No. 12-399

In The
Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR CHILD UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF OF *AMICUS CURIAE* CHRISTIAN ALLIANCE FOR INDIAN CHILD WELFARE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Christian Alliance for Indian Child Welfare ("Alliance") is a Montana nonprofit corporation with approximately 400 members in 35 states, including South Carolina. Alliance was formed, in part, to: (1) promote human rights for all United States citizens and residents; (2) educate the public about Indian rights, laws, and issues; and (3) encourage accountability of governments, particularly the federal government, to families with Indian ancestry.

Alliance seeks to help and protect the human, civil, and constitutional rights of all Americans, especially those of Native American ancestry, through education, outreach, and legal defense. One area of constitutional concern is the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 ("ICWA").

Alliance is particularly concerned for families with members of Indian ancestry who have been denied the full range of rights and protections of federal and state constitutions when subjected to tribal jurisdiction. Alliance is interested in this case because its members are birth parents, birth relatives, foster parents, and adoptive parents of children with varying amounts of Indian ancestry –

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[1] No counsel for a party authored this brief in whole or in part. No counsel for a party, or party, made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsels made a monetary contribution intended to fund the preparation or submission of this brief. All parties consented to the filing of this brief.

all of whom have seen or experienced the tragic consequences of applying the racial distinctions embedded in ICWA.

Tribal jurisdiction, whether regulatory or judicial, affects the parental, fundamental, and constitutional rights of United States citizens in many cases. These citizens include individuals of Indian ancestry who are not members of a federally recognized tribe, who have had no contact with a federally recognized tribe, and/or who have no desire for a political or other relationship with a federally recognized tribe.

These citizens also include individuals who are members of a tribe, but have chosen to live, work, and domicile beyond the borders of their tribe's reservation, sometimes for the express purpose of avoiding entanglement with their tribal government. They purposefully choose not to domicile within the confines of tribal government and intend for their Indian children to live and be raised outside tribal government.

Some citizens of non-Indian ancestry have no connection to tribal government, but have knowingly or unknowingly given birth to a child of some Indian ancestry. They often intentionally domicile off the tribe's reservation. They intend for their Indian children to live and be raised outside tribal government.

Alliance believes that the following argument will bring to the Court's attention relevant matter

not already brought to the Court's attention by the parties.

If affirmed, this case will further the chilling realization by state foster care and adoptive families of the possibility that a biological parent of an Indian child with minimal Indian ancestry may seek custody of the child under ICWA – outside the relevant state child custody law. A biological parent considering foster care or adoption as being in the best interests of their Indian child will face the horrifying uncertainty of whether it is safe to terminate their parental rights. Innocent Indian children, bonded and attached to their foster or adoptive families, face the danger of being torn from the homes and families and forced into the custody of strangers.

Alliance also believes that an Indian child's best interests are not inherently served through a forced political relationship with the child's tribe, and forced familial relationships with members of the tribe. A person's ancestry does not determine the person's values, emotions, motivations, skills, and inclinations. Numerous multi-racial children throughout the nation have been negatively affected by the application of the ICWA. Shockingly, Indian children who have never domiciled on, or been near, their tribe's reservation, nor involved in tribal customs or culture, are routinely removed from homes they love and placed with strangers. Sometimes, because of the racially based preferences embedded in ICWA, they are placed in homes that would be deemed unsafe for children of other ancestry.

SUMMARY OF ARGUMENT

Many of the ICWA sections addressed in this case impact Indian children in foster care, as well as Indian children not in foster care. While the case involves an adopted Indian child who was never in foster care, its resolution will impact: (1) foster care placements of Indian children, (2) terminations of parental rights involving Indian children in foster care, (3) preadoptive placements for Indian children in foster care, and (4) adoptive placements of Indian children in foster care.

To the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it applies based upon ancestry – which is a proxy for race. Because this application is racially discriminatory and not narrowly tailored, it unconstitutionally denies the Indian child equal protection of the laws.

To the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it deprives the Indian child and parents of their liberty interest and due process rights to domicile off the tribe's reservation, and to be subject to state law and jurisdiction – instead of tribal law and jurisdiction. This deprivation is based upon race and is unconstitutional.

To the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it overrides state law and jurisdiction governing child care and custody. This unconstitutionally violates the right reserved to states to govern child care and custody.

Courts interpreting and applying ICWA have differed in the extent they consider an Indian child's best interests. A child's best interests, however, should be considered in every ICWA determination, particularly when the child is domiciled off the tribe's reservation. There is no presumption that residing with members of an Indian child's tribe is in the child's best interests, particularly when the child is domiciled off the tribe's reservation.

