

**THE REAL IMPACT OF *ADOPTIVE COUPLE V. BABY GIRL*:
THE EXISTING INDIAN FAMILY DOCTRINE IS NOT
AFFIRMED, BUT THE FUTURE OF THE ICWA'S
PLACEMENT PREFERENCES IS JEOPARDIZED**

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I. INTRODUCTION

On July 3, 2013, Dusten Brown, his wife—Robin—and Brown's parents—Tommy and Alice Brown—filed actions to adopt “Baby Veronica,”¹ the four-year-old girl at the heart of the United States Supreme Court's recent decision in *Adoptive Couple v. Baby Girl*.² The Browns based their adoption petitions on the Indian preference provisions of the Indian Child Welfare Act³ (ICWA or Act) and the assumption that the *Baby Girl* Court did not affirm the existing Indian family (EIF) doctrine,⁴ a doctrine that limits application of the ICWA solely to children previously in the care or custody of an Indian relative.⁵ Because the Browns believed the Court did not affirm the EIF doctrine, they believed the ICWA's placement preferences, which give priority to Indian relatives in Indian

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¹ Andrew Knapp, *Father Files to Adopt Veronica. Move Heats up Custody Dispute*, POST & COURIER, July 9, 2013, at A1; see *Adoptive Couple v. Baby Girl*, 746 S.E.2d 51, 51–52 (S.C. 2013); Michael Muskal, *Girl, 4, Returned to Her Adoptive Parents*, L.A. TIMES, Sept. 25, 2013, at A12.

² *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

³ Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2012).

⁴ This Article uses EIF *doctrine* when discussing this concept generally, but refers to the EIF *exception* when specifically referring to the exception created by the doctrine.

⁵ See Cheyafna L. Jaffke, *The “Existing Indian Family” Exception to the Indian Child Welfare Act: The States’ Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 741 (2006) (“The [EIF] exception is an entirely judge-made doctrine that bars application of the ICWA when either the child or the child’s parents have not maintained a significant social, cultural, or political relationship with his tribe.”).

child adoption cases,⁶ continued to apply to their case and required Veronica's placement with an Indian relative.⁷ A close reading of the *Baby Girl* opinion supports the Browns' position. Nevertheless, on July 17, 2013, the South Carolina Supreme Court issued a remand to the South Carolina Family Court to finalize Veronica's non-Indian adoption.⁸ According to the South Carolina Supreme Court, the ICWA placement preferences were inapplicable because neither Brown nor his parents filed adoption petitions at the time of the original hearing.⁹

The South Carolina Supreme Court's ruling misinterprets the U.S. Supreme Court's decision on the applicability of the ICWA's placement preferences to Veronica's adoption. Unfortunately, the South Carolina Supreme Court's decision will likely be the first of many decisions in which judges interpret *Baby Girl* to limit the applicability of the ICWA's placement preferences. This Article examines the Court's decision in *Baby Girl* and concludes that it did not affirm the EIF doctrine, but that it did significantly curtail the applicability of the placement preferences in many future ICWA cases.

Part II of this Article discusses the EIF doctrine and shows how courts have found that the EIF doctrine prevents the application of all ICWA provisions, including the placement preferences of § 1915(a), to Indian children not deemed part of an "existing Indian family."¹⁰ Part III analyzes the Supreme Court's decision in *Adoptive Couple v. Baby Girl* and argues that this ruling was limited to ICWA § 1912(d) and (f) and, thus, was not a confirmation of the EIF doctrine.¹¹ Part IV examines the *Baby Girl* Court's discussion of § 1915(a) and why the South Carolina Supreme Court was wrong to find the ICWA's placement provisions did not apply.¹² Finally, Part V shows how the U.S. Supreme Court's decision, which limited § 1915(a) to parties that have formally filed for custody, will

⁶ 25 U.S.C. § 1915(a) ("In any adoptive placement of an Indian child under [s]tate law, a preference shall be given . . . to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.").

⁷ See *Adoptive Couple v. Baby Girl*, 746 S.E.2d 51, 52 (S.C. 2013) (noting Birth Father's argument that the ICWA placement preferences precluded Adoptive Couple from adopting Baby Veronica).

⁸ *Id.* at 54.

⁹ *Id.* at 52–53 (quoting *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557, 2564 (2013)).

¹⁰ See *infra* Part II.

¹¹ See *infra* Part III.

¹² See *infra* Part IV.

dramatically reduce this provision's applicability and importance in future ICWA cases.¹³

II. THE EXISTING INDIAN FAMILY DOCTRINE

Long before the Baby Veronica story became national news, courts routinely grappled with the question of whether the ICWA applied to Indian children who had never been part of an Indian family.¹⁴ Many judges were uneasy with the idea of applying the ICWA to children who met the Act's definition of an "Indian child," but had little or no contact with their Indian relatives.¹⁵ In 1982, this uneasiness led the Kansas Supreme Court to create the EIF exception in *In re Adoption of Baby Boy L.*

A. Baby Boy L. and Its Aftermath

In *Baby Boy L.*, the Kansas Supreme Court was asked to decide whether the ICWA applied to the adoption of an Indian child who had never been in the care or custody of his Indian father.¹⁶ The child's father was an enrolled member of the Kiowa tribe and, pursuant to § 1911 of the ICWA, the tribe sought to intervene, to transfer the case to tribal court, and to change temporary custody.¹⁷ The trial court denied these motions¹⁸ and the Kansas Supreme Court affirmed.¹⁹ Although the ICWA gives tribes the right to "intervene at any point" in a "state court proceeding for the foster care placement of, or termination of parental rights to an Indian child,"²⁰ the *Baby Boy L.* court found the Act did not apply because the child had never been in the care or custody of his Indian father or any other Indian relatives. The court then used this fact as the basis for creating the

¹³ See *infra* Part V.

¹⁴ See *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982) (holding the ICWA does not apply to a proceeding that involves a non-Indian mother's illegitimate child who was never in the custody and care of the father); see also *In re Adoption of Baby Boy D.*, 742 P.2d 1059 (Okla. 1985) (holding that father did not have standing under the ICWA), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

¹⁵ See *infra* notes 18–40 and accompanying text.

¹⁶ See *Baby Boy L.*, 643 P.2d at 171–72.

¹⁷ *Id.* at 173.

¹⁸ *Id.*

¹⁹ *Id.* at 176.

²⁰ *Id.* at 176–77 (citing 25 U.S.C. § 1911(c) (2012)).

EIF exception²¹ and concluded that, in such cases, “[t]he issue of the preservation of the Indian family [was] not involved” and the ICWA was inapplicable.²²

After *Baby Boy L.*, other courts also began applying the EIF exception. In 1985, the Oklahoma Supreme Court applied the EIF doctrine in *In re Adoption of Baby Boy D*²³ to find that § 1914 of the ICWA, which allows “any parent . . . from whose custody such [Indian] child was removed . . . [to] petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912 and 1911,”²⁴ did not give an unwed Indian father standing to challenge the adoption of his son.²⁵ According to the *Baby Boy D* court, § 1914 “grants standing to invalidate an action only to the parent from whose custody such child was removed.”²⁶ Therefore, because the court concluded that the father “never had custody” of the child, it ruled that the father did not have standing to challenge the adoption.²⁷ The court further added that its interpretation was consistent with the purpose of the ICWA, stating that Congress enacted the ICWA solely to prevent the removal of an “Indian child from an existing Indian family unit.”²⁸

One year later, in *In re S.A.M.*,²⁹ the Missouri Court of Appeals held that the EIF doctrine prevented an Indian father from challenging the involuntary termination of his rights under § 1912(d) and (f) of the ICWA.³⁰ Section 1912(d) requires that the state make “active efforts . . . to prevent the break up of the Indian family,”³¹ and § 1912(f) requires, as a condition precedent to the termination of parental rights, “that the continued custody of the child by the parent or Indian custodian is likely to

²¹ See *id.* at 175 (“[The ICWA] was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother.”).

²² *Id.* at 174–75 (internal quotation marks omitted) (upholding the trial court’s findings).

²³ 742 P.2d 1059 (Okla. 1985).

²⁴ *Id.* at 1064 (citing 25 U.S.C. § 1914).

²⁵ *Id.*

²⁶ *Id.* (emphasis omitted).

²⁷ *Id.* at 1067.

²⁸ *Id.* at 1064.

²⁹ 703 S.W.2d 603 (Mo. Ct. App. 1986).

³⁰ *Id.* at 608–09 (citing *In re Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982)).

³¹ 25 U.S.C. § 1912(d) (2012).

result in serious emotional or physical damage to the child.”³² In *S.A.M.*, the court found that these sections did not apply because the father had no previous relationship with the child and there was no “Indian family” to preserve.³³ In addition, the court quoted the *Baby Boy L.* decision extensively,³⁴ agreeing with the Kansas Supreme Court that the sole purpose of the ICWA is to prevent “the removal of Indian children from an existing Indian family unit and the resultant breakup of the Indian family.”³⁵

The cases discussed above demonstrate the appeal and versatility of the EIF exception. In the first five years after it was created, many state courts used the EIF exception to avoid application of multiple ICWA provisions, including §§ 1911(a) and (b), 1912(d) and (f), and 1914.³⁶ Since then, courts have also used the EIF doctrine to avoid other ICWA provisions, most notably § 1915(a), which gives preference to Indian placements over non-Indian ones.³⁷

In *In re Santos Y.*,³⁸ a California court used the EIF doctrine to avoid applying § 1915(a).³⁹ *Santos Y.* involved an Indian mother, an enrolled member of the Minnesota Chippewa Tribe, whose child tested positive for cocaine and was, thus, removed shortly after birth by the local department of family.⁴⁰ Due to the ICWA placement preferences, the trial court ordered the child to be placed with the mother’s Chippewa family on the Chippewa reservation.⁴¹ However, on appeal, the California Court of Appeals reversed, finding that the birth mother was not involved with the tribe and, thus, “[t]here [was] no Indian family . . . to preserve.”⁴²

³² *Id.* § 1912(f).

