IN THE NEBRASKA SUPREME COURT

Case No. S 22-653

In re Interest of Manuel C. & Mateo S.

APPEAL FROM THE SEPARATE JUVENILE COURT
OF LANCASTER COUNTY, NEBRASKA

The Honorable Shellie D. Sabata

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT

Nebraska Indian Child Welfare Coalition, Inc. & Nebraska Appleseed Center for Law in the Public Interest

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes Cited

Regulations Cited

Legislative Materials Cited

Other Authorities Cited

STATEMENT OF THE CASE

Amici Curiae accepts and adopts Appellant Amber Spencer's Statement of the Case.

SUMMARY OF ARGUMENT

It is Amici Curiae's opinion that the lower court erred in holding that the children at issue were not "Indian children" within the meaning of the Indian Child Welfare Act ("ICWA"). The federal and Nebraska ICWAs' legislative history, plain language, federal regulations, and related jurisprudence all clearly direct that the Red Lake Band of Chippewa Indians' determination that the children and their mother were members for the purposes of ICWA should have been conclusive. To allow a state court to second guess or interfere with such a determination is a direct affront to ICWA's purpose and language, the Bureau of Indian Affairs ("BIA") directions, and rights inherent to tribal sovereignty.

ARGUMENT

I. The legislative history and declarations within the Indian Child Welfare Acts demonstrate clear intent to protect the relationship between Indian children and their Tribes, as to mitigate the disparate severing of such relationships.

In the 1970's, Congress embarked on a multi-year investigation to study and address the "alarmingly high percentage" of Native children removed from their families and placed into non-Native foster and adoptive homes and institutions. 25 U.S.C. § 1901(4); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-35 (1989); Indian Child Welfare Act Proceedings, 81 Fed. Reg. 3877, 38780 (June 14, 2016). In doing so, it found "shocking" disparities, including that 25-35 percent of all Native children had been separated, often unjustifiably, from their families and that 90 percent had been placed into non-Native placements. Establishing Standards for the Placement of Indian Children in Foster or Adoptive Homes to Prevent the Breakup of Indian Families, and for Other Purposes, H.R. Rep. No. 95-1386, at 9-10; *Holyfield*, 490 U.S. at 32-33. Congress found that such separations were often carried out without due process or counsel and were

especially the result of predominantly non-Native State agencies, social workers, and courts failing to recognize the cultural and social standards and authority of Tribal Nations. H.R. Rep. No. 95-1386, at 10-12, 19; *Also see* 25 U.S.C. § 1901(5). It heard that this contributed to the "erosion of a generation of Indians from Tribal communities, loss of Indian traditions and culture, and long-term emotional effects on Indian children." 81 Fed. Reg. 3877, at 38780. Congress deemed this to be "trauma[tizing]," "abusive," "alarming," and "perhaps the most tragic and destructive aspect of [Native] life today." H.R. Rep. No. 95-1386, at 9, 11; 25 U.S.C. § 1901(4). Congress ultimately found that a "crisis [] of massive proportions" existed, which would ultimately result in the extinction of Tribes, absent congressional intervention. H.R. Rep. No. 95-1386, at 9-10, 19. As a result of such findings, it introduced and passed the federal ICWA in 1978 as an attempt to restore Native families and populations, and prevent continued disparate removals. 25 U.S.C. §§ 1901-1902; H.R. Rep. No. 95-1386, at 19.

ICWA begins by summarizing the above and finding that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," and that as a trustee to Tribes, the United States "has a direct interest . . . in protecting Indian children." 25 U.S.C. § 1901(3). As such, in order to "promote the stability and security of Indian tribes and families," ICWA establishes minimum standards for proceedings involving Native children that altogether discourage their removal from their families and Tribes, unless necessary. 25 U.S.C. § 1902. ICWA assumes that it is in a Native child's best interest to protect their relationship with their Tribe, and ensures Tribal involvement to help curtail the imposition of non-Native standards onto Native families. *See In re Zylena R. v. Elise M.,* 284 Neb. 834, 841 (2012).

