Brackeen v. Haaland

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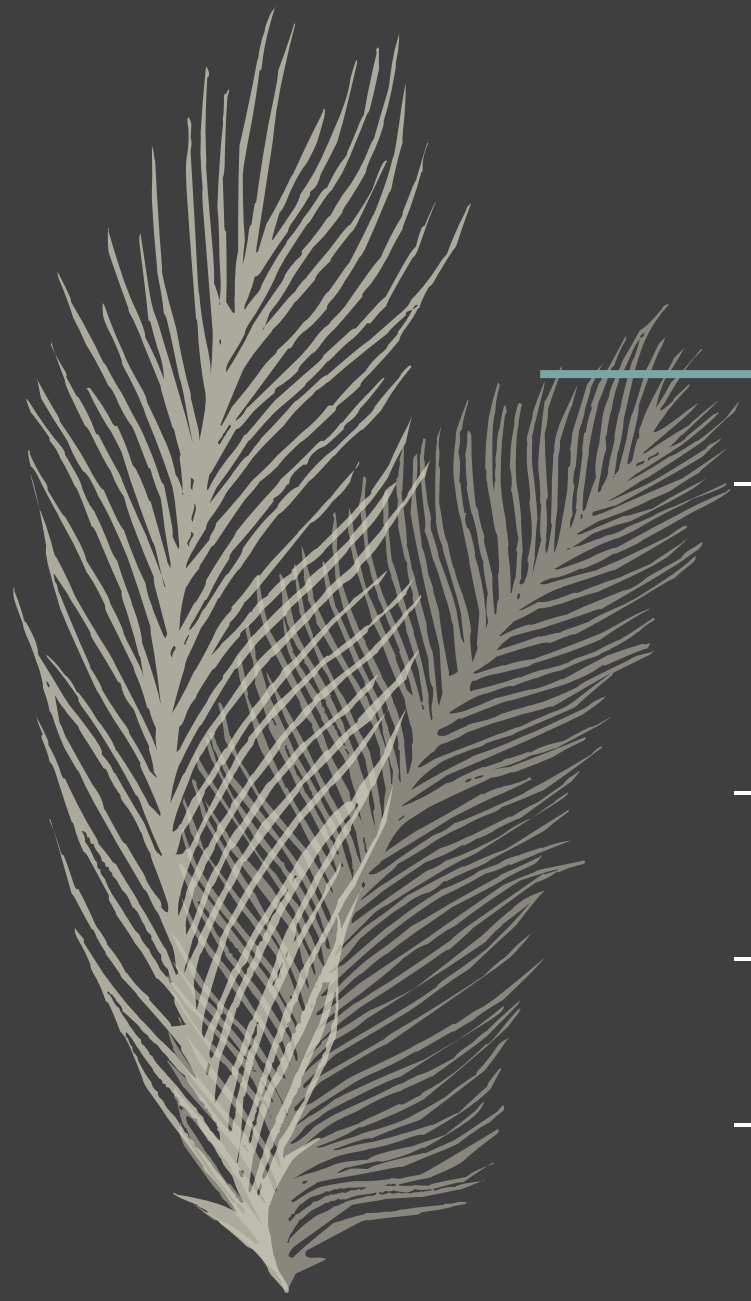
Background

- Since at least 2016, the Goldwater Institute, the National Council for Adoption, and other groups have filed at least ten federal lawsuits attempting to dismantle ICWA. In each case the anti-ICWA plaintiffs failed to prevail on claims that the ICWA is unconstitutional.
  - *C.E.S. v. Nelson*, Stipulation of Voluntary Dismissal, No. 15-cv-982 (W.D. Mich. Jan. 27, 2016); *National Council of Adoption v. Jewell*, 2017 WL 944066 (4th Cir. 2017); *Doe v. Hembree*, Order, No. 15-cv-471 (N.D. Okla. Mar. 3, 2017); *Doe v. Piper*, 2017 WL 3381820 (D. Minn. 2017); *Carter v. Tahsuda*, 743 Fed.Appx. 823 (9th Cir. 2018); *Watso v. Jacobson*, 929 F.3d 1024 (8th Cir. 2019), *cert denied*, 140 S.Ct. 1265 (2020); *Fisher v. Cook*, Order Dismissing Case, No. 19-cv-2034 (W.D. Ark. May 28, 2019); *Americans for Tribal Fifth Circuit Equality v. Piper*, Voluntary Dismissal, No. 17-cv-4597 (D. Minn. Sept. 6, 2019); *Whitney v. Bernhardt*, Notice of Dismissal, No. 19-cv-299 (D. Me. Aug. 23, 2019).