As held by some courts, ICWA applies only when an Indian child is removed from an existing Indian family and environment. If ICWA applies to an Indian child domiciled off the tribe's reservation, then it applies only if the child has significant cultural, social, and political contacts with the tribe.

If a parent of an Indian child is not a member of the child's tribe, then the tribe lacks inherent jurisdiction over the parent, even if the parent domiciles on the reservation. To the extent ICWA applies to the parent, it violates the equal protection provision of the federal constitution.

ARGUMENT

Among other things, this case involves the definition of a "parent" under ICWA, the voluntary and involuntary termination of parental rights under ICWA, a voluntary adoptive placement under ICWA, and the adoptive placement preferences under ICWA. *See Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012) *and* 25 U.S.C. §§ 1903, 1912, 1913, 1915. More importantly, this case addresses

whether the application of ICWA violates the federal constitution.

1. The statutory and constitutional issues addressed in this case impact Indian children in foster care.

While this case centers on "adoption" and not "foster care," the sections of ICWA addressed in this case impact Indian children in foster care, as well as Indian children not in foster care. *See* 25 U.S.C. §§ 1903, 1912, 1913, 1915. The resolution of this case, therefore, will impact: (1) foster care placements of Indian children, (2) terminations of parental rights involving Indian children in foster care, (3) preadoptive placements for Indian children in foster care, and (4) adoptive placements of Indian children in foster care.

In addition, the resolution of this case may impact sections of ICWA not addressed or disputed in this case. These sections impact Indian children in foster care. For example, ICWA grants an Indian tribe exclusive jurisdiction over any child custody proceeding involving an Indian child "who resides or is domiciled within the reservation of such tribe." Id. § 1911(a). It also states that, absent good cause to the contrary, parental objection, and declination of tribal jurisdiction, a state court must transfer a state foster care placement or termination of parental rights proceeding involving an Indian child "not domiciled or residing within the reservation of the Indian child's tribe" to the jurisdiction of the tribe. Id. § 1911(b). ICWA also permits an Indian tribe to intervene in a state foster care placement or

termination of parental rights proceeding "at any point in the proceeding." Id. § 1911(c).

More importantly, the federal constitutional issues addressed in this case impact Indian children in foster care, as well as Indian children not in foster care.

As of September 30, 2011, there were approximately 8,000 American Indian and Native Alaskan children in foster care. Children's Bureau, United States Department of Health and Human Services, *The AFCARS Report* No. 19 (July 2012), *available at* http://www.acf.hhs.gov/programs/cb/resource/afcars-report-19. Between October 1, 2010 and September 30, 2011, approximately 5,200 American Indian and Native Alaskan children entered foster care, and approximately 4,650 exited foster care. Id. As of September 30, 2011, approximately 1,850 American Indian and Native Alaskan children in foster care were waiting to be adopted. Id.

Many cases involving ICWA and foster care children occur in state courts, are not appealed, and are not reported on an electronic legal database. Yet, for the 2012 calendar year, a simple LEXIS search of state and federal cases mentioning "ICWA" and having a core-term of "foster" resulted in over 100 cases. And, many cases involving ICWA and foster care children are currently pending.

For example, one state court of appeals is currently considering a case involving a 31-month old Indian child in foster care. The child entered

foster care at approximately 9 months of age. The child and biological parents are domiciled over 1,000 miles from the Indian tribe's reservation. Pursuant to ICWA, the Indian tribe was notified when the child entered foster care, and was notified of all child custody proceedings.

After a juvenile court terminated the biological parents' rights, during an appeal to a superior trial court, and approximately 16 months after the child entered foster care, the tribe intervened. Approximately 17 months after the child entered foster care, the tribe moved to transfer jurisdiction to tribal court.

The trial court granted the motion to transfer. The guardian ad litem moved to stay the transfer pending appeal. During a hearing on the motion to stay, two experts testified that, because of multiple moves and trauma during the child's first 9-months, the Indian child suffered from inhibited reactive attachment disorder. Because the case involves legal questions of first impression in the state, and because there was "overwhelming" evidence that transferring physical custody would irreparably harm the child, the trial court stayed the transfer pending appeal.

Again, many cases involving ICWA and foster care children are currently pending. They need direction from the Court regarding application of ICWA.

Unless a tribe acts immediately upon an Indian child entering foster care, applying ICWA to

the child may extend the child's time in foster care, may prohibit or inhibit non-Indians from fostering and/or adopting the child, and may delay the child's adoption. This is particularly true when the tribe delays intervening or moving to transfer the proceeding, which is more likely the further the child is domiciled from the tribe's reservation.

