

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

T.G., AKA T.J.G — PETITIONER

v.

OREGON DEPARTMENT OF HUMAN SERVICES; COWLITZ INDIAN TRIBE; K.C. —

RESPONDENTS

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE OREGON SUPREME COURT*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED¹

1. This Court recently explained that, “In the usual course, state courts apply state law when placing children in foster or adoptive homes,” however “when the child is an Indian, a federal statute—the Indian Child Welfare Act—governs.” *Haaland v. Brackeen*, 599 U.S. 255, 263-64 (2023). Does the Supremacy Clause of the United States Constitution, preclude a state from enacting a state law to determine the foster care or adoptive placement of an Indian child?
2. Under the Oregon Indian Child Welfare Act, upon the consent of an Indian child’s tribe, the state shall transfer the placement process to the tribal authority for a determination of whether to permanently sever the relationship between the parent and the Indian child and thereby effectively terminate the parent’s parental rights. Once the tribal authority renders its decision, the Oregon court shall verify that decision with a judgment of adoption of the Indian child. When the tribal process lacks due process protection for the parent, and the tribal authority effectively terminates the parent’s parental rights by permanently severing the legal relationship between the parent and the Indian child, does the state violate a parent’s right to due process when the state court signs a judgment of adoption without an evidentiary hearing?

¹ The same legal questions are before this court in *M.G.J v. Oregon Department of Human Services, et al*, Docket Number 25-6586 (Petition for Certiorari pending). The petition in Docket Number 25-6586 is scheduled for the March 20, 2026, conference.

PARTIES TO THE PROCEEDING

The petitioner is Thomas Gutz, the Indian child's father and the appellant and petitioner on review in the courts below. The respondents are the Oregon Department of Human Services, the respondent and respondent on review in the courts below; the Cowlitz Indian Tribe, respondent on review; and the Indian child's mother, K.C., respondent on review.

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Preemption, Commandeering, and the Indian Child Welfare Act,
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Thomas Gutz, respectfully petitions for a writ of certiorari to review the judgment of the Oregon Court of Appeals and the order of the Oregon Supreme Court denying review.

OPINION BELOW

The opinion of the Oregon Court of Appeals (App. B) is published at 577 P.3d 893 (Or. Ct. App. 2025). The order of the Oregon Supreme Court denying review and the opinion concurring in the denial of review (App. A) are published at __ P.3d __ (SC S072305, Or January 29, 2026).

JURISDICTION

The order of the Oregon Supreme Court was entered on January 29, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, of the United States Constitution provides, in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const art. VI, cl. 2.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

No State shall...deprive any person of life, liberty, or property, without due process of law.

U.S. Const amend. XIV § 1.

The Indian Child Welfare Act provides, in part:

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

25 U.S.C. § 1921.

The Indian Child Welfare Act also provides:

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1911(b).

The Oregon Indian Child Welfare Act provides, in part:

At the permanency hearing the court shall...If the child is an Indian child and the case plan at the time of the hearing is something other than to reunify the family, make a finding whether, after the department's consultation with the child's tribe, and, if the tribe appears at the hearing, the court's direct consultation with the tribe, tribal customary adoption, as described in [Or.Rev.Stat §] 419B.656, is an appropriate permanent placement for the child if reunification is unsuccessful.

Or.Rev.Stat. § 419B.476(2)(e).

In turn, the Oregon Indian Child Welfare Act also provides:

As used in this section, "tribal customary adoption" means the adoption of an Indian child, by and through the tribal custom, traditions or law of the child's tribe, and which may be effected without the termination of parental rights.

Or.Rev.Stat. § 419B.656(1).

The Oregon Indian Child Welfare Act further provides:

(a) The juvenile court shall accept an order or judgment for tribal customary adoption that is filed by the Indian child's tribe if:

(A) The court determines that tribal customary adoption is an appropriate permanent placement option for the Indian child;

(B) The court finds that the tribal customary adoption is in the Indian child's best interests, as described in [Or.Rev.Stat §] 419B.612; and

(C) The order or judgment:

(i) Includes a description of the modification of the legal relationship of the Indian child's parents or Indian custodian and the child, including contact, if any, between the child and the parents or Indian custodian, responsibilities of the parents or Indian custodian and the rights of inheritance of the parents and child;

(ii) Includes a description of the Indian child's legal relationship with the tribe; and

(iii) Does not include any child support obligation from the Indian child's parents or Indian custodian.

(b) The court shall afford full faith and credit to a tribal customary adoption order or judgment that is accepted under this subsection.

