No. 17-942

# In The
# Supreme Court of the United States

R.K.B. and K.A.B.,

*Petitioners,*

v.

E.T.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Utah Supreme Court**

## BRIEF *AMICUS CURIAE* OF THE GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

TIMOTHY SANDEFUR*
ADITYA DYNAR
SCHARF–NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

* *Counsel of Record*

*Counsel for* Amicus Curiae *Goldwater Institute*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## QUESTION PRESENTED

A divided Utah Supreme Court held that a purported birth father of an "Indian child" subject to the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901–1963, who has not complied with the state or federal law rules for acknowledging or establishing paternity in court, can nevertheless make up his own rules, which Utah courts will permit so long as they are "reasonable."

Petitioners ask this Court to determine whether that is permissible under ICWA's definition of "parent." Courts of last resort are divided on this question, and the Court should consider it. Indeed, that is one of two questions on which the Court granted certiorari but did not decide, in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

But while answering that question in the negative would avoid myriad constitutional concerns, an affirmative answer would make an additional question unavoidable. That question is implicit in the question presented by the Petitioners. *Amicus* proposes that this Court expressly address that additional question, which is:

> Whether the "reasonableness" rule created by the court below to acknowledge or establish paternity under ICWA is unconstitutional.

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## INTEREST OF *AMICUS CURIAE*[1]

The Goldwater Institute ("GI") was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, policy briefings, and advocacy. Through its Scharf–Norton Center for Constitutional Litigation, GI litigates cases and files *amicus* briefs when its or its clients' objectives are implicated.

GI's Equal Protection for Indian Children project is devoted to reforming the federal and state legal treatment of Native American children subject to the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901–1963. GI is currently litigating civil rights cases challenging various provisions of ICWA for violating constitutional requirements and has also participated as *amicus* in many cases addressing ICWA issues. *See*, *e.g.*, *Renteria v. Superior Court*, No. 17-789 (cert. pending); *Carter v. Tahsuda*, No. 17-15839 (9th Cir., pending); *Tavares v. Whitehouse*, No. 17-429 (cert. pending).

GI scholars have also published research on the workings of ICWA. *See*, *e.g.*, Mark Flatten, *Death on a*

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[1] Pursuant to Supreme Court Rule 37(6), counsel for *Amicus Curiae* affirms that no counsel for any party authorized this brief in whole or in part and that no person or entity, other than *Amicus*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief. The parties' counsel of record received timely notice of the intent to file the brief, and all parties have consented to the filing of this brief.

*Reservation* (Goldwater Institute 2015);[2] Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1 (2017). *Amicus* believes its litigation experience and policy expertise will aid this Court in considering the petition.

## SUMMARY OF REASONS FOR GRANTING THE PETITION

This case involves a three-year-old boy who was voluntarily placed in a loving adoptive home by his biological mother at birth. Pet. at 10. On the eve of the court finalizing the adoption, a man came forward claiming to be the boy's father. He did not, however, comply with state-law procedure to acknowledge or establish paternity. Ordinarily that would be the end of it. But it was not the end of it in this case because the child in question happens to be of Native American ancestry. As a consequence, the case is governed by the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901–1963, which establishes a separate set of rules, *based on the child's race*, which preempt state law in child welfare matters. Acting pursuant to ICWA, the Utah Supreme Court then manufactured a new rule allowing the purported birth father of an Indian child a separate and extraordinarily broad path to establishing paternity.

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Procedures for acknowledging or establishing paternity, this Court has held, protect the best interests of the child and prevent courts from giving weight to the rights of an alleged genetic parent at the cost of the rights and best interests of the child and the rights of other adults who have a significant, established relationship with the child. *See* Pt. I, *infra*. These procedures are grounded in biology and in scientific developments such as assisted reproductive technology.

For children of all other races, an alleged biological father must demonstrate a commitment to parent and show an established relationship with the child to establish paternity. A mere allegation of a probable genetic link is not sufficient. Such rules are standardized across all fifty states, endorsed by Congress, and have been previously upheld by this Court as necessary to comply with the Due Process and Equal Protection Clauses of the U.S. Constitution. *Id*.

But because this is an ICWA case, the court below overlooked all of this, and—based solely on the child's Native American ethnic heritage—created a rule that allowed the alleged father here to intervene in the pending adoption without satisfying any of the rules required for the purported fathers of children of other races. In so doing, it ignored decades of statutory developments in this area and exacerbated the problem of separate, unequal treatment faced by thousands of Indian children across the country under ICWA.

