No. 12-399

In the Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, *ET AL.*,

Respondents.

On Writ of Certiorari to Supreme Court of South Carolina

BRIEF FOR RESPONDENT BIRTH FATHER

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QUESTIONS PRESENTED

1. Whether an Indian child's biological father who has expressly acknowledged that he is the child's father and has established that he is the father through DNA testing is the child's "parent" within the meaning of the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963.

2. Whether ICWA governs state proceedings to determine the custody of a minor who all parties concede to be an "Indian child" within the meaning of the Act.

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BRIEF FOR RESPONDENT BIRTH FATHER

STATEMENT

Congress enacted the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963, to address a crisis in the Nation's Indian communities, which had seen shockingly high numbers of Indian children being raised, not by their natural parents or families, but by non-Indian adoptive and foster parents. The magnitude of this problem was so great, in the congressional view, that it threatened the very survival of Indian Tribes. Congress responded by enacting ICWA, which created a range of specific substantive and procedural protections that govern *all* child custody disputes involving Indian children—among them, rules that require special showings by anyone seeking to terminate "the parent-child relationship" between an Indian child and his or her parent.

Application of these rules, according to their plain terms and the manifest congressional intent, resolves this case. It is conceded both that the little girl at the heart of this dispute—Baby Girl—is an "Indian child" within the meaning of ICWA and that this contested adoption is an ICWA "child custody proceeding." Respondent Father, Baby Girl's natural father, unquestionably is a "parent" protected by ICWA's guarantees against the termination of parental rights. And as we show below and as the Cherokee Nation and the United States demonstrate in their respective briefs, petitioners, the would-be adoptive parents, failed to satisfy a number of ICWA's requirements. Each of those failures is independently fatal to petitioners' attempted adoption.

But the intense emotional interest on each side of the case inevitably means that there is more to

discuss here than the technical terms of ICWA. Petitioners assert that "Father stepped in at the eleventh hour to block an adoption that was lawful and in the 'best interests' of Baby Girl." Pet. Br. 1. That statement is false and cannot go unchallenged. In fact, Father asserted his claim to raise his daughter literally the moment he was belatedly informed of the attempted adoption, which never would have gone forward at all had accurate information about Father and Baby Girl been provided to Oklahoma authorities and the Cherokee Nation. The South Carolina Family Court, after a four-day hearing at which it heard the testimony of all interested parties, held that awarding custody to Father was in Baby Girl's best interest because "the birth father is a fit and proper person to have custody of his child," who "has convinced me of his unwavering love for this child." Pet. App. 127a-128a. The South Carolina Supreme Court affirmed that factual determination in every respect. This Court should not disturb such a holding that allows a natural father to raise his daughter.

A. Statutory background.

1. As this Court has explained, ICWA "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes" of "the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 32 (1989). More than "four years of congressional hearings, oversight, and investigation" identified an "Indian child welfare * * * crisis" (124 Cong. Rec. 38,101-02 (1978) (Rep. Udall)) in which an "alarmingly high percentage of Indian children, living within both urban communities and In-

dian reservations," were being raised "in foster or adoptive homes, usually with non-Indian families." S. Rep. No. 95-597, at 1 (1977). Experts estimated that "25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions." *Holyfield*, 490 U.S. at 32. Nationwide, the adoption rate for Indian children was eight times that for non-Indians, with 90% of these Indian children placed in non-Indian homes. H.R. Rep. No. 95-1386, at 9 (1978). See *Holyfield*, 490 U.S. at 33. There was substantial evidence that separation of these children from their Tribes and natural families often caused serious "social and psychological consequences" as the children got older. S. Rep. No. 95-597, at 43. See *Holyfield*, 490 U.S. at 50.

This crisis was exacerbated by what Congress described as state failure "to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). In Indian communities, it is common for a child to "have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family." H.R. Rep. No. 95-1386, at 10 (1978). Many state social workers, however, "consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." *Ibid.*

Overall, witnesses termed "'the wholesale removal of Indian children from their homes[] . . . the most tragic aspect of Indian life today.'" *Holyfield*, 490 U.S. at 32. And while much of this testimony addressed "the harm to Indian parents and their children," "there was also considerable emphasis on the impact on the tribes themselves." *Id.* at 34. As this

evidence showed, when Indian children are not raised in Indian homes, "the tribes' ability to continue as self-governing communities" is "seriously undercut." *Ibid.* Congress accordingly concluded in legislative findings that, although "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children" (25 U.S.C. § 1901(3)), "an alarmingly high percentage" of Indian children "are placed in non-Indian foster and adoptive homes and institutions." *Id.* § 1901(4).

2. Congress responded by enacting ICWA, which "'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.'" *Holyfield*, 490 U.S. at 37 (quoting H.R. Rep. No. 95-1386, at 23). The statute declares it "the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children." 25 U.S.C. § 1902. ICWA effectuates this goal by, among other things, setting "procedural and substantive standards for those child custody proceedings that do take place in state court." *Holyfield*, 490 U.S. at 36.

Thus, ICWA provides a range of protections for "parents" of "Indian children" who are involved in "child custody disputes." All of these terms are defined. As relevant here, a "parent" is "any biological parent * * * of an Indian child," excepting "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). An "Indian child" is "any unmarried person who is under eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian

tribe and is the biological child of a member of an Indian tribe." *Id.* § 1903(4). And "child custody proceeding" is broadly defined to include several specified types of action, including those leading to the "'termination of parental rights[,]' which shall mean any action resulting in the termination of the parent-child relationship." *Id.* § 1903(1)(ii).

For purposes of this litigation, two of ICWA's substantive parental protections are especially important. One is 25 U.S.C. § 1912(f), which provides that "[n]o termination of parental rights may be ordered in [an involuntary] proceeding in the absence of a determination, supported by evidence 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." The other is 25 U.S.C. § 1912(d), which declares that "[a]ny party seeking to effect a * * * termination of parental rights to[] an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."

In addition, ICWA provides Tribes a range of procedural and substantive protections (see *Holyfield*, 490 U.S. at 49), among them the right to intervene in child custody proceedings. And the statute specifies a hierarchy of preferences in the adoptive placement of Indian children, providing that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a). See *id.* § 1903(2) (listing members

of extended family). These provisions collectively demonstrate "a Federal policy that, where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 37 (quotation omitted).

B. Factual background.

This case involves a bitterly contested child custody dispute. Unsurprisingly, the parties and other participants offer very different accounts of the underlying facts. See, *e.g.*, Pet. App. 3a n.3, 4a n.4, 8a n.9. Our account generally follows that of the South Carolina Supreme Court majority and of the state Family Court, the latter of which took testimony and was in a position to assess the witnesses' credibility.[1]

1. Father, respondent here, and Mother are the biological parents of Baby Girl. Father is a registered member of respondent Cherokee Nation. Father and Mother were engaged at the time the child was conceived, while Father was serving in the United States Army and stationed at Fort Sill, Oklahoma. The Family Court found that Father "was excited to learn of the pregnancy and urged [Mother] to move the wedding date forward so the child would be born during their marriage. In that way, she and the unborn child would have military health coverage during and after the pregnancy, the family could obtain base housing, and his military pay would increase." Pet. App. 105a.

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[1] Baby Girl's Birth Mother has filed an *amicus* brief in this Court supporting petitioners. That brief makes factual assertions that are not supported by citations to, and are not grounded in, the record. See, *e.g.*, Br. *amica* Birth Mother 8-9. We note that in its preliminary bench ruling the Family Court repeatedly stated that it did "not find birth mother's testimony credible." Tr. of Record, Sept. 29, 2011, at 12-13.

In the months that followed, however, the relationship between the couple became strained. Mother lived in Bartlesville, Oklahoma, a four-hour drive from Fort Sill, and Father had few opportunities to visit her. Pet. App. 3a; Trial Tr. 480. In the past, the two had stayed in near-constant contact, often speaking by phone and sending each other text messages throughout the day. Trial Tr. 481. But that spring, Mother stopped answering Father's calls and did not respond to his text messages. Pet. App. 3a. In May, Father drove to Bartlesville to see Mother after obtaining a four-day pass, but she sent a text message refusing to see him; when he called at her home the next day she did not answer. Trial Tr. 483-484. On Father's return to Fort Sill he received another text message from Mother calling off their engagement. Pet. App. 3a; Trial Tr. 485. Although Father repeatedly attempted to speak with her, Mother refused to respond, choosing instead to "end[] all contact and communication between herself and [Father]." Pet. App. 105a.[2]

Father did not hear from Mother again until June 2009, when "Mother sent a text message to Father asking if he would rather pay child support or surrender parental rights." Pet. App. 4a. See also Trial Tr. 488. At first Father responded that he did not know what to do; he ultimately answered via text message that he would relinquish his rights, but testified that he believed he was "relinquishing his rights to Mother." Pet. App. 4a. See also Trial Tr.

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[2] This brief cites to the Family Court opinion that is reprinted in the sealed petition appendix. Although sealed below, the South Carolina Supreme Court has since unsealed the proceedings.

488. Father mistakenly thought that Mother was seeking full custody of Baby Girl and that by agreeing to relinquish his rights he was consenting to an arrangement similar to the one he had with his ex-wife, who had full custody of their daughter Kelsey. Trial Tr. 535-536. See also *id.* at 307. This agreement had allowed Father to maintain a strong relationship with Kelsey—as the Family Court found, the "undisputed testimony" showed that Father is a "loving and devoted father" to Kelsey (Pet. App. 126a)—without worrying about what might happen if he did not return from Iraq. Trial Tr. 562-563. In addition, Father still hoped that he and Mother might reconcile and believed that agreeing to this arrangement would further that end. *Id.* at 488-489.

