No. 21-1471

In The
Supreme Court of the United States

DENISE HALVORSON, et al.,

Petitioners,

v.

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

Respondents.

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

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act, does a state court abuse its discretion by transferring a child welfare proceeding involving an Indian child to the child's tribal court at the request of the child's tribe and with the support of the public authority, the child's only living parent, and the child's guardian ad litem?

The Minnesota District Court transferred this child protection proceeding to Red Lake Tribal Court. The Minnesota Court of Appeals affirmed the transfer, and the Minnesota Supreme Court denied review.

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INTRODUCTION[1]

"There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3). To that end, Congress enacted the Indian Child Welfare Act ("ICWA") to curtail the ongoing destruction of Indian families through the "wholesale removal of Indian children from their homes." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 642, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013).

Mindful that ICWA provides only "minimum Federal standards" for protecting Indian children caught in the child welfare system, 25 U.S.C. § 1902, and directs state courts to apply any more protective state law, 25 U.S.C. § 1921, Minnesota adopted its own statutory safeguards as the Minnesota Indian Family Preservation Act ("MIFPA"), Minn. Stat. §§ 260.751 *et seq.* (2020). Like ICWA, MIFPA aims to "protect the long-term interests . . . of Indian children, their families . . . , and the child's tribe" and to "preserve the Indian family and tribal identity." Minn. Stat. § 260.753.

At the core of both ICWA and MIFPA are "provisions concerning jurisdiction over Indian child custody proceedings." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36, 109 S. Ct. 1597, 1601, 104 L. Ed. 2d 29 (1989). Together, these federal and state statutes provide a "dual jurisdictional

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[1] Respondents jointly submit this response in opposition to the Petition. If review is granted, Respondents may file separate arguments unique to each Respondent's individual positions.

scheme" depending on where an Indian child lives and the type of proceeding at issue. *Id.*

First, tribal courts maintain exclusive jurisdiction over Indian children who reside or are domiciled on the reservation or who are wards of the tribal court. 25 U.S.C. § 1911(a); Minn. Stat. § 260.771, subd. 1.

Second, ICWA and MIFPA recognize the "concurrent but presumptively tribal jurisdiction" over Indian children involved in any other foster care placement or termination of parental rights proceedings. 25 U.S.C. § 1911(b); Minn. Stat. § 260.771, subd. 3(a); *Holyfield*, 490 U.S. at 36, 109 S. Ct. at 1601–02; *In re Welfare of Child of: T.T.B. & G.W.*, 724 N.W.2d 300, 305 (Minn. 2006).

For cases in this second category, state courts defer to tribal court jurisdiction upon request by a parent, Indian custodian, or tribe, and will transfer proceedings to the appropriate tribal court. 25 U.S.C. § 1911(b); 25 C.F.R. § 23.117; Minn. Stat. § 260.771, subd. 3(a). A request to transfer can be made at any stage in the proceeding, 25 C.F.R. § 23.115(b); Minn. R. Juv. Prot. P. 31.01, subd. 1. And a transfer request may be denied only if: (1) a parent objects; (2) the tribal court declines; or (3) "good cause exists" to deny transfer. 25 U.S.C. § 1911(b); 25 C.F.R. § 23.117; Minn. Stat. § 260.771, subd. 3(a).

This case presents a routine instance of presumptive tribal court jurisdiction. L.J. is an "Indian child" within the meaning of ICWA and MIFPA. (Pet. App. at 011a.) She is the subject of a foster care placement

proceeding and currently lives with her Grandmother on the Red Lake reservation. (Pet. App. at 011a-012a); *see* 25 U.S.C. § 1903(1)(i). L.J.'s Tribe, the Red Lake Band of Chippewa, and her Grandmother requested the transfer to Red Lake Tribal Court. (Pet. App. at 001a.) And every other party except Petitioners supported the transfer, including the public authority, L.J.'s court-appointed guardian ad litem, and her sole living parent. (Pet. App. at 003a.)

Under ICWA and MIFPA, a transfer was presumptively appropriate unless Petitioners proved "good cause" to the contrary by clear and convincing evidence. Minn. Stat. § 260.771, subd. 3(a); 25 U.S.C. § 1911(b). They failed to do so. And the juvenile court rejected Petitioners' claims that the stage of the proceedings, the convenience of the parties, or Red Lake Tribal Court's jurisdiction, should preclude transfer. (Pet. App. at 007a-008a.)

