No. 12-1278

In The
Supreme Court of the United States

STATE OF NEBRASKA,

Petitioner,

v.

ELISE M. AND OMAHA TRIBE OF NEBRASKA,

Respondents.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

RESPONDENT OMAHA TRIBE OF NEBRASKA'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. When determining jurisdiction of a child custody proceeding under ICWA, is the state court required to consider "the best interests of the child"?

2. When determining whether the proceeding should transfer to the jurisdiction of the Tribe, does ICWA allow a state court to treat a termination of parental rights proceeding as a separate child custody proceeding from a foster care proceeding?

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STATEMENT

This case arises from a decision by the Nebraska Supreme Court involving both the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, and the Nebraska Indian Child Welfare Act ("NICWA"), Neb. Rev. Stat. §§ 43-1501 to -1516. Petitioner incorrectly claims that the Nebraska Supreme Court's decision regarding § 1911(b) of ICWA warrants review by this Court. The Nebraska Supreme Court correctly interpreted and applied § 1911(b). This case does not present an important question of federal law. Denial of the Petition for Writ of Certiorari is proper because no compelling reason exists to hear the case.

A. Statutory Background

Congress enacted ICWA in 1978.[1] Primarily, ICWA stemmed from a growing tribal and federal concern in the late 1960s and early 1970s that the intentional and unintentional practices of non-tribal public and private child welfare agencies led to the disproportionate, wholesale, and often unwarranted, separation of Indian children from their families. *Miss. Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 32-33 (1989). This separation usually led to the subsequent permanent placement of those children in non-Indian foster or adoptive homes and institutions.

[1] The Nebraska Unicameral enacted NICWA in 1985 in substantially the same form as the federal ICWA. Neb. Rev. Stat. §§ 43-1501 to -1516 (Reissue 2008).

25 U.S.C. § 1901(4) (2006). These practices eventually reached a level that caused tribes to fear for their survival. By 1974, so many tribal children were lost to the states' foster care systems and public and private adoption agencies that the tribes' survival had become a "crisis . . . of massive proportion." H.R. REP. NO. 95-1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532.

Congress specifically found, "that the states, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5) (2006). Recognizing there is no source more vital to this preservation than the Indian children, Congress declared that:

> it is the policy of this Nation to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1902 (2006).

Petitioner's claim that the purpose of ICWA is to seek "balance" of Indian children's interest against their families' and the tribes' interests is not accurate. *See* Pet. at 4. The purpose of ICWA is to protect the best interests of Indian children, which is done by giving tribal courts exclusive or presumptive jurisdiction. *Holyfield*, 490 U.S. at 36 ("At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings."); 25 U.S.C. § 1902 (2006) ("The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children. . . ."). "Section 1911(b) . . . creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation." *Id*. Thus, even when the state court may have concurrent jurisdiction, ICWA mandates the proceeding be transferred to the tribal court, absent good cause to the contrary or objection by either parent, the Indian custodian or the tribe. 25 U.S.C. § 1911(b) (2006). Section 1911(b) is a purely jurisdictional statute.

B. Factual Background

The Respondent does not dispute the statements in subsection "B. Factual Background" in the Petition for Writ of Certiorari except:

In *November of 2010*, not November of 2009, the juvenile court changed the permanency objective from reunification to adoption. Pet. App. at 4a.

C. Proceedings Below

The Respondent admits the statements in subsection "C. Proceedings Below" in the Petition for Writ of Certiorari. However, the following facts are material to the questions presented.

The Nebraska Supreme Court reversed the Court of Appeals and the juvenile court holding that "there is no basis on the records for a determination that the motions to transfer these cases to tribal court were filed at an advanced stage of the proceedings to terminate parental rights." Pet. App. at 27a. The Nebraska Supreme Court held so by interpreting the Bureau of Indian Affairs ("BIA") Guideline phrase "[t]he proceeding was at an advanced stage" to mean advanced stage of either a foster care placement or a termination of parental rights proceeding. *Id.* at 17a. Because the Tribe had requested a transfer shortly after the termination of parental rights proceedings was filed, good cause to deny a transfer did not exist. *Id.* at 21a. The Nebraska Supreme Court also determined that the Nebraska Court of Appeals had improperly considered the best interests of the child in its jurisdictional decision to deny transfer. *Id.* at 26a. The Nebraska Supreme Court opined "recognizing best interests as 'good cause' for denying transfer permits state courts to decide that it is not in the best interests of Indian children to have a tribal court determine what is in their best interests." *Id.*

