THE ROAD TO *BRACKEEN*: DEFENDING ICWA 2013–2023

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From 2013 to 2023, the Indian Child Welfare Act (ICWA) was challenged in the courts more than the Affordable Care Act. This Article lays out the history of the fight over ICWA from Baby Girl *to* Haaland*, from my perspective as a clinical professor who has been involved with every major ICWA case since 2013, as well as my observations about why ICWA was so vulnerable to an organized litigation attack despite continued bipartisan and widespread support of the law.*

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INTRODUCTION

Ten years ago, on June 23, 2013, the Supreme Court released a decision interpreting the Indian Child Welfare Act of 1978 (ICWA).[1] *Adoptive Couple v. Baby Girl*[2] was a devastating loss for a Cherokee father, his daughter, and all of Indian Country. The decision led to a decade of anti-ICWA challenges in state and federal court culminating in *Haaland v. Brackeen*.[3] As of this writing, *Brackeen* sits in front of the Supreme Court. Oral arguments were held on November 9, 2022, with a decision expected sometime in 2023.[4] The case has been in the federal court system for more than five years—which means it only took five years for those arrayed against ICWA in 2013 to find a vehicle to return to the Court. This is a stunningly fast timeframe, given the last time the Court took an ICWA case was in 1989.[5]

I became a lawyer in 2006. I wrote my first ICWA appellate brief with Matthew L.M. Fletcher[6] in 2009 on behalf of the American Indian Law

1. 25 U.S.C. §§ 1901–63.
2. 570 U.S. 637 (2013).
3. Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. argued Nov. 9, 2022).
4. *See id.*
5. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989).
6. Professor Fletcher is the Harry Burns Hutchins Collegiate Professor of Law at Michigan Law.

Section of the State Bar of Michigan in the Michigan Supreme Court.[7] As a result of that work, I started researching the legal arguments of ICWA, reading and classifying appeals and determining who was bringing ICWA appeals and why.[8] Since then, my clinic has been lucky enough to represent tribes on a wide range of ICWA appeals across the country. Because of the success of that work, I started the ICWA Appellate Project with Casey Family Programs,[9] representing tribes in appeals and advising tribes on how to avoid them. As a result, the clinic has represented tribes in some capacity in all the major ICWA appellate cases since the *Baby Girl* decision.

When I started working on ICWA appeals, I believed I would be spending most of my time in the state appellate courts, arguing on behalf of tribes in ICWA cases that involved individual families. These cases include arguments about the state providing active efforts,[10]

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7. Amicus Curiae Brief of the American Indian Law Section of the State Bar of Michigan, *In re* JL, 770 N.W.2d 853 (Mich. 2009) (No. 137653).

8. *See generally* Kathryn E. Fort, *The Cherokee Conundrum: California Courts and the Indian Child Welfare Act* 17–27 (Mich. State Univ. Coll. of L., Research Paper No. 07-07, 2009) (providing data on reported ICWA cases from January 1, 2007 through February 29, 2008); Kate Fort, *ICWA By The Numbers*, TURTLE TALK (May 18, 2012), https://turtletalk.blog/2012/05/18/icwa-by-the-numbers [https://perma.cc/2T96-6T8D] (providing data on reported ICWA cases in 2011 and part of 2012); Kate Fort, *2015 ICWA Appellate Cases by the Numbers*, TURTLE TALK (Jan. 6, 2016), https://turtletalk.blog/2016/01/06/2015-icwa-appellate-cases-by-the-numbers [https://perma.cc/HH5M-EU6M] (providing data on reported ICWA appellate cases in 2015); Kathryn E. Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, 6 AM. INDIAN L.J. 31, 37–39, 42–60 (2018) (summarizing data on reported ICWA cases in 2017); Kathryn E. Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update And Commentary*, 7 AM. INDIAN L.J. 20, 28–53 (2019) (providing data on reported ICWA cases in 2018); Kathryn E. Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, 8 AM. INDIAN L.J. 105, 105, 112–54 (2020) (providing data on reported ICWA cases in 2019 and some combined data on reported ICWA cases from 2015–2019); Kathryn E. Fort & Adrian T. Smith, *The Indian Child Welfare Act During the* Brackeen *Years*, 74 JUV. & FAM. CT. J. 9, 13–26 (2023) (providing data on reported ICWA cases from 2017–2021).

9. Kathryn Fort, *Keeping Indian Children Connected with Family and Culture*, 14 ENGAGED SCHOLAR ENEWSL. (Dec. 2021), https://engagedscholar.msu.edu/enewsletter/volume14/issue1/fort.aspx [https://perma.cc/6MJ5-MSF6].

10. *In re* JL, 770 N.W.2d 853, 863 (Mich. 2009) (rejecting the respondent's argument that her parental rights could not be terminated because the DHS failed to show that "active efforts [had] been made to prevent the breakup of the Indian family," as required by 25 U.S.C. § 1912(d)).

notice to tribes,[11] tribal membership,[12] transfer to tribal court,[13] placement preferences,[14] and adoption cases.[15] But more recently, my practice is in federal court, as those who seek to eliminate ICWA entirely filed complaint after complaint in an attempt to create a "circuit split"—a simpler route to get to the Supreme Court than trying to take state court of appeals decisions up on a writ of certiorari.[16]

This Article lays out the history of the fight over ICWA from *Baby Girl* to *Haaland*, from my perspective as a clinical professor who has been involved with every major ICWA case since 2013, as well as my observations about why ICWA was so vulnerable to an organized

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11. *In re* Dependency of Z.J.G., 471 P.3d 853, 864–65 (Wash. 2020) (en banc) (finding that, when courts have "reason to know" that a child in custody proceedings may be an Indian child, the petitioning party must "provide legal notice to the tribe").

12. *In re* K.C., 487 P.3d 263, 266 (Colo. 2021) (en banc) (addressing the issue of when state trial courts should intervene to determine whether Indian children should be enrolled in a tribe).

13. Gila River Indian Cmty. v. Dep't of Child Safety, 395 P.3d 286, 289–90 (Ariz. 2017) (addressing when child custody proceedings may be transferred from state court to tribal court under § 1911(b) of ICWA); *In re* C.J., Jr., 108 N.E.3d 677, 694 (Ohio Ct. App. 2018) (discussing the issue of when a parent may oppose the transfer of child custody proceedings to a tribal court); *In re* E.M., No. 5-21-35, 2022 WL 2230607, at *4 (Ohio Ct. App. June 21, 2022) (stating that, under Ohio law, "if both the parent and the tribe agree" to the transfer, a trial court must approve transfer of a child custody proceeding "unless good cause is shown as to why it should not be permitted").

14. *In re* Alexandria P., 204 Cal. Rptr. 3d 617, 630–31 (Cal. Ct. App. 2016) (explaining the "placement preferences" portion of ICWA, which dictates that preference should be given to placing an adopted Indian child with their extended family, other members of that child's tribe, or other Indian families and that good cause must be shown to support a departure from such preferences).

15. *In re* Adoption of B.B., 417 P.3d 1, 6 (Utah 2017) (deciding a case where an Indian child's mother listed no father on the child's birth certificate, misrepresented the identity of the birth father, and placed the child for adoption prior to telling the birth father).

16. Stipulation of Voluntary Dismissal at 1, C.E.S. v. Nelson, No. 1:15-cv-982 (W.D. Mich. Jan. 27, 2016); Nat'l Council for Adoption v. Jewell, No. 16-1110, 2017 WL 9440666, at *1 (4th Cir. Jan. 30, 2017); Doe v. Hembree, No. 15-471, 2017 WL 11685171, at *1 (N.D. Okla. Mar. 31, 2017); Doe v. Piper, No. 15-2639, 2017 WL 3381820, at *1 (D. Minn. Aug. 4, 2017); Carter v. Tahsuda, 743 F. App'x 823, 824 (9th Cir. 2018); Watso v. Lourey, 929 F.3d 1024, 1026 (8th Cir. 2019), *cert denied sub nom.*, Watso v. Harpstead, 140 S. Ct. 1265 (2020); Fisher v. Cook, Order granting Motion to Dismiss, No. 19-cv-2034 (W.D. Ark. May 28, 2019); Notice of Voluntary Dismissal by Plaintiff, Ams. for Tribal Ct. Equal. v. Piper, No. 17-cv-4597 (D. Minn. Sept. 6, 2019); Notice of Voluntary Dismissal by Plaintiff, Whitney v. United States, No. 2019-cv-00299 (D. Maine Aug. 23, 2019); Brackeen v. Haaland, 994 F.3d 249, 265, 267 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, 142 S. Ct. 1205 (2022).

litigation attack[17] despite continued bipartisan and widespread support of the law.[18]

I. THE INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act[19] is a federal law that applies in child dependency proceedings and adoptions.[20] The law is the most progressive law on child protection Congress has ever passed. After years of testimony by Native activists, tribal leaders, and non-profit organizations relating to the treatment of Native families at the hands of state agencies and courts, Congress passed ICWA in 1978.[21]

ICWA is designed to prevent the breakup of Indian families in state court proceedings.[22] The law provides specific protections to parents and families, while also enshrining tribal government rights to intervention, jurisdiction, and participation in cases involving their families.[23] In this way, ICWA balances the rights of parents with the

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17. *See* Michael Avery, *The Rise of the Conservative Legal Movement*, 42 SUFFOLK U.L. REV. 89, 89–91 (2008) (reviewing STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT (2008)); Ann Southworth, *Lawyers and the Conservative Counterrevolution*, 43 L. & SOC. INQUIRY 1698, 1698–1700 (2018).

18. *E.g.*, 124 CONG. REC. 37,379, 38,101–12 (1978) (passage of ICWA by the House with no dissent and the support of both the Democratic and Republican members of the committee); Brief for 87 Members of Congress as Amici Curiae in support of Federal and Tribal Defendants, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Aug. 19, 2022); Brief for the States of California et al. as Amici Curiae in Support of the Federal and Tribal Parties, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Aug. 19, 2022) (including four Republican Attorneys General); Augusta McDonnnell, *ICWA Protections Now Law in Wyoming, Montana Considers Similar Move*, KTVQ (Mar. 17, 2023, 5:02 PM), https://www.ktvq.com/news/icwa-protections-now-law-in-wyoming-montana-considers-similar-move [https://perma.cc/S7FL-YKAR] (passage of ICWA into Wyoming state law by a super majority Republican legislature and signed by Republican governor).

19. In federal law, including in ICWA, Congress uses the term "Indian." When referring to the law or the specific requirements, this article uses "Indian." Otherwise, the author uses Native or the tribal nation's name.

20. *See* 25 U.S.C. § 1902 (establishing "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes").

21. 25 U.S.C. § 1901(3)–(5).

22. *See* KELLY GAINES-STONER, MARK C. TILDEN & JACK F. TROPE, THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN 5, 7–11 (3d ed. 2018) (noting that judges must make findings regarding "Indian child," active efforts, heightened burdens of proof as well as have a certain amount of discretion to make rulings regarding placement preferences and transfer to tribal court).

