No. 13A115

In the

Supreme Court of the United States

BIRTH FATHER AND CHEROKEE NATION,

Applicants,

v.

ADOPTIVE COUPLE, ET AL.,

Respondents.

REDACTED RESPONSE FOR GUARDIAN AD LITEM, AS REPRESENTATIVE OF RESPONDENT BABY GIRL, IN OPPOSITION TO APPLICATION FOR STAY

To the Honorable John G. Roberts, Jr., Chief Justice of the United States:

Following remand from this Court's decision holding that the Indian Child Welfare Act of 1978 ("ICWA") does not bar the adoption at the center of this proceeding, the South Carolina Supreme Court concluded, "upon review of the record, that the adoption of Baby Girl by the Adoptive Couple is in the best interests of Baby Girl." July 24 Order at 2. The court accordingly remanded to the family court to finalize the adoption and determine, with the Guardian ad Litem's input, how to effectuate the transfer of custody to Adoptive Couple in a manner consistent with the current best interests of Baby Girl. After the court denied Birth Father's and the Cherokee Nation's request to stay its decision, Birth Father and the Cherokee Nation filed this application for a stay pending the filing of a petition for certiorari. As the duly appointed legal representative of the interests of Baby Girl

in these proceedings, the Guardian ad Litem ("the Guardian") respectfully submits this response on Baby Girl's behalf.

BACKGROUND

1. On June 25, 2013, this Court issued an opinion concluding that the South Carolina Supreme Court erred in holding "that certain provisions of the federal Indian Child Welfare Act of 1978 required [Baby Girl] to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his paternal rights and who had no prior contact with the child." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2556 (2013). Specifically, the Court concluded that section 1912(f) of the ICWA "does not apply when, as here, the relevant parent never had custody of the child," and that section 1912(d) likewise "is inapplicable when, as here, the parent abandoned the Indian child before birth and never had custody of the child." *Id.* at 2557. Finally, the Court concluded that because "Adoptive Couple was the only party that sought to adopt Baby Girl in the Family Court or the South Carolina Supreme Court," section 1915(a)'s adoptive placement preferences do not apply to these proceedings. *Id.* at 2564. At the Adoptive Couple's request, Justice Alito expedited the issuance of this Court's mandate, and the case was returned to the South Carolina Supreme Court on July 5, 2013, for further proceedings not inconsistent with this Court's opinion. No. 13A7.

2. In addition to concluding that the ICWA does not "bar[] the termination of Biological Father's parental rights," this Court also noted that "[i]t is undisputed

that ... Biological Father would have had no right to object to [Baby Girl's] adoption under South Carolina law." 133 S. Ct. at 2559; *see also Adoptive Couple v. Baby Girl*, 398 S.C. 625, 643 n.19 (2012) ("Under state law, [Biological] Father's consent to the adoption would not have been required."). Perhaps recognizing that he therefore now lacks any legal basis to object to the finalization of the adoption under South Carolina or federal law, Birth Father responded to this Court's decision by taking a series of steps designed to prevent the South Carolina courts from bringing this protracted custody dispute to a final resolution. First, before this Court's expedited mandate even issued, on July 1, 2013, Birth Father and his wife filed a petition to adopt Baby Girl in Oklahoma state court—even though an Oklahoma court previously concluded (in a decision Birth Father did not challenge) that the Oklahoma courts lack jurisdiction over this matter. *See* No. 12-399 JA 68–69. Second, the next day, Birth Father's parents filed a conditional petition for guardianship in Cherokee tribal court—even though the Cherokee Nation has already conceded that it, too, lacks jurisdiction over this matter because Birth Mother will not consent to tribal jurisdiction. *See* Trial Tr. 355; 25 U.S.C. § 1911(b). That same day, Birth Father informed the South Carolina Supreme Court that, as a result of these newly pending proceedings, the court should remand to the family court to determine whether to relinquish jurisdiction and transfer the case to Oklahoma or, in the alternative, engage in a *de novo* review of whether a best interests determination mandates that Birth Father permanently retain the

custody the state supreme court previously awarded him based on an error of federal law.

