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No. 12-399

In The

Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF WISCONSIN TRIBES AS AMICI CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether 25 U.S.C. § 1915(a), which provides that in "*any* adoptive placement" of an "Indian child," preference "*shall* be given" to members of the child's extended family or other Indian families, can be rewritten to apply only to placements of children who were previously in the custody of their Indian biological parent.

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INTEREST OF AMICI CURIAE[1]

Amici curiae are the eleven federally recognized Indian tribes located within the State of Wisconsin. They file this brief to describe the interests they have in protecting their tribal-citizen-children through enforcement of the Indian Child Welfare Act ("ICWA").

SUMMARY OF ARGUMENT

Petitioners admit that this is an involuntary proceeding under 25 U.S.C. § 1912 of the ICWA, in which they are seeking termination of the biological father's parental rights. Reading certain phrases of the ICWA in isolation, the Petitioners claim that the protections of Section 1912 extend only to custodial parents. In doing so, they raise the so-called "existing Indian family" doctrine, which claims that the ICWA only applies in cases where the Indian child has previously been raised in an Indian home. This doctrine has already been rejected by the vast majority of state courts and legislatures, including the court that was responsible for its initial development. *See, e.g.*, *In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

[1] The parties have given blanket consents that permit the filing of amicus briefs in this case. No counsel for any party authored this brief in whole or in part, and no person or entity other than the amici and its counsel contributed monetarily to the preparation or submission of this brief.

In crafting their arguments, the Petitioners have attempted to disguise the fact that even if the biological father has no rights in this case,[2] the ICWA still precludes them from adopting Baby Girl. Congress recognized that Indian tribes have an interest in child custody proceedings that is distinct from and on parity with the interests of biological and adoptive parents. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989). During the debates on the ICWA, Congress was presented with statistics demonstrating that up to 40 percent of all Indian children in the State of Wisconsin were being raised in non-Indian homes and institutions. *Indian Child Welfare Program: Hearings on Problems that American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction Before the Subcomm. on Indian Affairs or the Senate Comm. on Interior and Insular Affairs*, 93rd Cong. 172 (1974) [hereinafter 1974 Senate Hearings]. In passing the ICWA, Congress recognized that the federal government has a trust responsibility that includes "the protection and preservation of Indian tribes and their resources." 25 U.S.C. § 1901(2). This trust responsibility must extend to Indian children, because "there is no resource that is more vital to the continued existence and

[2] Amici do not agree with the arguments raised by Petitioners seeking to limit the rights of biological fathers under the ICWA. Those issues, however, have been adequately covered in the Respondents' merits briefing. They are not addressed in this brief, which focuses on the distinct rights of Indian tribes.

integrity of Indian tribes than their children." 25 U.S.C. § 1901(3).

One of the ways that Congress chose to fulfill its trust responsibility to Indian tribes through the ICWA was to require that *all* adoptive placements of Indian children be governed by the placement preferences in 25 U.S.C. § 1915. Indian children must be placed with their extended family, a member of the Indian child's tribe, or another Indian family unless "good cause" exists. This provision was designed to ensure that extended family members and Indian families are always the first priority when selecting adoptive families for Indian children.

In Part I of this brief, the amici explain that the "exception" sought by the Petitioners would eviscerate the statute and prevent the achievement of Congress' goals. Despite significant recent improvement, the State of Wisconsin currently complies with the ICWA's notice and placement preferences in less than 30 percent of its involuntary child protection proceedings. Applying the "existing Indian family" doctrine within the State could eliminate the statute's application to one-half of all current ICWA cases. Nearly all private adoptions in the United States involve unwed mothers who voluntarily relinquish their children immediately after birth, just as the biological mother did in this case. It could be argued that none of these children have been part of an "existing Indian family," meaning that the ICWA would not apply. This result clearly contravenes Congress' intent.

The amici are small tribes. Only a small portion of their members reside within reservation boundaries, where the tribe can exercise exclusive jurisdiction over child protection proceedings. If this Court creates an "existing Indian family" exception to the adoptive placement preferences found in 25 U.S.C. § 1915(a), it would threaten the amici's very existence.

The Petitioners suggest that the legislative history of the ICWA supports their assertion that Section 1915(a) should be limited by the "existing Indian family" doctrine. As the amici explain in Part II of this brief, it does not. The Senate took up the ICWA first, and the bill that it passed would have created an "existing Indian family" exception. For certain provisions of the Act to apply, the Senate bill would have required that the Indian child either be a resident of the reservation, or have "significant contacts with an Indian tribe."

When the House considered the ICWA it deleted any requirement that an Indian child must have "significant contacts with an Indian tribe." The House also rejected suggestions by the Department of Justice ("DOJ") and the Department of the Interior ("DOI") that would have limited the definition of "Indian child" to those children who were in the legal custody of their biological Indian parent. The House version of the bill prevailed in the conference committee. The legislative history thus demonstrates that Congress specifically rejected any "existing Indian family" doctrine when passing the final version of the ICWA.

Petitioners claim that Congress could not have "plausibly intended" this result, because it would require birth mothers to "go searching for Indian adults to adopt their child." The ICWA does not require this. If the birth mother was unable to choose an Indian family that met the placement preferences she could have simply requested that the Cherokee Nation do so. As Part III of this brief explains, there are a plethora of Indian families who would have been happy to adopt Baby Girl; not surprisingly, the demand for healthy infants in the United States greatly exceeds the supply. In any event, the birth mother did "go searching" for a couple to adopt her daughter by hiring a private adoption agency and selecting the Petitioners from a number of adoptive families. The adoption agency should have presented the birth mother with families that met the preference criteria.

This Court should not deviate from the plain language that Congress carefully crafted. That language requires that the adoptive placement preferences "*shall* be given" in "*any* adoptive placement of an Indian child." 25 U.S.C. § 1915(a). This is "[t]he most important substantive requirement imposed on state courts" by the ICWA. *Holyfield*, 490 U.S. at 36.

ARGUMENT

I. AGGRESSIVE ENFORCEMENT OF THE ICWA IS NECESSARY FOR THE CONTINUING EXISTENCE OF THE AMICI

Prior to 1978, Wisconsin tribes suffered under federal and state practices that encouraged the removal of Indian children from their families and tribes. While the ICWA sought to reverse these practices and protect the interests of Indian tribes, Indian children and their parents, its application in the State of Wisconsin has lagged behind its promise. For example, between 2005 and 2007, Indian tribes were provided notice in fewer than 18 percent of involuntary foster care and termination of parental rights proceedings. Likewise, the placement preferences contained in 25 U.S.C. § 1915 were followed in only 11 percent of ICWA cases.

