No. 12-399

IN THE

Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

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

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR THE CHEROKEE NATION

LLOYD B. MILLER
WILLIAM R. PERRY
ANNE D. NOTO
COLIN CLOUD HAMPSON
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, N.W.
Suite 600
Washington, DC 20005
(202) 682-0240

TODD HEMBREE
ATTORNEY GENERAL
CHRISSI ROSS NIMMO*
ASSISTANT ATTORNEY GENERAL
CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465
(918) 458-6998
chrissi-nimmo@cherokee.org

CARTER G. PHILLIPS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Respondent Cherokee Nation

* Counsel of Record

March 21, 2013

QUESTION PRESENTED

The South Carolina courts held that Father was a "parent" under the Indian Child Welfare Act of 1978, 25 U.S.C. §§1901-1963, his parental rights should not be terminated under §1912, and he was a fit and proper parent who should have custody of his daughter, Baby Girl, an "Indian child" covered under the Act. The South Carolina Supreme Court also recognized that Adoptive Couple was not entitled to custody by virtue of §1915(a). The Father's brief primarily addresses his rights under the Act. The Cherokee Nation primarily focuses on the following question:

> Whether the determination that Adoptive Couple is not entitled to custody of this Indian child under §1915(a) provides a separate ground to affirm the judgment of the South Carolina Supreme Court, and whether the constitutional avoidance doctrine permits unambiguous terms in the Act to be construed contrary to their plain meaning, when the Act falls comfortably within Congress's broad authority under the Constitution to protect Indian Tribes and does not violate any due process or equal protection rights of Adoptive Couple, Mother, or Baby Girl.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT	1
A. The Indian Child Welfare Act	1
B. Facts	5
C. Proceedings Below	7
SUMMARY OF ARGUMENT	8
ARGUMENT	12
I. THE SOUTH CAROLINA SUPREME COURT PROPERLY APPLIED ICWA	12
A. The South Carolina Supreme Court's Determination That Father Is A "Parent," That His Parental Rights Should Not Be Terminated, And That He Should Have Custody Of Baby Girl Should Be Affirmed	12
B. The South Carolina Supreme Court's Denial Of The Adoption Petition Under 25 U.S.C. §1915(a) Should Be Affirmed	15
II. CONGRESS DID NOT CONDITION ICWA'S APPLICATION ON A "PRE-EXISTING INDIAN FAMILY"	22
III. APPLICATION OF ICWA HERE IS CONSTITUTIONAL	27
A. ICWA Does Not Violate Principles Of Equal Protection	32

TABLE OF CONTENTS—continued

Page

1. Federal Legislation In Indian Affairs Deals With Indians Based On Their Political Status 32

2. ICWA Applies To Tribal Indians Based On Political Status, Not Race ... 36

3. Application Of ICWA Here Is Rationally Tied To Fulfillment Of The Federal Government's Unique Obligation To Indian Tribes..... 39

B. Application Of ICWA Here Does Not Violate The Mother's Liberty Interests Or Substantive Due Process Rights..... 47

C. Application Of ICWA Here Does Not Violate The Child's Liberty Interest Or Substantive Due Process Rights 48

D. Application Of ICWA Does No Violence To Federalism 51

CONCLUSION 54

TABLE OF AUTHORITIES

CASES Page

In re A.J.S., 204 P.3d 543 (Kan. 2009) 23, 27
Abbott v. *Abbott*, 130 S. Ct. 1983 (2010)..... 46
In re Adoption of Baade, 462 N.W.2d 485 (S.D. 1990) 23, 27
In re Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982) 23
In re Adoption of T.N.F., 781 P.2d 973 (Alaska 1989)..... 27
Antoine v. *Washington,* 420 U.S. 194 (1975) 53
In re Baby Boy C., 805 N.Y.S.2d 313 (N.Y. App. Div. 2005)..... 23, 27, 31
In re Baby Boy L., 103 P.3d 1099 (Okla. 2004) 27
Bd. of Cnty. Comm'rs v. *Seber*, 318 U.S. 705 (1943) 53
Carcieri v. *Salazar*, 555 U.S. 379 (2009)..... 38
Del. Tribal Bus. Comm. v. *Weeks,* 430 U.S. 73 (1977) 29, 34, 38
DeShaney v. *Winnebago Cnty. Dep't of Social Servs.*, 489 U.S. 189 (1989)..... 48
Elk v. *Wilkins*, 112 U.S. 94 (1884)..... 29
Exxon Co., U.S.A. v. *Sofec, Inc.*, 517 U.S. 830 (1996) 51
Fisher v. *Dist. Court*, 424 U.S. 382 (1976).... 4, 34
Graver Tank & Mfg. Co. v. *Linde Air Prods. Co.*, 336 U.S. 271 (1949) 51
Kamen v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90 (1991)..... 28
Lewis v. *United States*, 445 U.S. 55 (1980) .. 28
Menominee Tribe of Indians v. *United States*, 391 U.S. 404 (1968)..... 30
Michael H. v. *Gerald D.*, 491 U.S. 110 (1989) 48

TABLE OF AUTHORITIES—continued

Page

Michael J., Jr. v. *Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000) 23, 27
Miss. Band of Choctaw Indians v. *Holyfield*, 490 U.S. 30 (1989)..... *passim*
Moe v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976)..... 34, 53
Morton v. *Mancari*, 417 U.S. 535 (1974) .. *passim*
In re N.B., 199 P.3d 16 (Colo. App. 2007)..... 31
Perrin v. *United States*, 232 U.S. 478 (1914)..... 53
Quinn v. *Walters*, 845 P.2d 206 (Or. Ct. App. 1993), *rev'd on other grounds*, 881 P.2d 795 (Or. 1994) 31
Ramah Navajo Sch. Bd. Inc. v. *Bureau of Revenue*, 458 U.S. 832 (1982) 53
Reno v. *Flores*, 507 U.S. 292 (1993)..... 50
Rice v. *Cayetano,* 528 U.S. 495 (2000) .. 33, 34, 38
Roff v. *Burney*, 168 U.S. 218 (1897)..... 39
Santa Clara Pueblo v. *Martinez,* 436 U.S. 49 (1978)..... 30, 38, 39
Santosky v. *Kramer,* 455 U.S. 745 (1982)..... 49
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996)..... 29, 53
Smith v. *Org. of Foster Families for Equal. & Reform,* 431 U.S. 816 (1977)..... 49
Stephens v. *Cherokee Nation*, 174 U.S. 445 (1899)..... 29
Thompson v. *Thompson*, 484 U.S. 174 (1988)..... 46
Three Affiliated Tribes of the Fort Berthold Reservation v. *Wold Eng'g, P.C.*, 476 U.S. 877 (1986)..... 39
Troxel v. *Granville*, 530 U.S. 57 (2000) 47
United States v. *Antelope,* 430 U.S. 641 (1977)..... *passim*

TABLE OF AUTHORITIES—continued

Page

United States v. *Dion*, 476 U.S. 734 (1986).. 28
United States v. *Eagleboy*, 200 F.3d 1137 (8th Cir. 1999) 38
United States v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876) 53
United States v. *Holliday,* 70 U.S. (3 Wall.) 407 (1865) 30
United States v. *John,* 437 U.S. 634 (1978) 30
United States v. *Kagama*, 118 U.S. 375 (1886) 29
United States v. *Lara,* 541 U.S. 193 (2004) 10, 29, 30
United States v. *Nice*, 241 U.S. 591 (1916)... 30
United States v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001)..... 28
United States v. *Reliable Transfer Co.*, 421 U.S. 397 (1975) 51
United States v. *Sandoval*, 231 U.S. 28 (1913) 30
United States v. *Seminole Nation*, 299 U.S. 417 (1937) 29
United States v. *Wheeler*, 435 U.S. 313 (1978) 39
Washington v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) 34
Washington v. *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) 34
Williams v. *Babbitt*, 115 F.3d 657 (9th Cir. 1997) 35, 36

TABLE OF AUTHORITIES—continued

CONSTITUTION, TREATIES AND STATUTES — Page

U.S. Const. art. I, §8, cl. 3 29
U.S. Const. art. II, §2, cl. 2..... 29
U.S. Const. art. IV, §3, cl. 2 29
Treaty with the Cherokee Indians, July 19, 1866, 14 Stat. 799 5
25 U.S.C. §§305a-305e 45
25 U.S.C. §479a 37
25 U.S.C. §479a-1(a)..... 37, 38
25 U.S.C. §500n..... 35
25 U.S.C. §§1651-1660h..... 45
Indian Child Welfare Act of 1978,
25 U.S.C. §§1901-1963. 1
25 U.S.C. §1901(3)..... 3, 44
25 U.S.C. §1901(5)..... 40
25 U.S.C. §1902..... 2, 3
25 U.S.C. §1903(1)..... 4, 13
25 U.S.C. §1903(3)..... 32
25 U.S.C. §1903(4)..... 3, 32, 37
25 U.S.C. §1903(8)..... 3, 37
25 U.S.C. §1903(9)..... 23
25 U.S.C. §1911(a)..... 4
25 U.S.C. §1911(b)..... 4
25 U.S.C. §1911(c)..... 4, 7
25 U.S.C. §§1911-1915..... 18
25 U.S.C. §1912(f) 4
25 U.S.C. §1913..... 25
25 U.S.C. §1913(a)..... 4, 24
25 U.S.C. §1913(c)..... 4, 24
25 U.S.C. §1913(d) 24
25 U.S.C. §1915(a)..... *passim*
25 U.S.C. §1915(b)..... 24
25 U.S.C. §1915(c)..... 17
25 U.S.C. §1915(d) 17

TABLE OF AUTHORITIES—continued

Page

25 U.S.C. §1915(e) 17
25 U.S.C. §1917 5
25 U.S.C. §1921 4
25 U.S.C. §1932 45
25 U.S.C. §1933 45
25 U.S.C. §1951 5
25 U.S.C. § 3001(8) 45
25 U.S.C. § 3003-3005 45
28 U.S.C. §1738A 16, 46
42 U.S.C. §1996a 45
42 U.S.C. §§11601-11611 46

LEGISLATIVE AND EXECUTIVE MATERIALS

Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs, 93rd Cong. (1974) 24, 40, 41
Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs, 95th Cong. (1977) 25, 42
Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs 95th Cong. (1978) 41
Indian Education: A National Tragedy—A National Challenge, Special Subcommittee on Indian Education of the Senate Committee on Labor and Public Welfare, S. Rep. No. 91-501 (1969) 41, 42
Am. Indian Policy Review Comm'n Task Force Eight, *Report on Urban and Rural Non-Reservation Indians Final Report to the American Indian Policy Review Commission* (1976) 42