Or.Rev.Stat. § 419B.656(3).

INTRODUCTION

This case presents an important question of federal preemption under the Supremacy Clause of the United States Constitution. Specifically, whether the Indian Child Welfare Act (ICWA) preempts the states from enacting legislation controlling the adoption of Indian children. If the state law is not preempted, the process provided in the Oregon Indian Child Welfare Act (ORICWA) allowing for tribal customary adoption violates a parent's due process rights because the

tribal customary adoption process essentially terminates their parental rights without requiring an evidentiary hearing at which the proponent of adoption must prove current parental unfitness by at least clear and convincing evidence.

Since the early days of the republic, the Court has held that the Supremacy Clause of Article VI, preempts the state from enacting legislation contrary to federal laws:

The constitution, therefore, declares, that the constitution itself, and the laws passed in pursuance of its provisions, shall be the supreme law of the land, and shall control all state legislation and state constitutions, which may be incompatible therewith; and it confides to this court the ultimate power of deciding all questions arising under the constitution and laws of the United States. The laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the land, anything in the laws of any state to the contrary notwithstanding.

M'Culloch v. Maryland, 17 U.S. 316, 326–27 (1819). The question of federal preemption of State law is guided by two principles. First, “the purpose of Congress is the ultimate touchstone in every pre-emption case.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted); see *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). Second, “[i]n all pre-emption cases, and particularly in those in which Congress has ‘legislated ... in a field which the States have traditionally occupied,’ this court ‘start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Lohr*, 518 U.S., at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

As a starting point, the federal government has plenary power over tribal affairs. *United States v. Lara*, 541 U.S. 193, 200 (2004). Although the regulation of child adoption and family law in general is the domain of state police powers, those powers do not reach into tribal affairs. *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 390 (1976) (per curiam). Thus, on a structural level, the state police powers have never extended to child adoption involving an Indian child.

However, because some debate existed as to whether state police powers gave the states the authority to regulate an adoption of an Indian child living within state boundaries but outside a reservation, Congress enacted ICWA. In doing so, Congress “occupied the field” of Indian child adoption relating to Indian children living off the reservation. *Haaland v. Brackeen*, 599 U.S. 255, 287 (2023).

Although Congress included a provision in ICWA allowing state law to control when the state law provides greater protections than ICWA, that was intended to allow general state family law provisions to apply when the general state law pertaining to adoption and termination of parental rights “provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under [ICWA].” 25 U.S.C. § 1921. That provision, however, does not apply to recently enacted state laws specifically regulating Indian child adoption because, at the time of the enactment of ICWA, no such laws existed. Because no state had state laws specifically regulating the adoption of Indian children at the time Congress enacted ICWA, Congress could not have intended any such state laws to control over ICWA. As a result, Oregon

is precluded from relying on its own recently enacted Indian child welfare laws (ORICWA) regulating Indian child adoption.

If ORICWA is not preempted by ICWA, the procedures to effectively terminate parental rights without an evidentiary hearing at which the rules of evidence apply and which requires proof by at least clear and convincing evidence of present parental unfitness violate a parent's right to due process before the state court effectively terminates their parental rights.

ORICWA authorizes a new type of permanency plan for an Indian child: tribal customary adoption. Or.Rev.Stat. § 419B.476(5)(g); Or.Rev.Stat. § 419B.656. A tribal customary adoption does not require the consent of the Indian child's parents or the Indian child, and a tribal customary adoption "may be effected without the termination of parental rights." Or.Rev.Stat. § 419B.656(4)(e); Or.Rev.Stat. § 419B.656(1). In a tribal customary adoption, "[a]ny parental rights or obligations not specifically retained by the Indian child's parents in the juvenile court's adoption judgment are conclusively presumed to transfer to the tribal customary adoptive parents." Or.Rev.Stat. § 419B.656(5).

Under ICWA, prior to terminating the parental rights of an Indian parent, the state or tribe must provide adequate due process protections including, at a minimum, notice and a hearing and proof of parental unfitness beyond a reasonable doubt. 25 U.S.C. § 1912(f).² ORICWA authorizes an Oregon court to

² 25 U.S.C. § 1912(f) provides:

No termination of parental rights may be ordered in such proceeding 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.

issue an adoption judgment of an Indian child without an evidentiary hearing and without proof of current parental unfitness by any quantum of proof. Thus, not only does ORICWA deprive the parent of their due process rights in the termination process, but it also provides a lesser standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under ICWA. As a result, even if ICWA provides authority for state-promulgated Indian child welfare laws to apply to Indian child adoption proceedings, that authority is contingent upon the state laws providing greater protections than ICWA. Because ORICWA does not provide greater protections to the Indian child's parent in a tribal customary adoption proceeding than in permanent guardianship or termination of parental rights proceedings conducted under ICWA, ORICWA's tribal customary adoption provision is preempted by ICWA.

