

No. 12-1278

In The
Supreme Court of the United States

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IN RE INTEREST OF ZYLENA R. AND
ADRIIONNA R., CHILDREN UNDER EIGHTEEN
YEARS OF AGE, STATE OF NEBRASKA,

Petitioner,

vs.

ELISE M. AND OMAHA TRIBE OF NEBRASKA,

Respondents.

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**On Petition For Writ Of Certiorari
To The Nebraska Supreme Court**

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**RESPONDENT ELISE M.'S
BRIEF IN OPPOSITION**

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QUESTIONS PRESENTED

1. Is there a compelling reason that the issues presented by this case related to good cause to deny transfer to tribal court should be resolved by creation of a nationally applicable uniform rule?
2. Does a diversity of opinion among the States with regard to the elements of good cause to deny transfer to tribal court present a compelling reason for creating a nationally applicable uniform rule?

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INTRODUCTION

The petition for writ of certiorari fails to present compelling reasons why there must be a uniform rule among the States concerning whether a best interests standard must be applied by a non-Native, nontribal court when considering whether there is good cause to deny a transfer of a child custody case to a tribal court under the provisions of the Indian Child Welfare Act.

Similarly, the petition for writ of certiorari fails to present compelling reasons why there must be a uniform rule among the States concerning whether a neglect proceeding and a termination of parental rights proceeding subject to the provisions of the Indian Child Welfare Act must be considered as a single proceeding by a non-Native, nontribal court when considering whether a child custody case is at a late stage justifying a finding of good cause to deny a transfer of the case to a tribal court.



REASONS FOR DENYING THE PETITION

Respondent Elise M. argues that the Petition for Writ of Certiorari should be denied.

Petitioner's argument brings to mind the reasons expressed by Congress for enactment of the Indian Child Welfare Act, 25 U.S.C. § 1901, et seq. It recalls the concern about non-Native paternalism which

echoed throughout the legislative history of the Act, and found its way into the Congressional findings:

* * *

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the 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 people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1901.

These findings resonated in this Court's opinion in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597 (1989), citing testimony from the 1978 hearings on the Indian Child Welfare Act by Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association:

Chief Isaac also summarized succinctly what numerous witnesses saw as the principal reason for the high rates of removal of Indian children: One of the most serious failings of the present system is that Indian children are removed from the custody

of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are, at best, ignorant of our cultural values, and, at worst, contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.

Id. at 490 U.S., page 34.

The Congressional findings and this Court's opinion in *Holyfield, supra*, informed the Nebraska Supreme Court in formulating its opinion in *In re Interest of Zylena R. and Adrionna R.*, 284 Neb. 834 (Neb. 2012). Focussing on the background and reasons for passage of the Indian Child Welfare Act, the Nebraska Supreme Court considered a Minnesota appellate court decision in *In re Welfare of Children of R.M.B.*, 735 N.W.2d 348 (Minn. App. 2007), related to the advanced stage discussion, and noted the following:

It further reasoned that a tribe's interest in maintaining its relationship with an Indian child may not be implicated in a foster care placement proceeding to the same degree as in a termination proceeding.

In re Interest of Zylena R. and Adrionna R., op. cit., 284 Neb., at 847.

Looking to the record of testimony produced in the trial court in this case, the Nebraska Supreme Court observed:

A representative of the Tribe testified that placement of Indian children with foster parents, relatives, or a long-term guardian is consistent with the Tribe's cultural interests but that termination of parental rights is not. Thus, a Tribe may have no reason to seek transfer of a foster placement proceeding where it agrees with the Indian child's placement and the permanency goal is reunification with the parents. However, once the goal becomes termination of parental rights, a Tribe has a strong cultural interest in seeking transfer of that proceeding to tribal court.

Id. at 284 Neb., at 848.

Given the strength of the reasoning behind the discussion by the Nebraska Supreme Court, it is possible to see a strong basis for its opinion. However, in a nation as large and diverse as ours, one cannot ignore our history of placing value in allowing a diversity of approaches to addressing social issues. We value local and State control to the extent possible and seek a variety of solutions to social issues as a way of determining what works and what doesn't, depending on local perspectives and local conditions.

Why do we need a unified national rule on these issues at this time? Given the numbers of tribes found in our States, in varying numbers, populations, cultural perspectives, and local conditions, there may

be a value to be found in a variety of statutory approaches and court interpretations. Petitioner has not presented a compelling reason for this Court to grant the Petition for Writ of Certiorari.



CONCLUSION

There is no compelling reason or substantial federal question to justify granting the Petition for Writ of Certiorari.

Respectfully submitted,

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