No. 12-1278

In The

Supreme Court of the United States

IN RE INTEREST OF ZYLENA R. AND ADRIONNA R. CHILDREN UNDER 18 YEARS OF AGE, STATE OF NEBRASKA,

Petitioner,

v.

ELISE M. AND OMAHA TRIBE OF NEBRASKA,

Respondents.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Innumerable child welfare cases are brought in state courts each year. In those cases involving an Indian child domiciled off-reservation, the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-63 allows the tribe to request the case be transferred to tribal court. The state court must then transfer the case unless a parent objects or "good cause" is shown to deny the transfer. These transfer provisions apply throughout the life of a child welfare case and often only come into play after the child has been in foster care for years. But even at such late stages, a court must grapple with uncertain jurisdiction due to the open division involving at least seventeen states on two crucial issues:

(1) Whether ICWA prohibits a state court from considering the "best interests of the child" when determining whether "good cause" exists to deny the transfer of an ongoing child welfare case.

(2) Whether ICWA requires a state court to treat a motion to terminate parental rights as a "new proceeding" for purposes of determining whether "good cause" exists to deny the transfer of an ongoing child welfare case.

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The opinion of the Nebraska Supreme Court is reported at 284 Neb. 834, 825 N.W.2d 173 (2012). App. 1a. The decision of the Nebraska Court of Appeals is unpublished. *Id.* at 32a. The decisions of the Separate Juvenile Court of Lancaster County, Nebraska are unpublished. *Id.* at 50a, 53a.

JURISDICTION

On December 14, 2012, the Nebraska Supreme Court reversed the decision of the Nebraska Court of Appeals which had affirmed the decisions of the Separate Juvenile Court. Petitioner timely filed motions for rehearing on December 26, 2012, which the court denied on January 23, 2013. App. 56a, 58a. This Court has jurisdiction under 28 U.S.C. § 1257(a) (2006).

STATUTORY PROVISIONS INVOLVED

Section 1911(b) of Title 25, U.S.C., states:

> 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.

STATEMENT

Almost five years ago, the Omaha Tribe was notified that a child welfare case involving Zylena R. was pending in state court. App. 3a. The tribe determined that Zylena had insufficient blood quantum to even be eligible for enrollment in the tribe. *Id.* Consequently, the tribe neither intervened nor requested transfer of the case. Adrionna was born. *Id.* Six months after Adrionna's birth, both Zylena and Adrionna had to be placed in foster care. *Id.* The state court proceedings continued for years without the tribe's involvement. It was only on the eve of the filing of the motion for termination of the parents' parental rights that the tribe requested transfer of the cases. *Id.* at 4a. By then, the girls were bonded to their foster parents with whom they had lived for almost two years. *Id.* at 41a, 47a. By then, the girls' parents had made little to no progress in their cases. *Id.* at 4a. By then, the court-ordered permanency goal in the cases had been changed from reunification to adoption. *Id.* By then, Zylena and Adrionna deserved permanency. *Id.* at 47a.

It was a mistake. The tribe had miscalculated the blood quantum for Zylena back in 2008. *Id.* at 5a. When the recalculation was made, Zylena and Adrionna were both eligible for membership in the

Omaha Tribe. *Id.* When the recalculation was made, the tribe requested transfer of the cases to the tribal court. *Id.* at 4a, 5a. But, by then, it was too late, the state court held. The cases were at an advanced stage and needed to remain in the state court. *Id.* at 51a, 54a. The Court of Appeals agreed. *Id.* at 46a. And it did not leave it at that. It added that the cases needed to stay in state court because it was in the girls' best interests to move toward permanency. *Id.* at 47a.

Not so, said the Nebraska Supreme Court. Despite its long-standing precedent to the contrary, "best interests of the child" have no role in tribal transfer requests. *Id.* at 26a. And, a motion to terminate parental rights is a "new" proceeding so the tribe wasn't too late. *Id.* at 21a. The Indian Child Welfare Act dictated this result, said the majority. *Id.* at 21a, 26a. Not so, said the Chief Justice in dissent. The majority's holding emphasized the tribe's interests at the expense of the children's interest in permanency. *Id.* at 29a.

The two issues which caused so much disagreement in these cases have also contentiously divided state courts for years. This petition brings to this Court those two issues at an ideal time and in an ideal posture. This petition brings to this Court the opportunity to provide uniformity and clarity in the Indian Child Welfare Act's transfer provisions.

A. Statutory Framework

In 1978, Congress enacted the Indian Child Welfare Act (ICWA). Nebraska followed in 1985 with its enactment of the Nebraska Indian Child Welfare Act which mirrors ICWA. Neb. Rev. Stat. §§ 43-1501-1516 (Reissue 2008). When Congress enacted ICWA, it formed a system which was designed to appropriately balance the interests of at least three separate entities – Indian children, their families, and the tribes. Congress addressed this specifically in § 1902, which states the purpose of ICWA is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." This balancing of interests is evident throughout ICWA, but perhaps most obviously in its removal, tribal notice, and jurisdictional provisions.