On appeal to the Minnesota Court of Appeals, Petitioners did not challenge the district court's factual findings. Nor did they challenge the constitutionality of the portions of ICWA and MIFPA upon which the district court relied.

Instead, Petitioners insisted transfer should have been denied, in part, because they believed the Red Lake Tribal Court needed personal jurisdiction over them in order to resolve this child welfare dispute. The Minnesota Court of Appeals rejected Petitioners' arguments and affirmed the district court's exercise of its

discretion. The Minnesota Supreme Court then denied review.

Petitioners now ask this Court to grant certiorari and interpret ICWA's presumption favoring tribal court jurisdiction as extending only to cases in which all parties are members of the same Indian tribe. In doing so, however, Petitioners manufacture a split of authority, ignore their failure to preserve constitutional arguments for appeal, and misunderstand the law. All of Petitioners' arguments miss the mark.

First, there is no compelling reason for review. Contrary to Petitioners' assertions (Pet. at 6-7), there is no split of authority on this issue. Instead, both ICWA and the decision below follow the well-established principle that child-custody jurisdiction follows the child, not a proposed custodian.

Second, this case represents a poor vehicle for addressing the questions presented. Petitioners and amicus Goldwater Institute, under the guise of statutory interpretation, assert a number of constitutional challenges including due process and equal protection. But Petitioners failed to preserve any equal protection or due process arguments below. They further limited the development of the record by failing to give notice to the United States Attorney of what is effectively a constitutional challenge to ICWA's transfer provisions.

Finally, the merits of Petitioners' position are simply wrong. Even if the tribal court needed personal jurisdiction over Petitioners to resolve this child welfare proceeding (which it did not), Congress, through

ICWA, has expressly recognized tribal jurisdiction over child custody matters involving Indian children. That recognition necessarily extends to *all* parties to the proceedings, at least to the extent those parties continue to seek custody of an Indian child. Put simply, if a person wants custody of an Indian child, ICWA expects they will do so in that child's home court. There is nothing extraordinary about that expectation, and Petitioners provide no compelling reason why this commonsense principle requires review in this Court.

For these reasons, Respondents ask the Court to deny the Petition.

STATEMENT OF THE CASE

A. ICWA's Statutory Goals and Framework

"In Native American communities across the country, many families tell stories of family members they have lost to the systems of child welfare, adoption, boarding schools, and other institutions that separated Native children from their families and tribes. This history is a living part of tribal communities with scars that stretch from the earliest days of this country to its most recent ones." *Matter of Dependency of Z.J.G.*, 196 Wash. 2d 152, 471 P.3d 853 (2020).

Nearly five decades ago, Congress took notice of this long and painful history and expressed its own "rising concern . . . over the consequences to Indian children, Indian families, and Indian tribes" of the

"separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).

That concern eventually turned into action. Citing its "direct interest, as a trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe," Congress enacted ICWA to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. §§ 1901(3), 1902. To accomplish this purpose, ICWA fashioned a variety of safeguards, both procedural and substantive, that have since become the gold standard in child welfare practice.

"At the heart of . . . ICWA are its provisions concerning the jurisdiction over Indian child custody proceedings." *Holyfield*, 490 U.S. at 36. These provisions expressly recognize the jurisdiction of Indian tribes to determine the custody of their children in a variety of circumstances. 25 U.S.C. § 1911. So whenever an Indian child lives or is domiciled on a tribe's reservation, the tribe's authority over child custody matters is exclusive. 25 U.S.C. § 1911(a). For all other Indian children, Congress has recognized tribes' "concurrent but presumptive[]" jurisdiction in cases involving foster care and termination of parental rights. *Holyfield*, 490 U.S. at 36. And, upon request by a parent, Indian caregiver, or tribe, ICWA requires state courts to transfer these proceedings to tribal court, so long as the tribal

court will accept the case and neither parent objects. 25 U.S.C. § 1911(b); 25 C.F.R. § 23.117.

