No. 98003-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Dependency of Z.L.G. and M.G., minor children

STATE OF WASHINGON, DSHS,
Respondent,

v.

S.G.,

Petitioner.

MEMORANDUM OF AMICI CURIAE AMERICAN INDIAN LAW PROFESSORS, THE CENTER FOR INDIAN LAW & POLICY, AND THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF REVIEW

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Table of Contents

Table of Authorities iv
Identity and Interest of Amici Curiae……..1
Introduction and Summary of Argument 1
Argument 1
Conclusion 10

Table of Authorities

Cases

Cooke v. Yurok Tribe,
7 NICS App. 78 (Yurok Tribal Ct. App. 2005) 8

In re A.W.,
741 N.W.2d 793 (Iowa 2007) 7

In re White,
15 Am. Tribal Law 7 (Cherokee Nation S. Ct. 2017) 8

Loy v. Confederated Tribes of Grand Ronde,
4 Am. Tribal Law 132 (Grand Ronde Ct. App. 2003) 8

Rye v. Weasel,
934 S.W.2d 257 (Ky. 1996) 6

S.A. v. E.J.P.,
571 So.2d 1187 (Ala. Ct. Civ. App. 1990) 6

Santa Clara Pueblo v. Martinez,
436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978) 8

Statutes

25 U.S.C. § 1901(5) 3, 5

25 U.S.C. § 1912(a) 4, 6, 9

Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 *et seq*. 1

Regulations

25 C.F.R. § 23.107(a) 7

Legislative Materials

American Indian Policy Review Commission, *Task Force Four Final Report* (1976) 3, 4, 9

H.R. Rep. No. 95-1386 (July 24, 1978) 3

Indian Child Welfare Act of 1977, Hearing before the Senate Committee on Indian Affairs, 95th Cong., 1st Sess. (Aug. 4, 1977) 2, 4, 5

Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs (April 8 & 9, 1974) 2, 3, 4, 8, 9

Other Authorities

Associated Press, *Indians May Win Old Role of Child Care from State*, SEMI-WEEKLY SPOKANE REV., Dec. 14, 1977 5

Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence so Children Can Thrive* (Nov. 2014) 5, 6

KATHRYN E. FORT, AMERICAN INDIAN CHILDREN AND THE LAW: CASES AND MATERIALS (2019) 3

Indian Child Welfare Act Proceedings; Final Rule, 81 Fed. Reg. 38,778 (June 14, 2016) 7

Tommy Miller, *Beyond Blood Quantum: The Legal and Political Implications of Expanding Tribal Enrollment*, 3 AM. INDIAN L.J. 323 (2014) 7, 8

INTEREST AND IDENTITY OF AMICI CURIAE

The identity and interest of the amici are set forth in their motion for leave to file, submitted contemporaneously with this memorandum.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici American Indian Law Professors, the Center for Indian Law & Policy, and the Fred T. Korematsu Center for Law and Equality respectfully ask the court to review the decision below on the grounds that requiring notice to affected Indian tribes even where a parent who is eligible for tribal membership cannot prove their own tribal membership fulfills one of the critical purposes of the Indian Child Welfare Act (ICWA). Amici provides historical context explaining why the notice requirements of ICWA are so fundamental to the proper enforcement and implementation of the statute. Amici believes that this historical context is crucial for this Court to understand fully the need for this Court to address and determine the need for notice in these situations.

ARGUMENT

The improper removal of Indian children from their homes without notice is a core justification for the enactment of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 *et seq*. Before Congress, the leader of the Mississippi Band of Choctaw Indians, Chief Calvin Isaac, testified that state officials "generally" removed Indian children "without notice to or

consultation with responsible tribal authorities." *Indian Child Welfare Act of 1977*, Hearing before the Senate Committee on Indian Affairs, 95th Cong., 1st Sess. at 156 (Aug. 4, 1977) [*1977 Hearing*] (Written Statement of the National Tribal Chairmen's Association).

Lack of notice by states on tribal parties, Indian parents, and Indian grandparents contributed to some of the "grossest violations of due process," which were sadly "quite commonplace when . . . dealing with Indian parents and Indian children." *Indian Child Welfare Program*, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs at 67 (April 8 & 9, 1974) [*1974 Hearings*] (Testimony of Bertram Hirsch, Association on American Indian Affairs). The State of Washington was not immune from these types of due process violations. Colville Confederated Tribes leader and National Congress of American Indians president Mel Tonasket testified that state workers would show up on the reservation without a court order and demand Colville families turn over their children. *Id.* at 224 (Statement of Mel Tonasket). Some Colville children as young as 10 ended up in jail after running away from foster homes, all without notice to the tribe or to the Indian parents. *Id.* Tonasket lamented that "all [a state official] seems to have to do is to walk in[] and get a ward of the court paper filled out, because that's the only thing that we can find is a recommendation by the

juvenile officer to make these children wards of the court." *Id*.

