2022-2023 Daniel Webster-Batchelder American Inns of Court

Haaland v. Brackeen: The Indian Child Welfare Act, Anti-Commandeering, and Equal Protection

April 5, 2023
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Indian Child Welfare Act (ICWA) Overview

"The purpose of the Indian Child Welfare Act (ICWA) is to protect the best interest of Indian Children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children and placement of such children in homes which will reflect the unique values of Indian culture. ICWA provides guidance to States regarding the handling of child abuse and neglect and adoption cases involving Native children and sets minimum standards for the handling of these cases."

Indian Child Welfare Act (ICWA), U.S. Department of the Interior, Bureau of Indian Affairs, https://www.bia.gov/bia/ois/dhs/icwa (citations and quotations omitted).

"Congress enacted ICWA in 1978 to address the Federal, State, and private agency policies and practices that resulted in the wholesale separation of Indian children from their families. Congress found 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. Although the crisis flowed from multiple causes, Congress found that non-Tribal public and private agencies had played a significant role, and that State agencies and courts had often failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. To address this failure, ICWA establishes minimum Federal standards for the removal of Indian children from their families and the placement of these children in foster or adoptive homes, and confirms Tribal jurisdiction over child-custody proceedings involving Indian children."

Guidelines for Implementing the Indian Child Welfare Act, U.S. Department of the Interior Office of the Assistant Secretary—Indian Affairs, Bureau of Indian Affairs, https://www.bia.gov/sites/default/files/dup/assets/bia/ois/pdf/idc2-056831.pdf (December 2016) (citations and quotations omitted).

The following information was taken from the Indian Child Welfare Act Handbook, 2nd edition (2008), an ABA Family Law Section publication by BJ Jones, Mark Tilden & Kelly Gaines-Stoner

Proceedings in which ICWA applies - Application of ICWA is contingent upon definition of "Indian child" – a child who is a member (or eligible for membership) of a federally recognized tribe or Alaskan village/corporation/born to a member of a tribe member. 25 USC § 1903. Upon timely and official notice via registered mail to an Indian parent, Indian custodian or tribe, ICWA allows the right to intervene in any child custody proceeding within state courts and/or to seek transfer to a tribal court (if available). 25 USC §§ 1911 & 1912.

- **Foster care placements (voluntary or involuntary) (including any in which termination of parental rights is a possibility) –** ICWA comes into play regardless of whether an Indian child's out of home placement is voluntary (outside of the tribe) or involuntary (such as that done by a social service agency). This could also include a relative placement approved by a social service agency because termination of a parent's rights over an Indian child is a potential consequence. 25 USC § 1915.

- **Termination of parental rights (includes voluntary surrender of parental rights) –** Termination (or adoption of an Indian child) can only occur after proof is provided that all potential rehabilitative measures/services have been made available to the parents, without success. 25 USC § 1912. In case of voluntary surrender, consent must be in writing, received by a judge who ensures that all consequences are fully explained to the Indian parent or Indian custodian. Consent can be withdrawn for any reason (so long as before final decree of termination or adoption is entered). Otherwise, post-decree, any consent may be collaterally attacked. 25 USC § 1913.

- **Pre-adoptive placements –** ICWA follows other "out of home placement" criteria in that it must be the least restrictive setting and in reasonable proximity to the Indian child's home, and dictates a preference of placement options, generally in the following order: within that Indian family's extended family, foster home licensed/approved by Indian child's tribe, Indian foster home licensed/approved by authorized non-Indian agency, or institution for children approved by Indian tribe or operated by Indian organization (with an eye toward needs of Indian child). 25 USC § 1915 (b). Also includes long-term foster placement. 25 USC § 1915.

- **Adoptive placements –** Preference/deference is given (absent good cause to the contrary) similar to above, with a member of an Indian child's extended family, other members of the Indian child's tribe or other Indian families. 25 USC § 1915 (a).

Proceedings in which ICWA does NOT generally apply:

- **Divorce proceedings –** ICWA does not come into play when two parents are fighting for custody of their child (regardless of whether one or both parents are Indian).

