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IN THE SUPREME COURT OF THE UNITED STATES

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ADOPTIVE COUPLE, :
Petitioner : No. 12-399
v. :

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

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Washington, D.C.
Tuesday, April 16, 2013

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:12 a.m.

APPEARANCES:

LISA S. BLATT, ESQ., Washington, D.C.; on behalf of
Petitioners.

PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of
Respondent Guardian ad Litem in support of
Petitioners.

CHARLES A. ROTHFELD, ESQ., Washington, D.C.; on behalf
of Respondents Birth Father, et al.

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; for United
States, as amicus curiae, supporting Respondents

1 Birth Father, et al.
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P R O C E E D I N G S

(10:12 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 12-399, Adoptive Couple v. Baby Girl.

Ms. Blatt?

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE PETITIONERS

MS. BLATT: Thank you, Mr. Chief Justice, and may it please the Court:

All parties agree that even if the birth father is a parent under the Indian Child Welfare Act, the State court decision below awarding custody to the father must nonetheless be reversed unless Sections 1912(d) or (f) create custodial rights that the father concededly does not have under State law.

JUSTICE SOTOMAYOR: Are you suggesting -- I don't know that the parties -- I know that the Government has said that (f) doesn't apply to the father, but (d) does, so there's not a full concession on your point. But putting that aside, if it is a father who has visitation rights, and exercising all of his support obligations, is it your position that -- that because that father's not a custodian, he has no protections whatsoever under (d) or (e)?

1 The State can come and take the child away
2 from an unfit mother or father if they're the ones with
3 custody, and that responsible parent who only has
4 visiting rights has no protections under (d), (e), or
5 (f)?

6 MS. BLATT: Well, under State law --

7 JUSTICE SOTOMAYOR: I'm not asking about
8 State law --

9 MS. BLATT: Right. I think that --

10 JUSTICE SOTOMAYOR: -- I'm asking about
11 Federal law.

12 MS. BLATT: Yes, it's Federal law, which
13 requires custodial rights, would protect a father who
14 has visitation, i.e., custodial rights under State law.

15 So in other words, that -- that is to say,
16 if a father --

17 JUSTICE SOTOMAYOR: Well, (d) doesn't talk
18 about custodial rights. I do agree that (f) talks about
19 continued --

20 MS. BLATT: Right.

21 JUSTICE SOTOMAYOR: -- custody.

22 MS. BLATT: Okay. So let's talk about (d),
23 because I think we are in agreement that the Respondents
24 would have to agree that they either need to win under
25 (d) or (f), and we can talk about Section 1915, but

1 that's not a basis for father.

2 But section (d) -- and I'm reading from the
3 blue brief at 8a -- says that it requires the party
4 seeking the termination of parental rights to provide,
5 quote, "remedial services and rehabilitative programs
6 designed to prevent the breakup of the Indian family."

7 JUSTICE SOTOMAYOR: Well, you don't think
8 that a parent with custody -- well, you do think a
9 parent with custody is the only definition of family,
10 but why wouldn't a noncustodial parent with visitation
11 rights be considered a family with that child?

12 MS. BLATT: My understanding under State
13 law, a parent who --

14 JUSTICE SOTOMAYOR: I'm not going to State
15 law --

16 CHIEF JUSTICE ROBERTS: Could -- could I
17 hear her answer, please?

18 MS. BLATT: Yes.

19 So the answer is, a parent with visitation
20 rights has custody, so he's protected.

21 Under State law, if you're paying child
22 support and you bring a paternity action and sue for
23 visitation rights, that's a petition for custody. So
24 all a birth dad needs to do to protect himself is to
25 acquire legal rights.

1 This father had no legal rights whatsoever,
2 parental or custodial, and the word "breakup," even the
3 other side concedes, it's discontinuance of an existing
4 legal relationship. There was no legal relationship
5 between this child and the birth father or his
6 relatives.

7 JUSTICE SOTOMAYOR: Well, there is a support
8 obligation on that unwed father.

9 MS. BLATT: No.

10 JUSTICE SOTOMAYOR: Why isn't that a
11 parental right? It's one of the parental rights the
12 States enforce whether or not you want to provide
13 support or not.

14 MS. BLATT: If a child is being adopted, by
15 definition, the -- the adoptive family would be
16 providing support. But let's take the -- let's take
17 what a -- again, the definition of breakup. There is no
18 familial legal custodial parental relationship that
19 either this father or the -- or his parents -- his
20 extended family had with this child.

21 This adoption no more broke up an Indian
22 family than his -- than this Hispanic sole custodial
23 birth mother had raised the child herself.

24 JUSTICE SOTOMAYOR: So what do you do with
25 the States that do give unwed fathers that don't support

1 their children and who don't have an ongoing
2 relationship the right to be considered first for
3 adoption? Why should we follow the definitions of South
4 Carolina or those other States? Why shouldn't we just
5 give it a Federal meaning?

6 MS. BLATT: Because there's --

7 JUSTICE SOTOMAYOR: As --

8 MS. BLATT: Because there's nothing in this
9 Act that anyone can point to that was a basis for
10 transferring custody to this father. At most, there is
11 an obligation, an exhaustion obligation, that if a
12 custodial parent has something like a drug abuse problem
13 the State has to remediate before the family is broken
14 up.

15 What is so extraordinary about this case,
16 particularly the United States' position, is that the
17 adoptive parents' failure to remediate a dad meant that
18 the child got custody of the dad. So if this dad had
19 had a drug problem, because there was no treatment of
20 him the court held, well, that's a basis for giving the
21 dad custody.

22 But there's no language in the statute that
23 even remotely suggests that it's a rights-creating
24 provision. All of both of (d), (e), and (f) are
25 protections that assume existing rights and then make it

1 harder to terminate those rights.

2 JUSTICE SCALIA: Your -- your argument
3 assumes that the phrase in the statute "to prevent the
4 breakup of the Indian family" only applies where --
5 where the father has custody. I don't -- I don't know
6 why that should be true. If -- if that's what Congress
7 meant, they could have put it much more narrowly. They
8 had a very broad phrase, "to prevent the break up of an
9 Indian family." And this guy is -- is the father of the
10 child --

11 MS. BLATT: So he --

12 JUSTICE SCALIA: -- and they're taking the
13 child away from him even though he wants it.

14 MS. BLATT: Okay. But when you --

15 JUSTICE SCALIA: And that -- that is not the
16 breakup of -- of an Indian family?

17 MS. BLATT: The only relationship the dad
18 had is one of biology. And, Justice Scalia, you cannot
19 logically break up that biological relationship, nor can
20 you provide remedial services to prevent the breakup of
21 that biological relationship.

22 JUSTICE SCALIA: Oh, I see. You're
23 reading -- you're reading "Indian family" to mean
24 something more than -- than a biological relationship,
25 right? You're going to hang a lot of -- a lot of other

1 ornaments on that phrase?

2 MS. BLATT: Well, I'm hanging -- I'm hanging
3 a lot on two things.

4 JUSTICE SCALIA: I mean, it seems to me he's
5 the father, the other woman's the mother, that's the --
6 that's the Indian family, the father, the mother, and
7 the kid.

8 MS. BLATT: He has a biological link that
9 under State law was equivalent to a sperm donor.

10 JUSTICE SCALIA: He's the father. He's the
11 father.

12 MS. BLATT: And so is a sperm donor under
13 your definition. He's a biological father and nothing
14 else in the eyes of State law. And under that view --

15 JUSTICE SCALIA: This isn't State law. This
16 is a Federal statute which uses an expansive phrase,
17 "the breakup of the Indian family."

18 MS. BLATT: Right. And there is no Indian
19 family here. The only breakup --

20 JUSTICE SOTOMAYOR: What's the difference
21 with a sperm donor? I mean, I know that you raise that
22 in your brief. But, going back to Justice Scalia's
23 point, if the choice is between a mother, a biological
24 father, or a stranger, and if the father's fit, why do
25 you think that the Federal statute requires that it be

1 given to a stranger rather than to the biological father
2 when the statute defines "parent" as the biological
3 father?

4 MS. BLATT: And assuming all biological
5 fathers that are acknowledged or established are swept
6 in, which would include any biological father, the only
7 stranger in this case was the birth father, who
8 expressly repudiated all parental rights and had no
9 custodial rights. So, again, the problem the other side
10 has --

11 JUSTICE GINSBURG: But he didn't. I mean,
12 he -- he said that he was prepared to surrender rights
13 to the mother, but not to a stranger. And when the
14 issue of adoption came up, he said: "Yes, I want to
15 assert my parental rights."