In addition, a delay caused by applying ICWA to an Indian child in foster care may jeopardize federal financial assistance related to the child. Title IV-E of the Social Security Act provides foster care financial assistance to states with an approved "plan" meeting certain minimum requirements. 42 U.S.C. §§ 670-679c. Among other things, the plan must have a "case review system" meeting certain minimum requirements. Id. §§ 671(a)(16), 675(5). The case review system must, among other things, assure that a permanency hearing for a child in foster care is held no later than 12 months after the child entered foster care. Id. § 675(5)(C). In addition, the case review system must assure that, in general, if a child has been in foster care for 15 of the most recent 22 months, then the state must petition to terminate parental rights and pursue adoption. Id. § 675(5)(E).

A delay caused by applying ICWA to an Indian child in foster care may result in missing these deadlines and jeopardizing federal foster care assistance. Whether for logistical, geographical, or other reasons, the likelihood of a delay caused by applying ICWA is greater when the Indian child is domiciled off the tribe's reservation.

A statute must be applied in a manner that is constitutional and that avoids "grave doubts" about its constitutionality. *See Rust v. Sullivan*, 500 U.S. 173, 191 (1991) *and Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998). Likewise, a statute must be applied in a manner that avoids constitutional problems, "whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Suarez*, 543 U.S. 371, 380-81 (2005).

As discussed below, applying ICWA to an Indian child domiciled off the tribe's reservation violates the federal constitution. This is true for the adopted Indian child before the Court, and for Indian children in foster care.

2. To the extent ICWA applies to an Indian child domiciled <u>off</u> the tribe's reservation, it violates the equal protection, due process, liberty, and state rights provisions of the federal constitution.

A. To the extent ICWA applies to an Indian child domiciled <u>off</u> the tribe's reservation, it violates the equal protection provisions of the federal constitution.

Under the fourteenth amendment to the federal constitution, a person may not be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1. Under ICWA, an "Indian child" is an unmarried person under age eighteen who is: (1) a

member of an Indian tribe or (2) eligible for membership in an Indian tribe and is the biological child of a member. 25 U.S.C. § 1903(4). The Indian tribe determines whether the child is a member, or eligible for membership. *See In re L.S.*, 812 N.W.2d 505, 509 (S.D. 2012); *Bruce L. v. W.E.*, 247 P.3d 966, 975 (Alaska 2011); *and* Cohen's Handbook of Federal Indian Law §§ 4.01(2)(b), 11.02(2) (Nell Jessup Newton ed., 2012) [hereinafter, Cohen's Handbook].

Tribal membership is typically based upon: (1) a specified degree of ancestry from an individual on a base list or roll and/or (2) domicile at birth. Cohen's Handbook, *supra* at 3.03(2); *See also* 25 U.S.C. § 479 (as used in the Indian Reorganization Act of 1934, "Indian" includes Indian descendants who are tribal members and their descendants residing within a reservation, and all other individuals of one-half or more Indian blood). The required degree of ancestry or percentage of blood quantum varies widely, with some tribes permitting any descendant, regardless of blood quantum. Cohen's Handbook, *supra* at 3.03(2). Tribal membership, therefore, is based upon ancestry or domicile.

Baby Girl's biological father ("Birth Father") is 3/128th Cherokee blood quantum, although he seems to have had some uncertainty or ambivalence regarding his ancestry and tribal membership. Brief for Guardian Ad Litem, as Representative of Respondent Baby Girl, Supporting Reversal at 18, n. 6. Interestingly, Birth Father's initial legal pleading stated that neither he nor Baby Girl had "Native American blood." *Adoptive Couple*, *supra* at 555.

Approximately three months later, Birth Father amended the pleading to state that both he and Baby Girl had "Native American blood." Id. at 555 n. 12.

Baby Girl's biological mother ("Birth Mother") is not a member of the Cherokee Nation. Id. at 552, 554 n. 5. Baby Girl is 3/256th Cherokee blood quantum and is a member of, or eligible for membership in, the Cherokee Nation. Br. for G.A.L., *supra* at 18, n. 6 *and Adoptive Couple*, *supra* at 555, 560 n. 18.

In 1954, the Court held that segregation based upon race violated the equal protection provision of the federal constitution. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

In 1974, the Court held that a Bureau of Indian Affairs ("BIA") employment preference for Indians was not "racial discrimination." *Morton v. Mancari*, 417 U.S. 535, 553 (1974). Instead it was a preference "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." Id. at 554. At that time, the Court opined that without this so-called political distinction, a large body of federal statutes granting special treatment for Indians "living on or near reservations" would be "effectively erased." Id. at 552. The Court noted the Indian preference was similar to legal requirements that elected officials inhabit or reside within geographic areas related to their offices. Id. at 554. Since *Morton*, the Court's jurisprudence, including decisions specifying the narrow limits of tribal governmental jurisdiction, draws into question the accuracy and legitimacy of

this concern, particularly when contrasted with the rights of individuals.