3. Once this Court's mandate issued and the case was remanded to the South Carolina Supreme Court, Adoptive Couple moved to finalize their adoption of Baby Girl. Based on the belief that, in the wake of this Court's decision, neither state nor federal law provides any basis for denying the adoption petition, the Guardian authorized Adoptive Couple to note that she joined their request "to bestow upon Baby Girl the permanency of adoption." Adoptive Couple's Emergency Motion for Final Order Following Remand from the U.S. Supreme Court ("Emergency Motion") at 5. Adoptive Couple also proposed a transition plan designed to ensure that Baby Girl's best interests remain protected during the transfer of custody, should the court so order. After thoroughly reviewing that plan, implementation of which would be overseen both by a skilled attachment therapist who has been retained by tribes to do similar work in the past and by a member of the Cherokee Nation, the Guardian informed the court of her view that the plan "offers the best opportunity for a smooth transition for Baby Girl while also ensuring that Baby Girl is able to maintain important ties with her biological family and the Cherokee Nation." Br. of Guardian ad Litem Following Remand from the U.S. Supreme Court (attached as Ex. A) at 2.

4. After reviewing numerous filings from all interested parties on all remaining legal questions, on July 17, 2013, the South Carolina Supreme Court issued an order remanding to the family court for entry of an order approving and

finalizing Baby Girl's adoption by Adoptive Couple. Recognizing that this Court's decision removed "the perceived federal impediment to Adoptive Couple's adoption of Baby Girl," the court concluded that the question is now one of state law, and state law, as the full court had already indicated, does not require Birth Father's consent to the adoption of Baby Girl. July 17 Order at 4. Because it also remained the case that "no other party has sought adoptive placement in this action," *i.e.*, the South Carolina action, the court also rejected Birth Father's effort to invoke section 1915(a) and his post-remand efforts "at the midnight hour to further delay resolution of this case." July 17 Order at 4. Having resolved these legal issues, the court concluded that "nothing would be accomplished by a *de novo* hearing in the Family Court, except further delay and heartache for all involved—especially Baby Girl." July 17 Order at 2. It accordingly remanded to the family court to finalize the adoption and determine how best to proceed with the transfer of custody consistent with the current best interests of Baby Girl.

5. On July 22, 2013, Birth Father petitioned the court for rehearing and a writ of supersedeas. In his rehearing petition, Birth Father alleged, *inter alia*, that the court failed to recognize that it had the discretion to decline continued jurisdiction, failed to take Baby Girl's best interests into consideration, and failed to comply with the view expressed by the dissenting Justices in this Court that section 1915(a) could be taken into consideration if competing adoption petitions were filed. The supersedeas petition further noted that, should the court deny rehearing, Birth Father intended to challenge its order not only before this Court, but in various

collateral proceedings in state and federal court. The Cherokee Nation also filed its own petition for rehearing, in which it revealed for the first time that, unbeknownst to the Guardian, Adoptive Couple, or Birth Mother, Birth Father's wife and parents had initiated an *ex parte*, sealed action in the tribal court, which then purported to grant them "temporary guardianship" of Baby Girl.

6. On July 24, 2013, the South Carolina Supreme Court issued an order denying the motions. Noting that "[t]his matter was, without objection, placed in the jurisdiction of the South Carolina courts long ago," the court again rejected the invitation to cede its jurisdiction to the courts in which post-remand proceedings had been initiated. The court also reiterated that it "remain[s] fully aware of the important and time-sensitive interests at stake," and, "[m]ore to the point, ... cognizant that the paramount consideration is the best interest and welfare of Baby Girl." July 24 Order at 1. In keeping with that understanding, the court explained that it *had* "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." July 24 Order at 2. "[I]n recognition that the return of Baby Girl to [Adoptive Couple] must be accomplished with her best interest as the controlling consideration," the court also made clear that the family court retains full discretion to determine what "transition plan is in Baby Girl's best interest." July 24 Order at 2.

