No. 12-399

In the Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

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

Respondents.

On Petition for a Writ of Certiorari to Supreme Court of South Carolina

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents address the following questions:

1. Whether the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963, governs state proceedings to determine the custody of a minor who all parties concede to be an "Indian child" within the meaning of the Act.

2. Whether a father who satisfies state-law requirements to establish paternity qualifies as a "parent" under ICWA.

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MISCELLANEOUS

BRIEF IN OPPOSITION

STATEMENT

Petitioners and their *amici* contend that the Court should grant review to resolve what they characterize as two conflicts in the state courts on the meaning of the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963. That contention, however, is wrong on every level. On examination, one of petitioners' purported conflicts, concerning ICWA's use of the word "parent," simply has no bearing on the outcome of this case. And the other conflict, involving application of the so-called "existing Indian family doctrine," concerns the validity of a judicial construct that has been widely repudiated and is of limited and diminishing importance—which doubtless explains why petitioners *expressly waived* reliance on the doctrine in their argument to the South Carolina Supreme Court. As a consequence, the questions presented here, which were unanimously and correctly decided by the courts below, do not warrant this Court's attention. The petition should be denied.

A. Statutory background.

1. As this Court has explained, ICWA "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of 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." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 32 (1989). Oversight hearings found that "25 to 35% of all Indian children had been separated from their families and placed in adoptive

families, foster care, or institutions." *Ibid.* The adoption rate for Indian children was eight times that for non-Indians, and 90% of the adopted Indian children were placed in non-Indian homes. H.R. Rep. No. 95-1386, at 9 (1978). This crisis was exacerbated by what Congress described as state failure "to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). In Indian communities, it is common for a child to "have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family." H.R. Rep. No. 95-1386, at 10 (1978). Many state social workers, however, "consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." *Ibid.*

Overall, witnesses termed "[t]he wholesale removal of Indian children from their homes[] * * * the most tragic aspect of Indian life today." *Holyfield*, 490 U.S. at 32 (citation omitted). And while much of this testimony addressed "the harm to Indian parents and their children," "there was also considerable emphasis on the impact on the tribes themselves." *Id.* at 34. Faced with this evidence, Congress concluded in legislative findings that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3). But it determined that "an alarmingly high percentage" of Indian children "are placed in non-Indian foster and adoptive homes and institutions." *Id.* § 1901(4).

2. Congress responded by enacting ICWA, which "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and

tribe in retaining its children in its society." *Holyfield*, 490 U.S. at 37 (quoting H.R. Rep. No. 95-1386, at 23 (1978)). The statute declares it "the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children." 25 U.S.C. § 1902. ICWA effectuates this goal by, among other things, setting "procedural and substantive standards for those child custody proceedings that do take place in state court." *Holyfield*, 490 U.S. at 36.

Most important for present purposes, ICWA imposes a heightened evidentiary standard for terminating the parental rights of an Indian parent or custodian. This provision establishes that "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt * * * that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f) (the "Parental Termination provision"). ICWA defines the "parent" who is covered by this provision to include "any biological parent or parents of an Indian child," excluding "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). An "Indian child" whose custody proceeding is governed by ICWA is "any unmarried person who is under age eighteen[,] * * * is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

In addition, ICWA specifies a hierarchy of preferences in the placement of Indian children, providing

that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a). See 25 U.S.C. § 1913(2) (listing members of extended family). These provisions collectively demonstrate "a Federal policy that, where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 37 (citation omitted).

B. Factual background.

This case involves a bitterly contested child custody dispute. Unsurprisingly, the parties and other participants offer very different accounts of the underlying facts (see, *e.g.*, Pet. App. 3a n.3, 4a n.4, 8a n.9), which were viewed quite differently by the majority and dissent in the South Carolina Supreme Court. The petition's factual account is taken principally from the dissent below; our factual statement, in contrast, follows that of the South Carolina Supreme Court majority and of the state Family Court, the latter of which took testimony and was in a position to assess the witnesses' credibility.

1. Father, respondent here, and Mother are the biological parents of Baby Girl. Father is a registered member of respondent Cherokee Nation. Pet. App. 104a. They were engaged at the time the child was conceived, while Father was serving in the United States Army and stationed at Fort Sill, Oklahoma. *Id*. at 105a. The Family Court found that Father "was excited to learn of the pregnancy and urged [Mother] to move the wedding date forward so that the child would be born during their marriage. In that way, she and the unborn child would have military health coverage during and after the pregnancy,

the family could obtain base housing, and his military pay would increase." *Ibid.* But the relationship became strained and Mother "broke off the engagement in May [2009] via text message" (*id.* at 3a), "end[ing] all contact and communication between herself and [Father]." *Id.* at 105a.[1]

In June 2009, "Mother sent a text message to Father asking if he would rather pay child support or surrender his parental rights. Father responded via text message that he would relinquish his rights, but testified that he believed he was relinquishing his rights to Mother." Pet. App. 4a. During this exchange, "Mother never informed Father that she intended to place the baby up for adoption. Father insists that, had he known this, he would never have considered relinquishing his rights." *Ibid.*[2]

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

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[1] This brief cites to the Family Court opinion that is reprinted in the sealed petition appendix. Like the opinion of the South Carolina Supreme Court, this brief uses only pseudonyms in referring to the parties and contains no personal identifying information.

[2] Although petitioners declare that Father "voluntarily relinquished his parental rights via text message while the mother was pregnant" (Pet. 2), they fail to note that he did so in response to Mother's text message, after she had used text messages both to break their engagement and to request that he relinquish his parental rights or pay child support.

