No. 19-550

In The Supreme Court of the United States

KIMBERLY WATSO, *et al.*,

Petitioners,

v.

JODI HARPSTEAD, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the United States Court of Appeals for the Eighth Circuit correctly conclude that the Indian Child Welfare Act does not require Indian child custody proceedings to begin in State court?

PARTIES TO THE PROCEEDING

Petitioners Kimberly Watso (née Dietrich), Kaleen Dietrich, and Kimberly Watso on behalf of C.H. and C.P. were plaintiffs in the district court and then appellants in the United States Court of Appeals for the Eighth Circuit.

Respondents Jodi Harpstead (succeeding Tony Lourey and Emily Piper) in her official capacity as Commissioner of the Minnesota Department of Human Services ("Commissioner"), Scott County ("County"), Tribal Court of the Shakopee Mdewakanton Sioux Community ("Community" or "SMSC"), Judge John E. Jacobson in his official capacity as Community Tribal Court Judge, Tribal Court of the Red Lake Band of Chippewa Indians ("Red Lake Band"), and Judge Mary Ringhand in her official capacity as Red Lake Band Tribal Court Judge were defendants in the district court and appellees in the Eighth Circuit.

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BRIEF IN OPPOSITION

The Court of Appeals for the Eighth Circuit made short work of Petitioners' appeal, because the issues they raised were meritless. This Court should do the same, and deny the petition for writ of certiorari.

Petitioners' primary claim is that the Indian Child Welfare Act ("ICWA") requires all custody proceedings to begin in State court. But ICWA was designed to make it harder, not easier, for state authorities to make custody determinations that properly belonged to tribal authorities. Thus, ICWA certainly did not establish a rule that all Indian child custody cases must start in State court. Instead, this Court has interpreted ICWA to give presumptive jurisdiction to tribal authorities. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989). Petitioners' argument that the referral of this matter to tribal authorities violated Public Law 280 is likewise a nonstarter, as that law deals with federal-state authority, rather than tribal-state authority. Petitioners' due process argument ignores that they actively participated in tribal proceedings and received notice and an opportunity to be heard at every relevant stage, and Petitioners' "*Chevron* argument" was not raised below.

What is more, if Petitioners' arguments had merit, this case would be a terrible vehicle to address them. This is not a case involving an assertion of tribal jurisdiction over a child with no connection to the tribe or reservation life. The only child whose case has not been mooted by an agreed-upon settlement (a settlement

that awarded custody to one of the Petitioners, yet went unmentioned in the Petition) was domiciled on the reservation along with both his parents. The assertion of tribal jurisdiction under those circumstances raises no serious issue. In short, the Petition raises no issue worthy of this Court's attention and does not even squarely or cleanly present the issues it purports to raise. This Court should deny certiorari.

STATEMENT OF THE CASE

A. ICWA Expands Tribal Jurisdiction.

Congress passed ICWA in 1978 in large part due to the distressingly high number of Indian children who were being displaced from their families and their tribes, threatening the future of Indian tribes. *See* 25 U.S.C. § 1901; *see also Indian Child Welfare Program: Hearings Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs*, 93 Cong. 15-32 (1974). ICWA shifted jurisdiction over Indian "child custody proceedings"[1] from State courts to tribal courts. *Holyfield*, 490 U.S. at 45; *see also Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548, 555 (9th Cir. 1991) (ICWA "expanded the role of tribal courts and correspondingly decreased the scope of state court jurisdiction."). Notably, however, ICWA does not regulate or affect tribal court child

[1] Child custody proceedings are defined in 25 U.S.C. § 1903 to include foster care placements, termination of parental rights, preadoptive placements, and adoptive placements.

custody proceedings—the statute's provisions govern what occurs in State court custody proceedings involving Indian children. *See* 25 C.F.R. § 23.103(b)(1) ("ICWA does not apply to . . . A tribal court proceeding[.]").

Two provisions of ICWA are central to this dispute: 25 U.S.C. § 1911(a) and 25 U.S.C. § 1911(b). The former concerns the exclusive jurisdiction of tribes over certain Indian child custody proceedings, and the latter concerns the transfer of pending State court proceedings to tribal court when the state and tribe share concurrent jurisdiction.

