No. 12-399

IN THE
Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

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

Respondents.

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

BRIEF OF PROFESSOR JOAN HEIFETZ HOLLINGER, PROFESSOR ELIZABETH BARTHOLET, CENTER FOR ADOPTION POLICY, AND ADVOKIDS AS AMICI CURIAE IN SUPPORT OF RESPONDENT BABY GIRL AND REVERSAL

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INTEREST OF AMICI CURIAE

Amici are two law professors and two non-profit organizations with substantial knowledge of, and experience dealing with, the adoption and child custody issues presented in this case.[1]

Professor Joan Heifetz Hollinger, the John and Elizabeth Boalt Lecturer-in-Residence at the University of California Berkeley Law School, is a leading American scholar on adoption law and policy. She has been devoted to research, teaching, and advocacy on family law issues, especially as they affect the welfare of children. She is the editor and principal author of the standard national treatise *Adoption Law and Practice* 3 vols. (Lexis\Matthew Bender Co. 1988, Supp. 2012), co-editor of *Families By Law: An Adoption Reader* (NYU Press, 2004), and the author of numerous articles and conference papers, including *Interstate Jurisdiction and Choice of Law Issues in Adoption and Other Parentage Proceedings* (PLI 2010). She is the Reporter for the proposed Uniform Adoption Act, helped draft the revised Uniform Parentage Act of 2002, is an Honorary Member of many child advocacy organizations, wrote the federal *Guide to the*

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amici* or their counsel made such a monetary contribution. All parties have consented to the filing of this brief through letters of consent on file with the Clerk of this Court.

Multiethnic Placement Act (1998), and is at the forefront of efforts to improve the Hague Convention on Intercountry Adoption. She has appeared as *amicus curiae* on behalf of children in a number of high-profile adoption, assisted reproduction, parentage, and custody cases in state and federal courts that have recognized children's legal ties to their actual parents, whether biological or non-biological.

Professor Elizabeth Bartholet is the Morris Wasserstein Public Interest Professor of Law at Harvard Law School, and Faculty Director of its Child Advocacy Program, which is committed to advancing children's interests through facilitating productive interaction between academia and the world of policy and practice, and through training generations of students to contribute in their future careers to law reform and social change. She teaches civil rights and family law, specializing in child welfare and adoption. Before joining the Harvard Faculty, she was engaged in civil rights and public interest work, first with the NAACP Legal Defense Fund, and later as founder and director of the Legal Action Center, a non-profit organization in New York City focused on criminal justice and substance abuse issues. Bartholet graduated from Radcliffe College and from Harvard Law School. She has won several awards for her writing and her related advocacy work in the area of adoption and child welfare.

The Center for Adoption Policy (CAP) is a New York based non-profit organization. Its mission is to provide research, analysis, advice, and education to practitioners and the public about current legislation

and practices governing ethical domestic and intercountry adoption in the United States, Europe, Asia, Latin America, and Africa. CAP is an independent entity. It is not affiliated with any agency or entity involved in the placement of children.

Advokids is a non-profit organization that advocates on behalf of children in the foster care system and is dedicated to promoting, protecting, and securing for every California foster child the legal rights to which they are entitled, including each child's right to safety, security, and a permanent home. While Advokids serves all California foster children, it has a special focus on infants and young children in the foster care system and the effects of insecure placements on their long-term emotional health and well-being because more than 35% of the children entering foster care are under the age of five and remain in the foster care system longer than older children. Advokids' programs include policy advocacy with respect to issues affecting children in foster care. To that end, Advokids has participated as *amicus curiae* in both state and federal court proceedings affecting the rights of children in the foster care system.

Because the Supreme Court of South Carolina's interpretation of ICWA directly affects the rights of children as well as biological and adoptive parents, *amici* have a significant interest in the questions presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–1963, to limit the circumstances in which Indian children can be removed from their families involuntarily. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32–37 (1989). Congress determined that, because of their insensitivity to tribal culture, state and local welfare agencies were removing children from Indian families at "an alarmingly high" rate. 25 U.S.C. § 1901(4)–(5). To address this problem, Congress enacted ICWA "to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families." *Id.* § 1902.

ICWA protects the stability of Indian families by, among other things, providing procedural and substantive rights to an Indian child's parent or parents. In addition to affording parents notice, appointment of counsel, and a right of access to reports or documents, ICWA prohibits the termination of parental rights absent a showing, "beyond a reasonable doubt," that "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." *Id.* § 1912(f). These rights may be invoked only by a "parent," which Congress defined to include "any biological parent," while expressly excluding "the unwed father where paternity has not been acknowledged or established." *Id.* § 1903(9).

In interpreting this definition, the Supreme Court of South Carolina concluded that Congress defined "parent" broadly to include unwed fathers who have no parental rights under state law. As the court acknowledged, Birth Father could not object to Adoptive Couple's adoption of Baby Girl under South Carolina law because he had abandoned her and her mother. But, in the court's view, this state law was irrelevant to determining whether Birth Father was a "parent" under ICWA. Because he had intervened in the adoption proceeding and a DNA test showed that he was the biological father, Birth Father was a "parent" under ICWA and could block the adoption and take custody of the child he had never met.

