No. 12-399

In The
Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF PROFESSORS OF INDIAN LAW AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963, may be invoked by noncustodial parents.

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INTEREST OF AMICI CURIAE

Amici curiae, listed in the Appendix, are law professors who specialize in Indian law. They file this brief in order to acquaint the Court with the long history of the practices the Indian Child Welfare Act ("ICWA") was intended to stop. This history sheds considerable light on the meaning of the Act, but it is absent from the briefs filed by petitioners and their amici.[1]

SUMMARY OF ARGUMENT

The Indian Child Welfare Act cannot be understood without an appreciation of the practices it was intended to stop.

One of these practices was the removal of Indian children from their families. One of the primary reasons Indians were thought to be unfit to raise children was that in many tribes, the rearing of children was not a task solely for the nuclear family. Domestic responsibilities like child care were undertaken jointly by multiple tribe members. Indian children thus often spent much of their time outside

[1] The parties have filed blanket consents to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Amici file this brief as individuals and not on behalf of the institutions with which they are affiliated.

the custody of their parents. Government officials perceived Indian family structure as a grave defect and repeatedly urged that Indians should be made to live in nuclear families instead.

At first, the policy of removing Indian children from their families was implemented by compelling children to attend boarding schools. At these schools students were forced, often through physical abuse, to adopt mainstream American ways. By the mid-twentieth century, the boarding schools were widely recognized as a failure.

When boarding schools fell out of favor, the federal government turned to adoption as an alternative means of assimilation. By the early 1970s, an astonishing number of Indian children were being placed for adoption in non-Indian families. One reason was a very old one: social workers were generally unfamiliar with the common Indian practice of using the extended family to raise children. When social workers saw children under the care of adults who were not their parents, the social workers often misinterpreted this custom as neglect.

Another practice ICWA was intended to stop was the destruction of Indian tribes and Indian culture. For most of American history, policymakers believed that the Indians' traditional culture and political structure were hindrances to their "civilization." The federal government took many steps to stamp out Indian culture, from prohibiting traditional religious ceremonies to requiring Indians to adopt English

names. Government policy in this regard would change dramatically in the 1960s and 1970s. Rather than seeking to eradicate Indian tribes and Indian culture, the government began trying to help Indians preserve them. The Indian Child Welfare Act was an important part of this turnabout.

In the hearings that led up to ICWA, Congress heard considerable evidence that social workers were seizing children because they misinterpreted Indian childrearing practices as neglect. In addition, many witnesses testified to their fear that the loss of so many children posed a threat to the very existence of Indian tribes and Indian culture. All this testimony made a profound impression on the principal sponsors of ICWA, who made clear that the statute was intended to put a stop to these practices.

Because one of the abuses ICWA was intended to stop was the removal of Indian children on the ground that their parents were noncustodial, it would have made no sense for Congress to limit the statute's protections to custodial parents. This is why the term "parent" is defined in ICWA without any requirement of custody.

Because one of the abuses ICWA was intended to stop was the frequency with which state government employees and social workers imposed their own ideas of the family on the Indians, it would have made no sense for Congress to empower state government employees and social workers to determine whether children are being raised by an "existing

Indian family." This is why the statute includes no such requirement.

Because one of the abuses ICWA was intended to stop was the destruction of tribal culture, the statute grants rights to tribes as well as to parents. It would have made no sense for Congress to extend protection to tribes and custodial parents while simultaneously withholding protection from noncustodial parents, because the threat to the existence of Indian tribes from the loss of their children was equally serious whether any particular child was being raised by his parents or by another member of the extended family.

There is also a broader lesson in the record of government-backed efforts to remove Indian children from their homes. We all sympathize with young children, and we all want what is best for them. Where Indian children are concerned, however, these sympathies have a long and often unattractive history. They are the sympathies that gave rise to the very policies ICWA was intended to stop.

ARGUMENT

The historical background to ICWA makes clear that the statute may be invoked by noncustodial parents.