Both the Nebraska Court of Appeals and the Nebraska Supreme Court independently rested their

decisions on NICWA, Nebraska's version of ICWA. *See* Pet. App. at 17a, 25a, 42a. The Nebraska Court of Appeals relied solely on NICWA and failed to cite any provision in the federal ICWA in its ruling. *See generally*, Pet. App. at 42a-49a. The Nebraska Supreme Court determined that the "plain language of ICWA and NICWA" supported its conclusion that the child custody proceeding was not at an advanced stage when transfer was requested. Pet. App. at 17a. Similarly, that court concluded non-consideration of best interests is "consistent with the underlying purpose of ICWA and NICWA." Pet. App. at 25a.

REASONS FOR DENYING THE PETITION

No further review of the Nebraska Supreme Court's decision is warranted. First, the Nebraska Supreme Court's construction of ICWA's jurisdiction provision, § 1911(b) is correct. The statute does not seek to "balance" the interests of Indian children *against* those of tribes and Indian parents. Congress expressly recognized that children's "best interests" are *promoted by* jurisdictional and substantive rules that prefer tribal courts and aim to prevent severing of tribal relations. Both the text of § 1911 and this Court's decision in *Holyfield* make clear, moreover, that jurisdiction and substance under ICWA are entirely distinct; by including a "good cause" exception in the otherwise mandatory transfer provision, Congress did not intend for state courts to conduct complex, fact-intensive "best interests" analyses *at the*

jurisdictional threshold. Indeed, a rule that allows transfers to tribal court of only those proceedings where a state judge is convinced that tribal jurisdiction is in the "child's best interests" (including, as here, "best interests" judgments reflecting the state court's views about what the ultimate disposition should be) overturns ICWA's express jurisdictional preference and invites the sort of disregard for "the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities" that led Congress to enact the statute in the first place. 25 U.S.C. § 1901(5) (2006).

Contrary to Petitioner's claims, the best interests question has not generated an "intolerable" or pervasive conflict of judicial authority. Only four state courts of last resort have ever embraced Petitioner's best interests theory – none in the past two decades and only one in the twenty-four years since this Court's pathmaking *Holyfield* decision. (No Justice of the Nebraska Supreme Court sided with Petitioner on this question). The weight of recent and better-reasoned authority accords with the decision below; and even more telling, the supposedly critical issue has gone unaddressed by high courts in forty-four states in the thirty-five years since Congress enacted the provision.

Finally, even if the question were one warranting this Court's attention, this case would not be an appropriate vehicle for resolving it. The *trial court* did not ground its transfer decision on findings concerning these children's best interests; that rationale was

introduced for the first time by the intermediate appellate court (which said it was applying Nebraska, rather than federal, law). Moreover, even if there was any room for considering children's best interests as part of a jurisdictional determination, the version embraced by the intermediate court below – where "good cause" language would empower state courts to refuse transfer because *they disapprove of the expected outcome in tribal court* – is manifestly impermissible under ICWA.

Nor does the second question presented warrant this Court's intervention. Far from implicating a conflict among state courts of last resort on an important question of federal law, *see* SUP. CT. R. 10, the division of authority Petitioner alleges concerns the interpretation of a decades-old *non-binding* administrative BIA Guideline, and *no* state court of last resort has resolved the question as Petitioner proposes or in a manner that conflicts with the Nebraska Supreme Court's decision below.

To the extent there is some disagreement on the question among lower state courts, moreover, those taking the Nebraska Supreme Court's view are plainly correct – the text of ICWA strongly supports treating permanent and foster care placement proceedings as distinct. The logic of Petitioner's rule would be that tribes and parents who *do not in fact* object to state court jurisdiction over foster care proceedings must nonetheless seek transfer, lest their opposition to *future* proceedings seeking to permanently and irrevocably sever family and tribal ties

be rejected as untimely. In fact, Petitioner could prevail here only if the Court ruled that the statutory "good cause" language (as filtered through the BIA Guideline) somehow *forbids* states from taking account of basic differences between temporary placement and permanent termination proceedings involving Indian children and *requires* states to treat the two as a single proceeding, a rule that (in addition to violating plain statutory language) would flout *both* states' historic powers to shape family law *and* Congress' protective purposes in enacting ICWA.