23. *Id.* §§ 1911, 1912(e)–(f).

interests of the state and tribal governments in the health of families and best interests of Indian children.[24]

ICWA provides both procedural[25] and substantive[26] rights to parents designed to address the treatment of Indian children and families in state court child protection proceedings.[27] For a state court to place the child in foster care, the state agency or private party must demonstrate by clear and convincing evidence, supported by the testimony of a qualified expert witness, that the continued custody of the child by the parents will likely result in serious physical or emotional damage.[28] The agency or private party must also convince a judge that they made active efforts to reunify the family and the efforts failed.[29] If family reunification fails, ICWA provides standards for a termination of parental rights proceeding.[30] To terminate parental rights, courts must find beyond a reasonable doubt that returning the child to the parents is likely to result in serious emotional or physical harm to the child.[31] That finding must be supported by a qualified expert witness,[32] and the court must find the party seeking to terminate parental rights made active efforts to avoid the termination.[33]

Placement preferences continue for the entire time the child is in the state system and apply to foster care and adoptive placements.[34] Many tribes know this—the placement of Indian children with their relatives or other Indian families—as a particular area of contention.

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24. *See id.* § 1902. *See generally* Brief of *Amici Curiae* Family Defense Providers in Support of Petitioners, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Aug. 19, 2022).

25. 25 U.S.C. §§ 1912(a), (e)–(f).

26. *Id.* §§ 1912(d)–(f), 1915.

27. ICWA also applies in private adoptions, *id.* § 1913, but in the vast majority of appeals, the cases involve state child protection systems.

28. *Id.* § 1912(e). Emergency removals prior to judicial proceedings are permitted on a limited basis. Section 1922 provides:

> Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child.

Id. § 1922; *see also In re* J.M.W., 514 P.3d 186, 196 (Wash. 2022) (en banc).

29. 25 U.S.C. § 1912(d)–(f).

30. *Id.* § 1912(f).

31. *Id.*

32. *Id.*

33. *Id.* § 1912(d).

34. *Id.* § 1915.

Changing placements generally features in the high-profile cases that garner intense media attention.[35] Often overlooked is that federal law requires states to search for and attempt to place all children in kinship placements *before* stranger foster care.[36] This practice is widely recognized as a best practice, one that ICWA recognized nearly twenty years before Congress put it in place for all children.[37]

ICWA also recognizes a tribal interest in Indian children that is equal to, but separate from, that of parental interest.[38] For example, the state is required to notify the tribe when an Indian child is taken into foster care or changes placement.[39] In the case where an Indian child is removed from their home and they live off the reservation, their tribe has the right to intervene and request the transfer of the case to tribal court.[40] These jurisdictional provisions, which the Supreme Court has called the "heart of the ICWA," attempt to ensure that the tribe itself either gets to adjudicate the child protection case or be a party to the case when the state court does.[41]

ICWA was one of the first federal child protection laws Congress passed. Prior to ICWA, and well into the twentieth century, child

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35. *See, e.g.*, Andrew Cohen, *Indian Affairs, Adoption, and Race: The Baby Veronica Case Comes to Washington*, ATLANTIC (Apr. 12, 2013), https://www.theatlantic.com/national/archive/2013/04/indian-affairs-adoption-and-race-the-baby-veronica-case-comes-to-washington/274758 [https://perma.cc/ZN3V-G3FJ]; Alicia Towler, *Adoptive Mom: Like Baby Veronica Case, We Battled Tribe for Our Baby*, TODAY (June 25, 2013), https://www.today.com/parents/adoptive-mom-baby-veronica-case-we-battled-tribe-our-baby-6c10411624 [https://perma.cc/PN29-XGRU]; *Foster Family Appeals to State High Court over 1/64th Choctaw Girl Removed from Home*, ABC7 CHI. (Mar. 24, 2016), https://abc7chicago.com/lexi-choctaw-page-family-custody-fight/1258803 [https://perma.cc/ZCU3-NLBZ]; Amy Powell, *Indian Child Welfare Act Separates Foster Daughter from Santa Clarita Family*, ABC7 CHI. (Mar. 20, 2016), https://abc7.com/choctaw-nation-native-americans-alexandria-page-santa-clarita-valley/1253910 [https://perma.cc/M4ZB-V25A].

36. 42 U.S.C. § 671(a)(19) ("[T]he State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child."); CHILD WELFARE INFO. GATEWAY, PLACEMENT OF CHILDREN WITH RELATIVES 1 (2023), https://www.childwelfare.gov/pubPDFs/placement.pdf [https://perma.cc/U5DF-JBA5].

37. Cailin Wheeler & Justin Vollet, *Supporting Kinship Caregivers: Examining the Impact of a Title IV-E Waiver Kinship Supports Intervention*, 95 CHILD WELFARE 91, 92 (2017).

38. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 52 (1989).

39. 25 U.S.C. § 1912(a).

40. *Id.* § 1911(b)–(c).

41. *Holyfield*, 490 U.S. at 36.

protection was left to the state.[42] The uneven patchwork of state laws provided virtually no due process protections to parents and disproportionately affected Native families, and eventually led to Congress passing major laws that adopted portions of ICWA for all children.[43]

ICWA is a progressive child dependency law because of the nature of the protections for parents and children. When Congress enacted ICWA, its provisions were groundbreaking in their efforts to safeguard parents from state coercion during child protection proceedings and to ensure appropriate services for those same families. These include due process protections such as notice[44] and the testimony of a qualified expert witness.[45] They include the protections of higher burdens of proof to ensure the state has proved the case that a child should be placed in foster care[46] or to terminate parental rights.[47] They also include the preference that a child remain in kinship and community care whenever possible.[48] And perhaps most importantly, given the nature of a vast majority of child protection proceedings involving chemical and alcohol dependency, the provisions require those seeking to separate families to provide active efforts to reunify and rehabilitate the family.[49]

These provisions specifically have gained the support of non-Native organizations as well as states and their agencies.[50] ICWA's protections

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42. *See generally* Brief of *Amici Curiae* American Historical Ass'n & Organization of American Historians in Support of Federal and Tribal Parties at 15–22, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Aug. 19, 2022).

43. CONG. RSCH. SERV., R42792, CHILD WELFARE: A DETAILED OVERVIEW OF PROGRAM ELIGIBILITY AND FUNDING FOR FOSTER CARE, ADOPTION ASSISTANCE AND KINSHIP GUARDIANSHIP ASSISTANCE UNDER TITLE IV-E OF THE SOCIAL SECURITY ACT 5, 27 (2012); Vivek S. Sankaran, *Moving Beyond* Lassiter*: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. LEGIS. 1, 17–20 (2017).

44. 25 U.S.C. § 1912(a).

45. *Id.* § 1912(e)–(f).

46. *Id.* § 1912(e).

47. *Id.* § 1912(f).

48. *Id.* § 1915.

49. *Id.* § 1912(d).

50. *See, e.g.*, Brief for the Casey Family Programs & Twenty-six Other Child Welfare and Adoption Organizations as *Amici Curiae* in Support of Federal and Tribal Defendants at 1–7, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Aug. 19, 2022); Brief of American Academy of Pediatrics & American Medical Ass'n as *Amici Curiae* in Support of Respondents at 1–3, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Aug. 19, 2022) [hereinafter Brief for Am. Acad. of Pediatrics]; Brief of the American Psychological Ass'n et al. as *Amici Curiae* in Support

for parents and families are widely recognized as beneficial protections in a system sorely lacking them.[51] However, those who actively oppose ICWA are not grounded in child protection or regularly work in the child dependency system, but they are well known in the conservative legal movement.[52]

II. FOUNDATIONS OF FEDERAL INDIAN LAW AND ICWA

Federal Indian law's history is as long as the history of the United States. At its core, federal Indian law is about the relationship between the federal and sovereign tribal governments.[53] This substantial body of law, shaped by both congressional action and Supreme Court decisions, rests on three primary principles. First, tribes are pre-constitutional sovereign entities with the power to govern themselves.[54] Second, Congress has the power to legislate in the area of federal Indian law and has sole authority to do so.[55] Finally, the relationship between the federal government and tribes is a political one, based on

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of the Federal and Tribal Petitioners at 1–3, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Aug. 19, 2022); Brief of *Amici Curiae* Family Defense Providers in Support of Petitioners at 1, 31, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Aug. 19, 2022); Brief of National Ass'n of Counsel for Children & Thirty Other Children's Rights Organizations as Amici Curiae in Support of Federal and Tribal Defendants at 1, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Aug. 19, 2022).

51. *See generally* Brief for Am. Acad. of Pediatrics, *supra* note 50.

52. *See Haaland v. Brackeen (No. 21-376) Supreme Court Documents*, TURTLE TALK, https://turtletalk.blog/texas-v-zinke-documents-and-additional-materials/texas-v-haaland-supreme-court-documents [https://perma.cc/W247-P444] (listing the Cato Institute, Goldwater Institute, Pacific Legal Foundation, New Civil Liberties Alliance, and Project for Fair Representation as anti-ICWA Amicus Briefs); *see also* Ilya Somin, *The Harvard Law School Guide to Conservative/Libertarian Public Interest Law*, VOLOKH CONSPIRACY (Dec. 12, 2009, 3:44 PM), https://volokh.com/2009/12/12/the-harvard-law-school-guide-to-conservativelibertarian-public-interest-law [https://perma.cc/J2WC-XPN4].

53. *See generally* RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 4(a) & cmt. a (AM. L. INST. 2022) (describing the "general trust relationship between the United States and Indian tribes" as deriving from the Founding-era conception of relationships with pre-existing sovereign nations and as being "a foundational basis for federal legislation regarding Indians").

54. *See id.* § 1 cmt. a ("Federally recognized Indian tribes retain significant civil governance authority on Indian lands . . . .").

55. *Id.* § 7 (recognizing broad congressional authority to legislate in Indian affairs). An example of Congress's Indian affairs powers is the "Congressional plenary power" to recognize Indian tribes. *Id.* § 2 & cmt. f.

treaties and other formal agreements,[56] and tribal citizens themselves have political citizenship status as determined by their tribe.[57]

As a result of the treaties and the application of these principles, the federal government is supposed to protect tribes from state and private action. This is the bulk of the federal trust responsibility.[58] The constitutionality of laws passed on behalf of tribes and Indian people are not decided under the rubric of equal protection, and tribal sovereignty has tremendous power when tribes are dealing with outside interests.[59]

The federal Indian law arguments Congress addressed when it passed ICWA are similar to those made today. A House Committee addressed concerns about plenary power, the Tenth Amendment, and equal protection in the House Report accompanying the bill.[60]

First, the Report discusses the "[p]lenary power of Congress over Indian affairs,"[61] citing state court cases that found a broad interpretation of the Indian Commerce Clause, including in the area of child custody and protection.[62] The Report also addressed the power of Congress to pass laws that affect Indian people whether they are on or off the reservation.[63] And specifically addressing the question the Department of Justice (DOJ) asked regarding Congress's power to legislate in the area of traditional state power, the Report starts with *McCulloch v. Maryland*[64] and ends with two cases standing for the proposition that "Congress may, constitutionally, impose certain procedural burdens upon State courts in order to protect the substantive rights of Indian children, Indian parents, and Indian tribes in State court proceedings for child custody."[65] Finally, the Committee directly addressed the law's definition of Indian child. The Report states that Congress must have the right to *protect* those who have yet to become formal tribal members if federal criminal laws could reach

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56. *See id.* § 4(a) (describing the relationship between the federal government and the Indian tribes as "a government-to-government relationship").

57. Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservation Borders*, 12 LEWIS & CLARK L. REV. 1003, 1040–41 (2008).

58. RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 4 (AM. L. INST. 2022).

59. *Id.* § 14.

60. H.R. REP. No. 95-1386, at 12–19 (1978).

61. *Id.* at 13.

62. *Id.* at 14–15.

63. *Id.* at 15 ("Is the Congress limited to Indian lands or to the reservation in the exercise of its plenary power over Indian affairs? The answer is clearly, 'No.'").

64. 17 U.S. (4 Wheat.) 316 (1819).

65. H.R. REP. No. 95-1386, at 18 (1978).

"nonenrolled Indians" and apply to them.[66] Congress clearly found ICWA to be squarely within the powers that delineated and defined federal Indian law.

III. THE CURRENT OPPOSITION TO ICWA

Recently a coalition of unlikely partners have come together to synchronize federal lawsuits attacking ICWA. These are primarily attorneys,[67] including adoption attorneys, right-wing think tanks, a few attorneys at large law firms, as well as a few state attorneys general.[68] In their claims, they seek to undermine not only ICWA, but all of federal Indian law using the federal courts.[69] While the motivations of those opposing ICWA need not be more than it has always been—the racist belief that non-Native people will be better caretakers of Native children than Native people—it is also true that those who wish to

66. *Id.* at 17.

67. *See generally* JEFFERSON DECKER, THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT (2016) (discussing the history of conservative lawyers organizing to battle the regulatory state, ushering in the "conservative rights revolution").

68. National Council for Adoption, Mark Fiddler, Philip Jay McCarthy, Academy of Adoption and Reproductive Attorneys, Citizens Equal Rights Alliance, the Cato Institute, the Goldwater Institute, Matthew McGill, Lori McGill, the Pacific Legal Foundation, the Project for Fair Representation, and the New Civil Liberties Alliance, together with the Attorneys General in the states of Texas, Ohio, and Oklahoma. *See, e.g.*, *supra* note 52 and accompanying text; *see also* Kiera Butler, *The Christian Groups Fighting Against the Indian Child Welfare Act*, MOTHER JONES (Apr. 2023), https://www.motherjones.com/politics/2023/02/the-christian-groups-fighting-against-the-indian-child-welfare-act [https://perma.cc/7PVK-CZN4] (mentioning the roles of the Indian children adoption advocacy group Christian Alliance for Indian Child Welfare, the evangelical adoption agency Nightlight Christian Adoptions, Christian Instagram influencer Allie Beth Stuckey, and American Enterprise Institute Fellow Naomi Schaefer Riley in the fight against ICWA).

69. *See* Brief for Petitioner the State of Texas at 37–38, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. May 26, 2022) (questioning the scope of the Indian Commerce Clause, arguing that differential treatment of Indians is a race-based distinction, criticizing the federal government's requirement that state actors participate in the regulatory scheme, and attacking the delegation of certain ICWA powers to tribes). While some argue their case is limited to ICWA, *see generally* Brief Amici Curiae Goldwater Institute et al. in Support of Brackeen, et al. and State of Texas, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. June 1, 2022) [hereinafter Brief for Goldwater Inst. et al.], any claim that tribal citizenship is race based opens up all of U.S. code Title 25 for consideration. Morton v. Mancari, 417 U.S. 535 (1974). And as Justice Gorsuch repeatedly pointed out during oral arguments, the Texas and foster family arguments would have long-reaching effects including the very large Indian Health Services. Transcript of Oral Argument at 34–36, 77–81, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Nov. 9, 2022).

eliminate tribal nations as sovereign entities and eliminate the federal trust responsibility have often used Native children to do so.[70]

The conservative legal movement, described in depth in a book from 2008 of the same name,[71] is currently described as a group of similarly situated think tanks and lawyers using the courts to achieve specific goals to limit the powers of the federal government and enact a socially conservative ideology.[72] While there are no clear motivations for the turn to ICWA, there can be little doubt that is what is happening. It is perhaps enough that ICWA represents an explicit exercise of federal power for the benefit of Native families. However, as in other areas of law, the initial promise of progress through legislation is vulnerable to litigation attacks.[73]

IV. THE IMPLICATIONS OF *ADOPTIVE COUPLE V. BABY GIRL*

The Supreme Court case that kicked off the current round of federal attacks on ICWA came up through the state court system. South Carolina appellate courts successively upheld the application of ICWA to the case of a Cherokee citizen father hoping to keep and raise his child whose mother unilaterally decided to place the child for adoption.[74] The South Carolina Supreme Court opinion was well-reasoned, and included relevant and important facts regarding both the father and mother's actions in the case.[75] The case addressed the question of how ICWA applies when an adoption is voluntary as to one parent, but involuntary as to the other. Under ICWA, an involuntary proceeding requires the application of the protections in 25 U.S.C.

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70. *See generally* Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885 (2017).

71. *See generally* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008).

72. *See* Sam Singer, *Paul Clement and the State of Conservative Legal Thought*, 90 DENV. U. L. REV. 591, 595–97 (2012) (describing the cases involving the Defense of Marriage Act, health care, immigration, and voter identification laws that Paul Clement took up after leaving the DOJ making him the "bespectacled face of the conservative legal agenda.")

73. *See, e.g.*, Rachel M. Lynch, Note, *The Legacy of Shelby County: Brnovich and the Supreme Court's Ideological Struggle to Find a Standard for Vote-Deprivation Challenges to Section 2 of the Voting Rights Act*, 55 SUFFOLK U. L. REV. 559 (2022) (discussing how after the evisceration of the Voting Rights Act in *Shelby County v. Holder* and *Brnovich v. Democratic National Committee*, states are proposing restrictive voting laws with disparate impact on racial minorities).

74. Adoptive Couple v. Baby Girl, 398 S.C. 625, 629 (2012), *rev'd*, 570 U.S. 637.

75. *Id.* at 632 (adoption agency concealed father's tribal citizenship); *Id.* at 634 (adoption was concealed from father until he was days away from deploying to Iraq).

Section 1912,[76] and any adoption requires courts to follow the placement preferences in 25 U.S.C. Section 1915(a).[77]

But when *Adoptive Couple v. Baby Girl* reached the Supreme Court, a veritable who's who of Supreme Court practitioners lent their services to the prospective adoptive couple to argue against ICWA's application and constitutionality.[78] In particular, Paul Clement, as the Guardian ad Litem for the Native child, spent half of his brief arguing that ICWA was unconstitutional based primarily on racist arguments regarding Baby Girl's tribal citizenship.[79]

The surprising involvement of major participants from the Supreme Court Bar as well as the final decision in *Baby Girl* demonstrated ICWA's vulnerability to attack. In *Baby Girl*, the Court found odd ways to avoid the application of the law,[80] but stopped just short of finding that it violated equal protection concerns.[81] In addition, though a majority did not find ICWA unconstitutional, Justice Thomas's concurrence laid out a roadmap for anti-ICWA advocates, but just as importantly for conservative legal movement attorneys, to consider a way to challenge the constitutionality of the foundations of federal Indian law itself through ICWA. [82]

After *Baby Girl*, the federal government engaged directly with tribes and practitioners to shore up ICWA's provisions nearly forty years after its passage. After consultation with tribes, the Bureau of Indian Affairs

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76. *Id.* at 645; 25 U.S.C. § 1912.

77. *Id.* at 655; 25 U.S.C. § 1915(a).

78. Lisa Blatt represented the prospective Adoptive Couple, while Paul Clement represented the Guardian ad Litem representing Baby Girl. In addition, Birth Mother was represented by Lori Alvino McGill, at the time of Latham & Watkins, National Council for Adoption was represented by Theane Evangelis Kapur at Gibson, Dunn & Crutcher, while the Adoptive Parents Committee, Inc. was represented by Philip "Jay" McCarthy Jr. *See* Adoptive Couple v. Baby Girl, 570 U.S. 637, 639–40 (2013).

79. *See generally* Brief for Guardian Ad Litem, as Representative of Respondent Baby Girl, Supporting Reversal, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399).

80. *E.g.*, *Baby Girl*, 570 U.S. at 652 (noting that because father did not have physical custody of Baby Girl, he did not have "continued custody" of the child—the burden of proof language in 25 U.S.C. 1912—and therefore 1912 protections could not apply to him); *id.* (illustrating that the language of ICWA only speaks of removal, not "*transfer* of the child *to* an Indian parent"); *id.* at 654 (explaining that the placement preferences don't apply when there is not an "alternative party [who] has formally sought to adopt the child").

81. *Id.* at 655–56 (recognizing that certain readings of Section 1912 could raise equal protection concerns, but declining to read the statute in a way that implicates equal protections).

82. *See id.* at 656 (Thomas, J., concurring).

initially adopted new Guidelines in 2015, federal regulations,[83] then new Guidelines again in 2016.[84] The regulations provided the first substantive federal guidance on ICWA's provisions since 1978. They provided definitions[85] and clarified certain "good cause" provisions for placement preferences and transfer to tribal court.[86] This engagement was immediately followed by a series of unusual federal court lawsuits seeking to have ICWA declared unconstitutional.

V. FEDERAL LITIGATION AFTER *BABY GIRL*

Before the most recent wave of lawsuits I discuss below, and before I was even practicing law, tribes attempted to use the federal courts to *enforce* ICWA. Section 1914 of ICWA allows Indian children, their parents, or their tribes to petition a "court of competent jurisdiction" to invalidate a decision made in violation of sections 1911, 1912, and 1913 of ICWA.[87] Initially seen as a strong and promising avenue to ensure ICWA compliance at the trial level, attempts by ICWA advocates to use the federal courts were dismissed under abstention doctrines.[88] The promise of Section 1914 became nothing more than the already enshrined right to appeal an incorrect application of the law to state courts of appeal. More recently, the American Civil Liberties Union, along with the Oglala Sioux and Rosebud Sioux Tribes and Native parents, tried again to bring a federal case to enforce both due process protections and ICWA.[89] While the case survived and the tribes won at

83. 25 C.F.R. § 23.

84. U.S. DEP'T OF THE INTERIOR, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT (Dec. 2016) [hereinafter DEP'T OF INTERIOR ICWA GUIDELINES], https://www.bia.gov/sites/default/files/dup/assets/bia/ois/pdf/idc2-056831.pdf [https://perma.cc/H6A8-N5Z4].

85. 25 C.F.R. § 23.2.

86. 25 C.F.R. §§ 23.118, 23.132.

87. 25 U.S.C. § 1914 ("Any Indian child . . . , any parent or Indian custodian . . . , and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.").

88. For a full description of this early work, see B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 429–48 (1997) (explaining that the abstention doctrine bars federal court intervention in pending court action and thus is used to block ICWA cases).