More specifically, Section 1911(a) provides that an Indian tribe has exclusive jurisdiction over custody proceedings for Indian children domiciled or residing on the tribe's reservation. *Holyfield*, 490 U.S. at 36. And if an Indian child is not domiciled or residing on a tribe's reservation, and so is not subject to the exclusive jurisdiction of the tribe, then Section 1911(b) still requires State courts to transfer some pending State court proceedings to tribal court upon petition, unless the child's parents object or the tribal court declines. This Court has described Section 1911(b) as creating "concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation." *Holyfield*, 490 U.S. at 36.

Also relevant to this dispute is 25 U.S.C. § 1914, which permits an Indian child, parent, Indian custodian, or Indian child's tribe to "petition any court of competent jurisdiction to invalidate [foster care placements or terminations of parental rights under State

law] upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of [ICWA]." Section 1914 does not authorize filing a petition to invalidate tribal court proceedings.

B. The Commissioner Published the Manual to Provide Guidance on ICWA to Social Service Agencies.

The Commissioner published the Indian Child Welfare Manual ("Manual") to provide *guidance* to local social service agencies and private child-placement agencies on ICWA, the Minnesota Indian Family Preservation Act, and the Minnesota Tribal/State Agreement. Dkt. 1-1 at 5-6. The Manual was developed pursuant to the Minnesota Tribal/State Agreement, the purposes of which are, in part, to provide policies and procedures for "[m]aximizing the participation of tribes in decisions regarding Indian children," and "[a]ddressing barriers to implementing those services for the protection of Indian families and children." *Ibid.* The Manual states that it "applies to both county social service agencies and private child-placing agencies." *Id.* at 6.

The Manual contains guidance on referral of Indian child custody proceedings to State or tribal court. *Id*. at 26-28. The Manual bases this guidance on ICWA, cites ICWA in support, and does not in this respect purport to do anything other than instruct agencies on how to comply with ICWA. *Id*. First, in the case of an Indian child residing or domiciled within an Indian reservation, the Manual states that "a local social

services agency shall refer any proposed child custody proceeding involving an Indian child to the tribal social service agency for appropriate proceedings in tribal court." *Id*. at 26 (citing 25 U.S.C. § 1911(a)). The Manual requires the same referral if the subject child is a ward of a tribal court. *Ibid.*

Second, in the case of an Indian child *not* residing or domiciled on a reservation, the Manual states that "a local social services agency shall refer any proposed child custody proceeding involving an Indian child to the tribal social service agency for appropriate proceedings in tribal court." *Id.* at 27 (citing 25 U.S.C. § 1911(b)). In addition, however, it requires that the agency "give written notice of any [such] referral" to "a child's parent(s) or Indian custodian, designated tribal representative and tribal court." *Ibid.* The agency shall not make the referral to tribal court if: (1) it "concludes that there is good cause to the contrary;" (2) "[e]ither parent of a child objects, in writing;" or (3) either a designated tribal representative or the tribal court declines to accept jurisdiction. *Ibid.*

C. Public Law 280 Shifted Jurisdiction from the Federal Government to the States, but Did Not Affect Tribal Jurisdiction.

Petitioners assert that Public Law 280 has some bearing on whether tribal courts on reservations subject to that statute have jurisdiction over Indian child custody proceedings. It does not.

Congress passed Public Law 280 in 1953. Pub. L. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, and 28 U.S.C. § 1360). In Public Law 280, Congress granted criminal jurisdiction, and limited civil jurisdiction for cases involving private litigants, on Indian lands to state governments in select states, including Minnesota (except for the Red Lake Reservation). 18 U.S.C. § 1162(a). Thus, Public Law 280 applies to the Community's Reservation in south-central Minnesota, but not on the Red Lake Reservation. The lower federal courts and the leading commentator on Federal Indian Law all agree that it had no effect on tribal jurisdiction—and specifically did not divest tribal courts of jurisdiction they otherwise possessed. *Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990); *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 685 (5th Cir. 1999); *Native Village of Venetie*, 944 F.2d at 562; *Cohen's Handbook of Federal Indian Law* § 6.04[3][c] at 557, 558 (Nell Jessup Newton ed., 2012).

D. The Tribal Court Child Welfare Proceedings.

Kimberly Watso, who is not enrolled in an Indian tribe, is the mother of minor children C.P. and C.H. *Watso v. Piper (Watso II)*, No. 17-562 (D. Minn.), Compl. ¶ 1, Dkt. 1. Kaleen Dietrich is the children's maternal grandmother. *Id.* ¶ 5. C.P.'s father, Donald Perkins, is a member of the Red Lake Band and so is C.P. *Id.* ¶ 2. C.H.'s father, Isaac Hall, is a member of the Community and so is C.H. *Id.* ¶ 3. Both the Red Lake Band

and the Community are federally recognized Indian tribes. 84 Fed. Reg. 1200, 1203 (Feb. 1, 2019).