16 MS. BLATT: It was too late. There's not a
17 single State law that lets a dad, birth dad, hold that
18 kind of veto power over a woman.

19 JUSTICE GINSBURG: Where does it -- where is
20 there a reference in the definition of "parent" to a
21 State law? I see the -- which is the section which
22 defines a parent?

23 MS. BLATT: Section 1903(9). But even
24 assuming -- which is --

25 JUSTICE GINSBURG: Yes.

1 MS. BLATT: -- on page 4A. Whether it's a
2 Federal definition or a State law definition, I think
3 everyone agrees you've got to at least look at some sort
4 of State law. But even if it's just a bare fact of
5 paternity, meaning a biological link is established,
6 they still have to have a basis for an extraordinary
7 award of a transfer of custody when there's been no best
8 interest determination and you have a dad who's a
9 complete stranger with no -- no parental rights
10 whatsoever.

11 JUSTICE GINSBURG: It says a parent means a
12 biological parent of an Indian child, and he fits that
13 definition. And then the next section -- the next
14 sentence doesn't have any reference to State law.

15 MS. BLATT: That's right. And again,
16 assuming he is a parent -- they -- they need to win both
17 points, Justice Ginsburg. He needs to be a parent.

18 Now, if you're an ICWA parent, which means
19 if you want to accept this definition of "all
20 biological," you do have rights under the Federal Act of
21 getting notice and a right to counsel, and the tribe
22 would have a right to intervene. The question is, is
23 there a basis for transferring custody under (d) or (f).
24 (F) is the one that requires continuing custody.

25 JUSTICE KAGAN: But, Ms. Blatt, if he's a

1 parent, why wouldn't some provision in 1912 give him
2 some rights? In other words, what's the point of making
3 him a parent under that definitional section if he
4 doesn't get any of the protections that 1912 provides
5 for when to terminate rights?

6 MS. BLATT: Because this -- this Act is not
7 about creating rights that didn't otherwise exist. It's
8 about protecting rights and making it harder to
9 terminate rights that already exist.

10 JUSTICE KAGAN: But what's the point of
11 labeling him a parent if he gets no parental rights
12 under the statute and if the termination provisions
13 don't apply to him?

14 MS. BLATT: Notice, right to counsel, and
15 heightened consent requirements. So the mother here,
16 the birth mother is a parent, so she had a right to
17 notice, right to counsel, and heightened consent
18 requirements.

19 JUSTICE KAGAN: But what are they supposed
20 to --

21 MS. BLATT: So those are very significant.

22 JUSTICE KAGAN: Well, how are they
23 significant? I mean, I'm trying to understand this,
24 because if you get notice, but then you have nothing to
25 say in the proceeding because the statute gives you no

1 rights and the statute doesn't provide any standards for
2 terminating those rights --

3 MS. BLATT: Right.

4 JUSTICE KAGAN: -- what are you supposed to
5 do once you get notice?

6 MS. BLATT: Justice Kagan, just because he's
7 in the door as a parent, that doesn't mean the statute
8 let him leave out the back door with the child when
9 there was no, no determination with respect to -- I
10 mean, any kind -- it would be unprecedented to think
11 that because you had a failure to remediate to prevent
12 the breakup of an Indian family, that's a basis for
13 awarding custody? And that's the United States' view,
14 which is --

15 JUSTICE KAGAN: I think you're not answering
16 the question of what's the point of labeling him a
17 parent if he gets none of the protections that the Act
18 provides to a parent?

19 MS. BLATT: You're assuming that this entire
20 Act was to make sure unwed dads who are Indian got more
21 time than non-Indian dads to veto adoptions, and that
22 had -- that's not even remotely the purpose of this.

23 JUSTICE BREYER: Well, wait, wait, wait.
24 Isn't your answer 1915(a) still applies?

25 MS. BLATT: 1915(a) still applies.

1 JUSTICE BREYER: And so 1915(a) means --
2 that's right.

3 MS. BLATT: Right.

4 JUSTICE BREYER: So he does have a -- a
5 considerable right.

6 MS. BLATT: Well, 19 --

7 JUSTICE BREYER: I mean, they'll have to go
8 through a set and decide. They have to give it to him
9 unless -- unless something overcomes the preference or
10 there is good cause to the contrary.

11 MS. BLATT: He's not -- he didn't seek to
12 adopt the child and he's not one of the preferred
13 parties.

14 JUSTICE BREYER: Well, you're thinking about
15 this case. I'm thinking in general. I think the
16 question --

17 MS. BLATT: Well, no -- no father is a
18 preferred party under 1915. No father can -- can assert
19 1915. That is --

20 JUSTICE GINSBURG: Doesn't 1915 preclude the
21 adoptive parents because they're not in the preferred
22 category? If 1915(a) precludes the adoption, then the
23 adoptive parents would have no legal basis for objecting
24 to an award to the father.

25 MS. BLATT: Right. Well, we have three

1 responses. First, that provision assumes that somebody
2 actually in that -- in that statute stepped up to adopt
3 the child, and no one did here.

4 Second, it would raise grave constitutional
5 concerns. I mean, just look at (a)(3) on the other
6 Indian families if Congress presumptively presumed that
7 a non-Indian parent was unfit to raise any child with
8 any amount of Indian blood. And so it would either have
9 to -- it's not implicated here or resolved by good
10 cause. Otherwise, you do have an extraordinary reading,
11 Justice Ginsburg, of a statute that would override a
12 birth mother's right to choose the adoptive parents for
13 her child.

14 CHIEF JUSTICE ROBERTS: Is it your position
15 that the preference is absolute or is it simply a factor
16 to be considered with the other -- in other words, if
17 every other factor suggests that the best interests of
18 the child are served by placement with the adoptive
19 couple, does the preference under 1915(a) trump all
20 those other interests?

21 MS. BLATT: It's not our view. Our view is
22 you would have -- you absolutely would have had good
23 cause with -- here when you had the 27 months and also
24 the mother's choice. The tribe 's position is that --

25 JUSTICE GINSBURG: It's not listed under

1 the -- there are guidelines for what constitutes good
2 cause.

3 MS. BLATT: The best interests of the child
4 is not listed under the Government's guidelines, which
5 again is extraordinary. It's also extraordinary that
6 any other adopt -- any other Indian would get a
7 preference whether or not that Indian had the same
8 tribal member.

9 JUSTICE KENNEDY: In -- in your view, at
10 what point, at what date did the Indian father lose the
11 right to ask for custody? Because he changed his mind
12 in -- in January, there was about a 5-day period there.

13 MS. BLATT: Yeah.

14 JUSTICE KENNEDY: The adoption proceedings
15 had not concluded.

16 MS. BLATT: Right.

17 JUSTICE KENNEDY: And at this point he said,
18 in effect: I've changed my mind.

19 MS. BLATT: So State law is you have to
20 support the mother during pregnancy or at birth. So the
21 cases are pretty clear that the father can't wait till
22 he learns of the adoption.

23 JUSTICE KENNEDY: So the State law
24 determines when his rights under the Federal Act end?

25 MS. BLATT: No. State law determines just

1 when you have parental rights to begin with. So if
2 there's no question that this particular dad, had State
3 law applied, the adoption would have gone forward and
4 his rights would have been terminated by virtue of his
5 lack of a right to -- to object to the adoption.

6 JUSTICE SCALIA: Unless we believe that the
7 Federal statute determines when he has parental rights
8 by defining "parent" to include a biological father.

9 MS. BLATT: Yes, but you still have --

10 JUSTICE SCALIA: If that's the case, then
11 what you said doesn't apply.

12 MS. BLATT: -- custodial rights, though.
13 That's not a basis for granting him custodial rights.
14 This -- again, the -- we can talk about (f), but I think
15 (f) is pretty obvious that that assumes
16 preexisting custody to be continued.