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

Also in June 2009, Mother was introduced to petitioners ("Adoptive Couple"), a couple living in South Carolina, through an Oklahoma adoption agency. Mother testified "that she knew 'from the beginning' that Father was a registered member of the Cherokee Nation, and that she deemed this information 'important' throughout the adoption process." Pet. App. 5a. Nevertheless, "it appears that there were some efforts to conceal his Indian status" and the adoption agency's pre-placement form indicates that "[i]t was determined that naming him would be detrimental to the adoption." *Id.* at 6a. Although Mother's attorney provided the Cherokee Nation with father's name while inquiring whether the child would be an "Indian child" subject to ICWA, the attorney misspelled Father's first name (*ibid.*), and provided both the wrong day and the wrong year for Father's date of birth (*id.* at 106a); based on these misstatements, the Cherokee Nation responded that the child appeared not to be an Indian child, adding that any misinformation would invalidate that determination. *Id.* at 6a.

Baby Girl was born on September 15, 2009. The next morning, Mother signed forms relinquishing her parental rights and consenting to the adoption by Adoptive Couple. Pet. App. 7a. At the time, Adoptive

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

Couple was required to receive permission pursuant to the Oklahoma Interstate Compact on Placement of Children (ICPC) as a prerequisite to taking Baby Girl to South Carolina. The necessary forms, signed by Mother, "reported Baby Girl's ethnicity as 'Hispanic' instead of 'Native American.'" *Ibid.* Following submission of this misinformation, Adoptive Couple received permission to take Baby Girl to South Carolina. The misstatements were essential to the progress of the adoption: Had the birth father's status as a member of the Cherokee Nation been known, neither the Cherokee Nation nor the Oklahoma ICPC agency would have consented to the removal of the child from Oklahoma. *Id.* at 7a-8a & n.8.

Petitioners filed this adoption action in South Carolina on September 18, 2009, three days after Baby Girl's birth. But they did not inform father of the proceeding for almost four months. At that time, "days before Father was scheduled to deploy to Iraq," a process server presented Father with legal papers outside a mall near his base stating that "he was not contesting the adoption of Baby Girl." Pet. App. 8a-9a. Upon realizing that Mother had relinquished her rights to petitioners, Father immediately consulted with a JAG lawyer at his base, retained a personal lawyer, sought a stay of the adoption proceeding, and began an action to establish paternity, child custody, and support of Baby Girl. *Id.* at 9a.[4] Within days of this development (and after giving his father power of attorney to conduct the suit), Father "was dep-

[4] Father initially brought suit in Oklahoma but that action ultimately was dismissed on jurisdictional grounds. See Pet. App 9a-10a.

loyed to Iraq, where he served this country honorably during Operation Iraqi Freedom for a period of nearly one year" and received a Bronze Star for his service. *Id*. at 108a; see also *id*. at 3a n.2. Meanwhile, the Cherokee Nation identified Father as a registered member and intervened in the South Carolina adoption action pursuant to ICWA. *Id*. at 10a.

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

2. The Family Court held a four-day hearing to resolve custody of Baby Girl, at which a central question was whether to apply ICWA's child custody standards. Adoptive Couple contended that ICWA was unconstitutional and, in any event, should not apply in this case under the "existing Indian family doctrine," which posits that ICWA does not apply when an unmarried non-Indian mother surrenders custody of an Indian child who is not currently living with an Indian family. Pet. App, 109a-110a, 113a. But the Family Court rejected both of these contentions.

On the first, the court held that ICWA does not violate equal protection principles because disparate treatment "is 'granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities.'" Pet. App. 116a (quoting *Morton* v. *Mancari*, 417 U.S. 535, 554 (1974)). As for the "existing Indian family doctrine," the court held that it has no bearing here for two independent reasons. The court initially held the doctrine wholly invalid, "follow[ing] the majority of other jurisdictions and the clear modern trend and not adopt[ing] the 'existing Indian family' doctrine as an exception

to the application of ICWA." *Id.* at 118a. And, the family court judge added,

> even if I found "EIF" to be good law, I find it inapplicable to the facts of this case. Specifically, I find [Father] is a Cherokee in more than name only, and there is, in fact an existing Indian family. There was ample testimony to support that [Father's] heritage and culture are very important to him and always had been * * *. [T]here was evidence in [the home of Father and his family] reflecting their pride and connection to the [Cherokee] Nation and the Wolf Clan. I find that [Father] has a strong cultural tie to the Cherokee Nation.

Id. at 118a-119a.

The court went on to hold that Father meets ICWA's definition of "parent" because "he has both acknowledged paternity and paternity has been conclusively established in this action through DNA testing." Pet. App. 121a. This meant that, under ICWA, Adoptive Couple "must prove grounds to terminate [Father's] parental [rights] and must prove that custody of the child by [Father] is likely to result in serious emotional or physical damage to the child." *Id.* at 122a-123a. But the court found that Adoptive Couple failed to prove either of those things. *Id*. at 126a. The court noted that Father "is the father of another daughter" and that "[t]he undisputed testimony is that he is a loving and devoted father. Even [Mother] herself testified that [Father] was a good father. There is no evidence to suggest that he would be anything other than an excellent parent to this child." *Id*. at 126a-127a. Accordingly, the court found that "the birth father is a fit and proper person to

have custody of his child"; he "has demonstrated that he has the ability to parent effectively" and "has convinced me of his unwavering love for this child." *Id.* at 127a-128a.

