No. 17- _____

In the Supreme Court of the United States

R.K.B. AND K.A.B., PETITIONERS,

v.

E.T.

On Petition for a Writ of Certiorari to the Utah Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Indian Child Welfare Act of 1978, 25 U.S.C. 1901–1963, applies to state custody proceedings involving an Indian child. State courts of last resort are divided on the following critical question, a question that likely affects thousands of adoption proceedings each year, and on which this court granted certiorari but did not reach in *Adoptive Couple* v. *Baby Girl*, 133 S. Ct. 2552, 2560 (2013):

Does the Indian Child Welfare Act define "parent" in 25 U.S.C. 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent?

PARTIES TO THE PROCEEDING

The identities of Petitioners, R.K.B. and K.A.B., and Respondent E.T. are in a sealed letter on file with the clerk.

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INTRODUCTION

As this Court recently noted, "the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations." *United States* v. *Windsor*, 133 S. Ct. 2675, 2691 (2013). Yet a growing group of state courts of last resort claim that this principle is subject to an *implicit* exception under the Indian Child Welfare Act (ICWA or Act). These courts conclude—in conflict with at least two other state courts of last resort—that an unwed Native American birth father can acknowledge or establish paternity without satisfying state-law requirements for such a showing, and thereby thwart an adoption by a stable, loving family.

In the decision below, a bare majority of the Utah Supreme Court acknowledged that the Act "does not explicitly define the procedures and timing required" for acknowledging or establishing paternity. 59a. But that court nonetheless joined two other courts of last resort—and a state intermediate court—in holding that the Act allows unwed fathers to establish paternity even when they have failed to do so under state law. In so holding, the Utah court claimed that a vague federal "reasonability standard applies to the time and manner in which an unwed father may acknowledge or establish his paternity." 59a.

Like the other courts it has now joined, the Utah Supreme Court's holding turns the presumption of deference to state legislatures in family policy matters on its head. Rather than treating congressional silence as reflecting deference to state legislatures, see *Windsor*, 133 S. Ct. at 2691, the decision treats silence as permission for courts to "presume a [federal] reasonability

standard," 59a, or otherwise to depart from the requirements of state law.

It would be one thing if the decision below merely replaced a predictable state-law standard with another predictable standard. But it does no such thing. Rather, as Associate Chief Justice Thomas Lee noted in dissent, the decision leaves the bounds of the new federal "reasonableness" standard largely up to future courts. See 80a (Lee, A.C.J., dissenting). This is an invitation for an unwed father to challenge an adoption years after the child has been placed with a new family. As this case demonstrates, a court applying this vague federal standard would then engage in lengthy litigation about whether the father "reasonably" acknowledged paternity. All the time, children—and their family status—would be held in limbo.

Such a result would deprive the child of the "stability and security" of living in the same household for her entire childhood. Cf. *Adoptive Couple* v. *Baby Girl*, 133 S. Ct. 2552, 2561 (2013). It would also deter adoption by inserting enormous uncertainty into the determination of when an unwed father may challenge an adoption, making prospective adoptive parents less willing to risk adopting an Indian child.

State laws clearly lay out whether a child should live in the household of her unwed father or that of a willing adoptive couple. By ignoring state law, the Utah Supreme Court fundamentally undercut the Act's text and the centuries-old presumption reaffirmed in *Windsor*. This Court should grant review to correct that fundamental error and, in so doing, resolve the existing conflict on the question presented—a question that is likely implicated in thousands of adoptions each year.

OPINIONS BELOW

The opinion of the Utah Supreme Court is reported at 2017 UT 59, with publication in the Pacific Reporter forthcoming. It is reprinted at 1a. The order staying that decision pending resolution of this petition is reprinted at 146a. The unreported trial court opinion is reprinted at 147a.

JURISDICTION

The Utah Supreme Court issued its opinion on August 31, 2017. Justice Sotomayor granted an extension of time to file this petition until December 29, 2017.

Although the Utah Supreme Court's decision contemplates further proceedings on remand, that court's judgment is final for purposes of 28 U.S.C. 1257 because it falls comfortably within two categories of final judgments identified in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 480 (1975).

First, the Utah Supreme Court has squarely decided an issue of federal law that "will . . . require decision regardless of the outcome of future state-court proceedings." See 420 U.S. at 480. Based on the ruling below, Respondent—the putative birth father of the child (B.B.) that is the subject of the underlying adoption proceeding—now has an absolute right to intervene for the purpose of thwarting the adoption of a child who has lived with his would-be adoptive parents for his entire life of more than three years. See 68a-74a; 77a–78a; see also Utah Code 78A-6-507. Moreover, under that ruling, Respondent may retain parental rights even if Petitioners ultimately retain custody of B.B. See Utah Code 78B-6-133(2)(b). Either way, to vindicate their rights as adoptive parents, and in the best interests of their son, Petitioners will be forced to

continue challenging Respondent's parental status in any future state-court proceedings and, ultimately, back in this Court. Similarly, it is inconceivable that Respondent, having achieved parental status as a result of the decision below, will fail to invoke that status in challenging any future decision that may be adverse to him.