On January 22, 2015, a Community Child Welfare Officer filed an emergency petition requesting that the Community Tribal Court grant temporary custody of C.P. and C.H. to the Community's Family and Children's Services Department ("Department").[2] *Watso v. Jacobson (Watso I)*, No. 16-983 (D. Minn.), Dkt. 1 ¶ 52. The Community Tribal Court held a hearing with Watso present. *Id.* at ¶ 54.[3] During the hearing, the Department presented considerable evidence of chemical use by Watso and Hall, which prompted the Department to file the petition. *Watso II*, Dkt. 17 at 5. The Community Tribal Court opened a child welfare case, deemed the children in need of protection, and ordered social services to be provided to the parents. *Id.* at 5; Dkt. 21 at 5. Watso and Hall maintained custody of the children.

About one month later, on February 24, 2015, Watso and Hall brought C.H. to a medical clinic for an

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[2] The petition was filed under the Community's Domestic Relations Code. Petitioners' claim that "ICWA prompted all of these proceedings" is inaccurate. Pet. 16. As noted, ICWA plays no role in tribal court proceedings.

[3] This hearing was not mentioned in Petitioners' Complaint in this action; however, Petitioners have admitted it occurred in the Petition in multiple places. Pet. at 3, 5 ("Notably, SMSC had an ongoing case between Watso and C.H.'s father dating back to January 2015."). The citation here is to documents related to the tribal court proceedings that were filed in the first federal case Watso brought challenging the Community Tribal Court proceedings, which is discussed below.

examination of an injury to his head that a subsequent police report found "does not appear to be accidental." Compl. ¶ 18; Dkt. 1-1 at 68. The medical exam resulted in a report of possible child abuse or neglect by Watso and Hall. Compl. ¶¶ 15, 19. Consequently, police from the City of Shakopee (as to C.H.) and the City of Apple Valley (as to C.P.) placed the children on a 72-hour health and safety hold. D. Minn. Dkt. 1-1 at 68 (report initiated by the Shakopee Police Department to place a hold on the children); Dkt. 19 at 5.[4] Upon discovering that the children were Indian, the police called the Department.

No State court proceeding concerning C.H. or C.P. was ever initiated. Compl. ¶¶ 20, 90-91. And there is no evidence or allegation that Scott County took custody of the children at any point. There is also no evidence that the Manual was consulted or relied on before the Department was notified of the hold placed on the children.

The Department filed a new motion in the preexisting tribal court child custody proceeding, based on the report of possible abuse, to transfer legal and physical custody of both children from Watso and Hall to the Department. Dkt. 1-1 at 70. The Community Tribal Court transferred temporary custody of C.P. and C.H. to the Department. Dkt. 1-1 at 71. The children were temporarily placed in foster care.

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[4] A more legible copy of both police reports is in Dkt. 19 at 5-6.

By her own admission—and contrary to what is stated in the Petition (Pet. 8)—Watso and the children were domiciled and resided on the Community's reservation at all times relevant to the tribal child welfare proceedings. In her motion to dismiss the Community Tribal Court proceedings, Watso asserted that the "jurisdictional facts . . . are uncomplicated and not in dispute. . . . From July 2013 to March 2015, and at the time the [Community's child welfare proceeding] was commenced in tribal court, Watso, C.H., and C.P. resided with Isaac Hall, father of C.H., on the Shakopee Mdewakanton Sioux Community Reservation." Dkt. 18 at 2. Not surprisingly, the Community Tribal Court stated in its order denying the motion that the children "were domiciled at 5650 Tinta Circle, on the Shakopee Reservation, with their mother and the father of C.M.H." Dkt. 17 at 5.[5]

Shortly after the commencement of the Community Tribal Court proceedings in January 2015, C.P.'s membership in the Red Lake Band was established. Dkt. 17 at 6. Thereafter, representatives from the Red Lake Band participated in the proceedings and supported positions taken by the Department. *Ibid.*

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[5] Watso and Hall gave this same information to the police in February 2015. Dkt. 1-1 at 68 (reporting the address of the parents to be 5650 Tinta Circle, Shakopee, MN); Dkt. 19 at 5 (reporting the address of the parents to be 5650 Tinta Circle, Shakopee, MN, 55379); *see also* Dkt. 20 at 4 (another police report from March 2015 in which Watso (at the time still "Dietrich") reported that she lived with Hall at 5650 Tinta Circle).