During this exchange, "Mother never informed Father that she intended to place the baby up for adoption. Father insists that, had he known this, he would never have considered relinquishing his rights." Pet. App. 4a. As Father testified at trial:

> If I knew that * * * the adoption was going on, I would have said no, I wanted to keep my rights. And I would have fought then. I would have started right then and there. I would have went to military JAG and got a military lawyer and got started in the process of what I needed to do.

Trial Tr. 489. In fact, however, "[a]t approximately the same time [Mother] ended her relationship with [Father], she made the unilateral decision to give up the unborn child for adoption. [Father] had no knowledge of her plan." Pet. App. 105a. To the contrary, as described by the Family Court, "[a]ll attempts to contact [Mother] by [Father] and his family members were refused by [Mother]. * * * It was clear

that [Mother] wanted to have [Father] completely and permanently removed from her life and placing the child for adoption without his knowledge or consent would further this goal." *Id*. at 106a.[3]

Also in June 2009, Mother was introduced to petitioners, a couple living in South Carolina, through an Oklahoma adoption agency. Mother testified "that she knew 'from the beginning' that Father was a registered member of the Cherokee Nation, and that she deemed this information 'important' throughout the adoption process." Pet. App. 5a. Nevertheless, "it appears that there were some efforts to conceal [Father's] Indian status"; the adoption agency's preplacement form indicates that "'[i]t was determined that naming him would be detrimental to the adoption.'" Pet. App. 6a. Although Mother's attorney provided the Cherokee Nation with father's name while inquiring whether the child would be an "Indian child" subject to ICWA, the attorney misspelled Father's first name and provided both the wrong day and wrong year for Father's date of birth; based on these misstatements, the Cherokee Nation responded that the child appeared not to be an Indian child, adding that any misinformation would invalidate that determination. *Ibid*. Mother testified at trial that she knew the Cherokee Nation's determination could not be correct—and that she informed her attorney of that fact—but no further efforts were made

[3] There was conflicting testimony on whether Father or his family attempted to contact Mother in the period before or immediately after Baby Girl's birth. See Pet. App. 8a & n.9.

to determine whether Baby Girl was an Indian child. Trial Tr. 311.[4]

Baby Girl was born on September 15, 2009. The next morning, Mother signed forms relinquishing her parental rights and consenting to the adoption by petitioners. Pet. App. 7a. At the time, petitioners were required to receive permission pursuant to the Interstate Compact on Placement of Children as a prerequisite to taking Baby Girl to South Carolina. The necessary forms, signed by Mother, "reported Baby Girl's ethnicity as 'Hispanic' instead of 'Native American.'" *Ibid*. Following submission of this misinformation, petitioners received permission to take Baby Girl to South Carolina. The misstatements were essential to the progress of the adoption: "Had the birth father's status as a member of the Cherokee Nation been known, neither the Cherokee Nation nor the Oklahoma ICPC agency would have consented to the removal of the child from Oklahoma." *Id.* at 107a. See also *id*. at 7a-8a & n.8.

Petitioners filed this adoption action in South Carolina on September 18, 2009, three days after Baby Girl's birth. But they failed to inform or serve Father for almost four months, waiting to notify him until "days before [he] was scheduled to deploy to Iraq." Pet. App. 8a. At that time, a process server presented Father with legal papers outside a mall

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[4] Denying "bad motives" in the misspelling of Father's name, petitioners make the unlikely assertion that Father himself repeatedly misspelled his own name. Pet. Br. 8 n.2. In fact, the bank checks petitioners identify containing the misspelling are cashier's checks on which Father's name was incorrectly typed by the bank. See JA 70-76. In any event, it is not us, but the South Carolina Supreme Court, that noted the "efforts to conceal [Father's] Indian status." Pet. App. 6a.

near his base stating "that [Father] was not contesting the adoption of Baby Girl." *Id.* at 8a-9a. Father agreed to sign, believing that would give Mother full custody of Baby Girl. Trial Tr. 489. Upon being told that Mother had relinquished her rights to petitioners, Father attempted to grab the documents, but the server told Father he would go to prison if he damaged the papers. *Id.* at 495. Father then immediately consulted with a JAG lawyer at his base, retained a personal attorney at the JAG lawyer's recommendation, sought a stay of the adoption proceeding pursuant to the Servicemember's Civil Relief Act, and began an action to establish paternity and obtain child custody. Pet. App. 9a. Within days of this development, Father "was deployed to Iraq where he served this country honorably during Operation Iraqi Freedom for a period of nearly one year." *Id.* at 108a. Meanwhile, the Cherokee Nation identified Father as a registered member and intervened in the South Carolina adoption action pursuant to ICWA. *Id.* at 10a.

The Family Court ordered paternity testing, which conclusively confirmed that Father is Baby Girl's biological father. Pet. App. 10a.

2. The Family Court appointed a guardian ad litem ("GAL") who has filed a brief in this Court that purports to be on behalf of Baby Girl and asserts that Baby Girl's interests would be best served by awarding custody to petitioners. GAL Br. 22. In fact, the GAL is not a neutral party. Although appointed by the Family Court, that court noted that the GAL and her attorney both "were unilaterally selected by [petitioners'] counsel" (Pet. App. 129a); the GAL had a continuing business relationship with petitioners' attorney, with whom she had worked frequently in

the past and who had already referred her multiple cases in 2009. Trial Tr. 591-592.

In this case, although the GAL had performed a comprehensive home study of petitioners, she resisted repeated requests from Father's attorney to conduct a home study of Father. Trial Tr. 619-621. When the GAL finally did conduct such a study, well over a year after her appointment and some five months after counsel's request, she informed Father and his family that "she knew the adoptive couple prior to the child being placed in their home" and "had worked with them before the child had been placed" (JA 113); that petitioners were a well-educated couple with a beautiful home, could afford to send Baby Girl to any private school that they chose and, when she was older, to any college she wanted; and that there was nothing that Baby Girl needed that petitioners could not buy for her. JA 146-147. The GAL therefore told Father's family that they "really need[ed] to get down on [their] knees and pray to God that [they] can make the right decision for this baby" (*id.* at 148), and they "needed to talk to God and pray about taking the child from the only family that she has known" (*id*. at 113). At trial, Father stated that the GAL treated him and his family as "a bunch of * * * rednecks that can't * * * afford anything, that we're not able to provide this child with proper education, schooling * * *. Pretty much that we weren't fit to love this child and raise her." Trial Tr. 514.

The GAL's initial report did not note Baby Girl's Native American heritage because the GAL thought that was "not something * * * the courts need to take into consideration." Trial Tr. 632. As for the GAL's view of Native American culture, she stated that the

advantages of having Native American heritage "include[ed] free lunches and free medical care and that they did have their little get togethers and their little dances." *Id.* at 634.

Given the GAL's obvious bias, respondents initially sought her removal. But rather than delay the proceedings, respondents ultimately withdrew this motion on the understanding that the Family Court would *not* consider either the GAL's conclusion regarding Baby Girl's best interests or the GAL's custody recommendation. See Pet. App. 51a n.44. Indeed, South Carolina law *precludes* a guardian ad litem in a private adoption from providing a custody recommendation unless one is requested by the court (see S.C. Code § 63-3-830(A)(6)); no such request was made here.

3. After holding a four-day hearing to resolve custody of Baby Girl, the Family Court determined that ICWA applied to the proceeding, rejecting petitioners' invocation of the so-called "existing Indian family" doctrine that, petitioners asserted, barred application of ICWA when the Indian child was not part of an "Indian family" at the time of the proceeding. Pet. App. 118a. The court went on to hold that Father meets ICWA's definition of "parent" because "he has both acknowledged paternity and paternity has been conclusively established in this action through DNA testing." *Id.* at 119a-120a. This meant that "the only way this adoption can be granted is if the [petitioners] prove grounds upon which [Father's] parental rights can be terminated [under South Carolina law], and prove that custody of the minor child with [Father] is likely to result in serious emotional or physical damage to the child [under ICWA]." *Id.* at 122a-123a.

The court found as a matter of fact that petitioners failed to prove either of those things. Pet. App. 123a-128a. The court noted that Father "is the father of another daughter" and that "[t]he undisputed testimony is that he is a loving and devoted father. Even [Birth Mother] herself testified that [Father] was a good father. There is no evidence to suggest that he would be anything other than an excellent parent to this child." *Id.* at 126a-127a. Accordingly, the court found that "the birth father is a fit and proper person to have custody of his child"; he "has demonstrated that he has the ability to parent effectively" and "has convinced me of his unwavering love for this child." *Id.* at 127a-128a.

The court concluded that, "[w]hen parental rights and the best interests of the child are in conflict, the best interests of the child must prevail. However, in this case I find no conflict between the two." Pet. App. 128a. The court added that, although petitioners had Baby Girl in their care for two years, "[w]hen this child was but four months old, [petitioners] knew her natural father wanted custody of his daughter and he was contesting the adoption both in Oklahoma and in South Carolina. However, they elected to pursue adoption over his objection. Custody and parental rights cannot be gained by adverse possession." *Ibid.*

The court accordingly denied the adoption and required petitioners to transfer Baby Girl to Father. The transfer took place on December 31, 2011. Pet. App. 2a. As of this writing, Baby Girl, now a three-year-old, has resided with Father in Oklahoma for more than a full year.

