No. 17-95

In The
Supreme Court of the United States

S.S. and S.S.,

Petitioners,

v.

THE COLORADO RIVER INDIAN TRIBES, STEPHANIE H., and GARRETT S.,

Respondents.

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

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In their opposition brief, Respondents Colorado River Indian Tribes ("CRIT") and Stephanie H. have only demonstrated the pressing need for this Court to decide both questions presented. There are no vehicle problems in this case, and no need to await further development of an issue on which courts across the nation are intractably divided.

I. Lower courts are in disarray.

1. Respondents' claim that there is no split between the state courts of last resort, Resp. i, 11–15, 18, is a red herring. While it is true that many of the conflicting decisions were issued by "intermediate state appellate courts," *id.* at 11, state intermediate appellate courts are last-resort courts under Rule 10(b) if discretionary review by the state's highest court is not obtained—and that is true of those cases. Respondents' flimsy effort to downplay the significance of the split among lower courts must therefore fail.

2. Respondents dispute that there is a division of authority on the question of whether the Indian Child Welfare Act ("ICWA") applies to private intra-family disputes. *See* Resp. 11–13. But they do so by characterizing the relevant cases so narrowly as to ignore the forest for the trees. For instance, they contend that *In re Micah H.*, 887 N.W.2d 859 (Neb. 2016), was not about a private severance action initiated by one birth parent against another, and that *In re Bertelson*, 617 P.2d 121 (Mont. 1980), did not involve a petition for termination

of parental rights ("TPR"). This is true, of course—but beside the point, because what these and the other cited cases stand for is the proposition that ICWA does not apply to what the *Bertelson* court called "internal family dispute[s]." *Id.* at 125–26. TPR petitions are, of course, just one subset of internal family disputes.[1]

Micah H., Bertelson, and other cases, are other examples of internal family disputes. The point here—and the relevant division of authority—is that ICWA was not designed to apply to private family disputes, including, *but not limited to*, privately-initiated TPR actions such as this one. By focusing on irrelevant details, Respondents seek to distract this Court from the fact that lower courts are divided—and unless guided by this Court will remain divided—over whether ICWA applies to cases that do not involve "nontribal public [or] private agencies." 25 U.S.C. § 1901(4).

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[1] *See further Comanche Nation v. Fox*, 128 S.W.3d 745 (Tex. App. 2004) (ICWA does not apply in a grandparent-versus-mother dispute); *In re J.B.*, 100 Cal. Rptr. 3d 679 (Cal. App. 2009) (the "serious emotional or physical damage" provision does not apply in a parent-versus-parent dispute); *In re Micah H.*, 887 N.W.2d 859 (Neb. 2016) (ICWA Sections 1912(d) and (f) do not apply in a grandparent-versus-father dispute); *In re Sengstock*, 477 N.W.2d 310 (Wis. App. 1991) (ICWA does not apply in a parent-versus-parent dispute); *In re ARW*, 343 P.3d 407 (Wyo. 2015) (ICWA Sections 1912(d) and (f) do not apply in a TPR proceeding initiated by prospective adoptive parents against the father (as opposed to state-initiated TPR actions against birth parents)).

3. Respondents next seem to argue, Resp. 13, 14 n.9, that because some cases have faithfully applied this Court's reasoning in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013)—which itself was a privately-initiated TPR action against a birth parent, *id.* at 2558–59—while some cases have not, the Petitioners have not demonstrated the existence of confusion among lower courts over whether ICWA Sections 1912(d) and (f) apply to privately-initiated TPR actions. This simply makes no sense.

In *Adoptive Couple*, this Court observed that the "explicit congressional purpose" of ICWA was to address the "*removal* of Indian children from their families" by "nontribal public and private agencies," 133 S. Ct. at 2561–63 (emphasis in original), and therefore that it should not apply where no Indian family existed, and no removal was threatened. That is precisely why the court below erred in applying ICWA Sections 1912(d) and (f) to an action initiated by one birth parent against the other.