Finally, an overarching goal of ICWA is for equal treatment of Indian children and their parents in child custody proceedings, including termination and adoption proceedings, throughout the country. By allowing different states to enact and rely on their own laws to control Indian child adoption proceedings, the goal of equal treatment is severely undermined and, as a result, the parent of an Indian child adopted in Oregon may be treated differently than the parent of an Indian child adopted in Montana. Aside from potential equal protection violations, the fact that the Indian child may reside in one state and the tribe may be located within the boundaries of another state adds a question as to which state's law applies.

STATEMENT OF THE CASE

1. Petitioner is the father of the child at issue, who is referred to as “T” in the decision below. 577 P.3d at 896 (App. B). T is affiliated with the Cowlitz Indian Tribe through his maternal lineage. *Id.* As explained in further detail below, the Oregon juvenile court established dependency jurisdiction over T. *Id.* One year later, the Oregon juvenile court granted the Cowlitz Indian Tribe’s request to intervene in the dependency case as a party. *Id.* Over the course of the dependency case, the Oregon juvenile court changed T’s permanency plan from reunification to guardianship, and then from guardianship to tribal customary adoption. *Id.* The Department of Human Services, the tribe, T’s mother, and T’s counsel supported the change in permanency plan to tribal customary adoption. *Id.*

2. Thereafter, the Cowlitz Indian Child Welfare Committee scheduled a meeting to consider a tribal customary adoption of T and notified the parties that documents pertaining to the meeting may be sent to the committee for consideration. *Id.* at 896. Father submitted documents for the committee’s consideration. *Id.* Following its internal process, the committee considered the submitted documents and voted unanimously to order that T’s foster care providers “shall have the physical, legal, and financial responsibility” for T. *Id.*; App. C at 11-14. In so doing, the committee determined that returning T to his parents “would likely result in serious detriment” and that a tribal customary adoption was in T’s best interest. 577 P3d at 896. The tribe then issued an order that transferred the physical, legal, and financial responsibility for T to

the tribal customary adoption parents and recognized “the vital importance of the connection between tribal children and tribal family.” *Id.*; App C. at 11-14.

The tribe’s order further outlined other rights,

which included that [tribal customary adoption] parents have the discretion to allow visitation with T’s birth parents consistent with T’s best interest, that [tribal customary adoption] parents and birth parents are to annually confirm or update the means to communicate with each other, that [tribal customary adoption] parents are to provide annual updates to birth parents about T, and that T retains all rights of inheritance of birth parents.

577 P3d at 896; App C. at 11-14. The tribe filed its order of tribal customary adoption with the Oregon juvenile court. 577 P3d at 896.

3. Prior to the Oregon juvenile court convening a hearing on the tribe’s tribal customary adoption order, father filed an objection to the Oregon juvenile court’s “acceptance” of the tribal customary adoption, arguing that the Oregon juvenile court was required to hold a contested evidentiary hearing such as would be required to establish a permanent guardianship under Or.Rev.Stat. § 419B.365, ICWA, and the Due Process Clause of the United States Constitution. *Id.* at 896-97.

4. At the hearing before the Oregon juvenile court, father again requested a contested hearing. *Id.* The Oregon juvenile court ruled that under ORICWA, “the court shall accept the tribal customary adoption order,” and that it therefore would move forward with “finalizing” the tribal customary adoption. *Id.* The Oregon juvenile court then entered an order accepting the tribe’s order of tribal customary adoption. App. C at 1-4. The Oregon juvenile court followed

by entering an Oregon judgment of tribal customary adoption, and terminating its wardship of T. App. C at 6-14.

5. T's father, petitioner here, appealed from the Oregon juvenile court's adoption judgment. In his appeal, he argued, in part, that if the Oregon Court of Appeals interpreted ORICWA to allow for the effective termination of parental rights without an evidentiary hearing, ORICWA would be preempted by ICWA. App. E at 32-3. That is so, father argued, because 25 U.S.C. § 1912(f) mandates that parental rights shall not be terminated "in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified 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." App. E. at 37.