4. On appeal petitioners changed their approach, expressly waiving reliance on the "existing Indian

family doctrine" and disavowing any contention that ICWA is unconstitutional.[5] The South Carolina Supreme Court nevertheless affirmed. Pet. App. 1a-102a.

Although closely divided on other grounds, the court was unanimous in the view that the "existing Indian family" doctrine is invalid, "[g]iven that its policy conflicts with the express purpose of the ICWA"; the court noted that "we join the majority of our sister states who have rejected the EIF or have since abandoned the exception." Pet. App. 17a-18a n.17. Accord *id*. at 55a n.46 (Kittredge, J., dissenting). The court also was unanimous in rejecting petitioners' argument that, because South Carolina law did not require Father's consent to the adoption, he does not qualify as a "parent" under ICWA. The court explained that this argument "collapse[s] the notions of paternity and consent," and that "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 up for adoption and establishing his paternity through DNA testing." *Id.* at 22a. Accord *id*. at 58a (Kittredge, J., dissenting).

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[5] Petitioners did not argue either point in their briefs to the South Carolina Supreme Court. When pressed at oral argument, petitioners' counsel stated: "I am not arguing the Existing Indian Family doctrine. Made a conscious decision." He then reiterated that "we are not advocating" the "Existing Indian Family doctrine" and, when asked whether he challenged the constitutionality of the Family Court decision, stated: "No, we abandon all those [arguments]. Conscious decision. Known relinquishment." Because the court below does not prepare a transcript, these statements were transcribed from an audio recording of the argument.

Having found that ICWA applies, the court held that "we may only grant [petitioners'] adoption decree with respect to Father in the absence of his voluntary consent if [petitioners] can establish grounds for involuntarily terminating Father's parental rights under state law *and* the ICWA." Pet. App. 25a. Like the Family Court, the South Carolina Supreme Court held that petitioners made neither showing. It first found there had been no effort to undertake the remedial measures required by 25 U.S.C. § 1912(d) prior to the termination of parental rights; the court held that "a finding on these facts that the remedial measures mandated by the ICWA may be waived would be an unwarranted substitution of this Court's preferences for the clear dictates of statutory law." *Id.* at 26a-27a. The court went on to rule that petitioners also "have not satisfied their burden of proving Father's custody of Baby Girl would result in serious emotional or physical harm to her beyond a reasonable doubt," as required by 25 U.S.C. § 1912(f), and that "we can only conclude from the evidence presented at trial that Father * * * and his family have created a safe, loving, and appropriate home for her." *Id.* at 29a, 32a.

Turning next to the state-law inquiry into the best interests of Baby Girl, the court observed that this question "is not *replaced* by ICWA's mandate," but that, "[w]here an Indian child's best interests are at stake, our inquiry into that child's best interests must also account for his or her status as an Indian," given that "ICWA is 'based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected.'" Pet. App. 34a-35a (quoting *Holyfield*, 490 U.S. at 50 n.24). And here, "we cannot say that Baby Girl's best interests are not served by the grant of custody to

Father, as [petitioners] have not presented evidence that Baby Girl would not be safe, loved, and cared for if raised by Father and his family." *Id.* at 36a-37a.

Although that was enough to resolve the case, the court also held in the alternative that, "even if we were to terminate Father's rights, section 1915(a) of the ICWA establishes a hierarchy of preferences for the adoptive placement of an Indian child." "The party seeking to deviate from the preferences bears the burden of demonstrating that good cause [to do so] exists." Pet. App. 37a-38a. And here, the court found as a fact that petitioners did not demonstrate "the basis for deviation from the statutory placement preferences." *Ibid.*

INTRODUCTION AND SUMMARY OF ARGUMENT

There are some points in this case on which the parties agree. No one contests that Baby Girl is an "Indian child" and that this case is a "child custody proceeding" within the meaning of ICWA. Petitioners also do not dispute that, if ICWA precludes the termination of Father's parental rights, the adoption cannot go forward. In that circumstance, Father's parental rights will remain intact, he may assert his claim for custody of Baby Girl, and there would be no basis for setting aside the decisions of the state courts awarding Father custody under South Carolina law. Petitioners likewise appear to recognize that that the adoption cannot proceed if ICWA's preferential placement provision applies, which would offer an independent basis for affirming the decision below.

Against that background, the case presents two sets of questions. The first is whether Father is a

"parent" entitled to assert the protections that ICWA accords the parents of Indian children. The second is whether ICWA's language, or the "existing Indian family" policy that petitioners purport to find implicit in the statute, somehow precludes the application of ICWA's substantive limitations on the termination of parental rights (25 U.S.C. §§ 1912(d) and 1912(f)) and preferential placement guarantee (*id.* § 1915) in the circumstances of this case. Petitioners are wrong on each of these points.

I. Father is a "parent" within the meaning of ICWA and is entitled to invoke ICWA's protections against the termination of parental rights. Congress defined "parent" as "any biological parent * * * of an Indian child," excepting only an unwed father whose "paternity has not been acknowledged or established." It is undisputed that Father is Baby Girl's biological parent. He "acknowledged" his paternity by declaring that he is Baby Girl's father and bringing suit to establish that fact; he "established" it through a conclusive DNA test. That is precisely what the plain terms of the statute require. Petitioners' contrary contention, that ICWA's "parent" definition incorporates unexpressed state-law standards, is inconsistent with the statutory text, contrary to Congress' plain intent to adopt a federal definition, confuses the rules governing paternity and parental rights—and is unavailing even if correct, because Father also satisfies the relevant state-law paternity standard.

II. Invoking a version of the "existing Indian family" doctrine, petitioners insist that ICWA's provisions protecting parental rights apply only in cases where the parent invoking ICWA already had custody of the Indian child under state law. That is incor-

rect. ICWA's text makes no reference to any such doctrine, and the manifest congressional intent—apparent in the statutory language, structure, and background—precludes any such "pre-existing custody" requirement. Congress provided express statutory protections to all parents who had a legal relationship with an "Indian child"; sought to protect Tribes against the loss of their children, whether or not the children were in a "preexisting Indian family"; and protected Indian children themselves against what Congress identified as harmful adoptive placements outside Indian culture. All of these goals would be thwarted by petitioners' "existing Indian family" doctrine.

Petitioners also are wrong in arguing that Sections 1912(d) and 1912(f), the particular ICWA provisions at issue here that limit the termination of parental rights, have no application in this case. These provisions apply in every "child custody proceeding," which ICWA broadly defines to include any action that would terminate the "parent-child relationship." Section 1912(f) provides that "[n]o termination of parental rights may be ordered" absent a determination that "continued custody" of the child by the parent would harm the child, which in this context requires a showing that continuation of the parent-child legal relationship would cause injury. Petitioners concededly have not made such a showing here. By the same token, Section 1912(d) precludes termination of parental rights absent a demonstration that "active efforts have been made to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." Petitioners also have failed to make this showing. For both of these reasons, petitioners cannot prevail.

III. The decision below also should be affirmed for the independent reason that petitioners' attempted adoption is precluded by the preferential placement provision of Section 1915, which requires that preference in the adoptive placement of an Indian child be given to specified parties. That concededly was not done here. Petitioners attempt to evade this failure by insisting that here, too, the "existing Indian family" doctrine applies. But that argument is utterly without textual support in ICWA, which by its terms contemplates application of Section 1915 when the child is not part of an existing Indian family.

IV. ICWA is constitutionally applied in the circumstances of this case.

First, so far as equal protection principles are concerned, the distinction petitioners would draw between application of ICWA to custodial and noncustodial parents is chimerical; in both cases, Congress properly acted on the basis of sovereignty rather than race to bolster Tribes as political entities.

Second, application of ICWA does not "upset the federal-state balance," given Congress' plenary power with respect to Indian Tribes and the extensive findings Congress made on the need for ICWA's protections.

Third, the Court has never recognized extravagant substantive due process rights of the sort petitioners and the GAL assert on behalf of the Birth Mother and Baby Girl. The Constitution does not preclude application of ICWA according to its plain terms.

ARGUMENT

I. AN UNDISPUTED BIOLOGICAL FATHER WHO HAS BOTH EXPRESSLY ACKNOWLEDGED AND CONCLUSIVELY PROVED PATERNITY OF AN INDIAN CHILD IS A "PARENT" UNDER ICWA.

Petitioners first assert that Father is not a "parent" entitled to invoke ICWA's protections against the termination of parental rights because "[t]he word parent 'describes a legal status' that 'requires a reference to the law of the State which create[s] these relationships.'" Pet. Br. 20. But in the circumstances here, that proposition is self-evidently incorrect. In ICWA, Congress gave "parent" a specific, factual meaning: a "parent" is "any biological parent * * * of an Indian child or any Indian person who has lawfully adopted an Indian child," excepting only "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). And while it doubtless is true that "Congress passed ICWA with the understanding that 'a biological parent is not *necessarily* a child's parent under law'" (Pet. Br. 24 (citation omitted; emphasis added)), that is exactly what Congress said a parent *is under ICWA*.

