No. 13A115

In the Supreme Court of the United States

BIRTH FATHER AND CHEROKEE NATION,

Applicants,

v.

ADOPTIVE COUPLE, *ET AL.*,

Respondents.

REPLY IN SUPPORT OF APPLICATION FOR A STAY OF THE JUDGMENT OF THE SUPREME COURT OF SOUTH CAROLINA

Applicants Birth Father and Cherokee Nation respectfully submit this reply in support of their application for a stay of the judgment of the Supreme Court of South Carolina in this case. See E. Gressman, *et al.*, SUPREME COURT PRACTICE 884 (9th ed. 2007) (noting that stay applicant "may be given some brief period in which to submit a reply"). We also note one development since the filing of the application: on July 31, 2013, the South Carolina family court, acting at the direction of the South Carolina Supreme Court, approved the adoption of Baby Girl by the Adoptive Couple.

1. The federal question now presented in this case is whether the South Carolina Supreme Court misread 25 U.S.C. § 1915 and misunderstood this Court's decision in *Adoptive Couple* v. *Baby Girl* when it held that consideration of

competing adoption petitions—and application of the Section 1915 adoption placement preferences—is "foreclose[d]." Stay App. 4. The Adoptive Couple's defense of that holding, and their related assertion that the error below does not warrant this Court's review, is incorrect, for several reasons.

First, the Adoptive Couple misread the plain language of this Court's decision. They recognize that the principal dissent understood the decision to allow "Baby Girl's grandparents or other members of the Cherokee Nation [to] formally petition for adoption of Baby Girl" and to have those petitions "consider[ed] under the order of preference established in § 1915." 133 S. Ct. at 2585 (Sotomayor, J., dissenting). The Adoptive Couple nevertheless insist that the Court's holding forecloses such competing adoption petitions because the decision "explains that the relevant inquiry occurs 'as of the time of the adoption proceedings,' which has long since passed." Opp. 5 (quoting 133 S. Ct. at 2562).

In fact, the language quoted by the Adoptive Couple appears in the Court's discussion of 25 U.S.C. § 1912(f), *not* in connection with Section 1915. See 133 S. Ct. at 2562 (Birth Father could not invoke Section 1912(f) "because he had never had legal or physical custody of Baby Girl as of the time of the adoption proceedings"). As we showed in the stay application, the Court's treatment of Section 1915 stated only that the provision was inapplicable in the circumstances then before the Court because, as of that time, no one other than the Adoptive Couple had "formally sought to adopt the child" (133 S. Ct. at 2565); nothing in the Court's language suggests that it is too late for the filing of competing adoption petitions now. In any

event, "the time of the adoption proceedings" has *not*, in the Adoptive Couple's formulation, "long since passed"; at the time this Court remanded the case and the competing adoption petitions were filed, the Adoptive Couple's adoption petition had been *rejected* by both lower courts and the adoption proceedings remained open.

Second, as this discussion suggests, the Adoptive Couple misreads Section 1915's requirements. As we explained in the stay application (at 12-13), Section 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." 133 S. Ct. at 2585 (Sotomayor, J., dissenting) (quoting 25 U.S.C. § 1915(a) (emphasis added by Justice Sotomayor)). We are not aware of any court that ever has held Section 1915 inapplicable in a case where the adoption proceeding remained open at the time of filing of a competing adoption petition; the Adoptive Couple has not purported to identify any such authority; and they do not attempt to explain how their reading can be reconciled with the statute's plain text.

Third, as we also showed in the application (at 13), our argument applies with particular force in the circumstances here. We explained that, prior to this Court's decision in this case, *no* court had ever held that a competing adoption petition had to have been filed prior to invocation of the Section 1915 preferences; the Adoptive Couple did not assert such a requirement in the lower courts. In such a setting—where it is certain that both Birth Father and Paternal Grandparents *would* have filed timely formal adoption petitions had they been aware of such a requirement—it would be profoundly unfair to deny Baby Girl's relatives an

opportunity to pursue adoption and invoke the Section 1915 preferences now. The Adoptive Couple make no response to this point at all.