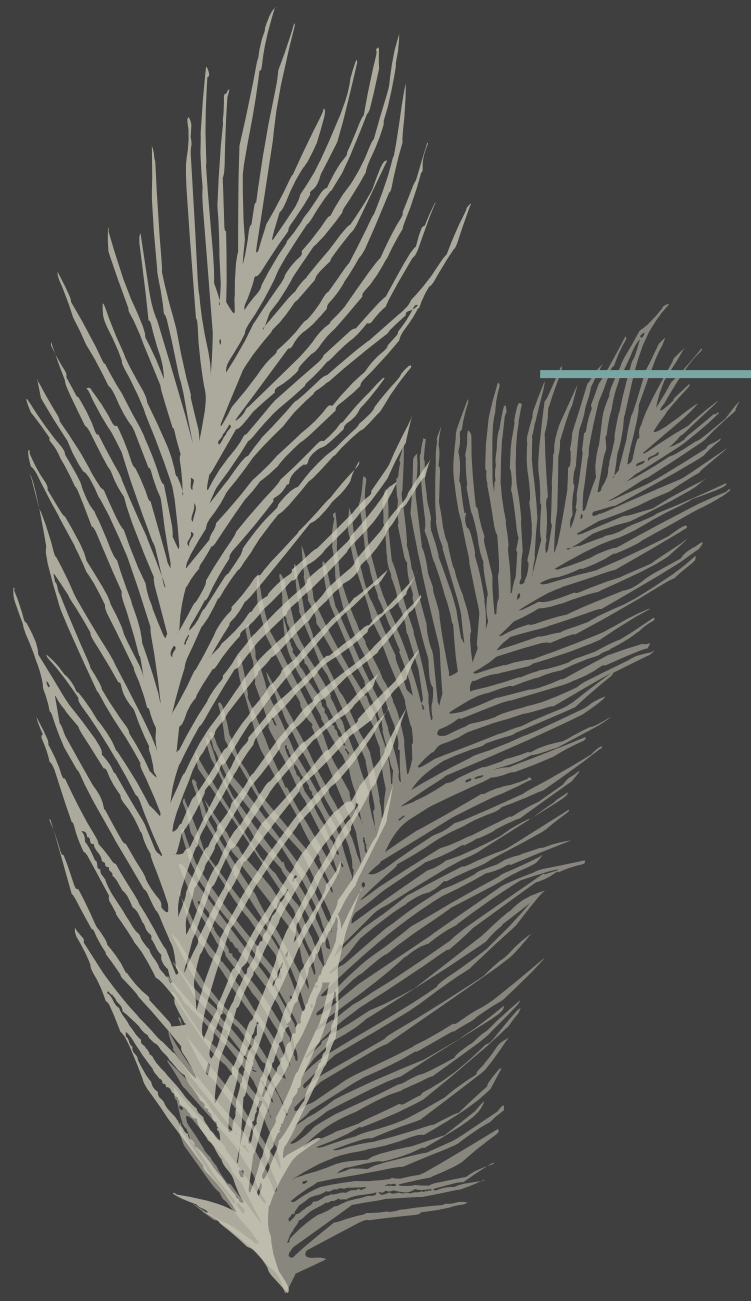
Background

- Lawsuit filed in federal District Court in Fort Worth, Texas in October 2017
- Assigned to Judge Reed O'Conner
- Plaintiffs: Texas, Louisiana, Indiana, Brackeens, Librettis, Cliffords, Mrs. H.
- Defendants: Dept. of Interior (DOI), Secretary of DOI, Bureau of Indian Affairs and Director, Department of Health and Human Services (DHS), Secretary of DHS
- Intervenors: Cherokee Nation, Oneida Nation, Quinault Indian Nation, Morongo Band of Mission Indians.