1. Petitioners concede that Father is Baby Girl's biological father. As for the remainder of ICWA's "parent" definition, the words "acknowledge" and "establish" had an ordinary and unambiguous meaning when ICWA was enacted, just as they do today. To "acknowledge" is "to show by word or deed that one has knowledge of and agrees to (a fact or truth)"; to "establish" is "to prove or make acceptable beyond a reasonable doubt" or "to provide strong evidence for: bring unavoidably to the attention." Webster's Third

New International Dictionary 17, 778 (1981). Thus, in the particular circumstances here, an unwed father must make an "avowal or admission that the child is [his] own" or act "[t]o settle * * * [or] prove" his paternity. Black's Law Dictionary 21, 490 (5th ed. 1979) (definitions of "acknowledge" and "establish"). That is precisely what Father has done. As the court below explained, Father at all times stated that he is Baby Girl's father and promptly contested Baby Girl's adoption (thus "acknowledging" paternity); he submitted to a genetic test that conclusively proved he is the natural father (thus "establishing" it). See Pet. App. 20a-22a, 58a. See also *Bruce L.* v. *W.E.*, 247 P.3d 966, 979 (Alaska 2011). That is enough to settle the matter.

It may be added that there is no doubt what it means to acknowledge or establish "paternity"; in 1978 "paternity" ordinarily was understood to mean the simple biological fact of fatherhood, as it does today. Paternity is "[t]he quality or state of being a father" or "origin or descent from a father: male parentage." Webster's Third New International Dictionary 1654 (1981). See Black's Law Dictionary 1014 (5th ed. 1979) ("paternity" is "the state or condition of a father"); *id.* at 547 (defining "father" to mean "[h]e by whom a child is begotten. Natural father, procreative of a child."). That is what Father acknowledged and established.

Petitioners offer a single textual response: that, "[b]ecause the first sentence [of Section 1903(9)] already covers an unwed father whose biological link is acknowledged or established, the canon against superfluity counsels reading the second sentence to require more than a proven biological connection." Pet. Br. 22-23. But as the United States shows (U.S. Br.

17-18), this contention misses the statutory point. The provision's second sentence excludes certain biological fathers from the definition, thus relieving a court of the need to identify the father where paternity has not been acknowledged or established, which the court otherwise would have to do to comply with various ICWA procedural requirements. U.S. Br. 18.

The second sentence also sets out the steps necessary to demonstrate paternity in an era when definitive DNA testing was unavailable. The language of "acknowledge" and "establish" was generally used at the time of ICWA's enactment to describe methods of proving paternity—by, for example, executing a writing acknowledging parentage. See, *e.g.*, Uniform Parentage Act §§ 3(2), 4(a)(5), 12 (1973) ("the natural father may be established under this Act"; a man is presumed to be the natural father of a child if "he acknowledges his paternity of the child in a writing" filed with the appropriate court or agency that the mother does not dispute; evidence "[r]elating to [p]aternity" includes scientific evidence and "all other evidence relevant to the issue of paternity of the child"). There can be no doubt that steps of this sort to show the *fact* of paternity, and not a veiled reference to unstated state-law standards, is what Congress intended in ICWA.[6]

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[6] Petitioners are wrong to rely on the House Report's statement that ICWA was "not meant to conflict with the decision of the Supreme Court in *Stanley*" v. *Illinois*, 405 U.S. 645 (1972), for the proposition that Congress chose not to disturb "the State's inherent police power to limit an unwed father's rights when he has not formed a relationship with his child." Pet. Br. 27 (citing H.R. Rep. No. 95-1386, at 21). *Stanley* recognized *expanded* constitutional protections for unwed fa-

2. Even if the statutory text left room for doubt on this question, the structure and policy of ICWA make clear that Congress did not intend the application of the statute's "parent" definition to be governed by state law, for reasons the Court addressed at some length in *Holyfield*.

The Court there noted as a general matter "that 'in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.'" *Holyfield*, 490 U.S. at 43. And here, in particular, "the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term" *Id.* at 44. Quite the contrary: "Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities," and it "perceived the States and their courts as partly responsible for the problem it intended to correct. * * * Under these circumstances, it is most improbable that Congress would have intended to leave the scope of" a key provision "subject to definition by state courts as a matter of state law." *Id.* at 44-45. As the United States shows (U.S. Br. 16), this principle actually applies with greater force in this case than in *Holyfield* because, although Con-

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thers; the report language invoked by petitioners shows only that Congress did not depart from *Stanley* by categorically *denying* rights to unwed fathers. The other decisions of this Court addressing the constitutional rights of unwed fathers that are cited by petitioners (see *id.* at 25, 27), which were not mentioned by Congress or post-dated ICWA's enactment altogether, have no bearing here.

gress did not define the term at issue in *Holyfield* ("domicile"), it did define "parent."[7]

Moreover, "a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind." *Holyfield*, 490 U.S. at 46. Yet defining "parent" by looking to state adoption-consent law, as petitioners advocate, would transform ICWA into an unworkable "patchwork plan." *NLRB* v. *Hearst Publ'ns, Inc.*, 322 U.S. 111, 123 (1944). At the time that Congress enacted ICWA, state adoption-consent laws varied dramatically. See generally *Aslin* v. *Seamon*, 587 P.2d 875, 878-879 (Kan. 1978) (collecting state laws on consent to adoption by the father of an illegitimate child); Br. for Resp't at 50, *Stanley* v. *Ill.*, 405 U.S. 645 (1972) (No. 70-5014), 1971 WL 126678 (same). Some States required the unwed father's consent only if he had established paternity according to the jurisdiction's own laws; others if he had established paternity under the laws of *any* jurisdiction; and still others required him both to acknowledge paternity and to legitimate the child. Others did not require his consent under any circum-

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[7] In fact, "had Congress intended a state-law definition," "it would have said so," as it did elsewhere in ICWA. *Holyfield*, 490 U.S. at 47 n.22. Indeed, in another statute passed one year after ICWA, Congress defined "parent" to mean "biological or adoptive parents or legal guardians, *as determined by applicable State law*." Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 475(2), 94 Stat. 500, 510 (emphasis added). It pointedly imposed no such condition in ICWA.

stances at all.[8] The Congress that recognized "the failure of state officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and * * * Indian tribe[s]" (H. Rep. No. 95-1386, at 19) could not have intended ICWA to apply in this manner.[9]

3. Finally, as the United States also correctly notes (U.S. Br. 17), Father would qualify as an ICWA "parent" even if state law did govern. The DNA test that Father took is sufficient to "establish * * * paternity" in South Carolina. S.C. Code § 63-17-10(C); see *id.* § 63-17-30(A). Petitioners' contrary argument rests on a basic misunderstanding of state law. Rather than look to South Carolina law on *paternity*, they argue that ICWA's definition of parent incorporates state law governing *adoption rights*. But as every member of the South Carolina Supreme Court

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[8] These laws were declared unconstitutional in 1979, after ICWA's enactment. See *Caban* v. *Mohammed*, 441 U.S. 380 (1979).

[9] Petitioners complain that "'paternity as a factual matter' is nothing more than a biological standard that would sweep in sperm donors and rapists." Pet. Br. 28. But the possibility of imagining aberrational cases that Congress surely did not contemplate—and that evidently have never arisen during the 35 years that ICWA has been in force—cannot dictate the meaning of the statute. Indeed, in the case of rapists, some States have found it necessary specifically to limit their parental rights. See, *e.g.*, 750 Ill. Comp. Stat. Ann. 50/8(a)(5); S.D. Codified Laws § 25-4A-20; Tex. Fam. Code Ann. § 161.007. Congress is fully capable of doing likewise if that proves necessary in practice under ICWA. But "[i]t is not the function of the courts to amend statutes under the guise of 'statutory interpretation.'" *Fedorenko* v. *United States*, 449 U.S. 490, 513 n.35 (1981).

observed, this contention improperly "collapse[s] the notions of paternity and consent." Pet. App. 22a. See *id.* at 58a (Kittridge, J., dissenting) ("The issues of paternity and whether one's consent is required in an adoption proceeding are separate questions.").

Every other state court of last resort that has looked to state law in applying Section 1903(9) likewise has invoked state procedures for acknowledging and establishing paternity, as ICWA's plain terms dictate. See *Bruce L.*, 247 P.3d at 979; *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 934 (N.J. 1988); *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1064 n.18 (Okla. 1985). There accordingly is no doubt: Father is a "parent" under ICWA.

II. THE "EXISTING INDIAN FAMILY DOCTRINE" HAS NO BASIS IN ICWA.

Petitioners' other argument rests on the "existing Indian family" doctrine, under which, they say, ICWA may be applied only "to preserve a preexisting Indian family." Pet. Br. 30. It is not entirely clear what petitioners mean by this. The words "preexisting Indian family" do not appear in, and of course are not defined by, ICWA; the doctrine is an extratextual rule created by a handful of state-court judges.

And petitioners themselves have been unable to decide on the basis for their theory, which they have now articulated in four quite different ways during the course of this litigation. Before the Family Court they did not identify *any* textual basis for the doctrine in ICWA, instead contending that Father's "connection to the Cherokee Nation is in name only" and that "[i]n the absence of a strong cultural tie to the Cherokee Nation, the application of ICWA to this

case is unconstitutional." Pl. Post-Trial Br. 11. Before the South Carolina Supreme Court, petitioners changed course and disclaimed *any* reliance on the doctrine at all. See page 15, *supra.* In their certiorari petition to this Court, petitioners resurrected their invocation of the doctrine but grounded it in 25 U.S.C. § 1912(f). See Pet. 25. And in their merits brief, petitioners now expressly disavow their original "not Indian enough" theory—"we make no such argument that questions Father's tribal ties" (Pet. Br. 41)—but for the first time assert that the doctrine rests on a *half-dozen* ICWA provisions. *Id.* at 30-39. This prior disavowal of and failure to articulate their current position suggests the Court should view it with skepticism.

