

No. 12-399

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**In the Supreme Court of the United States**

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ADOPTIVE COUPLE, PETITIONERS,

*v.*

BABY GIRL, A MINOR CHILD UNDER  
THE AGE OF FOURTEEN YEARS, *et al.*,  
RESPONDENTS.

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*ON WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE OF  
SOUTH CAROLINA*

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**BRIEF OF RELIGIOUS ORGANIZATION  
AMICI CURIAE FRIENDS COMMITTEE ON  
NATIONAL LEGISLATION, *ET AL.*,  
IN SUPPORT OF RESPONDENTS**

*(Additional Amici Listed on Inside Cover)*

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CONFERENCE OF MAJOR SUPERIORS OF MEN;  
AMERICAN FRIENDS SERVICE COMMITTEE;  
DISCIPLES JUSTICE ACTION NETWORK  
(CHRISTIAN CHURCH, DISCIPLES OF CHRIST);  
AND GENERAL SYNOD OF THE UNITED CHURCH  
OF CHRIST**

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**INTEREST OF AMICI CURIAE<sup>1</sup>**

This brief is filed on behalf of the Friends Committee on National Legislation, the National Advocacy Center of the Sisters of the Good Shepherd, the Conference of Major Superiors of Men, the American Friends Service Committee, the Disciples Justice Action Network (Christian Church, Disciples of Christ), and the General Synod of the United Church of Christ, ("*Amici*"), each a domestic religious organization with past and present active involvement in the field of American Indian and Alaska Native ("Native American" or "Indian") affairs, law and policy.

*Amici* have a profound interest in how this case is resolved because the Court's decision will affect the legislative and policy options available to *Amici* to address the needs and concerns of Native American children they serve and support.

*Amicus* Friends Committee on National Legislation ("FCNL") is a Quaker lobby in the public interest - the oldest registered faith-based lobbying

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<sup>1</sup> Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. On February 11 and 19, 2013, all parties filed letters with the Clerk reflecting their blanket consent to the filing of amicus briefs, pursuant to Rule 37.3.

organization in Washington, DC. Founded in 1943 by members of the Religious Society of Friends (Quakers), FCNL staff and volunteers work with a nationwide network of participants and supporters to advocate for social and economic justice, peace, and good government. FCNL is a nonpartisan 501(c)(4) public interest lobby organization. For the past 35 years, through its program on Native American affairs, FCNL has advocated for policies and appropriations that support Native American cultural rights and self-determination, promote the health and well-being of Native peoples, and honor the promises made to Native Americans in treaties and other laws throughout U.S. history. FCNL seeks to inform and engage representatives of other national faith organizations in this advocacy, and to benefit from the knowledge and experience that other faith groups have gained through their work in and among Native American communities.

*Amicus* National Advocacy Center of the Sisters of the Good Shepherd ("Order") offers education through processes and strategies that address social justice issues and advocates for the transformation of society to the benefit of all people. Since the Order was founded in France in 1835, it has dedicated itself to serving poor and marginal people. The work of the Order in 70 countries in five continents, 22 states, and two U.S. territories is based on the belief that everyone, regardless of age, sex, culture or religion, has the right to a basic quality of life; adequate income, shelter, opportunities for education and employment, quality

health care, and nutrition. As Catholics, our faith requires that everyone should be treated with the utmost dignity and respect. The work provided by the Order has made a significant contribution to the development of services and legislation that have helped to shape child welfare all across North America.

*Amicus* Conference of Major Superiors of Men (CMSM) is an association of the leadership of men in religious and apostolic institutes in the United States. The Conference has formal ties with the U.S. Conference of Catholic Bishops, the Leadership Conference of Women Religious, the National Assembly of Religious Brothers and other national agencies. CMSM represents U.S. male religious and apostolic communities before a number of national and international bodies, including the Congregation of Religious and Secular Institutes of the Holy See, which officially recognizes CMSM as the national representative body for men in religious and apostolic communities in the United States. CMSM addresses the life and concerns of religious and communities of apostolic life in the United States, including their evangelizing mission in the context of Church and culture in this country. CMSM is both a voice for major Superiors and a service to them:

a) as a voice, it speaks regionally, nationally and internationally, independently or in concert with other groups; it does so from the perspective of male religious and members of apostolic

communities on issues regarding their life, as well as that of the Church and of our society;

b) as a service, it assists major Superiors in their role of leadership in their own communities and in the Conference as a whole, especially in promoting greater fidelity and more effective witness to the Gospel ideal.

