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 OF CHILD ADVOCACY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF BABY GIRL SUPPORTING REVERSAL

BARBARA B. WOODHOUSE
CHILD RIGHTS PROJECT
EMORY UNIVERSITY
SCHOOL OF LAW
1301 Clifton Road
Atlanta, GA 30322
(404) 727-4934

THEANE EVANGELIS KAPUR
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tkapur@gibsondunn.com

JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105
(415) 393-8200

Counsel for Amici Curiae

QUESTIONS PRESENTED

Whether a non-custodial parent can invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law.

Whether ICWA defines "parent" in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.

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BRIEF OF CHILD ADVOCACY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF BABY GIRL

INTEREST OF *AMICI CURIAE*[1]

A. The Barton Child Law & Policy Center is a clinical program of Emory Law School dedicated to promoting and protecting the legal rights and interests of children involved with the juvenile court, child welfare, and juvenile justice systems in Georgia. The Center achieves its reform objectives through research-based policy development, legislative advocacy, and holistic legal representation for individual clients. The Barton Center's children's rights agenda is based on the belief that policy and law should be informed by research and that legal service to children and families needs to be holistic. The premise behind representing the "whole" child exists at the core of the Barton Center's mission and our approach to student instruction. That basis recognizes that children should be viewed in their social and familial contexts and provided with individualized services to protect their legal rights, respond to their human needs, and ameliorate the social conditions that create risk. The Barton Center adopts an interdisciplinary, collaborative approach to achieving justice for youth.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

B. The Child Rights Project (CRP) is a project of Emory Law School engaging students in researching and writing of friend of the court briefs in cases of importance to children and youth. Its mission is to highlight for the judiciary and the public the often unanticipated impact of court decisions on children and youth. The CRP's goal is to train new generations of lawyers in multidisciplinary research and advocacy. The CRP collaborates with distinguished law firms to provide pro bono representation to an underserved population. Leadership of the CRP has over 25 years of experience in appellate advocacy on behalf of children and youth.

C. Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well-being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies, such as abused and neglected children who are separated from their families and placed in foster care. JLC works to ensure that the rights of children are respected and supported and that they are treated fairly by the systems that are supposed to help them. Since its founding, Juvenile Law Center has represented hundreds of abused and neglected children in child welfare proceedings and played a prominent role in ensuring that children in Pennsylvania have access to counsel at all stages of dependency and child welfare proceedings, including termination of parental rights. Juvenile Law Center's work is guided by the view that children have a constitutional right to counsel in all matters where the state is restricting their liberty or altering the familial relationships that are central to the future well-being of the child and that children have a lib-

erty interest in the establishment and maintenance of familial relationships.

D. The Center on Children and Families (CCF) at the University of Florida Fredric G. Levin College of Law in Gainesville, Florida is an organization whose mission is to promote the highest quality teaching, research, and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Virgil Hawkins Civil Clinics and Gator TeamChild juvenile law clinic.

SUMMARY OF ARGUMENT

In the decision under review in this case, the South Carolina Supreme Court determined that it had no choice but to take two-year old Baby Girl away from the adoptive parents ("Adoptive Couple") who had raised her since infancy and transfer her to the custody of a biological father ("Father") whom she had never met. That decision violated Baby Girl's constitutional right to a custody decision that takes full and balanced account of all the factors that affect her best interests.

When Father expressly rejected any paternal rights or duties, the pregnant birth mother ("Mother") decided on adoption. More than two years passed between Baby Girl's placement at birth and the custody hearing. Many mistakes, misunder-

standings and poor choices by adults resulted in this long delay. But Baby Girl is indisputably blameless. It is not her fault that she bonded with Adoptive Couple or that she lacked contact with Father. Those facts simply reflected her reality at the time of the custody hearing, and she was entitled to have that reality taken into account. It was not.