TABLE OF AUTHORITIES—continued

Page

Am. Indian Policy Review Comm'n, *Final Report to Congress* (1977) 41, 43
S. Rep. No. 95-597 (1977)..... 43
H.R. Rep. No. 95-1386 (1978) ..... *passim*
123 Cong. Rec. 21,043 (1977)..... 40
124 Cong. Rec. 38,102 (1978)..... 43
124 Cong. Rec. 38,103 (1978)..... 41
44 Fed. Reg. 67,584 (Nov. 26, 1979) 20, 47

SCHOLARLY AUTHORITIES

Barbara Ann Atwood, *Achieving Permanency for American Indian and Alaska Native Children: Lessons from Tribal Traditions*, 37 Cap. U. L. Rev. 239 (2008)..... 17, 18
Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 Emory L.J. 587 (2002) 18
Dan Lewerenz & Padraic McCoy, *The End of "Existing Indian Family" Jurisprudence:* Holyfield *at 20,* In the Matter of A.J.S., *and the Last Gasps of a Dying Doctrine*, 36 Wm. Mitchell L. Rev. 684 (2010)..... 27
Wilma Mankiller & Michael Wallis, *Mankiller: A Chief and Her People* (1993)..... 41
Jeffrey A. Parness & Zachary Townsend, *Legal Paternity (and Other Parenthood) After* Lehr *and* Michael H, 43 U. Tol. L. Rev. 225 (2012)..... 52
Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* (1984) 42

INTRODUCTION

Baby Girl is an "Indian child" within the meaning of the Indian Child Welfare Act. She lives with her Father, a citizen of the Cherokee Nation, and her extended family, in Nowata, Oklahoma, an Indian community within the Cherokee Nation. This situation is consistent with Congress's considered judgment in the Indian Child Welfare Act that the interests of an Indian child are best served when the child is raised within an Indian family and community.

Baby Girl has been living with her Father because the South Carolina courts correctly determined, based on the evidence, that her Father is a parent whose custodial rights should not be terminated and that the adoption petition should be denied. The courts made an individualized determination, based upon the evidence, that the Father was able to "create[] a safe, loving, and appropriate home for her." Pet.App. 32a. Consistent with those findings, Baby Girl has been living with her Father and among her tribal community since New Year's Day 2012.

This result—sanctioned by the Indian Child Welfare Act and the South Carolina courts, and advancing the interests of Baby Girl, her Father and the Cherokee Nation—should not now be unsettled. This Court should affirm the decision that allowed Baby Girl to return to her Father and extended family within the Cherokee Nation.

STATEMENT

A. The Indian Child Welfare Act

The Indian Child Welfare Act of 1978, ("ICWA") 25 U.S.C. §§1901-1963, was enacted to "protect the best

interests of Indian children and to promote the stability and security of Indian tribes and families." §1902. Congress found those interests directly threatened by past federal policies and state and private child custody actions which had separated Indian children from their families and Tribes. As this Court recognized in *Mississippi Band of Choctaw Indians* v. *Holyfield,* 490 U.S. 30, 32 (1989), ICWA is:

> the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.

The child welfare problems Congress sought to correct were staggering, as documented by "numerous examples, statistical data, and expert testimony" presented at congressional hearings in 1974, 1977 and 1978. *Id*. at 32-33. As this Court noted:

> Studies undertaken by the Association on American Indian Affairs in 1969 and 1974, and presented in the Senate hearings, showed that *25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. Adoptive placements counted significantly in this total*: in the State of Minnesota, for example, one in eight Indian children under the age of 18 was in an adoptive home, and during the year 1971-1972 nearly one in every four infants under one year of age was placed for adoption. *The adoption rate of Indian children was eight times that of non-Indian children. Approximately 90% of the Indian placements were in non-Indian homes.* A number of witnesses also testified to the serious

> adjustment problems encountered by such children during adolescence, as well as the impact of the adoptions on Indian parents and the tribes themselves.

Id. at 32-33 (footnote and citations omitted). The record before Congress further demonstrated that the Indian child welfare crisis extended well beyond involuntary proceedings, and that "Congress intended the ICWA to reach voluntary as well as involuntary removal of Indian children." *Id.* at 50 n.25.

Congress found these placements of Indian children in non-Indian families adversely affected not only Indian children but the Tribes as well, concluding "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." §1901(3). This Court specifically recognized Congress's concern for the Tribes, *Holyfield,* 490 U.S. at 32, adding that the Act must "be seen as *a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves*." *Id.* at 49 (emphasis added).

In response to this well-documented crisis, Congress enacted ICWA. ICWA seeks to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," §1902, through a comprehensive and balanced framework. ICWA defines "Indian child" to include any child who has a political relationship with a Tribe by being either (1) a member of a federally recognized Tribe or (2) eligible for membership in a federally recognized Tribe and the biological child of a member of such Tribe. §1903(4), (8). Where an "Indian child" is involved, ICWA applies to *all* state court "child custody proceedings," including any foster care placement, termination of parental rights, preadop-

tive placement, or adoptive placement proceeding involving an "Indian child." §1903(1).[1]

ICWA establishes critical procedural safeguards and minimum federal standards applicable to all such proceedings. *Holyfield*, 490 U.S. at 56. ICWA requires voluntary consents to adoption to be executed before a judge, allows revocation of a consent to adoption "any time prior to the ... final decree of ... adoption," and requires proof "beyond a reasonable doubt" before any involuntary termination of parental rights. §§1913(a), (c), 1912(f). ICWA's provisions regarding voluntary and involuntary termination of parental rights apply to both parents of an Indian child—whether the parent is Indian or non-Indian.[2]

ICWA's "most important substantive requirement imposed on state courts" seeks to preserve families and the ties between the child and her Tribe by establishing presumptive preferences for the placement of Indian children. *Holyfield*, 490 U.S. at 36-37 (discussing §1915(a)). These preferences apply "in the absence of good cause to the contrary," a provision

---

[1] ICWA preserves exclusive tribal jurisdiction over an Indian child who is domiciled on an Indian reservation or a ward of a tribal court, §1911(a); *Holyfield*, 490 U.S. at 36; *see also Fisher* v. *Dist. Court*, 424 U.S. 382, 390-91 (1976) (per curiam), while providing concurrent state-tribal jurisdiction over all other child custody proceedings, §1911(b). As to state court proceedings, a Tribe may either seek a transfer of the proceeding to tribal court, §1911(b), or intervene in the state court case, §1911(c). A request for transfer to tribal court will be denied if either parent objects or if the state court finds "good cause" to decline the transfer. §1911(b).

[2] ICWA further provides that in any case where federal or state law establishes "a higher standard of protection to the rights of the parent," the higher standard applies. §1921.

which recognizes the need for flexibility in compelling circumstances.

ICWA further protects the Indian child's interest in a relationship with her Tribe, and in the political and cultural rights and benefits that flow from tribal membership. The Act does this by requiring that final adoption decrees involving Indian children be provided to the Secretary of Interior, so that such information may be provided to the child upon request at adulthood, §1951; *see also* §1917.

B. Facts

The events that led to the South Carolina courts' placement of Baby Girl with her Father are recounted in Father's brief and the Cherokee Nation incorporates that statement here.

The Cherokee Nation adds that it is a federally recognized Tribe and party to numerous Treaties and agreements with the United States. *E.g.*, Treaty with the Cherokee Indians, July 19, 1866, 14 Stat. 799. The Cherokee Nation governs pursuant to a Constitution and provides essential health,[3] education,[4] public safety, and human resource services to Cherokee Nation citizens and their families. The Cherokee Nation provides these services throughout a 14-county area within northeastern Oklahoma—the Nation's 1866 Treaty area. Baby Girl, her Father and her extended family live within this area, just

---

3 http://www.cherokee.org/Services/Health/30865/Information.aspx

4 The Nation's education services begin with Head Start and continue through college and adult education. Cherokee children are eligible for free enrollment in the Cherokee Immersion School, which teaches the entire curriculum in the Cherokee language. *See* http://www.cherokee.org/Services/Education/Default.aspx.

east of where she was born and where Mother lives. Baby Girl's home is eight blocks from the Nation's Will Rogers Health Center. Her grandparents live down the road, her half-sister lives nearby, and the Cherokee Nation's social services department regularly visits Baby Girl to monitor her care and well-being.

The Cherokee Nation's Human Services Department provides comprehensive programs to promote personal and family unity as well as economic and social stability.[5] This Department contains the Children Youth and Family Services agency ("CYFS"). CYFS is responsible for monitoring, intervening, and providing social services in a range of matters involving Cherokee children and families, including social services in state and tribal child custody proceedings. As part of its work, CYFS certifies foster and adoptive homes and has approximately 100 available "Resource" homes. Residents of Cherokee Resource homes undergo extensive training that includes child safety and well-being, and legal and cultural issues. Record on Appeal (ROA) 446-49. The breadth and depth of the Nation's comprehensive CYFS agency reflects the Nation's strong governmental interest in protecting Cherokee children.

The Cherokee Nation also offers a wide range of services to expectant mothers (Indian and non-Indian) whose children will be eligible for enrollment as Cherokee citizens. The Nation assists mothers in eliminating socio-economic barriers that are often the driving force behind adoption. If a mother chooses to place her child for adoption, the Nation assists in locating appropriate family members (unless the mother requests anonymity), and provides the

---

[5] http://www.cherokee.org/Services/Human/Default.aspx

mother with a wide variety of pre-approved adoptive "Resource" homes for consideration. The Nation has families available to meet the mother's wishes and needs based on desired openness of adoption, locale, cultural and religious background, and other factors. If the mother is working with an adoption agency, the Nation assists the agency in locating appropriate relative placements or providing the agency with pre-approved Cherokee homes for the mother's consideration.

Membership in the Cherokee Nation (defined as "citizenship" under the Cherokee Constitution, much like citizenship in the United States Constitution), carries with it important rights and interests. Nation citizens are eligible to vote in Nation elections, run for tribal government office, participate in the wide range of governmental services, programs and benefits the Nation makes available to its citizens, and share in the use of tribal assets and resources. Nation citizenship also carries with it intangible interests in Cherokee culture and tradition, and the opportunity to participate in and shape the Cherokee polity.

C. Proceedings Below

The proceedings in this case are described in the Father's brief, which the Nation incorporates by reference. The Nation intervened in the proceedings before the South Carolina courts pursuant to ICWA, §1911(c). The Nation presented evidence bearing on the Father's status as an enrolled Cherokee citizen, his suitability as a parent, and the customs and culture of the Cherokee people as they relate to the Father and his family and their role in Baby Girl's life. While the Nation supported (and continues to support) the Father's parental rights and custody of his daughter, the Nation also provided the South

Carolina court with evidence regarding qualified alternative placements for the child with extended family members, and was prepared to offer alternative preferred placements with other Cherokee Nation families consistent with ICWA. *See* JA 77-96, 151; ROA 446.

