No. 21-1471

In The
Supreme Court of the United States

DENISE HALVORSON, et vir,

Petitioners,

v.

HENNEPIN COUNTY CHILDREN'S SERVICES DEPARTMENT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Minnesota

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

TIMOTHY SANDEFUR
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

Counsel for Amici Curiae Goldwater Institute

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to this Court's Rule 37.3(b), the Goldwater Institute (GI) respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioners. Consent for the filing of this brief has been granted by counsel for Petitioner, counsel for the Guardian ad Litem Respondent, and counsel for Respondent Hennepin County Human Services Department. Counsel for Parent F.J.V., Foster Parent W.M., and Red Lake Band of Chippewa have failed to respond to consent requests, necessitating the filing of this motion.

The Goldwater Institute (GI) is a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when it or its clients' objectives are directly implicated.

GI's Equal Protection for Indian Children project is devoted to protecting Native American children against the unjust and unconstitutional provisions of the Indian Child Welfare Act (ICWA) and its state-law versions. Through that project, GI has litigated or participated as amicus in ICWA cases nationwide, including in Arizona (*S.S. v. Stephanie H.*, 388 P.3d 569 (Ariz. App. 2017); *Gila River Indian Cmty. v. Dep't of Child Safety*, 395 P.3d 286 (Ariz. 2017)); California

(*Renteria v. Shingle Springs Band of Miwok Indians*, No. 2:16-CV-1685-MCE-AC, 2016 WL 4597612 (E.D. Cal. Sept. 2, 2016)); Ohio (*In re C.J. Jr.*, 108 N.E.3d 677 (Ohio App. 2018)); Washington (*In re T.A.W.*, 383 P.3d 492 (Wash. 2016)), as well as before this Court (*Brackeen v. Haaland* (Nos. 21-376, 21-377, 21-378, & 21-380 (pending); *Renteria v. Superior Court*, 138 S. Ct. 986 (2018)). GI scholars have also published ground-breaking research on the well-intentioned but profoundly flawed workings of ICWA. *See*, *e.g.*, Mark Flatten, Death on a Reservation (Goldwater Institute, 2015)[1]; Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 Child. Legal Rts. J. 1 (2017); Timothy Sandefur, *The Unconstitutionality of the Indian Child Welfare Act*, 26 Tex. Rev. L. & Pol. 55 (2021); Timothy Sandefur, *The Federalism Problems with the Indian Child Welfare Act*, 26 Tex. Rev. L. & Pol. ___ (forthcoming, 2022).[2]

GI considers this case to be of special significance in that it concerns vital jurisdictional problems caused by ICWA: specifically, that it purports to give tribal governments jurisdiction to adjudicate child welfare cases based solely on a child's biological ancestry—even where the child is not a tribal member—and ICWA thereby forces people into tribal court even if, as in this case, they are not members of the tribe and have no "minimum contacts" with the tribal forum. Because tribal courts are not required to obey the Bill of Rights,

---

[1] http://www.flipsnack.com/9EB886CF8D6/final-epic-pamplet.html.

[2] https://ssrn.com/abstract=3853970.

this can deprive the people involved of their constitutional rights.

But, for a variety of reasons described in the brief, such cases usually evade this Court's review—making it vital that this petition be granted, in order to give state courts the guidance they need on both the subject matter and personal jurisdiction questions involved here.

This amicus brief will argue that the race-based jurisdiction ICWA purports to give tribal courts (over cases involving children who are "eligible" for tribal membership based solely on biological ancestry, *see* 25 U.S.C. § 1903(4)), violates due process and worsens the plight of at-risk Native American children. As the nation's leading organization devoted to defending Native American children, and the adults who love them, from the unjust and unconstitutional burdens of ICWA, amicus GI believes its policy expertise and litigation experience can assist this Court in its consideration of the petition, and respectfully requests that this motion be granted.

