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 AMICI CURIAE BONNIE AND SHANNON HOFER; ROGER, LOREAL, AND SIERRA LAUDERBAUGH; AND CRAIG AND ESTHER ADAMS 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 THE AMICI

Amici consists of non-Indian adoptive parents and an Indian child who have all been harmed by ICWA's racial-preference system for child custody.[1] All parties to this case have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Congress passed the Indian Child Welfare Act (ICWA) in 1978 to stop the unjustified removal of Indian children from their biological parents' homes on tribal land by state child-protection agencies. But as Petitioners' case and Amici's own experiences show, the racial-preference system that Congress created in ICWA to stop wrongful removals is now unfairly hindering the adoption of children with Indian blood heritage by non-Indian parents – regardless of whether the best interests of the child are objectively served by the adoption or not.

The effects of ICWA in otherwise proper adoptions violate the equal-protection and due-process rights of children with Indian blood. Thus, while Petitioners seek relief from such interference based

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity other than amici curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

on a narrow reading of ICWA that avoids the need for further constitutional review, Amici respectfully submit that this Court should instead hold that ICWA's racial-preference system for Indian child custody is unconstitutional. Children with Indian blood merit the same legal protections as other children.

ARGUMENT

I. Under ICWA, race dictates who may take custody of any child with Indian blood.

The Indian Child Welfare Act of 1978[2] (ICWA) serves to "protect the rights of the Indian child *as an Indian*. . . ." H. R. Rep. No. 95-1386, at 23 (1978). ICWA advances this goal in two main ways. *First*, ICWA enhances the authority of Indian tribes to influence and assume control over legal proceedings concerning the custody of an "Indian child" – a racialized term that ultimately includes any child with Indian blood heritage. *See* 25 U.S.C. § 1911 (2012). *Second*, ICWA requires state courts to generally favor Indian custody of an "Indian child" and imposes high burdens of proof on anyone daring to challenge this presumption. *See, e.g.*, *id.* § 1912(e), (f). ICWA thus lets race dictate who may assume custody of a child with Indian blood heritage – even if this

[2] Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (2012)).

runs counter to the child's best interests or, quite often, the wishes of the child's biological parents.

A. ICWA governs any child "eligible for membership in an Indian tribe," and Indian tribes largely define membership eligibility based on race.

ICWA governs all legal proceedings that pertain to the custodial status of an "Indian child." In turn, ICWA defines "Indian child" as follows:

> "Indian child" means any unmarried person who is under age eighteen and is either:
>
> (a) a member of an Indian tribe or
>
> (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

Id. § 1903(4).

In practical terms, this definition of "Indian child" allows ICWA to govern the custody of any child whose blood heritage – along with that of a biological parent – can be traced to a recognized Indian tribe. This is because numerous Indian tribes define their membership in purely racial terms – something they have "broad authority" to do. *Rice v. Cayetano*, 528 U.S. 495, 527 (2000) (Breyer, J., concurring).

For example, three of the five largest Indian tribes (by enrollment[3]) now recognized under federal law – the Cherokee Nation, the Choctaw Nation of Oklahoma, and the Muscogee (Creek) Nation[4] – limit membership to only those individuals who can trace their lineage to one of the tribe's original enrollees on the "blood rolls" compiled by the Dawes Commission in 1906.[5] This constitutes a virtual "one drop"-rule[6] for tribal membership that lets the Cherokee Nation (for example) count "blond people who are 1/1000th Cherokee" as members, even if they are not connected to the tribe in any meaningful way.[7]

Other Indian tribes limit membership to individuals who can prove they have a specific "quantum" of

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[3] *See generally* U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, 2005 AMERICAN INDIAN POPULATION & LABOR FORCE REPORT 27-39 (2005) (listing enrollment numbers).

[4] *See* CONST. OF THE CHEROKEE NATION, art. IV, § 1; CONST. OF THE CHOCTAW NATION OF OKLA., art. II, § 1.; CONST. OF THE MUSCOGEE (CREEK) NATION, art. III, § 2.

[5] *See generally* KENT CARTER, THE DAWES COMMISSION AND THE ALLOTMENT OF THE FIVE CIVILIZED TRIBES, 1893-1914, at 49 (1999) (describing the history of the Dawes Rolls).

[6] SCOTT MALCOLMSON, ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE 16 (Farrar, Straus & Giroux, 2001) ("The [Cherokee] . . . will not recognize anyone as Cherokee who does not have an ancestor on the Dawes rolls, though all it takes is one drop of blood.").

[7] Evelyn Nieves, *Putting to a Vote the Question "Who Is Cherokee?"* N.Y. TIMES, Mar. 3, 2007, http://www.nytimes.com/2007/03/03/us/03cherokee.html (quoting Marilyn Vann, President, Descendants of Freedmen of the Five Civilized Tribes).

Indian blood. Thus, to be a member of or eligible for membership in the Navajo Nation – the largest tribe recognized under federal law[8] – one must possess at least one-quarter Navajo blood. This means having, for example, one grandparent who is a "full-blooded" Navajo or two parents who each have one-quarter Navajo blood.[9] The degree of "blood quantum" required for membership varies among tribes from as much as one-half[10] to as little as one-sixteenth.[11] The Bureau of Indian Affairs aids tribes in enforcing these blood quantum degrees through the issuance of special certificates.[12]

Accordingly, for most Indian tribes, blood – and blood alone – serves to determine who belongs to the tribe. By contrast, political criteria like residency, knowledge of civic customs, and civic participation

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[8] *See supra* note 3.

[9] *See* Paul Spruhan, *The Origins, Current Status, & Future Prospects of Blood Quantum as the Definition of Membership in the Navajo Nation*, 8 TRIBAL L.J. 1, 5 (2007).

[10] Indian tribes requiring one-half blood quantum include the Mississippi Band of Choctaw Indians and the St. Croix Chippewa Indians. *See* CONST. OF THE MISS. BAND OF CHOCTAW INDIANS, art. III, § 1; CONST. OF THE ST. CROIX CHIPPEWA INDIANS OF WIS., art. III.