89. Oglala Sioux Tribe v. Fleming, 904 F.3d 603, 606 (8th Cir. 2018), *cert. denied*, 140 S. Ct. 105 (2019).

the district court level, on the first appeal, the Eighth Circuit dismissed the case under *Younger* abstention principles.[90]

A. Litigation from Baby Girl *to* Brackeen

Despite this recent exception, after *Baby Girl*, the federal courts have been almost exclusively used by anti-ICWA advocates. Almost immediately upon the adoption of the 2015 Guidelines, the National Council for Adoption ("NFCA") filed a federal lawsuit in the Eastern District of Virginia claiming the non-binding Guidelines violated the Administrative Procedure Act.[91] The attorneys involved were familiar from the *Baby Girl* case, reprising their roles in this new filing.[92]

This initial complaint outlined what would become the standard arguments for future federal complaints over the next five years, even though they made very little sense in the context of the 2015 non-binding Guidelines. Specifically, NCFA and Building Arizona Families argued the Guidelines themselves violated the due process and equal protection rights of children who meet ICWA's definition, that the Indian Commerce Clause does not provide the federal government authority to adopt the Guidelines, and that the Guidelines commandeer state agencies and state courts.[93] These arguments were based primarily on the Guidelines' direction to state courts to follow 25 U.S.C. Section 1915 and to limit the good cause exceptions to deviate from the placement preferences in Section 1915.[94]

The order dismissing the case addressed all of the problems with the complaint, clearly and quickly noting the Guidelines were not a final agency action, but rather "non-binding interpretive rules."[95] The court went on to rule the plaintiffs had not proven any of their constitutional claims, following the fundamental basics of federal Indian law and

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90. *Id.*, at 610, 614.

91. Complaint and Prayer for Declaratory and Injunctive Relief at 1, Nat'l Council for Adoption v. Jewell, 156 F. Supp. 3d 727 (E.D. Va. 2015) [hereinafter NCFA Complaint].

92. Lori McGill, then at Quinn Emanuel Urquhart, returned to represent the NCFA, along with her husband Matthew McGill at Gibson, Dunn & Crutcher. Philip Jay McCarthy returned as a Guardian ad Litem. *See id.* at 1, 54.

93. *See id.* at 38 ("The Indian Commerce Clause gives Congress authority '[t]o regulate commerce . . . with the Indian tribes.'").

94. *See* DEP'T OF INTERIOR ICWA GUIDELINES, *supra* note 84, at 59–60 tbl.H.4, 61–63 (specifying what state courts may and may not find constitutes good cause under Section 1915).

95. Nat'l Council for Adoption v. Jewell, No. 1:15-cv-675, 2015 WL 12765872, at *1 (E.D. Va. Dec. 09, 2015), *vacated,* No. 16-110, 2017 WL 9440666 (4th Cir. Jan. 30, 2017).

noting the plaintiffs provided no basis for their arguments.[96] Finally, in two paragraphs, the court dismissed the commandeering arguments, noting that even if the Guidelines were federal regulations, there would be no concerns.[97]

The Eastern District of Virginia is known for being a "rocket docket," or one that works very quickly, and perhaps the hope was the opportunity for appeal to the Supreme Court would arrive fast enough to prevent additional actions by the Obama Administration.[98] Regardless, the decision was quickly vacated by the Fourth Circuit after the 2015 Guidelines were withdrawn and replaced by the 2016 Guidelines and federal regulations.[99]

From *NCFA* through *Brackeen*, federal complaints and state cases involving the constitutionality of ICWA exploded across the country. While tribes continued to work on "regular" ICWA cases in state courts,[100] many were faced with the tremendous burden of federal claims and state cases going up on unusual writs of certiorari[101] to the Supreme Court.[102] Many of these cases involved the same attorneys and

96. *Id.* at *5–6.

97. *Id.* at *7.

98. *See* Dabney Carr & Robert Angle, *Why The Original 'Rocket Docket' Will Likely Resume Its Pace*, LAW360 (Feb. 9, 2023, 3:13 PM), https://www.law360.com/articles/1573357 [https://perma.cc/JJ87-ZZSS].

99. *See* Nat'l Council for Adoption v. Jewell, No. 16-110, 2017 WL 9440666, at *1 (4th Cir. Jan. 30, 2017).

100. *See The Indian Child Welfare Act During the* Brackeen *Years*, *supra* note 8, at 12–13 (explaining that approximately 200 ICWA appellate cases are in state court each year).

101. *E.g.*, *In re* Alexandria P., 204 Cal. Rptr. 3d 617 (Cal. Ct. App. 2016), *cert. denied sub nom.*, R.P. v. L.A. Cnty. Dep't of Child. & Fam. Servs., 137 S. Ct. 713 (2017); S.S. v. Stephanie H., 388 P.3d 569 (Ariz. Ct. App. 2017), *cert. denied sub nom.*, S.S. v. Colo. River Indian Tribes, 138 S. Ct. 380 (2017); Renteria v. Superior Ct. of Cal., Tulare Cnty., 138 S. Ct. 986 (2018); *In re* Adoption of B.B., 417 P.3d 1 (Utah 2017), *cert. denied sub nom.*, R.K.B. v. E.T., 138 S. Ct. 1326 (2018); Stipulation of Voluntary Dismissal at 1, C.E.S. v. Nelson, No. 1:15-cv-982 (W.D. Mich. Jan. 27, 2016); *Jewell*, 2017 WL 9440666, at *1; Doe v. Hembree, 15-cv-471, 2017 WL 11685171, at *1 (N.D. Okla. Mar. 3, 2017); Doe v. Piper, No. 15-2639, 2017 WL 3381820, at *1 (D. Minn. Aug. 4, 2017); Carter v. Tahsuda, 743 F. App'x 823 (9th Cir. 2018); Watso v. Lourey, 929 F.3d 1024 (8th Cir. 2019), *cert denied sub nom.*, Watso v. Harpstead, 140 S. Ct. 1265 (2020); Order, Fisher v. Cook, No. 2:19-cv-2034 (W.D. Ark. May 28, 2019); Voluntary Dismissal Without Prejudice, Ams. for Tribal Court Equal. v. Piper, No. 17-cv-4597 (D. Minn. Sept. 6, 2019); Notice of Dismissal, Whitney v. United States, No. 1:19-cv-299 (D. Me. Aug. 23, 2019); Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021).

102. At the Indian Law Clinic, we worked with both tribes and individuals to support oppositions to certiorari, many of which were done in partnership with attorneys at Kilpatrick Townsend & Stockton LLP.

organizations making repeated appearances and identical arguments.[103]

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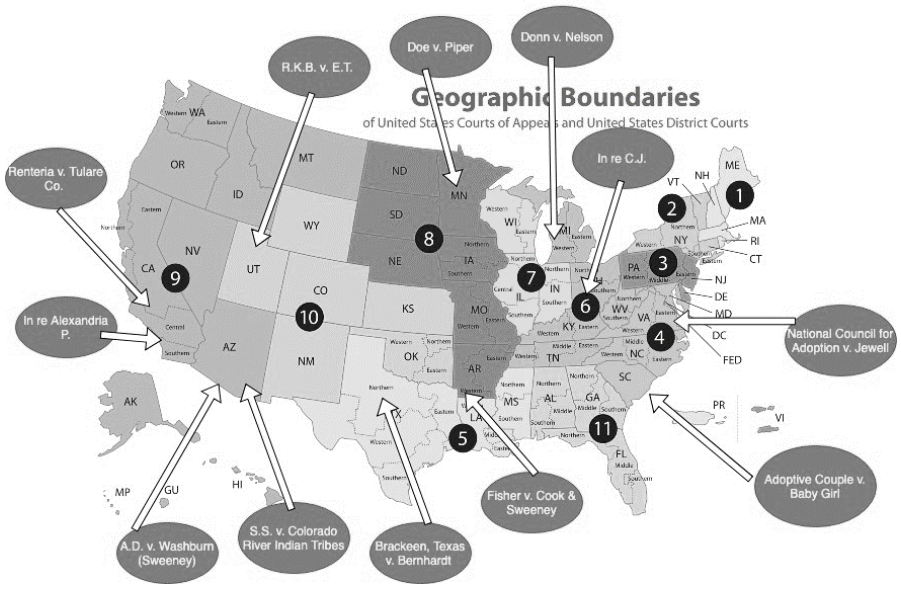
103. *See, e.g.*, Adoptive Couple v. Baby Girl, 570 U.S. 637, 640 (2013) (listing Mark Fiddler as counsel for appellants); Brief of Amicus Curiae American Academy of Adoption Attorneys in Support of Petitioners at 621, R.P. v. L.A. Cnty. Dep't of Child. & Fam. Servs., 137 S. Ct. 713 (2017) (No. 16-500) (listing Mark Fiddler as counsel of record and listing the Academy of Adoption Attorneys as amicus curiae); Brief of the Academy of Adoption and Assisted Reproduction Attorneys as *Amicus Curiae* in Support of Petition for a Writ of Certiorari, R.K.B. v. E.T., 138 S. Ct. 1326 (2018) (No. 17-942) (listing Mark Fiddler as counsel of record and listing the Academy of Adoption Attorneys as amicus curiae); Complaint at 15, C.E.S. v. Nelson, No. 15-cv-982 (W.D. Mich. Sept. 29, 2015) (listing Mark Fiddler as counsel for plaintiffs); *Piper*, 2017 WL 3381820, at *1 (listing Mark Fiddler as counsel for plaintiffs), Brief for Individual Petitioners, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. May 26, 2022) (listing Mark Fiddler and Matt McGill as counsel for plaintiffs); *In re* Alexandria P., 204 Cal. Rptr. 3d at 621 (listing Lori McGill as counsel for appellants); *Jewell*, 2017 WL 9440666, at *1 (listing Matt McGill as counsel for appellants); Nat'l Council for Adoption v. Jewell, 156 F. Supp. 3d 727, 730 (E.D. Va. 2015) (listing Philip Jay McCarthy as guardian ad litem); Gila River Indian Cmty. v. Dep't of Child Safety, 395 P.3d 286, 287 (Ariz. 2017) (listing attorneys from the Goldwater Institute as counsel); J.P. v. Alaska, 506 P.3d 3, 5 (Alaska 2022) (listing the Goldwater Institute as amicus curiae); *In re* Adoption of T.A.W. v C.W., 383 P.3d 492, 494 (Wash. 2016) (en banc) (listing the Goldwater Institute as amicus curiae); Motion for Leave to File and Brief *Amicus Curiae* for Goldwater Institute and the Cato Institute in Support of Petitioners, R.P. v. L.A. Cnty. Dep't of Child. & Fam. Servs., 137 S. Ct. 713 (2017) (No. 16-500) (listing the Goldwater Institute as amicus curiae); Motion for Leave to File Brief as Amicus Curiae by the Goldwater Institute, Renteria v. Shingle Springs Band of Miwok Indians, No. 2:16-cv-1685 (E.D. Cal. Oct. 20, 2016) (listing the Goldwater Institute as amicus curiae); Brief *Amicus Curiae* of the Goldwater Institute in Support of Petitioners, R.K.B. v. E.T., 138 S. Ct. 1326 (2018) (No. 17-942) (listing the Goldwater Institute as amicus curiae); *In re* C.J., Jr., 108 N.E.3d 677, 681 (Ohio Ct. App. 2018) (listing the Goldwater Institute as counsel on brief); Complaint at 2, A.D. v. Washburn, No. CV-15-1259 (D. Ariz. Mar. 16, 2017) (listing the Goldwater Institute as counsel for plaintiffs) Fisher v. Cook, No. 2:19-cv-2034, 2019 WL 1787338 (W.D. Ark. Apr. 24, 2019) (listing the Goldwater Institute as counsel for plaintiffs); Brief for Goldwater Inst. et al., *supra* note 69 (listing the Goldwater Institute as amicus curiae); Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners, Renteria v. Superior Ct. of Cal., Tulare Cnty., 138 S. Ct. 986 (2018) (No. 17-789) (listing the Pacific Legal Foundation as amicus curiae); Amicus Curiae Brief of Foster Parents and Pacific Legal Foundation in Support of Chad Everet Brackeen, et al., Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. June 1, 2022) (listing the Pacific Legal Foundation as amicus curiae); Brief of the Citizens Equal Rights Alliance as Amicus Curiae in Support of the Motion to Certify the Class Action, Carter v. Washburn, No. 15-cv-01259, 2017 WL 1019685 (D. Ariz. Mar. 16, 2017) (listing the Citizens Equal Rights Alliance as amicus curiae); Brief for Citizens Equal Rights Foundation as Amicus Curiae Supporting No Party, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. June 2, 2022) (listing the Citizens Equal Rights Alliance as amicus curiae).