In *Morton*, the Court held that the Indian preference was "reasonably and directly related to a legitimate, nonracially based goal," which is the "principal characteristic" generally absent from prohibited racial discrimination. Id. at 554. The Court noted that on "numerous occasions" it had upheld legislation singling out Indians for special treatment. The cases cited by the Court involved real estate tax immunity on an Indian homestead, inheritance of reservation land, regulation of affairs on a reservation, and federal benefits for Indians living "on or near" a reservation. Id. at 554-55.

In other parts of its opinion, the Court noted that a reason for the preference was to facilitate Indian BIA employees participating in or affecting "various services on the Indian reservations." Id. at 543-44. The Court also noted the "unique legal status" of tribal and "reservation-based" activities, and matters concerning tribal or "'on or near' reservation" employment. Id. at 546, 548.

In *Morton*, therefore, a primary consideration for the Court's finding that the Indian preference or special treatment was racially neutral – and constitutional – was its application to Indians living on or near their reservation. Otherwise, the preference or special treatment was racially discriminatory and unconstitutional.

Recognizing this reasoning, when Congress considered and enacted ICWA in 1978, Pub. L. No.

95-608, 92 Stat. 3069 (1978), the United States Department of Justice ("Department") noted, "The class of persons whose rights under the bill may, in our opinion, constitutionally be circumscribed by this legislation are the members of a tribe, whether living ***on or near*** a reservation." H.R. Rep. No. 95-1386 at 36 (1978) (emphasis supplied).

In addressing whether ICWA could constitutionally apply to individuals not living on Indian lands or the reservation, the House of Representatives Committee on Interior and Insular Affairs noted three Court cases. These cases, however, were criminal cases addressing the power of Congress to regulate commerce with Indian tribes. They did not involve racial discrimination. Id. at 15.

In enacting ICWA, Congress intended to protect tribal communities and the participation of Indian children in tribal communities. 25 U.S.C. § 1901(5) *and Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989). By definition, a "community" includes individuals domiciled near one another.

For purposes of ICWA, the term "reservation" means: (1) "Indian country" as defined in 18 U.S.C. § 1151 and (2) other land, title to which is: (a) held by the United States in trust for the benefit of any Indian tribe or individual or (b) held by any Indian tribe or individual subject to a restriction by the United States against alienation. 25 U.S.C. § 1903(10). As noted by the Court, "reservation" is defined "quite broadly" in ICWA. *Holyfield*, *supra* at 42.

In 1984, the Court reversed a child custody determination based upon race because it violated the equal protection provision of the federal constitution. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

In 1989, the Court addressed the meaning of the term "domiciled" within a reservation as used in the exclusive jurisdiction section of ICWA. *Holyfield*, *supra*; *See also* 25 U.S.C. § 1911(a). It held that domicile is "not necessarily" the same as residence. For example, the domicile of most minor children is the domicile of their parents. The domicile of an illegitimate child is the domicile of the child's mother. Id. at 48-49.

Because it was "undisputed" that the biological mother was domiciled on the tribe's reservation, the Court held the Indian children in the case were domiciled on the reservation. Id. at 48-49, 53. Because the Indian children were domiciled on their reservation, the Court had no reason to address whether the application of ICWA was racially discriminatory.

In 2000, the Court held that a requirement limiting voting in a Hawaiian election to individuals with specific ancestry was an unconstitutional racial discrimination. *Rice v. Cayetano*, 528 U.S. 495, (2000). The Court explained that ancestry can be a "proxy" for race, and can be used "as a racial definition and for a racial purpose." Id. at 514. Indeed, "racial discrimination" singles out persons "solely because of their ancestry or ethnic characteristics." Id. at 515 (*citing Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613, (1987)).

As the Court added, "The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name." Id. at 517. The Court described race as a "forbidden classification" because it "demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." Id. Inquiring into "ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens." Id.

In holding the requirement unconstitutional, the Court expressly refused to expand its holding in *Morton*. Id. at 518-22. The Court added that the failure of a class defined by ancestry to include all members of the race does not make the classification race neutral. Id. at 517.