17 JUSTICE SCALIA: Yes, I wanted you to talk
18 about (f). Are you going to say something about that
19 or --

20 MS. BLATT: Yes, and I do --

21 JUSTICE SCALIA: Are you going to leave it
22 to the Government?

23 MS. BLATT: No.

24 JUSTICE SCALIA: You don't agree with the
25 Government's position, do you?

1 MS. BLATT: Well, the Government agrees with
2 us on (f). But if you read (d), by the way, it is
3 inextricably intertwined with (e) and (f). It's talking
4 about the breakup of a removal proceeding under (f) or a
5 foster care proceeding under (e), and the Government
6 concedes that neither of those provisions create rights;
7 they just make it harder to terminate the custodial
8 rights of a parent who has custody that can be
9 continued.

10 The other side doesn't really have a
11 definition of "custody" or "continue" that would sweep
12 in a dad without any parental rights. And I do just
13 want to say in terms of looking, taking one step back.
14 This is not the case that Congress had in mind when it
15 passed the Act to halt the depletion of the tribal
16 population. This involves accretion and conscripting
17 other people's children to grow the tribal population
18 based solely on a biological link.

19 JUSTICE KAGAN: Ms. Blatt, continuing on the
20 assumption that this man is a parent under the statutory
21 definition, what your argument seems to be suggesting is
22 that there are really two classes of parents under the
23 statute, right, that everybody is labeled a parent, but
24 then there are the parents who get the protections of --
25 of the termination of rights provision and the parents

1 who don't.

2 And I'm just wondering why if this statute
3 creates two classes of parents it didn't say that in a
4 more upfront kind of way.

5 MS. BLATT: Yes.

6 JUSTICE KAGAN: It seems a strange thing to
7 read into a statute in this sort of backhanded way that
8 there are really two kinds of parents.

9 MS. BLATT: Well, I think it's rather
10 completely upside down that this entire statute, with 20
11 or 24 references to removal, custody, return of child to
12 the parent, is somehow being read to create rights.
13 There is no language in this statute that creates
14 custodial rights, and the birth father in this case,
15 because of an exhaustion failure under (d), walked off
16 with the child without any best interest determination.

17 If I could --

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Clement?

20 ORAL ARGUMENT OF PAUL D. CLEMENT

21 ON BEHALF OF THE RESPONDENT GUARDIAN

22 AD LITEM IN SUPPORT OF PETITIONERS

23 MR. CLEMENT: Mr. Chief Justice, and may it
24 please the Court:

25 But for the application of ICWA, two things

1 would be crystal clear: The birth father would have
2 absolutely no parental or custodial rights under State
3 law or the Constitution; and second, the baby girl would
4 be entitled to a custodial determination that focused on
5 her best interests.

6 Now, the lower courts --

7 JUSTICE SOTOMAYOR: What do you do with the
8 lower court's determination that one of the factors of
9 the best interest calculus was the Federal policy to
10 ensure that Indian children, children of biological
11 Indian parents, at least one, should be raised with
12 their parents? Because the lower court said it thought
13 it was in the best interest of this child to stay with
14 its birth father in light of the Federal policy. So I
15 disagree with your colleague that there wasn't a best
16 interest --

17 MR. CLEMENT: Justice Sotomayor, would that
18 it were true that the Federal preference was one factor
19 in a multifactor test that looked at this child in her
20 best interest. That did not happen here. And if you
21 have any doubt about that, look at page 40a of the
22 petition appendix. And what the lower court --

23 JUSTICE SOTOMAYOR: What do I do with the
24 lower court's finding that this father, despite not
25 being married to his prior lover, had children, was

1 attentive of those children, had the resources to raise
2 the child? What do we with -- why are you --

3 MR. CLEMENT: What you do with that, Justice
4 Sotomayor, is you look what context those findings were
5 made. Those findings were made in the context of
6 1912(f), and the court specifically said that for those
7 purposes all I can look at is the birth father and
8 whether this new custodial relationship beyond a
9 reasonable doubt would pose a serious harm to the girl.
10 And what he --

11 JUSTICE SOTOMAYOR: But they looked at
12 something else that everybody's ignoring --

13 JUSTICE SCALIA: Please finish. Let's
14 finish.

15 MR. CLEMENT: What the court specifically
16 said is they looked at the expert testimony of how it
17 would cause trauma, despair, anxiety, depression on this
18 baby girl to be taken from her parents, and the court
19 specifically said all of that was legally irrelevant
20 because 1912(f) only lets you look at the harm from the
21 new custodial relationship; it doesn't let you look at
22 any harm from the breakup of the previous custodial
23 relationship.

24 And all of that would make sense if you were
25 talking about 912(f)'s application to the situations

1 it's designed for.

2 JUSTICE KENNEDY: Well, and even in that
3 sense, serious emotional and physical damage is a much
4 different threshold than the best interests of the
5 child, even on the statutory terms.

6 MR. CLEMENT: It's miles away. And it's the
7 appropriate standard when you're taking somebody who has
8 existing legal custody and depriving them of it. But
9 everywhere in the law, including ICWA, when you make an
10 initial placement of a child in a new custodial setting,
11 you don't do that unless you look at the child's best
12 interest.

13 And look 1916(a) of ICWA, which is the only
14 provision in the Act that specifically contemplates a
15 child being placed in a new custodial setting. It talks
16 about what happens if you have an adoption and then the
17 adoptive parents for some reason terminate their rights
18 and then you send the child back to their original
19 Indian custodian. And in that situation, recognizing
20 that when there's been a break of custody, you don't
21 just send somebody off to a -- a new setting based on
22 beyond a reasonable doubt; you look at the best
23 interests of the child. And that's --

24 JUSTICE SOTOMAYOR: Mr. Clement, can I go
25 back to that best interest calculus. There's two

1 timeframes in my mind to look at: In January, when he
2 asserted his parental rights and 2 years later when the
3 trial was heard. If there's serious emotional harm, I
4 think the court below said: We're not looking at what
5 happens at the time we're deciding the custody issue,
6 because otherwise, we're going to give custody by
7 estoppel.

8 We're going to encourage people to hold on
9 to kids and create the serious physical harm. In
10 January, when he asserted his rights, that's what we're
11 looking at. What was in the best interests of the child
12 at the time the issue was raised, and that was 4 or 5
13 months after the birth of the child.

14 MR. CLEMENT: Well, Justice Sotomayor, I'm
15 here representing the guardian who represents the best
16 interest of the child. From the child's perspective,
17 the child really doesn't care whose fault it was when
18 they were brought in one custodial situation or another.

19 They just want a determination that focuses
20 on at the relevant time, that time, what's in their best
21 interest. And so in the same way that we think if you
22 rule in our favor and you remand to the lower court that
23 there has to be a best interest determination that takes
24 into account the current situation, notwithstanding that
25 that would be on the hypothesis that the last 15 months

1 of custody were based on a legal misunderstanding, we
2 still think this girl --

3 JUSTICE SOTOMAYOR: So we're going to freeze
4 it at that point or are we going to freeze it today,
5 after the child's been with his -- with her father for 2
6 years?

7 MR. CLEMENT: You freeze it at the time that
8 somebody's talking about --

9 JUSTICE SOTOMAYOR: I don't want to be that
10 judge, by the way.

11 MR. CLEMENT: You freeze it at the time that
12 somebody's talking about changing a custodial situation.
13 But what is so tragic here is that the lower court
14 applied 1912(d) and (f), which are clearly designed for
15 a situation when you're contemplating transferring
16 custody away from an existing custodial relationship.
17 They looked at that and applied those inapposite
18 standards to create a transfer to somebody with new
19 custody.

20 Now, the Solicitor --

21 JUSTICE GINSBURG: What about now, when you
22 said the best interest. Now the child has been some
23 15 months with the father. So if a best interest
24 calculus is made now, you would have to take into
25 account uprooting that relationship, would you not?

1 MR. CLEMENT: Absolutely, Justice Ginsburg.
2 We're not here to try to say that anybody is entitled to
3 automatic custody of this child based on some legal
4 rule.

5 JUSTICE KENNEDY: And I -- and I take it
6 you'll say that that goes back to this South Carolina
7 court if you prevail?

8 MR. CLEMENT: Absolutely. And I would hope
9 with instructions to please make that determination as
10 quickly as humanly possible.

11 JUSTICE KENNEDY: If the best interest of
12 the child is the uniformly accepted standard in State
13 courts, and if we forget constitutional avoidance
14 problems which I -- I think exist here, is there
15 anything in the statute that allows us to import the
16 best interests of the child into the statutory language,
17 or do we have to just rely on constitutional avoidance
18 and -- and really rewrite the statute?