³³ *S.A.M.*, 703 S.W.2d at 608.

³⁴ *See id.* at 608.

³⁵ *Id.* at 608–09; *In re Adoption of T.R.M.*, 525 N.E.2d 298, 302–03 (Ind. 1988).

³⁶ *Crystal R. v. Superior Court*, 69 Cal. Rptr. 2d 414, 427 (Cal. Ct. App. 1997) (remanding to lower court to determine whether the ICWA applies to the biological parents’ termination proceeding under § 1914); *Claymore v. Serr*, 405 N.W.2d 650, 654 (N.D. 1987) (holding that § 1911(a)–(b) did not apply because the child was not removed from an existing Indian family); *In re Adoption of D.M.J.*, 741 P.2d 1386, 1388–89 (Okla. 1985) (refusing to apply § 1912 because the child was not removed from an Indian family).

³⁷ 25 U.S.C. § 1915(a).

³⁸ 112 Cal. Rptr. 2d 692 (Cal. Ct. App. 2001).

³⁹ *Id.* at 726.

⁴⁰ *Id.* at 697–98.

⁴¹ *Id.* at 699.

⁴² *Id.* at 726.

B. Expansion of the EIF Doctrine

By the time *Santos Y.* was decided, the breadth of the EIF doctrine had grown dramatically. In the years since the Kansas court decided *Baby Boy L.*, courts applied the EIF doctrine to mothers,⁴³ fathers,⁴⁴ tribes,⁴⁵ children with high and low blood quantum,⁴⁶ and, most importantly, to multiple sections of the Act.⁴⁷ In addition, as *Santos Y.* demonstrates, the EIF doctrine soon eclipsed its original definition. Courts, such as the court in *Santos Y.*, no longer limited the EIF doctrine to cases in which an Indian child lacked a relationship with its Indian family. Instead, these courts began using the EIF doctrine even in cases in which the child had been in the custody of its Indian parent, if the court believed the parent was not quite Indian enough.⁴⁸

Specifically, in *Santos Y.*, the California Court of Appeals found there was no existing Indian family because, despite the fact the mother was an enrolled member of the Chippewa tribe, the court believed she was not sufficiently involved with her tribe.⁴⁹ Similarly, in *In re Adoption of Baby Boy C.*,⁵⁰ a New York family court found the Indian child's tribe had no right to intervene in the child's adoption proceedings because, although the mother was also an enrolled tribal member, she was currently inactive.⁵¹

⁴³ *Id.*

⁴⁴ *In re Adoption of Baby Boy D.*, 742 P.2d 1059, 1063–64 (Okla. 1985).

⁴⁵ See *infra* notes 50–51 and accompanying text.

⁴⁶ See *Santos Y.*, 112 Cal. Rptr. 2d at 697 (describing that each biological parent had Native American heritage); *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 515 (Cal. Ct. App. 1996) (noting that the children were of American Indian descent).

⁴⁷ See *Bridget R.*, 49 Cal. Rptr. 2d at 516 (holding that the ICWA does not apply when the parents do not maintain a strong relationship with their tribe).

⁴⁸ See, e.g., *In re M.B.*, 176 P.3d 977, 985 (Kan. Ct. App. 2008) (“The existing Indian family doctrine, as recognized by many courts, precludes application of the ICWA when the Indian child’s parent or parents have not maintained a significant social, cultural, or political relationship with an Indian tribe.”); *Rye v. Weasel*, 934 S.W.2d 257, 263 (Ky. 1996) (holding that the EIF doctrine applied because the foster family did not adopt the Indian culture).

⁴⁹ See *Santos Y.*, 112 Cal. Rptr. 2d at 723–24 (stating that the ICWA was unconstitutionally applied because the mother did not have significant involvement with her tribe).

⁵⁰ 784 N.Y.S.2d 334 (N.Y. Fam. Ct. 2004), *rev’d*, 805 N.Y.S.2d 313 (N.Y. App. Div. 2005).

⁵¹ See *Baby Boy C.*, 805 N.Y.S.2d at 317 (noting the family court’s findings before reversing that decision).

Additionally, the family court stated that, when an Indian parent has insufficient ties to the tribe, requiring the tribe to “relinquish[] control over a child born to [such] parents . . . costs the tribe nothing.”⁵²

A third example of these “not Indian enough” cases is *In re Bridget R.*⁵³ In *Bridget R.*, both parents were Indian; the father was an enrolled member of the Dry Creek Rancheria of Pomo Indians and possessed custodial rights of the child.⁵⁴ At the time the mother became pregnant, she and the father were living together and jointly raising their two sons,⁵⁵ but, soon after discovering the pregnancy, the parents’ financial situation deteriorated and they had to move into a shelter.⁵⁶ Due to these difficulties, the parents placed their twins for adoption.⁵⁷ However, the father’s voluntary relinquishment of his parental rights violated the ICWA⁵⁸ and, shortly afterward, he and his tribe sought to invalidate the adoption.⁵⁹

The father had a strong case: He was an enrolled member of a federally recognized Indian tribe and clearly possessed custodial rights to his children at the time of the relinquishment.⁶⁰ Nevertheless, the *Bridget R.* court still found the ICWA inapplicable.⁶¹ The California Court of Appeal appeared to want to base its decision on domicile, noting that it had “doubt[s] as to whether [the father], who, at all relevant times, resided several hundred miles from the tribal reservation, ever participated in tribal life or maintained any significant social, cultural[,] or political relationship

⁵² *Baby Boy C.*, 784 N.Y.S.2d at 341.

⁵³ 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996).

⁵⁴ *Id.* at 515.

⁵⁵ *Id.* at 517.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 515. “ICWA requires, among other things, that any voluntary termination of parental rights respecting an Indian child be (1) executed in writing, (2) recorded before a judge, and (3) executed more than ten days after the birth of the child.” *Id.* (citing 25 U.S.C. § 1913(a) (2012)). “Any consent not meeting these requirements is invalid and may be declared so at any time by a court of competent jurisdiction upon petition by the child, the Indian parent or custodian, or the child’s tribe.” *Id.* (citing 25 U.S.C. § 1914).

⁵⁹ *See id.* at 518 (stating that the father wanted to rescind the relinquishment of his parental rights due to his mother’s desire to have his sister raise the twins).

⁶⁰ *Id.* at 516–17.

⁶¹ *Id.* at 514–15.

with the [t]ribe.”⁶² However, after the United States Supreme Court’s decision in *Mississippi Band of Choctaw v. Holyfield*,⁶³ the California Court of Appeal could not base its decision solely on the family’s distance from the reservation.⁶⁴ Consequently, the court was forced to offer a different definition of “a significant social, cultural[,] or political relationship” sufficient to characterize a person as Indian and, thus, as a person capable of creating an Indian family.⁶⁵

The new definition of an Indian family offered by the *Bridget R.* court turned on whether the Indian parents:

[P]rivately observed tribal customs and, among other things, whether, despite their distance from the reservation, they participated in tribal community affairs, voted in tribal elections, or otherwise took an interest in tribal politics, contributed to tribal or Indian charities, subscribed to tribal newsletters or other periodicals of special interest to Indians, participated in Indian religious, social, cultural[,] or political events [that] are held in their own locality, or maintained social contracts with other members of [t]ribe.⁶⁶

⁶² *Id.* at 515–16. At the time of the relinquishment, the biological father (Richard) was living with the biological mother (Cindy) and their two children. *Id.* at 517. Together they made the decision to relinquish their parental rights because they realized they would not financially be able to care for the children. *Id.* Although the relationship between Richard and Cindy eventually deteriorated, they were together during her entire pregnancy and he was entitled to shared legal custody at the time of the twins’ birth. *Id.* at 518.

⁶³ 490 U.S. 30, 48–49 (1989) (holding that the children were domiciled on the reservation even though they had never been to the reservation).

⁶⁴ *Bridget R.*, 49 Cal. Rptr. 2d at 522 (holding that a child’s birth or residence off reservation did not by itself make the ICWA inapplicable).

⁶⁵ *See id.* at 516.

⁶⁶ *Id.* at 531. One professor posited:

To anyone who has had significant contact with tribal communities, this list of required affiliating acts says far more about the organizational experience of the justices than the realities of tribal life. Newsletter subscriptions and charitable contributions may be the mainstays of membership in the ACLU, the Christian Coalition, or the Sierra Club. But to insist that Indian people demonstrate their affiliation with their tribes in the same way is to impose non-Indian understandings of Indianness and of organizational belonging onto the

(continued)

The court then applied these criteria to the parents in *Bridget R.* and concluded that the Indian father was not Indian enough.⁶⁷ According to the court, the father had “fully assimilated into non-Indian culture” and, therefore, his family did not qualify as Indian.⁶⁸ The court then refused to apply the ICWA, finding that “the unique values of Indian culture [would] not be preserved in the home[.]”⁶⁹

C. Redefining the Indian Child

Cases like *Bridget R.* redefined the EIF exception to mean that the child’s Indian parents must “prove that they themselves have a significant relationship with an Indian community,” and these cases left the determination of whether an Indian parent was sufficiently Indian up to the non-Indian courts.⁷⁰ Consequently, decisions like *Bridget R.* were a substantial blow to Indian families, but they were still not the most extreme expansion of the EIF doctrine. Some courts extended the EIF doctrine even further, finding that the determinative factor is whether the Indian child has a connection to the Indian tribe independent of its relationship to its parents’ connection to the tribe.⁷¹

For example, in *In re Adoption of D.M.J.*,⁷² a non-Indian mother placed her child for adoption six years after her divorce from the child’s Indian father.⁷³ Although the father was a full-blooded member of the Cherokee tribe⁷⁴ and previously exercised custody, including a period of primary custody over the child,⁷⁵ the Supreme Court of Oklahoma still applied the

realities of tribal members. For most tribal cultures, what binds them together is far more profound and spiritual than any newsletter.

Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1388 (2002).

⁶⁷ See *Bridget R.*, 41 Cal. Rptr. 2d at 536–37.

⁶⁸ *Id.* at 526.

