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, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

BRIEF OF *AMICA CURIAE* BIRTH MOTHER IN SUPPORT OF PETITIONERS AND BABY GIRL

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QUESTIONS PRESENTED

(1) Whether provisions of the Indian Child Welfare Act (ICWA) "designed to *prevent the breakup* of the Indian family," 25 U.S.C. § 1912(d), and maintain "the *continued custody* of the child by the parent or Indian custodian," *id.* § 1912(f) (emphases added), apply when an unwed non-Indian birth mother with sole custody voluntarily places her child with an adoptive family.

(2) Whether ICWA's term "parent," which "does not include the unwed father where paternity has not been acknowledged or established," 25 U.S.C. § 1903(9), includes any unwed biological father, including one who has voluntarily declined to take steps to attain legal status as a parent under state law.

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INTRODUCTION AND INTEREST OF *AMICA CURIAE*[1]

The South Carolina Supreme Court held that provisions of the Indian Child Welfare Act (ICWA) "designed to *prevent the breakup* of the Indian family," 25 U.S.C. § 1912(d), and maintain "the *continued custody* of the child by the parent or Indian custodian," *id.* § 1912(f) (emphases added), apply to and trump an unwed non-Indian birth mother's profound and deeply personal decision to place her child with a loving adoptive family through an open adoption that was lawful in every respect under applicable state law.

The state court further held that the biological father of Baby Girl is a "parent" with standing under ICWA to belatedly block her adoption. It reached that conclusion, even though the biological father had voluntarily declined to take steps to attain legal status as a parent under state law and announced to Birth Mother in no uncertain terms that he wished to "give up" his parental rights while Baby Girl was still in utero—rendering his consent to the adoption unnecessary under state law.

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[1] Pursuant to Supreme Court Rule 37.3(a), Birth Mother states that all parties have filed blanket consents to the filing of amicus briefs in this case. Pursuant to Supreme Court Rule 37.6, Birth Mother states that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than Birth Mother and her counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

The state court's interpretation of ICWA is incorrect, and needlessly collides with the constitutional interests of children who have Native American ancestry and the women who carry and bear them. The text of the statute signals at every turn that Congress did not intend ICWA to allow a person who is no more a parent than an anonymous donor of genetic material to override the birth mother's voluntary and considered decision to place her child in an open adoption—based solely on the fact that he is considered "Indian." Rather, where (as here) the unwed biological father voluntarily abandoned the child, rendering his consent to the adoption unnecessary under applicable state law, he does not have standing to invoke the Act to thwart the mother's decision—and convert the traditional "best interests" inquiry into a rule of essentially automatic transfer of custody from an existing adoptive family to him.

The state courts' erroneous interpretation of ICWA raises grave constitutional concerns. Under the South Carolina Supreme Court's interpretation, the statute (1) created parental rights where none exist under state law or the federal constitution, (2) deprived Baby Girl of a best-interests determination and her liberty interest in remaining with the stable and loving adoptive family that had raised her since birth, and (3) nullified a single mother's decision to place her child with petitioners, who shared her values and embraced her continuing involvement in an open adoption arrangement. It did all of that, the state court concluded, on facts that do not touch even the periphery of matters concerning "Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974). Erroneous application of ICWA to these and

similar facts imposes life-altering burdens on children and the mothers who bear them based solely on race or ancestry. *See Rice v. Cayetano*, 528 U.S. 495, 519 (2000). At a minimum, then, ICWA must be construed to avoid the grave constitutional problems that would arise if it applied to adoption proceedings, like this case, where the child is in the exclusive custody of a non-Indian parent who is the only legally recognized parent of the child; the non-Indian parent has voluntarily chosen to place the child for adoption; and the unwed biological father—but for his race—would have no rights whatsoever.

1. *Amica curiae* Birth Mother is the biological and birth mother of Baby Girl, and is the single mother of two other children. Birth Mother was once engaged to be married to Biological Father, though they never lived together. Pet. App. 4a. Their relationship quickly deteriorated once Birth Mother became pregnant. *Id.* at 3a. Biological Father initially tried to use the pregnancy as a means to secure better housing and a pay increase for himself and pressured Birth Mother to marry him as soon as possible. *Id.* at 3a n.3. When she resisted, he levied an ultimatum: Marry me, or I will not support you or have anything to do with this child. *Id.* at 44a. Birth Mother refused to agree to marry him on those terms and, after repeated failed attempts to solicit support of any kind from Biological Father, ultimately ended the relationship. *Id.* at 45a.

Shortly thereafter, still pregnant, she inquired again whether Biological Father would agree to contribute financially, or would rather relinquish his parental rights. *Id.* She explained that she needed to know because she "had choices and decisions of [her] own [she] would need to make." Trial Tr. at 307,

Adoptive Couple v. Baby Girl, No. 2009-DR-10-3803 (S.C. Fam. Ct. Sept. 13, 2011). He responded via text message that he would not support her or the child and that he wanted to "give up" his parental rights. Pet. App. 45a, 89a. Apparently, the fate of his child was not worth even a telephone call.

Biological Father made no further attempt to contact Birth Mother during the pregnancy. *Id.* at 45a. He refused to pay any of Birth Mother's medical or living expenses or accompany her to a single doctor's visit, despite his ability to do so. *Id.* Nor did he inquire about Baby Girl after her birth, even though Birth Mother had told him the baby's expected due date and the hospital where she was to be born. *Id.* at 7a-8a, 48a-49a. Biological Father continued to show no interest in parental rights or responsibilities in the ensuing months, despite knowing that he would soon be deployed overseas for a year. *See id.* at 8a-9a.