Section 1912(e) of ICWA provides protections to parents by requiring active efforts be made to prevent removal of Indian children and prohibiting their continued removal without testimony from a qualified expert that continued custody by the parent is likely to result in serious emotional or physical harm to the child. Section 1911(a) provides protections to the tribe by mandating that tribal courts have exclusive jurisdiction over Indian children domiciled on the reservation. Section 1912 enhances these protections by mandating notice to the tribe when Indian children are placed out of their home, and by permitting the tribe to intervene in the state child custody proceeding. Section 1911 protects both the tribe and parents by providing that either can request transfer of the

proceeding to the tribal court. But, § 1911(b) also balances this dual protection in its transfer refusal provisions – that is, a tribe can refuse to accept the transfer of a case requested by a parent and a parent can refuse to let a case be transferred to the tribal court. Section 1911(b) of ICWA also incorporates protection for the rights of Indian children by permitting a state court to refuse to transfer a proceeding to tribal court where there is good cause to deny the transfer. It is this "good cause" provision that stands at the heart of this petition.

B. Factual Background

Zylena R. was born in June of 2007 and Adrionna R. was born in December of 2008, both to Elise M. and Francisco R. App. 2a. An amended petition was filed on July 1, 2008, in state court alleging that Zylena was a child as defined by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) due to the fault and habits of both Elise M. and Francisco R. *Id.* Since Elise is an enrolled member of the Omaha Tribe, proper notice of the proceeding was sent to the Omaha Tribe on July 1, 2008. *Id.* On July 16, 2008, the Omaha Tribe responded that Zylena was neither enrolled nor eligible for tribal enrollment. *Id.* Zylena was adjudicated on September 22, 2008. *Id.*

On May 1, 2009, a similar case was commenced in state court involving both Zylena and Adrionna. *Id.* It was adjudicated on May 12, 2009. *Id.* The girls

were placed with their current foster family on May 29, 2009. *Id.*

Even though the girls share the same parents, in October of 2010, notice was sent to the Omaha Tribe by an employee of the Nebraska Department of Health and Human Services (Department), inquiring whether Adrionna was either enrolled or eligible for enrollment with the tribe. App. 4a. The notice included an advisement that the case could result in removal of the child from the home or termination of parental rights and adoption. *Id.* The Department received no response from the tribe. *Id.*

Both Elise and Francisco were provided various services in an attempt to correct the conditions of neglect, but neither made any real progress. *Id.* In November of 2009, the court changed the permanency objective from reunification to adoption. *Id.* At that same time, as provided in Neb. Rev. Stat. § 43-292.02 (Reissue 2008), the court found that no exception existed to eliminate the requirement for the filing of motions to terminate parental rights with respect to Zylena. App. 35a. On February 4, 2011, motions to terminate parental rights of both parents were filed. *Id.* at 4a. On February 14, 2011, and February 22, 2011, respectively, the Omaha Tribe filed Notices of Intervention and Transfer in Zylena's case. *Id.* The tribe filed similar motions in the second case on March 1, 2011. *Id.*

C. Proceedings Below

1. Hearings were held on the transfer requests. App. 4a-5a, 36a. At those hearings, both the petitioner and the girls' guardian ad litem objected to the transfer. *Id.* at 4a-5a. A Department representative testified that the girls are bonded to their foster home. *Id.* at 41a. She further testified that she believed termination of parental rights should occur and adoption should be pursued with the current foster parents because the girls needed permanency. *Id.* at 41a, 47a. When the rulings were entered, Zylena was almost four years old and Adrionna was two and one-half years old. *Id.* at 2a, 5a. They had both been living with their foster parents for over two years. *Id.* at 3a, 5a.

A representative of the Omaha Tribe testified that, because the tribe understated Elise's blood quantum in 1991, the tribe concluded in 2008 that Zylena was ineligible for membership in the tribe. *Id.* at 5a. The tribe first realized the mistake in late January or early February of 2011, which was when the termination of parental rights motions were filed. *Id.* The tribal representative testified that, if the transfer was granted, the tribal court would work to reunify the family, but would not terminate parental rights. *Id.* A long-term guardianship could be established for the girls by the tribal court if the efforts at reunification were to fail. *Id.* The tribal representative also testified that it would be her recommendation that the children stay in their current placement,

but that there was no guarantee the tribal court would follow her recommendation. *Id.* at 40a.

On June 29, 2011, the juvenile court denied the transfer requests. *Id.* at 51a. In the case involving Zylena, the court concluded that "good cause" existed to deny the transfer because the "proceeding was at an advanced stage" and the "Tribe did not file its Notice to Transfer for 32 months after receiving original notice." *Id.* In the case involving both girls, the court also found that notice was sent to the tribe in October of 2010 for Adrionna; the tribe had received notice in July of 2008 for Zylena; on November 4, 2010, a permanency plan of adoption was approved by the court; on November 4, 2010, the court had found that no exception existed to eliminate the requirement that a motion for termination of parental rights be filed; and the motion for termination of parental rights was filed and was now pending. *Id.* at 54a. Based on those facts, the court concluded: "Given the proceeding is at an advanced stage and given the Omaha Tribe did not promptly file its Notice to Transfer, good cause has been shown to deny the transfer." *Id.* The juvenile court made no finding in either case concerning whether the transfer was in the children's best interests. *Id.* at 6a.