*Amicus* American Friends Service Committee ("AFSC") is a Quaker organization that promotes lasting peace with justice, as a practical expression of faith in action. Founded in 1917 in Philadelphia, Pennsylvania, AFSC has nearly 100 years of experience building peace and supporting human dignity in communities worldwide, including long term engagement with a number of Native American communities. The AFSC has sought to build on the successes and learn from the grave failures that have taken place over three centuries of Quaker interactions with Native Americans, dating from the 1683 treaty between Pennsylvania's founder William Penn and the Lenape Indians, and including AFSC work across the country. AFSC has in particular gained deep understanding of the harm done to children, and to families and successive generations, by policies and practices that sought to remove and "civilize" Indian children, with devastating consequences for generations of Indian individuals, families, and communities until these practices were halted by the enactment and implementation of the Indian Child Welfare Act of 1978 ("ICWA"). Currently AFSC supports the work of a Truth and

Reconciliation Commission in Maine to promote learning, healing and still-needed policy change in the state to address the damaging impacts of the Maine child welfare system on Wabanaki people.

*Amicus* Disciples Justice Action Network is a multiracial, multi-ethnic and multi-generational ministry committed to promoting a passion for justice within the churches of the Christian Church (Disciples of Christ) and to providing prophetic Disciples leadership to ecumenical and interfaith coalitions working together for greater peace, justice, diversity and care for creation.

*Amicus* General Synod of the United Church of Christ is the representative body of the national United Church of Christ ("UCC") and is composed of delegates chosen by its Conferences, from member churches, voting members of Boards of Directors of Covenanted Ministries who have been elected by the General Synod as described in the Bylaws of the UCC, and of ex officio delegates. The UCC was formed in 1957 by the union of the Evangelical and Reformed Church and the General Council of the Congregational Christian Churches of the United States in order to express more fully the oneness in Christ of the churches composing it, to make more effective their common witness in Christ, and to serve God's people in the world. The UCC has approximately 5,200 local churches in the United States, with a membership of approximately 1.2 million. The General Synod of the UCC, various settings of the UCC, and its predecessor

denominations, have a rich heritage of supporting the rights of Native Americans and working to redress the injustices done to their tribal communities.

Some *Amici* were actively engaged in the legislative efforts that led to the 1978 enactment of ICWA<sup>2</sup>, and supported the compelling rationale for its enactment and effective implementation.<sup>3</sup>

*Amici's* support for ICWA is informed by lessons learned from their, or their religious colleagues', varying, centuries-long involvement in the field of federal Indian affairs and policy.<sup>4</sup> Over the years, many of *Amici* have had first-hand and substantial involvement in nation-wide efforts to provide education, health and social welfare program benefits to Native Americans.

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<sup>2</sup> 25 U.S.C. 1901-1963.

<sup>3</sup> These *Amici* and other religious organizations lobbied in support of enactment of ICWA. As part of that effort, some *Amici* joined with other religious organizations in writing Congress on October 2, 1978 that the "... future of ... Indian people rests upon the survival of their families. They must be protected from unnecessary separations. This bill provides for both tribal jurisdiction over child placements and special consideration of Indian cultures and extended family structures."

<sup>4</sup> A zeal for the education of Indian children first took churches into Indian Country where great efforts were made by religious missionaries to assimilate Indians, without their consent, into mainstream society, which efforts *Amici* now find regrettable.

Child welfare is a field in which many individual members of *Amici* have long had personal involvement, including foster and adoptive care of Native American and other children. Many members of *Amici's* organizations are adoptive parents.

When it became known in the mid-1970s that Indian child welfare policies were resulting in an alarmingly high rate of removal of Indian children from their Indian families and tribal communities, religious organizations, including some of those participating here as *Amici*, joined with Indian organizations to craft the provisions that were enacted as ICWA in 1978.

Recognizing that they had been complicit in the cause of the problem, religious organizations sought to be active in its repair, not unlike their leading engagement in the national debate between assimilation and sovereignty goals that preceded enactment of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. 461 *et seq.*, in the early twentieth century.<sup>5</sup> Just as the IRA was designed to stem the loss of Indian land, ICWA was designed to stem the loss of Indian children by rebuilding tribal government child welfare programs and restoring recognition of tribal authority over their own

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<sup>5</sup> See, generally the discussion at pages 3-15 in the Introduction to the book, David W. Baily, *Battle for the BIA: G.E.E. Lindquist and the Missionary Crusade against John Collier* (U. Ariz. Press 2004).

domestic relations. ICWA's support for tribal self-government and self-determination, and its preservation of invaluable opportunities for tribal membership accorded to individual Indians, are consistent with the federal Indian policies favoring tribal self-governance and self-determination which *Amici* actively have supported in recent decades.

