No. 12-399

In the Supreme Court of the United States

ADOPTIVE COUPLE,
Petitioners,
v.
BABY GIRL, a minor child under the age of fourteen years, BIRTH FATHER, AND THE CHEROKEE NATION,
Respondents.

On Writ of Certiorari to the South Carolina Supreme Court

BRIEF OF *AMICI CURIAE* MINNESOTA DEPARTMENT OF HUMAN SERVICES AND MINNESOTA OMBUDSPERSON FOR AMERICAN INDIAN FAMILIES IN SUPPORT OF RESPONDENTS BIRTH FATHER AND CHEROKEE NATION

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Minnesota Department of Human Services (DHS) is the largest state agency in Minnesota and has a significant impact on the lives of children in Minnesota. It supports and protects the welfare of children of the State through a comprehensive and coordinated program of public child welfare services. DHS administers child protection, foster care, and adoption through its Children and Family Services division. The agency also supervises the 87 counties in Minnesota that provide direct services to children and families. DHS is responsible for ensuring that Minnesota children involved in child custody proceedings benefit from all available legal protections and that they and their families receive support and social services to meet their individual needs.

DHS is also actively engaged in developing policies to improve and implement practices to meet the unique needs of Indian children and families. The agency has

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[1] Pursuant to Supreme Court Rule 37.3(a) all parties have filed blanket consents to the filing of amicus briefs in this case. *See* correspondence from counsel for Petitioners and Guardian ad Litem of Baby Girl, filed with the Court on February 11, 2013; correspondence from counsel for respondents Birth Father and Cherokee Nation, filed with the Court on February 19, 2013. Pursuant to Supreme Court Rule 37.6, DHS and the Ombudsperson state 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 DHS and the Ombudsperson and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

collaborated with each of the eleven tribes located in Minnesota to develop a tribal-state agreement, which encourages the tribes' participation in child custody proceedings involving Indian children.

The Minnesota Ombudsperson for American Indian Families (Ombudsperson) is an independent agency created by the Minnesota Legislature in 1991 to ensure that agency decisions, rules, procedures, or other forms of policy and decision-making processes affecting Indian children in Minnesota are in compliance with federal and state laws. *See* Minn. Stat. § 257.0755, *et seq*. (establishing Ombudsperson for Families for the Indian Affairs Council). The Ombudsperson monitors agency compliance with child welfare laws impacting the placement of Indian children, assists with resolving problems involving social service agencies and officials, and investigates complaints of unfair treatment by Indian community members.

DHS and the Ombudsperson have a significant interest in this case because the questions presented directly affect the rights of Indian children and families as well as DHS' current efforts to implement ICWA through collaboration with tribes in Minnesota. DHS and the Ombudsperson submit this amicus brief to inform the Court of their experience in Minnesota relating to application of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901, *et seq*.

SUMMARY OF THE ARGUMENT

ICWA granted the states authority to enact standards providing greater protections than ICWA and authorizes states to enter into agreements with

tribes concerning care and custody of Indian children and jurisdiction over child custody proceedings. Pursuant to this authority, Minnesota has enacted several laws, and DHS has entered into a tribal-state agreement with eleven tribes in Minnesota, that expand ICWA's protections. The Court should be cognizant of individual state developments as they relate to ensuring the best interests of Indian children and craft its decision so as not to frustrate Minnesota in this regard.

ARGUMENT

I. THE INDIAN CHILD WELFARE ACT.

A. Background.

ICWA was enacted in 1978 as a result of what hearing testimony characterized as "[t]he wholesale removal of Indian children from their homes" through voluntary and involuntary adoption and foster care placement. *See* Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., 3 (1974) (statement of William Byler) (hereinafter 1974 Hearings). ICWA was motivated by concerns that many Indian children were taken away from their families based on various discriminatory practices of welfare officials. *Id*. at 5.

Testimony indicated that what social workers commonly determined to be child neglect, *i.e.* leaving children with adults outside of the nuclear family, was in fact a misunderstanding of the dynamics of extended family in child-rearing, *id.* at 18, and that social

workers also often misinterpreted Indian parents' reliance on a state agency for temporary care of their children as a lack of concern. *Id.* at 19. According to hearings, exacerbating this problem was the fact that most Indian children and families lacked adequate access to legal representation in child custody cases or simply had no "idea of what kind of legal recourse...[was] available to them." 1974 Hearings, 5.