2. Birth Mother—who was carrying the child—did not have the option of "texting" her responsibilities away. She was already struggling financially as a single mother of two children. *Id.* at 46a. She "'wanted [her] little girl to have a chance.'" *Id.* (alteration in original). Unable to provide the stable two-parent home she wished for Baby Girl, Birth Mother decided that it would be in Baby Girl's best interest to be placed with a loving adoptive family. *Id.* That was the most difficult decision she has ever made. She hand-picked petitioners, whom she met through the Nightlight Christian Adoption Agency in Oklahoma. *Id.* at 4a-5a. Birth Mother considered other families, including families residing in Oklahoma, but ultimately selected petitioners because they had values similar to her own, could provide Baby Girl a stable and loving

home, and were willing to allow Birth Mother to have a continuing relationship with Baby Girl through an open adoption. *Id.* at 47a.

Contrary to statements made in the brief in opposition to certiorari and various press accounts of this case, Birth Mother was upfront about Biological Father's Cherokee heritage from the beginning and throughout the adoption process. The *undisputed* record demonstrates that Birth Mother disclosed this information on the adoption agency's form, *id.* at 5a-6a,[2] informed her attorney that she believed Biological Father was a card-carrying member of the Cherokee Nation, *id.* at 6a, and provided his correct full name and current address for the purposes of an official inquiry to the Tribe, before Baby Girl's birth, *id.* at 47a. Birth Mother also provided what she believed to be Biological Father's birth date, though she explained that she was not certain of its accuracy. *Id.* at 48a. Birth Mother's attorney then sent a letter to the Cherokee Nation for the purpose of determining whether the tribe would consider Baby Girl to be an "Indian child" within the meaning of ICWA. In that letter, Biological Father's first name was misspelled (an "i" in place of an "e"). Petrs. Br. 8. The Tribe responded on September 3, 2009 that, based on the

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[2] Birth Mother reported Baby Girl's ethnicity as "Caucasian/Native American/Hispanic." At some point, Hispanic was circled. R. 388-89. Birth Mother is predominantly Hispanic. Biological Father is apparently predominantly Caucasian, and is 3/128th Cherokee. GAL Br. at 18. Although the fact that Baby Girl is 3/256th (approximately 1%) Cherokee makes her eligible for membership in the tribe, it would be absurd to suppose that Baby Girl should have been identified (by Birth Mother or anyone else) as ethnically "Native American."

information provided, Biological Father was not a member of the Cherokee Nation and ICWA thus did not apply to the adoption proceeding. *Id.*.[3]

3. Baby Girl was born on September 15, 2009, and she was placed with petitioners the following day. Birth Mother was not required to tell Biological Father of her adoption plan. *See* Okla. Stat. tit. 10, §§ 7503-3.1, 7505-4.2; Pet. App. 46a; Infant Adoption Training Initiative, *Frequently Asked Questions About Adoption in Oklahoma*, at 4, http://www.iaatp.com/docs/FAQs-OK.pdf (last visited Feb. 25, 2013); *see also* Jeffrey A. Parness & Zachary Townsend, *Legal Paternity (And Other Parenthood) After* Lehr *and* Michael H., 43 U. Tol. L. Rev. 225, 243 (2012). Nor was she required to notify the Cherokee Nation (even though she had in fact put the Tribe on notice of her plans when she inquired about Baby Girl's status). *See* 25 U.S.C. § 1912(a); S.C. Code Ann. § 63-9-730; Okla. Stat. tit. 10, § 40.4.

At the time Biological Father was served with notice of the South Carolina adoption proceedings, he had not made any effort to see the baby or even contact Birth Mother, much less contribute financially or otherwise to their care. He signed the notice of service and consent, which asked him to affirm "that he was

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[3] That typographical error hardly evidences an intention to conceal or misrepresent information. Moreover, as the Tribe concedes, even with the misspelling of his first name, there were only eight possible matches for Biological Father's last name and birth year, and Birth Mother had provided his correct address on a military base in Fort Sill, Oklahoma. Pet. App. 48a, 6a. The Tribe's failure to conduct reasonable diligence at that point is—if not grounds for estoppel—relevant to the Tribe's claimed interest in Baby Girl's custody proceedings.

the father of Baby Girl, that he was *not contesting the adoption*, and that he waived the thirty-day waiting period and notice of hearing." Pet. App. 50a (emphasis added). Biological Father later explained that he signed that document because he was somehow under the impression (notwithstanding the document's plain language) that he was signing away his rights only to *Birth Mother*, so that she would raise the child alone and he "'would not be responsible in any way for the child support or anything else as far as the child's concerned.'" *Id.* at 46a.

Having washed his hands of any responsibility for the child, Biological Father was not the least bit concerned at that point that Baby Girl would be raised in a "Hispanic," rather than an "Indian," home. Nor could he, or his extended family, have interfered with Birth Mother's right to direct Baby Girl's upbringing if he later decided that Baby Girl should be exposed to Cherokee culture or embrace tribal affiliation. *See Troxel v. Granville*, 530 U.S. 57 (2000).

