NCUIH Signs on to Amicus Brief in Support of the Indian Child Welfare Act

Category: Policy Blog
written by Moira Stuart | September 8, 2022

On August 19, 2022, the National Council of Urban Indian Health (NCUIH) and five urban Indian organizations (UIOs) (Nebraska Urban Indian Health Coalition, Inc., Sacramento Native American Health Center, Fresno American Indian Health Project, All Nations Health Center, and Oklahoma City Indian Clinic) signed on to the National Indigenous Women's Resource Center's (NIWRC) amicus brief to the Supreme Court in support of the constitutionality of the Indian Child Welfare Act (ICWA) in the *Brackeen v. Haaland* case. NCUIH worked directly with NIWRC to engage with UIOs to ensure that the submitted brief was inclusive of urban American Indians/Alaska Natives (AI/ANs).

The Amicus Brief Argues:

- ICWA constitutes a critical safeguard that protects Indian women and children from abuse.
    - Indian children are especially susceptible to abuse and trafficking when placed in state-run adoptive and foster homes.
- Declaring Indian to be a racial classification subject to strict scrutiny would impede Congress' Trust duty and responsibility to address violence against Native women and children.
    - The Supreme Court used a political, not a racial, classification to eliminate tribal criminal jurisdiction over non-Indians in its 1981 decision in *Oliphant v. Suquamish Indian Tribe* (*Oliphant*).
    - Following *Oliphant*, Indian women and children face high rates of non-Indian violence in the United States.
    - The Violence Against Women Act (VAWA) 2013 utilized the same political classification as ICWA and
    - VAWA 2022 utilized the same political classifications as ICWA and *Oliphant*.
- The transformation of Indian into a racial classification would significantly impede Congress's ability to effectuate its Trust duty and responsibility to protect and safeguard the lives of Native Women and Children

Background and Advocacy

Legal Proceedings and Opposition to ICWA

In *Brackeen*, Texas, Indiana, 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 Court of Appeals overturned the District Court's decision in most respects. The Court 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 a 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.

On February 28, 2022 the U.S. Supreme Court agreed to review the Fifth Circuit's decision in *Brackeen v. Haaland*. The challengers and their amici argue that American Indian/Alaska Native is a racial classification rather than a political classification, making ICWA constitutionally suspect under the Equal Protection Clause. The challengers and their amici further argue that ICWA violates several constitutional provisions including anti-commandeering and nondelegation.

- On May 26, 2022, the Court received amicus briefsfrom supporters of the ICWA challengers highlighting their arguments.
- On August 19, 2022, the next round of amicus briefs in support of ICWA and Tribal intervenors were due.
- Oral argument is scheduled for November 9, 2023.
- The Supreme Court will release its decision by June 30, 2023.

ICWA and its Importance to AI/ANs

It was critical that NCUIH signed onto NIWRC's brief because of the threat posed by the overturning of ICWA. ICWA represents the gold standard in child welfare proceedings, strengthening and preserving AI/AN family structure and culture. When it was established in 1978, studies showed that between 25% and 35% of all Native children were removed from their homes 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 ensures that the previously forced removal of AI/AN children from their homes and their placement into white families will not be repeated.

Today, Native children continue to be overrepresented in state foster care systems at a rate 2.7 times higher than their non-Native peers. 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 undoubtedly includes AI/AN children living in urban areas.** According to the Indian Health Service (IHS), Native youth living off-reservation often face a higher risk of health problems, including mental health and substance abuse, suicide, gang activity, teen pregnancy, abuse, and neglect. Additionally, IHS found that urban Indian populations experience the same health problems as the general Indian population, but these problems are exacerbated by a lack of access to family and traditional cultural environments. Challenges to ICWA threaten to place urban Native youth at even greater risk if they

enter foster or adoption systems that do not offer protections to keep them from being further removed from their communities and culture.

NCUIH previously provided an in-depth analysis on the impact of ICWA. We will continue to monitor ongoing developments as *Brackeen v. Haaland* proceeds to oral argument and provide updates on how the case impacts urban Indians.

- NCUIH Policy Blast: ICWA's Constitutionality Challenged and Review by the Supreme Court Underway (March 11, 2022)
- NCUIH Policy Update: Challenge to Indian Child Welfare Act Advances at Supreme Court (July 21, 2022)

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 the AI/AN classification is political classification rather than racial is a critical underpinning of not just ICWA, but many laws that relate to housing, healthcare, education, and employment. This political classification goes back to the 19th Century and has been upheld by Courts at multiple levels. Acknowledging the importance of tribal citizenship, AI/ANs are classified by this citizenship, not by their race. 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.

Next Steps

- Oral argument for *Brackeen* is scheduled for November 9, 2022.
- The Supreme Court will issue a decision by June 30, 2023.
- 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. NCUIH will track the upcoming Supreme Court term for updates on *Brackeen*.