Respectfully submitted,

TIMOTHY SANDEFUR*
SCHARF-NORTON CENTER FOR
CONSTITUTIONAL LITIGATION
AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

**Counsel of Record*

QUESTION PRESENTED

The Due Process Clause forbids courts from exercising jurisdiction over cases without having both subject matter jurisdiction and (at least) "minimum contacts" between the parties and the forum. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). These requirements govern tribal as well as state courts. *See*, *e.g.*, *Red Fox v. Hettich*, 494 N.W.2d 638, 645 (S.D. 1993). The Indian Child Welfare Act (25 U.S.C. § 1911(b)), however, purports to give tribal courts nationwide jurisdiction over child welfare cases involving children who are biologically eligible for membership in an Indian tribe—whether they're members or not—and to do so even where that child and the adults involved are not tribal members and have no significant contacts with the tribal forum. Is that constitutional?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICUS CURIAE[1]

The interest of amicus curiae is set forth in the accompanying motion to file.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

The Indian Child Welfare Act (ICWA) purports to grant tribal courts authority to resolve not only child welfare cases that occur on reservations, but also child welfare cases involving children and adults who have never been domiciled on reservations—or even visited them—and children who are *not tribal members*, but who are merely *eligible* for tribal membership, based exclusively on their biological ancestry. 25 U.S.C. § 1903(4). This leads tribal courts to adjudicate child welfare matters involving children who have no political, social, or cultural relationship to the tribe. *See*, *e.g.*, *In re C.J. Jr.*, 108 N.E.3d 677 (Ohio App. 2018); *Renteria v. Shingle Springs Band of Miwok Indians*, No. 2:16-cv-1685-MCE-AC, 2016 WL 4597612 (E.D. Cal. Sept. 2, 2016). Some tribes have even exercised jurisdiction over cases involving children who are *not* eligible for membership in that tribe. *See J.P. v. State*, 506 P.3d 3

[1] Pursuant to Rule 37, amicus affirms that no counsel for any party authored the brief in whole or part, that no person other than amicus, its members, or its counsel, contributed money to fund the brief's preparation or submission, and that all parties received required notice at least 10 days prior to filing.

(Alaska 2022); *In re M.H.C.*, 381 P.3d 710, 715–17 (Okla. 2016).

This defies the principles of both subject matter jurisdiction and personal jurisdiction. It should go without saying that the Constitution is not compatible with courts (tribal or otherwise) exercising jurisdiction over cases based solely on the blood in a person's veins—let alone, as in this case, the blood in someone *else's* veins. Yet that is exactly what ICWA purports to authorize—at least, according to some courts.

Here, the state court granted the tribe's motion to transfer the case into Red Lake tribal court based on the fact that the child is eligible for tribal membership—as a function of biological criteria, in accordance with ICWA's definition of "Indian child," 25 U.S.C. § 1903(4)—and regardless of the fact that the child was never domiciled on reservation. As a consequence, the parties to the case—*none of whom are members of Red Lake*—are forced to adjudicate the case in Red Lake tribal court.

That is plainly unconstitutional, because (a) tribes have no subject matter jurisdiction over non-members in such circumstances, and (b) biology alone cannot satisfy the "minimum contacts" requirement for personal jurisdiction—a requirement that is an element of due process, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980), and therefore binds tribal courts as much as state or federal courts. *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 809 (9th Cir. 2011). But, unfortunately, it is not

uncommon. Tribal courts routinely assert the most expansive jurisdictional authority—or purport to—based on the broadest possible interpretations of ICWA. Meanwhile, state and federal courts rarely address these matters. This is partly due to exhaustion doctrines and the neutering of the Indian Civil Rights Act (ICRA) in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), both of which often block parties from obtaining state or federal appellate rulings on such questions. It is also partly due to the inability of state courts to regain jurisdiction once wrongfully relinquished.