⁶⁹ *Id.* (citing 25 U.S.C. § 1902 (2012)).

⁷⁰ *Id.* at 531.

⁷¹ See Christine Metteer Lorillard, *Retelling the Stories of Indian Families: Judicial Narratives that Determine the Placement of Indian Children Under the Indian Child Welfare Act*, 8 WHITTIER J. CHILD & FAM. ADVOC. 191, 214–17 (2008) (noting the changed definition came after the U.S. Supreme Court’s decision in *Holyfield*).

⁷² 741 P.2d 1386 (Okla. 1985).

⁷³ *Id.* at 1387.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1390 (Hodges, J., dissenting) (“The record reflects that D. lived for a period of time with her natural father and her paternal, Indian grandparents after the divorce.”).

EIF exception and found the ICWA inapplicable.⁷⁶ The court held that involuntary termination of the father's rights was permissible because it concluded that the fact the child had been in the custody of her non-Indian mother for six years meant she was not being removed from the custody of an Indian parent or environment.⁷⁷

Similarly, in *State ex rel. D.A.C.*,⁷⁸ a Utah family court terminated a divorced Indian father's parental rights so that the mother's new husband could adopt the children.⁷⁹ Although the children's father had previously exercised custody and he and the children were all enrolled members of the Eastern Shoshone Tribe, the trial court found there was no "existing Indian family" because the children had been in the physical custody of the mother since the divorce and, thus, were not being removed from an existing Indian cultural setting.⁸⁰

The above cases clearly break with the original EIF cases and the understanding that the exception should be limited to parents who had not previously exercised custody. However, even these cases were not the most expansive application of the exception. In the shocking case of *Rye v. Weasel*,⁸¹ the court applied the exception to an Indian child raised by Indian parents on an Indian reservation.⁸² *Rye* involved a custody proceeding between a divorcing foster couple who had cared for an Indian child.⁸³ The child was born on reservation, was an enrolled member of the Standing Rock Sioux Tribe, and was a ward of the Standing Rock Sioux Tribal Court.⁸⁴ Nevertheless, relying on the EIF doctrine, the Kentucky Supreme Court denied the tribe's motion to intervene in the custody proceedings and its request to transfer the case to tribal court.⁸⁵

Specifically, the *Rye* court found that it was unimportant that the child had previously lived in Indian country, in an Indian cultural environment, or with an Indian parent because it concluded that she was no longer living

⁷⁶ *Id.* at 1389 (majority opinion).

⁷⁷ *Id.*

⁷⁸ 933 P.2d 993 (Utah Ct. App. 1997).

⁷⁹ *Id.* at 995, 1003. The Utah Court of Appeals ultimately affirmed the termination of the father's parental rights. *Id.* at 1003.

⁸⁰ *Id.* at 995, 998. The appellate court overruled the trial court's determination that the ICWA did not apply. *Id.* at 1000.

⁸¹ 934 S.W.2d 257 (Ky. 1996).

⁸² *Id.* at 257-59.

⁸³ *Id.* at 257-58.

⁸⁴ *Id.* at 259.

⁸⁵ *Id.* at 259, 264.

in such an Indian environment.⁸⁶ The court also found it insufficient that the child was a ward of the tribe and had previously lived on the reservation with her Indian mother, whose rights were never terminated.⁸⁷ Lastly, the court ignored the fact that the child's foster father, an enrolled member of the Standing Rock Sioux Tribe, moved back to the reservation after the divorce and, thus, would have cared for her on the reservation if granted custody.⁸⁸ The court dismissed all these facts and found the ICWA inapplicable based on its conclusion that the child had primarily grown up in a non-Indian environment,⁸⁹ did not speak the Sioux language,⁹⁰ and did not practice its religion or customs.⁹¹

D. Criticism of the EIF Doctrine

As the above cases demonstrate, courts have used the EIF doctrine in a wide range of Indian child cases and in some instances quite expansively. However, this expansion led many to question the correctness of the doctrine and, over time, opponents of the EIF doctrine have used this uneasiness to successfully convince nineteen states that the exception is an unjustified loophole, violating both the language and the spirit of the ICWA.⁹² Consequently, the majority of states that have considered the EIF

⁸⁶ *Id.* at 262 (discussing the failure to pass amendments to the ICWA that would have made it mandatory to apply the ICWA to situations in which the child lived in an Indian country or environment).

⁸⁷ *Id.* at 259, 263.

⁸⁸ *Id.* at 259.

⁸⁹ *See id.* at 264.

⁹⁰ *Id.* at 260. Even this is somewhat disingenuous because, as the court noted, “[s]he [knew] some words and phrases of the native Sioux language, but [could not] speak conversationally in it.” *Id.*

⁹¹ *Id.*

⁹² *See* Annette Ruth Appell, 5 NEV. L.J. 141, 162–67 (2004) (discussing problems with the EIF doctrine and the courts that have employed it); Dan Lewerenz & Padraic McCoy, *The End of “Existing Indian Family” Jurisprudence: Holyfield at 20, In the Matter of A.J.S., and the Last Gasps of a Dying Doctrine*, 36 WM. MITCHELL L. REV. 684, 687 (2010) (discussing that nineteen states have rejected the EIF doctrine); Jaffke, *supra* note 5, at 741 (“The [EIF] exception is an entirely judge-made doctrine that bars application of the ICWA when either the child or the child’s parents have not maintained a significant social, cultural, or political relationship with his tribe.”); *see generally* Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the “Existing Indian Family” Exception (Re)Imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329 (2009) (discussing how courts have used the EIF doctrine).

doctrine have now rejected it, including four states—Kansas, South Dakota, Oklahoma, and Washington—that had previously applied the EIF doctrine.⁹³

Of the nineteen states that have rejected the doctrine, the most significant is Kansas—the state that first created it. Specifically, in *In re A.J.S.*,⁹⁴ the Kansas Supreme Court overruled *Baby Boy L.*⁹⁵ and rejected the EIF doctrine, concluding that the doctrine ignores the tribal interests that “drove passage of [the] ICWA” and deviates from the Act’s “core purpose of ‘preserving and protecting the interests of Indian tribes in their children.’”⁹⁶ The court further held that the doctrine was unnecessary because the ICWA provision allowing deviation for “‘good cause’ . . . ensures that all interests—those of both natural parents, the tribe, the child, and the prospective adoptive parents—are appropriately considered and safeguarded.”⁹⁷

The sentiments of the *A.J.S.* court reflect the view of the majority of states that have considered the EIF doctrine. Nevertheless, a handful of states still employ it⁹⁸ and, consequently, when the Supreme Court granted certiorari in *Baby Girl*, there was a real question as to whether the Court had done so to resolve this split regarding the validity of the EIF doctrine.⁹⁹ However, the Court’s opinion makes clear that *Baby Girl* is not an affirmation of the EIF doctrine.

III. *BABY GIRL* DOES NOT AFFIRM THE EIF DOCTRINE

At first glance, plenty of reason exists to question whether *Baby Girl* is an affirmation of the EIF doctrine. In many ways, the Court’s discussion

⁹³ Lewerenz & McCoy, *supra* note 92, at 687.

⁹⁴ 204 P.3d 543 (Kan. 2009).

⁹⁵ *Id.* at 551.

⁹⁶ *Id.* at 549–50 (quoting *In re Baby Boy C.*, 805 N.Y.S.2d 313, 323 (N.Y. App. Div. 2005)).

⁹⁷ *Id.* at 551; see *Baby Boy C.*, 805 N.Y.S.2d at 322–23 (“Having considered the various arguments and authorities for and against the acceptance of the EIF exception, we reject it as fundamentally inconsistent with both the plain language of [the] ICWA and one of its core purpose[s] of preserving and protecting the interests of Indian tribes in their children.” (footnote omitted)).

⁹⁸ See Lewerenz & McCoy, *supra* note 92, at 687 (stating that only six states employ the EIF doctrine).

⁹⁹ See Adam Liptak, *Justices Take Case on Adoption of Indian Child*, N.Y. TIMES, Jan. 5, 2013, at A11.

of § 1912(d)¹⁰⁰ and (f)¹⁰¹ mirrors that of early EIF cases. Like these cases, the Court's decision focuses on the Indian father's lack of prior custody.¹⁰² However, although the Court's discussion is similar to some of these custody-based EIF cases, the Court's analysis of the applicability of § 1915(a) confirms that *Baby Girl*'s prior relationship requirement is limited to § 1912(d) and (f). *Baby Girl* is, thus, narrower than even the most limited custody-based EIF cases that, unlike *Baby Girl*, did not confine the EIF doctrine to a particular ICWA provision.

From the beginning, courts used the EIF doctrine to invalidate multiple ICWA provisions based on an Indian parent's lack of prior custody.¹⁰³ In contrast, the *Baby Girl* Court confined its prior custody reasoning to § 1912(d) and (f),¹⁰⁴ despite having the opportunity to apply this reasoning to § 1915(a) as well. Instead, the Court explicitly noted that its decision about § 1912 and prior custody had no impact on the applicability of § 1915(a).¹⁰⁵ This refusal to extend the prior custody reasoning to § 1915(a) is significant and demonstrates that *Baby Girl* did not affirm the existing Indian family doctrine. Moreover, the Court's opinion entirely avoids any reliance on the issue of "Indianness,"¹⁰⁶ which is also telling because more recent EIF cases frequently find Indianness to be the determinative issue.

A. *The Baby Girl Holding*

The issue in *Baby Girl* was whether the South Carolina Family Court could involuntarily terminate the parental rights of an Indian father who had no relationship, custodial or financial, with his child prior to the child's

¹⁰⁰ Compare *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2561–63 (2013) (stating that, when a parent abandons a child before birth, there is no relationship that is discontinued), with *In re S.A.M.*, 703 S.W.2d 603, 608 (Mo. Ct. App. 1986) (describing that the minimal contacts between the child and parent were insufficient for § 1912(d) to apply).

¹⁰¹ Compare *Baby Girl*, 133 S. Ct. at 2560 (discussing that § 1912(f) is conditioned on the continued custody of the child by the parent), with *S.A.M.*, 703 S.W.2d at 607 (describing that § 1912(f) did not apply because the parent never had custody of the child).