6. The Oregon Court of Appeals, in its opinion, noted that "father argues that the [Oregon] juvenile court erred in accepting the order of tribal customary adoption and entering the judgment because it was in violation of ORICWA, ICWA, and due process." 577 P.3d 893, 897 (App B.). However, that court further noted that, "Because we conclude ICWA does not apply in the manner argued by father, we do not reach any issues of preemption." *Id.* at 897 n. 2. In addition, the court rejected the Department of Human Services' claim that father failed to preserve his arguments that ICWA and due process required an evidentiary hearing. *Id.*

Later in its opinion, the court observed,

Having concluded that the juvenile court did not violate ORICWA, we turn to father's arguments that are grounded in federal law. We understand father to be essentially making two separate, but related, arguments: that we must read ORICWA to

require the same protections as a termination of parental rights proceeding under ORICWA or ICWA because failing to do so would result in a violation of father's due process rights; and, alternatively, that the juvenile court's acceptance of the tribal customary adoption violated ICWA because it effectively terminated father's parental rights in the absence of the required proof and, thus, ICWA preempts conflicting state law.

Id. at 901. The court rejected both arguments “for the primary reason that they do not address the full faith and credit a state court is required to give to the tribe’s sovereign role in determining the parameters of T’s tribal customary adoption.” *Id.* The court reasoned that, “By its plain terms, ICWA does not apply to proceedings in tribal court, which includes the tribal committee in this case.” *Id.* The court continued by explaining that,

Here, it was the tribe, through its own tribal process, that “suspended/modified” father’s parental rights to T in the tribal customary adoption order. Simply stated, ICWA does not apply to the change in father’s parental rights of T accomplished through the tribe’s tribal customary adoption.

*Id.*³

7. Father petitioned for discretionary review with the Oregon Supreme Court. App. D. One question presented in that petition was whether ICWA preempts the provision of ORICWA that authorizes an Oregon court to divest the parent of an Indian child of all or most of their parental rights without proof establishing that continued custody by the Indian child’s parent is likely to result in serious emotional or physical damage to the child as required by 25 U.S.C. § 1912(f). App. D at 8. A second question presented in father’s petition

³ As father was not a member of the Cowlitz Indian Tribe or any tribe, it is not clear that the tribal committee would have the authority to terminate his parental rights without ORICWA.

asked whether, “as a matter of due process and equal protection, the parents of Indian children are entitled to the same substantive and procedural protections as the parents of non-Indian children before a court may sever their parental rights without their consent.” App. D at 9.

8. The Oregon Supreme Court denied review. __ P.3d __ (SC S072305, January 29, 2026) (App. A). However, Justice DeHoog wrote a concurrence to the denial. __ P.3d at __ (slip op at 1-2) (App. A at 4-5). Citing to the Oregon Supreme Court’s recent decision in *Dept. of Human Services v. M.G.J.*, 577 P.3d 893 (2025), Justice DeHoog concurred with the Oregon Court of Appeals that ORICWA “does not authorize a juvenile court to relitigate a tribe’s internal determination of the parameters of such an adoption.”⁴ Justice DeHoog explained,

I write solely to highlight one issue that the Court of Appeals declined to consider due to father’s belated and summary raising of the issue: whether, and to what extent, the juvenile court must consider whether a tribe’s internal customary adoption process complied with a parent’s federal due process rights *before* the court accepts and affords full faith and credit to the tribe’s decision.

Id. at __ (slip op at 1-2). Justice DeHoog concluded that,

Thus, the nature of the juvenile court’s inquiry into the process afforded a parent by a tribe, and particularly whether the court must satisfy itself that the tribe’s process complied with the parent’s federal due process rights before accepting a tribal customary adoption is an open question that, in my view, this court may wish to consider in another case.

Id. at __ (slip op at 2).

⁴ The Oregon Supreme Court’s decision in that case is the subject of the pending petition for certiorari in docket number 25-6586.

REASONS FOR GRANTING THE PETITION

As explained further below, this case, along with the pending petition for certiorari in *M.G.J.*, presents an important question of federal law that has not been settled by this court. The Oregon Court of Appeals decided in this case that the provisions of ICWA do not apply to tribal customary adoption procedures and that father therefore was not entitled to the protections of ICWA in the Oregon juvenile court when that court “accepted” the tribe’s order and entered an Oregon adoption judgment in the Oregon court’s case register. 577 P.3d at 901. Additionally, in *M.G.J.* the Oregon Supreme Court decided an important federal question, namely whether ICWA either completely preempts state laws regulating the adoption of Indian children or partially preempts state law when the state laws regulating the adoption of Indian children conflict with ICWA.