After the passage of the federal ICWA, Nebraska passed its state version in 1985, largely mirroring the federal version. Judiciary Comm. Hearing on L.B. 566, 104th Neb. Leg. 1st Sess., at 2 (Feb. 26, 2015). Then, in 2015, it passed a significant update via Legislative Bill 566 out of recognition that Nebraska's disproportionate separation of Native families continued to be among the highest in the country, with Native youth being seven percent of the state's child welfare population despite being only one percent of the overall child population. Statement of Intent: L.B. 566, 104th Neb. Leg. 1st Sess. (2015); Judiciary Comm. Hearing on L.B. 566, at 2. The Legislature noted the 2015 version intended to

"strengthen[]" the state ICWA, "ensur[e] that the tribes have a voice," and "respect[] the inherent sovereignty of tribes." Judiciary Comm. Hearing on L.B. 566, at 2-3. Notably, LB 566 added more protections than the federal ICWA and a commitment to recognizing tribes' "continuing and compelling governmental interest in an Indian child." L.B. 566, 104th Neb. Leg. 1st Sess. § 5 (2015); Neb. Rev. Stat. § 43-1502.

The above underscores ICWA's clear intent and commitment to protect and restore the relationship between Native children and their Tribes whenever possible, and to defer to Tribes in proceedings involving such children. While ICWA has helped make progress, disparities still exist today, with Nebraska and Minnesota, the home state of the Red Lake Band, placing in the top four most disproportionate states for Native youth by child welfare investigations. *If I Wasn't Poor, I Wouldn't Be Unfit,* Human Rights Watch, Table 9 (Nov. 17, 2022).

II. The plain language found within the Indian Child Welfare Acts and accompanying regulations objectively instruct that a Tribe's determination of membership for the purposes of ICWA is conclusive.

As is at issue in this case, the application of ICWA turns on whether or not a child is an "Indian child," which is defined as a child who is "a member of a[ ]Tribe" or "eligible for membership . . . and is the biological child of a member." 25 U.S.C. § 1903(4) and Neb. Rev. Stat. § 43-1503(8). In determining who is a "member," the federal ICWA regulations explicitly instruct that Tribes have the sole "jurisdiction and authority" to make such a decision, which "State court[s] may not substitute." 25 C.F.R. § 23.108. The federal BIA Guidelines to the ICWA regulations explain that this is because Tribes are sovereign entities with the "exclusive authority to determine their [membership] requirements" and are "the authoritative and best source of information regarding" membership. Guidelines for Implementing the Indian Child Welfare Act, U.S. Department of the Interior Bureau of Indian Affairs, 21 (Dec. 2016).

Indeed, foundational to Indian law is the principle that each Tribe is a sovereign entity equipped with many powers inherent to self-government, which the Supreme Court has said centrally includes the authority to define who its

members are. *Santa Clara Pueblo*, 436 U.S. 49, 55, n. 32 (1978) (*internal citations omitted*); *Mont. v. U.S.*, 450 U.S. 544, 564 (1981). In respecting such sovereignty, Congress has historically declined to define tribal membership within its hundreds of treaties with Tribes and decades of Indian legislation, instead deferring to Tribes' authority to determine who is encompassed and affected by each. Abi Fain & Mary Kathryn Nagle, *Indian Law: Close to Zero*, 43 Mitchell Hamline L. Rev. 801, 804-05 (2017). Following suit, rather than imposing its own understanding of Indian identity, ICWA does not define "member," instead deferring to Tribes. 25 C.F.R. § 23.108. This is in line with ICWA jurisprudence across jurisdictions prior to, and after, 25 C.F.R. § 23.108 was promulgated, which has consistently and clearly said that membership determinations by Tribes are conclusive. *In re Adoption of Riffle*, 277 Mont. 388, 392 (1996); *In re A.G.,* 326 Mont. 403, 406-07 (2005); *In re Dependency of Z.J.G.,* 196 Wn.2d 152, 158, 177 (Wash. 2020); *In re N. C. H.,* 311 Or. App. 102, 105 (2021).