All of this leaves state trial-level courts with little guidance on jurisdictional questions under ICWA. The consequence is to send an unknown number of cases to tribal courts that don't belong there, and to effectively strip the parties in such cases of their constitutional rights. In the long run, this works to the detriment of Native American children deemed "Indian" under ICWA. *See generally* Timothy Sandefur, *Recent Developments in Indian Child Welfare Act Litigation: Moving Toward Equal Protection?*, 23 Tex. Rev. L. & Pol. 425, 456–64 (2019). This Court's guidance on these matters is long overdue. The petition should therefore be granted.

ARGUMENT

I. Nationwide, biology-based jurisdiction such as ICWA purports to give, is unconstitutional.

A. How ICWA's jurisdictional provisions work.

ICWA governs child custody proceedings involving "Indian children." It defines this term as children who are either members of a tribe, or, as in this case, who are merely *eligible* for membership and have a biological parent who is a member. 25 U.S.C. § 1903(4). ICWA defines "child custody proceedings" as lawsuits involving foster care, termination of parental rights (TPR), and adoption. *Id.* § 1903(1).

ICWA itself does not specify whether a tribe's authority to adjudicate child welfare cases involving "eligible" children emanates from inherent tribal sovereignty, or whether it is a power Congress delegated to the tribes. Nor has this Court addressed that question. Some state courts have said it is inherent, on the theory that tribes as institutions are perpetuated by future generations, which means cases involving children who are not tribal members, but might *become* tribal members, are important enough to the institutional survival of tribes that tribal courts should decide them. *See*, *e.g.*, *Simmonds v. Parks*, 329 P.3d 995, 1008–09 (Alaska 2014). Other states have concluded that ICWA involves not inherent authority, but power "conferred by Congress," but have still said tribes may exercise this jurisdiction over non-members. *Thompson v.*

Fairfax Cnty. Dep't of Fam. Servs., 747 S.E.2d 838, 849 (Va. App. 2013). Still others have held that the jurisdiction in question is *not* inherent, and that ICWA does *not* permit transfer of cases to tribal court where the parties are not members, because statutes depriving state courts of their jurisdiction should be narrowly construed. *In re R.S.*, 805 N.W.2d 44, 51 (Minn. 2011).

ICWA provides that child custody proceedings involving children residing on reservation should be decided by tribal courts, in accordance with tribal law. This is an unremarkable instance of jurisdiction; tribal members are governed by tribal law, and those residing on tribal lands should have their cases resolved by tribal courts.[2] But ICWA also governs cases involving children who live *off* reservation, who *may not be members*—and may never *become* members—of a tribe. That is because ICWA defines "Indian child" as a child who is *eligible* for membership and has a biological parent who is a member—regardless of the child's cultural connection to a tribe, or lack thereof. 25 U.S.C. § 1903(4). Because all tribes base their membership criteria on biological ancestry instead of cultural or political factors, the consequence is that children whose only connection to a tribe is that a distant ancestor was a tribal member are deemed "Indian children," and

---

[2] It is beyond dispute—and not disputed here—that tribes have legitimate authority "*within [their] own boundaries and membership*, to provide for the care and upbringing" of children, which is "a sine qua non to the preservation of [a tribe's] identity." *Wis. Potowatomies v. Houston*, 393 F. Supp. 719, 730 (W.D. Mich. 1973) (emphasis added).

thus are subjected to ICWA's separate set of rules for child custody cases, based solely on their racial/national origin.[3]

Cases involving children not domiciled on reservation would ordinarily be decided by state courts, which have jurisdiction to decide questions on such a quintessential state law matter as child welfare. But Section 1911(b) of ICWA provides that cases involving "Indian children" living off reservation, must—"in the absence of good cause to the contrary"—be transferred out of state court, into tribal court. "Good cause" is not defined in the law, but the Bureau of Indian Affairs (BIA) has issued regulations declaring that state courts may *not* deny transfer based on the child's lack of cultural connections to the tribe or the reservation, 25 C.F.R. § 23.118(c)(4), and most states have reached the same conclusion on their own. *See* Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 Child. Legal Rts. J. 1, 65–70 (2017).