The state supreme court recognized that "Adoptive Couple are ideal parents who have exhibited the ability to provide a loving family environment for Baby Girl." Pet. App. 40a. And it acknowledged the "emotional bonding" that had occurred between Baby Girl and Adoptive Parents—"a normal and desirable outcome when, as here, a child lives with a foster family for several years." *Id.* at 39a. Nevertheless, the court held that the Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq.* ("ICWA"), required it to remove Baby Girl from her home and family without full consideration of her best interests. As the court explained its holding: "[T]he dictates of federal Indian law supersede [the best interests of the child standard] where the adoption and custody of an Indian child is at issue." Pet. App. 40a; *see also id.* at 39a ("'The best interests of the child is an improper test to use in ICWA cases.'") (quoting *In re C.H.*, 997 P.2d 776, 784 (Mont. 2000)) (alterations omitted).

"Because this case involves an Indian child," the court concluded, "the ICWA applies and confers conclusive custodial preference to the Indian parent. *All of the rest of our determinations flow from this reality*." Pet. App. 40a (emphasis added).

ICWA was never intended to create a conclusive presumption in favor of the Indian parent or Indian tribe that overrides all other factors affecting the best interests of the child—an outcome that would

violate children's constitutional right to a hearing that recognizes and gives proper weight to all of their rights and interests. ICWA must be interpreted to allow consideration of Baby Girl's constitutional right to continuity and stability of her developed family relationships, in addition to considering the importance of preserving ties with her Indian heritage.

ARGUMENT

I. CHILDREN HAVE A CONSTITUTIONAL RIGHT TO CONSIDERATION OF THEIR DEVELOPED FAMILY RELATIONSHIPS.

A. It is well settled that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). This Court has repeatedly endorsed that principle, holding that many of the fundamental rights enshrined in our Constitution apply with equal measure to both children and adults. *See*, *e.g.*, *Bellotti v. Baird*, 443 U.S. 622, 648 (1979) (plurality opinion) (right to privacy); *Danforth*, 428 U.S. at 74-75 (same); *In re Winship*, 397 U.S. 358, 368 (1970) (right to proof beyond a reasonable doubt); *In re Gault*, 387 U.S. 1, 35-37, 55 (1967) (rights to legal counsel and against self-incrimination). Even where children's constitutional rights differ in scope from their adult counterparts, the Court has underscored that any such difference must be attributable to the state's "general interest in the youth's well being." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

It is equally well settled that parents have a constitutional liberty interest in raising their children. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)

("[L]iberty . . . denotes . . . the right of the individual to . . . establish a home and bring up children."). This Court has consistently recognized the constitutional significance of parents' interest in maintaining continuing ties to, and custody over, the children in their care. *See Lehr v. Robertson*, 463 U.S. 248, 256 (1983) ("The intangible fibers that connect parent and child . . . are sufficiently vital to merit constitutional protection in appropriate cases."). Such recognition rests upon "the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family." *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (plurality opinion).

Thus, in *Stanley v. Illinois*, this Court protected a biological father's interest in maintaining custody over the illegitimate children he had raised. 405 U.S. 645, 657-58 (1972). And in *Caban v. Mohammed*, the Court protected a biological father's right to prevent the adoption of his illegitimate children, where he had supported the children and maintained contact with them. 441 U.S. 380, 394 (1979).

Further, this Court has suggested that constitutional protection for parent-child relationships may extend beyond biological parents, to other parental figures in the child's life. As the Court remarked in *Smith v. Organization of Foster Families for Equality & Reform*, "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association." 431 U.S. 816, 844 (1977); *see also Troxel v. Granville*, 530 U.S. 57, 98 (2000) (Kennedy, J., dissenting) ("Cases are sure to arise—perhaps a substantial number of cases—in which a third party, by acting in a caregiving role over a significant period of time, has developed a

relationship with a child which is not necessarily subject to absolute parental veto."); *Michael H.*, 491 U.S. at 127-29 (plurality opinion) (noting that family is not necessarily based on biological ties). Even where the parent-child relationship does not resemble a "traditional" nuclear family, the Constitution provides important guarantees that the existing family unit will not be disturbed. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 504 (1977) (plurality opinion) (protecting relationships with extended family members).

