No. 21-1471

IN THE

Supreme Court of the United States

DENISE HALVORSON, ET VIR,

Petitioners,

v.

HENNEPIN COUNTY CHILDREN'S SERVICES DEPARTMENT, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

REPLY BRIEF FOR PETITIONERS

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I. THIS CASE PROVIDES A COMPELLING REASON FOR REVIEW, DESPITE RESPONDENT'S CLAIMS.

Respondent Hennepin County ("County") states no compelling reason for review exists as state courts "routinely" apply ICWA's presumptions in favor of tribal jurisdiction, there is no split of authority, and the result below is consistent with basic principles of child custody jurisdiction. See Hennepin Opp. 15-16. Yet Respondent does not and cannot dispute the importance of the questions presented: whether a tribe has "inherent jurisdiction" to try custody cases involving nonmembers, and the separate but related issue of whether forcing nonmembers to defend their custody claims in tribal court is consistent with the 14th Amendment. Instead, they devote the bulk of their responses to arguing the merits of those questions.

A) Respondent Hennepin County Refuses To Address The Important, Unsettled Questions Of Whether Tribal Courts Have Adjudicatory Jurisdiction Over Nonmembers.

Respondent County argues there is no split of authority among state courts, but it does so only by confusing the issue raised. But Petitioners urge this Court to address the larger issue of whether tribes possess civil adjudicatory jurisdiction over nonmembers—here, framed in the context of an Indian Child Welfare Act proceeding. Instead, Respondent mischaracterizes the issues raised by Petitioners as narrowly focused on ICWA *per se*—that is, whether "*ICWA's* recognition of presumptive tribal jurisdiction in certain child welfare matters has produced a split of authority."

This misreading enables Respondent to cast the two conflicting cases as of the "nothing-to-see-here-move-along" type. This case indeed presents a conflict between at least two leading state court cases: *In re Welfare of Child of R.S.*, 805 N.W.2d 44, 50 (Minn. 2011) and *State v. Cent. Council of Tlingit*, 371 P.3d 255, 270 (Alaska 2016).

Respondent argues the "first [case] at least 'superficially' involves the same statute at issue here. In *In re the Welfare of R.S.*, the Minnesota Supreme Court held that ICWA did not expressly authorize transfer of pre-adoption and adoption proceedings to tribal court except when an Indian child lives on the reservation. 805 N.W.2d 44, 50–51 (Minn. 2011)." Hennepin Opp. 6. The County added, "*R.S.* never held that ICWA "*prohibits* transfer to tribal court of cases involving nonmembers," as argued by Petitioners. This too, is an erroneous reading of case law. The Minnesota Supreme Court unequivocally questioned tribal jurisdiction over nonmembers:

> the child who is the subject of these proceedings and the child's parents all resided in Fillmore County. Moreover, neither the child nor the child's parents are domiciled on the White Earth reservation, and the district court record indicates that R.S. is not Native American. As a result, *the tribal court lacked inherent jurisdiction* over the termination of parental rights proceedings. *See Montana v. United States,* 450 U.S. 544, 566, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) (tribe lacked inherent power to regulate activities of non-tribal members on non-Indian land); …

> Therefore, the tribal court could assume jurisdiction over the proceeding, if at all, only by Congressional grant.

In re Welfare of Child of R.S., 805 N.W.2d at 50. Respondent fails to cite the *Montana* case upon which the Minnesota Supreme Court relied. Not even a passing reference was made.

The County then argues, "Petitioners' second case, *State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, doesn't involve ICWA at all, much less conflict with *R.S.* In *Tlingit & Haida*, the Alaska Supreme Court analyzed whether a tribal court had jurisdiction over a non-member's child support obligation. 371 P.3d 255, 265 (Alaska 2016)." Hennepin Opp. 16. Petitioners agree *Tlingit* did not address ICWA, but so what? Their point is that state courts are split on their application of *Montana*.

On that score, *Tlingit* reveals a clear split. There, the Alaska Supreme Court held, "the *Montana* Court described the regulatory issue before it as 'a narrow one.'" *Cent. Council of Tlingit*, 371 P.3d at 270. Yet, the court held *Montana* did not apply because the application of tribal child support laws to nonmembers was a matter that fell within two of *Montana's* exceptions—that there, the nonmember had "consensual dealings" with the tribe and that the "[t]he conduct… 'imperil[ed] the subsistence' of the tribal community." *Id.* at 273.

Notable again in Respondent's discussion of the case is what it leaves out: that the Alaska Supreme Court recognized that even *if* a tribe has "inherent jurisdiction" over a nonmember, due process may still preclude extra-

territorial, nonmember jurisdiction. As the court held, "the question whether a tribal court exercising inherent, non-territorial subject matter jurisdiction has personal jurisdiction over the parties…should be decided in cases presenting concrete factual records and a full opportunity to develop the factual and legal arguments." *Id.* at 275.