Recently, however, there has been reason for hope. After receiving these statistics, the tribes and the State spent several years working out the details of State legislation to rectify implementation deficiencies. In 2009, the legislature unanimously passed the Wisconsin Indian Child Welfare Act ("WICWA"). This Act codified the ICWA into state law. In doing so, it explicitly rejected the so-called "existing Indian family" doctrine. The Act also acknowledged that the "best interests" of Indian children were considered by Congress, and placing Indian children with either their extended family or in Indian adoptive homes furthered those interests.

Extensive training of social workers, attorneys, and judges has been occurring since the passage of the WICWA. The State's compliance percentage has nearly doubled over the past year, but there is still a long way to go before the promise of the ICWA is achieved. This section illustrates why there is a continuing need for aggressive enforcement of the ICWA, and why the "existing Indian family" doctrine, which has already been repudiated by the vast majority of states, would compromise the recent progress made in Wisconsin.

A. Wisconsin Statistics from the ICWA's Legislative History

When Congress was considering passage of the ICWA, it reviewed a study completed at its behest by the Association on American Indian Affairs. *E.g.*, *Indian Child Welfare Act: Hearing on S. 1214 Before the Select Comm. on Indian Affairs*, 95th Cong. 537-603 (1977) [hereinafter 1977 Senate Hearing]. That study compiled data on child protection proceedings in 19 different states, including Wisconsin. *Id.* at 539. The results were shocking.

In 1970, there were 10,176 Indian persons under 21 years of age living in the State of Wisconsin. *Id.* at 600. One out of every 13.9 of those children was adopted by a non-relative. This was almost 18 times the rate of non-Indian adoptions in the State during the same time period. Tragically, 69 percent of these Wisconsin Indian children were less than one-year old

when they were adopted. *Id.* Since nearly all of these children were placed in non-Indian homes, they were never able to learn about their tribe's culture or traditions. *See* 1974 Senate Hearings at 5 (approximately 85 percent of all Indian children in out-of-home placements were living in white adoptive or foster homes).

Indian children were also disproportionately represented in the foster care system. In March 1973, there were 545 Indian children in foster care in Wisconsin. *Id.* at 600. This represented one out of every 18.7 Indian children. By comparison, one out of every 250 non-Indian children were in foster care during the same time period. *Id.* Combining foster care and adoptive placements, the study concluded that one out of every eight Indian children in Wisconsin were in out-of-home care. *Id.* at 601; *Indian Child Welfare Act: Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Pub. Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. 269 (1978) [hereinafter 1978 House Hearings].

As terrible as these statistics are, they do not even provide a complete picture of the problem. Adoptions facilitated by private agencies were not included in the study completed by the Association on American Indian Affairs, because no reliable figures were available at the time. 1977 Senate Hearing at 601. Testimony indicated, however, that when private adoptions and juvenile incarcerations were added to the State's out-of-home placement figures, nearly 40 percent of all Indian children in Wisconsin were in

non-Indian homes or institutions. 1974 Senate Hearings at 172.

The statistical evidence from Wisconsin and other states helped Congress realize the seriousness of the problem. "Indian tribes and Indian people [were] being drained of their children and, as a result, their future as a tribe and a people [was] being placed in jeopardy." 124 Cong. Rec. 38,102 (1978). *See also* 1974 Senate Hearings at 70 (testimony of attorney who noted that his client "was concerned that if many more of their children were taken . . . [the tribe's] very survival would be at stake"). The absence of Indian children threatened Indian tribes' abilities to perpetuate their cultures and traditions. 1978 House Hearings at 193; 1974 Senate Hearings at 122; 123 Cong. Rec. 21,043-44 (1977). Additionally, the very core of tribal sovereignty and self-determination was jeopardized by the wholesale displacement of Indian children. For tribes to remain separate, fully functioning sovereigns, they must have enough citizens willing and able to serve in tribal governmental positions, including legislative, executive, and judicial branches. 1978 House Hearings at 193; 124 Cong. Rec. 38,103 (1978). For these and other reasons, Congress passed the ICWA to keep Indian children in Indian families.

B. Problems with Implementation of the ICWA in Wisconsin

While progress was made as a result of ICWA's enactment, it has been slower than expected. In 2005,

three and one-half percent of Wisconsin's foster care population was Indian, even though Indian children represented only one percent of the total number of children within the State. *See, e.g.*, Wisconsin State Senate and Assembly Joint Hearing on ICWA Codification LRB 0150/3 (Sept. 16, 2009) (testimony of Mark Tilden on behalf of the National Indian Child Welfare Association). Studies completed and statistics compiled between 2004 and 2009 prove that the State rarely notified Indian tribes of involuntary child placement proceedings as required by 25 U.S.C. § 1912(a), and often failed to abide by the placement preferences contained in 25 U.S.C. § 1915(a) and (b).

One such study was completed by the U.S. Department of Health and Human Services ("HHS"). The HHS is authorized to review state child and family service programs to ensure that they comply with federal child welfare requirements, including the ICWA. These Child and Family Services Reviews ("CFSRs") consist of two parts: a statewide assessment, and an on-site review of service outcomes and program systems. States who have not achieved substantial conformity with federal law in the areas assessed are required to develop and implement Program Improvement Plans to address the areas needing improvement. *See*, *e.g.*, HHS, Children's Bureau, *Child and Family Services Reviews Fact Sheet*, *available at* http://www.acf.hhs.gov/sites/default/files/cb/cfsr_factsheet.pdf.