But petitioners' theory is, in any event, wrong on its own terms. Although the scope of their proposed rule is obscure, petitioners appear to contend, at a minimum, that neither a parent nor a Tribe may invoke ICWA when the Indian child who is the subject of a proceeding to terminate parental rights is currently in the state-law custody of a non-Indian. See, *e.g.,* Pet. Br. 29, 51-52. As a consequence, they insist that the ICWA provisions establishing standards for the termination of parental rights and preferences for the adoptive placement of Indian children—as relevant here, Sections 1912(d) and (f), and 1915(a)—have no application in this case. This contention, however, is utterly inconsistent with the central goals and plain text of ICWA. The court below correctly held that each of these provisions applies and bars the termination of Father's parental rights.

A. ICWA governs all child custody disputes involving Indian children.

Petitioners maintain that, when an Indian child is in the state-law custody of a non-Indian who seeks to place the child for adoption, "ICWA's purpose to prevent the unwarranted removal of Indian children and the continuation of their existing Indian ties is not implicated." Pet. Br. 39-40. They then use this proposition as the foundation for their further assertion that *none* of ICWA's provisions apply in these circumstances. But for several fundamental reasons, that assertion cannot be reconciled with ICWA's express statutory declaration of purpose to protect Indian parents, Tribes, and children.

1. At the outset, Congress very plainly did not intend to confine its protection of parental rights, the subject of proceedings involving Sections 1912(d) and 1912(f), to those parents who have state-law custody of the child at the time of the proceeding. To the contrary, Congress took extraordinary steps in ICWA to protect *all* parent-child relationships. ICWA's definition of "child custody proceeding," a term that is central to the statute's application, therefore broadly includes proceedings directed at the "termination of parental rights," which in turn is defined in the most inclusive terms to "mean any action resulting in the termination of the parent-child relationship." 25 U.S.C. § 1903(1)(ii).

In writing this language, Congress quite consciously moved beyond limited state-law custody concepts, addressing ICWA to *all* proceedings that would alter the legal relationship between parent and child. In its original form, the Senate bill that became ICWA placed heavy emphasis on legal custody, using the term "child placement" to describe what

ultimately became "child custody proceeding" and defining "child placement" as:

> [A]ny proceedings * * * under which an Indian child is removed by a nontribal public or private agency from (1) the *legal custody* of his parent or parents, (2) the *custody* of any extended family member in whose care he has been left by his parent or parents, or (3) the *custody* of any extended family member who otherwise has custody in accordance with Indian law or custom, or (4) under which the parental or *custodial* rights of any of the above mentioned persons are impaired.

S. 1214, 95th Cong. § 4(h) (1977) (emphases added). See also H.R. 12,533, 95th Cong. § 4(9) (1978) (defining "placement" as "any action resulting in the removal of an Indian child from the *custody* of his or her parent or Indian custodian where such removal results in the loss by such parent or Indian custodian *of the unconditional right to regain custody* upon demand") (emphasis added). But as enacted, all of this language of "legal custody" was omitted; ICWA's definition of "child custody proceeding" makes no reference to "custody" at all.

Unsurprisingly, many provisions of ICWA therefore confer rights on parents wholly without regard to the existence of state-law custody—or, for that matter, of what petitioners label a "preexisting Indian family." These include the parent's right to petition to move a proceeding for termination of parental rights from state to tribal court (25 U.S.C. § 1911(b)); to notice of such a proceeding (*id.* § 1912(a)); and to appointment of counsel in such a proceeding if indigent (*id.* § 1912(b)). ICWA also gives parents special protections relating to the voluntary termination of

parental rights and to voluntary adoption (*id.* § 1913(a), (c), and (d)), even though, as in this case, the children involved in such actions may never live with, let alone be in the legal custody of, the biological parents. And as we have shown, Congress took pains to include unwed fathers within ICWA's definition of "parent," even though some of these fathers will not have custody of their children under state law. See Pet. Br. 33 n.4. Congress would not have given non-custodial parents these rights had it not meant to entitle such parents to invoke the full range of ICWA protections.

There is no mystery why Congress took this expansive approach to the protection of parental rights: among the principal abuses that prompted the enactment of ICWA were attempts to strip parental rights from non-custodial parents, such as those whose children had been placed in temporary foster care. See, *e.g.*, H.R. Rep. No. 95-1386, at 11 (addressing typical example of an Indian parent who "was persuaded to sign a waiver granting temporary custody to the State, only to find that this is now being advanced as evidence of neglect and grounds for the permanent termination of parental rights"). Yet petitioners' reading would exclude all of those cases from the statute's scope, while also making ICWA inapplicable to a wide range of non-custodial parents who wish to avoid "termination of parental rights"—such as, to name just a few, divorced parents who have only visitation rights and virtually all unwed fathers. Congress could not have intended a statute broadly designed to protect parental rights to have such a result.

2. Petitioners' attempt to hinge application of ICWA on the child's current status as a member of

an "existing Indian family" also wholly ignores the tribal interest that underlies the statute. In enacting ICWA, Congress emphasized that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3). This Court therefore has recognized that ICWA "'seeks to protect the * * * rights of the Indian community and tribe in retaining its children in its society.'" *Holyfield*, 490 U.S. at 37. This background leaves no doubt that "Congress was concerned not solely with the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." *Id.* at 49. As the Court continued, "[t]he numerous prerogatives accorded the tribes through ICWA's substantive provisions * * * must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves." *Ibid.* These prerogatives include a litany of provisions that give Tribes the right to participate in ICWA child custody proceedings. See *ibid.* (citing provisions).

Not one of these provisions is conditioned on the Indian child being in the custody of an Indian parent or part of a "preexisting Indian family" at the time of the ICWA child custody proceeding. The reason is obvious: the goal of assisting Tribes "in retaining [their] children in * * * society" and limiting "the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians" is in no way limited to children who are in the legal custody of an Indian at the time of the child custody proceeding. The threat to the survival of Tribes from "being drained of their children" (124 Cong. Rec. 38,102 (1978) (Rep. Udall)) is no less serious simply because

the child's biological parent does not have custody at the time of the adoptive placement. Petitioners' invocation of the "existing Indian family" doctrine would largely read this policy out of the statute.[10]

It is no answer to this point that Birth Mother could have chosen not to "expose[] the child to an Indian culture" had she retained custody and raised Baby Girl herself. Pet. Br. 41-42. For obvious reasons, Congress did not attempt to dictate how natural parents raise their *own* children, whether those parents are Indian or not, just as it chose not to address the award of custody as between divorcing parents. 25 U.S.C. § 1903(1). But when Birth Mother chose *not* to raise Baby Girl, the question became what considerations determine who will get custody, as between non-Indians who had no prior connection to the child and Baby Girl's Indian natural father. Congress determined *that* choice should be guided by the significant tribal and federal interest in "the future and integrity of Indian tribes and Indian families." 124 Cong. Rec. 38,102 (1978) (Rep. Udall).

3. In addition, petitioners entirely ignore the Indian child's own interest. Petitioners think it immaterial to an Indian child whether he or she is raised in an Indian environment because, in a case like this one, "the continuation of their existing Indian ties is not implicated." Pet. Br. 39-40. But Congress was of a very different view. As the Court explained in *Holyfield*, "it is clear that Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental im-

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[10] Petitioners do not, and could not, contend that ICWA is limited to children domiciled on a reservation. See, *e.g.*, 25 U.S.C. § 1911(b); *Holyfield*, 490 U.S. at 36.

pact on the children themselves of such placements outside their culture." 490 U.S. at 49-50. "Thus, the conclusion seems justified that * * * '[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected.'" *Id*. at 50 n.24.

That view is plain from the statutory text. "Indian child" is defined as an unmarried person under the age of 18 who "is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). That ICWA governs custody proceedings concerning children who are *eligible* for tribal membership makes apparent that Congress extended ICWA's protections to children who have not yet formed their Indian identities. And this, too, was a well-considered choice. The Department of Justice had objected to defining "Indian child" as including a child "who is merely eligible for membership * * * [and] is lodged exclusively with nontribal members," proposing that the definition be limited to a child who is "eligible for membership in an Indian tribe and is *in the custody of a parent who is a member of an Indian tribe."* H.R. Rep. No. 95-1386, at 39 (emphasis added). But Congress expressly rejected the change, declaring that, regardless of who has custody of the child at the time of the ICWA proceeding, any child who is eligible for tribal membership and whose biological parent is a tribal member has a "right to share in the cultural and property benefits of an Indian tribe." *Id.* at 20. It therefore could not be plainer that Congress wanted the provisions of ICWA applied even to Indian children who were *not* in the state-law custody of an Indian parent at the time of the "child custody proceeding." For this reason as well, the "existing Indian family" doctrine

cannot be squared with ICWA's language and purpose.

4. Against this background, it is not surprising that petitioners' position cannot be reconciled with this Court's decision in *Holyfield*, with the views of most state courts, and with subsequent congressional action.