Testimony further indicated that not only were a disproportionate number of Indian children placed in foster care, but almost 85 percent of those children were placed in non-Indian homes. 1974 Hearings, 5. As stated in one of the committee hearings:

> Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.

Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess., 191-92 (1978) (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians) (hereinafter 1978 Hearings). Scholarly journals report that these policies were viewed by many as "reflect[ing] a determined effort to reshape the

Native American family into the nineteenth-century Anglo-American model." Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 Ark. L. Rev. 327, 329 (1986).

Committee testimony stated that "[c]ulturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people." 1978 Hearings, 193. Testimony also addressed tribal sovereignty and self-determination: "[f]urthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships." *Id*.

B. The Federal Government's Goal Of Protecting American Indian Children, Families, And Tribes.

Section 1901 reflects the legislative goals of ICWA:

> the Congress finds....
>
> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

Indian Child Welfare Act, 25 U.S.C. § 1901 (2012).

Recognizing that "for decades Indian parents and their children [had] been at the mercy of arbitrary or abusive action of local, State, Federal, and private agency officials," Congress established minimum federal procedural and substantive standards for the removal of Indian children from their families. *See* 1974 Hearings, 1; 25 U.S.C. § 1901, *et seq*. ICWA "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." House Report, at 23, U.S.Code Cong. & Admin. News 1978, at 7546.

II. INDIAN CHILD WELFARE IN MINNESOTA.

A. Background.

ICWA provides minimum federal standards and recognizes the states' authority to enact legislation that provides higher standards for the protection of Indian children and families involved in child custody proceedings. *See* 25 U.S.C. § 1921 (2012). It also grants states and tribes the authority to enter into agreements concerning the care and custody of Indian children and jurisdiction over child custody cases. *See* 25 U.S.C. § 1919(a) (2012). At the time ICWA was debated, "one in eight Indian children under the age of 18 was in an adoptive home" in Minnesota, and "during the year 1971-1972 nearly one in every four infants under one year of age was placed for adoption." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 (1989). The adoption rate for Indian children in Minnesota was "eight times that of non-Indian children" and "approximately 90% of the Indian placements were in non-Indian homes." *Id*.; *see also* 1974 Hearings, 5. To address these concerns, Minnesota enacted several pieces of legislation to complement and extend the protections provided by ICWA.

B. The Minnesota Minority Child Heritage Protection Act.

Shortly after passage of ICWA, the Minnesota Legislature enacted legislation requiring child welfare officials to consider ethnic and racial identity in out-of-home placements of children of color. *See* Laws of

Minnesota 1983, chapter 278. This law, known as the Minnesota Minority Child Heritage Protection Act (MMCHPA), established the foster care and adoption policy concerning the placement of children of color. *Id*. MMCHPA provided placement preferences similar to those under ICWA. It required child placement agencies, in evaluating the child's best interests, to consider the child's ethnic heritage in making a family foster care placement. *Id*. Additionally, MMCHPA directed welfare agencies to recruit foster families from among the child's relatives and families of the same ethnic heritage. *Id*. MMCHPA was later repealed. *See* 1999 Minn. Laws, ch. 139, art. 4, sec. 3.

C. The Minnesota Indian Family Preservation Act.

While Minnesota was the first state to adopt legislation requiring consideration of a child's ethnic and racial identity in foster care and adoptive placements, it struggled with issues concerning placement of Indian children. Resources on Minnesota Issues, *Minnesota Minority Child Heritage Protection Act*, March 2012, http://www.leg.state.mn.us/lrl/issues/issues.aspx?issue=mmchpa; Kathryn A. Carver, *The 1985 Minnesota Indian Preservation Act: Claiming a Cultural Identity*, 4 Law & Ineq. 327, 329 (1986). ICWA was viewed by some to have inadequately dealt with voluntary foster care and adoptive placements. *Id.* at 337.