Second, a "refusal [] to review" the decision below now would "seriously erode federal policy." *Cox*, 420 U.S. at 483. By delaying adoptions through increased litigation, the Utah Supreme Court's holding would undercut stability for Indian children needing adoption. See *Baby Girl*, 133 S. Ct. at 2583 (noting the Act is designed to promote stability) (internal citations omitted). Accordingly, this is one of those cases in which "[r]esolution of this important issue . . . should not remain in doubt." *Fort Wayne Books* v. *Indiana*, 489 U.S. 46, 56 (1989).

RELEVANT STATUTORY PROVISION

25 U.S.C. 1903(9) defines "parent" as follows:

> "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established[.]

STATEMENT

An understanding of this case's importance requires some familiarity with the legal framework of the Indian Child Welfare Act, this Court's decision in *Baby Girl*, the facts of this case, and the Utah Supreme Court's majority and dissenting opinions.

A. The Indian Child Welfare Act

Many laws protecting the rights of unwed fathers were enacted shortly after this Court's decision in *Stanley* v. *Illinois*, 405 U.S. 645 (1972). *Stanley* concerned custody of children following the death of their mother. Because the parents were not married and Illinois law presumed an unwed father was unfit to be a parent, Illinois took the children into state custody after the mother's death. *Id.* at 646–47. This Court held that the Illinois law violated basic due process principles. The Court explained that because the Illinois law "insist[ed] on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove[,]" it was unconstitutional. *Id.* at 658.

1. After *Stanley*, "many states adopted statutes defining the circumstances under which a man would be presumed to be a child's father. . . ." *Yavapai-Apache Tribe* v. *Mejia*, 906 S.W.2d 152, 172 (Tex. App. 1995). Approximately fifteen states adopted a uniform code. *In re Adoption of Child of Indian Heritage*, 543 A.2d 925, 934 (N.J. 1988). This code explained what an unwed father must do to acknowledge or establish paternity. Uniform Parentage Act §§ 3, 4 (Unif. Law Comm'n 1973).

Even those states—like Utah—that did not follow the uniform code adopted similar protections. See *In re Adoption of Child of Indian Heritage*, 543 A.2d at 934.

Utah adopted a statute protecting unwed fathers just three years after *Stanley*. See 1975 Utah Laws 378, 379–380 [Ch. 94]. Much like Utah's statute today, the 1975 statute said that an unwed father may "claim rights pertaining to his paternity" "by registering with" state agencies. *Id.* This registration must include "a notice of his claim of paternity of an illegitimate child and of his willingness and intent to support the child to the best of his ability." *Id.*; see also *Wells* v. *Children's Aid Soc'y*, 681 P.2d 199, 206 (Utah 1984) (upholding statute as constitutional).[1] This statute, much like the uniform code, thus explained what an unwed father must do to "acknowledge" or "establish" paternity. *Id.* at 204–05 (citing 1975 Utah Laws 378, 379).

2. The federal Indian Child Welfare Act was passed in 1978, just six years after *Stanley* and three years after Utah enacted its statute explaining how an unwed father could acknowledge or establish paternity. Congress's principal purpose in the Act was to protect "Indian parents and their children who were involuntarily separated by decisions of local welfare authorities." *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 34 (1989). Recognizing that a "high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies," 25 U.S.C. 1901(4), Congress established "minimum Federal standards for the removal of Indian children," *id.* § 1902. The Act thus represents a rare but limited entry by the federal government into substantive family law,

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[1] *Wells*' logic was abrogated by a plurality of the Utah Supreme Court in *Bolden v. Doe*, 358 P.3d 1009, 1024–1025 (Utah 2014). But *Bolden* did not alter the constitutionality of Utah's statute for acknowledging and establishing paternity.

which has long been the exclusive domain of state law. See *United States* v. *Windsor,* 133 S. Ct. 2675, 2691 (2013). ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.") (quoting *In re Burrus*, 136 U.S. 586, 593–594 (1890)).

Congress did not, however, extend federal rights under the Act to all biological parents of Indian children. Rather, Congress excluded from the definition of "parent" "the unwed father where paternity has not been acknowledged or established[.]" 25 U.S.C. 1903(9). The Act did not attempt to define expressly how an unwed father could "acknowledge" or "establish" paternity—matters traditionally governed by state law—much less establish federal standards governing those inquiries. *Id.*; 42a & n.20.

B. This Court's Decision in *Baby Girl*

In a recent decision interpreting the Act, *Adoptive Couple* v. *Baby Girl*, this Court addressed a related question: whether a child who was never in the custody of her biological father could be adopted without imposing on the adoptive couple a heightened standard for terminating the biological father's parental rights. 133 S. Ct. at 2557.

