1   IN THE SUPREME COURT OF THE UNITED STATES

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3   ADOPTIVE COUPLE,   :

4   Petitioner   :   No. 12-399

5   v.   :

6   BABY GIRL, A MINOR CHILD UNDER THE:

7   AGE OF FOURTEEN YEARS, ET AL.   :

8   - - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Tuesday, April 16, 2013

11

12   The above-entitled matter came on for oral

13   argument before the Supreme Court of the United States

14   at 10:12 a.m.

15   APPEARANCES:

16   LISA S. BLATT, ESQ., Washington, D.C.; on behalf of

17   Petitioners.

18   PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of

19   Respondent Guardian ad Litem in support of

20   Petitioners.

21   CHARLES A. ROTHFELD, ESQ., Washington, D.C.; on behalf

22   of Respondents Birth Father, et al.

23   EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,

24   Department of Justice, Washington, D.C.; for United

25   States, as amicus curiae, supporting Respondents

 1   Birth Father, et al.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:12 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   first this morning in Case 12-399, Adoptive

5   Couple v. Baby Girl.

6   Ms. Blatt?

7   ORAL ARGUMENT OF LISA S. BLATT

8   ON BEHALF OF THE PETITIONERS

9   MS. BLATT: Thank you, Mr. Chief Justice,

10   and may it please the Court:

11   All parties agree that even if the birth

12   father is a parent under the Indian Child Welfare Act,

13   the State court decision below awarding custody to the

14   father must nonetheless be reversed unless Sections

15   1912(d) or (f) create custodial rights that the father

16   concededly does not have under State law.

17   JUSTICE SOTOMAYOR: Are you suggesting -- I

18   don't know that the parties -- I know that the

19   government has said that (f) doesn't apply to the

20   father, but (d) does, so there's not a full concession

21   on your point. But putting that aside, if it is a

22   father who has visitation rights, and exercising all of

23   his support obligations, is it your position that --

24   that because that father's not a custodian, he has no

25   protections whatsoever under (d) or (e)?

4

1   The State can come and take the child away

2   from an unfit mother or father if they're the ones with

3   custody, and that responsible parent who only has

4   visiting rights has no protections under (d), (e), or

5   (f)?

6   MS. BLATT: Well, under State law --

7   JUSTICE SOTOMAYOR: I'm not asking about

8   State law --

9   MS. BLATT: Right. I think that --

10   JUSTICE SOTOMAYOR: -- I'm asking about

11   Federal law.

12   MS. BLATT: Yes, Federal law, which

13   requires custodial rights, would protect a father who

14   has visitation, i.e., custodial rights under State law.

15   So in other words, that -- that is to say,

16   if a father --

17   JUSTICE SOTOMAYOR: Well, (d) doesn't talk

18   about custodial rights. I do agree that (f) talks about

19   continued --

20   MS. BLATT: Right.

21   JUSTICE SOTOMAYOR: -- custody.

22   MS. BLATT: Okay. So let's talk about (d)

23   because I think we are in agreement that the Respondents

24   would have to agree that they either need to win under

25   (d) or (f), and we can talk about Section 1915, but

1   that's not a basis for father.

2   But section (d) -- and I'm reading from the

3   blue brief at 8a says that it requires the party seeking

4   the termination of parental rights to provide, quote,

5   "remedial services and rehabilitative programs designed

6   to prevent the breakup of the Indian family."

7   JUSTICE SOTOMAYOR: Well, you don't think

8   that a parent with custody -- well, you do think a

9   parent with custody is the only definition of family,

10   but why wouldn't a noncustodial parent with visitation

11   rights be considered a family with that child?

12   MS. BLATT: My understanding under State

13   law, a parent who --

14   JUSTICE SOTOMAYOR: I'm not going to State

15   law --

16   CHIEF JUSTICE ROBERTS: Could -- could I

17   hear her answer, please?

18   MS. BLATT: Yes.

19   So the answer is, a parent with visitation

20   rights has custody, so he's protected.

21   Under State law, if you're paying child

22   support and you bring a paternity action and sue for

23   visitation rights, that's a petition for custody. So

24   all a birth dad needs to do to protect himself is to

25   acquire legal rights.

1   This father had no legal rights whatsoever,

2   parental or custodial, and the word "breakup," even the

3   other side concedes, it's discontinuance of an existing

4   legal relationship. There was no legal relationship

5   between this child and the birth father or his

6   relatives.

7   JUSTICE SOTOMAYOR: Well, there is a support

8   obligation on that unwed father.

9   MS. BLATT: No.

10   JUSTICE SOTOMAYOR: Why isn't that a

11   parental right? It's one of the parental rights the

12   States enforce whether or not you want to provide

13   support or not.

14   MS. BLATT: If a child is being adopted, by

15   definition, the -- the adoptive family would be

16   providing support. But let's take the -- let's take

17   what a -- again, the definition of breakup. There is no

18   familial legal custodial parental relationship that

19   either this father or the -- or his parents -- his

20   extended family had with this child.

21   This adoption no more broke up an Indian

22   family than his -- than this Hispanic sole custodial

23   birth mother had raised the child herself.

24   JUSTICE SOTOMAYOR: So what do you do with

25   the States that do give unwed fathers the -- that don't

1   support their children and who don't have an ongoing

2   relationship the right to be considered first for

3   adoption? Why should we follow the definitions of South

4   Carolina or those other States? Why shouldn't we just

5   give it a Federal meaning?

6   MS. BLATT: Because there's --

7   JUSTICE SOTOMAYOR: As --

8   MS. BLATT: Because there's nothing in this

9   Act that anyone can point to that was a basis for

10   transferring custody to this father. At most, there is

11   an obligation, an exhaustion obligation, that if a

12   custodial parent has something like a drug abuse problem

13   the State has to remediate before the family is broken

14   up.

15   What is so extraordinary about this case,

16   particularly the United States' position, is that the

17   adoptive parents' failure to remediate a dad meant that

18   the child got custody of the dad. So if this dad had

19   had a drug problem because there was no treatment of him

20   the court held, well, that's a basis for giving the dad

21   custody.

22   But there's no language in the statute that

23   even remotely suggests that it's a rights-creating

24   provision. All of both of (d), (e), and (f) are

25   protections that assume existing rights and then make it

1   harder to terminate those rights.

2   JUSTICE SCALIA: Your -- your argument

3   assumes that the phrase in the statute "to prevent the

4   breakup of the Indian family" only applies where --

5   where the father has custody. I don't -- I don't know

6   why that should be true. If -- if that's what Congress

7   meant, they could have put it much more narrowly. They

8   had a very broad phrase, "to prevent the break up of an

9   Indian family." And this guy is -- is the father of the

10   child --

11   MS. BLATT: So he --

12   JUSTICE SCALIA: -- and they're taking the

13   child away from him even though he wants it.

14   MS. BLATT: Okay. But when you --

15   JUSTICE SCALIA: And that -- that is not the

16   breakup of -- of an Indian family?

17   MS. BLATT: The only relationship the dad

18   had is one of biology. And, Justice Scalia, you cannot

19   logically break up that biological relationship, nor can

20   you provide remedial services to prevent the breakup of

21   that biological relationship.

22   JUSTICE SCALIA: Oh, I see. You're

23   reading -- you're reading "Indian family" to mean

24   something more than -- than a biological relationship,

25   right? You're going to hang a lot of -- a lot of other

1   ornaments on that phrase?

2   MS. BLATT: Well, I'm hanging -- I'm hanging

3   a lot on two things.

4   JUSTICE SCALIA: I mean, it seems to me he's

5   the father, the other woman's the mother, that's the --

6   that's the Indian family, the father, the mother, and

7   the kid.

8   MS. BLATT: He has a biological link that

9   under State law was equivalent to a sperm donor.

10   JUSTICE SCALIA: He's the father. He's the

11   father.

12   MS. BLATT: And so is a sperm donor under

13   your definition. He's a biological father and nothing

14   else in the eyes of State law. And under that view --

15   JUSTICE SCALIA: This isn't State law. This

16   is a Federal statute which uses an expansive phrase,

17   "the breakup of the Indian family."

18   MS. BLATT: Right. And there is no Indian

19   family here. The only breakup --

20   JUSTICE SOTOMAYOR: What's the difference

21   with a sperm donor? I mean, I know that you raise that

22   in your brief. But going back to Justice Scalia's

23   point, if the choice is between a mother, a biological

24   father, or a stranger, and if the father's fit, why do

25   you think that the Federal statute requires that it be

1   given to a stranger rather than to the biological father

2   when the statute defines "parent" as the biological

3   father?

