13A97
No. A-

In the Supreme Court of the United States

ADOPTIVE COUPLE,

PETITIONERS,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, *ET AL.*,

RESPONDENTS.

OPPOSITION TO APPLICATION FOR IMMEDIATE ISSUANCE OF THE MANDATE

To the Honorable Samuel Alito, Associate Justice of the United States Supreme Court:

1. Respondents Birth Father and Cherokee Nation respectfully oppose petitioner Adoptive Couple's application for an order directing immediate issuance of the mandate in this case.

2. We note at the outset that the application does not accurately state the Court's holding. The Court did not "recognize[] that the adoption would have been approved and finalized under state law absent the misapplication of federal law." App. 1, ¶ 2. It could not have done so: the South Carolina Family Court held as a matter both of federal *and* of state law that Birth Father's parental rights could not be terminated (see Pet. App. 123a-126a), and that court accordingly had no occasion to determine whether, *had* Birth Father's rights been terminated, adoption of Baby Girl by Adoptive Couple would be in the child's best interest as a matter of state

law. The South Carolina Supreme Court likewise nowhere suggested that the adoption would have been approved absent application of federal law.

In addition, this Court did not hold, as the application represents (App. 1, ¶ 2), that the Indian Child Welfare Act "is not an impediment to the adoption of Baby Girl by Adoptive Couple." To be sure, the Court held that the state courts misapplied 25 U.S.C. § 1912(d) and (f). But the Court recognized that the ICWA adoption placement preferences come into play when an "alternative party that is eligible to be preferred under § 1915(a) has come forward." Slip op. 15. The principal dissent therefore read the Court's opinion not to "foreclose the possibility that on remand, Baby Girl's paternal grandparents or other members of the Cherokee Nation may formally petition for adoption of Baby Girl. If these parties do so, and if on remand Birth Father's parental rights are terminated so that an adoption becomes possible, they will then be entitled to consideration under the order of preference established in § 1915." Slip op. 25 (Sotomayor, J., dissenting).

2. Respondents Birth Father and Cherokee Nation oppose the issuance of the mandate at this time. Respondents are evaluating the Court's decision, which creates a complex interrelationship between state and federal law, and are considering what steps are appropriately taken upon remand. In these circumstances, we believe that, as in the ordinary course, withholding the mandate for a brief period would facilitate a more orderly and well-considered remand process.

3. Respondents agree with Adoptive Couple that swift resolution of this litigation is in the best interest of all parties. Given the stakes, however, and given that the litigation already has proceeded for several years, we believe that taking the additional care that would facilitate the best-considered outcome justifies withholding the mandate for a few additional days.

4. Once respondents' evaluation of the Court's decision is complete, they will be prepared to consult with Adoptive Couple to set an agreed, expedited date for issuance of this Court's mandate.

Accordingly, respondents Birth Father and Cherokee Nation request that Adoptive Couple's application that the mandate issue forthwith be denied.

Respectfully submitted.

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