### SUMMARY OF ARGUMENT

*Amici* support ICWA and its continuing implementation and enforcement. ICWA implements sound federal Indian policies that deserve affirmation. ICWA facilitates the effective provision of child welfare program services by *Amici*, and is consistent with the federal Indian policies for which *Amici* have advocated.

ICWA provides certainty and finality for the welfare of Indian children. Its procedures have reversed previous trends toward demographic extinction by increasing the placement of Indian children within Indian communities and respecting the proper place of tribal governments in tribal domestic relations and child welfare matters.

ICWA procedurally protects the unique best interests of Indian children by helping to preserve their eligibility for tribal membership, which is their birthright of invaluable worth.

**ARGUMENT****I. ICWA SOUNDLY IMPLEMENTS EFFECTIVE CHILD WELFARE POLICIES**

Federal Indian policy has zigzagged through the past two centuries, veering from military campaigns to treaty-making to removals overridden by homesteading and assimilation, and turning back to the IRA<sup>6</sup> followed by termination. Finally, in recent decades, federal policy has recognized tribal self-governance and self-determination principles reflected in measures like ICWA.

ICWA's enactment enshrined in statute the spirit that has in modern times guided *Amici's* involvement in Indian affairs -- that of support for tribal self-government and self-determination, tribal cultures and institutions, and protection of the unique, government-to-government relationship and trust obligation owed to tribal governments and their citizens by the United States. ICWA recognizes tribal government authority to be notified of any pending decision affecting the custody of a child who is a member of, or may be eligible for membership in, a tribe, and to have some measure of influence over that decision.

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<sup>6</sup> 25 U.S.C. 461 *et seq.*

## II. ICWA PROVIDES CERTAINTY AND FINALITY FOR ALL INVOLVED

*Amici* acknowledge that the uncertainties generally accompanying the different requirements of different state laws can make adoption processes in America emotionally traumatic for all involved.

For adoptive parents, certainty and finality are usually of the highest priority. Likewise, certainty and finality are among the best interests of any child in need of an out-of-home placement.

ICWA provides great certainty and finality to Indian children, to their birth families and tribes, and to prospective adoptive parents. Its notice requirements and timeframes apply uniformly, as federal law, in every state. Uncertainty and lack of finality under ICWA arise only if its basic requirements are not followed.

ICWA's requirements reasonably can be met.<sup>7</sup> And they largely have been met in the tens of thousands<sup>8</sup> of ICWA-related placement decisions made since 1978. If a birth parent is identified with an Indian tribe, notice simply must be given to the

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<sup>7</sup> ICWA's requirements can be complied with as readily as can the varying requirements of the 50 states, the District of Columbia, and the various territories.

<sup>8</sup> U.S. Gov't Accountability Office, GAO-05-290, *Indian Child Welfare Act - Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States*, 1 (2005).

child's tribal community of any proposed and involuntary out-of-home placement of the child.<sup>9</sup> If ICWA's notice provisions are adhered to, and its jurisdictional and intervention provisions and procedures for consent are complied with, virtually no ICWA-related adoption may be disturbed once it is finalized.<sup>10</sup>

An April, 2005 U.S. Government Accountability Office study concluded that ICWA's procedural requirements did not result in Indian children staying in foster care longer than their non-Indian peers.<sup>11</sup> Because its procedural requirements for involving a child's tribal community in placement decisions better address an Indian child's unique best interests, ICWA works well for Indian children and should be affirmed.

### **III. ICWA RESPECTS THE PROPER ROLE OF TRIBAL GOVERNMENTS IN TRIBAL DOMESTIC RELATIONS AND CHILD WELFARE MATTERS**

*Amici* have devoted decades of charitable and philanthropic support to, as well as advocacy for, programs whose goals are to protect the best

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<sup>9</sup> 25 U.S.C. 1912(a). Most states similarly require notice to be given to a child's extended family.

<sup>10</sup> 25 U.S.C. 1913(d). As is customary in state domestic relations law, under ICWA a placement is final absent fraud or duress in the initial consent.

<sup>11</sup> GAO-05-290, 4.

interests of Native American children and to support tribal government authority. This support has focused both on shaping federal policy and on providing local program services to individual Native American children and their tribal communities. *Amici* work together for the common good in public and private settings, including promoting and defending public policy which aids their program services and protects the interests of those they serve.<sup>12</sup>

*Amici* are keenly and deeply committed to the constitutional guarantee of equal protection of the laws for all persons. *Amici* are likewise committed to the constitutional guarantees protecting tribal sovereignty and self-government against undue interference; and to safeguarding the unique federal trust responsibility towards tribal governments and individual Native Americans, including children.<sup>13</sup>

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<sup>12</sup> For example, *Amici* worked to support enactment of provisions successfully sought by tribal governments in the reauthorization of the Violence Against Women Act (2013) and of the American Indian Health Care Improvement Act (2010), and the enactment of the Tribal Law and Order Act of 2010.