In that case, the mother placed the child for adoption, but the Cherokee Nation was unable to locate the biological father, and the adoption went forward. *Id.* at 2558. When he learned of the adoption, the father protested. He claimed the Act protected his relationship with the child because (1) he had "acknowledged" or "established" paternity under the Act despite not doing so under South Carolina law, and (2) the Act mandated that "courts consider heightened federal requirements

to terminate parental rights" as to Indian parents. *Adoptive Couple* v. *Baby Girl*, 731 S.E.2d 550, 559–563 (S.C. 2012). Under the Act, the father needed to win on both issues to gain custody. The South Carolina court ruled for him on both issues. *Ibid.* Following that decision, "at the age of 27 months, Baby Girl was handed over to Biological Father, whom she had never met." *Baby Girl*, 133 S. Ct. at 2559.

After the father prevailed in the South Carolina Supreme Court, this Court granted the adoptive couple's petition for certiorari. The couple claimed that the Act only required a heightened federal standard for removal if the father had ever had custody, which he had not at the time of the South Carolina Supreme Court's decision. See Petition for Writ of Certiorari at i, *Adoptive Couple* v. *Baby Girl*, No. 12-399. The couple also raised the question presented here: whether state law controls the determination whether an unwed father has acknowledged or established paternity. *Ibid.* This Court granted certiorari on both questions.

On the merits, the Court assumed the father was a "parent" for purposes of the Act, and then held that a showing of serious harm was not required for an adoption when the father had never had custody of the child. 133 S. Ct. at 2565. Because it ruled for the couple on these grounds, the Court did not decide the more basic question of whether state law controls the determination whether an unwed father has acknowledged or established paternity. *Id.* at 2560, 2560 n.4. Rather, finding that the adoptive couple prevailed on its first argument, the Court reversed and remanded for further proceedings. *Id.* at 2557.

C. The Facts of This Case

This case turns on the question left open in *Baby Girl*—whether an unwed Indian father, who has not acknowledged or established paternity under state law, is a "parent" under the Act.

1. Both courts below accepted Respondent's explanation of his paternity. Respondent alleged that he had a sexual relationship with the birth mother and she became pregnant with B.B. 5a.[2] Both Respondent and the birth mother are Indians. 5a. When she was six months pregnant, the birth mother relocated to Utah, and reconnected with the father of her other children. 5a. Initially, Respondent communicated with the birth mother while in Utah. 6a. But she then cut off communications with Respondent and determined to give B.B. up for adoption. 6a. Thinking that the birth mother "just needed some space," Respondent testified he assumed that she "would return to South Dakota before she delivered [their] baby, or that she and the baby would return together after the delivery." 6a. Respondent thus "knew [birth mother] was in Utah for at least two months prior to the Child's birth, and knew that she had cut off communication with him." 186a. "During all of this time, he could have complied with the Utah adoption statutes, but did not do so." 186a.

In the adoption proceedings, the birth mother told a different story. Rather than telling the court that Respondent was the birth father, the mother claimed her brother-in-law was the father. 6a. According to Respondent—and, again, accepted by the court below—

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[2] The full names of the birth and adoptive parents, as well as the name of birth mother's brother-in-law, are in a sealed letter on file with the clerk.

the brother-in-law also lied about B.B.'s paternity and consented to the adoption. 6a. Based on the brother-in-law's statements, the trial court found the adoption unopposed. That is, the court concluded that no man had contested the adoption according to the requirements of Utah law. 156a (citing Utah Code 78B-6-121(3)(a)).

2. Petitioners took custody of B.B. in late Summer 2014, very shortly after his birth, and have raised him ever since. 157a. B.B. is now more than three years old.

Meanwhile, the birth mother returned to South Dakota immediately after B.B. was placed for adoption. 7a. She told Respondent that B.B. had been born and placed for adoption. 7a. Respondent immediately sought legal advice, but did not file a motion to intervene in the adoption proceeding for three additional months. 7a–8a. When he finally intervened, he asserted his rights under the Act, including arguing that he was a "parent" under Section 1903(9). 149a.

3. The trial court denied Respondent's motion to intervene. The court first noted that the Act's core purpose—to prevent removal of children from established Indian homes—was not present here. 162a ("This case . . . does not involve the action of any [] child welfare agency going into an Indian home and attempting to remove a child, and thus does not directly implicate the specific policy concerns that apparently motivated the passage of ICWA."). The trial court nonetheless concluded that the Act applied, as B.B. is an Indian child. See 162a–163a.