I. After *Brackeen*, the question remains whether ICWA displaces state laws regulating the adoption of Indian Children.

One category of federal preemption occurs when Congress intended to displace state law altogether and its intent can be inferred from a framework of regulation so pervasive that Congress left no room for the States to supplement it. *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

In *Brackeen*, the Court observed that “[w]hen a state court adjudicates [an adoption proceeding involving an Indian child], ICWA governs from start to finish.” 599 U.S. at 266. Indeed, in a concurrence, Justice Gorsuch stated that “responsibility for managing interactions with the Tribes rests exclusively with

the federal government.” *Id.* at 313 (Gorsuch, J., concurring). Ultimately, the Court held that ICWA falls under Congress’ plenary power over Indian affairs and, as a result, validly displaces state-law adoption proceedings involving an Indian child. *Id.* at 280.

This case presents the converse issue: if, as the *Brackeen* Court held, ICWA validly displaces state authority over adoptions involving Indian children, does ICWA preempt the states from applying state laws that apply only to Indian children to adoption proceedings involving Indian children.

Currently 18 states have comprehensive laws regulating Indian child adoptions.⁵ Under *Brackeen*, ICWA governs Indian child adoption proceedings from start to finish. Thus, a situation exists wherein ICWA controls Indian child adoption proceedings yet 18 states have created laws to govern Indian child adoptions within their borders. Each law provides its own standards and procedures that the state courts must follow in Indian child adoption proceedings. Thus, an Indian child in one state will be treated differently than an Indian child in another state. For example, in Oregon, an Indian child and their parents are subject to ORICWA, which provides for tribal customary adoption, but a child and their parents in a different state are not subject to such a procedure. As a result, Indian children and their parents are not treated equally throughout the country which raises issues of equal protection under the United States Constitution.

⁵ According to the National Indian Child Welfare Association (NICWA), the following states have laws regulating Indian child adoptions: California, Colorado, Connecticut, Iowa, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Washington, Wisconsin, and Wyoming. See <https://www.nicwa.org/state-icwa/> (last visited March 2, 2026).

Although 25 U.S.C. § 1921 appears to allow for the application of state laws so long as those laws provide “a higher standard of protection to the rights of the parent or Indian custodian of an Indian child,” it does not authorize such comprehensive state laws to control Indian child adoptions for two reasons. First, the text of that statute clearly states that it applies to “State or Federal law applicable to a child custody proceeding.” In other words, 25 U.S.C. § 1921 applies to state laws generally applicable to all child custody proceedings, not to laws specific to adoption proceedings involving Indian children. Second, and related to the first point, the state Indian child welfare laws have been enacted *after* Congress enacted 25 U.S.C. § 1921.⁶ Therefore, Congress could not have intended 25 U.S.C. § 1921 to apply to state-enacted Indian child adoption laws that had not been enacted.

One important aspect of ICWA is that the same standards apply to all adoption proceedings of Indian children throughout the United States regardless of where the child resides. This uniformity is critical because the Indian child may reside in one state yet the child’s tribe may be located within the boundaries of a different state. More importantly, some tribes such as the Navajo Nation are located within the boundaries of more than one state. Uniformity is also important to ensure that all Indian children in adoption proceedings receive the same protections and, as here, the parents receive the

⁶ Of the 18 states with comprehensive laws governing Indian child adoptions, eight were enacted in 2023, the year the Court decided *Brackeen*. Of the remaining 10 states, two were enacted after the Fifth Circuit issued its opinion in *Brackeen v. Bernhardt*, 937 F.3d 406 (2019). Thus, it appears that 12 of the 18 states with comprehensive laws governing Indian child adoption proceedings enacted those laws as a contingency if the Court found ICWA to be unconstitutional. None of those state laws were in place when ICWA was enacted.

same rights as other parents of Indian children. As noted above, disparate treatment of Indian children and their parents in adoption proceedings invokes equal protection issues.

This issue is also important because in *Brackeen*, the Court affirmed that ICWA was constitutionally enacted under Congress' plenary power over Indian tribes. Indeed, the primary reason that Congress enacted ICWA in 1978 was to *prevent* state adoption laws from controlling the adoption of Indian children, in direct response to a history of state courts separating Indian children from their tribe and their culture. *See Preemption, Commandeering, and the Indian Child Welfare Act*, 2022 Wis. L. Rev 1199, 1206 (2022) (summarizing the legislative intent behind ICWA).