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

The court accordingly denied the adoption and required Adoptive Couple to transfer Baby Girl to Father. The transfer took place on December 31, 2011. Pet. App. 2a. As of this writing, Baby Girl has resided with Father and his parents in Oklahoma for almost a full year.[5]

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[5] A guardian ad litem ("GAL") was appointed to represent Baby Girl below; the GAL has filed a brief in this Court as respondent in support of the petition that purports to be on behalf of Baby Girl and asserts that Baby Girl's interests "would be served by allowing her adoptive parents to retain custody." GAL Br. 1. This submission is entitled to no weight. The GAL was selected by Adoptive Parents. Respondents initially sought removal of the GAL because they believed that the GAL was both biased in petitioners' favor and wholly unfamiliar with Indian culture. See Initial Brief of Respondent Cherokee Nation at 19-21, *Adoptive Couple* v. *Baby Girl*, No. 2009-DR-10-8303 (S.C. Feb. 15, 2012). Rather

3. On appeal Adoptive Couple changed their approach, expressly waiving reliance on the "existing Indian family doctrine" and disavowing their constitutional argument.[6] The South Carolina Supreme Court nevertheless affirmed. Pet. App. 1a-102a.

That court devoted the great bulk of its attention to the question whether Adoptive Couple "proved grounds to terminate Father's parental rights under the ICWA." *Id.* at 12a. On this, the court was closely divided. The majority held that "we cannot say that

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than delay the proceedings, however, they instead ultimately agreed with petitioners that the Family Court would *not* consider either the GAL's conclusion regarding Baby Girl's best interests or the GAL's custody recommendation. See Pet. App. 51a n.44 (Kittredge, J., dissenting). Indeed, South Carolina law *precludes* a guardian ad litem in a private adoption from providing a custody recommendation unless one is requested by the court (see S.C. Code Ann. § 63-3-830(A)(6)); no such request was made here.

We also note that, notwithstanding her filing in this Court, the GAL did not appeal the Family Court's decision below. Although the GAL nevertheless initially attempted to file a brief in the South Carolina Supreme Court, she then withdrew it—seemingly not "after deciding that Baby Girl would be better served if the South Carolina Supreme Court were only asked to address the arguments raised by petitioner in their appeal," as she now improbably asserts (GAL Br. 5 n.1), but in response to Father's motion to strike her brief as improper. See Motion By Birth Father To Strike Initial Brief Filed By Guardian Ad Litem Or In The Alternative To Permit Birth Father To File Brief In Response, *Adoptive Couple* v. *Baby Girl*, No. 2009-DR-10-8303 (S.C. Feb. 21, 2012).

[6] Petitioners did not argue either point in their briefs to the South Carolina Supreme Court. When pressed at oral argument, petitioners' counsel expressly disclaimed both. We do not reprint the exchange here because the transcript of that argument remains sealed.

Baby Girl's best interests are not served by the grant of custody to Father, as [petitioners] have not presented evidence that Baby Girl would not be safe, loved, and cared for if raised by Father and his family" (*id.* at 37a); the court added that "even if we were to terminate Father's rights" (*ibid.*), Adoptive Couple failed to demonstrate good cause for departing from ICWA's statutory placement preferences. *Id.* at 38a-39a. The two dissenting justices vehemently disagreed, opining that "the unique facts of this case" should lead to placement of Baby Girl with Adoptive Couple. *Id.* at 42a (Kittredge, J., dissenting). Petitioners, however, do not raise that factual issue—the source of the disagreement below—before this Court.

In contrast, the justices below found the two questions that petitioners now present to this Court to be easy, and they unanimously rejected petitioners' arguments on those questions. In a footnote, the majority below took "this opportunity to reject the 'Existing Indian Family' doctrine," "[g]iven that its policy conflicts with the express purpose of the ICWA"; the court noted that "we join the majority of our sister states who have rejected the EIF or have since abandoned the exception." *Id.* at 17a-18a n.17. The dissenting justices agreed. *Id.* at 55a n.46 (Kittredge, J., dissenting).

By the same token, the majority rejected petitioners' argument that, because South Carolina law does not require Father's consent to the adoption, he does not qualify as a "parent" under ICWA. The court explained that this argument "collapse[s] the notions of paternity and consent," and that "Father met the ICWA's definition of 'parent' by both acknowledging his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed

up for adoption and establishing his paternity through DNA testing." *Id.* at 22a. "[B]y its plain terms, this is all that is required under the ICWA." *Ibid.* The dissenters expressly agreed. *Id.* at 58a (Kittredge, J., dissenting). And both majority and dissent likewise agreed that Father's status as a "parent" under ICWA was largely beside the point: "ICWA applies because Baby Girl is an Indian child, and whether or not this Court finds Father a 'parent' has no bearing on ICWA's applicability." *Id.* at 20a-21a n.18; see *id.* at 59a (Kittredge, J., dissenting) ("[E]ven if Father had not acknowledged paternity here, ICWA nonetheless would apply simply because Baby Girl is an Indian child."). As a consequence, the issues now presented here by petitioners and their *amici* were a very small part of the dispute below, where those questions were regarded as noncontroversial and were easily resolved.

REASONS FOR DENYING THE PETITION

The petition for certiorari in this case makes a very peculiar presentation. Although the South Carolina Supreme Court was indeed closely divided, petitioners have chosen *not* to advance the issues on which the justices below disagreed. Instead, the petition presents for review two questions that the justices of the South Carolina Supreme Court unanimously, and correctly, regarded as insubstantial.