SUMMARY OF ARGUMENT

I. The Indian Child Welfare Act was enacted by Congress to address a nationwide crisis. Tribes across the country were losing children in staggering numbers based on culturally insensitive, and often abusive, state and private child welfare practices. Recognizing that the very future of tribal self-government demanded a resolution of this problem, Congress enacted a comprehensive set of jurisdictional, procedural and substantive provisions to address voluntary and involuntary child custody proceedings involving Indian children.

There is no dispute that this case involves an "Indian child" and a "child custody proceeding" under the Act. The South Carolina courts, properly recognizing that these are the only statutory prerequisites, applied ICWA. Based on the evidentiary record, the courts determined that Father's parental rights should not be terminated and awarded custody of Baby Girl to Father, a member of the Cherokee Nation. Baby Girl and her Father have lived together in a Cherokee community in Oklahoma for over a year, a result fully consistent with Congress's intent in enacting ICWA. This is where Baby Girl should remain.

Even if this Court were to hold that the state court erred in its rulings regarding the rights of Father, the proper disposition would still be to affirm the denial of the adoption petition pursuant to §1915(a). Section

1915(a), "[t]he most important substantive requirement imposed on state courts," *Holyfield,* 490 U.S. at 36, provides a series of presumptive placement preferences—including extended family members, and other tribal members—in connection with the adoption of Indian children. These preferences apply in the absence of "good cause" to the contrary. The South Carolina Supreme Court properly applied §1915(a), and on that independent basis denied the Petitioners' application to adopt the child. Pet.App. 37a-39a. Based on the factual record before it, the court held that Petitioners failed to demonstrate "good cause" to depart from §1915(a)'s presumptive placement preferences. Since Petitioners do not here challenge that court's ruling on §1915(a), this provides a separate and independent ground for affirmance.

II. Petitioners' efforts to severely limit the scope of ICWA by the use of the "existing Indian family" doctrine reflects a palpable schizophrenia. On the one hand, Petitioners recognize that the "existing Indian family" doctrine has been sharply criticized for many reasons, including because it commands state courts to make a subjective and standardless evaluation of whether a family is "'Indian enough' to merit protection under ICWA." Pet. Br. 40. On the other hand, they cannot resist trying to limit the sweep of the Act to only one aspect of the broad child welfare problems Congress addressed in ICWA—removal of an Indian child from his or her family because of cultural misunderstandings.

Petitioners' insistence upon a "preexisting Indian family" must fail because Congress did not so limit ICWA. No such requirement can be found in the statutory text, and the legislative history shows beyond any doubt that Congress intended to cover

many situations—including adoptions at birth—where no "preexisting Indian family" could possibly be present. This Court in *Holyfield* made plain that Congress enacted ICWA in significant measure to protect Tribes' interests in their children, and that ICWA therefore applies (as it was applied in *Holyfield* itself) where children have never lived a day with an Indian parent or family. *Holyfield*, the statutory text, and the legislative history are fatal to Petitioners' "preexisting Indian family" argument and their related argument that ICWA does not apply absent a custodial Indian parent.

III. Petitioners and the Guardian ad Litem ("GAL") make no direct constitutional attack on ICWA. They abandoned their constitutional arguments below and press no such issues in their questions presented. Their argument that adopting an atextual "pre-existing Indian family" doctrine is necessary to avoid a constitutional infirmity fails because the constitutional avoidance doctrine has no application when the statute speaks clearly to the issue at hand. Here, ICWA's operative terms "child custody proceeding" and "Indian child" are clear and unambiguous. Any constitutional arguments are for another day when the issue has been squarely presented.

If this Court nevertheless reaches constitutional issues, the Petitioners' and GAL's contentions do not withstand scrutiny. This Court has repeatedly affirmed that the Constitution affords Congress broad authority in Indian affairs. *United States* v. *Lara*, 541 U.S. 193, 200-04 (2004). Yet Petitioners and GAL urge a formulation that would strip Congress of its powers, and would make federal authority in Indian affairs dependent on a subjective state court determination regarding the extent of the connection between an individual and his Tribe. Pet. Br. 44;

GAL Br. 54. There is no basis for restricting Congress's constitutional power over Indian affairs to accommodate such a wholly subjective and standardless test.

This Court has repeatedly emphasized that legislation regarding Indian affairs properly addresses Tribes as political entities, and that legislation aimed at tribal interests and tribal members therefore does not constitute an impermissible racial classification. *Morton* v. *Mancari*, 417 U.S. 535, 552 (1974); *United States* v. *Antelope,* 430 U.S. 641, 645-47 (1977). ICWA expressly deals with Indians in terms of their political affiliation with their Tribe, and makes no mention of a child's Indian ancestry or blood quantum.

Consistent with *Mancari*, 471 U.S. at 555, ICWA is rationally tied to the fulfillment of the government's unique obligation to Indians. Congress enacted ICWA based on a comprehensive record demonstrating that the future of Tribes as self-governing entities was jeopardized by abusive child welfare practices that led to the massive loss of tribal children. Under its broad constitutional authority over Indian affairs, Congress in ICWA addressed this problem through carefully tailored and specific terms focused on tribal membership. In addressing the core interest of Tribes with respect to their members—and the interest of members in the political, property and other rights associated with tribal membership—Congress acted well within its authority in fulfilling its unique obligations to Tribes. There is no equal protection violation here.

Petitioners' and GAL's other constitutional arguments fare no better. The application of ICWA cannot violate the Mother's liberty interests in raising her child because Mother has sought only to

relinquish her rights to raise the child, and accordingly has *no* liberty interest after doing so. And while this Court has not defined the scope of a child's liberty interest in the family context, it is clear that, however defined, a child's first interest is in her relationship with her Father. As for Petitioners, temporary custody is a matter of statutory, not constitutional, right. Nor is there a federalism concern presented here, as best exemplified by the fact that neither South Carolina, nor any other State, has suggested otherwise. In any event, ICWA involves a congressional determination that federal law must protect the core tribal interest in assuring that Indian children may become members who will maintain the future of Tribes as self-governing entities. Given Congress's plenary authority in this area, ICWA's application here raises no federalism issues.

ARGUMENT

I. THE SOUTH CAROLINA SUPREME COURT PROPERLY APPLIED ICWA.

A. The South Carolina Supreme Court's Determination That Father Is A "Parent," That His Parental Rights Should Not Be Terminated, And That He Should Have Custody Of Baby Girl Should Be Affirmed.

The South Carolina Supreme Court—both the majority *and* the dissent—correctly determined that this case involves an "Indian child" and a "child custody proceeding," and that, since these are the *only* statutory prerequisites, ICWA accordingly applies. Pet.App. 13a (majority); Pet.App. 59a (dis-

sent).[6] Both the majority and dissent also agreed that Father met 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." Pet.App. 22a (majority); *accord* Pet.App. 58a (dissent). After reviewing competing expert testimony, the Supreme Court stated that "we can only conclude from the evidence presented at trial that Father desires to be a parent to Baby Girl, and that he and his family have created a safe, loving, and appropriate home for her." Pet.App. 32a; *see also* Pet.App. 127a (Family Court) ("There is no evidence to suggest that [Father] would be anything other than an excellent parent to this child."). In sum, in awarding custody to Father, the South Carolina courts fully protected the best interests of this Indian child, in accordance with ICWA's fundamental purpose. That ruling should be affirmed.

While the Solicitor General agrees that the South Carolina Supreme Court's decision should be affirmed, he disagrees with that court's understanding of §1912(f). US Br. 23-26. That provision governs proceedings regarding the "termination of parental rights," defined as "any action resulting in the termination of the parent-child relationship." §1903(1)(ii). That definition clearly addresses a legal relationship, independent of any custody requirement. The Solicitor General agrees that a parent's legal or physical custody triggers §1912(f), but suggests that no specific finding was made by the South Carolina Supreme Court with respect to Father's

[6] The source and scope of Father's rights under ICWA are addressed fully in the Father's brief and the Cherokee Nation incorporates the Father's arguments in full.

custody. US Br. 25. But here, Father was held to be a "parent," and accordingly, for purposes of ICWA he had "parental rights" (and presumptive legal custody) which could not be "terminated" absent compliance with §1912(f). Since Father is a "parent," no further finding of custody was required. Indeed, requiring an additional finding of custody outside of ICWA would remove many parents from the Act's purview—including parents stationed overseas in the military, parents with children in foster care, and divorced parents who only have visitation rights. There is no indication that Congress intended to limit the rights of such parents. The better understanding is that Congress intended ICWA's protections regarding "parental rights" to apply to all who fall within the definition of "parent," and the South Carolina Supreme Court should be affirmed on this basis as well.

This case illustrates well ICWA's abiding importance. To be sure, this case involves sharply disputed views of the facts—as reflected in the widely different recitations set forth by the Family Court and the majority, on the one hand, and by the dissent on the other. These facts were resolved through full proceedings in the South Carolina courts. The result (thus far) is that an Indian child is living in Oklahoma with her Indian father surrounded by her extended family within the Cherokee Nation—and without question the child is thriving. Having now lived with her Father and Grandparents for over a year, and having successfully transitioned from her former custodial situation, the child should not now be made to leave her Father's home and the Indian environment that supports and nurtures her.

B. The South Carolina Supreme Court's Denial Of The Adoption Petition Under 25 U.S.C. §1915(a) Should Be Affirmed.

The decision below correctly applied ICWA, holding that Father was a "parent," retained his parental rights, and should have custody of Baby Girl, Pet.App. 40a, and it should be affirmed on these grounds. Not only is the father the correct person to have custody, but also, even if he were not, the adoptive couple are clearly not an appropriate placement for Baby Girl in light of §1915(a).

The South Carolina Supreme Court denied Petitioners' adoption petition. It did so because the Petitioners failed to meet ICWA's presumptive placement preferences applicable in "*any adoptive placement* of an Indian child under State law." §1915(a) (emphasis added). The court determined that the Petitioners failed to show "good cause" to deviate from these placement preferences. Pet.App. 37a-39a. This holding—which expressly "affirm[ed] the family court's denial of the adoption decree," Pet.App. 40a—was not challenged below in the petition for rehearing before the South Carolina Supreme Court, nor was this issue included in the Petitioners' questions presented here.

This provides a separate and independent ground for affirmance. That is, in the event this Court disagrees with the South Carolina courts' conclusion that the Father retained parental rights to his daughter, the proper result still would be to affirm, based on the South Carolina Supreme Court's denial of the adoption petition under §1915(a). Since the Petitioners' adoption petition has been rejected, and since that determination is not the subject of any question presented here, Petitioners lack any further interest in this proceeding. Moreover, since Baby

Girl has resided in Oklahoma for over a year with Father, and since Petitioners (the only link with South Carolina) no longer have any claim to custody, the South Carolina courts lack jurisdiction over any future proceedings that may involve her. *See* 28 U.S.C. §1738A(d). There is simply nothing left for the South Carolina courts to do.[7]

In addition to providing an appropriate ground for disposition here, §1915 illustrates certain key features of ICWA.