Thus not only does *Tlinget* directly conflict with *R.S.*, it left undecided the vital question raised and preserved in this case: does the 14th Amendment prevent nonmembers from being forced to defend themselves in tribal court in a child custody case, even assuming the tribe possessed inherent jurisdiction to adjudicate civil custody disputes over nonmembers? Petitioners believe the answer to this question is an easy call, but one the courts below refused to make. This plain split in authority merits review.

B) Whether ICWA and the Decisions Below Adhere to Well-Established Principles of Child Custody Jurisdiction is a Valid Question Going to the Merits.

Respondent County argues, "the absence of any support for Petitioners' arguments rests in their fundamental misunderstanding of child custody jurisdiction, which, like ICWA, follows the child, not the proposed custodians." Hennepin Opp. 17. These arguments go to the merits, and Petitioners do not address them in depth.

Yet suffice it to say Respondent County again overplays the case law it cites. As a for instance, it grudgingly cites *Kulko v. Superior Court of Cal.*, 436 U.S. 84, 91, 98 (1978), arguing it allowed "imposing a child support obligation on a parent [a]s a personal obligation *requiring jurisdiction over the parent.*" By contrast, it argues "custody" cases

are mere "status" cases in which the 14th Amendment has less force. Hennepin Opp. 18. Apparently, children are much like a "res" in which contacts with the forum are less important. Yet under most states' law, a court that determines "custody" over a child imposes a *panoply* of duties of care and support for the child. *See, e.g.,* Minn. Stat. § 518.003 (legal custody obligations defined). So the "status v. imposing duties" distinction urged by Respondent does not wash.

C) The Brackeen case may be relevant.

Respondent County argues this case also does not implicate any of the issues currently under review by this Court in *Haaland et al.v. Brackeen*. Respondent Hennepin Opp. 20. Petitioner agrees this case raises distinctly different issues but would note that if this Court grants review in this case, the Court's subsequent decision in *Brackeen* could render this case moot if Section 1911 (b) of ICWA (governing transfer) is found to be unconstitutional. Conversely, if ICWA is upheld on all grounds, this case would still present an important vehicle for the Court to define the contours of tribal jurisdiction over nonmembers in civil actions, not to mention ICWA itself.

II. THIS CASE IS A PROPER VEHICLE FOR REVIEW.

Respondent Hennepin argues this case provides a poor vehicle for this Court to reach Petitioners' proposed issue as Petitioners seek a ruling by this Court that section 1911 of ICWA is unconstitutional," and the issue has not been preserved. Hennepin Opp. 22. This is a red herring. Petitioners have simply and forthrightly argued at every stage below that ICWA can—and should—be *construed*

to reach a constitutional result, that Section 1911's "good cause" provision (to deny transfer) may be construed to grant state court's a duty to ensure that transfers of a party's case to tribal court be voluntary and consistent with due process. Indeed, this Court has held, when "a serious doubt" is raised about the constitutionality of an act of Congress, "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018).

Here, the capacious term "good cause" in Section 1911 (b) is certainly broad enough to require state courts to deny transfer motions when a tribe is without "inherent jurisdiction" over nonmembers or when subjecting a nonmember to tribal jurisdiction without their consent[1] would run afoul of the 14th Amendment's requirements of fair play and substantial justice. Notification of the United States Attorney general is not required simply because the canon of constitutional avoidance is invoked. *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018).

CONCLUSION

Petitioners, American Indians of a different tribe than the child, have lost the right to seek custody of L.J.H. in state court. L.J.H. is a full biological sibling to three children they have already adopted. Because they were adoptive parents to three of the child's siblings, the state court made them full parties to the ongoing child protection proceedings in Hennepin County District Court, Minneapolis, Minnesota, the only jurisdiction with

1. Even ICWA predicates transfer to tribal court upon the consent of the parents. See 25 U.S.C. 1911 (b).

unquestioned jurisdiction over *all* of the parties to this troubling case.

Petitioners filed their own custody proceeding for L.J.H. in state court, which the Minnesota Court of Appeals recognized they had every right to do—yet the Minnesota Court of Appeals affirmed the transfer of the case to Red Lake Tribal Court, a court foreign to Petitioners. And it also told Petitioners they must file their custody claim in a court foreign to them. They lost their right to access state court.

Whether an Indian tribe can, under Section 1911 (b) of ICWA, subject Petitioners to a foreign tribal jurisdiction without their consent is an important question, the answer to which will affect countless Indian children. And the answer to this question can lend clarity to the issue of whether other nonmember litigants may be subjected to civil tribal jurisdiction.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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