ICWA's Constitutionality Challenged and Review by the Supreme Court Underway

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On February 28, 2022 the U.S. Supreme Court agreed to hear a case challenging the constitutionality of the Indian Child Welfare Act (ICWA). ICWA came under intense scrutiny in an April 2021 en banc decision of the United States Court of Appeals for the Fifth Circuit. In *Brackeen v. Haaland*, the Fifth Circuit considered a challenge to the constitutionality of ICWA brought by Texas, Louisiana, Indiana, and several individual plaintiffs. A sharply divided court generally upheld the constitutionality of ICWA. However, as a result of its divided ruling, the Court also upheld the lower court's decision that certain provisions concerning the placement preferences of Native children for Indian homes as well as certain ICWA processes violated the Constitution. Finally, the Court ruled that the corresponding provisions of the law's implementing regulations violated the Administrative Procedures Act (APA). The Supreme Court has now granted, and consolidated, four petitions for a writ of certiorari that raise overlapping questions on several constitutional doctrines, including equal protection, standing, anticommandeering, and nondelegation, as well as APA considerations. The case is expected to be argued in the fall 2022.

Purpose of the ICWA and Its Success for AI/AN Children

ICWA was created in 1978 by the federal government to re-establish tribal authority over the adoption of Native American children. The goal of the Act was to strengthen and preserve Native American family structure and culture. Studies conducted in advance of ICWA's drafting showed that between 25% and 35% of all Native children were being removed from their home by state child welfare and private adoption agencies. Of those, 85% were placed with non-Native families, even when fit and willing relatives were available. ICWA was established as a safeguard that requires placement cases involving Native American children be heard in tribal courts, if possible, and permits a child's tribe to be involved in state court proceedings. It also requires testimony from expert witnesses who are familiar with Native American culture before a child can be removed from his or her home. If a child is removed, either for foster care or adoption, the law requires that Native American children be placed with extended family members, other tribal members, or other Native American families prior to placement in non-Indian homes. For a more complete explanation of the requirements of ICWA, please visit the Native American Rights Fund's "Practical Guide to the Indian Child Welfare Act."

As eighteen leading national child welfare organizations, including Casey Family Programs and the Child Welfare League of America, attested to the Supreme Court, ICWA represents "the gold standard for child welfare policies and practices that should be afforded to all children." According to the National Indian Child Welfare Association (NICWA), ICWA "[l]essens the trauma of removal by promoting placement with family and community . . . [p]romotes the best interest of Indian children by keeping them connected to their culture, extended family, and community, which are proven protective factors . . . [and] [p]romotes placement stability by ensuring that voluntary adoptions are truly voluntary," among other benefits. Positive and continuing connections to one's family, community, and culture, are key factors in ensuring health and well-being.

However, despite the progress which has been made since 1978, the need for ICWA remains today. According to NICWA, "Native children are removed from their homes at 2–3 times the rate of their

white counterparts and often are not placed with relatives or other Indian families, even when such placements are available and appropriate. In addition, "Native families are the most likely to have children removed from their homes as a first resort, and the least likely to be offered family support interventions intended to keep children within the home."

Legal Proceedings and Opposition to ICWA

In *Brackeen*, Texas, Indian, Louisiana, and individual plaintiffs sued the federal government, arguing that ICWA and its implanting regulations are unconstitutional because they violate the equal protection and substantive due processes provisions of the Fifth Amendment and violate the anticommandeering doctrine of the Tenth Amendment. The plaintiffs also argued that ICWA and the implementing regulations violate the nondelegation doctrine and the APA.

The initial 2018 ruling by Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas, held that ICWA (including its implementing regulations) is unconstitutional, and the regulations violate the APA. Specifically, Judge O'Connor held that ICWA violates the Constitution's guarantee of equal protection because it applies to all children eligible for membership in a Tribe, not just enrolled tribal members, and therefore operates as a race-based statute. Judge O'Connor further held that ICWA violates the Tenth Amendment's prohibition on the federal government issuing direct orders to states and unconstitutionally delegates Congress's power by giving tribes the authority to change adoption placement preferences and make states abide by them.