The state court's interpretation of ICWA is deeply flawed. Congress intended for ICWA to protect Indian families by limiting the circumstances in which they could be broken up. Congress did not intend for ICWA to allow an unwed Indian father with no parental rights under state law to block a non-Indian mother's voluntary adoptive placement of her newborn child, which would lead to the dissolution of the family Baby Girl has known since birth.

I. ICWA's definition of "parent" must be interpreted in light of the backdrop against which the statute was enacted. At the time, this Court's decisions made clear that *some* unwed fathers had constitutionally protected parental rights, but they did not hold that *all* unwed fathers had such rights. *See Stanley v. Illinois*, 405 U.S. 645 (1972). Subsequent decisions held that a father's biological connection to a child, standing alone, does not entitle him to notice of a child custody proceeding involving

his biological child, much less a right to veto an adoption arranged by the child's mother. *See Lehr v. Robertson*, 463 U.S. 248, 261 (1983). The vast majority of states responded to these decisions by enacting laws that drew the same distinction and extended substantive parental rights only to unwed fathers who had demonstrated an actual commitment to parenting and a capacity to assume custody of their child, not merely a desire to block the mother's placement decisions.

This Court should interpret ICWA's definition of "parent" to incorporate these state laws. By defining "parent" to include "any biological parent," the first sentence of the "parent" definition requires a biological connection between the father and child. Thus, Congress had no reason to add the "unwed father" exclusion if it wanted an unwed father to become a "parent" based solely on biology. Rather than depriving the "unwed father" exclusion of any independent meaning, the Court should interpret it to incorporate the state law limitations on the rights of unwed fathers, especially given the well-established presumption that Congress intends to incorporate state parentage laws. *See, e.g., De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956).

ICWA's incorporation of state law is confirmed by the statute's history and purpose. The legislative history indicates that the "unwed father" exception was intended to take into account this Court's decision in *Stanley*, which spurred the development of state laws addressing the parental rights of unwed fathers. By expressly referencing *Stanley*, Congress displayed its intent to preserve state laws governing the rights of unwed fathers. This interpretation of

ICWA is also consistent with Congress's goal of protecting Indian families, children, and tribes. Nothing in ICWA's congressional findings nor its declaration of policy suggests that Congress intended to displace the state law limitations on the rights of unwed Indian fathers.

II. Even if ICWA could be read to preempt state law limitations on the rights of unwed fathers, the Court should not adopt this interpretation in light of the serious constitutional concerns it would raise.

Under the state court's interpretation, unwed Indian fathers have greater parental rights than unwed non-Indian fathers based solely on their Indian ancestry. Although Congress can provide preferential treatment to promote Indian tribal self-governance, the racial classification does nothing to further this interest here. Regardless of whether Birth Mother chose to raise the child herself or to consent to Adoptive Couple's adoption, Baby Girl was going to be raised by a non-Indian parent (or parents) away from the Indian reservation. As a result, if the Court were to interpret ICWA to give preferential treatment to unwed Indian fathers in these circumstances, the law should be subject to strict scrutiny, which it almost certainly could not satisfy.

The state court's interpretation of ICWA also raises serious due process concerns. An unwed mother with sole custody of her children unquestionably has a due process right to make decisions concerning her children. When the biological father does not have the same right, a law that allows him to interfere with the mother's

exercise of her rights raises serious due process concerns. The state court's interpretation also forces this Court to decide whether children have a fundamental liberty interest in preserving their relationships with adoptive parents. The Court should avoid these constitutional issues by interpreting ICWA's definition of parent to incorporate state law.

III. Most states distinguish between the parental rights of unwed fathers who demonstrate a commitment to raising their children and those who do not. Indeed, more than 30 states consider the same factors as South Carolina in determining whether to require an unwed father to consent to an adoption. As a result, adopting the South Carolina court's interpretation of "parent" would affect adoptions of Indian children across the country by preempting parentage laws in these states. This result would disrupt states' careful policy judgments regarding the rights of unwed fathers, biological mothers, children born out of wedlock, and adoptive parents, in an area where states have traditionally been free to legislate.

ARGUMENT

I. ICWA's Definition of "Parent" Incorporates State Law Limitations on the Rights of Unwed Fathers.

The state court held that Birth Father was a "parent" under ICWA because he had intervened in the adoption proceeding and had established, through DNA testing, that he was Baby Girl's biological father. App. 22a. By interpreting "parent"

in this manner, the court construed ICWA to preempt the South Carolina law that would have allowed Birth Father to veto the adoption only if he could show that he lived with Baby Girl or provided financial support during Birth Mother's pregnancy. *See* S.C. Code Ann. § 63-9-310(A)(5). Rather than construing "parent" to preempt this state law, the court should have followed the approach of the many state courts that interpret the term to incorporate state law.[2] Had the court taken this approach, Birth Father could not object to Baby Girl's adoption under ICWA because he could not do so under state law.

A. When Congress Enacted ICWA, State Laws Provided Parental Rights to Unwed Fathers Only If They Assumed Parental Responsibilities.