Complaint – Claims by All

- Count 1: The Federal Rule (25 CFR Part 23) violates the Administrative Procedures Act (APA) because it is not in accordance with law under the Equal Protection Clause, Tenth Amendment, Article I.
- Count 2: ICWA was not a valid exercise of power under the Indian Commerce Clause.
- Count 3: ICWA violates the anti-commandeering principle under the Tenth Amendment.
- Count 4: ICWA violates the Equal Protection Clause of the 5th Amendment because the placement preferences discriminate against non-Indians.



Complaint – Other Claims

- Brackeens:
  - The Final Rule is a violation of the APA (not in accordance with law) because the placement preferences in the Final Rule violate the substantive due process rights of Brackeens and other non-Indian prospective adoptive parents.
  - The placement preferences under the ICWA violate the Brackeens substantive due process rights
- State of Texas:
  - ICWA and the Final Rule allow tribes to pass resolutions to alter the placement preferences. This violates the non-delegation clause under Article I of U.S. Constitution.

District Court Decision

- Plaintiffs have standing
- Equal Protection
  - ICWA's definition of "Indian child" is race based and therefore strict scrutiny applies (not rational basis, which would apply if ICWA classification was political).
  - The government has not offered a compelling interest that ICWA's racial classification served or argued that the classification is narrowly tailored to that end.
  - The government's entire defense is based on argument that classification is political, not racial, so government has failed to meet their burden to show a compelling government interest that is narrowly tailored.

District Court Decision

- ICWA Violates Non-Delegation Doctrine
- ICWA violates Anti-Commandeering Principle under Tenth Amendment
- ICWA violates APA
- Denied Substantive Due Process Claims
- Congress did not have authority to pass ICWA under Indian Commerce Clause

5th Circuit Appeal – Panel
(Wiener, Dennis and Owens (dissent in part)

- Affirmed District Court ruling that Plaintiffs have standing
- District Court erred by concluded Indian child definition was raced based.
  - *Mancari* does not just apply to Indians living "on or near reservations."
  - Conditioning a child's membership, in part, on whether a biological parent is a member is not a proxy for race, but for a not yet formalized tribal affiliation, particularly when the child is too young to apply for membership.
  - Classification is political and entitled to rational basis review.

5th Circuit Appeal – Panel (Wiener, Dennis and Owens)

- Anti-commandeering doctrine does not apply to obligation of state courts to enforce ICWA. Doctrine prohibits federal laws commanding the executive or legislative branch of a state to act or refrain from acting.
- ICWA obligations imposed on state agencies do not violate the anticommandeering doctrine.
- ICWA preempts state conflicting laws.
- ICWA provision that allows tribes to adopt different order of placement preferences through tribal resolution is not an unconstitutional delegation of power.
- Final Rule was valid

5th Circuit Appeal – En Banc
Brackeen III, 994 F.3d 249 (5th Cir. 2021) (en banc).

