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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The outcome of a concurrent jurisdictional dispute under the ICWA depends on what constitutes "good cause." Unfortunately, Congress neither defined the phrase "good cause," nor provided any guidance to state courts as to what may properly be considered in a "good cause" analysis. Perhaps if the definition of "good cause" were not central to a jurisdictional determination, the differences which have arisen among state court formulations of "good cause" during the past 35 years could be tolerated. But the jurisdictional provisions of the ICWA lie at its heart, and should have uniform application. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

This lack of a uniform federal understanding of "good cause" means that the jurisdictional outcome for an individual Indian child is solely dependent upon geography, not federal law. This cannot be what Congress intended. Although it may have been appropriate to let state courts work for a time fleshing out "good cause" factors, the lack of uniformity should no longer be tolerated. It is now time for this Court to weigh in definitively on two important and divisive issues within the "good cause" analysis, those being "best interests of the child" and "advanced stage of the proceeding."

I. ICWA'S JURISDICTIONAL PROVISIONS REQUIRE NATIONWIDE UNIFORMITY

Respondent Tribe correctly asserts that this Court's opinion in *Holyfield* places the jurisdictional

provisions at the core of the ICWA, but fails to point out that *Holyfield* also emphasizes the importance of *uniformity* among state courts on the Act's jurisdictional provisions. "Even if we could conceive of a federal statute under which the rules of domicile (*and thus of jurisdiction*) applied differently to different Indian children, a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind." *Id.* at 46 (emphasis added). Since § 1911(b) requires a state court to transfer a proceeding unless the parent or Indian custodian objects or "good cause" exists to deny the transfer, a "good cause" analysis is therefore central to a determination of jurisdiction. If Congress could not have intended the lack of nationwide uniformity of jurisdiction that would result from individual state law definitions of "domicile," it is difficult to believe that Congress intended the lack of nationwide uniformity of a concurrent jurisdictional analysis that has resulted from conflicting state court formulations of "good cause."

Two examples set forth the problem. First, imagine that an Indian child is taken by his parent to Indiana, and thereafter is removed from the parental home. Imagine that the case is adjudicated and a rehabilitative plan is implemented. Imagine that every single fact in the case points to the conclusion that it would *not* be in that child's best interests for the case to transfer to the tribal court, but a parent requests the case be transferred to the tribal court,

anyway. Fortunately for the child, Indiana law provides that "best interests of the child" is a factor which the court can consider in its "good cause" analysis. *In re T.R.M.*, 525 N.E.2d 298, 307-308 (Ind. 1988). Since the child is in Indiana, the case will *not* be transferred to the tribal court because it would not be in that child's best interests.

Now imagine this exact same fact scenario, with the same child, except that it occurred in North Dakota. Unfortunately for the child, the case *will* be transferred to the tribal court even though transfer will not be in the child's best interests, because North Dakota case law prohibits its courts from considering the "best interests of the child" as a factor in its "good cause" analysis. *In re A.B.*, 663 N.W.2d 625, 635 (N.D. 2003).

Now imagine that a child custody proceeding involving an Indian child has been ongoing for years in Illinois, and a termination of parental rights motion has been filed within that case. Imagine that at this late stage of the proceeding a parent requests the case be transferred to the tribal court. In Illinois, that case will *not* be transferred because *In re M.H.*, 956 N.E.2d 510, 522-523 (Ill. App. Ct. 2011) holds that a termination motion does not initiate a new proceeding under the ICWA. Thus, there would be "good cause" for denying a transfer because the request was not timely. On the other hand, if that same Indian child's case is in North Dakota, the case *will* be transferred to the tribal court. That is because the North Dakota Supreme Court requires its courts

to find that a motion to terminate parental rights in an existing case initiates a new proceeding. Thus, in North Dakota, the "transfer clock" starts over for purposes of determining whether "good cause" exists to deny the transfer. *In re A.B.*, 663 N.W.2d at 632. In both examples, geography has dictated differing results.

These differing results cannot be tolerated, as they are in direct conflict with this Court's ruling in *Holyfield*. As *Holyfield* states, the general assumption is that, "in the absence of plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Id*. at 43. "One reason for this rule of construction is that federal statutes are generally intended to have uniform nationwide application." *Id.*

As shown by the two examples above, it is abundantly clear that this federal statute is not receiving uniform nationwide application. Again, taking into account this Court's ruling in *Holyfield*, it likewise follows that Congress also did not intend the lack of uniformity that has resulted from state court formulations of "good cause." Although Congress may have envisioned some flexibility within the concept of "good cause" to account for unforeseen unique circumstances, it could not possibly have intended that some states would prohibit consideration of a certain factor that other states find vital to the "good cause" analysis. Clearly, "best interests of the child" and "advanced stage of the proceeding" are two recurrent and

important facets of a "good cause" determination which deserve nationwide uniformity.