[redacted]

STANDARD

A stay pending a petition for certiorari is an extraordinary remedy that may be "granted only in extraordinary cases." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (internal quotation marks omitted). To establish that a stay would be appropriate, the applicant must demonstrate "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari ...; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm [will] result from the denial of a stay." *Id.* (internal quotation marks omitted). "The party requesting a stay bears the burden of showing that

[1] As the hearing was about to get under way, an action was filed against the family court judge in the United States District Court for the District of South Carolina by attorneys purporting to act on behalf of Baby Girl seeking an *ex parte* temporary restraining order and preliminary injunction to prevent the hearing from going forward. *See V.B. v. Martin*, No. 2:13-cv-20730. The district court promptly denied the temporary restraining order. Doc. No. 9.

the[se] circumstances" exist. *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). Even when the applicant satisfies that heavy burden, moreover, "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Id.* at 433 (internal quotation marks omitted). "It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Id.* (internal quotation marks and alterations omitted).

ARGUMENT

Applicants' request for extraordinary relief provides no basis for this Court's re-entry into this already protracted state court proceeding or for any further delay in its long-overdue resolution for Baby Girl. Contrary to their contentions, the proceedings on remand have been entirely consistent with this Court's opinion and mandate, as well as with the Guardian's legal obligations and representations before this Court. The remand proceedings implicate no federal issue that this Court is reasonably likely to review, let alone resolve in Applicants' favor. Indeed, the proceedings on remand have largely turned on matters of state law and the unique and profoundly factbound circumstances of this case.

Nor do the equities favor the stay Applicants request. Applicants' attempt to freeze the status quo pending another round of merits briefing before this Court—guaranteeing that there will be no inquiry whatsoever into Baby Girl's current best interests for many additional months—is difficult to reconcile with their professed concern with absence of an inquiry into Baby Girl's current best interests. [redacted]

[redacted]

[redacted] The courts below have confirmed that Birth Father has no state law rights to custody or to object to the adoption. They have likewise held that it is too late to consider other adoptive placements (and recognized that doing so would disserve Baby Girl's best interest given Birth Mother's objection to any other placement), which in turn means that section 1915(a)'s constitutionally dubious preferences are not even implicated here. Under these circumstances, any balancing of the equities should be focused exclusively on the best interests of Baby Girl in transitioning back into a family relationship that was disrupted based on what all must now accept was a mistaken construction of federal law. [redacted]

[redacted]

[redacted] That state trial court, not this Court considering an extraordinary stay request, is now the proper forum for this case.

1. Contrary to Applicants' contentions, there is no fair prospect that this Court will grant certiorari in this case once again to consider whether "§ 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." Stay Application at 9. Although this Court someday may need to resolve whether section 1915(a)'s constitutionally dubious preferences are compatible with the Equal Protection Clause, the South Carolina Supreme Court's entirely factbound determination that it was too late to consider alternative placements means that

section 1915(a) is not even implicated in this case. Applicants dispute that factbound determination, but do not seriously attempt to demonstrate that this question is cert-worthy in any traditional sense. While the issues this Court previously considered in this case were likely to recur in countless cases, the question whether it is too late as a timing and procedural matter to consider alternative adoption placements is as factbound a question as one can imagine. As a consequence, Applicants principally contend that the South Carolina Supreme Court's determination somehow runs afoul of this Court's opinion. It does not.

Applicants identify nothing in this Court's opinion suggesting, let alone mandating, that the South Carolina courts provide Birth Father or anyone else an opportunity to file an adoption petition (in the South Carolina courts or elsewhere) at this late date and assert section 1915(a)'s preferences. To the contrary, the Court's opinion strongly supports the decision below, as the key factor the Court identified in finding section 1915(a) inapplicable—namely, that "Adoptive Couple was the only party that sought to adopt Baby Girl in the Family Court or the South Carolina Supreme Court"—has not changed. 133 S. Ct. at 2564. Applicants are therefore forced to rely on the *dissent*'s suggestion that Birth Father or others might attempt to invoke section 1915(a) on remand. Even indulging the dubious assumption that the dissenting Justices had in mind the filing of adoption petitions not in the South Carolina courts to which this matter was remanded, but in courts that have already concluded that they lack jurisdiction, Applicants unsurprisingly identify no authority for the proposition that this Court is reasonably likely to grant

certiorari to correct a "mistaken application" of a dissenting opinion. Stay Application at 12.