- On April 6, 2021, fourteen months after arguments, the United States Circuit Court of Appeals for the Fifth Circuit sitting en banc, issued a 325-page decision in *Brackeen v. Haaland*
- Seven of the sixteen judges wrote separately on claims that over two dozen federal ICWA provisions and implementing regulations are unconstitutional. The Decision is extremely complex even for those familiar with ICWA.
- *"There is a term for a judicial decision that does nothing more than opine on what the law should be: an advisory opinion. That is what the roughly 300 pages you just read amount to." – Judge Costa*

Standing

- Panel was unanimous in holding that Plaintiffs had standing to challenge Congressional authority to enact ICWA and press anticommandeering and non-delegation challenges.
- Panel was unanimous in holding that had standing to challenge the ICWA Final Rule under the Administrative Procedures Act (APA) .
- Panel was equally divided as to whether Plaintiffs had standing to challenge 1913 (parental rights and voluntary termination) and 1914 (petition to invalidate action) on equal protection grounds. Therefore, District Court (DC) opinion affirmed but not precedential.
- Panel majority held the Plaintiffs had standing as to assert equal protection challenges to other provisions of ICWA.

Equal Protection

- Panel majority agrees that as a general proposition, Congress had authority to enact ICWA under Article I of Constitution.
- Panel majority agrees that ICWA's Indian child classification does not violate equal protection
- Panel was equally divided on whether Plaintiffs prevail on EP challenge to ICWA's adoptive placement preferences for "other Indian families" (1915)(a)(3) and foster care placement for Indian foster homes (1915(b)(iii)). The DC ruling that provisions of ICWA and the Final Rule are unconstitutional because they incorporate the "Indian child" classification is reversed, but its ruling that 1915(b)(3) and 1915(b)(iii) violate EP is affirmed w/out a precedential opinion.

Anticommandeering

- Panel majority holds that active efforts (1912(d)), expert witnesses (1912(e) and (f)) and record keeping (1915(e)) unconstitutionally commandeer state actors.
- Panel is equally divided on whether placement preferences (1915(a) and (b)) violate anticommandeering to the extent they direct state action by state agencies and officials. Therefore, the District Court opinion declaring these sections unconstitutional is affirmed w/out precedential opinion.
- Panel is equally divided on whether the notice provision (1912(a)) unconstitutionally commandeers state agencies. Therefore, the District Court opinion declaring this section unconstitutional is affirmed w/out precedential opinion.

Anticommandeering

- Panel is equally divided on whether placement record provision (1915(a)) unconstitutionally commandeers state courts. Therefore, the District Court opinion declaring this section unconstitutional is affirmed w/out precedential opinion.
- Panel majority holds that several challenged ICWA provisions validly preempt state law and do not commandeer including the right of intervention (1911(c)), appointed counsel (1912(b)), to examine documents (1912(c)), to explanation of consent (1913(a)), to withdraw consent and seek invalidation (1913 (b),(c)(d)), to seek return of custody (1916 (a)) and to obtain tribal information (1917). DC ruling on these matters is reversed.
- Panel majority holds that the following provisions validly preempt contrary state law to the extent they apply to state courts (as opposed to state agencies): placement preferences (1915(a) and (b)) and the placement and termination standards (1912(e) and (f). DC ruling on these matters is reversed.

Anticommandeering

- Only three states challenged ICWA's constitutionality. But only 1% of federally recognized tribes and only 4% of the American Indian/Alaska Native population are located in those three states.
- Twenty-six states and the District of Columbia filed amicus briefs asking the Fifth Circuit to uphold ICWA. Interestingly, 94% of federally recognized tribes and 69% of the American Indian/Alaska Native population are located in those twenty-six states that support ICWA.

Non-Delegation Doctrine

- En Banc majority holds that 1915(c), which allows tribes to establish an order of preference different than 1915(a) and (b) does not violate delegation doctrine. DC ruling on this matter is reversed.

ICWA Final Rule and Administrative Procedure Act (APA)

- En Banc majority holds that BIA did not violate the APA by concluding that in the Final Rule that it may issue regulations binding on state courts.
- However, En Banc majority also holds that to the extent the majority held that 1912(d),(e) and 1915(e) commandeer the states, the Final Rule violated the APA to the extent it implemented those provisions.
- En banc majority determines that 25 C.F.R. § 23.132(b), requiring proof by clear and convincing evidence to depart from the ICWA Placement Preferences, violated the APA.