First, §1915(a) reflects Congress's decision to promote and protect the Tribe's interest in its children, and the child's corresponding interest in affiliation with her Tribe. As this Court in *Holyfield* stated in discussing this very section:

> The ICWA thus, in the words of the House Report accompanying it, "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." It does so by establishing "a Federal policy that, where possible, an Indian child should remain in the Indian community," and by making sure that Indian child welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family."

490 U.S. at 37 (quoting H.R. Rep. No. 95-1386, at 23, 24 (1978)). Based in significant measure on the devastating impact on *Tribes* of abusive state and private custody actions involving Indian children,

---

[7] Even if this Court does not affirm (and concludes that the South Carolina courts somehow retain jurisdiction), a remand for application of §1915 would be the appropriate disposition.

Congress established a presumption that Indian children be placed with extended family or tribal members. §1915(a)(1), (2). Congress also authorized a Tribe to adopt its own order of preference regarding placement, required that tribal community standards be used in placement determinations, and provided Tribes with a right to request and obtain state records of state court Indian child placements. §1915(c), (d), (e). By these means, §1915 embodies ICWA's core thrust—that "Congress was concerned not solely about 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*." *Holyfield*, 490 U.S. at 49 (emphasis added).

Second, §1915(a) demonstrates that Congress undertook a careful balancing of the interests involved, authorizing a range of possible placements. While the Act generally favors placements with tribal members, the first option listed—"a member of a child's *extended family*"—includes the possible placement of an Indian child with his or her *non-Indian* extended family. Moreover, in the case of the Cherokee Nation, the placement options for a Cherokee child also include approximately 100 available and certified adoptive Cherokee homes.[8] ROA 446.

What is more, §1915(a) does not mandate any particular placement outcome. Like ICWA's other provisions, §1915(a) is part of a statutory framework that provides state courts *options* to address the

[8] Tribes have a history of using a variety of alternative placements for Indian children by which a child is provided a stable, secure and loving home. *See* Barbara Ann Atwood, *Achieving Permanency for American Indian and Alaska Native Children: Lessons from Tribal Traditions*, 37 Cap. U. L. Rev. 239, 278-90 (2008).

compelling circumstances that sometimes arise in custody cases. What makes ICWA unique is it seeks to eliminate the inherent bias that non-Indian decision-makers often have in preferring a non-Indian custodial arrangement. By giving every Tribe an independent statutorily-recognized interest in protecting its existence by retaining Indian children within its sphere of influence, the statute makes certain that the interests of the child are not skewed by cultural biases.

Section 1915 operates in tandem with ICWA's other jurisdictional rules, procedural safeguards and substantive standards, all in aid of a basic presumption that an Indian child's best interests (as well as the Tribe's best interests) are generally served when the child is raised with her family and within the Tribe. §§1911-1915. At the same time, Congress included protecttions to assure that, in appropriate cases, that presumption may be overcome and the determination of the appropriate decisionmaker—and ultimately the appropriate placement decision itself—could properly accommodate a broader range of interests. Section 1915(a) operates in that context, establishing adoption placement preferences which apply "in the absence of good cause to the contrary." This "good cause" provision assures that ICWA is *not* an inflexible mandate that dictates results in every possible case. Indeed, following this Court's decision in *Holyfield*, the matter was sent back to the Tribe to exercise its own jurisdiction over the matter, and the Tribe awarded custody of the Indian twins to the non-Indian adoptive couple. *See* Atwood, *supra* note 8, at 279. Section 1915(a)'s "good cause" language authorizes state courts to make similar placement determinations in appropriate cases. *See* Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare*

Act: Toward a New Understanding of State Court Resistance, 51 Emory L.J. 587, 661-62 (2002).

To be sure, the "good cause" language must be applied in a manner that gives effect to Congress's basic intent that Indian children are best raised within their extended families or with other tribal families. It is therefore not a license for state courts to return to the abusive custody practices and prejudices that gave rise to ICWA. But properly applied, the "good cause" provision signifies that ICWA both creates a strong presumption that will control in the vast majority of cases, and provides an effective safety valve for those cases that present a sufficiently compelling justification to overcome that presumption. The "good cause" provision thus ensures that the ultimate custody decision reflects the child's best interests.

Petitioners seek to avoid the clear force of §1915(a) in various ways. Petitioners argue that §1915(a) is irrelevant to this case (Cert. Pet. 15 n.2), but then fault the South Carolina Supreme Court for failing to find good cause to deviate from the statutory preferences based on the time Baby Girl spent with Petitioners. Pet. Br. 53. But the South Carolina Supreme Court reviewed the factual record and concluded that "[Father] and his family have created a safe, loving and appropriate home," for his daughter (Pet.App. 32a), who was only two years old, and that Baby Girl at this age would likely transition well (as, in fact, occurred). The record further demonstrated that, from the time Baby Girl was four months old, Petitioners knew that Father sought custody, so that for the majority of the time Baby Girl was with Petitioners, they knew her ultimate placement was in doubt. Pet.App. 27a. The court determined that "under these facts," bonding between Petitioners and

Baby Girl during the pendency of a contested proceeding was insufficient to establish "good cause" under §1915(a). Pet.App. 38a-39a. This reasonable determination, based on the particular factual circumstances presented below, fully comports with ICWA. *Holyfield*, 490 U.S. at 37; *see also* 44 Fed. Reg. 67,584, 67,954-55 (Nov. 26, 1979).

Petitioners next argue that §1915(a) "requires a preexisting Indian family." Pet. Br. 52. But that is contrary to §1915(a)'s express language, which applies to "*any* adoptive placement of an Indian child" (emphasis added), and says nothing about preexisting Indian families. *See infra* at 22-27. There is no reason to import judge-made limitations where Congress chose words without limitation. Nor would it be "passing strange," Pet. Br. 52, or even uncommon, for Congress not to include any limitation within "[t]he *most important* substantive" provision of ICWA. *Holyfield*, 490 U.S. at 36-37 (emphasis added).

Petitioners also argue that "Section 1915(a) does not authorize courts to create new Indian families." Pet. Br. 52. But that is precisely what §1915(a) *does* command, establishing a presumptive placement preference for tribal members to adopt Indian children. Contrary to Petitioners' assertion, §1915(a) is unquestionably designed to facilitate the creation of new Indian (adoptive) families.

Petitioners also contend that the South Carolina Supreme Court's decision "is a *de facto* ban on the interracial adoption of any child suspected of having Indian ancestry." Pet. Br. 54. This is simply not so, as the result in *Holyfield* demonstrates. *Supra* at 18. Properly understood, ICWA provides only a presumption—albeit a strong presumption—in favor of placing an Indian child with members of her extended family or within her Tribe. It decidedly

does not *dictate* a result in any particular case, nor undermine a state court's responsibility to determine a child's best interests—precisely what the courts below did. Pet.App. 128a (Family Court) ("When 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. 36a-37a (agreeing with the Family Court and adding "we cannot say that Baby Girl's best interests are not served by the grant of custody to Father"). The South Carolina Supreme Court explained that a placement *could* be made outside of §1915's placement preferences if Petitioners proved "good cause" to deviate from those preferences, but found that Petitioners failed to make this showing and could not, in these circumstances, rely on a bond formed during the litigation itself. *See* Pet.App. 37a-39a.

Finally, Petitioners contend that §1915(a) should not apply because no alternative placement was presented to the Family Court. Pet. Br. 55. But in these proceedings it was premature for that court to consider alternative placements, since the threshold issues were whether Father had parental rights and, if so, whether his rights should be terminated. Only if those issues had been resolved against the Father would it have been appropriate for the court to receive full evidence on alternative placements. Nevertheless the South Carolina Supreme Court still made an independent finding that Petitioners had not shown good cause for Baby Girl to be placed with them, a finding made at the urging of Petitioners' counsel at oral argument.[9] In any event, the Nation

[9] At oral argument, Petitioners' counsel urged the South Carolina Supreme Court to make an independent determination under §1915(a), even though the Family Court had not done so,

presented evidence at trial about potential alternative placements—that the paternal grandparents had been certified by the Nation as a qualified adoptive placement, that (as she testified) the paternal grandmother would have received Baby Girl "[i]n a minute," JA 77-96, 151, and that at that time the Nation had approximately 100 certified adoptive homes, ROA 446. Petitioners' argument simply ignores the record below.

Thus, even if this Court determines that ICWA does not support the award of custody of Baby Girl to Father, that portion of the decision denying the adoption based on §1915 should be affirmed. And even if that were not so, the appropriate disposition would be a remand where the Nation would be entitled to assert that §1915(a)'s placement priorities, including the preference in favor of the child's extended family, should be applied.

II. CONGRESS DID NOT CONDITION ICWA'S APPLICATION ON A "PREEXISTING INDIAN FAMILY."

Petitioners insist that no aspect of ICWA applies unless there was a "preexisting Indian family." *E.g.*, Pet. Br. 30, 40-41, 51-54. At the same time, Petitioners try to distance themselves from the wholly atextual "existing Indian family" doctrine adopted by a few state courts, in the hopes of dodging the criticism which that doctrine has appropriately invited—including "the propriety of examining whether a preexisting Indian family is 'Indian' enough to merit protection under ICWA." *Id.* at 40. But Petitioners cannot have it both ways: they cannot seek to limit ICWA by the concept of a "preexisting Indian family,"

---

because Petitioners had raised this issue in their motion to reconsider before the Family Court.

yet evade the fundamental criticisms which have led a strong majority of state courts to reject the doctrine altogether.[10]

The text of ICWA does not support Petitioners' "preexisting Indian family" argument. The Act nowhere uses the term "preexisting Indian family," "existing Indian family," or any other variation of that phrase. The absence of a textual basis for the existing Indian family doctrine has been widely cited as a reason to reject it. *E.g.*, *In re Baby Boy C.*, 805 N.Y.S.2d 313, 323 (N.Y. App. Div. 2005); *Michael J., Jr.* v. *Michael J., Sr.*, 7 P.3d 960, 963 (Ariz. Ct. App. 2000); *In re Adoption of Baade*, 462 N.W.2d 485, 490 (S.D. 1990); *A.J.S.*, 204 P.3d at 549.

Moreover, ICWA's text plainly demonstrates that it applies whether or not there is a preexisting Indian family. Indeed, one of the provisions at issue here, §1903(9)'s definition of parent, expressly includes an unwed father who acknowledges or establishes paternity as a "parent" entitled to rights under ICWA. While by no means uniformly the case, it is fair to assume that many unwed fathers who acknowledge paternity will not have custody of their children. Nevertheless, Congress included *all* such unwed fathers who acknowledge or establish paternity as parents, without regard to the status of the family or the current custody of the Indian child.