4   MS. BLATT: And assuming all biological

5   fathers that are acknowledged or established are swept

6   in, which would include any biological father, the only

7   stranger in this case was the birth father, who

8   expressly repudiated all parental rights and had no

9   custodial rights. So again, the problem the other side

10   has --

11   JUSTICE GINSBURG: But he didn't. I mean,

12   he -- he said that he was prepared to surrender rights

13   to the mother, but not to a stranger. And when the

14   issue of adoption came up, he said, "Yes, I want to

15   assert my parental rights."

16   MS. BLATT: It was too late. There's not a

17   single State law that lets a dad, birth dad, hold that

18   kind of veto power over a woman.

19   JUSTICE GINSBURG: Where does it -- where is

20   there a reference in the definition of "parent" to a

21   State law? I see the -- which is the section that

22   defines a parent?

23   MS. BLATT: Section 1903(9). But even

24   assuming -- which is --

25   JUSTICE GINSBURG: Yes.

1   MS. BLATT: -- on page 4A. Whether it's a

2   Federal definition or a State law definition, I think

3   everyone agrees you've got to at least look at some sort

4   of State law. But even if it's just a bare fact of

5   paternity, meaning a biological link is established,

6   they still have to have a basis for an extraordinary

7   award of a transfer of custody when there's been no best

8   interest determination and you have a dad who's a

9   complete stranger with no -- no parental rights

10   whatsoever.

11   JUSTICE GINSBURG: It says a parent means a

12   biological parent of an Indian child and he fits that

13   definition. And then the next section -- the next

14   sentence doesn't have any reference to State law.

15   MS. BLATT: That's right. And again,

16   assuming he is a parent -- they -- they need to win both

17   points, Justice Ginsburg. He needs to be a parent.

18   Now, if you're an ICWA parent, which means

19   if you want to accept this definition of "all

20   biological," you do have rights under the Federal Act of

21   getting notice and a right to counsel, and the tribe

22   would have a right to intervene. The question is, is

23   there a basis for transferring custody under (d) or (f).

24   (F) is the one that requires continuing custody.

25   JUSTICE KAGAN: But, Ms. Blatt, if he's a

1   parent, why wouldn't some provision in 1912 give him

2   some rights? In other words, what's the point of making

3   him a parent under that definitional section if he

4   doesn't get any of the protections that 1912 provides

5   for when to terminate rights?

6   MS. BLATT: Because this -- this Act is not

7   about creating rights that didn't otherwise exist. It's

8   about protecting rights and making it harder to

9   terminate rights that already exist.

10   JUSTICE KAGAN: But what's the point of

11   labeling a parent if he gets no parental rights

12   under the statute and if the termination provisions

13   don't apply to him?

14   MS. BLATT: Notice, right to counsel, and

15   heightened consent requirements. So the mother here,

16   the birth mother is a parent, so she had a right to

17   notice, right to counsel, and heightened consent

18   requirements.

19   JUSTICE KAGAN: But what is he supposed

20   to --

21   MS. BLATT: So those are very significant.

22   JUSTICE KAGAN: Well, how are they

23   significant? I mean, I'm trying to understand this

24   because if you get notice, but then you have nothing to

25   say in the proceeding because the statute gives you no

1   rights and the statute doesn't provide any standards for

2   terminating those rights --

3   MS. BLATT: Right.

4   JUSTICE KAGAN: -- what are you supposed to

5   do once you get notice?

6   MS. BLATT: Justice Kagan, just because he's

7   in the door as a parent, that doesn't mean the statute

8   let him leave out the back door with the child when

9   there was no, no determination with respect to -- I

10   mean, any kind -- it would be unprecedented to think

11   that because you had a failure to remediate to prevent

12   the breakup of an Indian family, that's a basis for

13   awarding custody? And that's the United States' view,

14   which is --

15   JUSTICE KAGAN: I think you're not answering

16   the question of what's the point of labeling him a

17   parent if he gets none of the protections that the Act

18   provides to a parent?

19   MS. BLATT: You're assuming that this entire

20   Act was to make sure unwed dads who are Indian got more

21   time than non-Indian dads to veto adoptions, and that

22   had -- that's not even remotely the purpose of this.

23   JUSTICE BREYER: Well, wait, wait, wait.

24   Isn't your answer 1915(a) still applies?

25   MS. BLATT: 1915(a) still applies.

1   JUSTICE BREYER: And so 1915(a) means --

2   that's right.

3   MS. BLATT: Right.

4   JUSTICE BREYER: So he does have a -- a

5   considerable right.

6   MS. BLATT: Well, 19 --

7   JUSTICE BREYER: I mean, they'll have to go

8   through a set and decide. They have to give it to him

9   unless -- unless something overcomes the preference or

10 there is good cause to the contrary.

11   MS. BLATT: He's not -- he didn't seek to

12 adopt the child and he's not one of the preferred

13 parties.

14   JUSTICE BREYER: Well, you're thinking about

15 this case. I'm thinking in general. I think the

16 question --

17   MS. BLATT: Well, no -- no father is a

18 preferred party under 1915. No father can -- can assert

19 1915. That is --

20   JUSTICE GINSBURG: But doesn't 1915 preclude

21 the adoptive parents because they're not in the preferred

22 category? If 1915(a) precludes the adoption, then the

23 adoptive parents would have no legal basis for objecting

24 to an award to the father.

25   MS. BLATT: Right. Well, we have three

1   responses. First, we -- that provision assumes that

2   somebody actually in that -- in that statute stepped up

3   to adopt the child, and no one did here.

4   Second, it would raise grave constitutional

5   concerns. I mean, just look at (a)(3) on the other

6   Indian families if Congress presumptively presumed that

7   a non-Indian parent was unfit to raise any child with

8   any amount of Indian blood. And so it would either have

9   to -- it's either not implicated here or resolved by good

10   cause. Otherwise, you do have an extraordinary reading,

11   Justice Ginsburg, of a statute that would override a

12   birth mother's right to choose the adoptive parents for

13   her child.

14   CHIEF JUSTICE ROBERTS: Is it your position

15   that the preference is absolute or is it simply a factor

16   to be considered with the other -- in other words, if

17   every other factor suggests that the best interests of

18   the child are served by placement with the adoptive

19   couple, does the preference under 1915(a) trump all

20   those other interests?

21   MS. BLATT: It's not our view. Our view is

22   you would have -- you absolutely would have had good

23   cause with -- here when you had the 27 months and also

24   the mother's choice. The tribe's position is that --

25   JUSTICE GINSBURG: It's not listed under

1   the -- there are guidelines for what constitutes good

2   cause.

3   MS. BLATT: The best interests of the child

4   is not listed under the government's guidelines, which

5   again is extraordinary. It's also extraordinary that

6   any other adopt -- any other Indian would get a

7   preference whether or not that Indian had the same

8   tribal member.

9   JUSTICE KENNEDY: In -- in your view, at

10   what point, at what date did the Indian father lose the

11   right to ask for custody? Because he changed his mind

12   in -- in January, there was about a 5-day period there.

13   MS. BLATT: Yeah.

14   JUSTICE KENNEDY: The adoption proceedings

15   had not concluded.

16   MS. BLATT: Right.

17   JUSTICE KENNEDY: And at this point he said,

18   in effect, I've changed my mind.

19   MS. BLATT: So State law is you have to

20   support the mother during pregnancy or at birth. So the

21   cases are pretty clear that the father can't wait till

22   he learns of the adoption.

23   JUSTICE KENNEDY: So the State law

24   determines when his rights under the Federal Act end?

25   MS. BLATT: No. State law determines just

1   when you have parental rights to begin with. So its

2   there's no question that this particular dad, had State

3   law applied, the adoption would have gone forward and

4   his rights would have been terminated by virtue of his

5   lack of a right to -- to object to the adoption.

6   JUSTICE SCALIA: Unless we believe that the

7   Federal statute determines when he has parental rights

8   by defining "parent" to include a biological father.

9   MS. BLATT: Yes, but you still have --

10   JUSTICE SCALIA: If that's the case, then

11   what you said doesn't apply.

12   MS. BLATT: -- custodial rights, though.

13   That's not a basis for granting him custodial rights.

14   This -- again, the -- we can talk about (f), but I think

15   (f) is pretty obvious that that assumes

16   preexisting custody to be continued.