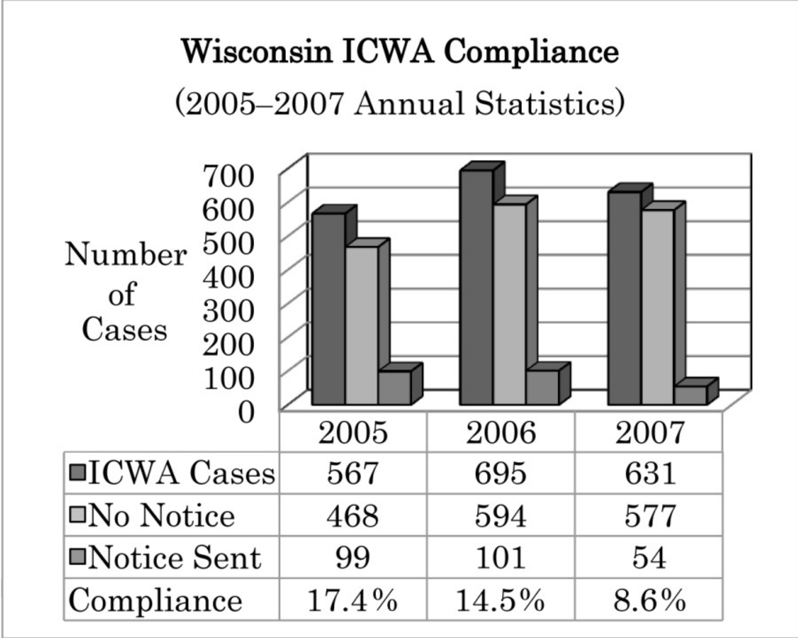
In 2003, the HHS conducted a CFSR for the State of Wisconsin. In its Final Report, the Department

concluded that the State was deficient in (1) identifying Indian children, and (2) providing Indian tribes with timely notice of involuntary foster care and termination of parental rights cases. *See* HHS, Final Report, Wisconsin Child and Family Services Review 42, 61, 66 (Jan. 13, 2004). State officials admitted that "adherence to ICWA provisions is not occurring consistently across the state." *Id.* at 42.

While the Wisconsin CFSR's findings were disconcerting, the sample size used to determine compliance with the ICWA was extremely small, and therefore, it was impossible to know whether the problems identified in the study were widespread. Fortunately, the Wisconsin Supreme Court began its own survey of ICWA cases as part of its Children's Court Improvement Project. Court employees reviewed the files of 92 child protection cases where the ICWA was applicable. The Court's survey indicated that notice of involuntary child custody proceedings was only provided to Indian tribes in 18 percent of the cases. Only 28 percent of the case files contained documentation demonstrating that an "active efforts" finding had been made either orally or in writing prior to terminating parental rights, as required by 25 U.S.C. § 1912(d). Finally, a qualified expert witness presented testimony in only 42 percent of the cases studied where parental rights were terminated, even though 25 U.S.C. § 1912(f) requires such testimony in all cases.

These studies prompted the Wisconsin Department of Children and Families to use its own database

– the Wisconsin Statewide Automated Child Welfare Information System ("eWiSACWIS") – to determine the agency's compliance with the ICWA in involuntary child custody proceedings. Some of the eWiSACWIS data generated through that search is included in the chart below:



	2005	2006	2007
ICWA Cases	567	695	631
No Notice	468	594	577
Notice Sent	99	101	54
Compliance	17.4%	14.5%	8.6%

This eWiSACWIS data confirmed the results of the CFSR and Wisconsin Supreme Court studies: the State was not providing notice to Indian tribes as required by the ICWA. The State's compliance with the placement preferences of the Act was even worse. Between 2005 and 2007, out of 1,893 cases subject to the ICWA, the placement preferences contained in

25 U.S.C. § 1915 were followed in just 207 cases, or 11 percent of the time.[3]

Wisconsin was also struggling with the applicability of the "existing Indian family" doctrine. While Wisconsin appellate courts had never decided whether the doctrine was consistent with the text and legislative history of the ICWA, they seemed to imply that they might be amenable to such arguments. *See, e.g.*, *In re Shawnda G.*, 634 N.W.2d 140, 143 n.5 (Wis. Ct. App. 2001); *In re the Termination of Parental Rights to Branden F.*, 695 N.W.2d 905, ¶ 14, n.3 (Wis. Ct. App. 2005).

Perhaps encouraged by dicta in these appellate decisions, some State trial judges were applying the "existing Indian family" doctrine in their own unpublished opinions. At times, the issue was raised *sua sponte* by a judge, but then abandoned when the county attorney refused to advocate for the doctrine.[4]

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[3] These statistics are taken from the legislative history of the WICWA, which is discussed in Section I(C) *infra*.

[4] For example, the "existing Indian family" doctrine was raised in a termination of parental rights case in Dane County, Wisconsin. The birth father was a citizen of the Lac Courte Oreilles Band, but he had not had any contact with the child after his birth. Judge Diane Nicks called for supplemental briefing addressing the applicability of the "existing Indian family" doctrine. When the tribe, the father's attorney, the county attorney, and the guardian ad litem all excoriated the doctrine, the Judge abandoned her position. With the permission of the tribe, the child was ultimately adopted to a non-Indian couple. The adoptive couple entered into agreements with the tribe that

(Continued on following page)

Other times, the doctrine was raised by private parties and used with devastating effect. One such case began in Brown County, Wisconsin, in 1985.

A non-Indian single mother sought to have her school-aged daughter, K.S.M., adopted by a Caucasian couple that she had identified with the help of Pauquette Children's Services, a private adoption agency. K.S.M. was eligible for citizenship in the Red Cliff Band, where her biological father was a citizen. At the time of the adoption proceedings, however, her father was in prison and had not contacted K.S.M. for several years. When the Red Cliff Band was provided notice of the termination of parental rights proceeding, K.S.M.'s paternal grandmother and uncle stepped forward as potential adoptive parents. Despite the preference provisions in 25 U.S.C. § 1915, which favored placement with the child's extended family, the Brown County Circuit Court approved K.S.M.'s preadoptive placement with the Caucasian couple identified by the birth mother. *In re K.S.M.*, 85JV-204 (Apr. 15, 1986).

In doing so, the Circuit Court applied the so-called "existing Indian family" doctrine, although it did not use that phrase. It noted that there was no Indian custodian involved in the proceedings since the biological mother was non-Indian and the biological

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ensured the child's connections with both his culture and his extended family would be maintained.

father had abandoned K.S.M. The court's order went on to state as follows:

> To place this child on a tribal reservation in a completely strange and foreign environment would destroy her. If the law required placement in an Indian environment, the Court would refuse to terminate [parental rights] because it would be contrary to the best interest of the child. This position of the Court is not meant to be interpreted as having any prejudice against the Native American. . . . [W.G.] impressed the Court that he is willing to take custody of [K.S.M.]. He is capable of providing an adequate home for a child with a Native American background, but it simply wouldn't work for [K.S.M.]. [K.S.M.] is not on the Tribal roll, has never lived on a reservation and could not handle the trauma of such a drastic and depressing change in her life.