In *Holyfield*, an Indian couple took pains to ensure that their twins would not be born on a reservation and, immediately after birth, the biological parents "'voluntarily surrendered and legally abandoned'" the children to non-Indian adoptive parents. Those acts led a state court to conclude (as petitioners argue here) "that, for this reason, *none* of the provisions of the ICWA was applicable." *Holyfield*, 490 U.S. at 40. This Court reversed. Although the specific holding of *Holyfield* was that the twins were domiciliaries of the reservation and therefore subject to tribal jurisdiction (see *id.* at 43-54), the Court's broader rationale dooms petitioners' case. The twins, who were legally abandoned by their parents virtually at birth, were not in the custody of Indian parents at the time of the "child custody proceeding." Had it not been for ICWA's application the twins would never have been raised in an Indian environment; far more than in this case, application of ICWA in *Holyfield* would, in petitioners' terms, "create a new Indian family." Pet. Br. 41.[11] Yet this Court held

[11] In *Holyfield* no Indian family members sought custody; the Tribe intervened to have the adoption set aside on the ground that the tribal court had exclusive jurisdiction over the proceeding. 490 U.S. at 38-40. Here, of course, Baby Girl has an Indian father who seeks custody. As it happens, after the Tribe prevailed in this Court, the tribal court in *Holyfield* found it in the children's best interest for the non-

ICWA to apply, invoking Congress' goal to protect both Tribes and Indian children (see 490 U.S. at 49-50)—and offering no suggestion that the lack of an "existing Indian family" had any relevance.

Moreover, those state courts that have addressed the "existing Indian family doctrine" have rejected it overwhelmingly.[12] A half dozen state legislatures have as well.[13]

And acting almost twenty years after ICWA's enactment, the Senate Committee on Indian Affairs, by a vote of 14-1, rejected a proposal to adopt the "existing Indian family" doctrine "because it had great potential for harm to Indian children, to Indian families, and to fundamental principles of Federal-tribal relations and tribal sovereignty," and "[a]t the very

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Indian adoptive mother to retain custody. See Barbara Ann Atwood, *Achieving Permanency for American Indian and Alaska Native Children: Lessons from Tribal Traditions*, 37 Cap. U.L. Rev. 239, 279 (2008).

[12] See *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Adoption of T.N.F.,* 781 P.2d 973, 978 (Alaska 1989); *In re Adoption of Baade*, 462 N.W.2d 485, 490 (S.D. 1990); *In re Baby Boy Doe,* 849 P.2d 925, 931-32 (Idaho 1993); *In re Adoption of S.S.*, 622 N.E.2d 832, 840 (Ill. App. Ct. 1993); *Quinn* v. *Walters*, 845 P.2d 206, 208 (Or. Ct. App. 1993) (en banc); *In re Elliott*, 554 N.W.2d 32, 35 (Mich. Ct. App. 1996); *In re Adoption of Riffle*, 922 P.2d 510, 515 (Mont. 1996); *State ex rel. D.A.C.*, 933 P.2d 993, 998 (Utah Ct. App. 1997); *Michael J., Jr.* v. *Michael J., Sr.*, 7 P.3d 960, 964 (Ariz. Ct. App. 2000); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 324 (N.Y. App. Div. 2005); *In re N.B.*, 199 P.3d 16, 21 (Colo. App. 2007); *In re A.J.S.*, 204 P.3d 543, 547 (Kan. 2009).

[13] See Okla. Stat. tit. 10 §§ 40.1, 40.3; Iowa Code Ann. § 232B.5; Cal. Welf. & Inst. Code § 224(c); Minn. Stat. Ann. § 260.771; Wash. Rev. Code § 13.34.040(3); Wis. Stat. Ann. § 938.028(3)(a).

least * * * would have caused an explosion of litigation and disrupted tribal and State child welfare systems." S. Rep. No. 104-335, at 14 (1996). In doing so, the Committee made clear that the doctrine "is completely contrary to the entire purpose of ICWA," which "recognizes that the Federal trust responsibility and the role of Indian tribes as parens patriae extend to all Indian children involved in all child custody proceedings." *Ibid.* Accordingly, "[w]hen the ICWA was enacted, * * * Congress intended * * * to provide for tribal involvement with, and Federal protections for, all children defined by their tribes as members or eligible for membership who are involved in any child custody proceeding, regardless of their individual circumstances." *Ibid.* This determination, the Committee concluded, "should be construed as a rejection of 'existing Indian family exception' doctrine in all of its manifestations." *Ibid.*[14]

[14] The GAL asserts that in 1987 the Senate Committee on Indian Affairs rejected a proposed amendment that would have disapproved state-court decisions applying the "existing Indian family" doctrine. GAL 45-46. That is not entirely accurate. The language identified by the GAL was part of a much larger bill that would have amended ICWA in numerous significant and controversial ways. S. 1976, 100th Cong., 1st Sess. (1987). Although much congressional criticism was directed at these other provisions, we have been unable to identify any challenge in the legislative record to the language discussed by the GAL. In this context, rejection of the broader bill sheds no light on Congress' view regarding the "existing Indian family" doctrine.

B. Non-custodial parents may invoke ICWA provisions limiting the termination of parental rights.

Against all this, petitioners purport to defend the "existing Indian family" doctrine on textual grounds, asserting that 25 U.S.C. §§ 1912(d) and 1912(f)—the provisions applied by the court below to preclude the termination of Father's parental rights—"apply only when the objecting parent seeks to preserve a preexisting Indian family." Pet. Br. 30. Petitioners are wrong: their argument misreads the plain statutory text.

1. Petitioners spend the most time arguing that Section 1912(f) does not apply. That provision states:

> No termination of parental rights may be ordered in [an involuntary child custody] proceeding in the absence of a determination * * * 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.

Petitioners rely centrally on the phrase "continued custody," and reason as follows: A court applying Section 1912(f) "requires prospective adoptive parents to show that the 'continued custody' by the objecting parent would seriously harm the child"; "custody must already exist before it can be 'continued'"; and "[i]t necessarily follows that Congress did not intend noncustodial parents such as Father to invoke Section 1912(f)'s heightened protections." Pet. Br. 33-35.

But that, very simply, is not what the statute says. Section 1912(f) nowhere states affirmatively that it is inapplicable to non-custodial parents. In-

stead, the statute's plain terms provide that parental rights may not be terminated "in the absence of a determination" that "continued custody" by the parent would injure the child. If petitioners are correct that such a determination of likely harm categorically cannot be made when the parent whose rights will be terminated currently lacks state-law custody, the necessary consequence is *not* that Section 1912(f) becomes inapplicable to the proceeding; it is, as Congress expressly put it, that "[n]o termination of parental rights may be ordered." After all, it surely is more likely that Congress intended Section 1912(f) to be applied according to its literal terms than that the drafters sought to make a central provision of ICWA inapplicable to all non-custodial parents in the backhanded and exceedingly indirect manner proposed by petitioners. As the Court has noted more than once, Congress "does not * * * hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

And that is especially so because our reading is in fact fully in accord with the congressional language and purpose. As we have noted, ICWA's definition of "child custody proceeding" includes any proceeding involving the "termination of parental rights." Such a termination—the subject of Section 1912(f)—is *any* action that would terminate the "parent-child relationship," and therefore addresses a far wider range of relationships than simply that of child and current legal custodian. Thus, Rep. Udall, chief House sponsor of ICWA, explained that "termination of parental rights" is an "action[] affecting parental, not custodial rights." 124 Cong. Rec. 38,103 (Oct. 14, 1978).

Here, too, the point is confirmed by the evolution of the statutory text: What ICWA now refers to as an "involuntary proceeding" to terminate "parental rights" subject to Section 1912(f), the initial Senate bill described as a proceeding "where the natural parent or parents of an Indian child * * * *opposes the loss of custody*." S. 1214, 95th Cong. § 101(b) (1977) (emphasis added). But as enacted, Section 1912(f) addresses any proceeding that would terminate the "parent-child relationship." Congress therefore plainly understood that, for ICWA purposes, "custody" includes *all* parent-child legal relationships, including those that do not currently involve the exercise of legal custody. Against this background, there is every reason to believe that Congress wanted Section 1912(f) to preclude termination of parental rights in this broad sense absent a showing that continuation of the *parent-child legal relationship* would injure the child.[15]

The United States, which agrees with petitioners on their reading of Section 1912(f) (although on nothing else, see U.S. Br. 23-26), adds nothing to their analysis. It, too, focuses exclusively on the phrase "continued custody" and takes no account of the operative language of the provision, which precludes

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[15] Petitioners assert that "[t]he text [of Section 1912(f)] plainly presupposes that absent termination of parental rights, the child will continue in the custody of the objecting parent." Pet. Br. 33. It doubtless ordinarily is the case that a natural parent who prevails in a Section 1912(f) proceeding will be awarded custody under state or tribal law. But that is not necessarily so, if the parent is for some reason unfit. In such a case, custody would be determined by application of ICWA's other provisions (including the placement preferences of Section 1915) and, where applicable, state law.

termination of parental rights in the broadest sense unless the requisite showing of harm can be made. And when the United States says that Congress would not have wanted Section 1912(f)'s test to apply except "where the parent has already had *some form of custody* that would be maintained or restored after an interruption" (U.S. Br. 25 (emphasis added)), it fails to recognize that Congress defined "child custody proceeding" to include proceedings involving a broader range of parent-child relationships than those limited to state-law physical and legal custody, and therefore would have used "custody" in Section 1912(f) to refer to the parent-child relationship in this broader sense.[16]