Considerations of certainty, uniformity or administrability do not support the rule Petitioner invites the Court to impose. On the contrary, the regime on best interests the Petitioner urges would require fact-intensive and protracted *jurisdictional* proceedings (and appeals) before courts could ever reach the merits of child placement proceedings. And the regime Petitioner seeks, whereby each state decides for itself how, if at all, to incorporate a best interests analysis at the jurisdictional threshold or to treat all child custody proceedings as one prolonged proceeding, does not even have the *potential* to bring interstate uniformity.

Finally, the fact that this Court recently reviewed and decided *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), which did not concern transfer, but rather, raised questions of statutory interpretation of a different ICWA section, is not a compelling ground for granting certiorari. This Court should deny the Petition for Writ of Certiorari.

I. THE QUESTION OF WHETHER ICWA REQUIRES STATE COURTS TO CONSIDER THE "BEST INTERESTS OF THE CHILD" UNDER § 1911(b) DOES NOT WARRANT REVIEW

A. The Nebraska Supreme Court Correctly Determined that ICWA Does Not Authorize State Courts to Consider the Best Interests of the Child When Applying the Presumptive Tribal Jurisdiction Provisions in § 1911(b).

Even when the state court may have concurrent jurisdiction, ICWA mandates the proceeding be transferred to the tribal court, absent good cause to the contrary or objection by either parent, the Indian custodian or the tribe. 25 U.S.C. § 1911(b) (2006). The Nebraska Supreme Court properly rejected the Petitioner's argument that "good cause" to deny transfer can be based on the best interests of the Indian child.

Nothing in the statutory language supports interjecting best interests into the term "good cause." The term "best interests" is not used in § 1911(b). If Congress had meant for the Indian child's "best interests" to be a part of the jurisdictional analysis, Congress would have said so. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' "). Congress knew how to use the term "best interests" when it wanted to. *See, e.g.*, 25 U.S.C.

§ 1912(b) (2006) ("The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child."); 25 U.S.C. § 1916(a) (2006) ("that such return of custody is not in the best interests of the child."). Besides the statutory language, the BIA Guidelines notably do not suggest that the Indian child's best interests may be good cause to deny transfer.

The purposes of ICWA would be frustrated by having a best interests analysis performed at the jurisdictional stage. The Nebraska Supreme Court astutely noted that allowing a best interests analysis into the jurisdictional stage "permits state courts to decide that it is not in the best interests of Indian children to have a tribal court determine what is in their best interests." Pet. App. at 26a. Reading best interests into § 1911(b) permits state courts to stand in judgment of what the tribal courts may do and to deny transfer if the expected tribal court outcome is different than what the state court thinks is appropriate. Congress enacted ICWA to prohibit that very action. *See* 25 U.S.C. § 1901(5) (2006).

This Court's decision in *Holyfield* supports the Nebraska Supreme Court's reasoning. *Miss. Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 53 (1989). In *Holyfield*, the issue was whether the adoption of an Indian child had been granted by a state court without jurisdiction, due to the exclusive jurisdiction of tribal courts over a child who resides or is domiciled within the reservation of such tribe. *Id.* at 53. There, three years had passed since the time of the

adoption. In deciding the case, this Court stressed the procedural nature of the statute. In holding that adoption to be void for lack of jurisdiction, this Court noted that "[w]e have been asked to decide the legal question of who should make the custody determination concerning these children – not what the outcome of that determination should be." *Id*. While the Court was mindful of the bonding that had occurred, which is a traditional consideration under a best interests analysis, it still made the proper jurisdictional decision. *Id*. (noting that "Three years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain. Whatever feelings we might have as to where the twins should live, however, it is not for us to decide that question. . . . The law places that decision in the hands of the Choctaw tribal court.").

