No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MANUELITA G. JACOBS — PETITIONER

v.

OREGON DEPARTMENT OF HUMAN SERVICES; PIT RIVER TRIBE; S.H.A.; K.O.A. —

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE OREGON SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court recently explained that, "In the usual course, state courts apply state law when placing children in foster or adoptive homes," however "when the child is an Indian, a federal statute—the Indian Child Welfare Act—governs." *Haaland v. Brackeen*, 599 US 255, 263-64 (2023). Does the Supremacy Clause of the United States Constitution, preclude a state from enacting a state law to determine the foster care or adoptive placement of an Indian child?
2. Under the Oregon Indian Child Welfare Act, the Oregon juvenile court may change the permanency plan for a dependent Oregon Indian child to Tribal Customary Adoption if the Oregon Indian child's tribe consents to the Oregon juvenile court doing so. Thereafter, the Oregon Indian child's tribe must decide the terms of the Tribal Customary Adoption by employing its own procedures (or simply by decree) and must reduce those determinations to writing in the form of a proposed order or judgment. The Oregon Indian Child Welfare Act then requires the Oregon juvenile court to accept the tribe's proposed order or judgment—without regard to whether the parents of the Indian child were provided any procedural protections at all—and requires the Oregon juvenile court to sign an Oregon adoption judgment and enter the Oregon adoption judgment in the Oregon juvenile court's case register. When the terms of the tribe's Tribal Customary Adoption order or judgment include changing the child's name and reserving for the parent only the single "right" to request an annual

visit be granted at the sole discretion of the adoptive parent, does the Tribal Customary Adoption provision of the Oregon Indian Child Welfare Act violate both the parent's due process rights and ICWA?

PARTIES TO THE PROCEEDING

The petitioner is Manuelita G. Jacobs, the mother of the Indian children at issue and the appellant and petitioner on review in the courts below. The respondents are the Oregon Department of Human Services, the respondent and respondent on review in the courts below; the Pit River Tribe, respondent on review; and the Indian children, S.H.A., aka S.H.P., aka S.T., and K.O.A., aka P.J.R.J., respondents on review.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Manuelita G. Jacobs, respectfully petitions for a writ of certiorari to review the judgment of the Oregon Supreme Court

OPINION BELOW

The opinion of the Oregon Supreme Court (App. A) is published at 577 P.3d 714 (Or 2025).

JURISDICTION

The judgment of the Oregon Supreme Court was entered on September 25, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, of the United States Constitution provides, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const art. VI, cl. 2.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall…deprive any person of life, liberty, or property, without due process of law.

U.S. Const amend. XIV § 1.

The Indian Child Welfare Act provides, in part:

> In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian

> custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

25 U.S.C. § 1921.

The Oregon Indian Child Welfare Act provides, in part:

> If the child is an Indian child...If the court determines that tribal customary adoption, as described in [Or.Rev.Stat. §] 419B.656, is an appropriate permanent placement for the child, and the Indian child's tribe consents, the court shall request that the tribe file with the court a tribal customary adoption order or judgment evidencing that the tribal customary adoption has been completed.

Or.Rev.Stat. § 419B.476(7)(d)(A).

The Oregon Indian Child Welfare Act also provides:

> (1) As used in this section, "tribal customary adoption" means the adoption of an Indian child, by and through the tribal custom, traditions or law of the child's tribe, and which may be effected without the termination of parental rights.

Or.Rev.Stat. § 419B.656(1).[1]

The Oregon Indian Child Welfare Act further provides:

> After accepting a tribal customary adoption order or judgment under subsection (3) of this section, the juvenile court that accepted the order or judgment shall proceed as provided in [Or.Rev.Stat. §] 109.350 and enter a judgment of adoption. In addition to the requirements under [Or.Rev.Stat. §] 109.350, the judgment of adoption must include a statement that any parental rights or obligations not specified in the judgment are transferred to the tribal customary adoptive parents and a description of any parental rights or duties retained by the Indian child's parents, the rights of inheritance of the child and the child's parents and the child's legal relationship with the child's tribe.
>
> A tribal customary adoption under this section does not require the consent of the Indian child or the child's parents.

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[1] Petitioner includes the full text of Oregon's tribal customary adoption statute, Or.Rev.Stat. § 419B.656, at App. F.

