IN THE SUPREME COURT OF THE UNITED STATES

No. 12-399

ADOPTIVE COUPLE,

PETITIONERS,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

MOTION OF RESPONDENT CHEROKEE NATION FOR DIVIDED ARGUMENT

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March 21, 2013

Pursuant to Rule 28.4 of this Court, Respondent Cherokee Nation respectfully moves for divided argument in this case, with counsel for Birth Father allowed 20 minutes and counsel for Cherokee Nation allowed 10 minutes. The Nation understands that the Solicitor General is planning to request divided argument as well. The Nation supports that request and if the Court is inclined to grant it, the Nation urges the Court to allot an additional 10 minutes of time (on each side) to the argument to permit both the United States and the Cherokee Nation to present complementary arguments. Respondent Birth Father consents and Respondent GAL, Petitioner and United States as Amicus Curiae do not oppose this motion.[1]

1. This case comes before this Court for review of the decision of the South Carolina Supreme Court which found that (1) Father had parental rights in Baby Girl, (2) Congress had protected those rights under the Indian Child

[1] The Cherokee Nation recognizes that a three-way divided argument is unusual, but this case is unique, involving the very different interests of a private individual, the United States and the Cherokee Nation. Each litigant has a distinct set of concerns and arguments and the Nation believes the Court will benefit from hearing the views of each and in having a chance to question the lawyers representing each party. In the event the Court denies the Nation's motion, it urges the Court to grant the Solicitor General's motion on behalf of the United States and the Nation will allow counsel for the birth Father to present oral argument on behalf of respondents.

Welfare Act of 1978, 25 U.S.C. §1901 *et seq.* ("ICWA"), (3) termination of those parental rights was not warranted under that Act, and (4) in any event, Petitioners' adoption of Baby Girl had to be denied because, *inter alia*, Petitioners could not establish "good cause" for the South Carolina courts not to place Baby Girl with her Father or another preferred tribal placement specified under 25 U.S.C. § 1915. On these bases, the South Carolina Supreme Court ordered Baby Girl returned to her Father.

2. Respondent Birth Father is the biological parent and current custodian of Baby Girl, and unquestionably has a strong interest and right to participate at oral argument in this case.

3. The Cherokee Nation is a sovereign government, recognized as an Indian Tribe by the United States and retaining rights of self-governance which predate the Constitution. *Worcestor v. Georgia*, 31 U.S. 515 (1832). Neither Respondent Birth Father nor the United States can adequately represent the Cherokee Nation's sovereign interests in this case. And Congress recognized as much by expressly authorizing Indian Tribes to intervene in child custody proceedings involving Indian children. 25 U.S.C. § 1911(c).

4. The Cherokee Nation has a separate and distinct interest in this case based on the Nation's inherent governmental interests in Baby Girl (who the parties agree is an "Indian child" under 25 U.S.C. § 1903(4), eligible for membership in the Cherokee Nation), and the Cherokee Nation's additional statutory rights secured under ICWA. Those separate rights include:

Congress's declaration of policy to promote the "stability and security of Indian tribes" (§ 1902); exclusive tribal court jurisdiction over reservation-domiciled Indian children (§ 1911(a); see *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989)); the right of the Cherokee Nation to secure transfer of proceedings from state court to tribal court (§ 1911(b)); the right of the Cherokee Nation to intervene in state court child custody proceedings, as occurred here (§ 1911(c)); the Cherokee Nation's right to petition to invalidate any state court termination of parental rights for non-compliance with ICWA (§ 1914); the Cherokee Nation's right to implement, support or alter the statutory placement preferences which are at issue in this appeal (§ 1915); and the Cherokee Nation's authorization to enter into agreements with States for the care and custody of Indian children (§ 1919). All of these rights are unique to the Cherokee Nation, and cannot adequately be represented by Respondent Birth Father or the United States.

5. One of the core statutory provisions at issue in this case is § 1915, which provides a series of presumptive placement preferences—including preferred placements with extended family members, and other tribal members—in connection with the adoption of Indian children. This section is "[t]he most important substantive requirement [of ICWA] imposed on state courts." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989). Section 1915(a) "'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its

society.'" *Id.* at 37 (citations omitted). Petitioners and Respondent GAL directly challenge the Cherokee Nation's rights and interests under ICWA, including the Nation's rights under § 1915. The Cherokee Nation has a discrete and vital interest in the proper application of § 1915, the heart of the Indian Child Welfare Act. Respondent Birth Father does not share the same interest because § 1915 only comes into play if it is assumed, *arguendo*, that the Father has no parental rights in the matter. For this reason, the Cherokee Nation and the Respondent Birth Father have differing interests and they are filing separate merits briefs.

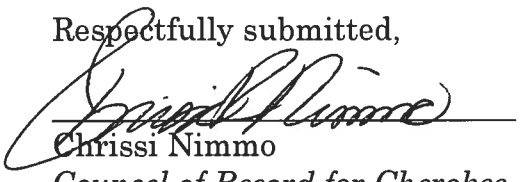
6. The Cherokee Nation's interests and Respondent Birth Father's interests are distinct. While the Cherokee Nation's rights and interests will be fully protected if Respondent Birth Father retains placement of Baby Girl (as ordered by the South Carolina courts), in the event that Baby Girl's placement is not affirmed by this Court, the Cherokee Nation has distinct rights and interests under § 1915 and has asserted separate and independent grounds to affirm the denial of the adoption complaint based upon § 1915.
7. Of the named parties in this case, Cherokee Nation is the only party that has any real interest in the impact of the Court's decision beyond the specific facts of this case. For Petitioners, Respondent GAL and Respondent Birth Father, a decision on this matter determines their rights and concludes their interests in the Indian Child Welfare Act. But for the Cherokee Nation, any

decision made by this Court will have long lasting effects on the Nation, its citizens, and future Cherokee children.

8. Allowing Respondents to present divided argument will assist the Court in deciding both the specific case before it and the broader implications of the Court's decision.

9. The United States has filed an Amicus Curiae Brief supporting affirmance. That brief focuses heavily on particular portions of Section 1912 of ICWA as the proper basis for decision. The Nation would not propose to address that provision during the oral argument. Accordingly, in the event the United States's motion for divided argument is granted, and the Nation supports that motion, the Cherokee Nation respectfully moves this Court to enlarge the time allotted per side accordingly.

Respectfully submitted,



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March 21, 2013

CERTIFICATE OF SERVICE

No. 12-399

Adoptive Couple,

Petitioners,

v.

Baby Girl, A Minor Under The Age Of Fourteen Years, Birth Father, And The Cherokee Nation,

Respondents.

I, Chrissi Nimmo, do hereby certify that, on this twenty-first day of March, 2013, I caused a copy of the Motion Of Respondent Cherokee Nation For Divided Argument in the foregoing case to be served by first class mail, postage prepaid, on the following parties:

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