17   JUSTICE SCALIA: Yes, I wanted you to talk

18   about (f). Are you going to say something about that

19   or --

20   MS. BLATT: Yes, and I do --

21   JUSTICE SCALIA: -- are you going to leave

22   it to the government?

23   MS. BLATT: No.

24   JUSTICE SCALIA: You don't agree with the

25   government's position, do you?

1   MS. BLATT: Well, the government agrees with

2   us on (f). But if you read (d), by the way, it is

3   inextricably intertwined with (e) and (f). It's talking

4   about the breakup of a removal proceeding under (f) or a

5   foster care proceeding under (e), and the government

6   concedes that neither of those provisions create rights;

7   they just make it harder to terminate the custodial

8   rights of a parent who has custody that can be

9   continued.

10   The other side doesn't really have a

11   definition of "custody" or "continue" that would sweep

12   in a dad without any parental rights. And I do just

13   want to say in terms of looking, taking one step back.

14   This is not the case that Congress had in mind when it

15   passed the Act to halt the depletion of the tribal

16   population. This involves accretion and conscripting

17   other people's children to grow the tribal population

18   based solely on a biological link.

19   JUSTICE KAGAN: Ms. Blatt, continuing on the

20   assumption that this man is a parent under the statutory

21   definition, what your argument seems to be suggesting is

22   that there are really two classes of parents under the

23   statute, right, that everybody is labeled a parent, but

24   then there are the parents who get the protections of --

25   of the termination of rights provision and the parents

1   who don't.

2   And I'm just wondering why if this statute

3   creates two classes of parents it didn't say that in a

4   more upfront kind of way?

5   MS. BLATT: Yes.

6   JUSTICE KAGAN: It seems a strange thing to

7   read into a statute in this sort of backhanded way that

8   there are really two kinds of parents.

9   MS. BLATT: Well, I think it's rather

10   completely upside down that this entire statute, with 20

11   or 24 references to removal, custody, return of child to

12   the parent, is somehow being read to create rights.

13   There is no language in this statute that creates

14   custodial rights, and the birth father in this case

15   because of an exhaustion failure under (d), walked off

16   with the child without any best interest determination.

17   If I could --

18   CHIEF JUSTICE ROBERTS: Thank you, counsel.

19   Mr. Clement?

20   ORAL ARGUMENT OF PAUL D. CLEMENT

21   ON BEHALF OF THE RESPONDENT GUARDIAN

22   AD LITEM IN SUPPORT OF PETITIONERS

23   MR. CLEMENT: Mr. Chief Justice, and may it

24   please the Court:

25   But for the application of ICWA, two things

1   would be crystal clear: The birth father would have

2   absolutely no parental or custodial rights under State

3   law or the Constitution; and second, the baby girl would

4   be entitled to a custodial determination that focused on

5   her best interests.

6   Now, the lower courts --

7   JUSTICE SOTOMAYOR: What do you do with the

8   lower court's determination that one of the factors of

9   the best interest calculus was the Federal policy to

10   ensure that Indian children, children of biological

11   Indian parents, at least one, should be raised with

12   their parents? Because the lower court said it thought

13   it was in the best interest of this child to stay with

14   its birth father, in light of the Federal policy. So I

15   disagree with your colleague that there wasn't a best

16   interest --

17   MR. CLEMENT: Justice Sotomayor, would that

18   it were true that the Federal preference was one factor

19   in a multifactor test that looked at this child in her

20   best interest. That did not happen here. And if you

21   have any doubt about that, look at page 40a of the

22   petition appendix. And what the lower court --

23   JUSTICE SOTOMAYOR: What do I do with the

24   lower court's finding that this father, despite not

25   being married to his prior lover, had children, was

1 attentive of those children, had the resources to raise

2 the child? What do we with -- why are you --

3   MR. CLEMENT: What you do with that, Justice

4 Sotomayor, is you look what context those findings were

5 made. Those findings were made in the context of

6 1912(f), and the court specifically said that for those

7 purposes all I can look at is the birth father and

8 whether this new custodial relationship, beyond a

9 reasonable doubt, would pose a serious harm to the girl.

10 And what he --

11   JUSTICE SOTOMAYOR: But they looked at

12 something else that everybody's ignoring --

13   JUSTICE SCALIA: Please finish. Let's

14 finish.

15   MR. CLEMENT: What the court specifically

16 said is they looked at the expert testimony of how it

17 would cause trauma, despair, anxiety, depression on this

18 baby girl to be taken from her parents, and the court

19 specifically said all of that was legally irrelevant

20 because 1912(f) only lets you look at the harm from the

21 new custodial relationship. It doesn't let you look at

22 any harm from the breakup of the previous custodial

23 relationship.

24   And all of that would make sense if you were

25 talking about 912(f)'s application to the situations

1   it's designed for.

2   JUSTICE KENNEDY: Well, and even in that

3   sense, serious emotional and physical damage is a much

4   different threshold than the best interests of the

5   child, even on the statutory terms.

6   MR. CLEMENT: It's miles away. And it's the

7   appropriate standard when you're taking somebody who has

8   existing legal custody and depriving them of it. But

9   everywhere in the law, including ICWA, when you make an

10   initial placement of a child in a new custodial setting,

11   you don't do that unless you look at the child's best

12   interest.

13   And look at 1916(a) of ICWA, which is the only

14   provision in the Act that specifically contemplates a

15   child being placed in a new custodial setting. It talks

16   about what happens if you have an adoption and then the

17   adoptive parents for some reason terminate their rights

18   and then you send the child back to their original

19   Indian custodian. And in that situation, recognizing

20   that when there's been a break of custody, you don't

21   just send somebody off to a -- a new setting based on

22   beyond a reasonable doubt; you look at the best

23   interests of the child. And that's --

24   JUSTICE SOTOMAYOR: Mr. Clement, can I go

25   back to that best interest calculus? There's two

1 timeframes in my mind to look at: In January, when he

2 asserted his parental rights and 2 years later when the

3 trial was heard. If there's serious emotional harm, I

4 think the court below said, we're not looking at what

5 happens at the time we're deciding the custody issue

6 because otherwise, we're going to give custody by

7 estoppel.

8   We're going to encourage people to hold on

9 to kids and create the serious physical harm. In

10 January, when he asserted his rights, that's what we're

11 looking at. What was in the best interests of the child

12 at the time the issue was raised, and that was 4 or 5

13 months after the birth of the child.

14   MR. CLEMENT: Well, Justice Sotomayor, I'm

15 here representing the guardian who represents the best

16 interest of the child. From the child's perspective,

17 the child really doesn't care whose fault it was when

18 they were brought in one custodial situation or another.

19   They just want a determination that focuses

20 on at the relevant time, that time, what's in their best

21 interest. And so in the same way that we think if you

22 rule in our favor and you remand to the lower court that

23 there has to be a best interest determination that takes

24 into account the current situation, notwithstanding that

25 that would be on the hypothesis that the last 15 months

1   of custody were based on a legal misunderstanding, we

2   still think this girl --

3   JUSTICE SOTOMAYOR: So we're going to freeze

4   it at that point or are we going to freeze it today,

5   after the child's been with his -- with her father for 2

6   years?

7   MR. CLEMENT: You freeze it at the time that

8   somebody's talking about --

9   JUSTICE SOTOMAYOR: I don't want to be that

10   judge, by the way.

11   MR. CLEMENT: You freeze it at the time that

12   somebody's talking about changing a custodial situation.

13   But what is so tragic here is that the lower court

14   applied 1912(d) and (f), which are clearly designed for

15   a situation when you're contemplating transferring

16   custody away from an existing custodial relationship.

17   They looked at that and applied those inapposite

18   standards to create a transfer to somebody with new

19   custody.

20   Now, the Solicitor --

21   JUSTICE GINSBURG: What about now, when you

22   said the best interest. Now the child has been some

23   15 months with the father. So if a best interest

24   calculus is made now, you would have to take into

25   account uprooting that relationship, would you not?

1   MR. CLEMENT: Absolutely, Justice Ginsburg.

2   We're not here to try to say that anybody is entitled to

3   automatic custody of this child based on some legal

4   rule.

5   JUSTICE KENNEDY: And I -- and I take it

6   you'll say that that goes back to this South Carolina

7   court if you prevail?

8   MR. CLEMENT: Absolutely. And I would hope

9   with instructions to please make that determination as

10   quickly as humanly possible.