In 2007, the Court noted that it is "well settled" that when government distributes burdens or benefits on the basis of race, the action is reviewed under strict scrutiny. The use of race must be narrowly tailored to achieve a compelling government interest. Otherwise, the use is an unconstitutional violation of due process and equal protection. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *See also* U.S. Const. amends. V, XIV, § 1. Indeed, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Id. at 745-46. A child born in the United States to a member of an Indian tribe is a

United States citizen. U.S. Const. amend. XIV, § 1 *and* 8 U.S.C. § 1401(b).

To the extent an "Indian child" under ICWA is determined based upon Indian ancestry and domicile on the tribe's reservation, then the determination is narrowly tailored and may not violate the equal protection provisions of the federal constitution. However, to the extent the determination is based upon Indian ancestry and not domicile on the tribe's reservation, then it is racially based, is not narrowly tailored, and violates the equal protection provision of the federal constitution.

Accordingly, to the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it violates the equal protection provision of the federal constitution.

B. To the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it violates the due process and liberty provisions of the federal constitution.

Under the fifth and fourteenth amendments to the federal constitution, a person may not be deprived of liberty without due process of law. U.S. Const. amends. V, XIV, § 1. Freedom of association, and freedom of choice, associated with family relationships are personal liberty interests protected by the federal constitution. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-20 (1984) *and Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 842-47 (1977).

As noted by the Court, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Smith*, *supra* at 843. Likewise, the personal relationships and affiliations regarding the "creation and sustenance of a family," like marriage, childbirth, and the raising and education of children are protected. *Roberts*, *supra* at 619. They are entitled to a "substantial measure of sanctuary from unjustified interference by" state or federal government. Id. at 618.

ICWA includes extensive provisions and heightened standards regarding foster care placement, termination of parental rights, preadoptive placement, and adoptive placement proceedings. *See* 25 U.S.C. §§ 1902, 1911-1923.

As noted above, ICWA grants an Indian tribe exclusive jurisdiction over a child custody proceeding involving an Indian child domiciled on the tribe's reservation. It also permits transfer to tribal jurisdiction of a state foster care placement or termination of parental rights proceeding involving an Indian child domiciled off the tribe's reservation. While a parent of the Indian child may object to and prevent the transfer, the Indian child may not object to or prevent the transfer. 25 U.S.C. § 1911(b). That is, if an Indian child has a guardian ad litem to protect the child's best interests, then the guardian ad litem may not object to or prevent the transfer.

A fundamental liberty right of families is determining where to domicile, and to what local law

and jurisdiction to be subject. If an Indian parent and child decide to domicile on the tribe's reservation, and be subject to tribal law and jurisdiction, then their liberty interest protects this right. Likewise, if an Indian parent or child decides to domicile off the tribe's reservation, and be subject to state law and jurisdiction, then their liberty interests protect this right. Otherwise, the Indian parent and child would have no freedom to leave the reservation and tribal law and jurisdiction.

In *Holyfield*, the Court noted that the law of domicile cannot permit an individual "reservation-domiciled" tribal member to defeat the tribe's exclusive jurisdiction. *Holyfield*, *supra* at 53; *See also* 25 U.S.C. § 1911(a). The liberty interest of an Indian parent and child, however, permits them to domicile off the reservation to defeat the tribe's jurisdiction.

If ICWA applies to an Indian parent and child domiciled on the tribe's reservation, then it may not violate their personal liberty rights. If, however, ICWA applies to an Indian parent and child domiciled off the tribe's reservation, then it violates their liberty interests. Otherwise, the Indian parent and child could never escape the application of ICWA and tribal jurisdiction, even though domiciling off the tribe's reservation.

Accordingly, to the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it violates the due process and liberty provisions of the federal constitution.

C. To the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it violates the state rights provisions of the federal constitution.

Under the tenth amendment to the federal constitution, powers not delegated to the federal government, nor prohibited by it to the states, are "reserved to the States." U.S. Const. amend. X. As the Court has "consistently recognized," the law governing domestic relations between parent and child is reserved to the states, and not the federal government. *Rose v. Rose*, 481 U.S. 619, 625 (1987). Before a state law governing these domestic relations is overridden, it "must do 'major damage' to 'clear and substantial' federal interests." Id.

Standards and protections regarding child care and custody have traditionally been addressed by the states, and not by the federal government. ICWA, however, includes extensive provisions and heightened standards regarding child custody proceedings. It also grants an Indian tribe exclusive jurisdiction over any child custody proceeding involving an Indian child "who resides or is domiciled within the reservation of such tribe." 25 U.S.C. § 1911(a). It also addresses the transfer of a state foster care placement or termination of parental rights proceeding involving an Indian child "not domiciled or residing within the reservation of the Indian child's tribe." Id. § 1911(b).