This Court in *Holyfield* also directed that § 1911(b) presumes tribal jurisdiction because "ICWA designates the tribal court as . . . the preferred forum for nondomiciliary Indian children." *Holyfield,* 490 U.S. at 36, 52 (citing *In re Adoption of Halloway*, 732 P.2d 962, 969-70 (Utah 1986)). Jurisdictional provisions of ICWA limit the state court to "decide the legal question of who should make the custody determination" and not "what the outcome of that determination should be." *Holyfield,* 490 U.S. at 53. Utilizing a best interests analysis at the jurisdictional stage wrongly interjects the question of what the outcome for the child should be rather than who should make that decision.

The Nebraska Supreme Court chose the interpretation that is the most sensible and reasonable. Section 1911(b) is a statute dealing with jurisdiction, not the merits of the child custody proceeding. Interjecting a best interests analysis would morph a pragmatic jurisdictional question into a fact intensive inquiry. It would cause two trials rather than one. Additionally, it is nonsensical to infer that Congress meant to give state courts the ability to apply their own best interests analysis at the jurisdictional stage when the entire ICWA was enacted to prevent states from applying their non-Indian views of what was in the Indian child's best interest. *See* 25 U.S.C. § 1901(5) ("the States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.").

Given the statutory language, purpose, and practical considerations of ICWA, the Nebraska Supreme Court properly determined that state courts are not authorized to consider the best interests of the Indian child when ruling on a motion to transfer jurisdiction under § 1911(b). The Nebraska Supreme Court correctly interpreted and applied § 1911(b) in this case.

B. Very Few State Courts of Last Resort Conflict Over Whether ICWA Prohibits State Courts from Considering an Indian Child's Best Interests When Applying § 1911(b).

The Petitioner's portrayal of the differing state court opinions on the definition of "good cause" as an "intolerable" conflict is significantly overstated. *See* Pet. at 11. The majority of cases within this conflict the Petitioner cites are not cases from state courts of last resort. Pet. at 14-15. Conflict between lower appellate courts is not a compelling reason to grant certiorari. SUP. CT. R. 10(b).

Only six of the states' highest courts over the thirty-five years of ICWA's existence have decided whether ICWA prohibits a best interests analysis when determining whether good cause to deny a transfer exists. *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 J.J.*, 454 N.W.2d 317, 331 (S.D. 1990); *In re T.R.M.*, 525 N.E.2d 298, 308 (Ind. 1988), *cert. denied*, 490 U.S. 1069 (1989); *In re A.B.*, 663 N.W.2d 625, 634 (N.D. 2003); *In re Zylena R.*, 825 N.W.2d 173, 186 (Neb. 2012). The states which used a best interests test did so without significant analysis. The first state to do so was Montana in its 1981 decision in *Matter of M.E.M.* However, in *Matter of M.E.M.*, the Montana Supreme Court failed to provide any reasoning or discussion behind its decision. Instead, the Montana Supreme Court simply stated a rule that good cause can be shown by examining the best

interests of the child. *Matter of M.E.M.*, 635 P.2d at 1317. This decision was made without the benefit of this Court's decision in *Holyfield*. The Oklahoma, Indiana, and South Dakota Supreme Courts then all blindly followed the Montana Supreme Court's decision. In each case, the state supreme court failed to engage in any significant analysis or discussion but merely cited the Montana Supreme Court's decision in *Matter of M.E.M. See Matter of N.L.*, 754 P.2d at 869; *In re J.J.*, 454 N.W.2d at 331; *In re T.R.M.*, 525 N.E.2d at 307-08. The last of these three state supreme courts to follow *Matter of M.E.M.* was in 1990.[2] No other state court of last resort has agreed with those four state supreme courts since then.

Two of the states' highest courts have decided that ICWA prohibits a best interests analysis under § 1911(b).[3] The North Dakota Supreme Court decided

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[2] In 2011, the Montana Supreme Court cited its earlier decision and rule from *Matter of M.E.M.* in *In re J.W.C.* but did so in dicta, as it stated that "the issue of good cause was never reached, so we need not further address this exception." *In re J.W.C.*, 265 P.3d 1265, 1271 (Mont. 2011).