2. Elise M. appealed the denial of the motions to transfer. *Id.* The tribe filed a cross-appeal. *Id.* The guardian ad litem and the petitioner defended the juvenile court decisions. The father and the Department did not participate. *Id.* at 32a. The appeals were consolidated by the Court of Appeals. *Id.* at 33a.

The Nebraska Court of Appeals affirmed the decisions of the juvenile court. *Id.* Based on the court's reading of prior Nebraska precedent, it concluded that there was "good cause" to deny the transfer of the cases to the tribal court because the cases were at an "advanced stage" when the tribe made its motions to transfer. The court noted that it has been the "policy of this state to consider the entire history of a juvenile proceeding in determining whether such is at an advanced stage." *Id.* at 46a. The court further held that ICWA "does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus." *Id.* It found that, "if the case were transferred, the children could remain in limbo indefinitely while they waited for Elise to complete drug and alcohol treatment – something which she has not been able to do in past attempts." *Id.* at 47a. It also found that "the children have been out of their parents' home for more than 2 years, that they are now being well cared for, and that they are in a home that appears to be committed to fostering their Native American heritage." *Id.* The court then concluded that "the present situation is currently in the children's best interests," and affirmed the juvenile court's denial of the transfer motions. *Id.* at 47a, 49a.

3. Elise petitioned for further review to the Nebraska Supreme Court, in which the tribe joined. *Id.* at 2a. The Nebraska Supreme Court granted the petition and reversed the Court of Appeals. *Id.* at 2a, 27a. In so doing, it disapproved in part and overruled in part a long-standing Nebraska case which had

interpreted ICWA. The Chief Justice wrote a terse dissent. *Id.* at 21a, 26a, 27a-31a. The majority held that ICWA prohibits a state court from considering the "best interests of the child" when determining whether "good cause" exists to deny the transfer of an ongoing child welfare case. *Id.* at 29a. It also held that ICWA requires a state court to treat a motion to terminate parental rights as a "new proceeding" for that "good cause" analysis. *Id.* at 21a. Chief Justice Heavican, in dissent, concluded that the filing of a termination of parental rights motion does not commence a new "proceeding" for purposes of the "good cause" analysis. *Id.* at 29a. He reasoned that the notice and intervention provisions of ICWA provide adequate protection of the tribe's rights, but when a case reaches a certain point, the children's interests in permanency should be paramount. *Id.* at 29a-30a.

On January 23, 2013, the Nebraska Supreme Court denied the petitioner's timely requests for rehearing. App. 56a, 58a.

REASONS FOR GRANTING THE PETITION

The highest court in Nebraska has now held that ICWA prohibits its state courts from considering the "best interests of the child" when making transfer decisions in an ICWA case. App. 26a. This reversed the court's long-standing precedent, *id.*, and further complicated a split between as many as sixteen states on that issue. The court also held that ICWA requires

state courts to treat a motion for termination of parental rights as a "new proceeding," thereby requiring state courts to reset the "timeliness of request" clock on a motion to transfer jurisdiction to the tribal court. *Id.* at 21a. This holding solidified a burgeoning split on that issue between as many as eight states.

The uncertainties created by these splits between state courts on issues surrounding jurisdictional disputes over Indian children are intolerable. Because tribal members are found in all fifty states, tribes currently must know the interpretation each of those states has made of ICWA's transfer provisions. Tribes, parents, and state courts must predict how an undecided appellate court will align itself along the divisive issues. Tribes, parents, and state courts must attempt to predict whether an appellate court will suddenly switch sides, as happened in Nebraska, on one of the divisive issues. And, most importantly, while all the adults are trying to figure out what to do, the Indian children are waiting. As one commentator pointed out, when jurisdiction remains unclear, courts must "hammer out" ad hoc jurisdictional rules, which prolongs the process unnecessarily. Barbara Ann Atwood, Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 59 (2010).

This Court has itself recognized that the jurisdictional provisions lie "[a]t the heart of the ICWA." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989). Yet with only one interpretation from this Court concerning jurisdiction in ICWA's

thirty-five year history, these jurisdictional provisions have fallen into disarray. Moreover, *Holyfield* dealt with the definition of domicile and exclusive jurisdiction, therefore not addressing the issues at hand.

Courts on both sides of these splits acknowledge the core importance of the jurisdictional questions at issue. *People in Interest of J.L.P.*, 870 P.2d 1252, 1256 (Colo. App. 1994); *In re J.W.C.*, 265 P.3d 1265, 1269 (Mont. 2011); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 170 (Tex. App. 1995). But independently they can do little to remedy the problem. Similarly, academics point to this as an area of confusion and concern. And with "migration across reservation boundaries on the rise and intermarriage between Indians and non-Indians at an all-time high," tension between concurrent state and tribal jurisdiction will only increase. Barbara Ann Atwood, Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 58 (2010). Children, parents, tribes, and state courts have little option other than to look to this Court to provide uniformity and clarity to these jurisdictional determinations.