19 MR. CLEMENT: Well, a couple of things,
20 Justice Kennedy. If you got to the point of applying
21 1915(a) and the placement preferences -- and we agree
22 with Petitioners that they're not squarely applicable
23 here, because the birth father's argument was not that I
24 get to adopt, but that I have an entitlement -- if you
25 got to that, I think the good cause standard gives you a

1 vehicle for importing a lot of best interest standards.

2 I also think you could look --

3 JUSTICE GINSBURG: Even though -- even
4 though the guidelines to what's good cause do not
5 include best interest.

6 MR. CLEMENT: That's right, but even the
7 Justice Department doesn't say that the guidelines are
8 binding or entitled to anything more than Skidmore
9 deference, and I'd take constitutional avoidance over
10 Skidmore deference any day.

11 But the second thing I would put on the
12 table is I think the fact that 1916(a) tells you that
13 the one time you are thinking about transferring
14 custody, Congress looked to the best interest standard.
15 That's a good hint that if you are talking about
16 transferring custody you should look to the best
17 interests.

18 And, again, I think it's imperative to look
19 at 1912(d), (e), and (f). As the Government and the
20 Solicitor General recognizes, they all contemplate
21 continued custody, (e) and (f) do.

22 Now, then the Government turns around and
23 says: Well, but (d) was a basis for what the lower
24 court did, which is to transfer custody. With all due
25 respect to the Government, (d) makes even less sense as

1 a basis for transferring custody than (f). At least (f)
2 has some standard designed for some transfer of custody.
3 It happens to be the wrong transfer. It's the transfer
4 away from continuing custody out and it's beyond a
5 reasonable doubt.

6 But (d) has no standard to satisfy. And
7 their position is that because this birth father was not
8 presented with remedial and rehabilitative services,
9 therefore, because he didn't get remedial services that
10 presumably he needed, he gets the child. That's crazy.

11 And what it shows is that 12(d) assumes that
12 it's like an exhaustion requirement, and unless and
13 until these services are provided you preserve the
14 status quo ante. But the lower court didn't preserve
15 the status quo ante. The lower court ordered this poor
16 girl sent to somebody who, at least under state law and
17 just a matter of practicality, is a stranger to her.

18 And nowhere in the law do you see any child
19 being transferred to a new custodial arrangement without
20 a best interest determination. And why did it happen
21 here? It happened here because of ICWA, which by its
22 terms does not apply to these situations, and it
23 happened because of 3/256ths of Cherokee blood.

24 Now, the Justice Department back in 1978
25 recognized there were profound constitutional problems

1 with the statute. Then-Assistant Assistant Attorney
2 General, later Judge, Patricia Wald, told Congress that
3 there were applications of the statute that raised equal
4 protection problems because they treated people
5 differently solely on the basis of race.

6 One of the things she pointed to is what she
7 point -- described as "the (b) portion of the definition
8 of 'Indian child.'" And that's what makes this child an
9 Indian child here, its biology, its biology combined
10 with the fact that the tribe, based on a racial
11 classification, thinks that somebody with 325 --
12 1 percent Indian blood is enough to make them a
13 tribal -- a tribal member, eligible for tribal
14 membership.

15 And as a result of that, her whole world
16 changes and this whole inquiry changes. It goes from an
17 inquiry focused on her best interests and it changes to
18 a focus on the birth father and whether or not beyond a
19 reasonable doubt there is a clear and present danger.
20 Again, that is --

21 JUSTICE BREYER: So what do we do about
22 that?

23 MR. CLEMENT: You correct the lower court.
24 And there's two paths to correct the lower court. One
25 way to correct the lower court is to say, look -- can I

1 finish the answer?

2 CHIEF JUSTICE ROBERTS: Finish the answer.

3 MR. CLEMENT: You could -- you would either
4 do it by changing the definition of "parent" and
5 recognize that, given the consequences that flow from a
6 parent in the statute, it only makes sense to prove
7 something more than bare paternity.

8 Or you could do it by recognizing that if
9 somebody gets in the front door of this statute based on
10 bare paternity, you have to interpret provisions like
11 (d), (e), and (f) with sensitivity to the fact that
12 under that reading just because you are a parent doesn't
13 mean you have these kind of extraordinary rights.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Rothfeld?

16 ORAL ARGUMENT OF CHARLES A. ROTHFELD

17 ON BEHALF OF RESPONDENTS BIRTH FATHER, ET AL.

18 MR. ROTHFELD: Thank you, Mr. Chief Justice,
19 and may it please the Court:

20 It is simply false to say that this child's
21 custody was transferred without a best interest
22 determination, as is apparent from any reading of the
23 lower court decisions in this case.

24 Both of the State courts here looked very
25 closely at the situation here and they found, in their

1 words, that the father here was a "fit, devoted, and
2 loving father," and they said expressly and found
3 expressly as a factual matter that it was in the best
4 interest of this child.

5 CHIEF JUSTICE ROBERTS: Do you think that's
6 correct under the Act? Where in the Act does it say
7 that you need to consider whether or not the father is
8 a -- would be a good parent? I thought your reading was
9 that it doesn't matter, all that matters is that he has
10 in his case 3/128ths Cherokee blood.

11 MR. ROTHFELD: Well, I -- I think that there
12 is some confusion as to exactly what the State courts
13 did here and what ICWA does. ICWA does not assign
14 custody. ICWA -- ICWA addresses the question whether or
15 not the parental rights of -- of a parent of an Indian
16 child can be terminated. The courts here, both courts,
17 correctly held that under the plain application of ICWA,
18 under Section 1912(d), as discussed by Justices
19 Sotomayor and Scalia, clearly parental rights could not
20 be terminated.

21 The question then arose: What happens to
22 the child? And the court then, because there were a
23 natural parent with intact parental rights, applied the
24 usual rule that there is a strong presumption that a fit
25 parent, natural parent, who wants to exercise custody

1 of -- of his or her child should get custody. That was
2 what happened here.

3 JUSTICE KENNEDY: And do you -- you want us
4 to write the case as if this is just a standard best
5 interest determination and -- and this federal statute
6 is irrelevant? I don't understand your argument.

7 MR. ROTHFELD: No, no, Your Honor. I -- I
8 think that the analysis of the South Carolina Supreme
9 Court was exactly right in this -- in -- in those terms.
10 The court applied ICWA, the Federal statute. The
11 question was: Could the parental rights of this parent
12 be terminated? This -- everyone concedes this is an
13 Indian child. ICWA applies because of that.

14 The question then is: Can the parental
15 rights be terminated? Sections 1912(e) and (f) address
16 that question -- (d), (e), and (f). And --

17 JUSTICE SCALIA: Do you apply a "best
18 interest of the child" standard to a termination of
19 parental rights?

20 MR. ROTHFELD: No, not in the --

21 JUSTICE SCALIA: I mean, can -- can -- I
22 know a lot of kids that would be better off with
23 different parents.

24 MR. ROTHFELD: And that -- that, too, is
25 exactly right, Justice Scalia. That is precisely what

1 the ordinary state law standard says, that there is a
2 presumption that the natural parent, if the natural
3 parent is fit, should be awarded custody of the child.

4 JUSTICE BREYER: Actually, it does -- does
5 (f) apply in your opinion to this case or not?

6 MR. ROTHFELD: Yes, it -- in our opinion,
7 both (d) and (f) apply.

8 JUSTICE BREYER: And (f) has something of
9 the best interest standard tilted towards the Indian
10 parent.

11 MR. ROTHFELD: Well, I think --

12 JUSTICE BREYER: Is that right or not? I
13 mean, as I read it it's something. It's tough, but it's
14 there.

15 MR. ROTHFELD: I think that that's right,
16 but I -- but I would add the -- the caveat that it's not
17 a best interest in the sense of we are going to apply
18 this standard to determine custody.

19 JUSTICE BREYER: So in your view the best
20 interest standard does not apply, but rather (f)
21 applies?

22 MR. ROTHFELD: (F) applies --

23 JUSTICE BREYER: And (f) is a tough version
24 of the best interest standard.

25 Have I got it right or not?

1 MR. ROTHFELD: Correct, but with this
2 addition: What it applies for is the question whether
3 or not the rights of this parent can be terminated,
4 whether the parental rights of the parent can be
5 terminated. And so --

6 JUSTICE KAGAN: Well, how does (f) apply?
7 It says "continued custody." That seems to assume that
8 custody exists.

9 MR. ROTHFELD: That is -- that is the other
10 side's argument. Our response is that there is a
11 definitional provision in ICWA that says that a child
12 custody proceeding is one that includes a proceeding
13 leading to the termination of parental rights. Parental
14 rights are defined to be broadly as the parent-child
15 relationship.