Biological Father did not make an effort to see Baby Girl until he was deposed for this case and advised to do so by his attorney. Pet. App. 67a. Because Biological Father had taken no steps to protect his parental rights to the child, it is undisputed—and both state courts held—that his consent to the adoption was not required under South Carolina state law. *Id.* at 21a n.19. *See also* S.C. Code Ann. §§ 63-9-310(A)(5), 63-17-20(B); S.C. Code Ann. Regs. § 114-4730. Nor would his consent have been required under the laws of Oklahoma, Biological Father's home state. *See generally* Okla. Stat. tit. 10, §§ 7501-7505, 7800.

4. In stark contrast to Biological Father's "vanishing act," Pet. App. 42a, petitioners financially supported Birth Mother, spoke to her weekly, and traveled from South Carolina to Oklahoma to visit her during her pregnancy, *id.* at 5a. Petitioners were in the delivery room when Birth Mother delivered Baby Girl, Adoptive Father cut the umbilical cord, and the couple cared for Baby Girl as their child from that moment forward—until they were ordered to hand her over to Biological Father (a complete stranger, because of the choices *he* had made). *Id.* at 7a, 11a. By then, Baby Girl was an active toddler a few months past her second birthday, and petitioners—"Momma" and "Daddy"—were her entire world. Because of the open nature of the adoption, Birth Mother had the opportunity to observe all of this first-hand during her visits with the family. *See* GAL Br. at 16.

While petitioners were raising Baby Girl, they were in contact with Birth Mother at least monthly. They sent her pictures and videos of Baby Girl as she grew. They held up the telephone to let Birth Mother hear Baby Girl babble, laugh, and say her first words. Birth Mother got to hear about every milestone in Baby Girl's young life—her first tooth, when she began to crawl, when she took her first steps, when she said her first words. The families exchanged presents at Christmas and on Baby Girl's birthday.

Birth Mother visited with Baby Girl and petitioners at their home in South Carolina on two occasions. Although she was initially anxious about visiting with the family, when she saw Baby Girl "run with open arms to [Adoptive Mother,] screaming 'Momma Momma' with a huge smile on her face," she felt an

enormous sense of relief and peace about the choice she had made, as painful as it was for her at the time.

When Baby Girl was transferred to Biological Father at the age of 27 months, he immediately cut off all communication between Baby Girl and the only family she had ever known. GAL Br. at 23-24. Birth Mother does not even know Baby Girl's current address. Neither Biological Father nor anyone in his extended family has attempted to contact Birth Mother, even though she has the same address, employer, and telephone number she has had for years. Birth Mother feels enormous guilt for—in her words—having "let my baby down," after making the "hardest decision that I have ever had to make in my whole life."

The state courts' erroneous application of ICWA in this case voided Birth Mother's decision to place Baby Girl with petitioners in an open adoption, and ripped Baby Girl from the only family she had ever known, in derogation of both Birth Mother's and Baby Girl's rights and expectations under state law. Birth Mother therefore has a substantial, and indeed immeasurably profound, interest in the outcome of this case. Having made the heart-wrenching decision to relinquish the care and custody of her child to petitioners—with the expectation that *petitioners* would care for and raise Baby Girl through an open adoption that would allow her to remain a part of her daughter's life, and the belief that Baby Girl's interests would be best served in petitioners' care—Birth Mother is uniquely situated to speak to the profound effect of the decision below on the deeply personal, fundamental, and lawful choices made by child-bearing women.

SUMMARY OF ARGUMENT

Few decisions in a woman's life are more fundamental and personal than the decision to bear a child. For single mothers, the decision may pose particular burdens and challenges. That is particularly so for women in poverty, or near-poverty, already struggling to raise other children, when the would-be father has announced that he will not take any responsibility, financial or otherwise.

Consistent with ICWA, Birth Mother could have raised Baby Girl herself, in a non-Indian home, without any interference from Biological Father, and with no connection whatsoever to the tribe or any of its members. It is entirely implausible to suppose that Congress nevertheless intended to prevent or even discourage adoption as an option for non-Indian women like Birth Mother, with sole physical and legal custody of their children, who will otherwise be making a choice between single parenthood and termination of the pregnancy. *See* Carol Sanger, *Placing the Adoptive Self, in Child, Family, and State* 58, 78 (Stephen Macedo & Iris Marion Young eds., 2003) (noting that "the overwhelming majority of [unwed birth mothers] … choose either single parenthood or abortion.").

For the reasons explained in petitioners' and the guardian's briefs, the only reasonable reading of the text excludes from the definition of "parent" unwed fathers who have voluntarily rejected a parent-child relationship and thus are not recognized as a "parent" under applicable state (or tribal) law. Even if Congress intended to eschew the ready-made body of state law on the subject and create a uniform federal rule of parenthood specific to unwed Indian fathers, it could not have intended the rule adopted by the South

Carolina Supreme Court. That rule presumes that Congress intended to deviate from the traditional dominance of state law in the sphere of familial relations, and would render meaningless Congress's carve-out for unwed fathers who have not "acknowledged or established" their paternity.

Moreover, where the child involved is neither a member of the tribe, nor has any social or political connection to the tribe, creating an automatic veto right for unwed biological fathers of a particular race—and denying mothers of Indian children the ability to choose adoptive parents (a right afforded to all mothers of non-Indian children)—"'solely because of … ancestry,'" *Rice*, 528 U.S. at 515 (citation omitted).

ICWA can, and should, be construed to avoid the heart-wrenching result in this case. Doing so not only would give proper respect to the predominant role of state law in this sphere, but avoid serious questions about the constitutionality of tearing stable adoptive families apart in these circumstances based solely on the fact that a biological father has some Indian blood.

