No. 11-680

In The Supreme Court of the United States

BRITNEY 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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a unique measure adopted by the Cherokee Nation in 1993, which imposes a "Temporary Automatic Membership" on infants born to non-members, without regard to the parent's wishes or consent, qualifies a newborn as a "member" of the Cherokee tribe for purposes of § 1903(4)(a) of the Indian Child Welfare Act of 1978, and therefore an "Indian child" under that subsection.

PARTIES TO THE PROCEEDING

Petitioner Britney Jane Nielson is the biological mother of C.D.K. and was the plaintiff and appellee in the courts below. Respondents are Sunny and Joshua Ketchum, C.D.K.'s adoptive parents. According to this Court's on-line docket, the Cherokee Nation is not a petitioner.

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INTRODUCTION

The Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq*. ("ICWA" or "the Act"), provides that children who are members of Indian tribes or whose parents are members – but not children who are merely eligible for membership and whose parents are *not* members – are subject to certain procedural protections in adoption and foster-placement proceedings. The unusual Cherokee measure at issue here contradicts those provisions by imposing a special "Temporary Automatic Membership" on *all* children who are eligible for membership because of Cherokee heritage, without regard to the wishes, consent, or even knowledge of their non-member parents.

No other federal or state court has ruled on the question whether ICWA applies to an infant who qualifies for "Temporary Automatic Membership" under the Cherokee provision. The court of appeals' decision has no effect on the status of ordinary tribal membership policies (including those of the Cherokee Nation) in this or other contexts, or for other tribal, state, or federal purposes.

In any event, the relief petitioner seeks – invalidation of her biological child's adoption – is unavailable. Except under circumstances not present here, neither ICWA nor state law authorizes vacatur of a final adoption decree or return of custody to the biological parent. Furthermore, petitioner's related

claims in state court are barred by the applicable statute of limitations.

The court of appeals in this case correctly rejected petitioner's attempt to capitalize on ICWA for purposes and under circumstances not within its scope.

STATEMENT OF THE CASE

I. Statutory Background

A. The Indian Child Welfare Act of 1978

The Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq*., governs proceedings involving the adoption or foster-care placement of any "Indian child." The Act defines "Indian child" as an unmarried minor who "is either (a) a *member* of an Indian tribe or (b) is *eligible* for membership in an Indian tribe *and* is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4) (emphases added). At the time of ICWA's passage, Congress considered and rejected a broader definition which would have included "any person who is a member of or who is eligible for membership" in a tribe. S. Rep. No. 95-597, 95th Cong. 2 (1977). In 2001, 2002, and 2003, Congress declined to take action on proposals to expand its original definition of

"Indian child" to include children eligible for membership regardless of parental membership.[1]

Thus, a child is not covered by ICWA merely by virtue of his Indian ancestry. Instead, the statute covers only those children who have one of the two expressly defined connections to an Indian tribe: (a) actual membership, or (b) eligibility for membership, if at least one biological parent is a member. The statute's scope reflects Congress' concern with the continuing viability of Indian tribes and their *members'* families.

The statute mainly addresses the involuntary removal of Indian children from their parents, followed by placement in foster care or adoption. Congress was concerned with Indian families that were "broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." H.R. 12533, 95th Cong. 26 (1978). After their children were taken from them, "Indian parents [were] forced . . . to chase their children from agency to agency – court to court – State to State, in a frantic effort to recover their children. Many never d[id]." 124 Cong. Rec. H3560-62 (daily ed. May 3, 1978) (statement of Rep. Udall). Many of ICWA's

[1] As relevant here, the language proposed in 2003 would have defined "Indian child" as an unmarried minor who is a "member" or is "eligible for membership." H.R. 2750, 108th Cong. § 19 (2003). *See also* H.R. 2644, 107th Cong. § 15 (2001); H.R. 4733, 107th Cong. § 19 (2002).

provisions address involuntary proceedings, not voluntary adoptions. *See* 25 U.S.C. § 1912(a)-(f).[2]

The Act's treatment of voluntary child custody proceedings, in § 1913, focuses on the biological parent's consent. Subsection (a) contains the provision upon which petitioner relies, mandating a ten-day waiting period for any voluntary termination of parental rights.[3] It also requires any "consent[ ] to a foster care placement or to termination of parental rights" to be in writing, recorded, and certified by the judge to have been "fully understood by the parent." Subsections (b) and (c) govern withdrawal of consent in foster care placements and in proceedings to terminate parental rights. Subsection (d), which governs withdrawal of consent after a final decree of adoption, comes into play only when consent was obtained by fraud or duress.

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[2] In involuntary proceedings, the Act provides for notice to the child's parent and tribe; court-appointed counsel for indigent Indian parents; each party's right to examine "reports or other documents"; a required showing that other "remedial services . . . have proved unsuccessful"; and high burdens of proof for removing a child. 25 U.S.C. § 1912(b)-(e).

[3] This provision was not in any of the proposed bills considered prior to the Act's passage. It first appeared on the eve of the vote, without discussion in the legislative history, in an amendment to H.R. 12533.

B. Cherokee Nation Membership Laws

1. *Membership*. The Cherokee Nation Constitution defines who may become a member of the tribe and establishes an enrollment process. To become a member, an applicant must satisfy two constitutional requirements. First, the applicant must present evidence of eligibility, showing that he is a "descendant[ ] of original enrollees listed on the Dawes Commission Rolls." Cherokee Nation Constitution, art. IV, § 1.[4] Second, prospective members must apply for membership to the Registration Committee, to "have their names entered in the Cherokee Register." *Id*. § 2(a). A number "shall be . . . assigned to every name, which is approved and entered into the Cherokee Register." *Id*. § 2(b). According to the clerk responsible for membership in the tribe's registration department, there is no other way to become a member, and minors cannot apply for membership without the consent of a parent or sponsor. Deposition of Jana Leach, Appendix to Appellants' Brief ("App.") at 170-71, *Nielson* v. *Ketchum*, 640 F.3d 1117 (10th Cir. 2011) (Nos. 09-4113, 09-4129).