Applying state law and jurisdiction to child custody proceedings involving an Indian child

domiciled on a reservation may do major damage to federal interests. To the extent ICWA applies to an Indian child domiciled on the tribe's reservation, it may constitutionally override state law and jurisdiction. However, applying state law and jurisdiction to child custody proceedings involving an Indian child domiciled off the tribe's reservation, but within the state, does not do major damage to a clear and substantial federal interest. To the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it may not constitutionally override state law or jurisdiction.

Agreeing, and as noted during congressional consideration of ICWA, the Department of Justice thought that Congress could override state law when addressing "reservation Indians." H.R. Rep. No. 95-1386 at 40 (1978); *see also In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 n. 1 (Ind. 1988). The Department, however, was not convinced that Congress' power to control litigation involving "nonreservation Indian children and parents" under the Indian commerce clause was "sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising State jurisdiction over what is a traditionally State matter." Id. It seemed to the Department that the "Federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power contemplated by [ICWA]." Id.

As noted above, the Court held that the Indian children in *Holyfield* were domiciled on their

reservation. The Court, therefore, had no reason to address whether the application of ICWA violated the tenth amendment to the federal constitution.

Accordingly, to the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it violates the state rights provisions of the federal constitution.

D. Because Baby Girl was domiciled off Indian land, the application of ICWA to her violates the federal constitution.

Birth Father's family "had Indian land" in Oklahoma. *Adoptive Couple v. Baby Girl*, *supra* at 565. Baby Girl's biological parents ("Birth Parents"), however, were not married. Id. at 552-53. As noted above, the domicile of an illegitimate child is the domicile of the child's mother. As an illegitimate child, Baby Girls' domicile is Birth Mother's domicile.

Because Birth Parents did not live together before Baby Girl's birth, and because of their "strained" and later broken relationship, Birth Mother was not domiciled on the Indian land. Id. at 553. Because neither Birth Father nor his parents contacted Birth Mother while she was hospitalized for Baby Girl's birth, and because Birth Father did not see Baby Girl for approximately 4 months after her birth, Baby Girl was not domiciled on the Indian land. Id. at 554-55. Baby Girl, therefore, was not domiciled on a "reservation" under ICWA.

Accordingly, because Baby Girl was domiciled off Indian land, the application of ICWA to her violates the federal constitution.

3. An Indian child's best interests should be considered in every "good cause" and other determination under ICWA, particularly when the child is domiciled off the tribe's reservation. There is no presumption that residing with members of an Indian child's tribe is in the child's best interests, particularly when the child is domiciled off the tribe's reservation.

As noted above, under ICWA, in a state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child domiciled off the tribe's reservation, the state court must transfer the proceeding to tribal jurisdiction, "in the absence of good cause to the contrary." 25 U.S.C. § 1911(b). Also under ICWA, in any foster care, preadoptive placement, or adoptive placement of an Indian child, preferences are given, "in the absence of good cause to the contrary." Id. §§ 1915(a), (b).

Also under ICWA, Congress declared that it is the Nation's policy to: (1) protect the best interests of Indian children and (2) promote the stability and security of Indian tribes and families. 25 U.S.C. § 1902. The meaning of this declaration is expressed by the ordinary meaning of the words used. *Holyfield*, *supra* at 47. Based upon the ordinary meaning of the words used, the Nation has two

policies. The first is protecting the best interests of Indian children. The second is promoting the stability and security of Indian tribes and families. They are separate policies. While the policies may, or may not, overlap, they are separate and distinct policies.

In a footnote, the *Holyfield* Court agreed with a state court that ICWA is based on the "fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." *Holyfield*, *supra* at 50 n. 24. Based upon this and other statements in *Holyfield*: (1) state courts have disagreed whether a Indian child's best interests may be considered in determining whether "good cause to the contrary" exists to deny transfer of jurisdiction or to deviate from placement preferences, *see*, *e.g.*, *In re Zylena R.*, 284 Neb. 834, 849-52, 825 N.W.2d 173 (Neb. 2012) *and cases cited therein*; *In re J.L.*, 779 N.W.2d 481, 486-87 (Iowa Ct. App. 2009) *and cases cited therein*; *In re Adoption of Baby Girl B.*, 67 P.3d 359, 370-72 (Okla. Civ. App. 2003); *In re Adoption of S.W.*, 41 P.3d 1003, 1009-10 (Okla. Civ. App. 2001) *and cases cited therein*; *In re Guardianship of J.O.*, 743 A.2d 341, 348-49 (N.J. Super. Ct. App. Div. 2000) *and cases cited therein*; *and In re A.E.,* 572 N.W.2d 579, 583-85 (Iowa 1997) *and cases cited therein*, and (2) state courts have held that protecting an Indian child's relationship with the tribe is presumed to be in the child's best interests, *see*, *i.e.*, *Navaho Nation v. Arizona Dep't of Econ. Sec.*, 284 P.3d 29, 35-36 (Ct. App. Ariz. 2012); *In re A.R.*, No. 11CA1448, 2012 Colo. App. LEXIS 2144, 7 (Colo. App., Nov, 8, 2012);