To address this concern, legislation was proposed in Minnesota to expand ICWA's protections to voluntary foster care, pre-adoptive, and adoptive placements. *Id*. at 338-40. Although the bill was initially defeated due

to concerns about some of the requirements concerning adoption matters, legislation was proposed again in 1985, this time focusing primarily on voluntary foster care placements. *Id*. at 340-46. The new law, known as the Minnesota Indian Family Preservation Act (MIFPA), established ICWA as state law and expanded several protections provided under ICWA.

For example, MIFPA mandates that tribes receive notice of foster care placements involving Indian children, whether voluntary or involuntary. *See* Minn. Stat. §§ 260.761, 260.765 (2012). Moreover, the law requires child welfare agencies to notify the child's tribe when there is a *potential* for out-of-home placement. Minn. Stat. § 260.761, subd. 2. The effect of these provisions "is to ensure tribal involvement before the decision is made to place the child out of the home" and "prevent culturally biased removals and work toward keeping the Indian family together." Carver, *supra*, at 345.

In 1987, MIFPA was amended to authorize grants to Indian tribes, organizations, and social service agencies for the provision of Indian child welfare services. *See* 1987 Minn. Laws ch. 403, art. 2, secs. 110-127. The 1987 amendments also gave the Commissioner of DHS the authority to enter into agreements with tribes regarding jurisdiction of child custody cases involving Indian children. *See* 1987 Minn. Laws, ch. 403, art. 2, sec. 118; *see also* 25 U.S.C. § 1919(a).

In 2007, MIFPA was amended again, in part, to address the so-called "existing Indian family

exception."[2] The amendment provided, in part, as follows:

> A court shall not determine the applicability of [MIFPA] or the federal Indian Child Welfare Act to a child custody proceeding based upon whether an Indian child is part of an existing Indian family or based upon the level of contact a child has with the child's Indian tribe,

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[2] The "existing Indian family exception" (EIFE) is a doctrine under which state courts will not apply ICWA to children who otherwise qualify as Indian under ICWA if neither the child nor the child's parents have a relationship with the tribe. Other states have also rejected the EIFE. *See* Iowa Code Ann. § 232B.5(2); Wis. Stat. Ann. § 938.028(3)(a); *In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989); *Michael J. Jr. v. Michael J. Sr.*, 7 P.3d 960, 963-64 (Ariz. Ct. App. 2000); *In re N.B.*, 199 P.3d 16, 21 (Colo. App. 2007); *In re Baby Boy Doe*, 849 P.2d 925, 931-32 (Idaho 1993); *In re Adoption of S.S.*, 622 N.E.2d 832, 839 (Ill. App. 1993) (rev'd on other grounds by *Adoption of S.S.* [*S.S. II*], 657 N.E.2d 935 (Ill. 1995)); *In re Elliott*, 554 N.W.2d 32, 35 (Mich. Ct. App. 1996); *In re Adoption of Riffle*, 922 P.2d 510, 514 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932-33 (N.J. 1988); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 322-23 (N.Y. App. Div. 2005); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *Quinn v. Walters* [*Quinn I*], 845 P.2d 206, 208-09 (Or. Ct. App. 1993) (rev'd on other grounds by *Quinn v. Walters* [*Quinn II*], 881 P.2d 795 (Or. 1994)); *D.J.C. v. P.D.C.*, 933 P.2d 993, 999 (Utah Ct. App. 1997). Some states, though, have adopted the exception. *See*, *e.g.*, *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990); *In re T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988); *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331, 337 (La. Ct. App. 1995); *In re S.A.M.,* 703 S.W.2d 603, 609 (Mo. Ct. App. 1986); *In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009); *In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL 1138130, at *5 (Tenn. Ct. App. Apr. 27, 2009).

> reservation, society, or off-reservation community.