Until the early 1970s, many states followed the common law rules in which biology played no role in whether a father had parental rights. If a mother were married when she gave birth, the common law provided parental rights to both the mother and her husband, who was presumed to be the child's father. *See Michael H. v. Gerald D.*, 491 U.S. 110, 124–25 (1989) (plurality). When a child was born out of wedlock, the mother was considered the child's only

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[2] *See, e.g., In re Daniel M.*, 1 Cal. Rptr. 3d 897, 900 (Ct. App. 2003); *In re S.A.M.*, 703 S.W.2d 603, 607 & n.4 (Mo. Ct. App. 1986); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 933–38 (N.J. 1988); *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1064 (Okla. 1985), *overruled on other grounds In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. App. Ct. 1995).

parent, and the biological father had no parental rights. See Joan Heifetz Hollinger, 1-2 *Adoption Law & Practice* § 2.04[2][a] (Lexis\Matthew Bender Co. 1988, Supp. 2012).

After this Court's decision in *Stanley v. Illinois*, 405 U.S. 645 (1972), states could no longer follow the common law rules and deprive all unwed fathers of parental rights. In *Stanley*, the Court held that an unwed father has a due process right to notice of a child custody proceeding involving his biological child if he has developed a substantial relationship with the child. *Id.* at 648. There, the father had lived with, and helped raise, his biological children, but had never married their mother. *Id.* at 646. When the mother died, the state declared the children to be wards of the state without giving the father an opportunity to show that he was fit to continue caring for them. *Id.* Noting that an unwed father has a constitutionally protected interested in the "children he has sired and raised," *id.* at 651, the Court concluded that the state's irrebuttable presumption that an unwed father is unfit to care for his children violated the father's due process and equal protection rights, *id.* at 657–58.

Five years after *Stanley*, and less than a year before ICWA was enacted, the Court revisited the issue of unwed fathers' constitutional rights. *See Quilloin v. Walcott*, 434 U.S. 246 (1978). In *Quilloin*, the Court upheld a state law that required an unwed mother, but not an unwed father, to consent to an adoption. *Id.* at 256. The unwed father in *Quilloin* had never lived with his biological child, "had provided support only on an irregular basis," and

asserted his parental rights only after receiving notice of the adoption proceeding. *Id.* at 250–51. Because the father "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child," the Equal Protection Clause did not require the state to provide the father with the same consent rights as it provided to the mother. *Id.* at 256.

This Court's subsequent decisions also distinguish between the constitutionally protected parental rights of unwed fathers who demonstrate a commitment to raising their children and those who do not. Shortly after ICWA's enactment, the Court held that an unwed father's equal protection rights were violated by a state law requiring only the unwed mother to consent to an adoption. *See Caban v. Mohammed*, 441 U.S. 380 (1979). Because the biological father in *Caban* had lived with his children and had "participated in [their] care and support," the father's "relationship with his children [was] fully comparable to that of the mother," and therefore he was entitled to the same parental rights. *Id.* at 389.

Finally, in *Lehr v. Robertson*, 463 U.S. 248, 260 (1983), the Court explained that the Due Process Clause requires an unwed father to receive notice and an opportunity to be heard only when he has a cognizable liberty interest at stake in the proceeding. Such an interest is present "[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." *Id.* at 261 (internal quotation marks, brackets, and citation

omitted). In contrast, "the mere existence of a biological link does not merit equivalent constitutional protection." *Id.* Because the unwed father in *Lehr* "never had any significant custodial, personal, or financial relationship" with his daughter, he did not even have a due process right to notice of her adoption, much less any right to block the adoption. *Id.* at 262.

As a result of *Stanley*, states could not deprive all unwed fathers of parental custodial rights when ICWA was enacted. Although there was some uncertainty about what the Constitution required in the context of adoption proceedings, the states did not respond to *Stanley* by granting parental rights to all unwed fathers based solely on their biological connection to a child. Nor did states go so far as to ensure that all unwed fathers had notice of adoption or custody proceedings involving their biological children. Instead, they enacted laws that identified the circumstances in which notice was required, and instructed unwed fathers of the steps they must take to ensure they would receive notice.

In 1973, one year after *Stanley*, the Uniform Law Commissioners promulgated the Uniform Parentage Act (UPA), which provided comprehensive treatment of legal parenthood by specifying the circumstances in which an unwed father could be recognized as a child's parent under the law. Under the UPA, unwed biological fathers were not automatically recognized as legal parents. Instead, a male was "presumed to be the natural father" where certain conditions were met. UPA § 4(a). An unwed father who had never married the mother was

entitled to a presumption of paternity if he "receive[d] the child into his home and openly [held] out the child as his natural child," or he "acknowledge[d] his paternity of the child in writing" and filed it with the appropriate state agency. *Id.* § 4(a)(4)–(5). Eight states had adopted the UPA when ICWA was enacted.[3]

In addition to enacting laws addressing the issue of notice, the vast majority of states had laws that provided substantive parental rights to certain unwed fathers when ICWA was enacted.[4] These laws typically followed the distinction drawn in *Stanley* and subsequent cases, and provided parental rights only to unwed fathers who had demonstrated their commitment to parenting. Indeed, at the time of ICWA's enactment, more than half of the states did not require unwed fathers to consent to the adoption of a child unless they had "asserted or established their parental role."[5]

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[3] *See* Note, *Unwed Fathers: An Analytical Survey of Their Parental Rights and Obligations*, 1979 Wash. U. L.Q. 1029, 1055.