The trial court then addressed whether Respondent was a "parent" under the Act. The court rejected Respondent's argument that "an unwed biological father can satisfy it by simply—and in basically any

manner—'acknowledging' paternity of the Child." 164a. Instead, the trial court relied on the language of the Act to conclude that whether Respondent had "acknowledged" or "established" paternity was governed by state law, that Respondent had not established that he was a parent under Utah law, and thus was not a parent under the Act. 201a. The trial court further found that the discussion of *Stanley* in the legislative history strongly suggested "a legislative intent to have the acknowledgment or establishment of paternity determined by state law." 167a (citation omitted).

D. The Utah Supreme Court Decision

Respondent appealed on various state and federal questions, including the federal question presented here. See generally 11a. On appeal and certification from the Utah Court of Appeals, a divided Utah Supreme Court reversed the trial court's holding that Respondent not be allowed to intervene in the adoption proceeding. The court concluded that the trial court was correct that intervention was not permitted as a matter of Utah law.[3] However, a majority also concluded that Respondent's intervention was required by the Act. 41a–66a.

In so holding, the majority opined that the terms "acknowledged" and "established" in the Act were to be read according to their ordinary meaning, not as legal

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[3] The three-Justice majority on this point was joined by Justices Lee, Durrant and Pearce. While Justice Pearce did not join any opinion opining on this point, the opinion is clear that Justices Himonas and Durham were dissenting when they concluded that the birth father acknowledged or established paternity under Utah law. App. 1a–2a (syllabus); 66a–67a (Opinion of Himonas, J., dissenting).

terms of art. 43a–45a. Rejecting the idea that state law provides the meaning of these words, the majority instead concluded that the terms are to be construed "reasonably." 59a ("[A] reasonability standard applies to the time and manner in which an unwed father may acknowledge or establish his paternity."). And the majority concluded that Respondent had "reasonably" acknowledged his paternity by filing "a motion to intervene, a motion for paternity testing, and a paternity affidavit expressly acknowledging that he was the Child's biological father." 65a.

Justice Lee, joined by Chief Justice Durrant, dissented. 119a–145a. According to the dissent, the majority's opinion "expands the reach of ICWA in a manner that its plain language cannot bear." The dissenters also noted four statutory indications that each foreclosed the majority's view, and established that the terms "acknowledge" and "establish" should be understood as legal terms of art referencing state-law processes for determining paternity:

- the Congress that passed the Act understood that courts would likely read family law terms as "determined by state, rather than federal law" as "paternity . . . has always been a matter within the exclusive sovereignty of the states;"
- "acknowledgement and establishment of paternity are long-established terms of art in state family law;"
- the use of "acknowledged" and "established" refer to past actions, meaning actions predating any litigation under the Act; and
- it needs to be clear when a birth father acknowledges or establishes paternity, so third parties

> (including courts and would-be adoptive parents) can notify him of any proceedings in which he might have an interest.

121a, 125a–130a (citations omitted). Noting that there was no reason to expect that Congress intended state courts of last resort to define federal law in this area, the dissenters concluded that the terms "acknowledged" and "established" are intended to be terms of art referencing the relevant state law. 145a.

6. Petitioners received a stay pending resolution of this petition for certiorari. 146a. That stay prevented the trial court from immediately (a) allowing Respondent to intervene in the ongoing adoption proceeding, and (b) moving ahead with adjudicating—and possibly changing—custody until this petition is fully resolved.

REASONS FOR GRANTING THE PETITION

As noted above, this Court previously granted certiorari on the question presented. There is no doubt the Court was right to do so: There is a clear conflict among state courts of last resort on that question, which in turn creates uncertainty about procedures for adopting Indian children throughout the United States. Moreover, the Utah Supreme Court majority misinterpreted the Act's language, for reasons well explained in Justice Lee's dissent. And this case is a clean vehicle for resolving the question presented, with the majority and dissenting opinions below well-tailored to aid its resolution.

A. The decision below expands the conflict on the federal question on which this Court granted review, but which it did not reach, in *Baby Girl.*

This court has already determined that there are "compelling reasons" for resolving the question presented. See Sup. Ct. R. 10.

1. As explained above, in *Baby Girl*, this Court granted certiorari on this very question. See Petition for Writ of Certiorari at i, *Adoptive Couple* v. *Baby Girl*, No. 12-399; *Adoptive Couple* v. *Baby Girl*, 568 U.S. 1081 (2013) (granting certiorari). But the Court ultimately decided that case on other grounds. See *Baby Girl,* 133 S. Ct. at 2560 n.4 (2013) ("[W]e need not decide whether Biological Father is a 'parent.'").

This case thus falls within a prominent category of cases in which this Court has granted certiorari on a question, failed to decide the question in that case, and then resolved the same question on a subsequent petition. See, *e.g.*, *Obergefell* v. *Hodges*, 135 S. Ct. 2584

(2015) (resolving issue previously granted in a narrower form but not reached in *Hollingsworth* v. *Perry*, 133 S. Ct. 2652 (2015)); *Johnson* v. *California*, 545 U.S. 162, 167–168 (2005) (granting certiorari on the same question a second time, and then deciding it); *Employment Division*. v. *Smith*, 494 U.S. 872 (1990) (similar).