[11] Indian tribes requiring one-sixteenth blood quantum include the Fort Sill Apache and the Confederated Tribes of Siletz Indians. *See* CONST. OF THE CONFEDERATED TRIBES OF SILETZ INDIANS OF ORE., art. I, § 1(B); CONST. OF THE FORT SILL APACHE TRIBE OF OKLA., art. II, § 1(c).

[12] *See* Genealogy, BUREAU OF INDIAN AFFAIRS, http://www.bia.gov/FOIA/Genealogy/ (last visited Feb. 8, 2013).

are seemingly irrelevant.[13] Given this reality, it must be recognized that "children who are related by blood to . . . [Indian] tribe[s] may be claimed by the[se] tribe[s], and thus made subject to the provisions of ICWA, solely on the basis of their biological heritage. *Only children who are racially Indians face this possibility*." *In re Bridget R.*, 41 Cal. App. 4th 1483, 1509 (Cal. Ct. App. 1996) (emphasis added).

B. ICWA enforces the racial presumption that Indians are the most appropriate custodians for any child with Indian blood.

Race defines not only ICWA's reach – encompassing virtually any child with the requisite amount of Indian blood – but also its grasp. In particular, ICWA requires state courts to presume that the most appropriate custodian for a child with Indian blood is an Indian tribal member. ICWA imposes this presumption in two ways. *First*, ICWA requires that preference be given to tribal custodians in foster care, preadoptive, or adoptive placements of children with Indian blood. *Second*, ICWA makes it very difficult for non-Indians to take custody of a child with Indian blood unless certain high evidentiary burdens are met.

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[13] *See, e.g.*, Application Instructions for Tribal Registration, CHEROKEE NATION, http://www.cherokee.org/Docs/Org2010/2012/8/31660Application_Instructions.pdf (last visited Feb. 8, 2013) (indicating lineage is sole criteria to join Cherokee Nation).

Custodial Preferences – ICWA dictates that state law must afford preference to the following types of custodians as adoptive placements for children with Indian blood: "(1) a member of the child's extended family; (2) other members *of the Indian child's tribe*; or (3) other *Indian families*." 25 U.S.C. § 1915(a) (2012) (emphasis added). ICWA establishes a similar regime of preferences with respect to foster-care placements of such children, favoring "a member of the Indian child's extended family" first, followed by foster homes and similar institutions for children approved of "by the Indian child's tribe" or otherwise operated by Indians. *Id.* § 1915(b).

ICWA thus requires states to treat Indian tribal members as the most preferred custodian for any child with Indian blood. This preference in turn is inextricably linked to the racial criteria for tribal membership described *supra*, Part I.A (i.e., "blood roll" lineage and "blood quantum" degrees). *See id.* § 1903(3). And such racial criteria also bear directly upon the "extended-family" placements that ICWA prescribes. Indeed, ICWA leaves the term "extended family member" to be defined by "the law or custom of the Indian child's tribe." *Id.* § 1903(2).

In addition to prescribing a set of racially-driven custodial preferences for children with Indian blood, ICWA insulates these preferences from challenge. Indeed, ICWA dictates that these preferences may only be disregarded for "good cause." *Id.* § 1915(a),

(b). ICWA does not define "good cause,"[14] but several state courts have ruled that "good cause" does not include the simple determination that "placement outside [ICWA's] preferences would be in the child's best interests." *In re Custody of S.E.G., A.L.W., & V.M.G.*, 521 N.W.2d 357, 362 (Minn. 1994); *see also In re C.H.,* 997 P.2d 776, 784 (Mont. 2000).

Evidentiary Burdens – Ultimately, the exception for "good cause" noted above is one of several burdens-of-proof in ICWA that operate to make it very hard for non-Indian adoptive and foster parents to obtain or maintain custody of children with Indian blood – even if deep bonds already exist between those adults and the child. These burdens of proof exist on three levels.

First, ICWA requires foster or adoptive parents vying for the custody of a child with Indian blood to prove that "serious emotional or physical damage" would likely result to the child if left in the care of an applicable Indian custodian. 25 U.S.C. § 1912(e), (f). For foster-care placements, such risk-of-harm must be proven by "clear and convincing evidence." *Id.* § 1912(e). And for adoptive placements involving the termination of an Indian parent's rights, such risk-of-harm must be proven by "evidence beyond a reasonable doubt." *Id.* § 1912(f). Together, these high burdens

[14] The Bureau of Indian Affairs does provide non-binding guidelines for reading ICWA. *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979).

rig the legal inquiry surrounding custody of a child with Indian blood to favor Indian custodianship. *See, e.g.*, *In re A.P.*, 961 P.2d 706, 713 (Kan. Ct. App. 1998) ("[ICWA's] standard is more stringent than the requirements for termination of the rights of non-Indian parents under [Kansas] law.").

Second, ICWA prevents courts from determining that Indian custodianship would threaten "serious emotional or physical damage" to a child with Indian blood unless a "qualified expert witness" agrees. 25 U.S.C. § 1912(e), (f). ICWA does not define this term, but several state courts have read "qualified expert witness" to mean a witness versed in "tribal culture and values." *In re Appeal in Pima Cnty. Juv. Action No. S-903*, 635 P.2d 187, 192 (Ariz. Ct. App. 1981); *see also In re Welfare of B.W.*, 454 N.W.2d 437, 444 (Minn. Ct. App. 1990) (listing cases). Consequently, this tribe-favoring evidentiary requirement further tilts the scales against non-Indian parents seeking custody of children with Indian blood.