16 And so we think in context (f) means that
17 it's the termination of the parent-child relationship is
18 what has to be considered.

19 JUSTICE KAGAN: So your argument is not that
20 "continued" means something different from the normal
21 language; your argument is that "custody" means
22 something different from its normal language.

23 MR. ROTHFELD: Our argument is that
24 "custody" means what Congress said "child custody
25 proceeding" means, which is termination of the

1 parent-child relationship. And so we think that
2 continuation of a relationship -- the question is under
3 (f) would that be harmful for the child? But I should
4 quickly say that (f) is only one part of the argument
5 here. As Justices Sotomayor and Scalia began the
6 discussion with Ms. Blatt, (d) also applies. (D) says
7 nothing at all about custody. The question under --

8 CHIEF JUSTICE ROBERTS: Could -- could I go
9 back to what you just said about (f)? You think custody
10 covers someone who has never had custody of the child
11 because it refers to something beyond the accepted
12 definition?

13 MR. ROTHFELD: Well, I -- again, the
14 definition of "child custody proceeding" in ICWA
15 includes a proceeding leading to the termination of
16 parental rights. Parental rights --

17 CHIEF JUSTICE ROBERTS: But (f) doesn't say
18 "child custody proceeding." It says "continued custody
19 of the child."

20 MR. ROTHFELD: That -- that's true, but I
21 think that has to be interpreted within the context of
22 the definitional provision and what Congress had in mind
23 when it referred to child custody proceeding.

24 But I think -- you know, (f), as I say, is
25 only a portion of the argument here. And to return to

1 what Justices --

2 JUSTICE SOTOMAYOR: Tell me why you are
3 fighting Justice Breyer? He said: I see -- and your --
4 Mr. Clement said the same thing -- that "good cause"
5 under 1958 is a variant of best interests of the child
6 or factors that are considered. I see (f) as doing the
7 same thing, allotting however a burden of proof that may
8 or may not be higher than other States.

9 I mean, in -- in -- some States may have
10 clear and convincing evidence, some States may have
11 preponderance. Some States -- I don't know if any have
12 beyond a reasonable doubt. But it's an allocation of
13 burden.

14 MR. ROTHFELD: No. I -- I think that that's
15 right, and I certainly don't intend to fight
16 Justice Breyer. I -- I think that --

17 JUSTICE BREYER: You should if I'm not
18 right.

19 MR. ROTHFELD: I don't --

20 JUSTICE GINSBURG: But I think Justice
21 Breyer is quite wrong because a standard that says
22 results in serious emotional or physical damage to the
23 child is far from a best interest standard.

24 JUSTICE SCALIA: It sure is. And do you
25 know of any State that -- that applies best interest of

1 the child standard to termination of parental rights as
2 opposed to adoption?

3 MR. ROTHFELD: Absolutely not. And I -- and
4 I think I -- I will try to agree with both
5 Justice Breyer and Justice Ginsburg and Justice Scalia
6 and say that --

7 CHIEF JUSTICE ROBERTS: But not me, right?
8 (Laughter.)

9 MR. ROTHFELD: And Justice Sotomayor. And
10 always -- always the Chief Justice.

11 JUSTICE SOTOMAYOR: You might just have to
12 take --

13 MR. ROTHFELD: Which gets me to five, so.

14 But I think -- I think the crucial point is
15 what -- what we're talking about the determination of
16 parental rights under -- under (f) is whether or not, as
17 Justice Scalia says, the rights of a biological parent
18 can be terminated, which is not sort of the ordinary
19 best interest determination when you're choosing between
20 two people who are strangers to the child. So --

21 CHIEF JUSTICE ROBERTS: This is not -- (f)
22 is not about terminating parental rights. It's about
23 what -- I mean, it's about custody, right?

24 MR. ROTHFELD: No, no. I think (f) is
25 about -- both (d) and (f) are about terminating parental

1 rights. Parental rights cannot be terminated unless
2 these determinations have been made. Unless it's been
3 shown that --

4 CHIEF JUSTICE ROBERTS: In what proceeding,
5 the adoption proceeding or custody determination?

6 MR. ROTHFELD: Any proceeding which is aimed
7 at the termination of parental rights. The adoption
8 proceeding here cannot go forward, all concede, unless
9 parental rights are terminated. And so if parental
10 rights cannot be terminated under either (d) or (f),
11 this adoption cannot go forward and we are in a
12 different place.

13 I think that's what -- exactly what the
14 South Carolina Supreme Court said. It said, we're going
15 to apply -- we're going to look to ICWA to see can we
16 terminate the parental rights of this natural father.
17 And as Justice Scalia says, that is central. There is a
18 natural parent here who wants custody. Can his -- can
19 his claim for custody be denied and can his parental
20 rights be terminated? To determine that, Congress has
21 put Federal standards in place in ICWA, in (d) and (f),
22 and we have to say both of those have been satisfied
23 here.

24 CHIEF JUSTICE ROBERTS: If -- if you had a
25 tribe, is there at all a threshold before you can call,

1 under the statute, a child an "Indian child"? 3/256ths?
2 And what if the tribe -- what if you had a tribe with a
3 zero percent blood requirement; they're open for, you
4 know, people who want to apply, who think culturally
5 they're a Cherokee or -- or any number of fundamentally
6 accepted conversions.

7 MR. ROTHFELD: That --

8 CHIEF JUSTICE ROBERTS: I mean, is it --
9 is -- would that child be considered an Indian child, so
10 a father who had renounced any interest in her until he
11 found out about the adoption would have all these
12 rights?

13 MR. ROTHFELD: Well, that -- that would be a
14 different question. What we have here is a --

15 CHIEF JUSTICE ROBERTS: No, no. That's why
16 I asked it. It's a different question.

17 MR. ROTHFELD: Well -- and the answer would,
18 I think, be as a threshold matter, as this Court has
19 said consistently, it is fundamental -- fundamental
20 basis of tribal sovereignty that -- that a tribe get to
21 determine the --

22 JUSTICE GINSBURG: I thought the definition
23 of an Indian child is just straight out of the statute.
24 An Indian child is someone who is either a member of a
25 tribe or eligible, and is the biological child of a

1 member of an Indian tribe.

2 MR. ROTHFELD: That is correct.

3 CHIEF JUSTICE ROBERTS: So return to what is
4 a hypothetical question and not what the statute
5 provides: Under your argument, a tribe that did not
6 require any blood requirement, but simply enrollment,
7 could be considered an Indian child.

8 MR. ROTHFELD: Well, the -- the child would
9 have to be a -- would have to be biological parents --

10 CHIEF JUSTICE ROBERTS: Yes, you have
11 somebody who has no Indian blood, he enrolls in my
12 hypothetical tribe, has a biological child. That child
13 would be an Indian child and the father would be
14 entitled to the protections you're arguing for.

15 MR. ROTHFELD: Well, that's -- that's true
16 in theory. But of course, A, that is not our case. B,
17 if that were to occur and whether or not that would be
18 sort of a legitimate basis for determining membership of
19 a -- in an Indian tribe I think would be --

20 JUSTICE BREYER: But that is a problem.
21 Because, look, I mean, as it appears in this case is he
22 had three Cherokee ancestors at the time of George
23 Washington's father. All right? Now, you say, oh,
24 well, that's a different issue.

25 But I don't see how to decide that case

1 without thinking about this issue, because if your view
2 is taken and you accept that definition, a woman who is
3 a rape victim who has never seen the father could,
4 would, in fact, be at risk under this statute that the
5 child would be taken and given to the father who has
6 never seen it and probably just got out of prison, all
7 right? And you don't know that this beyond reasonable
8 doubt standard would satisfy that.

9 Now, that's obviously something I find
10 disturbing, as a person and also as a judge, because
11 we're trying to interpret the statute to avoid results
12 that would be very far out, at least. And -- and that's
13 what I want you to tell me. How do I prevent that kind
14 of risk through an interpretation of the statute?