It may be added, however, that even if petitioners are correct that the question here is whether Father's "continued" legal and physical custody would cause harm to Baby Girl, they are wrong in contending that it is impossible to "marshal the facts to fit the statutory language." Pet. Br. 34. As the definitions of "continued" offered by petitioners and the United States—"carried on or kept up without cessation" (*id*. at 33) and "stretching out in time and space" (U.S. Br. 24)—themselves suggest, the word has a primarily prospective meaning, as does the

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[16] The United States is incorrect in finding support for its reading of "continued custody" in the BIA guidelines, which refer to the inquiry whether "'it is dangerous for the child to remain with his or her *present* custodians.'" U.S. Br. 24 n.5 (citation omitted; emphasis added). If the government's reading of "custody" is correct, the inquiry cannot be limited to "present" custodians; the United States itself recognizes that Section 1912(f) must apply, at least, to parents who had custody in the past that would be "restored after an interruption." *Id*. at 25.

phrase with which it is linked in Section 1912(f), "likely to result in." Even on petitioners' reading, then, the question for a court in a case under Section 1912(f) is whether a custodial relationship with the parent is likely to result in harm to the child. And as the detailed analysis offered by both courts below demonstrates, it is entirely possible to determine from the record that a currently noncustodial father will be "an excellent parent of his child." Pet. App. 127a.[17]

2. Petitioners also are wrong in declaring that the "existing Indian family" doctrine is incorporated in 25 U.S.C. § 1912(d), which provides that a party seeking to terminate parental rights must "satisfy the court that active efforts have been made * * * to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." Here, the South Carolina Supreme Court correctly found that *no* efforts were made to prevent the breakup of the Indian family; petitioners did not contend otherwise. Pet. App. 26a. (Had such efforts been made, they surely would have proved successful, given Father's immediate assertion of custody when he learned of the planned adoption.) As the United States demonstrates (U.S. Br. 20-23), petitioners accordingly did

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[17] Petitioners criticize the South Carolina Supreme Court for looking to the possibility of harm resulting from the "transferee parent's prospective legal and physical custody." Pet. Br. 34 (quoting Pet. App. 32a). In fact, the court below was there rejecting petitioners' own assertion that the court should "find severe emotional harm likely based solely on the expected harm" *of removing Baby Girl from petitioners*. Pet. App. 31a. Petitioners now appear to have abandoned that argument, replacing it with reliance on the "existing Indian family" doctrine.

not (and could not) satisfy the courts below that the requisite "active efforts" were made and "proved unsuccessful." Section 1912(d), by its plain terms, therefore preludes termination of Father's parental rights.

Petitioners nevertheless insist that "[t]his provision cannot be applied to noncustodial parents consistent with the text" because "[i]n such cases, there is no 'Indian family' that includes the father to break up." Pet. Br. 30. But that manifestly is not so: A termination of parental rights that will prevent a father from raising his biological daughter, in the company of her grandparents and other members of her extended family, surely would effectuate a "breakup" of that family in the ordinary sense. To refer again to the dictionary, among the principal definitions of "breakup" is "[t]he discontinuance of a relationship." American Heritage Dictionary 235 (3d ed. 1992). And that doubtless describes an action that will terminate a father's legal relationship with his daughter.

Petitioners' further contention that it "would be both perverse and cruel to require prospective adoptive parents * * * to find and convince the father who abandoned that child to grasp the reins of parenthood" (Pet. Br. 31) is a non sequitur; although Section 1912(d) requires the party seeking to terminate the parental relationship to show that remedial efforts to prevent the breakup of the family "have been made," the "efforts" may be those of the Tribe, or of a State or private adoption agency. See U.S. Br. 22. And petitioners are poorly situated to insist that ICWA does not require adoptive parents to offer notice of their plans "so that tribes can cajole fathers to seek custodial rights." Pet. Br. 32. No "cajoling" by petitioners was required here: Father asserted his

interest in raising Baby Girl literally the moment he was belatedly informed of petitioners' adoption plans. Timely notification of Father is all that would have been necessary to prevent the breakup of this Indian family.

3. Finally, petitioners are wrong when they point to four other provisions of ICWA that, they assert, "show that neither fathers nor tribes can invoke ICWA to block an adoption without an existing Indian family." Pet. Br. 35. It is revealing that petitioners have never before suggested that *any* of these provisions bears on the question here. Most of the courts that have embraced the "existing Indian family" doctrine also have not relied upon, or even cited, any of these provisions. That is for good reason: These disparate statutory sections use differing language to address particular narrow circumstances. None has any application here.

Section 1913 provides that, when voluntary consent to termination of parental rights is withdrawn, the child "shall be restored to the parent." Petitioners read this to mean that ICWA applies only to custodial parents. Pet. Br. 37-38. But the plain intent of this provision is that, upon revocation of consent, the status quo ante (whatever that was) will be restored. Section 1913 does not use the word "custody" at all, and petitioners cannot seriously suggest that non-custodial parents have no right to revoke termination of their parental rights under the plain terms of Section 1913.

Petitioners describe **Section 1914** as providing that "any parent … from whose *custody* such child was *removed* … may petition any court of competent jurisdiction to invalidate" a termination of parental rights that violated specified provisions of ICWA.

Pet. Br. 35. Petitioners take this language to mean that only custodial parents may benefit from ICWA. In fact, however, the provision, fully quoted, actually states that "any parent *or Indian custodian from whose custody such child was removed*, *and the Indian child's tribe*" may petition to invalidate a termination of parental rights. 25 U.S.C. § 1914 (emphasis added). As the Tenth Circuit has noted, this language is best read to so "that 'any parent' stands alone, unmodified by the phrase 'from whose custody such child was removed.'" *Morrow* v. *Winslow*, 94 F.3d 1386, 1394 n.4 (10th Cir. 1996). Moreover, the *tribal* right to petition unquestionably is not limited by any custodial requirement, which shows conclusively that termination of parental rights may be set aside even when the parent was non-custodial. And in any event, for the reasons we have explained, the use of "custody" in this context is best understood to refer broadly to all parental rights.[18]

Section 1916 provides that, when a decree of adoption is set aside or the adoptive parents voluntarily consent to termination of their parental rights, a biological parent "may petition for return of custody." We think this is best understood as offering an opportunity to restore broad parental rights and gain legal custody. But however that may be, the provi-

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[18] This understanding is confirmed by the House Report, which describes Section 1914 as "authoriz[ing] the child, parent, or Indian custodian, or the tribe to move to set aside any foster care placement or termination of parental rights." H.R. Rep. No. 95-1386, at 23. Congress thus described the provision in terms that make no reference to "custody" except as implicit in the circumstances of an Indian custodian, and indicate expressly that all interested parties may act when parental rights are terminated in violation of ICWA.

sion addresses circumstances where parental rights *already* have been terminated, a situation far removed from the one in this case.[19] The same is true of **Section 1920**, which applies in the special circumstance where someone "has improperly removed the child from custody of the parent"; that Congress specifically addressed ICWA to that circumstance hardly means that the entirety of ICWA is directed *only* to that circumstance.[20] Petitioners, in short, have offered no reason to read into ICWA unstated and harmful limitations that would frustrate the congressional purpose.

III. THE ADOPTION ALSO IS PRECLUDED BY ICWA'S PREFERENTIAL PLACEMENT PROVISION.

For those reasons, the decision below should be affirmed. But there is an additional, independent ground on which petitioners cannot prevail, stated as an alternative holding by the court below and ad-

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[19] Petitioners also fail to acknowledge that, in a proceeding under Section 1916, the court must grant the parent's petition for return of custody "unless there is a showing, in a proceeding *subject to the provisions of section 1912 of this title*, that such return of custody is not in the best interests of the child." (Emphasis added). Because a child subject to a Section 1916 proceeding by definition is not in the natural parent's custody, this provision shows that Congress expected Section 1912(f) to apply even when the child is not in the custody of the biological parent at the time of the proceeding.

[20] Moreover, Section 1920 plainly had in mind the special situation of *physical* custody, addressing the problem of state social workers and others who physically removed Indian children from their homes without the parents' permission. See H.R. Rep. No. 95-1386, at 25.

dressed at length by Cherokee Nation: Adoption of Baby Girl by petitioners is precluded by the placement preference provision established in Section 1915.

Section 1915(a) provides: "In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." This preference is not optional; as the Court has explained, it is "[t]he most important substantive requirement imposed on state courts" by ICWA. *Holyfield*, 490 U.S. at 36. By its plain terms, it applies in all adoptive placements of Indian children.

Here, as the South Carolina Supreme Court held, there is no "good cause" to disregard the placement preferences. Below, petitioners offered only one ground for avoiding the preferences: that a bond had formed between Baby Girl and petitioners *after* she was placed in their home. But as the state court correctly explained, "rather than seek to place Baby Girl within a statutorily preferred home, [Birth] Mother sought placement in a non-Indian home. In our view, the ensuing bond that has formed in the wake of this wrongful placement cannot be relied on * * * to deviate from the ICWA's placement preferences." Pet. App. 38a-39a. Petitioners did not question that holding in their petition for certiorari and do not renew their argument regarding "bonding" or good cause here.