and In re A.T.W.S., 899 P.2d 223, 224 (Colo. App. 1994).

An Indian child, however, is the subject of rights, and not the object of rights. That is, an Indian child has the right for his or her best interests to be protected and promoted. An Indian child is not the object of the tribe's rights, particularly when the child is domiciled off the tribe's reservation. The rights of an Indian child are different from the rights to the child. The rights of an Indian child include having his or her best interests protected and promoted. Those rights are different from the tribe's right to the child, particularly when the child is domiciled off the tribe's reservation.

As noted by the Court, a child's welfare is the "controlling factor" in child custody decisions. *Palmore*, *supra* at 432. Likewise, a state has a "duty of the highest order" to protect a child's best interests, particularly for a child "of tender years." Id. at 433. Granting custody based upon a child's best interests is "indisputably a substantial government interest" for equal protection purposes. Id.

The inability to consider an Indian child's best interests in making "good cause" determinations, and presuming that residing with members of the child's tribe is in the child's best interests, are inconsistent with ICWA. *See* 25 U.S.C. § 1902. The inability to consider best interests, and the presumption, are particularly inappropriate when an Indian child is domiciled off the tribe's reservation.

Protecting and promoting a child's best interests are the paramount considerations in ICWA and other child custody proceedings. While not considering the best interests of an Indian child domiciled on the tribe's reservation in "good cause" determinations seems inappropriate, not considering the best interests of a child domiciled off the reservation seems even more inappropriate. By domiciling off the tribe's reservation, the Indian child's parents presumably believed that to be in the child's best interests.

While keeping an Indian child domiciled on the tribe's reservation with the tribe may presumptively be in the child's best interests, this is not true for an Indian child domiciled off the reservation. By definition, a child domiciled off the reservation is not with his or her tribe or community, particularly if the child is domiciled far off the reservation. While facts and circumstances may indicate that returning an Indian child domiciled off the tribe's reservation to his or her tribe is in the child's best interests, this is not presumed. If anything, there is a presumption that returning the Indian child is not in his or her best interests.

In the present case, the dissent noted, "It is apparent that the decision of the family court judge was influenced to some extent by the erroneous legal conclusion that ICWA eclipses the family court's obligation to determine what would be in the child's best interests." *Adoptive Couple*, *supra* at 579. The majority acknowledged the "settled principle" that a child's best interests is "primary, paramount and

controlling" in all child custody cases, but the majority "ignore[d] [the principle] in application." Id. Based upon the guardian ad litem's testimony and report, and other evidence, the dissent concluded that placing Baby Girl with her adoptive parents would serve her best interests. Id. at 580.

An Indian child's best interests should be considered in every "good cause" and other determination under ICWA, particularly when the child is domiciled off the tribe's reservation. Because Baby Girl is domiciled off the tribe's reservation, her best interests should be considered. There is no presumption that residing with members of an Indian child's tribe is in the child's best interests, particularly when the child is domiciled off the tribe's reservation. Because Baby Girl is domiciled off the tribe's reservation, there is no presumption that residing with members of her tribe is in her best interests. As noted by the dissent, placing Baby Girl with her adoptive parents is in her best interests.

4. If ICWA applies to an Indian child domiciled off the tribe's reservation, then it applies only if the child is part of an existing Indian family or environment.

As noted in ICWA, Congress found that states often failed to recognize the "cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). Congress also declared that it is a national policy to promote the "stability and security of Indian tribes and families" in a manner that "reflect[s] the unique values of Indian culture." Id. § 1902. ICWA, therefore,

protects the culture, values, and social standards "prevailing" in a tribe.

This protection prevents the removal of an Indian child from a family or environment "reflect[ing]" tribal culture, values, and social standards. ICWA, therefore, applies only when an Indian child is being removed from a family or environment "reflect[ing]" tribal culture, values, and social standards.

Agreeing, some state courts have held that ICWA applies only when an Indian child is being removed from an existing Indian family and environment. *See In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009); *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996) *and In re Hampton*, 658 So. 2d 331, 334-37 (La. Ct. App. 1995); *and In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988).