Petitioners' contentions should not get a more favorable reception here. The "existing Indian family doctrine" on which they rely has received an increasingly chilly reception from state courts and legislatures across the nation; there is no need for this Court to address an approach that is invoked infrequently and with diminishing success in the lower courts. Even if that were not so, petitioners *waived*

reliance on the doctrine below, leaving undeveloped factual points that bear on application of the doctrine and making this case an especially poor one in which to address it. As for the second purported conflict advanced by petitioners—whether state or federal law governs the determination of paternity under ICWA—it is not presented here at all: *every* court would apply the approach to that question taken by the South Carolina Supreme Court in this case.

Having said that, we of course recognize that the dispute here is a painful and wrenching one because it involves child custody. But it is not a dispute where this Court's intervention is appropriate. The petition for certiorari should be denied.

I. Petitioners' Question Regarding The "Existing Indian Family Doctrine," Which Was Waived Below, Does Not Warrant Review.

Petitioners' principal contention is that the Court should grant review to determine the validity of the "existing Indian family doctrine," maintaining that "[t]he division among state courts" on that question "has become more deeply entrenched in recent years" and that "[t]his case presents an ideal vehicle to resolve the conflict." Pet. 14. But these contentions are quite plainly wrong. In fact, this case is an especially poor vehicle for resolution of the question, and the conflict is in any event one of limited and diminishing importance. For these reasons—and because the decision below is correct—further review of the issue is not warranted.

A. Petitioners waived the "existing Indian family" argument.

At the outset, this case would be a notably bad one in which to address the "existing Indian family

doctrine." When pressed at oral argument before the South Carolina Supreme Court, counsel for petitioners explicitly *abandoned* reliance on the doctrine. Presumably as a consequence, the court below—although "tak[ing] this opportunity to reject" the doctrine (Pet. App. 17a n.17)—limited its analysis to a single footnote. *Ibid.* In three sentences, the court described the doctrine, observed that the majority of states have rejected or abandoned it, and refused to apply the doctrine on the ground that "its policy conflicts with the express purpose of the ICWA." *Ibid.* It is unclear whether the court actually regarded these brief comments as a holding; the dissenting justices opined that they likewise would have rejected the doctrine "[w]ere the issue before this Court." *Id.* at 55a n.46 (Kittredge, J., dissenting). This failure by petitioners to properly present the issue below is reason enough for the Court to deny review.

That is especially so because petitioners' waiver of the argument denied the South Carolina Supreme Court an opportunity to address the issue fully, and therefore would handicap this Court's consideration of the question were review granted. Thus, the Family Court found that the doctrine, even if good law, would be "inapplicable to the facts of this case" because "there is in fact an existing Indian family." Pet. App. 118a. There is good reason to believe that even those courts that accept the doctrine would agree: Those courts have applied the doctrine when the child "probably never would be" raised in an Indian environment absent application of ICWA (*In re the Adoption of Baby Boy L.*, 643 P.2d 168, 171 (Kan. 1982)), a conclusion that cannot be reached here given the close connection of Father and his family with the Cherokee Nation. Yet petitioners' waiver of the "existing Indian family doctrine" argument on appeal

means that this issue was not explored below. And that, too, counsels in favor of denying the petition.

B. The "existing Indian family" argument is of limited importance and does not warrant consideration by this Court.

1. Even if the issue had not been waived, it assuredly is not the case that the conflict on the "existing Indian family doctrine" in state court "has become more deeply entrenched in recent years." Pet. 14. In fact, the very substantial majority of state courts that have considered the doctrine have rejected it. Nineteen states firmly oppose application of the doctrine,[7] while only seven states employ it.[8] And the

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[7] In fourteen of these States, it is the courts that rejected the exception. *In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989); *Michael J., Jr.* v. *Michael J., Sr.*, 7 P.3d 960, 963 (Ariz. Ct. App. 2000); *In re N.B.*, 199 P.3d 16, 21 (Colo. App. 2007); *In re Baby Boy Doe*, 849 P.2d 925, 931 (Idaho 1993); *In re Adoption of S.S.*, 622 N.E.2d 832, 839 (Ill. App. Ct. 1993), rev'd on other grounds, 657 N.E.2d 935 (Ill. 1995); *In re A.J.S.*, 204 P.3d 543, 549 (Kan. 2009); *In re Elliott*, 554 N.W.2d 32, 35 (Mich. Ct. App. 1996); *In re Adoption of Riffle*, 922 P.2d 510, 514 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 322-23 (N.Y. App. Div. 2005); *In re A.B.*, 663 N.W.2d 625, 635-36 (N.D. 2003); *Quinn* v. *Walters*, 845 P.2d 206, 209 (Or. Ct. App. 1993), rev'd on other grounds, 881 P.2d 795 (Or. 1994); *In re Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990); *In Interest of D.A.C.,* 933 P.2d 993, 999-1000 (Utah Ct. App. 1997). In six additional states, legislatures rejected the doctrine. See Cal. Welf. & Inst. Code § 224(c); Iowa Code Ann. § 232B.5; Minn. Stat. Ann. § 260.771; Okla. Stat. Ann. tit. 10, § 40.1; Wash. Rev. Code Ann. § 13.34.040(3); Wis. Stat. Ann. § 938.028(3)(a).

[8] *S.A.* v. *E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990); *In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988); *Rye* v. *Weasel*, 934 S.W.2d 257 (Ky. 1996); *Hampton* v. *J.A.L.*, 658

movement is all in one direction: Although South Dakota, Oklahoma, Washington, and Kansas initially embraced the doctrine, each of those States now rejects it. By contrast, there is no jurisdiction that initially rejected the doctrine but later chose to adopt it.