In fact, this Court has held on more than one occasion that continuity of existing familial relationships—whether biological or not—is more important than the protection of purely biological ties. *See Astrue v. Capato*, 132 S. Ct. 2021, 2030 (2012) ("[A] biological parent is not necessarily a child's parent under law."). Thus, where a biological father has never sought actual or legal custody of a child, he may be prevented from blocking an adoption. In *Lehr*, for example, the Court rejected the claim of an unwed biological father that his due process rights had been violated when he was not notified of his child's adoption. *See* 463 U.S. at 250. Because the father had failed to "accept some measure of responsibility for the child's future," the "Federal Constitution [did] not automatically compel a State to listen to his opinion of where the child's best interests lie." *Id.* at 262. In *Quilloin v. Walcott*, an unwed father was prevented from vetoing the adoption of his biological child. 434 U.S. 246, 248-49 (1978). The father had provided support to the child "only on an irregular basis," and "had never been a *de facto* member of the child's family unit." *Id.* at 251, 253. The Court therefore held that the State was not "required in this situation to find anything more than

that the adoption, and denial of legitimation, were in the 'best interests of the child.'" *Id.* at 255.

The Court has not yet had the occasion, however, to recognize a *child's* constitutional liberty interest in maintaining those same, developed relationships with his or her established primary caregivers. *See Michael H.*, 491 U.S. at 130 (plurality opinion) ("We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship."). The Court has only implied that such a right exists. *See Smith*, 431 U.S. at 842 n.45 ("There can be, of course, no doubt of appellees' standing to assert [a liberty] interest, which, to whatever extent it exists, belongs to the foster parents *as much as to the foster children*.") (emphasis added); *Stanley*, 405 U.S. at 645 (noting that presumption of parental unfitness "risks running roughshod over the important interest of both parent *and child*" and is therefore unconstitutional) (emphasis added). As Justice Stevens has elaborated, "[w]hile this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation." *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting) (citation omitted).

B. A child has a constitutional right to protection of his or her parental relationships, especially where (as was the case here) the parents are loving and supportive and have been the child's only caregivers since birth.

Experts in the fields of psychology and child development have long recognized that a strong bond—an "attachment"—develops between young children and their caregivers. *See* Jude Cassidy & Phillip R. Shaver, *Handbook of Attachment: Theory, Research, and Clinical Applications* (2d ed. 2010); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 619-20 (1984) ("Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."). Because it "has important implications for children's early affective experience," "attachment to a caregiver is a major part of children's early social lives." William Damon, *Social and Personality Development: Infancy Through Adolescence* 41 (1983). Furthermore, "the quality of children's attachment to their caregivers is linked with their propensity to explore the world around them, including other persons in that world." *Id.* These bonds of attachment are just as powerful for children of adoptive parents as they are for children of biological parents. *See* Leslie M. Singer et al., *Mother-Infant Attachment in Adoptive Families*, 56 Child Dev. 1543, 1547, 1550 (1985) ("Like nonadoptive mother-infant pairs, most adoptive mothers and their infants develop warm and secure attachment relationships.").

Experts agree that children benefit immensely from the continuity of their attachments. Leah Matas et al., *Continuity of Adaptation in the Second Year: The Relationship Between Quality of Attachment and Later Competence*, 49 Child Dev. 547, 553 (1978) ("Subjects classified as securely attached in infancy . . . were significantly more enthusiastic, affectively positive, and persistent; they exhibited less

nontask behavior, ignoring of mother, and noncompliance."). In fact, "[s]ignificant disruptions in children's relationships with their primary caregivers can present developmental challenges for children." Lois A. Weithorn, *Developmental Neuroscience, Children's Relationships with Primary Caregivers, and Child Protection Policy Reform*, 63 Hastings L.J. 1487, 1531 (2012) (collecting expert sources); *see also* 1 John Bowlby, *Attachment and Loss* (2d ed. 1982); Damon, *supra*, at 41-48.