Third, and finally, ICWA dictates that no foster placement or termination of parental rights related to a child with Indian blood may take place until a court finds the state has made "active efforts . . . to prevent the breakup of [the child's] Indian family and that these efforts . . . proved unsuccessful." 25 U.S.C. § 1912(d). ICWA does not define what "active efforts" means, but state courts applying ICWA make it clear that non-Indian foster or adoptive parents of children with Indian blood stand to lose those children if the state has failed to make sufficient "active efforts."

See, *e.g.*, *C.J. v. State Dep't of Health & Social Servs.*, 18 P.3d 1214, 219 (Alaska 2001).

Ultimately, many of the race-based custodial preferences and evidentiary burdens described above can be traced to a central source: junk social science. In 1978, ICWA's main proponents relied on a study by social psychiatrist Dr. Joseph Westermeyer to convince Congress that "Indian adoptive parents [were] better able than their non-Indian counterparts to give Indian children a proper upbringing."[15] As legal scholar Randall Kennedy explained in a recent book on race and adoption, Westermeyer's study is anything but "rigorous social science."[16] Instead, this study reflects a pernicious combination of poor data collection and "utterly subjective musings."[17] Yet, the effects of this junk science continue to live on in the enforcement of ICWA's racial-preference system. *See, e.g.*, *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 n.1 (1989) (citing Westermeyer).

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[15] RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, & ADOPTION 499 (Pantheon, 2003).

[16] *Id.* at 503.

[17] *Id.* Kennedy reveals that Westermeyer's study was based on nothing more than Westermeyer's observation of "a small sample of psychiatrically troubled patients." *Id.* at 502.

II. ICWA's racial-preference system for child custody threatens otherwise proper adoptions of children with Indian blood.

Petitioners in this case are a couple who have suffered the consequences of the racial-preference system by which ICWA regulates the custody of children with Indian blood. Indeed, these non-Indian parents have lost custody of their adopted daughter just because of her Indian bloodline – and despite her non-Indian mother consenting to this adoption and her Indian father abandoning her since birth. But what makes this case most disturbing is just *how ordinary it is*. In short, this case is just one more heartbreaking tragedy in ICWA's thirty-year history of putting tribal interests ahead of the best interests of the child. Amici's experiences with ICWA are no exception, thus further illuminating the variety and extent of injustice that ICWA makes possible.

A. Amici Bonnie and Shannon Hofer's ICWA experience.

Bonnie and Shannon Hofer are a married couple who live in a rural area of southwest Minnesota. In September 2002, with one small child of their own, the Hofers learned at their church that an Indian mother was looking for an adoptive home for her twenty-month-old boy. The boy's father was an illegal immigrant who had been deported. This was the second time that this mother (JGB) had tried to find a home for her son (CGB) through the church. Another

couple in the church were already caring for JGB's older children.

The Hofers took the boy into their home and agreed to adopt him. They retained an attorney to guide them through the adoption process; another attorney represented the mother. Through their attorneys, the Hofers and the mother completed nearly all of the paperwork for adoption, including a home study, consent forms, and an offer of counseling services for the mother. The mother testified under oath that she did not want her son placed in foster care; instead, she wanted him to bond with the Hofers (who are not Indian).

In October 2002, the state court in Minnesota granted the Hofers custody of CGB pending final adoption. The Hofers then filed an adoption petition and the Hofers' lawyer asked the mother, JGB, to return a medical-and-social-history form that was part of the petition. The lawyer also contacted a representative of the Three Affiliated Tribes in North Dakota, of which JGB was believed to be a member, to determine the tribe's stance. The Hofers' attorney received no response from the tribe or JGB.

This lack of response continued until April 2004, when a new lawyer for the Hofers advised them to seek termination of JGB's parental rights so the adoption could be completed. The Hofers filed a petition to this effect. Then, after CGB had been raised by the Hofers for two years, his biological mother reemerged with the support of a new lawyer

and lawyers for her tribe, demanding that CGB be returned to her custody and invoking ICWA's special restrictions on the placement and adoption of Indian children as the legal basis for their demand.

Relying on the placement preferences of ICWA, a Minnesota state-court judge initially ordered that CGB be returned to JGB's custody pending trial. The Hofers and the guardian ad litem for CGB ultimately succeeded in persuading the court to stay that order and allow CGB to stay with his adoptive parents until trial. While preparing for trial, the Hofers and the guardian learned a great deal about the difficult and unstable lives of JGB and her four children (her other children were two, nine, and ten years of age when CGB was born).

The father of JGB's first three children was a severe alcoholic (he has since passed away). JGB's first three children lived much of their lives with an non-Indian couple who lived seventy miles from JGB. JGB placed CGB in the care of other non-Indians before she found the Hofers. One person, whom JGB met at a county fair, took care of CGB for ten months. JGB had no connections with the tribe, which was over 500 miles from her home.

All of this information was presented to the state court through affidavits and testimony before trial, during an intense period of emotional turmoil for

everyone involved, including the child.[18] After all of these filings and several hearings – and after JGB had been allowed to visit with CGB and thereby witness his strong emotional attachment to the Hofers – the biological mother agreed to voluntarily terminate her parental rights, thus finally letting the Hofers complete their adoption of CGB.

If CGB had not possessed Indian blood – and thus not been subject to ICWA – he would have received very different and heightened protection under the law. If ICWA's presumptions and standards had not applied, JGB's abandonment of CGB for long periods of time – including during the two years before the Hofers filed their petition – would have presumptively led to termination of her parental rights.

B. Amici Roger, Loreal, and Sierra Lauderbaugh's ICWA experience.

Sierra Lauderbaugh was an Indian child (she is now an adult) and member of the Leech Lake Band of Ojibwe in central Minnesota. She was in foster care from the age of ten until she was finally able to be adopted, at 17, by her third foster family (Roger and Loreal Lauderbaugh). Sierra and two of her brothers

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[18] *See* Guardian Ad Litem's Memorandum of Law with Affidavits of Even, et al. and Reports of the Guardian Ad Litem, *In re Child of JLG*, No. 41-J5-04-50019 (Minn. Dist. Ct. June 16, 2005).

had been removed from their biological Indian mother's home due to extreme neglect and abuse. When the county in which she lived first became involved in her life in January 2005, neither Sierra nor her brothers were enrolled in school and they were found living in a home that was deemed a health and safety hazard to children.[19] There was little or no adult supervision in the home. There was garbage everywhere and no food to eat. The children had dirty clothes and they were sleeping where ever they could find a clean spot in the home.