[3] Similarly, the recent trend of lower court cases on this issue show that the courts are overwhelmingly deciding as the Nebraska Supreme Court did. When the lower courts facing this issue have engaged in analysis and discussion, they agree with the Nebraska Supreme Court's decision. *People in Interest of J.L.P.*, 870 P.2d 1252, 1258-59 (Colo. App. 1994); *In re Armell*, 550 N.E.2d 1060, 1064-66 (Ill. App. Ct. 1990), *appeal denied*, 555 N.E.2d 374 (Ill. 1990), *cert. denied*, 498 U.S. 940 (1990); *In re Welfare of R.L.Z.*, No. A09-0509, 2009 WL 2853281, *5-6 (Minn. Ct. App. Sept. 8, 2009); *In re C.E.H.*, 837 S.W.2d 947, 953-54 (Mo. Ct. App. 1992); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d

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this way in 2003, and the Nebraska Supreme Court did so most recently in this case. *In re A.B.*, 663 N.W.2d 625, 634 (N.D. 2003); *In re Zylena R.*, 825 N.W.2d 173, 186 (Neb. 2012). Only six of the states' highest courts have addressed the best interests issue. If this were an important issue to states, more than just six of the states' highest courts over the

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152, 168-71 (Tex. Ct. App. 1995); *c.f.*, *In re Guardianship of Ashley Elizabeth R.*, 863 P.2d 451 (N.M. Ct. App. 1993) (agreeing with the court in *Armell* but doing so without significant discussion or analysis).

Of the lower court cases cited in the Petition that have sided in favor of using the best interests analysis to determine good cause, they either ruled so because they were bound by their state's highest court (i.e., they were a lower court in Oklahoma or Montana) or altogether failed to engage in any significant analysis or discussion of the issue. *In re Maricopa County Juvenile Action No. JS-8287*, 828 P.2d 1245, 1251 (Ariz. Ct. App. 1991) (stating briefly, without further analysis, the rule and citing *Matter of M.E.M.*, *Matter of N.L.,* and 25 U.S.C. § 1902); *In re Robert T.*, 246 Cal. Rptr. 168, 175 (Cal. Ct. App. 1988) (merely citing *Matter of M.E.M.* and 25 U.S.C. § 1902); *In Interest of B.M.*, 532 N.W.2d 504, 506 (Iowa Ct. App. 1995) (failing to cite to any case that supports the issue); *In re Welfare of Children of R.A.J.*, 769 N.W.2d 297, 304 (Minn. Ct. App. 2009) (only citing one general state law provision on best interests); *Chester Cty. Dept. of Social S. v. Coleman*, 372 S.E.2d 912, 915 (S.C. Ct. App. 1988) (stating the rule in passing without discussion or citation). Petitioner also lists the following cases in support, but these discussed or alluded to the issue only in dicta. *Crystal R. v. Superior Court*, 69 Cal. Rptr. 2d 414, 424 (Cal. Ct. App. 1997) (recognizing the rule only in dicta); *In re P.E.M.*, No. 06-1895, 2007 WL 914185, *2-3 (Iowa Ct. App. March 28, 2007) (failing to cite any authority and determining that the issue was waived and appellant mother lacked standing to bring the challenge).

thirty-five years of ICWA's existence would have given it attention.[4]

The movement toward declining to interject a best interests analysis into the jurisdictional stage of a child custody proceeding likely results from this Court's clear direction to state courts in *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 53 (1989). The two most recent states' highest courts faced with this issue were decided in the post-*Holyfield* era. Both correctly followed *Holyfield*'s direction that jurisdictional provisions of ICWA limit the state court to "decide the legal question of who should make the custody determination" and not "what the outcome of that determination should be." *Miss. Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 53 (1989).

In *In re A.B.*, the North Dakota Supreme Court cited *Holyfield* and emphasized that "[a]lthough one of the goals of ICWA is to protect the best interests of an Indian child . . . the issue here is the threshold

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[4] It is also noteworthy that, while there were several early attempts to seek Supreme Court interpretation on the use of best interests in the good cause determination, each petition for certiorari was denied. *Matter of Appeal in Pima Cnty. Juvenile Action No. S-903*, 635 P.2d 187, 192 (Az. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); *In re T.R.M.*, 525 N.E.2d 298 (Ind. 1988), *cert. denied*, 490 U.S. 1069 (1989); *In re Armell*, 550 N.E.2d 1060 (Ill. App. Ct.), *appeal denied*, 555 N.E.2d 374 (Ill. 1990), *cert. denied*, 498 U.S. 940 (1990); *In re T.S.*, 801 P.2d 77, 80 (Mont. 1990), *cert. denied*, 500 U.S. 917 (1991). No petitions for certiorari have been filed on this issue since 1991.