The unifying theme of *Adoptive Couple* and other lower court cases that support the Petitioners' position is that (1) ICWA does *not* apply in *all* cases involving Indian children; and (2) ICWA does not apply in private proceedings where none of the reasons for ICWA's enactment are implicated. *That* is the case here.

4. Respondents maintain that no split exists on the constitutionality question. Resp. 3, 9, 18. Not so.

Pet. 25–26. And Respondents themselves acknowledge there is an express split in lower courts between *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 41 Cal. App. 4th 1483 (1996), and *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 92 Cal. App. 4th 1274 (2001), as compared to other cases they cite. Resp. 19 & n.12.

In light of the lower court splits, the reasoning of *Morton v. Mancari*, 417 U.S. 535 (1974), assuming it is relevant in light of *Rice v. Cayetano*, 528 U.S. 495 (2000), and *Adoptive Couple*, *supra*, must be viewed as an open question that can only be resolved by this Court.

II. There are no vehicle problems in this case.

1. Respondents suggest this case is moot because Laynee S., the stepmother to S.S. and S.S., filed a divorce petition against Garrett S., and because it is unclear whether she wants to adopt the Petitioners. Resp. 3, 8, 10. These arguments are irrelevant. First, adoption by Laynee S. is not the sole basis for the underlying TPR petition. Pet. App. 2a–4a. The *basis* for seeking TPR here is "abandonment and neglect" and the best interests of S.S. and S.S. Pet. App. 3a. Second, it is simply not a factor in a TPR proceeding. Rather, the factors in a TPR case are the state-law factors described in the Petition at 7–8. If Sections 1912(d) and (f) of ICWA do apply to this case, they require steps *in addition to* those state-law factors. *Id.*

Therefore, the divorce to which Respondents refer simply does not render this case moot or otherwise provide any reason to deny the petition. It is simply irrelevant.

2. Respondents' exclusive-jurisdiction argument is also wrong. Resp. 10–11. Respondents suggest that Petitioners "recently resumed residence on the Tribe's reservation." Resp. 10.[2] And because of that, Respondents claim, CRIT's tribal court has exclusive jurisdiction under 25 U.S.C. § 1911(a). *Id.*

Not so. Section 1911(a) does not confer jurisdiction where none existed before. It is undisputed that Arizona courts had jurisdiction over this matter, and that Petitioners, as parties aggrieved by the decision below, can petition this Court. Moreover, in the context of ICWA Section 1911(a), it is "a well-established rule in both federal and state courts that jurisdiction over a case is established at the time an action is filed and cannot be voided [or altered] by later events." *In re G.R.F.*, 569 N.W.2d 29, 34 (S.D. 1997). Thus, "change in domicile to the reservation during pendency of the proceedings did not divest the state court of jurisdiction obtained when the action was first brought." *Id. Fisher v. District Court*, 424 U.S. 382 (1976), on which Respondents rely, Resp. 21, 23, does not apply, because all

[2] There is no evidentiary basis for the Respondents' claim that S.S. and S.S. "resumed" residence on the reservation. There is no evidence they were ever domiciled on, or residents of, the reservation.

conduct supporting this TPR action took place off reservation.

Even if there were grounds for tribal court jurisdiction, however, that matter would have to be resolved in a subsequent proceeding, through a motion to transfer, for example. Here, Arizona courts indisputably had jurisdiction, resolved the dispute, and issued a judgment which has not been rendered moot. There is therefore no jurisdictional weakness here.[3]

3. Respondents also insinuate that the court below did not address Section 1912(f). Resp. i, 8. Not so. It did.[4] *See* Pet App. 5a, 23a. All parties agree that, assuming this Court grants the children's petition, the

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[3] Respondents' desperation in creating phantom vehicle problems when there are none is evident in their claims that "Father denied all visitation to Mother," Resp. 6 (citing Pet. App. 3a–4a), which is obviously not true—the *trial court*, in its discretion, "denied" "Mother's petitions for visitation," and Stephanie H. *by choice* "ha[s] not seen the children since May 2009," Pet. App. 4a—and that CRIT "was not a party in [Garrett and Stephanie's] divorce and custody proceedings," Resp. 6, when in fact ICWA does not apply to divorce proceedings or to any custody order made in a divorce proceeding. 25 U.S.C. § 1903(1).

