No. A-

In the Supreme Court of the United States

BIRTH FATHER AND CHEROKEE NATION,

Applicants,

v.

ADOPTIVE COUPLE, *ET AL.*,

Respondents.

APPLICATION FOR A STAY OF THE JUDGMENT OF THE SUPREME COURT OF SOUTH CAROLINA

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Pursuant to Rules 22 and 23 of the Rules of this Court, applicants Birth Father and Cherokee Nation respectfully request a stay of the judgment issued by the Supreme Court of South Carolina in this case on remand from a decision of this Court. Copies of the decision below and of the order of the South Carolina Supreme Court declining to stay that court's judgment are attached.

In its decision in this case, this Court held that the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963, does not preclude termination of applicant Birth Father's parental rights in this dispute over the custody of Baby Girl, and remanded the case for "further proceedings not inconsistent" with its opinion. On

remand, the South Carolina Supreme Court evidently understood this Court's decision to mandate an immediate resolution of the case. Accordingly, even though Baby Girl has lived with Birth Father for nearly nineteen months, the court below ordered the award of custody and immediate transfer of Baby Girl to respondents Adoptive Couple without *any* consideration either of Baby Girl's current best interests or of competing petitions for adoption that have been filed pursuant to 25 U.S.C. § 1915 since this Court's decision. This holding—which a commentator who *supported* the Adoptive Couple's position in this Court labeled "infuriatingly, obtusely uninterested in the best interests of 3½ year old [Baby Girl]" (Emily Bazelon, *Send Veronica Back: A truly terrible ruling in the Baby Girl custody case*, SLATE (July 18, 2013) (http://tinyurl.com/VeronicaSct)—is premised on a misapplication of § 1915 and a misreading of this Court's decision as it relates to that important federal statutory provision. It should not stand.

1. On June 25, 2013, this Court issued its decision in this case. *Adoptive Couple v. Baby Girl*, 570 U.S. ___ (2013) (No. 12-399). In that decision, the Court recognized that the ICWA applies to this dispute. Slip op. 2, n. 1 ("It is undisputed that Baby Girl is an 'Indian child' as defined by the ICWA" and "that the present case concerns a 'child custody proceeding'" under the ICWA). The Court then observed that "[t]hree provisions of the ICWA are especially relevant to this case": Sections 1912(d), 1912(f), and 1915. Slip op. 3. As to these provisions, the Court held that §§ 1912(d) and (f) do not preclude the termination of Birth Father's parental rights in the circumstances here. Slip op. 7-14. It also concluded that § 1915, which

requires that preference in the adoption of Indian children be given to specified persons "in the absence of good cause to the contrary," is "inapplicable in cases where no alternative party has formally sought to adopt the child." Slip op. 15. See slip op. 17 (§ 1915's "rebuttable adoption preferences" do not "apply when no alternative party has formally sought to adopt the child"). The Court therefore held that, on the facts then before the Court, § 1915 does not preclude adoption of Baby Girl by the Adoptive Couple—who fall outside the statutory preferences—because Birth Father "did not seek to adopt Baby Girl" (he instead argued that "his parental rights should not be terminated in the first place") and Baby Girl's other relatives "never sought custody." Slip op. 15, 16.

Both the concurring opinion of Justice Breyer and the principal dissent also addressed § 1915. Justice Breyer explicitly "raise[d], but [did] not here try to answer," the question whether § 1915(a) could "allow an absentee father to re-enter the special statutory order of preference with support from the tribe, and subject to the court's consideration of 'good cause[.]'" Slip op. 2 (Breyer, J, concurring).

And the dissenting opinion of Justice Sotomayor, joined in relevant part by Justices Scalia, Ginsburg, and Kagan, stated:

> [T]he majority does not and cannot 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.* The majority cannot rule prospectively that §1915 would not apply to an adoption petition that has not yet been filed. Indeed, the statute applies "[i]n any adoptive placement of an Indian child under State law," 25 U. S. C. §1915(a) (emphasis added), and contains no

> temporal qualifications. It would indeed be an odd result for this Court, in the name of the child's best interests, cf. *ante*, at 15, to purport to exclude from the proceedings possible custodians for Baby Girl, such as her paternal grandparents, who may have well-established relationships with her.

Slip op. 25 (Sotomayor, J, dissenting) (emphasis added). Although the majority addressed numerous other points made by the dissent, specifically indicating some areas where the dissent misunderstood the majority opinion (see slip op. 8. & n.5, 9n.6, 10, 11 n.7, 13-14 n.8, 14 n.10), it did not comment on or express disagreement with either Justice Breyer's view in concurrence or Justice Sotomayor's expression in dissent that competing adoption claims could be brought on remand in this case so as to trigger the operation of § 1915.

Having described the proper construction of the ICWA, the Court reversed and remanded to the Supreme Court of South Carolina "for further proceedings not inconsistent with this opinion." Slip op. 17. This Court issued its mandate to the Supreme Court of South Carolina on July 5, 2013.