Absent objection by the tribal court or a parent, the only other exception to ICWA's presumptive transfer requirement is "good cause" to deny it. *Id*. In essence, "good cause" acts as a "modified doctrine of *forum non conveniens*, in appropriate cases, to ensure the rights of the child as an Indian, the Indian parents or custodian, and the Tribe are fully protected." Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,821 (June 14, 2016). Though intended to allow "case-by-case discretion," good cause exceptions are also "limited and animated by the Federal policy to protect the rights of the Indian child, parents, and Tribe, which can often best be accomplished in tribal court." *Id.* Thus, courts considering whether good cause exists may look to a variety of facts and circumstances, but may not consider:

> (1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;
>
> (2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
>
> (3) Whether transfer could affect the placement of the child;

> (4) The Indian child's cultural connections with the Tribe or its reservation; or
>
> (5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

25 C.F.R. § 23.118.

Like its federal counterpart, Minnesota law also encourages transferring proceedings involving the welfare of an Indian child to tribal court. MIFPA thus provides a more specific definition of good cause that protects the tribal court jurisdiction except when:

> (1) the Indian child's tribe does not have a tribal court or any other administrative body of a tribe vested with authority over child custody proceedings, as defined by the Indian Child Welfare Act, United States Code, title 25, chapter 21, to which the case can be transferred, and no other tribal court has been designated by the Indian child's tribe; or
>
> (2) the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses and the tribal court is unable to mitigate the hardship by any means permitted in the tribal court's rules. Without evidence of undue hardship, travel distance alone is not a basis for denying a transfer.

Minn. Stat. § 260.771, subd. 3a(b). Under MIFPA, the party opposing transfer also bears the burden of proving good cause by clear and convincing evidence. *Id.* at subd. 3a(a).

Together, the jurisdictional provisions of ICWA and MIFPA ensure that decisions about the welfare of Indian children are made by the court best positioned to honor and promote their best interests. 25 U.S.C. § 1901(3).

B. Proceedings Below

L.J., an Indian child, was removed from her father's custody by the Hennepin County Human Services and Public Health Department ("Department") in May 2019.[2] At that time, the state court did not believe ICWA applied and placed L.J. in foster care with Petitioners, who had adopted three of L.J.'s siblings.

After father could no longer remain legally in the United States,[3] L.J.'s maternal grandmother, Respondent W.M. ("Grandmother") requested visits with L.J. and asked the court reexamine ICWA's applicability, based on L.J.'s eligibility for membership in Red Lake Band of Chippewa. L.J.'s father also requested a delay to allow L.J.'s Tribe to participate. But the district court declined both requests, resting on its earlier determination that ICWA did not apply. The state court then adjudicated L.J. as a child in need of protection or services and transferred L.J.'s custody to the Department, and in a separate order ordered visits with relatives including Grandmother.

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[2] L.J.'s mother is now deceased. Prior to her death, her parental rights to L.J. were terminated and awarded to L.J.'s father.

[3] Father is a Mexican citizen and now resides in Mexico.

Following notice of a petition to terminate parental rights, the Red Lake Band Tribe confirmed L.J. was an Indian child, and a week later, a tribal representative renewed Grandmother's requests for visits with L.J. Grandmother also confirmed her interest in providing a permanent home for L.J. and advised the Department that she was working to become licensed as a foster care provider. Shortly after the Red Lake Band became involved, the district court determined that L.J. is an Indian child and began applying ICWA and MIFPA's statutory protections.

In the months that followed, Grandmother successfully became licensed as a foster care provider, and the Department, with the support of the Red Lake Band and L.J.'s guardian ad litem, sought to place L.J. with her Grandmother as a preferred placement under ICWA, MIFPA, and Minnesota state law prioritizing placement with relatives. 25 U.S.C. § 1915(b) ("In any foster care . . . placement, a preference shall be given . . . to a placement with . . . a member of the Indian child's extended family. . . ."); Minn. Stat. § 260.771 ("The court must follow the order of placement preferences required by the Indian Child Welfare Act of 1978, United States Code, title 25, section 1915, when placing an Indian child."); Minn. Stat. § 260C.211 ("The county agency shall consider placement with a relative . . . whenever the child must move from or be returned to foster care."). On May 6, 2020, the district court approved L.J.'s placement with her Grandmother.