Instead, petitioners contend that Section 1915 applies only when there is a "preexisting Indian family." Pet. Br. 52. But as is apparent from their discussion (see *id.* at 52-54), this argument is utterly

without textual support in Section 1915(a), which provides that the preferences must be applied to "any adoptive placement of an Indian child." Indeed, the House Report explained that Section 1915 "as a whole[] contemplates those instances where the parental rights of the Indian parent *already has been terminated*," in which circumstance the placement preferences "would strengthen the chances of the Indian child staying within the Indian community and growing up with a consistent set of cultural values." H. Rep. No. 95-1386, at 24, 31 (emphasis added). The provision thus expressly contemplates situations in which the child is *not* part of an Indian family at the time of the adoptive placement. Accordingly, although petitioners assert that Section 1915(a) "does not authorize courts to create new Indian families" (Pet. Br. 52), that is just what its plain text *does*: if the child cannot be placed with a member of his or her extended family, the court is directed to look to "other members of the Indian child's tribe" or to "other Indian families."

Petitioners' other argument is that Section 1915(a) comes into play only when a "preferred party specified in the provision is before the family court." Pet. Br. 55. This argument, too, finds no support in the statutory language. And it is nonsensical in a case such as this one, where the child's natural father sought custody and there would have been no reason for other members of Baby Girl's extended family or of her Tribe to step forward unless Father were found unsuitable. The record here makes clear, moreover, that, had it been necessary, there would have been no difficulty finding a preferred placement: Baby Girl's grandmother appeared in court and testified that she and Baby Girl's grandfather would have taken placement of Baby Girl "in a mi-

nute." JA 151. Petitioners' arguments, not advanced below and in any event insupportable, cannot save their case.

IV. ICWA IS IN ALL RESPECTS CONSTITUTIONAL.

Finally, petitioners and the GAL contend that, unless their reading of ICWA prevails, application of the statute in the circumstances of this case will run afoul of no fewer than three separate constitutional principles. The Cherokee Nation and the United States thoroughly refute this improbable contention, and we do not repeat their arguments here. But several points bear special emphasis.

1. Petitioners and the GAL invoke equal protection principles. Pet. Br. 44-47; GAL Br. 53. They do not contend that ICWA generally is unconstitutional, conceding that the statute properly draws distinctions based on considerations of Indian sovereignty where applied "to protect preexisting connections between an Indian child and her custodial parent." Pet. Br. 45. See also GAL Br. 54-55. But when the parent does not have custody of the Indian child at the time of the child custody proceeding, they continue, the Tribe's sovereign interest "evaporates" and the statutory distinction becomes one that is based solely on race. Pet. Br. 45.

This distinction, however, is chimerical. ICWA draws political rather than racial distinctions because it responds to what Congress identified as a profound problem affecting Tribes *as sovereign entities*: "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children" (25 U.S.C. § 1901(3)); yet the adoption of Indian children by non-Indians had "'se-

riously undercut the tribes' ability to continue as self-governing communities'" (*Holyfield*, 490 U.S. at 34); ICWA therefore sought to advance "the rights of the Indian community and tribe in retaining its children in its society." H.R. Rep. No. 95-1386, at 23. ICWA furthers that goal in just the same way whether the parent is custodial or non-custodial at the time of the child custody proceeding: In either case, it assures that the Indian child prospectively has bonds with his or her Tribe. That is certainly true in this case, where the Family Court found that Father "has a strong cultural tie to the Cherokee" and that his family home reflected "pride and connection to the [Cherokee] Nation and the Wolf Clan." Pet. App. 118a-119a. Placement with Father thus affords Baby Girl the opportunity to grow up immersed in Cherokee traditions and strengthens the Tribe as a sovereign political entity.[21] Petitioners' recognition that ICWA is constitutional as applied to custodial parents thus dooms their constitutional claim.

Against this background, petitioners and the GAL are wrong in contending that ICWA's classifications are based on race. As the United States shows (U.S. Br. 28-29), it is membership or eligibility for membership in a Tribe, the quintessential political consideration, that triggers application of ICWA.

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[21] Petitioners invoke the views expressed by the Justice Department prior to ICWA's enactment regarding the statute's jurisdictional provisions. Pet. Br. 46-47. Congress carefully considered and rejected those views. H.R. Rep. No. 95-1386, at 36-37. The Department itself acknowledged that it did not review the legislative history or testimony when it noted its concerns, which "necessarily would be considered by a court which had to interpret [ICWA's] provisions and determine its constitutional validity." *Id*. at 35.

And that application of ICWA to a child who is eligible for tribal membership is coupled with the child's having a biological parent who *is* a member no more makes for a racial classification than does the rule that automatically makes a child born "of parents" who are U.S. citizens, or born "to a member" of an Indian tribe, a citizen of the United States. 8 U.S.C. § 1401(c), (b).[22]

2. Petitioners are wrong to contend that application of ICWA in cases not involving a "preexisting Indian family" would "upset the federal-state balance." Pet. Br. 50-51. This Court has long recognized Congress' "plenary and exclusive" power with respect to Indian tribes. *United States* v. *Lara*, 541 U.S. 193, 200 (2004). See also *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 531 (1998). That authority is not limited to reservations or tribal lands, but applies "whether upon or off an Indian reservation." *United States* v. *Nice*, 241 U.S. 591, 597 (1916). Here, Congress explained in considerable detail, in the text of the legislation, why the exercise of this authority

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[22] The GAL and petitioners repeatedly note that Baby Girl has "a 3/256 quantum of Cherokee blood." GAL Br. 3; *id*. at 18 & n.6, 30, 52; Pet. Br. 6 n.1. It is not entirely clear what conclusion they draw from that observation. It is undisputed that Baby Girl is eligible for membership in the Cherokee Nation and that she is an "Indian child" within the meaning of ICWA. Petitioners and the GAL do not challenge the fundamental rule that Tribes have a sovereign right to set their own criteria for tribal citizenship. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 72 n.32 (1978). And they surely do not contend that ICWA would be more constitutionally defensible if it required that an "Indian child" have a higher blood quantum than does Baby Girl. If anything, their observation accordingly emphasizes the political rather than the racial nature of the distinction at issue here.

in ICWA was essential to the survival of Indian Tribes. To the extent that ICWA overrides state law, it does so for good reason: "Congress perceived the States and their courts as partly responsible for the problem [the ICWA] intended to correct." *Holyfield,* 490 U.S. at 44–45. Accordingly, state courts have themselves recognized that federalism concerns do not support the "existing Indian family doctrine." See *In re Guardianship of D. L. L.*, 291 N.W.2d 278, 281 (S.D. 1980); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 326 n.7 (App. Div. 2005).

3. There is no substance to the assertion of petitioners and the GAL that application of ICWA would infringe the substantive due process rights of Birth Mother or of Baby Girl herself. While a natural parent does indeed have a constitutionally protected interest in *raising* his or her child (see, *e.g.*, *Troxel* v. *Granville*, 530 U.S. 57, 70 (2000)), Birth Mother has here finally and definitively relinquished her interest in Baby Girl. No provision of the Constitution suggests that the wishes of such a parent unilaterally to place the child with a particular caregiver overrides both the views of the other natural parent—who *does* want to raise the child himself—and a state determination of the child's best interests.

As for Baby Girl, this Court never has held that the Constitution incorporates a "best interests of the child" rule. See *Reno* v. *Flores*, 507 U.S. 292, 303-304 (1993). But even if it did, the fact of the matter is that ICWA incorporates just such a standard, reflecting a congressional judgment, based on substantial evidence, about the considerations that advance an Indian child's best interest. See 25 U.S.C. § 1902; *Holyfield*, 490 U.S. at 49-50 n.24. Both courts below therefore explained that the best interest inquiry "is

not *replaced* by ICWA's mandate" (Pet. App. 34a); "[w]hen parental rights and the best interests of the child are in conflict, the best interests of the child must prevail" (*id*. at 128a). In this case, after extensive examination of the record, both courts found "no conflict between the two" because Father is "a fit and proper person to have custody of his child" who "has convinced [the court] of his unwavering love for this child." *Ibid*. See also *id*. at 36a-37a ("[W]e cannot say that Baby Girl's best interests are not served by the grant of custody to Father, as [petitioners] have not presented evidence that Baby Girl would not be safe, loved, and cared for if raised by Father and his family."). The GAL accordingly is quite wrong in asserting that the only inquiry conducted below "was whether Birth Father was likely to 'seriously' harm Baby Girl if he obtained custody of her." GAL Br. 52.

The GAL also argues that ICWA here deprives Baby Girl of her interest in remaining with petitioners, with whom the GAL claims she forged the only "intimate human relationships" she had ever known. GAL Br. 57. We do not question petitioners' emotional commitment to Baby Girl, in what has been painful and difficult litigation for all the parties. But "the law cannot be applied so as automatically to 'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.'" *Holyfield*, 490 U.S. at 54. And insofar as the connection described by the GAL is thought relevant, petitioners' is no longer "the only home [Baby Girl] has ever known." GAL Br. 58. By the time of this Court's decision, Father will have cared for Baby Girl for almost 18 months in a loving and stable environment, surrounded by her extended family, during a critical period in her development. Because the decision below properly applied ICWA

and took full account of Baby Girl's best interests, this Court should not break such a connection between a devoted father and his daughter.

CONCLUSION

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

Respectfully submitted.

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