No. 11-680

In the Supreme Court of the United States

BRITINEY JANE LITTLE DOVE NIELSON,
Petitioner,

v.

SUNNY KETCHUM AND JOSHUA KETCHUM,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

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Respondents' brief confirms the extraordinary and destructive nature of the holding below. Respondents embrace the core of that holding: that the Cherokee Nation engaged in improper "gamesmanship" by amending its tribal membership criteria to effectuate the policies of ICWA; and that a federal court is free to disregard a Tribe's membership criteria when determining who is a member of the Tribe for purposes of federal law. That holding is an affront to the Cherokee Nation,[1] cannot be reconciled with basic principles of Indian sovereignty, and undermines the effectiveness of a statute intended "to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in society." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 37 (1989) (citation omitted). Although respondents' brief in opposition is very long, it offers no reason to deny review.

1. Respondents' principal argument against review is that there is no other case addressing the application of ICWA to a tribal membership provision

[1] Respondents state that, "[a]ccording to this Court's on-line docket, the Cherokee Nation is not a petitioner." Opp. ii. In fact, the Cherokee Nation informed the Court by letter on December 8, 2011, that it had been notified by the Clerk's office that it could not proceed as a petitioner because it had not joined petitioner Nielson's application for an extension of time in which to file the petition. But the Nation also informed the Court that, having been a party below, it recognized that it would be designated a respondent in this case; "notif[ied] the Court that it has an active interest in this case and that it fully supports the position of petitioner;" and indicated that, if the Court grants review, "the Cherokee Nation intends to participate as a respondent in support of the petitioner."

precisely like the one at issue in this case. Opp. 16-18. That assertion is true, as far as it goes. But it wholly misses the fundamental point. As respondents' own brief demonstrates, the diverse policies and traditions of Indian tribes make it inevitable that tribal membership criteria will vary widely: Some allow any lineal descendant of a member on the Tribe's base rolls to become a member; some require demonstration of a minimum blood quantum; some require applicants for membership to have at least one parent who is a member; some confer automatic membership on newborns of member parents (Opp. 8-9)—and some, like the Cherokee Nation, offer separate conditions of membership "for the purposes of the Indian Child Welfare Act." Lummi Code § 8.01.010(c) (enrolling, among others, "a descendant of an enrolled member of the Lummi Nation"). By holding that a Tribe's own membership criteria may be disregarded when a court applies federal law that expressly premises rights and obligations on tribal membership, the decision below raises doubt about which elements of a Tribe's definition of membership will render tribal criteria unworthy of federal deference—while running roughshod over the doctrine of Indian sovereignty.[2]

By the same token, respondents are no doubt correct when they say that the decisions of other courts applying ICWA have not addressed factual circumstances identical to those in this case. Opp. 18-21. But here, too, respondents evade the central

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[2] Respondents emphasize the temporary nature of membership under the Citizenship Act, but the Tenth Circuit indicated that it would reach the same conclusion "even if [the Act conferred] full citizenship as opposed to temporary." Pet. App. 13a-14a.

point, which is that courts uniformly have premised their ICWA decisions on the principle that "[t]ribal membership * * * is not defined by the Act. Membership for purposes of the Act is instead left to the control of each individual tribe." *B.H.* v. *People ex rel. X.H.*, 138 P.3d 299, 303 (Colo. 2006) (citing *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584 (Nov. 26, 1979); Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (4th ed. 2005)). These decisions necessarily determined whether a child was an "Indian child," and made that determination by application of the principle that "[w]hether a person is a member of a Native American tribe for ICWA purposes is for the tribe itself to answer." *In re Philip A.C.*, 149 P.3d 51, 56 (Nev. 2006)." See *In re Adoption of C.D.*, 751 N.W.2d 236, 241-242 (N.D. 2008) ("An Indian tribe's determinations of its own membership and eligibility for membership are binding and conclusive in an ICWA proceeding.").

In this respect, it is especially notable that respondents, like the Tenth Circuit, have virtually nothing to say about the meaning of the ICWA Guidelines issued by the Bureau of Indian Affairs to govern precisely this situation. See Opp. 35 n.19. As we showed in the petition, those Guidelines speak directly to the sort of problem presented in this case: "The determination by a tribe that a child is or is not a member of that tribe * * * is conclusive." *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584 § B.1(b)(i) (Nov. 26, 1979). "It is the tribe's prerogative to determine membership criteria." *Ibid.* (B.1 Commentary). The Guidelines surely are entitled at least to *Skidmore* deference and have been accorded "great weight" by courts (*In re Junious M.*, 144 Cal. App. 3d 786, 792 n.7 (1983)), which have

cited and relied upon the Guidelines repeatedly. See, *e.g.*, *Steven H.* v. *Ariz. Dep't of Econ. Sec.*, 190 P.3d 180, 186-187 (Ariz. 2008) ("[C]ourts have looked to [the Guidelines] for assistance in interpreting and applying the provisions of ICWA."); *In re C.H.*, 997 P.2d 776, 780 (Mont. 2000) ("[T]hese guidelines are persuasive and we apply them when interpreting the ICWA."). In such circumstances, the Tenth Circuit's failure even to attempt to explain why it declined to follow the BIA's guidance itself counts heavily in favor of review.