All of this means that children with no cultural, social, political, religious, or linguistic relationship with a tribe, but whose sole connection the tribe is biological, can be deemed "Indian," and their cases transferred to tribal courts with which they have no

[3] One should always bear in mind the difference between tribal membership, which is a function of tribal law and therefore not subject to constitutional limits—and "Indian child" status under ICWA, which is a function of state and federal law, and therefore must be *within* constitutional limits. *In re Abbigail A.*, 375 P.3d 879, 885–86 (Cal. 2016).

minimum contacts—even in states they have never visited.

That is a serious concern because tribal courts are not governed by the bill of rights. *United States v. Bryant*, 579 U.S. 140, 149 (2016). That consideration has led this Court to presume against tribal jurisdiction over non-members. *Montana v. United States*, 450 U.S. 544, 565–66 (1981). As Justices Souter, Kennedy, and Thomas noted two decades ago, this presumption "serves sound policy," *Nevada v. Hicks*, 533 U.S. 353, 382 (2001) (Souter, J., concurring), because tribal courts are not governed either by the text of the Constitution or legal precedents interpreting it. Tribal courts are frequently governed by traditional customs, sometimes unwritten, "which would be unusually difficult for an outsider to sort out," *id.* at 384–85, and their decisions are sometimes based on Native religious views which the parties may find objectionable. *See In re B.G.J.*, 111 P.3d 651, 654–59 (Kan. App. 2005). This problem is not resolved by ICRA, because *Santa Clara Pueblo* deprives people of the civil-rights protections promised in that Act and largely eliminates its effectiveness.

In cases involving jurisdiction transfer, principles of comity typically include some consideration of whether the foreign tribunal provides due process protections. *See*, *e.g.*, *de Csepel v. Republic of Hungary*, 714 F.3d 591, 607 (D.C. Cir. 2013). But the BIA's regulations expressly prohibit weighing this factor in ICWA cases. Under those regulations, state courts "must not consider . . . negative perception of Tribal . . . judicial

systems" when deciding whether there is good cause to deny transfer of a case to tribal court. 25 C.F.R. § 23.118(c)(5).

This combination of factors means that non-member parents, or would-be adoptive or foster parents, of a child who is not a tribal member, but who satisfies the biological criteria for future membership, may have their child custody proceeding sent from a state court to a tribal court anywhere in the country, where the case may be decided under a body of law unfamiliar and inaccessible to them, and through procedures that do not accord them the basic minimum of due process. That cannot and should not be the law.

B. ICWA unconstitutionally allows tribal courts to adjudicate cases based solely on a child's biological ancestry—leading to conflicts between the lower courts.

With respect to subject matter jurisdiction, tribes have authority to adjudicate disputes between members, but rarely have jurisdiction over non-members. *Montana*, 450 U.S. at 564–65. There are two well-known exceptions where jurisdiction over non-members is permitted: cases where non-members enter into "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," *id.*, and cases where the non-member's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. And in an

important reminder, this Court has emphasized that "[t]hese exceptions are 'limited' ones and cannot be construed in a manner that would 'swallow the rule,' or 'severely shrink' it." *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (citations omitted).

Neither exception covers custody disputes involving adults who are not tribal members and are not domiciled on reservation. These are not the kinds of "consensual relationships" that give rise to tribal court jurisdiction. In *Strate v. A-1 Contractors*, 520 U.S. 438, 456–57 (1997), this Court made clear that the phrase "consensual relationships" in *Montana* meant *commercial* relationships. This Court has never held that it authorizes tribal court jurisdiction over people based solely on the fact they have a familial or intimate relationship with a tribal member. Nevertheless, in *State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d 255 (Alaska 2016), the Alaska Supreme Court held that this *Montana* exception applies to any "relationship that leads to the birth of a child," *id.* at 272, and in *Kelly v. Kelly*, No. DV 08-013, 2008 WL 7904116, at *7 (Standing Rock Sioux Tribal Ct., June 23, 2008), the tribal court held that "marrying an enrolled member of this Tribe and fathering an enrolled dependent" qualified.