2. Following the course implicitly suggested by this Court's decision, on July 1, 2013, Birth Father and his wife (Stepmother) filed an action in Oklahoma state court formally seeking to adopt Baby Girl.[1] That action is now pending. In addition,

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[1] A parent in Birth Father's circumstances is entitled by Cherokee law to invoke the adoptive placement preferences; that law defines "extended family" members entitled to placement preference under § 1915 to include "*any* biological relative or married relation to the second degree." Cherokee Nation Child, Youth, and Family Services Administrative Rules, Chap. III, subsection A-2 (definition of "extended family") (effective Nov. 1, 2000) (emphasis added). A stepparent is entitled to adoption preference as "a member of the child's extended family" under § 1915(a). See 25 U.S.C. § 1903(2) (defining "extended family member" to include "stepparent[s]").

on July 2, 2013, Birth Father's parents (Paternal Grandparents) and Stepmother filed an action for guardianship of Baby Girl in the Cherokee tribal court, indicating that they also seek additional relief in the form of adoption if Baby Girl becomes available for adoption. On July 17, 2013, the Cherokee Nation District Court entered a Temporary Guardianship Order granting joint legal custody of Baby Girl to Stepmother, Paternal Grandfather, and Paternal Grandmother.

3. On July 3, 2013, Birth Father filed a motion with the Supreme Court of South Carolina to remand the matter to state family court for a full analysis of Baby Girl's current best interests. In doing so, Birth Father noted that counsel for Baby Girl's guardian ad litem (GAL), who supported the Adoptive Couple before this Court, had assured the Court during oral argument that such a best-interest analysis would have to be conducted if the case returned to state court:

> MR. CLEMENT: Well, Justice Sotomayor, I'm here representing the guardian who represents the best interest of the child. From the child's perspective, the child really doesn't care whose fault it was when they were brought in one custodial situation or another. They just want a determination that focuses on at the relevant time, that time, what's in their best interest. *And so in the same way that we think if you rule in our favor and you remand to the lower court that there has to be a best interest determination that takes into account the current situation,* notwithstanding that that would be on the hypothesis that the last 15 months of custody were based on a legal misunderstanding, we still think this girl—
>
> JUSTICE SOTOMAYOR: So we're going to freeze it at that point or are we going to freeze it today, after the child's been with his—with her father for 2 years?
>
> MR. CLEMENT: You freeze it at the time that somebody's talking about—
>
> JUSTICE SOTOMAYOR: I don't want to be that judge, by the way.

> MR. CLEMENT: *You freeze it at the time that somebody's talking about changing a custodial situation.* * * *
>
> * * *
>
> JUSTICE GINSBURG: What about now, when you said the best interest. Now the child has been some 15 months with the father. So if a best interest calculus is made now, you would have to take into account uprooting that relationship, would you not?
>
> MR. CLEMENT: *Absolutely, Justice Ginsburg. We're not here to try to say that anybody is entitled to automatic custody of this child based on some legal rule.*
>
> JUSTICE KENNEDY: And I—and I take it you'll say that that goes back to this South Carolina court if you prevail?
>
> MR. CLEMENT: Absolutely. And I would hope with instructions to please make that determination as quickly as humanly possible

Oral Argument Tr., p. 24, line 14 – p. 26, line 10 (emphasis added).

Nevertheless, on remand to state court, the Adoptive Couple, joined by the GAL, disavowed the assurances provided by the GAL's counsel to this Court. They instead filed an "Emergency Motion for Final Order Following Remand from US Supreme Court" and "Transition Proposal" in which they opposed a current best-interest inquiry and contended that this Court intended to direct the ministerial act of entering final judgment for the Adoptive Couple. Birth Father opposed that motion.

4. On July 17, 2013, a closely divided Supreme Court of South Carolina issued its ruling, ordering that custody be awarded to the Adoptive Couple. After recounting this Court's holding regarding § 1912, that court "rejected Birth Father's argument that § 1915(a)'s placement preferences could be an alternative basis for

denying the Adoptive Couple's adoption petition." App. 3. The state court noted that, "at the time Adoptive Couple sought to institute adoption proceedings, they were the only party interested in adopting [Baby Girl]." App. 4. Although the court also recognized "that numerous petitions for adoption have [since] been filed in Oklahoma and the Cherokee Tribal Court" (App. 1 n.1), it believed that §1915 "has no application in concluding this matter, nor may that section be invoked at the midnight hour to further delay the resolution of this case. We find the clear import of the [U.S.] Supreme Court's majority opinion to foreclose successive § 1915 petitions." App. 4.

