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 Supreme Court of Utah

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901, *et seq.*, established "minimum Federal standards for the removal of Indian children from their families" and their adoption. *Id.* § 1902. Under § 1913(a), a voluntary termination of parental rights "shall not be valid" unless a parent's consent meets certain requirements. The statutory definition of "parent" includes an unwed biological father who has "acknowledged or established" paternity. *Id.* § 1903(9). When valid consent is absent, a parent may petition the court to invalidate the termination of parental rights. *Id.* § 1914.

In this case, the birth mother terminated all contact with respondent birth father during the pregnancy, misrepresented the identity of the father to the court, and consented to the adoption. Upon learning of his son's birth and the adoption proceedings, respondent quickly moved to intervene in the adoption case to establish his paternity. Although respondent had missed the strict state-law time requirements for establishing paternity, the Utah Supreme Court determined that, under *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), federal law applied to whether respondent had "acknowledged or established" paternity under ICWA.

The question presented is:

Whether state law may apply to deprive an unwed father of his ability to "acknowledge or establish" paternity under 25 U.S.C. § 1903(9) when he was fraudulently denied knowledge of his child's birth and the pending adoption proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other Authorities

INTRODUCTION

In the Indian Child Welfare Act, ("ICWA") 25 U.S.C. §§ 1901, *et seq*., Congress declared that "it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." *Id.* § 1902. In enacting ICWA, Congress exercised its plenary authority over Indian affairs and responded to staggering rates of adoption of Indian children by non-Indians: more than one in four Indian children were placed for adoption and 90 percent of the Indian placements were in non-Indian homes. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32–33 (1989). Nearly four decades after the enactment of ICWA, the dramatic overrepresentation of Indian children in foster care and adoption demonstrates the continuing need for its procedural safeguards.[1]

In this case, the birth mother (C.C.) and respondent birth father (E.T.) were enrolled members of the Cheyenne River Sioux Tribe living on its

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[1] *See, e.g.,* Shamini Ganasarajah, *et al*., *Disproportionality Rates for Children of Color in Foster Care (Fiscal Year 2015)* 14 (Nat'l Council of Juvenile & Family Court Judges, Sept. 2017), *available at* https://www.ncjfcj.org/sites/default/files/NCJFCJ-Disproportionality-TAB-2015_0.pdf; Children's Bureau, U.S. Dep't of Health & Human Servs., *Race/Ethnicity of Public Agency Children Adopted* (July 2015), https://www.acf.hhs.gov/sites/default/files/cb/race2014.pdf. In 2014, American Indian/Alaska Native children represented 30 percent of public adoptions in South Dakota. *Id.*

reservation in South Dakota. E.T. supported C.C.—both emotionally and financially—during the pregnancy. Before giving birth, C.C. moved to Utah and then—in fear of violence from the father of her older children—she severed communication with E.T. and agreed to voluntarily terminate her rights to their baby, B.B. After being told that the adoption would "go faster" if the biological father relinquished his rights, C.C. then fraudulently represented that her brother-in-law was B.B.'s father. C.C. withheld notification of the potential adoption from the Tribe and from E.T.

When he first learned that his child had been born and adoption proceedings had started, E.T. immediately sought assistance and then obtained legal counsel. When B.B. was just two months old, C.C. alerted petitioners—the prospective adoptive parents—that she wished to withdraw her consent to the adoption. When B.B. was only three months old, C.C. and E.T. alerted petitioners that C.C. had misrepresented the identity of the father. Rather than seek prompt judicial resolution of the fraud claim, petitioners ignored this information.

When B.B. was only four months old, E.T. moved to intervene in the adoption proceeding and expressly acknowledged paternity. Again, instead of supporting expeditious judicial consideration of E.T.'s claims of fraud and paternity, so as to minimize any negative impact on B.B., petitioners opposed E.T.'s intervention. They asserted that he had forfeited all of his parental rights by not claiming paternity and intervening before he even knew the child had been born. The Utah trial court found that E.T. failed to "acknowledge or establish" paternity under state law

and therefore denied his parental status under ICWA and his right to intervene. Before entry of a final adoption decree, E.T. appealed the district court's decision and obtained a stay of the adoption proceedings.

The Utah Supreme Court reversed. Applying federal (rather than state) law to determine "acknowledge or establish," the court found E.T.'s actions "both timely and sufficient for [E.T.] to acknowledge paternity under ICWA, making [E.T.] a 'parent' for purposes of section 1914." Pet. App. 66a.