Sierra's biological mother was a drug addict and alcoholic, with a lengthy criminal history. Her crimes included theft, forgery, assault, malicious punishment of a child, and criminal vehicular injury. Sierra and her brothers spent their childhood in a home filled with violence, drug and alcohol abuse, and neglect. Sierra's biological mother was embroiled in a series of relationships and marriages to violent and abusive men. Sierra's biological mother even assaulted Sierra, dragging her across the lawn by her hair, leaving her screaming and bleeding.

Despite the county's repeated efforts to rehabilitate the family relationships, the county ultimately found it was unable to reunite the children with their

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[19] *In the Matter of the Welfare of the Children of . . .* , No. 04-J7-05-50043 (Beltrami County, Minn.), Permanency Order of September 11, 2006 at ¶ 5 (Holter, J.).

mother and determined that permanent removal was necessary to protect the best interests of the children.

After the children were removed from the home and placed in foster care, Sierra's biological mother repeatedly told the county to keep her children. As years went by, Sierra rarely had any contact with her mother. But when Sierra asked her mother to voluntarily terminate her parental rights so she could be adopted, her mother refused. Then, after finding the courage to approach her foster family about adoption, Sierra had to go to the Leech Lake Tribal Commission to ask the Tribe to support her adoption by a non-Indian family. Leech Lake turned down pleading requests *three times*.

Because of her status as an Indian child, Sierra faced an uphill battle under ICWA to be adopted. Adoption is generally in the best interests of a child like Sierra, who was permanently removed from the custody of her biological mother. Adoption was also psychologically critical for Sierra, who needed to know that her non-Indian foster parents would be her parents forever – and not just another home from which she would be removed. But ICWA made this difficult. Although Leech Lake did not object to Sierra remaining with her non-Indian foster-care family (who lacked any cultural connections to the tribe), Leech Lake (which did not want the precedent of having supported a non-Indian adoption) would not support the termination of Sierra's mother's parental rights.

Through her guardian ad litem, Sierra finally filed a petition to terminate her biological mother's parental rights. Because Sierra has Indian blood, she had to meet a heightened burden under ICWA, including a finding, beyond a reasonable doubt, that active efforts had been made to prevent the breakup of the family and that those efforts had failed.

Sierra also had to prove, beyond a reasonable doubt, that if she were returned to her biological mother, serious emotional or physical harm would likely result. The testimony of the likelihood of such harm had to come from a qualified expert witness, with both relevant professional expertise and relevant cultural expertise to testify to such a conclusion about an Indian child. Further, a court had to find that "good cause" existed to deviate from the preferences for tribal placement dictated by ICWA, to place Sierra in a non-Indian home.

After a hearing on the petition to terminate parental rights, at which Sierra's guardian ad litem, at considerable expense, presented the testimony of a qualified expert witness to support the petition, the court found that adoption by Roger and Loreal Lauderbaugh was in Sierra's best interest and terminated the parental rights of Sierra's mother.[20] Sierra's adoption was finalized in May 2012, four years after

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[20] *In the Matter of the Welfare of the Child of . . .* , No. 04-J7-05-50043 (Beltrami County, Minn), Order of September 8, 2011 (Melbye, J.).

she began the process and one month before her eighteenth birthday.

C. Amici Esther and Craig Adams's ICWA experience.

Esther and Craig Adams are a married couple who live in Farmington, Minnesota. On February 10, 2007, a licensed child-placement agency (North Homes) gave the Adamses physical custody of ARP, who had been born less than two weeks earlier. ARP had never lived with either of her biological parents. Her biological mother, JP – who had given up custody of an earlier child at birth – wanted ARP to be adopted by the Adamses.[21] ARP's biological father (DB), who learned of ARP's birth from a relative shortly after ARP was born, had nothing to do with ARP and he ignored a certified letter from North Homes advising him that he was ARP's putative father.

The two biological parents had been involved in an intimate relationship on and off for almost four years before ARP's birth, but JP did not even identify DB as the biological father when ARP was born and, instead, lied about the identity of the child's father.[22] DB was an enrolled member of the Bois Forte Band of

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[21] Motions and Mem. of Law, Ex. B, *In re Petition of Craig and Esther Adams to Adopt [ARP]* (Minn. Dist. Ct. Aug. 4, 2008).

[22] *Id.* at Ex. A.

Chippewa.[23] He had fathered several children before ARP, including a child with JP's sister.

In June 2007, the Adamses filed an adoption petition in Minnesota state court. In February 2008 – more than a year after ARP's birth, during which the Adamses were ARP's sole caretakers – DB registered with the Father's Adoption Registry in Minnesota.[24] One month later, in March 2008, after extensive investigation of the Adamses and the birth parents, the court-appointed guardian ad litem for ARP recommended ARP's adoption by the Adamses, finding this was in ARP's best interests.[25]

Shortly thereafter, DB filed a motion for reunification with ARP and for dismissal of the adoption petition. His motion was based in part on the fact that he had reconciled with JP (ARP's biological mother) and JP had since revoked her consent to the adoption. Because the guardian ad litem's report referenced DB's criminal history – including several allegations of sexual molestation – the Adamses made a formal request to the Bois Forte Tribal Court for DB's criminal records.

To keep these records a secret, DB withdrew his motion for reunification with ARP, claiming that he

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[23] *See* Findings of Fact, Conclusions of Law, Order for Judgment and Decree of Adoption, *In re Petition of Craig and Esther Adams to Adopt [ARP]*, (Minn. Dist. Ct. Nov. 25, 2008).