In response, Petitioners (who had cared for L.J. on a temporary basis) moved to intervene as parties to the

child welfare case and stay L.J.'s reunification with her Grandmother. The district court denied the stay request, finding no reason to prefer Petitioners as non-family members over L.J.'s family and legally preferred placement. However, applying Minnesota's permissive intervention standard in child protection matters, the court granted Petitioners' party status, reasoning that it would "reduce barriers" to Petitioners' ability to provide the court with information about L.J. *See* Minn. R. Juv. Prot. P. 34.02.

On June 5, 2020, L.J. finally began living with her Grandmother in the Red Lake tribal community. Throughout subsequent hearings, the Department and L.J.'s guardian ad litem reported she was doing well. So L.J. had contact with relatives living on the reservation, while Grandmother also coordinated visits for L.J. with her father (virtually) and all six of L.J.'s siblings (including three who did not live with Petitioners). Reports filed by the Department indicated that L.J. felt excited at these renewed contacts, and "continue[d] to thrive, grow and meet new developmental milestones." At the same time, however, the Department expressed concerns that Petitioners repeatedly involved themselves when L.J. would visit her siblings, including sending inappropriate and confusing messages to L.J.

As L.J. flourished in Grandmother's home, the Department, L.J.'s guardian ad litem, the Red Lake Band, and even L.J.'s father, supported Grandmother as permanent caregiver for L.J. if she and father could not reunify. With Grandmother identified as the

near-universal choice for L.J.'s long-term placement, Grandmother and the Red Lake Band sought to transfer ongoing proceedings to Red Lake's Tribal Court. Only Petitioners opposed the request, and the same day initiated a new state court case, petitioning the state district court to grant them custody of L.J.

Grandmother and the Red Lake Band moved to dismiss Petitioners' new proceeding, which the state court heard alongside the request to transfer the existing child welfare case to Red Lake Tribal Court. The Department, L.J.'s guardian ad litem, and L.J.'s father all joined Grandmother and the Red Lake Band in their requests.

In an April 2021 order, the district court dismissed Petitioners' new custody case as legally barred under Minnesota law. In the same order, the court transferred L.J.'s case to Red Lake's Tribal Court. In reaching its decision, the court examined each of the relevant criteria for transfer under both ICWA and MIFPA, concluding that Petitioners had not met their burden under either statute. Specifically, the court found that the "evidence necessary to decide the case may be adequately presented" in Red Lake's Tribal Court "without undue hardship, to the parties or witnesses." (Pet. App. at 005a.) In fact, Red Lake was able to offer "similar accommodations available for conducting remote appearance as [the State] Court." (*Id.*) Red Lake also made specific arrangements to ensure Father "will be able to participate to the same extent in tribal court as in state court," including receiving support from the

consulate in his home country and maintaining his current legal representation. (*Id.*)

Petitioners appealed to the Minnesota Court of Appeals arguing, among other things, that because Red Lake did not have personal jurisdiction over them, L.J.'s case could not be transferred. In a unanimous, unpublished decision, the appellate court affirmed, acknowledging that tribal jurisdiction is "presumed" under ICWA, and that Petitioners remained free to seek custody of L.J. in tribal court if they chose.

Petitioners then sought review in the Minnesota Supreme Court, which was denied.

REASONS FOR DENYING THE PETITION

This case involves nothing more than the routine application of presumptive, tribal jurisdiction under settled state and Federal law, and the Petition for review in this Court should be denied for at least three reasons.

First, lower courts are neither confused nor divided over the application of ICWA's jurisdictional provisions. ICWA embodies well-settled principles that child custody jurisdiction follows the child, not any particular proposed custodian. And no state or federal court has ever accepted Petitioners' arguments that "good cause" exists to depart from ICWA's presumptively tribal jurisdiction simply because one party is not a member of the child's tribe. Moreover, while this

Court is presently considering other matters related to ICWA in *Haaland et al. v. Brackeen*, this case does not implicate any of the questions to be decided in that case. *Haaland v. Brackeen*, No. 21-376 (U.S. petition granted Feb. 28, 2022), *oral argument scheduled*, No. 21-380 (U.S. Nov. 9, 2022).