Applicants fare no better with their attempt to glean support from Justice Breyer's observation in his concurring opinion that section 1915(a) might be interpreted to "allow an absentee father to re-enter the special statutory order of preference with support from the tribe, and subject to a court's consideration of 'good cause.'" 133 S. Ct. at 2571 (Breyer, J., concurring). Justice Breyer presumably envisioned such re-entry would occur in the state courts with jurisdiction over the principal adoption petition; candidly acknowledged that he "raise[d], but d[id] not here try to answer, the question," *id.*; and did not so much as intimate that he joined the majority opinion on the understanding that Birth Father would be able to pursue that unorthodox avenue on remand here. Accordingly, the South Carolina Supreme Court's conclusion that section 1915(a) could not be invoked "at the midnight hour" to block this adoption, July 17 Order at 4, is in no way inconsistent with this Court's opinion.

Nor does the state court's resolution of that question independently warrant this Court's plenary review.[2] At the outset, if the Court were inclined to consider

[2] Indeed, it is not even clear that Applicants seek to present a question of federal law. In declining to consider the midnight hour adoption petitions and holding section 1915(a) inapplicable, the South Carolina Supreme Court reiterated its duty "to ensure 'the sanctity of the adoption process' under state law is 'jealously guarded.'" July 17 Order at 4 (quoting *Gardner v. Baby Edward*, 228 S.C. 332, 334 (1986)). In doing so, the court indicated that section 1915(a) was inapplicable because the new petitions were untimely and/or inadequate as a matter of *state law*. To the extent that determination has implications for Applicants' rights under federal law, those implications would appear to stem from a state law determination based on the unique factual circumstances at hand, not from any question about the proper interpretation of section 1915(a). Applicants would bear a

when and how section 1915(a) applies, this would be a particularly poor case in which to do so. First, even assuming Applicants were correct that section 1915(a) could be invoked to preclude this adoption (and they are not), that would not entitle them to the relief they seek, as Birth Mother has made crystal clear that she will not consent to Baby Girl's adoption by anyone other than Adoptive Couple. July 17 Order at 5 n.6; *see also* 25 U.S.C. § 1913(c). Moreover, as this Court went out of its way to reiterate, a court always retains the power under section 1915(a) "to determine whether 'good cause' exists to disregard the tribe's order of preference," 133 S. Ct. at 2564 n.11; *see also* 133 S. Ct. at 2571 (Breyer, J., concurring), and there is every reason to believe that the state courts would be inclined to reach that conclusion under the unusual circumstances of this case.

But even setting aside those practical problems, considering whether section 1915(a) applies in this anomalous posture would require the Court to answer a series of antecedent questions unique to the facts of this case—including whether a petition must be filed in the court in which adoption proceedings are pending, whether it is in fact the case that a biological parent with no rights under the ICWA may re-enter the order of preferences, and/or whether a "conditional" petition suffices to implicate section 1915(a)—before ever getting to the question Applicants seek to present regarding whether a petition may be filed "at the midnight hour" to block an adoption petition that has been pending for years. Applicants make no

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heavy burden in attempting to demonstrate that the South Carolina court's application of South Carolina law was so unsound as to implicate constitutional concerns.

effort to identify any lower court disagreement on that question or demonstrate that it occurs with anything approaching frequency. Indeed, the question that Applicants seek to present is inherently intertwined with the unique facts of this case, and now that this Court has clarified the inapplicability of sections 1912(d) and (f) in these circumstances, the question is almost uniquely unlikely to recur. Nor do they attempt to reconcile the result they seek with this Court's admonishment that the ICWA should not be interpreted to allow "eleventh hour" invocations of its provisions that "surely" would cause "many prospective adoptive parents [to] pause before adopting any child who might possibly qualify as an Indian under the ICWA." 133 S. Ct. at 2565. Particularly when combined with the fact that accepting Applicants' interpretation of section 1915(a) would leave this Court facing all the same constitutional questions it avoided by concluding that section 1915(a) does *not* apply, it is exceedingly unlikely that this Court will grant review of the question Applicants seek to present, let alone resolve that question in Applicants' favor.