question regarding the proper forum for that decision." *In re A.B.*, 663 N.W.2d at 633-34. Similarly, the Nebraska Supreme Court followed *Holyfield* in stating that denying transfer based on the "best interests of the child negates the concept of 'presumptively tribal jurisdiction' over Indian children who do not reside on a reservation." *In re Zylena R.*, 825 N.W.2d at 186 (citing *Holyfield*, 490 U.S. at 36-37). *Holyfield* gave the North Dakota Supreme Court and the Nebraska Supreme Court the guidance necessary to properly determine that best interests has no place in the jurisdictional decision of whether to deny transfer.

A thorough review of the cases cited in the Petition reveals only minimal conflict. The courts that engaged in analysis on the issue overwhelmingly all side with the Nebraska Supreme Court. Further, the recent post-*Holyfield* states' highest courts have demonstrated that states do not need direction from this Court on this issue again.

II. THE QUESTION OF WHETHER A TERMINATION OF PARENTAL RIGHTS PROCEEDING AND A FOSTER CARE PROCEEDING ARE SEPARATE PROCEEDINGS UNDER § 1911(b) DOES NOT WARRANT REVIEW

A. The Nebraska Supreme Court Correctly Determined that ICWA Allows a State Court to Treat a Termination of Parental Rights Proceeding and a Foster Care Proceeding as Separate Proceedings When Determining Whether the Child Custody Proceeding Should Transfer to the Jurisdiction of the Tribe.

The Nebraska Supreme Court correctly applied a plain language analysis to determine that a termination of parental rights proceeding and a foster care proceeding, each with different purposes and consequences, should not be treated as a single proceeding. The court then appropriately held that because the termination of parental rights proceeding had barely begun when the Tribe moved to transfer, the proceeding was not at an advanced stage.

Section 1911(b) of ICWA provides that "[i]n any State court proceeding for the foster care placement of, **or** termination of parental rights to, . . . the court, in the absence of good cause to the contrary, **shall** transfer **such proceeding** to the jurisdiction of the tribe. . . ." 25 U.S.C. § 1911(b) (emphasis added). The plain language of the statute supports the Nebraska Supreme Court's decision. The ordinary and plain language of ICWA's transfer provision identifies two

"child custody proceedings" subject to transfer: (1) foster care proceedings and (2) termination of parental rights proceedings. The definition sections of ICWA and NICWA also identify each as a separate proceeding serving a different purpose, which are not interchangeable. The purpose of a "foster care placement" proceeding is to obtain reunification with the parent(s) or tribal family whereas the purpose of a termination of parental rights proceeding is to end reunification efforts and legally sever the parent/child relationship. 25 U.S.C. § 1903(1) (2006). Failing to object to a foster care placement should not be treated as a waiver to object to a termination of parental rights.

The Petitioner's complaint is not that the Nebraska Supreme Court did not follow the statute, but rather that the court's interpretation of a non-binding BIA Guideline was erroneous. *See infra* at Section II(B) for discussion and citations to Petitioner's Appendix. When applying the BIA Guideline that good cause to deny transfer may exist when a proceeding is at an advanced stage, the court may examine the foster care placement proceeding and the termination of parental rights proceeding separately.

Petitioner frames this issue as whether ICWA requires state courts to treat the two proceedings separately when determining whether good cause to deny transfer exists. The real question is whether ICWA forbids a state court to treat them separately. The answer is "no" given the plain language of the

statute. The Nebraska Supreme Court committed no error here.

B. There is No Conflict Among State Courts of Last Resort Regarding Whether a Termination of Parental Rights Proceeding and a Foster Care Proceeding Are Separate Child Custody Proceedings.

Petitioner has manufactured the alleged conflict between state courts on whether these separate child custody proceedings with different purposes and consequences should be treated as one proceeding. There is no conflict between the states' highest courts on this issue.