---

[10] The "existing Indian family" doctrine describes an approach to ICWA invoked by a small number of state courts (mostly States lacking significant tribal member populations), in which ICWA is not applied to certain Indian child custody proceedings. *E.g.*, *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982), overruled *In re A.J.S.*, 204 P.3d 543 (Kan. 2009). The doctrine has been expressly *rejected* by the courts of 14 States, including the South Carolina Supreme Court below, and has also been rejected by six States by statute. *See* Cert. Opp'n 16 n.7.

Likewise, ICWA plainly applies to voluntary adoptions and voluntary terminations of parental rights, including those occurring immediately upon a child's birth. *E.g.*, §1913(a), (c), (d). Such children never live in any birth family at all, much less an "existing Indian family." So, too, §1915(a)'s placement preferences apply to "*any* adoptive placement of an Indian child," and §1915(b) applies to "*any* foster care or preadoptive placement." "Any" is clear, and these provisions require neither a preexisting Indian family nor an Indian custodial parent.

ICWA's legislative history confirms this point. Congress's inquiry revealed major problems associated with at-birth adoptions and other circumstances where a child had never lived with an Indian parent. Before ICWA, mothers of Indian children were often pressured by social workers and other agencies to give up their babies for adoption, even before the babies were born. *E.g.*, H.R. Rep. No. 95-1386, at 11 (1978) ("1978 House Report"); *Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong. 167 (1974) ("1974 Senate Hearings"). The record also contained a study of a Bureau of Indian Affairs funded demonstration project to recruit Indian families to adopt Indian children. In discussing the work of this project, the study recited:

> In one instance a 16 year old Navajo girl, pregnant and unmarried, came to Phoenix for her confinement and delivery. Following the child's birth she signed relinquishment papers and returned to the reservation to live. The baby remained in foster care for a few months while we worked to contact the father, who was away in military service. When we did reach him, he expressed great interest in the child and

> resumed contact with the mother. Extended family members then became interested and involved, and ultimately the mother revoked her relinquishment and the child was returned to her. Since that time the young couple has married, and the maternal grandmother is caring for their child. In this particular case the Navajo clan system, which is actively involved in the lives of its members, stepped into [sic] offer a plan that was acceptable to the natural parents and which ensures the child's growing up within his own extended family.

Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs, 95th Cong. 423-24 (1977) ("1977 Senate Hearing"). The report concluded "that dependent children can be kept within the Indian community," *id.* at 426, even when (as in the quoted example) an unwed mother seeks to give up her Indian child at birth and there is, of necessity, no "preexisting Indian family."

Petitioners insist that "Congress passed ICWA to stem the number of Indian children involuntarily removed from their homes by government officials ... without sufficient sensitivity to the family's cultural norms." Pet. Br. 16. But that is only partially true, for (1) Congress certainly intended ICWA to cover *voluntary* proceedings, (§1913), (2) Congress intended ICWA to address problems associated with private placements, and (3) Congress intended to protect the *Tribes*' discrete and compelling interest in tribal children, including in private adoption proceedings. *Holyfield*, 490 U.S. at 49.

Petitioners' incomplete vision of ICWA illustrates a key flaw in the cases that have adopted the existing Indian family doctrine. Like Petitioners, those cases insist that Congress's sole purpose was to protect

Indian children from being removed from Indian homes. *Holyfield* demonstrates otherwise. Noting that Congress made ICWA applicable to voluntary adoptions, and included several provisions protecting tribal rights, this Court concluded that "Congress was concerned not solely about 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.*

Holyfield also undermines Petitioners' argument in another way. The lack of any textual definition of "preexisting Indian family" raises the question of what constitutes a "family" under Petitioners' view of the Act.[11] In the case of an adoption at birth, an Indian child has never lived with an Indian parent or an Indian family, and this is so regardless of which biological parent is Indian. Nevertheless, in *Holyfield* this Court held that ICWA applies in precisely such 'non-family' circumstances: the Indian twins were born off the Choctaw Reservation, they were given up at birth for adoption to a non-Indian couple, and they never lived with either biological parent.

---

[11] Petitioners' argument implicitly assumes that "family" should be defined as a nuclear family, not an extended family. Such an assumption about what constitutes a "family" was among the very problems that led to the massive Indian child welfare crisis that Congress sought to end by ICWA. As the House Report stated,

> the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.

1978 House Report at 10.

Id. at 39. In *Holyfield*, there was no 'family' (in normal parlance) except the adoptive couple. Yet this Court applied ICWA to protect both the children and the Tribe. *Holyfield* directly forecloses Petitioners' notion that an Indian parent must be a custodian of the child for ICWA to apply.

Not surprisingly, most state courts that have considered the matter after *Holyfield* have rejected the existing Indian family doctrine, including some that had previously endorsed it. *E.g.*, *A.J.S.*, 204 P.3d at 549; *Baby Boy C.*, 805 N.Y.S.2d at 322-23; *In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989); *Michael J., Jr.*, 7 P.3d at 963; *In re Baby Boy L.*, 103 P.3d 1099, 1107 (Okla. 2004); *Baade*, 462 N.W.2d at 489. As these courts have recognized, this Court's understanding of ICWA, including ICWA's protection of tribal interests, leaves no room for an existing Indian family doctrine or a requirement that ICWA only protects custodial parents. *See* Dan Lewerenz & Padraic McCoy, *The End of "Existing Indian Family" Jurisprudence:* Holyfield *at 20,* In the Matter of A.J.S., *and the Last Gasps of a Dying Doctrine*, 36 Wm. Mitchell L. Rev. 684 (2010).

III. APPLICATION OF ICWA HERE IS CONSTITUTIONAL.

For 35 years, state courts nationwide have applied ICWA in thousands of child custody proceedings involving Indian children both on and off reservation. This Court applied ICWA in *Holyfield*, and most state courts have applied it broadly, including in many cases where no custodial parent or preexisting Indian family was present. *E.g.*, *Michael J., Jr.,* 7 P.3d 960; *A.J.S.*, 204 P.2d 543; *Baby Boy C.*, 805 N.Y.S.2d 313; *Baade*, 462 N.W.2d 485.

Despite that overwhelming record, Petitioners and GAL urge the Court to ignore ICWA's plain and sweeping language and refuse to apply it in the circumstances presented here. They assert this is necessary to avoid raising constitutional issues concerning both the scope of Congress's power, and the liberty and equal protection concerns that they contend might arise by refusing to order the child back to Petitioners. But this case does not present a proper vehicle for addressing any constitutional issue.

Significantly, Petitioners and GAL advance *no* direct constitutional challenge to ICWA. Rather, all of their arguments rely upon the constitutional avoidance doctrine. Pet. Br. 3, 43-44, 54; GAL Br. 48.[12] But that doctrine only applies when a statute is ambiguous. *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001); *Lewis* v. *United States*, 445 U.S. 55, 65 (1980). Since Congress has spoken clearly in ICWA by providing that the Act applies where an "Indian child" is involved in a "child custody proceeding," there is no basis for reaching any constitutional issue as an aid to construe the statute. Moreover, the Court should not reach out to decide a constitutional question where the parties expressly *abandoned* their constitutional challenges in the lower courts, and have not raised them here in the questions presented. In short, the Court should apply ICWA as written, leaving for another day what, if any, constitutional issues the application of the Act might generate.

---

[12] Several of Petitioners' amici contend that ICWA's application here would be unconstitutional. But amici cannot inject an issue into a case where the parties have not presented it. *United States* v. *Dion*, 476 U.S. 734, 746 (1986); *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991).

In any event, Petitioners and GAL face an exceedingly high burden in pressing their constitutional claims. When Congress legislates regarding Indian Tribes, its authority is based on the powers that the Constitution vests exclusively in the federal government to deal with Tribes as political entities, and the United States' unique constitutional and trust obligations to Indians. "[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes" which this Court has "consistently described as 'plenary and exclusive.'" *Lara*, 541 U.S. at 200. The source of that power rests in the affirmative grants set out in the Indian Commerce Clause, U.S. Const. art. I, §8, cl. 3, the Treaty Clause, *id.* art. II, §2, cl. 2, as well as the Property Clause, *id.* art. IV, §3, cl. 2. *Lara*, 541 U.S. at 200 (citing *Mancari,* 417 U.S. at 552); *see also United States* v. *Kagama*, 118 U.S. 375, 379-80 (1886); *Seminole Tribe* v. *Florida*, 517 U.S. 44, 62 (1996). It also rests "upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as 'necessary concomitants of nationality.'" *Lara*, 541 U.S. at 201 (citations omitted).

Congress has exercised these powers broadly, for example, to determine tribal membership and Indian status for federal purposes, s*ee, e.g.*, *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 488 (1899); to determine when Indians, wherever they lived, would be entitled to status as citizens of the United States, *Elk* v. *Wilkins*, 112 U.S. 94, 106-07 (1884); to transfer tribal property to individual Indians, *United States* v. *Seminole Nation*, 299 U.S. 417, 428-29 (1937); and to define Indian eligibility to share in distributions of tribal property, *Del. Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 84-85 (1977). Congress has the power to

completely terminate the federal guardianship over Indian Tribes, *see Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 408 (1968), as well as the power to recognize Indian Tribes that are subject to federal guardianship, *see United States* v. *Holliday,* 70 U.S. (3 Wall.) 407, 419 (1865); *United States* v. *Sandoval*, 231 U.S. 28, 46-47 (1913); *United States* v. *John,* 437 U.S. 634, 652-53 (1978); *Lara*, 541 U.S. at 202, and to decide when and on what terms to maintain that guardianship, *United States* v. *Nice*, 241 U.S. 591, 598 (1916).

Petitioners disregard this Court's broad deference to Congress in dealing with Indian Tribes. Instead, they offer myriad constitutional arguments based on a single erroneous premise: somehow the circumstances presented here, they contend, are not "Indian enough" for ICWA's application to be constitutional. Nothing in the Constitution, and certainly nothing in this Court's rulings, suggests a basis for such a subjective and standardless inquiry. To the contrary, this Court has made clear that Congress has broad powers over Indian affairs, and that it is up to *Congress* to determine the measure of that power's application, including determining who is an "Indian" for federal law purposes. *See Nice*, 241 U.S. at 598-601. Likewise, this Court has repeatedly held that where Congress legislates regarding Indian Tribes or their members (as it has done many hundreds of times for over two centuries), such legislation is based on political association; it is not race-based. *E.g.*, *Mancari,* 417 U.S. at 552; *Antelope,* 430 U.S. at 645-47. Further, this Court has emphasized that membership in an Indian Tribe—the interest at the core of ICWA—is a fundamental aspect of tribal self-government, which Congress unquestionably has plenary authority to protect. *Santa Clara Pueblo* v.