Second, this case is a poor vehicle for interpreting ICWA's transfer provisions. While Petitioners frame their position in this case as a matter of statutory interpretation, their arguments (and those of Goldwater Institute) hinge on constitutional challenges which were not sufficiently developed or preserved below, including by notifying the relevant Federal authorities.

Finally, Petitioners simply misstate the law. While attempting to frame this case through the lens of *Montana* and *Cooley*, there is no meaningful question of tribal jurisdiction here. In enacting ICWA, Congress expressly recognized tribal jurisdiction (sometimes exclusive and sometimes presumptive) over Indian children. That recognition necessarily extends to jurisdiction over any party who seeks custody of an Indian child. There is nothing unsettled or even unusual about that state of affairs. To find otherwise would render Congress's clear directive on presumptive jurisdiction meaningless; except in those fleetingly rare cases where all parties are tribal members.

The Petition should be denied.

I. THIS CASE PROVIDES NO COMPELLING REASON FOR REVIEW.

Petitioners state no compelling reason for review. State courts routinely apply ICWA's presumptions in favor of tribal jurisdiction without any split of authority and consistent with basic principles of child custody jurisdiction.

A. There Is No Split of Authority Among State Appellate Courts on ICWA's Recognition of Presumptive Tribal Jurisdiction in Child Welfare Cases.

Petitioners contend that ICWA's recognition of presumptive tribal jurisdiction in certain child welfare matters has produced a split of authority among state courts. (Pet. at 6-7.) Not so.

In support of a claimed split, Petitioners cite only two cases, and misread both. The first at least superficially involves the same statute at issue here. In *In re the Welfare of R.S.*, the Minnesota Supreme Court held that ICWA did not expressly authorize transfer of preadoption and adoption proceedings to tribal court except when an Indian child lives on the reservation. 805 N.W.2d 44, 50–51 (Minn. 2011). That holding attempted to make sense of ICWA's "dual jurisdictional scheme" which recognizes tribal court jurisdiction differently depending on whether an Indian child lives in or outside of the reservation. *Holyfield*, 490 U.S. at 36. But *R.S.* never held that ICWA "*prohibits* transfer to tribal court of cases involving nonmembers." 805

N.W.2d at 51 (Pet. at 7.) It simply found that ICWA did not apply to the type of action (an adoption) being transferred to tribal court. *See* 804 N.W.2d at 50.

In contrast, Petitioners' second case, *State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, doesn't involve ICWA at all, much less conflict with *R.S.* In *Tlingit & Haida*, the Alaska Supreme Court analyzed whether a tribal court had jurisdiction over a non-member's child support obligation. 371 P.3d 255, 265 (Alaska 2016). In concluding that it did, the Alaska high court reasoned that the tribe's jurisdiction, "stem[med] from their power over family law matters concerning the welfare of Indian children." *Id.* Importantly, *Tlingit & Haida* did not interpret section 1911(b), analyze its provisions, or address its recognition of presumptively tribal court jurisdiction.

In short, *R.S.* and *Tlingit & Haida* do not show any split of authority in state courts; they barely address similar issues. As important, neither case supports Petitioners' argument that the only constitutional application of ICWA requires courts to disregard the presumptive jurisdiction of tribal court except when all parties either consent or are members of the same tribe. Besides no split in authority, Petitioners cannot point to any court that has adopted (or even considered) their interpretation of ICWA.

B. ICWA and the Decisions Below Adhere to Well-Established Principles of Child Custody Jurisdiction.

The absence of any support for Petitioners' arguments rests in their fundamental misunderstanding of child custody jurisdiction, which, like ICWA, follows the child, not the proposed custodians.

Unlike many civil matters, child custody disputes implicate questions of status. As a result, the majority of courts have held that personal jurisdiction over a parent or caregiver is neither necessary nor sufficient to adjudicate custody disputes.[4] Instead, "a state's power to decide a custody matter . . . depends on its ability to adjudicate matters concerning the status of its citizens through *quasi in rem* jurisdiction," regardless of whether the court has personal jurisdiction over all (or any) of the proposed custodians. *Henderson v. Henderson*, 818 A.2d 669, 675 (R.I. 2003).

