No. 17A562

In the Supreme Court of the United States

R.K.B. and K.A.B.
Applicants,

v.

E.T.
Respondent

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

**Directed to the Honorable Sonia Sotomayor,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the
United States Court of Appeals for the Tenth Circuit**

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December 18, 2017

To the Honorable Sonia Sotomayor, as Circuit Justice for the United States Court of Appeals for the Tenth Circuit:

R.K.B. and K.A.B. ("Applicants") respectfully request an 18-day extension of the deadline for filing their petition for a writ of certiorari, from December 29, 2017 to January 16, 2018. Applicants previously sought and received a 30-day extension from November 29, 2017 to December 29, 2017.

Applicants will ask this Court to review a judgment by the Utah Supreme Court, issued on August 31, 2017 (App. A), which ruled that the federal Indian Child Welfare Act creates a federal standard for determining parenthood, rather than incorporating and relying upon existing state standards. No other court in the 39-year history of the Indian Child Welfare Act has held that a federal "reasonableness" standard applies. The Court will have jurisdiction under 28 U.S.C. § 1257(a).

1. As explained in the last application for extension, Applicants' petition will ask this Court to clear up conflicts and confusion among state courts of last resort about the proper determination of parenthood in the context of adoptions of Native American children following this Court's decision in *Adoptive Couple* v. *Baby Girl*, 133 S. Ct. 2552 (2013). To give the Court an opportunity to resolve this confusion, Applicants presently intend to present at least the following issue for review:

> Does the Indian Child Welfare Act define "parent" in 25 U.S.C. 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent?

This Court granted certiorari on this very question in *Adoptive Couple* v. *Baby Girl*, but ultimately decided the case on other grounds. 133 S.Ct. 2552, 2560 (2013).

This question continues to divide state courts, including those of last resort. The New Jersey Supreme Court and Oklahoma Supreme Court have held that the Indian Child Welfare Act does not create parental rights for biological fathers when state law does not otherwise recognize that right.[1] But state courts of last resort in Alaska and South Carolina have held that the Indian Child Welfare Act requires biological fathers be given certain rights *regardless* of state law.[2] Agreeing with these courts—but going a step further than they had gone—the court below determined that courts must apply a previously unknown federal "reasonableness" standard in determining paternity.[3] This division creates confusion among courts, biological parents, and adoptive parents, substantially extending the amount of time before a child's home is finally determined.

2. This issue is obviously of substantial importance to the Applicants: if the decision below stands, they will face a litigation challenge, from

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[1] *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1064 (Okla. 1985) (eroded on other grounds in *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004)).

[2] *Bruce L.* v. *W.E.*, 247 P.3d 966, 979 (Alaska 2011); *Adoptive Couple* v. *Baby Girl*, 731 S.E.2d 550, 559–560 (S.C. 2012), *reversed on other grounds*, 133 S. Ct. 2552 (2013).

[3] In *re Adoption of B.B.*, ___ P.3d. ___; 2017 UT 59.

the claimed biological father, to their right to adopt a child whom they welcomed into their home three years ago, and have loved ever since. This issue is also of substantial importance to other adoptive parents of Native American children: if this Court does not resolve the conflict among the state courts, many such parents will have to attempt to satisfy *both* state-law standards for terminating the rights of biological parents *and* some vague and undefined "federal" standard such as that adopted by the Utah Supreme Court. And the mere lack of clarity on this question will deter potential adoptive parents from adopting Native American children who urgently need stable homes.

The Utah Supreme Court's position is also indefensible on the merits: As noted in the two-Justice dissent, paternity has "never been a creature of federal law[.]" *In re Adoption of B.B.*, ___ P.3d. ___; 2017 UT 59, ¶ 163 (Lee, A.C.J., dissenting). And, as Petitioners will show in their petition, the ICWA did "not create an independent federal adoption regime," *id.* ¶ 160, but rather "recognized [state] jurisdiction over Indian child custody proceedings," *id.* ¶ 159 (quoting 25 U.S.C. § 1901(5)). Nor is the majority's vague "reasonableness" standard likely to produce consistent results. *Id.* ¶ 100 (Lee, A.C.J., dissenting).

3. To adequately present these and perhaps other issues for the Court's consideration, undersigned counsel needs additional time. Counsel has

recently been occupied with a number of other matters, including various matters pending or soon to be pending before this Court, and has been unable to complete the research and analysis necessary to prepare the petition.

Chief among these other matters is that undersigned counsel is preparing to file an amicus brief in *National Institute of Family and Life Advocates* v. *Becerra*, No. 17-609, which will be filed on January 4, 2017. That case presents important issues regarding the proper interpretation of the Free Speech Clause. This amicus brief and other matters (and the holiday season) will occupy counsel's time during late December and early January.

4. Of course, counsel is aware that Respondent opposed the first extension request. While Applicants share Respondent's desire for a speedy resolution, several factors make the effect of this extension on the timing of this case's resolution minimal.

First, as noted above, the forthcoming petition raises a question on which this Court previously granted certiorari. There is thus a fair prospect that this petition will be granted on the same question. If the Court grants the petition, both Applicants and Respondent will need to wait for oral arguments—presumably next term—and the subsequent opinion. When compared to a modest 18-day extension, the timing of these subsequent events will be the dominant factors in determining the precise date of resolution.

Second, Respondent has already retained experienced counsel for the certiorari stage of this case. Respondent's counsel will be able to file a brief in

opposition in accordance with whatever timetable is in his client's best interests.

Last, undersigned counsel has elected not to seek a full 30-day extension to the maximum authorized by 28 U.S.C. § 2101(c), but rather a more modest 18-day extension. One reason for this choice is to respect Respondent's desire to expedite the certiorari process—while still ensuring the petition adequately presents the important question or questions that this court should resolve.

For all these reasons, Applicants respectfully request an extension of time to file their certiorari petition, up to and including January 16, 2018.

Respectfully submitted.

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