11   JUSTICE KENNEDY: If the best interest of

12   the child is the uniformly accepted standard in State

13   courts, and if we forget constitutional avoidance

14   problems which I -- I think exist here, is there

15   anything in the statute that allows us to import the

16   best interests of the child into the statutory language,

17   or do we have to just rely on constitutional avoidance

18   and -- and really rewrite the statute?

19   MR. CLEMENT: Well, a couple of things,

20   Justice Kennedy. If you got to the point of applying

21   1915(a) and the placement preferences -- and we agree

22   with Petitioners that they're not squarely applicable

23   here because the birth father's argument was not that I

24   get to adopt, but that I have an entitlement -- if you

25   got to that, I think the good cause standard gives you a

1   vehicle for importing a lot of best interest standards.

2   I also think you could look --

3   JUSTICE GINSBURG: Even though -- even

4   though the guidelines to what's good cause do not

5   include best interest.

6   MR. CLEMENT: That's right, but even the

7   Justice Department doesn't say that the guidelines are

8   binding or entitled to anything more than Skidmore

9   deference, and I'd take constitutional avoidance over

10   Skidmore deference any day.

11   But the second thing I would put on the

12   table is I think the fact that 1916(a) tells you that

13   the one time you are thinking about transferring

14   custody, Congress looked to the best interest standard.

15   That's a clear hint that if you are talking about

16   transferring custody you should look to the best

17   interests.

18   And, again, I think it's imperative to look

19   at 1912(d), (e), and (f). As the government and the

20   Solicitor General recognizes, they all contemplate

21   continued custody, (e) and (f) do.

22   Now, then the government turns around and

23   says, well, but (d) was a basis for what the lower court

24   did, which is to transfer custody. With all due respect

25   to the government, (d) makes even less sense as a basis

1   for transferring custody than (f). At least (f) has

2   some standard designed for some transfer of custody. It

3   happens to be the wrong transfer. It's the transfer

4   away from continuing custody out and it's beyond a

5   reasonable doubt.

6   But (d) has no standard to satisfy. And

7   their position is that because this birth father was not

8   presented with remedial and rehabilitative services,

9   therefore, because he didn't get remedial services that

10   presumably he needed, he gets the child. That's crazy.

11   And what it shows is that 12(d) assumes that

12   it's like an exhaustion requirement, and unless and

13   until these services are provided you preserve the

14   status quo ante. But the lower court didn't preserve

15   the status quo ante. The lower court ordered this poor

16   girl sent to somebody who, at least under state law and

17   just a matter of practicality, is a stranger to her.

18   And nowhere in the law do you see any child

19   being transferred to a new custodial arrangement without

20   a best interest determination. And why did it happen

21   here? It happened here because of ICWA, which by its

22   terms does not apply to these situations, and it

23   happened because of 3/256ths of Cherokee blood.

24   Now, the Justice Department back in 1978

25   recognized there were profound constitutional problems

1   with the statute. Then-Assistant Assistant Attorney

2   General, later Judge, Patricia Wald, told Congress that

3   there were applications of the statute that raised equal

4   protection problems because they treated people

5   differently solely on the basis of race.

6   One of the things she pointed to is what she

7   point -- described as "the (b) portion of the definition

8   of 'Indian child.'" And that's what makes this child an

9   Indian child here, its biology, its biology combined

10   with the fact that the tribe, based on a racial

11   classification, thinks that somebody with 325 --

12   1 percent Indian blood is enough to make them a

13   tribal -- a tribal member, eligible for tribal

14   membership.

15   And as a result of that, her whole world

16   changes and this whole inquiry changes. It goes from an

17   inquiry focused on her best interests and it changes to

18   a focus on the birth father and whether or not beyond a

19   reasonable doubt there is a clear and present danger.

20   Again, that is --

21   JUSTICE BREYER: So what do we do about

22   that?

23   MR. CLEMENT: You correct the lower court.

24   And there's two paths to correct the lower court. One

25   way to correct the lower court is to say, look -- can I

1   finish the answer?

2   CHIEF JUSTICE ROBERTS: Finish the answer.

3   MR. CLEMENT: You could -- you would either

4   do it by changing the definition of "parent" and

5   recognize that, given the consequences that flow from a

6   parent in the statute, it only makes sense to prove

7   something more than bare paternity.

8   Or you could do it by recognizing that if

9   somebody gets in the front door of this statute based on

10   bare paternity, you have to interpret provisions like

11   (d), (e), and (f) with sensitivity to the fact that

12   under that reading just because you are a parent doesn't

13   mean you have these kind of extraordinary rights.

14   CHIEF JUSTICE ROBERTS: Thank you, counsel.

15   Mr. Rothfeld?

16   ORAL ARGUMENT OF CHARLES A. ROTHFELD

17   ON BEHALF OF RESPONDENTS BIRTH FATHER, ET AL.

18   MR. ROTHFELD: Thank you, Mr. Chief Justice,

19   and may it please the Court:

20   It is simply false to say that this child's

21   custody was transferred without a best interest

22   determination, as is apparent from any reading of the

23   lower court decisions in this case.

24   Both of the State courts here looked very

25   closely at the situation here and they found, in their

1   words, that the father here was a "fit, devoted, and

2   loving father," and they said expressly and found

3   expressly as a factual matter that it was in the best

4   interest of this child.

5   CHIEF JUSTICE ROBERTS: Do you think that's

6   correct under the Act? Where in the Act does it say

7   that you need to consider whether or not the father is

8   a -- would be a good parent? I thought your reading was

9   that it doesn't matter, all that matters is that he has

10   in his case 3/128ths Cherokee blood.

11   MR. ROTHFELD: Well, I -- I think that there

12   is some confusion as to exactly what the State courts

13   did here and what ICWA does. ICWA does not assign

14   custody. ICWA -- ICWA addresses the question whether or

15   not the parental rights of -- of a parent of an Indian

16   child can be terminated. The courts here, both courts,

17   correctly held that under the plain application of ICWA,

18   under Section 1912(d), as discussed by Justices

19   Sotomayor and Scalia, clearly parental rights could not

20   be terminated.

21   The question then arose, what happens to the

22   child? And the court then, because there were a natural

23   parent with intact parental rights, applied the usual

24   rule that there is a strong presumption that a fit

25   parent, natural parent, who wants to exercise custody

1 of -- of his or her child should get custody. That was

2 what happened here.

3   JUSTICE KENNEDY: And do you -- you want us

4 to write the case as if this is just a standard best

5 interest determination and -- and this federal statute

6 is irrelevant? I don't understand your argument.

7   MR. ROTHFELD: No, no, Your Honor. I -- I

8 think that the analysis of the South Carolina Supreme

9 Court was exactly right in this -- in -- in those terms.

10 The court applied ICWA, the Federal statute. The

11 question was, could the parental rights of this parent

12 be terminated? This -- everyone concedes this is an

13 Indian child. ICWA applies because of that.

14   The question then is, can the parental

15 rights be terminated? Sections 1912(e) and (f) address

16 that question -- (d), (e), and (f). And --

17   JUSTICE SCALIA: Do you apply a "best

18 interest of the child" standard to a termination of

19 parental rights?

20   MR. ROTHFELD: No, not in the --

21   JUSTICE SCALIA: I mean, can -- can -- I

22 know a lot of kids that would be better off with

23 different parents.

24   MR. ROTHFELD: And that -- that, too, is

25 exactly right, Justice Scalia. That is precisely what

1   the ordinary state law standard says, that there is a

2   presumption that the natural parent, if the natural

3   parent is fit, should be awarded custody of the child.

4   JUSTICE BREYER: Actually, it does -- does

5   (f) apply, in your opinion, to this case or not?

6   MR. ROTHFELD: Yes, it -- in our opinion,

7   both (d) and (f) apply.

8   JUSTICE BREYER: And (f) has something of

9   the best interest standard tilted towards the Indian

10   parent.

11   MR. ROTHFELD: Well, I think --

12   JUSTICE BREYER: Is that right or not? I

13   mean, as I read it it's something. It's tough, but it's

14   there.

15   MR. ROTHFELD: I think that that's right,

16   but I -- but I would add the -- the caveat that it's not

17   a best interest in the sense of we are going to apply

18   this standard to determine custody.

19   JUSTICE BREYER: So in your view the best

20   interest standard does not apply, but rather (f)

21   applies?

22   MR. ROTHFELD: (F) applies --

23   JUSTICE BREYER: And (f) is a tough version

24   of a best interest standard.

25   Have I got it right or not?

1   MR. ROTHFELD: Correct, but with this

2   addition, what it applies for is the question whether or

3   not the rights of this parent can be terminated.