2. Respondents also contend that the issue here is of limited importance, suggesting that ICWA issues are infrequently litigated (Opp. 27), that "the statute mainly addresses the involuntary removal of Indian children from their parents" (Opp. 3), and—based on the deposition testimony of a clerk in the Cherokee registration department—that the Citizenship Act has limited practical operation (Opp. 7-8, 30). Each of these assertions is incorrect.

In fact, as we showed in the petition (at 23), ICWA is the subject of very frequent litigation; that reality is simply undeniable. As we also showed (at 16-19), there can be no doubt that the Tenth Circuit's decision substantially undermines ICWA's policies; wholly apart from any question of parental consent, "[t]he protection of * * * tribal interest[s] is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents." *Holyfield*, 490 U.S. at 52 (quotation omitted). In this respect, the Tenth Circuit's decision is perverse, condemning the Citizenship Act as an exercise in "gamesmanship" precisely *because* it was enacted to implement ICWA policies. Pet. App. 13a.

As for the clerk's testimony, evidently recounted by respondents to suggest that her lack of knowledge of the Citizenship Act establishes the Act's insignificance, its depiction in respondents' brief is misleading in significant respects. In fact, the clerk's questioner was informed that "all Membership Act questions are going to be outside the scope of her knowledge" and that even the Cherokee registrar herself would not be able to add much on the subject "because we keep our government run fairly separately." Appellant's Appendix, *Nielson* v. *Ketchum*, 640 F.3d 1117 (10th Cir. 2011) (Nos. 09-4113, 09-4129), at 170, 171. In any event, the clerk knew virtually nothing at all about the operation of the Cherokee government. See *id.* at 165 (clerk did not know whether Cherokee registration department has a registrar and two assistants, or whether the clerk is "an assistant per the constitution[al] definition"); 168 (did not know why it would be to anyone's benefit to enroll in the Cherokee Nation ("I really don't know. I'm sorry, I can't really answer that.")); *ibid.* (did not know what benefits flow from membership ("I couldn't really speak on it"; "I don't know their guidelines or requirements")); *ibid.* (did not know whether there is a Cherokee reservation); *id.* at 169 (did not know whether the Cherokee register of members is used to determine who has the right to vote "or any other things that the register is used for"). This uninformed testimony provides no useful information about the Act's application.

3. Respondents' remaining arguments against review are insubstantial. Respondents contend that the case is moot because petitioner cannot hope to prevail in her state-court effort to set aside the adop-

tion of her son. Opp. 22-25.[3] But it is a sufficient answer to that contention to note that the Utah Court of Appeals viewed the matter differently; it considered the adoption issue as sufficiently close and important that it certified the matter to the Utah Supreme Court (Opp. 13), a decision that required the appellate court to determine that the case was "of such a nature that it is apparent that [it] should be decided by the Supreme Court and that the Supreme Court would probably grant a petition for a writ of certiorari in the case if decided by the Court of Appeals, irrespective of how the Court of Appeals might rule." Utah R. App. P. 43. The state proceedings have now been stayed by the Utah Supreme Court pending the resolution of *this* case. Pet. 10 n.4.[4]

Respondents' further argument that the case could be decided on the alternative ground that there is insufficient evidence that petitioner's son actually is a member of the Cherokee Nation is equally defective. Opp. 26-27. The district court held that "no reasonable factfinder could conclude that C.D.K. is any-

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[3] Respondents note that the federal district court lacks the authority under ICWA to itself set aside the adoption (Opp. 22-23), but the federal judgment voiding petitioner's relinquishment of her parental rights is, of course, a necessary precondition to petitioner's state-court challenge to the adoption.

[4] Moreover, ICWA expressly trumps state law when, as here, its protections serve to invalidate an adoption: "*Notwithstanding State law to the contrary*, whenever a final decree of adoption of an Indian child has been vacated * * *, a biological parent * * * may petition for return of custody and the court shall grant such petition unless there is a showing * * * that such return of custody is not in the best interests of the child." 25 U.S.C. § 1916(a) (emphasis added). State statutes of limitations or other restrictions on the reopening of adoptions cannot, accordingly, bar ICWA petitions.

thing other than a direct descendant of an original enrollee of the Cherokee Nation and that C.D.K. was a member of the Cherokee Nation, pursuant to the Membership Act, at the time of the Relinquishment Hearing." Pet. App. 24a. The court of appeals agreed that the record "compels th[at] conclusion." Pet. App. 11a. Respondent's alternative theory has already been rejected.