2. Applicants alternatively offer an equitable plea to this Court to order application of section 1915(a) on the theory that doing so "could permit" the South Carolina courts to engage in a best interests determination that they claim was prematurely eliminated by the decisions below. Stay Application at 14. Applicants' portrayal of the remand proceedings is both inaccurate and unfair, and the relief they seek—a stay that would ensure the absence of any best interests determination for many months—is a complete non sequitur. The South Carolina

Supreme Court neither interpreted this Court's decision as compelling immediate transfer of Baby Girl to Adoptive Parents nor failed to consider her best interests before determining how to proceed. To the contrary, the court made clear both that its custody determination was based on *state law*, not this Court's mandate, *see* July 17 Order at 4, and that, "upon review of the record," it concluded that "the adoption of Baby Girl by the Adoptive Couple is in the best interests of Baby Girl." July 24 Order at 2. The court likewise reiterated that the transfer of custody to Adoptive Couple "shall be accomplished in accordance with Baby Girl's best interests," including all that has happened over the course of these proceedings, and remanded to the family court to determine what that entails. July 24 Order at 2.

Notably, Applicants do not profess any intention to challenge the substance of the state court's best interests determination before this Court. Nor would Birth Father be in any position to do so, having insisted in his earlier representations to this Court that a best interests determination presents no federal question. No. 12-399 Br. for Resp. Birth Father at 52 ("this Court never has held that the Constitution incorporates a 'best interests of the child' rule"). Instead, Applicants focus their efforts on intimating that the Guardian has somehow abdicated her responsibility to advocate for Baby Girl's best interests on remand and acted contrary to representations made to this Court. The Guardian has done no such thing.

While this Court's decision did not purport to order that any party be awarded permanent custody of Baby Girl, it also did not purport to create any new

legal avenues by which Birth Father or anyone else might assert a claim to custody or adoption. Instead, the Court decided only that the state court erred in concluding that the ICWA was an obstacle to Adoptive Couple's petition, and left it to the state court to determine on remand whether anything else might preclude the adoption from going forward. Indeed, as noted, if anything, this Court's treatment of the section 1915(a) issue is far more consistent with the notion that it was too late to inject competing adoption petitions into this case. In all events, the state court had already concluded that "Adoptive Couple are ideal parents who have exhibited the ability to provide a loving family environment for Baby Girl," and that Birth Father has no right as a matter of state law to contest their adoption petition. *See Adoptive Couple*, 398 S.C. at 643 n.19, 657. And, as noted, no other party has petitioned the South Carolina courts—before or after remand—to adopt Baby Girl. Accordingly, there remained no legal basis under state or federal law for preventing the adoption by Adoptive Couple from being finalized. That being the case, the Guardian authorized Adoptive Couple to notify the court that she joined in their request court to "bestow upon Baby Girl the permanency of adoption" and bring a long-overdue end to this proceeding. Emergency Motion at 5.

That does not mean, however, that a transfer of physical custody will occur without an inquiry into Baby Girl's current best interests. Notwithstanding Applicants' repeated insistence otherwise, neither the Guardian nor the state supreme court suggested that Baby Girl should be returned to the custody of Adoptive Couple "immediately," without taking into consideration all that has