<sup>13</sup> For example, *Amici* FCNL's legislative policy states: "Friends have long sought to honor William Penn's commitment to live 'a kind, just and peaceable life' with Native Peoples. In this spirit ... we encourage respectful relations with Native peoples. ... The tribal governments established by Native Americans are entitled to set policies that govern life on reservations and that affect tribal members who live off reservations."

ICWA carefully balances these twin constitutional principles.

Our long and winding road through American history, informed by our decades of relationships with Indian tribes, has convinced *Amici* that the well-being of Indian Country and its rich and varied cultures requires our Nation to recognize the tribal authority and autonomy embedded in laws like ICWA to help strengthen tribal self-sufficiency and responsibility. Indian families are the bedrock of Indian communities, and only by remaining in relationship with its Indian children may a tribe avoid extinction. Without children, tribal membership shrivels and a tribe withers away.

#### **IV. ICWA PROPERLY PROTECTS THE UNIQUE BEST INTERESTS OF INDIAN CHILDREN**

Petitioners' cause directly challenges the Respondents' unique status as Indians. Petitioners would have this Court set aside ICWA as constitutionally infirm, asking the Court to strip Indian children of ICWA's procedural protections of their birthright.

Chief among the birthrights of an Indian child is the right of franchise, to vote and otherwise influence the decisions made by an individual Indian's tribal government. Of comparable import is the panoply of rights, benefits and privileges which vest in individual tribal members by federal or tribal

law. These in some instances may include monetary transfers or other material benefit distributed by a tribe to its members, and sometimes may involve employment preferences in the federal or tribal workforce, education and training benefits, health and social services which arise from treaty and trust responsibilities taken on by the federal government in exchange for land and resources.<sup>14</sup>

As this Court previously has affirmed, each Indian tribe determines its own requirements for an eligible person to be admitted to tribal membership.<sup>15</sup> In some instances, an individual Indian may be eligible for membership but because of a lack of personal ties to an Indian community or of demonstrations of personal interest, may not be admitted to membership or invited to be admitted.<sup>16</sup>

ICWA applies to a child who is a member of a tribe or is eligible for tribal membership.<sup>17</sup> That

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<sup>14</sup> This opportunity for invaluable material and non-material benefits by fate of birth is not unlike that presaged in the ancient Bible story recounting Jacob's theft of Esau's birthright in *Genesis*, 25:29-34

<sup>15</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 54-55 (1978). Self-government and determinations of tribal membership are at the heart of tribal sovereignty.

<sup>16</sup> Tribal membership is by no means imposed upon an individual. While *membership* is a privilege, not a right, *eligibility* to be considered for membership is a birthright.

<sup>17</sup> 25 U.S.C. 1903(4) defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of  
(footnote continued on next page)

eligibility is an Indian child's birthright. While not alone sufficient for tribal membership, eligibility is necessary for tribal membership.

Native American children possess a unique birthright. Removal from their Indian community and culture at a young age will very likely sever their personal, social, and political link to their birthright, and practically foreclose a choice to pursue tribal membership -- a choice a child might desire to make in adulthood. Wresting a child from his or her tribal birthright context without any regard to the desires of the child's extended family and cultural community, and without regard to the impact removal will have on any future choice by the child to pursue tribal membership, is precisely the practice that was repudiated by Congress in 1978 in its enactment of ICWA. Without an opportunity to grow up in his or her tribal community and participate in its cultural, social, and political life, an Indian child's birthright of eligibility may never ripen.

Properly implemented, ICWA does not predetermine placement decisions. Rather, ICWA requires only that a placement decision take into

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an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." Accordingly, ICWA must be read to apply to custodial decisions made for an "Indian child" regardless of his or her current custodial context. Otherwise, the Act's stated intention to stem the alarming rate of removals could be easily thwarted.

account the unique best interests of an Indian child, including the right to have his or her extended family and tribal community participate in a placement decision that the Indian child in its tender years cannot make.

### CONCLUSION

*Amici* supported enactment of ICWA in 1978 precisely to secure its explicit statutory recognition of the unique political status accorded Indian tribes and their authority over tribal domestic relations, both in the sense of self-government over matters involving individual members of an Indian tribe, and in the more specific sphere of family law. For these same reasons, *Amici* urge the Court to uphold effective implementation of ICWA and affirm the lower court's placement of the Baby Girl in this case with her Indian birthfather.

Respectfully submitted,

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