II. THE DIVISION AMONG STATE COURTS WARRANTS REVIEW

Respondent Tribe contends that this Court should not grant this petition for certiorari because the division among the states over two facets of the "good cause" analysis – "best interests of the child" and "advanced stage of the proceeding" – has not generated a pervasive conflict of judicial authority in courts of last resort. Respondent Tribe concedes, however, that there were sixteen state courts involved in the "best interests" split, six of which were courts of last resort in those states. Opp. 13-15. In contrast, the "conflict" recognized by this Court in *Holyfield* involved only *four* state courts, only *two* of which were courts of last resort in those states. *Holyfield*, 490 U.S. at 41. Despite that, this Court granted certiorari "[b]ecause of the centrality of the exclusive tribal jurisdiction provision to the overall scheme of the ICWA. . . ." *Holyfield*, 490 U.S. at 41. Additionally, the divide on "advanced stage of the proceeding" at the time of the writing of Petitioner's brief involved three state supreme court decisions and seven appellate court decisions. Pet. 18-19.

Courts are still wrestling with this jurisdictional "good cause" analysis. Just this week, the Virginia Court of Appeals weighed in on both the "best interests of the child" and the "advanced stage of the

proceeding" components of "good cause" in the case of *Thompson v. Fairfax County Dept. of Family Services*, 4788747 (Va. App. 2013). Given the centrality of the concurrent jurisdiction provision to the overall scheme of the ICWA, and the conflict existing now among *19* states on these two issues, this Court should grant certiorari.

III. THIS CASE RAISES IMPORTANT FEDERAL QUESTIONS WHICH WARRANT REVIEW

Respondent Tribe argues that this Court should not grant certiorari in this case because the Nebraska Supreme Court was simply misinterpreting a non-binding BIA Guideline, not misinterpreting a federal statute. Opp. 19-22. Nothing could be further from the truth. First, the "best interests of the child" component in the "good cause" analysis does not appear at all in the BIA guidelines, and the Nebraska Supreme Court clearly held its interpretation of the Act itself prohibited a "best interests" consideration. Second, the Nebraska Supreme Court concluded that the actual length of time a case has been open in state court is not a proper consideration in the "good cause" analysis because of the use of the word "or" between the words "foster care placement" and "termination of parental rights" in Section 1911(b) of the ICWA. This also clearly involves statutory interpretation. Suppose for a minute that the "advanced stage of the proceeding" language from the BIA Guidelines did not exist. State courts would still be faced with

determining whether the fact that a case had been ongoing for years was a factor to consider in its "good cause" analysis.

This Court has the authority and the duty to define "good cause" in some way that provides guidance to state courts. It can provide state courts either with factors which must be considered when conducting the "good cause" analysis, or with factors which must not be considered when conducting that analysis. Either or both is necessary. As discussed in *Holyfield*, it is the lack of uniform interpretation of the statutory phrase "good cause" that raises an important federal question which warrants review by this Court.

IV. *ADOPTIVE COUPLE V. BABY GIRL* WARRANTS REVIEW OF THIS CASE

Respondent Tribe asserts that *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013) has no bearing on this case. Apparently, Respondent Tribe has failed to fully appreciate several of the points this Court made in *Baby Girl* which are directly relevant to this case. First, in *Baby Girl*, this Court reiterated its stance that the primary intent of the ICWA was to provide enhanced nationwide protection for Indian children who were being removed from their families by state agencies. Since the focus of the ICWA really is about a "child's welfare," and the Court has recently been reviewing and interpreting this Act, now is the best time for this Court to provide guidance to state courts

on two of the most contentious areas of conflict within the statutory scheme of concurrent jurisdiction.

This Court's holdings in *Baby Girl* clearly recognize that certain interpretations of the ICWA can have devastating consequences for Indian children – namely the potential to dissuade people from seeking to adopt Indian children. This Court recognized the disadvantage that the Act could cause Indian children if adoptive parents were required to provide a biological parent with "active efforts" to prevent the breakup of the Indian family. As this Court stated: "[i]f prospective adoptive parents were required to engage in the bizarre undertaking of 'stimulat[ing]' a biological father's 'desire to be a parent,' it would surely dissuade some of them from seeking to adopt Indian children. *And this would, in turn, unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home,* even in cases where neither an Indian parent nor the relevant tribe objects to the adoption." *Adoptive Couple v. Baby Girl*, 133 S.Ct. at 2563-2564 (emphasis added).