Or.Rev.Stat. § 419B.656(4)(d), (e).

The Oregon Indian Child Welfare Act also provides:

> This section shall remain operative only to the extent that compliance with the provisions of this section do not conflict with federal law as a condition of receiving funding under Title IV-E of the Social Security Act.

Or.Rev.Stat. § 419B.656(6).

INTRODUCTION

This case presents important questions of federal preemption under the Supremacy Clause of the United States Constitution. Specifically, whether the Indian Child Welfare Act (ICWA) preempts the states from enacting legislation controlling the adoption of Indian children. If such state law is not preempted in its entirety by ICWA, the process provided in the Oregon Indian Child Welfare Act (ORICWA) allowing for tribal customary adoption is preempted by ICWA and also violates a parent's due process rights because the tribal customary adoption process authorizes termination of parental rights without requiring an evidentiary hearing at which the proponent of adoption must prove current parental unfitness by any quantum of proof.

Since the early days of the republic, the Court has held that the Supremacy Clause of Article VI, preempts the state from enacting legislation contrary to federal laws:

> The constitution, therefore, declares, that the constitution itself, and the laws passed in pursuance of its provisions, shall be the supreme law of the land, and shall control all state legislation and state constitutions, which may be incompatible therewith; and it confides to this court the ultimate power of deciding all questions arising under the constitution and laws of the United States. The laws of the United States, then, made in pursuance of the

> constitution, are to be the supreme law of the land, anything in the laws of any state to the contrary notwithstanding.

M'Culloch v. Maryland, 17 US 316, 326–27 (1819). The question of federal preemption of State law is guided by two principles. First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted); *see Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied," this court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Lohr*, 518 U.S., at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

As a starting point, the federal government has plenary power over tribal affairs. *United States v. Lara*, 541 U.S. 193, 200 (2004). Although the regulation of child adoption and family law in general is the domain of state police powers, those powers do not reach into tribal affairs. *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 390 (1976) (per curiam). Thus, on a structural level, the state police powers have never extended to child adoption involving an Indian child.

However, because some debate existed as to whether state police powers gave the states the authority to regulate an adoption of an Indian child living within state boundaries but outside a reservation, Congress enacted ICWA. In doing so, Congress "occupied the field" of Indian child adoption relating to Indian

children living off the reservation. *Haaland v. Brackeen*, 599 U.S. 255, 287 (2023).

Although Congress included a provision in ICWA allowing state law to control when the state law provides greater protections than ICWA, that was intended to allow general state family law provisions to apply when the general state law pertaining to adoption and termination of parental rights "provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under [ICWA]." 25 U.S.C. § 1921. That provision, however, does not apply to recently enacted state laws specifically regulating Indian child adoption because, at the time of the enactment of ICWA, no such laws existed. Because no state had state laws specifically regulating the adoption of Indian children at the time Congress enacted ICWA, Congress could not have intended any such state laws to control over ICWA. As a result, Oregon was precluded from relying on its own recently enacted Indian child welfare laws (ORICWA) regulating Indian child adoption.

If ORICWA is not entirely preempted by ICWA, the ORICWA procedures to permanently divest the parents of an Indian child of their right to the care and custody of their child without an evidentiary hearing at which the rules of evidence apply and which requires proof of present parental unfitness violate both ICWA and the parent's right to due process.

ORICWA authorized a new type of permanency plan for an Indian child: tribal customary adoption. Or.Rev.Stat. § 419B.476(5)(g); Or.Rev.Stat. § 419B.656 (App. F). A tribal customary adoption does not require the consent of the Indian

child's parents or the Indian child, and a tribal customary adoption "may be effected without the termination of parental rights." Or.Rev.Stat. § 419B.656(4)(e); Or.Rev.Stat. § 419B.656(1). In a tribal customary adoption, "[a]ny parental rights or obligations not specifically retained by the Indian child's parents in the juvenile court's adoption judgment are conclusively presumed to transfer to the tribal customary adoptive parents." Or.Rev.Stat. § 419B.656(5).