[24] Motions and Mem. of Law, *supra* note 21, at 3.

[25] *Id.*

was "unable to care for [her] at the present time based on his need to obtaining [sic] independent and suitable housing."[26] He then argued that his criminal records were no longer relevant, and the court agreed.[27] But DB still refused to waive his parental rights. Instead – invoking ICWA's racial-preference system – he asked the court to take ARP from the Adamses and put her with an Indian family.[28]

In making his removal request, DB did not dispute the guardian's conclusion that adoption of ARP by the Adamses was in ARP's best interests. Indeed, he recognized "the love [ARP] has received in the Adam's [*sic*] home and is thankful for the care they have given his daughter."[29] Still, he argued that ARP's adoptive placement violated the placement preferences of ICWA and that there was no "good cause" to deviate from those placement preferences because the biological parents had not agreed to the adoption. DB also argued there was no showing that ARP had extraordinary physical or emotional needs or that suitable Indian families for ARP were unavailable for adoptive placement after a diligent search.[30]

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[26] Motions and Mem. of Law, *supra* note 21, at 5 (Aug. 4, 2008).

[27] Letter from Judge Edward Lynch, *In re Petition of Craig and Esther Adams to Adopt [ARP]* (Minn. Dist. Ct. Aug. 11, 2008).

[28] *See* Motions and Mem. of Law, *supra* note 26, at 5.

[29] *See id.* at 6.

[30] *Id.* at 4-5.

JP and DB soon thereafter separated again, and JP again agreed to let the Adamses adopt ARP.[31] In July 2008, after much strife and negotiation, JP finally signed a contact agreement with the Adamses that let her periodically visit ARP. The agreement also provided that ARP would be educated about the history of the Boise Forte Band, including "the Band's cultural, political, religious, and other practices."[32] The agreement's terms were crafted, in part, with an Ojibwe elder's help. On December 8, 2008, DB finally acquiesced to ARP's adoption.

The Adamses experiences with ICWA exemplify the discrimination that children with Indian blood suffer under ICWA. The objective best interests of ARP were not enough, under the law, to overcome the incontrovertible evidence of JP and DB's parental unfitness. As such, ICWA's racial-preference system threatened to tear a child away from the only family who had loved and cared for her since birth.

III. ICWA's constitutional infirmities should be addressed by this Court.

The common ordeal endured by Petitioners and Amici in dealing with ICWA exemplify the chaos this law has caused for countless non-Indian families raising children with Indian blood. Petitioners thus

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[31] *See* Motions and Mem. of Law, *supra* note 26, at 5.

[32] Contact Agreement, *In re Petition* (Minn. Dist. Ct. July 22, 2008).

advance a narrower reading of ICWA that would give Petitioners relief and further avoid the need to consider ICWA's constitutionality. Pet'rs' Br. at 19-49. But Amici respectfully submits that now is the time for this Court to directly address the constitutionality of ICWA's racial-preference system for the custody of children with Indian blood.

A. Petitioners' case stems from ICWA's constitutionally infirm racial preference system for child custody.

Petitioners lost custody of their adopted baby girl – a child with Indian blood – because the lower court held that the girl's Indian biological father could invoke ICWA to halt an adoption voluntarily initiated by the girl's non-Indian biological mother. *See Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 567 (S.C. 2012). The court held that ICWA mandated this result despite: (1) the father having abandoned the girl for most of her life; and (2) the girl lacking material tribal ties, having been born to a non-Indian mother outside of any tribal context. *See id.*

Petitioners argue that the state court reached these holdings based on a misreading of ICWA that runs counter to ICWA's text, history, and purpose, as well as key constitutional rights. *See* Pet'rs' Br. at 19-49. Petitioners argue that a proper, narrower reading of ICWA would remedy this error as well as avoid the constitutional issues that are raised by the state court's interpretation of ICWA. *See id.* Under this

narrower reading: (1) state law (not ICWA) should govern when an unwed father may invoke ICWA's protections related to "parents"; and (2) ICWA should generally not apply to voluntary adoptions initiated by a sole custodial, non-Indian parent. *See id.*

This interpretation of ICWA would certainly do much to reduce the harm that ICWA inflicts on non-Indian parents seeking to adopt children with Indian blood. But these harms are not limited to just what Petitioners have endured. ICWA is harming many would-be adoptive parents and Indian children through a racial-preference system designed to regulate the custody of children with Indian blood – a system that replaces objective concern for the "best interests of the child" with a presumption that "placement of Indian children within the preferences of [ICWA] is in the best interests of Indian children." *In re S.E.G.,* 521 N.W.2d at 362. But for this racial gerrymandering, Petitioners would not have lost custody of their adopted daughter. *See Adoptive Couple*, 731 S.E.2d at 567 ("ICWA applies and confers conclusive custodial preference to the Indian parent.").

Given this reality, Amici respectfully submit that the constitutional issues that Petitioners now urge can be avoided through their narrow reading of ICWA are, in fact, "'indispensably necessary' to resolving the case at hand." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 919 (2010) (Roberts, C.J., concurring). Accordingly, the Court should not hesitate to "meet and decide" these issues. *Id.*

B. The decision of state courts to create an Existing-Indian-Family exception to ICWA further proves why ICWA needs constitutional review.

To resolve Petitioners' case, this Court should finally decide the constitutional issues that surround ICWA's racial-preference system for child custody. Avoiding these issues is no longer an option – and the distressing history of state ICWA jurisprudence over the last thirty years demonstrates why. Faced with repeated instances in which ICWA's racial-preference system for child custody threatened a child's actual "best interests," several state courts deemed it better to create a special exception to ICWA rather than review the Act's constitutionality.[33] In the long term, the flaws of this approach have led most state courts to reject it, including the same court that pioneered the exception thirty years ago.