These reversals reflect important developments in the doctrine's history, each of which has contributed to its decline. The first was this Court's decision in *Holyfield*, where the Court recognized ICWA's role in protecting the tribal interest in Indian children. After that decision, courts in twelve States rejected the doctrine, nearly all relying on *Holyfield*. See note 7, *supra*. In addition, legislatures in six states rejected the doctrine after *Holyfield*, in several cases setting aside prior judicial constructions. See *ibid.*

The final and most dramatic reversal came from the Kansas Supreme Court, which first judicially created the doctrine in 1982. In 2009, that court reversed its original decision and repudiated the doctrine. The court stressed that the later decision had been "influenced by our sister states' and commentators' widespread and well-reasoned criticism of the doctrine." *In re A.J.S.*, 204 P.3d 543, 550 (Kan. 2009), overruling *In re Adoption Baby Boy L.*, 643 P.2d. 168 (Kan. 1982). Following this decision, scholars have predicted that "the tide will continue to turn against the doctrine until eventually it is completely rejected." Dan Lewerenz & Padraic McCoy, *The End of "Existing Indian Family" Jurisprudence:* Holyfield *at*

So. 2d 331, 337 (La. Ct. App. 1995); *In Interest of S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986); *In re N.J.*, 221 P.3d 1255 (Nev. 2009); *In re Morgan*, 1997 WL 716880 (Tenn. Ct. App. 1997).

20, In the Matter of A.J.S.*, and the Last Gasps of A Dying Doctrine*, 36 Wm. Mitchell L. Rev. 684, 690 (2010).

Against this background, the conflict plainly has weakened, as "the last dozen years * * * have seen a wholesale rejection of the 'existing Indian family doctrine.'" Lewerenz & McCoy, *supra*, at 690. Since 2000, five states have joined the consensus against the doctrine (Arizona, New York, North Dakota, Kansas, and Colorado), while only one new state (Nevada) has endorsed it.[9] Because the doctrine has been relegated "to little more than a troublesome footnote in a handful of states" (*ibid.*), this conflict would not merit the Court's review even were the issue properly presented here.

2. As this last point indicates, the evidence also suggests that the persistence of the "existing Indian family doctrine" in a small and diminishing number of jurisdictions is not a matter of significant concern—and certainly does not justify the Court reaching out to grant review in a case with as substantial a waiver problem as this one. Petitioners attempt to inflate the significance of the conflict with sweeping claims that the doctrine affects "thousands of adoption proceedings." Pet. 18. By all indications, however, the doctrine affects no more than a few litigants each year.

Although ICWA cases may be common, only a small fraction of these disputes involve the "existing

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[9] Indeed, the Nevada "case-by-case" approach demonstrates why even those courts that embrace the doctrine would not apply it here. *In re N.J.*, 221 P.3d at 848. There, the court employed it only because neither the Indian father nor the Tribe contested the adoption. Here, both do.

Indian family doctrine." A comprehensive search reveals that, in the last ten years, fewer than 2% of all ICWA decisions in the Westlaw database have even *mentioned* the doctrine.[10]

The absolute numbers are equally telling. The doctrine was raised in only 51 of the nearly 3,000 ICWA cases reported in Westlaw during the last decade. In the last three years, the Nation's state courts have reported to Westlaw just twelve cases involving the doctrine. Indeed, most jurisdictions have reported only one or two cases addressing the doctrine during the entire course of its thirty-year history. Eleven states (Arizona, Idaho, Illinois, Kentucky, Michigan, Montana, Nevada, New Jersey, North Dakota, Oregon, and South Carolina) report only one such case on Westlaw, while eight others (Alaska, Colorado, Indiana, Louisiana, Missouri, New York, Tennessee, and Utah) report two. In twenty-four states, the doctrine has never been addressed in a reported decision. Overall, courts have reported nearly 800 ICWA cases in the last three years, but have employed the doctrine in just two of those decisions. Plainly, this is not an issue calling out for this Court's attention.

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[10] These numbers were obtained by performing two searches—"*Indian Child Welfare Act"* and *"Indian Child Welfare Act" & "existing Indian"*—for each of the years from 2000 to 2012. We note that most state family court decisions are not reported on Westlaw and decisions in such cases accordingly are reflected in these numbers only if appeals were taken.

C. The South Carolina Supreme Court was correct in unanimously rejecting the "existing Indian family doctrine."

The limited need for review is particularly apparent because the South Carolina Supreme Court's rejection of the "existing Indian family doctrine" is correct.

As an initial matter, "the plain meaning of the legislation should be conclusive." *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 242 (1989). And under the plain text, only two requirements must be met for ICWA to apply: the child involved must be an "Indian child"; and the child must be the subject of a "child custody proceeding"—that is, an action involving termination of parental rights, foster care, or preadoptive or adoptive placement. 25 U.S.C. § 1903(1). There is nothing in the law's text to suggest that ICWA does not apply when both of these requirements are satisfied.

In nevertheless defending the doctrine, petitioners point to a single legislative clause, in 25 U.S.C. § 1912(f), which states that parental rights may not be terminated without a finding "that the *continued custody* of the child by the parent * * * is likely to result in serious emotional or physical damage to the child." (Emphasis added). Petitioners maintain that this language precludes the law's application "when the parent at issue lacks prior custody of the child." Pet. 25. But their argument fails, for two reasons.

First, as the statutory text suggests, this provision has the limited purpose of "establish[ing] evidentiary standards" for use in child custody proceedings. H.R. Rep. No. 95-1386, at 22 (1978). See also S. Rep. No. 95-597, at 16 (1978) ("[t]he intent of [the

parental termination provision] is to establish standards and guidelines" in the placement of Indian children). Petitioners overlook the most likely explanation for Congress's use of the term "continued custody" in this context—that most parental-rights termination hearings involve parents who have custody of the child.