Under ICWA, prior to terminating the relationship between the parent and the Indian child,[2] the state must provide procedural protections including proof of parental unfitness beyond a reasonable doubt. 25 U.S.C. § 1912(f).[3] ORICWA's tribal customary adoption provisions require an Oregon juvenile court to issue an Oregon juvenile court adoption judgment of an Indian child without an evidentiary hearing and without proof of current parental unfitness by any quantum of proof. Thus, not only does ORICWA deprive the parent of their due process rights, but it also provides a lesser standard of protection for the rights of the parent of an Indian child than the rights provided to that parent under ICWA. As a result, even if ICWA provides authority for state laws to apply to Indian child adoption proceedings, that authority is contingent upon the state laws providing greater protections than ICWA. And because ORICWA does not provide greater protections to the Indian child's parent in a tribal

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[2] 25 U.S.C. § 1903(1)(ii) (defining "termination of parental rights" as "any action resulting in the termination of the parent-child relationship").

[3] 25 U.S.C. § 1912(f) provides:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

customary adoption proceeding than in permanent guardianship or termination of parental rights proceedings conducted under ICWA, ORICWA's tribal customary adoption provision is preempted by ICWA.

Finally, an overarching goal of ICWA is for equal treatment of Indian children and their parents in child custody proceedings, including termination and adoption proceedings, throughout the country. By allowing different states to enact and rely on their own laws to control Indian child adoption proceedings, the goal of equal treatment is severely undermined and, as a result, the parent of an Indian child adopted in Oregon may be treated differently than the parent of an Indian child adopted in Montana. Aside from potential equal protection clause violations, the fact that the Indian child may reside in one state and the tribe may be located within the boundaries of another state adds a question as to which state's law applies.

STATEMENT OF THE CASE

1. Petitioner, the mother of the two Indian children at issue, is a member of the Pit River Tribe, a federally recognized Indian tribe located in Northern California. 577 P.3d at 719. Her two children, S.H.A. and K.O.A., are also members of the Pit River Tribe. *Id.* As explained in further detail below, under ORICWA, the Oregon juvenile court asserted dependency jurisdiction over the children. The initial plan for the children was for reunification with their mother, but the Oregon Department of Human Services petitioned the juvenile court to change the plan from reunification to tribal customary adoption. *Id.*

2. Pursuant to Or.Rev.Stat. § 419B.476, the Oregon juvenile court held a two-day permanency hearing. *Id.* Pursuant to Or.Rev.Stat. § 419B.476(1) and Or.Rev.Stat. § 419B.325(2), the rules of evidence did not apply at that hearing. At the hearing, the Oregon Department of Human Services and the Pit River Tribe presented testimony and documents to support the plan change from reunification to tribal customary adoption. Among the witnesses at that hearing was one of the proposed adoptive parents, who is a member of the Pit River Tribe and the mother's cousin. *Id.* Other testimony and material showed that the lack of permanency was detrimental to the children and that the mother had not made the changes necessary for the children to safely return to her care. *Id.*

3. At the conclusion of the permanency hearing, the Oregon juvenile court ordered that the plan for the children be changed from reunification to tribal customary adoption. In doing so, the Oregon juvenile court found that the tribe had requested and approved both tribal customary adoption as the new permanency plan and the proposed adoptive family as the planned placement. *Id.* The Oregon juvenile court further found that the Oregon Department of Human Services had made the efforts required by Or.Rev.Stat. § 419B.192 to place the children together with a relative with whom they had a relationship and that placement in substitute care with the adoptive placement was in the children's best interest.[4] *Id.*

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[4] Petitioner here, the children's mother, appealed from that permanency decision contending that the Department of Human Services had not made sufficient progress for her children to return safely home. The Oregon Court of Appeals affirmed the juvenile court's decision. *Dept. of Human Services v. M. G. J.*, 532 P.3d 905 (2023) and the Oregon Supreme Court denied review. 537 P.3d 938 (2023).

4. After the Oregon juvenile court's decision to change the plan for the children to tribal customary adoption, the Pit River Tribe established and approved a "Tribal Customary Adoption Resolution and Agreement" through internal tribal procedures. *Id.* at 721. The Tribal Customary Adoption Resolution transferred all of mother's enforceable rights and responsibilities vis-à-vis her children to the children's adoptive placement. Mother retained only the "right" to one visit with each child per year at the discretion of the adoptive placement.