Experts also agree that the severing of attachment relationships poses severe and lifelong risks to an individual's health and welfare. *See* National Scientific Council on the Developing Child, *The Science of Early Childhood Development: Closing the Gap Between What We Know and What We Do* 6 (2007) ("[S]table, responsive relationships build healthy brain architecture that provides a strong foundation for lifelong learning, behavior and health."); Bruce D. Perry, *Examining Child Maltreatment Through a Neurodevelopmental Lens: Clinical Applications of the Neurosequential Model of Therapeutics*, 14 J. Loss & Trauma 240, 246 (2009) ("If the caregiver is . . . inconsistent, or absent, [stress response and relational networks] develop abnormally."); Centers for Disease Control and Prevention, *Adverse Childhood Experiences (ACE) Study: Major Findings*, http://www.cdc.gov/ace/findings.htm (Jan. 18, 2013) (finding correlation between adverse childhood experiences and, *inter alia*, alcohol and drug abuse, heart disease, liver disease and suicide attempts). Severing a young child's attachment relationship makes the child more likely to suffer long-term medical problems and mental health issues, including psychological and physiological distress, emotional dysregulation, loss of appetite, sleep deprivation, and

behavioral problems. Damon, *supra*, at 41-48; Myron A. Hofer, *Psychobiological Roots of Early Attachment*, 15 Current Directions Psychol. Sci. 84, 85-86 (2006).[2] Such separation from a childhood caregiver may even affect a child's capacity to form healthy relationships later in life. *See* Bruce D. Perry, *Childhood Experience and the Expression of Genetic Potential: What Childhood Neglect Tells Us About Nature and Nurture*, 3 Brain and Mind 79, 95 (2002).

It bears noting that adoption poses challenges of its own. Even in the most successful adoptions, adoptees may yearn to know their birth families, cultures, and traditions. *See* David M. Brodzinsky, *Long Term Outcomes in Adoption*, 3 Future of Children 153 (1993); Solangel Maldonado, *Permanency v. Biology, Making the Case for Post-Adoption Contact*, 37 Cap. U. L. Rev. 321 (2008).

For those reasons, the "best interests of the child" standard has served as the pole star in adoption decisions, in most cases ensuring that the welfare of the child remains the central focus of courts' concern. *See* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & Fam. Stud. 337, 347-48 (2008); *see also*, *e.g.*, *In re Baby Boy C.*, 581 A.2d 1141, 1144 (D.C. 1990) (per curiam) (a presumptively fit father's right to veto a proposed adoption may nonetheless be overcome by clear and convincing evidence that it is in the best interest of the minor for the adoption to proceed); *Sorentino v. Family & Children's Soc'y of Elizabeth*, 367 A.2d 1168,

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[2] *See also*, *e.g.*, Ross A. Thompson & Mary Fran Flood, *Toward a Child-Oriented Child Protection System, in Toward a Child-Centered Neighborhood Based Child Protection System* 155, 169-170 (Gary B. Melton et al. eds., 2002).