¹⁰² *Baby Girl*, 133 S. Ct. at 2560 ("As a result, § 1912(f) does not apply in cases where the Indian parent *never* had custody of the Indian child.").

¹⁰³ See *supra* text accompanying notes 16–31.

¹⁰⁴ See *Baby Girl*, 133 S. Ct. at 2557.

¹⁰⁵ *Id.*

¹⁰⁶ See *id.* at 2565 (stating that, in certain situations, many people would be hesitant to adopt a child who might qualify as an Indian under the ICWA).

adoptive placement.¹⁰⁷ Under South Carolina law, a parent's failure to provide financial support for a child constitutes grounds for involuntary termination of that parent's parental rights.¹⁰⁸ However, ICWA § 1912(d) and (f) prevents such terminations. Section 1912(d) forbids this type of termination unless "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful,"¹⁰⁹ and § 1912(f) forbids such terminations in the "absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."¹¹⁰

When applicable, these ICWA subsections supersede state law and prevent the termination of an Indian parent's rights.¹¹¹ In *Baby Girl*, the South Carolina Family Court found both subsections applicable and held that the court could not involuntarily terminate Dusten Brown's parental rights.¹¹² The court also added that, regardless of § 1912, the placement preferences of § 1915(a) barred the adoption because these preferences require courts to place Indian children with an Indian relative, tribal member, or other Indian family before considering non-Indian placements.¹¹³ The U.S. Supreme Court reversed all three determinations.¹¹⁴

With regard to § 1912(d) and (f), the Court held that these provisions do not apply when the involuntary termination action is against a parent who never exercised custodial rights.¹¹⁵ In reaching this conclusion, the Court focused on the term *continued custody* and reasoned that it refers to

¹⁰⁷ *Id.* at 2559.

¹⁰⁸ S.C. CODE ANN. § 63-7-2570(4) (2010). *Cf. id.* § 63-9-310 (2010) (establishing that, if the father supported the mother during pregnancy, the father must consent to the adoption).

¹⁰⁹ 25 U.S.C. § 1912(d) (2012).

¹¹⁰ *Id.* § 1912(f).

¹¹¹ Andrea V. W. Van, *The Indian Child Welfare Act and Iñupiat Customs: A Case Study of Conflicting Values, with Suggestions for Change*, 21 ALASKA L. REV. 43, 48 (2004).

¹¹² *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 556 (S.C. 2012), *rev'd*, 133 S. Ct. 2552 (2013).

¹¹³ *See id.* at 567 (affirming the lower court's interpretation of § 1915).

¹¹⁴ *See Baby Girl*, 133 S. Ct. at 2565.

¹¹⁵ *See id.* at 2561–62.

a “pre-existing state.”¹¹⁶ Therefore, the Court concluded “§ 1912(f) does not apply in cases where the Indian parent *never* had custody of the Indian child.”¹¹⁷ The Court also found that § 1912(d) was similarly inapplicable because Dusten Brown never had legal or physical custody of Veronica.¹¹⁸ According to the Court, Congress enacted the requirement in § 1912(d)—that there be remedial services before terminating parental rights—to prevent the “breakup of the Indian family” and, thus, the requirement only applies when the parent has an established relationship with the child.¹¹⁹ Further, the Court added that these statutory readings comport with the purpose of the ICWA, which Congress enacted to “stem the unwarranted removal of Indian children from intact Indian families.”¹²⁰ The Court explained that, in a case such as *Baby Girl*, where the non-Indian parent with sole custodial rights initiated the adoption, “the ICWA’s primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families is not implicated.”¹²¹

B. *Baby Girl and Indianness*

In *Baby Girl*, the Court uses the term *preexisting state* to define the term *continued custody*,¹²² but it is significant that the Court never mentions the phrase *existing Indian family*. The Court’s decision not to employ this term makes sense because, upon close examination, it is clear that the majority’s definition of continued custody is different from what lower courts have meant when defining an existing Indian family.

As Part II of this Article demonstrated,¹²³ courts applying the EIF doctrine have permitted the involuntary termination of parental rights even in cases in which the Indian parent had exercised custody, as long as the courts determined those parents had not been living an Indian lifestyle.¹²⁴

¹¹⁶ *Id.* at 2560.

¹¹⁷ *Id.*

¹¹⁸ *See id.* at 2562.

¹¹⁹ *Id.*; 25 U.S.C. § 1912(d) (2012).

¹²⁰ *Baby Girl*, 133 S. Ct. at 2561.

¹²¹ *Id.*

¹²² *Id.* at 2560.

¹²³ *See supra* Part II.A–B.

¹²⁴ Courts typically define this as “maintain[ing] a significant social, cultural[,] or political relationship with their tribe.” *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 516 (Cal. Ct. App. 1996). At the time of the relinquishment, Richard was living with Cindy and their two children. *Id.* at 517. Together they made the decision to relinquish their parental rights because they realized they would not be able to care financially for the children. *Id.*

(continued)

In *Baby Girl*, the Court found there was no Indian family because the father had no legal or physical relationship with his daughter, but not because he was not Indian enough.¹²⁵ The only hint of this idea is Justice Alito's dual reference to the fact that Veronica is "1.2% (3/256) Cherokee."¹²⁶ Although Alito had concerns with characterizing children like Veronica as Indian because "an ancestor—even a remote one—was an Indian,"¹²⁷ such statements were irrelevant to the Court's decision. The Court's opinion never questions whether Veronica is an "Indian child" under the Act,¹²⁸ and the opinion makes clear that, had Dusten Brown exercised custody at some point prior to termination, he and Veronica would have constituted an Indian family and § 1912 would have protected their relationship.¹²⁹

In addition, even if one ignored the EIF cases based on Indianness and looked solely at EIF cases concerning the existence of a prior custodial relationship, the Court's decision still cannot be read as an affirmation of the EIF doctrine. Although courts crafted the earliest EIF cases for situations such as *Baby Girl*, where the objecting parent had never exercised custodial rights,¹³⁰ these decisions stand for the proposition that the lack of a prior custodial relationship makes all of the ICWA's provisions inapplicable.¹³¹ However, the *Baby Girl* majority specifically noted that, subsequent to its decision, "'numerous' ICWA provisions" would still apply and afford "'meaningful' protections to biological fathers

Although the relationship between Richard and Cindy eventually deteriorated, they were together during her entire pregnancy and Richard was entitled to shared legal custody at the time of the twins' birth. *Id.* at 516–17.

¹²⁵ *Baby Girl*, 133 S. Ct. at 2562.

¹²⁶ *Id.* at 2556.

¹²⁷ *Id.* at 2565.

¹²⁸ *Id.* at 2557 n.1 ("It is undisputed that *Baby Girl* is an 'Indian child' as defined by the ICWA . . ."). Similarly, although the justices had some question as to whether Brown was a parent under the ICWA, they did not address this question. *Id.* at 2560 n.4. Moreover, in the adoptive couple's brief, the couple also raised this issue to focus on the father's legal relationship with the child, arguing that "parent" should not be "based on proven biology alone." Brief for Petitioners at 23, *Baby Girl*, 133 S. Ct. 2552 (No. 12-399), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-399_pet.pdf.

¹²⁹ See *Baby Girl*, 133 S. Ct. at 2562.

¹³⁰ See *supra* Part II.A.

¹³¹ See *supra* Part II.A.

regardless of whether they ever had custody.”¹³² Specifically, the majority approvingly cited the dissent’s statements that the *Baby Girl* decision has no impact on ICWA §§ 1911(b), 1913(a) and (c), and 1912(a) and (b), and the majority also agreed that these sections will continue to apply to noncustodial fathers.¹³³

In addition, Justice Breyer’s concurrence further demonstrates that the *Baby Girl* decision is too narrow to be an affirmation of the EIF doctrine. In his concurrence, Justice Breyer notes that he joins the majority’s decision to bar application of § 1912(d) and (f) to Indian parents lacking a prior custodial relationship,¹³⁴ but he also takes pains to make his agreement as limited as possible. He qualifies his agreement with a number of significant exceptions that further limit the Court’s decision and show it is not an application of the EIF doctrine.¹³⁵ For example, Justice Breyer notes that the Court’s holding should not and does not cover “a father with visitation rights or a father who has paid all of his child support obligations.”¹³⁶ Justice Breyer further adds that the *Baby Girl* holding does not cover “a father who was deceived about the existence of the child or a father who was prevented from supporting his child.”¹³⁷ All of these qualifications distinguish the court’s holding from the EIF doctrine, which has never contained these exceptions. In fact, many of these exceptions are specifically at odds with the purpose behind the EIF doctrine.

1. Child Support

Justice Breyer would make an exception for a father who has paid all his child support.¹³⁸ However, payment of child support creates a financial relationship with the child, but not necessarily a custodial relationship.¹³⁹ Child support and child custody are not related, and payment of child

¹³² *Baby Girl*, 133 S. Ct. at 2561 n.6 (quoting *id.* at 2574 (Sotomayor, J., dissenting)).

¹³³ *See id.* (explaining that the dissent admitted that multiple ICWA sections provide protections to biological fathers, regardless of whether the father previously had custody).

¹³⁴ *Id.* at 2571 (Breyer, J., concurring).

¹³⁵ *See id.* Consequently, without Justice Breyer’s support, there is no majority opinion for these circumstances. *Id.* at 2556 (majority opinion) (stating that Justice Breyer was the fifth member of the majority).