Petitioners ask this Court to decide whether the standard for determining whether an unwed father "acknowledged or established" paternity under ICWA is governed by state or federal law. This question does not merit review. Contrary to their claim of a "clear conflict among state courts of last resort on that question," Pet. 14, there is no disagreement among state courts of last resort that unwed Indian fathers may "acknowledge or establish" paternity for the purpose of ICWA without rigidly adhering to state-law requirements. The two aged cases on which petitioners rely to establish a purported split—each more than 30 years old—are of questionable vitality after *Holyfield* and are perfectly consistent with the decision below. Further, a federal standard accords with Congress' plenary authority over Indian affairs and provides far more predictability than application of potentially 50 different state laws, especially given that birth mothers often cross state lines to give birth or consent to place a child for adoption. Moreover, the decision below comports with this Court's decision in *Holyfield*, which directed that federal law applies to

undefined terms that are critical to the uniform nationwide applicability of ICWA's protections.

STATEMENT OF THE CASE

A. ICWA's Statutory Goals and Framework.

Congress, acting pursuant to its plenary authority over Indian affairs, *see United States v. Lara*, 541 U.S. 193, 200 (2004), and as trustee to tribes, Indian children, and Indian families, enacted ICWA in part because "States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). Accordingly, in ICWA Congress sought to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." *Id.* § 1902.

When Congress established these minimum federal standards, it made each parent's fully voluntary and informed consent the procedural keystone of a voluntary adoption. Under ICWA, a parent's consent to adoption is *per se* invalid if it is not executed before a judge and accompanied by the judge's certification that "the terms and consequences of the consent were fully explained in detail and were fully understood by the parent. . . ." *Id.* § 1913(a).

ICWA also expressly allows Indian parents to withdraw their consent "for any reason at any time prior to the entry of a final decree of termination or

adoption . . . and the child shall be returned to the parent." *Id.* § 1913(c). An action terminating parental rights may be invalidated by a parent upon a showing that the action violated the protections provided by § 1913. *Id.* § 1914. And a parent may withdraw his or her consent *after* the entry of a final decree of adoption on grounds that the consent was obtained through fraud or duress and then may petition the court to vacate the decree. *Id.* § 1913(d). Upon a finding of fraud or duress, "the court shall vacate such decree and return the child to the parent." *Id.*

Congress provided these procedural protections to parents of an Indian child. The term "parent" "means any biological parent or parents of an Indian child. . . . It does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). Further, a parent voluntarily placing a child for adoption cannot unilaterally waive ICWA's protections for the other parent "simply as a result of his or her transport [of the child] from one State to another." *Holyfield*, 490 U.S. at 46.

B. E.T.'s Exclusion from the Ongoing Adoption Proceedings.

E.T. and C.C. were in a committed romantic relationship and conceived a baby boy, B.B., in December 2013 while living on the Cheyenne River Sioux Reservation in South Dakota. Pet. App. 5a. Both E.T. and C.C. are enrolled members of the Cheyenne River Sioux Tribe. *Id.* E.T. supported C.C. during her pregnancy emotionally and financially, paying for C.C.'s phone bill, their rent, utilities, and groceries. *Id.* In June or July 2014, C.C. moved from the Reservation to Utah to be near friends and family. *Id.* The couple agreed that E.T. would wrap up his affairs

and join her in Utah where they would share an apartment. *Id.* E.T. was excited to become a father and to raise his child with C.C. The couple was unsure exactly how far along C.C. was in her pregnancy, but E.T. understood that they would reunite before the baby's birth.[2] E.T. never expected that his son would be placed for adoption. *Id.* at 7a.

Once in Utah, C.C. remained in contact with E.T. for several weeks, but halted direct communication after she encountered a former boyfriend, C.R.R. *Id.* at 5a–6a. As a minor, C.C. suffered frequent violence from C.R.R., resulting in fractured bones and visits to the hospital. Record 628–31. C.R.R. threatened C.C. with further violence and to keep C.C.'s other children from her, unless she gave the baby up for adoption, lied about the biological father's identity, and cut off communication with E.T. *Id.* at 258, 630. Knowing E.T. was concerned for her and the baby, C.C. instructed her friends to assure E.T. that she was doing fine and would soon return to South Dakota. Pet. App. 6a. Based on these representations, E.T. believed that C.C. needed space and she would return to South Dakota either before the birth or with the baby soon after his birth. *Id.*

C.C. gave birth to B.B. in late August 2014. Record 643. Within hours of the birth, C.R.R. visited the hospital and again threatened C.C. *Id.* at 630. In fear for her safety and that of her children and against her actual desire to keep B.B., C.C. agreed to place him for adoption with Heart to Heart Adoptions.

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[2] Amicus Academy of Adoption and Assisted Reproduction Attorneys ("AAARA") is therefore simply wrong in asserting (Br. 24) that E.T. "dodge[d] his parental responsibilities."