Id. at 3. This judge's prejudicial belief – that living on a reservation is "drastic and depressing" – led him to use the "existing Indian family" doctrine to claim that the ICWA was inapplicable. Only then could the Caucasian couple be considered a placement that was in the child's "best interests," even though members of her extended family wished to adopt her.

This case was truly a contemporary ICWA horror story. The adoption was never finalized because K.S.M. was later sexually abused by the Caucasian adoptive father. She was then removed and placed with yet

another non-Indian adoptive family by Pauquette Children's Services. This time, no notice was provided to the birth mother, the Red Cliff Band, or K.S.M.'s extended family. They did not discover what had happened until after K.S.M. had been in the new placement for several years. This is just one example of how destructive the "existing Indian family" doctrine was in Wisconsin prior to its abolition.

C. Wisconsin's Codification of the ICWA into State Law

To its credit, the State of Wisconsin was concerned about its ICWA compliance record when these statistics and stories surfaced. At the request of the amici tribes, the State began considering codifying the ICWA into State law. State officials are, of course, required to comply with federal laws even in the absence of corresponding state legislation. But state law is typically the first place that social workers and judges turn to when making decisions in child protection cases. Including the ICWA in State law, and showing how the ICWA would interact with other State laws in the area of child protection, was considered by all stakeholders to be a crucial step towards increasing compliance with the federal mandates.[5]

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[5] Most federal child welfare mandates have been codified in State law to ensure compliance. *See, e.g.*, The Adoption and Safe Families Act, Wis. Stat. §§ 48.31(5), 48.335(3j), 48.427(5), 48.427(6)(b)(4); The Child Abuse Prevention and Treatment Act, Wis. Stat. § 48.981(3)(bm).

The Wisconsin Department of Children and Families formed an ICWA Codification Workgroup with the amici Wisconsin tribes. Over a four-year period beginning in 2005, the workgroup conducted extensive research on the ICWA, including reviewing the text of the Act, its legislative history, and case law from Wisconsin and other state courts. In 2007, the workgroup sent a proposed draft bill to stakeholders (*e.g.*, county social services, district attorneys, judges) for initial review and comment. A consensus in favor of codification was formed.

In 2009, seven negotiation meetings were held between legislators and key stakeholders. After these meetings and two public hearings, Senator Robert Jauch and Representative Ann Hraychuck introduced a revised bill to codify the ICWA into State law, primarily in Chapters 48 (the Children's Code) and 938 (the Juvenile Justice Code). The bill received a *unanimous* vote in the Assembly and Senate committees, and went on to receive a *unanimous* vote on the floor of the Senate and Assembly. The WICWA was signed into law by Governor Doyle on December 7, 2009.

Importantly, the WICWA addresses each of the questions presented to the U.S. Supreme Court in these proceedings. After reviewing the text and legislative history for the federal statute, as well as court decisions from sister states, the State of Wisconsin concluded that the federal ICWA precluded use of the judicially created "existing Indian family" doctrine. The WICWA explicitly precludes that doctrine's

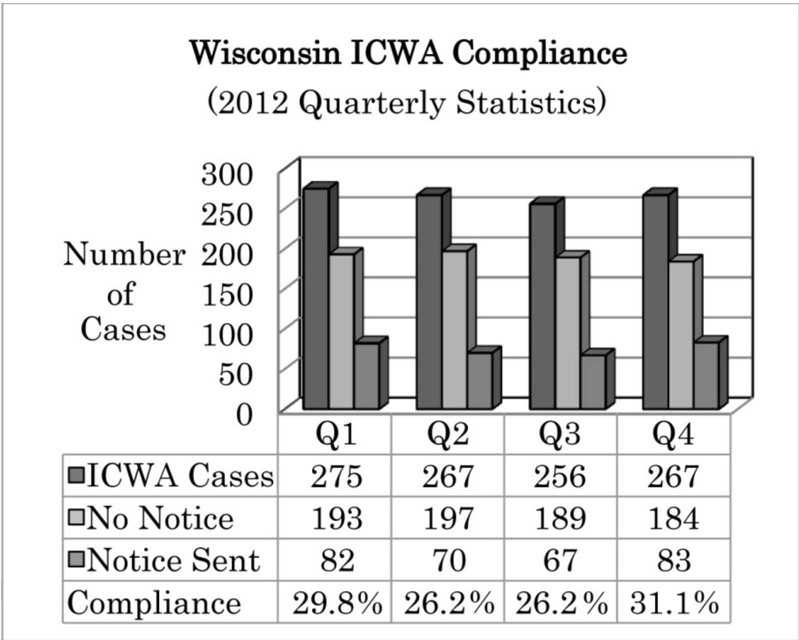
use within the State. Wis. Stat. § 48.028(3) ("A court . . . may not determine whether this section and the [ICWA], apply to an Indian child custody proceeding based on whether the Indian child is part of an existing Indian family."). The WICWA also acknowledges that the "best interests" of an Indian child was considered by Congress in enacting the ICWA, and that the statute is meant to serve those interests. Wis. Stat. § 48.01(2). One of the ways the ICWA and WICWA ensure the best interests of Indian children is through the adherence to statutory placement preferences for Indian children in out-of-home care. These placement preferences are mandatory unless the court finds "good cause" to depart from them. Wis. Stat. § 48.028(e).

Only three years have passed since the WICWA was enacted in Wisconsin. Despite this short time period, improvements can already be seen. The Midwest Child Welfare Implementation Center of the University of Nebraska-Lincoln provided a grant which allowed an extensive training and technical assistance plan to be developed. To date, the training has reached over 1,000 child welfare workers in the State of Wisconsin. By September 2013, the State projects that its training will have also reached 400 attorneys and judges.

In addition to increased training on the requirements of the ICWA and WICWA, the State updated its eWiSACWIS computer system used to track child welfare cases. An ICWA tab was created to track these cases and ensure that data can be easily generated to

track compliance and to identify problem areas. The eWiSACWIS system also includes templates for key ICWA documents, such as the notice required to be provided to Indian tribes under 25 U.S.C. § 1912(a).