¹³⁶ *Id.* at 2571 (Breyer, J., concurring) (internal quotation marks omitted).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See id.* at 2578 (Sotomayor, J., dissenting) (discussing the example of a father who did not have custody but still paid child support).

support does not guarantee custodial or visitation rights.¹⁴⁰ Moreover, because parents frequently pay child support through wage garnishment,¹⁴¹ one cannot even assume that a father who has paid all of his child support has done so willingly. Consequently, a father who has no rights to his child, but simply pays child support, would not meet the EIF definition of having an existing family relationship with his child. However, according to Justice Breyer, the *Baby Girl* decision does not exclude such a father.¹⁴² A father who has paid all his child support is still covered by § 1912(d) and (f), regardless of any custodial relationship.¹⁴³

2. *Concealed Pregnancy*

Justice Breyer also makes an exception for situations where a mother concealed her pregnancy from an Indian father.¹⁴⁴ This exception is particularly revealing because, although there are no published cases in which the court applied the EIF doctrine to an Indian parent who had paid all child support owed, there are cases involving the concealment of pregnancies.¹⁴⁵ Thus, the fact that Justice Breyer makes an exception for these situations, when the EIF doctrine does not, further indicates that the *Baby Girl* decision is not an affirmation of the doctrine.¹⁴⁶

First, for example, in *Guardianship of Zachary H.*,¹⁴⁷ the California Court of Appeal used the reasoning of the EIF doctrine to terminate the rights of a father who fully intended to support his child, but was prevented

¹⁴⁰ *See id.*

¹⁴¹ *See* Mary Fenlon, Comment, *Garnishment of Wages to Enforce Child Support: A New Remedy for an Old Problem*, 15 ST. MARY'S L.J. 381, 391 (1984); Debrina Washington, *Wage Garnishments and Child Support Payments: How Wage Garnishments Are Processed*, ABOUT.COM, http://singleparents.about.com/od/calculatepayments/a/wage_garnishments.htm (last visited Feb. 4, 2014) ("Child support payments are often facilitated by the courts and a governmental agency through wage garnishments.").

¹⁴² *See Baby Girl*, 133 S. Ct. at 2571 (Breyer, J., concurring).

¹⁴³ *Id.* at 2578–79 (Sotomayor, J., dissenting) (discussing the example of a father who did not have custody but still paid child support).

¹⁴⁴ *Id.* at 2571 (Breyer, J., concurring).

¹⁴⁵ *Id.* at 2578 n.8 (Sotomayor, J., dissenting) (citing *A Child's Hope, LLC v. Doe*, 630 S.E.2d 673, 674 (N.C. Ct. App. 2006) (explaining that the trial court found that the father did not know of the child's birth until he was served a summons); *In re Termination of Parental Rights of Biological Parents of Baby Boy W.*, 988 P.2d 1270, 1271–72 (Okla. 1999) (explaining that, for several months, the father did not know he fathered a child)).

¹⁴⁶ The dissent also listed numerous non-Indian cases demonstrating how common such occurrences are in general. *See id.*

¹⁴⁷ 86 Cal. Rptr. 2d 7 (Cal. Ct. App. 1999).

from doing so when the mother went into hiding in order to place the baby for adoption.¹⁴⁸ *Zachary H.* was not an ICWA case.¹⁴⁹ Nonetheless, the court relied heavily on the reasoning in *Bridget R.*, which was an ICWA case,¹⁵⁰ to deny the father's petition opposing his child's guardianship with a potential adoptive couple.¹⁵¹ The *Zachary H.* court used *Bridget R.* to support its conclusion that, when a child has no custodial relationship with its biological parent, the noncustodial biological parent's interest in the child cannot control.¹⁵² Thus, the court used an EIF case to hold that a noncustodial father has no legal rights to his child even when his lack of relationship with his child was due to the mother's deception.¹⁵³

Second, in a similar case—*In re Michael J.*¹⁵⁴—the California Court of Appeal found the ICWA inapplicable to a father who never learned of the Indian mother's pregnancy.¹⁵⁵ Although the mother did not intentionally conceal her pregnancy from her son's non-Indian father, she attributed her pregnancy to another man and, thus, the biological father had no reason to believe he was the father.¹⁵⁶ Nevertheless, after finding out about the child, the child's father attempted to establish a relationship with his son and argued the ICWA entitled him reunification services.¹⁵⁷

The ICWA makes no distinction between an Indian and non-Indian parent with regard to the application of reunification services; therefore, a non-Indian parent has a right equal to that of the Indian parent to invoke the ICWA as the Indian parent.¹⁵⁸ Still, in *Michael J.*, the state argued the ICWA was inapplicable to the non-Indian father because he and his child

¹⁴⁸ *See id.* at 10, 17.

¹⁴⁹ *See id.* at 8–9.

¹⁵⁰ *See supra* Part II.B.

¹⁵¹ *Zachary H.*, 86 Cal. Rptr. 2d at 17.

¹⁵² *Id.*

¹⁵³ *See id.* at 9, 17 (explaining that the biological father asked the mother to reconsider adoption, but she cut off all communication from him).

¹⁵⁴ No. A103198, 2004 WL 551251 (Cal. Ct. App. Mar. 22, 2004).

¹⁵⁵ *Id.* at *9, *13.

¹⁵⁶ *Id.* at *14.

¹⁵⁷ *Id.* at *4–5.

¹⁵⁸ Under the statutory definitions of the ICWA, a non-Indian parent of an Indian child can use the ICWA. 25 U.S.C. § 1903(9) (2012) (“‘[P]arent’ means any biological parent or parents of an Indian child . . .”). In this case, however, the court did not decide the EIF question because it determined that the father had waived the issue by not raising it below. *Michael J.*, 2004 WL 551251, at *7.

could not be considered an existing Indian family.¹⁵⁹ The court agreed.¹⁶⁰ The court noted the “conceptual difficulties” of describing the father as a parent under the ICWA because it determined that “[a]pplication of state law to deny [father] reunification services did not damage an Indian family”¹⁶¹ The fact that the mother misled the father and, thus, prevented the father from forming a relationship with the child made no difference.¹⁶² The court still found the ICWA was inapplicable because the court determined there was no Indian family to preserve.¹⁶³

Third, in *In re Adoption of Baby Boy D*,¹⁶⁴ the Supreme Court of Oklahoma focused on the definition of “parent” under ICWA and indicated that it could not apply the EIF doctrine despite a mother’s concealment of her pregnancy.¹⁶⁵ Specifically, the *Baby Boy D* court determined that an unwed father who had not legally established paternity had no rights under the ICWA.¹⁶⁶ Although the father knew of the pregnancy, the court’s reasoning was broad and made no exception for fathers unaware of a pregnancy.¹⁶⁷

According to the *Baby Boy D* court, the ICWA does not apply to a father who “made no attempt to acknowledge or establish paternity until he filed his petition to vacate the decree of adoption.”¹⁶⁸ Further, the court added that limiting the ICWA’s definition of a parent to fathers who have acknowledged paternity:

¹⁵⁹ *Michael J.*, 2004 WL 551251, at *8.

¹⁶⁰ *Id.* at *9.

¹⁶¹ *Id.* at *11. Specifically, the court determined the failure to apply the ICWA was harmless error because it found no existing Indian family. *Id.*

¹⁶² *See id.* at *11–12 (“He also fails to demonstrate the intended effect of the ICWA was in any way compromised by the juvenile court’s dispositional order. To the contrary, the denial of reunification services under state law was premised on [the child’s] *best interests*.” *Id.* at *12.).

¹⁶³ *Id.* at *13.

¹⁶⁴ 742 P.2d 1059 (Okla. 1985).

¹⁶⁵ *Id.* at 1064. *See* Richard B. Taylor, Note, *Curbing the Erosion of the Rights of Native Americans: Was the Supreme Court Successful in Mississippi Band of Choctaw Indians v. Holyfield?*, 29 J. FAM. L. 171, 178 (1990) (“If the mother conceals the fact that the child is part Indian, and if the father does not know of the child . . . , the court will not acknowledge the child as being an ‘Indian child’ pursuant to the Act.”).

¹⁶⁶ *Baby Boy D*, 742 P.2d at 1064.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

[I]s in accord with the stated purpose of the [A]ct[, which is] to protect Indian children from the destruction of Indian family units by child welfare agencies and courts. The ICWA emphasizes that the Congress seeks to protect the Indian child by setting minimum federal standards for the removal of that Indian child from an existing Indian family unit. Here we have a child who has never resided in an Indian family, and who has a non-Indian mother. For the foregoing reasons[,] we conclude [father] lacks standing to invoke the ICWA in this case.¹⁶⁹

Thus, the *Baby Boy D* court used the EIF doctrine to hold that, unless a father acknowledges paternity—something particularly difficult for a thwarted father to do—he has no right to invoke the ICWA.¹⁷⁰

The above EIF cases establish that the ICWA is unavailable to thwarted fathers. However, Justice Breyer's exception for deceived fathers breaks with such cases.¹⁷¹ *Baby Girl's* requirement of prior custody does

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* Increasingly, a deceived father who wishes to ensure acknowledgement of paternity must register with a putative father registry. *See, e.g.*, S.C. CODE ANN. § 63-9-820(C) (Supp. 2013). Legislatures created these registries to allow fathers to retain their rights even in the event that the mother wishes to hide her pregnancy. *See id.* § 63-9-810 (Supp. 2013). In states employing these registries, sexual intercourse is considered notice of a potential child. *See, e.g., id.* § 63-9-820(L). Thus, a father who wants to have legal rights to a resulting child must register with the putative father registry based on nothing more than the fact that sexual intercourse can result in a child. However, if a father fails to register, he loses his right to notification of a pending adoption, his consent is not necessary for the adoption, and his ignorance of the pregnancy or adoption does not give him grounds to contest a finalized adoption. *See Lehr v. Robertson*, 463 U.S. 248, 264 (1983) (upholding the constitutionality of these registries); *see also* S.C. CODE ANN. § 63-9-820(D), (K); *In re John Paul B.*, 909 N.Y.S.2d 753, 755 (N.Y. App. Div. 2010) (finding father's consent unnecessary, even though mother concealed her pregnancy, where he did not protect his paternal interest in the six months prior to the adoption).