The Indian Child Welfare Act cannot be understood without an appreciation of the practices it was intended to stop. For most of American history, federal Indian policy favored the removal of Indian

children from their homes and the eradication of Indian tribes and Indian culture. These measures were undertaken to facilitate the Indians' assimilation.

Federal Indian policy changed dramatically in the 1960s and 1970s, when the government began trying to help Indians preserve their culture and their family structures. The Indian Child Welfare Act was an important part of this reversal. ICWA was intended to put a stop to several longstanding practices that had come to be understood as mistakes.

One of these practices was the removal of Indian children from their homes and families. Government officials and private social workers often misconstrued Indian family patterns; they used circumstances that were perfectly normal in many Indian families as reasons for taking children from their homes. One of these circumstances was that aunts, grandparents, and other relatives often played key roles in raising Indian children. For a century before ICWA, government officials and social workers interpreted this practice as neglect and cited it as a reason for taking Indian children away, at first to be sent to boarding schools and later to be put up for adoption.

Before Congress enacted ICWA, it heard considerable evidence of the harms caused by such adoptions, in some cases where the child's biological parents had been custodial and in others where they had been noncustodial. Some of these harms were of course specific to the children and parents involved, but some were broader. The loss of so many children

imperiled the very existence of Indian tribes and Indian culture.

For these reasons, Congress drafted ICWA to protect Indian children without reference to whether their parents are custodial.

A. U.S. policy formerly favored removing Indian children from their families as a means of "civilizing" the Indians.

The once-conventional view was that the Indians would be better off assimilating into mainstream American life, and that the best way to accomplish this goal would be to take Indian children away from their parents so they could be raised in a non-Indian environment. *Cohen's Handbook of Federal Indian Law* 1397 (Nell Jessup Newton ed. 2012). For example, Cyrus Kingsbury, a missionary to the Cherokees and Choctaws, argued in 1816 that Indian "children should be removed as much as possible from the society of natives," to live instead with their teachers. Bernard W. Sheehan, *Seeds of Extinction: Jeffersonian Philanthropy and the American Indian* 133 (1973). "Removed from the bad example of Wild Indians in their drunken revelry," urged another writer a few years later, "the native talent can be [c]ultivated, surrounded by the first families in the West." *Id.* at 135.

The government officials responsible for relations with the Indians likewise believed that civilizing the Indians required separating children from the

baleful influence of their families. "All experience has demonstrated the impossibility of educating Indian children while they are permitted to consort and associate with their ignorant, barbarous, and superstitious parents," declared the appendix to a congressional report of 1867. "Where the Indian youth is left to the alternate struggle between civilization and barbarism the contest is likely to culminate on the side of his savage instincts." *Condition of the Indian Tribes: Report of the Joint Special Committee, Appointed Under the Joint Resolution of March 3, 1865*, at A3 (1867).

By the second half of the nineteenth century, officials were virtually unanimous in recommending that Indian children be raised apart from their parents. General Robert H. Milroy, the Superintendent of Indian Affairs in the Washington Territory in the 1870s, insisted that "[a]ll Indian children over five years old should be taken away from under the authority and influence of their savage parents (from whom they absorb only poisonous barbarism) and placed wholly under the control of white male and female teachers." R.H. Milroy, *Our Indian Policy Further Considered*, 5 Presbyterian Q. and Princeton Rev. 624, 625-26 (1876). If Indian children "had words in which to express their thoughts," averred Commissioner of Indian Affairs Thomas J. Morgan, they would beg to be saved "from the doom that awaits them if left to grow up with their present surroundings." The humanitarian thing to do, Morgan concluded, was "for the strong arm of the nation to reach

out, take them in their infancy and place them in its fostering schools, surrounding them with an atmosphere of civilization, . . . instead of allowing them to grow up as barbarians and savages." T.J. Morgan, *A Plea for the Papoose*, 18 Baptist Home Mission Monthly 402, 404 (1896).

1. One of the primary shortcomings policymakers found in Indian childrearing was that Indians tended to rely on extended kinship networks.