- **Intra-family disputes –** which are private in nature (unless where a non-parent may seek guardianship over an Indian child over the objection of the Indian parent OR where a parent with custody of Indian child seeks to terminate an Indian parent's parental rights to pave the way for non-Indian step-parent adoption)

- **Delinquency proceedings –** where placement of Indian child outside of his/her home is a result of his/her delinquent or "criminal" behavior, BUT ICWA could come into play if out of home placement for delinquent youth is continued/perpetuated because home of Indian parent is not "appropriate" to allow child to return.

- **Voluntary placements –** placement of a child outside his/her Indian home, for educational or religious purposes, as determined by Indian parents – so long as the Indian parent can recover custody of the child when he/she wishes.

Frequently Asked Questions
Bureau of Indian Affairs
Final Rule: Indian Child Welfare Act (ICWA) Proceedings

General

What is this rule?

This rule implements the Indian Child Welfare Act (ICWA), which Congress enacted in 1978.

What does this rule do?

This rule incorporates child-welfare best practices and promotes uniformity in State ICWA proceedings—no matter the child welfare worker, judge, or state handling the case—while still taking into account the unique circumstances of each child.

What is ICWA?

ICWA is a statute passed by Congress to address the agency policies and practices that resulted in the wholesale separation of Indian children from their families.

- State and private agencies were removing as many as 25 - 35% of Indian children from their families and placing many of these children in non-Indian foster and adoptive homes.
- Congress determined that cultural ignorance and biases within the child welfare system were significant causes of this problem.
- Congress recognized that it is in the best interest of the child to maintain Tribal connections and that children are vital to Tribes' continued existence, and enacted ICWA to "protect the best interests of Indian children and to promote the stability and security of Indian Tribes and families."

What does ICWA do?

ICWA governs State child-custody proceedings in multiple ways, including: (1) by recognizing Tribal jurisdiction over decisions for their Indian children; (2) by establishing minimum Federal standards for the removal of Indian children from their families; (3) by establishing preferences for placement of Indian children with extended family or other Tribal families; and (4) by instituting protections to ensure that birth parents' voluntary relinquishments of their children are truly voluntary. (See "Statute's Basics" later in this list for additional information).

Why is this rule needed now?

While ICWA has been in place since 1978, compliance with ICWA has been inconsistent across, and even within, States. As a result, many of the issues that ICWA was intended to address continue to exist today:

- Native American children are still disproportionately more likely to be removed from their homes and communities than other children. Indian families continue to be broken up by the removal of their children by non-Tribal public and private agencies. Nationwide, based on 2013 data, Native American children are represented in State foster care at a rate 2.5 times their presence in the general population.[1] In some States,

[1] *National Council of Juvenile and Family Court Judges, Disproportionality Rates for Children of Color in Foster Care tbl. 1 (June 2015).*

Native American children are represented in State foster-care systems at rates as high as 14.8 times their presence in the general population of that State.[2]

- Differing interpretations of ICWA provisions by individual States and State courts have created substantial variation in how this Federal law is applied. This final rule promotes the uniform application of an important Federal law to protect the rights of Indian children, their parents, and their Tribes, regardless of the child welfare worker, judge, or State involved.

How will this rule help Indian children?

The rule includes protections for Indian children that reflect the "gold standard" in child welfare practices. The rule promotes stability for the child by requiring early inquiry as to whether ICWA applies, by minimizing unnecessary separation of children and their parents, and by maximizing early placements of the child with extended family and other preferred placements. The rule also incorporates the best practice in child welfare of favoring extended family placements, including placement within a child's broader kinship community, and placement with siblings (regardless of whether they are also "Indian children").

How will this rule help Indian families faced with involuntary removal of their children?

The rule will help Indian families by ensuring that they receive prompt notice of involuntary proceedings to allow them to participate in protection of their rights. The rule ensures that agencies take active efforts to prevent the breakup of the family. The rule also helps to minimize unnecessary separation of children and families and ensures that emergency placements without the full suite of protections in ICWA are limited in duration.

How will this rule help Indian families who wish to voluntarily put their children up for foster care or adoption?