Interpreting the "consensual relationship" exception so broadly as to give tribal courts jurisdiction over cases involving children who might someday become tribal members would "'swallow the [*Montana*] rule.'" *Plains Com. Bank*, 554 U.S. at 330. No doubt it may be

proper for tribal courts to exercise jurisdiction over non-members in cases where their overall activities evince an intent to be subject to tribal jurisdiction—as where a person is domiciled on tribal land, owns real property there, or has other sufficient "contacts" to warrant that jurisdiction. But it would plainly exceed the limits of the *Montana* exceptions to hold that tribes have jurisdiction based solely on the fact that the non-member married a member or engaged in a relationship that led to the birth of a child whose biological ancestry entitles her to tribal membership. That would mean jurisdictional determinations would become "a simple blood test," which would offend the principles of due process. *United States v. Cruz*, 554 F.3d 840, 849 (9th Cir. 2009).[4]

That is why the South Dakota Supreme Court rejected the reasoning of the Alaska Supreme Court, and held in *In re J.D.M.C.*, 739 N.W.2d 796 (S.D. 2007), that

---

[4] Even worse, under Minnesota's state law analogue of ICWA (the Minnesota Indian Families Preservation Act, Minn. Stat. § 260.771), a child is deemed an "Indian child" if she is eligible for membership, *regardless* of the parent's tribal membership *vel non*. That, plus the fact that some tribes, such as the Cherokee and Choctaw, require no minimum blood quantum for membership, but only require that a person be a lineal descendant of a signer of the Dawes Rolls, means the following: if potential membership in a tribe entitles a tribal court to exercise jurisdiction, people eligible for tribal membership would find that under Minnesota law they and all of their descendants are *forever* subject to that tribal court jurisdiction, based *solely* on biology, and there is nothing they can do about it. Such a principle would contradict "the clear and God-given right to withdraw from [one's] tribe and forever live away from it." *United States v. Crook*, 25 F. Cas. 695, 699 (C.C.D. Neb. 1879) (No. 14,891).

"marrying a tribal member, allowing children to be enrolled members of the tribe and receiving tribal services do *not* qualify under the consensual relationship exception in *Montana*." *Id.* at 809 ¶ 41 (emphasis added).

Nevertheless, tribal courts continue to assert authority over cases based solely on a child's ancestry. For example, the Court of the Eastern Band of Cherokee Indians has held that tribal courts obtain personal and subject matter jurisdiction over a case "the moment an Indian child . . . is born," meaning that

> upon the birth of a person who is eligible for membership in an Indian Tribe and is the biological child of a member of an Indian Tribe, that Indian child's Tribe *ipso facto* is vested with either exclusive or, at the very least, concurrent jurisdiction over any later [child custody] proceeding.

In re B.A.S., Nos. 19-CVJ-014, 17-CVJ-059, 2019 WL 3451159, at *5 (Eastern Cherokee Ct. June 21, 2019).

Tribal courts even assert jurisdiction over cases that do not involve the removal of children from their parents—which was what ICWA was supposed to govern. *See id.* 25 U.S.C. § 1901(4).[5] This has led to anomalous results in both subject matter jurisdiction and

---

[5] Thus, e.g., in *Brackeen v. Haaland*, Nos. 21-376, 21-377, 21-378, & 21-380 (pending), the Brackeen family sought to adopt an Indian child *with the parents' consent*—but lower courts nevertheless held that ICWA applied, which would enable tribal governments to veto the adoption.