Policymakers had many reasons for believing that Indians were unfit to raise children, but one reason was that in many tribes the rearing of children was (and sometimes still is) a task for the extended family rather than just the nuclear family. *See, e.g.*, Institute for Government Research, *The Problem of Indian Administration* 572 (1928). Domestic responsibilities including child-rearing were undertaken jointly, by multiple tribe members. Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 Ark. L. Rev. 327, 328 (1986). Indian children thus often spent much of their time outside the custody of their parents, living with and receiving instruction from adults other than their mothers and fathers. *See, e.g.*, M. Inez Hilger, *Arapaho Child Life and Its Cultural Background* 75, 215-16 (Smithsonian Inst. Bureau of Am. Ethnology, 1952); Robert Staples and Alfredo Mirandé, *Racial and Cultural Variations Among American Families: A Decennial Review of the Literature on Minority*

Families, 42 J. of Marriage and the Family 887, 898 (1980).

Policymakers perceived Indian family structure as a grave defect. Lacey, *supra*, at 349-72. "The family is God's unit of society," declared Merrill Gates, the chairman of the Board of Indian Commissioners. "And here I find the key to the Indian problem." *Americanizing the American Indians: Writings by "Friends of the Indian" 1880-1900*, at 50 (Francis Paul Prucha ed. 1973). Government officials repeatedly urged that Indians should be made to live in nuclear families rather than tribes. "The tribal relations should be broken up," Thomas Morgan insisted, "and the family and the autonomy of the individual substituted." *Id.* at 75.

2. The policy of removing Indian children from their families was implemented at first by forcing children to attend boarding schools.

The earliest efforts to remove Indian children from their families were undertaken by missionaries and religious organizations. For example, the minister Eleazer Wheelock, who later founded Dartmouth College, began his career as an educator by running a boarding school for Indians in Connecticut in the 1750s and 1760s. James Axtell, *The European and the Indian: Essays in the Ethnohistory of Colonial North America* 89-109 (1981). Wheelock required that "the Children [be] taken quite away from their

Parents, and the pernicious Influence of *Indian* Examples." Eleazer Wheelock, *A Plain and Faithful Narrative of the Original Design, Rise, Progress and Present State of the Indian Charity-School* 25 (1763).

The federal government began operating Indian boarding schools in the 1870s. By 1905, more than 20,000 Indian pupils were enrolled in government-run boarding schools, many of which were located far from the children's homes. David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928*, at 320 (1995). The philosophy underlying these schools was best expressed by Richard Henry Pratt, the superintendent of the boarding school in Carlisle, Pennsylvania. "It is a great mistake to think that the Indian is born an inevitable savage. He is born a blank," Pratt reasoned. "Transfer the savage-born infant to the surroundings of civilization, and he will grow to possess a civilized language and habit." Pratt's goal for each of his Indian students, he explained, was to "[k]ill the Indian in him and save the man." *Id.* at 52.

The curriculum at the Indian boarding schools reflected this philosophy. Students were required to speak English and were punished – often beaten – for using their native languages. *Boarding School Blues: Revisiting American Indian Education Experiences* 25 (Clifford E. Trafzer et al. eds. 2006); *Cohen's Handbook*, *supra*, at 77. They were taught American history from a distinctly non-Indian point of view. They learned to play western musical instruments and to sing patriotic and Christian songs. *Boarding School*

Blues, *supra*, at 26-27. At some of the schools, children were victims of physical and sexual abuse. *Id.* at 220-21; Adams, *supra*, at 122-23. *See also* 146 Cong. Rec. E1454 (Sept. 12, 2000) (reprinting the apology of the Assistant Secretary of the Interior for such abuse).

Indian children were often forced to attend boarding school over the objections of their parents. Jon Reyhner and Jeanne Eder, *American Indian Education: A History* 169-79 (2004). Officials withheld food rations from Indians unwilling to part with their children. The police undertook annual fall roundups, seizing children from their homes and taking them away to school. Adams, *supra*, at 211. For example, one official on the Navajo Reservation recalled what he considered "the greatest shame of the Indian Service – the rounding up of Indian children to be sent away to government boarding schools":

> In the fall the government stockmen, farmers, and other employees go out in the back country with trucks and bring in the children to school. Many apparently come willingly and gladly; but the wild Navajos, far back in the mountains, hide their children at the sound of a truck. So stockmen, Indian police, and other mounted men are sent ahead to round them up. The children are caught, often roped like cattle, and taken away from their parents, many times never to return. They are transferred from school to school, given white people's names, forbidden to speak their own tongue, and when sent to

> distant schools are not taken home for three years.