Heart to Heart Adoptions arrived at the hospital six minutes after the time mothers may legally relinquish their rights in Utah—twenty-four hours after birth of a baby. Pet. App. 6a. *See* Utah Code Ann. § 78B-6-125(1). C.C. signed a form, prepared by Heart to Heart Adoptions, relinquishing her parental rights and consenting to the adoption. Pet. App. 6a. Heart to Heart Adoptions, as well as petitioners' counsel, informed C.C. that the adoption would "go faster" if the birth father relinquished his rights or consented to the adoption. Record 259. C.C. signed a Statement Concerning Birth Father in which, as instructed by C.R.R., she listed her non-Indian brother-in-law as the birth father.[3] Pet. App. 6a. Heart to Heart Adoptions obtained a sworn affidavit from C.C.'s brother-in-law stating that he was the biological father, relinquishing his parental rights, consenting to the adoption, and stating that he was not an enrolled member of a tribe. *Id.*

In early September 2014, just shy of ten days after B.B.'s birth—indeed, earlier than ICWA allows, *id.* at 32a–37a—C.C. signed a Voluntary Relinquishment of Parental Rights, Consent to Adoption and Consent to Entry of Order Terminating Parental Rights in state court. *Id.* at 6a–7a. The court found that no man claimed B.B. on the birth certificate, through a paternity action, or by otherwise complying with the requirements of Utah's adoption consent statute for unwed biological fathers, and that no man had established that he is a "parent" of B.B. for purposes of ICWA. *Id.* at 7a. On these bases, the district court

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[3] Contrary to amicus Goldwater Institute's brief (Br. 9), the brother-in-law was C.C.'s sister's husband, not E.T.'s brother. Record 259.

entered an order of voluntary relinquishment and final decree of termination. *Id.*

When the child was about one month old, C.C. returned to South Dakota and, on or about September 27, 2014, she informed E.T. of the birth and that she had relinquished her parental rights, misrepresented the identity of the father, and placed B.B. for adoption. E.T. was "completely shocked and devastated." Pet. App. 7a.

Upon learning of the adoption proceedings, E.T. took immediate steps to assert his parental rights. Using the only resources available to him on the Reservation, E.T. obtained assistance from Dakota Plains Legal Services ("DPLS"); however, the non-attorney advocate there could not take legal action in Utah on his behalf. In October 2014, within a month from the time that E.T. was informed of the adoption proceedings, DPLS contacted counsel for petitioners and informed them that C.C. wanted to withdraw her consent. *Id.* at 8a. Petitioners were also informed in November 2014 that C.C. was untruthful in identifying the birth father. *Id.* Thus, petitioners were aware that the purported father's consent was fraudulent and that C.C. wished to withdraw her consent when the child was less than three months old. Petitioners chose not to inform the court of these facts.

E.T. and C.C. also sought assistance from the Tribe's ICWA office. In December 2014, the Director of the Tribe's ICWA program informed Heart to Heart Adoptions that B.B. was eligible for enrollment in the Tribe, and that the Tribe would have already intervened in the proceedings had it been notified. Record 157. Also in December, DPLS referred E.T. to

Utah Legal Services, which provided E.T. with an attorney for the first time.

C. Proceedings Below.

1. Petitioners filed a Petition for Adoption five days after B.B. was born. On September 25, 2014, the court entered an order allowing relinquishment of parental rights, terminating C.C.'s parental rights, and determining that the birth father had forfeited his rights. Pet. App. 7a.

2. On December 31, 2014—only three months after E.T. learned of the pending adoption proceedings, four months after B.B.'s birth, and before petitioners took any other action to finalize the adoption—E.T. filed a motion to intervene in order to establish paternity and to file a petition to have his parental rights determined. *Id.* at 9a. E.T. filed a paternity affidavit and C.C. filed an affidavit stating that E.T. was the birth father. *Id.* E.T. subsequently filed an Answer, Objection, and Verified Counterpetition to the Verified Petition for Adoption and a Notice of Commencement of Paternity Proceeding with the Utah Department of Health Office of Vital Records and Statistics. *Id.* at 9a–10a. Though she was unrepresented, C.C. filed a Verified Withdrawal of Consent to Adoption and Motion for Return of Custody *pro se*. *Id.* at 10a.

Although B.B. was barely four months old at the time of these filings, petitioners did not seek prompt judicial resolution of E.T.'s assertion of fraud, claim of paternity, and rights under ICWA. Instead, with temporary custody of his child, they fought him tooth-

and-nail—opposing his intervention to establish paternity.[4]

On April 21, 2015, the court denied E.T.'s motion to intervene on the basis that he was "not a 'parent' under either ICWA or under Utah's adoption statutes," which effectively mooted his motion for paternity testing. Pet. App. 149a. The court further denied C.C.'s motion to withdraw her consent to termination of parental rights on the basis that "once a birth mother's parental rights have been terminated by order of a court, that birth mother no longer has the right under ICWA to withdraw her consent, even if an adoption decree has not yet been entered."[5] *Id.* at 150a.