I. STATE COURTS DIVERGE DRAMATICALLY ON TWO CORE COMPONENTS OF THE EXERCISE OF JURISDICTION OVER INDIAN CHILDREN

A. State Courts Are Divided Over Whether "Best Interests of the Child" Is a Factor for the Court to Consider When Determining Whether "Good Cause" Exists to Deny Transfer to the Tribal Court

When an Indian child resides off-reservation, the tribe or parents can request transfer of jurisdiction from state court to tribal court. That request must be granted except where the parent objects or there exists "good cause to the contrary." 25 U.S.C. § 1911(b) (2006). ICWA does not define "good cause." The Bureau of Indian Affairs (BIA) has released non-binding guidelines for denying transfer including reasons like untimeliness of the request and "inconvenient forum." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584-95 (Nov. 26, 1979). However, as many as sixteen states contentiously divide as to whether the court may also consider the child's best interests.

Courts in at least nine states have addressed the issue in favor of "best interests," finding it a relevant consideration in assessing "good cause." Where ICWA left the meaning of "good cause" unexplained, these courts found the statute's stated purpose and legislative history suggest the relevance of the child's best interests. *E.g.*, *In re T.R.M.*, 525 N.E.2d 298, 307-08 (Ind. 1988), *cert. denied*, 490 U.S. 1069 (1989) and

In re T.S., 801 P.2d 77, 80 (Mont. 1990). These courts often refer to the child's best interests as a "primary," "paramount," or "necessary" concern. *See, e.g.*, *In re Robert T.*, 246 Cal. Rptr. 168, 175 (Cal. Ct. App. 1988); *In re Welfare of Children of R.A.J.*, 769 N.W.2d 297, 304 (Minn. Ct. App. 2009). As described by one New Jersey appellate court, the "best interests of the child test is the backbone of American family law and we would be very loathe to ignore that standard in the context of determining whether retention of jurisdiction in the [state court] is warranted." *In re Guardianship of J.O.*, 743 A.2d 341, 348-49 (N.J. Super. App. Div. 2000). Accordingly, courts in Arizona, California, Indiana, Iowa, Minnesota, Montana, Oklahoma, South Carolina, and South Dakota have all given weight to the child's best interests. *In re Maricopa County Juv. Action No. JS-8287*, 828 P.2d 1245, 1251 (Ariz. Ct. App. 1991); *In re Robert T.*, 246 Cal. Rptr. 168, 175 (Cal. Ct. App. 1988); *Crystal R. v. Superior Court*, 69 Cal. Rptr. 2d 414, 424 (Cal. Ct. App. 1997); *In re T.R.M.*, 525 N.E.2d 298, 308 (Ind. 1988), *cert. denied*, 490 U.S. 1069 (1989); *In re P.E.M.*, No. 06-1895, 2007 WL 914185, at *3 (Iowa Ct. App. March 28, 2007); *In Interest of B.M.*, 532 N.W.2d 504, 506-07 (Iowa Ct. App. 1995); *In re Welfare of Children of R.A.J.*, 769 N.W.2d 297, 304 (Minn. Ct. App. 2009); *In re J.W.C.*, 265 P.3d 1265, 1271 (Mont. 2011); *In re T.S.*, 801 P.2d 77, 80 (Mont. 1990); *Matter of M.E.M.*, 635 P.2d 1313, 1317 (Mont. 1981); *Matter of N.L.*, 754 P.2d 863, 869 (Okla. 1988); *In re Adoption of S.W.*, 41 P.3d 1003, 1010 (Okla. Ct. App. 2001); *Chester Cty. Dept. of Social S. v. Coleman*, 372 S.E.2d 912, 915

(S.C. Ct. App. 1988); *In re J.J.*, 454 N.W.2d 317, 331 (S.D. 1990).

On the other hand, courts in seven states have rejected the relevance of "best interests." These courts also cite to the goals of the act, reasoning any best interests consideration "defeats the very purpose for which the ICWA was enacted." *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 169-70 (Tex. App. 1995). Under their reasoning, the determination of best interests "lies with the Tribe." *People in Interest of J.L.P.*, 870 P.2d 1252 (Colo. App. 1994). At last count, courts in Colorado, Illinois, Minnesota, Missouri, New Mexico, North Dakota, and Texas have rejected the relevance of best interests. *People in Interest of J.L.P.*, 870 P.2d 1252, 1258-59 (Colo. App. 1994); *In re Armell*, 550 N.E.2d 1060, 1065 (Ill. App. Ct.), *appeal denied*, 555 N.E.2d 374 (Ill.), *cert. denied*, 498 U.S. 940 (1990); *In re Welfare of R.L.Z.*, No. A09-0509, 2009 WL 2853281, at *5 (Minn. Ct. App. Sept. 8, 2009); *In re C.E.H.*, 837 S.W.2d 947, 954 (Mo. Ct. App. 1992); *In re Guardianship of Ashley Elizabeth R.*, 863 P.2d 451, 456 (N.M. Ct. App. 1993); *In re A.B.*, 663 N.W.2d 625, 634 (N.D. 2003); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 169-70 (Tex. App. 1995). Nebraska's recent switch to this side of the debate brings the state total to eight.[1]

[1] Minnesota appellate courts are split on the "best interests" issue, thus sixteen states are involved in the nine to eight split.