happened in the past year and half—including the relationship Baby Girl has developed with Birth Father and others—to determine what is in the best interests of Baby Girl. Rather, consistent with her obligations to represent the best interests of Baby Girl and her representations to this Court that she would continue to do so on remand, the Guardian "thoroughly reviewed" Adoptive Couple's proposed plan for transitioning the custody of Baby Girl and then informed the Court of her view that "the Plan will serve the best interests of not only Baby Girl, but all parties involved in this case." Ex. A at 2. In doing so, the Guardian clearly considered current conditions, including the reality of Baby Girl's custodial situation since the South Carolina courts mistakenly ordered the transfer of custody, and specifically emphasized Adoptive Couple's efforts to design a plan that will "ensur[e] that Baby Girl is able to maintain important ties with her biological family and the Cherokee Nation," and also to ensure that individuals with particular experience and expertise relating to the Cherokee Nation and similar transfers "will play a critical role in the effective implementation of the Plan." *Id.* Consistent with the South Carolina Supreme Court's instructions on remand, the Guardian remains fully prepared to assist the family court in ensuring that Baby Girl's best interests are protected throughout this process. In short, as the state supreme court reiterated, everyone in this case remains deeply "cognizant that the paramount consideration is the best interest and welfare of Baby Girl," July 24 Order at 1, and Applicants' repeated accusations otherwise are both unfounded and unfair.

Indeed, if anything, it is Applicants' request for extraordinary relief from this Court that fails to afford adequate consideration to the best interests of Baby Girl. Applicants are not asking this Court to order the immediate best interests determination that they (erroneously) contend has not occurred.[3] They instead ask this Court to freeze the status quo and leave Baby Girl in Birth Father's custody without any inquiry into what would serve her current best interests for what in all likelihood would be, at a *minimum*, another six months before ultimately remanding to the state courts to assess her best interests. In other words, Applicants ask not so much that Baby Girl's best interests be given the immediate consideration they contend has been lacking, but rather that this Court simply indulge their assumption that Birth Father's continued physical custody over Baby Girl (without affording any access to Adoptive Couple or the Birth Mother) would serve Baby Girl's best interests. They ask this Court to ignore that the only basis for that physical custody is what all—even Applicants—must concede is a mistaken construction of federal law. And they ask this Court to allow the Applicants, and not the family court, to be the sole judge of Baby Girl's best interests. That fundamental disconnect between the equitable interest Applicants assert and the

[3] Applicants' failure to request such relief may reflect the absence of any obvious basis in ICWA to order it in this case. Applicants appear to recognize that the only way for this Court to order anything even resembling a best interests inquiry would be to reverse the South Carolina Supreme Court's procedural ruling that it is too late to consider the new adoption petitions, thereby making section 1915(a) relevant. But that would not result in a best interests determination; rather, it would simply implicate the scope of the "good cause" language of 1915(a) and the constitutional questions this Court sought to avoid. [redacted]

extraordinary relief they seek would put Baby Girl at further risk of the harm she suffers every day that she is denied a permanent resolution to these proceedings. If the ultimate concern is that the state courts have resolved this matter without adequate consideration of Baby Girl's best interests (and they have not), then freezing the status quo without undertaking *any* inquiry into how doing so might affect Baby Girl is the last thing Applicants should be asking this Court to do, and is far more likely to create irreparable injury to Baby Girl than to prevent it.

The reality is that based on fact-specific determinations that turn largely, if not exclusively, on matters of state law, the South Carolina courts on remand have determined that the adoption of Baby Girl by Adoptive Couple should be finalized. That does not mean that immediate physical transfer will occur without any consideration of Baby Girl's current best interests. [redacted] in light of the factbound and state-law-intensive nature of the rulings below, the notion that this Court would grant review, let alone reverse, is implausible. Moreover, at this point, any balancing of the equities must focus on Baby Girl and her best interests. The stay Applicants seek would guarantee that it will be months before any court considers Baby Girl's current best interests, while her current physical custody—produced by the happenstance of a mistaken construction of federal law—continues. [redacted]

[redacted] The choice between those alternatives is clear: This Court should deny the application.

CONCLUSION

This Court should deny the application for a stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Paul D. Clement, a member of the Supreme Court Bar, hereby certify that three copies of the attached Response of Guardian ad Litem, as Representative of Respondent Baby Girl, in Opposition to Application for Stay were served on:

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