Compliance with key ICWA provisions has increased since the adoption of the WICWA. The chart below shows 2012 Wisconsin compliance figures for one key provision: the requirement that notice be provided to Indian tribes in involuntary foster care and termination of parental rights proceedings:



	Q1	Q2	Q3	Q4
ICWA Cases	275	267	256	267
No Notice	193	197	189	184
Notice Sent	82	70	67	83
Compliance	29.8%	26.2%	26.2%	31.1%

As this chart illustrates, there is still substantial progress to be made. At best, Indian tribes are receiving notice in 31.1 percent of the cases where notice is required by federal and state law. Still, this is double the compliance rate that existed prior to enactment of

the WICWA, and the Wisconsin tribes are confident that compliance rates will continue to increase as more persons take part in the WICWA training program. The State of Wisconsin's participation in this case as amicus curiae also demonstrates its continued commitment to working with tribes to ensure that the promises of the ICWA and WICWA are fulfilled.

D. The Need for Aggressive Enforcement of the ICWA

The Petitioners claim that the ICWA (and presumably, the WICWA) would violate a host of constitutional provisions if it is not limited by the so-called "existing Indian family" doctrine. According to the Petitioners, that doctrine requires that non-custodial Indian parents receive no protections under the ICWA. The Petitioners also claim that the adoptive placement preferences contained in Section 1915(a) cannot be applied to Indian children that were not part of an "existing Indian family" prior to removal or voluntary placement.

If the Petitioners arguments are accepted by this Court, the very existence of the Wisconsin tribes could be jeopardized. Voluntary private adoptions – like the adoption of Baby Girl in this case – account for one-half of the total number of adoptions of children of all ages in the United States. HHS, Administration for Children and Families, "*How Many Children Were Adopted in 2007 and 2008?*" at 11 (Sept. 2011) (private adoptions have steadily accounted for 46-47 percent of the total number of adoptions

during the past decade). Almost 95 percent of all voluntary adoptions that occur are of infants born to unmarried mothers. Kathy S. Stolley, *Statistics on Adoption in the United States*, 3(1) The Future of Child. 26, 32 (Spring 1993). Because these infants are relinquished at birth, it would be difficult for them to be considered part of an "existing Indian family."

The amici are all small tribes. For example, the St. Croix Chippewa, Sokaogon Chippewa, and Forest County Potawatomi each have fewer than 1,500 citizens.[6] Ten out of the 11 Wisconsin tribes have fewer than 10,000 citizens. The preliminary progress made in Wisconsin following codification of the ICWA into State law is threatened by these proceedings, which could eliminate the Act's applicability to almost 50 percent of all Indian adopted children who reside off-reservation. When coupled with the State's compliance record for Indian children in foster care, the impact on the amici could be enormous.

Despite what the Petitioners' supporters argue, the amici cannot protect their interests solely through the exertion of jurisdiction over Indian children domiciled within reservation boundaries. Many tribes have small or non-existent land bases. For example, the Ho-Chunk Nation does not have a reservation. It holds just 4,017 acres of trust lands scattered across

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[6] The amici are not alone. Approximately one-half of all Indian tribes in the lower 48 states have 1,500 or fewer citizens. *See generally Tiller's Guide to Indian Country* (Veronica E. Velarde Tiller ed. 2005).

14 counties. The Nation uses this land for governmental buildings, economic development, natural resources, and housing. Consequently, only 20% of tribal citizens (1,312 persons) are able to live on lands that are considered Indian country under federal law. Other tribes may have larger land bases, but that still does not guarantee that this land is available for housing. For example, 88 percent of the lands owned by the Bad River Band are undeveloped; most of these lands are unsuitable for housing due to their proximity to wetlands or other water sources. *See also* Wisconsin State Senate and Assembly Joint Hearing on ICWA Codification LRB 0150/3 (Sept. 16, 2009) (testimony of Greg Miller, Vice President of the Stockbridge Munsee Community, indicating that only half of the 1,500 tribal citizens live on-reservation, meaning that "you will be hard pressed to find a family who has not been affected by the removal of Indian children" even following ICWA's enactment). For these and other reasons, the majority of the amici's tribal citizens live off-reservation, which makes application of the ICWA even more important.

II. ICWA'S LEGISLATIVE HISTORY DEMONSTRATES THAT CONGRESS CONSIDERED AND REJECTED THE "EXISTING INDIAN FAMILY" DOCTRINE

The Wisconsin amici agree *in toto* with the Cherokee Nation's analysis of Section 1915(a), which provides the placement preferences that "*shall* be given" by state courts in "*any* adoptive placement" of

an Indian child. 25 U.S.C. § 1915(a). The Petitioners attempt to avoid these arguments by claiming that the legislative history of the ICWA supports application of the "existing Indian family" doctrine to adoptive proceedings under Section 1915(a). Pet. Br. at 52 (citing H.R. Rep. No. 95-1386). Of course, this Court should not resort to the legislative history unless the statute is ambiguous, which it is not. *E.g.*, *U.S. v. Gonzalez*, 520 U.S. 1, 6 (1997); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). Regardless, however, the legislative history does not support the Petitioners' argument.

Congress heard exhaustive testimony, which led it to conclude that Indian children, Indian biological parents, and Indian tribes all have interests in child placement decisions. It makes no sense to eliminate the *tribe's* right to have a tribal-citizen-eligible child placed in an Indian adoptive home, because the *Indian biological parent* failed to exert physical custody over the child prior to termination of their parental rights. The rights of the tribe and the biological parents are distinct from one another. *Holyfield*, 490 U.S. at 52 ("[T]he tribe has an interest in the child which is distinct from but on a parity with the interest of the parents.").

More specifically, however, the legislative history demonstrates that Congress explicitly considered and rejected any "existing Indian family" exception to the ICWA.

A. Congress Decided Not To Require "Significant Contacts" With an Indian Tribe Prior to Application of the ICWA

The "existing Indian family" doctrine has two variations, neither of which are supported by the ICWA. One version requires that an Indian child reside in a home that adheres to the cultural and traditional practices of the tribe. *In re Alexandria Y.*, 53 Cal. Rptr. 2d 679, 681, 687 (Ct. App. 1996) (refusing to apply the ICWA because neither Indian child nor Indian biological mother had maintained connection with "Indian life"). The other version requires that an Indian child be in the custody of an Indian parent for the Act to be effective. *Claymore v. Serr*, 405 N.W.2d 650, 654 (S.D. 1987) (refusing to apply the ICWA because the Indian child never resided with her Indian biological father). The goal of both variations is the same: to determine whether a particular child is "Indian enough" for the tribe to have an identifiable interest that makes the ICWA applicable. In the first category of cases, the court addresses this question directly. In the second category, the court uses the custody of an Indian parent to serve as a proxy for the "Indianness" of the child.