personal jurisdiction. For example, *Renteria*, came about when the parents of three children were killed in a car accident. The father was a member of the Miwok tribe, but none of the family members was domiciled on reservation. The surviving relatives disputed who should take in the orphans. One set of relatives was Miwok, the other was non-Native. 2016 WL 4597612, at *1. Despite the fact that the children had never been domiciled on reservation—and despite the fact that ICWA was not written to govern intrafamily disputes—the tribal court issued an order commanding the non-Native relatives to surrender custody of the children to the Native family members. *Id.* Its claim to jurisdiction rested solely on the children's biological ancestry. And although the federal district court barred enforcement of that order due to various improprieties by the tribal court, *id.* at *9, it rejected the argument that the tribal court lacked jurisdiction over the children. It said that "as long as the child is . . . eligible for membership" in a tribe, a tribal court may exercise jurisdiction; "enrollment," it said, "is [not] required." *Id*. at *10.

C. Tribal courts regularly seek to exercise jurisdiction over children who lack minimum contacts with those courts—and litigants rarely get a chance for appellate court review.

The principle of personal jurisdiction is rooted in "traditional notions of fair play and substantial justice," *International Shoe v. Washington*, 326 U.S. 310,

316 (1945) (citation omitted), which are offended by the proposition that a court can adjudicate a case based on the racial or ethnic background of the individuals involved.

In *In re C.J. Jr.*, for example, the Gila River Indian Community tribal court issued an order demanding that the Ohio-based foster family of an Ohio-born child turn over custody of the child to a family residing on an Arizona-based reservation, despite the fact that the child had never even visited Arizona, let alone maintained any type of contact with the tribal forum. 108 N.E.3d at 694–97. Taking the child away from the only family he had ever known and sending him to live on a reservation he had never visited with a couple he had never met, would have inflicted extreme psychological distress on the child—but BIA regulations also forbid state courts from taking *that* into consideration. 25 C.F.R. § 23.132(e).

Fortunately, the Ohio Court of Appeals ruled that the tribal court lacked jurisdiction. Noting that the "minimum contacts" rule of *International Shoe* governs tribal courts as well as state courts, the Ohio appellate judges unanimously found that "neither C.J. Jr., nor his birth parents, nor the foster parents have the minimum contacts necessary for the tribal court to exercise personal jurisdiction over them consistent with due process. . . . Without the requisite minimum contacts the tribal court lacks personal jurisdiction over the non-resident parties in this case." 108 N.E.3d at 696 ¶¶ 95–96.

But *C.J. Jr.* was an extreme rarity. State appellate courts have virtually never addressed the question of tribal court jurisdiction in ICWA matters—because they rarely have the opportunity. Once a case is transferred to tribal court, the opportunities for final appellate resolution in a state or federal court are extremely limited, particularly where a tribal government expeditiously moves a child beyond the state court's jurisdiction.

That is what happened in *J.P. v. State*, 506 P.3d 3 (Alaska 2022), which involved an even more aggressive expansion of tribal court jurisdiction. That case concerned a child who was a member of Tangirnaq Native Village (TNV), which had no tribal court, and which therefore purported to authorize *another* tribe, Sun'aq, to exercise jurisdiction over the child's case—even though the child was not eligible for membership in the Sun'aq tribe. The child, known as J.F., was placed in foster care with J.P. and S.P., shortly after birth. Years later, the child's case still remained unresolved. But when J.P. and S.P. sought permanent placement, TNV immediately petitioned to remove the case from state court and put it in Sun'aq tribal court, instead. The state court granted that motion, and the tribe then immediately removed the child from J.P. and S.P., and with 24 hours' notice, sent him to live in New Mexico—in an ultimately successful effort to avoid state court resolution of the propriety of the transfer.

It worked. By the time the Alaska Supreme Court addressed the matter, it concluded that the case had been rendered moot by the child's move to New Mexico.