The trial court granted E.T.'s unopposed motion for a stay of the adoption proceedings pending appeal. *Id.* at 11a. The Utah Court of Appeals certified the case to the Utah Supreme Court.

3. On appeal, the Utah Supreme Court reversed. A majority first held that E.T. had not established paternity under Utah law, which required him to establish paternity before C.C.'s consent to adoption or relinquishment of the child for adoption, *see* Utah Code Ann. §§ 78B-6-121(3), 78B-6-122(2). Pet. App.

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[4] Petitioners do not dispute that B.B. is an "Indian child" under 25 U.S.C. § 1903(4) because he is the biological child of two enrolled members of the Cheyenne River Sioux Tribe and is eligible for membership in that Tribe.

[5] The Cheyenne River Sioux Tribe also filed a motion to intervene, which the court denied because the Tribe was not represented by counsel and purportedly lacked a right under ICWA to intervene. E.T.'s parents, represented by counsel, also moved to intervene as a priority placement under ICWA, which the trial court also denied. Pet. App. 10a–11a.

66a–67a (dissenting opinion). A different majority held, however, that federal rather than state law applied to determine whether E.T. had "acknowledged or established" paternity under § 1903(9) of ICWA. The court found that application of federal law was consistent with ICWA's text and express intent and purpose, and the application of federal law ensured the uniform nationwide application of ICWA's paternity standard. *Id.* at 41a–64a.

Applying a federal "reasonability" standard to the time and manner in which an unwed father may acknowledge or establish his paternity for the purpose of ICWA, the court concluded that E.T.'s financial and emotional support for C.C. during her pregnancy as well as the assertion of his rights in state court were timely and sufficient to acknowledge paternity under ICWA. *Id.* at 64a–66a. As a parent, the court held, E.T. "possesses a fundamental liberty interest in the care, custody, and management of [his] child" and ICWA accords him the right to intervene in the adoption proceedings. *Id.* at 69a.

Associate Chief Justice Lee, joined by Chief Justice Durrant, dissented on the ICWA holding. *Id.* at 119a–144a.

Petitioners obtained a stay of the Utah Supreme Court's decision. *Id.* at 146a. As a result, E.T. has not yet received the hearing under ICWA to which the Utah Supreme Court found he was entitled.

REASONS FOR DENYING THE PETITION

This Court should deny the petition. Petitioners fail to demonstrate a live split of authority among state courts of last resort, instead relying on two 30-year-old cases that preceded *Holyfield* and are not

inconsistent with the decision below. Moreover, the Utah Supreme Court's decision is correct. *Holyfield* held that *federal* not state law applies to ICWA's critical undefined terms. Application of state law here would require unwed fathers intent on parenting their Indian child, but who are denied knowledge of their child's birth or adoption due to fraud, to navigate 50 different state paternity laws.

I. This Case Does Not Warrant This Court's Review.

A. There Is No Split Of Authority Among State Supreme Courts On The Question Whether Federal Law Applies To ICWA's Paternity Standard.

Petitioners contend (Pet. 15–16) that there is a split between the decision below and previous decisions by the Supreme Courts of New Jersey and Oklahoma. There is no split. First, *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988), and *In re Adoption of Baby Boy D*, 742 P.2d 1059 (Okla. 1985), were decided before this Court's 1989 decision in *Holyfield*. There is no reason to believe those courts would fail to reconsider their holdings to comport with this Court's subsequent decision. Second, neither *Child of Indian Heritage* nor *Baby Boy D* categorically held that state law, and *only* state law, applies to determine whether an unwed father "acknowledged or established" paternity. Indeed, both supreme courts have *expressly* recognized that state

law does not solely control. For this reason, neither decision is inconsistent with the opinion below.[6]

1. The New Jersey And Oklahoma Cases Predate *Holyfield*.

Baby Boy D and *Child of Indian Heritage* were decided in 1985 and 1988, respectively—before this Court's decision in *Holyfield*. In *Holyfield*, this Court held that federal, not state, law governed the definition of "domicile" in ICWA. *See* 490 U.S. at 43–47. This Court held that "the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary." *Id.* at 44; *see infra* at 20–21.

Neither the New Jersey Supreme Court nor the Oklahoma Supreme Court has revisited its decision since it was issued more than 30 years ago or assessed whether it survived *Holyfield*. At the very least, it is doubtful that the New Jersey and Oklahoma Supreme Courts would adhere to *Baby Boy D* and *Child of Indian Heritage* after the Court's explicit instruction in *Holyfield* to apply federal law to a critical undefined term in ICWA. For example, in its decision the New Jersey Supreme Court in *Child of Indian Heritage* expressly relied on cases holding that state law applied to the definition of "domicile" in ICWA, *see* 543 A.2d at 935 n.6—an approach subsequently rejected by this Court in *Holyfield*.