ARGUMENT

I. ICWA DOES NOT CREATE AN ADOPTION VETO RIGHT FOR AN UNWED BIOLOGICAL FATHER WHO VOLUNTARILY ABANDONED THE OPPORTUNITY TO DEVELOP A PARENT-CHILD RELATIONSHIP

Section 1903(9) excludes from the definition of "parent" "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). The state court reasoned that an unwed father is a "parent" under ICWA so long as he has a

biological link to an Indian child and contested the adoption after receiving notice. *Id.* at 22a. That interpretation works a revolution in the rights of unwed biological fathers and renders Congress's explicit exclusion meaningless. The only reasonable reading of the text excludes from the definition of "parent" unwed fathers who have voluntarily rejected a parent-child relationship and thus are not recognized as a "parent" under applicable state (or tribal) law.

A. Congress Enacted ICWA Against The Backdrop Of Well Settled State Law And This Court's Decisions Establishing That Biology Alone Does Not Make A "Parent"

1. Neither biological paternity nor one's race has ever been a sufficient basis to remove a child from a loving adoptive home. Familial relationships, including whether a man who has fathered a child is legally recognized as the child's "parent," have traditionally been matters of state law. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) ("'The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'" (citation omitted)); *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (parent-child relationship is "a legal status" that "requires a reference to the law of the State which create[s] those legal relationships"). And state law has never entitled a biological father to destroy an existing familial relationship in circumstances like the ones presented in this case.

DNA testing is a relatively recent phenomenon. Until at least the 1980s, there was no reliable method for establishing a father's biological link to a child. State paternity laws historically have focused on

proxies for fatherhood, principally marriage to the birth mother of the child. State laws also historically treated children born to an unwed mother as exclusively within the legal custody of the natural mother, even when paternity was uncontested. In many states, the unwed birth mother had sole decision-making authority over whether to place the child for adoption, irrespective of the putative biological father's contribution to pregnancy-related expenses or his commitment to shouldering the responsibilities of parenthood. *See generally* Scott A. Resnik, *Seeking the Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoptions*, 20 Seton Hall Legis. J. 363, 390 (1996).

In a line of cases beginning in the early 1970s, this Court identified circumstances in which an unwed biological father has a constitutionally protected interest in the care and custody of his offspring. *See Stanley v. Illinois*, 405 U.S. 645, 649 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 253-54 (1978); *Caban v. Mohammed*, 441 U.S. 380, 397 (1979); *Lehr v. Robertson*, 463 U.S. 248, 261 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110, 136 (1989) (O'Connor, J., concurring). "Parental rights," this Court has explained, "do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Caban*, 441 U.S. at 397. The Court has accordingly distinguished between persons with a "mere … biological link" to a child, *Lehr*, 463 U.S. at 261, and those who have taken timely and substantial steps to provide the care, affection, and financial and emotional support that are required to form a "protected family unit under the historic practices of our society," *Michael H.*, 491 U.S. at 142.

In *Stanley*, the Court held that the state's removal of an unwed father's children without a hearing on his parental fitness violated the father's right to due process and equal protection of the laws. At issue in *Stanley* was an Illinois statute that excluded all unwed fathers from the statutory definition of "parent." 405 U.S. at 649-50. Stanley had lived with the mother for 18 years; mother, father, and children had lived together as a family; and he had contributed to the support and rearing of his children from birth. Upon the death of the mother, the state removed the children from his custody solely because he had not been married to their mother, without any hearing on his fitness as a parent. *Id.* at 646-47. The Court concluded that the state's blanket exclusion of all unwed fathers from the status of "parent" violated the Due Process and Equal Protection clauses of the Fourteenth Amendment. *Id.* at 658-59.

Of course the facts of *Stanley* could scarcely be more different from the facts of this case. But the Court also noted, however, that there was "no constitutional … obstacle" to excluding those unwed fathers who had not taken the steps required to form a protected parent-child relationship. *See id.* at 657 n.9 ("Unwed fathers … retain the burden of proving their fatherhood."). And the Court elaborated on this distinction between a mere biological link to a child and a constitutionally protected parent-child relationship in a series of cases over the following decade. In *Quilloin v. Walcott*, for example, a biological father sought to prevent the mother's husband from adopting the child. The biological father had maintained some relationship with the child, but had "never exercised actual or legal custody," and "ha[d] never shouldered any significant

responsibility with respect to the daily supervision, education, protection, or care of the child." 434 U.S. at 256. The Court held that he did not have a protected parent-child relationship and therefore had no right to object to the adoption. *Id.*

Similarly, in *Lehr v. Robertson*, the Court held that a biological father who not established "any custodial, personal, or financial relationship with [the child]" did not have a parent-child relationship that "merit[ed] … constitutional protection." 463 U.S. at 261. The Court explained that "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring." *Id.* at 262. It is only "[w]hen an unwed father demonstrates a *full commitment* to the responsibilities of parenthood by '[coming] forward to participate in the rearing of his child,' [that] his interest in personal contact with his child acquires substantial protection under the Due Process Clause." *Id.* at 261 (quoting *Caban*, 441 U.S. at 392) (emphasis added). If biological father "fails to accept[] some measure of responsibility for his child's" welfare, "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.