Courts both neutral to and on either side of the debate have recognized the split. *E.g.*, *In the Matter of C.R.H.*, 29 P.3d 849, 854 n.24 (Alaska 2001); *Ex parte C.L.J.*, 946 So. 2d 880, 893-94 (Ala. Civ. App. 2006); *In re Guardianship of J.O.*, 743 A.2d 341, 348 (N.J. Super. App. Div. 2000); *In re Adoption of S.W.*, 41 P.3d 1003, 1009 (Okla. Ct. App. 2001); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 168 (Tex. App. 1995). And at least a few have noted the difficulty of the question. *E.g.*, *In re Guardianship of J.O.*, 743 A.2d 341, 348 (N.J. Super. App. Div. 2000); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 168 (Tex. App. 1995).

Academics have recognized this issue as a "source of confusion" for courts. Note, *The Best Interests of Children in the Cultural Context of the Indian Child Welfare Act in In re S.S. and R.S.*, 28 LOY. U. CHI. L.J. 839, 850 (1997). They have criticized the statute's lack of guidance on the issue as having led to confusion "not only in terms of whether the test is appropriate, but also in the determination of what is in the best interest of an Indian child." Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419, 444 (1998). It remains one of plainest and most polarizing splits in ICWA. *See* B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 398 (1997).

This case presents a unique opportunity for this Court to address the applicability of the "best interests

of the child" doctrine in light of ICWA's transfer provisions. The Nebraska Court of Appeals made specific findings concerning the best interests of Zylena and Adrionna, app. 47a, and those findings were not disputed by the Nebraska Supreme Court. *Id.* at 1a-27a. Instead, the Nebraska Supreme Court determined that ICWA prohibited courts from considering whether a transfer of the proceeding would be in the best interest of the child. *Id.* at 16a. Thus, this case represents a rare opportunity for this Court to determine whether "best interests of the child" should be considered by a state court in an ICWA transfer request without, at the same time, being required to make factual determinations of "best interests."

B. State Courts Are Divided Over What Constitutes an "Advanced State of the Proceeding" When Determining Whether "Good Cause" Exists to Deny Transfer of a Motion to Terminate Parental Rights to the Tribal Court

The BIA Guidelines explain that "good cause" to deny transfer exists where "[t]he proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing." Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,591 (Nov. 26, 1979). The Guidelines, however, are silent as to how to measure the timeline of a child welfare case. As such, courts are divided over what constitutes an "advanced

stage." Essentially, the question is whether filing a motion to terminate parental rights turns the case into a new proceeding, thereby "resetting the transfer clock."

Several courts have looked to a case's history and the length of time a child has been exposed to litigation rather than to metaphysical concepts of the beginning of a "proceeding." Several courts have noted that the "advanced stage" justification for denying transfer serves the child's welfare by protecting the child from endless litigation and uncertainty. *E.g.*, *In re Robert T.*, 246 Cal. Rptr. 168, 173 (Cal. Ct. App. 1988); *In re Welfare of Children of C.V.*, A04-441, 2004 WL 2523127, at *5 (Minn. Ct. App. Nov. 9, 2004). Apparently inspired by such a reading, courts like *In re M.H.*, 956 N.E.2d 510 (Ill. App. Ct. 2011) reject a concept of "proceeding" which resets upon a motion to terminate parental rights. Others have recognized that "[Child in Need of Assistance] and 'termination proceedings are not separate and distinct actions, but are interdependent and interwoven.'" *In re M.M.*, Nos. 1999-235, 98-1944, 1999 WL 1157441, at *2 (Iowa Ct. App. Dec. 13, 1999). Still others view successive child welfare cases "as a continuum," focusing on the uncertainty and delay already imposed on the child by litigation rather than on the date at which termination became a goal. *In re Termination of Parental Rights to Branden F.*, No. 04-2560, ¶11 (Wis. Ct. App. 2005) (Westlaw). Indeed, many courts seem to look at the child's underlying welfare actions as a whole, despite a change in the action's goals. *E.g.*,

In re A.T.W.S., 899 P.2d 223, 226 (Colo. App. 1994); *In re J.J.*, 454 N.W.2d 317, 319 (S.D. 1990).

Courts in other states have explicitly rejected this view, and instead regard a case as a legally distinct "proceeding" where the goals have shifted to include termination of parental rights. The Supreme Court of North Dakota endorsed this view, reasoning that foster care placement and termination of parental rights proceedings serve different purposes, thereby creating separate rights of transfer. *In re A.B.*, 663 N.W.2d 625, 632 (N.D. 2003). The court in *In re Welfare of Children of R.M.B.*, 735 N.W.2d 348, 352 (Minn. App. 2007) similarly admonished the district court for "conflating" these proceedings in its determination of advanced stage. When the Nebraska Supreme Court followed suit in this case, the division between states as to the proper test for untimeliness has solidified this open question into a full-fledged split.