The Petitioners and their amici alternate between these variations of the "existing Indian family" doctrine. At the trial level, the Petitioners argued the first variation: the ICWA did not apply because the child and biological father weren't "really" Indian. Pls.' Post-Trial Br. at 11 (claiming that the birth father's connection to the Cherokee Nation was "in

name only" and that he did not have "a strong cultural tie" to the tribe). In this Court, the Petitioners now claim that they are not questioning whether the biological father is "Indian-enough," Pet. Br. at 40-41, even though they repeatedly refer to the blood quantum of the father, a factor typically used in such cases. *E.g.*, Pet. Br. at 6; GAL Br. at 18, 52. Their amici, however, continue to make this argument directly. For example, the Brief of the Adoptive Parents Committee alleges that due to constitutional concerns, the ICWA only applies to children domiciled off-reservation if the child's parents "maintain significant social, cultural, or political relationship to the tribe." Adoptive Parents Committee Br. at 16. *See also* Christian Alliance for Indian Child Welfare Br. at 5 ("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.") (emphasis in original).

The legislative history of the ICWA demonstrates that Congress explicitly considered whether to limit the statute's application to children who were not only eligible for tribal citizenship, but who also maintained a connection with their tribe either personally or through their parents. This "existing Indian family" doctrine was introduced in the second draft of Senate Bill 1214, in 1977. Indian Child Welfare Act, S. 1214, 95th Cong. (1977). In that draft, key provisions of the bill (including the tribal court transfer, and tribal notice and intervention provisions, would not apply if the Indian child resided off-reservation

and had no "significant contacts with an Indian tribe." *Id.* § 102(f). Whether a particular child had significant contacts with the tribe was an issue of fact to be determined by the courts after considering factors such as "family ties within the tribe," "prior residency on the reservation for appreciable periods of time," "statements of the child demonstrating a strong sense of self-identity as an Indian," "or any other elements which reflect a continuing tribal relationship." *Id.* § 102(f). The Senate adopted this version of the bill on November 3, 1977. S. Rep. No. 95-597, at 4-6 (1977) (providing text of the bill).[7]

When the House took up the ICWA it began with Senate Bill 1214, and held hearings on February 9 and March 9, 1978. The Bureau of Indian Affairs ("BIA"), the Department of Health, Education and Welfare ("HEW"), and certain adoption agencies opposed its passage because they felt that the "significant contacts" test was not strong enough. BIA and HEW officials stated that the bill should never apply to parents and children of "mixed backgrounds" who

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[7] Even the Senate bill noted that "[a] finding that such Indian child does not have significant contacts with an Indian tribe . . . *does not waive the preference standards for placement* set forth in section 103 of this Act." S. 1214 § 102(f) (emphasis added). The placement preferences in the Senate Bill prioritized placement in an Indian home where the head of the household was a member of the tribe in which the child had "significant contacts." *Id.* at § 103(a). But if no such home existed, it allowed placement in any "Indian home approved by the tribe" that the child was eligible for citizenship in. *Id.*

live off-reservation in urban settings. 1978 House Hearings at 54-55, 59. The North American Center on Adoption's ARENA project agreed.

ARENA was "concerned about what determines significant contact with an Indian tribe." 1978 House Hearings at 143. It noted that a child could be black and Indian and live with a black parent off-reservation, yet the bill would not allow that child to be placed with a black family even though supposedly "[t]heir identity problems will be less in the black culture than they will be in the Indian culture." *Id.* Alternatively, the organization claimed that a child could be ripped away from his Caucasian grandparent because of some Indian ancestry. *Id.* ARENA also argued that if the parent lived off-reservation, and had a child out of wedlock, they should be able to conceal any child protection proceedings from the Indian tribe, and place that child with whomever they pleased. *Id.* at 143-44. At the time, Representative Taylor responded to these concerns by noting that "the significant contact test that is contained in the bill is designed to solve the problem that you have talked about *where an Indian child is raised outside an Indian setting* and has very limited or no contact with a tribe." *Id.* at 147-48 (emphasis added).

The House Hearings also included a significant amount of testimony arguing that the significant contact test was too restrictive and should not be used. Mike Ranco, Executive Director of Health and Social Services for the Central Maine Indian Association

informed committee members that 52 percent of the Indian population in Maine lived off-reservation. Most of these people lived in northern Maine, far from any reservation. *Id.* at 112. Ranco's research indicated that these families were in greatest need of the support that the ICWA could provide, yet the Senate Bill would not help them because of the significant contacts test. *Id.* at 113. Robert Aitken, Director of Social Services for the Minnesota Chippewa Tribe agreed, noting that there were many Indian families who lived off-reservation, particularly when their children were young. *Id.* at 130.

Voices on both sides of the "existing Indian family" debate were therefore considered. The House resolved these debates by rewriting the bill. Representative Udall introduced House Bill 12533. Indian Child Welfare Act, H.R. 12533, 95th Cong. (1978). This compromise bill was responsive to both sides. It allowed biological parents involved in involuntary child protection proceedings to object to any transfer of those proceedings to tribal court. H.R. 12533 § 101(b). The new bill did not require that Indian tribes be provided notice in purely voluntary adoption proceedings. But House Bill 12533 eliminated the "significant contact" language and provided that the ICWA applied to every Indian child, regardless of the extent of their prior connections to the tribe or Indian biological parent. H.R. 12533 §§ 102(a), 105(a).

House Bill 12533 was passed by the House of Representatives, and the substance of this bill prevailed during the conference committee. The

consideration and ultimate elimination of language requiring "significant contacts" with an Indian tribe is evidence that Congress rejected the "existing Indian family" doctrine that the Petitioners now raise in this Court. *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 964 (Ariz. Ct. App. 2000) ("[I]t appears that Congress considered and rejected a 'significant contacts' doctrine similar to the 'existing Indian family' exception."); *In re Adoption of S.S.*, 657 N.E.2d 935, 951 (Ill. 1995) (McMorrow, J., dissenting). This Court cannot create an exception that was rejected by the legislature.

B. Congress Decided Not to Require that an Indian Child be in the Custody of their Indian Parent Before ICWA Would Apply

After Representative Udall eliminated the "significant contacts" test in his redraft of House Bill 12533, federal officials sought another, similar exception. They suggested that the ICWA be limited to cases where the child was in the custody of an Indian parent prior to the commencement of child protection proceedings.