Lack of understanding of—and bias against—Indian childrearing practices and culture made the lack of notice to Indian tribes worse. Congress found that "States . . . often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). State workers seeing Indian children "left for long times with extended family members" often labeled them neglected, not understanding that "the community considered it necessary for the child to be raised by many relatives, so she would learn the skills, stories, and specializations each family member held." KATHRYN E. FORT, AMERICAN INDIAN CHILDREN AND THE LAW: CASES AND MATERIALS 6 (2019) (citing H.R. Rep. No. 95-1386, at 20 (July 24, 1978)).

In Washington state, the problem was acute. In 1976, there were more than 13 times more Indian kids in foster and adoptive care than non-Indian kids in the State. American Indian Policy Review Commission, Task Force Four Final Report 180 (1976) [*1976 Report*]. *See also id*. at 181 (finding more than nine times Indian kids in foster care); *id*. at 237 (finding more than 19 times more Indian kids in adoptive placements). Mel Tonasket testified that the State of Washington subjected even successful Indian families to supervision and possible removal:

> We talked about families that are so large in size, maybe 20 people in a household. That is the reason that the family is so large because they bring in the children who need a roof, and need food. And, yet, we find ourselves fighting head to head with the State of Washington. . . . It's a lot simpler [for the State] to take these children and move them away from us.

1974 Hearings, *supra*, at 225. The State of Washington made "over 80 percent of Indian foster placements in non-Indian homes." *1976 Report*, *supra*, at 106. Lack of notice to the tribes, and the ensuing lack of participation by the tribes in child welfare matters, unfortunately allowed state officials to remove Indian children without tribal input.

State officials admitted in the years before the enactment of § 1912(a) that the State of Washington and its subdivisions were keeping tribes and tribal courts in the dark: "Tribal courts and social service resources have been kept out of the picture by state and county court and agency staff, and by policies and manuals." *1977 Hearing*, *supra*, at 355 (Written Statement of Don Milligan, Indian Desk, State of Washington Dept. of Health and Social Services). This lack of communication and cooperation led directly to the unnecessary removal of Indian children from their homes:

> Non-Indian caseworkers and court workers are delivering the services to Indian children and families but are unable to understand and communicate with the Indian clients, and therefore are unable to deliver relevant social services. In many instances, this communication and attitudinal problem on the part of non-Indian staff has resulted in

> numerous inappropriate deprivations, adoptions, foster home placements and other disruptions of Indian family and tribal life.

Id. Indian advocates in Washington state argued in 1977 that before ICWA, "white social workers [made] judgements on the basis of middle class, white viewpoints, with no regard to Indian ways, traditions and culture." Associated Press, *Indians May Win Old Role of Child Care from State*, SEMI-WEEKLY SPOKANE REV., Dec. 14, 1977, at 5. *See also id*. ("'This is a problem of two cultures,' Mike Ryan, an Irish-born social worker employed by the Seattle Indian Center, commented. 'Too often the price the Indian has had to pay has been acceptance of the white culture or lose his child.'"). This was exactly the concern Congress articulated in enacting ICWA in 1978. 25 U.S.C. § 1901(5) (finding that "the States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families").

In the 21st century, state agencies still tend to favor termination of Indian parental rights even though most Indian child welfare cases involve neglect, and not physical or sexual abuse. Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence so Children Can Thrive* 75 (Nov. 2014); *see also id*. at 87 ("Of all maltreatment victims, 89.3 percent of [Indian]

children were involved in the child welfare system because of a disposition of neglect compared to 78.3 percent of all children nationwide."). Indian families are uniquely vulnerable to intrusive government intervention. *Id*. ("Cultural bias, racism, and a misunderstanding of poverty reflected in legal definitions and workers' decisions to substantiate allegations of neglect make [Indian] families susceptible to biased treatment in child welfare systems."). Governments remove Indian children from their homes "disproportionately." *Id*. at 87 ("Even though the primary reason for child welfare involvement is neglect, [Indian] children are disproportionately removed from their homes and placed in foster care."). ICWA's notice requirement is designed to involve tribes earlier in the process to help avoid unnecessary removals.