Only two states' supreme courts have addressed this issue – North Dakota in *In re A.B.* and Nebraska in this case. Both agreed that a foster care placement proceeding and termination of parental rights proceeding create separate rights of transfer. *In re A.B.*, 663 N.W.2d at 632; *In re Zylena R.*, 825 N.W.2d at 184. There is no split between state courts of last resort on this issue. If this were an important and critical issue, it would have arisen in more than just two states' highest courts during the thirty-five years of ICWA's existence. Review by this Court is not warranted. SUP. CT. R. 10(b).

Other than those two cases, the Petitioner cites only a handful of lower state court cases that have addressed this issue. Even if lower courts conflict on

this issue, it is not an important area of federal law because it is really based on application of a nonbinding regulation. Petitioner frames its second issue as a question of statutory interpretation. However, the Petitioner is actually asserting that the Nebraska Supreme Court erred in finding the proceeding was not at an advanced stage. *See* Pet. App. at 17a, 27a, 47a. The source of this advanced stage of the proceedings inquiry is not statutory. Instead, it finds its source in nonbinding BIA Guidelines. Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67584, 67591 (Nov. 26, 1979). This Court has expressly noted that the BIA Guidelines promulgated regarding ICWA are nonbinding. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 n.26, (1989) (noting, in footnote 26, that the BIA issued nonbinding ICWA guidelines for the state courts).

This issue is not an important area of federal law because it really is a sub-question of a non-binding guideline interpreting only a part of the statute. Petitioner is not asking for a direct interpretation of "good cause" in § 1911(b). Instead, Petitioner's issue is couched in several sub-questions. To even get to the question Petitioner posed, the Court would have to first decide that good cause to deny transfer may exist when a proceeding is at an advanced stage. If so, then the Court would have to determine if the advanced stage basis for good cause applied at both the foster care placement proceeding and a termination of parental rights proceeding. Pet. at 17. Even though

the Petitioner frames the issue as the meaning of the statutory phrase "child custody proceeding," that definition is only relevant if a court adopts the advanced stages BIA Guideline. This Court could not compel the adoption of the BIA Guidelines, or correct the manner in which it is interpreted by a state supreme court, because the BIA Guidelines are not statutes, treaties, or laws of the United States. As this factor is not contained within the Constitution, a treaty, or a federal statute, this question does not present a proper basis for granting certiorari. *See* 28 U.S.C. § 1257(a) (2006); SUP. CT. R. 10.

III. THE CLAIMED BENEFITS OF PREDICTABILITY AND UNIFORMITY ARE WHOLLY ILLUSORY

Petitioner argues that the uncertain state of these issues is harmful to Indian children, parents, and Indian tribes. Pet. at 11, 20-22. The Petitioner claims that intolerable uncertainties exist because of the allegedly differing interpretations between state courts. Any alleged benefits of one uniform national rule for the two questions at issue here are wholly illusory.

First, by not defining "good cause," Congress meant for state courts to have some discretion. The BIA Guidelines inform that, "the legislative history of the Act states explicitly that the use of the term 'good cause' was designed to provide state courts with flexibility in determining the disposition of a

placement proceeding involving an Indian child." Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67584 (Nov. 26, 1979) (citing S. REP. NO. 95-597 (1977)). The Supreme Court recently affirmed that Congress gave state courts "the power" to determine what constitutes "good cause." Although interpreting the other section of ICWA containing the "good cause" standard, the Supreme Court recently stated "the court would still have ***the power*** to determine whether 'good cause' exists." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2564 n.11 (2013) (emphasis added) (interpreting § 1915(a) pertaining to adoption placement preferences). Congress gave that same ***power*** to state courts in § 1911(b) by using the identical "good cause" language. Even if the Supreme Court sided with the Petitioner here, national uniformity will never be achieved because a state court will have flexibility to determine "good cause."

Additionally, the best interests issue is incompatible with national uniformity. Petitioner does not ask for the Supreme Court to find that ICWA always requires state courts to interject a best interests analysis when determining whether good cause to deny transfer exists but rather that ICWA does not prohibit state courts from doing so. The relief requested by Petitioner would allow each state to decide whether to impose best interests into the jurisdictional analysis. This is anything but uniform. Further, states may diverge on how they apply the best interests analysis itself.