Additionally, petitioners' interpretation would lead to absurd results. If the meaning of "continued custody" were limited to physical custody, Section 1912(f) would arbitrarily "preclude application of the Act to an entire class of fathers who were unable, due to circumstances beyond their control, such as imprisonment, military service, or the mother leaving the jurisdiction, to assume actual physical custody of their children." *In re Adoption of Child of Indian Heritage*, 543 A.2d 925, 937-938 (N.J. 1988). Had Congress intended to limit ICWA in this way, it surely would have done so explicitly and not by indirection in a collateral statutory provision. *Cf. Chisom* v. *Roemer*, 501 U.S. 380, 396 (1991) ("if Congress had such an intent, Congress would have made it explicit in the statute"). "Congress * * * does not alter the fundamental details of a regulatory scheme in * * * ancillary provisions—it does not * * * hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).[11]

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[11] Moreover, petitioners ignore the likelihood that in this context "custody" refers to legal—not physical—custody. ICWA defines an "Indian custodian" as "any Indian person who has legal custody of an Indian child" or "to whom temporary physical care, custody, and control has been transferred by the parent of such child." 25 U.S.C. § 1903(6). Pointing to this provision, several courts have held that § 1912(f) "must encompass more than simply actual physi-

Second, the "existing Indian family doctrine" does violence to more than the statutory text; it also frustrates one of ICWA's core purposes. The statute was enacted "to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children * * *. " 25 U.S.C. § 1902. That interest is directly harmed by the doctrine: In a case like this one, the doctrine would lead to removal of an Indian child from an Indian family that wants to raise the child in a tribal environment. That plainly runs counter to the "[f]ederal policy that, where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 37.

The Court gave force to this policy in *Holyfield*, where it held that the biological parents of two Indian children could not avoid tribal jurisdiction under ICWA by acting to have their children born outside the reservation. 490 U.S. at 49. As the Court explained, ICWA's provisions should not "be defeated by the actions of individual members of the tribe, for 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." *Ibid.* The Court stressed that "[t]he numerous prerogatives accorded the tribes through the ICWA's substantive provisions * * * must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of

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cal custody." *In re Crystal K.*, 276 Cal. Rptr. 619, 626 (Ct. App. 1990); accord *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 937 (N.J. 1988); *In re Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990); *In Interest of D.A.C.*, 933 P.2d 993, 1002 (Utah Ct. App. 1997).

the tribes themselves." *Ibid*. And just as the parents in *Holyfield* could not preclude ICWA's application, Mother in this case may not frustrate ICWA by unilaterally deciding that her child will not be raised in an Indian home.

D. The "existing Indian family doctrine" is not necessary to preserve the constitutionality of ICWA.

In addition, petitioners disregard their waiver below and, supported by the guardian ad litem, suggest that application of the "existing Indian family doctrine" is essential to the constitutionality of ICWA. Pet. 26. Although this argument is in some respects obscure, we understand petitioners and the guardian to contend that ICWA is constitutionally defensible only "when the Indian child's 'relationship to the tribe' is based on something more than race," as when there are "'substantial social, cultural or political affiliations between the child's family and a tribal community.'" GAL Br. 15, 17 (citation omitted). But in the area of Indian affairs, the Court has consistently acknowledged that special treatment of Indians is justified "[a]s long as the [treatment] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974). That is what Congress did in ICWA, determining "that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3). The promulgation of standards to address the massive separation of Indian children from their tribal communities therefore is exactly what this Court contemplated when it held that "Congress may fulfill its treaty obligations and its responsibilities to the In-

dian tribes by enacting legislation dedicated to their circumstances and needs." *Rice* v. *Cayetano*, 528 U.S. 495, 519 (2000).

Regardless whether Baby Girl was "disconnected from the Tribe and her Indian relatives" at the time of birth (GAL Br. 14-15), the issue of her custody concerns tribal sovereignty directly, for her placement will either contribute to or detract from the "continued existence and integrity of Indian tribes." 25 U.S.C. § 1901(3). The Parental Termination provision helps prevent unwarranted removal of Indian children. Especially when combined with the statutory preference for intra-tribal placement, the Parental Termination provision serves ICWA's broader purpose that, "where possible, an Indian child [should remain] in the Indian community." *Holyfield*, 490 U.S. at 37. The "clear connection between the child and tribal sovereignty" demanded by the guardian (GAL Br. 14) is therefore fully present in this case.

In any event, even if there could be something to Petitioners' and guardian's constitutional contentions, the affiliations they demand are precisely what the Family Court in this case found Father and his family *to have* with the Cherokee Nation (see 8-9, *supra*)—and the existence of such relationships hardly turns on physical custody of Baby Girl by an Indian caregiver at the time Mother surrendered the child for adoption. As we have noted, petitioners forfeited their right to challenge that factual determination by waiving their "existing Indian family doctrine" and constitutional arguments on appeal below.

II. This Case Does Not Implicate Any Conflict Over ICWA's Definition Of "Parent" As Applied To Unwed Fathers.

Petitioners also are incorrect in their separate argument that review is appropriate to settle the meaning of the word "parent" as it is used in ICWA. The statute defines "parent" to mean "any biological parent or parents of an Indian child"; it excepts "the unwed father where paternity has not been acknowledged or established," but does not specify *how* an unwed father may acknowledge or establish paternity. 25 U.S.C. § 1903(9). Here, the South Carolina Supreme Court concluded that Father satisfied the statutory definition of parent by both (1) "acknowledging his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for adoption" and (2) "establishing his paternity through DNA testing." Pet. App. 22a. See also *id.* at 58a (Kittredge, J., dissenting) (same). This sensible determination accords with the approach taken by *every* state court to address the issue. But even if that were not so, ICWA's ultimate applicability in this case turns not on Father's status as a "parent," but on Baby Girl's undisputed status as an "Indian child." Review by this court accordingly is unwarranted.