[4] In 1979, a few states still denied parental rights for all unwed fathers notwithstanding this Court's decision in *Stanley*. *See* Note, *Unwed Father*, 1979 Wash. U. L.Q. at 1038, 1040.

[5] Note, *Unwed Fathers*, 1979 Wash. U. L.Q. at 1047, 1059–62; *see, e.g.*, *S.C. Dep't of Soc. Serv. v. Parker*, 268 S.E.2d 282, 284 (S.C. 1980) ("[W]here the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child." (internal quotation marks and citation omitted)); *Adoption of Murray*, 150 Cal. Rptr. 58, 59 & n.2 (Ct. App. 1978) (an unwed father cannot veto an adoption under California law if he "fail[ed] to communicate with [a]nd to pay for the care, support, and (continued…)

B. Congress Intended to Incorporate, Rather Than Preempt, State Law.

ICWA defines "parent" in two sentences. The first sentence states that "parent" includes "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom." 25 U.S.C. § 1903(9). The second sentence excludes from this definition "the unwed father where paternity has not been acknowledged or established." *Id.* Purporting to interpret the statute "by its plain terms," the South Carolina court concluded that Birth Father "met the ICWA's definition of 'parent' by both acknowledging his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed for adoption and establishing his paternity through DNA testing." App. 22a.

The state court's interpretation fails because it does not account for the state law limitations on the rights of unwed fathers. Given these state laws, as well as this Court's decisions addressing the constitutional rights of unwed fathers, ICWA cannot plausibly be interpreted to treat an unwed father as a "parent" based solely on his biological connection to a child. By defining "parent" to include "any biological parent," the definition's first sentence requires an unwed father to show a biological connection with the child. Thus, had Congress

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education of such child when able to do so" for the period of one year (quotation marks and citation omitted)).

intended for an unwed father to become a "parent" under ICWA based solely on biology, the first sentence of the definition would have been sufficient to achieve that result. The definition's second sentence—the "unwed father" exclusion—must therefore be interpreted to require an unwed father to show more than a biological connection to avoid violating the "cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks and citation omitted). The Court should give effect to the "unwed father" exclusion by interpreting "parent" to incorporate the state law limitations on the rights of unwed fathers.

The state court's interpretation also fails because it construes ICWA to preempt state law even though there is no indication that Congress intended this result. As the Court explained more than a century ago, "[t]he 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." *In re Burrus*, 136 U.S. 586, 593–94 (1890). Because of the states' authority over domestic relations, this Court interprets federal law to preempt state law only where "Congress has positively required by direct enactment that state law be pre-empted," and where state family law does "major damage to clear and substantial federal interests." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (internal quotation marks and citations omitted).

Given the states' substantial interest in family law matters, this Court has presumed that Congress intended to incorporate state family law, even when preemption is not an issue. For example, in *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956), the Court interpreted the term "children" in the Copyright Act to incorporate state law. The Court explained:

> The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.

Id. (internal citations omitted); *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991).

In interpreting "parent," the state court recognized that "ICWA does not explicitly set forth a procedure for an unwed father to acknowledge or establish paternity." App. 21a. That recognition should have resolved the court's inquiry. By not creating a uniform federal definition of "parent," Congress did not clearly manifest an intent to preempt the state law limitations on the parental rights of unwed fathers. The term "parent" should therefore be interpreted to incorporate state law.[6]

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[6] This Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), does not dictate a different (continued…)

2. The state court rejected the argument that ICWA incorporates state laws addressing whether an unwed father's consent is necessary for a voluntary adoption on the ground that it "collapse[s] the notions of paternity and consent." App. 22a. That is incorrect.

The court erred in attempting to differentiate between laws that solely address paternity and those that address substantive parental rights. This Court's decision in *De Sylva* makes clear that, when Congress incorporates state law, it incorporates the state laws that resolve the legal issue that the federal statute addresses. 351 U.S. at 581–82. Having interpreted "children" in the Copyright Act to incorporate state law in *De Sylva*, the Court needed to decide which of the various state laws addressing "children" had been incorporated. *Id.* Adopting a functional approach that considered the object of the federal statute, the Court held that, because "[t]his is really a question of the descent of property . . . the controlling question under state law should be whether the child would be an heir of the author." *Id.* at 582.

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result. In *Holyfield*, the Court was not addressing a substantive issue of family law, but instead was interpreting the term "domicile" to resolve a jurisdictional issue. *Id.* at 44–47. Given that the purpose of this provision was to deprive state courts of jurisdiction in certain cases, the Court concluded that "it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to state courts as a matter of state law." *Id.* at 45. In contrast, this case presents an issue that goes to the heart of family law: when does an unwed biological father have sufficient parental rights that he can block a child's adoption?

This functional approach is necessary to achieve Congress's objective in incorporating state law into a federal statute. The purpose of incorporation is to harmonize state and federal law so that both laws resolve the same issue in the same manner. That purpose is frustrated by the distinction that the state court attempted to draw in this case. If ICWA is interpreted to incorporate only the state laws addressing paternity, then it would still preempt the state laws addressing substantive parental rights, such as the right of an unwed father to object to an adoption. Under this flawed approach, ICWA's definition of "parent" would both incorporate and preempt state law—a result that has no support in either the case law or logic.