"[O]rders transferring jurisdiction present special risk of evading review," the court said, "unless judges are careful to fashion them so as to preserve appellate rights and the parties act expeditiously." *Id*. at 6. Thus although "[t]he question of whether a tribe that is not the child's tribe but is acting as the child's tribe's agent may receive jurisdiction under § 1911(b) could arise again and is important to the public interest," the Sun'aq tribe succeeded in thwarting resolution of that question. *Id.*

Left undisturbed, the *J.P.* ruling would mean not only that tribal courts have power to adjudicate cases anywhere in the United States that involve children biologically eligible for membership in that tribe, but also to adjudicate cases anywhere in the country that involve children eligible for membership in *any* tribe—because tribes can delegate power to other tribes to exercise such jurisdiction. This makes a mockery of the due process principles of personal jurisdiction.

How all the factors discussed above work in practice was made clear in *Simmonds v. Parks*, 329 P.3d 995 (Alaska 2014), in which a tribal court *terminated the parental rights* of a *non-member* father, in a proceeding in which his attorney was not even permitted to argue. *Id.* at 998. Minto tribal law provides that children born of tribal members are automatically eligible for membership, and because the child's mother was Minto, the child qualified as an "Indian child" under ICWA due to his eligibility. Synthesizing precedents on the question of tribal authority over non-members, *see id.* at 1019–22, and reasoning that "tribal jurisdiction . . .

depend[s] solely on the membership status of the child," *id*. at 1019, the court "*reject[ed]* the State's argument that these precedents create a 'presumptive lack of [tribal] jurisdiction' over nonmembers," *id.* at 1021 (emphasis added; citation omitted). As a result, a man who was not a tribal member was stripped of his rights to his child in a tribal court proceeding where he was not given a full opportunity to make his case.

II. Jurisdictional problems such as these are extraordinarily likely to evade this Court's review.

Tribal courts' aggressive stretching of jurisdictional claims is likely to evade this Court's review. That is the result of several factors. Parties who allege that a tribal court is exceeding its jurisdiction are typically required to exhaust their tribal court remedies—which can amount to the denial of relief. *See*, *e.g.*, *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004). Also, thanks to this Court's decision in *Santa Clara Pueblo*, a party who is subjected even to wrongful tribal court jurisdiction is barred even from bringing a claim in federal court—except by going through the entire tribal appellate process and seeking cert from this Court, which, is, of course, rarely granted.

Tribal governments can easily evade appellate review, moreover, by simply transferring a child beyond the reach of a state court, so that no further adjudication by state courts is possible, as in *J.P.* What's more, tribal courts do not necessarily follow the same

jurisdictional principles laid down by this Court in matters of this kind, and that, combined with the exhaustion requirement, can stymie federal court review of jurisdictional disputes.

Consider *Boozer*. There, a non-Indian father and a tribal member mother separated, and tribal court awarded custody to the mother. The child remained with the mother on the reservation, although the father argued that she was not domiciled there for purposes of ICWA. When the mother died, the grandparents obtained a tribal court order giving them custody and barring the father from contacting either them or the child. He filed suit in federal court, arguing that the tribal court had no jurisdiction over him, or over the child custody matter, on the grounds that she was not domiciled on reservation. On appeal, the Ninth Circuit did not resolve that question, but held that the tribal court's claim to jurisdiction was "not frivolous." 381 F.3d at 935 n.3. For that reason, the case did not qualify for an exception to the tribal exhaustion requirement—an exception which only applies where "'the action is patently violative of express jurisdictional prohibitions' . . . or it is otherwise plain that the tribal court lacks jurisdiction over the dispute." *Id*. at 935 (citations omitted).

Yet tribal courts in ICWA cases do not necessarily follow the principles of jurisdiction and domicile set forth by this Court. For example, in *Father v. Mother*, No. CV-FR-1998-0169, 1999 WL 34828488 (Mashantucket Pequot Tribal Ct. Mar. 9, 1999), the Mashantucket Pequot Tribal Court rejected the "domicile"

principle that this Court adopted in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), whereby a child's domicile is presumptively that of the mother. Characterizing that rule as "'historically gendered and sexist,'" the tribal court instead adopted a rule "which looks to the legal residence or domicile of the spouse who is a member of the Cheyenne River Sioux Tribe." 1999 WL 34828488, at *3. This self-serving rule, of course, will typically prejudice the outcome of any custody dispute between any tribal member spouse and any non-tribal member spouse. Yet, again, BIA regulations would forbid a state court from considering that fact in any dispute over transfer. 25 C.F.R. § 23.118(c)(5). And, combined with the tribal exhaustion requirement, it means that the losing party's only hope for review of the jurisdictional question by a neutral court would be to appeal and appeal and then ask this Court for certiorari.