Following a period of foster care during which the parents were unable or unwilling to comply with their case plans, the Department and the Guardian *ad Litem* recommended, and the Community Tribal Court ordered, that C.P. be temporarily placed with Dietrich and that he receive therapy to address behaviors driven by anxiety. *Id.* at 6-7. The Department recommended (and the tribal court adopted the recommendation) that C.H., who at the time struggled with cognitive and emotional development, be placed with his paternal great aunt. *Ibid.*

Hall and Watso separated in 2015. Later that year, Watso married another Community member, Ed Watso. *Id.* at 7.

On December 8, 2015, Watso moved to dismiss the Community Tribal Court proceedings for lack of jurisdiction. The tribal court denied the motion, holding that it had authority under the Community's Domestic Relations Code and its inherent authority to exercise jurisdiction over Indian children residing or domiciled on the Community's reservation, jurisdiction confirmed by Congress in ICWA. *Id.* at 9-14.

Watso then filed a petition for habeas corpus in the District of Minnesota under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304, on behalf of herself and C.P., challenging the Community Tribal Court's jurisdiction. *Watso I*, No. 16-983 (D. Minn.). While the petition was pending, the Red Lake Band initiated its own child custody proceeding involving C.P., and on the Red Lake Band's motion, the Community Tribal Court

closed its proceeding as to C.P. as a matter of comity. *Ibid.* Because the Community Tribal Court was no longer exercising jurisdiction over C.P., the parties stipulated to dismiss the habeas litigation as moot, and the district court did so with prejudice. Stip. for Dismissal, Dkts. 49, 51, *Watso I*, No. 16-983 (D. Minn. Feb. 9-10, 2017).

E. The District Court Proceedings.

Shortly thereafter, on February 23, 2017, Petitioners filed this action against Respondents, as well as the Community, the Red Lake Band, C.H.'s father, and C.P.'s father. Dkt. 1 at 1. Underlying Petitioners' claims was the argument that ICWA Section 1911(b) and Public Law 280 granted the State exclusive jurisdiction over the child custody proceedings involving C.H. and C.P. unless the State initiated a court proceeding and transferred the case to tribal court with parental consent. *Id.* ¶¶ 42-47. According to Petitioners, the Manual, by not referring all Indian child custody proceedings to State court, violates ICWA because "[u]nder federal law, State district court, not the tribal court, is vested with exclusive civil adjudicative jurisdiction over child custody disputes involving minor children of Public Law 280 tribes." *Id.* ¶ 116.

Respondents filed motions to dismiss. Petitioners voluntarily dismissed much of their Complaint, and dismissed the Community, the Red Lake Band, and the fathers of the children as defendants. Dkt. 73, 97-98. The only claims that went to decision were Count I, a

claim against the tribal court Respondents based on 25 U.S.C. § 1914 seeking to invalidate tribal court proceedings, and Count III, a 42 U.S.C. § 1983 claim against the Commissioner and Scott County.

The district court dismissed the remaining claims in the Complaint, holding in part that ICWA does not require an Indian child custody proceeding to begin in State court as Petitioners claimed, and therefore no conflict exists between the Manual's jurisdictional referral instructions and ICWA. Pet. App. 16a-21a.

F. Settlement of C.P.'s Case.

While this case was pending before the district court, the Red Lake Tribal Court child custody proceeding concerning C.P. was resolved when Red Lake Family and Children's Services, Watso, and Dietrich reached a settlement to place C.P. with Dietrich permanently and without limitation. Dkt. 112. The Red Lake Band Tribal Court ordered that Dietrich, who had been caring for C.P. since early 2015, be awarded custody of C.P. and closed the case. Dkt. 112.

G. The Eighth Circuit's Decision.

On appeal to the United States Court of Appeals for the Eighth Circuit, Petitioners again argued that there was a conflict between the Manual and ICWA in that the Manual does not require Indian child custody proceedings to begin in State court, with a transfer to tribal court only upon parental consent. *See* Pet. App.

4a-5a. In a unanimous decision authored by Judge Benton, the Eighth Circuit affirmed the district court's dismissal of Petitioners' Complaint, holding that "[t]here is no conflict between the Manual's requirement that local social service agencies refer child custody proceedings involving Indian children to tribal social service agencies for proceedings in tribal court, and the ICWA's recognition of exclusive or presumptive tribal jurisdiction for child custody proceedings involving Indian children." Pet. App. 6a. According to the Eighth Circuit, "Section 1911(b) addresses the transfer of proceedings from state court to tribal court. Here, there were no state court proceedings. There was no transfer from state court to tribal court. Section 1911(b) does not apply." *Id.* at 5a.