In this case, the "controlling question" is whether Birth Father's consent is necessary for Adoptive Couple's adoption of Baby Girl. Because ICWA's definition of "parent" incorporates state law, *see supra* Part I.A, the statute necessarily incorporates the state laws that determine whether Birth Father's consent is necessary. As the state court acknowledged, South Carolina law did not require his consent. App. 21a n.19. The state court therefore erred in interpreting ICWA to allow Birth Father to block the adoption and take custody of Baby Girl.

C. ICWA's History and Purpose Confirm Congress's Intent to Incorporate the State Law.

This Court should hold that Congress intended to incorporate state law because nothing in the statutory text rebuts the presumption against

preemption. Even if the Court were to look beyond the statutory text to determine whether Congress has clearly manifested its intent to preempt statute law, ICWA's legislative history and purpose provide further support that ICWA's definition of "parent" incorporates state law.

1. The legislative history demonstrates that Congress did not intend to displace state law limitations on the rights of unwed fathers. Instead, Congress added the "unwed father" exception to the definition of "parent" to take into account this Court's decision in *Stanley*. *See* H.R. REP. 95-1386, at 21 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7543 ("Paragraph (9) defines 'parent'. It should be noted that the last sentence is not meant to conflict with the decision of the Supreme Court in *Stanley v. Illinois*, 405 U.S. 645 (1972)."). In so doing, Congress expressly disclaimed any intent to preempt state law. *Id.* at 17, *reprinted in* 1978 U.S.C.C.A.N. at 7540 (ICWA not intended to "oust the State from the exercise of its legitimate policy powers in regulating domestic relations").

The reference to *Stanley* in the legislative history shows that Congress intended to leave the issue of an unwed father's parental rights to state law. *Stanley* was a critical decision in the development and proliferation of state family laws concerning unwed fathers. *See supra* Part I.A. In that case, this Court held that an unwed father had a constitutionally protected interested in the "children he has sired and raised," 405 U.S. at 651, and thus his due process and equal protection rights were violated by the state's irrebuttable presumption

that an unwed father is unfit to care for his children, *id.* at 657–58.

By endorsing the rule set forth in *Stanley*, Congress made clear that the statutory language excluding unwed Indian fathers from the definition of "parent" could not be used to shut unwed Indian fathers out of child custody proceedings altogether. Instead, by including an exception for those unwed fathers who had "acknowledged" and "established" paternity, Congress ensured that unwed fathers could exercise rights provided by state law in accordance with *Stanley*. Although Congress certainly could have overridden these state laws in favor of a uniform federal standard, the reference to *Stanley* in the legislative history demonstrates that it did not.

2. The state court's interpretation of "parent" also finds no support in Congress's purpose for enacting ICWA. Congress enacted ICWA to address the "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes." *Holyfield*, 490 U.S. at 32. This problem was the result, in Congress's view, of child welfare agencies and state courts giving insufficient weight to the importance of keeping Indian children with their parents. *Id.* at 34–35. Congress addressed this problem by requiring state courts to apply a presumption that an Indian child's interests are best served by being raised in an Indian family. 25 U.S.C. § 1912(f).

Nothing in the congressional findings nor declaration of policy suggests that Congress also

intended to provide parental rights to unwed Indian fathers who lacked rights under state law. There is no evidence that Congress thought unwed Indians fathers were being harmed by generally applicable state law limitations on the rights of unwed fathers, much less that ICWA was intended to address this concern. Given that state laws must necessarily protect the rights of unwed fathers who "demonstrate[] a full commitment to the responsibilities of parenthood," *Lehr*, 463 U.S. at 261, Congress's purpose of maintaining existing Indian families is fully served by interpreting "parent" to incorporate state law.

The state court's broad interpretation of "parent" also frustrates the purpose of ensuring that that the child's placement is in his or her best interest. Custody decisions under state law generally focus on the best interest of the child. *See, e.g.*, *Cook v. Cobb*, 245 S.E.2d 612, 614 (S.C. 1978) ("The welfare of the child and what is in his/her best interest is the primary, paramount and controlling consideration."). *See generally* Hollinger, 1-1 *Adoption Law and Practice* §§ 1.01[2][b], 1.03[2]. In enacting ICWA, Congress adopted a strong presumption that remaining in an existing Indian family is in the best interest of an Indian child, so long as the child's safety is not a concern. 25 U.S.C. § 1912(f). But that presumption is based on the desire to keep an Indian family together. The same interest is not present when an unwed Indian father attempts to use ICWA to break up an existing family by removing his biological child from the only home she has known. No congressional policy is furthered

by sweeping aside the traditional best interest of the child inquiry in these circumstances.

In short, because interpreting "parent" to preempt state law finds no support in the legislative history and would not further Congress's objectives, that interpretation should be rejected. *See Hisquierdo*, 439 U.S. at 581.

II. ICWA's Definition of "Parent" Should Be Interpreted to Incorporate State Law to Avoid Serious Constitutional Problems.