The present cases provide the perfect vehicle for this issue to be addressed by this Court. The Nebraska Supreme Court clearly determined that the statutory language of ICWA required the conclusion that a termination of parental rights filing constitutes a new proceeding. App. at 21a. There are no factual disputes about the timing of the tribe's motion to transfer. *Id.* at 4a. Rather, the only dispute is one of statutory construction – does ICWA compel the conclusion that a motion to terminate parental rights is a new proceeding for purposes of ICWA's transfer provisions?

II. THE ISSUES PRESENTED ARE CRUCIAL TO A LARGE NUMBER OF INDIAN CHILDREN, THEIR PARENTS AND THEIR TRIBES

A. Unresolved Jurisdictional Rules Are Harmful for Indian Children, Their Parents and Their Tribes

Under both state law and ICWA, the welfare of the child is foundational. 25 U.S.C. § 1902 (2006) (including "best interests" as one of the policy justifications behind the ICWA); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152 (Tex. App. 1995) (noting "best interest" as the "backbone" of state child custody law). Yet it is the child whose interests are most disrupted by continued jurisdictional controversy. Indian children can be placed in foster care for years before a transfer request can be made. Only then will the "best interests" and "advanced stage of the proceeding" issues be implicated, at which time issues of attachment disruption, permanency, and finality may have become paramount concerns for the children.

Congress has recognized how harmful it can be to children when they lack permanency in their lives. Thus, when Congress enacted the Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115, (ASFA), it required state welfare systems to act swiftly to provide children with permanent homes, whether that be with their biological parents or with adoptive parents when the biological parents are not able or willing to correct the problems that caused the children to come into foster care initially. In recognition of the harm that a lack of permanency causes

children, ASFA provides that the state is required to initiate or join proceedings to terminate parental rights when the child has remained in an out-of-home placement for fifteen out of the most recent twenty-two months. Adoption and Safe Families Act, Pub. L. No. 105-89, sec. 103, 111 Stat. 2115 (codified as amended at 42 U.S.C. § 675 (2006)).

Given ASFA's accelerated timelines for the establishment of permanency, the clock is always ticking for children. Any time spent navigating split jurisdictional divides is a potentially harmful waste of time in that child's young life. "Nothing is more basic to a child's well-being during the formative years than a stable and loving home environment." *Crystal R. v. Superior Court*, 69 Cal. Rptr. 2d 414, 424 (Cal. App. 1997). Prolonged litigation surrounding jurisdictional issues adds instability and uncertainty, thereby undermining the court's task of assuring children that stability. "Uncertainty as to the outcome of protracted litigation can be detrimental to children, and can interfere with the ability of the child's custodians and caregivers to assist the child." *In re Thomas H.*, 889 A.2d 297, 309 (Me. 2005). *See also,* Michael J. Dale, *State Court Jurisdiction under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 GONZ. L. REV. 353, 391 (1992) ("[t]he result of the jurisdictional battles which occur in state courts in Indian child custody cases is a debilitating disruption in the child's life caused by the seemingly endless litigation process.").

But it is not only children who need certainty and stability around transfer issues. Tribes and parents

also need that certainty. Since tribes can have members in all fifty states, they must know each state's jurisdictional interpretations in order to make good decisions about when and if to request transfer. This is especially difficult when there are splits between jurisdictions, and when some state courts have yet to weigh in on the issues. Parents are in the same position as tribes if their case is in a state which has not yet weighed in on the issue. But, even if their state has declared clear rules, parents must still attempt to guess whether their appellate courts might jump the jurisdictional divide, as just happened in Nebraska.

This Court has recognized the central importance of jurisdiction in ICWA's scheme of protection. In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989), this Court went so far as to describe the jurisdictional provisions in 25 U.S.C. § 1911(a) and (b) as "the heart of the ICWA." Given the central importance of jurisdiction to ICWA, uniformity throughout the fifty states surrounding the factors a state court can take into account in a transfer decision is essential. Uniformity will provide Indian children, their parents, and their tribe with the ability to more accurately predict the consequences which will flow from the timing of their decisions to pursue, or not, transfer of a case.

B. These Issues Recur Often in ICWA Cases

These concerns are all the more potent when one considers that Indian children are involved in child welfare proceedings in much higher proportions than other groups and that a large and growing number live off-reservation, where they are subject to concurrent state jurisdiction. As of 2010, the United States was home to over four million American Indians and Alaska Natives, representing a little over 1% of the United States population. *See* Joyce A. Martin et al., *Births: Final Data for 2010*, 60 Nat'l Vital Statistics Reports 69 tbl.II (2012). Yet they represent over 2% of the national population involved in the child welfare system, a near doubling in proportionate representation. Center for the Study of Soc. Policy, Disparities and Disproportionality in Child Welfare: Analysis of the Research 37 (2011); Children's Bureau, U.S. Dep't of Health & Human Services, Addressing Racial Disproportionality in Child Welfare 3 (2011). While statistical limitations always exist in such studies, the disproportionality of their representation in the child welfare system is apparent, and seems clearly higher than any other racial group. Confirming this point are the disproportionate numbers of neglect and abuse cases. *See* Barbara Ann Atwood, Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 23 (2010). Moreover, by the year 2000, almost two-thirds of American Natives lived off-reservation. *See* Barbara Ann Atwood, Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 21