Not surprisingly, both post-*Holyfield* state supreme court cases addressing the issue have held

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[6] The state intermediate appellate court decisions that petitioners cite (Pet. 15) do not create a relevant split of authority. *See* S. Ct. R. 10(b).

that state law does not control whether an unwed birth father qualifies as a parent under ICWA. *See Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 559–60 (S.C. 2012), *rev'd on other grounds*, 133 S. Ct. 2552 (2013); *Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011).

2. The New Jersey And Oklahoma Decisions Do Not Conflict With The Decision Below.

In addition to the uncertainty regarding the continued vitality of the 30-year-old, pre-*Holyfield* decisions, neither *Child of Indian Heritage* nor *Baby Boy D* conflicts with the Utah Supreme Court's decision.

a. In *Child of Indian Heritage*, the New Jersey Supreme Court determined that an unwed birth father who had offered to pay for the abortion of his son, had knowledge of his birth, denied paternity, consented to the adoption, and did nothing to regain custody of his son for 21 months was not a parent under ICWA. 543 A.2d at 928, 936–38. The court applied state law to determine paternity only upon concluding that New Jersey law was consistent with "methods of acknowledging and establishing paternity *within the general contemplation of Congress when it passed the ICWA*" and confirming that state law "provide[s] a *realistic opportunity* for an unwed father to establish an actual or legal relationship with his child." *Id.* at 935 (emphases added). In other words, the New Jersey Supreme Court applied state law because it was consistent with the federal standard enacted in ICWA.

At the time of *Child of Indian Heritage*, New Jersey law permitted an unwed birth father to claim paternity anytime "prior to the final judgment of adoption." *Id.* at 936. The court expressly distinguished New Jersey law, which allowed no less than eight months for an unwed birth father to establish paternity before a court finalized a private adoption, from other states' laws that required acknowledgement of paternity to be completed soon after birth. *Id.* (citing S.D. Codified Laws Ann. § 25-6-1.1 (requiring establishment of paternity within 60 days)). In stark contrast to New Jersey, Utah law requires fathers to establish paternity *before* a mother's consent to adoption or relinquishment of the child for adoption, *see* Utah Code Ann. §§ 78B-6-121(3), 78B-6-122(2)—a period that is not eight months, but as little as 24 hours.

In other words, if faced with Utah law, the New Jersey court in *Child of Indian Heritage* would not have applied state law to determine whether the birth father "acknowledged or established" paternity.

b. In *Baby Boy D*, the Oklahoma Supreme Court determined that an unwed birth father who took no steps to assert his parental rights despite his knowledge of the pending adoption, made no attempt to contact the mother, and failed to provide financial support to the mother was not entitled to ICWA's protections. 742 P.2d at 1061. The court cursorily determined that an unwed father must acknowledge or establish paternity under tribal or state law. *Id.* at 1064.

Although *Baby Boy D* applied state law, subsequently the Oklahoma Supreme Court, just like the New Jersey court, expressly held that state law

was not the end of the story. In *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004), the Indian father acknowledged paternity and was pleased at the prospect of becoming a father; the mother lived with him during a significant portion of the pregnancy; and the father quit school and obtained a job in preparation for providing for the family. *Id.* at 1108. After a falling out, the mother falsely told the father that she had miscarried, and after she ultimately told him the truth, she denied him access to the child and sought termination of parental rights and an order of eligibility for adoption without the father's consent. *Id.* at 1102. The Oklahoma Supreme Court held that the father had sufficiently acknowledged paternity under state law. The court went further, however, in an alternative holding. "*Even if the father had not met the minimal [state-law] statutory requirements*," the court explained, "it would seem incongruous to apply the statute when during the critical period—the term of pregnancy—he was allowed to believe that the mother was no longer pregnant." *Id.* at 1108 (emphasis added).[7]

Just like the New Jersey court, therefore, the Oklahoma Supreme Court has indicated that it would not rigidly adhere to state-law requirements under ICWA.

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[7] *See also In re Adoption of Baby Girl B.*, 67 P.3d 359, 367–68 (Okla. Ct. Civ. App. 2003) ("The fact of Indian relationships coupled with the strong legislative policies here involved, compel full examination and determination of the facts so that State laws or procedures do not deliberately or inadvertently work to frustrate the interests involved or the application of the [state and federal ICWA] Acts.").