[4] The Dawes Commission Rolls were compiled by a congressional commission at the end of the nineteenth century, to "identify all qualifying Indians entitled to receive an allotment [of reservation lands]." Barbara Ann Atwood, *Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children* 35-36 (2010). The Dawes Rolls included a membership list for the Cherokee Nation. *Id.* at 39-40.

2. *The special "Temporary Automatic Membership" provision*. At a meeting of the Tribal Council Rules Committee in 1993, a staff member brought up "a problem concerning the adoption of Cherokee babies." Minutes of Tribal Council Rules Comm. Meeting ("Tribal Minutes"), May 20, 1993. She said that "adoption agencies [were] bypassing the Indian Child Welfare Act" by obtaining a signed membership relinquishment document from "young Indian women . . . before their child is born and then six months later, after the adoption is complete, telling them they [could] re-enroll and receive all benefits as before." *Id*. In response to its concern about the removal of members' children from the tribe, the Tribal Council declared its "right under the Indian Child Welfare Act to determine who our members are." *Id*.

The Tribal Council considered several proposals to prevent temporary relinquishments of membership and passed two of them. One of the enacted proposals imposed a 180-day waiting period before the Cherokee Registrar could act on any application for relinquishment of membership. Cherokee Nation Membership Act, Legis. Act No. 2-93, § 19. The other proposal, which became the provision relied upon by petitioner, was to "establish[ ] some form of *special membership* for a short period of time." Tribal Minutes, May 20, 1993 (emphasis added).

On July 12, 1993, the Tribal Council voted to amend the tribe's Membership Act to create this "special membership," entitled "Temporary Automatic Membership of Newborn Children (for 240 days)."

Minutes of Tribal Council Meeting, July 12, 1993.[5] This provision says that the tribe automatically admits "every newborn child who is a Direct Descendent [*sic*] of an Original Enrollee [listed on the Dawes Rolls] . . . as a member of the Cherokee Nation for a period of 240 days following the birth of the child." Cherokee Nation Membership Act, Legis. Act No. 2-93, § 5A(b). The description of newborns who qualify for this "special membership" – "Direct Descendent[s] [*sic*] of an Original Enrollee" – is the same as the tribe's definition in its Constitution of *eligibility* for membership. *See* Cherokee Nation Const., art. IV, § 1.

In practice, the Cherokee Registrar does not enroll newborns as members of the tribe under this "Temporary Automatic Membership" provision. *See* App. 171. They are not recorded on the membership rolls, and the Registrar does not keep track of them or know who they are. *Id*. According to the deposition testimony of the membership clerk in the tribe's registration department, the only way to become a member is through application. *Id*. at 170-71. The clerk initially stated that she was unaware of the Citizenship Act. *Id*. at 170. Although she later said that she had heard of it, she stated that she did not understand the temporary membership provision. *Id.* at 171. When counsel for respondents sought to depose the Registrar, the tribe's Assistant Attorney

[5] The "Membership Act" was re-named the "Citizenship Act" in 2002. Cherokee Nation Membership Act, Legis. Act No. 16-02, § 4A.

General stated that the Registrar would not "have any type of knowledge over what [the clerk] has," and that the clerk was authorized to speak for the tribe on these matters. *Id*.

C. Membership Provisions of Other Tribes

Of the 565 federally recognized tribes, petitioner does not cite, and respondents could not locate, even one that has a provision like the Cherokee provision, creating a special or temporary membership (or any kind of automatic membership) for children of non-members. Of the seventy-three tribes within the Tenth Circuit, and all other tribes with enrollments greater than 10,000 members as of 2005, it appears that none besides the Cherokee provides for automatic, temporary membership of children not born to members of the tribe.[6]

Some tribes, like the Muscogee, allow any lineal descendant of a person listed on the tribe's base rolls to become members, but only upon application. *See, e.g.*, Constitution of the Muscogee (Creek) Nation, art.

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[6] Counsel for respondents reviewed tribal constitutions, codes, and ordinances of 30 of the 34 federally recognized tribes with more than 10,000 enrolled members (excluding the Cherokee Nation), and from other, smaller tribes within the Tenth Circuit. These documents were obtained from tribes' websites, from library collections, and directly from tribes. Some tribes declined to provide tribal documents, and others stated that their membership requirements are not in writing. Whether all of these documents are current could not be determined.

III, §§ 2-3. Other tribes, like the Pascua Yaqui, restrict membership to applicants who demonstrate a minimum blood quantum. Pascua Yaqui Code, tit. 2, ch. 6-1, § 140. The Oneida Tribe requires a minimum blood quantum and that the applicant have at least one parent who is a member. Constitution and Bylaws of the Oneida Tribe of Indians of Wisconsin, art. II, § 1 (1969).

While the Navajo and Oglala Sioux tribes confer automatic membership on some newborns, those memberships are neither temporary nor conferred unless at least one parent is a member. Constitution of the Oglala Sioux Tribe, art. II, § 1 (2008); Navajo Nation Code Ann. tit. 1, § 701 (2010). A prospective parent who does not want a child to become a member of the tribe automatically at birth, for purposes of an adoption or otherwise, can relinquish his or her own membership before the child's birth. *See*, *e.g.*, Navajo Nation Code Ann. tit. 1, § 705 (2010).

The Cherokee Nation provision is thus unique in at least three respects. Its membership is temporary; it confers automatic membership even when neither of the child's parents is a member; and it purports to make children members without their knowledge or consent, or that of a parent.

II. Facts and Procedural History

1. At the time of C.D.K.'s birth, petitioner was not (and had not previously been) a member of the Cherokee Nation or any other Indian tribe. Pet. App.

