Everyone wants the Supreme Court to review ICWA's Constitutionality

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The Indian Child Welfare Act of 1978, or ICWA, set federal requirements to state child custody proceedings involving Native American children, adding additional protections and considerations to ensure children stay with family, with their tribe, and stay connected to their community. The act made it federal policy to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families"[1] due to Congressional findings of the disproportionate and "alarmingly high percentage of Indian families [that] are broken up by removal, often unwarranted."[2] The findings were buttressed by the history of removal, their damaging impact on Native American children, and the importance of sovereignty and stability to the survival of tribes. While progress has been made, The National Indian Child Welfare Association has found that Native American children are still disproportionately removed and put in out-of-home placement, with Native American children four times as more likely to be removed and placed in foster care than White children.

While legal challenges to ICWA are not a new occurrence, in 2013 the Supreme Court held that ICWA does not protect the parental rights of a Native parent if they have never had physical custody of their Native child in *Adoptive Couple v. Baby Girl*, significantly narrowing the interpretation of the law.[3] In the same year, 18 of the nation's leading organizations on child welfare filed an amicus brief in support of ICWA in another case, including Casey Family Programs, Children's Defense Fund, and the Child Welfare League of America arguing that ICWA practices are universal best practices. In December 2016, Bureau of Indian Affairs (BIA) published additional federal guidelines to state courts and in the same month, Federal regulations were enacted as a final rule addition to ICWA to improve proceedings and ensure implementation across states.

Currently, the future of the Act and its protections are being appealed to the Supreme Court to review in *Brackeen v. Haaland (formerly Brackeen v Bernhardt)*, with both sides submitting petitions asking for constitutional review. The case began in 2018 as a lawsuit brought by the Brackeens, Texas, Indiana, Louisiana, and other families with similar complaints against the federal government.[4] The Brackeens, a wealthy white evangelical couple from Fort Worth, Texas, had a 10-month old Navajo and Cherokee boy placed with them through foster care in June 2016. Like most ICWA challenges, when they planned to adopt him and ICWA requirements mandated that a native family first be sought, they challenged the fairness and constitutionality of ICWA. The challengers to ICWA argue that the preferential treatment to Native American families is a constitutional violation of the Fourteenth Amendment's Equal Protection Clause and amounts to a racist and discriminatory law.

In 2018, a Federal District Judge in Texas agreed with them and ruled that the entirety of ICWA is unconstitutional. The decision was appealed by the federal government, with five tribes joining as intervenors: the Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, Quinault Indian Nation, and the Navajo. A three-judge panel on the Fifth Circuit of Appeals

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[1] Indian Child Welfare Act of 1978, 25 U.S.C. § 1902
[2] *Id*. at §1901
[3] Adoptive Couple v. Baby Girl, 570 U.S. 637, 643-45
[4] Brackeen v. Bernhardt, 942 F.3d 287 (2019) (rev'd).

reversed the lower court and held that ICWA does not violate the constitution. They held that "ICWA's definition of "Indian child" is a political classification subject to rational basis review." They concluded that ICWA is rationally tied to Congress's stated purpose of protecting Native children and reaffirms inherent rights of tribal nations to be involved in matters involving their own citizens. However, one panel member strongly dissented on the constitutionality of the Final Rule, the added mandate on implementation and record-keeping, as a violation of the 10th Amendment's anticommandeering doctrine. Subsequently, the case was reconsidered *en banc*, with all the judges of the circuit rehearing the case. The resulting ruling is a 325-page opinion, while broadly upholding ICWA as a valid exercise of legislative power and affirming that the definition of an "Indian child" is not a racial category. However, they found some of ICWA's placement preferences invalid, and struck down a "central tenet of the law, which requires… 'active efforts' are made to keep" Native American children with Native families.

Now, parties on both sides want greater clarity on ICWA and its implementation and have petitioned the Supreme Court to take the case and decide whether the federal law is constitutional. Four petitions have been submitted to the Supreme Court, with 325 tribal nations, 57 Native organizations, 21 states, 31 child welfare organizations, 7 members of Congress, and numerous legal scholars joining the federal government to argue for the constitutionality of ICWA.

While the Supreme Court does not have to take the case, as the issue is closely divided and both parties want review, many predict they will accept. Stay tuned for more ICWA updates from the Field Center as the case progresses!