Petitioners have briefed the division in last-resort courts on the question of how to acknowledge or establish paternity under ICWA. Pet. at 15–16.[3] That alone is reason to grant certiorari as this case is an ideal vehicle to resolve this question. But there is a second dimension to this case which this Court should also consider: the constitutionality of ICWA's de jure separate-and-substandard treatment of Indian children.

## REASONS FOR GRANTING THE PETITION

### I. The "reasonableness" standard created by the court below ignores biology, science, sound state-law statutory development, and this Court's decisions.

#### A. Rules for acknowledging or establishing paternity are the same in all fifty states—for children of all races *other* than Native American.

Congress first required states to enact procedures regarding paternity in 1984. *See* Child Support

[3] *Compare In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 935 (N.J. 1988) (state-law procedures must be followed by alleged father to acknowledge or establish paternity); *In re Baby Boy D.*, 742 P.2d 1059, 1064 (Okla. 1985) (same); *In re Daniel M.*, 1 Cal. Rptr. 3d 897, 900 (Cal. App. 2003) (same); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 172 (Tex. App. 1995) (same), *with Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011) (alleged fathers of Indian children can acknowledge or establish paternity regardless of state law); *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 559–60 (S.C. 2012) (same), *reversed on other grounds*, 133 S. Ct. 2552 (2013); *Jared P. v. Glade T.*, 209 P.3d 157, 161 ¶ 21, 162 ¶ 27 (Ariz. App. 2009) (same).

Enforcement Amendments of 1984, Pub. L. No. 98-378, § 3, 98 Stat. 1305 (later codified, in part, as 42 U.S.C. § 666). It did not then require states to enact procedures for *acknowledging* paternity, but four years later, it amended 42 U.S.C. § 666 to "encourage[] . . . states to adopt simple civil process for voluntarily acknowledging paternity and a civil procedure for establishing paternity in contested cases." Family Support Act of 1988, Pub. L. No. 100-485, § 111(d), 102 Stat. 2343 (capitalization removed). It also required states to enact procedures requiring children and alleged genetic parents to undergo genetic testing in contested-paternity cases. *Id*. § 111(c) (codified at 42 U.S.C. § 666(a)(5)(B)).

Today, federal law requires states to enact state laws providing for contested-paternity cases. It requires that children and adults must undergo genetic testing accompanied by an adult's "sworn statement" either (1) "establishing a reasonable possibility of the requisite sexual contact between the parties," or (2) "establishing a reasonable possibility of the nonexistence of sexual contact between the parties." 42 U.S.C. § 666(a)(5)(B)(i)(I)–(II). All states have enacted such laws.

As for *non*-contested cases, 42 U.S.C. § 666(a)(5)(C) requires states to provide a "simple civil process for voluntarily acknowledging paternity" only if the writing is signed by the "mother and a putative father." They have all done that, too. All fifty states have

enacted some version of the Uniform Parentage Act.[4] Utah's appears at Utah Code §§ 78B-15-101–78B-15-902.

Under this Act, as the court below confirmed, the birth *mother* must sign, along with the unmarried biological father, in order "[f]or a biological father to acknowledge paternity." Pet. App. at 55a–56a ¶ 67 (citing Utah Code § 78B-15-302(1)(c)). This standard for *acknowledging* paternity is endorsed by Congress and is law in all the states.

Utah's standard where paternity is *contested*, which is also referred to as the path to *establish* paternity, is also found in the Uniform Parentage Act. *See* Utah Code §§ 78B-15-601–78B-15-623 (provisions regarding genetic testing in paternity contests); Uniform Parentage Act §§ 601–623 (same). It requires genetic testing in paternity contests.

Both options—acknowledging or establishing paternity—comply with constitutional requirements. *Lehr v. Robertson*, 463 U.S. 248 (1983), held that forcing an alleged biological father to take certain steps to acknowledge or establish paternity does not violate Due Process or Equal Protection. Requiring a person to do more than merely assert sexual contact is unremarkable. Were it otherwise, such an assertion without "demonstrat[ing] a full commitment to the responsibilities of parenthood" would have to be given legal effect—which would disregard the "best interests" of a

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child, as well as the child's Due Process and Equal Protection rights. *Id*. at 261–62 & n.19. That is why a purported father's mere allegation of the "existence of a biological link does not merit . . . constitutional protection" "equivalent" to that which biological mothers enjoy. *Id*. at 261.

This Court reiterated this principle in *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 63 (2001), when it said that "[t]he imposition of a different set of rules" for alleged biological fathers to prove parenthood "is neither surprising nor troublesome from a constitutional perspective" because alleged biological fathers "are not similarly situated with regard to the proof of biological parenthood" as are biological mothers.