The tribe filed the Resolution in the Oregon juvenile court, and the Oregon Department of Human Services requested a hearing for the court to accept it. *Id.* At the ensuing hearing, the Department of Human Services and the tribe asserted that the hearing was meant to be "ministerial" in nature. *Id.* at 723. Specifically, the Department of Human Services asserted that given the filing of the tribe's Resolution, the Oregon juvenile court must simply accept the Resolution and sign Oregon adoption judgments, thereby finalizing the tribal customary adoptions in the Oregon juvenile court, dismiss the parties, and terminate the Oregon juvenile court's jurisdiction over the children. *Id.* at 722. The mother argued, in part, that the hearing should not be a "rubber-stamp hearing" and that the juvenile court must allow for testimony at the hearing. *Id.* at 722-23.

The Oregon juvenile court ruled that Or.Rev.Stat. § 419B.656 had been either fully or substantially complied with and, without allowing the mother to present any evidence or testimony or requiring any other party to do so in accord

with the standards set forth in ICWA, the Oregon juvenile court accepted the tribe's Resolution for each child, signed Oregon adoption judgments for each child (App. C), entered those Oregon adoption judgments in the Oregon juvenile court's case registers, dismissed the parties, and terminated its jurisdiction over both children. *Id.* at 723.

5. The children's mother, petitioner here, appealed the Oregon juvenile court's adoption judgments. In her appeal, she argued, in part, that her procedural rights were violated when the Oregon juvenile court accepted the tribe's Resolutions without making its own best-interest determination, and that her procedural rights were violated when the court entered adoption judgments terminating all of her parental rights (except the purported "right" to request that the adoptive placement allow a single visit each year). *Id.* at 721.

In an unpublished memorandum opinion, the Oregon Court of Appeals concluded that the children's mother had not argued that ORICWA required independent best-interest findings at the hearing. (App. B). The Court of Appeals further concluded that "although mother had raised 'generalized concerns' about the court's process, she had not sought to introduce testimony or other evidence, nor had she otherwise signaled that she was raising a constitutional challenge." *Id.* at 721-22.

6. The Oregon Supreme Court granted mother's petition for review from the Court of Appeals decision. *Id.* at 722. In her opening brief to the Oregon Supreme Court (App. D), mother argued, in part, that the Oregon Supreme Court should invalidate the tribal customary adoption judgments

because the Oregon juvenile court's acceptance of the tribe's Resolutions and its entry of adoption judgments was a state court proceeding that qualified as a termination of parental rights under ICWA. As mother argued, because ICWA provides greater protections in a termination proceeding than ORICWA, ICWA preempts the Oregon law. App. D, p. 31.

Citing *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000), mother explained that preemption arises (1) when the federal law expressly provides for preemption; (2) when a congressional statutory scheme so completely occupies the field with respect to some subject matter that an intent to exclude the states from legislating in that subject area is implied; or (3) when an intent to preempt is implied from an actual conflict between state and federal law. App. D, p. 32. Focusing on the second and third bases for preemption, mother argued that if the Oregon Supreme Court were to interpret ORICWA to authorize the severance of mother's parental rights without any proof of any element required to terminate parental rights under ICWA, then that conflict between ORICWA and ICWA requires preemption of ORICWA either in part or in whole. App. D, p. 35. Mother argued that in enacting ICWA—to prevent the unnecessary breakup of Indian families—Congress prohibited what Oregon law allows: An Oregon juvenile court entered Oregon court adoption judgments divesting an Indian mother of two Indian children of the custody, care, companionship, and control of her Indian children without a hearing conducted in accord with ICWA and without any proof by any quantum that the Indian mother was presently unfit.

7. In its opinion, the Oregon Supreme Court interpreted the applicable provisions of ORICWA to allow the effective termination of parental rights without an evidentiary hearing once the tribe submits its tribal customary adoption order (or, as in this case, Resolution). 577 P.3d at 732. The court further concluded that the Oregon juvenile court is not required to make a finding of "best interest" prior to effectively terminating parental rights under ORICWA. *Id.* at 735.

The Oregon Supreme Court did not address petitioner's preemption arguments in its opinion.

REASONS FOR GRANTING THE PETITION

As explained further below, this case presents an important question of federal law that has not been settled by this court. Additionally, the Oregon Supreme Court decided an important federal question, namely whether ICWA either completely preempts state laws regulating the adoption of Indian children or partially preempts state law when the state laws regulating the adoption of Indian children conflict with ICWA.