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[4] *See*, *e.g.*, *Hurlock v. Hurlock*, 703 So. 2d 535, 536 (Fla. Dist. Ct. App. 1997); *Glanzner v. State, Dept. of Soc. Serv., Div. of Child Support Enf't*, 15 S.W.3d 747, 753 n.3 (Mo. App. 2000); *Schuyler v. Ashcraft*, 680 A.2d 765, 780 (N.J. Super. Ct. App. Div. 1996); *Bruneio v. Bruneio*, 890 S.W.2d 150, 153 (Tex. Ct. App. 1994); *Henderson v. Henderson*, 818 A.2d 669, 675 (R.I. 2003); *Leonard v. Leonard*, 122 Cal. App. 3d 443, 459 (Cal. Ct. App. 1981).

Only a minority of older cases have held that a proceeding for the custody of children is an *in personam* proceeding. *See*, *e.g.*, *Ex parte Dean*, 447 So. 2d 733, 736 (Ala. 1984); *Mallory v. Edmondson*, 521 S.W.2d 215, 218-19 (Ark. 1975) (analyzing under a personal jurisdiction lens).

In this sense, child custody cases do not impose a "personal obligation or duty" on the parties that requires personal jurisdiction in the first place. *Compare Williams v. North Carolina*, 317 U.S. 287, 298 (1942) (holding that determining marital status does not require personal jurisdiction) *with Kulko v. Superior Ct.*, 436 U.S. 84, 91, 98 (1978) (imposing a child support obligation on a parent is a personal obligation requiring jurisdiction over the parent); *see also Shaffer v. Heitner*, 433 U.S. 186, 208 n.30 (1977) (acknowledging the "particularized rules governing adjudications of status"). Instead, courts in child custody and child welfare matters are fundamentally tasked with determining the status of the children subject to the court's jurisdiction based on each child's needs and best interests.[5]

These core principles are enshrined in both state and federal law, which now base child custody jurisdiction primarily on the child's "home state" regardless of that state's connections with each of the child's parents or caregivers. *See* Minn. Stat. § 518D.201; 28 U.S.C. § 1738A. ICWA reflects the same focus, recognizing

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[5] This Court has previously held that personal jurisdiction in child custody matters is required before a custody order must be granted full faith and credit. *May v. Anderson*, 345 U.S. 528 (1953). However, *May* rested entirely on the Full Faith and Credit Clause and never determined personal jurisdiction was necessary for a court to adjudicate child custody. *Id.* at 535 (Frankfurter, J., concurring). In response, Congress passed the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. § 1738A, requiring states to give full faith and credit to the custody determinations regardless of personal jurisdiction considerations.

each tribe's jurisdiction over its own children, regardless of whether other parties in a child welfare matter (including the public authority, court-appointed guardians, foster parents, and others) are themselves tribal members. 25 U.S.C. § 1911.

With these principles in mind, the flaw in Petitioners' argument becomes clear. Red Lake's jurisdiction over Petitioners (or lack thereof) does not impact whether there is "good cause" to deny transfer under ICWA, because Red Lake Tribal Court never needed personal jurisdiction over Petitioners in the first place. Instead, and as with every other child custody case, Red Lake need only have jurisdiction over the child, L.J., to decide her status. To the extent Petitioners, or anyone else, wish to seek custody of L.J. they may choose to submit themselves to Red Lake's jurisdiction, but they are not required to. And in doing so, Petitioners are no different than any proposed custodian, living elsewhere, who must come to the child's home jurisdiction, whether that be tribal jurisdiction or jurisdiction of a neighboring country or state, if they wish to seek custody of that child.

Put differently, there is nothing unusual or constitutionally suspect about the custody of a Canadian child being decided in a Canadian court, or the custody of a Wisconsin child being decided in a Wisconsin court. ICWA employs precisely the same principle.

C. The Issues Are Different Than Those Before This Court In *Brackeen*.

This case also does not implicate any of the issues currently under review by this Court in *Haaland et al. v. Brackeen*.

Respondents are mindful this case is not the only challenge to ICWA before this Court. *Brackeen*, which is set for argument in November 2022 includes several facial challenges to the constitutionality of ICWA, including (among others) equal protection, anti-commandeering, and non-delegation, and comes to this Court after producing producing a multiplicity of opinions and outcomes at the Fifth Circuit. *Brackeen v. Haaland*, 994 F.3d 249, 267 (5th Cir. 2021) (en banc).