The state court then turned to South Carolina law, holding that Birth Father's consent to the adoption is not required by state law and that no further inquiry is necessary to determine whether his parental rights should be terminated. App. 5. And opining that "the [U.S.] Supreme Court plainly contemplated an expeditious resolution of this case" (App. 5), the South Carolina Supreme Court remanded to state family court "for the prompt entry of an order approving and finalizing Adoptive Couple's adoption of Baby Girl" without any inquiry into Baby Girl's current best interests; "upon entry of the Family Court's order, custody of Baby Girl shall be transferred to Adoptive Couple." App. 5. The court made no mention of Baby Girl's best interests except to note that Birth Father had requested a determination "'whether, on the current record, * * * it is in Baby Girl's best interest[s] for her to remain with the natural parent who has cared for her and with whom she has bonded over * * * 18 months.'" App. 2. The court rejected that

request.

Two Justices dissented, stating that they would have remanded the case to South Carolina family court for factual findings about Baby Girl's best interests. Those Justices observed that nothing in this Court's decision "suggests, much less mandates, that [the state court] is * * * obligated to order that the adoption of this child by Adoptive Parents be immediately approved and finalized. Further, the majority orders the immediate transfer of the child, no longer an infant or toddler, upon the filing of the family court's adoption order, without regard to whether such an abrupt transfer would be in the child's best interest." App. 6. Noting that "what is ultimately at stake is the welfare of a little girl," the dissent concluded that "this is a situation where the decisions that are in the best interests of this child, given all that has happened in her short life, must be sorted out in the lower courts." App. 6-7.

5. On July 24, 2013, a divided South Carolina Supreme Court denied petitions for rehearing filed by Birth Father and the Cherokee Nation, and declined to stay its decision. App. 8-9. The majority declared itself "cognizant that the paramount consideration is the best interest and welfare of Baby Girl" and stated that it "determine[d], upon review of the record, that the adoption of Baby Girl by the Adoptive Couple is in the best interests of Baby Girl." App. 9. As the record in the case closed some two years ago and no court has heard evidence concerning Baby Girl's circumstances during the eighteen months she has been living with Birth Father, however, the court below necessarily could not have considered Baby

Girl's current circumstances and could not, as Justice Ginsburg put it at oral argument, have "take[n] into account [the] uprooting [of] that relationship."

Two Justices dissented, noting that they "would grant the petitions for rehearing, vacate the Court's earlier order, and remand this matter to the family court for further proceedings. Since the majority of the Court has decided to deny rehearing, we would grant the request for a stay." App. 10.

Also on July 24, the South Carolina family court set a hearing for July 31 "to determine the matter of transfer of physical custody" of Baby Girl.

6. The decision below misapplied § 1915 and misunderstood the plain import of this Court's ruling. Birth Father intends to seek prompt review of that decision in this Court and will ask for summary reversal; he will contend that § 1915 requires application of ICWA's adoption placement preferences, in light of the pending adoption petitions filed by Birth Father and Baby Girl's other relatives. He now requests that the decision below be stayed pending resolution of that petition for certiorari.

That relief is imperative. Professor Joan Heifetz Hollinger, one of the Nation's leading authorities on adoption—and one who filed an amicus brief in this Court *supporting* the position of the Adoptive Couple—has described the South Carolina Supreme Court's holding on remand as "shameful" and a "terrible ruling" that "treats this as if the clock stopped during appeals and can resume as if nothing had happened to this child in [the] intervening two years!! This gives a VERY bad name to adoption proceedings[.]" Bazelon, *supra*. And a commentator who also

supported Adoptive Couple's position before this Court "never imagined that the South Carolina courts would send [Baby Girl] back to the [Adoptive Couple] without a careful investigation of what is now in her bests interests. * * * If [Birth Father] is a good parent—which appears to be the case—most child development experts would probably counsel the opposite." *Ibid.* This "shameful," "terrible" order should be stayed.

7. The requirements for obtaining a stay are satisfied here. See generally *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers); E. Gressman, *et al.*, SUPREME COURT PRACTICE 871 (9th ed. 2007).

a. The prospect of irreparable injury absent a stay, to Birth Father and to Baby Girl, are manifest. This child has now lived in her home with Birth Father since December 2011. The *only* evidence in this case supports the state family court's initial finding, upheld by the South Carolina Supreme Court, that Birth Father is a fit, loving parent and that it is in Baby Girl's best interests that he have custody. See No. 12-399, *Adoptive Couple* v. *Baby Girl*, Pet. App. 36a-37a, 123a-128a. Baby Girl has in fact thrived in Birth Father's home since that finding was made, forming deep bonds with Birth Father, Stepmother, and Paternal Grandparents. There surely is no need for an elaborate demonstration that irreparable injury within the meaning of the governing stay standard would be suffered by all of these people were Baby Girl removed from her father. Most notably, Baby Girl herself is now almost four years old, at a time in her life when being taken from long-term and loving caregivers would have a profound effect and

cause certain emotional and psychological injury. It presumably is for that reason that counsel for the GAL assured this Court at oral argument that, "if you rule in our favor and you remand to the lower court * * * there has to be a best interest determination that takes into account the current situation, notwithstanding that that would be on the hypothesis that the last 15 months of custody were based on a legal misunderstanding." That assurance has now been disavowed by the Adoptive Couple and the GAL, and was disregarded by the state court.