1171 (N.J. 1976) (per curiam) (because the child had been in the custody of the adoptive parents for over two and a half years, the adoptive parents were entitled to a hearing on "whether transferring the custody of the child to plaintiffs . . . will raise the probability of serious harm to the child"). A number of state courts have recognized that children, as much as adults, possess a constitutional right to maintain fundamental family relationships. For example, the California Court of Appeal has held that "the rights of children in their family relationships are at least as fundamental and compelling as those of their parents. *If anything, children's familial rights are more compelling*." *In re Bridget R.*, 41 Cal. App. 4th 1483, 1504 (1996) (emphasis added); *see also In re Jasmon O.*, 878 P.2d 1297, 1307 (Cal. 1994) (child's interest in stability with foster family outweighed biological parent's interest because "[c]hildren, too, have fundamental rights"). The Michigan Supreme Court has held that the "*mutual* rights and obligations" of parent and child constitute a "fundamental human relationship" under the due process clause. *Reist v. Bay Cnty. Circuit Judge*, 241 N.W.2d 55, 62 (Mich. 1976) (emphasis added); *see also Hiller v. Fausey*, 904 A.2d 875, 891 (Pa. 2006) (Newman, J., concurring) ("Security, continuity, and stability in an ongoing custodial relationship, whether maintained with a biologic or adoptive parent and/or with a grandparent is vital to the successful personality development of a child."); Barbara Bennett Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption*, 34 Cap. U. L. Rev. 297, 316 (2005) (adoption is "a fundamental family relationship").

Although this Court has not yet expressly reached that conclusion, it "has long recognized that, because the Bill of Rights is designed to secure indi-

vidual liberty, it must afford the formation *and preservation* of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts*, 468 U.S. at 618 (emphasis added). To a two-year-old child, there could be no liberty interest more important—more deserving of this Court's protection under the Constitution—than her interest in maintaining an enduring and stable relationship with the only parents she has ever known. *See* Carol George, et al., *Incorporating Attachment Assessment into Custody Evaluations: The Case of a 2-Year Old and Her Parents*, 49 Fam. Ct. Rev. 483, 483 (2011) ("Children under the age of five, whose developmental capacities are limited, may be especially vulnerable in separation and custody decisions.") (citation omitted).

C. By recognizing that a child's right to a stable and supportive family environment rises to a constitutional level, this Court would help to ensure that a child's best interests are properly analyzed and balanced against any other rights that may be at stake. Courts, like the court below, would no longer feel "constrained," Pet. App. 40a, to ignore the child's emotional and developmental needs in applying the provisions of ICWA.

There are competing rights and interests at stake in any contested adoption under ICWA and, as with the interests of the child, the strength and weight of adults' interests may vary according to the facts of a case. This Court has already determined that the strength of an unmarried biological father's interest depends on whether he has established an "actual relationship of parental responsibility" with the child. *Lehr*, 463 U.S. at 260. Although a State normally must give "special weight" to a biological

parent's wishes, *Troxel*, 530 U.S. at 69 (plurality opinion), it need not defer to the preferences of an unwed biological father who failed to establish an actual relationship with his child before her adoption. *See Lehr*, 463 U.S. at 262; *Quilloin*, 434 U.S. at 255.

In applying ICWA, this Court has determined that the strength of an Indian tribe's interest in a child's custodial determination is premised on the "semi-independent position" of Indian tribes and their "power [to] regulat[e] their internal and social relations." *McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 173 (1973) (internal quotation marks omitted). Because tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation," *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008), the tribe's interests under ICWA are at their apex where an adoption threatens to *remove* an Indian child from her Indian family—especially where that family is living on Indian lands. *See* 25 U.S.C. § 1901(4) (ICWA addresses the "alarmingly high percentage of Indian families" being "broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies"); *see also id.* § 1912(f) (focusing on "the *continued* custody of the [Indian] child by the [Indian] parent" (emphasis added)).

In such cases, ICWA grants tribal courts exclusive jurisdiction over the adoption "to preserve tribal sovereignty over the domestic relations of tribe members." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 58 (1989) (Stevens, J., dissenting); *see also* 25 U.S.C. § 1911(a). *Amici* are well aware of the tragic history that gave rise to ICWA and they recognize that ICWA plays a valuable role in preserving the rights of children of Indian ancestry to

protection of their Indian families, tribes, and traditions. Where a tribe's connection to the child is extremely attenuated, however, the tribe's interests under ICWA are also diminished and may not trump the constitutional rights of the child to a decision that is in her best interests.