In a May 23, 1978 letter, the DOJ claimed that the ICWA may be unconstitutional if it provides for exclusive tribal jurisdiction in all cases where an Indian child is domiciled within an Indian reservation. The DOJ also objected that all cases involving a child domiciled outside of the reservation could be

transferred to tribal court. It suggested that these problems be remedied by amending the definition of "Indian child" to require that the child be "eligible for membership in an Indian tribe and is in the custody of a parent who is a member of an Indian tribe." 1978 House Hearings at 49-50; House Report No. 95-1386, at 39. This proposed change was also pushed by the DOI. In a June 6, 1978 letter from Assistant Secretary Forest Gerard to Rep. Morris Udall, the DOI noted that "[i]f H.R. 12533 is amended as detailed herein and as recommended by the Department of Justice's letter of May 23, 1978, we would recommend that the bill be enacted." 1978 House Hearings at 42.

Congress considered, but rejected, these proposed changes. Rep. Udall repeated the Committee's view that the ICWA would withstand any constitutional challenges, including any challenges by a "non-tribal member custodian of an Indian child" who was eligible for citizenship in the tribe. 124 Cong. Rec. 38,103 (1978). The Committee did not alter the definition of "Indian child" or otherwise limit the applicability of the Act to Indian children in the physical or legal custody of an Indian biological parent, because "foster care placement and termination of parental rights . . . are actions affecting parental, not custodial, rights." *Id.*

The State of Wisconsin reviewed this legislative history when debating whether the "existing Indian family" doctrine should be included within the WICWA. It concluded that this doctrine was contrary to the clear language in the ICWA defining "Indian

child," and the legislative history supporting that definition. ICWA Codification Workgroup, Summary of the Negotiations with Stakeholders, Indian Child Welfare Codification Bill at 8 (Mar. 4, 2009). It also noted that more than 20 states had rejected it either judicially or legislatively, and that "the authority of tribes to determine their own membership is a paramount consideration in recognizing the sovereignty of tribes." *Id.* For these reasons, the State of Wisconsin rejected the "existing Indian family" doctrine, and this Court should as well.

III. THIS CASE ILLUSTRATES WHY CONGRESS ADOPTED THE PLACEMENT PREFERENCES IN SECTION 1915(a)

In an attempt to avoid the placement preferences in Section 1915(a), Petitioners claim that "Congress could not have plausibly intended to require non-Indian mothers and adoptive parents to go searching for Indian adults to adopt their child." Pet. Br. at 4, 53. They also imply that if this Court fails to overturn the South Carolina Supreme Court's decision, it will "chill[ ] prospective parents from adopting abandoned Indian children." Pet. Br. at 49. These arguments ignore the reality of the private adoption market in the United States.

A. There are Ample Indian Families Available to Adopt Baby Girl

In the United States, approximately 136,000 children are adopted each year. HHS, *Child and Family*

Services Reviews Fact Sheet, supra, at 4, 8. While this number appears high, it has actually declined from a peak of 170,000 adoptions in 1970.[8] Frank Biafora & Dawn Esposito, Adoption Data and Statistical Trends, *in Handbook of Adoption: Implications for Researchers, Practitioners and Families* 32-34, 36, 38 (2007). This is true even though the U.S. population has increased by 100 million people since that time.[9]

The low supply of healthy infants available for adoption in the United States is coupled with a high demand for such infants. Barbara Fedders, *Race and Market Values in Domestic Infant Adoption*, 88 N.C. L. Rev. 1687, 1688, 1696 (2010); Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 Tenn. L. Rev. 509, 519 (2005). The number of couples seeking to adopt infants surpasses the annual number of adoptions by a ratio of 3.3 to 1. Indeed, the wait time to adopt a healthy infant is typically two or more years. Stolley, *supra*, at 26, 37.

There are many Indian families waiting to adopt Indian infants. An example from Wisconsin is illustrative. A few years ago, a young Indian mother was

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[8] The decline in the number of children placed for adoption is due to unwed mothers increasingly choosing to keep their children. *See* Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. Legal Stud. 323, 325 (1978).

[9] U.S. Dep't of Commerce, History, http://www.census.gov/history/www/through_the_decades/fast_facts/ (last updated Oct. 18, 2012).

admitted to a Milwaukee hospital and gave birth to a healthy infant. She decided to leave the child at the hospital and take advantage of the State's "safe haven" law. The Bureau of Milwaukee Child Welfare ("BMCW") agency contracts with two private agencies to provide a full range of foster care and adoption services for the city. One of these private agencies took custody of the infant, and placement occurred with a non-Indian couple who hoped to adopt the infant.

The birth mother was Indian. A hospital worker informed BMCW that the birth mother was believed to be a citizen of the Menominee Tribe, but the private agency chose to ignore this information. The day before a termination of parental rights hearing was scheduled to take place, an official for BMCW, at great risk to his/her own career, verbally notified the Menominee Tribal Social Services Department of the case. Because the name of the birth mother could not be revealed, the Menominee Tribe then notified other Wisconsin tribes. At the court hearing in this matter, officials from the Menominee, Forest County Potawatomi, Oneida, Stockbridge-Munsee and Ho-Chunk tribes all appeared in person to protect their potential interests in the child. All had Indian families ready and willing to adopt the infant. It was ultimately determined that the child was indeed Menominee, and through court action, the baby was adopted to a Menominee couple.

This is just one example. The Menominee Tribe received 238 ICWA notices in 2012. It responded to each of these notices. If the child identified in the

notice was a citizen or eligible for citizenship, the Menominee Tribe intervened in each and every ICWA case. While the Tribe does not have the lengthy waiting list of adoptive parents that the Cherokee Nation does, *see* Cherokee Nation Br. at 17 (noting that it has at least 100 preapproved adoptive families waiting), it has never had difficulty placing a young, healthy child with a Menominee family.

Still, Petitioners' amici claim that there are not a sufficient number of Indian families willing to adopt, and therefore, the ICWA causes Indian children to languish in foster care as a result of the Act's provisions. *E.g.*, Christian Alliance for Indian Child Welfare Br. at 7. This is untrue. In 2007, two percent (9,214) of the children in foster care in the United States were Alaska Native/American Indian. During that same year, two percent (5,854) of the children that exited the foster care system (through reunification with their parents or adoption) were Alaska Native/American Indian. And two percent of children waiting to be adopted were Alaska Native/American Indian (2,190). *See* HHS, The AFCARS Report for Fiscal Year 2007 (Oct. 2009). These statistics demonstrate that the ICWA has lowered the number of Indian children in foster care and has not resulted in a disproportionate number of Indian children waiting for adoptive homes.