It is worth noting that § 23.108, along with several other ICWA regulations, was promulgated in 2016 by the BIA after it found inconsistent applications of ICWA across states, leading to courts improperly legislating Indian child welfare matters and disparate outcomes that "essentially voided Federal protections for groups of Indian children to whom ICWA clearly applies." Guidelines for Implementing ICWA, at 6. As such, the 2016 regulations were intended to fill and clarify gaps left by ICWA, providing *binding*, "minimum . . . standard[s] that must be met, regardless of State law," including in defining "Indian child." *Id*. at 7; *See also* 25 C.F.R. § 23.106. Courts across jurisdictions, including this Court, have rightfully relied upon such regulations and their Guidelines to interpret ICWA, as acknowledged and done by this Court in *In re Zylena R.* (284 Neb. at 842–43) and *In re Tavian B.*, (292 Neb. 804, 810-13 (2016)). As it has done in the past, this Court should follow and find persuasive the BIA regulations and Guidelines.

Moreover, both ICWAs instruct that states are to give "full faith and credit" to Tribes' public acts and records in ICWA proceedings. 25 U.S.C. § 1911(d); Neb. Rev. Stat. § 43-1504(5). Here, multiple representatives of the Red Lake Band of Chippewa Indians provided public testimony and documentation that the Tribe considers the children *and* their mother to be "members," fitting the definition of "Indian child" under both ICWAs. (24:20-25, 25:1-3, 27:5-10, 32:9-13; E23, p.1).

Altogether, the lower court's responsibility was to take that determination as conclusive and give it full faith and credit.

To be clear, the lower court ruling, and Appellee State of Nebraska's position, that a child or their parent be "enrolled" for ICWA to apply has no support in the federal or state ICWA or regulations. In fact, other jurisdictions have explicitly rejected such a requirement, as enrollment is not the only means of signaling membership. *In re Hunter*, 132 Or. App. 361, 364 (1995); *In re Adoption of Riffle*, 277 Mont. at 392; *In re R.R., Jr.*, 294 S.W.3d 213, 217 (Tex. App. 2009). To impose such a requirement would not only unjustifiably narrow ICWA's reach but would wrongfully interfere with a Tribe's sovereign right to determine how it defines "membership" as having to include enrollment. Additionally, as individual sovereign entities, each Tribe has the authority to enact its own rules and procedures regarding membership, with enrollment not being the only means of doing so. *See In re Hunter*, 132 Or. App. at 364 ("As the [BIA] guidelines provide: 'Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls . . . Enrollment is . . . not the only means nor is it necessarily determinative.' 44 Fed. Reg. 67586 (1979)"). Creating a uniform requirement for "membership" would inappropriately homogenize all Tribes, and impede their ability to continue expanding and restoring their membership, against ICWA's declared purposes. Instructively, in responding to criticism that ICWA too broadly encompassed children who were *and* were not-yet members, Congress noted that the scope of its powers to legislative Indian matters "cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity" or initiate the formal proceedings sometimes necessary to become enrolled. H.R. Rep. No. 95-1386, at 17. A state court requiring enrollment to show tribal membership, over the statement of a Tribe regarding its own membership requirements, is improper, impractical, unsupported, and is a rejected argument within other jurisdictions.

Lastly, even assuming an ambiguity exists within the existing ICWAs regarding who is an "Indian child," special canons of statutory interpretation regarding federal Indian legislation apply and instruct that such "statutes are to be construed liberally in favor of [Tribes], with ambiguous provisions interpreted to their

benefit." *Mont. v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). As such, an interpretation by this Court of 25 USC § 1903(4)'s definition would have to be guided by such favor to Tribes' rights and interests, which include a strong interest in proceedings regarding children they deem to be their members. Here, the Red Lake Band repeatedly noted their determination that the children and their mother were members and wished to intervene. Per all of the aforementioned, as other jurisdictions have consistently held, such determination should have been taken as conclusive and the lower court's second guessing of such determination is an unsupported divergence.

III. A state court substituting its own judgment as to Tribal membership determinations is a direct affront to tribal sovereignty, Congress' responsibility towards Tribes, and the intent of the ICWAs.