Martinez, 436 U.S. 49, 72 n.32 (1978). Congress in enacting ICWA exercised its powers over Indian affairs, drew a bright line regarding which Indians are covered to ensure it was political and not racial, and underscored the fundamental connection between custody of Indian children and tribal self-government. Petitioners and GAL seek to supersede all those principles with an approach never suggested by this Court, embraced by Congress, or commanded by the Constitution.

Petitioners and GAL would replace Congress's determinations in ICWA with a doctrine under which state courts would usurp congressional authority over Indian affairs and would decide, without any meaningful criteria, whether an Indian is "Indian enough" for ICWA to apply. In this sense, Petitioners and GAL are seeking to constitutionalize the existing Indian family doctrine, under which state courts determine whether the child's family is in some subjective sense "Indian enough." Yet, that doctrine has been roundly criticized precisely for allowing state courts to make ad hoc determinations of how "Indian" a person must be for ICWA to apply. *E.g., In re N.B.*, 199 P.3d 16, 21-22 (Colo. App. 2007); *Baby Boy C.*, 805 N.Y.S.2d at 324; *Quinn* v. *Walters*, 845 P.2d 206, 208-09 (Or. Ct. App. 1993), *rev'd on other grounds,* 881 P.2d 795 (Or. 1994).

There is no basis for stripping Congress of its power over Indian affairs as expressed in ICWA, based on a standardless state court determination of whether an Indian is "Indian enough." Actual membership (or eligibility for membership) in an Indian Tribe is a perfectly reasonable criterion for Congress to use in the exercise of its authority to protect and preserve Indian Tribes.

A. ICWA Does Not Violate Principles Of Equal Protection.

1. Federal Legislation In Indian Affairs Deals With Indians Based On Their Political Status.

Federal legislation concerning Tribes and tribal members is a matter of political association, not race. *Mancari*, 417 U.S. 535. Congress in ICWA legislated specifically with *Mancari* in mind, *see* 1978 House Report at 16-17, and limited ICWA's application to Indians who are members of federally recognized Tribes (and their eligible children). Tribal membership is the touchstone for ICWA's application, §1903(3), (4), and that is a complete answer to Petitioners' contrary argument.

In *Mancari*, this Court sustained a federal employment preference favoring tribal members against a due process and equal protection challenge, reasoning that the classification was not based on race but on "the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." 417 U.S. at 551. Finding that "[t]his unique legal status is of longstanding ... and its sources are diverse," *id.* at 555 (citation omitted), this Court explained that "[i]f these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized," *id.* at 552. The Court concluded that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the

Indians, such legislative judgments will not be disturbed." *Id*. at 555.

In *Mancari*, the Court found that an Indian employment preference met this standard because it was "reasonably designed to further the cause of Indian self-government and to make the [Bureau of Indian Affairs] more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency." *Id*. at 554. Congress's special treatment of Indians was justified by an interest that was *indirectly* linked to tribal self-government: employment with the federal agency that regulates tribal affairs. By comparison, the interests at stake in ICWA are *directly* tied to the Tribe, for they involve the right to maintain a political relationship with the Tribe itself. Nothing could be closer to tribal rights of self-governance than protection of the right to politically associate with the Tribe and the interests (including cultural, social, property and Treaty interests) that flow from the exercise of that political right.

Since *Mancari*, this Court has regularly reaffirmed that legislation regulating Indian affairs "is not based on impermissible [racial] classifications," but is "rooted in the unique status of Indians as 'a separate people' with their own political institutions," *Antelope,* 430 U.S. at 646, and that "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs," *Rice* v. *Cayetano*, 528 U.S. 495, 519 (2000).[13] Based on these principles,

---

[13] *Rice*, while reaffirming the vitality of *Mancari*, 528 U.S. at 518, also involved a very different situation in at least two key respects. First, it addressed the unique history of Native Hawaiians, as to which this Court stated "[i]t is a matter of

this Court has rejected equal protection challenges to federal laws that singled out Indians for unique treatment, whether those laws benefitted or burdened Indian interests. These have included federal laws that precluded Indian residents of a reservation from accessing state courts to adjudicate an adoption involving a reservation child, *Fisher*, 424 U.S. at 382, 390-91; subjected Indian criminal defendants to a lesser federal standard of proof than would have been applied if the defendant had been a non-Indian charged under state law, *Antelope,* 430 U.S. at 646-47; allowed a State to assume partial jurisdiction within an Indian reservation, *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501-02 (1979); determined which Indians would share in a distribution of tribal funds, *Del. Tribal Bus. Comm.*, 430 U.S. at 84-85; immunized Indians from state sales taxes, *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 479-80 (1976); and preempted state law that would otherwise have regulated Indian fishing and hunting outside of Indian reservations, *Washington* v. *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 & n.20 (1979).

Petitioners and GAL do not challenge *Mancari*, Pet. Br. 44; GAL Br. 54, nor do they challenge *Holyfield*, Pet. Br. 42; GAL Br. 55. They presumably recognize that ICWA's application to the twins in *Holyfield* was not unlawful racial discrimination but a matter of

---

some dispute ... whether Congress may treat the native Hawaiians as it does the Indian tribes." *Id.* at 518. Second, *Rice* involved a *state* voting scheme that directly affected "the affair[s] of the State of Hawaii" and thus implicated the Fifteenth Amendment. *Id*. at 520, 522. *Rice* did not involve the well-established authority of Congress to legislate for the benefit of federally recognized Indian Tribes, nor did it address a core tribal interest like the custody of tribal children.

political association. Accordingly, if the Indian child in this case had been domiciled on the Reservation, even under Petitioners' and GAL's argument there would be no issue of race.

So, despite their protestations about race, Petitioners' and GAL's arguments actually lie elsewhere. Their core argument is that ICWA's constitutionality turns on whether the facts are "sufficiently tied to the government's interest in preserving tribal connections." Pet. Br. 44. The GAL suggests a similar formulation. *See* GAL Br. 54 (whether the matter is "tethered directly to tribal land or tribal self-government"). These formulations invite a broad departure from *Mancari*'s clear and deferential standard, and they must fail because this child's undisputed status as a child "eligible for membership" in the Cherokee Nation clearly promotes tribal connections and self-government.

Without members, a Tribe ceases to exist. Every eligible member who is removed from her Tribe triggers Congress's core concern in ICWA to preserve the Tribe, a concern well within Congress's authority to address. The only way to avoid this conclusion—and the real argument underlying Petitioners' and GAL's thesis—is to argue that Congress's authority only extends to tribal members who are "Indian enough" in terms of their bond to their Tribe. But as we already have shown, such an utterly subjective standard is no basis for restricting Congress's plenary power over Indian affairs. [14]

---

[14] GAL's reliance on *Williams* v. *Babbitt*, 115 F.3d 657 (9th Cir. 1997), is misplaced. That case involved a statute providing a preference for Alaskan Natives with respect to the herding of reindeer. Under the Reindeer Industry Act of 1937, the preference was applied to "natives of Alaska," *which was expressly defined without regard to membership in any Tribe*. 25 U.S.C.

Along these very lines, Petitioners insist that ICWA's application depends on whether "the child could be exposed to Indian culture or tribal politics through her Indian parent." Pet. Br. 45. Like the existing Indian family doctrine, that subjective notion could never be consistently applied by diverse state court judges called to assess whether application of Congress's enactment is, in each case, sufficiently tied to tribal interests to pass constitutional muster. Petitioners themselves concede the issue with respect to the existing Indian family doctrine, noting that "[c]ourts that have rejected the existing Indian family doctrine have criticized the propriety of examining whether a preexisting Indian family is *'Indian' enough* to merit protection under ICWA." Pet. Br. 40 (emphasis added). It is hard to see how Petitioners' "could-be-exposed-to-Indian-culture-or-tribal-politics" standard could possibly fare any better.

2. ICWA Applies To Tribal Indians Based On Political Status, Not Race.

Consistent with *Mancari* and its progeny, ICWA expressly deals with Indians as a political matter,

---

§500n. In addition, the preference applied to an industry that was not a part of the traditional "Alaskan native way of life," and the Act provided no rights or benefits to Tribes (as opposed to individual natives of Alaska). *Williams,* 115 F.3d at 659. In this context—where Congress acted without addressing Indian Tribes as political entities—the court considered *Mancari* as likely not applicable with respect to its equal protection analysis. *Id.* at 665. The court therefore determined that, since the Act did not expressly prohibit non-Natives from participating in the reindeer industry, *id.* at 660, an administrative decision to the contrary was incorrect, *id.* at 668. Whether *Williams* was correctly decided or not, it has no application to a statute like ICWA which, as this Court explained in *Holyfield,* directly protects the interests of Tribes and tribal members.

based on tribal affiliation. The Act applies only to children who satisfy the Act's definition of the term "Indian child," which is: "any unmarried person who is under age 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." §1903(4). ICWA further defines the term "Indian tribe" to apply only to those Tribes that are federally recognized. §1903(8). Such Tribes are identified by lists published annually in the Federal Register. *See* 25 U.S.C. §§479a, 479a-1(a).

Contrary to Petitioners' and GAL's arguments, nothing in ICWA applies to an Indian child based on a child's race. The text of the Act makes this much plain, as it makes no reference to a child's Indian ancestry or blood quantum. Just as in *Holyfield*, where the Court dealt with "the twins [who] were 'Indian children'" without addressing their blood quantum or race, 490 U.S. at 42, this case does not concern Baby Girl's or her Father's race. Like the tribal member employment preference in *Mancari*, ICWA turns only on a child's membership (or eligibility for membership) in a Tribe that has been federally recognized. Given that Congress's definition of "Indian child" is tied explicitly to membership in a Tribe, without any regard to the child's "blood," it follows *a fortiori* from *Mancari* that Congress's classification is not racial. As applied in the Cherokee context, the situation is akin to that under the United States Constitution: a person who is born of a U.S. citizen is herself a U.S. citizen. No one thinks that such a right of citizenship by descent is in any manner racial, nor insists that there must be a clearer nexus to the nation before the citizenship right may arise.

As a result of Congress's careful calibration in ICWA, many persons of Indian ancestry are excluded. ICWA does *not* apply to children who may have Indian ancestry but cannot trace that ancestry to an ancestor's membership in a federally recognized Tribe, *cf. Rice*, 528 U.S. at 518, or who—even with such ancestry—do not satisfy the relevant Tribe's membership requirements, *e.g.*, *Santa Clara Pueblo,* 436 U.S. at 52. Even for children who are eligible for membership in a Tribe, ICWA further narrows its scope only to those who are also the biological child of a tribal member. If a parent, though eligible to enroll, either failed to do so or elected to relinquish membership in the Tribe, the child, even if eligible for membership, is not covered by ICWA.