II. BABY GIRL'S CONSTITUTIONAL RIGHTS WERE NOT GIVEN FULL AND FAIR CONSIDERATION.

In this case, the South Carolina Supreme Court improperly allowed the interests of biological Father and the tribe to preclude an honest assessment of Baby Girl's best interests—particularly her constitutional right to a stable, supportive family environment and the continuity of her developed relationship with her adoptive parents. This Court should rectify this error by holding that ICWA does not create a conclusive presumption and that Baby Girl's constitutional right to protection of her developed family relationships should not have been trumped by the diminished rights of the Father or the tribe in this case.

Baby Girl had a constitutionally significant interest in preservation of the "loving family environment" and emotional security provided by Adoptive Couple, who had raised her since infancy. Pet. App. 40a. Adoptive Couple began caring for Baby Girl even before she was born, providing financial assistance and emotional support to Mother during the final months of her pregnancy. *Id.* at 5a. Adoptive Couple provided her with a "loving, nurturing, and stable home." *Id.* at 72a (Kittredge, J., dissenting) ("The evidence of their parental fitness is overwhelming."). Most importantly, an "expert in familial bonding who conducted a bonding evaluation of [Adoptive

Couple] and Baby Girl" testified that "he believed *beyond a reasonable doubt* that the removal of Baby Girl from [Adoptive Couple's] care would cause serious emotional harm." *Id.* at 74a, 76a (emphasis added).

Under this Court's precedents, Father's interest in preventing Baby Girl's adoption was particularly weak. It is "undisputed" that Father never lived with Mother when she was pregnant with Baby Girl; he refused to support Mother financially in any way, "even though he had the ability to provide some degree of financial assistance to Mother"; he "did not make any meaningful attempts to contact [Mother]," let alone provide her with emotional support, for at least five months prior to Baby Girl's birth; and he "made no attempt to contact or support Mother directly in the months following Baby Girl's birth," even though he "was aware of Mother's expected due date." Pet. App. 4a, 8a. In fact, it is uncontroverted that when Mother asked for financial assistance during her pregnancy, Father sent her a text message explicitly relinquishing his parental rights. *Id.* at 4a; *see also id.* at 44-45a (Kittredge, J., dissenting) ("At trial, Father was asked, 'But [Mother] had to marry you before you felt you'd be responsible as a father?' He answered, 'Correct.'"). At trial, Father admitted that he *still* would have "sign[ed] all [his] rights and responsibilities away to [Baby Girl] just so as long as the mother was taking care of [her]." *Id.* at 46a (Kittredge, J., dissenting).

In line with this Court's precedents, South Carolina law precludes an unwed father from vetoing an adoption unless he has "openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption" or has "paid a fair and reasonable

sum . . . for support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child"—neither of which Father did. S.C. Code § 63-9-310(A)(5); *see also* Pet. App. 24a (recognizing Father's lack of parental rights under South Carolina law).[3]

Although ICWA properly protects the interests of tribes in preserving Indian families, the Cherokee Nation's interest is particularly weak in this case. This is not an archetypal ICWA case, in which non-Indian persons are seeking to remove a child from Indian custody and Indian lands. *See* H.R. Rep. No. 95-1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531 (ICWA is intended to address both "the trauma of separation [of Indian children] from their families" and the "problems of adjusting to a social and cultural environment much different from their own"); *see also Holyfield*, 490 U.S. at 36 (describing "the heart of the ICWA"). Both Baby Girl and Father have only tenuous ties to the tribe. Before this litigation began, Baby Girl—whose Mother is Hispanic, not Indian—had never spent any time with her Indian father or on Indian land. *See* Pet. App. 7a. And Father himself does not reside and has apparently never resided on Indian land. *See* GAL Br. 10. Of course, even a child who has never visited tribal lands can still be raised to identify with Indian cul-