I. After *Brackeen*, the question remains whether ICWA displaces state laws regulating the adoption of Indian Children.

One category of federal preemption occurs when Congress intended to displace state law altogether and its intent can be inferred from a framework of regulation so pervasive that Congress left no room for the States to supplement it. *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

In *Brackeen*, the Court observed that "[w]hen a state court adjudicates [an adoption proceeding involving an Indian child], ICWA governs from start to finish." 599 U.S. at 266. Indeed, in a concurrence, Justice Gorsuch stated that "responsibility for managing interactions with the Tribes rests exclusively with the federal government." *Id.* at 313 (Gorsuch, J., concurring). Ultimately, the Court held that ICWA falls under Congress' plenary power over Indian affairs and, as a result, validly displaces state-law adoption proceedings involving an Indian child. *Id.* at 280.

This case presents the converse issue: if, as the *Brackeen* Court held, ICWA validly displaces state authority over adoptions involving Indian children, does ICWA preempt the states from applying state laws to adoption proceedings involving Indian children.

Currently 18 states have comprehensive laws regulating Indian child adoptions.[5] Under *Brackeen*, ICWA governs Indian child adoption proceedings from start to finish. Thus, a situation exists wherein ICWA controls Indian child adoption proceedings yet 18 states have created laws to govern Indian child adoptions within their borders. Each law provides its own standards and procedures that the state courts must follow in Indian child adoption proceedings. Thus, an Indian child in one state will be treated differently than

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[5] According to the National Indian Child Welfare Association (NICWA), the following states have laws regulating Indian child adoptions: California, Colorado, Connecticut, Iowa, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Washington, Wisconsin, and Wyoming. *See* https://www.nicwa.org/state-icwa/ (last visited November 19, 2025).

an Indian child in another state. For example, in Oregon, an Indian child is subject to ORICWA, which provides for tribal customary adoption, but a child in a different state is not subject to such a procedure. As a result, Indian children (and their parents) are not treated equally throughout the country which raises issues of equal protection under the United States Constitution.

Although 25 U.S.C. § 1921 appears to allow for the application of state laws so long as those laws provide "a higher standard of protection to the rights of the parent or Indian custodian of an Indian child," it does not authorize such comprehensive state laws to control Indian child adoptions for two reasons. First, the text of that statute clearly states that it applies to "State or Federal law applicable to a child custody proceeding." In other words, 25 U.S.C. § 1921 applies to state laws generally applicable to all child custody proceedings, not to laws specific to adoption proceedings involving Indian children. Second, and related to the first point, the state Indian child welfare laws have been enacted *after* Congress enacted 25 U.S.C. § 1921.[6] Therefore, Congress could not have intended 25 U.S.C. § 1921 to apply to state-enacted Indian child adoption laws that had not been enacted.

One important aspect of ICWA is that the same standards apply to all adoption proceedings of Indian children throughout the United States regardless of where the child resides. This uniformity is critical because the Indian child

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[6] Of the 18 states with comprehensive laws governing Indian child adoptions, eight were enacted in 2023, the year the Court decided *Brackeen*. Of the remaining 10 states, two were enacted after the Fifth Circuit issued its opinion in *Brackeen v. Bernhardt*, 937 F.3d 406 (2019). Thus, it appears that 12 of the 18 states with comprehensive laws governing Indian child adoption proceedings enacted those laws as a contingency if the Court found ICWA to be unconstitutional. None of those state laws were in place when ICWA was enacted.

may reside in one state yet the child's tribe may be located within the boundaries of a different state. More importantly, some tribes such as the Navajo Nation are located within the boundaries of more than one state. Uniformity is also important to ensure that all Indian children in adoption proceedings receive the same protections and, as here, the parents receive the same rights as other parents of Indian children. As noted above, disparate treatment of Indian children and their parents in adoption proceedings invokes equal protection issues.

This issue is also important because in *Brackeen*, the Court affirmed that ICWA was constitutionally enacted under Congress' plenary power over Indian tribes. Indeed, the primary reason that Congress enacted ICWA in 1978 was to *prevent* state adoption laws from controlling the adoption of Indian children, in direct response to a history of state courts separating Indian children from their tribes and their culture. *See Preemption, Commandeering, and the Indian Child Welfare Act*, 2022 Wis. L. Rev 1199, 1206 (2022) (summarizing the legislative intent behind ICWA).