The Destruction of American Indian Families 18 (Steven Unger ed. 1977).

Policymakers believed compulsory attendance at the boarding schools was for the Indians' own good. "[T]here should be no mawkish sentimentality as to the sacredness of the home ties," insisted one writer. "Something must be sacrificed, and whether it shall be the well-being of the little child and the good of the whole country, or the ignorant prejudices of the aboriginal mind, is the question to be considered." Mary Alice Harriman, *The Indian in Transition*, 35 Overland Monthly 33, 38 (1900). Carl Schurz, Secretary of the Interior during the Hayes administration, was but one of many officials who believed that forcing Indian children to assimilate was the Indians' only hope of survival. "To civilize them," Schurz observed, "has now become an absolute necessity, if we mean to save them." *Americanizing the American Indians*, *supra*, at 14.

Some of the boarding schools adopted what was called the "outing system," a form of temporary adoption under which Indian pupils were sent to live with non-Indian families for the summer or for the entire year. Adams, *supra*, at 156-63. Richard Henry Pratt, the originator of the plan, argued that it was the fastest way to assimilate the Indians, "for the reason that all their talking is with English-speaking people; and, being along the lines of civilized life and

its needs innumerable, other important things are learned at the same time." *Americanizing the American Indians*, *supra*, at 274. The Bureau of Indian Affairs encouraged other schools to follow Pratt's lead. *Documents of United States Indian Policy* 178 (Francis Paul Prucha ed., 3d ed. 2000).

The tide of opinion turned against the boarding schools in the mid-twentieth century. As early as 1928, the Meriam Report (a comprehensive review of federal Indian policy) concluded that the schools had disrupted Indian family life while contributing little to the Indians' wellbeing. Institute for Government Research, *supra*, at 574-75. The prevailing view is now even darker. As the catalog to a recent exhibit about the schools at Phoenix's Heard Museum relates, "Indian boarding schools were key components of cultural genocide against Native cultures." *Away from Home: American Indian Boarding School Experiences* 19 (Margaret L. Archuleta et al. eds. 2000). The federal government still operates Indian boarding schools today, but they serve a purpose precisely the opposite of their original goal. Their mission is no longer to eradicate Indian ways, but rather "to provide quality educational opportunities that are compatible with tribes' cultural and economic wellbeing and their wide diversity as distinct cultural and government entities." U.S. Government Accountability Office, *Bureau of Indian Education Schools*, GAO-08-679 (2008), at 8.

3. When the boarding schools fell out of favor as a means of assimilation, the government turned to adoptions by non-Indian families.

As policymakers lost faith in boarding schools, they turned to adoption as an alternative. Indian children had long been sent to live temporarily with non-Indian families under the "outing system," but before the mid-twentieth century Indian children were not permanently adopted by non-Indian families in significant numbers. That began to change in 1957, when the Bureau of Indian Affairs joined with the Child Welfare League of America to encourage social workers on Indian reservations to find children available for adoption. David Fanshel, *Far from the Reservation: The Transracial Adoption of American Indian Children* 37-38 (1972). These efforts resulted in the Indian Adoption Project, a program that placed several hundred Indian children with non-Indian families between 1958 and 1968. *Id.* at ix.

The adoption program began during an era when federal Indian policy promoted the termination of tribes and the assimilation of Indians. Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 1041 (1984). The goal of adoption was the same as that of the boarding schools: to assimilate Indian children and thereby improve the lot of the Indians by destroying their tribes and their culture. "If you want to solve the Indian problem you can do it in one generation," asserted a county attorney in Minnesota a few years

before the program got underway. "You can take all of our children of school age and move them bodily out of the Indian country and transport them to some other part of the United States. Where there are civilized people." Lila J. George, "Why the Need for the Indian Child Welfare Act?," in *The Challenge of Permanency Planning in a Multicultural Society* 165, 169 (Gary R. Anderson et al. eds. 1997).