3a, 19a. The same was true for her mother, C.D.K.'s grandmother. *Id*. at 19a-20a. Petitioner also has an older child who was twenty-one months old when C.D.K. was born. App. 102, 397. He was not a member of the Cherokee Nation or any other Indian tribe at that time or before. *Id*. at 102.

2. Respondents, Sunny and Joshua Ketchum, are a married couple who live in Utah. They filed a petition to adopt C.D.K. in Utah state court on October 30, 2007. App. 86-87. The Ketchums informed the court that C.D.K. was due to be born to petitioner the following week and stated their belief that petitioner would consent to the adoption. *Id*. at 86. The Ketchums had been communicating with petitioner about the adoption and had provided petitioner with adoption counseling, covered related prenatal and childbirth costs, and accompanied petitioner on visits to her obstetrician. *Id*. at 75, 79, 401.

Petitioner gave birth to C.D.K. on the morning of November 5, 2007. Pet. App. 3a. Consistent with the waiting period established by Utah law, petitioner appeared in Utah state court the next day to relinquish her parental rights and consent to the Ketchums' adoption of C.D.K. *Id*. The court reminded petitioner of her right to consult with counsel and her right to additional adoption counseling at the Ketchums' expense, but petitioner declined both. App. 75, 79-80.

At the relinquishment hearing, petitioner informed the court under oath that she had read the relinquishment document provided for her signature, that she understood its terms, and that she had been given an opportunity to have her questions answered. Pet. App. 18a. The court further pressed petitioner to ask any questions she might have about the relinquishment document or adoption process. App. 80. Petitioner affirmed that she understood the implications of relinquishing her rights and that she would not be allowed to rescind the relinquishment if she later changed her mind. Pet. App. 18a.

The court then accepted the relinquishment, explicitly finding that petitioner offered it of her own free will and choice, and ordered that the Ketchums assume temporary custody of C.D.K. Pet. App. 19a. Six months later, without objection and in conformity with Utah law, the court finalized the Ketchums' adoption of C.D.K. on May 13, 2008. App. 93-94.

3. On June 25, 2008, seven months after voluntarily relinquishing her parental rights and more than a month after entry of the final adoption decree, petitioner filed a petition in the U.S. District Court for the District of Utah. Pet. App. 4a. She claimed that C.D.K. was an "Indian child" within the meaning of ICWA and that her voluntary relinquishment of parental rights within ten days of C.D.K.'s birth was invalid under ICWA. *Id*. at 4a-6a. The Cherokee Nation intervened on petitioner's behalf, asserting that C.D.K. was a member of the tribe at the time of the relinquishment hearing. *Id*. at 4a.

On August 5, 2008 – nearly nine months after C.D.K.'s birth, three months after the adoption was finalized, and more than a month after filing her federal suit – petitioner enrolled herself as a member of the Cherokee Nation. Pet. App. 20a. She enrolled her older child at the same time. App. 102. While petitioner's mother had previously told the Utah trial court that she was an enrolled member of a tribe, in fact she was not. She became an enrolled member of the Cherokee Nation on June 4, 2008, nearly seven months after the state-court relinquishment hearing and a month after the adoption was finalized. Pet. App. 19a-20a.

In the district court, it was undisputed that C.D.K. was not, and has never been, an enrolled member of any Indian tribe. Pet. App. 18a, 20a. The district court noted, with "frustration," that neither petitioner nor the Cherokee Nation provided documentary evidence that C.D.K. was descended from an original enrollee listed on the Dawes Rolls. Pet. App. 24a. Nevertheless, the court relied on genealogical evidence that petitioner's great-great-great-grandmothers were full-blooded Cherokee as indirect evidence that C.D.K. was descended from an original enrollee. *Id*. at 23a-24a. The court thus found that C.D.K. was a member of the Cherokee Nation automatically at birth, under the tribe's "Temporary Automatic Membership" provision. *Id*. at 24a.

Pursuant to § 1914 of ICWA, the court invalidated petitioner's voluntary relinquishment of parental rights on the ground that it did not comply with

the ten-day waiting period mandated by § 1913(a). Pet. App. 24a, 27a. Nevertheless, the court denied petitioner's motion to vacate the adoption decree and return custody of C.D.K. to her, since petitioner did not prove "fraud or duress" as required by § 1913(d). *Id*. at 6a-7a. Three days later, the district court ruled that it could not order a return of custody pursuant to § 1916 of ICWA, "which allows the . . . court to order return of the child only if the adoption decree is vacated." *Id*. at 7a. Petitioner did not appeal either of these rulings. *Id*. at 8a n.4.

4. After the federal district court issued its final order, petitioner filed a motion to invalidate the adoption and a petition for return of custody in Utah state court. The state trial court denied both on the ground that they were barred by Utah's statute of limitations. *In re Adoption of C.D.K.*, No. 072700191, slip op. at 18 (Utah D. Ct. Aug. 31, 2009). Petitioner appealed this ruling to the Utah Court of Appeals, which certified the case to the Utah Supreme Court. The Utah Supreme Court stayed the proceeding pending disposition of this federal litigation. *In re Adoption of C.D.K.*, No. 20090808-SC (Utah Sept. 29, 2010).

5. On respondents' appeal in the federal case, the court of appeals reversed the judgment of the district court. It noted that neither petitioner nor the Cherokee Nation had "identified any other law by any other tribe" that provides for this kind of temporary membership. Pet. App. 13a. The court acknowledged the general rule that tribes "'have exclusive authority on membership determinations for tribal purposes.'"

Id. at 14a (quoting *Ordinance 59 Ass'n* v. *U.S. Dep't of Interior Sec'y*, 163 F.3d 1150, 1153 n.3 (10th Cir. 1998)). It observed, however, that "[i]n this context," the tribe "does not seek to define membership only for tribal purposes, but also seeks to define membership for the purposes of a federal statute." *Id*. Indeed, the tribe authorized this type of temporary membership "in order to invoke ICWA's protections." *Id*. at 13a.