15 MR. ROTHFELD: Well, let me answer both that
16 question and the Chief Justice's question which I think
17 have similar responses. As to the rape victim, I am
18 confident that an application of Section 1912(f) would
19 lead to termination of that father's parental rights,
20 and so he would never be in the picture as a possible --
21 well, the question whether or not custody of someone who
22 has engaged in such conduct could lead to serious
23 physical or emotional damage to the child, I think there
24 will be no difficulty in reaching that conclusion.

25 But on the question of could a tribe

1 establish some manipulative type of -- of membership
2 criteria, it's significant that that is not this case
3 because --

4 JUSTICE SCALIA: Aren't there Federal
5 definitions of approvals of tribes? Not every group of
6 native Americans who get together can call themselves a
7 tribe.

8 MR. ROTHFELD: That -- that is quite right.

9 JUSTICE SCALIA: And isn't one of the
10 conditions of that a condition of blood and not -- not
11 of voluntary membership?

12 MR. ROTHFELD: As I --

13 JUSTICE SCALIA: I'm quite sure that's
14 right. So I think the hypothetical is -- is a null set.
15 I don't think it ever exists.

16 MR. ROTHFELD: I -- I think that --

17 CHIEF JUSTICE ROBERTS: Well --

18 MR. ROTHFELD: -- that's what I was trying
19 to get to -- I'm sorry, Mr. Chief Justice.

20 CHIEF JUSTICE ROBERTS: I'm just wondering
21 is 3/256ths close -- close to zero? I mean, that's --
22 that's the question in terms to me, that if you have a
23 definition, is it one drop of blood that triggers all
24 these extraordinary rights?

25 MR. ROTHFELD: But it has always been the

1 Cherokee membership criterion that if someone who can
2 trace their lineal ancestry to some -- to a person who
3 is on the Dawes Rolls is a member. No one has ever
4 questioned that that is a legitimate basis for
5 establishing tribal citizenship. And so --

6 JUSTICE ALITO: But what if a tribe makes
7 eligibility available for anybody who, as a result of a
8 DNA test, can establish any Indian ancestry, no matter
9 how slight?

10 MR. ROTHFELD: I think that that would lead
11 to the question posed by Justice Scalia. Whether or not
12 that would be a legitimate basis for establishing --

13 JUSTICE ALITO: No, it's different from his.
14 He says it's -- it has to be based on blood. This would
15 be based on blood.

16 MR. ROTHFELD: But I -- I think it leads to
17 his question that there is a Federal element to
18 recognition of an Indian tribe. And I think whether or
19 not tribal membership criteria so far depart from the
20 traditional understanding of what constitutes a tribe as
21 to be acceptable for those purposes, that would be a
22 question to be resolved by the United States, by the
23 political branches.

24 JUSTICE SOTOMAYOR: Counsel, there are two
25 forms of the EIFD doctrine, the existing Indian family

1 doctrine. One applies directly to this case; what's the
2 status of an unwed father, and they seem, under that
3 doctrine, to apply the definition that a parent who
4 hasn't been involved in the care during pregnancy is not
5 a father.

6 But the other side of the doctrine is the
7 one that addresses, I think, the Chief's concern, which
8 is you don't only have Indian blood, but you've been a
9 father who's actually been a member of an Indian tribe,
10 an active member.

11 We don't have to reach that separate issue
12 here, that EIFD -- that part of the EIFD doctrine.

13 MR. ROTHFELD: Well, I guess I'll give you
14 two answers to that. First, in this case, there has
15 been a finding by the family court that this father has
16 significant ties to the Cherokee Nation. And so, if one
17 could think that that was part of the test under ICWA,
18 it is certainly satisfied here.

19 I -- I would go further than that and say
20 that I think the vast majority of State courts have
21 correctly rejected that theory, because --

22 JUSTICE SOTOMAYOR: I don't disagree.

23 MR. ROTHFELD: It -- it would be sort of
24 beyond the judicial competence to determine whether or
25 not a particular person is Indian enough to qualify for

1 treatment as a father of an Indian child under -- under
2 ICWA.

3 Just to nail this down, as to the particular
4 membership criteria of the Cherokee Nation, no one has
5 ever suggested, our opponents here do not suggest that
6 that is, in any sense, illegitimate or not a traditional
7 basis for establishing membership in an Indian tribe.

8 So if one can imagine wild hypotheticals of
9 the sort that Justice Alito and the Chief Justice have
10 suggested, they are not present here, and those would
11 present political questions to be addressed by Congress
12 or addressed by the executive branch.

13 In this case, again, the State courts found
14 that ICWA should be applied to allow a natural father to
15 raise his child. Those courts found that s in the best
16 interests of the child to be raised by their natural
17 parent because that parent was a fit, was a loving, was
18 a devoted parent in the words of -- of the lower courts.
19 Those conclusions were quite clearly correct.

20 And if I can turn to something which
21 attracted some attention from Justice Scalia and Justice
22 Sotomayor in their exchanges with Ms. Blatt, the
23 application of Section 1912(d) and whether or not the
24 parental rights of this -- this father, who
25 unquestionably satisfies the definition of parent in

1 ICWA, Section 1912(d) says that parental rights cannot
2 be terminated unless remedial efforts have been made,
3 rehabilitative efforts have been made to fix a family
4 that is broken in some respect.

5 And Ms. Blatt suggests that that does not
6 apply here because there was no Indian family. I think
7 what Justice Scalia said was absolutely right. There
8 unquestionably was a family here in the ordinary sense.
9 There was a mother, there was a father, there was their
10 little girl, there were grandparents who very much
11 wanted to be involved in the life of this child, who
12 knit socks for her. There's no question --

13 JUSTICE SCALIA: Is my recollection correct
14 that -- that he had offered to -- to marry the mother,
15 and she rejected that?

16 MR. ROTHFELD: That -- that is quite
17 correct. I think that the genesis of this case, they --
18 they were an engaged couple and the mother broke the
19 engagement. The father wanted, very much wanted to
20 marry the mother, wanted to --

21 JUSTICE GINSBURG: I thought that there's
22 some ambiguity there, because one reason why he wanted
23 to marry was that he would get more pay and allowances.

24 MR. ROTHFELD: Well, there -- there are
25 disputed facts as to what was going on, and so I don't

1 want to hinge a lot on this. But I think it is quite
2 clear the father -- they were engaged, the father wanted
3 to marry the mother.

4 The father's testimony -- and the family
5 court found, so we're not talking about simply, you
6 know, assertions here. The family court found that the
7 father was excited by the pregnancy, was looking forward
8 to the birth of the child, that he wanted to marry the
9 mother so that she would qualify for military health
10 benefits. The father at the time --

11 CHIEF JUSTICE ROBERTS: He was excited, but
12 there is no doubt he paid nothing during the pregnancy
13 and nothing at the time of the birth, right, to support
14 the child or the mother?

15 MR. ROTHFELD: That -- that is true. But
16 I -- I am --

17 CHIEF JUSTICE ROBERTS: So he was excited by
18 it; he just didn't want to take any responsibility.

19 (Laughter.)

20 JUSTICE SCALIA: Well, that -- that was
21 after she had rejected his offer to marry her, no?

22 MR. ROTHFELD: Yes. I mean --

23 JUSTICE KENNEDY: Well, these -- these
24 considerations are why domestic relations pose the
25 hardest problems for judges. Our domestic relations

1 judges all by themselves every day have these difficult
2 problems. If we could appoint King Solomon, who was the
3 first domestic relations judge, as special master, we
4 could do it. But we can't do it.

5 MR. ROTHFELD: That -- that -- that --

6 JUSTICE KENNEDY. But what we have -- what
7 we have here is a question of a Federal statute which,
8 as I must understand it, displaces the ordinary best
9 interest determinations of the State courts. Would you
10 agree with that?

11 MR. ROTHFELD: I -- I would agree that
12 Congress indicated that part of the best interest
13 inquiry for an Indian child concerns -- takes account of
14 their status as an Indian child, and Congress made a
15 factual determination -- the fact that --

16 JUSTICE SCALIA: I don't know why you make
17 that concession. I mean, your client has been deprived
18 of parental rights. I do not know that -- that it is
19 traditional to decide whether a parent will be deprived
20 of parental rights by assessing what is in the best
21 interest of the child.