Although the Oregon Supreme Court in *Department of Human Services v. M.G.J.* did not expressly reject the petitioner's argument that ICWA displaces state laws regulating adoptions involving Indian children, by affirming the tribal customary adoption proceeding, a proceeding found in ORICWA but not ICWA, the court implicitly rejected that argument. Similarly, in this case the Oregon Court of Appeals rejected father's preemption arguments. 577 P.3d 893, 901. Without a definitive decision on whether states may apply their own Indian child welfare laws to Indian child adoptions within their borders, the nationwide landscape will return to the pre-ICWA days with different states applying different procedures so long as those procedures do not expressly conflict with a procedure under ICWA. That will undermine the goal of nationwide uniformity in the process and lead to an unpredictable landscape in many states.

II. The tribal customary adoption procedure in ORICWA stands in direct contradiction to ICWA.

A second category of preemption occurs when a state law stands in direct contradiction to a federal law. *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 493 (2013).

As noted above, the plain text of ICWA permits a state to apply procedures under its general adoption laws to adoption proceedings involving Indian children when those laws provide greater protections to the rights of the Indian child's parents. 25 U.S.C. § 1921. However, if that exception also includes state-enacted laws specifically for Indian child adoptions, the second category of preemption applies.

This case presents an opportunity for the Court to address this second area of preemption in the context of ICWA. That law precludes, among other things, the severance of parental rights absent "a determination, supported by evidence beyond a reasonable doubt, including testimony of a qualified expert witness, 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." 25 U.S.C. § 1912(f).

However, ORICWA permits the severance of parental rights without any proof of those or any other elements. Ultimately, if the adoption and termination process occurs through tribal customary adoption, the only role for a state juvenile court is to enter an Oregon court adoption judgment in the Oregon court's case register. As occurred here, the hearing at which the court must do so is merely a formality.

Thus, this case presents the important question of “partial” preemption, that is, preemption of a provision of a state law that conflicts with a provision of a federal law. In other words, 25 U.S.C. § 1912(f) and Or.Rev.Stat. § 419B.656 directly contradict each other in that the federal provision requires specific protections for the rights of the parents before the termination of parental rights but the state provision, as interpreted by the Oregon Supreme Court in *Dept of Human Services v. M.G.J.*, 577 P.3d at 732, does not.

The Court’s role is not to correct the interpretation of an Oregon statute by the Oregon appellate courts. However, the Oregon Court of Appeals’ interpretation of Or.Rev.Stat. § 419B.656 in this case, just as the Oregon Supreme Court’s subsequent decision in *M.G.J.*, directly conflicts with 25 U.S.C. § 1912(f). Therefore, the Oregon provision, as interpreted by the Oregon Court of Appeals and Supreme Court, is preempted by conflicting federal law.

III. Tribal customary adoption proceedings under ORICWA deprive the parents of an Indian child of due process prior to terminating their parental rights.

The tribal customary adoption agreement in this case qualifies as a termination of parental rights under ICWA. See 25 U.S.C. § 1903(1)(ii) (defining “termination of parental rights” as “any action resulting in the termination of the parent-child relationship”). The Oregon juvenile court effected a termination of father’s parental rights when it accepted the tribal Indian Child Welfare Committee’s order of tribal customary adoption and entered an Oregon judgment of adoption in the Oregon court’s case register without affording father any of ICWA’s protections; most notably, without proof beyond a reasonable doubt of grounds for termination and without qualified expert testimony “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.” 25 U.S.C. § 1912(f).

A parent faced with the termination of their parental rights has a right to due process in the termination hearing. *Lassiter v. Dept. of Soc. Servs. of Durham Cnty., N. C.*, 452 U.S. 18, 33–34 (1981). Although father had appointed counsel to represent him, the Oregon juvenile court denied his request for a contested evidentiary hearing at which he could present testimony and evidence. Indeed, “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.” *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

However, under ORICWA, once a tribe's tribal customary adoption order is presented to the Oregon juvenile court, the Oregon court *must* sign an Oregon adoption judgment without providing the parent with a meaningful opportunity to be heard. Thus, the tribal customary adoption provisions of ORICWA fail to provide the required process for a termination of parental rights proceeding and are, therefore, unconstitutional.

As a final matter, this case is subject to post-judgment invalidation under 25 U.S.C. section 1914 ("Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.").

For these reasons, this case, along with *M.G.J. v. Oregon Department of Human Services, et al* (25-6586), is a good case to answer important questions of preemption, both when the state law stands in direct contradiction to the federal law and when Congress intended to displace state law altogether.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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