Of course, we recognize that the Adoptive Couple also has a significant interest at stake and would like to obtain immediate custody of Baby Girl. We do not denigrate the importance of that interest, which must be considered in the stay calculation. But denying a stay would force an immediate and traumatic change in Baby Girl's circumstances; and, if we are correct about the proper reading of this Court's decision and of § 1915, that change is unwarranted and ultimately would be undone. In such circumstances, the Court should "balance the equities * * * and determine on which side the risk of irreparable injury falls most heavily." *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1308-09 (1973) (Marshall, J., in chambers) (internal quotation marks omitted). Here, that balance unquestionably favors a stay. See, *e.g.*, *San Diegans for the Mt. Soledad Nat'l War Mem'l* v. *Paulson*, 548 U.S. 1301, 1303 (2006) (Kennedy, J., in chambers) (compared to the "irreparable harm of altering" the status quo, "the harm in a brief delay pending [final resolution] of the case seems slight"). But given the need for expeditious action and a quick final resolution of this case, Birth Father will file his petition for certiorari promptly and

will comply with any early filing deadline that is set by a Justice or the Court. See SUPREME COURT PRACTICE, at 868.

b. There is a reasonable probability that the Court will grant review and that Birth Father will prevail on the merits. *First*, the South Carolina Supreme Court misread this Court's decision. That court believed that this Court's holding "foreclose[d]" consideration of other pending adoption petitions under § 1915. App. 4. But as is apparent from our description of this Court's decision, the four Justices in dissent *expressly* explained that it remains open on remand for Baby Girl's relatives to pursue competing adoption petitions under § 1915, which they have now done; a fifth Justice (Justice Breyer) expressly left open the question whether a father whose parental rights have been terminated could seek to adopt his child with the support of his Tribe, as Birth Father has now done; and the majority nowhere suggested that such proceedings would be precluded on remand in this case or that the dissent's understanding on this point was incorrect. In these circumstances, the decision below is premised squarely on the state court's misreading of this Court's holding. There is a fair probability that this Court will correct such a mistaken application of one of its decisions. See generally SUPREME COURT PRACTICE, at 277-279.

Second, the holding below that competing adoption petitions were filed too late to be considered in this action is, in fact, a misapplication of the ICWA. As Justice Sotomayor observed, § 1915(a) provides that the placement preferences apply "'[i]n *any* adoptive placement of an Indian child under State law'" and

"'contains no temporal qualifications.'" Slip op. 25 (Sotomayor, J., dissenting) (quoting 25 U.S.C. § 1915(a) (emphasis added by Justice Sotomayor)). The Adoptive Couple's petition for adoption has, to this point, never been approved or finalized by any court; under ICWA's plain language, competing petitions remain timely.

Third, that is especially so in the circumstances here. So far as we are aware, prior to this Court's decision in this case, *no* court ever had held that a competing adoption petition had to have been filed prior to invocation of the § 1915 preferences; the Bureau of Indian Affairs guidelines do not state any such requirement; and the Adoptive Couple did not assert such a rule in the lower courts. It therefore would be profoundly unfair to deny Baby Girl's relatives an opportunity to invoke those preferences now—particularly when Baby Girl's paternal grandmother testified at the trial *in this case* that Paternal Grandparents would have sought to adopt Baby Girl "in a minute" had it not been that their son already was seeking to obtain custody of Baby Girl in that same proceeding as her natural father. No. 12-399, *Adoptive Couple* v. *Baby Girl*, JA 151. Had the rule ultimately adopted by this Court been established at the time, there can be no doubt that Paternal Grandparents (and Birth Father himself) would have filed conditional adoption petitions that would have triggered application of § 1915. With Birth Father's parental rights now in jeopardy of termination, fundamental fairness dictates that Paternal Grandparents and Birth Father be given an opportunity to assert adoptive rights under §1915.

Fourth, while it is presumed that the "minimum federal standards of ICWA,"

including the placement preferences, "protect the best interests of Indian children" (25 U.S.C. S 1902), it also bears mention that a proceeding under § 1915 could permit the court to engage in the best-interest-of-the-child inquiry that the GAL assured this Court would occur but that the court below disavowed. As both this Court's majority and Justice Breyer noted, § 1915 allows departure from the statutory placement preferences on a showing of "good cause." Slip op. 15-16 n.11; slip op. 2 (Breyer, J., concurring). A court conducting the required § 1915 analysis therefore necessarily would consider Baby Girl's current circumstances and interests as part of the inquiry into whether there is good cause to depart from the statutory placement preferences. Engaging in that inquiry would both advance the statutory purpose and serve to "determine what is good for [Baby Girl]"—"[w]hich, amazingly, no court has ever done." E. Bazelon, *supra*. And these reasons, too, suggest that a petition for certiorari is likely to be successful.

8. Given the sensitive nature of the issue presented, its relationship to a very recent decision of the Court, and the need for an expeditious final resolution of this matter, Birth Father respectfully requests pursuant to Rule 22.5 of the Rules of this Court that this application be submitted to the full Court for determination.