That is, ICWA does not apply when an Indian child is not being removed from an Indian cultural setting, the biological parents have no substantive ties to a tribe, and neither biological parent resided or plans to reside within a reservation. *In re C.E.H.*, 837 S.W.2d 947, 951-52 (Mo. Ct. App. 1992); *see also In re S.A.M.*, 703 S.W.2d 603, 608-09 (Mo. Ct. App. 1986).

ICWA does not apply when an Indian child has minimal contact with the tribe's members, minimal contact with the tribe's reservation, minimal involvement in the tribe's activities, and minimal participation in the tribe's culture. *S.A. v.*

E.J.P., 571 So. 2d 1187, 1189-90 (Ala. Civ. App. 1990).

ICWA does not apply when an Indian child has had no contact with the tribe's reservation and the biological parents are domiciled off the tribe's reservation. *In re K.L.D.R.*, No. M2008-00897-COA-R#-PT, 2009 Tenn. App. LEXIS 163, at 10-12 (Tenn. Ct. App. 2009) *and In re Morgan*, No. 02A01-9608-CH-00206, 1997 Tenn. App. LEXIS 818, at 42-44 (Tenn. Ct. App. 1997).

Courts disagree whether *Holyfield* supports or opposes the application of ICWA to an Indian child who is not part of an existing Indian family or environment. *See In re Baby Boy C.*, 805 N.Y.S.2d 313, 319-23 (N.Y. App. Div. 2005) *and cases cited therein*; *In re Morgan*, No. 02A01-9608-CH-00206, 1997 Tenn. App. LEXIS 818, at 24-41 (Tenn. Ct. App. 1997) *and cases cited therein*; *Rye v. Weasel*, 934 S.W.2d 257, 262-63 (Ky. 1996) *and cases cited therein*; *and Crystal R. v. Super. Ct. of Santa Cruz Cnty.*, 69 Cal. Rptr. 2d 414, 715 (Cal. Ct. App. 1997) *and cases cited therein*. Through *Holyfield*, the Court created confusion regarding the application of ICWA.

If ICWA applies to an Indian child domiciled off the tribe's reservation, then it applies only if the child is part of an existing Indian family or environment. The child must have significant cultural, social, and political contacts with the tribe reflecting the tribe's unique values.

In the present case, the Supreme Court of South Carolina concluded that ICWA applies, regardless of whether an Indian child is part of an existing Indian family or environment. *Adoptive Couple*, *supra* at 558, n. 17. For the reasons discussed above, however, ICWA must apply only to an Indian child domiciled on the tribe's reservation. If ICWA applies to an Indian child domiciled off the tribe's reservation, then it applies only if the child is part of an existing Indian family or environment.

5. A tribe lacks inherent jurisdiction over a nonmember. To the extent ICWA applies to the parent of an Indian child, which parent is not a member of the tribe, then it violates the equal protection provision of the federal constitution, even if the parent domiciles on the tribe's reservation.

Under ICWA, a "parent" means "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child." 25 U.S.C. § 1903(9). As noted above, the child's tribe has exclusive jurisdiction over all child custody proceedings, and concurrent jurisdiction over foster care placement and termination of parental rights proceedings, involving the Indian child. Id. §§ 1911(a), (b). As also noted above, ICWA includes substantive provisions governing child custody proceedings. As held by the Court, however, a tribe generally lacks inherent jurisdiction over a nonmember. *Montana v. United States*, 450 U.S. 544, 563-67 (1980); *see also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206-12 (1978).

While a tribe retains inherent jurisdiction to "regulate domestic relations among members," this jurisdiction does not include domestic relations involving a nonmember. Id. at 564. Likewise, while a tribe retains inherent jurisdiction to regulate a nonmember's consensual business relationships with the tribe or its members, this jurisdiction does not include a nonmember's consensual personal relationships with the tribe or its members. Id. at 565. Further, while a tribe retains inherent jurisdiction to regulate the conduct of nonmembers that threaten political integrity, economic security, health, or welfare of the tribe, this jurisdiction does not include the conduct of nonmembers that does not threaten these areas. Id. at 566.

To the extent ICWA applies to the parent of an Indian child, which parent is not a member of the child's tribe, it violates the equal protection provision of the federal constitution. This is true even if the parent is domiciled on the tribe's reservation. As a United States citizen or resident, the parent is entitled to the same protections afforded to other parents who are not members of the tribe.

CONCLUSION

The Court should reverse the Supreme Court of South Carolina holding.

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February 26, 2013