Native American Rights Fund

Indigenous Peoples' Rights

https://www.narf.org/cases/brackeen-v-bernhardt/

Campaign and Advocacy

For decades, the Indian Child Welfare Act has been recognized by child welfare experts as the gold standard in child welfare practice. Anti-tribal interests have launched a series of legal challenges against ICWA. Brackeen is the most prominent.

Status: Active

Haaland v. Brackeen ***is the lawsuit brought by Texas (and previously Indiana and Louisiana) and several individual plaintiffs, who allege ICWA is unconstitutional. This case has worked its way through the lower courts (federal district court, Fifth Circuit Court of Appeals, Fifth Circuit en banc) and is being reviewed by the U.S. Supreme Court in the fall of 2022.***

Find ICWA-related information and resources at https://icwa.narf.org/

Read more about the* Brackeen *case in past articles in the NARF Legal Review:

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The Indian Child Welfare Act (ICWA) is a 43-year-old federal law that protects the well-being and best interests of Indian children and families. ICWA does this by upholding family integrity and stability and by keeping Indian children connected to their community and culture. ICWA also reaffirms the inherent rights of tribal nations to be involved in child welfare matters involving their citizens.

For decades, ICWA has been recognized by child welfare experts as the gold standard in child welfare practice, and the law has helped tens of thousands of Indian children and families find fairness and healing in state child welfare systems. In the past several years, anti-tribal interests have launched a series of legal challenges against ICWA, with the goal of broadly undermining tribal sovereignty. The most prominent case and challenge to ICWA is *Haaland v. Brackeen* (formerly *Brackeen v. Zinke* and *Brackeen v. Bernardt*).

The Native American Rights Fund (NARF) is involved with the *Brackeen* case in two ways:

Briefing in the case can be found atthe Tribal Supreme Court Project website.

ICWA is widely supported by an impressive array of stakeholders within and outside of Indian Country. At the lower court in *Brackeen v. Haaland*, 486 Tribal Nations, 59 Native organizations, 31 child welfare orgs, 26 states + DC, and 77 members of Congress offered support for ICWA. These supporters recognize that ICWA is firmly in the best interests of Native children. In keeping them connected to their extended family and cultural identity,the positive outcomes are far-reachingand include higher self-esteem and academic achievement. Further, they recognize that collaboration between sovereign Tribal Nations and state child welfare systems is effective and just governance.

In 2018, a federal district court in Texas, in a widely criticized decision, held that ICWA violates the U.S. Constitution. This decision was in many ways unprecedentednever before has a federal court found ICWA unconstitutional, and the Supreme Court has consistently rejected arguments that federal Indian statutes violate the Equal Protection Clause or exceed Congress authority under the Indian Commerce Clause.

The case was appealed by the federal government and four intervening tribal nations to the Fifth Circuit Court of Appeals. In January 2019, 325 tribal nations, 57 Native organizations, 21 states, 31 child welfare organizations, Indian and constitutional law scholars, and seven members of Congress joined the United States and four intervenor tribes in filingbriefs to urge Fifth Circuit to uphold the Indian Child Welfare Act. In August 2019 , a three-judge panel from the Fifth Circuit reversed the district courts decision. The courts decision affirmed the constitutionality of ICWA, recognizing the unique political status of tribal nations and upholding the federal law that is so critical to safeguarding Indian child welfare. It was a resounding victory for the law and those who fought to protect it.

Then, in November 2019, the Fifth Circuit agreed to conduct an *en banc* review of the three-judge panels decision. In an*en banc*review, complex cases of broad legal significance are reconsidered by the entire circuit court. The decision of the *en banc* review panel replaces the three-judge panels decision. and In December 2019, 486 federally recognized American Indian and Alaska Native Tribes and 59 Native organizations filed an amicus brief defending the constitutionality of the Indian Child Welfare Act as part of the Courts*en banc*proceedings. About the December 13 brief NARF Executive Director John Echohawk said, I am happy but not surprised by the number of signatories that joined on this briefIndian country stands as one in support of the Indian Child Welfare Act. Support for ICWA is strong and consistent across tribes as well as organizations and individuals who work on child welfare issues. It is known as an essential protection that promotes our childrens well-being. Well-being that historically has been neglected and ignored.

In April 2021, the *en banc* panel released a fractured, 325-page decision. Although the court generally upheld the authority of Congress to enact ICWA, and also held that ICWAs definition of Indian child did not operate on the basis of race, it also found certain sections of ICWA to be unconstitutional.

In September 2021, the U.S. Department of Justice, intervening tribal nations, and Texas and individual Plaintiffs all formally asked the United States Supreme Court to review the Fifth Circuits *en banc* decision. In February 2022, the Supreme Court granted all four petitions and consolidated the case. The parties legal briefs were submitted throughout spring and summer 2022 and the case is scheduled to be heard in November 2022.

Read more about NARFs work to protect the welfare of Indian children.

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