¹⁷¹ *See Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2571 (2013) (Breyer, J., concurring); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 943 (N.J. 1988) (finding the ICWA inapplicable because the father failed to establish paternity according to state standards and the child had never lived in an Indian environment or Indian family). Moreover, also relevant is that at least thirty states have putative father registries, including some with the highest Indian populations, such as Oklahoma, Kansas, Arizona, New York, and New Mexico. *See State Putative Father Registries*, N.H. RES. DIVISION OFF. LEGIS. SERVICES, <http://www.courts.state.nh.us/probate/registrylist.pdf> (last visited Feb 4, 2014).

not apply to deceived fathers.¹⁷² *Baby Girl* does not require these fathers to acknowledge paternity, and it extends the ICWA's protections to thwarted fathers regardless of whether the state considers such fathers to have a legal relationship with their child. Consequently, this exception further demonstrates that the *Baby Girl* decision is not an affirmation of the EIF doctrine.¹⁷³

IV. SECTION 1915(A) AND THE CONTINUED RELEVANCY OF THE ICWA'S PLACEMENT PREFERENCES

In *Baby Girl*, the opinion's lack of reliance on the father's Indianness, the fact it was limited to § 1912(d) and (f), and its exceptions for fathers who have paid child support or been deceived¹⁷⁴ all support the proposition that *Baby Girl* is not an affirmation of the EIF doctrine. However, the Court's decision regarding the applicability of § 1915(a) is the most definitive proof that *Baby Girl* does not affirm the EIF doctrine. The majority held that the lower court incorrectly found § 1915(a) applicable to this case, but the majority based its reasoning specifically on the father's failure to file for adoption, not his lack of prior custody.¹⁷⁵

Section 1915(a) of the ICWA grants adoptive preference to "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families" in the "absence of good cause to the contrary."¹⁷⁶ The Supreme Court of South Carolina explained that, even if it had terminated Dusten Brown's parental rights, the court still would not have permitted the adoptive parents to adopt Veronica because the ICWA placement preferences would have applied and the court would have been obligated to place her with an interested party who fit one of these preference categories.¹⁷⁷ Specifically, the court assumed § 1915(a)

¹⁷² *Baby Girl*, 133 S. Ct. at 2571 (Breyer, J., concurring) ("[This case] does [not] involve special circumstances such as a father who was deceived about the existence of a the child . . .").

¹⁷³ Although research for this Article found no published ICWA cases including pregnancy concealment, numerous examples of such deception exist in family law cases in general. See *supra* Part III.B.2. Moreover, in *Baby Girl*, the father knew about the pregnancy, but the mother concealed her desire to place the child for adoption. See *Baby Girl*, 133 S. Ct. at 2558.

¹⁷⁴ See *supra* Part III.

¹⁷⁵ See *Baby Girl*, 133 S. Ct. at 2564.

¹⁷⁶ 25 U.S.C. § 1915(a) (2012).

¹⁷⁷ See *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 566–67 (S.C. 2012), *rev'd*, 133 S. Ct. 2552 (2013).

meant that, even if the court terminated Brown's parental rights, the court would still have had to consider him or his parents as potential adoptive placements and, absent good cause, give the Browns preference over the adoptive parents.¹⁷⁸

A. Baby Girl Does Not Require Continued Custody for § 1915(a)

The Supreme Court rejected the South Carolina courts' understanding of § 1915(a).¹⁷⁹ However, once again, its reasoning was not based on the EIF doctrine. According to the Court, the placement preferences of § 1915(a) are inapplicable in cases in which "no alternative party that is eligible to be preferred under § 1915(a) has come forward."¹⁸⁰ The Court explained that the placement preferences were not available because the adoptive parents were the only party that sought to adopt Veronica.¹⁸¹ The Court held that § 1915(a) did not cover Brown at the time of initial hearing "because he did not seek to adopt Baby Girl."¹⁸² Further, the Court added that the same reasoning applied to the paternal grandparents because they also "never sought custody of Baby Girl."¹⁸³ Importantly, at no point did the Court state that § 1915(a) was inapplicable because Brown had no prior custodial relationship with Veronica. In fact, the Court's discussion implies the opposite conclusion; regardless of a prior custodial relationship, § 1915(a) applies to any Indian party formally filing for adoption or custody.¹⁸⁴

The Court's opinion makes clear that, had the father, the grandparents, or another member of the tribe attempted to adopt Veronica at the initial hearing, the placement preferences of § 1915(a) would have been applicable regardless of the fact that they had no prior relationship with her and, therefore, could not be considered an "existing Indian family."¹⁸⁵ This part of the Court's opinion is odd because it means that noncustodial Indian parents facing termination will likely fare better in their bids to

¹⁷⁸ *See id.* at 566.

¹⁷⁹ *See Baby Girl*, 133 S. Ct. at 2564–65.

¹⁸⁰ *Id.* at 2564.

¹⁸¹ *Id.*

¹⁸² *Id.* (emphasis omitted).

¹⁸³ *Id.*

¹⁸⁴ *See id.* at 2564 ("In this case, Adoptive Couple was the only party that sought to adopt Baby Girl in Family Court or the South Carolina Supreme Court. Biological Father is not covered by § 1515(a) because he did not seek to *adopt* Baby Girl" (citation omitted)).

¹⁸⁵ *See id.* at 2564–65.

adopt their own children than in their attempts to prevent the termination of their parental rights. However, regardless of its peculiarity, this part of the decision was clearly not an adoption of the EIF doctrine.

Similarly, Justice Breyer's concurrence supports this understanding of the applicability of § 1915(a) to noncustodial fathers. In his concurrence, Justice Breyer specifically notes that, even after termination, the provisions of § 1915(a) could still "allow an absentee father to reenter the special statutory order of preference."¹⁸⁶ Justice Sotomayor makes this point even more explicitly in her dissent, noting:

[T]he majority does not and cannot foreclose the possibility that on remand, Baby Girl's paternal grandparents or other members of the Cherokee Nation may formally petition for adoption of Baby Girl. If these parties do so, and if on remand Birth Father's parental rights are terminated so that an adoption becomes possible, they will then be entitled to consideration under the order of preference established in § 1915. The majority cannot rule prospectively that § 1915 would not apply to an adoption petition that has not yet been filed. Indeed the statute applies "[i]n any adoptive placement of an Indian child under [s]tate law" and contains no temporal qualifications.¹⁸⁷

B. The South Carolina Supreme Court Was Wrong

As this Article has demonstrated, three separate opinions—the majority, Justice Breyer's concurrence, and the dissent—all support the understanding that an Indian parent's prior custodial relationship with the parent's child has no bearing on the applicability of the ICWA's placement preferences.¹⁸⁸ Consequently, *Baby Girl* stands in stark contrast to EIF cases such as *In re Santos Y.*, which explicitly held that the placement preferences of § 1915(a) do not apply when there is no existing Indian family to preserve.¹⁸⁹ However, although the *Baby Girl* decision holds that the placement provisions can still apply regardless of a father's prior

¹⁸⁶ *Id.* at 2571 (Breyer, J., concurring).

¹⁸⁷ *Id.* at 2585 (Sotomayor, J., dissenting) (first alteration in original) (quoting 25 U.S.C. § 1915(a) (2012)).

¹⁸⁸ *See supra* Part III.A.

¹⁸⁹ *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 726 (Cal. Ct. App. 2001).

custodial relationship,¹⁹⁰ on remand the South Carolina Supreme Court misinterpreted the Court's decision and held the placement preferences inapplicable to Veronica's adoption.¹⁹¹

After the Supreme Court's decision, Dusten Brown and his parents filed petitions to adopt Veronica.¹⁹² The Court's decision made clear that such a filing was necessary for a court to consider Brown or his parents under the ICWA's placement preferences.¹⁹³ However, the South Carolina Supreme Court ignored these adoption petitions and issued an order treating the *Baby Girl* decision as if it was in existence at the time of the original adoption hearing.¹⁹⁴ Then, after making this temporal contortion, the court determined § 1915(a) was inapplicable to Veronica's adoption because the adoptive parents were still the only ones that had filed a petition.¹⁹⁵

The South Carolina court's decision was disingenuous and wrong. The Browns had filed for adoption and, thus, according to *Baby Girl*, they were entitled to the protections of § 1915(a).¹⁹⁶ Nevertheless, although this ruling was wrong with regard to the Browns, the *Baby Girl* decision does support similar rulings in subsequent ICWA cases. In the future, many potential Indian adoptive parents will not have filed a competing adoption petition at the time a court considers a non-Indian adoption.

The *Baby Girl* case was an unusually high-profile ICWA case,¹⁹⁷ thus providing the Browns with the notice, opportunity, and legal support

¹⁹⁰ See *Baby Girl*, 133 S. Ct. at 2564.

¹⁹¹ *Adoptive Couple v. Baby Girl*, 746 S.E.2d 51, 52 (S.C. 2013) (denying the birth father's argument that the ICWA prohibited the adoption of Baby Veronica).

¹⁹² Knapp, *supra* note 1, at A1. See *Baby Girl*, 746 S.E.2d at 52 (explaining that the birth father raised the issue of whether this case should have been moved to Oklahoma, which was where the competing adoption petitions were pending).

¹⁹³ *Baby Girl*, 133 S. Ct. at 2564.

¹⁹⁴ *Baby Girl*, 746 S.E.2d at 53.

¹⁹⁵ *Id.*

¹⁹⁶ The issue on remand should have been solely whether there was good cause to deviate from these placement preferences. See BIA Guidelines for State Courts, 44 Fed. Reg. 67,584, 67,594 (Nov. 26, 1979); see also *In re A.H.*, No. SCUK-JVSQ-11-16333-01, 2012 WL 6178300, at *7 n.8 (Cal. Ct. App. Dec. 12, 2012) ("The party opposing the placement has the burden to show there is good cause not to follow the stated preferences."); *People ex rel. A.R.*, 310 P.3d 1007, 1018 (Colo. App. 2012) (stating that the party seeking to overcome the presumption that the ICWA preferences apply must show good cause).