This rule ensures that parents who choose to put their Indian children up for foster care or adoption do so of their own free will, without threat of removal by a State agency. The rule requires parents' consent to be in writing before a court with certain contents and requires the court to explain the terms and legal consequences of such consent to the parents and certify that the parents understand.

How will this rule help Tribes?

This rule will help Tribal government agencies by ensuring that they receive prompt notice of involuntary proceedings to allow them to exercise their jurisdiction and other rights and help identify preferred placements. The rule also encourages courts to allow alternative methods of participation in State child-custody proceedings, in recognition that Tribes may not have the capability to appear in person at multiple proceedings across the country. Tribes, like other governments, have a sovereign interest in the welfare of their citizens, and in particular, their children.

How will this rule help State courts and State child-welfare agencies?

This rule provides more certainty for State courts and State child-welfare agencies regarding how to comply with ICWA. The rule addresses everything from the initial determination of whether the Tribe or State has jurisdiction over the proceeding, to what recordkeeping is required after closing an ICWA proceeding. The rule will

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[2] *Id.*

help State courts and agencies to identify whether ICWA applies, and if so, which provisions of ICWA apply to the type of proceeding at hand, helps clarify Federal interpretations of ICWA terms and requirements, and establishes parameters for exercising discretion in the application of ICWA's standards.

How will this rule help foster and adoptive parents?

This rule will help foster and adoptive parents who are non-preferred placements by minimizing late discoveries that ICWA applies. The rule will help foster and adoptive parents who are preferred placements by promoting their early identification as preferred placements.

Applicability

Who is subject to ICWA?

ICWA applies to any State child-custody proceeding involving an "Indian child," based on the child's political affiliation with the Tribe. A child is an "Indian child" only if:

(1) The child is himself or herself a member of a federally recognized Tribe; or

(2) The child's parent is a member of a federally recognized Tribe and the child is eligible for membership.

What if I don't want ICWA to apply to me?

ICWA applies only if the child or parent is a citizen of a federally recognized Tribe. Parents may choose to not apply for Tribal citizenship for themselves or their child, or may renounce their Tribal citizenship. If a parent of the child is not a Tribal citizen, and the child is not a Tribal citizen, ICWA does not apply.

Does ICWA allow Tribes to "claim" children?

No. ICWA applies only to children who are citizens of a federally recognized Tribe, or who are eligible for citizenship and the child's parent is a citizen of the Tribe.

Rule Specifics

Where will the rule be located?

The rule will be located at 25 CFR 23. The bulk of the rule will be in a new subpart I within 25 CFR 23.

What, specifically, does this rule do?

Provisions in the new rule:

- Clarify ICWA's applicability.
- Require State courts to ask, in every child custody proceeding, whether the Act applies.
- Establish limits on the duration of emergency placements before full ICWA rights are afforded to the child, parents or Indian custodians, and Tribes.
- Require notice to the parents and Tribe of involuntary proceedings.

- Clarify the procedures for transfer to a Tribal court and establish parameters of what is "good cause" to deny transfer.
- Clarify who may serve as a qualified expert witness.
- Clarify when placement preferences apply and what placement preferences apply in foster care, preadoptive, and adoptive placements, and establish parameters of what is "good cause" to depart from the placement preferences.
- Clarify requirements for voluntary proceedings.
- Confirm adult adoptees' rights to information about their Tribal affiliation.
- Identify records States and BIA must maintain regarding implementation of ICWA.
- Highlight the statutory right to invalidate an action taken in violation of ICWA.

How does the rule clarify the applicability of ICWA?

The rule clarifies that ICWA applies to any child custody proceeding involving an "Indian child," as that term is defined by the Act. Generally, ICWA applies to any Indian child custody proceeding, any emergency proceeding involving an Indian child, and any proceeding involving status offenses resulting in the need for out-of-home placement of the child.

How does the rule address the so-called "existing Indian family (EIF)" exception?

The Bureau of Indian Affairs (BIA) agrees with the large number of courts that rejected the EIF exception as incompatible with the plain language of ICWA. The final rule clarifies that ICWA applies whenever an "Indian child" is involved in a child-custody proceeding and codifies that State courts may not rely on certain listed factors (the factors a minority of courts continue to use in the EIF exception) as the basis for excepting a case from ICWA's applicability.