Quoting this Court's decision in *Holyfield*, the Eighth Circuit reasoned that Section 1911(a) creates exclusive jurisdiction for tribes over Indian child custody proceedings for children residing or domiciled on the tribe's reservation or who are wards of the tribal court and that Section 1911(b) "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation." *Id.* at 5a-6a. Therefore, the Manual's referral provisions do not conflict with ICWA. *Id.* at 6a.

Regarding Petitioners' argument that Public Law 280 somehow divested the Community of its inherent jurisdiction over Indian child custody proceedings, the Eighth Circuit held that Public Law 280 "does not require a state court hearing or any state court proceedings. . . . The SMSC Court's jurisdiction over C.P. and

C.H.'s child custody proceedings is consistent with Public Law 280." *Id.* at 7a (citing holdings in the Eighth and Ninth Circuits).

As for a vague claim that a transfer from a state agency to a tribal court violated Petitioners' due process rights, the Eighth Circuit held that Petitioners "had sufficient notice of the tribal court proceedings. They were heard in tribal court. They have presented no evidence of a due process violation." Pet. App. 7a.

REASONS FOR DENYING THE WRIT

Petitioners do not reference United States Supreme Court Rule 10, or identify any consideration governing review on a writ of certiorari that they believe supports granting their Petition. Petitioners do not identify any conflict between courts under Rule 10(a) or (b) that might warrant this Court's review. They also do not identify, under Rule 10(c), any federal question that the Eighth Circuit answered in a way that conflicts with relevant decisions of this Court. At best, Petitioners simply try to establish that the Eighth Circuit misapplied federal law, which is not true and in any event is a basis on which certiorari is "rarely granted." U.S. Sup. Ct. R. 10.

I. The Eighth Circuit Court of Appeals Correctly Rejected Petitioners' Argument that the Manual Conflicts with ICWA.

As an initial matter, Petitioners' arguments imply that the lower courts held that the Manual somehow overrides ICWA, contrary to preemption doctrine or *Chevron* deference. Pet. 9-17. This is a red herring. Instead—and as the lower courts recognized—there simply is no conflict between the Manual and ICWA. This disposes of Petitioners' preemption and *Chevron*-related arguments.[6]

Petitioners argue that 25 U.S.C. § 1911(b) requires Indian child custody proceedings to begin in State court if they involve Indian children not residing or domiciled on a reservation. Therefore, according to Petitioners, the Manual is preempted by federal law. Petitioners simply assert that Section 1911(b) "require[s] that a state court hearing must take place before a state agency transfers an Indian child to a tribe," Pet. 10, but make no textual or other argument for such a conclusion, and cite no case or other authority so interpreting the statute.

To the contrary, the plain language of Section 1911(b) does not require a State court proceeding, but simply sets forth a transfer procedure applicable if "any State court proceeding" exists. Both the district court and the Eighth Circuit adopted that commonsense reading. Pet. App. 6a, 20a. Accordingly, the

[6] In addition, and as discussed further below, Petitioners never raised a *Chevron*-related argument before the lower courts.

Manual's instruction that Indian child custody proceedings involving Indian children not residing or domiciled on a reservation be transferred to the tribe absent parental or tribal objection (*see supra* at pages 4-5; Dkt. 1-1 at 28)—as well as the absence of any instruction that such proceedings must begin in State court—does not conflict with ICWA.[7]

The lower courts' rejection of Petitioners' Section 1911(b) argument is uncontroversial. The argument has no basis in the language of the statute or its implementing regulations. There is no need for this Court to consider such an unsupportable argument in a challenge to one state's ICWA manual.

II. The Courts of Appeals Agree that Neither ICWA Nor Public Law 280 Divested Tribes of Jurisdiction over Indian Child Custody Proceedings.

Petitioners claim that a combination of ICWA Section 1911(b) and Public Law 280 divested tribes covered by Public Law 280 of jurisdiction over child

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[7] Petitioners' argument concerning 25 C.F.R. § 23.106(b) is tied to their Section 1911(b) argument. According to Petitioners, 25 C.F.R. § 23.106(b) requires that the federal or state law that is most protective or solicitous of parents' views be applied. Petitioners erroneously believe that Section 1911(b) requires the state to initiate an Indian child custody proceeding before a tribal court can initiate a proceeding, which they claim without support provides the most protection to parents. Pet. 11.