¹⁹⁷ See Nicole Adams, *Adoptive Couple v. Baby Girl: Information and Resources*, NAT'L INDIAN CHILD WELFARE ASS'N, <http://www.nicwa.org/babyveronica/> (last visited (continued)

needed to file for adoption and seek the protections of § 1915(a). The South Carolina Family Court should have granted the Browns' adoption petitions, but did not consider the petitions only because the South Carolina Supreme Court misinterpreted the *Baby Girl* decision. However, few future Indian fathers and grandparents will have similar resources. Therefore, although the *Baby Girl* decision primarily concerns § 1912, the Court's discussion of § 1915(a) might have the most wide-reaching impact.

V. *BABY GIRL* AND THE ICWA PLACEMENT PREFERENCES

The *Baby Girl* case focuses on the applicability of § 1912(d) and (f) to a noncustodial father in a voluntary adoption proceeding.¹⁹⁸ However, voluntary private adoptions make up only 2% of the entire ICWA caseload.¹⁹⁹ The majority of ICWA adoption and custody cases concern a child involuntarily removed from the parents' custody.²⁰⁰ The Court's decision about § 1912(d) and (f) has little relevance for these Indian families, but its discussion of § 1915(a) is extremely pertinent. In *Mississippi Band of Choctaw v. Holyfield*,²⁰¹ the Supreme Court's only other ICWA case,²⁰² the Court described § 1915(a) as "[t]he most important substantive requirement [the ICWA] imposed on state courts."²⁰³ Consequently, any change in the applicability of § 1915(a) is hugely important.

Feb. 5, 2014) ("*Adoptive Couple v. Baby Girl* garnered significant concern from Indian Country, as the decision had great potential to impact not just the future of [the] ICWA, but also Congress'[s] power to pass laws that protect Indian tribes and people.").

¹⁹⁸ See *supra* Part III.A.

¹⁹⁹ *Amendments to the Indian Child Welfare Act: Hearing Before the S. Comm. on Indian Affairs*, 104th Cong. 107 (1996) (statement of Deborah J. Doxtator, Chairwoman, Oneida Tribe of Indians of Wisconsin).

²⁰⁰ See *id.* at 107–08 ("The vast majority of children presently on our caseload have been placed in foster care because their parents are unable to care for them at the present time.").

²⁰¹ 490 U.S. 30 (1989).

²⁰² See Abigail Perkiss, *Supreme Court's Upcoming Child-Custody Decision: The Baby Veronica Case*, YAHOO! NEWS (Mar. 4, 2013, 11:00 AM), <http://news.yahoo.com/supreme-court-upcoming-child-custody-decision-baby-veronica-110206332--politics.html> (stating that the the Supreme Court first considered the ICWA in *Holyfield* and it would come before the Court again in *Adoptive Couple*).

²⁰³ *Holyfield*, 490 U.S. at 36.

A. The Prior Understanding of § 1915(a)

Until the *Baby Girl* decision, § 1915(a) appeared to place an affirmative duty on states to seek out and prefer Indian custodians to non-Indian custodians in all Indian child adoption and custody cases.²⁰⁴ The commentary to the Bureau of Indian Affairs (BIA) Guideline F.1 reflects this view, stating that § 1915(a) requires “that the court or agent make an active effort to find out if there are families entitled to preference who would be willing to adopt the child.”²⁰⁵ As a result, states understood § 1915(a) to mean that, whenever they consider the placement of an Indian child, they must ask the Indian parent about potential family placements, contact those family members, contact the tribe, or seek placement with a native foster family.²⁰⁶ For example, § 361.31(g) of California’s Welfare and Institutional Code reflects this view of state obligations, stating: “Any person or court involved in the placement of an Indian child shall use the services of the Indian child’s tribe, whenever available through the tribe, in seeking to secure placement within the order of placement preference established in this section and in the supervision of the placement.”²⁰⁷

The belief that § 1915(a) imposes an affirmative duty on states to seek Indian placements has meant that Indian parents and tribes have been able to offer a forceful challenge to the nonnative placement of their children, so long as they can demonstrate someone in the preference categories was

²⁰⁴ See 25 U.S.C. § 1915(a) (2012).

²⁰⁵ BIA Guidelines for State Courts, 44 Fed. Reg. 67,584, 67,594 (Nov. 26, 1979).

²⁰⁶ See *Adina B. v. State Dep’t of Health & Soc. Servs.*, No. S-14314, 2012 WL 516007, at *4-5 (Alaska Feb. 15, 2012) (explaining that the Office of Children’s Services contacted the maternal grandmother and also specifically sought an “Alaska Native medical foster home” before placing the child with a non-native foster mother).

²⁰⁷ CAL. WELF. & INST. CODE § 361.31(g) (2008); MONT. CODE ANN. § 41-3-109 (2013) (“If a proceeding under this chapter involves an Indian child, as defined in the Indian Child Welfare Act, 25 U.S.C. 1901, et seq., the proceeding is subject to the Indian Child Welfare Act.”); OKLA. STAT. tit. 10, § 40.6 (2009) (“In all placements of an Indian child . . . , the person or placement agency shall utilize to the maximum extent possible the services of the Indian tribe of the child in securing placement consistent with the provisions of the Oklahoma Indian Child Welfare Act.”); OR. REV. STAT. § 419B.500 (2007) (“If an Indian child is involved, the termination of parental rights must be in compliance with the Indian Child Welfare Act.”); S.D. CODIFIED LAWS § 26-8A-32 (2004) (“Due regard shall be afforded to the Indian Child Welfare Act . . . if that Act is applicable.”); VT. STAT. ANN. tit. 33, § 5120 (Supp. 2013) (“The federal Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., governs any proceeding under this title that pertains to an Indian child, as defined by the Indian Child Welfare Act, and prevails over any inconsistent provision of this title.”).

interested in taking custody.²⁰⁸ Moreover, although courts have ruled that there was good cause for the non-Indian placement in many cases,²⁰⁹ courts had not rejected, until *Baby Girl*, § 1915(a) challenges because the potential custodians had not formally initiated adoption procedures.

For example, in *Pit River Tribe v. Superior Court*, the California Court of Appeal reversed the lower court's approval of a non-Indian placement for an Indian child because it did not comport with § 1915(a).²¹⁰ In this case, the tribe brought an action to vacate the lower court's order because it deviated from the ICWA placement preferences, and the appellate court granted the motion.²¹¹ In explaining its decision, the court noted that, although the tribe identified multiple potential relative placements, the Sacramento County Department of Children and Family Services made few efforts to evaluate these relatives or actively assist in their custodial bids.²¹² As a result, the court found that the department failed to make active efforts to comply with the ICWA preference categories.²¹³

Specifically, the *Pit River* court held that the department violated the ICWA because it failed to do the following: use the services of the tribe to secure placement in conformity with the ICWA; evaluate in a timely fashion the relatives recommended by the tribe; assist in obtaining a criminal records exception for these relatives or explain why it did not do so; and apply the tribe's social and cultural standards when evaluating the relative placement.²¹⁴ Thus, the court interpreted the ICWA as requiring active efforts on the part of the state to locate potential Indian caregivers.²¹⁵ However, the court did not require the potential Indian caregivers to identify themselves first, and it certainly did not require them to formally file for adoption.²¹⁶

²⁰⁸ See *Pit River Tribe v. Superior Court*, No. C067900, 2011 WL 4062512, at *1 (Cal. Ct. App. Sept. 14, 2011) (vacating lower court's placement order because it deviated from the ICWA placement preferences).

²⁰⁹ See, e.g., *In re B.B.A.*, 224 P.3d 1285, 1286 (Okla. Civ. App. 2009) (finding the biological parents' preference of a non-Indian placement constituted good cause).

²¹⁰ *Pit River Tribe*, 2011 WL 4062512, at *1.

²¹¹ *Id.*

²¹² *Id.* at *9, *11.

²¹³ *Id.* at *9.

²¹⁴ *Id.* at *12.

²¹⁵ See *id.* at *9.

²¹⁶ See *id.* at *12 (holding that the department violated the ICWA based on its own failures not to confer with the tribe before placement, refusal to review initially the tribe's
(continued)

Similarly, *People ex rel. South Dakota Department of Social Services*²¹⁷ also demonstrates how courts have interpreted § 1915(a) to require active efforts to locate potential Indian caregivers. In this case, the Supreme Court of South Dakota affirmed the lower court's finding of good cause to deviate from the placement preferences only after it determined that the South Dakota Department of Social Services had "conducted a diligent search and no suitable ICWA-preferred placement options had been found."²¹⁸ In more detail, the court quoted the circuit court's findings:

Since the inception of this case in August of 2006, over [3.5] years ago, the South Dakota Department of Social Services has conducted diligent searches for an adoptive placement within the preferences set forth in [the ICWA]. . . . [DSS] has made contact with the minor child's tribe and has contacted known members of the child's extended family, as defined by [the ICWA], but has been unable to locate a suitable placement for the children within the preference guidelines. . . . The Court finds that placement of the child within the order of preference as set forth in [the ICWA] is not available and that good cause exists for placement of the child with an individual or family outside of said order of preference²¹⁹

placement recommendation, failure to consider the tribe's cultural standards, and failure to acquire criminal records).

²¹⁷ 795 N.W.2d 39 (S.D. 2011).

²¹⁸ *Id.* at 44.

²¹⁹ *Id.* (alterations in original) (internal quotation marks omitted). For example, in an Arizona appellate court decision, a native mother challenged her children's placement in a nonnative foster home. *Yvonne L. v. Ariz. Dep't of Econ. Sec.*, 258 P.3d 233, 237 (Ariz. Ct. App. 2011). The mother argued that the children should have been placed with her half sister, whom the tribe established was interested. *Id.* at 237, 242. However, closer examination revealed that the sister was uncertain about her willingness to be a guardian, did not want to permanently adopt the children and, thus, did not have the backing of the tribe. *Id.* at 242. Accordingly, the court found good cause to deviate from the placement preferences. *Id.*; see also *Christina H. v. Ariz. Dep't of Econ. Sec.*, No. 1 CA–JV11–0145, 2012 WL 70650, at *7 (Ariz. Ct. App. Jan. 10, 2012) (finding that good cause existed to place the child near her relatives on the reservation rather than placing the child with her grandmother).