22 That seems to me quite --

23 MR. ROTHFELD: That is quite --

24 JUSTICE SCALIA: -- extraordinary, not
25 normal.

1 JUSTICE KENNEDY: But is -- is that true
2 under South Carolina law?

3 MR. ROTHFELD: Yes, that is. I -- with
4 respect to that --

5 JUSTICE KENNEDY: Under South Carolina law
6 in this adoption proceeding, the -- if it had not been
7 for the statute, the best interest of the child standard
8 would not have applied?

9 MR. ROTHFELD: I think there are three
10 things that are going on here.

11 Had ICWA not applied here at all, then the
12 father would have had no right to object to the
13 adoption, so the adoption would have gone forward had it
14 not been for ICWA.

15 However, as Justice Scalia says correctly,
16 when a natural parent is involved, and the natural
17 parent has rights that have not yet been terminated, as
18 this parent's have not, then ordinarily a best interest
19 inquiry --

20 JUSTICE GINSBURG: He would be out under
21 South Carolina law because he didn't support the child
22 during the pregnancy.

23 MR. ROTHFELD: I -- I have to disagree with
24 that, Justice Ginsburg. The family court judge found
25 that his parental rights could not be terminated as a

1 matter of South Carolina law, as well as a matter of
2 ICWA law. And so we think it is quite clear that this
3 father's right would not be terminated.

4 As Justice Scalia says, in the ordinary
5 course, while we're not engaged in a free-floating best
6 interest inquiry, one would say whether or not a -- a
7 profound showing of parental neglect or insufficiency
8 has been made to terminate those rights. If it cannot,
9 then that father should get custody.

10 In response to what Justice Kennedy asked
11 about --

12 JUSTICE GINSBURG: Termination of parental
13 rights requires a showing that it's an unfit parent,
14 which is quite --

15 MR. ROTHFELD: That -- that is absolutely
16 right, and no such showing has been made or could be
17 made in this case.

18 And if I may just finish --

19 CHIEF JUSTICE ROBERTS: You have an extra --
20 you have an extra minute.

21 MR. ROTHFELD: The -- both of the State
22 courts in this case carefully looked at the -- at the
23 situation here and found that this father, far from
24 being an unfit father, was a fit, loving, devoted father
25 who had created a safe, satisfactory and -- and loving

1 environment for the child.

2 Under ordinary South Carolina standards,
3 once one gets past ICWA, parental rights cannot be
4 terminated in a situation of this sort, the parental
5 rights, as Justice Scalia says, of a natural parent, who
6 had --

7 JUSTICE ALITO: Well, if this case would
8 have come out the same way under purely South Carolina
9 law, then why are we here?

10 MR. ROTHFELD: The -- the only reason that
11 ICWA comes into play is because South Carolina law did
12 not give this father a right to object to the adoption.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 MR. ROTHFELD: Thank you very much, Your
15 Honor.

16 CHIEF JUSTICE ROBERTS: Mr. Kneedler?

17 ORAL ARGUMENT OF EDWIN S. KNEEDLER,
18 FOR THE UNITED STATES, AS AMICUS CURIAE,
19 SUPPORTING RESPONDENTS BIRTH FATHER, ET AL.

20 MR. KNEEDLER: Mr. Chief Justice, and may it
21 please the Court:

22 I would like to start with the definition of
23 "parent" under the Act because I think a lot flows from
24 that. The Act provides that a parent -- a parent of an
25 Indian child is the -- is the biological parent, except

1 where the child -- or where the parent -- paternity has
2 not been established or acknowledged.

3 Here, the -- the father's paternity was
4 acknowledged and established, both courts below found.
5 As a consequence, he has not simply a biological
6 relationship to the child; he has a legal relationship
7 to the child, created under Federal law.

8 Then --

9 JUSTICE KENNEDY: But -- but -- did you --
10 at your -- when you began, do you use "paternity" in the
11 biological sense?

12 MR. KNEEDLER: "Paternity" itself is in a
13 biological sense, but when --

14 JUSTICE KENNEDY: As -- as you -- as you
15 interpret the statute, "paternity is the biological
16 sense," not -- not an --

17 MR. KNEEDLER: Yes.

18 JUSTICE KENNEDY: -- not an existing
19 parental relationship.

20 MR. KNEEDLER: No, a biological sense. But
21 the establishment of --

22 JUSTICE SCALIA: It says that, doesn't it?
23 A parent is -- is the -- the biological parent.

24 MR. KNEEDLER: Yes. It does.

25 JUSTICE SCALIA: That's what it says.

1 MR. KNEEDLER: Yes. But what I'm saying is,
2 once -- in the unwed father situation, once the father
3 establishes or acknowledges paternity, the father has a
4 legal relationship, not just the --

5 JUSTICE ALITO: Well, family law is
6 traditionally a State province, but your argument is
7 that Federal law can take a traditional family law term
8 like "parent" and perhaps others and give it a meaning
9 that is very different from its traditional meaning or
10 its meaning under State law?

11 MR. KNEEDLER: Well, several things about
12 that.

13 JUSTICE ALITO: Strike the "traditional
14 meaning: But its meaning under State law.

15 MR. KNEEDLER: Well, several things about
16 that. First, there are States -- the Casey amicus brief
17 in footnote 7 identifies a number of States which
18 recognize parental rights for a parent who has
19 established or acknowledged citizenship. So the State
20 law varies on that.

21 And this was the -- one of the very problems
22 Congress was concerned about with respect to Indian
23 children, because --

24 JUSTICE SCALIA: Wait. I didn't understand.
25 Citizenship, who has acknowledged citizenship?

1 MR. KNEEDLER: I'm sorry. I meant to say
2 paternity. Sorry.

3 JUSTICE SCALIA: Okay. I understand now.

4 MR. KNEEDLER: What you have here are people
5 who are citizens of two separate sovereigns. An Indian
6 tribe is a sovereign and a State. Congress tried to
7 accommodate those competing interests by leaving the
8 cases in State court, letting them be subject to State
9 law, but subject to minimum standards to protect the
10 people who are citizens -- or eligible for citizenship
11 in the Indian tribe.

12 That is a classic implementation of
13 Congress's plenary responsibility in the Federal trust
14 and guardianship for Indians, and nothing could be more
15 at the core of tribal self-determination and tribal
16 survival than the determination of tribal membership and
17 the care about what happens to Indian children.

18 JUSTICE KAGAN: Mr. Kneedler, let's say
19 you're right that this man is a parent under the terms
20 of the Act, so not just a biological father but also he
21 has a legal status as parent under this Act. And then
22 1912 says, well, this is how you go about terminating
23 parental rights, right?

24 But then your argument suggests that one of
25 these clauses applies to him and the other one doesn't,

1 even though he's a parent. But you're saying he only
2 gets some of the protections, that there are really two
3 classes of parents, custodial parents and non.

4 So where does that come from?

5 MR. KNEEDLER: I think it's not two classes
6 of parents. It comes from the text of (f) itself, which
7 talks about continued custody, which we think means that
8 (f) applies -- it presupposes that there is custody to
9 continue. And that's just a condition on the
10 termination of parental rights.

11 JUSTICE SCALIA: That's a very strange way
12 to put it. I mean, just -- just in passing in the
13 sentence, that "the continued custody." I mean, you
14 would think if that's what they meant, they would say,
15 "where the child" is -- "is within the custody of a
16 parent, comma, no termination of parental rights may be
17 ordered, in the absence of a determination," blah, blah,
18 blah, blah, blah.

19 It doesn't say that. It says, "No
20 termination may be ordered in absence of a
21 determination, including testimony of a qualified
22 expert, that the continued custody of the child by the
23 parent or Indian custodian is likely to result in
24 serious emotional."

25 When it's -- when it's framed that way, I

1 am -- I am inclined to believe that the "continued
2 custody" means looks to the future, the continuing
3 custody by this person in the future. To read into it
4 the fact that -- that the whole provision only applies
5 to someone who is then in custody of the child, that's
6 very strange. That's -- that's not the way somebody
7 would write a provision like that.

8 MR. KNEEDLER: I -- I grant you it is
9 somewhat awkwardly written, but we think the sense of it
10 is -- is that, because this is -- as this court noted in
11 the Santosky decision, this is a very unusual statutory
12 provision with respect to the burden of proof.