The Fifth Circuit overturned the District Court's decision in most respects. The Fifth Circuit found that Congress had the authority to enact the law. The majority opinion also held that ICWA's application to all children eligible for tribal citizenship is not a race-based classification and therefore ICWA does not violate equal protection. This reaffirms that the status of "Indian child" is not an unconstitutional racial classification. However, the court was equally divided as to whether references to "other Indian families" and "Indian foster home" are an unconstitutional racial classification. Because the Court was equally divided on this holding the District Court's ruling was upheld, but it was without precedential authority. Further, the Court affirmed the District court's conclusion that several of the "active efforts" required under ICWA violated the Tenth Amendment, which prohibits the federal government from imposing duties on state officials. The Court was again equally divided on whether ICWA's placement preferences violate the Tenth Amendment. This narrow but lengthy decision, which was over 300 pages and decided by a divided 16-judge court, creates confusing precedent for those trying to navigate the law and makes the case ripe for review by the Supreme Court. The Fifth Circuit also addressed APA challenges to the Bureau of Indian Affairs rules implementing ICWA.

Supreme Court to Review

In early September, 2021, the United States government, tribal defendants, as well as state and private plaintiffs filed petitions asking the United States Supreme Court to review the Fifth Circuit's April decision. In their petitions, the States and private individuals stated that ICWA places "various legal mechanisms that play favorites based on race" and that the Supreme Court should "reject the United States' and tribes' efforts to artificially narrow this court's review of these mechanisms." While the tribes and the federal government agree with the Fifth Circuit's decision that ICWA is generally constitutional and accords with long-standing precedent, they also believe that review of this decision is appropriate due to the Court's narrow interpretation and decision to overturn specific provisions regarding placement preferences and processes.

This will be the Supreme Court's first ruling on ICWA since the 2013 decision in Adoptive Couple v.

Baby Girl , in which a 5-4 court ruled that a Cherokee father couldn't rely on ICWA to block his biological child's adoption. Since that time, the structure of the Supreme Court has changed and there is the possibility that a case like this could be another opportunity for Justice Neil Gorsuch to again serve as a swing vote on AI/AN issues and provide the decisive vote to uphold ICWA. Because ICWA has long received bi-partisan support, the government and tribes' positions could potentially sway the politically divided Supreme Court to uphold the constitutionality of the long-standing law. Indeed, the Fifth Circuit found it notable that the Plaintiff States (including Ohio which filed an amicus brief on their behalf) "are home to only about 1% of the total number of federally recognized Indian tribes and less than 4% of the national American Indian and Alaska Native population," while the States which filed amicus briefs supporting ICWA "are collectively home to 94% of federally recognized Indian tribes and 69% of the national American Indian and Alaska Native population."

ICWA and Urban Populations

AI/AN children are overrepresented in state foster care systems. According to NICWA, AI/AN children are in foster care at a rate 2.7 times greater than their proportion in the general population. This means that while AI/AN children represent 0.9% of all children in the United States, they are 2.1% of all children who are placed in foster care. Because more than 70% of AI/AN people live in urban settings, this overrepresentation undoubtably has an impact in urban AI/AN communities. Many health problems arise for AI/ANs living in urban settings because of mental and physical hardships due to the lack of family and the traditional cultural environments. Additionally, urban Indian youth are at a greater risk for serious mental health and substance abuse problems, suicide, increased gang activity, teen pregnancy, abuse, and neglect.

If the Supreme Court were to uphold the Fifth Circuit's decision and declare portions of ICWA unconstitutional or go even further and declare the entire statute unconstitutional, urban AI/AN youth who may already feel isolated and disconnected from their cultural ties may be even more at risk if they enter the foster or adoption systems and there are no protections to keep them from being further removed from their communities and culture.

ICWA as a Vehicle to Challenge Federal Indian Law

It is also important to recognize that this case, as well as other on-going challenges to ICWA are part of a broader effort to attack the foundations of Federal Indian Law. The recognition that being Native is a political classification is a critical underpinning of not just ICWA, but many laws that relate to housing, healthcare, education, and employment. However, publications from the organizations supporting this lawsuit and others, including the Cato Institute and the Goldwater Institute, make clear that they view Native identity as being a matter of race, not political identity and citizenship. If overturned, the repeal of ICWA would not only upend a law in place for more than 40 years but undercut the heart of tribal sovereignty and the federal government's trust responsibility to Native communities. A successful attack on ICWA would have far reaching implications on all areas of Federal Indian Law and policy.

NCUIH will continue to closely monitor updates in this case and alert UIOs and stakeholders to what a decision could mean for urban Indian communities.