Supreme Court Held Oral Argument on Case Challenging the Indian Child Welfare Act

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written by Rori Collins | January 31, 2023

On November 9, 2022, the Supreme Court of the United States held oral argument in *Haaland v. Brackeen*, a case challenging the constitutionality of the Indian Child Welfare Act of 1978 (ICWA). The questions presented to the Court in *Brackeen* are: (1) Whether various provisions of ICWA violate the anticommandeering doctrine of the Tenth 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];" (3) Whether the default placement preferences for Indian homes in adoption or foster care cases are rationally related to legitimate governmental interests and therefore consistent with equal protection. The Supreme Court's decision in *Brackeen* will have far-reaching implications on all areas of Federal Indian Law and policy and the National Council of Urban Indian Health (NCUIH) continues to advocate for the protection of ICWA to safeguard American Indian/Alaska Native (AI/AN) children and families.

Summary of Oral Argument

Oral argument for *Brackeen* lasted over three hours and focused heavily on the scope of Congress's constitutional authority to legislate on behalf of AI/ANs, the equal protection limitations on that power, and whether the requirements imposed on states by the ICWA, particularly the "active efforts" requirement, violates the anticommandeering doctrine. Oral argument began with the parties challenging ICWA, referred to as "plaintiffs." Solicitor General Judd Stone argued on behalf of the state of Texas, and Matthew McGill, a partner at Gibson, Dunn & Crutcher, argued on behalf of the potential adoptive families. The plaintiffs' arguments centered on the assertion that ICWA deprives Indian children and non-Indian prospective parents of the "best interest of the child" standard in child welfare proceedings in violation of the Equal Protection Clause. The parties defending ICWA, referred to as "defendants," argued second. Deputy Solicitor General Edwin Kneeler argued on behalf of the federal defendants and Ian H. Gershengorn, a partner at Jenner & Block, LLC , argued on behalf of the intervening Tribes (the Cherokee Nation, Oneida Nation, Quinault Nation, and Morongo Band of Mission Indians). The defendant' arguments centered on the fact that Congress has broad power to legislate in Tribal affairs, and this power is limited only by other constitutional provisions or by the test set by Supreme Court precedent in Morton v. *Mancari*, 417 U.S. 535 (1974), which requires congressional action to be rationally related to the fulfillment of Congress' unique obligations to Indians.

Background on *Haaland v. Brackeen*

Congress enacted the ICWA in 1978 to re-establish Tribal authority over the adoption of AI/AN children. ICWA is a procedural safeguard to "protect the best interests of Indian children and to promote the stability and security of Indian Tribes and families." 25 U.S.C. § 1902. In *Brackeen*, Texas, Indiana, Louisiana, and individual plaintiffs (plaintiffs) sued the federal government in the U.S. District Court for the Northern District of Texas, 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 District Court ruled in favor of the plaintiffs, finding

that the 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. The District Court 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. On appeal, the Fifth Circuit reversed the District Court's opinion in most respects. In a fractured ruling, the Fifth Circuit sitting en banc upheld portions of the District Court's opinion and reversed other portions.

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 decision. The U.S. Supreme Court agreed to review the Fifth Circuit's decision in *Brackeen v. Haaland* on February 28, 2022, and held oral argument on November 9, 2022.

NCUIH Advocacy

On August 19, 2022, 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 ICWA in the *Haaland v. Brackeen* case. NCUIH worked directly with NIWRC to engage with UIOs to ensure that the submitted brief was inclusive of urban AI/ANs. On September 7, NCUIH submitted written comments to the Bureau of Indian Affairs (BIA) and the Administration for Children and Families (ACF) on the BIA and ACF's efforts to promote the consistent application of ICWA) and protect children, families, and Tribes.

NCUIH previously provided an in-depth analysis on the impact of ICWA and will continue to monitor ongoing developments.

Next Steps

The Supreme Court will hand down a decision by the end of the 2022 term on July 1, 2023. Due to the complex nature of the case, a decision is not expected until the Spring. The Supreme Court's decision in *Brackeen* will have far-reaching implications on all areas of Federal Indian Law and policy. 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. 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.