The Existing-Indian-Family exception to ICWA was forged in 1982 by the Kansas Supreme Court in *In re Adoption of Baby Boy L.*, 643 P.2d 168, 206 (Kan. 1982). The case involved a baby boy with five-sixteenths Kiowa Indian blood. *See id.* at 209. The child was voluntarily placed for adoption by his non-Indian mother, who had no tribal ties or connections. *See id.* at 204-05. But the child's Indian

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[33] *See* Dan Lewerenz & Padraic McCoy, *The End of "Existing Indian Family" Jurisprudence:* Holyfield *at 20,* In the Matter of A.J.S., *& the Last Gasps of a Dying Doctrine*, 36 WM. MITCHELL L. REV. 685, 686 (2010).

father objected and sought tribal custody despite being in jail for multiple violent felonies. *See id.*

After noting all these facts, the Kansas Supreme Court held that ICWA did not apply to the child, for Congress never meant "to dictate that an illegitimate infant who has never been a member of an Indian home . . . should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother." *Id.* at 206. But the court also recognized that the child's bloodline meant that he was "an 'Indian child' within the definitions of [ICWA]." *Id.* at 208.

State courts that adopted the Existing-Indian-Family exception in the years following *Baby Boy L.* were able to spare many children from the harms of ICWA's racial-preference system while avoiding the constitutional issues involved[34] – but only for a short while. Only six states apply the exception today.[35] Nineteen other states have rejected the exception,[36] including Kansas, whose supreme court overruled *Baby Boy L.* in 2009. *See In re A.J.S.*, 204 P.3d 543 (Kan. 2009). In doing so, the court explained that it could no longer ignore "the plain language of ICWA" or "ICWA's core purpose of 'preserving and protecting the interests of Indian tribes. . . .'" *Id*. at 550. This reasoning makes clear why the constitutional issues

[34] *See id.* at 695-96 (collecting cases).

[35] *See id.* at 687 & n.10.

[36] *See id.* at 687 & n.12.

raised by ICWA cannot be interpreted away, but instead must be tackled head on if the actual, objective "best interests" of all children with Indian blood are to be protected in the years to come.

C. ICWA's severability clause invites constitutional review of the Act.

One final reason why this Court should address the constitutional issues raised by Petitioners' case is because ICWA contains the following severability clause: "If any provision of this chapter *or the applicability thereof* is held invalid, the remaining provisions of this chapter shall not be affected thereby." 25 U.S.C. § 1963 (emphasis added).

The presence and wording of this clause thus anticipate that "a legislatively unforeseen constitutional problem" might arise with ICWA that would "require[ ] modification of a statutory provision as applied in a significant number of instances." *United States v. Booker*, 543 U.S. 220, 247 (2005). As such, this Court should favor severability over avoidance in dealing with ICWA's constitutionality. *See Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J., dissenting) ("The Constitution does not . . . tolerate . . . devotion to the status quo . . . when such devotion ripens into racial discrimination.").

IV. ICWA denies equal protection to children with Indian blood in custodial matters.

"Equal protection of the laws" is one of the most fundamental "personal rights" afforded under the Constitution. *Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978). This right serves to ensure that our laws do not mean "one thing when applied to one individual and something else when applied to a person of another color." *Id.* at 289-90. Yet, unequal treatment is just what ICWA doles out: treatment that leaves children with Indian blood less protected in custodial matters than their non-Indian peers. ICWA's racial-preference system for child custody thus warrants – and cannot survive – strict scrutiny review.

A. ICWA regulates child custody based on race – not political affiliation.

"Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society." *Adarand Constructors, Inc.*, *v. Pena*, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring). As such, this Court has recognized time and again that laws based on "blood" are among the most destructive racial classifications possible. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 11-12 & n.4 (1967) (invalidating state bar on marriage between persons of certain racial blood quanta). *Contra Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (upholding a system of racial segregation in public transportation

that was triggered by the "proportion of colored blood necessary to constitute a colored person").

This Court's decisions regarding the "unique legal status of Indian tribes under federal law" do not deviate from this equal-protection principle. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Indeed, this Court has found that while Congress can enact laws that "single[ ] out Indians for particular and special treatment" without offending equal protection, this Court has also emphasized that such laws may not be directed at Indians on the basis of race *alone* – they must also rest on *voluntary political affiliation*. *See id.* at 553-55 & n.24. Hence, when a law serves to classify and regulate Indians in a way that "operates to exclude many individuals who are racially to be classified as 'Indians'. . . . the preference is political rather than racial in nature." *Id.* at 554 n.24.

Respect for this political-affiliation distinction is consistent with the only ICWA-related case that this Court has decided to date. In *Mississippi Band of Choctaw Indians v. Holyfield*, this Court held that federal law – not state law – determined the meaning of the term "domicile" under ICWA. 490 U.S. 30, 47 (1989). The Indian parents in the case were enrolled tribal members and *active tribal residents*. *See id.* at 37-38. In short, they chose to affiliate themselves – and by legal extension, their newborn children – with a specific tribe. *See id.* at 48-53. And under ICWA, this choice granted the tribe exclusive jurisdiction over child custody proceedings involving the parents' newborns. *See id.* This Court thus found that the

parents' temporary departure from tribal land could not defeat this reality. *See id*. The Court did not hold that ICWA enabled the tribe to assert authority over the parents – or their children – simply because they shared some quantity of tribal blood. *See id.*

Based on these principles, this Court should find that ICWA's racial-preference system for child custody operates entirely based on race – not political affiliation.[37] By its own terms, ICWA governs any "child custody proceeding" that involves an "Indian child." *See* 25 U.S.C. §§ 1911-1922. But ICWA's definition of an "Indian child" is not limited to children who have *voluntarily* joined a tribe, either on their own initiative or through their parents. *See id.* at § 1903(4). Instead, "Indian child" under ICWA includes *all* children who *could belong* to a tribe and who have a biological parent who is a member, thereby incorporating Indian tribal law that tends to define eligibility for tribal membership exclusively in terms of "blood." *See supra* Part I.A.