In the wake of this Court's decisions defining the extent of unwed biological fathers' parental rights, States adjusted their laws to ensure that those unwed fathers who timely "demonstrate[] a full commitment to the responsibilities of parenthood" attain the status of legal "parent," including the right to object to or participate in an adoption proceeding. *Id.* at 261. But those who do not promptly demonstrate such a commitment, or commit too late—often prompted by

learning the mother's adoptive plan—have no right to interfere with the legal parent or custodian's choice of adoptive placement, which will be honored if it is determined to be in the child's best interests.[4]

2. Here, it is undisputed that Biological Father did not meet South Carolina's "general minimum standards by which an unwed father timely may demonstrate his commitment to the child, and his desire … to assume full responsibility for his child." *Abernathy v. Baby Boy*, 437 S.E. 2d 25, 29 (S.C. 1993); Pet. App. 22a-23a. Consistent with this Court's decisions in *Quilloin* and *Lehr* and the law of other states, in South Carolina an unwed father may not veto, or even participate in, adoption proceedings if he failed to make prompt and substantial efforts to support the birth mother and child before adoption proceedings began. *See, e.g., Roe v. Reeves*, 708 S.E. 2d 778, 785 (S.C.) (biological father who initially abandoned birth mother but then changed

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[4] *See, e.g.*, Ala. Code § 26-10A-9(a)(1), (3); Del. Code Ann. tit. 13, § 1103(a)(2); Fla. Stat. § 63.062(2)(a)(1); Haw. Rev. Stat. § 578-2(a)(5); Idaho Code Ann. § 16-1504(2); Kan. Stat. Ann. § 59-2136(h)(1); Miss. Code Ann. § 93-17-6(4), (5); Mont. Code Ann. § 42-2-610(1), (3); N.C. Gen. Stat. § 48-3-601(2)(b); Ohio Rev. Code Ann. § 3107.07(B); Okla. Stat. tit. 10, § 7505-4.2(C); S.C. Code Ann. § 63-7-2570(3), (4); S.D. Codified Laws § 25-6-4(2), (3), (4); *see also, e.g., Matter of Raquel Marie X.*, 570 N.Y.S.2d 604, 605-06 (App. Div. 1991) (public acknowledgment of paternity, contribution to expenses, and occasional visits deemed insufficient to give biological father right to veto adoption, where he was content to leave the child's care to the mother, despite her frequent complaints of her inability to attend to the needs of two children) , *remanded from* 559 N.E. 2d 418 (1990), *cert. denied*, 498 U.S. 984 (1990); *see generally* Ardis L. Campbell, Annotation, *Rights Of Unwed Father To Obstruct Adoption Of His Child By Withholding Consent*, 61 A.L.R. 5th 151 (1998) (survey of state statutes and judicial decisions on the subject).

his mind six months into the pregnancy and lodged objection to planned adoptive placement immediately after child's birth had not "undert[aken] a sufficient effort to make the sacrifices fatherhood demands"), *cert. denied*, 132 S. Ct. 760 (2011). "[I]t is only the combination of biology and custodial responsibility" that gives rise to parental rights. *Abernathy*, 437 S.E. 2d at 28 (citing Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 Ohio State L.J. 313, 368 (1984)).[5]

B. Nothing In The Text, Purpose, Or Legislative History Of ICWA Evinces Congressional Intent To Depart Radically From Prevailing State Law And Create A New Federal Definition Of Parent Based On A Biological Link Alone

Ultimately, respondents' position is that Congress intended to depart radically from these principles when it enacted ICWA. Neither the text, nor the purpose, nor the legislative history of ICWA supports that unsettling conclusion.

Quite the contrary. The text of ICWA is clear that some unwed biological fathers are not "parents" with standing to invoke the Act's parental termination

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[5] Indeed, because Biological Father had not taken any responsibility for Baby Girl, and had affirmatively stated his desire to "give up" his parental rights, Birth Mother could have lawfully refused to reveal his identity when she initiated adoption proceedings. *See Evans v. South Carolina Dep't of Soc. Servs.*, 399 S.E. 2d 156, 157-58 (S.C. 1990) (holding that "blind John Doe" notice of adoption proceeding is sufficient where biological father's consent to adoption is not required under state law, explaining that contrary policy would violate mother's right to privacy).

provisions. Congress explicitly excluded from the definition of "parent" "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). Congress did not further define the steps necessary for an unwed father to "acknowledge[]" and "establish[]" his paternity for purposes of ICWA's parental termination provision. But Congress was perfectly clear about one thing: its intention to *exclude* some subset of unwed biological fathers who may seek to exploit the Act, but have not taken steps to "acknowledge[] or establish" paternity.

Congress is presumed to have been mindful of the traditional dominance of state law where parent-child relationships are concerned. *See De Sylva*, 351 U.S. at 580 (parent-child relationship is "a legal status" that "requires a reference to the law of the State which create[s] those legal relationships"). "[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks and citation omitted); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *United States v. Bass*, 404 U.S. 336, 349 (1971).