4   Whether the parental rights of the parent can be

5   terminated. And so --

6   JUSTICE KAGAN: Well, how does (f) apply?

7   It says "continued custody." That seems to assume that

8   custody exists.

9   MR. ROTHFELD: That is -- that is the other

10   side's argument. Our response is that there is a

11   definitional provision in ICWA that says that a child

12   custody proceeding is one that includes a proceeding

13   leading to the termination of parental rights. Parental

14   rights are defined to be broadly as the parent-child

15   relationship.

16   And so we think in context (f) means that

17   it's the termination of the parent-child relationship is

18   what has to be considered.

19   JUSTICE KAGAN: So your argument is not that

20   "continued" means something different from the normal

21   language, your argument is that "custody" means

22   something different from its normal language.

23   MR. ROTHFELD: Our argument is that

24   "custody" means what Congress said "child custody

25   proceeding" means, which is termination of the

1 parent-child relationship. And so we think that

2 continuation of a relationship -- the question is under

3 (f) would that be harmful for the child? But I should

4 quickly say that (f) is only one part of the argument

5 here. As Justices Sotomayor and Scalia began the

6 discussion with Ms. Blatt, (d) also applies. (D) says

7 nothing at all about custody. The question under --

8   CHIEF JUSTICE ROBERTS: Could -- could I go

9 back to what you just said about (f)? You think custody

10 covers someone who has never had custody of the child

11 because it refers to something beyond the accepted

12 definition?

13   MR. ROTHFELD: Well, I -- again, the

14 definition of "child custody proceeding" in ICWA

15 includes a proceeding leading to the termination of

16 parental rights. Parental rights --

17   CHIEF JUSTICE ROBERTS: But (f) doesn't say

18 "child custody proceeding." It says "continued custody

19 of the child."

20   MR. ROTHFELD: That -- that's true, but I

21 think that has to be interpreted within the context of

22 the definitional provision and what Congress had in mind

23 when it referred to child custody proceeding.

24   But I think -- you know, (f), as I say, is

25 only a portion of the argument here. And to return to

1   what Justices --

2   JUSTICE SOTOMAYOR: Tell me why you are

3   fighting Justice Breyer? He said, I see -- and your --

4   Mr. Clement said the same thing -- that "good cause"

5   under 1958 has a variant of best interests of the child

6   or factors that are considered. I see (f) as doing the

7   same thing, allotting however a burden of proof that may

8   or may not be higher than other States.

9   I mean, in -- in -- some States may have

10   clear and convincing evidence, some States may have

11   preponderance. Some States -- I don't know if any have

12   beyond a reasonable doubt. But it's an allocation of

13   burden.

14   MR. ROTHFELD: No. I -- I think that that's

15   right, and I certainly don't intend to fight

16   Justice Breyer. I -- I think that --

17   JUSTICE BREYER: You should if I'm not

18   right.

19   (Laughter.)

20   MR. ROTHFELD: I don't --

21   JUSTICE GINSBURG: But I think Justice

22   Breyer is quite wrong because a standard that says

23   results in serious emotional or physical damage to the

24   child is far from a best interest standard.

25   JUSTICE SCALIA: It sure is. And do you

1   know of any State that -- that applies best interest of

2   the child standard to termination of parental rights as

3   opposed to adoption?

4   MR. ROTHFELD: Absolutely not. And I -- and

5   I think I -- I will try to agree with both

6   Justice Breyer and Justice Ginsburg and Justice Scalia

7   and say that --

8   CHIEF JUSTICE ROBERTS: But not me, right?

9   (Laughter.)

10   MR. ROTHFELD: And Justice Sotomayor. And

11   always -- always the Chief Justice.

12   JUSTICE KAGAN: You might just have to

13   pick --

14   MR. ROTHFELD: Which gets me to five, so.

15   But I think -- I think the crucial point is

16   what -- what we're talking about the determination of

17   parental rights under -- under (f) is whether or not, as

18   Justice Scalia says, the rights of a biological parent

19   can be terminated, which is not sort of the ordinary

20   best interest determination when you're choosing between

21   two people who are strangers to the child. So --

22   CHIEF JUSTICE ROBERTS: This is not -- (f)

23   is not about terminating parental rights. It's about

24   what -- I mean, it's about custody, right?

25   MR. ROTHFELD: No, no. I think (f) is

37

1   about -- both (d) and (f) are about terminating parental

2   rights. Parental rights cannot be terminated unless

3   these determinations have been made. Unless it's been

4   shown that --

5   CHIEF JUSTICE ROBERTS: In what proceeding,

6   the adoption proceeding or custody determination?

7   MR. ROTHFELD: Any proceeding which is aimed

8   at the termination of parental rights. The adoption

9   proceeding here cannot go forward, all concede, unless

10   parental rights are terminated. And so if parental

11   rights cannot be terminated under either (d) or (f),

12   this adoption cannot go forward and we are in a

13   different place.

14   I think that's what -- exactly what the

15   South Carolina Supreme Court said. It said, we're going

16   to apply -- we're going to look to ICWA to see can we

17   terminate the parental rights of this natural father.

18   And as Justice Scalia says, that is central. There is a

19   natural parent here who wants custody. Can his -- can

20   his claim for custody be denied and can his parental

21   rights be terminated?

22   To determine that, Congress has put Federal

23   standards in place in ICWA, in (d) and (f), and we have

24   to say both of those have been satisfied here.

25   CHIEF JUSTICE ROBERTS: If -- if you had a

1   tribe, is there at all a threshold before you can call,

2   under the statute, a child an "Indian child"? 3/256ths?

3   And what if the tribe -- what if you had a tribe with a

4   zero percent blood requirement? They're open for, you

5   know, people who want to apply, who think culturally

6   they're a Cherokee or -- or any number of fundamentally

7   accepted conversions.

8   MR. ROTHFELD: That --

9   CHIEF JUSTICE ROBERTS: I mean, is it --

10   is -- would that child be considered an Indian child, so

11   a father who had renounced any interest in her until he

12   found out about the adoption would have all these

13   rights?

14   MR. ROTHFELD: Well, that -- that would be a

15   different question. What we have here is a --

16   CHIEF JUSTICE ROBERTS: No, no. That's why

17   I asked it. It's a different question.

18   (Laughter.)

19   MR. ROTHFELD: Well -- and the answer would,

20   I think, be as a threshold matter, as this Court has

21   said consistently, it is fundamental -- fundamental

22   basis of tribal sovereignty that -- that a tribe get to

23   determine the --

24   JUSTICE GINSBURG: I thought the definition

25   of an Indian child is just straight out of the statute.

1 An Indian child is someone who is either a member of a

2 tribe or eligible, and is the biological child of a

3 member of an Indian tribe.

4   MR. ROTHFELD: That is correct.

5   CHIEF JUSTICE ROBERTS: So return to what is

6 a hypothetical question and not what the statute

7 provides. Under your argument, a tribe that did not

8 require any blood requirement, but simply enrollment,

9 could be considered an Indian child.

10   MR. ROTHFELD: Well, the -- the child would

11 have to be a -- would have to be biological parents --

12   CHIEF JUSTICE ROBERTS: Yes, yes, you have

13 somebody who has no Indian blood, he enrolls in my

14 hypothetical tribe, has a biological child. That child

15 would be an Indian child and the father would be

16 entitled to the protections you're arguing for.

17   MR. ROTHFELD: Well, that's -- that's true

18 in theory. But of course, A, that is not our case. B,

19 if that were to occur and whether or not that would be

20 sort of a legitimate basis for determining membership of

21 a -- in an Indian tribe I think would be --

22   JUSTICE BREYER: But that is a problem.

23 Because, look, I mean, as it appears in this case is he

24 had three Cherokee ancestors at the time of George

25 Washington's father. All right? Now, you say, oh,

1   well, that's a different issue.

2   But I don't see how to decide that case

3   without thinking about this issue because if your view

4   is taken and you accept that definition, a - a woman who

5   is a rape victim who has never seen the father could,

6   would, in fact, be at risk under this statute that the

7   child would be taken and given to the father who has

8   never seen it and probably just got out of prison, all

9   right? And you don't know that this beyond reasonable

10   doubt standard would satisfy that.

11   Now, that's obviously something I find

12   disturbing, as a person and also as a judge, because

13   we're trying to interpret the statute to avoid results

14   that would be very far out, at least. And -- and that's

15   what I want you to tell me. How do I prevent that kind

16   of risk through an interpretation of the statute?