The Court should follow that pattern here, and once again grant certiorari to resolve the question on which review was granted in *Baby Girl*, but which has yet to be resolved.

2. The Utah Supreme Court took a novel approach to the question presented, deepening an already substantial split among state courts of last resort.

Before the Utah decision, two state courts of last resort and two intermediate state appellate courts had all held that state law controls the question whether a birth father has "acknowledged" or "established" paternity. Specifically, the supreme courts of New Jersey and Oklahoma have held that the Act does not create parental rights for biological fathers when state law does not otherwise recognize that right.[4] Intermediate appellate courts in California[5] and Texas[6] have ruled similarly.

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[4] *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1064 (Okla. 1985) (eroded on other grounds in *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004)).

[5] *In re Daniel M.*, 1 Cal. Rptr. 3d 897, 900 (Cal. App. 4th 2003).

[6] *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 172 (Tex. App. 1995).

However, the Alaska Supreme Court has held that the Act requires that biological fathers be given certain rights *regardless* of state law.[7] The South Carolina Supreme Court has likewise signaled it will follow the same rule.[8] The Arizona Court of Appeals has held the same.[9] Agreeing with these courts—but going further still—the Utah Supreme Court held that in determining paternity in cases involving Indian children, courts must apply a previously unknown federal "reasonableness" standard. 58a–64a.

This division creates confusion among courts, biological parents, and adoptive parents, substantially extending the amount of time before a child's home is finally determined. Moreover, to the extent state courts of last resort have read the Act to displace state law governing the determination of who constitutes a legal "parent," that misinterpretation of the Act undermines the historical and proper allocation of responsibility for adoption and custody matters to the States.

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[7] *Bruce L.* v. *W.E.*, 247 P.3d 966, 979 (Alaska 2011).

[8] *Adoptive Couple* v. *Baby Girl*, 731 S.E.2d 550, 559–560 (S.C. 2012), *reversed on other grounds*, 133 S. Ct. 2552 (2013).

[9] *Jared P.* v. *Glade T.*, 209 P.3d 157, 160, 162 (Ariz. Ct. App. 2009).

B. The practical importance of that question for children, adoptive parents and birth parents, has likewise grown.

In addition to being the subject of a deepening split among state courts of last resort, the question presented urgently needs the resolution that only this Court can provide. See Sup. Ct. R. 10(c). The alternative—leaving the issue to percolate in future cases—would not only continue to undermine the States' authority over family-law matters within their borders. That alternative would also harm children, chill adoptions, and encourage even more litigation between adoptive parents and alleged birth parents.

1. One reason the question has such enormous practical importance is that, since the Act was passed, the number of people identifying as Native Americans has exploded. According to the most recent United States Census, approximately 5.2 million Americans now self-identify as having some Indian heritage,[10] as compared to 1.4 million when the Act was adopted, [11] thus dramatically expanding the number of families and children affected by the Act.

Furthermore, the states divided over the Act's definition of "parent" include the four states with the largest Indian populations: California, Oklahoma,

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[10] Tina Norris et al., U.S. Census Bureau, The American Indian and Alaska Native Population: 2010, at 1 (2012), https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.

[11] See Jeffrey S. Passel, *The Growing American Indian Population, 1960–1990: Beyond Demography*, *in* Changing Numbers, Changing Needs: American Indian Demography and Public Health 79, 82 (Gary D. Sandefur et al., eds. 1996) (noting 1980 population).

Arizona, and Texas, which collectively account for 36% of the nation's Indian population.[12] Given that more than a third of the Indian population is already affected by the split among state courts on the question presented, the need for resolution by this Court is clear.

2. The ongoing conflict has its greatest impact on the children who are the subjects of custody and adoption battles, which are very common with respect to Indian children. One reason, as noted in the petition in *Baby Girl* (at 18), is that the birthrate of Indian children outside of marriage is substantially higher than the rate in the general U.S. population. In 2015, for example, 29,148 Indian children, or 65.8 percent, were born to unmarried parents—compared with 40.3 of children born to unmarried parents in the U.S. population as a whole.[13] Moreover, as of September 2011, there were 8,020 Alaskan Native or American Indian children in publicly supported foster care.[14]

The adoption rates for Indian children are equally striking. In 2008—the last year for which complete data are apparently available—27,457 children adopted in the United States were Indian.[15] Based on nationwide statistics, at least half of those were likely

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[12] Tina Norris et al., *supra* note 10, at 6–7.

[13] Joyce A. Martin, et al., *Births: Final Data for 2015*, Nat'l Vital Statistics Rep., Jan. 5, 2017 at 44.