In light of these well-settled principles, respondents face an exceedingly high hurdle in attempting to show that Congress sought to upset the state law discussed above in the traditional state-law realm of determining the steps an unwed biological father must take in order to attain status as a parent. "Because domestic relations are preeminently matters of state law, [this Court has] consistently recognized that Congress, when it passes general legislation, rarely intends to

displace state authority in this area." *Mansell v. Mansell*, 490 U.S. 581, 587 (1989). Instead, where Congress leaves a term undefined, in an area traditionally reserved to states, it is appropriate to presume that Congress intended the courts to apply the "ready-made body of state law." *De Sylva*, 351 U.S. at 580; *cf. Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word … and the meaning its use will convey to the judicial mind unless otherwise instructed."); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."). The legislative history further confirms that Congress did not intend to displace the body of state law governing the parental status of unwed fathers. *See* H.R. Rep. No. 95-1386, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7540 (explaining that ICWA "do[es] not oust the State from the exercise of its legitimate policy powers in regulating domestic relations").[6]

Mississippi Band of Choctaw Indians v. Holyfield, is not to the contrary. 490 U.S. 30 (1989). In *Holyfield*, Court held that Congress intended the term "domicile" in ICWA's jurisdictional provision, Section 1911(a), to be construed in accordance with the federal law of

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[6] If the unwed biological father is domiciled on an Indian reservation and subject to the exclusive jurisdiction of the tribal court, then presumably tribal law would govern whether he has attained legal status as a parent. *See* Petrs. Br. at 29, 42.

domicile, rather than incorporating state law. *Id.* at 36. But there is no developed federal common law defining parent-child relationships, because Congress and the federal courts have traditionally deferred to state law on such issues. *De Sylva*, 351 U.S. at 580.

2. Even if it were appropriate to infer from congressional silence an intent to have *state* courts applying ICWA fashion a new *federal* definition of "parent," the text of the statute forecloses the rule adopted below.

Congress was unmistakably clear about its intent to exclude some unwed biological fathers from the status of "parent." Under the South Carolina Supreme Court's interpretation, however, *all* biological fathers are "parents" with standing to invoke the Act. According to the state courts below, the biological father "acknowledge[s]" paternity by his very act of objecting to an adoption. And he may subsequently "establish" his biological relationship to Baby Girl through DNA testing. Pet. App. 21a-22a. But Congress did not merely require any unwed biological father eventually to "acknowledge" or "establish" paternity for purposes of obstructing an adoption; rather, it chose the past tense, excluding those who had not "acknowledg*ed* or "establish*ed*" paternity from the class of "parent" entitled to object.

The state courts' interpretation also renders the carve-out meaningless. Under that interpretation, any biological father who belatedly invokes ICWA to try to block an adoption is a parent with standing to do so. In other words, according to the courts below, the category of unwed fathers Congress excluded is a null set. But under ordinary rules of statutory construction, the provision must be construed, if

possible, in a manner that makes this explicit exclusionary clause "meaningful in the statutory definition." *Board of Trustees of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2196 (2011) (rejecting the argument that the phrase "invention of the contractor" "'include[s] *all* inventions made by the contractor's employees with the aid of federal funding,'" where that reading "assumes that Congress subtly set aside two centuries of patent law" and rendered part of the phrase meaningless (citation omitted)).

Congress is presumed to have been aware of this Court's decisions and the well-developed body of state law in this area when it enacted ICWA. *See Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) ("[T]he well-settled presumption [is] that Congress understands the state of existing law when it legislates …."); *accord Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).[7] Nothing in the text, history, or purpose of ICWA indicates that Congress intended to depart radically from the backdrop principle that an unwed biological father must take prompt and substantial steps to take responsibility for a child in order to establish a legal parent-child relationship. There is thus no reason to depart from the normal rule that "[w]ell-settled state law can inform our understanding of what Congress had in mind when it employed a [federal] term it did not define." *Holyfield*, 490 U.S. at 47; *see also Reves v. Ernst & Young*, 494 U.S. 56, 78 n.*

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[7] Indeed, the House Report accompanying the Act explicitly acknowledges explains that ICWA's definition of "parent" "is not meant to conflict with the decision of the Supreme Court in *Stanley*." H.R. Rep. No. 95-1386, at 21, 1978 U.S.C.C.A.N. at 7453.

(1990) ("In the absence of … alternative sources for discerning the applicability of [a] statutory term … we are dependent on the state common law at the time of the Act's creation as a basis for a nationally uniform answer to this 'federal question.'").[8]

Because Biological Father failed timely to take responsibility for Baby Girl (and indeed affirmatively told Birth Mother that he wished to relinquish his parental rights), neither South Carolina, nor Oklahoma, nor the United States Constitution recognizes him as a parent with standing to object to an adoption or otherwise assert rights as a "parent" of Baby Girl. ICWA's "acknowledged or established" proviso must too be read to exclude Biological Father from the category of "parents" entitled to invoke the Act.

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[8] The so-called "pro-Indian canon" does not change the result here. For one thing, it is dubious that the canon has any place when the text of a statute, as opposed to an Indian treaty, is involved. *See Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001). In any event, the pro-Indian canon is offset here by the competing canon directing courts to give meaning to the entire provision. *Id.* In any event, the ultimate question for the Court is what Congress intended, and one need not resort to any canons of construction in order to determine that Congress's unambiguous intent to carve out from the definition of "parent" a subset of unwed biological fathers.

II. THE SOUTH CAROLINA COURTS' INTERPRETATION RAISES GRAVE CONSTITUTIONAL CONCERNS

A. A Mother's Fundamental Right To Direct The Upbringing of Her Child Includes The Right To Select An Adoptive Placement Consistent With The Child's Best Interests

1. The South Carolina Supreme Court's interpretation of ICWA not only is at odds with the text, it raises profound constitutional concerns. This Court has long recognized that "'freedom of personal choice in matters of … family life'" is one of the essential liberties protected by the Due Process Clause. *Quilloin*, 434 U.S. at 255 (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)). The rights to conceive and to raise one's children are "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), "far more precious … than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953); *see also Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 862 (1977) ("One of the liberties protected by the Due Process Clause … is the freedom to 'establish a home and bring up children.'" (quoting *Meyer*, 262 at 399)).