17   MR. ROTHFELD: Well, let me answer both that

18   question and the Chief Justice's question which I think

19   have similar responses. As to the rape victim, I am

20   confident that an application of Section 1912(f) would

21   lead to termination of that father's parental rights,

22   and so he would never be in the picture as a possible --

23   well, the question whether or not custody of someone who

24   has engaged in such conduct could lead to serious

25   physical or emotional damage to the child, I think there

41

1   will be no difficulty in reaching that conclusion.

2   But on the question of could a tribe

3   establish some manipulative type of -- of membership

4   criteria, it's significant that that is not this case

5   because --

6   JUSTICE SCALIA: Aren't there Federal

7   definitions of approvals of tribes? Not every group of

8   native Americans who get together can call themselves a

9   tribe.

10   MR. ROTHFELD: That -- that is quite right.

11   JUSTICE SCALIA: And isn't one of the

12   conditions of that a condition of blood and not -- not

13   of voluntary membership?

14   MR. ROTHFELD: As I --

15   JUSTICE SCALIA: I'm quite sure that's

16   right. So I think the hypothetical is -- is a null set.

17   I don't think it ever exists.

18   MR. ROTHFELD: I -- I think that --

19   CHIEF JUSTICE ROBERTS: Well --

20   MR. ROTHFELD: -- that's what I was trying

21   to get to -- I'm sorry, Mr. Chief Justice.

22   CHIEF JUSTICE ROBERTS: I'm just wondering

23   is 3/256ths close -- close to zero? I mean, that's --

24   that's the question in terms to me, that if you have a

25   definition, is it one drop of blood that triggers all

1   these extraordinary rights?

2   MR. ROTHFELD: But it has always been the

3   Cherokee membership criterion that if someone who can

4   trace their lineal ancestry to some -- to a person who

5   is on the Dawes Rolls is a member. No one has ever

6   questioned that that is a legitimate basis for

7   establishing tribal citizenship. And so --

8   JUSTICE ALITO: But what if a tribe makes

9   eligibility available for anybody who, as a result of a

10 DNA test, can establish any Indian ancestry, no matter

11 how slight?

12   MR. ROTHFELD: I think that that would lead

13 to the question posed by Justice Scalia. Whether or not

14 that would be a legitimate basis for establishing --

15   JUSTICE ALITO: No, it's different from his.

16 He says it's -- it has to be based on blood. This would

17 be based on blood.

18   MR. ROTHFELD: But I -- I think it leads to

19 his question that there is a Federal element to

20 recognition of an Indian tribe. And I think whether or

21 not tribal membership criteria so far depart from the

22 traditional understanding of what constitutes a tribe as

23 to be acceptable for those purposes, that would be a

24 question to be resolved by the United States, by the

25 political branches.

1   JUSTICE SOTOMAYOR: Counsel, there are two

2 forms of the EIFD doctrine, the existing Indian family

3 doctrine. One applies directly to this case, what's the

4 status of an unwed father, and they seem, under that

5 doctrine, to apply the definition that a parent who

6 hasn't been involved in the care during pregnancy is not

7 a father.

8   But the other side of the doctrine is the

9 one that addresses, I think, the Chief's concern, which

10 is you don't only have Indian blood, but you've been a

11 father who's actually been a member of an Indian tribe,

12 an active member.

13   We don't have to reach that separate issue

14 here, that EIFD -- that part of the EIFD doctrine.

15   MR. ROTHFELD: Well, I guess I'll give you

16 two answers to that. First, in this case, there has

17 been a finding by the family court that this father has

18 significant ties to the Cherokee Nation. And so if one

19 could think that that was part of the test under ICWA,

20 it is certainly satisfied here.

21   I -- I would go further than that and say

22 that I think the vast majority of State courts have

23 correctly rejected that theory because --

24   JUSTICE SOTOMAYOR: I don't disagree.

25   MR. ROTHFELD: It -- it would be sort of

1 beyond the judicial competence to determine whether or

2 not a particular person is Indian enough to qualify for

3 treatment as a father of an Indian child under -- under

4 ICWA.

5   Just to nail this down, as to the particular

6 membership criteria of the Cherokee Nation, no one has

7 ever suggested, our opponents here do not suggest that

8 that is, in any sense, illegitimate or not a traditional

9 basis for establishing membership in an Indian tribe.

10   So if one can imagine wild hypotheticals of

11 the sort that Justice Alito and the Chief Justice have

12 suggested, they are not present here, and those would

13 present political questions to be addressed by Congress

14 or addressed by the executive branch.

15   In this case, again, the State courts found

16 that ICWA should be applied to allow a natural father to

17 raise his child. Those courts found that was in the

18 best interests of the child to be raised by their

19 natural parent because that parent was a fit, was a

20 loving, was a devoted parent in the words of -- of the

21 lower courts. Those conclusions were quite clearly

22 correct.

23   And if I can turn to something which

24 attracted some attention from Justice Scalia and Justice

25 Sotomayor in their exchanges with Ms. Blatt, the

1   application of Section 1912(d) and whether or not the

2   parental rights of this -- this father, who

3   unquestionably satisfies the definition of parent in

4   ICWA, Section 1912(d) says that parental rights cannot

5   be terminated unless remedial efforts have been made,

6   rehabilitative efforts have been made to fix a family

7   that is broken in some respect.

8   And Ms. Blatt suggests that that does not

9   apply here because there was no Indian family. I think

10   what Justice Scalia said was absolutely right. There

11   unquestionably was a family here in the ordinary sense.

12   There was a mother, there was a father, there was their

13   little girl, there were grandparents who very much

14   wanted to be involved in the life of this child, who

15   knit socks for her. There's no question --

16   JUSTICE SCALIA: Is my recollection correct

17   that -- that he had offered to -- to marry the mother,

18   and she rejected that?

19   MR. ROTHFELD: That -- that is quite

20   correct. I think that the genesis of this case, they --

21   they were an engaged couple and the mother broke the

22   engagement. The father wanted, very much wanted to

23   marry the mother, wanted to --

24   JUSTICE GINSBURG: I thought that there's

25   some ambiguity there because one reason why he wanted to

1 marry was that he would get more pay and allowances.

2   MR. ROTHFELD: Well, there -- there are

3 disputed facts as to what was going on, and so I don't

4 want to hinge a lot on this. But I think it is quite

5 clear the father -- they were engaged, the father wanted

6 to marry the mother.

7   The father's testimony -- and the family

8 court found, so we're not talking about simply, you

9 know, assertions here. The family court found that the

10 father was excited by the pregnancy, was looking forward

11 to the birth of the child, that he wanted to marry the

12 mother so that she would qualify for military health

13 benefits. The father at the time --

14   CHIEF JUSTICE ROBERTS: He was excited, but

15 there is no doubt he paid nothing during the pregnancy

16 and nothing at the time of the birth, right, to support

17 the child or the mother?

18   MR. ROTHFELD: That -- that is true. But

19 I -- I am --

20   CHIEF JUSTICE ROBERTS: So he was excited by

21 it, he just didn't want to take any responsibility.

22   (Laughter.)

23   JUSTICE SCALIA: Well, that -- that was

24 after she had rejected his offer to marry her, no?

25   MR. ROTHFELD: Yes. I mean --

1   JUSTICE KENNEDY: Well, these -- these

2   considerations are why domestic relations pose the

3   hardest problems for judges. Our domestic relations

4   judges all by themselves every day have these difficult

5   problems. If we could appoint King Solomon, who was the

6   first domestic relations judge, as special master, we

7   could do it. But we can't do it.

8   MR. ROTHFELD: That -- that -- that --

9   JUSTICE KENNEDY. But what we have -- what

10   we have here is a question of a Federal statute which,

11   as I must understand it, displaces the ordinary best

12   interest determinations of the State courts. Would you

13   agree with that?

14   MR. ROTHFELD: I -- I would agree that

15   Congress indicated that part of the best interest

16   inquiry for an Indian child concerns -- takes account of

17   their status as an Indian child, and Congress made a

18   factual determination -- the fact that --

19   JUSTICE SCALIA: I don't know why you make

20   that concession. I mean, your client has been deprived

21   of parental rights. I do not know that -- that it is

22   traditional to decide whether a parent will be deprived

23   of parental rights by assessing what is in the best

24   interest of the child.

25   That seems to me quite --

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1   MR. ROTHFELD: That is quite --

2   JUSTICE SCALIA: -- extraordinary, not

3   normal.

4   JUSTICE KENNEDY: But is -- is that true

5   under South Carolina law?