Respectfully submitted.

TODD HEMBREE
Attorney General
CHRISSI ROSS NIMMO
Assistant Attorney General
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465
(918) 458-6998

LLOYD B. MILLER
WILLIAM R. PERRY
ANNE D. NOTO
COLIN CLOUD HAMPSON
Sonosky, Chambers, Sachse, Endreson & Perry, LLP
1425 K Street, N.W.
Suite 600
Washington, DC 20005
(202) 682-0240

CARTER G. PHILLIPS
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Cherokee Nation

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

JOHN S. NICHOLS
Bluestein, Nichols, Thompson & Delgado LLC
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599

SHANNON PHILLIPS JONES
3 State Street
Charleston, SC 29401
(843) 720-3100

LESLEY ANN SASSER
39 Broad Street, Suite 206
Charleston, SC 29401
(843) 608-3653

Counsel for Birth Father

July 25, 2013

The Supreme Court of South Carolina

Adoptive Couple, Appellants,

v.

Baby Girl, a minor child under the age of fourteen years, Birth Father, and the Cherokee Nation, Respondents.

Appellate Case No. 2011-205166

ORDER

This case reaches this Court again from the decision of the Supreme Court of the United States, reversing our prior decision, *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 731 S.E.2d 550 (2012), and remanding the case for further proceedings "not inconsistent with" its opinion. *Adoptive Couple v. Baby Girl*, 570 U.S. at ___, No. 12-399, slip op. at 17 (U.S. June 25, 2013). On June 28, 2013, the Supreme Court expedited the issuance of the mandate, which transferred jurisdiction to this Court on July 5, 2013.[1] *See* Adoptive Couple v. Baby Girl, No. 12-399 (U.S. June 28, 2013) (order expediting mandate issuance). On July 3, 2013, the Respondent Birth Father (Birth Father) filed a Motion to Remand this case to the Family Court to address the matter *de novo* with explicit instructions regarding how to proceed. An Emergency Motion for Final Order Following Remand with this Court filed by Appellants (Adoptive Couple) followed, along with a petition to appear as amica

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[1] Despite our understanding that numerous petitions for adoption have been filed in Oklahoma and the Cherokee Tribal Court, we retain jurisdiction to finally resolve Baby Girl's adoption in the courts of South Carolina by virtue of the Supreme Court's transfer of jurisdiction to this Court. We note further that an Oklahoma court already declined to exercise jurisdiction in this case. *See Adoptive Couple v. Baby Girl*, 398 S.C. at 643–44, 731 S.E.2d at 559. Moreover, the adoption has been pending in South Carolina since Adoptive Couple instituted the proceedings. *See Knoth v. Knoth*, 297 S.C. 460, 464, 377 S.E.2d 340, 342–43 (1989) (stating "once a custody decree has been entered, the continuing jurisdiction of the decree state is exclusive" and "[e]xclusive continuing jurisdiction is not affected by the child's residence in another state" (citations omitted)).

curiae filed by Birth Mother.[2] On July 8, 2013, Adoptive Couple filed a Return to Birth Father's Motion to Remand.[3] On July 12, 2013, Respondent Cherokee Nation notified this Court via letter that it was joining Birth Father's request to remand this case to the Family Court.[4]

In his Motion to Remand, Birth Father raises a number of "new" issues he claims should be resolved by the Family Court in this case, in particular: "(1) [whether] the case should be transferred to Oklahoma where Baby Girl has lived for 18 months, where the relevant witnesses are all located, and where competing adoption petitions are pending; (2) whether, on the current record, [Birth] Father's parental rights may be terminated, or whether it is in Baby Girl's best interest[s] for her to remain with the natural parent who has cared for her and with whom she has bonded over those 18 months; and (3) whether, in light of the competing adoption petitions, the ICWA placement preferences preclude adoption of Baby Girl by the self-styled Adoptive Couple." We deny Birth Father's motion in its entirety. Because we can resolve the issues of law here, nothing would be accomplished by a *de novo* hearing in the Family Court, except further delay and heartache for all involved—especially Baby Girl.

A majority of the Supreme Court has cleared the way for this Court to finalize Adoptive Couple's adoption of Baby Girl. In denying Adoptive Couple's petition for adoption and awarding custody to Birth Father, we held that Birth Father's parental rights could not be terminated under the federal Indian Child Welfare Act, 25 U.S.C. §§ 1901–23 (the ICWA). *See Adoptive Couple v. Baby Girl*, 398 S.C. at 644, 731 S.E.2d at 560. The Supreme Court has unequivocally found that the ICWA does not mandate custody be awarded to Birth Father, thereby reversing our previous holding:

> Contrary to the State Supreme Court's ruling, we hold that 25 U.S.C. § 1912(f)—which bars involuntary termination of a parent's rights in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent's "continued custody" of the child—does not apply when, as here, the relevant parent never had custody of

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[2] We granted Birth Mother's request on July 8.