But the issues here are distinct from *Brackeen*. While Petitioners and Goldwater Institute offer similar arguments, they "do not argue that [] ICWA is unconstitutional." (Pet. at 11.) And none of the portions of ICWA challenged in *Brackeen* (including its minimum standards, placement preferences, record-keeping provisions) are at issue here. *Haaland v. Brackeen*, No. 21-376. Instead, Petitioners challenge the routine application of ICWA's recognition of tribal jurisdiction, in section 1911(b), a portion of ICWA not challenged or subject to review in *Brackeen*.

In sum, Petitioners are unable to demonstrate a split of authority regarding ICWA's recognition of presumptive tribal jurisdiction in child welfare cases. Moreover, the ICWA follows well-established child-custody jurisdiction that custody jurisdiction follows

the child, not the proposed custodian. Therefore, the Petition should be denied.

II. THIS CASE IS A BAD VEHICLE FOR REVIEW.

Even had Petitioners demonstrated an adequate basis for review, this case provides a poor vehicle for this Court to reach Petitioners' proposed issue.

A. Petitioners Did Not Preserve Any Constitutional Issues Below.

While disclaiming any arguments that ICWA is unconstitutional, Petitioners propose to render its provisions on tribal jurisdiction effectively null through constitutional arguments not properly preserved below.

If a party believes an error has occurred, "he must object in order to preserve the issue." *Puckett v. United States*, 556 U.S. 129, 134 (2009). "If the error is not properly preserved, appellate-court authority to remedy the error . . . is strictly circumscribed." *Id.* Thus, when issues raised for this Court's review were "not raised and passed upon in state court," this Court generally declines to reach the issue. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988).

Here, Petitioners never asserted a claim that section 1911 of ICWA is unconstitutional: not at the state district court; not at the Minnesota Court of Appeals; and not in their petition for review at the Minnesota

Supreme Court. However, for the first time in their Petition, Petitioners argue that the district court's transfer order "violate[d] their due process rights to fundamental fairness and equal protection." (Pet. at 10.) In so arguing, Petitioners seek a ruling by this Court that section 1911 of ICWA is unconstitutional.

Petitioners attempt to circumvent their failure to preserve the constitutional arguments by denying that they are arguing that ICWA is unconstitutional (Pet. at 11), but their words belie their meaning. Since Petitioners failed to preserve this constitutional argument at any level below, the Court should decline to review this issue. *See Bankers Life and Casualty Co.*, 486 U.S. at 77.

B. Petitioners Did Not Notice The United States Attorney.

Relatedly, Petitioners' failure to preserve their constitutional challenge is made all the more problematic because they did not notify the United States Attorney and provide it an opportunity to participate below.

Federal law requires the challenging party to provide notice to the United States Attorney so it can adequately defend the state's interests, both at the district court level and on appeal. 28 U.S.C. § 2403(a). This is particularly true when a party challenges the constitutionality of a statute. When a party fails to provide notice of a constitutional question, federal courts

typically decline to consider it. *E.g.*, *Pleasant-El v. Oil Recovery Co.*, 148 F.3d 1300, 1302 (11th Cir. 1998).

Here, Petitioners advance constitutional arguments to eviscerate tribal jurisdiction over any matter involving an Indian child when one party is not a tribal member. Practically speaking, these arguments would invalidate, on constitutional grounds, any transfer from state to tribal court under ICWA as at least one party will almost *always* be a non-tribal member. *See* Minn. R. Juv. Prot. P. 32.01 (listing the parties to a juvenile protection matter as the child's guardian ad litem, legal custodian, the petitioner – usually the public authority – and any person who intervenes, is joined as a party, or "who is deemed by the court to be important to the resolution that is in the best interests of the child").

But despite deploying constitutional arguments to attack the very "heart" of ICWA, Petitioners never notified the United States Attorney to allow it the opportunity to defend these statues. Despite years of litigation in the district court, an appeal to the Minnesota Court of Appeals, a petition for review in the Minnesota Supreme Court, and now this petition, the United States has not had an opportunity to defend its own laws. Without the benefit of more fully developed arguments below, the Court should decline to review Petitioners' constitutional challenges.