6   MR. ROTHFELD: Yes, that is. I -- with

7   respect to that --

8   JUSTICE KENNEDY: Under South Carolina law

9   in this adoption proceeding, the -- if it had not been

10   for the statute, the best interest of the child standard

11   would not have applied?

12   MR. ROTHFELD: I think there are three

13   things that are going on here.

14   Had ICWA not applied here at all, then the

15   father would have had no right to object to the

16   adoption, so the adoption would have gone forward had it

17   not been for ICWA.

18   However, as Justice Scalia says correctly,

19   when a natural parent is involved, and the natural

20   parent has rights that have not yet been terminated, as

21   this parent's have not, then ordinarily a best interest

22   inquiry --

23   JUSTICE GINSBURG: He would be out under

24   South Carolina law because he didn't support the child

25   during the pregnancy.

1   MR. ROTHFELD: I -- I have to disagree with

2   that, Justice Ginsburg. The family court judge found

3   that his parental rights could not be terminated as a

4   matter of South Carolina law, as well as a matter of

5   ICWA law. And so we think it is quite clear that this

6   father's right would not be terminated.

7   As Justice Scalia says, in the ordinary

8   course, while we're not engaged in a free-floating best

9   interest inquiry, one would say whether or not a -- a

10   profound showing of parental neglect or insufficiency

11   has been made to terminate those rights. If it cannot,

12   then that father should get custody.

13   In response to what Justice Kennedy had

14   asked about --

15   JUSTICE GINSBURG: Termination of parental

16   rights requires a showing that it's an unfit parent,

17   which is quite --

18   MR. ROTHFELD: That -- that is absolutely

19   right, and no such showing has been made or could be

20   made in this case.

21   And if I may just finish --

22   CHIEF JUSTICE ROBERTS: You have an extra --

23   you have an extra minute.

24   MR. ROTHFELD: The -- both of the State

25   courts in this case carefully looked at the -- at the

1   situation here and found that this father, far from

2   being an unfit father, was a fit, loving, devoted father

3   who had created a safe, satisfactory and -- and loving

4   environment for the child.

5   Under ordinary South Carolina standards,

6   once one gets past ICWA, parental rights cannot be

7   terminated in a situation of this sort, the parental

8   rights, as Justice Scalia says, of a natural parent, who

9   had --

10   JUSTICE ALITO: Well, if this case would

11   have come out the same way under purely South Carolina

12   law, then why are we here?

13   MR. ROTHFELD: The -- the only reason that

14   ICWA comes into play is because South Carolina law did

15   not give this father a right to object to the adoption.

16   CHIEF JUSTICE ROBERTS: Thank you, counsel.

17   MR. ROTHFELD: Thank you very much, Your

18   Honor.

19   CHIEF JUSTICE ROBERTS: Mr. Kneedler?

20   ORAL ARGUMENT OF EDWIN S. KNEEDLER,

21   FOR THE UNITED STATES, AS AMICUS CURIAE,

22   SUPPORTING RESPONDENTS BIRTH FATHER, ET AL.

23   MR. KNEEDLER: Mr. Chief Justice, and may it

24   please the Court:

25   I would like to start with the definition of

1   "parent" under the Act because I think a lot flows from

2   that. The Act provides that a parent -- a parent of an

3   Indian child is the -- if it's the biological parent,

4   except where the child -- or where the parent -- paternity

5   has not been established or acknowledged.

6   Here, the -- the father's paternity was

7   acknowledged and established, both courts below found.

8   As a consequence, he has not simply a biological

9   relationship to the child, he has a legal relationship

10   to the child, created under Federal law.

11   Then --

12   JUSTICE KENNEDY: But -- but -- did you --

13   at your -- when you began, do you use "paternity" in the

14   biological sense?

15   MR. KNEEDLER: "Paternity" itself is in a

16   biological sense, but when --

17   JUSTICE KENNEDY: As -- as you -- as you

18   interpret the statute, "paternity is the biological

19   sense," not -- not an --

20   MR. KNEEDLER: Yes.

21   JUSTICE KENNEDY: -- not an existing

22   parental relationship.

23   MR. KNEEDLER: No, a biological sense. But

24   the establishment of --

25   JUSTICE SCALIA: It says that, doesn't it?

1   A parent is -- is the -- the biological parent.

2   MR. KNEEDLER: Yes. It does.

3   JUSTICE SCALIA: That's what it says.

4   MR. KNEEDLER: Yes, but what I'm saying is,

5   once -- in the unwed father situation, once the father

6   establishes or acknowledges paternity, the father has a

7   legal relationship, not just the --

8   JUSTICE ALITO: Well, family law is

9   traditionally a State province, but your argument is

10   that Federal law can take a traditional family law term

11   like "parent" and perhaps others and give it a meaning

12   that is very different from its traditional meaning or

13   its meaning under State law?

14   MR. KNEEDLER: Well, several things about

15   that.

16   JUSTICE ALITO: Strike the "traditional"

17   meaning, but its meaning under State law.

18   MR. KNEEDLER: Well, several things about

19   that. First, there are States -- the Casey amicus brief

20   in footnote 7 identifies a number of States which

21   recognize parental rights for a parent who has

22   established or acknowledged citizenship. So the State

23   law varies on that.

24   And this was the -- one of the very problems

25   Congress was concerned about with respect to Indian

1   children because --

2   JUSTICE SCALIA: Wait. I didn't understand.

3   Citizenship, who has acknowledged citizenship?

4   MR. KNEEDLER: I'm sorry. I meant to say

5   paternity. Sorry.

6   JUSTICE SCALIA: Okay. I understand now.

7   MR. KNEEDLER: What you have here -- what

8   you have here are people who are citizens of two

9   separate sovereigns. An Indian tribe is a sovereign and

10   a State. Congress tried to accommodate those competing

11   interests by leaving the cases in State court, letting

12   them be subject to State law, but subject to minimum

13   standards to protect the people who are citizens -- or

14   eligible for citizenship in the Indian tribe.

15   That is a classic implementation of

16   Congress's plenary responsibility in the Federal trust

17   and guardianship for Indians, and nothing could be more

18   at the core of tribal self-determination and tribal

19   survival than the determination of tribal membership and

20   the care about what happens to Indian children.

21   JUSTICE KAGAN: Mr. Kneedler, let's say

22   you're right that this man is a parent under the terms

23   of the Act, so not just a biological father, but also he

24   has a legal status as parent under this Act. And then

25   1912 says, well, this is how you go about terminating

1   parental rights, right?

2   But then your argument suggests that one of

3   these clauses applies to him and the other one doesn't,

4   even though he's a parent. But you're saying he only

5   gets some of the protections, that there are really two

6   classes of parents, custodial parents and non.

7   So where does that come from?

8   MR. KNEEDLER: I think it's not two classes

9   of parents. It comes from the text of (f) itself, which

10   talks about continued custody, which we -- we think

11   means that (f) applies -- it presupposes that there is

12   custody to continue. And that's just a condition on the

13   termination of parental rights.

14   JUSTICE SCALIA: That's a very strange way

15   to put it. I mean, just -- just in passing in the

16   sentence, that "the continued custody." I mean, you

17   would think if that's what they meant, they would say,

18   "where the child" is -- "is within the custody of a

19   parent, comma, no termination of parental rights may be

20   ordered, in the absence of a determination," blah, blah,

21   blah, blah, blah.

22   It doesn't say that. It says, "No

23   termination may be ordered in absence of a

24   determination, including testimony of a qualified

25   expert, that the continued custody of the child by the

1   parent or Indian custodian is likely to result in

2   serious emotional."

3   When it's -- when it's framed that way, I

4   am -- I am inclined to believe that the "continued

5   custody" means looks to the future, the continuing

6   custody by this person in the future. To read into it

7   the fact that -- that the whole provision only applies

8   to someone who is then in custody of the child, that's

9   very strange. That's -- that's not the way somebody

10   would write a provision like that.

11   MR. KNEEDLER: I -- I grant you it is

12   somewhat awkwardly written, but we think the sense of it

13   is -- is that because this is -- as this Court noted in

14   the Santosky decision, this is a very unusual statutory

15   provision with respect to the burden of proof.

16   And there is some logic for Congress

17   applying this -- this -- where there is a custodial --

18   JUSTICE BREYER: But doesn't it happen, in

19   your interpretation, unlike the two parties who have an

20   interpretation I can understand, that -- remember my

21   hypothetical, which I deliberately made dramatic. We

22   can think of a whole range of things short of that where

23   the father has seen the mother never, perhaps, or sperm

24   donors for very short periods of time, and under your

25   interpretation where there is an ongoing relationship,

1   even a short one, at least they can't give the child to

2   the father where it would be very harmful to the -- to

3   the child.