The HHS's most recent report to Congress establishes that states are able to find adoptive homes for 86.8 percent of all children in the foster care system. They are the least successful in placing children with

disabilities (77 percent placed) and children who enter the foster care system when they are 13 years of age or older (67.3 percent placed). "These disparities in finding permanent homes for older children and children with disabilities have been consistent findings in the Child Welfare Outcomes Reports." HHS, Child Welfare Outcomes 2007-2010: Report to Congress at 14. They apply to children of all races and citizenship. While this is certainly an area of concern, it is not a problem created or exacerbated by the ICWA,[10] and it has nothing to do with this case, which involves the attempted *private* adoption of a *healthy infant*. *See* U.S. Government Accountability Office, Report to Congressional Requests, Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States 4 (Apr. 2005) (noting that data contained "no consistent differences when comparing the length of time [Indian children] spent in foster care compared to Caucasian or other minority children").

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[10] A court can depart from the placement preferences for "good cause." 25 U.S.C. § 1915(a). Good cause is typically found when an extended family member or Indian family cannot be located to adopt the child, even after a diligent search has been completed. This situation usually arises only when the child has significant disabilities or is an older child that is part of a larger sibling group seeking to be adopted together. *See, e.g.*, *In re C.H.*, 997 P.2d 776, 780-81 (Mont. 2000); Dep't of the Interior, Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,594 (Nov. 26, 1979); 1978 House Hearings at 71, 146-47.

B. Few Indian Families are Clients of Private Adoption Agencies

Without the placement preferences in Section 1915(a), however, Indian families would have little chance of adopting Indian infants through the private adoption process. "[E]conomic interests influence adoption more than we might like to acknowledge" and "the adoption process is more like a market than less so." Michele Goodwin, *The Free-Market Approach to Adoption: The Value of A Baby*, B.C. Third World L.J. 61, 63 (2006). Couples spend upwards of $50,000 to adopt a healthy infant. Debora L. Spar, *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception* 179 (2006); Goodwin, *supra*, at 66-67.[11] The private adoption agency receives a fee of between $6,500 and $52,000. Other expenses include the payment of medical costs and costs of living for the birth mother during pregnancy, home study fees, and application fees. Jack Darcher, *Market Forces in Domestic Adoptions: Advocating a Quantitative Limit on Private Agency Adoption Fees*, 8 Seattle J. for Soc. Just. 729, 732-33 (2010); Fedders, *supra*, at 1694-95.

Birth mothers seeking to relinquish their infants typically go to private adoption agencies to choose adoptive parents. The agency shows them prospective

[11] The Petitioners testified in the lower court proceedings that they had spent $30,000 or $40,000 on Baby Girl's adoption. J.A. at 321.

adoptive couples who are clients of the agency, and the birth mother chooses from those couples. The willingness and ability of couples to pay for the birth mother's living expenses during pregnancy, on top of the already high agency fees, often plays a significant role in the decision-making process.

Few Indian families have $50,000+ in disposable income they can spend on the adoption process, even though they could provide a safe and loving home for a child. The average per-person income for the Wisconsin tribal amici ranges from a low of $7,589 for the Sokaogon Chippewa Community, to a high of $25,680 for the Oneida Tribe. *Tiller's Guide to Indian Country*, *supra*, at 1037-64. As a result, Indian prospective adoptive parents are rarely clients of private adoption agencies. Many private adoption agencies choose not to ask birth mothers if their child is Indian, because they do not have families to offer the birth mother that fit the placement preferences in Section 1915(a). Even when that information is volunteered by the birth mother – as it was here – agencies routinely ignore the placement preferences in the ICWA. If they contacted the Indian tribe that the child was eligible for citizenship in, that tribe could provide several suitable Indian adoptive couples. But this would not generate any money for the private adoption agency, and therefore, it is rarely done.

This problem was once rampant in Wisconsin. Private adoption agencies from around the country were recruiting birth mothers there yet refusing to follow the placement preferences in the ICWA. As a

result, the Wisconsin tribes lobbied to ensure that sanctions could be imposed against adoption agencies violating the ICWA. Section 54.05(6) of the administrative code governing the Wisconsin Department of Children and Families was amended effective June 1, 1993. It provides that if a child-placing agency "knowingly and intentionally disregards a requirement of the ICWA, the department shall by letter of notification order the child-placing agency to stop accepting for service all Indian children referred for service to the agency." Wis. Admin. C. § 54.05(6)(a). If the agency disregards this letter, the Department "shall revoke or not renew . . . the child-placing agency's license." *Id.* § 54.05(6)(b).

When the Petitioners claim that if given full force, the ICWA will "chill[ ] prospective parents from adopting abandoned Indian children," Pet. Br. at 49, they are missing the point. This very issue was raised during the congressional debates prior to enactment. HEW noted that the ICWA would disrupt voluntary, private adoption proceedings. 1978 House Hearings at 59. Tribal witnesses, including LeRoy Wilder, an attorney representing the Association on American Indian Affairs noted that if the ICWA had a chilling effect on non-Indian adoptions of Indian children, "then so be it. This bill is not designed to make the adoption of Indian children easier." *Id.* at 71. And that is exactly the point. The ease with which the Baby Girl was moved out of state without the agency or birth mother ever considering a Cherokee adoptive family or notifying the baby's biological Cherokee

father, demonstrates why the ICWA was passed in the first place. Congress determined that, absent good cause, it is in the best interests of Indian children to be raised within their extended families or by other Indian families. This Court should respect that judgment.

CONCLUSION

The judgment of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

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APPENDIX

List of Amici Curiae

Bad River Band of Lake Superior Chippewa Indians

Forest County Potawatomi Community

Ho-Chunk Nation

Lac Courte Oreilles Band of Lake Superior Chippewa Indians

Lac du Flambeau Band of Lake Superior Chippewa Indians

Menominee Indian Tribe of Wisconsin

Oneida Tribe of Indians of Wisconsin

Red Cliff Band of Lake Superior Chippewa Indians

Sokaogon Chippewa Community, Mole Lake Indian Reservation

St. Croix Chippewa Indians of Wisconsin

Stockbridge-Munsee Community