The flaw with this argument is simple: since Petitioners are wrong about Section 1911(b), their argument about its implementing regulation fails. Pet. App. 21a.

custody proceedings involving Indian children. Pet. 11, 15. The Courts of Appeals that have addressed this issue have rejected Petitioners' argument.

Petitioners envision a jurisdictional scheme in which State courts are presumed to have jurisdiction over Indian child custody proceedings, which is the exact situation ICWA was designed to remediate. *See Holyfield*, 490 U.S. at 36 (ICWA "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes."); 25 U.S.C. § 1901(5) ("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 communities and families.").

ICWA's "purpose was, in part, to make clear that in certain situations the state did *not* have jurisdiction over child custody proceedings." *Holyfield*, 490 U.S. at 45 (emphasis in original); *see also Doe v. Mann*, 415 F.3d 1038, 1047 (9th Cir. 2005) ("The purpose of ICWA was to rectify state agency and court actions that resulted in the removal of Indian children from their Indian communities and heritage."). Consequently, ICWA "established federal standards that govern state-court child custody proceedings involving Indian children;" it does not regulate tribal-court proceedings. *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2557 (2012); 25

C.F.R. § 23.103(b)(1) ("ICWA does not apply to . . . A tribal court proceeding[.]").

With no analysis, Petitioners assert that Public Law 280 divested tribes of jurisdiction over Indian child custody cases. They state that "given the tribe's lack of Public Law 280 status, they did not have the jurisdiction or authority to transfer custody." Pet. 15.[8]

The Courts of Appeals that have addressed Public Law 280's impact on tribal jurisdiction have held that it did not divest tribes of any jurisdiction; at most, it grants states concurrent jurisdiction. *TTEA*, 181 F.3d at 685; *Native Village*, 944 F.2d at 560, 562 (Public Law 280 "is not a divestiture statute"); *Walker*, 898 F.2d at 675 ("Nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority."); *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987) ("Congress' primary concern in enacting Pub.L.280 was combating lawlessness on reservations. The Act plainly was not intended to effect total assimilation of Indian tribes into mainstream American society."). Petitioners cite no authority to the contrary.

To the extent Petitioners more broadly attack the tribes' jurisdiction over Indian children, which the Petition does not make clear, the lower courts correctly

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[8] Although Petitioners do not clarify which tribe they claim lacked jurisdiction, it apparently is the Community, since that is the only tribe involved here to which Public Law 280 applies. The Red Lake Band is expressly written out of Public Law 280, contrary to Petitioners' allegations. Pet. 2.

relied on this Court's *Holyfield* decision to reject such a claim. ICWA "establishes exclusive jurisdiction in tribal courts for proceedings concerning an Indian child 'who resides or is domiciled within the reservation of such tribe,' as well as for wards of tribal courts regardless of domicile." *Holyfield*, 490 U.S. at 36 (quoting 25 U.S.C. § 1911(a)); Pet. App. 5a-6a. It "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation." *Ibid.* (citing 25 U.S.C. § 1911(b)).[9]

If the children's domicile or residence were dispositive—the lower courts held it is not—Petitioners' claims would still fail. Petitioners failed to plead the domicile or residence of either child at the time the Community Tribal Court child custody proceedings were initiated. Pet. App. 45a. But, as discussed above at page 9, the documents submitted to the district court, including documents attached to the Complaint, show that Watso and C.H.'s father were domiciled and residing at an address located on the Community's reservation from July 2013 to March 2015. Because the parents were domiciled on the reservation, the children are deemed to be domiciled on the reservation. *Holyfield*, 490 U.S. at 48 ("Since most minors are legally incapable of forming the requisite intent to

[9] Petitioners allude to there being a problem with the tribes exercising "exclusive jurisdiction." Pet. 9. But the tribes did not need to have exclusive jurisdiction to exercise jurisdiction over the child custody proceedings at issue. Concurrent jurisdiction over the children is sufficient.

establish a domicile, their domicile is determined by that of their parents.").