[14] Children's Bureau, U.S. Dep't of Health & Human Servs., The AFCARS Report (Preliminary FY 2011 Estimates as of July 2012), No. 19, at 2, http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport19.pdf (last visited Dec. 27, 2017).

[15] Nat'l Council for Adoption, Adoption Factbook V 109 (2011).

born to unwed Indian fathers.[16] That in turn suggests that the question presented here is potentially implicated in over 10,000 adoption proceedings annually.

These statistics alone show the pressing need for this Court to resolve the question presented. That question is critical to the proper implementation of an important federal law, one that is implicated in thousands of adoption cases involving Indian children of unwed parents.

3. The present uncertainty on the question presented also has concrete effects in the lives of those children. For example, any uncertainty about whether an unwed father has "acknowledged" paternity within the meaning of the Act increases the likelihood that his child will be shuffled back and forth between the adoptive couple and an unwed father during years-long litigation.

This shuffling can be devastating to children. As the National Council for Adoption has emphasized, "Consistent caretakers are developmentally necessary and removal from a loving family can be detrimental to a child's whole development." Brief for the National Council for Adoption at 11, *Adoptive Couple* v. *Baby Girl*, 133 S. Ct. 2552 (2013). If this Court fails to enforce state laws in this context, children will be in prolonged custody battles while courts try to apply a vaguely defined federal standard for acknowledging or establishing paternity.

Both *Baby Girl* and this case illustrate this concern. In *Baby Girl,* after nearly two years of litigation, "at the age of 27 months, Baby Girl was handed over to Biological Father, whom she had never met." 133 S.

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[16] Joyce A. Martin et al., *supra* note 14, at 44.

Ct. at 2559. Because the adoptive couple ultimately prevailed, the child eventually went *back* to the adoptive couple months later, following the grant of certiorari, oral argument, and reversal.

So far, B.B. has narrowly avoided the same fate as Baby Girl. If the Utah Supreme Court had not stayed further state court proceedings, B.B. may well have been returned to his putative biological father—even while this petition was pending. The same would be true if the federal question were not reviewable now because additional state court proceedings had to be completed first. Thankfully for B.B. and all who want a quick resolution, the decision in this case is final. See pages 3–4, *supra* (noting this decision is final under 28 U.S.C. 1257 as explained in *Cox Broadcasting*, 420 U.S. at 480). But there is no assurance that other children will be so lucky.

4. The current lack of clarity on the question presented also has a chilling effect on potential adoptive parents who might otherwise be willing to adopt children with Indian heritage. This chilling effect, in turn, negatively affects Indian birth mothers seeking an adoptive home for their children. As this Court explained in *Baby Girl*, absent clear standards under the Act, "a biological Indian father could abandon his child in utero and refuse any support for the birth mother — perhaps contributing to the mother's decision to put the child up for adoption — and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests." *Baby Girl*, 133 S. Ct. at 2565. The Court went on to explain that, in the face of such a risk, "many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under" the Act. *Id.* at 2565.

This risk burdens not only the child, but the birth mother, who may be forced to raise the child in more difficult circumstances than adoption could provide. Even worse, this fear could lead to more abortions of Indian children.

While the decision in *Baby Girl* ultimately turned on a different legal question, the policy imperative is the same: Vague standards for intervention, custody and adoption—like the one the Utah Supreme Court applied here—undoubtedly chill adoption, placing Indian children at risk.

5. The vague legal "standard" adopted by the decision below will also hurt children, birth fathers, and adoptive parents by prolonging custody and adoption issues. It is entirely understandable that many birth parents or adoptive parents would seek temporary custody while the ultimate outcome is being determined. But if state courts are left to determine parenthood under an ill-defined federal "reasonableness" standard, birth parents and adoptive parents will inevitably engage in a tug-of-war over custody in trial court. Indeed, if the decision below stands, this tug-of-war will likely occur in virtually all cases while the result of the federal "reasonableness" determination is appealed—which it surely will be, given the vagueness of that standard. This back-and-forth will needlessly increase litigation costs and stress levels at the very time when at least some of the parties are trying to provide an acceptable home for the child.

Only by deferring to the clear state-law standards in place since before the Act can this Court prevent such an interminable tug-of-war, one that will hurt B.B. and thousands of other Indian children. For this

reason too, certiorari should be granted to ensure expeditious resolution of the question presented.

C. For reasons well explained by Justice Lee and the trial court, the majority reached the wrong conclusion on the question presented.

Not only is the question presented of great importance, but the majority opinion below got the answer wrong. Justice Lee's approach, buttressed by the trial court's analysis and this Court's decision in *Windsor,* makes clear that there should be no federal standard for paternity, that state law should control the determination whether a birth father has adequately acknowledged or established paternity, and that reversal is the proper course here.

1. Justice Lee explained that, in adopting the Act, Congress used "acknowledged and established" as a "legal term[] of art with settled meaning in family law." 125a. He provided five pieces of evidence supporting the conclusion that Congress intended to invoke the terms as used in state law. 125a–132a.