[3] Likewise, counsel for the Guardian *ad litem* filed a responsive brief on July 8.

[4] On July 15, 2013, Birth Father filed a Return to Adoptive Couple's Emergency Motion for Final Order and a Reply to Adoptive Couple's Return to Motion to Remand.

> the child. We further hold that § 1912(d)—which conditions involuntary termination of parental rights with respect to an Indian child on a showing that remedial efforts have been made to prevent the "breakup of the Indian family"—is inapplicable when, as here, the parent abandoned the Indian child before birth and never had custody of the child. Finally, we clarify that § 1915(a), which provides placement preferences for the adoption of Indian children, does not bar a non-Indian family like Adoptive Couple from adopting an Indian child when no other eligible candidates have sought to adopt the child.

570 U.S. ___, slip op. at 1–2.

The Supreme Court has articulated the federal standard, and its application to this case is clear: the ICWA does not authorize Birth Father's retention of custody. Therefore, we reject Birth Father's argument that § 1915(a)'s placement preferences could be an alternative basis for denying the Adoptive Couple's adoption petition.[5] The Supreme Court majority opinion unequivocally states:

> § 1915(a)'s preferences are inapplicable in cases where no alternative party has formally sought to adopt the child . . . .
>
> In this case, Adoptive Couple was the only party that sought to adopt Baby Girl in the Family Court or the South Carolina Supreme Court. [Birth] Father is not covered by § 1915(a) because he did not

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[5] In making this argument, Birth Father relies on the following language in Justice Sotomayor's dissent:

> [T]he majority does not and cannot 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. The majority cannot rule prospectively that the § 1915 would not apply to an adoption petition that has not yet been filed.

570 U.S. ____, slip op. at 25 (Sotomayor, J., dissenting) (alterations added).

> seek to *adopt* Baby Girl; instead, he argued that his parental rights should not be terminated in the first place. Moreover, Baby Girl's paternal grandparents never sought custody of Baby Girl. Nor did other members of the Cherokee Nation or "other Indian families" seek to adopt Baby Girl, even though the Cherokee Nation had notice of—and intervened in—the adoption proceedings.

570 U.S. ___, slip op. at 15–16 (emphasis in original) (internal citations and footnotes omitted) (alteration added). As the opinion suggests, at the time Adoptive Couple sought to institute adoption proceedings, they were the only party interested in adopting her. Because no other party has sought adoptive placement in this action, § 1915 has no application in concluding this matter, nor may that section be invoked at the midnight hour to further delay the resolution of this case. We find the clear import of the Supreme Court's majority opinion to foreclose successive § 1915 petitions, for litigation must have finality, and it is the role of this court to ensure "the sanctity of the adoption process" under state law is "jealously guarded." *Gardner v. Baby Edward*, 288 S.C. 332, 334, 342 S.E.2d 601, 603 (1986).

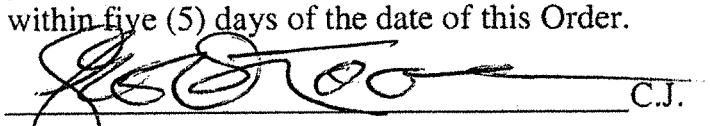
With the removal of the perceived federal impediment to Adoptive Couple's adoption of Baby Girl, we turn to our state law. In our previous decision, we held that, under state law, Birth Father's consent to the adoption was not required under section 63-9-310(A)(5) of the South Carolina Code. *See Adoptive Couple v. Baby Girl*, 398 S.C. at 643 n. 19, 731 S.E.2d at 560 n. 19 ("Under state law, Father's consent to the adoption would not have been required."). That section provides consent is required of an unwed father of a child placed with the prospective adoptive parents six months or less after the child's birth only if:

> (a) the father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption, and the father openly held himself out to be the father of the child during the six months period; or
>
> (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses.

S.C. Code Ann. § 63-9-310(A)(5) (2010).[6] Because Birth Father's consent is not required under the statute, we need not turn to our parental termination provision, section 63-7-2570 of the South Carolina Code, to terminate Birth Father's parental rights, as the effect of a final adoption decree will be to automatically terminate any legal or parental right he has with respect to Baby Girl. *See* S.C. Code Ann. § 63-9-760 (stating the effect of an adoption is, in part, that "the biological parents of the adoptee are relieved of all parental responsibilities and have no rights over the adoptee"); *S.C. Dep't of Soc. Servs. v. Parker*, 275 S.C. 176, 179, 268 S.E.2d 282, 284 (1980) (noting a father who has no right to object to the adoption is not permitted to "block a termination of his purported parental rights"). Once the final adoption decree is entered, therefore, "the relationship of parent and child and all the rights, duties, and other legal consequences of the natural relationship of parent and child" will exist between Adoptive Couple and Baby Girl. S.C. Code Ann. § 63-9-760(A).