ICWA's blood-driven definition of "Indian child" thus enables Indian tribes to influence the custody of any child as long as the child has some tribal blood. *See, e.g.*, *In re S.M.M.D.*, 272 P.3d 126, 128 (Nev. 2012) (noting that change in tribe's blood quantum

[37] Congress has already conceded that ICWA regulates child custody based on race to the extent it has seen fit to exclude ICWA from the scope of federal laws barring racial discrimination in adoption. *See* 42 U.S.C. § 1996b(3) (2012).

criteria rendered children-at-issue subject to ICWA). The same goes for the custodial preferences and evidentiary burdens that ICWA prescribes – they all fall under the same blood-driven definitions for tribal membership that govern the meaning of "Indian child." *See* 25 U.S.C. § 1903(3) ("'Indian' means any person who is a *member* of an *Indian* tribe. . . ."); *id.* § 1915(a) (dictating that adoptive placements should favor "the *Indian child's* tribe" or "other *Indian* families"). And therein lies ICWA's basic character as an ever-expanding system of racial classification, versus being a more humble set of political preferences that actually "exclude[ ] many individuals who are racially . . . classified as 'Indians'." *Morton,* 417 U.S. at 554-55 n.24.

B. ICWA greatly burdens children with Indian blood in custodial matters.

It is repugnant to the principle of equal protection that any person "may be compelled to hold . . . any material right essential to the enjoyment of life, at the mere will of another." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). But that is what ICWA forces children with Indian blood to experience on a regular basis: because of ICWA's racial-preference system for child custody, children with Indian blood must hold their right to a stable home at the mere will of Indian tribes and, sometimes, unfit Indian parents.

Accordingly, while ICWA is often understood as a law that confers a series of *benefits* on children with

Indian blood, the reality is the exact opposite: children with Indian blood are *greatly burdened* in custodial matters thanks to ICWA and the manner in which its racial preferences serve to put "the best interests of the tribe" ahead of "the best interests of the child." And these burdens, of course, are ones that non-Indian children do not have to face.

These burdens include:

Empowered Unfit Parents – ICWA bars children with Indian blood from obtaining permanent residence in a home with loving adoptive parents until the state has made "active efforts . . . to provide remedial services . . . designed to prevent the breakup of the Indian family." 25 U.S.C. § 1912(d). ICWA's "active efforts" rule thus often forces children with Indian blood to stay with an objectively unfit Indian parent for a long time, as the state tries to fix a family that may not have even existed in the first place. *See, e.g.*, *People ex rel. K.D.* 155 P.3d 634, 637 (Colo. App. 2007) ("[T]he court may terminate parental rights . . . when a social services department has expended substantial . . . efforts *over several years* to prevent the breakup of the family. . . ." (emphasis added)).

Worse yet, states must meet – and children with Indian blood must live with – ICWA's "active efforts" rule even if the Indian parent invoking the rule has previously abused children or is incarcerated. *See, e.g.*, *A.M. v. State*, 891 P.2d 815, 827 (Alaska 1995) (vacating termination of Indian father's rights under

ICWA on "active efforts" grounds even though father was incarcerated for sex abuse). By contrast, non-Indian children governed under the federal Adoption and Safe Families Act (ASFA) do not face this burden. *See People ex rel. J.S.B.*, 691 N.W.2d 611, 613, 617 (S.D. 2005) (explaining that ASFA, unlike ICWA, does not require "active efforts" if parent "has a pattern of abusive or neglectful behavior").

Greater Custodial Instability – ICWA lets Indian parents and tribes intervene in custodial proceedings involving children with Indian blood at almost any time. *See* 25 U.S.C. § 1911(c). ICWA also lets Indian parents withdraw previous consent to an adoption "*for any reason at any time*" before the adoption is finalized. *Id.* § 1913(c). Hence, children with Indian blood are faced with the chronic possibility that years of their lives in loving non-Indian adoptive homes can be threatened (or wiped out) in an instant based on mere tribal or parental caprice. Petitioner's case amply reflects this disturbing reality, as do Amici's own experiences with ICWA. *See supra* Part II.

Lost Chances for Adoption – ICWA imposes high evidentiary burdens on non-Indian parents who wish to adopt a child with Indian blood. *See* 25 U.S.C. § 1912(e), (f). ICWA further institutes affirmative custodial preferences in favor of Indian custodians. These provisions thus inherently diminish the pool of parents available to children with Indian blood in need of foster or adoptive care. Indeed, "[f]or non-Indians who wish to adopt an Indian child, the risks are often considerably greater than in adoptions of

other children."[38] And Petitioners' case reflects these "greater risks" in spades. *See supra* Part III.A

C. ICWA's racial-preference system for child custody fails strict scrutiny for lack of narrow tailoring.

"[A]ll racial classifications . . . must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors*, 515 U.S. at 227. This is particularly true when the racial classification at issue is a form of preference or entitlement. After all, "[t]o pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred." *Id.* at 239 (Scalia, J., concurring).

"Under strict scrutiny, the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'" *Johnson v. California*, 543 U.S. 499, 505 (2005). And if the "compelling interest" at stake is correcting "past racial discrimination," then "narrowly tailored" means the government: (1) avoided defining the remedy in overinclusive terms; and (2) "carefully examined and rejected race-neutral

[38] Joan Heifetz Hollinger, *Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children*, 66 U. OF DETROIT L. REV. 451, 453 (1989).

alternatives." *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 507-08 (1989).

As explained in Part IV.A, ICWA regulates child custody based on race. ICWA's racial classifications are thus subject to strict scrutiny. Now, a "compelling interest" for these classifications may be found in Congress's desire to help Indian tribes in the late 1970s, when state agencies were taking many Indian children from their tribal families and placing them with non-Indian homes for improper, racially-biased reasons. *See* 25 U.S.C. §§ 1901-1902.