[4] The TPR test is conjunctive. All four factors—state-law statutory grounds, best-interests-of-the-child test, Section 1912(d), *and* Section 1912(f)—must be met to be successful in a TPR petition if ICWA applies. The applicability and constitutionality of *both* Sections 1912(d) and (f) are at issue in this case because they are inextricably linked in *one* test—a test the court below applied in this case. *See* Pet. 7–8. All the legal issues presented here have been raised and preserved. *See* Pet. App. 16a ("the children finally argue that application of *ICWA* to Father's petition violates their constitutional rights to equal protection") (emphasis supplied).

only question here is whether or not the children should be subjected to the additional burdens imposed by Sections 1912(d) and (f)—and whether those sections are unconstitutional. Petitioners' case-in-chief on the Arizona law (statutory grounds, plus best interests of the child), even Respondents agree, survived the motion to dismiss. The children's argument is that the two *additional* grounds under ICWA do not apply, and if they do, such an application is unconstitutional. *See* Pet. App. 2a, ¶ 1.

4. Finally, Respondents claim that Garrett S. has "abandoned the case." Resp. 2 n.2. He has not. Counsel are authorized to represent to this Court that he joins in and supports this petition.[5] Even if he did not, that would present no concern, as the children, through their court-appointed counsel, are entitled to bring this petition on their own behalf.

III. Respondents' merits arguments provide no basis for denying review.

Respondents then proceed to argue the merits. Resp. 18, 19–23. Those arguments confirm the urgent

[5] There being no *guardian ad litem* for the children is also a non-issue. The court-appointed counsel for S.S. and S.S. bring this petition pursuant to 25 U.S.C. § 1912(b). That is true also as a matter of Arizona law if this were not an ICWA case. *See* A.R.S. §§ 8-221, 8-235, 8-533. The lower courts had no concerns with this arrangement, nor did Respondents raise any objections about it in the lower courts. Nor does it affect this Court's jurisdiction under 28 U.S.C. § 1257(a).

need for this Court's guidance on the questions presented.

1. Respondents' main argument regarding the applicability of ICWA to a private TPR action seems to be ICWA's "plain text," Resp. 9, 15–16, although they offer little to support that argument. The reality is that ICWA's text and context show that it was enacted to address the problem of "*nontribal public and private agencies*" removing children from parents and placing them in "foster and adoptive homes," 25 U.S.C. § 1901(4) (emphasis supplied). None of this is going on in this or any other privately-initiated TPR case. ICWA's plain text therefore does not support applying ICWA to such cases.

This context of ICWA also makes plain that Sections 1912(d) and (f) are inapplicable here. A private family dispute that does not threaten the removal of children from their birth parents is simply not the sort of case Congress contemplated when enacting ICWA. On the contrary, when disputes *between* parents were mentioned in the legislative history, they were *excluded* from ICWA. In discussion pertaining to Section 1903(1)'s definition of "child custody proceeding," for instance, the House Report noted that ICWA's provisions "are not needed in proceedings between parents." H.R. Rep. No. 95-1386 at 31 (1978) (1978 WL 8515).

The 1979 Bureau of Indian Affairs ("BIA") Guidelines—now superseded by the 2016 Regulations—stated that "[c]hild custody disputes arising in the context of divorce or separation proceedings or *similar*

domestic relations proceedings are *not* covered by the Act so long as custody is awarded to one of the parents." 44 Fed. Reg. 67,584, 67,587 § B.3(b) (1979) (emphasis supplied). The 2016 Regulations also declare that the active-efforts provision applies only to "*agencies*" and "requires . . . actions *by agencies*" and is triggered when children are "*removed* from their homes." 81 Fed. Reg. 38,778, 38,790 (2016) (emphasis supplied). In a private TPR action such as this one, there is of course no *agency* and no *removal* is threatened.