Since the tribe's definition of membership is not linked to the membership of the child's parent, as Congress contemplated, the court refused to allow the tribe to "expand the reach of a federal statute by a tribal provision that extends automatic citizenship to the child of a nonmember of the tribe." *Id*. at 14a-15a. The court therefore "conclude[d] that C.D.K. was not an 'Indian child' at the time of the adoption proceedings for ICWA purposes," and so ICWA did not apply to those proceedings. *Id.* at 15a.

REASONS FOR DENYING THE PETITION

There is no need for this Court to decide this case. Courts are not divided on the question presented, which has not been addressed by any other court. Petitioner does not even claim that there is a conflict with the state court decisions that she cites. The Tenth Circuit's decision does not call into question, and indeed reaffirms, the general rule that tribes determine their own membership for tribal purposes. The "Temporary Automatic Membership"

provision, however, is not treated as a membership provision for tribal purposes but rather was adopted and operates solely to trigger the applicability of ICWA. Moreover, because this case concerns an atypical provision of one tribe, it is of little general importance.

This case would be a poor vehicle for review. No court can grant petitioner the relief she seeks under ICWA, and Utah's statute of limitations and its substantive adoption laws bar her state-law claims. In addition, there is an alternative ground for sustaining the judgment of the court of appeals, based on insufficient evidence that the child in this case was a member of the tribe.

The decision below is manifestly correct. In order to trigger ICWA's coverage, the tribe's definition of "member" must at least be used by the tribe for tribal purposes, independent of ICWA. Because the "Temporary Automatic Membership" provision serves no such independent tribal purpose, it cannot be the basis for defining "Indian child" for purposes of the federal statute. The tribe's definition also conflicts with Congress' intent regarding the role that tribal membership would play in defining the coverage of the statute. If accepted, it would impermissibly expand the scope of the statute and lead to untenable and absurd results.

I. This Case Presents a Question of First Impression, on Which No Other Court Has Issued a Conflicting Decision or Even Ruled

The ruling below neither creates nor contributes to any split of authority. Petitioner cites no decisions from any court holding that the automatic, involuntary imposition of temporary tribal membership on a child of non-members makes that child an "Indian child" for purposes of ICWA. Indeed, petitioner cites no federal cases at all on the question presented. The few state court decisions she cites arise in different factual contexts and raise legal issues distinct from those of this case. Indeed, while petitioner argues that the ruling in this case is "inconsistent" with some of those decisions, Pet. 11, she does not claim a conflict, and certainly not an entrenched or significant one.

A. No Other Court Has Considered the Issue in This Case

The issue in this case is not whether Indian tribes are empowered to determine their own membership. This Court and the Tenth Circuit have long recognized the right of a tribe "to define its own membership *for tribal purposes*." *See Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 72 n.32 (1978) (emphasis added); *Ordinance 59 Ass'n*, 163 F.3d at 1153 n.3; Pet. App. 14a. The much narrower issue in this case is whether a tribal measure that imposes an automatic temporary membership on unidentified newborn children, even of non-member parents (who

have not consented or might object), makes those children *bona fide* members of the tribe within the meaning of § 1903(4) of ICWA, and therefore "Indian child[ren]" under that subsection. Pet. App. 10a. Petitioner cites no other decision on that question, and respondents are aware of none.

The Tenth Circuit did not hold, as petitioner claims, that a "court is free to reject a tribe's conclusion that particular categories of persons are tribal members." Pet. 12. The general principle of tribal autonomy over membership has been honored in the Tenth Circuit both before and after this Court stated it in *Santa Clara Pueblo*. *See Ordinance 59 Ass'n,* 163 F.3d at 1153 n.3 ("tribes . . . have exclusive authority on membership determinations for tribal purposes") (citing *Martinez* v. *Southern Ute Tribe*, 249 F.2d 915, 920 (10th Cir. 1957)). The court of appeals merely held that ICWA was not triggered in this case by "*this* sort of temporary membership" imposed on children of non-members. Pet. App. 13a (emphasis added).[7] This ruling does not "depart from" any prior

[7] The court below also said that "even if" the Cherokee Citizenship Act granted full rather than temporary membership to the children of non-members, that would not make such children "Indian children" for purposes of ICWA because such a result would "violate[ ] Congress' intent." Pet App. 13a. If an Indian tribe ever grants such full membership to children of non-members, the question whether the Tenth Circuit's dictum on the subject is correct could arise and be resolved by the courts, including this Court if appropriate.

authority, Pet. 12, let alone create the kind of conflict that would require resolution by this Court.

B. The Decision Below Does Not Conflict With Other Decisions Under the Indian Child Welfare Act

Petitioner does not cite any case involving a temporary, automatic membership provision or the question whether such a provision (or any similar provision) can mandate coverage under ICWA. Implicitly acknowledging the lack of a conflict, petitioner instead cites six cases from state high courts that generally address tribal determinations of membership in individual cases. Pet. 14-15. Those cases involve different facts and distinct legal questions from those of this case and do not show that this case would have been decided differently by any of those courts.

1. Neither *B.H.* v. *People ex rel. X.H.*, 138 P.3d 299 (Colo. 2006) (*en banc*), nor *In re M.C.P.*, 571 A.2d 627 (Vt. 1989), had occasion to decide, or decided, the meaning of "Indian child" under § 1903(4) of ICWA, much less determined whether an aberrant provision like the one in this case dictates the definition of the federal statutory term. Both cases concerned a separate statutory provision, 25 U.S.C. § 1912(a), which requires a court to give notice to the appropriate tribe in an involuntary proceeding if the court has "reason to know" that the child in question is Indian. Courts have not interpreted this phrase literally; rather,

following the suggestion of the Bureau of Indian Affairs ("BIA"), they require notice if there is "reason to believe" that the child might be an Indian child. *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (Nov. 26, 1979). The threshold showing required for notice under § 1912 is low, and precedes any consideration of "Indian child" status under § 1903(4).