Figure 1: Location of Major Federal or State ICWA Cases by Federal Court Boundaries



Of the challenges, the most direct attack came from the Goldwater Institute. *A.D. v. Washburn*,[104] in the District of Arizona, purported to be brought by Native children and their foster parents "on behalf of themselves and all off-reservation Arizona-resident children with Indian ancestry and all off-reservation Arizona-resident foster, preadoptive, and prospective adoptive parents in child custody proceedings involving children with Indian ancestry."[105] Plaintiffs argued ICWA was unconstitutional under both the equal protection and due process clauses of the Fifth and Fourteenth Amendments, that it exceeded the powers of Congress, and violated the Tenth Amendment.[106]

Plaintiffs were represented by the Goldwater Institute,[107] a right-wing think tank that, prior to this lawsuit, showed no interest in issues related to child dependency or tribal nations.[108] Amici supporting the

104. No. CV-15-1259 (D. Ariz. Mar. 16, 2017).
105. Complaint at 2, A.D. v. Washburn, No. CV-15-01259 (D. Ariz. Mar. 16, 2017).
106. *Id.* at 9, 21–22, 24–25.
107. *Id.* at 1.
108. Alleen Brown, *How a Right-Wing Attack on Protections for Native American Children Could Upend Indian Law*, INTERCEPT (June 17, 2019, 12:10 PM),

case included Citizens Equal Rights Alliance, an openly anti-tribal organization, as well as the Ohio Attorney General, who has been a frequent participant in the federal lawsuits against ICWA.[109]

Both the Gila River Indian Community and Navajo Nation intervened in the case, and a few amicus briefs were filed at the district court level.[110] The case drew considerable media attention and moved at a much slower pace than the *NCFA* case, but ultimately, the district court held the plaintiffs could not overcome standing barriers.[111] Despite attempts to appeal the case, the Ninth Circuit found the case to be moot, and the Supreme Court denied certiorari.[112]

B. Haaland v. Brackeen

Seven months after the Arizona district court dismissed the Goldwater case, in October 2017, the Texas Attorney General and a Texas foster family filed a complaint in the U.S. District Court for the Northern District of Texas, arguing that ICWA was unconstitutional under a myriad of familiar claims.[113] For the first time, anti-ICWA advocates found a state attorney general willing to bring constitutional arguments against ICWA—something that had not happened in the

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https://theintercept.com/2019/06/17/indian-child-welfare-act-goldwater-institute-legal-battle [https://perma.cc/4Y5S-HJDT] (explaining the impact of the Goldwater Institute on ICWA litigation).

109. Brief of the Citizens Equal Rights Alliance as Amicus Curiae in Support of the Motion to Certify the Class Action, Carter v. Washburn, No. CV-15-1259, 2017 WL 1019685 (D. Ariz. Nov. 11, 2015); Amicus Memorandum of State of Ohio in Opposition to Motions to Dismiss at 13, A.D. v. Washburn, No. CV-15-1259 (D. Ariz. Mar. 16, 2017).

110. Motion of the Gila River Indian Community to Intervene as Defendant, A.D. v. Washburn, No. 2:15-cv-1259 (D. Ariz. Oct. 16, 2015); Motion to Intervene, A.D. v. Washburn, No. 2:15-cv-1259 (D. Ariz. Nov. 18, 2017).

111. Order, A.D. v. Washburn, No. CV-15-1259 (D. Ariz. Mar. 16, 2017).

112. Memorandum, Carter v. Tahsuda, No. 17-15839 (9th Cir. Aug. 6, 2018); Order list at 2, 587 U.S. 1 (May 28, 2019).

113. Complaint, Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2017) (No. 4:17-cv-868).

over forty-year history of the law.[114] The complaint was filed in Texas's favorite court.[115]

While the plaintiffs eventually filed amended complaints to bring in two additional foster families and states,[116] at the Indian Law Clinic we began talking to tribes about intervening in the case. Without a tribe as an intervenor-party, the posture of the case would mean that foster families, states, and the federal government would have the most consequential legal arguments about ICWA without any tribal government representation. Four tribes across the country agreed to intervene and defend ICWA alongside the federal government.[117] The Navajo Nation later intervened for the purpose of a Rule 19 motion, then fully intervened on appeal.[118]

The three foster families, the Brackeens, the Cliffords, and the Librettis, all claimed that ICWA interfered with their ability to adopt Native children out of the foster care system.[119] While the Brackeens' case was in Tarrant County in the Northern District of Texas, the other

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114. *Cf.* Zach Despart & James Barragán, *Texas AG Ken Paxton Impeached, Suspended From Duties; Will Face Senate Trial*, TEX. TRIB. (May 27, 2023, 8:00 PM), https://www.texastribune.org/2023/05/27/ken-paxton-impeached-texas-attorney-general [https://perma.cc/SG42-B98C] ("Few attorneys general have been as prominent as Paxton, who made a career of suing the Obama and Biden administrations.").

115. *See* Steve Vladeck, *Texas Judge's Covid Mandate Exposes Federal 'Judge-Shopping' Problem*, MSNBC (Jan. 11, 2022, 6:33 PM), https://www.msnbc.com/opinion/texas-judge-s-covid-mandate-ruling-exposes-federal-judge-shopping-n1287324 [https://perma.cc/5TP4-TN7X] (explaining that it is easy to forum shop in Texas courts due to its organization to find a favorable conservative judge); Ian Millhiser, *How Republicans Rigged Texas's Federal Courts Against Biden*, VOX (Aug. 10, 2022, 7:00 AM), https://www.vox.com/policy-and-politics/2022/8/10/23296841/supreme-court-biden-judiciary-republicans-texas-judge-shopping-immigration-obamacare [https://perma.cc/D4TR-XBL6].

116. Second Amended Complaint, Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (No. 4:17-cv-868) [hereinafter *Zinke* Second Amended Complaint].

117. Motion of Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians to Intervene as Defendants, Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (No. 4:17-cv-868). These tribes are represented by the Author at the Michigan State University Indian Law Clinic as well as attorneys at Jenner & Block LLP and Kilpatrick Townsend & Stockton LLP.

118. Motion of the Navajo Nation to Intervene as Defendant for the Limited Purpose of Seeking Dismissal Pursuant to Rule 19, Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (No. 4:17-cv-868). A Rule 19 Motion requires the joinder of an indispensable party. When a tribal nation does this, if they are an indispensable party, the case may be ultimately dismissed due to their status as sovereigns. *See* Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns,* 40 GONZ. L. REV. 1, 14–15 (2004)

119. *Zinke* Second Amended Complaint, *supra* note 116, at 5.

two foster families were from Minnesota and Nevada and had no connection to Texas.[120] Regardless of the court's ultimate ruling, the decision would not be binding on the state courts in Minnesota and Nevada.[121]

The plaintiffs made the same arguments seen in other federal complaints—that ICWA was violative of equal protection, that it commandeered state agencies, and that it was beyond Congress's power to pass the law.[122] The fourth argument, out of place in the complaint, is a familiar one in the arsenal of the conservative legal movement.[123] The plaintiffs argued that 25 U.S.C. Section 1915(c) constituted impermissible delegation.[124] In other words, the provision that allows tribes to rearrange the placement preferences through a tribal ordinance was a violation of Article I's non-delegation doctrine. This issue between Congress and tribes has long been settled in Supreme Court precedent.[125] Its inclusion only makes sense to catch the eye of those judges and clerks interested in familiar, dog whistle arguments.[126]

The plaintiffs quickly moved for summary judgment, meaning their presented facts in the complaint would never be tested in the federal court, and Judge O'Connor's ultimate ruling finding ICWA unconstitutional rested on the assumed facts in the district court case.[127] Given its import, the decision was cursory, finding that

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120. *Id.* at 3, 41.

121. Brackeen v. Haaland, 994 F.3d 249, 445 (5th Cir. 2021) (Costa, J., concurring in part and dissenting in part).

122. *Zinke* Second Amended Complaint, *supra* note 119, at 57, 63, 66.

123. Thanks to Dean Erwin Chemerinsky and Professor Dan Lewerenz for pointing this out.

124. *Zinke* Second Amended Complaint, *supra* note 119, at 61.

125. *See* United States v. Mazurie, 419 U.S. 544, 556–57 (1975) (holding that the non-delegation doctrine applies less stringently where an entity possesses independent authority over the subject matter and noting that Indian tribes are unique aggregations posing such sovereignty over their members and territory).

126. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279 (2021); Charles P. Pierce, *No Bad Conservative Idea Ever Dies*, ESQUIRE (May 27, 2020), https://www.esquire.com/news-politics/politics/a32689108/supreme-court-conservatives-nondelegation-doctrine [https://perma.cc/5NLX-KDE8]. *But see* Peter J. Wallison, *Only the Supreme Court Can Effectively Restrain the Administrative State*, NAT'L REV. (Dec. 1, 2020, 6:30 AM), https://www.nationalreview.com/2020/12/only-the-supreme-court-can-effectively-restrain-the-administrative-state [https://perma.cc/YB2J-Q5DB].

127. Brackeen v. Zinke, 338 F. Supp. 3d 514, 519 (N.D. Texas 2018). Robyn Bradshaw was never deemed unfit to serve as a foster parent, yet this fact is in the first

fundamental cornerstones of federal Indian law did not support the passage or application of ICWA in a mere 26 pages of analysis.[128]

Both the outcome and the decision itself left the intervening tribes and the DOJ in a difficult position. The DOJ operates under a mandate to defend the constitutionality of laws passed by Congress.[129] As such, it nearly always appeals decisions where a court finds a law unconstitutional, and there was no reason to believe they would not here.[130] And while there was discussion about the value of appealing the decision in Indian Country, ultimately the court's unmoored findings that the definition of "Indian child" was a racial classification rather than a political one,[131] that ICWA was beyond congressional power to enact,[132] and that the law commandeered states could not be left unchallenged.[133]

The Fifth Circuit panel decision overturned the lower court and reinstated all of ICWA.[134] Judge Owen dissented on the issue of commandeering,[135] but otherwise agreed on the issues of equal protection and congressional power in Indian affairs.[136] The plaintiffs were left with two choices—immediately file for a writ of certiorari in the Supreme Court, or file for en banc review in the Fifth Circuit. The unremarkable nature of the panel decision made it less attractive for

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paragraph of the order. *Id.* Before the case came to the Supreme Court, Crooked Tree Media released season two of the podcast "This Land," which attempted to dig into some of the underlying cases the provided the basis for this challenge. *See This Land*, CROOKED MEDIA (2021), https://crooked.com/podcast-series/this-land [https://perma.cc/7SAZ-K3RE]; *see also* Brief for Robyn Bradshaw, Grandmother and Adoptive Parent of P.S. ("Child P.") as *Amicus Curiae* in Support of Tribal and Federal Defendants, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Aug. 19, 2022).