A. ICWA's definition of "parent" for unwed fathers does not look to state adoption law.

Petitioners suggest that there is a conflict among state courts over the meaning of Section 1903(9)'s requirement that an unwed father acknowledge or establish paternity. They maintain that courts in five states have held that "a putative father's parental status under ICWA is contingent upon compliance

with state paternity laws," while the court below joined two other state courts in holding "that ICWA's definition of 'parent' does not require compliance with state laws for establishing or acknowledging paternity." Pet. 15, 16. In fact, whether there is *any* disagreement on this point is questionable; most courts have given the subject only minimal analysis, and not one has suggested a division of authority. *Cf. Bruce L.* v. *W.E.*, 247 P.3d 966, 979 (Alaska 2011) (canvassing California, New Jersey, South Dakota, Texas, and Arizona cases and concluding they all indicate that "to qualify as an ICWA parent an unwed father * * * [need only have] made reasonable efforts to acknowledge paternity").

Even assuming that the conflict hypothesized by petitioners exists, however, it is not presented by this case. *Every* state court of last resort that has looked to state law in applying Section 1903(9) has invoked state procedures for acknowledging and establishing paternity. See *Bruce L.*, 247 P.3d at 979 (looking to the "Alaska legitimation statute"); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 934 (N.J. 1988) (New Jersey Parentage Act); *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1064 n.18 (Okla. 1985).[12] See also, *e.g.*, *Jared P.* v. *Glade T.*, 209 P.3d 157, 161 (Ariz. Ct. App. 2009) (state procedures for petitioning for paternity); *In re Daniel M.*, 1 Cal. Rptr. 3d 897 (Ct. App. 2003) (state procedures for voluntary declaration of paternity or blood testing).

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[12] The *Baby Boy D* court cited two provisions of state law: 10 O.S. 1981 § 55; *id.* § 60.3(4) (making an unmarried father eligible to adopt a child).

And that is just what the courts below did in this case. South Carolina's paternity law provides that a court "may order * * * the putative father * * * to submit to genetic tests * * * which have been developed for the purpose of proving or disproving parentage." S.C. Code Ann. § 63-17-30(A). These tests create a rebuttable presumption in favor of the putative father's paternity if they show a statistical probability of paternity greater than ninety-five percent. *Id.* § 63-17-60(A)(3). It was pursuant to this law that the Family Court ordered Father to take a paternity test, and that test conclusively established that he is Baby Girl's biological father. This finding—as well as the fact that Father acknowledged biological paternity since before Baby Girl's birth—established Father's paternity *under South Carolina law*. Even applying state law to ICWA's definition of "parent," then, Father has satisfied the statutory criteria. In such circumstances, this case presents no opportunity for the Court to address the conflict posited by petitioners.

Petitioners' contrary argument rests on a basic misunderstanding of state law. Rather than look to South Carolina law on *paternity*, they argue that the correct referent in Section 1903(9) is state *adoption* law. This law, they claim, "in effect defines parenthood by specifying the circumstances in which an unwed biological father's consent is required to proceed with an adoption that takes place within six months of the child's birth." Pet. 23 (citing S.C. Code Ann. § 63-9-310(A)(5)).

As all of the justices below observed, however, this contention "collapse[s] the notions of paternity and consent." Pet. App. 22a. See also *id.* at 58a (Kittridge, J., dissenting) ("The issues of paternity and

whether one's consent is required in an adoption proceeding are separate questions."). There is no need to define paternity "in effect" by looking to South Carolina adoption law; South Carolina law expressly and *directly* defines the procedures for acknowledging or establishing paternity. See S.C. Code § 63-17-10(A) ("The purpose of this article is to establish a procedure to aid in the determination of the paternity of an individual."). Father satisfied the test established by those procedures.[13]

No court has ever held that an unwed father's status as a "parent" for purposes of ICWA depends on his state law right to consent to an adoption. And rightly so, as that reading would defeat a central purpose of the statute. ICWA itself grants parents important consent rights in the adoption context. See 25 U.S.C. § 1912(f) (requiring parental consent to adoption absent proof beyond a reasonable doubt that continued custody is likely to result in serious damage to the child); *id.* § 1913(c) (giving a parent the right to withdraw consent to an adoptive placement of an Indian child "for any reason at any time prior to the entry of a final decree"). It makes no sense to condition the availability of these enhanced federal consent rights on the existence of state consent rights; Congress enacted ICWA to give Indian parents *more* protection than was available under state law, not less. See *Holyfield*, 490 U.S. at 44-45.

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[13] The Uniform Parentage Act, cited by petitioners (Pet. 22-23), contains no provision addressing when an unwed father must consent to adoption. See Uniform Parentage Act (2002), *available at* http://tiny.cc/z2sgow.