4. Finally, respondents defend the merits of the Tenth Circuit's decision, principally on the grounds (a) that temporary membership under the Citizenship Act "serves no tribal purpose independent of ICWA" (Opp. 29), and (b) that the Act produces absurd results because it means that "every descendant of anyone on the Dawes Rolls will be subject to ICWA, even if no ancestor for generations has been a member" (Opp. 35). These merits-based arguments would not be a sufficient basis for denying review even if there were something to them. But they are, in any event, incorrect on their own terms.

The first is, very simply, *not* the basis for the decision below. The Tenth Circuit did not refuse to apply the Citizenship Act because the Act serves no tribal purpose; the court's rationale was the very different one that "the Cherokee Nation does not seek to define membership only for *tribal* purposes, but *also* seeks to define membership for the purposes of a federal statute." Pet. App. 14a (second emphasis added).[5] By this, the court meant that it is improper

[5] In fact, as we showed in the petition, on the face of it the Citizenship Act makes the newborns it affects tribal citizens "for all purposes." Pet. 8. The Cherokee Nation informs us that, pursuant to the Act, it provides social services to a newborn deemed a temporary member (and his or her parents) during

"gamesmanship" for a Tribe to take account of the federal-law implications when setting its tribal membership criteria. But neither respondents nor the court of appeals offer any reason *why* that should be so. The right to determine tribal membership is the most fundamental element of tribal sovereignty; there accordingly is the strongest presumption that federal laws basing rights upon tribal membership incorporate the Tribe's own standards. Pet. 20-23. Respondents complain about this principle (Opp. 28-29), but are unable to explain why it is illegitimate for a Tribe to consider federal-law implications when establishing membership criteria—particularly when, as here, the undoubted purpose of the tribal standard is to *effectuate the policy of the federal law*. See Pet. 19. Nor are respondents able to point to *any* decision of this Court suggesting *any* basis on which tribal membership criteria may be second-guessed.

As for respondents' parade of horribles, it seemingly is premised on the view that a Tribe lacks the authority to confer automatic tribal membership based on ancestry if the new member's parents were not themselves tribal members. But respondents make no attempt to explain the origin or basis of such a limit, which is inconsistent with the principle that accords Tribes plenary authority over their membership criteria. After all, conferring tribal membership does not involve the assertion of tribal authority over off-reservation non-members; it simply offers those members the benefits of tribal membership. And respondents' argument based on imaginary cases in which "no ancestor for generations has been a member of the tribe" (Opp. 35) is especially

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the pendency of ICWA proceedings, including housing assistance, parenting classes, and counseling services.

ill-taken in this case. Petitioner's mother (C.D.K.'s grandmother) *has* been an enrolled member of the Cherokee Nation since 1988.[6] And because petitioner herself was a minor at the time that she gave birth to her son, under Cherokee law she lacked the capacity at that time to seek membership either for herself *or* for her son, as respondents evidently recognize. Opp. 5 ("minors cannot apply for membership without the consent of a parent or sponsor"). Petitioner is herself now an enrolled member of the Cherokee Nation. Pet. App. 3a n.1.

Moreover, as we explained in the petition (at 16-17), when Congress enacted ICWA it noted the very problem addressed in the Citizenship Act: that a "minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing therefrom." H.R. Rep. No. 95-1386, at 17. The Citizenship Act resolves this danger by

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[6] Respondents are incorrect (Opp. 10, 12) in suggesting that C.D.K.'s grandmother enrolled in the Cherokee Nation in 2008. The grandmother stated in her deposition that she enrolled in 1988, two decades before the events in this case. Dep. Lonita Jean Rowe, at 3:7 (Jan. 30, 2009), *In re the Adoption of C.D.K.*, No. 08-cv-00490 (D. Utah). The Cherokee Nation confirms that she received her Certificate of Degree of Indian Blood ("CDIB") on January 25, 1988, which conclusively established her membership. See Res. No. 21-88, Council of the Cherokee Nation (Mar. 12, 1988). Although respondents have never previously contested this point, they now point to the July 4, 2008 issue date of the grandmother's "Blue Card," which is an internal identification card provided by the Cherokee Nation. Pet. App. 20a (citing Petr.'s Aff., Att. C, Dkt. No. 12, *In re the Adoption of C.D.K.*, No. 08-cv-490 (D. Utah)). But the date the Blue Card issued has no bearing whatsoever on the date of her enrollment.

conferring full citizenship for all purposes on eligible children for a period long enough for their parent or guardian to formally enroll them—or long enough for their Tribe to do so, "because of concerns going beyond the wishes of individual parents." *Holyfield*, 490 U.S. at 50 (citation omitted). Respondents have nothing to say about this, and make no effort to explain how the decision of a Tribe to change the procedural requirements for children's tribal membership so as to address a concern identified by Congress could be inconsistent with ICWA. Further review accordingly is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

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