Thus, the Supreme Court of Colorado noted in *B.H.* that the "threshold requirement for notice was clearly not intended to be high" and held that notice was appropriate in that case. 138 P.3d at 303. Similarly, in holding that notice should have been given in *In re M.C.P.,* the Supreme Court of Vermont emphasized the low threshold for the notice requirement, which should be given a "broad reading . . . even where it is unclear that the child involved is an Indian child." 571 A.2d at 633-34. The court expressly declined to decide what degree of deference is due to tribal determinations of membership. *See id.* at 633 n.4.

2. Two of petitioner's cases address the evidentiary and procedural requirements that tribes must meet to prove a membership determination. *See In re Adoption of C.D.*, 751 N.W.2d 236 (N.D. 2008); *In re Phillip A.C.*, 149 P.3d 51 (Nev. 2006). In *C.D.*, the Supreme Court of North Dakota found insufficient evidence supporting a birth mother's claim that her child was an "Indian child." 751 N.W.2d at 244-45. The court noted that while a tribe "has the authority to determine its own membership," it must adduce

evidence that it has done so. *Id*. at 242. Assertions in litigation, without more, do not constitute a determination of membership deserving of deference. *Id.*; *see also In re Phillip A.C.*, 149 P.3d at 56-57 (holding that a tribal enrollment officer's affidavit provided sufficient evidence of a tribal determination but cautioning that "[w]hether a tribe has concluded that a child is eligible for membership in a Native American tribe is a question of fact" that must be established by evidence and found by the court). Each of these cases turned on evidence issues; neither involved a dispute over whether the application of a tribe's membership rule triggered ICWA coverage.

3. Finally, petitioner cites two state court cases in which courts expressed deference to a tribe's determination that a particular child was a member, based on unchallenged membership criteria. That is a different inquiry from the one in this case. Because of the procedural posture of these cases, neither of these courts had occasion to hold, or held, that satisfaction of tribal membership criteria conclusively triggers ICWA coverage.

In *In re J.L.M.*, the Nebraska Supreme Court recognized a tribe's prerogative to determine its membership, but in that case the tribe had determined that the child in question lacked the tribe's "total Indian blood requirement" and therefore was not eligible for membership. 451 N.W.2d 377, 385-87 (Neb. 1990). In *In re A.G.*, an involuntary adoption proceeding, the Montana Supreme Court held that the trial court erred in determining Indian child

status without any input on that question from the tribe. 109 P.3d 756, 758-59 (Mont. 2005).

Neither of these cases provided any occasion to decide whether the applicable tribal criteria triggered ICWA protection. In *J.L.M.*, the determination that the child was not a tribe member precluded any exploration of the issue. In *A.G.*, the court's statement that tribal determinations of membership are "conclusive" was unnecessary to the decision, and therefore dictum; the lack of any tribal input on the question would have been error under any standard of deference to tribal determinations. *See* 109 P.3d at 759.

Moreover, these cases concerned a tribe's factual consideration of an individual child's status according to typical, unexceptional membership requirements. This case, by contrast, concerns a tribe's "special" membership rule which departs from the tribe's usual enrollment criteria, reaches children of non-members (without their consent), and is inconsistent with the plain language, purpose, and intended scope of ICWA. The question here is whether a tribe may unilaterally extend ICWA protections designated for tribe members and their children to children who are eligible for membership but do not have a parent who is a member, as required by the statute. That narrow issue is the first of its kind, is not the subject of a split, and does not warrant this Court's review.

II. Grave Vehicle Problems Would Prevent This Court From Reaching the Question Presented

This case is a particularly poor vehicle in which to consider the question presented. First, the case is moot. Even if petitioner prevailed on the question presented, neither the federal court nor the Utah courts could grant the relief petitioner seeks. The applicable substantive laws do not permit vacatur of the final adoption decree in this case, and, in any event, the applicable statute of limitations has run.

Second, there is an alternative ground for affirming the judgment below, based on the lack of competent evidence that the tribe in fact determined that C.D.K. is a member.

A. This Case Is Moot

1. Under ICWA, no court can grant petitioner the relief she seeks, namely, vacating the final adoption decree and giving her custody of C.D.K. In a voluntary proceeding, ICWA authorizes a court to "vacate" a final adoption decree and "return the child to the parent" only "[u]pon a finding that [the biological parent's] consent was obtained by fraud or duress." 25 U.S.C. § 1913(d). The district court rejected petitioner's § 1913(d) claim, however, finding that petitioner's allegations of fraud and duress "were unsupported by evidence or law, and were, in large part, directly contradicted by the official record of the November 2007 relinquishment proceeding." Order

Amending Judgment at 1-2, Doc. 55, 08-cv-490 (D. Utah June 15, 2009).[8]

Accordingly, the district court correctly held that it could not vacate the adoption decree or order custody of C.D.K. returned to petitioner. App. 507-09. Petitioner did not appeal this decision, *see* Pet. App. 8a n.4, and it is not before this Court.[9]

2. Any attempt by petitioner to obtain relief under state law would also necessarily fail. First, her claim is time-barred, as the state trial court held. *In re Adoption of C.D.K.*, No. 072700191, slip op. at

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[8] Nor can petitioner obtain custody under § 1916(a) of ICWA, which authorizes a "return of custody" when either (1) a final adoption decree "has been vacated or set aside," or (2) when the "adoptive parents voluntarily consent to the termination of their parental rights to the child," in either instance unless "such return of custody is not in the best interests of the child." 25 U.S.C. § 1916(a). Neither of those circumstances is present here.