If the petition is granted, Petitioners will show why ICWA does not apply to private family disputes such as this—whether on the basis of its text, its context, its structure and design, its legislative history, or the policy consequences of a contrary holding. This is not the proper time for such arguments. It suffices to say that Respondents' merits arguments should not dissuade the Court from reviewing this crucial case.[6]

2. As to the constitutional question presented, Respondents recite various purported state interests that have nothing to do with this case. For example, Respondents cite the "separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." Resp. 1. But these concerns are simply not implicated or affected in a *private TPR*

[6] Respondents are right that the "active efforts" burden of proof is not necessarily before the Court. Resp. 16–17. Petitioners emphasized that point to demonstrate the deleterious consequences of applying ICWA's separate, more burdensome standard of proof to private family disputes.

action brought by an Indian father seeking the best interests of his children, as in this case. The children are not at risk of "separation" from their family—if the underlying petition were granted, they would remain with their father. For the same reason, foster care and placement in a non-Indian home are simply not at issue. *That is why ICWA does not apply* to this case.

As to ICWA protecting the tribe's interest in "retaining its children," *id*. at 3, that interest is also neither implicated nor affected in a private TPR action. Applying ICWA to this context, which it was not designed for, has no nexus to such tribal interests.

3. Finally, as to the argument that the separate and less-protective rules that ICWA applies to Indian children withstand the rational-basis analysis of *Mancari*, *supra*, while this is not the appropriate place for a merits argument, one thing is plain: the *Mancari* Court specifically *declined* to apply such lenient review to laws that are "directed towards a 'racial' group consisting of 'Indians.'" 417 U.S. at 553 n.24. Instead, *Mancari* concerned adults who chose to be members of a tribe. This Court later explained that *Mancari*'s rationale was "confined to the authority of the BIA, an agency described as '*sui generis*,'" *Rice*, 528 U.S. at 520, and that it did not apply to laws that "single[] out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.'" *Id.* at 515 (citation omitted). ICWA, by contrast, *does* target a racial group consisting of Indians—it turns not on tribal membership but on *eligibility* for membership, which is biologically determined by ancestry and ethnic characteristics. *Mancari* simply does not apply.

Even if ICWA did not qualify as a racial classification, it qualifies as a national-origin based discrimination, which is subject to the same strict scrutiny. *United States v. Virginia*, 518 U.S. 515, 567 (1996). But it makes no sense *at all* to allow the government to treat people differently—on the basis of race, political affiliation, *or* nationality—in a private TPR action to which such factors are simply irrelevant. For the federal government to impose different evidentiary burdens and substantive law on TPR cases involving children of, say, Republican parents, or Californian parents, or Chinese parents, than on children of Democratic, or Nevadan, or Canadian parents, would not even satisfy rational basis scrutiny.

But the sad truth about ICWA is that it equates "Indianness" with genetics. Cultural or religious or political affiliation is simply not a factor: ICWA applies *solely* on the basis of biology, and not "social, legal, or political identification." Solangel Maldonado, *Race, Culture, and Adoption: Lessons from* Mississippi Band of Choctaw Indians v. Holyfield, 17 COLUM. J. GENDER & L. 1, 27 (2008).

The problem the children complain of here is that ICWA Sections 1912(d) and (f) apply to them to begin with. For constitutional avoidance reasons, they present arguments on why it should not apply in private TPR cases. And, if this Court were to determine that those sections do apply in private TPR cases, then the children argue that those sections, as applied, are unconstitutional. This surgically precise argument also

preserves any other interests the Respondents may assert or have in the continued applicability of ICWA Sections 1912(d) and (f) in state-initiated TPR actions—an issue that is not before this Court in this case.

CONCLUSION

The petition should be *granted*.

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Respectfully submitted,

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