But Congress drafted ICWA in such a grossly overinclusive manner that it encompassed not only voluntary members of Indian tribes but also any child who could be classified as "Indian" via the operation of tribal blood-driven membership requirements. *See id.* § 1903(3), (4). This reality in itself demonstrates that Congress did not narrowly tailor ICWA to deal with the problem of clearly wrongful removals of Indian children from otherwise proper Indian homes. *Cf. City of Richmond*, 488 U.S. at 506.

There also is no evidence that Congress either considered or tried any race-neutral alternatives for stopping wrongful removals before it passed ICWA. For example, Congress could have funded training programs for state court judges, guardians ad litem, and attorneys who regularly dealt with Indian children, helping them to better understand how to factor tribal culture and history of Indian family life into an

objective evaluation of a child's actual best interests. *Cf. City of Richmond*, 488 U.S. at 507.

Ample reason thus exists for this Court to find that ICWA's tribal, blood-driven racial classifications lack narrow tailoring and thus are unconstitutional as a matter of strict scrutiny review.

V. In custodial matters, ICWA denies due process to children with Indian blood.

Children have rights under the Constitution. *See Troxel v. Granville*, 530 U.S. 57, 89 n.8 (2000) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."). One of these rights is the child's fundamental due-process right to have their long-term custodial status be adjudicated based on an objective review of their own "best interests." Two cases decided by this Court involving custodial determinations reflect this basic principle.

In *Lehr v. Robertson*, this Court held that a father's status as biological parent did not outweigh the right of his child to stay in a loving and stable adoptive home. 463 U.S. 248, 261-65 (1983). In reaching this conclusion, the Court repeatedly pointed to the "best interests" – standard as the key test by which a child's custodial status is to be decided. *See id.* at 254, 257, 259, 262, 266-67. Ultimately, concern for protecting the integrity of this standard compelled the Court to find that where a biological father deliberately failed to develop any real relationship with

his child, "the Federal Constitution will not automatically compel a State to listen to *his opinion of where the child's best interests* lie." *Id.* at 262 (emphasis added).

Similarly, *Quilloin v. Walcott*, this Court held that a child's "best interests" was the only standard a state court needed to consider in deciding whether an unwed absentee father could stop his biological child from being adopted. 434 U.S. 246, 248-255 (1978). As the Court noted: "[W]e cannot say that the State was required in this situation to find *anything more* than that the adoption, and denial of legitimation, were in the 'best interests of the child.'" *Id.* (emphasis added).

Lehr and *Quilloin* (and cases similar to them) thus evince the fundamental due-process right of children to have their long-term custodial status be adjudicated by reference to an objective evaluation of their "best interests."[39] But, as several state courts have implicitly held, ICWA displaces this right with legislative concern for what best serves Indian tribal interests. *See, e.g.*, *In re S.E.G.*, 521 N.W.2d at 362; *In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah

[39] The Court's analysis of "best interests" review in *Reno v. Flores* does not affect this conclusion. 507 U.S. 292, 303-04 (1993). In *Reno*, the Court held that "best interests" was not the sole test for how the government – or natural parents – should be judged as custodians when providing otherwise adequate care. *See id.* But the Court did not displace the standard as the most proper basis for *determining who a child's guardian should be* when this is legitimately in doubt. *See id.*

1986) ("[T]he tribe's ability to assert its interest in its children . . . is at the core of the ICWA . . . .").

In this regard, ICWA is best understood as a sweeping, almost irrebuttable statutory presumption in favor of tribal custody. *See* 25 U.S.C. §§ 1902, 1911, 1915. This presumption works to displace objective evaluation of an Indian child's actual "best interests" with the more parochial ambition of: (1) ensuring tribal courts decide the future of children with Indian blood; and (2) ensuring children with Indian blood are placed in tribal homes to advance their racial identity and tribal status. *See id.*; *In re Baby Girl Doe*, 865 P.2d 1090, 1095 (Mont. 1993) ("[T]he principal purposes of [ICWA] are to promote the stability and security of Indian tribes . . . .").

But as this Court observed in *Vlandis v. Kline*, "permanent irrebuttable presumptions have long been disfavored" as a matter of due process. 412 U.S. 441, 446 (1973). Hence, in *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court determined that "an Illinois statute containing an irrebuttable presumption that unmarried fathers are incompetent to raise their children violated the Due Process Clause." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 645 (1974). The Court reached this vital conclusion because it recognized "the State could not conclusively presume that any particular unmarried father was unfit to raise his child; the Due Process Clause required a more individualized determination." *Id.*

Similar reasoning reveals the gross extent to which ICWA violates the due-process rights of children with Indian blood: ICWA conclusively presumes in all cases involving such children that "placement . . . within the [tribal] preferences of [ICWA] is in the best interests of Indian children." *In re Custody of S.E.G.*, 521 N.W.2d at 362. But standard best-interests review makes no such presumption and instead requires individualized determinations. *Cf. Stanley*, 405 U.S. at 654 n.5, 658 (holding that unwed father could not be presumed unfit under state law that otherwise applied "best interests" test).

This Court should find ICWA violates the fundamental due-process right of children with Indian blood to have their custody determined just like that of any other child: based on what is in their own best interests, rather than based on a nearly irrebuttable, racially-driven statutory presumption. Moreover, as explained in Part IV.C of this brief, this Court should find that such a presumption cannot be justified under the test of strict scrutiny.

CONCLUSION

In *Holyfield*, this Court observed that ICWA protects "the rights of the Indian child *as an Indian*." 490 U.S. at 37. Consistent with this view, the lower court took non-Indian Petitioners' adopted Indian daughter from them – destroying the only family she has ever known. Given this reality and Amici's own

experiences, Amici respectfully submit that even if ICWA protects the rights of the Indian child "as an Indian," the Constitution requires this Court protect the rights of the Indian child *as a child*.

This Court should therefore reverse the decision below on the grounds that ICWA's racial-preference system for child custody is unconstitutional.

Respectfully submitted,

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