Although the Oregon Supreme Court did not expressly reject mother's argument that ICWA displaces state laws regulating adoptions involving Indian children, by affirming the issuance of adoption judgments under a proceeding found in ORICWA but not ICWA, the court implicitly rejected that argument. Without a definitive decision on whether states may apply their own laws to Indian child adoptions, the nationwide landscape will return to the pre-ICWA days with different states applying different procedures (so long as those

procedures do not expressly conflict with a procedure under ICWA). That will undermine the goal of nationwide uniformity in the process and lead to an unpredictable landscape in many states.

II. The tribal customary adoption procedure in ORICWA stands in direct contradiction to ICWA.

A second category of preemption occurs when a state law stands in direct contradiction to a federal law. *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 493 (2013).

As noted above, the plain text of ICWA permits a state to apply procedures under its general adoption laws to adoption proceedings involving Indian children when those laws provide greater protections to the rights of the Indian child's parents. 25 U.S.C. § 1921. However, if that exception also includes state-enacted laws specifically for Indian child adoptions, the second category of preemption applies.

This case presents an opportunity for the Court to address this second area of preemption in the context of ICWA. That law precludes, among other things, the severance of parental rights absent "a determination, supported by evidence beyond a reasonable doubt, including testimony of a qualified expert witness, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f).

However, ORICWA permits the severance of parental rights without any proof by any quantum of those or any other elements. Ultimately, if the termination and adoption process occurs through the Oregon dependency statute

pertaining to tribal customary adoption, Or.Rev.Stat. § 419B.656, the only role for the Oregon juvenile court is to enter an Oregon adoption judgment and dismiss the Oregon dependency case. As occurred here, the hearing at which the court must do so is merely a formality.

Thus, this case presents the important question of "partial" preemption, that is, preemption of a provision of a state law that conflicts with a provision of a federal law. In other words, 25 U.S.C. § 1912(f) and Or.Rev.Stat. § 419B.656 directly contradict each other in that the federal provision requires specific protections for the rights of the parents of an Indian child before the termination of the parent-child relationship but the state provision, as interpreted by the Oregon Supreme Court, does not.

The Court's role is not to correct the interpretation of an Oregon statute by the Oregon Supreme Court. However, the Oregon Supreme Court's interpretation of Or.Rev.Stat. § 419B.656 directly conflicts with 25 U.S.C. § 1912(f). Therefore, the Oregon provision, as interpreted by the Oregon Supreme Court, is preempted by conflicting federal law.

III. The tribal customary adoption proceeding under ORICWA deprives the parents of the Indian child of the heightened protections of ICWA and the right to due process.

The tribal customary adoption Resolution in these cases qualifies as a termination of parental rights under ICWA. See 25 U.S.C. § 1903(1)(ii) (defining "termination of parental rights" as "any action resulting in the termination of the parent-child relationship"). The Oregon juvenile court effected a termination of petitioner's parental rights when it accepted the Resolution and entered

judgments of adoption in the Oregon juvenile court's case register, and it did so without affording petitioner any of ICWA's protections; most notably, without proof beyond a reasonable doubt of grounds for termination and without qualified expert testimony "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f).

A parent faced with the termination of their parental rights has a right to due process in the termination hearing. *Lassiter v. Dept. of Soc. Servs. of Durham Cnty., N. C.*, 452 U.S. 18, 33–34 (1981). Although mother in this case had appointed counsel to represent her, the Oregon juvenile court prohibited her from presenting testimony and evidence at that hearing, and it did not require the proponents of the adoptions to prove the elements required under ICWA. But "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

However, under ORICWA, once a tribe's tribal customary adoption order (or in this case, the tribe's Resolution) is presented to the Oregon juvenile court, the Oregon juvenile court *must* sign an Oregon adoption judgment without proof of the required ICWA elements and without providing a meaningful opportunity for the parent to be heard. Thus, the tribal customary adoption provisions of ORICWA fail to provide the required protections and process for a termination proceeding and, therefore, violate ICWA and are unconstitutional.

As a final matter, this case is subject to post-judgment invalidation under 25 U.S.C. § 1914 ("Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.").

For these reasons, this case is a good case to answer important questions of preemption, both when the state law stands in direct contradiction to the federal law and when Congress intended to displace state law altogether.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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