128. *See Zinke*, 338 F.Supp. 3d at 531–46 (the entirety of the analysis portion of the decision was thirteen pages long).

129. 28 U.S.C. § 530D(a)(1)(B).

130. *But see* Press Release, Department of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), https://www.justice.gov/opa/pr/statement-attorney-general-litigation-involving-defense-marriage-act [https://perma.cc/TD55-BL2W] (where the DOJ declined to continue defending the Defense of Marriage Act in federal court litigation).

131. *See Zinke*, 338 F. Supp. 3d at 533–34.

132. *Id.* at 546.

133. *Id.* at 538–41.

134. Brackeen v. Bernhardt, 937 F.3d 406, 441 (5th Cir. 2019).

135. *Id.* at 441–42 (Owen, J., concurring in part and dissenting in part) (arguing that the ICWA statute does violate the anti-commandeering principle because it directs state officers and agents to administer a federal law).

136. *Id.* at 429, 434–35 (majority opinion), 446 (Owen, J., concurring in part and dissenting in part).

Supreme Court review, while the opportunity to open up the decision to the sixteen judges on a circuit with a large number of Trump appointees would have been deeply attractive.[137]

And ultimately, the plaintiffs could not have hoped for a better decision than what the en banc court produced.[138] The opinions of the deeply divided court that was over 300 pages long simply invited Supreme Court review, even though its ultimate application was as unlikely as it was unwieldly.[139] While some state courts acknowledged the decision, none followed it,[140] perhaps because it was difficult even for those steeped in the case to understand the limited holdings.[141] For children and families in the child protection system, the decision of the court was an utter failure. The court was unable to directly address in any meaningful way the reason ICWA exists and how it applies in actual state court cases.[142]

In fact, this outcome is exactly why the case should have triggered the application of an abstention doctrine or other prudential concerns. The success of the Brackeens and Texas in the face of foundational precepts of standing, abstention, and redressability has continually surprised federal court attorneys and observers.[143] Each federal court in this case has been willing to set aside relevant facts and

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137. *See* Ann E. Marimow, *Trump's Lasting Legacy on the Judiciary is Not Just at the Supreme Court*, WASH. POST (Jan. 29, 2023, 5:00 AM), https://www.washingtonpost.com/politics/2023/01/29/5th-circuit-court-trump-judges-conservative [https://perma.cc/GJ2W-WCDM].

138. Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc) (upholding the ICWA statute in its entirety).

139. *See* Sup. Ct. R. 10(a), (b).

140. According to the Westlaw citing references, since its release in 2001, only thirty-eight cases on appeal cited to this decision, and only eleven of those involve ICWA. This tracks the Author's experience of having virtually no advocates contact her regarding the use of this opinion in trial or appellate ICWA cases.

141. Ultimately the court was able to achieve a majority finding all parties had standing, that Congress had Article I authority to pass ICWA, and that a majority of ICWA was a valid exercise of preemption. However, the qualified expert witness and active efforts provisions of 1912 and the recordkeeping provisions of 1915 violated the Constitution under commandeering, and 25 C.F.R. 23.132(b) requiring clear and convincing evidence of good cause to change a placement violated the Administrative Procedure Act. *See generally Haaland*, 994 F.3d 249.

142. Haaland, 994 F.3d at 286–87. Even the opinion supporting ICWA's constitutionality spends two paragraphs describing its provisions and half of that is on the placement preferences, rather than the substantive rights provided to parents and tribes.

143. *See, e.g.*, Barbara Ann Atwood, *Standing Matters:* Brackeen*, Article III, and the Lure of the Merits*, 23 J. OF APP. PRAC. & PROCESS 105 (2023).

prudential standards to reach the merits of the claims of the plaintiffs, despite ample reason to find otherwise.[144]

Similar to the calculus at the district court, there was very little question that multiple parties would petition the Supreme Court for certiorari after the en banc decision. Texas and the individual plaintiffs requested the Court consider broad questions that would certainly have implications beyond ICWA.[145] In contrast, the DOJ and intervening tribes asked the Court to consider much narrower questions, while Navajo Nation declined to participate at the cert stage.[146]

The Court granted certiorari in February of 2022, but did not clarify nor narrow the questions presented.[147] The Court granted all four petitions, and all questions presented. As such, the Court has twelve questions before it, including both the narrowest and broadest requests.[148] Briefing was completed in August, with oral argument held November 9, 2022. The decision will be issued sometime before the end of June 2023.

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144. *See* Amicus, *Is This How We Do Law Now?*, SLATE (Dec. 17, 2022), https://slate.com/podcasts/amicus/2022/12/civil-rights-lawyer-sherrilyn-ifill-on-how-arguments-are-going-down-at-this-supreme-court [https://perma.cc/9P5Z-YEBV] (interview with Sherillyn Ifill discussing the way cases are getting to the Supreme Court without meeting standing requirements, case and controversy requirements, or developed trial records below).

145. *See* Transcript of Oral Argument at 33–36, 74–75, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Nov. 9, 2022).

146. Petition for a Writ of Certiorari at 1, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Sept. 3, 2021); Brief of 180 Indian Tribes and 35 Tribal Orgs. As *Amici Curiae* in Support of Cherokee Nation, et al., Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Oct. 8, 2021); Letter from Doreen N. McPaul, Attorney General, Navajo Nation, to Scott S. Harris, Clerk of the Court, Supreme Court of the United States (Oct. 6, 2021).

147. Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022); Haaland v. Brackeen, 142 S. Ct. 1205 (2022); Brackeen v. Haaland, 142 S. Ct. 1205 (2022); Texas v. Haaland, 142 S. Ct. 1205 (2022); Questions Presented, Haaland v. Brackeen, No. 21-376 (U.S. Feb. 28, 2022); Questions Presented, Cherokee Nation v. Brackeen, No. 21-377 (U.S. Feb. 28, 2022); Questions Presented, Texas v. Haaland, No. 21-378 (U.S. Feb. 28, 2022); Questions Presented, Brackeen v. Haaland, No. 21-380 (U.S. Feb. 28, 2022).

148. *Compare* Questions Presented, Texas v. Haaland, No. 21-378 (U.S. Feb. 28, 2022) ("Whether the Indian classifications used in ICWA and its implementing regulations violate the Fifth Amendment's equal-protections guarantee."), *with* Questions Presented, Cherokee Nation v. Brackeen, No. 21-377 (U.S. Feb. 28, 2022) ("Did the *en banc* Fifth Circuit err by reaching the merits of the plaintiffs' claims that ICWA's placement preferences violate equal protection.").

IV. REFLECTIONS

My experience with Supreme Court practice was entirely removed from the work I do with tribes and states. Where I usually chose to focus my work is on the bridge between where we are today, and where we want to be when it comes to a community that can protect children without causing further harm.

As the child protection system exists today, the resources necessary to support families, provide services, support the kin taking care of a child, and ensure all due process protections exist for families is massive.[149] The system is failing under its own weight as the country continues to use it to address issues that would be better dealt with major anti-poverty legislation,[150] funding mental health programs, and providing communities with real resources to fight both chemical and alcohol dependency. Attacking ICWA does none of those things, and worse, diverts the time, energy, and money of those deeply committed to improving existing state systems and building capacity of tribal systems.[151]

ICWA was vulnerable to attack for a few reasons. First, there are no easy child protection cases. The facts that give rise to them are often devastating and it is easy for anti-ICWA advocates to appeal to emotion in individual cases to change the law. Second, despite ICWA, state systems are still biased against tribes and Native parents, and the informality of child protection proceedings seems to invite that bias.[152] Third, a vast majority of tribes were and are uniquely underprepared for a synchronized legal attack on ICWA. And finally, while ICWA is a

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149. *Cf.* DOROTHY ROBERTS, SHATTERED BONDS 141–46 (2002) (arguing the funding of the child welfare system is "swollen" and should be invested "in the things that have been proven to promote children's well-being").

150. This is shamelessly stolen from many conversations the author had with Adrian T. Smith, formerly of the National Indian Child Welfare Association, the Oregon Governor's office, and now an independent consultant at Tobin Consulting. *See also id.* at 141–42.

151. Or abolishing state systems altogether. *Id.* at 11, 295–304.

152. Opinion, *In re* Dependency of A.C., No. 100966-6 (Wash. Mar. 9, 2023) (holding it is impermissible to rely heavily hearsay in child dependency proceedings); Opinion, Diego K. v. Alaska Dept. of Health & Soc. Servs., No. 7226 (Alaska Feb. 23, 2018) (relying on hearings where no evidence was taken to terminate parental rights in an ICWA case is impermissible); *see also* Amy Sinden, *"Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings*, 11 YALE J. OF L. & FEMINISM 339, 380 (1999) ("Where decision making occurs without these formal constraints, however, it is even more susceptible to being swayed by prejudices, stereotypes, and snap judgments based on innuendo and rumor.").

bipartisan law,[153] the combination of forces brought to bear on ICWA put it uncomfortably in the conservative legal movement's style of litigation.

A. Child Protection Narratives and ICWA

On more than one occasion when I spoke with federal court practitioners, I could tell my perspective on the facts of a child protection case was fundamentally different than those who did not have years of exposure to the child protection system. Attorneys who worked with me more than once laughed ruefully at my characterization of the facts in the *Brackeen* case variously as "not that bad" and "a close call." In fact, the *Brackeen* case in the state court was incredibly, sadly, stereotypical—and, I maintain, a close call. The mother was unstable and unhoused, having both mental health and chemical dependency issues.[154] The father had chemical dependency issues, but the paternal grandparents did not.[155] The child's placement with their paternal grandparents was unsuccessful because the grandparents remained in close contat with their son, the child's father, and let him see and care for the child.[156]

In addition, the child was in stranger foster care for around eighteen months, not an unusual amount of time before the state moved to terminate parental rights.[157] The Navajo Nation found an appropriate permanent placement for the child,[158] and the foster parents knew from the start they would not be the child's permanent placement.[159] Yet they brought the federal complaint anyway, framing the case as a voluntary adoption and their home as the only place where this Navajo child should ever live.[160]

The anti-ICWA amicus briefs in the *Brackeen* case provided facts that were wrong, exploitative, and designed to illicit an emotional, anti-tribal response from those who read them. In its brief, the Christian

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153. *See supra* note 18.

154. Jan Hoffman, *Who Can Adopt a Native American Child? A Texas Couple vs. 573 Tribes*, N.Y. TIMES (June 5, 2019), https://www.nytimes.com/2019/06/05/health/navajo-children-custody-fight.html [https://perma.cc/7GFC-PYPP] (asserting A.L.M.'s biological mother has struggled with chemical dependency).

155. *Id.*

156. *Id.* (asserting his parents sporadically visited and then A.L.M.'s parents rights were terminated).

157. Brackeen v. Haaland, 994 F.3d 249, 288 (5th Cir. 2021).

158. *Id.*

159. *See* Brackeen v. Zinke, 338 F. Supp.3d 514, 525 (N.D. Tex. 2018).