The Adoptive Couple do acknowledge that Justice Breyer expressly left open the question whether fathers in Birth Father's circumstances may invoke Section 1915 in "future cases '*of this kind,*'" although they insist that he "did not suggest that this was an open question *in this case*." Opp. 5 (quoting 133 S. Ct. at 2571 (Breyer, J., concurring) (emphasis added by Adoptive Couple). They accordingly understand Justice Breyer to have stated that, although all *future* parents who are identically situated to Birth Father may be entitled to benefit from Section 1915, Birth Father himself—because he was not, and could not have been, aware of the reading to be given Section 1915 by the Court in his case—will be denied that opportunity and will lose custody of his daughter. That is an improbable reading of Justice Breyer's opinion.

Fourth, the Adoptive Couple is wrong in contending that review should be denied even if the Court believes that the decision below is incorrect. Opp. 4. This Court has noted that Section 1915 is "[t]he most important substantive requirement imposed on state courts" by ICWA. *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 36 (1989). It therefore is of considerable importance that the rules governing application of the provision be clearly settled. And even if that were not the case, this Court's surely should act when one of its decisions is being misapplied to mandate the removal of a little girl from a fit and loving father.

2. The Adoptive Couple is incorrect in contending that our reading of Section

1915—the reading that universally had prevailed in the lower courts prior to this Court's decision—"would be disastrous to the orderly administration of child custody proceedings" by requiring "Indian children [to] wait in limbo indefinitely through seriatim adoption proceedings" whenever "one Indian person * * * raise[]s his hand minutes before a final adoption decree is signed." Opp. 5-6. In the circumstances hypothesized by the Adoptive Couple, the "good cause" exception to Section 1915 would preclude invocation of the placement preferences by persons who inappropriately delayed the filing of their adoption petitions. But that, of course, is not this case, where Birth Father and Paternal Grandparents at all times made clear their interest in obtaining custody of Baby Girl.

It may be added that the prospect imagined by the Adoptive Couple is wholly unrealistic. There is no tactical—or any other imaginable—benefit to be gained by delaying the filing of an adoption petition in the manner hypothesized here. That doubtless is why such a case has never arisen; we are unaware of *any* case, in the thirty-five years that ICWA has been on the books, in which "Indian children waited in limbo indefinitely through seriatim adoption proceedings" or would-be adoption petitioners materialized minutes before the close of an adoption.

3. The Adoptive Couple's suggestion that the South Carolina Supreme Court engaged in any meaningful inquiry into Baby Girl's best interests (Opp. 8-9) is incorrect. That court *could not* have considered Baby Girl's current circumstances. The court below made its purported best interest determination "upon review of the record." Stay App. 9. But the record closed two years ago. There is no evidence upon

which the court below *could* have determined whether the Adoptive Couple remain suitable parents[1]; whether Birth Father and Stepmother are as good, or better, parents for Baby Girl than the Adoptive Couple would be; or whether, at the current stage of her life, Baby Girl would be harmed (as Justice Ginsburg put it at oral argument) by "uprooting" her from the loving father and extended family with whom she has bonded over the last nineteen months. With respect, we do not see how the holding below, avowedly made on a stale record, could be consistent with the assurance offered this Court by the GAL's counsel that, on remand, "there has to be a best interest determination that takes into account the current situation" and that (again in Justice Ginsburg's words) "take[s] into account uprooting th[e] relationship" between Baby Girl and Birth Father. Oral Argument Tr., p. 24, line 14 – p. 26, line 10.[2]

In saying this, we do not suggest that determination of Baby Girl's best interests involves a federal question to be resolved by this Court. *Cf.* Opp. 7-8. We *do* note that consideration of the competing adoption petitions pursuant to Section 1915, in light of that provision's "good cause" proviso, would allow for the

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[1] South Carolina Children's Code § 63-9-520(b) (emphasis added) provides that, "if the waiting period for an adoptive placement exceeds one year from the date the preplacement investigation report is completed, the report *must* be updated before the placement of a child for the purpose of adoption *to determine any change in circumstances.*" That was not done here.