If Congress had defined "parent" to preempt state law and provide parental rights to unwed fathers based on biology, ICWA would raise equal protection and due process concerns. The Court should "avoid such problems" by interpreting "parent" to incorporate state law. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

1. Birth Father's right to block the adoption and take custody of Baby Girl was based solely on his Indian ancestry. As the Supreme Court of South Carolina acknowledged, if Birth Father were subject to the same South Carolina laws as unwed fathers of other races, the adoption would have proceeded without his consent. App. 21a–22a & n.19. By granting preferential treatment to Birth Father based solely on race, the Supreme Court of South Carolina's interpretation of ICWA raises serious equal protection concerns.

Congress's authority to legislate on Indian affairs does not give it unfettered discretion to grant

preferential treatment to Indian tribes or their members. Although this Court "has upheld legislation that singles out Indians for particular and special treatment," such legislation is constitutionally suspect unless "the preference is reasonable and rationally designed to further Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 554–55 (1974); *see also Rice v. Cayetano*, 528 U.S. 495 (2000); *Williams v. Babbitt*, 115 F.3d 657, 664–65 (9th Cir. 1997). The state court's interpretation of ICWA does not qualify for this exception. The decision to give Baby Girl up for adoption affected who would raise the child, but it had no effect on the fact that she would be raised by a non-Indian parent (or parents) away from the Indian reservation. As a result, the adoption neither affects the tribe's membership nor otherwise has any impact on its self-governance.

Because the state court's broad interpretation does not further Indian self-government, it should be subject to strict scrutiny. *See, e.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (recognizing a strong presumption that custody determinations based on race are unconstitutional); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating statute withholding marriage right based on race). Because there is no reason to think that ICWA could survive strict scrutiny, ICWA's definition of "parent," as interpreted by the state court, almost certainly violates the Equal Protection clause. *Cf. Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("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.").

2. Interpreting ICWA to preempt state law limitations on the rights of unwed fathers also raises serious questions about the due process rights of unwed mothers. An unwed mother with sole custody of her children unquestionably has a due process right "to make decisions concerning the care, custody, and control of [her] children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality). If the biological father also has a fundamental right to make decisions regarding the children, the parents must work together to make those decisions. But when the father has no constitutionally protected interest, a law that allows him to interfere with the mother's exercise of her rights raises serious due process concerns. *Id.* at 68–69 (holding that mother's due process rights were violated when state law provided visitation rights for grandparents against mother's wishes).

3. The state court's interpretation also has profound implications for Indian children. Although this Court has yet to fully address "the nature of a child's liberty interests in preserving established familial or family-like bonds," *id.* at 88 (Stevens, J., dissenting); *see also Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989), such an interest surely exists. That interest is plainly implicated when a child is placed with adoptive parents, without objection from an unwed father who had expressly relinquished his parental rights, and is then separated from the only family she has ever known.

This Court need not reach these constitutional issues. Rather than interpreting ICWA to provide rights to unwed Indian fathers who have played no role in their children's upbringing, the Court should apply the canon of constitutional avoidance and interpret "parent" to incorporate state law limitations on the parental rights of unwed fathers. *See Edward J. DeBartolo Corp.*, 485 U.S. at 575.

III. The State Court's Interpretation Would Preempt Parentage Laws in Most States.

This Court has never extended constitutional protections to unwed fathers based solely on biology. Rather, a state must provide parental rights only to those unwed fathers who have "demonstrate[d] a full commitment to the responsibilities of parenthood." *Lehr*, 463 U.S. at 261. Relying on this constitutional principle, most states distinguish between the parental rights of unwed fathers who demonstrate a commitment to raising their children and those who do not. As a result, adopting the South Carolina court's interpretation of "parent" would affect adoptions of Indian children across the country because the vast majority of states have enacted laws that impose limitations on the rights of unwed fathers.

Today, roughly half of the states have enacted the UPA or laws that follow a similar approach.[7] In

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[7] By 2000, 19 states had adopted the original UPA, while still others enacted significant portions of it. *See* Uniform Parentage Act of 2002, Prefatory Note. A subsequent version of the UPA, promulgated in 2002, has been enacted in nine states. Uniformlaws.org, Uniform Law Comm'n, Legislative Fact (continued…)

these states, an unmarried man is presumed to be a father of a child only if he is listed on the child's birth certificate, if he provides financial support to the child or in relation to the pregnancy, or if he openly holds himself out to be the biological father of the child and receives the child into his home. *See supra* pp. 12–13.[8] When an unwed father takes the steps necessary to become a "presumed father," he is then provided parental rights under state law.[9] But under the South Carolina court's interpretation of ICWA, an unwed Indian father's compliance with these laws is optional. Even if he fails to take the steps to become a "presumed father" under state law, he still receives the same parental rights under federal law.

Many states have also established putative father registries to facilitate notice to unwed fathers. These registries, enacted in 24 states, require a man who believes he may have fathered a child out of wedlock to promptly document and acknowledge

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Sheet—Parentage Act, http://uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage Act.