[9] The statutory remedy for a violation of the waiting-period requirement of § 1913(a) is found in § 1914, which allows "any court of competent jurisdiction to invalidate" a "termination of parental rights under State law" upon a showing "that such action violated any provision of section[ ] 1913." 25 U.S.C. § 1914. Invalidation of petitioner's consent to termination (or relinquishment) of her parental rights is not the same, however, as vacatur of the adoption decree, and does not provide a basis for vacating the adoption decree under ICWA. Invalidating a relinquishment has practical legal effect only *before* an adoption is finalized, to allow a birth parent to withdraw consent to the adoption under § 1913(c) and mandate a return of custody if an adoption does not go through.

18 (Utah D. Ct. Aug. 31, 2009).[10] The state trial court also ruled that neither equitable tolling nor the Utah savings statute could revive petitioner's claim. *Id.* Petitioner's appeal of that ruling has been stayed by the Utah Supreme Court pending a final judgment in this federal litigation, but that court's precedents entirely support the lower state court's ruling.[11]

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[10] The Utah statute of limitations provides unequivocally: "No person may contest an adoption after one year from the day on which the final decree of adoption is entered." Utah Code Ann. § 78B-6-133(7)(b).

[11] Utah law sets a "high bar" for the "extraordinary relief" of equitable tolling. *Beaver Cnty.* v. *Property Tax Div.,* 128 P.3d 1187, 1193 (Utah 2006). It requires proof that petitioner "did not know of and could not reasonably have known of the existence of the cause of action in time to file a claim within the limitation period." *Warren* v. *Provo City Corp*., 838 P.2d 1125, 1129 (Utah 1992). As the state trial court noted, petitioner could not make such a showing; she actually "reopened" the state court adoption proceedings in order to retrieve documents for use in this federal court litigation "well before the one-year limitations period ran, and yet failed to timely file her adoption contest within the time prescribed under the Utah Adoption Act." *In re Adoption of C.D.K.*, No. 072700191, slip op. at 17.

The savings statute does not apply because the text and legislative history of the Utah Adoption Act "ma[ke] plain its intention to forever bar adoption contests of those who are guilty of a procedural misstep." *Id*. at 15; *see Standard Fed. Sav. & Loan Ass'n* v. *Kirkbride*, 821 P.2d 1136, 1138 (Utah 1991); Utah Code Ann. § 78B-6-102 (stating legislature's findings, including state's "compelling interest . . . in preventing the disruption of adoptive placements," right of adopted children to "permanence and stability in adoptive placements," and rights of adoptive parents "in retaining custody of an adopted child").

Second, even if petitioner's claim were not time-barred, Utah law would prevent any state court from vacating the final adoption decree or awarding custody of C.D.K. to petitioner. Utah Code Ann. § 78B-6-133(7)(a) provides that "[a] person may not contest an adoption after the final decree of adoption is entered, if that person . . . (iii) executed a consent to the adoption or relinquishment for adoption."[12] That prohibition applies "to all attempts to contest an adoption . . . *regardless of the basis for contesting the adoption,* including claims of fraud, duress, undue influence, lack of capacity or competency, mistake of law or fact, or lack of jurisdiction." *Id*. at § 78B-6-133(7)(c) (emphasis added).

3. Because no court can provide petitioner the relief she seeks, the case is moot. *See, e.g*., *United States* v. *Juvenile Male*, 131 S. Ct. 2860, 2864 (2011) (per curiam); *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1993) (impossibility of any effectual relief moots a case); 13B Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.1 (3d ed. 2008).[13]

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[12] The other subsections of this provision bar any contest of a final adoption by anyone who "(i) was a party to the adoption proceeding; [or] (ii) was served with notice of the adoption proceeding." Utah Code Ann. § 78B-6-133(7)(a)(i), (ii).

[13] This case does not fall within the exception for issues that are "capable of repetition, yet evad[e] review." *Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983); *see also DeFunis* v. *Odegaard*, 416 U.S. 312, 318-19 (1974). A biological parent can challenge an adoption before it is finalized, subject to applicable state law.

B. There Are Alternative Grounds for Affirming the Judgment Below

As the cases cited by petitioner illustrate, courts do not simply accept a tribe's assertions in litigation that a particular person is a member. Rather, competent evidence must be produced that the tribe has actually determined that a child is a member. *See, e.g.*, *In re Adoption of C.D.*, 751 N.W.2d at 242; *In re Phillip A.C.*, 149 P.3d at 57; *see also* pp. 19-20, *supra*. As respondents argued below, petitioner's claim suffers an evidentiary deficiency similar to the one in *C.D.* Brief for Appellants ("Appellants' Br.") at 25-28, *Nielson* v. *Ketchum*, 640 F.3d 1117 (10th Cir. 2011) (Nos. 09-4113, 09-4129). The court of appeals noted that "evidence of C.D.K.'s ancestry was not clearly presented in the district court." Pet. App. 11a.

More fundamentally, petitioner's only evidence of C.D.K.'s membership consisted of an unsworn and unauthenticated letter to respondents' counsel from Myra Reed, an intake specialist in the tribe's Indian Child Welfare office. App. 372-73. The letter asserted that C.D.K. was "eligible" for Cherokee membership and that he was an "Indian child" under ICWA by virtue of the "Temporary Automatic Membership" provision. *Id.* The letter did not state that C.D.K. was a member of the tribe.

Respondents argued that this was insufficient and also questioned whether Ms. Reed was "authorized to make such statements on the tribe's behalf." *In re Phillip A.C.*, 149 P.3d at 56 (internal quotation

marks omitted); *see* Appellants' Br. at 24-25. This possible lack of authority is of particular concern in light of the sworn statements of the tribe's registration clerk that she did not understand the temporary membership provision and that enrollment is required for membership. *See* pp. 5, 7-8, *supra*.

III. The Decision Below Is of Limited Importance

There is no need for this Court to review the court of appeals' decision. First, the Tenth Circuit stands alone in addressing this question of first impression, on atypical facts concerning the Cherokee Nation's "Temporary Automatic Membership" provision, which appears to be unique to this tribe. The question has arisen only in this one case in the three decades since ICWA was enacted, and the Tenth Circuit's decision will affect few, if any, other people. The Tenth Circuit's decision does not have any bearing on the membership provisions of other tribes or the Cherokee Nation's regular membership provision. Thus, petitioner's statement that the Tenth Circuit is home to seventy-five tribes (Pet. 24) is irrelevant.