The Indian Adoption Project was a small one, but it inspired a great deal of emulation. By the early 1970s, an astonishing number of Indian children were being placed for adoption in non-Indian families. Surveys of states with large Indian populations indicated that between 25 and 35 percent of Indian children had been separated from their families. Indian children were being adopted at per capita rates far higher than non-Indian children – thirteen times higher in Montana, sixteen times higher in South Dakota, and nineteen times higher in Washington. *The Destruction of American Indian Families*, *supra*, at 1.

When the American Indian Policy Review Commission submitted its final report to Congress in 1977, the Commission recognized that these adoptions were the modern incarnation of a very old practice. The Commission reported: "The policy of removing Indian children from their homes and tribal settings to 'civilize' them began in the 1880's with the advent of boarding schools. Indian children are still being removed from their tribal culture. Today, however, this is done through the adoption of Indian children by

non-Indian families." *American Indian Policy Review Commission: Final Report* 422 (1977). The Commission accordingly recommended legislation giving tribal courts jurisdiction over Indian child custody cases. *Id.* at 423.

There were many reasons for this explosion in Indian adoptions, but one of the reasons was a very old one. Social workers were generally unfamiliar with the common Indian practice of using the extended family to raise children. When social workers saw children under the care of adults who were not their parents, the social workers often misinterpreted this custom as evidence that the parents were guilty of neglect. *The Destruction of American Indian Families*, *supra*, at 43, 59. In one case, for instance, a social worker initiated adoption proceedings on the ground that a mother sometimes left her son with the child's great-grandmother. *Id.* at 3. Another case involved Robert Kewaygoshkum, the chairman of the Grand Traverse Band of Ottawa and Chippewa Indians, who spent his early childhood in the care of his grandfather. He was in the third grade when, as he later recalled, "one day a white lady came to the door and knocked on the door and said it was time to go." After being placed in a series of foster homes, he never saw his grandfather again. Matthew L.M. Fletcher, "The Indian Child Welfare Act: Implications for American Indian and Alaska Native Children, Families, and Communities," in *American Indian and Alaska Native Children and Mental Health* 275-77 (Michelle C. Sarche et al. eds. 2011).

When the Department of Health, Education, and Welfare studied the problem, its report concluded that "non-Indian social service providers often find it difficult to identify who is responsible for an Indian child and are frustrated by the mobility of the child, who may be the responsibility of different adults at different times." The report noted that "the children have a sense of family even if their parents are not present. However, if social workers fail to understand this system or insist on enforcing middle-class Anglo standards, they may intervene when Indians feel there is no reason for intervention." U.S. Department of Health, Education, and Welfare, *Indian Child Welfare: A State-of-the-Field Study*, DHEW Pub. 76-30096 (1976), at 16. A task force of the American Indian Policy Review Commission reached the same conclusion: "The social workers, who are usually untrained and have little or no understanding of Indian lifestyle or culture, make judgments concerning the adequacy of the Indian child's upbringing." *Report on Federal, State, and Tribal Jurisdiction: Task Force Four: Federal, State, and Tribal Jurisdiction: Final Report to the American Indian Policy Review Commission* 79 (1976). When social workers evaluated Indian parenting, "the evaluation process involves the imposition of cultural and familial values which are often opposed to values held by the Indian family." *Id.* at 80.

The generation of Indian children adopted in the 1960s and 1970s are the adults of today. Many still suffer from feelings of dislocation and a sense of not

belonging, the same effects that were often created by the boarding schools in earlier years.

B. U.S. policy formerly favored eradicating Indian tribes and Indian culture to facilitate the Indians' assimilation.

For most of American history, policymakers believed that the destruction of Indian tribes and Indian culture were necessary steps toward assimilation. "The assimilation campaign promised to destroy the Indians' ancient cultures," the leading historian of this campaign concludes, "but that destruction would serve what reformers believed was a greater good: the expansion of 'civilized' society." Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920*, at 39 (1984).