First, the state-law definitions of "acknowledged and established," while they vary from state to state, all share common cores: "acknowledgement . . . generally refers to a writing by a father," while "establishment . . . is initiated by a court filing and culminates in the issuance of a judicial order." 125a–127a. The existence of these core commonalities strongly indicates that, by using settled terms of art, Congress meant to incorporate their common meaning into federal law.

Second, Justice Lee noted that the statutory phrase "has not acknowledged or established paternity" is "in the past tense." 127a. "This backward-looking phrasing," he explained, "further underscores the state

term-of-art premise of the ICWA definition." 127a. That is, the phrase presumes that the issues of "acknowledgement" and "establishment" will already have been settled *before* the federal Act is invoked—again, necessarily under state law. Moreover, because there is no federal family law, the statute would necessarily have been looking back at the only authority that already defines the pertinent terms—state law. See 127a.

Third, three distinct canons of construction show that Congress was unlikely to believe it could implicitly set any parenthood standard where states already had such a standard. These canons are that:

> "(a) [t]he whole subject of the domestic relations of husband and wife, parent and child has long been understood to belong[] to the laws of the states, and not to the laws of the United States,
>
> (b) state courts have virtually exclusive primacy in the area of family law, while federal courts, as a general rule, do not adjudicate issues of family law even when there might otherwise be a basis for federal jurisdiction, and
>
> (c) for these and other reasons, family law terms in federal statutes are ordinarily deemed to be determined by state, rather than federal law[.]"

129a–130a (citations and internal quotation marks omitted, line breaks added). Applied to the Act, each of these canons casts further doubt on the majority's rejection of state law standards for acknowledging and establishing paternity.

Fourth, in adopting the Act, Congress expressly *recognized* that it was intruding into an area of established state law. As Justice Lee noted, this recognition leads to the conclusion that a "countervailing purpose at stake under ICWA is the protection of the traditional jurisdiction of state courts over adoption proceedings." 119a–120a (citing 25 U.S.C. 1901(5)). The very fact that the Act was designed to respect the traditional state domain even as it was expressly intruding into it, however slightly, shows that in other areas Congress did not intend to upset the traditional allotment of family law matters to the states by implication. See 120a (Lee, J., dissenting); see also *Windsor*, 133 S. Ct. at 2691.

Last, Justice Lee noted that, when a father "acknowledges" or "establishes" paternity, that act also creates requirements for others. 128a–129a. For example, "A family who wishes to adopt a child of Indian heritage has a statutory duty to provide notice to any *parent*. But if *parent* includes anyone who has vaguely acknowledged paternity in some informal way, the adopting family will [not] know how to fulfill its obligations under" the Act. 129a. If the Act really created a vague federal reasonableness standard, as the majority held, that would make it more difficult for third parties to comply with the Act's *own* notice requirements. See 129a.

2. While the majority responded to these points in its opinion, its responses are ultimately flawed. Indeed, the trial court opinion exposes these flaws.

To give just one example, the majority criticized Justice Lee for claiming that "acknowledged" and "established" were terms of art. In the majority's telling, Justice Lee's claim that Congress was invoking a term

of art failed because "[a] term of art has one established meaning, not fifty." 45a.

However, the trial court's discussion of the history surrounding the Act's enactment clearly explains why the term was well understood, and in a largely uniform way, when the Act was passed. 164a–168a. At that time, approximately fifteen states had a uniform adoption law and many others had substantially similar definitions. See *In re Adoption of Child of Indian Heritage*, 543 A.2d at 934; 166a–168a (trial court opinion). Although the precise scope of the terms "acknowledge" and "established" varied slightly from state to state, the variation was minimal. See *In re Adoption of Child of Indian Heritage*, 543 A.2d at 934.

3. Not only did Justice Lee explain persuasively why the Act reflects a desire to defer to state legislatures, he also explained why the majority's proposed replacement—a federal "reasonableness" standard—is unworkable.

As Justice Lee explained, the majority's "reasonableness" standard "is a make-it-up-as-we-go standard[.]" 140a–141a. The majority did not lay out a test for determining whether paternity was acknowledged under the Act. Rather, the majority's test (as Justice Lee summarized) merely concludes that (a) the federal standard for acknowledging or establishing paternity is less than the Utah standard and (b) Respondent did enough to acknowledge paternity. Pet 141a. For the majority, the Utah standard was too "exacting" to meet the Act's definition of "acknowledged or established." 58a–61a; see also 141a (Lee, J., dissenting). But the majority offered no clear alternative.

Without any standard to guide future cases, Justice Lee predicted that any standard greater than the absolute minimal acknowledgment would never be adopted. 141a–142a. After all, since any standard could be seen as more exacting than the Act's policy of protecting biological parents, courts adopting the majority's view of the Act will likely always rule for the birth father. See 142a–144a (Lee, J., dissenting).