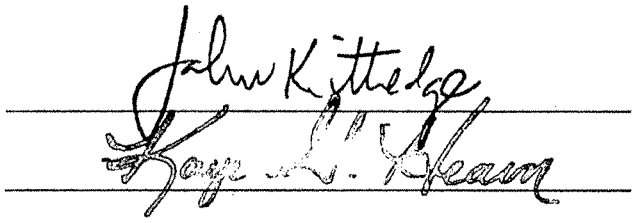
We think the Supreme Court plainly contemplated an expeditious resolution of this case, and we believe the facts of this case require it. There is absolutely no need to compound any suffering that Baby Girl may experience through continued litigation. As it stands, Adoptive Couple is the only party who has a petition pending for the adoption of Baby Girl, and thus, theirs is the only application that should be considered at this stage.

For these reasons, we remand this case to the Family Court for the prompt entry of an order approving and finalizing Adoptive Couple's adoption of Baby Girl, and thereby terminating Birth Father's parental rights, in accordance with section 63-9-750 of the South Carolina Code. Upon the entry of the Family Court's order, custody of Baby Girl shall be transferred to Adoptive Couple. If additional motions are pending or are filed prior to the entry of the order finalizing the adoption, the family court shall promptly dispose of all such motions and matters so as not to delay the entry of the adoption and the return of Baby Girl to the Adoptive Couple. Further, if any petition for rehearing is to be filed regarding this Order, it shall be served and filed within five (5) days of the date of this Order.



C.J.

[6] Thus, Birth Mother's consent is the only consent required under the statute, and she gave her consent in accord with the requirements of our adoption provisions. *See* S.C. Code Ann. §§ 63-9-310(A)(3); 63-9-330; 63-9-340. In fact, in her amica curiae brief, she avers that she will revoke her consent to the adoption of Baby Girl by any other prospective adoptive parents.



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I agree that we should remand this matter to the family court for further proceedings consistent with the United States Supreme Court's ruling. As I understand that decision, the Court held that we erred when we held that two provisions of the Indian Child Welfare Act (ICWA)[7] barred the termination of Father's parental rights. *Adoptive Couple v. Baby Girl*, 570 U.S. ___, No. 12-399, slip op. at 11, 14 (U.S. June 25, 2013). Further, the majority indicated we erred when we suggested that the adoptive preference provisions of ICWA[8] would have been applicable if Father's parental rights had been terminated because, as the Court explained, no person entitled to invoke these statutory preferences was then seeking to adopt the child in the South Carolina proceedings. Nothing in the majority opinion suggests, much less mandates, that this Court is authorized to reject the jurisdiction of other courts based upon a 1989 case deciding jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA),[9] nor obligated to order that the adoption of this child by Adoptive Parents be immediately approved and finalized. Further, the majority orders the immediate transfer of the child, no longer an infant or toddler, upon the filing of the family court's adoption order, without regard to whether such an abrupt transfer would be in the child's best interest.

Much time has passed, and circumstances have changed. I have no doubt that all interested parties wish to have this matter settled as quickly as possible, keeping in mind that what is ultimately at stake is the welfare of a little girl, and that of all who love her. I would remand but I would not order any specific relief at this juncture, as I believe this is a situation where the decisions that are in the

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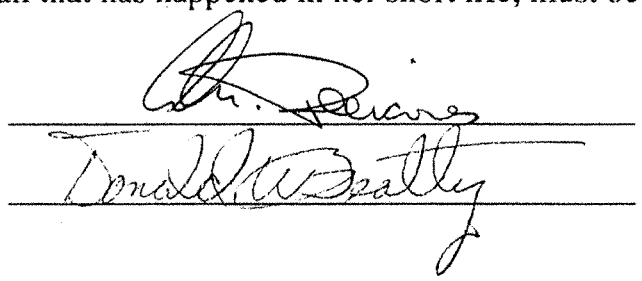
[7] 25 U.S.C. §§ 1912(d) and 1912(f).

[8] 25 U.S.C. § 1915(a).

[9] *Knoth v. Knoth*, 297 S.C. 460, 377 S.E.2d 340 (1989) cited in footnote 1, *supra*. I note that in 2008, the UCCJA was replaced by the Uniform Child Custody Jurisdiction and Enforcement Act, S.C. Code Ann. §§63-15-300 *et seq.*, which specifically provides that it "does not govern an adoption proceeding. . . ." § 63-15-304; *see also* § 63-15-306 (A)(ICWA trumps state law concerning custody of an Indian child).

best interests of this child, given all that has happened in her short life, must be sorted out in the lower court(s).



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Columbia, South Carolina
July 17, 2013

The Supreme Court of South Carolina

Adoptive Couple, Appellants,
v.
Baby Girl, a minor child under the age of fourteen years,
Birth Father, and the Cherokee Nation, Respondents.