Baby Girl appears to have eliminated the active efforts requirement of § 1915(a). States are no longer required to seek out potential adoptive Indian caregivers.²²⁰ Instead, the potential caregivers now bear the onus to identify themselves and take the necessary steps to file for adoption, and this change will likely drastically reduce the probability of Indian adoptees being placed in Indian homes. The one glimmer of hope is that § 1915(b) could potentially mitigate this effect if future courts find *Baby Girl* had no impact on this provision. At the same time, an opposite ruling (i.e., that *Baby Girl* does impact § 1915(b)) could gut the ICWA.

B. Section 1915(b) After Baby Girl

Prior to *Baby Girl*, states clearly had to use active efforts to find Indian adoptive homes.²²¹ In addition, it was well established that states had to use active efforts to locate Indian foster homes,²²² as § 1915(b) covers the foster care placements of Indian children and states that Indian children in foster care are to be placed in the same order of preference listed in § 1915(a).²²³ Although the adoption in *Baby Girl* was voluntary, this provision is essential because the majority of Indian adoptions are involuntary and begin as foster care cases.²²⁴ Consequently, the question of *Baby Girl's* impact on § 1915(b) is crucial.

Before the *Baby Girl* decision, the ICWA's placement preferences also clearly applied to foster cases,²²⁵ additionally, *Baby Girl* did not specifically address § 1915(b).²²⁶ Thus, the Court's decision may be limited to § 1915(a). If this turns out to be true, then the continued applicability of the placement preferences in the foster care context would leave the likelihood of an Indian child's eventual adoption by an Indian family relatively unchanged. The majority of Indian child adoptions occur after the child has been involuntarily removed from their parent's care and,

²²⁰ See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2564 (2013) (finding § 1915(a) inapplicable because Adoptive Father did not seek to adopt Baby Girl).

²²¹ See *supra* Part V.A.

²²² See *supra* Part V.A.

²²³ 25 U.S.C. § 1915(b) (2012).

²²⁴ *Amendments to the Indian Child Welfare Act: Hearing Before the S. Comm. on Indian Affairs*, *supra* note 199, at 107–08.

²²⁵ See *supra* Part V.A. “In any *foster care* or preadoptive placement, a preference shall be given” to placements conforming to requirements very similar to those listed in § 1915(a). 25 U.S.C. § 1915(b) (emphasis added).

²²⁶ See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557–58 (2013) (stating that the relevant provisions of the ICWA to this case were §§ 1912(d), (f), and 1915(a)).

thus, most fall under § 1915(b).²²⁷ However, because *Baby Girl* virtually eliminated the applicability of placement preferences for voluntary Indian adoptions, courts may interpret the decision to have done the same for foster care adoptions.

After the *Baby Girl* decision, there is a real possibility that future courts will hold that § 1915(b) must be treated like § 1915(a) and find that the placement preferences of § 1915(b) only apply after a potential Indian caregiver has actually applied to become a foster parent. Under this interpretation of *Baby Girl*, the state would be under no duty to locate and actively encourage potential Indian caregivers.²²⁸ In fact, the Court's decision might actually mean that a state could intentionally discourage potential Indian caregivers from seeking to become foster parents because any requirement of active efforts to comply with the placement preferences would not attach until after the caregiver's formal request to become a foster parent to that child. Then, after the state placed the Indian child with a non-Indian caregiver, the child's adoption by that non-Indian caregiver would also be exempt from the ICWA's placement preferences unless a potential Indian caregiver had filed formal adoption papers.

C. Section 1915(e) and Its Relation to § 1915(a)

Interpreting § 1915(b) similar to § 1915(a) could have devastating consequences for Indian families. However, there is a strong argument against interpreting either of these provisions as limited to those who have made formal custody requests because doing so creates a significant statutory interpretation problem. Section 1915(e) states: "A record of each such placement, under [s]tate law, of an Indian child shall be maintained by the [s]tate in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section."²²⁹ When interpreting this provision, lower courts—like the Utah appellate court in *State ex rel. C.D.*²³⁰—have determined that § 1915(e) must be read in

²²⁷ See *Amendments to the Indian Child Welfare Act: Hearing Before the S. Comm. on Indian Affairs*, *supra* note 199, at 107–08.

²²⁸ Federal foster care law requires that states give notice to relatives when a child has been removed, but there is no requirement of active efforts beyond this. See 42 U.S.C. § 671(a)(29). Additionally, there is no requirement to make "reasonable efforts"—the term used in federal foster care law—to facilitate a kinship placement. See *id.* Moreover, there is no preference for Indian relatives. See *id.*

²²⁹ 25 U.S.C. § 1915(e).

²³⁰ 200 P.3d 194 (Utah Ct. App. 2008).

tandem with the placement preferences of § 1915(a).²³¹ According to the *C.D.* court, “the ICWA expressly requires that a record be created that documents the attempts to place the children in compliance with the ICWA preferences.”²³² Such an explanation makes sense if states must make active efforts to locate potential Indian caregivers. However, if the placement preferences of § 1915(a) or (b) are now limited to persons who have formally filed for custody, the provision becomes nonsensical.

Baby Girl appears to permit ignoring interested, potential Indian custodians in any instance in which they have not formally filed for custody.²³³ However, this means the requirement of § 1915(e), which requires that states document their efforts to comply with the placement preferences, is toothless if states are only required to document their efforts to place children with Indian caregivers who have already formally filed for custody. Such an interpretation of the placement preference requirements would clearly contradict the Court’s statement in *Mississippi Band of Choctaw v. Holyfield* that § 1915(a) is the ICWA’s most important provision.²³⁴

D. The Future of Placement Preferences

Most concerning in the Court’s discussion of § 1915(a) is that the Court seems to have given little thought to the implications of this part of its decision. The majority focuses on § 1912(d) and (f).²³⁵ The discussion of § 1915(a) appears almost as an aside, yet it is the section with potentially the greatest impact. The Court’s decision regarding § 1915(a) appears to disrupt long-established ICWA policy and procedure. Now, tribes must be extra vigilant in identifying potential Indian custodians and encouraging them to formally seek custody because of this ruling. In all likelihood, this means tribes will need to increase the assistance they offer potential Indian custodians—specifically help in complying with procedural requirements, filings, and deadlines—if they hope to ensure the ICWA’s placement preferences remain meaningful.

Moreover, although increased tribal efforts may prove successful in some instances, the realities of many tribes’ finances and organization mean that the declining importance of § 1915(a) is all but assured. ICWA

²³¹ See *id.* at 208.

²³² *Id.* at 212 n.31.

²³³ See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2564 (2013) (“Biological Father is not covered by § 1915(a) because he did not seek to *adopt* Baby Girl . . .”).

²³⁴ 490 U.S. 30, 36 (1989).

²³⁵ See *Baby Girl*, 133 S. Ct. at 2559–62, 2563–65.

cases are replete with instances of tribes and Indian family members needing additional time and assistance to successfully challenge placements.²³⁶ As a result, notice will be key now more than ever. Without adequate notice, there is little hope that tribes will be able to identify potential placements and have potential adoptive parents file adoption petitions within the allotted time frame. However, increased reliance on notice is also concerning given the fact that notice deficiencies are common in ICWA cases.²³⁷

The ICWA requires that tribes receive notice of the potential adoption of an Indian child,²³⁸ yet errors are common—even the *Baby Girl* case included such an error. Although the state sent Cherokee Nation notice that Veronica might be an Indian child, the notice the tribe received had Dusten Brown’s first name misspelled and included his incorrect birthdate.²³⁹ Given this faulty information, the tribe was unable to confirm whether Veronica was an Indian child eligible for enrollment.²⁴⁰ Therefore, if Brown had not independently challenged the termination of his parental rights,²⁴¹ the tribe might never have learned of Veronica’s adoption, and it certainly would not have had the time to identify potential placements before the adoption was finalized. Thus, the *Baby Girl* decision now makes adequate tribal notice more crucial than ever. The only way the ICWA’s preference provisions will continue to protect Indian tribes and their children is through notice and speedy action on the part of the tribe.

²³⁶ See, e.g., *In re Adam L.*, No. F062458, 2012 WL 274741, at *9 (Cal. Ct. App. Jan. 31, 2012) (“The tribe . . . failed to file its transfer request promptly after reunification efforts failed.”); *In re Alvarez*, Nos. 304669, 304670, 2012 WL 2476421, at *2 (Mich. Ct. App. June 28, 2012) (noting that the tribe did not respond to the first notice of termination hearing but did respond to the second).

²³⁷ See, e.g., *In re A.M.*, No. A129891, 2012 WL 661787, at *2 (Cal. Ct. App. Feb. 28, 2012) (“[The Contra Costa County Bureau of Children and Family Services] acknowledged that it had failed to make any inquiry about Mother’s Indian heritage or notify the [t]ribe of the proceedings.”); *In re D.W.*, 193 Cal. App. 4th 413, 417 (Cal. Ct. App. 2011) (noting numerous deficiencies with tribal notice); *Nicole K. v. Superior Court*, 53 Cal. Rptr. 3d 251, 254–55 (Cal. Ct. App. 2007) (remanding to provide a proper ICWA notice after human services agency sent the ICWA notice to the wrong address for the tribe and there was no evidence that the tribe received actual notice of the proceedings).

²³⁸ 25 U.S.C. § 1912(a) (2012).

²³⁹ *Baby Girl*, 133 S. Ct. at 2558.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 2558–59.

VI. CONCLUSION

The *Baby Girl* case cast the ICWA into the national spotlight and led many to question its necessity. However, it is clear the Court's decision was not a referendum on the ICWA. The Court had the opportunity to adopt the EIF doctrine and create significant exceptions to the ICWA's applicability, but it declined to do so.²⁴² Instead, the Court issued a narrow ruling reaffirming the viability of the ICWA.²⁴³ Additionally, although the decision has the potential to significantly limit the applicability of Indian placement preferences, there is the possibility that vigilant efforts on the part of tribes and their advocates will prevent this from occurring.

²⁴² See *supra* Part III.

²⁴³ See *supra* Part III.