitutionality of the ICWA as applied to such facts. *Id. a*t 1492. The court held that the ICWA could not constitutionally be applied under the Fifth, Tenth, and Fourteenth Amendments to a voluntary relinquishment of

5. *See*, *Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982) (attempt by biological mother to remove child from foster care – Court recognized hat the children did have a liberty interest with respect to their family environment entitled to due process protection. *Id.* at 1026, citing *Parham v. J.R.* 442 U.S. 584, 596-97 (1979).

parental rights respecting an Indian child not domiciled on a reservation, unless the child's biological parent or parents are of Indian decent and also maintain significant social, cultural, or political relationship to the tribe. *Id.*

The *Bridget R.* court noted that children have a constitutionally protected fundamental interest in maintaining established familial bonds and in the continuity and stability of their homes, whether those bonds are with biological or *de facto* family, and held that those rights are subject to the requirements of both procedural and substantive due process. *Id.* at 1502-07. The court also indicated that these rights were no less fundamental because those bonds were formed with an adoptive family after a knowing, intelligent and express relinquishment of parental rights. *Id.* at 1506-07. Because these rights are fundamental, legislation that interferes with them is subject to strict scrutiny, and must be set aside unless it serves a compelling governmental purpose and is necessary to accomplish that purpose. *Id.* at 1503. With respect to tribal rights designed to be protected under the ICWA, the court noted that the preservation of Indian culture was a compelling governmental purpose but found that this purpose would not be served by applying the ICWA in cases where the Indian parents have no significant social, cultural, or political relationship with the tribes. *Id.* at 1507. Where a fully assimilated Indian parent seeks to voluntarily relinquish his or her children for adoption, there is no necessity to apply the ICWA to preserve Indian culture, because no culture exists in the first instance. *Id.* at 1507-08. Applying the ICWA under such circumstances would violate the child's fundamental right to remain in a home where she is loved, well-cared for, and lives with parents to whom she

becomes more attached to each day and who provide her with a secure environment in which to learn and grow. *Id.* Accordingly, the *Bridget R.,* court concluded that the ICWA impermissibly violates the child's fundamental due process rights when applied in a case where there is no existing Indian family. When there are no cultural, political or social connections to the tribe, the sole criteria for restricting the child's rights must be the child's race, which raises constitutional concerns. *See, Santos,* 92 Cal. App.4th at 1318-19 (rejecting argument that application of the ICWA solely on racial classification of child is merely a political classification under *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474 (1974).

**The EIF is Consistent with this Court's *Holyfield* Decision.**

The South Carolina Supreme Court was wrong to dismiss the EIF doctrine as inconsistent with this Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597 (1989). In *Holyfield*, the Court addressed whether two Indian parents who were residents and domiciliaries of a reservation could defeat the provisions of ICWA granting exclusive jurisdiction over adoption proceedings involving domiciliaries of the reservation to tribal courts merely by leaving the reservation to give birth to their child. *Holyfield*, 490 U.S. 32-54. The Court held that the jurisdictional requirements of the ICWA could not be defeated by temporarily leaving the reservation.

But, *Holyfield*, never addressed the EIF and did not involve the situation presented here, where neither the child nor the custodial parent, her single mother, had any

significant contact with the tribe or its culture, and the child's mother did not intend to raise the child in tribal culture and the respondent biological father never had custody and had ceded all parental control and custody to the non-Indian birth mother.

*Holyfield*, is limited to cases involving domiciliaries of a reservation and does not apply to a custodial parent and her child who have no connection to an existing Indian tribe or culture. The plain text of the statute 25 U.S.C. 1902 states that the purpose of the ICWA is 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*. . . "25 U.S.C. 1902 (emphasis added). The plain text of the statute itself refers to existing Indian families and the standard for removing children from existing Indian families. It is also clear that the applicability of the ICWA is left to the state courts for resolution in each specific case. *See Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587, 591 (10th Cir. 1985) (refusing to review state court's determination that ICWA did not apply under res judicata and full faith and credit principles). The day should have long passed when children are treated as chattels and the unwed father can chauvinistically dictate when, and if, they deign to act as a father to their out-of-wedlock child. It is both demeaning and patronizing to hold Indian fathers less responsible for their out-of-wedlock child than non-Indian father.

The State has an important interest in "ensuring swift, permanent placements" of newborns that "are more likely to be adopted and more readily bond with adoptive parents." *Matter of Raquel Marie X.*, 76 N.Y. 2d at 404,

406, 559 N.E.2d at 425, 559 N.Y.S.2d at 862. "Certainty and finality" are what the law seeks to achieve precisely to protect the infliction of needless harm. *See Matter of Sarah K.*, 66 N.Y.2d 223, 234, 487 N.E.2d 241, 246, 496 N.Y.S.2d 384, 389 (1985), *cert. denied sub nom. Kosher v. Stamatis*, 475 U.S. 1108 (1986). *See also Matter of Raymond AA v. Doe*, 217 A.D. 2d 757, 759, 629 N.Y.S.2d 321, 324 (3d Dept. 1995), *lv. app. denied*, 87 N.Y.2d 805, 663 N.E.2d 919, 640 N.Y.S.2d 840 (N.Y 1995) ("It is axiomatic that the State has a legitimate interest in establishing procedures which assure both a prompt adoption and the stability of the adopted child.").

If this decision is allowed to stand it will have the unintended consequence of reducing the number of adoptions for children most in need of permanent loving homes. The Constitution does not require such a poor public policy. The Order below is not faithful to the Constitution and should be reversed.

## CONCLUSION

The judgment of the Supreme Court of South Carolina should be reversed.

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Respectfully submitted,

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