Parents have the responsibility and privilege of imparting a set of moral principles and values to their children. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972)

("The duty to prepare the child for 'additional obligations' … must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship."); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."). That right and duty encompasses the right to choose who will—and who will not—be responsible for the child's care. *Cf. Troxel*, 530 U.S. at 78 (Souter, J., concurring in the judgment) ("The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character."). Mindful of a mother's unique interest in directing the care and upbringing of her child, this Court has held that she may not be forced to allow paternal grandparents access to her child, because of her "fundamental right to make decisions concerning the care, custody, and control of her two daughters." *Id.* at 60 (plurality op.).

The decision to place a child for adoption falls squarely within the realm of the fundamental parenting decisions protected by the Constitution. A birth mother who places her child for adoption and selects the adoptive parents makes a deeply personal decision that is fundamental to her role as a birth mother, and included within her right to provide care for and influence the destiny of her child. *See* Carol Sanger, *Placing the Adoptive Self*, in *Child, Family, and State* 58, 81 (Stephen Macedo & Iris Marion Young eds., 2003) (the custodial authority of a birth mother includes "the right—and the obligation—to provide care for one's children, whether personally or by arranging for a surrogate caretaker"). Of course, many

times that decision is made by the biological mother and father together. But when, as here, the biological father has voluntarily relinquished any interest in an unborn child, the birth mother's decision is no less fundamental to her role as mother. Indeed, if anything, the decision has even greater implications for the destiny of both mother and child.

2. After Biological Father abandoned Birth Mother she was left with a critical decision to make. As a single mother of two other children and a woman struggling to make ends meet despite being gainfully employed, Birth Mother realized that she could not provide the life that she wanted for her unborn child. Pet. App. 46a. She, like thousands of other women who have been forced to confront similar circumstances, made the difficult, selfless, and deeply personal choice to place Baby Girl for adoption and to provide her with the stable and loving home that she deserves.

Birth Mother endured significant physical, financial, and social sacrifices in order to bring Baby Girl into the world,[9] and took very seriously her responsibility to

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[9] *See* Shari Motro, *Preglimony*, 63 Stan. L. Rev. 647, 654 (2011) ("[F]or a pregnancy taken to term, the consequences [for a birth mother] go far beyond the monetary charges of visits to the obstetrician/gynecologist and the delivery room. Pregnancy may of course be an inspiring and joyful experience, but even smooth pregnancies come with routine difficulties that are more extensive than is generally recognized— including prolonged bouts of nausea and vomiting, back pain, and fatigue. Pregnancy also limits a woman's freedom of movement and it transforms her public identity."); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 373-374 ("The work of gestation thus involves on-going calculations and compromises that can have

find a stable and loving home for Baby Girl with parents who shared Birth Mother's values. She chose petitioners, through the Nightlight Christian Adoption Agency, after having considered a number of other prospective families, including families with some Indian heritage. She chose them because she believed they could provide Baby Girl everything she needed to thrive and that they had values similar to her own. She also appreciated that they were willing to allow her to continue to be involved in Baby Girl's life.

Petitioners proved to be the right choice. They were with Birth Mother for every important stage of her pregnancy and during the delivery of Baby Girl. *Id.* at 5a-7a. They also embraced Birth Mother's desire to have an open adoption through which she could remain a part of Baby Girl's life. Petitioners were in frequent contact with Birth Mother and kept her informed of every milestone in their young daughter's life. They sent her pictures and videos of Baby Girl as she grew from an infant into an active and happy toddler. The families exchanged presents at Christmas and on Baby Girl's birthday, and took family photographs together when Birth Mother came to South Carolina to visit Baby Girl in petitioner's home.

Birth Mother realized, and no one can deny, that petitioners were Baby Girl's family—in every legal and human sense. There is no basis at all to attribute to Congress an intent to create a federal right to break up such families in the circumstances at issue here over

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a pervasive impact on women's lives; its impositions are simultaneously physical and social.").

the objection of the woman who carried and bore the child and selected the adoptive parents.[10]

B. The Court's Erroneous Application Of ICWA Unconstitutionally Interfered With Birth Mother's Right To Select Baby Girl's Adoptive Parents

The state court's erroneous interpretation of ICWA not only allowed Biological Father to override Birth Mother's constitutionally protected rights to direct the upbringing of her child, but did so solely because of Biological Father's and Baby Girl's ancestry. It literally came down to the fact that Biological Father apparently is 3/128th Cherokee. GAL Br. at 18. That makes Baby Girl an "Indian child" under ICWA, but only because the Cherokee Nation—unlike some other tribes—has no blood quantum requirement for membership. If Biological Father had been a descendent of a Florida Seminole, instead of a Cherokee, he would have been out of luck.[11]

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[10] There is perhaps no more difficult decision for a woman, especially for an unwed woman who must go it alone like Birth Mother here, than the decision to place her unborn child for adoption. Presented with such circumstances some women choose simply to terminate the pregnancy. But whatever else is true, there is no basis whatsoever to attribute to Congress an intent to make the *adoption* option more difficult by creating the prospect that that a deadbeat father who has abandoned his rights to an unborn child could come along after the child has been placed with a loving adoptive family in accordance with state law and simply wrench the child from that family, as occurred here.