In some cases, affected non-members are not even given that meager opportunity for appellate review. For example, *Central Council of Tlingit & Haida Indian Tribes of Alaska*, which held that tribes have "*inherent* power" to adjudicate cases involving children who are eligible for membership, 371 P.3d at 265—even if the consequence is to subject non-members to tribal court jurisdiction—evaded this Court's review because, as two justices observed, the lower court decided the question in the context of a dispute between the state and the tribe, in which no non-member parent's voice was heard. "The choice to seek U.S. Supreme Court review of today's decision belongs solely to the

State," these justices noted, "not to a non-member parent of a tribal child. That decision . . . will be primarily a political decision, based on how the State wishes to co-exist with sovereign tribes within its boundaries. Who in this case represents the legal interests of non-member parents of tribal children? No one." 371 P.3d at 277 (Winfree & Stowers, JJ., concurring in part).

The exhaustion requirement means that the only way a non-member can typically dispute whether the tribal court has jurisdiction over her is to appeal through the tribal appellate process and then seek certiorari in this Court. She cannot seek to enforce the rights promised by ICRA, of course, because *Santa Clara Pueblo* has effectively neutered that Act by declaring that the only remedy available in such cases is *habeas corpus*. Thus the bottom line is: because ICWA appears to give tribal courts authority to resolve cases involving children who are eligible for membership—and tribal assertions of eligibility are conclusive, *see*, *e.g.*, *In re Riffle*, 922 P.2d 510, 513 (Mont. 1996)—a tribe's assertion of jurisdiction becomes effectively conclusive, also. If the standard is a "not frivolous" standard, *Boozer*, 381 F.3d at 935 n.3, tribal court assertions of jurisdiction will virtually never be addressed by this Court.

What's more, a transfer to tribal court can be effectively irreversible. Consider *In re G.S.*, No. E068000, 2017 WL 6275692 (Cal. App. Dec. 11, 2017). It involved a child whose father was a member of Osage Nation and whose mother was a member of Picuris Pueblo. The latter tribe sought transfer of the case to its tribal

court, to which the father objected, because, among other things, he lived in California and the tribe sought to remove the children to New Mexico. *Id.* at *2. The state court granted the transfer, without giving notice to the Osage tribe, and the children were sent out of state. *Id.* The California Court of Appeal later concluded that "the juvenile court erred"—but held that it could do nothing about it, now that the case had been transferred: "The juvenile court has lost jurisdiction over this dependency case and, therefore, has no power to compel the tribal court to return the case to the California courts." *Id.* at *4. Indeed, tribal courts frequently order children moved beyond the reach of state courts as quickly as possible, precisely to thwart state or federal court review.

Given the many legal hurdles that stand in the way, the chances of this Court having a better opportunity to decide whether tribal courts can exploit their ICWA powers to decide cases involving people who are *not* tribal members and do *not* have minimum contacts with the trial forum, are minute. Yet the importance of this question cannot be gainsaid. On it rides the future safety and welfare of countless children deemed "Indian" based exclusively on their biological ancestry—and the pretenses of tribal governments to adjudicate cases nationwide based on nothing other than the genetic pedigree of the children involved.

CONCLUSION

The petition should be *granted*.

Respectfully submitted,

TIMOTHY SANDEFUR*
SCHARF-NORTON CENTER FOR
CONSTITUTIONAL LITIGATION
AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

**Counsel of Record*