Petitioner also asserts that certiorari should be granted because uncertainty of transfers of jurisdiction increases the delays suffered by Indian children in the system. Respectfully, whatever merit there may be in this argument, granting certiorari and adopting the rule advocated by the Petitioner will increase delays, rather than lessen them. Petitioner is seeking to inject a best interests test into what is a procedural motion to transfer jurisdiction. Consideration of this extraneous factor would increase, rather than shorten, the delay in ruling on § 1911(b) motions.

There is a certain amount of irony in the fact that the Lancaster County Attorney is asserting a tribal and parental rationale for seeking certiorari. The Lancaster County Attorney has no difficulty in determining which law it will apply, as it will always be applying Nebraska law, including interpretations of applicable federal law made by the Nebraska Courts. While there is an unavoidable complexity that Indian tribes deal with, as a consequence of having to deal with Indian children in multiple states' family law courts, the complexity results from a federal system where there are fifty states, each with its own laws. The difference in state laws for children needing assistance, termination of parental rights, and adoption is an infinitely greater source of complexity than applying § 1911(b). Further, ICWA does not prevent states from adopting state laws providing more protections for tribes. Notably too, § 1911(b) does not regulate primary conduct but rather is a procedural

rule applied only after a child custody proceeding begins.

Finally, Petitioner's assertion that certiorari should be granted so litigants will not have to risk a state appellate court reversing earlier precedent is also not compelling. The risk of appellate court reversal of prior decisions is normal and inherent to the judicial process itself. If this is a reason for granting certiorari, it would apply equally to every decision made by a state supreme court.

IV. *ADOPTIVE COUPLE V. BABY GIRL* HAS NO BEARING ON THIS CASE

The Court's recent consideration of *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) does not present a compelling reason to grant certiorari because, contrary to Petitioner's assertions, it is not a companion to this case nor does it pair well with this case. In *Adoptive Couple*, the Court faced a situation where a couple's petition for adoption was denied after the South Carolina Supreme Court applied § 1912 of ICWA. *Id.* at 2559. The Indian child's biological father had objected to the adoption and termination of his parental rights. *Id.* This Court held that § 1912(f), concerning termination of parental rights, and § 1912(d), concerning foster care placements, did not apply to the biological father in that case and that § 1915(a), concerning adoption placement preferences, does not apply when there is no competing petition for adoption. *Id.*

The only similarity between this case and the *Adoptive Couple* case is that both cases involve interpretation of an ICWA provision. *Adoptive Couple* did not concern ICWA's transfer provisions in § 1911(b). Tribal jurisdiction was never at issue in *Adoptive Couple*, because the Cherokee Nation did not move to transfer. *See id.* at 2564.

Nonetheless, Petitioner asserts that granting certiorari is appropriate. Pet. at 24-26. Petitioner asserts this because, according to Petitioner, "the two issues of the 'existing Indian family doctrine' and the ICWA's definition of 'parent' [] being litigated" in *Adoptive Couple* are regularly discussed in tandem by commentators with the issues of this case. Pet. at 25. As the Court in *Adoptive Couple* interpreted § 1912 and § 1915 without having to address the existing Indian family doctrine or ICWA's definition of parent, this reason for granting certiorari, whether accurate or not, is moot. *See generally*, *id*. at 2560 ("We need not – and therefore do not – decide whether Biological Father is a 'parent.' ").

The fact this Court recently decided a different ICWA case does not provide a compelling reason for this Court to grant certiorari here. *Adoptive Couple* concerned different issues under ICWA not present in this case. Any overlap in the cases would be minimal and limited to the basic history of ICWA. Required analysis of pertinent case law and authorities would be significantly different.

CONCLUSION

Compelling reasons to grant certiorari to address the questions presented here do not exist because the Nebraska Supreme Court correctly interpreted and applied § 1911(b), Petitioner has overstated any minimal conflict that may exist on these issues, and national uniformity is not desirable or even achievable through Supreme Court review. As the Nebraska Supreme Court properly interpreted and applied § 1911(b) of ICWA, this case is not an appropriate vehicle for granting certiorari. As state courts of last resort do not significantly conflict, this case does not present an issue of national importance. As national uniformity is unnecessary and unachievable, this is not an appropriate time to grant certiorari.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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