(2010). And that number is on the rise. *See* Barbara Ann Atwood, Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 58 (2010). From this, it is reasonable to conclude that of the already high proportion of child custody cases involving an Indian child, a majority of those are subject to concurrent state jurisdiction, and therefore to the open questions of transfer jurisdiction. Indeed, "[t]he fact that a majority of Indian families do not reside on Indian lands is of core significance in jurisdictional disputes over custody, adoption, and child welfare placements of Indian children." *See* Barbara Ann Atwood, Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 21 (2010).

That is to say, jurisdictional questions, particularly over transfer jurisdiction, are occurring more frequently in these cases. "With migration across reservation boundaries on the rise and intermarriage between Indians and non-Indians at an all-time high, contentious tribal-state conflicts over child custody regularly surface in tribal court, state court, and occasionally federal court." Barbara Ann Atwood, Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 58 (2010).

C. This Case Pairs Well with *Adoptive Couple v. Baby Girl*

By the time this petition is filed, this Court will have heard oral arguments in a case arising from the

South Carolina Supreme Court. In *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012), *cert. granted*, 133 S. Ct. 831 (2013) (No. 12-399), the two issues of the "existing Indian family doctrine" and the ICWA's definition of "parent" are being litigated. Both of those issues have contributed significant tension and confusion in ICWA adoption cases. Indeed, the "existing Indian family doctrine" has drawn substantial attention as one of the few major open questions in ICWA cases. *E.g.*, B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395 (1997). Alongside these discussions of the existing Indian family doctrine, commentators have often focused heavily on the court confusion as to "good cause" for denying transfer to tribal court. *E.g.*, Michael J. Dale, *State Court Jurisdiction under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 GONZ. L. REV. 353, 380-82, 384-90 (1992); B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 397-98 (1997); Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419, 427-36, 439-44 (1998).

Thus, *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012), *cert. granted*, 133 S. Ct. 831 (2013) (No. 12-399) and this petition present this Court with a unique opportunity to resolve in tandem a majority

of ICWA's most contentious questions – two in the adoption setting and two in the child welfare setting. This would certainly prove to be an effective use of judicial resources, given that the Court would not have to retread the same statutory ground years from now when the child welfare issues raised in this petition appear again before this Court.

III. THE STATE COURT DECISION IS WRONG

A. ICWA Does Not Eliminate "Best Interests of the Child" in Transfer Decisions

The Nebraska Supreme Court held that ICWA prohibits a state court from considering the "best interests of the child" when determining whether "good cause" exists to deny the transfer of an ongoing child welfare case. App. at 16a. The court came to this conclusion by finding that the tribal court can protect the best interests of the child. *Id.* That reasoning, however, obviates the reality that the passage of time has a clear impact on a child and on that child's valid interest in achieving permanency in a reasonable period of time. As noted in the BIA Guidelines, "[l]ong periods of uncertainty concerning the future are generally regarded as harmful to the well-being of children." Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. at 67,591-92 (Nov. 26, 1979).

Early in a foster care case, the tribal court would quite likely be in the same position as a state court as far as its ability to provide for the best interests of the

child. It would therefore be rare, but not inconceivable, at that stage for a "best interests of the child" argument to defeat tribal transfer. This is because, at the beginning of a foster care case, the tribal court is in the same position as the state court as far as placement of the children.

While the "best interests of the child" may not counsel strongly against transfer at the beginning of a foster care case, it becomes increasingly important as the case progresses, and at no point should it be absolutely irrelevant. Indeed, "best interests of the child" is the backbone of family law. *In re Guardianship of J.O.*, 743 A.2d 341, 348-49 (N.J. Super. App. Div. 2000). The Nebraska Supreme Court's outright dismissal of the child's best interests as a factor to consider is quite troubling.

This is especially true given that ICWA's first-stated purpose is to "protect the best interests of Indian children," particularly where two of the other interested parties – the parents and the tribe – already receive a measure of control over transfer, since they both have explicit power to "veto" a transfer request. Could it really be possible that Congress meant for children to have no voice and for their best interests to be given no consideration in such a critical decision about their very lives? Indeed, when the Iowa legislature attempted to eliminate "best interests of the child" as a consideration in transfer decisions, its court system stepped in to hold that a "narrow definition of good cause prohibiting the children from objecting to the motion to transfer based

upon their best interests and introducing evidence of best interests violates their substantive due process rights." *In re J.L.*, 779 N.W.2d 481, 486 (Iowa Ct. App. 2009).

Congress undoubtedly included "good cause" in the formula for several reasons. One of those reasons is to provide children the relief they deserve from the wrongs that adherence to a rigid rule would otherwise inflict. When the Nebraska Supreme Court held that "best interests of the child" has no place in the "good cause" mix, it totally eliminated the child's individualized voice on a potentially life-altering decision. Nothing in ICWA demanded this result. Nothing in ICWA permits this result. This Court has the power to give back to the children their individual voices.