4   But under your interpretation, the one

5   category of people who is exempt from that are the

6   category of fathers who've never seen the mother.

7   Who've seen the mother a very short time. Who may be in

8   -- they're not even subject to looking to see if it's

9   very harmful to the child.

10   So I just -- am I right about your

11   interpretation having that effect? And if it does have

12   that effect, what's the justification for it?

13   MR. KNEEDLER: Well, the -- there's

14   several -- several things about that with respect to the

15   rapist and the sperm donor. In the 35-year history of

16   this statute --

17   JUSTICE BREYER: All right. So you can say,

18   oh, there's no such thing as a parent, a father who only

19   sees the mother --

20   MR. KNEEDLER: No, no, no.

21   JUSTICE BREYER: All right. Okay. All

22   right.

23   Now, let's suppose there is such a thing.

24   As long as there is such a thing, the anomaly that I

25   mentioned seems to me to exist. And am I wrong or right

1   about that? And if it exists, what's the basis for your

2   creating an interpretation of the statute that would

3   produce it?

4   MR. KNEEDLER: It's -- it's not as anomalous

5   as you're suggesting because state law standards still

6   apply, and under state law standard under Santosky,

7   there has to be clear and convincing evidence to

8   terminate -- to apply the State termination of parental

9   rights provisions, which is what the family court did in

10   this case.

11   This is -- this is a Federal overlay, an

12   additional requirement.

13   If I could, though, move on to --

14   JUSTICE KAGAN: But as a Federal overlay,

15   Mr. Kneedler, I mean, does it make sense to sort of

16   split apart (d) and (f) in this way? Because (d) is the

17   curing provision that says you have to take steps to try

18   to cure this parent and, you know, to try to make him or

19   her a better parent. And then (f) says here's the

20   standard for terminating parental rights if those

21   curative efforts have failed. Right?

22   So to -- to use -- to have the curative

23   provision but not the standard just seems to -- to make

24   a -- a mess of the statute.

25   MR. KNEEDLER: Well, with respect, I don't

1   think so because custody is in the one and -- and not in

2   the other. (D) speaks of breakup of -- of the family

3   relationship. And I think there, the family

4   relationship because it -- it speaks of termination of

5   parental rights, which is in turn defined in the Act as

6   anything that terminates the parent-child relationship,

7   which -- which can be much broader than -- than whether

8   the parent actually has custody, which is the word

9   that --

10   JUSTICE GINSBURG: But the whole thrust of

11   it, you -- this is directed to providing remedial

12   services, which it -- it seems that it fits a situation

13   where someone has custody but is having problems getting

14   his or her act together so needs the help of a social

15   worker, but it makes no sense to talk about remedial

16   services for someone who has never had custody.

17   MR. KNEEDLER: Not -- with -- with respect,

18   Justice Ginsburg, I don't agree. Remedial services here

19   would entail -- the remedial services have to be tied to

20   whatever the problem is. And here the problem was the

21   father had not shown sufficient interest in the child.

22   Remedial services would have been efforts to interest

23   the father in the child.

24   Here that wasn't necessary because as soon

25   as the father found out about the adoption proceeding,

1   he acknowledged and established his paternity and said,

2   I want that child.

3   CHIEF JUSTICE ROBERTS: But he didn't want

4   anything to do with the child if the mother had kept the

5   child in her care. It was only when she wanted to put

6   it up for adoption that he had developed this interest

7   in the child.

8   MR. KNEEDLER: And that's -- that is

9   precisely the point when ICWA kicks in. ICWA does not

10   try to regulate the relationship between the mother and

11   the father. That is -- that is left to State law or

12   tribal law. ICWA kicks in only when there's going to be

13   an adoption or a termination of rights and the child is

14   going to be placed outside of -- of the relationship.

15   CHIEF JUSTICE ROBERTS: But what's -- is --

16   is -- are the would-be adoptive parents required to

17   provide remedial services and rehabilitative programs

18   under (d)?

19   MR. KNEEDLER: No, their burden is to

20   demonstrate that that has happened. The remedial --

21   CHIEF JUSTICE ROBERTS: So that it's a

22   tribe -- if the tribe wants to defeat the adoption, all

23   they have to do is do nothing with respect to the

24   father's --

25   MR. KNEEDLER: Well, I -- I think the -- the

1 family court could direct that remedial service --

2 this -- this happens, I think, frequently in family

3 court, is the remedial services -- this is not an

4 unusual provision. Much State family law provides for

5 this. The State court can oversee the -- the remedial

6 services and that could have been done in this -- in

7 this case.

8   CHIEF JUSTICE ROBERTS: Thank you,

9 Mr. Kneedler.

10   Ms. Blatt, you have three minutes remaining.

11   REBUTTAL ARGUMENT OF LISA S. BLATT

12   ON BEHALF OF THE PETITIONERS

13   MS. BLATT: Thank you, Mr. Chief Justice,

14 and may it please the Court:

15   If you affirm below, you're basically

16 banning the interracial adoption of abandoned Indian

17 children. There's not a single adoptive parent in their

18 right mind who is going to do what the court below said,

19 which is go through these Kafkaesque hoops of making

20 sure an absentee father's desire to be a parent has been

21 stimulated.

22   This is a private adoption. This is absurd

23 that an adoptive parent would beg the family court to go

24 provide parenting classes. And I wanted to --

25   JUSTICE SOTOMAYOR: Counsel, this Act, in

1   terms of voluntary surrender of Indian children by

2   parents, says that it's not final for an adoptive parent

3   until the court does the adoption decree. It gives the

4   mother the right -- or father -- to rescind the

5   voluntary adoption till the very last minute. Has that

6   stopped adopt -- voluntary adoptions?

7   MS. BLATT: No, but this -- first of all --

8   I mean, I love that about this case, the irony here. He

9   had no -- we didn't need his consent under State law, so

10   the application of 1913, which allowed this withdrawal

11   of consent, mandates the return of the child.

12   Well, there was no way to return this child

13   to anybody other than the mother. And I want you to

14   keep in mind about this case, is your decision is going

15   to apply to the next case and to a apartment in New York

16   City where a tribal member impregnates someone who's

17   African-American or Jewish or Asian Indian, and in that

18   view, even though the father is a completely absentee

19   father, you are rendering these women second-class

20   citizens with inferior rights to direct their

21   reproductive rights and their -- who raises their child.

22   You are relegating adoptive parents to go to

23   the back of the bus and wait in line if they can adopt.

24   And you're basically relegating the child, the child to

25   a piece of property with a sign that says, "Indian, keep

1   off. Do not disturb."

2   This case is going to affect any interracial

3   adoption of children.

4   JUSTICE SCALIA: That was its intent.

5   MS. BLATT: No.

6   JUSTICE SCALIA: You don't think that that's

7   what its intent was?

8   MS. BLATT: No.

9   JUSTICE SCALIA: It only applies to children

10 of -- to tribal children. And -- and the purpose was to

11 establish much more difficult standards for the adoption

12 of -- of a child --

13   MS. BLATT: No, no, Justice Scalia.

14   JUSTICE SCALIA: Now, maybe you -- you

15 disagree with that policy, but that's clearly a policy

16 behind the law.

17   MS. BLATT: No, I think the policy is

18 fantastic. It was talking about Indian families who

19 were being ripped away because of cultural biases and

20 insensitivity. This case didn't involve cultural

21 biases.

22   JUSTICE SCALIA: It didn't say that. It --

23 its definition of --

24   MS. BLATT: There's 30,000 pages of

25 legislative history that's talking about the removal.

1   JUSTICE GINSBURG: That, Ms. Blatt, is what

2   provoked the Act that Indian children were being removed

3   from their families, but the Act is written in much

4   broader terms.

5   MS. BLATT: I agree. 1915 is extraordinary,

6   if you read it the way the tribe does, which is -- and

7   the government does.

8   And a little bit about the membership

9   criteria. The tribe's view is any child born Indian is

10   automatically a member. So even if the parents withdrew

11   their tribal membership, this child would be covered.

12   CHIEF JUSTICE ROBERTS: Thank you, counsel.

13   The case is submitted.

14   (Whereupon, at 11:15 a.m., the case in the

15   above-entitled matter was submitted.)

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