How does the rule emphasize the importance of early inquiry?

The rule requires State courts to ask each participant in an emergency or voluntary or involuntary child-custody proceeding, whether the participant knows or has "reason to know" that the child is an Indian child. The rule also lists what factors indicate a "reason to know" a child is an "Indian child" as that term is defined by the Act.

What are the rule's requirements for emergency proceedings?

The rule reinforces that emergency removals and emergency placements should occur only in limited circumstances (when there is imminent physical damage or harm to the child). The rule does not further define "imminent physical damage or harm," as that statutory phrase is already clear and understandable as written. The BIA understands the phrase to reflect the endangerment of the child's health, safety and welfare, not just bodily injury or death.

The rule also provides that emergency placements should be of a limited duration. Under the rule, when an emergency removal/placement has occurred, the emergency removal/placement may not last more than 30 days unless the court makes a determination that:

(1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm; and

(2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and

(3) It has not been possible to initiate a "child custody proceeding" subject to ICWA's notice and other requirements.

What are the rule's requirements for notice?

The rule incorporates the statute's requirements for notice in involuntary proceedings, requiring the party seeking placement to provide notice to the Tribe and parent or Indian custodian. The rule affords some flexibility by allowing notice by certified mail with return receipt requested, in lieu of registered mail with return receipt requested. The rule also specifies the information that should be provided as part of such notice.

What are the rule's requirements for transferring child-custody proceedings to Tribal court?

The rule reinforces that, for proceedings involving children domiciled outside an Indian reservation (where the Tribe's jurisdiction and State's jurisdiction are concurrent), the State court must transfer the proceeding to the Tribe upon the request of the Tribe or parent/Indian custodian, unless a parent objects to the transfer, the Tribal court declines transfer, or there is "good cause" to deny the transfer. The rule establishes parameters on what may be considered "good cause" to deny transfer, by establishing that the State court must not consider:

- Whether the foster-care or termination of parental rights proceeding is at an advanced stage if the parent, Indian custodian, or Indian child's Tribe did not receive notice of the proceeding until an advanced stage;
- Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
- Whether transfer could result in a change in the placement of the child;
- The Indian child's cultural connections with the Tribe or reservation; or
- Socio-economic conditions or any negative perception of Tribal or BIA social services or judicial systems.

What are the rule's requirements for qualified expert witnesses?

The rule reinforces that the State court's order for foster care placement or termination of parental rights must be based upon evidence supported by the testimony of one or more qualified expert witnesses. The rule establishes that the qualified expert witness should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe and must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Does the rule include the proposed rule's list of qualified expert witnesses?

No. The final rule does not include the proposed rule's list of qualified expert witnesses; rather, it focuses on the fact that a qualified expert witness must be qualified to testify as to whether continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. In addition, it emphasizes that the qualified expert witness should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe.

Does the qualified expert witness need to have knowledge of Tribal culture?

The final rule provides that the qualified expert witness should have knowledge of the prevailing social and cultural standards of the Indian child's Tribe by being qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. This helps ensure that relevant information about Tribal social and cultural standards is provided to the courts, and can inform the determination about whether the continued custody of the child by the parent is likely to result in serious emotional of physical damage to the child.

How do I find a qualified expert witness with knowledge of the Tribe's social and cultural standards?

The final rule provides that the Indian child's Tribe may designate a person as having knowledge of the prevailing social and cultural standards of the Tribe and that the court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.

Are there any other limits on who can serve as a qualified expert witness?

Yes, the final rule prohibits the social worker regularly assigned to the Indian child from serving as a qualified expert witness in child-custody proceedings concerning the child.

What are the rule's requirements for placement preferences?

In any foster care or preadoptive placement of an Indian child, where the Indian child's Tribe has not established a different order of preference, preference must be given to placement of the child with:

- A member of the child's extended family;
- A foster home approved or specified by the child's Tribe;
- An Indian foster home; or
- An institution for children approved by a Tribe or operated by an Indian organization which has a program to meet the child's needs.