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[3] *Accord* Ala. Code § 26-10A-7(a)(3); Alaska Stat. § 25.23.040(a)(2); Ariz. Rev. Stat. § 8-106(A)(2); Ark. Code § 9-9-206(a)(2); Cal. Fam. Code § 8605; Fla. Stat. § 63.062(1)(b); Haw. Rev. Stat. § 578-2(a)(5); Idaho Code § 16-1504(2)(b); 750 Ill. Comp. Stat. 50/8(b)(1)(B); Mass. Ann. Laws ch. 210, § 2; Miss. Code § 93-17-5(3); Mo. Rev. Stat. § 453.030; Mont. Code § 42-2-301; N.Y. Dom. Rel. Law § 111(e); N.C. Gen. Stat. § 48-3-601(2)(b); Okla. Stat. tit. 10, § 7505-4.2(C)(1); 23 Pa. Cons. Stat. § 2511(a)(6); Utah Code § 78B-6-121.

ture and traditions. But by disclaiming any responsibility for Baby Girl before she was born, Father sacrificed his opportunity to raise Baby Girl in the Indian culture.[4]

Under the facts of this case, ICWA's statutory priorities should not have trumped Baby Girl's constitutional right to a custody decision guided by her best interests. *See* U.S. Const. art. VI, cl. 2. To ignore or undervalue the bonds that Baby Girl developed with her Adoptive Parents—as the state supreme court did—inflicted substantial and irreparable harm on her, denying her the "dignity owed to individual persons." Barbara Bennett Woodhouse, *Talking About Children's Rights in Judicial Custody and Visitation Decision-Making*, 36 Fam. L. Q. 105, 18 (2002). The decision below reflects an abdication of the court's responsibility to be ever vigilant in protecting the interests of the most vulnerable members of our society—young children—and to place their emotional and developmental needs first. *See* Leigh Goodmark, *From Property to Personhood: What the Legal System Should do for Children in Family Violence Cases*, 102 W. Va. L. Rev. 237, 252 (1999) ("[Custody] [d]ecisions . . . more frequently tend to reflect the interests and desires of the parents, reinforcing the sense that children are essentially chattel."); Diane I. Bonina & Ruth A. Baha-Jachna, *The Treatment of Children as Chattel in Recent Adoption Decisions*, 26 Hum. Rts. 2, 6 (1999) ("Until courts stop treating children as chattel and begin to recognize and give meaningful consideration to the rights of children . . ., children . . . will continue to be the

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[4] Moreover, the dissenters below recognized Adoptive Couple's "dedication to exposing the child to her Indian heritage." Pet. App. 100a (Kittredge, J., dissenting).

innocent victims of our judicial system."). Baby Girl was removed from her bonded caregivers without any apparent consideration of her needs for support during the period of transition and acclimatization. *See* GAL Br. 23-24 ("It is the Guardian's understanding that Birth Father allowed Baby Girl to speak with Adoptive Couple by telephone [on the day after custody was transferred], and then cut off all communication between them.").

By far the best practice in contested adoption cases, under ICWA or any other adoption statute, is a speedy, accurate and final resolution. Children cannot be placed in escrow while adults litigate their competing claims. Courts should instead take steps to ensure that their established family relationships, whether biological or adoptive, are protected and respected. If a change of custody must occur after a child has bonded with her caregivers, it should be accomplished with sensitivity to the emotional and developmental needs of the child. The best interests of the child demand no less from courts that decide their destinies. *Amici* urge this Court to bear in mind the constitutional rights of the child who is the subject of this dispute and interpret ICWA to allow a full and fair consideration those rights.

CONCLUSION

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

Respectfully submitted.

BARBARA B. WOODHOUSE
CHILD RIGHTS PROJECT
EMORY UNIVERSITY
SCHOOL OF LAW
1301 Clifton Road
Atlanta, GA 30322
(404) 727-4934

THEANE EVANGELIS KAPUR
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tkapur@gibsondunn.com

JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105
(415) 393-8200

Counsel for Amici Curiae

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