B. Petitioners' Other Arguments Do Not Justify Certiorari.

1. Petitioners contend (Pet. 14–15) that the grant of certiorari in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), supports a grant in this case. Not so. *Adoptive Couple* involved unique circumstances quite distinct from those present here. It is understandable that this Court would grant the *Adoptive Couple* petition in its entirety, so as not to limit the grounds on which the Court could rule. And in fact the Court decided the case on other grounds. *Id.* at 2560 (declining to address the question presented here). Accordingly, it is not accurate to conclude that the Court found the second question presented in *Adoptive Couple* (and that petitioners here repeat) to be independently certworthy. Moreover, that this Court occasionally is unable to address a question presented in one case, and thereafter grants certiorari in a second case in order to reach that question (Pet. 14–15), provides no guidance as to whether, *in this case*, the question presented satisfies Rule 10. And there is no basis to argue that the grant in *Adoptive Couple* excuses petitioners from independently satisfying Rule 10 here.

2. In the absence of a split of authority, petitioners seek to magnify the importance of the question presented by contending that it affects "over 10,000 adoptions proceedings annually." Pet. 19. Petitioners misread the statistics on which they rely, confusing the total number of Indian children under 18 who had been adopted during the previous *18 years* with the number adopted in 2008 itself.[8] The actual number of

[8] The source petitioners cite (Pet. 18 & n.15) provides the number of adopted Indian children *under age 18*. *See* Nat'l Council for

Indian children adopted in 2008 is a fraction of 10,000. And this legal issue impacts only the small subset of those adoptions in which the adoption was contested, paternity was also contested, and state and federal law differed in the standard by which an unwed father establishes paternity. There is no basis for believing that subset is anything but a small number of adoptions.

3. Petitioners also contend that certiorari is warranted because the Utah Supreme Court decision will result in "uncertainty" regarding the process for acknowledging and establishing paternity that will hurt Indian children, birth fathers, and adoptive parents by prolonging litigation.[9] Pet. 21–22. To the contrary, a federal standard provides a single, predictable standard that is more likely to achieve uniform application by state courts nationwide and guard against intentional evasion of ICWA's protections.

Standards based on reasonableness are anything but vague. As the cases cited by the majority below show, reasonableness standards are a mainstay of the common law applied by state courts every day. Pet. App. 60a–61a n.26. Indeed, Utah state courts

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Adoption, Adoption Factbook V at 109 (2011), *available at* https://www.adoptioncouncil.org/images/downloads/adoption-factbook-v-digital.pdf.

[9] Amicus AAARA contends (Br. 9) that the decision below "ignored [the] evolved 'biology plus' template in direct contravention of the Congressional intent behind ICWA." But the Utah Supreme Court did not rely solely on E.T.'s biological connection with B.B., but also on his support for C.C. during the pregnancy and his "timely" assertion of his rights under ICWA. Pet. App. 64a–66a.

frequently apply reasonableness standards under the Utah Adoption Act, Utah Code Ann. §§ 78B-6-101, *et seq*.[10]

The Utah Supreme Court's federal reasonability standard does not increase uncertainty regarding the adoption of Indian children. ICWA puts prospective adoptive couples on notice that a parent may withdraw his or her consent "for any reason at any time prior to entry of a final decree of termination or adoption" and may invalidate an adoption up to two years after it is entered upon a showing of fraud. 25 U.S.C. § 1913(c), (d). Since an order terminating parental rights may be set aside on the basis of violation of these consent requirements, *id.* § 1914, Congress' intent to protect the rights of parents of Indian children is unambiguous.

Ultimately, any alleged uncertainty of a federal reasonability standard is not what will hurt B.B. or future couples seeking to adopt Indian children. B.B. has been deprived of a relationship with his biological father—a relationship that is constitutionally protected. *See Stanley v. Illinois*, 405 U.S. 645 (1972). Petitioners' failure to promptly inform the court of the fraud and permit expeditious adjudication of it, and the trial court's failure to address and correct the fraud—*not* E.T.'s prompt assertion of his legal rights—would be the cause of any adverse impact on

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[10] For example, under § 78B-6-122(1)(c), an unwed father's consent to adoption is required if a father "through the exercise of reasonable diligence could not have known" that specified circumstances existed that would alert him to the potential adoption of his child. Moreover, to obtain relief from an adoption decree a plaintiff must bring an action within a "reasonable time." *Maertz v. Maertz*, 827 P.2d 259, 261 (Utah Ct. App. 1992).

B.B. resulting from a future change in custody of the child. *See Holyfield*, 490 U.S. at 53 ("Had the mandate of the ICWA been followed . . ., much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to 'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.'") (quoting *In re Adoption of Halloway*, 732 P.2d 962, 972 (Utah 1986)).

II. The Utah Supreme Court Correctly Held That Federal Law Applies, Consistent With *Holyfield*.

Holyfield controls in this case. The Utah Supreme Court correctly applied *Holyfield* and determined that federal, not state, law governs whether an unwed father "acknowledged or established" paternity under § 1903(9).