In adoptive placements of Indian children, where the Indian child's Tribe has not established a different order of preference, preference must be given to the placement with:

- A member of the Indian child's extended family;
- Other members of the Indian child's Tribe; or
- Other Indian families.

Does the rule allow State courts to depart from the placement preferences if a child has bonded with a non-preferred placement?

The rule establishes what may constitute good cause to depart from the placement preferences, and explicitly prohibits courts from relying solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA. The child is best served by identifying, as early as possible, whether ICWA applies, and seeking out preferred placements.

What if no preferred placements are available?

If no suitable preferred placements are available, then a State court may find good cause to depart from the placement preferences, but only if the court determines that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located.

How does the rule clarify ICWA's applicability to voluntary proceedings?

The rule clarifies ICWA does not apply to voluntary placements in which the parent or Indian custodian may have the child returned upon verbal request without any formalities or contingencies. For all other voluntary placements, the rule requires a determination of whether the child is an "Indian child" and, if so, requires compliance with the placement preferences and requirements regarding informed consent.

Does the rule require notifying Tribes and extended family of voluntary adoptions?

No. The final rule does not include the proposed rule's provisions that would have required agencies to notify a birth parent's extended family of a pending adoption. The final rule does require taking all reasonable steps to verify whether the child is an Indian child, if there is a reason to know that he or she is an Indian child. This may include contacting the Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) to verify the child's status.

How does the rule protect a birth parent's privacy in voluntary proceedings?

The final rule includes several protections to ensure confidentiality. Among these are the following:

- With regard to inquiry and verification of the Indian child's status and identifying preferred placements, the final rule provides that, where a consenting parent requests anonymity, both the State court and Tribe must keep relevant documents and information confidential. *See* FR § 23.107(d).
- With regard to a parent or Indian custodian's consent to a placement or termination of parental rights, the final rule provides that, where confidentiality is requested or indicated, the parent or Indian custodian does not need to execute the consent in a session of court that is open to the public. *See* FR § 23.125(d).

Does this rule affect a parent's right to choose who adopts their child in voluntary adoptions?

No. Parents may choose adoptive parents as long as they attest that they have reviewed the placement options, if any, that comply with ICWA's order of preference.

Effective Date

When is this rule effective?

The final rule is effective 180 days after its publication in the Federal Register. None of the provisions of the rule affects proceedings that are initiated prior to the effective date.

If a child custody proceeding is already underway on the effective date of this rule, does the rule apply to the proceeding?

The rule will apply to all proceedings that begin on or after the date the rule becomes effective.

BIA Expertise

What role does ICWA provide for the Bureau of Indian Affairs (BIA)?

ICWA authorizes the Secretary of the Interior to promulgate implementing regulations. The Secretary has delegated this authority to BIA.

What expertise does BIA have in child welfare issues?

BIA has significant expertise in ICWA and child welfare issues and administers ICWA in many ways (see list below). BIA's Office of Indian Services, through its Division of Human Services employs a team of child protection social workers and employs an ICWA Policy Social Worker who serves as the central BIA expert and liaison on ICWA matters. Tribal and Department caseworkers are the first responders for child and family services on reservations in Indian country—this requires social-service workers to frequently engage families through face-to-face contacts, assess the safety of children, monitor case progress, and ensure that essential services and support are provided to the child and her family. This experience is critical toward understanding the areas where ICWA is or is not working at the State level, as well as the necessary standards to address ongoing problems.

The Department has also consulted extensively with the Children's Bureau of the Administration for Children and Families, Department of Health and Human Services, and the Department of Justice to produce a final rule that reflects the expertise of all three agencies.

How does BIA currently administer ICWA?

BIA administers ICWA in many ways. For example, BIA:

- Collects information from Tribes on their ICWA activities for the Indian Child Welfare Quarterly and Annual Report,
- Ensures that ICWA processes and resources are in place to facilitate implementation of ICWA,
- Administers the notice process under Section 1912 of the Act,
- Publishes a nationwide contact list of Tribally designated ICWA agents for service of notice,
- Administers ICWA grants,
- Maintains a central file of adoption records under ICWA,
- Provides technical assistance to State social workers and courts on ICWA and Indian child welfare in general, including but not limited to assisting in locating expert witnesses and identifying language interpreters,
- Is a significant Federal funding source for Indian child-welfare programs run by Tribes.