Justice Lee also explained (at 143a) that the majority's test fails to solve the majority's central problem with deferring to state law: "a complete lack of uniformity." Rather, as Justice Lee explained, it is the *majority's* opinion that will "guarantee chaos and unpredictability—not uniformity." 143a. If the majority's opinion takes hold, "each court faced with the paternity question" will be required "to offer its own subjective assessment of what is a 'reasonable' acknowledgment of paternity." 143a. This is unworkable.

To be sure, the majority opinion relied (at 48a–50a) on this court's opinion in *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30 (1989), in which this court did set a federal standard for defining the term "domicile." But Justice Lee explained why *Holyfield* does not apply: In *Holyfield*, the meaning of the word domicile was "generally uncontroverted." 490 U.S. at 48; *accord* 135a (Lee, A.C.J., dissenting). The Court thus used that term because it was the common usage, not to create an end run around state law. See 135a (Lee, A.C.J., dissenting).

4. In addition to being wrong for the reasons explained in Justice Lee's opinion, the majority's expansion of *Holyfield* contradicts a more recent decision by this Court, *United States* v. *Windsor* 133 S. Ct. 2675

(2013). Under the majority's reading of *Holyfield*, marriage itself would not be a term of art. After all, as *Windsor* noted, states have fifty different rules about such marriage requirements as consanguinity and age limitations. See 133 S. Ct. at 2691–2692. States also have different procedural requirements to enter marriage, and a variety of other individual nuances[17] that are an inherent part of our federal system.

Since "the steps one must take to" marry "and the legal effects [marriage] has" vary among the fifty states, see 46a n.21 (majority), the majority's theory would allow courts to assume Congress did not intend to defer to state laws about marriage when it refers to married couples without defining marriage. Under the majority's logic, courts could infer the meaning of the term "marriage" from a more general congressional purpose. But this is incorrect. As *Windsor* explained, when Congress intends to use a different meaning of marriage for federal law than state courts do, it says so. See 133 S. Ct. at 2689–2693 (noting that, with rare, explicit exceptions, federal law always defers to state law on the definition of marriage).

In short, Justice Lee's and the trial court's opinions—as well as this Court's precedent—demonstrate that Congress meant for state courts to apply the Act's terms "acknowledged or established" as used in state law. Such an instruction was readily understood when the Act was passed. And this case gives the Court an excellent opportunity to ensure that instruction is uniformly followed throughout the Nation.

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[17] See, *e.g.,* FindLaw, Marriage License Requirements, http://family.findlaw.com/marriage/marriage-laws/marriage-blood-test.html.

D. This case is a good vehicle for resolving the question presented.

Nor is there any reason to wait for another case in which to resolve the question presented, or to correct the error of the majority in this case. This case offers an excellent vehicle for resolving the question presented.

1. Despite the seeming complexity of the lower court opinions, those opinions ultimately reduce to two sets of holdings: (1) decisions on matter of state law, and (2) the federal question presented here. As the state law decisions are, of course, not reviewable, this Court can cleanly resolve the federal question presented without the need to decide any preliminary issues.

Specifically, the Utah Supreme Court cleared the path for review in this Court by squarely holding (1) that Respondent is not a parent under Utah law,[18] and (2) that it had jurisdiction to reach the federal question presented despite the birth mother's apparent lie regarding the identity of the father.[19] These state law holdings simplify the potential federal questions to merely the question presented, making this petition a clean vehicle.

As the discussion above suggests, the division among the Utah Supreme Court Justices also provides the strongest arguments on both sides of the question presented. Indeed, the majority opinion spends some twenty-seven paragraphs discussing the question presented, spanning some twenty-six pages of the petition

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[18] See n. 3 and accompanying text, *supra*. (citing App. 1a–2a; 66a–67a).

[19] App. 83a–119a (Lee, J., for the majority).

appendix. 41a–66a. Justice Lee's dissent responds with forty-five paragraphs, also spanning twenty-six pages of the petition appendix. 119a—144a. Moreover, each of the opinions devotes substantial space to responding to the other's arguments. 45a–47a, 53a–54a, 58a–64a (majority opinion); 132a–144a (Lee, J., dissenting).

The exceptional thoroughness of the opinions on both sides of the issue contributes to making this an ideal vehicle for resolving the question presented.

CONCLUSION

Besides deepening a split among state courts of last resort on a question this court has previously agreed to review, the Utah Supreme Court's decision upsets basic principles of federalism. The clean procedural posture of this case, and the dueling opinions of the majority and dissent below, make this an ideal candidate to resolve the question this Court left unresolved in *Baby Girl*—a question that likely continues to affect thousands of adoptions of Indian children annually.

For all these reasons, the petition should be granted.

Respectfully submitted,

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