Those facts about domicile—which Watso described to the Community Tribal Court as "uncomplicated and not in dispute"—trigger Section 1911(a)'s exclusive tribal jurisdiction provisions related to Indian children domiciled or residing on the reservation and make Section 1911(b) inapplicable. 25 U.S.C. § 1911(a); *see also* Pet. 12 ("Notably, the Tribal Courts, under the ICWA, have exclusive jurisdiction if the child is domiciled on the reservation."); Dkt. 18 at 2. They only strengthen the Community Tribal Court's exercise of jurisdiction over the child custody proceeding involving C.H. and C.P.

The Eighth Circuit's holdings that neither ICWA Section 1911(b) nor Public Law 280 divested the tribes of jurisdiction and that the tribal courts had jurisdiction over the child custody proceedings involving C.H. and C.P. were based on settled law. There is no need for this Court to address them.[10]

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[10] For the first time in this case, Petitioners cite two State court decisions concerning tribal jurisdiction, *Roe v. Doe*, 649 N.W.2d 566 (N.D. 2002), and *In re Defender*, 435 N.W.2d 717 (S.D. 1989), for the proposition that the tribes here did not have jurisdiction over the child custody proceedings involving C.H. and C.P. Both cases are inapposite**,** as they involved divorce proceedings which are excluded from the scope of ICWA. *Roe*, 649 N.W.2d at 569; *In re Defender*, 435 N.W.2d at 721; *see also* 25 U.S.C. § 1903(1) (excluding divorce proceedings from the reach of ICWA).

III. There Are a Plethora of Other Reasons Why This Court Should Not Grant Certiorari.

A. Petitioners' Claims Regarding C.P. Are Waived or Moot.

"A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). "The case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013).

Petitioners mooted, or waived,[11] any claim regarding tribal court jurisdiction over C.P. when they reached a settlement in the Red Lake Band Tribal Court and agreed to the permanent placement of C.P. with Dietrich—*who is one of the Petitioners*. Dkt. 112. After the settlement was reached, the Red Lake Band Tribal Court closed its case file. Dkt. 112. Thus, there are no proceedings as to C.P. to enjoin or invalidate, and there is no case or controversy concerning the Red Lake Band Tribal Court child custody proceedings.[12]

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[11] *Wood v. Milyard*, 566 U.S. 463, 474 (2012) ("Waiver is the intentional relinquishment or abandonment of a known right." (quotations omitted)).

[12] The Tribal Court and Tribal Judge Respondents argued to the Eighth Circuit that the doctrine of claim preclusion applied to any challenge to the Community Tribal Court's exercise of jurisdiction over C.P., in light of Petitioners' previously dismissed habeas case, *Watso I*. SMSC CA8 Br. at 42; Red Lake CA8 Br. at 33. The Eighth Circuit did not address this issue.

B. Petitioners Did Not Preserve Arguments Related to *Chevron* Deference.

This Court does not consider arguments that were not raised by parties before the courts from which they appeal. *See*, *e.g.*, *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) ("It is indeed the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts."). Petitioners devote an entire section of the Petition to the Court of Appeals', State's, or tribes'[13] improper "*Chevron* deference" to the Manual. Pet. 2 (claiming the Eighth Circuit improperly deferred to the Manual), 13-17 (claiming the State and the tribe improperly deferred to the Manual). But Petitioners never made such an argument before either the district court or the Eighth Circuit, and it is not properly before this Court for review.

C. Petitioners Do Not Explain Their Meritless Due Process Assertions.

Petitioners vaguely contend that tribal court jurisdiction over Indian child custody proceedings violates

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[13] Petitioners, for the first time in this case, suggest that the tribal courts, as opposed to the County, improperly applied the Manual. Pet. 13 ("The Tribal Court's deference to the Manual over agency IWCA [sic] interpretations resulted in Watso's due process rights being violated."). The Manual was created by the Commissioner for state agencies, local social service agencies, and private child-placement agencies, not tribes, tribal agencies, or tribal courts. Dkt. 1-1 at 6. There is no allegation in the Complaint that the tribal courts applied the Manual and there is no reason to believe they would.

"due process" when one parent is a non-Indian. *See* Pet. 2 (asking "whether a tribal court can deprive a non-Indian [of] parental rights without the matters being addressed in State court under the Due Process Clause"), 8, 13. Throughout the Petition, and throughout this litigation, they have used the phrase "due process rights" as a punch line without explanation of any legal basis for using it.

While it is unclear, Petitioners appear to argue that an alleged transfer of child custody proceedings from the County to the Community violated Petitioners' due process rights. Pet. 16; Watso CA8 Op. Br. at i, 5; Dkt. 75 at 23-28. None of the cases Petitioners cite stands for such a proposition. For example, *Troxel v. Granville*, 530 U.S. 57, 66 (2000), recognizes "the fundamental right of parents to make decisions concerning the care, custody, and control of their children," but does not establish any constitutional right possessed by a parent to select the forum in which a child custody proceeding will take place.