Implementation

Will BIA be offering any training to State courts and agencies?

BIA plans to offer both on-line training modules and in-person training at regional locations for State courts and agencies on the rule.

How does this rule affect ICWA funding to Tribes?

This rule has no effect on ICWA funding to Tribes or other entities.

Statute's Basics

Tribal Jurisdiction Over Decisions for Their Indian Children

ICWA recognizes that Tribes have exclusive jurisdiction over child-custody proceedings in certain instances: specifically, where the Indian child is domiciled or resides on the reservation, or the child is a ward of Tribal court. In all other cases, the Tribe's jurisdiction over the Indian child custody proceeding is concurrent with that of the State, and ICWA provides that, if the Tribe or parent/Indian custodian requests transfer of the proceeding to Tribal court, the State court *must* transfer the proceeding, in the absence of good cause to the contrary unless a parent objects to transfer, the Tribal court declines transfer, or there is "good cause" to deny the transfer.

Minimum Federal Standards for Removal of Indian Children

ICWA's minimum Federal standards embody the best practices in child welfare of allowing families to remain together or be reunified. Specifically, ICWA:

- Limits emergency removals and emergency placements in use and in time;
- Requires notice to be given to Tribes and parents or Indian custodians of any involuntary foster care, preadoptive, or adoptive placement or termination of parental rights;
- Provides time for the Tribes and parents or Indian custodians to prepare for involuntary proceedings;
- Requires qualified expert witnesses to testify prior to foster care or adoptive placements in involuntary Indian child custody proceedings; and
- Establishes a clear-and-convincing evidentiary standard for involuntary foster care placement and a beyond-a-reasonable-doubt evidentiary standard for involuntary termination of parental rights.

Preferences for Placement of Indian Children

ICWA encourages kinship and community placements by requiring that Indian children be placed in preferred foster homes and adoptive homes (i.e., in accordance with placement preferences), in the absence of good cause to the contrary.

Protections in Voluntary Foster Care and Adoptions

ICWA imposes safeguards to ensure a parent's consent to removal and placement is truly voluntary.

Further Information

Who can I contact for more information about this rule?

For questions regarding the regulation and its development, please contact Elizabeth K. Appel, Director, Office of Regulatory Affairs & Collaborative Action – Indian Affairs, Elizabeth.appel@bia.gov, (202) 273-4680.

For questions regarding implementation of this regulation, please contact Debra Burton, Indian Child Welfare Specialist, Office of Indian Services, Bureau of Indian Affairs, Debra.burton@bia.gov, (202) 513-7610.

***Haaland v. Brackeen*: An Overview**

The Supreme Court has taken up four cases challenging the constitutionality of the Indian Child Welfare Act (ICWA).[1]

The Circuit Court:

In *Brackeen v. Haaland*, , the en banc Fifth Circuit Court of Appeals wrote a complex decision with no one opinion garnering a majority on all issues. The en banc majority held that ICWA's "Indian Child" classification does not violate the Equal Protection Clause, but the en banc court was equally divided as to whether ICWA'a adoptive and foster placement preference for "other Indian families" and "Indian foster home[s]" violated the Equal Protection Clause. *Brackeen v. Haaland*, 994 F.3d 249, 267-68 (5th Cir. 2021). Thus, the district court's ruling that ICWA's placement preferences violated the Equal Protection Clause was affirmed without precedential opinion. Id. at 268.

As to the 10th Amendment, the en banc majority held that "ICWA's 'active efforts,' § 1912(d), expert witness, § 1912(e) and (f), and recordkeeping requirements, § 1915(e), unconstitutionally commandeer state actors." Id. Thus, the district court was affirmed on these issues. Id. "However, the en banc court is equally divided on whether the placement preferences, § 1915(a)- (b), violate anticommandeering to the extent they direct action by state agencies and officials; on whether the notice provision, § 1912(a), unconstitutionally commandeers state agencies; and on whether the placement record provision, § 1951(a), unconstitutionally commandeers state courts." Id. Thus, the district court's decision on these issues was affirmed without precedential opinion. Id.