160. *See id.*

Alliance for Indian Child Welfare ("CAICW") described—without citations of any kind—cases with alleged unfair outcomes they claimed to be because of ICWA's application.[161] At least one of those cases took place in tribal court, where ICWA does not apply. Attorneys for the Gila River Indian Community asked counsel for CAICW to correct the misrepresentations made to the Court in their *amicus* brief, but counsel refused (under the mistaken assumption that ICWA applies to tribal court proceedings).[162]

Similarly, the Pacific Legal Foundation's ("PLF") brief focused on an Ohio case where the trial and appellate courts rejected its equal protection argument and instead determined ICWA should be applied.[163] While the PLF attributes gross delays to the application of ICWA, the delays were in fact the result of Ohio's failure to provide notice of the case to the Gila River Indian Community in a reasonable time, three appeals, and PLF's efforts to prevent the Community from representing its interests in court. Despite knowing the child, C.J., Jr., was Pima, the Ohio agency waited more than a year and half to notify the Community of the case. The Guardian ad Litem filed two of the appeals, and repeatedly obstructed the Community's efforts to participate. The GAL was ultimately removed from the case for bias and misconduct.[164] The delay in this case was a result of state actor resistance to ICWA and their unwillingness to follow it, not from the application of ICWA itself.

The Goldwater Amicus Brief misconstrued facts of multiple ICWA cases. A father in one case attempted to terminate the parental rights of the mother to their two children and was unsuccessful. The Goldwater brief implies this is entirely due to ICWA, however, no parent, under ICWA or not, has the right to terminate another parent's rights unilaterally.[165] Just as importantly, and not mentioned in the

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161. Brief of Christian Alliance for Indian Child Welfare & ICWA Children & Families as *Amici Curiae* Supporting the Brackeen and State Petitioners, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. June 2, 2022).

162. Author emailed conversations with inhouse counsel for Gila River Indian Community.

163. Amicus Curiae Brief of Foster Parents & Pacific Legal Foundation in Support of Chad Everet Brackeen, et al., Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. June 1, 2022).

164. *See In re* C.J., Jr., 108 N.E.3d 677, 682–83, 685–87 (Ohio Ct. App. 2018) (asserting that the Guardian ad Litem filed more than one appeal, delaying the proceedings and the Gila River Indian Community was served with the case eighteen months after the complaint was filed against normal procedures).

165. Brief for Goldwater Inst. et al., *supra* note 69, at 2 (citing S.S. v. Stephanie H., 388 P.3d 569, 572 (Ariz. App. 2017)).

brief, the Arizona court found the mother had addressed her issues leading to the potential termination, and as such, termination was inappropriate.

In the same brief, a foster family stated the foster child in their care was "sent to live in Oklahoma."[166] As the foster family knew, the foster child who was in their care was placed with her relatives and siblings in Utah.[167] The California court spent considerable time discussing the best interests of the child, and that a child's best interest is one factor in determining her placement.[168] Finally another foster family asserted that the foster child in their care was sent to New Mexico and no one had heard from him since.[169] As that foster family knew, the child was sent to live with his paternal relatives,[170] and the Tribe is in contact with the child and family.

The hard and difficult truth of the child protection system is that children in foster care do not have good outcomes.[171] They suffer from adverse childhood experiences.[172] In non-ICWA cases, children are returned to parents and are abused. In non-ICWA cases, children are placed in foster care and abused. ICWA has nothing to do with the faults of the system. The facts of an individual case too often lead to

166. *Id.* at 2–3.

167. *In re* Alexandria P., 204 Cal. Rptr. 617, 622 (Cal. Ct. App. 2016).

168. *Id.*

169. Brief for Goldwater Inst. et al., *supra* note 69, at 2.

170. *See* J.P. v. Alaska, 506 P.3d 3, 4 (Alaska 2022) (finding that J.P. was placed with paternal relatives in New Mexico).

171. *See generally* Laura Gypen, Johan Vanderfaeillie, Skrallan De Maeyer, Laurence Belenger & Frank Van Holen, *Outcomes of Children Who Grew Up in Foster Care: Systematic-Review*, 76 CHILD. & YOUTH SERVS. REV. 74 (2017); YOUNG ADULTS FORMERLY IN FOSTER CARE: CHALLENGES AND SOLUTIONS, YOUTH.GOV, https://youth.gov/youth-briefs/foster-care-youth-brief [https://perma.cc/JY6V-UZYA]; Daniel Pollack, Khaya Eisenberg & Amanda Dolce, *Multiple Foster Care Placements Should Be Considered a Mitigating Factor in Criminal Proceedings*, 44 OHIO N.U. L. REV. 85 (2018).

172. Delilah Bruskas & Dale H. Tessin, *Adverse Childhood Experiences and Psychosocial Well-Being of Women Who Were in Foster Care as Children*, 17 PERMANENTE J. e131, e137 (2013) ("The results of this study show an association between the number of ACEs and the level of psychological distress of women who were in foster care as children.").

impetuous changes in law,[173] or avoidance of the application of the law.[174]

The limited data we do have about ICWA and child welfare generally indicate the law is a benefit that can directly address adverse childhood experiences.[175] We know in the aggregate that having early tribal participation in ICWA cases is beneficial for children and families.[176] Further, we know that in the aggregate, kinship care is better than stranger foster care.[177] ICWA does not create bad facts. ICWA exists to mitigate them, if agencies and courts abide by it.

B. Biases in Existing Systems

From the time of its passage, ICWA's implementation has been stymied by racism and bias against Native people and tribes. Over the course of my career, I've come to see that tension repeatedly when courts give more weight to immediate individual interests of foster families rather than future broad interests of Indian children and their tribes. When I speak with judges about the way their individual decision-making to avoid ICWA is about more than just one child, inevitably one will say they have only had one ICWA case. I use the example of a thunderstorm. The judge, faced with one ICWA case in their court, only sees the one drop. The tribes are faced with a

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173. Jill Lepore, *Baby Doe: A Political History of Tragedy*, NEW YORKER (Jan. 24, 2016), https://www.newyorker.com/magazine/2016/02/01/baby-doe [https://perma.cc/V898-B7C9] ("Child protection is trapped in a cycle of scandal and reform."); Sinden, *supra* note 152, at 372 ("But too often policy choices in this area are driven by the periodic horror stories that make the front pages of newspapers rather than a sober assessment of the full range of families affected by the system.").

174. Cheyañna Jaffke, *Judicial Indifference: Why Does the "Existing Indian Family" Exception to the Indian Child Welfare Act Continue to Endure?*, 38 W. ST. U. L. REV. 127, 128 (2011)

175. Joaquin R. Gallegos & Kathryn E. Fort, *Protecting the Public Health of Indian Tribes: the Indian Child Welfare Act*, HARV. PUB. HEALTH REV., https://hphr.org/12-article-gallegos [https://perma.cc/HS5M-RK2E].

176. Alicia Summers, *Exploring Indian Child Welfare Act Implementation and Case Outcomes*, 74 JUV. & FAM. CT. J. 37, 45–46 (2023).

177. *See* Heidi Redlich Epstein, *Kinship Care is Better for Children and Families*, AM. BAR ASS'N (July 1, 2017), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families [https://perma.cc/8L6Q-JL6H] (explaining that kinship care is more likely to improve children's wellbeing, minimize trauma, increase permanency for children's home placement, improve behavioral and mental health outcomes, and preserve children's cultural identifies than foster care placement with non-relatives).

thunderstorm. Each decision about the individual drop makes a difference when faced with the storm.

This resistance to applying ICWA to cases is usually because of an amorphous best interest of the child standard.[178] Simply put, this standard invites bias.[179] At the time ICWA was under consideration by Congress, Evelyn Blanchard eloquently discussed this question of unrestrained best interests as used by non-Native judges.[180] Her 1977 essay, *The Question of Best Interest*, remains as important today as it was when it was published.[181] Most importantly, she concludes that Indian people share in the concern that the best interest of all children be provided for and recognized. For Indian children they see that the best interest must also include recognition and appreciation for the persons they are. The best interest of the Indian child must be defined within the context of the child's whole life.[182] In other words, an Indian child's interests are broad, communal, and include their future needs.

Even at oral argument at the Supreme Court, the Chief Justice brought up the best interest standard repeatedly.[183] The Brackeens claimed repeatedly the trial court did not address the best interests of the child they hoped to adopt.[184] While states often provide a multi-element definition in laws regarding child custody,[185] it is very rarely defined in child *protection* laws. In fact, child protection laws exist to

178. Amanda B. Westphal, *An Argument in Favor of Abrogating the Use of the Best Interests of the Child Standard to Circumvent the Jurisdictional Provisions of the Indian Child Welfare Act in South Dakota*, 49 S.D. L. REV. 107, 125, 127 (2003).

179. Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 245–49 (2013); Amy Mulzer & Tara Urs, *However Kindly Intentioned: Structural Racism and Volunteer CASA Programs*, 20 CUNY L. REV. 23, 62, 75–76 (2016).

180. Evelyn Blanchard, *The Question of Best Interest*, *in* THE DESTRUCTION OF AMERICAN INDIAN FAMILIES 57, 60 (Steven Unger ed., 1977).

181. *See id.* (discussing the hardships Indian parents and children face in forced separations).

182. *Id.*

183. Transcript of Oral Argument at 116–21, 126, 165, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Nov. 9, 2022).

184. *See* Complaint and Prayer for Declaratory and Injunctive Relief at 26, Brackeen v. Zinke, 338 F.Supp. 3d 514 (N.D. Tex. 2018) (No. 4:17-cv-868) (asserting that ALM's best interest were with the Brackeens yet was disregarded in favor of ICWA). Judges in Texas must make a best interest finding during various hearings, which happened in the child protection proceedings. TEX. FAM. CODE ANN. §§ 263.306(a-1)(5)(B), (a-1)(5)(I)(ii) (West 2019).

185. *E.g.*, MICH. COMP. LAWS § 722.23 (2016) (defining "best interest" as being the sum of numerous factors considered by the court, including the emotional ties between the parties involved and the child, and moral fitness of the involved parties); *cf.* TEX. FAM. CODE ANN. § 263.307(a) (West 2015) (defining "best interest" as placing child in safe environment).

put boundaries and barriers on free floating applications of the best interest of the child, and informal determinations made outside the rules of evidence.[186] ICWA is intended to force courts to act in the best interests of *Indian* children, using minimum federal standards to maintain their connection to family and community.[187]

Unfortunately, using the federal courts to bring ICWA cases provides no better pathway, and family reunification narratives are usually lost on federal court judges.[188] The truth of the matter is that very few federal judges have any experience in the state court trial level of child protection. If federal judges do see child abuse cases, they either occurred on federal land,[189] or are the most heinous, rising to the level of violations of federal laws.[190] State child welfare practice involves families in deep crisis who need supports and a safe place, or way to take care of, their children. Explaining this to federal judges is both time consuming and difficult and most recently, bringing ICWA claims to federal court only benefited those seeking to end the law's protections.

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186. *See* Diego K. v. Alaska Dep't of Health & Soc. Servs., 411 P.3d 622, 628–29 (Alaska 2018); Sinden, *supra* note 152, at 375. *See generally* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005).

187. 25 U.S.C. § 1901.