That background principle was left intact by *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), which held that the five-year continuous citizenship requirement imposed on unwed citizen fathers (as compared to the one-year continuous physical presence provision imposed on unwed mothers) to confer citizenship to a child violated Equal Protection. Even before the five-year countdown starts, unwed fathers must, as a threshold matter, acknowledge or establish paternity in ways that look identical to the rules imposed by all fifty states, federal law, and all versions of the Uniform Parentage Act.

None of these rules resemble the amorphous "reasonableness" standard created by the court below. And the difference between the two is simple: the child in this case is an "Indian child" under ICWA—so that a

separate and less-protective set of rules apply to his case, according to the court below. *See generally* Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1, 4 (2017). The dissent called this a "background principles problem," Pet. App. at 108a ¶ 141 n.24 (Lee, J., dissenting). That problem is, indeed, difficult to justify under the Constitution.

### B. The court below disregarded ICWA's borrowing of state-law terms and created a new rule that allows an alleged biological father to override an Indian child's best interests.

ICWA's paternity provision is neither remarkable nor problematic in one respect: it allows an alleged biological father to either acknowledge *or* establish paternity. 25 U.S.C. § 1903(9). But it does not specify what it means to establish or acknowledge paternity. That silence, however, indicates merely that courts should consult other existing federal (42 U.S.C. § 666) and state law (Utah Code §§ 78B-15-101–78B-15-902) to supply that definition. These laws already provide a tried, tested, workable, and constitutional standard. And it makes sense to apply state procedural rules in ICWA cases. After all, it is blackletter law that "family law terms in federal statutes are ordinarily deemed to be 'determined by state, rather than federal law,'" as Justice Lee writing for himself and Justice Durrant in dissent, observed. Pet. App. at 129a–30a ¶ 173 (quoting *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956)).

Federal laws like ICWA borrow state-law definitions of family law, property law, or tort law all the time.

Thus the alleged biological father, the biological mother, and the Respondent's brother all had state-law options that are "neither surprising nor troublesome from a constitutional perspective." *Tuan Anh Nguyen*, 533 U.S. at 63.[5]

But rather than employ such rules, the Utah Supreme Court fashioned a *new* rule for "Indian children" under ICWA. It held that Respondent E.T. had "reasonably" acknowledged paternity by filing "a motion to intervene" in the adoption proceeding. Pet. App. at 64a–65a ¶¶ 74–75. The ruling provides no explanation of what constitutes reasonableness, however—a notoriously broad standard, and one that does not meet even the minimum requirements endorsed by *Lehr* or 42 U.S.C. § 666. And the decision nullifies the "establish[]" "paternity" provision of ICWA, 25 U.S.C. § 1903(9), in defiance of regular tools of statutory construction.

The result is that in ICWA cases, alleged genetic parents *of just Indian children* have a shortcut around the procedures that under state and federal law apply to children of all other races—a shortcut that can thwart a child's adoption into a family that loves him.

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[5] Respondent's brother could have signed a denial of parentage. *See* Utah Code § 78B-15-303; *see also* Uniform Parentage Act (2017), *supra*, § 303.

In other words, the decision below allows a purported biological father to "play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests," "solely because an ancestor—even a remote one—was an Indian." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013). That "raise[s] equal protection concerns." *Id*.

If left undisturbed, the decision below will place Indian children at a "great disadvantage," *id*.—because their adoptions will be subject to an unpredictable veto under a separate, vaguely defined set of laws that applies to no other race of children. *See In re Bridget R.*, 49 Cal. Rptr. 2d 507, 527 (Cal. App. 1996) ("As a result of this disparate treatment, the number and variety of adoptive homes that are potentially available to an Indian child are more limited . . . and an Indian child . . . in an adoptive or potential adoptive home [faces] a greater risk . . . of being taken from that home and placed with strangers.").

## II. The vague "reasonableness" standard created by the court below violates equal protection because it applies only to cases involving one racial group: Indian children.

Even if the reasonableness standard had no other flaws, it fails a simpler and more serious test: it applies only with respect to "Indian children"—a classification that subjects children and adults to different legal rules based on their race. This Court should grant certiorari to determine whether this differential

treatment qualifies as race-based, and therefore is unconstitutional, *see*, *e.g.*, *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 727–31 (Cal. App. 2001) (finding ICWA unconstitutional when applied based on genetics), or whether it is a political classification, subject only to lenient rational-basis scrutiny. *See*, *e.g.*, *S.S. v. Stephanie H.*, 388 P.3d 569, 576 ¶ 27 (Ariz. App. 2017) (holding ICWA constitutional under rationality review), *cert. denied sub nom. S.S. v. Colorado River Indian Tribes*, 138 S. Ct. 380 (2017).