[8] *See* Ala. Code § 26-17-204(a); Ark. Code Ann. § 9-10-108(b); Cal. Fam. Code § 7611; Colo. Rev. Stat. § 19-4-105; Del. Code Ann. tit. 13, § 8-204(a)(5); Haw. Rev. Stat. § 584-4; 750 Ill. Comp. Stat. 45/5; Kan. Stat. Ann. § 23-2208; Mass. Gen. Laws ch. 209C, § 6(a); Minn. Stat. § 257.55; Mo. Rev. Stat. § 210-822; Mont. Code Ann. § 40-6-105(1); Nev. Rev. Stat. § 126.051, N.J. Stat. Ann. § 9:17-43; N.M. Stat. § 32A-5-3(*V*); N.D. Cent. Code § 14-20-10, Ohio Rev. Code Ann. § 3111.03; R.I. Gen. Laws § 15-8-3; S.C. Code Ann. § 63-9-730; Tenn. Code Ann. § 36-2-304; Tex. Fam. Code Ann. § 160.204; Wash. Rev. Code § 26.26.116.

[9] *See* Hollinger, 1-2 *Adoption Law & Practice* § 2.04[2][c][i].

paternity or the possibility of paternity.[10] Because putative father registries are based on the view that enrollment demonstrates the father's intent to assume responsibility for the care of his children, enrollment entitles the father to notice of any subsequent adoption or custody proceedings. *See generally* Mary Beck, *Toward a National Putative Father Registry*, 25 Harv. J.L. & Pub. Pol'y 1031, 1039–42 (2002).[11] The South Carolina court's interpretation of ICWA also makes compliance with these parent registry laws optional. Even in states that deny parental rights to unwed fathers who fail to enroll on a parent registry, the state court's interpretation allows an unwed Indian father to obtain parental rights without enrolling on the registry.

In addition to the state laws addressing notice for unwed fathers, many states impose additional

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[10] *See* Ala. Code § 26-10C-1; Ariz. Rev. Stat. Ann. § 8-106.01; Ark. Code Ann. § 20-18-702; Del. Code Ann. tit. 13, §§ 8-401 to -423; Fla. Stat. § 63.054; Ga. Code Ann. § 19-11-9(d); 750 Ill. Comp. Stat. 50/12.1; Ind. Code § 31-19-5; Iowa Code § 144.12A; La. Rev. Stat. Ann. § 9:400; Minn. Stat. § 259.52; Mo. Rev. Stat. § 192.016; Mont. Code Ann. §§ 42-2-202 to -204; Neb. Rev. Stat. § 43-104.01; N.H. Rev. Stat. Ann. § 170-B:6(c); N.M. Stat. § 32A-5-20; N.Y. Soc. Serv. Law § 372-c; Ohio Rev. Code Ann. § 3107.062; Okla. Stat. tit. 10, § 7506-1.1; Tenn. Code Ann. § 36-2-318; Tex. Fam. Code Ann. §§ 160.401–.402; Utah Code Ann. §§ 78-45g-401 to -410; Va. Code Ann. §§ 63.2-1249 to -1253; Wyo. Stat. Ann. § 1-22-117.

[11] Some registry forms require the enrollee to express a willingness and intent to support the child. *See, e.g.,* Ariz. Rev. Stat. § 8-106.01(A); *see also* UPA § 404, comment (2002) ("[T]he registry provides a clear procedure for determining that a man does not intend to assert parental rights with regard to the infant.").

requirements for an unwed father to satisfy before he is granted substantive parental rights, such as the ability to veto an adoption. *See* Hollinger, 1-2 *Adoption Law & Practice* § 2.04[2][c] ("In order to acquire a right to consent to, or to veto their child's adoption, unwed fathers must meet additional formal requirements, such as marrying the mother, or must behave in ways that are sufficiently 'parental,' such as supporting the child financially . . . ." (internal citation omitted)).

The South Carolina law at issue in this case provides a good example. To exercise the right to withhold consent and block an adoption in the first six months of the child's life, an unwed father must have taken the additional steps of either (i) openly living with the child and holding himself out to be the biological father, or (ii) providing financial support to the child or in connection with the mother's pregnancy. *See* S.C. Code Ann. § 63-9-310(A)(5). The law is even more demanding for an adoption initiated more than six months after the child's birth. In that circumstance, the father must have "maintained substantial and continuous or repeated contact with the child," evidenced by his financial support, regular visits that occur at least monthly, or regular communication. *Id.* § 63-9-310(A)(4).

Many states have similar laws. Currently, the laws in at least 33 states and the District of Columbia consider whether an unwed father has provided financial support to the mother during her pregnancy or to the child following birth to

determine whether the unwed father's consent is necessary for an adoption.[12] And at least 30 states consider whether an unwed father has developed a personal or emotional relationship with the child, including through meaningful or regular communication.[13] Unless the unwed father satisfies