Even after Congress mandated notice to Indian tribes in cases where the court "has reason to know that an Indian child is involved," 25 U.S.C. § 1912(a), many state courts improperly continued to hold that a given child was not an Indian child. Some courts held that a child was not an Indian under the statute because they did not speak the tribal language, did not practice the tribal religion, and attended public school. *Rye v. Weasel*, 934 S.W.2d 257, 264 (Ky. 1996). *See, e.g.*, *S.A. v. E.J.P.*, 571 So.2d 1187, 1189 (Ala. Ct. Civ. App. 1990) ("She has had no involvement

in tribal activities or any participation in Indian culture."); *In re A.W.*, 741 N.W.2d 793, 799 (Iowa 2007) ("There is no evidence on the record tending to prove the children have ever lived on the Winnebago Reservation."). The 2016 regulations should have put the question to rest by reconfirming that state courts must ask the question, must do so at the commencement of the proceedings on the record, and must instruct the participants to update the court if new information is received. 25 C.F.R. § 23.107(a). The Department of the Interior explained that notice to tribes is proper to assist the court in determining whether a child is eligible for membership in a federally recognized tribe: "The determination of whether a child is an Indian child turns on Tribal citizenship or eligibility for citizenship. . . . [T]hese determinations are ones that Tribes make in their sovereign capacity and requires courts to defer to those determinations." *Indian Child Welfare Act Proceedings; Final Rule*, 81 Fed. Reg. 38,778, 38,803 (June 14, 2016). In short, a judge's subjective perception of the "Indianness" of a given child is not relevant to the inquiry.

Tribal membership criteria, enrollment procedures, classifications of tribal membership status, and the interpretation of tribal membership laws are unique to each tribe, and often incredibly complicated. Some tribes use a blood quantum requirement for enrollment, while some tribes

use a lineal descendancy requirement. Tommy Miller, *Beyond Blood Quantum: The Legal and Political Implications of Expanding Tribal Enrollment*, 3 AM. INDIAN L.J. 323, 323 (2014). Some tribes bar enrollment of persons with requisite ancestry unless the petitioner's parent is enrolled. *E.g.*, *Cooke v. Yurok Tribe*, 7 NICS App. 78 (Yurok Tribal Ct. App. 2005). Some tribes have adopted waiting periods before a petitioner can enroll. *E.g.*, *Loy v. Confederated Tribes of Grand Ronde*, 4 Am. Tribal Law 132 (Grand Ronde Ct. App. 2003). Some tribes have different classifications of tribal membership rooted in that tribe's history. *E.g.*, *In re White*, 15 Am. Tribal Law 7 (Cherokee Nation S. Ct. 2017). Further, each tribe has exclusive jurisdiction to make membership decisions. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). None of these enrollment matters are to be reviewed by a state or federal court. It should be taken as a given that a state court's interpretation of tribal law about tribal membership status is nothing more than speculation and runs directly afoul of Congress's considered judgment on which children are protected by ICWA.

Improper state court or agency interpretation of tribal law can lead to significant consequences for Indian children. Sadly, the State of Washington has a poor history of ignoring tribal interests in Indian child welfare matters that led to the repeated theft of trust account funds of

Indian children by non-Indian adoptive and foster parents. *1974 Hearings*, *supra*, at 118 ("When adoptive parents become aware that the [Yakama] Indian child has money deposited in their [federal trust] account, they start seeking a method to get it.") (Statement of Mel Sampson); *id.* at 226 (Statement of Mel Tonasket) (referencing the same circumstance at Colville). *Cf. 1976 Report, supra*, at 106 ("One witness described case histories of four children from one family taken under State jurisdiction from the Colville Indian Reservation, while in foster care, over $12,500 of these children's money was turned over to the State of Washington by the Bureau of Indian Affairs."). At Colville, the tribal council found a way to bar non-Indian parents from accessing the Indian children's trust accounts. Tonasket testified, "[w]hen we cut off the child's money to the foster or adoptive parent, her own money from the tribe, there was a decrease of non-Indians who wanted to adopt or take any children into their foster homes." *1974 Hearings*, *supra*, at 228. Notice to Indian tribes of child welfare proceedings has great benefit to Indian children.

In summary, the tribal notice requirement of § 1912(a) brings Indian tribes with a legal interest into an Indian child welfare proceeding, benefiting the parties in at least two ways. The tribe's participation can help in lessening any cultural bias once it is clear the child is an Indian child. But even before that stage, the tribe's participation is necessary in

determining whether the child is an Indian child at all. Only tribes can interpret tribal law.

CONCLUSION

The Court of Appeals' holding that excludes Indian children whose parents are not enrolled needless creates harmful results. For this reason, amici request the Supreme Court accept review of this petition.

DATED this 18th day of February 2020.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on February 18, 2020, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 18th day of February, 2020.

/s/ Brooke Pinkham
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