[2] For the same reason, we are mystified by the statement of Prof. Hollinger, reprinted by the Adoptive Couple, that she has no objection to finalization of the adoption, given the South Carolina Supreme Court's determination that it is "'in Baby Girl's best interest.'" Opp. 11. As the commentator who quoted Prof. Hollinger's remarks noted, "[i]f [Birth Father] is a good parent—which appears to be the case—most child development experts would probably counsel the opposite." Emily Bazelon, *Send Veronica Back: A truly terrible ruling in the Baby Girl custody case*, SLATE (July 18, 2013) (http://tinyurl.com/VeronicaSct.

consideration of Baby Girl's current circumstances and best interests that the court below failed to provide. See Stay Application 13-14. The Adoptive Couple makes no response to this point.

4. The Adoptive Couple does not deny that Birth Father would suffer irreparable injury if Baby Girl is taken from him. And they do not assert that *they* would suffer irreparable injury from the brief preservation of the status quo that would follow from grant of a stay.

Instead, the Adoptive Couple focuses on Baby Girl, insisting that "[o[nly the child's GAL speaks for Baby Girl, and the GAL supports the proposed transition plan as serving Baby Girl's best interests." Opp. 9. As we explained in our merits brief, however (at 11-13), there is reason to doubt the GAL's assertions: she was unilaterally selected by the Adoptive Couple's attorney; has been accused of bias by Birth Father; and Birth Father withdrew his motion to remove the GAL only upon obtaining agreement that her recommendations regarding best interests and custody would not be considered by the family court. Even if none of that were so, the GAL is simply in no position to speak to Baby Girl's current best interests. She made no effort to inquire into Baby Girl's status or circumstances during the period that Baby Girl has lived with Birth Father, and has no basis on which to opine about how Baby Girl would be affected by the transfer of custody. And, of course, the transition plan that the GAL endorses could be implemented just as well at the ultimate termination of this litigation as it could now.

The most salient consideration is this: immediate transfer of custody would

cause a traumatic change in Baby Girl's circumstances that, if we are correct on the merits, is unwarranted and ultimately would be undone. See Stay Application 11. The Adoptive Couple has nothing to say on that point. They maintain, instead, that Baby Girl has a "paramount interest in finality and return to her *permanent* home." But if any doubt exists about where Baby Girl's permanent home should be—as there is under our reading of Section 1915 and of this Court's decision—their argument against a stay can have no merit.

5. Finally, the Adoptive Couple accuse Birth Father and the Cherokee Nation of "obstruct[ing] the prompt and orderly resolution of Baby Girl's permanent placement" and engaging in a "scorched-earth strategy of obstruction." Opp. 11-14. Although not directly relevant to the issue now before this Court, we must take issue with that characterization. Much of this "obstruction" involves the filing of the competing adoption petitions that Justice Sotomayor expressly anticipated; we do not see how action that was contemplated with approval by (at least) four Justices of this Court can be regarded as inappropriately "obstructive."[3] And in any event, it surely is understandable that a father would take whatever actions are lawfully available to retain custody of the child he loves.[4]

All involved in this long and very painful litigation doubtless seek the best for

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[3] Although the Adoptive Couple criticize Birth Father and Paternal Grandparents for filing adoption petitions in Oklahoma rather than South Carolina (Opp. 12), South Carolina law precludes the filing of an adoption petition in that State unless the child is present there. S.C. Code §63-9-50. Because Baby Girl now resides in Oklahoma, state law barred any attempt by Baby Girl's relatives to adopt her in South Carolina. That aspect of state law cannot be thought to limit the application of Section 1915.

[4] Unsurprisingly, the quotations from Birth Father's attorneys that are quoted at Opp. 14 n.2, which suggest an intent to unlawfully defy court orders, are taken misleadingly out of context.

Baby Girl. That remains the goal of Birth Father and the Cherokee Nation.

For these reasons and those offered in the stay application, the judgment of the South Carolina Supreme Court in this case should be stayed.

Respectfully submitted.

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