13 And there is some logic for Congress
14 applying this -- this -- where there is a custodial --

15 JUSTICE BREYER: But doesn't it happen, in
16 your interpretation, unlike the two parties who have an
17 interpretation I can understand, that -- remember my
18 hypothetical, which I deliberately made dramatic. We
19 can think of a whole range of things short of that where
20 the father has seen the mother never, perhaps, or sperm
21 donors for very short periods of time, and under your
22 interpretation where there is an ongoing relationship,
23 even a short one, at least they can't give the child to
24 the father where it would be very harmful to the -- to
25 the child.

1 But under your interpretation, the one
2 category of people who is exempt from that are the
3 category of fathers who've never seen the mother.
4 Who've seen the mother a very short time. Who may be in
5 -- they're not even subject to looking to see if it's
6 very harmful to the child.

7 So I just -- am I right about your
8 interpretation having that effect? And if it does have
9 that effect, what's the justification for it?

10 MR. KNEEDLER: Well, the -- there's
11 several -- several things about that with respect to the
12 rapist and the sperm donor. In the 35-year history of
13 this statute --

14 JUSTICE BREYER: All right. So you can say,
15 oh, there's no such thing as a parent, a father who only
16 sees the mother --

17 MR. KNEEDLER: No, no, no.

18 JUSTICE BREYER: All right. Okay. All
19 right.

20 Now, let's suppose there is such a thing.
21 As long as there is such a thing, the anomaly that I
22 mention seems to me to exist. And am I wrong or right
23 about that? And if it exists, what's the basis for your
24 creating an interpretation of the statute that would
25 produce it?

1 MR. KNEEDLER: It's -- it's not as anomalous
2 as you're suggesting because state law standards still
3 apply, and under state law standard under Santosky,
4 there has to be clear and convincing evidence to
5 terminate -- to apply the State termination of parental
6 rights provisions, which is what the family court did in
7 this case.

8 This is -- this is a Federal overlay, an
9 additional requirement.

10 If I could, though, move on to --

11 JUSTICE KAGAN: But as a Federal overlay,
12 Mr. Kneedler, I mean, does it make sense to sort of
13 split apart (d) and (f) in this way? Because (d) is the
14 curing provision that says you have to take steps to try
15 to cure this parent and, you know, to try to make him or
16 her a better parent. And then (f) says here's the
17 standard for terminating parental rights if those
18 curative efforts have failed. Right?

19 So to -- to use -- to have the curative
20 provision but not the standard just seems to -- to make
21 a -- a mess of the statute.

22 MR. KNEEDLER: Well, with respect, I don't
23 think so, because custody is in the one and -- and not
24 in the other. (D) speaks of breakup of -- of the family
25 relationship. And I think there, the family

1 relationship, because it -- it speaks of termination of
2 parental rights, which is in turn defined in the Act as
3 anything that terminates the parent-child relationship,
4 which -- which can be much broader than -- than whether
5 the parent actually has custody, which is the word
6 that --

7 JUSTICE GINSBURG: But the whole thrust of
8 it, you -- this is directed to providing remedial
9 services, which it -- it seems that it fits a situation
10 where someone has custody but is having problems getting
11 his or her act together so needs the help of a social
12 worker, but it makes no sense to talk about remedial
13 services for someone who has never had custody.

14 MR. ROTHFELD: Not -- with -- with respect,
15 Justice Ginsburg, I don't agree. Remedial services here
16 would entail -- the remedial services have to be tied to
17 whatever the problem is. And here the problem was the
18 father had not shown sufficient interest in the child.
19 Remedial services would have been efforts to interest
20 the father in the child.

21 Here that wasn't necessary because as soon
22 as the father found out about the adoption proceeding,
23 he acknowledged and established his paternity and said,
24 I want that child.

25 CHIEF JUSTICE ROBERTS: But he didn't want

1 anything to do with the child if the mother had kept the
2 child in her care. It was only when she wanted to put
3 it up for adoption that he had developed this interest
4 in the child.

5 MR. KNEEDLER: And that's -- that is
6 precisely the point when ICWA kicks in. ICWA does not
7 try to regulate the relationship between the mother and
8 the father. That is -- that is left to State law or
9 tribal law. ICWA kicks in only when there's going to be
10 an adoption or a termination of rights and the child is
11 going to be placed outside of -- of the relationship.

12 CHIEF JUSTICE ROBERTS: But what's -- is --
13 is -- are the would-be adoptive parents required to
14 provide remedial services and rehabilitative programs
15 under (d)?

16 MR. KNEEDLER: No, their burden is to
17 demonstrate that that has happened. The remedial --

18 CHIEF JUSTICE ROBERTS: So that it's a
19 tribe -- if the tribe wants to defeat the adoption, all
20 they have to do is do nothing with respect to the
21 father's --

22 MR. KNEEDLER: Well, I -- I think the -- the
23 family court could direct that remedial service --
24 this -- this happens, I think, frequently in family
25 court, is the remedial services -- this is not an

1 unusual provision. Much State family law provides for
2 this. The State court can oversee the -- the remedial
3 services and that could have been done in this -- in
4 this case.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Kneedler.

7 Ms. Blatt, you have three minutes remaining.

8 REBUTTAL ARGUMENT OF LISA S. BLATT

9 ON BEHALF OF THE PETITIONERS

10 MS. BLATT: Thank you, Mr. Chief Justice,
11 and may it please the Court:

12 If you affirm below, you're basically
13 banning the interracial adoption of abandoned Indian
14 children. There's not a single adoptive parent in their
15 right mind who is going to do what the court below said,
16 which is go through these Kafkaesque hoops of making
17 sure an absentee father's desire to be a parent has been
18 stimulated.

19 This is private adoption. This is absurd
20 that an adoptive parent would beg the family court to go
21 provide parenting classes. And I wanted to --

22 JUSTICE SOTOMAYOR: Counsel, this Act, in
23 terms of voluntary surrender of Indian children by
24 parents, says that it's not final for an adoptive parent
25 until the court does the adoption decree. It gives the

1 mother the right -- or father -- to rescind the
2 voluntary adoption till the very last minute. Has that
3 stopped voluntary adoptions?

4 MS. BLATT: No, but this -- first of all --
5 I mean, I love that about this case, the irony here. He
6 had no -- we didn't need his consent under State law, so
7 the application of 1913, which allowed this withdrawal
8 of consent, mandates the return of the child.

9 Well, there was no way to return this child
10 to anybody other than the mother. And I want you to
11 keep in mind about this case, is your decision is going
12 to apply to the next case and to a apartment in New York
13 City where a tribal member impregnates someone who's
14 African-American or Jewish or Asian Indian, and in that
15 view, even though the father is a completely absentee
16 father, you are rendering these women second-class
17 citizens with inferior rights to direct their
18 reproductive rights and their -- who raises their child.

19 You are relegating adopted parents to go to
20 the back of the bus and wait in line if they can adopt.
21 And you're basically relegating the child, the child to
22 a piece of property with a sign that says, "Indian, keep
23 off. Do not disturb."

24 This case is going to affect any interracial
25 adoption of children.

1 JUSTICE SCALIA: That was its intent.

2 MS. BLATT: No.

3 JUSTICE SCALIA: You don't think that that's
4 what its intent was?

5 MS. BLATT: No.

6 JUSTICE SCALIA: It only applies to children
7 of -- to tribal children. And -- and the purpose was to
8 establish much more difficult standards for the adoption
9 of -- of a child --

10 MS. BLATT: No, no, Justice Scalia.

11 JUSTICE SCALIA: Now, maybe you -- you
12 disagree with that policy, but that's clearly a policy
13 behind the law.

14 MS. BLATT: No, I think the policy is
15 fantastic. It was talking about Indian families who
16 were being ripped away because of cultural biases and
17 insensitivity. This case didn't involve cultural
18 biases.

19 JUSTICE SCALIA: It didn't say that. It --
20 its definition of --

21 MS. BLATT: There's 30,000 pages of
22 legislative history that's talking about the removal.

23 JUSTICE GINSBURG: That might is what
24 provoked the Act that Indian children were being removed
25 from their families, but the Act is written in much

1 broader terms.

2 MS. BLATT: I agree. 1915 is extraordinary,
3 if you read it the way the tribe does, which is -- and
4 the Government does.

5 And a little bit about the membership
6 criteria. The tribe's view is any child born Indian is
7 automatically a member. So even if the parents withdrew
8 their tribal membership, this child would be covered.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 The case is submitted.

11 (Whereupon, at 11:15 a.m., the case in the
12 above-entitled matter was submitted.)

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