Although this Nebraska Supreme Court case is not an adoption case, similarly devastating consequences will result if this Court does not reverse it. In one fell swoop, the Nebraska Supreme Court made all Indian foster children, and foster children who might possibly qualify as Indian children, less desirable to foster because the state court system is prohibited from considering their best interests when a request is made to transfer their cases to the tribal court. In

one fell swoop, the Nebraska Supreme Court made all Indian foster children, and foster children who might possibly qualify as Indian children, less desirable to foster because the state court system is prohibited from considering that years have gone by and bonds have been forged with loving foster parents when a request is made to transfer their cases to the tribal court. In essence, in one fell swoop, the Nebraska Supreme Court made all Indian foster children, and foster children who might possibly qualify as Indian children, second class citizens.

This Court must keep in mind that Respondent Tribe did not even recognize Zylena as eligible for membership in the tribe until two years and seven months had gone by in her case. Only when a motion to terminate parental rights was filed did the tribal court determine that Zylena and her sister Adrionna were eligible for enrollment in the tribe. Only after these children had bonded and attached to their foster parents and termination of parental rights was looming did the tribal court move to transfer the cases.

This Court has made it clear both in *Holyfield* and in *Baby Girl* that the ICWA was designed as a shield to protect Indian children from being removed from their homes by "overeager" state welfare agencies. The Act put protections into place that ensured Indian children were shielded from cultural bias, both intended and unintended. The Nebraska Supreme Court's interpretation of the ICWA, however, turns the Act from the shield that Congress intended for

Indian children into a sword that Congress clearly did not intend.

This Court's ruling in *Baby Girl* also points out how certain interpretations of the ICWA can result in it being utilized as a sword. As this Court stated: "[u]nder the State Supreme Court's reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor, even a remote one, was an Indian. As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child in utero and refuse any support for the birth mother – perhaps contributing to the mother's decision to put the child up for adoption – and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian child under the ICWA." *Baby Girl*, 133 S.Ct. at 2565.

Similarly, the Nebraska Supreme Court's interpretation of the ICWA encourages a tribal court's transfer request to be used as a sword at the eleventh hour to stall proceeding and to even override the best interests of Indian children. If the Nebraska Supreme Court's interpretation of the ICWA is allowed to stand, a tribe could, similarly to the father in *Baby Girl,* "abandon" its Indian child in the state court system, and refuse to provide any assistance to that child or to that child's parent, perhaps contributing to that parent's inability to correct the conditions of

neglect, and then play the tribe's "ICWA trump card at the eleventh hour" to override the child's best interests.

V. THE DECISION BELOW IS WRONG

Nothing in the ICWA prohibits state courts from utilizing a "best interests" or an "advanced stage of the proceeding" analysis when determining whether "good cause" exists to deny the transfer of an ongoing child welfare case.

First, Respondent Tribe concedes that the purpose of the ICWA is to protect the best interests of Indian children. Opp. 3. Additionally, in *Baby Girl*, this Court recognized the interplay of "best interests" in the ICWA when it reversed the State Supreme Court's reading of the Act so that an Indian father could not utilize the ICWA to override a mother's decision and the child's best interests. The statutory language at issue in *Baby Girl*, specifically §§ 1912(d) and (f) made no mention of "best interests of the child"; still, this Court recognized the implicit goal of protecting the best interests of the child that runs throughout the ICWA. This Court has determined that the primary focus of the ICWA is the "unwarranted *removal* of Indian children from Indian families. . . ." *Baby Girl*, 133 S.Ct. at 2561. In this case, the Tribe's transfer motion was made years after these Indian children had been removed from the home. Only after the termination of parental rights motion was filed did the Tribe file its motion to

transfer. The court's denial of the transfer motion did not implicate any of the unwarranted *removal* problems the ICWA intended to solve; rather it protected the well-being of the children and their pursuit of permanency.

Second, the Nebraska Supreme Court's "new proceeding" holding provides no incentive for the tribes to transfer cases early in the removal process. Instead, it actually encourages tribes to wait and see. Let the state adjudicate the children and then provide (and pay for) necessary services for the parents and foster care for the children for years. When the state moves to sever the parent-child relationship to provide the children permanency, then step in and request a transfer. In other words, use ICWA's transfer provisions as a sword when you don't like what the state court is doing. Certainly this cannot be what Congress intended.

Respondent Tribe seems to mistakenly believe that a termination of parental rights proceeding does something more than sever parental rights. Indeed, Respondent Tribe makes an argument that Petitioner's requested relief in this case would create a situation that would require "tribes and parents who do not in fact object to state court jurisdiction over foster care proceeding [to] nonetheless seek transfer, lest their opposition to future proceeding seeking to permanently and irrevocably sever family *and tribal ties* be rejected as untimely." Opp. 7-8 (emphasis removed and added.) Nothing in the record of this case supports this claim that a termination of

parental rights finding severs tribal ties. In fact, the record in this case makes it abundantly clear that the strongest form of tribal ties, that is, membership in the tribe, is calculated solely based on blood quantum, not current legal relationship to a person's ancestors.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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