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[12] *See* Ala. Code § 26-10A-9(1); Alaska Stat. § 25.23.050(a)(2)(b); Ark. Code Ann. § 9-9-207(a)(10); Cal. Fam. Code § 8604; Colo. Rev. Stat. § 19-5-203(1)(d)(II); Del. Code Ann. tit. 13, §§ 1103(a)(2)(a)(1)(A), 1106(a)(e); D.C. Code § 16-304(d); Fla. Stat. § 63.062(2)(a)(1); Ga. Code Ann. § 19-8-10(b)(2); Haw. Rev. Stat. § 578-2(c)(1)(D); Idaho Code Ann. § 16-1504(1)(e); Ind. Code Ann. § 31-19-9-8(a)(2)(B); Kan. Stat. Ann. § 59-2136(d), (e)(5), (h)(1)(C)–(D); Ky. Rev. Stat. Ann. §§ 199.500(1)(d), 625.065(1)(e); La. Child. Code Ann. art. 1245(B)(1), (C)(1); Md. Code Ann., Fam. Law § 5-3B-22(b)(1)(iii)(2); Mass. Gen. Laws Ann. ch. 210, § 3(c)(xi); Mich. Comp. Laws Ann. §§ 710.43(1)(a)(i), 710.51(6)(a); Neb. Rev. Stat. § 43-104.22(3); N.H. Rev. Stat. Ann. § 170-B:6(I)(d); N.J. Stat. Ann. § 9:3-46(a); N.M. Stat. § 32A-5-18(A)(2); N.Y. Dom. Rel. Law § 111(d); N.D. Cent. Code § 14-15-06(1)(b)(2); Ohio Rev. Code Ann. § 3107.07(A), (B)(2)(b); Okla. Stat. tit. 10, § 7505-4.2(B)–(C); 23 Pa. Cons. Stat. §§ 2511(a)(6), 2714; R.I. Gen. Laws §§ 15-7-5, -7(a)(1); S.C. Code Ann. § 63-9-310(A)(4)(a), -310(A)(5)(b); S.D. Codified Laws § 25-6-4(4); Tenn. Code Ann. § 36-1-113(g)(9)(A)(i)–(ii); Utah Code Ann. § 78B-6-121(1)(a)(iii); W. Va. Code §§ 48-22-301(b)(3), -306(a)(1) & (b)(2)–(3); Wy. Stat. Ann. § 1-22-110(a)(iv).

[13] *See* Ala. Code § 26-10A-9(1); Alaska Stat. § 25.23.050(a)(2)(a); Ark. Code Ann. § 9-9-207(a)(10); Cal. Fam. Code § 8604; Del. Code Ann. § tit. 13, §§ 1103(a)(2)(a)(1)(B), 1106(a)(e); Fla. Stat. § 63.062(2)(a)(1); Ga. Code Ann. § 19-8-10(b)(1); Haw. Rev. Stat. § 578-2(c)(1)(D); Idaho Code Ann. § 16-1504(1)(e); Ind. Code Ann. § 31-19-9-8(a)(2)(A); Kan. Stat. Ann. § 59-2136(d), (h)(2)(B); La. Child. Code Ann. art. 1245(B)(2), (C)(2); Md. Code Ann., Fam. Law § 5-3B-22(b)(1)(iii)(1); Mass. Gen. Laws Ann. ch. 210, § 3(c)(x); Mich. Comp. Laws Ann. §§ 710.43(1)(a)(i), 710.51(6)(b); Miss. Code Ann. §§ 93-17-7, 93-15-103(3)(b) & (d)(i); N.J. Stat. Ann. § 9:3-46(a); N.M. Stat. § 32A-5-18(A)(2); N.Y. Dom. Rel. Law § 111(d); N.D. Cent. Code § 14-15-
(continued…)

one or both of these criteria, he has no right to block an adoption in these states.[14]

As evidenced by the South Carolina court's decision in this case, if ICWA's definition of "parent" does not incorporate state law, the laws of more than 30 states will be preempted. Exercising their traditional legislative power over domestic relations, these states have made a policy judgment that when an unwed biological father has not provided support to the unwed mother and child, he should have no right to object to the mother's decision to place the child for adoption. This Court should not interpret ICWA to preempt these state laws as applied to unwed Indian fathers.

CONCLUSION

For the reasons set forth above, as well as the reasons set forth in the Brief of Adoptive Couple and Brief of Guardian Ad Litem, as Representative of Respondent Baby Girl, the decision of the Supreme Court of South Carolina should be reversed.

06(1)(b)(1); Ohio Rev. Code Ann. § 3107.07(A); Okla. Stat. tit. 10, § 7505-4.2(H); Or. Rev. Stat. § 109.324; 23 Pa. Cons. Stat. §§ 2511(a)(6), 2714; R.I. Gen. Laws §§ 15-7-5, -7(a)(4); S.C. Code Ann. § 63-9-310(A)(4)(b)–(c), -310(A)(5)(a); Tenn. Code Ann. § 36-1-113(g)(9)(A)(iii); Utah Code Ann. § 78B-6-121(1)(a)(i); Va. Code Ann. § 63.2-1202(H); W. Va. Code §§ 48-22-301(b)(3), -306(a)(2) & (b)(4);

[14] Other states also consider these factors in determining whether a father has deserted or abandoned his child. *See, e.g.*, Fla. Stat. § 63.072(a); 750 Ill. Comp. Stat. 50/8(a)(1), 50/1(D)(a)–(c); Iowa Code § 600.7(4); Maine Rev. Stat. Ann. tit. 18-A, §§ 9-302(b)(1)(iii), 9-201(*i*); Minn. Stat. § 259.24, subd. 1(a)(2); Mo. Rev. Stat. § 453.040(7).

Respectfully submitted,

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