III. ICWA EXPRESSLY RECOGNIZES TRIBAL COURT JURISDICTION OVER THE PETITIONERS OR ANY POTENTIAL CUSTODIANS OF INDIAN CHILDREN.

Finally, this Court's review is not warranted because Petitioners are simply wrong on the merits. While conceding that Congress can authorize tribal jurisdiction over non-members, Petitioners then ignore the express provisions of ICWA that do just that. (Pet. at 7.) But ICWA expressly recognizes tribal jurisdiction in foster care matters involving Indian children, including jurisdiction over any party to those matters. Petitioners' exegesis on the limits of inherent, tribal jurisdiction is thus both incorrect and irrelevant.

Indian tribes possess "attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). Congress can therefore recognize tribal jurisdiction even over non-members including delegating authority to tribes to regulate non-members in certain instances. *Id.*; *United States v. Lara*, 541 U.S. 193 (2004) (upholding a federal statute providing for tribal jurisdiction to prosecute non-member Indians).

This recognition or delegation by Congress does not require any magic words. Rather, tribes have such authority even when Congress has spoken only by implication "inherent in recognizing the power of tribes." *See Arizona Pub. Serv. Co. v. E.P.A.*, 211 F.3d 1280, 1290 (D.C. Cir. 2000) (rejecting any specific language, like

"we hereby delegate," as necessary to effectuate a delegation of authority).

ICWA's tribal jurisdiction provision represents just such an "inherent recogni[tion] of the power of tribes." *Id*. Under section 1911(b), Congress has expressly recognized tribal jurisdiction over child custody proceedings, even when the child is not domiciled. This recognition, while "concurrent" with state courts, remains "presumptively tribal" whenever an Indian child is subject to certain child welfare proceedings. *Holyfield*, 490 U.S. at 36.

Petitioners dismiss this portion of ICWA as not sufficiently explicit to authorize jurisdiction over nonmembers. (Pet. at 7.) They therefore suggest that the presumption in favor of tribal court jurisdiction really means a presumption in favor of tribal court jurisdiction *when all parties are members of the same tribe*. This interpretation passes the bounds of credulity: seeking to condition Congress's express recognition of tribal jurisdiction on the vagaries of state court rules regarding who is (and isn't) a party in child welfare cases.[6] In so doing, Petitioners violate the "general

[6] While requirements vary from state to state, child welfare cases generally involve multiple parties. For example, in Minnesota, the parties to a child protection matter must include the child's guardian ad litem; the child's legal custodian; in the case of an Indian child, the child's parents, the child's Indian custodian, and the child's tribal representative; and the petitioner. Barriers to intervention are also low, and courts may join as party any other person who is important to a resolution that is in the best interest of the child. Minn. R. Juv. Prot. P. 32.01. By comparison, in Maine, a petition may be brought by the Department

assumption that . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Holyfield*, 490 U.S. at 43.

By Petitioners' logic, in states where the Department of Human Services is always a party, no proceeding could ever be transferred to tribal court. In states where the court must appoint a separate guardian ad litem for the child, that appointment would bar tribal court jurisdiction unless the guardian ad litem were also a member of the child's tribe. And in states (like Minnesota) when any other person can be made a party, even for reasons as simple as providing information to the Court, each and every party would have equal power to veto a Congressionally-authorized transfer to tribal court.

Indeed, Petitioners here were not parties until many months into the case, and were granted party status only to more effectively furnish more important information to the Court about L.J.'s best interests. They now seek to use that status, granted under state rules of procedure, to eviscerate ICWA's preference for tribal court jurisdiction over Indian children.

CONCLUSION

Petitioners have not established any compelling reasons for review in this Court. They have ignored

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of Health and Human Services, a police officer or sheriff, or three or more persons. Me. Stat. § 4032.

basic concepts of child custody jurisdiction, failed to preserve their central arguments, and ignored ICWA's clear recognition of tribal court jurisdiction. For all of these reasons, Respondents respectfully request the Petition be denied.

Respectfully submitted,

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DATE: September 14, 2022