The fact that ICWA specifically requires Indian children to be members of (or eligible for membership in) a "federally recognized" Tribe further underscores the political nature of the determination. Federal recognition is grounded in the continuing existence of a tribal community which maintains a government-to-government relationship with the United States. *See, e.g.*, *Carcieri* v. *Salazar*, 555 U.S. 379, 397-99 (2009) (Breyer, J., concurring) (documenting recognized Tribes' ongoing cohesion and interaction with the federal government); *accord* 25 U.S.C. §479a-1(a). Many persons of Indian descent are not members of, nor eligible to enroll in, a federally recognized Tribe. *See Del. Tribal Bus. Comm.*, 430 U.S. at 85; *see also United States* v. *Eagleboy*, 200 F.3d 1137, 1138 (8th Cir. 1999). By limiting ICWA only to children who have enrolled, or who are eligible to enroll, in a federally recognized Tribe, Congress understood that an eligible "Indian child" like Baby Girl might enroll in her Tribe and thereby affiliate politically with a

tribal entity that itself maintains a government-to-government relationship with the United States.

In the end, Petitioners and GAL are left casting aspersions on the Cherokee Nation's enrollment standards. But it is not for Petitioners or GAL (and certainly not state courts) to determine appropriate standards for tribal membership. On that issue, Congress deferred to the Tribes, a judgment which this Court has observed the Judiciary must respect. *Santa Clara Pueblo*, 436 U.S. at 72 & n.32.

3. Application Of ICWA Here Is Rationally Tied To Fulfillment Of The Federal Government's Unique Obligation To Indian Tribes.

Mancari and its progeny provide that a congressional enactment in Indian affairs meets the requirements of the Equal Protection Clause where it is rationally tied to the fulfillment of the government's unique obligations to Indians. The federal government's most fundamental obligation in Indian affairs is to protect the right of tribal self-government. *E.g.*, *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986) ("Congress' jealous regard for Indian self-governance"); *Santa Clara Pueblo,* 436 U.S. at 62 (Congress's "commitment to the goal of tribal self-determination"). This Court has consistently recognized that decisions on tribal membership and enrollment go to the core of tribal sovereignty and tribal identity, and have "long been recognized as central to [a Tribe's] existence as an independent political community." *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *accord United States* v. *Wheeler*, 435 U.S. 313, 322 n.18 (1978) ("[U]nless limited by treaty or statute, a tribe has the power to determine tribe membership."); *Roff* v. *Burney*, 168 U.S. 218, 222

(1897) ("The citizenship which the Chickasaw legislature could confer it could withdraw.").

Prior to ICWA's passage, the obligation of the United States to protect the future existence of Tribes as self-governing entities was jeopardized by hostile child custody practices. A comprehensive record developed by Congress revealed the disproportionately high number of Indian children then being raised in non-Indian, non-familial homes, and that widespread discrimination by public and private child welfare agencies impacted both involuntary and voluntary placements. *Holyfield*, 490 U.S. at 45 n.18, 50 n.25; 1978 House Report at 10-11. The record before Congress also showed that agencies used coercive and deceptive tactics to secure what were inaptly referred to as "voluntary waivers of parental rights." 1978 House Report at 11; *accord* 1974 Senate Hearings at 68. Further, some private agencies and adoptive and foster parents were motivated by financial incentives to place and adopt Indian children. 1978 House Report at 11; 1974 Senate Hearings at 118, 119; *see also* 123 Cong. Rec. 21,043 (1977) (remarks of Senator Abourezk that "demand for Indian children has increased dramatically"). Discriminatory standards also affected foster care and adoption placements, making it "virtually impossible for most Indian couples to qualify as foster or adoptive parents." 1978 House Report at 11. These kinds of biases and the failure to understand "the cultural and social standards prevailing in Indian communities and families," §1901(5), still exist and were very much at issue in this case. *See*, *e.g.,* JA 104, 106, 113, 146-148.

The separation of Indian children from their families and Tribes also gave rise to concerns about the "loss of [the Indian child's] right to share in the

cultural and property benefits of membership in his tribe." 124 Cong. Rec. 38,103 (1978) (remarks of Rep. Lagomarsino). Tribal witnesses testified about the difficulty for adopted children in securing information necessary to enroll and obtain benefits and inheritance rights that would otherwise follow tribal membership. *Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 75, 130 (1978) ("1978 House Hearings"); *see also* 1974 Senate Hearings at 166 (social worker denied Indian mother's request to have her children who were removed from her to be placed on the tribal roll).

The record further demonstrated that the problem was nationwide, occurring both on-reservation and off. Congress learned of the tragic impact of earlier federal policies which had led to the involuntary relocation of many Indians off-reservation. For example, although officially described as "voluntary," federal relocation programs in the 1950s and 1960s "pressured the Indians into relocating" to cities such as Chicago, Los Angeles and Minneapolis, without adequate preparation for the change.[15] The relocation program directly affected the Cherokee Nation. Wilma Mankiller, the only female Chief of the Cherokee Nation, was twelve years old when her family relocated to California under the federal Indian relocation program. After much struggle, she eventually made her way back to Oklahoma to become Chief of the Cherokee Nation in 1985. Wilma

---

[15] 1978 House Hearings at 103-07; *see also* Am. Indian Policy Review Comm'n (AIPRC), *Final Report to Congress* 429-33 (1977); *Indian Education: A National Tragedy—A National Challenge, Special Subcommittee on Indian Education of the Senate Committee on Labor and Public Welfare*, S. Rep. No. 91-501, at 163 (1969).

Mankiller & Michael Wallis, *Mankiller: A Chief and Her People* (1993).

Other federal programs, specifically targeting Indian children, led to the further decline of Indian families and communities. Congress was presented with evidence that federal use of boarding schools had "contribute[d] to the destruction of Indian family and community life." 1978 House Report at 9. From the 1880s into the 1950s, this policy undermined reservation life by placing Indian children in off-reservation boarding schools. This particularly cruel policy had as its objective "to separate a child from his reservation and family, strip him of his tribal lore and mores, force the complete abandonment of his native language, and prepare him for never again returning to his people."[16]

Another federal policy, known as the "Indian Adoption Project," in effect from 1958 into the early 1970s, actively sought to adopt Indian children through private and state agencies to non-Indian parents. 1977 Senate Hearing at 182, 415; *see also* Francis Paul Prucha, *The Great Father: The United States Government and the American Indians,* 1153-54 (1984). The 1977 American Indian Policy Review Commission's comprehensive report to Congress leveled special attention at this problem:

> The policy of removing Indian children from their homes and tribal settings to "civilize" them

---

[16] S. Rep. No. 91-501, at 12; *see also* AIPRC Task Force Eight, *Report on Urban and Rural Non-Reservation Indians Final Report to the American Indian Policy Review Commission,* 25 (1976) ("The sites of these schools were determined ... by the conscious intention of forcing a separation between Indian parents and children and between Indian children and the idea of the reservation.").

> began in the 1880's with the advent of boarding schools. Indian children are still being removed from their tribal culture. Today, however, this is done through the adoption of Indian children by non-Indian families and their placement in non-Indian foster care homes and institutions.

S. Rep. No. 95-597, at 39 (1977), *reprinting excerpts from* AIPRC, *Final Report to Congress* (1977).

Overall, the record before Congress demonstrated that these and other policies and practices posed a concrete threat to the very existence of the Tribes. Indian Tribes were "being drained of their children and, as a result, their future as a tribe and a people [was] being placed in jeopardy." 124 Cong. Rec. 38,102 (1978) (remarks of Rep. Udall). As this Court recognized, quoting the testimony of one tribal leader:

> "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People.... [T]hese practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships."

Holyfield, 490 U.S. at 34 (quoting 1978 House Hearings at 193 (testimony of Calvin Isaac, Tribal Chief of Mississippi Band of Choctaw Indians)); *see also* 1978 House Report at 19 (noting "the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future"); *id.* at 23 (legislation "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").

ICWA is an eminently rational congressional response to this tragedy of epic proportions. The interests that ICWA protects—a child's interest in the political, property, Treaty and cultural rights that flow from membership with her Tribe, and the Tribe's concomitant interest in ensuring that children who are members (or eligible for membership) retain their rights as tribal members—are tightly bound up in principles of tribal self-governance that Congress sought to address. As Congress recognized, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." §1901(3). An Indian child placed with her Indian parent (or another tribal member), will grow up to have the right to vote in tribal elections, run for tribal office, share in tribal assets, use tribal lands, exercise tribal Treaty rights, partake in tribal cultural activities, and otherwise participate (to the extent she wishes) in the life of the Tribe. The same child, placed elsewhere, could lose all these opportunities. All of this implicates the kind of political interests that this Court held in *Mancari* are a legitimate object of Congress's attention under its broad constitutional powers over Indian affairs.

As for the inclusion of children "eligible" for membership, this was a practical necessity:

> This minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing there from. Obviously, Congress has power to act for their protection. *The constitutional and plenary power of Congress over Indians and Indian tribes*

> *and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity*.

1978 House Report at 17 (emphasis added). In so doing, Congress also carefully considered this Court's decision in *Mancari* and the federal government's broad constitutional powers in Indian affairs. *Id*. at 16-17.

The interests Congress sought to advance in ICWA do not terminate when an Indian is outside the reservation. Congress determined, based on the record before it, that its purpose of protecting tribal survival across generations does not end at the border of the reservation.[17] Instead, Congress recognized that tribal integrity rests on notions of Indian community that are distinct from "Indian Country." This case is a good example of that approach being vindicated, for Baby Girl today lives in the heart of an Indian community and in the care of her Indian family. Congress's determination to protect that child and

---

[17] In ICWA, Congress authorized funds for off-reservation Indian child and family service programs. §§1932, 1933. ICWA is one among many federal statutes that protects the interests of Tribes and their members outside of Indian reservations. *See, e.g.*, 25 U.S.C. §§1651-1660h (authorizing federal funds for urban Indian health care); 25 U.S.C. §§3001(8), 3003-3005 (requiring museums, States and local agencies to repatriate Native American human remains and cultural objects); 25 U.S.C. §§305a-305e (protecting Indian artists from others who falsely represent a work as Indian-made); 42 U.S.C. §1996a (exempting from criminal prosecution use of peyote by traditional Indian religious practitioners).

the Tribe does not run afoul of any provision of the Constitution.

Congress's determination to apply ICWA nationwide was also consistent with the need for uniformity. *Holyfield*, 490 U.S. at 44-47. The sometimes fortuitous nature of where child custody proceedings take place is illustrated by this case. Both parents live and the child was born in Oklahoma, within a Cherokee community where the Cherokee Nation provides extensive services to Cherokee citizens. Nevertheless, her custody was adjudicated in South Carolina—it might have been anywhere—simply because that happened to be the residence of the couple petitioning for adoption. Neither the Tribe nor the Father could have predicted such a development. Even then, the location of the child custody proceeding was impacted by a series of procedural issues that affected whether the Cherokee Nation and state authorities were properly informed of the child's status as an Indian child. *See* Pet.App. 19a.