Officials were certain that the institution of the tribe was retarding the Indians' progress. "We must as rapidly as possible break up the tribal organization," declared Merrill Gates, the chairman of the Board of Indian Commissioners. "Politically it is an anomaly – an *imperium in imperio*." *Americanizing the American Indians*, *supra*, at 52, 49. Gates predicted that "[a]s the allegiance to tribe and chieftain is weakened, its place should be taken by the sanctities of family life and an allegiance to the laws which grow naturally out of the family!" *Id.* at 51. As one official put it, "it is to be hoped that the time is not far distant when there will be as many bands as there are families; in other words, every head of a family

his own chief." *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1880*, at 41 (1880).

To stamp out Indian culture, the federal government prohibited traditional religious ceremonies and dances, regulated matters like hair length and funeral procedures, and required Indians to adopt personal names that would be easier for non-Indians to pronounce and remember. *Cohen's Handbook*, *supra*, at 75-78. Even the reorganization of Indian land tenure had a similar motive, as it was widely thought that the ownership of fee simple parcels would cause Indians to dispense with their tribes and their traditional ways of life and to take on cultural traits officials considered markers of civilization. Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* 260-68 (2005). "The allotment system tends to break up tribal relations," insisted Commissioner of Indian Affairs Hiram Price. "It has the effect of creating individuality, responsibility, and a desire to accumulate property. It teaches the Indians habits of industry and frugality." *Americanizing the American Indians*, *supra*, at 89.

Government policy toward Indian tribes and Indian culture would eventually change, at first temporarily in the 1930s and then permanently in the 1960s and 1970s. Prucha, *The Great Father*, *supra*, at 940-68, 1087-1170. Rather than seeking to eradicate Indian tribes and Indian culture, the government began trying to help Indians preserve them. The Indian

Child Welfare Act was an important part of this turnabout. *Id.* at 1153-57.

C. Because Congress intended ICWA to put a stop to these practices, the statute was drafted so that it may be invoked by all parents, whether or not custodial.

ICWA was not a quick fix for a short-term problem. It was a long-gestating effort to put a stop to several very old practices that had come to be understood as mistakes. Congress heard a great deal of evidence about how social workers were seizing Indian children from extended families on the ground that their parents were noncustodial. Many witnesses lamented how the loss of their children imperiled the continued existence of Indian tribes and Indian culture. In light of all this evidence, Congress drafted ICWA to protect all Indian children by making the statute available to custodial and noncustodial parents alike.

1. Congress enacted ICWA after hearing considerable evidence that one of the factors contributing to adoptions of Indian children was that social workers misinterpreted Indian childrearing practices as neglect.

In the hearings that led up to ICWA, Congress was informed again and again that social workers were removing Indian children from the care of their

extended families in the mistaken belief that proper child care required custodial parents. "In judging the fitness of a particular family," testified William Byler, the Executive Director of the Association on American Indian Affairs:

> many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.
>
> For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.

Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs, 93d Cong., 2d Sess. 18 (1974) [1974 Hearings]. The Association on American Indian Affairs supported the bill that became ICWA because – as its lawyer testified – "Indian cultures universally recognize a very large extended family. Many relatives of Indian children are considered by tribal custom to be perfectly logical and able custodians of Indian children. This bill will require State

agencies and courts to recognize this extended family." *Indian Child Welfare Act of 1978: Hearings Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong., 2d Sess. 69 (1978) [1978 Hearings].

Howard Tommie, the chair of the National Indian Health Board, likewise emphasized the frequency with which social workers misinterpreted as neglect the Indian custom of placing children in the care of adults other than their parents. *Indian Child Welfare Act of 1977: Hearing Before the U.S. S. Select Comm. on Indian Affairs*, 95th Cong., 1st Sess. 316 (1977) [1977 Hearings].