Second, the more typical factual question of whether a particular child is a member of a tribe, for ICWA purposes, appears to be litigated infrequently. Petitioner cites very few cases, and even those cases often turn on issues antecedent to the question of membership, like the adequacy of notice, or evidentiary or procedural matters. See pp. 18-20, *supra*.

Finally, given the narrow compass of the decision below, there is no basis for petitioner's claims that the decision creates uncertainty (Pet. 24), affects the unquestioned right of tribes to determine membership for their own purposes, or has any bearing on other federal statutes. *See* Pet. 11, 24-25.

IV. The Decision Below Is Correct

A. The "Temporary Automatic Membership" Provision Did Not Make C.D.K. an "Indian Child" Under ICWA

Indian tribes have the authority to determine their own membership "for tribal purposes." *Santa Clara Pueblo*, 436 U.S. at 72 n.32. From that general principle, petitioner argues that the word "member" in ICWA must be defined by "the tribe's own membership criteria." Pet. 21. That is not necessarily the case.

This Court has made clear that when federal statutes look to other sources, like state law, to give content to federal statutory terms, the resulting incorporation is subject to at least one important qualification. The referenced definition will not be adopted if it is "strange," "aberrant," or inconsistent with the federal statute, because in such cases the referenced "rules do not provide appropriate standards for federal law." *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 581 (1973); *see also De Sylva* v. *Ballentine*, 351 U.S. 570, 580-81 (1956) (federal Copyright Act's definition of "child" looks to state law

unless the state's definition is "entirely strange to those familiar with its ordinary usage"); *Reconstruction Fin. Corp.* v. *Beaver Cnty.*, 328 U.S. 204, 210 (1946) (federal tax law uses states' definitions of "real property" unless they "run counter to the terms of the Act").

Applying that principle in this case, the tribe's aberrant "Temporary Automatic Membership" provision does not deserve deference, especially because it serves no tribal purpose independent of ICWA. *Cf. Frank Lyon Co.* v. *United States*, 435 U.S. 561, 583-84 (1978) (transactions "with economic substance" should be honored for tax purposes, but "not [ones] shaped solely by tax-avoidance features that have meaningless labels attached"); *Comm'r* v. *Court Holding Co.*, 324 U.S. 331, 334 (1945) ("true nature of a transaction [not allowed] to be disguised by mere formalisms, which exist solely to alter tax liabilities"). A court is not required to defer to a tribe's definition of membership that serves no tribal purpose independent of ICWA and was adopted "solely to alter" the application of ICWA.

The temporary membership rule was not used "for tribal purposes." Petitioner refers to benefits and "full citizenship for all purposes" during an infant's first 240 days of life. Pet. 16. Petitioner has cited no record evidence, however, that the tribe or anyone else ever relied on the temporary membership rule to provide benefits to infants born to nonmembers, or, for that matter, used it for any tribal

purpose independent of ICWA. There is no evidence of such newborns being "treated as members." Pet. 22.

On the contrary, the tribal official responsible for maintaining the tribe's membership rolls at first testified that she had not heard of the Citizenship Act. As far as she knew, the only way to become a member was to enroll. When reminded about the Citizenship Act, she testified that she had heard of it but did not understand the "temporary membership" provision. App. 171. Her testimony on the membership rules is corroborated by the tribe's Constitution, which the Cherokee Nation itself considers the exclusive authority for conferring membership. *See* pp. 5, 7-8, *supra*.[14]

The *raison d'etre* of the "Temporary Automatic Membership" provision, as stated explicitly during the meeting leading to its passage, was to prevent pregnant women who were tribe members from relinquishing their membership in order "to facilitat[e] an adoption" outside of ICWA. Tribal Minutes, May

[14] One of the cases cited by petitioner involved a decision that a child was an "Indian child" under subsection (b) of § 1903(4) because the Cherokee Nation "acknowledged that [the child's father] was a member of the tribe, and that . . . his biological child[ ] was *eligible* for enrollment." *Jared P.* v. *Glade T.*, 209 P.3d 157, 162 (Ariz. App. 2009) (emphasis added). Apparently the Cherokee Nation did not rely in that case on the "Temporary Automatic Membership" provision as a basis for considering the child herself a member under subsection (a) of § 1903(4).

20, 1993; *see* p. 6, *supra*.[15] Rather than serving any tribal purpose independent of ICWA, the rule is aimed exclusively at triggering ICWA coverage. If that were permissible, the statute would have said that an "Indian child" for purposes of ICWA is anyone a tribe designates, rather than keying the definition of that term to the membership of the child (or a parent) in a tribe.[16]

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[15] Petitioner provides no basis for her speculation that the temporary provision was enacted to let infants, who could not enroll themselves, take advantage of tribal benefits. *See* Pet. 16.

[16] If petitioner's argument were correct, there would be no limit to the tribe's right to define its membership for ICWA purposes. If the tribe passed a measure declaring that all babies born to U.S. citizens are citizens of the Cherokee Nation for their first 240 (or even 10) days of life, petitioner's argument would treat that membership definition as conclusive, and ICWA's requirements would apply to all those children.

The instant case differs from the hypothetical only in degree. Neither petitioner nor her mother had ever been a member of the Cherokee Nation before C.D.K.'s birth. Apparently it has been several generations since petitioner's ancestors have been members. According to petitioner (and the Cherokee Nation), the temporary membership provision would apply even if none of petitioner's ancestors had been enrolled since the Dawes Rolls, a century ago.

Where, as here, the child in question was not born to a tribe member, there is no concern about removal of Indian children from their tribe, or tribe members relinquishing their membership (temporarily or otherwise) in an attempt to circumvent ICWA. C.D.K. is not even arguably among the children intended to be covered by ICWA, or even by the tribe's "Temporary Automatic Membership" provision.