As the facts here underscore, the place where an Indian child custody proceeding occurs is often a matter of chance. Congress reasonably determined that uniform federal standards were required precisely to avoid inconsistencies in state law in determining the future of Indian Tribes. In so doing, Congress took action analogous to other statutes that establish uniform federal standards for determining jurisdiction and choice of law when more than one sovereign has an interest in a child custody proceeding. *See, e.g.*, *Thompson* v. *Thompson*, 484 U.S. 174, 180-81 (1988) (addressing the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. §1738A); *Abbott* v. *Abbott*, 130 S. Ct. 1983 (2010) (addressing the International Child Abduction Remedies Act, 42 U.S.C. §§11601-11611).

In sum, there is no equal protection violation here. Congress enacted ICWA based on a comprehensive record demonstrating that the future of Tribes as self-governing entities was threatened by child custody practices across the 50 States. Exercising its plenary constitutional authority over Indian Tribes, Congress reasonably tailored a response to the problem that addressed the matter in terms of political association. In addressing core tribal interests—membership, and the political, property and other rights that flow from membership—Congress acted rationally in furthering its unique obligations to the Tribes.

B. Application Of ICWA Here Does Not Violate The Mother's Liberty Interests Or Substantive Due Process Rights.

While the Petitioners contend that ICWA's application would violate the Mother's liberty interests in raising a child, Pet. Br. 48, no such claim regarding the Mother was raised at any time in the proceedings below. In any event, from before the time Baby Girl was born, Mother consistently *disclaimed* any interest in raising her. She relinquished her parental rights. JA 22-24. While a parent has a fundamental liberty interest in raising a child, *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000), that interest does not continue after a parent relinquishes all parental rights. At that point, child custody becomes a matter of statutory law. To be sure, the views of a biological parent regarding the adoptive placement of a child may be considered, under both state law and ICWA. *See* 44 Fed. Reg. at 67,594. But such a parent's views are by no means determinative and they warrant no constitutional protection.

Petitioners' argument focuses on the unquestionably difficult choices that an unmarried woman who

becomes pregnant must make, decisions which can be all the more complicated if she is estranged from the biological father. But that is the case whether or not the child is an Indian child under ICWA. In any event, ICWA reflects a comprehensive and reasonable determination by Congress regarding how to accommodate the competing interests involved in Indian child custody proceedings, and a mother who chooses to relinquish all legal rights to raise her child has no fundamental liberty interest to challenge Congress's judgments.

C. Application Of ICWA Here Does Not Violate The Child's Liberty Interest Or Substantive Due Process Rights.

Petitioners and GAL argue that ICWA's application violated the child's liberty interests. Pet. Br. 49; GAL Br. 50, 56-58. But even Petitioners concede that this Court has never addressed "'a child's liberty interest in preserving established familial or family-like bonds.'" *See* Pet. Br. 49 (citing *Troxel*, 530 U.S. at 88 (Stevens. J., dissenting), and *Michael H.* v. *Gerald D.*, 491 U.S. 110, 130 (1989) ("We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintain her filial relationship.")). In nonetheless treading into this ill-defined area, they insist that to apply ICWA here would unconstitutionally deprive Baby Girl of a placement that would be in her best interests. Their argument fails to recognize that (1) the child's rights in this context are first and foremost rights to a relationship with her Father, and (2) ICWA, by incorporating a "good cause" standard into §1915(a), already protects whatever liberty interest the child may have regarding custody determinations. *See DeShaney* v. *Winnebago Cnty. Dep't of Social Servs.*, 489 U.S. 189 (1989).

First, Petitioners' and GAL's argument conflates two separate inquires. Before the lower court could determine whether the child should be placed with the adoptive couple, the court had to determine whether the Father had rights as a parent, and, if he did, whether those rights should be terminated. If the Father had parental rights, those rights were constitutionally protected and could not be terminated unless he was shown to be unfit. *Santosky* v. *Kramer*, 455 U.S. 745, 753-54 (1982). A child's interests in a filial relationship exists most significantly in her relationship with her natural parents, including her Father, absent a judicial determination that her Father either possessed no parental rights or should have those rights terminated. But so long as parental rights exist, "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Id.* at 760.

Without doubt, a child who is temporarily placed in a foster care or preadoptive home pending a full adjudication of the parents' rights (as occurred here, JA 57, 59), may develop bonds to her custodians. But temporary custody of a child is a matter of statutory law, not constitutional right. *Smith* v. *Org. of Foster Families for Equal. & Reform,* 431 U.S. 816, 845-46 (1977). As a result, "whatever emotional ties may develop" during a temporary placement, those relationships are always subject to the substantive liberty interests of the Father who, if he has established rights as a parent, "has an absolute right to the return of his child in the absence of a court order obtainable only upon compliance with rigorous substantive and procedural standards, which reflect the constitutional protection accorded the natural family." *Id.* at 845, 846. Once found to be a parent,

the Father's fitness as a parent is not measured by comparison with other placement options; it is judged on its own merit. *See Reno* v. *Flores*, 507 U.S. 292, 304 (1993).

Second, their argument misconstrues how ICWA operates and how it was applied here. ICWA provides for presumptive placement in accordance with certain preferences, while allowing state courts to depart from those preferences based on "good cause." §1915(a). The "good cause" analysis provides full protection for the child's interests. The lower court took care to account for the child's best interests. After seeing the witnesses at trial, the Family Court specifically found that "[Father] is the father of another daughter. The undisputed testimony is that he is a loving and devoted father. Even [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." Pet.App. 126a-127a. The Family Court added that:

> Parental rights are fundamental rights that are to be protected. Santosky v. Kramer, 455 U.S. 745 ... (1982). I find that [Father], 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, based upon his relationship with his other daughter. [Father] has convinced me of his unwavering love for this child.

Pet.App. 127a-128a. The South Carolina Supreme Court affirmed these findings, Pet.App. 31a, 36a-37a, and in so doing rejected the dissent's view that the family court had applied ICWA to "eclipse[] the family court's obligation to determine what would be in the child's best interests," Pet.App. 36a n.29. In sum, application of ICWA here did not violate the

child's liberty interests or substantive due process rights.

At core, Petitioners' and GAL's argument is premised on their view of the *evidence*, a view that was rejected by the Family Court and the South Carolina Supreme Court and is not subject to review here under the Court's two-court rule. *See*, *e.g.*, *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 840-41 (1996) ("application of law to fact, ... is left to the factfinder, subject to limited review.... 'A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'"); *see also United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.,* 336 U.S. 271, 275 (1949).

D. Application Of ICWA Does No Violence To Federalism.

Although no State has stepped forward and complained about the South Carolina Supreme Court's holding in this case, Petitioners nevertheless contend that applying ICWA here violates federalism concerns by infringing on traditional states' rights in the field of domestic relations. Pet. Br. 49-51. Significantly, neither South Carolina nor *any* other State filed a brief in support of Petitioners here, which suggests that the federalism claim lacks merit.

What makes Petitioners' federalism concerns particularly overblown is that no one can identify which state laws are implicated. Petitioners contend that ICWA's application here "creat[ed] a new federal class of parents that consists of unwed fathers holding no parental rights under state law" and, as such,

is in derogation of state authority in domestic affairs. Pet. Br. 50. But state laws differ considerably on when an unwed father is a "parent," and an unwed father may have greater (or lesser) rights as a parent depending on where the matter is adjudicated. *See* Jeffrey A. Parness & Zachary Townsend, *Legal Paternity (and Other Parenthood) After* Lehr *and* Michael H, 43 U. Tol. L. Rev. 225, 249-50 (2012).

Certainly the record before Congress supports its decision to apply a uniform standard for Indian child custody proceedings in state courts. The diverse application of state law regimes would frustrate Congress's purpose in securing to Tribes and Indian children security in their vital relationships. *Holyfield*, 490 U.S. at 45-46. ICWA (like other federal laws establishing uniform standards for certain child custody proceedings, *see supra* at 47) responds to a pressing problem where the federal government has an overriding interest in the application of uniform law.[18]

---

[18] Petitioners cite to concerns expressed by Judge Wald, then Assistant Attorney General, during congressional consideration of ICWA about the extent to which federal legislation could apply to custody proceedings involving Indian children in state courts off-reservation. Pet. Br. 50-51 (citing 1978 House Report at 40). Judge Wald's concerns in this regard were stated generally, without any reference to this Court's rulings with respect to the scope of federal power over Indian affairs. Congress responded to those concerns by undertaking a careful examination of this Court's precedent, which strongly supports Congress's conclusion that its constitutional power to legislate in Indian affairs may properly preempt state law and apply to Indians both within and outside of Indian reservations as set forth in ICWA. 1978 House Report at 12-15. Congress correctly determined that the child welfare crisis threatened the future viability of Indian Tribes and that this problem required a comprehensive nationwide solution. Contrary to Judge Wald's general view, Congress reasonably determined that enactment

No one disputes that States have an interest in child custody matters. But under the Constitution, States have no interest in matters affecting tribal membership or internal tribal relations. The Constitution conveyed all such power to the federal government, *Seminole*, 517 U.S. at 62; *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194-95 (1876), and pursuant to its constitutional authority over Indian affairs, Congress has for two centuries enacted measures for Indians that touch upon core state interests, *e.g.*, *Antelope*, 430 U.S. at 648 (criminal law); *Perrin* v. *United States*, 232 U.S. 478, 485 (1914) (alcohol regulation); *Ramah Navajo Sch. Bd. Inc.* v. *Bureau of Revenue*, 458 U.S. 832 (1982) (schools); *Bd. of Cnty. Comm'rs* v. *Seber*, 318 U.S. 705, 718 (1943) (property taxes); *Moe*, 425 U.S. at 479-81 (sales and tobacco taxes). Federal authority to legislate regarding Indians, and to preempt state law, has frequently included matters impacting Indians outside of Indian country. *E.g.*, *Perrin*, 232 U.S. at 485; *Seber*, 318 U.S. at 718; *Antoine* v. *Washington,* 420 U.S. 194, 205-06 (1975). Given the plenary nature of Congress's authority in Indian affairs, the Act as applied here does not implicate federalism concerns.

---

of ICWA was based on an important federal interest—the protection of tribal self-governance and the future survival of Indian Tribes.

CONCLUSION

For the foregoing reasons, the judgment of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

LLOYD B. MILLER
WILLIAM R. PERRY
ANNE D. NOTO
COLIN CLOUD HAMPSON
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, N.W.
Suite 600
Washington, DC 20005
(202) 682-0240

TODD HEMBREE
ATTORNEY GENERAL
CHRISSI ROSS NIMMO*
ASSISTANT ATTORNEY GENERAL
CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465
(918) 458-6998
chrissi-nimmo@cherokee.org

CARTER G. PHILLIPS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Respondent Cherokee Nation

March 21, 2013

* Counsel of Record