Several witnesses provided detailed examples. Ramona Bennett, the chair of the Puyallup Tribe, told members of Congress about a resident of her own reservation, a "grandmother with a seventy year tradition of carrying water, boiling water, washing clothes, washing dishes, giving sponge baths, washing floors," and "generally maintaining an immaculate home." This grandmother would be a stricter disciplinarian than could be found in more affluent circumstances, Bennett observed, and yet "[u]nder the currently enforced 'standards' any children she is raising are subject to removal and placement by state agencies." 1977 Hearings at 166. Mike Ranco of the Central Maine Indian Association provided a similar example – his own grandmother, from whom the state tried to wrest custody of his brother, despite her success in raising five children, twenty-three grandchildren, and thirteen great-grandchildren. 1978 Hearings at

115. Goldie Denny of the Quinault Nation recalled her own childhood, when the state welfare department took her and her sister out of the home of their grandmother and father, simply for being found wading barefoot in mud puddles. 1977 Hearings at 77. Denny concluded: "We have lost a great number of children through foster care and adoption by non-Indian caseworkers who come upon the reservation and remove children for stupid reasons." *Id.* at 78.

All this testimony made a profound impression on the principal sponsors of the legislation that became ICWA. Senator James Abourezk, the chair of the Subcommittee on Indian Affairs, even interrupted a witness on one occasion to note that "it is pretty obvious that when a non-Indian social worker, or a non-Indian authority tries to impose their own standards on the Indian people and the Indian families, it is almost certainly doomed to failure, no matter what they try." 1974 Hearings at 47. By the end of the 1974 hearings, Senator Abourezk summarized the previous two days of testimony: "Witness after witness got up and testified that non-Indian social workers have been totally ignorant of exactly what an Indian family is and what it ought to be." 1974 Hearings at 449. On the Senate floor, Abourezk explained the need for legislation by referring to this testimony about how "the persons responsible for making decisions about child neglect may not be equipped by their professional training to decide whether or not a child is suffering emotional damage at home, in spite of conditions which might indicate neglect in an Anglo

middle-class home." 123 Cong. Rec. S10810 (June 27, 1977).

Representative Morris Udall, the bill's sponsor in the House, also discussed this testimony in explaining the need for legislation on the floor of the House. "Hearing witnesses reiterate time and again the failure or inability of State agencies, courts, and procedures to fairly consider the differing cultural and social norms in Indian communities and families," Udall observed. "Regrettably, public and private agency officials are all too often unfamiliar with and/or disdainful of Indian culture and society. Often the conditions which lead to separation are not demonstrably harmful." 124 Cong. Rec. H12849 (Oct. 14, 1978).

Both the House and Senate Committee Reports on the bills that became ICWA accordingly emphasized that the statute would put an end to these practices – broadly, an end to the ill-informed disrespect of Indian child care practices, and specifically, an end to the removal of Indian children on the ground that their parents were noncustodial. The House Report repeated verbatim the testimony of William Byler that "[m]any social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." H.R. Rep. No. 95-1386, 95th Cong., 2d Sess., at 10 (1978). The Report explained that "[t]he concept of the extended family maintains its vitality and strength in

the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in child-rearing. Yet, many non-Indian public and private agencies have tended to view custody of an Indian child by a member of the extended family as prima facie evidence of neglect." *Id.* at 20. The Senate Report reproduced portions of the Final Report of the American Indian Policy Review Commission, and portions of the report of one of the Commission's task forces, that made the same points. S. Rep. No. 95-597, 95th Cong., 1st Sess., at 39, 43-45 (1977).

Of course, many of the abuses that prompted the enactment of ICWA involved the removal of Indian children from custodial parents. But some of the abuses that prompted ICWA involved the removal of Indian children from families with noncustodial parents, precisely *because* the parents were noncustodial. These were among the adoptions ICWA was intended to end.

2. Congress enacted ICWA after hearing considerable evidence that the wholesale adoption of Indian children posed a threat to the very existence of Indian tribes and Indian culture.

Much of the evidence presented at the hearings leading up to ICWA concerned the damage that adoptions were inflicting on tribes, even apart from the damage inflicted on parents and children.