Takeaways

- The Fifth Circuit upheld ICWA's constitutionality, affirming decades of U.S. Supreme Court precedent on Congress's authority to pass federal laws that pertain to Indians.
- The decision is not binding on Arizona state courts and has no impact on Arizona state laws that support ICWA.
- The starkly divided Court did not reach a majority on several District Court holdings and thus, those rulings are not binding precedent in the Fifth Circuit.
- Even the majority rulings of the Court have limited precedential value outside the Northern District of Texas or Texas state courts.

Four Cert Petitions September 3, 2021

- Individual Plaintiffs: Brackeens, Libretti's, Cliffords and Mrs. H.
- State Plaintiffs: Texas, Louisiana, Indiana
- Solicitor General for the United States
- Intervening Tribes: Cherokee Nation, Oneida Nation, Quinault Indian Nation, Morongo Band of Mission Indians.

Individual Plaintiffs
(Brackeens, Cliffords, Librettis, Mrs. H.)

The questions presented are:

1. Whether ICWA's placement preferences—which disfavor non-Indian adoptive families in child-placement proceedings involving an "Indian child" and thereby disadvantage those children—discriminate on the basis of race in violation of the U.S. Constitution.

2. Whether ICWA's placement preferences exceed Congress's Article I authority by invading the arena of child placement—the "virtually exclusive province of the States," *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975)—and otherwise commandeering state courts and state agencies to carry out a federal child-placement program.

1. Whether Congress has the power under the Indian Commerce Clause or otherwise to enact laws governing state child-custody proceedings merely because the child is or may be an Indian.

2. Whether the Indian classifications used in ICWA and its implementing regulations violate the Fifth Amendment's equal-protection guarantee.

3. Whether ICWA and its implementing regulations violate the anticommandeering doctrine by requiring States to implement Congress's child-custody regime.

4. Whether ICWA and its implementing regulations violate the nondelegation doctrine by allowing individual tribes to alter the placement preferences enacted by Congress.

(I)

State Plaintiffs

Texas

Louisiana

Indiana

Defendants

Deb Haaland, Et. Al.

1. Whether various provisions of ICWA—namely, the minimum standards of Section 1912(a), (d), (e), and (f); the placement-preference provisions of Section 1915(a) and (b); and the recordkeeping provisions of Sections 1915(e) and 1951(a)—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," 25 U.S.C. 1915(a)(3), and for "Indian foster home[s]," 25 U.S.C. 1915(b)(iii).

3. Whether Section 1915(a)(3) and (b)(iii) are rationally related to legitimate governmental interests and therefore consistent with equal protection.

Intervening Tribes
(Cherokee Nation, Oneida Nation, Quinault Indian Nation, Morongo Band of Mission Indians)

1. Did the *en banc* Fifth Circuit err by invalidating six sets of ICWA provisions – 25 U.S.C. §§1912(a),(d),(e)-(f), 1915(a)-(b), (e) and 1951(a) – as impermissibly commandeering States (including via its equally divided affirmance)?
2. Did the *en banc* Fifth Circuit err by reaching the merits of plaintiff's claims that ICWA's placement preferences violate equal protection?
3. Did the *en banc* Fifth Circuit err by affirming (via an equally divided court) the district court's judgement invalidating two of ICWA's placement preferences, 25 U.S.C. §1915(a)(3), (b)(iii), as failing to satisfy the rational-basis standard of *Morton v. Mancari*, 417 U.S. 535 (1974).

What Next?

- After initial petitions are filed, petitioner and respondent are permitted to file briefs in opposition to a petition for writ. Must be done w/in 30 days of placed on docket. This is not mandatory, except in a capital case or when ordered by the Court.
- Supreme Court accepts 100-150 of the more than 7000 cases that its asked to review each year. That is 1-2%.
- Four of the Nine justices must vote to accept a case.
- If cert is granted, petitioner has certain amount of time to file a brief not to exceed 50 pages. Respondent can file a brief of no more than 50 pages.

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