Zylena is almost six years old. App. 2a. She has spent over half of her life in foster care. *Id.* Adrionna is almost four and one-half years old. She has spent all but approximately six months of her life in foster care. *Id.* It is undeniable that these girls deserve permanency. *Id.* For Zylena and Adrionna, a transfer will mean another delay in permanency while their mother tries to complete drug and alcohol treatment – something which she has not been able to do in previous attempts. *Id.* at 47a.

B. ICWA Does Not Mandate that a Termination of Parental Rights Motion Is a "New Proceeding"

The Nebraska Supreme Court held that ICWA requires a state court to treat a motion to terminate parental rights as a "new proceeding" for purposes of determining whether "good cause" exists to deny the transfer of an ongoing child welfare case. App. 21a. In so doing, the court placed unnecessary and unwarranted emphasis on the use of the word "or" in § 1911(b). *Id.* at 16a-17a, 19a-20a.

ICWA says that in a state court proceeding for "the foster care placement of, or termination of parental rights to, an Indian child" living off-reservation must be transferred to the tribe "in absence of good cause to the contrary." 25 U.S.C. § 1911(b) (2006). Given the stringent proof requirements of ICWA,[2] it can reasonably be concluded that most termination of parental rights motions are filed in cases in which Indian children have been in foster care for years. Therefore, the most natural reading of § 1911(b)'s transfer provisions is that cases involving at least one of these two types of hearings are subject to § 1911(b)'s transfer provisions. Indeed, termination of

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[2] "No termination of parental rights may be ordered . . . 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." 25 U.S.C. § 1912(f) (2006).

parental rights filings can occur without a foster care placement, such as those filed in adoption cases. *See, e.g., Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012), *cert. granted*, 133 S. Ct. 831 (2013) (No. 12-399).

Instead of employing this more natural reading, the Nebraska Supreme Court rigidly compartmentalized the on-going foster care case from the termination motion that arose within it. App. 16a-17a, 19a-20a. In so doing, the court ignored both the reality of how termination of parental rights motions emerge within foster care cases and the human toll that its misinterpretation produces.

The BIA Guidelines state that "good cause" to deny a transfer can exist where "[t]he proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing." Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979) (not codified). At least three considerations support this guideline. First is the reality that children naturally form bonds with their foster care providers, and those bonds should not be disrupted unnecessarily. Second, this guideline acknowledges that late transfer requests can cause unacceptable delays which are, in and of themselves, harmful to children. As previously noted, "[l]ong periods of uncertainty concerning the future are generally regarded as harmful to the well-being of children." Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. at 67,591-92

(Nov. 26, 1979). Third, this guideline acknowledges that late transfer requests cause unwarranted delays in the progress of the case itself.

The Nebraska Supreme Court's artificial interpretation of "proceeding" makes a request for transfer which would be unreasonably late in the case as a whole, suddenly timely once the state files a motion to terminate parental rights. To permit a late transfer is to place the rights of the parent or the tribe over those of the child at a time when the child's rights should receive the utmost consideration and emphasis.

As Chief Justice Heavican's dissent notes, tribes have an undeniable interest in protecting the best interests of Indian children. App. 29a. But the stated purpose of ICWA also acknowledges the importance of the child's welfare in these types of cases. 25 U.S.C. § 1902 (2006). Indeed, the mere existence of a "good cause" exemption from mandatory transfer jurisdiction reflects explicit congressional recognition of the other interests which counterbalance those of the tribe. *See In re Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228, 234 (Ariz. Ct. App. 1983); *Crystal R. v. Superior Court*, 59 Cal. App. 4th 703, 720 (Cal. App. Ct. 1998). As Chief Justice Heavican states, "the conclusion that a new 'proceeding' is not initiated by the filing of a motion to terminate parental rights is an appropriate balance of the interests of all the stakeholders in a juvenile case." *Id.* The tribe's interests are adequately protected by requiring notice to the tribe and freely permitting intervention. *Id.* At

the same time, the state has an interest in providing permanency for such children. *Id.* "By curtailing the right of transfer after a certain point, the State is allowed to pursue permanency on behalf of children who are not able to be returned to their parental home." *Id.*

One California court perhaps stated it best: "As the tribe's interest in the proceedings weakens, the state's interest in protecting the best interests of the child assumes more importance." *Crystal R. v. Superior Court*, 59 Cal. App. 4th 703, 720 (Cal. App. Ct. 1998). A rule which prohibits the filing of a termination of parental rights motion to automatically "reset the transfer clock" reflects the appropriate shifting in predominance of interests that naturally occurs over time. Such a rule still provides the tribe and parents with a fair opportunity to transfer a case, but restricts this opportunity once other interests predominate.

In these cases, Zylena's and Adrionna's interest in permanency deserve to predominate. Their cases are at an advanced stage. The Nebraska Supreme Court was wrong when it ordered their cases transferred to the tribal court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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