Congress and the Supreme Court have long declared the United States' unique, moral responsibility to work to protect Tribes, akin to a trustee relationship. *See Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). Importantly, this responsibility includes protecting tribal sovereignty from government encroachment. 25 U.S.C. § 3601. ICWA begins with an express acknowledgement of this, recognizing Congress' "responsibility for the protection and preservation of Indian tribes," and their children. 25 U.S.C. §§ 1901(2)(3). But it also recognizes that state's interference and imposition of non-Native standards onto Native families was a major source of the crisis leading to ICWA. 25 U.S.C. § 1901(5); H.R. Rep. No. 95-1386, at 10-12, 19. As such, ICWA not only intends to protect Native children, but also Tribes' "significant" interests, including from the overreaching of states into matters concerning Native children. *See In re Elias L.*, 767 N.W.2d 98, 103 (Neb. 2009). In quoting the Utah Supreme Court, the United States Supreme Court said "The protection of [the tribe's ability to assert its interest in its children] is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on parity with the interests of the parents." *Holyfield*, 490 U.S. at 52-53 (quoting *In re Adoption of Halloway*, 732 P.2d 962, 969-70 (1986). Such a strong interest would be weakened if state courts were permitted to encroach on tribal sovereignty, against the responsibilities declared within ICWA.

The adoption of the Appellee's position would inappropriately allow and incentivize parties to encroach on this interest through state court litigation of a child's "Indian-ness," potentially to avoid the application of ICWA. Such allowance would be similar to the judicially created and often rejected "Existing Indian Family Doctrine," which provides an exception to ICWA if the child at issue had not previously been a member of an Indian home. *In re Dependency of Z.J.G.,* 196 Wn.2d at 169. This exception, which has not been adopted by Nebraska's appellate courts, has been widely criticized and wisely rejected by scholars and state courts, recognizing that litigating who is "Indian-enough" for ICWA to apply denies Tribes their sovereign right to determine their membership and is an inappropriate role for the judiciary. *In re A.J.S.*, 288 Kan. 429, 437-442 (2009). One critic of the Doctrine noted that it "invites precisely the kind of state court interference and paternalism that the ICWA was intended to eliminate." Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 Emory L.J. 587, 633 (Spring 2002). Another scholar wrote:

> The prospect of state courts holding hearings under ICWA on whether tribal members are sufficiently "Indian" is a disturbing one . . . This non-Indian meddling into tribal understandings of group membership or citizenship is both constitutionally misguided and prone to error . . . it also retards the process of rebuilding tribal economies and populations, while undermining Indian identities.

Carole Goldberg, *Critical Race Studies: Descent into Race*, 49 UCLA L. Rev. 1373, 1393-94 (2002). Even this court has acknowledged ICWA's intent that Indian "child welfare determinations are not based on a 'white, middle-class standard which, in many cases, forecloses placement with [an] Indian family." *Zylena R.,* 284 Neb. at 841 *(quoting Holyfield,* 490 U.S. at 36-37). Ultimately, the Kansas Supreme Court, which created the Doctrine, was persuaded by the criticism and overturned it, recognizing that such judicial assessments of "Indian-ness" clearly frustrate ICWA's purpose and protections. *A.J.S.*, 288 Kan. at 441. Allowing a lower court to second guess Tribal decisions regarding membership is problematic for the same reasons critics of the exception expressed, with both allowing state courts to impose their non-Native understanding of Native identity,

tribal law, and directly interfering with their sovereign right to determine membership. State courts do not and should not have this authority.

CONCLUSION

In summary, the legislative history and plain language of the state and federal ICWAs, federal regulations, and fundamental principles of Indian and Tribal law all support that the lower court in this matter should have taken the Red Lake Band of Chippewa Indians' declaration that the children at issue were members for the purposes of ICWA as conclusive, allowing its intervention and the protections of ICWA to apply. Allowing the lower court to reject the Tribe's determination would be a direct affront to the declared purposes and policies within the ICWAs and fundamental principles of Tribal sovereignty. Amici Curiae respectfully opine that this Court should reverse the lower court's holding and find that ICWA should apply.

Dated this 15th day of March, 2023.

Respectfully submitted,

Nebraska Appleseed Center for Law in the Public Interest and the Nebraska Indian Child Welfare Coalition, Inc.

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CERTIFICATE OF COMPLIANCE

Amici Curiae hereby certify that this brief was prepared using Microsoft Word Version 16.70, complies with the word count and typeface requirements of Neb. Ct. R. §§ 6-105 and 2-103(C)(4), and contains 3,528 words, not including this certification.

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Certificate of Service

I hereby certify that on Wednesday, March 15, 2023 I provided a true and correct copy of this *Amicus Brief NICWA & Appleseed Center* to the following:

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