A. Holyfield Directly Controls The Legal Question In This Case.

Similar to C.C., in *Holyfield*, the Indian birth mother intentionally left her domicile on the Choctaw Reservation to give birth and to place her Indian twins for adoption with a non-Indian couple in state court without notice to the tribe. 490 U.S. at 38–40. The tribe moved to vacate the adoption on the basis that ICWA vested exclusive jurisdiction over the adoption in the tribal court. *Id.* at 39. The Supreme Court of Mississippi applied state law to the definition of "domicile" and determined that the Indian children's domicile was off the reservation and denied tribal-court jurisdiction. This Court reversed.

The legal question in *Holyfield*, as in this case, was whether state or federal law applies to define a critical

term left undefined in ICWA. *Id.* at 43–44. The Court's analysis proceeded from the general assumption that "in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Id.* at 43 (citations omitted). The Court looked to the purpose of the statute and to "established common-law principles" "to the extent that they are not inconsistent with the objectives of the congressional scheme." *Id.* at 47–48.

This Court determined that federal law applied because "the federal program would be impaired if state law were to control." *Id.* at 44. The *Holyfield* Court observed that "the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; *quite the contrary*." *Id.* (emphasis added). "Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities." *Id.* at 45; *see also id.* at 45 n.17 (noting the "inescapable" conclusion that "the main effect" of the statute is "to curtail state authority"). The Court explained that "it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law." *Id.* at 45.

The Court also applied federal law to avoid a parent's manipulation of his or her domicile to circumvent tribal courts' exclusive jurisdiction "merely by transporting [the child] across state lines." *Id.* at 46. Such a gaping loop-hole in Congress' carefully crafted statutory scheme, the Court predicted, "would likely spur the development of an adoption brokerage business." *Id.* at 46 n.20.

B. The Utah Supreme Court Faithfully Applied *Holyfield*.

In interpreting "acknowledged or established," the Utah Supreme Court followed *Holyfield* precisely. The court first considered the plain meaning of the terms "acknowledge" and "establish" and determined that their dictionary definitions were inadequate. Pet. App. 43a–45a. Next, the court observed that ICWA defined certain terms with reference to state or tribal law, but did not do so with respect to "acknowledge or establish." *Id.* at 49a–50a (citing 25 U.S.C. § 1903(2), (6)). Had Congress intended to defer to state law, the court concluded, "it would have said so." *Id.* at 50a (quoting *Holyfield*, 490 U.S. at 47 n.22).

Consistent with *Holyfield*, the court considered Congress' explicit requirement that where federal or state law provides a "higher standard of protection to the rights of a parent . . . of an Indian child than the rights provided under [ICWA]," courts apply that higher standard. *Id.* at 55a (quoting 25 U.S.C. § 1921). Utah paternity law provided the court's case in point. In Utah, a birth father can be precluded from acknowledging paternity if the mother declines to sign the declaration of paternity. Utah Code Ann. § 78B-15-302(1)(c). Consequently, the court found, "when applying Utah law, the unmarried biological father's option to acknowledge paternity is essentially read out of ICWA." Pet. App. 56a. "[A]pplying Utah law specifically to eliminate the option of acknowledging paternity . . . 'would, to a large extent, nullify the purpose the ICWA was intended to accomplish.'" *Id.* at 57a (quoting *Holyfield*, 490 U.S. at 52).

The Utah Supreme Court also explained that application of federal law ensured uniform nationwide

applicability of the paternity standard under ICWA. If domicile is the key to exclusive tribal court jurisdiction, the standard for acknowledging and establishing paternity is the key to protecting the rights of an unwed father. Consistent with *Holyfield*'s concern about parents circumventing tribal-court jurisdiction, the court explained, application of federal law to the definition of "acknowledged or established" prevents a parent's interstate transport of the child to defeat the rights of an unwed father.[11] *Id.* at 57a–58a.

C. A Uniform Federal Standard Of Paternity Promotes ICWA's Policies.

The Utah Supreme Court's federal standard ensures greater certainty in cases involving the law of multiple states, in cases in which a father is not informed of his child's birth or adoption, and in cases of fraud. This case implicates all three of these circumstances.

Mothers frequently cross state lines to place their children for adoption. In *In re I.K.*, 220 P.3d 464 (Utah 2009), for example, the birth parents lived in New Mexico, the mother gave birth in Colorado, and she then travelled to Utah to place the child for adoption.[12] *Id.* at 466. Under petitioners' theory, if the

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[11] Amicus AAARA contends (Br. 12–13) that the decision below "eviscerates" this Court's decision in *Adoptive Couple* "[b]ecause E.T. . . . never had custody of B.B." But the majority below held that E.T. had "legal custody" of B.B. under Utah law. Pet. App. 69a; *see also id.* at 77a n.34. This Court lacks jurisdiction to review that state-law determination. *See Murdock v. Memphis,* 87 U.S. (20 Wall.) 590, 626 (1875).