B. Basing ICWA Coverage on the "Temporary Automatic Membership" Provision Would Expand the Statute Beyond Its Intended Scope

Under § 1903(4), a child can qualify as an "Indian child" for purposes of ICWA in one of two ways, either (a) by direct membership in a tribe or (b) by eligibility for membership *if* the child's parent is a member. The Cherokee Nation's "Temporary Automatic Membership" provision attempts to treat eligibility as membership,[17] but without the Act's limitation that eligibility counts only for children of tribe members. It is clear from the two distinct prongs of § 1903(4) that "Temporary Automatic Membership" for children of non-members is not what Congress had in mind when it defined "Indian child" as a "member" of an Indian tribe.

Petitioner states that the "contemporaneous understanding when Congress wrote ICWA was that Indian tribes determine their own membership." Pet. 12. When ICWA was enacted in 1978, however, the "temporary" Cherokee provision did not exist. Nor has petitioner pointed to any evidence that any other tribe at that time had ever conferred an automatic temporary (or even permanent) membership on the children of non-members. Petitioner does not identify

[17] The description of newborns who qualify for temporary membership – any "Direct Descendent [*sic*] of an Original Enrollee" – is the same as the tribe's definition of *eligibility* for membership in its Constitution. Cherokee Nation Const., art. IV, § 1.

on what basis a tribe would have sovereign power to impose membership on the child of a non-member, especially without a parent's consent.[18]

Indeed, at the time of ICWA's original enactment and again when it was amended in 2003, Congress considered and rejected broader definitions that would have included "eligible" children of non-members. *See* pp. 2-3, *supra*. Instead, Congress defined the scope of the statute in a manner consistent with its concern about the removal of Indian children from their tribal families. Since petitioner was not a member of the Cherokee Nation at the time of C.D.K.'s birth or before, C.D.K. cannot be said to have been "removed" from the tribe. Congress' concern simply is not implicated in this case.

For similar reasons, the ramifications of the decision below are quite limited. The Tenth Circuit's ruling does not mean that "newborns [can]not be treated as tribal members," nor does it "write ICWA's 10-day rule out of the statute." Pet. App. 18-19. The court held only that "ICWA does not apply to *this* sort of temporary membership." Pet. App. 13a (emphasis added). The ten-day waiting period remains applicable in cases involving tribal rules like those of the Navajo and Oglala Sioux, which automatically treat

[18] Congress' explicit limitation of the eligibility prong to children of members is consistent with the principle that tribes have authority over non-members "only in limited circumstances." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 445 (1997).

infants born to members as permanent members at birth. *See* p. 9, *supra*. The ten-day rule also applies to newborns who are not considered automatic members of their tribes, but who are eligible for enrollment and have a parent who is a tribe member, under subsection (b) of § 1903(4).

This Court's decision in *Santa Clara Pueblo* does not cast doubt on the correctness of the Tenth Circuit's decision. There the issue was whether a tribe's extension of membership to children of male (but not female) members who married outside the tribe violated the equal protection provision of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-1303. This Court did not reach the merits because it ruled that the tribe had sovereign immunity and that ICRA did not authorize a suit for declaratory or injunctive relief against a tribal officer. *Santa Clara Pueblo,* 436 U.S. at 59.

This Court mentioned, in dictum, the rights of tribes to "define [their] own membership for tribal purposes," *id*. at 72 n.32, along with "regulating their *internal* . . . relations" and "mak[ing] their own substantive law in *internal* matters." *Id*. at 55 (emphases added). The Court's statements have no bearing on this case, which extends beyond internal tribal matters to the meaning and scope of an Act of Congress,

and to an adoption not involving members of any tribe.[19]

C. Petitioner's Construction of § 1903(4)(a) Would Lead to Unacceptable and Absurd Results

By including as members all newborns who are eligible for membership because they are descended from Dawes Rolls enrollees many generations ago, the "Temporary Automatic Membership" provision by its terms covers infants who have no direct relationship with the Cherokee Nation. Accepting petitioner's argument would mean that every descendant of anyone on the Dawes Rolls will be subject to ICWA, even if no ancestor for generations has been a member of the tribe.[20] Any child born to any of those

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[19] Petitioner's reliance on *Smith* v. *Babbitt*, 100 F.3d 556, 558 (8th Cir. 1996), is also misplaced. Pet. 21-22. In a case under the Indian Gaming Regulation Act ("IGRA"), 25 U.S.C. §§ 2701-2721, the Eighth Circuit declined jurisdiction on the ground that the particular dispute over distribution of gaming revenues to members was an "intra-tribal matter." *Smith,* 100 F.3d at 557.

Petitioner also places too much weight on the guidelines promulgated by the BIA, *see* Pet. 14, which are advisory but not binding. *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 51 n.26 (1989). There is no reason to believe that even the BIA would consider its guidelines applicable to the aberrant membership rule at issue here.

[20] Children would be covered by ICWA even if their parents renounced their membership, or if ancestors renounced their membership decades or even generations ago. Under § 19 of the Citizenship Act, relinquishing membership results in "los[ing]

(Continued on following page)

descendants would be an "Indian child" under § 1903(4)(a). Any adoption or foster-placement of such children could be challenged under ICWA, either by the biological parent or the Cherokee Nation, even when the biological parent voluntarily consented.

Such a scheme would be virtually impossible for courts to administer and would produce unacceptable uncertainty for adoptive parents. This cannot have been Congress' intent when it enacted ICWA.

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all benefits . . . of [one's] status as a citizen of Cherokee Nation." Cherokee Nation Membership Act, Legis. Act No. 16-02, § 4D(N). Yet under petitioner's argument, the tribe could still impose membership on the children of an ex-member, and interfere with voluntary adoptions for all future generations.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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March 5, 2012