Several witnesses testified that they feared the disappearance of their tribes' culture, because the loss of so many children imperiled their ability to hand their culture down to the next generation. Calvin Isaac, the tribal chief of the Mississippi Band of Choctaw Indians, explained: "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people." 1977 Hearings at 157. Another witness lamented: "We are losing our children and our heritage." 1978 Hearings at 112. And another: "Indian children are not only physically deprived of their culture, but even their attitudes and ideas are turned against their traditional customs and lives." 1974 Hearings at 99.

This testimony had a powerful effect on the principal sponsors of ICWA, who cited the threat posed by adoptions to the survival of Indian tribes as one of the reasons the legislation was needed. "Indian cultures are being destroyed by this practice since so many Indian children are not learning Indian ways," Senator Abourezk declared on the Senate floor. 123 Cong. Rec. S10810 (June 27, 1977). "Their entire Indian way of life is smothered," he insisted on another occasion. "It has been called cultural genocide." 123 Cong. Rec. S5331 (Apr. 1, 1977). Representative Udall likewise observed: "There is nothing that is more central to the preservation of an Indian tribe and no resource that is more vital to its future than its

children. We could not more effectively and completely destroy an Indian tribe than by depriving them of their children." 124 Cong. Rec. H3560 (May 3, 1978).

One of the concerns that prompted ICWA was the harm to Indian parents and children caused by adoptions, but another concern was the harm done to tribes as political and cultural entities. While one purpose of ICWA was to protect Indian families, another purpose was to protect Indian tribes and Indian culture.

3. ICWA may accordingly be invoked by non-custodial parents.

Because one of the abuses ICWA was intended to stop was the removal of Indian children on the ground that their parents were not custodial, it would have made no sense for Congress to limit the statute's protections to custodial parents. This is why ICWA protects Indian children of all parents, without reference to whether the parents are custodial or noncustodial. The statute grants rights to anyone who is a "parent" of an "Indian child." 25 U.S.C. § 1912(a). The term "parent" is defined in ICWA without any requirement of custody – the definition explicitly requires acknowledgement or proof of *paternity* but is silent as to custody. 25 U.S.C. § 1903(9). Considering the historical background to ICWA, the irrelevance of custody is no surprise.

Nor is it any surprise that ICWA lacks any requirement of an "existing Indian family." One of the abuses that prompted the enactment of ICWA was the frequency with which state government employees and private adoption agencies imposed their own ideas of the family on Indians. It would have been ironic, to say the least, if Congress had responded to this problem by empowering state government employees and private adoption agencies to determine when an "Indian family" exists. Instead, ICWA does the far more sensible thing: it grants rights to parents without reference to whether parents live in arrangements others would recognize as families.

Indeed, parents are not the only ones who may invoke the protections of ICWA. Because one of the abuses ICWA was intended to stop was the destruction of Indian tribes as cultural and political entities, the statute grants rights to "the Indian child's tribe" as well. 25 U.S.C. §§ 1911(b), 1912(a), 1915(a). This term is also defined in the statute, again without any reference to custody. 25 U.S.C. § 1903(5). As this Court has explained, tribes may invoke the protections of ICWA even over the objection of *both* parents. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49-51 (1989).

The fact that ICWA protects tribes as well as parents makes even clearer that the statute may be invoked by noncustodial parents, because it would have made no sense for Congress to extend protection to tribes and custodial parents while simultaneously withholding protection from noncustodial parents.

The threat to the existence of Indian tribes from the loss of their children was equally serious whether any particular child was being raised by his parents or by another member of the extended family.

There is also a broader lesson in the record of government-backed efforts to have Indian children raised by non-Indian adults, a lesson that was well understood at the time ICWA was enacted but one that we are in danger of forgetting today. We all sympathize with young children, and we all want what is best for them. Where Indian children are concerned, however, these sympathies have a long and often unattractive history. They are the same sympathies that prompted generations of policymakers – including some who were just as well-intentioned as anyone alive today – to establish the boarding schools and adoption programs that caused so much harm to Indians. They are the sympathies that gave rise to the very policies ICWA was intended to stop.

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CONCLUSION

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

Respectfully submitted,

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