[12] *See also*, *e.g.*, *Nevares v. Adoptive Couple,* 384 P.3d 213 (Utah 2016); *In re Adoption of Baby Boy B*, 308 P.3d 382 (Utah 2012); *In re Baby Girl T.*, 298 P.3d 1251 (Utah 2012).

mother denies the father notice of the pregnancy, birth, or adoption, the father would be forced to navigate a labyrinth of 50 potentially applicable (and inconsistent) state paternity statutes and, in the process, could—through no fault of his own—lose his parental rights. *See*, *e.g.*, *id.* (the father filed a paternity action in the state of the birth parents' residence instead of the state of the adoption because the mother did not inform him of the adoption proceedings). A federal standard avoids the absurd result whereby "a parent who has never had physical custody—through no fault of his own—could not bring an action under section 1914," which, the Utah court observed, "would have the same baffling effect of barring the very people the Act is intended to benefit." Pet. App. 72a; *see Holyfield*, 490 U.S. at 43 ("federal statutes are generally intended to have uniform nationwide application").

As this case demonstrates and as ICWA contemplates, not only are fathers sometimes intentionally denied knowledge of their child's birth or adoption, but they also can be the victims of fraud. *See* 25 U.S.C. §§ 1913(d), 1914. Application of a federal reasonability standard in states such as Utah, which do not recognize an exception within their paternity statutes for fraud, *see* Utah Code Ann. § 78B-6-106, is the only way to prevent the violation of a willing father's constitutionally protected interest in parenthood. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 118 (1996) (the interest of parents in maintaining their relationships with their children is "an important interest, one that undeniably warrants deference and, absent a powerful countervailing interest, protection.") (internal quotation marks omitted); *Stanley*, 405 U.S. at 651 ("The rights to conceive and

to raise one's children have been deemed essential.") (internal quotation marks omitted).

As both the majority and dissent below acknowledged, standards for an unwed father to acknowledge paternity "vary widely across the fifty states."[13] Pet App. 46a, 127a n.35. In states that permit the adoption of a child despite claims of fraud by an unwed father, a federal standard is the only way to "adequately protect[] his opportunity to form . . . a relationship" with his child, as protected by the Due Process Clause of the Fourteenth Amendment. *Lehr v. Robertson*, 463 U.S. 248, 263 (1983); *see also Bruce L. v. W.E.*, 247 P.3d 966, 978 (Alaska 2011) (an unwed father who "'manifests an interest in developing a relationship with [his] child' cannot constitutionally be denied parental status based solely on the failure to comply with the technical requirements for establishing paternity") (citing *Stanley*, 405 U.S. at 658). As in *Holyfield*, "Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions" of "acknowledge" and "establish." 490 U.S. at 45.

Finally, petitioners contend that "'the Federal government, through our history, has deferred to state-law policy decisions with respect to domestic relations.'" Pet. 1 (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013)). It is true that, generally speaking, Congress defers to state law in this area. But there are significant exceptions. And, pursuant to

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[13] Amicus Goldwater Institute therefore errs in contending (Br. 3) that "[s]uch rules are standardized across all fifty states. . . ." *See also* Brief of Amicus Utah Adoption Council 14 ("each state's statutory regime for determining how a biological father acknowledges or establishes paternity is unique").

Congress' plenary authority over Indian affairs, ICWA is one of the principal exceptions to congressional deference to state family law—precisely because Congress wanted to change the practices of state courts and child welfare agencies, *see* 25 U.S.C. § 1901(2), (4), (5), and for this reason adopted "minimum Federal standards," *id.* § 1902. *See Holyfield*, 490 U.S. at 45 ("Congress perceived the States and their courts as partly responsible for the problem it intended to correct."). Congress simply did not intend to permit application of state law that is "inconsistent with federal policy." *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 241 (1985). Finally, ICWA is not the only federal statute adopting a federal paternity standard; for example, Congress adopted federal standards for determining parenthood for purposes of citizenship, *see* 8 U.S.C. § 1409, and eligibility for social security benefits, *see* 42 U.S.C. § 416(h)(3)(C).[14]

[14] Amicus Goldwater Institute asserts a constitutional argument (Br. 10–14) that was neither advanced nor addressed below, and therefore is not properly before this Court. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997). The argument also is wrong, as Congress exercises its plenary power as to Indians "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *United States v. Antelope*, 430 U.S. 641, 645–47 (1977) (quoting *Morton v. Mancari*, 417 U.S. 535, 554 (1974)).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted.

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