B. This case is a poor vehicle to resolve the question.

In any event, as all of the justices below also noted, Father's status as an ICWA "parent" is largely beside the point for present purposes: Here, application of ICWA turns not on Father's status as a "parent" but on Baby Girl's uncontested status as an "Indian child." See Pet. App. 21a n.18 ("[T]he ICWA applies because Baby Girl is an Indian child, and whether or not this Court finds Father a 'parent' has no bearing on the ICWA's applicability."); *id.* at 59a (Kittredge, J., dissenting) ("[E]ven if Father had not acknowledged paternity here, ICWA nonetheless would apply simply because Baby Girl is an Indian child."). ICWA gives the Cherokee Nation an independent right to intervene in "any State court proceeding for * * * termination of parental rights to[] an Indian child." 25 U.S.C. § 1911(c). And as an intervenor, the Cherokee Nation has standing to invoke 25 U.S.C. § 1915(a), which sets out placement preferences for the adoption of Baby Girl. See, *e.g.*, *In re T.S.W.*, 276 P.3d 133, 143 (Kan. 2012). This Court has called that provision the "most important substantive requirement imposed on state courts" by ICWA. *Holyfield*, 490 U.S. at 36. Absent good cause to the contrary, Section 1915(a) requires that Baby Girl be placed with a member of her extended family or another member of her Tribe.

In this case, the South Carolina Supreme Court expressly found that placement of Baby Girl with her family was presumptively in her best interests, and therefore concluded that petitioners failed to demonstrate good cause to deviate from the statutory placement preference established by Section 1915(a). Pet. App. 37a-39a. Petitioners have not asked this

Court to review that good-cause determination. Accordingly, resolution of the question they do present would not affect the outcome here—which, again, makes this case a uniquely bad one in which to address petitioners' contention regarding the meaning of ICWA.

C. ICWA's definition of "parent" does not mandate compliance with state definitions of paternity for unwed fathers.

Finally, petitioners' argument that 25 U.S.C. § 1903(9) requires unwed fathers to comply with the state definition of "parent" is wrong on the merits. ICWA's text, purpose, and structure require only that, to establish parenthood, the unwed father take reasonable steps to acknowledge or establish paternity before an adoption is finalized—as Father undeniably did here.

The Court's interpretation of ICWA begins "where all such inquiries must begin: with the language of the statute itself." *Ransom* v. *FIA Card Servs., N.A.*, 131 S. Ct. 716, 723 (2011). That language deems an unwed father to be a "parent" when paternity has been "acknowledged or established." 25 U.S.C. § 1903(9). These words have an ordinary meaning: it is enough for the father to affirm paternity or take reasonable steps to establish paternity as a factual matter. See *Bruce L.*, 247 P.3d at 979.

That is especially so because the Court "start[s] * * * with the general assumption that in the absence of a plain indication to the contrary, * * * Congress when it enact[ed ICWA was] not making the application of the federal act dependent on state law." *Holyfield*, 490 U.S. at 43 (citation omitted). "Where Congress did intend that ICWA terms be defined by ref-

erence to other than federal law, it stated this explicitly." *Id.* at 47 n.22. See, *e.g.*, 25 U.S.C. § 1903(6) (defining "Indian custodian" to mean "any Indian person who has legal custody of an Indian child under tribal law or custom or *under State law*") (emphasis added). Yet it did not do so in Section 1903(9).

Against this backdrop, petitioners rely on a snippet from the legislative history—"the definition of 'parent' in ICWA 'is not meant to conflict with the decision of the Supreme Court in *Stanley* [v. *Illinois*, 405 U.S. 645 (1972)]"—which they read to mean that Congress in ICWA "intended that parenthood for unwed fathers would be limited to those who showed the requisite support under state law." Pet. 22 (quoting H.R. Rep. No. 95-1386, at 21 (1978)). As a due process case, however, *Stanley* applies with equal force to federal *and* state procedures for acknowledging or establishing paternity.[14] ICWA's legislative history is just as consistent with a congressional intent to define paternity with reference to *federal* law as it is with an intent to define it with reference to *state* law; in both cases, the applicable procedures must meet constitutional standards. This fragment of legislative history therefore sheds no light at all on the question presented by petitioners. Certainly, it does not rebut the "likelihood that, had Congress intended a state-law definition, * * * it would have said so." *Holyfield*, 490 U.S. at 47 n.22.

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[14] *Stanley* involved a due process challenge to an Illinois statute that declared the children of unwed fathers wards of the State upon the death of the mother, without any opportunity for the father to show parental fitness. The Court concluded that Illinois had to give the father a hearing before it removed his children from his custody. 405 U.S. at 658.

* * *

There is no denying that the circumstances of this case have been painful and personally difficult for all of the parties. But that hardly means, as petitioners hyperbolically contend, that the legal issues here "potentially impact thousands of child custody cases *annually*," that "[t]he decision below sends a chilling message to any couple wishing to adopt a child of Native American descent," or that legal uncertainty in this area "spawns litigation that permanently and tragically disrupts established family units." Pet. 3, 10. To the contrary, as the dissenting justices below themselves recognized, the dispute here turned on "the unique facts of this case" and the conclusions drawn from those facts upon review of "the voluminous record." Pet. App. 42a, 43a (Kittredge, J., dissenting).

In fact, the real disruption here stems from the extraordinary defects in the adoption process that are attributable to Mother and petitioners. As both courts below noted, had Father's Cherokee heritage been candidly disclosed prior to the adoption, Baby Girl would never have been allowed to leave Oklahoma in the first place. Had the commencement of the adoption proceedings been disclosed to Father in a timely fashion—and not four months after the fact, by a process server, as Father was en route to his deployment in Iraq—Father would have contested it at the outset. And even so, as the Family Court explained, "[w]hen the child was but four months old, [Adoptive Couple] knew her natural father wanted custody of his daughter and he was contesting the adoption both in Oklahoma and in South Carolina. However, they elected to pursue adoption over his objection. Custody and parental rights cannot be

gained by adverse possession." Pet. App. 128a. Baby Girl, now three years old, has been living with Father and her family in Oklahoma for almost a year. This Court should deny review and bring this litigation to an end.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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