ICWA applies to child neglect, foster care, and adoption cases involving Indian children, which ICWA defines as children who are tribal members or are (a) eligible for tribal membership and (b) the biological child of a tribal member. 25 U.S.C. § 1903(4). Eligibility for membership, however, is universally based on genetics—no cultural, social, or political affiliation between the child and the tribe is needed. 25 C.F.R. § 83.11(e). A child with the requisite DNA is an Indian child without any consideration of cultural, social, or political factors—*see*, *e.g.*, *In re Alexandria P.*, 204 Cal. Rptr. 3d 617 (Cal. App. 2016), *cert. denied sub nom., R.P. v. Los Angeles Cnty. Dept. of Children & Family Svcs.*, 137 S. Ct. 713 (2017) (child with no cultural tribal ties nevertheless subject to ICWA)—and a child who is fully acculturated would not qualify as an Indian child if she lacked the required biology. *See*, *e.g.*, *In re Francisco D.*, 178 Cal. Rptr. 3d 388, 396 (Cal. App. 2014) (adopted child of tribal member not an "Indian child").

Thus ICWA "singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics,'" in order to treat them "as a distinct people." *Rice v. Cayetano*, 528 U.S. 495, 515 (2000) (quoting *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987)). It therefore establishes a racial category—it "use[s] ancestry as a racial definition and for a racial purpose." *Id*.

Some courts, however, have concluded that "Indian child" status is a political classification, not a racial or national origin-based one. In *In re Vincent M*., 59 Cal. Rptr. 3d 321, 335–36 (Cal. App. 2007), for example, the California Court of Appeals found, in reliance on *Morton v. Mancari*, 417 U.S. 535 (1974), that ICWA is subject only to rational basis review because it is based on political status rather than race. Yet the *Mancari* Court specifically noted that the law at issue in that case was "not directed towards a 'racial' group consisting of 'Indians.'" *Id*. at 553 n.24. ICWA *is* directed toward a racial group consisting of Indians—because it is triggered exclusively by considerations of biological descent.

The "reasonableness" standard created below applies only to a single, biologically-defined group: children who genetically qualify as Indian children under ICWA. The result is therefore literal separate-but-equal—or, more accurately, separate-and-unequal—in that the reasonableness standard created below allows alleged genetic parents of Indian children—and Indian children alone—to *acknowledge* paternity merely by alleging sexual contact with the biological mother (or

by alleging biological mother's promiscuity), *without more, even where the biological mother contests that allegation*. And such an acknowledgement can—as in this case—derail a consensual adoption or, at a minimum, delay it significantly. That works to the detriment of the rights of the child and the dignity of the biological mother.

Nor is time any consideration. The child B.B. is now more than three years old, and has lived with his prospective adoptive parents, Petitioners R.K.B. and K.A.B., *since birth*. Pet. at 10. His biological mother voluntarily placed him in their care pursuant to ICWA's voluntary-adoption provision, 25 U.S.C. § 1913. Yet at this late date, the "reasonableness" rule created by the court below allows Respondent to play the "ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests." *Adoptive Couple*, 133 S. Ct. at 2565.

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Indian children like B.B. have a constitutional right not to be singled out for separate, disparate and unequal treatment based on their ancestry or ethnicity—and especially when the consequence is to override the best interests and the rights of the child. *See Santosky v. Kramer*, 455 U.S. 745 (1982) (refusing to protect the rights of parents at the cost of the rights and best interests of the child).

By creating a "reasonableness" standard to acknowledge paternity of an Indian child—a standard Congress, fifty state legislatures, and several last-resort courts rejected—the Utah Supreme Court singled out Indian children in a way that is difficult to reconcile with the Constitution.

## CONCLUSION

The questions presented here are exceptionally important: the lives and future of thousands of Indian children will be negatively affected if the "reasonableness" rule adopted below is left undisturbed. This case is an ideal vehicle to resolve the question presented which was left undecided in *Adoptive Couple*: whether ICWA's separate and less-protective treatment of Indian children is constitutional. The petition for writ of certiorari should be *granted*.

Respectfully submitted,
Dated: February 2018

TIMOTHY SANDEFUR*
ADITYA DYNAR
SCHARF–NORTON CENTER FOR
CONSTITUTIONAL LITIGATION
AT THE GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

* *Counsel of Record*

*Counsel for* Amicus Curiae *Goldwater Institute*