Supreme Court Upholds Constitutionality of ICWA in 7-2 Ruling, Protecting Native Children and Families

Category: Policy Blog
written by Chelsea Gutierrez | July 7, 2023

On June 15, 2023, the Supreme Court reaffirmed and upheld the constitutionality of the Indian Child Welfare Act of 1978 (ICWA). The Justices ruled 7-2 and the majority opinion was authored by Justice Barrett. Justices Gorsuch and Kavanaugh wrote concurring opinions, while Justices Thomas and Alito wrote dissenting opinions. The National Council of Urban Indian Health welcomes the Supreme Court's decision to reject all challenges to ICWA.

Read the Court's Opinion here.

Claims raised by Petitioners in this case included that Congress exceeded Article I authority when it enacted ICWA, Congress violated the anticommandeering doctrine when it enacted ICWA, and placement preferences under ICWA are racially discriminatory and violate equal protection. The Supreme Court rejected the first two claims on the merits, while it declined to address the equal protection claim for a lack of standing. Based on the majority's ruling, ICWA is upheld, and therefore, there are no major changes to ICWA's implementation.

Justice Barrett Upholds Congress's Authority to Enact ICWA and Rejects Anticommandeering Claim

Justice Barrett first addressed the Article I claim, explaining that, "in a long line of cases, we have characterized Congress's power to legislate with respect to the Indian Tribes as 'plenary and exclusive.'" Authority under Article I provide Congress with a set of enumerated powers, including the power to legislate. Here, the court agreed with the Fifth Circuit's ruling that Congress did not exceed its authority when it enacted ICWA. It also did not find any merit to the claim that ICWA overrides state authority in child custody proceedings. Barrett explained, "in fact, we have specifically recognized Congress's power to displace the jurisdiction of state courts in adoption proceedings involving Indian children."

Next, Justice Barrett discussed Petitioner's anticommandeering claim, which is a doctrine under the Tenth Amendment preventing the federal government from forcing states to pass or not pass certain legislation or enforce federal law. She rejected the anticommandeering argument, as ICWA's provisions apply both to private individuals and agencies as well as government entities. She also rejected their argument because, "Petitioners assert an anticommandeering challenge to a provision that does not command state agencies to do anything," as the burden to search for placement rests on the Tribe or other objecting party. She then addressed claims regarding the recordkeeping requirements, finding that Congress allows it as a logical consequence because under dual sovereignty state courts must apply federal law.

Lastly, Justice Barrett did not decide the equal protection claim, because Petitioner's lacked standing for the Supreme Court to hear and address the argument. To have standing, a party must show they suffered an injury, (the injury is caused by actions of the opposing party), and a favorable decision in court would remedy the harm caused. Parties must also sue the correct party to have

standing, and in this case, they sued federal officials when suit against state officials would have been appropriate. She found their claim of racial discrimination as injurious but did not agree it met the requirements of an injury, nor did she find any ruling by the Supreme Court that would properly remedy their harm. She also addressed Texas, and other states, by finding they cannot raise equal protection claims in court on behalf of their citizens.

In their dissents, Justices Thomas and Alito made their own arguments as to why ICWA should be overturned. Justice Thomas focused on Congress intruding on state power to regulate their own child welfare proceedings in state court. Justice Alito argued that ICWA conflicts with state authority to follow the "best interest of the child" standard when conducting child custody proceedings.

Justice Gorsuch Remains a Champion for Native Rights with His Concurrence

Joined in his concurrence by Justices Sotomayor and Jackson, Justice Gorsuch began by going over the history and background that led to the enactment of ICWA. He argued Congress exercised its lawful authority and stayed within the Constitution's original design. He also placed emphasis on the purpose of ICWA as a response and tool to protect Native children from the longstanding practice of removing them from their families.

"Our Constitution reserves for the Tribes a place—an enduring place—in the structure of American life. It promises them sovereignty for as long as they wish to keep it, and it secures that promise by divesting States of authority over Indian affairs and by giving the federal government certain significant (but limited and enumerated) powers aimed at building lasting peace. In adopting the Indian Child Welfare Act, Congress exercised that lawful authority to secure the right of Indian parents to raise their families as they please; the right of Indian children to grow in their culture; and the right of Indian communities to resist fading into the twilight of history."

Concerns Raised as the Court Leaves Undecided the Issue of Equal Protection

Within his concurrence, Justice Kavanaugh was the only justice to address the equal protection claims raised by Petitioners. He joined the majority opinion but found that the equal protection issue is too important not to be decided. He raises scenarios where children are denied placement, or a prospective parent is denied fostering/adoption based on race. There are questions regarding equal protection principles and Court precedent that can be addressed once a plaintiff brings a claim with standing. Due to this, it is likely there will be more challenges to ICWA specifically targeting the issue of racial discrimination.

A full archive of our coverage on *ICWA* is available on the NCUIH website.