188. *See* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 137 (2022) (discussing Judge Posner's equating a choice of cocktail with the choice of a safety plan); *see also* Adoptive Couple v. Baby Girl, 570 U.S. 637, 689 (2013) (Sotomayor, J., dissenting) ("In an ideal world, perhaps all parents would be perfect. They would live up to their parental responsibilities by providing the fullest possible financial and emotional support to their children. They would never suffer mental health problems, lose their jobs, struggle with substance dependency, or encounter any of the other multitudinous personal crises that can make it difficult to meet these responsibilities. In an ideal world parents would never become estranged and leave their children caught in the middle. But we do not live in such a world. Even happy families do not always fit the custodial-parent mold for which the majority would reserve IWCA's substantive protections; unhappy families all too often do not. They are families nonetheless.")

189. *See* Press Release, U.S. Att'y's Off., Dist. of N.J., New Jersey Couple Resentenced for Child Abuse (Apr. 12, 2018), https://www.justice.gov/usao-nj/pr/new-jersey-couple-resentenced-child-abuse [https://perma.cc/XH4X-7245]; *see also* Kathryn E. Fort & Peter S. Vicaire, *Invisible Families: Child Welfare and American Indian Active-Duty Service Members and Veterans*, 62 FED. LAW. 40, 42–43 (2015) (pointing out the convergence of jurisdictional issues on military bases).

190. *See e.g.*, 18 U.S.C. 2243 (sexual abuse of a minor); 18 U.S.C. 2421 (transporting children for the purpose of sexual abuse).

C. The Specific Vulnerability of ICWA to Federal Indian Law

For tribes, every ICWA case is important—every one of them means a tribal family in crisis. For those looking to exploit ICWA to attack the law, and federal Indian law more broadly, they can pick and choose cases to bring to appeal or federal court. They can use their resources strategically, bringing federal cases in multiple circuits, while tribes are forced to address those in addition to working on every other ICWA case in state court.[191] Tribes are always vulnerable to attack when it comes to their children, as they have been since the first time Europeans demonstrated their willingness to use Native children to achieve their ends of conquest.[192]

The tribal ICWA response is often driven by a necessary allocation of resources, or, more accurately, a lack thereof. Tribes rarely have attorneys, either in-house or on retainer, to represent them in ICWA cases. For years, the focus has been on building tribal social worker capacity rather than legal capacity.[193] Even then, tribal agencies are notoriously strained for resources.[194] Tribes can receive minimal unrestricted funding for an Indian Child Welfare worker, but certainly not enough funding for an attorney. This puts tribes appearing in state courts at a significant disadvantage when every other party is represented by legal counsel. Tribal workers are ignored by judges, and they are not trained in legal practice. Even tribes with inhouse attorneys run into issues of unauthorized practice of law when they try to appear out of state.[195] For tribes seeking to bring their cases

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191. *See The Indian Child Welfare Act During the* Brackeen *Years*, *supra* note 8, at 13 (finding that tribal communities lack the resources to keep up with the number of cases and appeals pending).

192. Fletcher & Singel, *supra* note 70, at 890–91.

193. *See* Blanchard, *supra* note 180, at 40 (calling for an increase in the quality and quantity of social workers, especially those from tribal lands); *Division of Human Services Mission*, U.S. DEP'T OF THE INTERIOR, INDIAN AFFS., https://www.bia.gov/bia/ois/dhs [https://perma.cc/W8XG-U2FK] (asserting that the BIA has over 900 tribal staff as social workers).

194. Kathryn E. Fort, *After* Brackeen*: Funding Tribal Systems*, 56 FAM. L. Q. 191, 208–209 (2023).

195. E-mail from a tribal in-house attorney to author (Feb. 16, 2023) (on file with author) (noting an observation of more objections based on unauthorized practice since the start of the anti-ICWA federal litigation); *see also State and Tribal Pro Hac Vice Rules for ICWA Cases*, TURTLE TALK https://turtletalk.blog/icwa/state-pro-hac-vice-rules-for-icwa-cases [] (detailing court rules in various states that have been adopted to address this issue).

exclusively into tribal court, they face different barriers related to funding and services.[196]

Even for tribes with funding, the importance of tribal lawyers in the state child protection system can be overlooked or simply takes up a tremendous amount of resources.[197] Over time, I have come to believe that I need to loudly explain to anyone who will listen[198] how child protection legal practice is a complex and difficult area of law. Often done by women, the work we do is often dismissed as easy or not as important as other areas of law.[199] One of my long held goals has been to figure out a way to create jobs to do the kind of work we do in the Clinic for young Native attorneys who want to practice child welfare for Native children, families, and tribes. The closest opportunities are with an Indian legal aid organization, the ICWA Law Center in Minneapolis,[200] or to work for a tribe that has enough resources to hire ICWA attorneys. The lack of coordinated tribal legal specialists dedicated to this work is a major area of weakness that has been exploited by these strategic lawsuits.

D. The Strategies of the Anti-ICWA Coalition

Finally, given the federal government's treatment of tribes and the uneven nature of Supreme Court decision making,[201] it is probably safe to say that no tribe or tribal citizen has ever felt secure in the promises made by federal entities.[202] The vigilance of tribal governments is constant, and real or perceived threats of attack are taken very seriously.[203]

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196. Fort, *supra* note 194, at 218–19.

197. E-mail from a tribal in-house attorney to author (Feb. 16, 2023) (on file with author) (discussing how much time just one contested ICWA case can take in attorney and social service resources).

198. This makes the Author a great guest at parties.

199. The Author once had a law professor tell her that if they had a student who was struggling in law school, they would recommend they go into ICWA work because it was "easy."

200. *See Who We Are*, ICWA L. CTR., https://www.icwlc.org/about-the-indian-child-welfare-act-law-center [https://perma.cc/UR75-SMMY].

201. *Compare* McGirt v. Oklahoma, 140 S. Ct. 2452, 2477 (2020) (holding the federal government had exclusive jurisdiction over Indian country), *with* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2504–05 (2022) (holding that the federal and state governments have concurrent jurisdiction over Indian country).

202. ROBERT A. WILLIAMS JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 162 (2005).

203. *See* Kristen Matoy Carlson, *Lobbying as a Strategy for Tribal Resilience*, 2018 BYU L. REV. 1159, 1173–74 (2019) (finding that Indian tribes respond to threats offensively and defensively through lobbying efforts).

In addition, the usual political fault lines do not run the same way for tribes or in federal Indian law.[204] The attack on ICWA by organizations aligned with the conservative legal movement simply does not match the bipartisan support for the law in Congress and the several states.[205] Because of this, the length of time ICWA has survived, the unified support of the law by all tribes, a majority of states, and increased recognition by outside child protection advocacy groups of the law's importance, there may have been a belief, or hope, the law was safe from major attack.[206] Unfortunately, the alignment of traditional ICWA opposition forces—adoption attorneys usually concerned with private cases—with powerful organizations and individuals aligned with the conservative legal movement left ICWA vulnerable.[207]

In 2014, the Goldwater Institute sent a letter seeking foster families to bring challenges to the ICWA placement preferences.[208] Prior to this letter, the Goldwater Institute filed no briefs in ICWA cases. Between 2015 and the Supreme Court's grant of certiorari in 2022, Goldwater filed in more than ten ICWA cases on appeal.[209] Since the grant, and for some time before, Goldwater has been absent from ICWA cases. This is not because there is a lack of ICWA appeals they would likely find compelling.[210] Instead, it appears that since they have achieved

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204. Justice Gorsuch, despite many conservative holdings, is perhaps the staunchest supporter of tribal rights currently on the Supreme Court, as evinced by his authorship of the *McGirt* opinion.

205. *See supra* note 18.

206. *See* Transcript of Oral Argument at 42, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Nov. 9, 2022) ("Justice Gorsuch: . . . . But I'm not aware of anybody holding ICWA facially unconstitutional in the manner that you're asking us to. Mr. McGill: . . . I would concede that no state court has . . . done that.").

207. At least one of the lead anti-ICWA attorneys resents the conservative moniker. *See* Gabby Deutch, *A Court Battle Over a Dallas Toddler Could Decide the Future of Native American Indian Law,* ATLANTIC (Feb. 22, 2019, 8:25 PM), https://www.theatlantic.com/family/archive/2019/02/indian-child-welfare-acts-uncertain-future/582628 [https://perma.cc/V694-A4BX] (describing how Mark Fiddler "resents the charge that he must be conservative because he's allied with the Goldwater Institute").

208. Letter on file with author and journal.

209. *See Ensuring Equal Protection for Native American Children*, GOLDWATER INST., https://www.goldwaterinstitute.org/indian-child-welfare-act [https://perma.cc/6NU8-NT8R] (providing that Goldwater litigated thirteen ICWA cases).

210. *See, e.g.*, *In re* E.M., No. 5-21-35, 2022 WL 2230607, at *2 (Ohio Ct. App. June 21, 2022) (transfer to tribal court case opposed by foster parents); Chignik Lagoon v.

their goal by getting ICWA, or rather questions regarding the fundamentals of federal Indian law, in front of the Supreme Court, they no longer have any need to insert themselves into child protection cases. Other organizations have similarly dropped out of the field.

The anti-ICWA movement's hypocritical attack on ICWA, claiming to protect Native children in the face of a unified Indian country, child welfare NGOs, child medical professionals, and the testimony of youth with lived experience has caused deep harm. These legal battles have drawn down the limited resources tribes have for child protection. They create burnout among those of us fighting both these cases and working on daily child protection issues. They have thrown the area of law into confusion and forced us to focus on arguments that had been settled for decades, rather than work on innovative solutions for family protection. They are already using the same arguments they used on ICWA to go after Indian gaming,[211] undermining their claim that these cases were only about children and ICWA and not a broader attack on Indian country. These claims would be laughable if they weren't so dangerous and exhausting.

CONCLUSION

I have been taught that tribes are timeless entities.[212] This is what those who seek to roll back ICWA, to harm tribes, and to ignore the sacredness of Native children fail to see.[213] The Court's decision in *Brackeen* will not change tribes' interest in, and fight for, their children. Disruption *can* lead to positive change, and tribes now have an opportunity to consider how best to advocate for foundational changes in both state and tribal child protection systems. The work of those who came before to create and implement ICWA will never be lost.

Alaska Dep't of Health & Soc. Servs., 518 P.3d 708, 709 (Alaska 2022) (hearing an appeal to decide which Indian tribe a child belongs to); *In re* K.C., 487 P.3d 263, 266 (Colo. 2021) (hearing an appeal regarding the termination of parental rights under ICWA); *In re* Dependency of Z.J.G., 471 P.3d 853, 859 (Wash. 2020) (hearing an appeal for an Indian child in Washington covered by ICWA).

211. *See* Maverick Gaming LLC. v. United States, No. 3:22-cv-5325, 2023 WL 2138477, at *7 (Feb. 21, 2023) (finding against the party asking the court to find tribal compacts permitting Class III gaming unconstitutional).

212. *See* Matthew L.M. Fletcher, *Restatement as Aadizookam*, 2022 WISC. L. REV. 197, 208 (2022) ("It is easy to forget that Indian tribes truly are timeless. Their powers are not dependent on the federal government. The Supreme Court could issue an opinion next year that purports to abrogate an aspect of tribal powers, but all that opinion does is abrogate the federal government's recognition of those tribal powers.").

213. Joanna Woolman & Sarah Deer, *Protecting Native Mothers and Their Children: A Feminist Lawyering Approach*, 40 WM. MITCHELL L. REV. 943, 948 (2014).

Whatever the next step may be to protect Native children and families, it will only build on that foundational work, and the values ICWA embodies will continue to inform generations to come.