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

D. 1989 "Reasonable Efforts" Legislation.

The Minnesota Legislature also passed the "Reasonable Efforts" law in 1989. The legislation "incorporates into state law additional portions of ICWA not considered by the [Minnesota] Indian Family Preservation Act." Peter W. Gorman & Michelle Therese Paquin, *A Minnesota Lawyer's Guide to the Indian Child Welfare Act*, 10 Law & Ineq. 311, 320 (1992). It requires, in part, that a court ensure reasonable efforts, "including culturally appropriate services . . . are made to prevent placement or to eliminate the need for removal and to reunite the child with the child's family at the earliest possible time. . . ." Minn. Stat. § 260.012(a) (2012). In child custody cases involving Indian children, the statute requires trial court judges to make findings and conclusions consistent with ICWA's provision for active efforts. Minn. Stat. § 260.012(c).

E. Minnesota's Tribal State Agreement.

Section 1919 of ICWA authorizes states and tribes to enter into agreements respecting the care and custody of Indian children and jurisdiction over child custody agreements. 25 U.S.C. § 1919(a). MIFPA incorporates this provision into Minnesota state law, giving the Commissioner of DHS ("Commissioner") the authority to enter into such agreements on behalf of the State of Minnesota. *See* Minn. Stat. § 260.771,

subd. 5 (2012). The Commissioner has twice entered into such agreements with the tribes located within Minnesota—first in 1998, and more recently in 2007.

Like its predecessor, the 2007 Tribal-State Agreement (TSA) was developed to "protect the long term best interests, as defined by the tribes, of Indian children and their families, by maintaining the integrity of the Tribal family, extended family and the child's Tribal relationship." Minn. Dep't of Human Serv., 2007 Tribal/State Agreement, 2 (2007), https://edocs.dhs.state.mn.us/lfserver/Legacy/DHS-5022-ENG) (hereinafter 2007 Tribal/State Agreement). The Commissioner and the Minnesota tribes intended the agreement "to strengthen implementation of the letter, spirit and intent of [ICWA] and [MIFPA]" and "to coordinate the abilities and to maximize the guidance, resources and participation of tribes in order to remove barriers from the process that impede the proper care of Indian children." *Id.* at 2-3.

Collaborative efforts of DHS and the tribes are demonstrated in several provisions of the TSA. For example, DHS has agreed to establish and maintain one or more positions within DHS filled by an individual with knowledge of and experience with Indian child welfare and tribal identities in Minnesota. 2007 Tribal/State Agreement, 24. These individuals are charged with, among other things, "strengthening and monitoring services to Indian children and families provided by local social service agencies and private child placement agencies. . . ." *Id*. The TSA's resolution process is another example of cooperation between DHS, the Ombudsperson, and the tribes. Under this process, a joint DHS/tribal committee

receives, documents, investigates, and works to resolve issues of non-compliance or problems that affect how tribal families receive services. *Id.* at 25-26. DHS and Minnesota tribes have also partnered to develop a plan to recruit Indian foster and adoptive homes. *Id.* at 32. DHS and the tribes also collaborate to provide training to assist potential Indian foster care providers in complying with tribal or state licensing standards. *Id*.

III. DHS AND THE OMBUDSPERSON ENCOURAGE THE COURT TO INTERPRET ICWA TO CONTINUE TO ALLOW MINNESOTA AGENCIES THE AUTHORITY TO EFFECTUATE ICWA'S GOALS.

DHS and the Ombudsperson believe the implementation of ICWA depends largely on the willingness of states and tribes to work collaboratively to further the best interests of Indian children. They believe the outcome of this case could redefine how states and tribes can work together on issues of child welfare concerning Indian children and ask this Court to carefully interpret ICWA to ensure that they continue to have authority under ICWA regarding Indian child welfare. ICWA recognizes that states in some instances will provide higher standards to protect the rights of Indian children and families, and DHS and the Ombudsperson believe that complementary state policies, legislation, and programming allow Indian children to receive services tailored to meet their individual needs. In short, DHS and the Ombudsperson believe that the decision in this case should reflect consideration of Minnesota's interest in

having the ability to retain authority in implementing the protections afforded under ICWA.

CONCLUSION

DHS and the Ombudsperson have a sincere interest in upholding the intent and responsibility of ICWA for the benefit of all Minnesotans. They respectfully request that the Court interpret ICWA to continue to allow Minnesota agencies the authority to effectuate ICWA's goals.

Respectfully Submitted,

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