[11] *See* Seminole Tribe of Florida, *Frequently Asked Questions*, http://www.semtribe.com/FAQ/ (last visited Feb. 26, 2013) ("In order to apply for membership … you must have a minimum of

To be sure, "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs," *Rice*, 528 U.S. at 519, including legislation that "single[s] out Indians for particular and special treatment" designed "to further Indian self-government," *Mancari*, 417 U.S. at 554-55. Thus, in custody proceedings involving children domiciled on a reservation or who have some other non-biological tribal connection, a federal law designed to prevent the involuntary breakup of the Indian family may legitimately "further Indian self-government." *Mancari*, 417 U.S. at 555; *see Holyfield*, 490 U.S. at 34.

But even if the interest in preserving tribal sovereignty could trump a parents' fundamental rights to direct the child's upbringing—and the child's right to a best interests determination—in voluntary adoptions involving children domiciled on a reservation, that interest is not remotely implicated here. Where, as here, the dispute involves a child who is *not* domiciled on Indian reservation and had no other connection to a tribe, whose parents have never been domiciled on an Indian reservation, whose sole legal and physical custodian was her *non-Indian* birth mother, whose Indian biological father abandoned her in utero—giving the Indian unwed biological father a right to veto the mother's adoption choice, solely based on his ancestry, violates the Equal Protection Clause. *See Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (recognizing a strong presumption that custody determinations based on race are unconstitutional); *see also In re Bridget R.*, 49 Cal. Rptr. 2d 507, 528 (1996) (holding that "any

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one-quarter Florida Seminole blood (that is, one of your grandparents must have been a full-blooded Florida Seminole).").

application of ICWA which is triggered by an Indian child's genetic heritage, without substantial social, cultural or political affiliations between the child's family and a tribal community, is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny under the equal protection clause"), *cert. denied*, 520 U.S. 1181 (1997).

Baby Girl's home was not with an "Indian family," not because her non-Indian birth mother chose adoption, but because her Indian biological father intentionally abandoned her to be raised in Birth Mother's non-Indian (Hispanic) home. Consistent with ICWA, Birth Mother could have raised Baby Girl herself, in a non-Indian home, without any interference from Biological Father, and with no connection whatsoever to the tribe or any of its members.[12]

In these circumstances, the ancestry-based preference (bestowed on a class of unwed fathers) and burden (imposed on Indian children and their mothers) serves no purpose relating to "Indian self-government," *Mancari*, 417 U.S. at 555, and could not stand. The Court may and should save the heartland of the statute by construing it to avoid this glaring constitutional defect. *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (where one construction "would raise serious constitutional problems," and "an alternative

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[12] *See* Billy Joe Jones et al., *The Indian Child Welfare Act Handbook* 5 (2d ed. 2008) ("ICWA does not apply to custody disputes between parents, either as part of a divorce or non-divorce proceeding …."); *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584, 67,587 (Nov. 26, 1979) (ICWA does not apply to any "domestic relations proceeding[] … so long as custody is awarded to one of the parents").

interpretation of the statute is 'fairly possible,' [the Court is] obligated to construe the statute to avoid such problems") (internal citations omitted); *see also id.* at 299 ("[W]hen a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.").

III. ICWA DOES NOT COMPEL A NON-INDIAN UNWED BIRTH MOTHER WITH SOLE PHYSICAL AND LEGAL CUSTODY TO SEEK OUT AN "INDIAN" ADOPTIVE FAMILY FOR HER CHILD

Section 1915(a) of the Act provides that in "any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (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).

In dictum, the majority of the South Carolina Supreme Court sought to lay blame for this tragedy on Birth Mother, faulting her for not "plac[ing] Baby Girl within a statutorily preferred home" with an Indian family, rather than with petitioners. Pet. App. 38a. On the majority's view, even if Biological Father had no rights as a "parent," Birth Mother—a non-Indian single mother who was carrying a child who may or may not be 1% Cherokee—had violated ICWA's placement-priority provisions by selecting the loving couple that she did—simply because neither adoptive parent has any known Indian blood. Pet. App. 37a-39a.

That conclusion defies common sense. The only sensible interpretation of § 1915 is that it does not

apply where, as here, the child was not removed from, or adopted out of, an "Indian family." *See* Petr. Br. at 51-53; *see also Holyfield*, 390 U.S. at 36-37 ("[W]here possible, an Indian child should *remain* in the Indian community" to protect "the rights of the Indian community and tribe in *retaining* its children in its society.") (emphases added) (quoting H.R. Rep. No. 95-1386, at 23, 1978 U.S.C.C.A.N. at 7546).

In any event, even if the provision were applicable by its terms, its "good cause" exception must be read to be satisfied here. Congress could not have intended to displace the decision of a non-Indian woman concerning the child who is in her sole physical and legal custody simply because of the genetic contribution of an absent father who has relinquished any parental rights in his unborn child. But that is precisely the result under the state court's interpretation of § 1915. And the result would be the same, on that view, whether the biological father was a former fiancée, an abusive ex-boyfriend, or a sperm donor.

That interpretation is not only entirely implausible, but also raises grave constitutional concerns by once again infringing on a non-Indian birth mother's fundamental and deeply personal choice of an adoptive placement that she believes is in the best interests of the child she carried and gave birth to, in favor of an ancestry-based placement priority scheme. That scheme furthers no interest in tribal sovereignty when applied to the little girl at issue in this case.

CONCLUSION

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

Respectfully submitted,

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