The Supreme Court cases:

Plaintiffs:

1. States (TX, LA, and IN)
2. Non-Indian couples who want to foster or adopt Indian children
3. Woman who wants her Indian biological child to be adopted by non-Indian family

Note: TX, LA, and IN contain less than 4% of the national American Indian & Alaskan Native population.

[1] *Haaland v. Brackeen*; *Cherokee Nation v. Brackeen*; *Texas v. Haaland*; and *Brackeen v. Haaland*

Defendants:

1. United States
2. U.S. Department/Secretary of the Interior
3. Bureau of Indian Affairs
4. U.S. Department/Secretary of Health and Human Services

Intervenors:

1. Certain Native American tribes who wanted to support the federal agencies

Amicus Briefs were filed by 26 states and DC, asking the Fifth Circuit to uphold constitutionality of ICWA. These states are home to a majority of the indigenous population.

Argued: November 9, 2022
https://www.supremecourt.gov/oral_arguments/audio/2022/21-376

Briefs: Haaland v. Brackeen - SCOTUSblog

Questions Presented:

Bracken v. Haaland
(1) Whether the Indian Child Welfare Act of 1978's placement preferences — which disfavor non-Indian adoptive families in child-placement proceedings involving an "Indian child" and thereby disadvantage those children — discriminate on the basis of race in violation of the U.S. Constitution; and
(2) whether ICWA's placement preferences exceed Congress's Article I authority by invading the arena of child placement — the "virtually exclusive province of the States," as stated in Sosna v. Iowa — and otherwise commandeering state courts and state agencies to carry out a federal child-placement program.

Haaland v. Brackeen
(1) Whether various provisions of the Indian Child Welfare Act of 1978 — namely, the minimum standards of Section 1912(a), (d), (e), and (f); the placement-preference provisions of Section 1915(a) and (b); and the recordkeeping provisions of Sections 1915(e) and 1951(a) — violate the anticommandeering doctrine of the 10th Amendment;
(2) whether the individual plaintiffs have Article III standing to challenge ICWA's placement preferences for "other Indian families" and for "Indian foster home[s]"; and

(3) whether Section 1915(a)(3) and (b)(iii) are rationally related to legitimate governmental interests and therefore consistent with equal protection.

Cherokee Nation v. Brackeen
(1) Whether the en banc U.S. Court of Appeals for the 5th Circuit erred by invalidating six sets of Indian Child Welfare Act provisions — 25 U.S.C. §§1912(a), (d), (e)-(f), 1915(a)-(b), (e), and 1951(a) — as impermissibly commandeering states (including via its equally divided affirmance);
(2) whether the en banc 5th Circuit erred by reaching the merits of the plaintiffs' claims that ICWA's placement preferences violate equal protection; and
(3) whether the en banc 5th Circuit erred by affirming (via an equally divided court) the district court's judgment invalidating two of ICWA's placement preferences, 25 U.S.C. §1915(a)(3), (b)(iii), as failing to satisfy the rational-basis standard of *Morton v. Mancari*.

Texas v. Haaland
(1) Whether Congress has the power under the Indian commerce clause or otherwise to enact laws governing state child-custody proceedings merely because the child is or may be an Indian;
(2) whether the Indian classifications used in the Indian Child Welfare Act and its implementing regulations violate the Fifth Amendment's equal-protection guarantee;
(3) whether ICWA and its implementing regulations violate the anticommandeering doctrine by requiring states to implement Congress's child-custody regime; and
(4) whether ICWA and its implementing regulations violate the nondelegation doctrine by allowing individual tribes to alter the placement preferences enacted by Congress.

Additional Resources:

- Oyez overview of case Haaland v. Brackeen | Oyez
- Sahan Journal "How an Ojibwe grandmother's adoption fight in Minnesota ended up in the U.S. Supreme Court" A Native grandmother's custody battle reaches U.S. Supreme Court (sahanjournal.com)
- 5th Circuit Opinion: Brackeen v. Haaland, No. 18-11479 (5th Cir. 2021) :: Justia