Many of Petitioners' arguments, including their due process assertions, are based on the notion that the County "transferred" child custody proceedings to the Community in February 2015. Pet. 5, 14, 16. But, as Petitioners admit, the Community Tribal Court had already initiated child custody proceedings in January 2015. Pet. 3, 5 ("Notably, SMSC had an ongoing case between Watso and C.H.'s father dating back to January 2015."). There was no transfer of jurisdiction or transfer of a case because the Community Tribal Court was already exercising jurisdiction and had already

initiated a proceeding (and conversely, no State court proceeding was ever initiated).

In reality, all that happened was that the Shakopee Police Department reported an instance of potential child abuse to the Community's Family and Children's Services Department, which prompted the Department to take protective actions in the case already pending before the Community Tribal Court. Pet. 4 (admitting that the 72-hour hold was placed on the children by the police and that the Community "was notified of the situation"); Dkt. 1-1 at 68; Dkt. 19 at 5. Petitioners' argument therefore boils down to a complaint that the police violated their due process rights by notifying a tribal agency, which was tasked with ensuring that Indian children were safe and protected, of potential child abuse without the mother's consent and a State court hearing. The argument is not deserving of the Court's consideration.

To the extent Petitioners are claiming that the exercise of tribal jurisdiction over C.P. and C.H. violated their due process rights, the Eighth Circuit held that Petitioners "presented no evidence of a due process violation." Pet. App. 7a. "Watso and Dietrich had sufficient notice of the tribal court proceedings. They were heard in tribal court." *Ibid.*

Finally, Petitioners have dismissed their only due process-related claims against the tribal courts and their judges. Dkt. 1 at 40-44 (claims as stated in the Complaint); Dkt. 73 (dismissing the claims). Consequently, any argument in the Petition related to the

tribal courts' infringement on Petitioners' due process rights is unpreserved and not available for review.

D. Petitioners Have Not Stated a Cognizable Claim Against the Tribal Courts or Tribal Court Judges under 25 U.S.C. § 1914.

Petitioners' only remaining claim alleged against the two tribal courts and the tribal court judges is Count I, "25 U.S.C. § 1914 ICWA petition to invalidate action upon showing of ICWA violation." Dkt. 1 at 37. But 25 U.S.C. § 1914, by its terms, applies only to foster care placement "under State law." Section 1914 does not mention tribal law, nor a tribal court proceeding. No court has permitted anyone to maintain an action under Section 1914 against a tribal court.

Moreover, arguments that are not raised in an opening brief in an appellate court are generally deemed forfeited. *Joseph v. United States*, 135 S.Ct. 705, 705 (2014). The tribal courts and their judges moved to dismiss the Complaint because, among other things, Petitioners could not state a claim to invalidate tribal court proceedings under 25 U.S.C. § 1914. Dkt. 14 at 13-14. Petitioners failed to respond to the argument in the district court. They also failed to file an objection with the district court after the magistrate judge determined that Section 1914 provided them with no viable claim. Pet. App. 46a-47a. But perhaps most importantly, Petitioners did not make an argument for why their Section 1914 claim was viable in their opening appellate brief after the district court, by adopting

the report and recommendation, determined the claim was not viable.

Because Petitioners consistently failed to defend their Section 1914 claim, they have forfeited their only remaining claim against the tribal courts and tribal court judges. There is no basis remaining in the case for this Court to review the tribal courts' exercise of jurisdiction.

E. Both Children Reside with Persons with Placement Preferences that Would Apply in State Court.

Without any support, Petitioners claim that the tribal court proceedings separated Watso from her children and imply that the results would have been different had the case proceeded in State court. Pet. 9. However, both children reside with a "member of the Indian child's extended family," the preferred placement in State court under ICWA, 25 U.S.C. § 1914(b)(i), and under Minnesota law for any child. *See* Minn. Stat. § 260C.212, subd. 2 (placement preferences); Dkt. 1 ¶ 33 (alleging that C.P. is under the care of Petitioner and maternal grandmother Dietrich, and that C.H.'s great aunt, has custody of C.H.).

* * *

Given all of these additional defects in the Petition and Petitioners' claims, this case is not a suitable vehicle for Supreme Court review—even if Petitioners had better arguments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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