Appellate Case No. 2011-205166

ORDER

On July 22, 2013, Birth Father and the Cherokee Nation filed petitions for rehearing requesting that this Court reconsider its order dated July 17, 2013. Additionally, on July 22, 2013, Birth Father filed a petition for supersedeas, which the Cherokee Nation joins by way of return. All petitions are denied.[1]

We remain fully aware of the important and time-sensitive interests at stake. More to the point, we are cognizant that the paramount consideration is the best interest and welfare of Baby Girl. This matter was, without objection, placed in the jurisdiction of the South Carolina courts long ago. Jurisdiction remains in South Carolina, notwithstanding apparent actions filed in other jurisdictions following the decision of the United States Supreme Court (USSC). As determined by the USSC, the Indian Child Welfare Act (ICWA) has no application to Birth Father. Our original and erroneous decision was premised on the applicability of ICWA to the Birth Father. As a result, the Birth Father's rights, if any, are determined by the law of the state of South Carolina. While this Court was in error concerning the applicability of ICWA, we have consistently held that under state law, the Birth Father's parental rights (because of his irrefutable lack of support, interest and involvement in the life of Baby Girl) would be terminated.[2] Therefore, under state

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[1] It has come to our attention that on July 23, 2013, Birth Father filed a motion in the Charleston County Family Court requesting a de novo hearing. We reiterate that such a hearing is unavailable in light of this Court's order dated July 17, 2013.

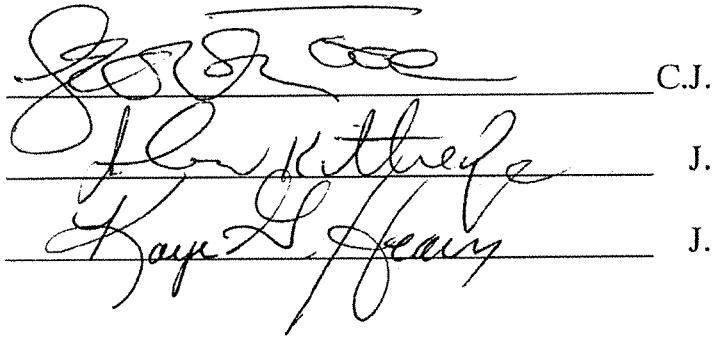
[2] On this point, the respective majority and dissenting opinions from our original decision are in accord.

law, the Birth Father is precluded from challenging the adoption. Moreover, in light of the urgent need for this matter to be concluded, we determine, upon review of the record, that the adoption of Baby Girl by the Adoptive Couple is in the best interests of Baby Girl.

The Adoptive Couple has throughout this litigation confirmed their intent to rear Baby Girl in a manner that maintains a meaningful connectedness to her Native American heritage. Consistent with their commitment to serve Baby Girl's best interests, and in recognition that the return of Baby Girl to them must be accomplished with her best interest as the controlling consideration, the Adoptive Couple has commendably proposed a thoughtful transition plan. We leave it to the family court to determine whether to adopt the Adoptive Couple's proposed transition plan or another plan. Nevertheless, our order of July 17, 2013, stands.

We reiterate that, aside from the narrow issue of whether a transition plan is in Baby Girl's best interest, the orders of this Court following remand from the USSC leave nothing further to be decided by the family court. Accordingly, the family court shall forthwith approve the adoption and award legal custody to the Adoptive Couple. The matter of transfer of physical custody shall be accomplished in accordance with Baby Girl's best interest, as determined by the family court.

It is our fervent hope that the parties will work together in good faith and place the best interest and welfare of Baby Girl above their own desires. This emotionally charged case was fully litigated in the South Carolina courts and the United States Supreme Court. This case has reached finality, in this unchallenged forum and jurisdiction. That finality should be honored.

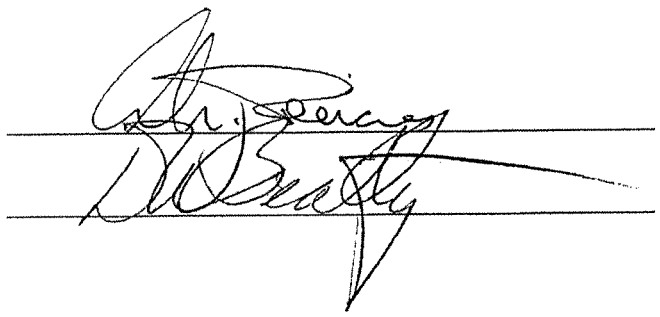


C.J.

J.

J.

We would grant the petitions for rehearing, vacate the Court's earlier order, and remand this matter to the family court for further proceedings. Since the majority of the Court has decided to deny rehearing, we would grant the request for a stay.



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J.

Columbia, South Carolina

July 24, 2013

cc:
Robert Norris Hill
Lesley Ann Ann Sasser
Thomas P. Lowndes, Jr.
Raymond William Godwin
James-Fletcher Thompson
Shannon Phillips Jones
Julie Mahon Rau
Dione Cherie Carroll
John S. Nichols
Mark Fiddler
Philip McCarthy
Chrissi Nimmo
Larry Dale Dove
Julie J. Armstrong
The Honorable Jack A. Landis, Chief Administrative Judge for the Ninth Circuit, Family Court