IMPRINT, Aug. 9, 2023: Supreme Court Upheld ICWA, But Challenges Could Loom in State Courts

BY NANCY MARIE SPEARS

The nation's highest court recently upheld the Indian Child Welfare Act in a major case over the law's constitutionality, a decision hailed by many as a victory for Indigenous children and their families.

But while the 7-2 majority decision in the Brackeen v. Haaland case firmly rejected key arguments against the law known as ICWA, state-level challenges have been moving through lower courts across the country, with varying degrees of success.

Cases in Nebraska, Alaska, Iowa, Montana and Oklahoma center on different legal issues than those decided by the U.S. Supreme Court last month. Plaintiffs in Brackeen v. Haaland — a group of states along with white adoptive parents seeking custody of Native children — argued unsuccessfully that ICWA was unconstitutional because it exceeds the "plenary powers" of Congress to pass legislation governing tribal affairs, "commandeers" states to follow federal law and violates equal protection guarantees.

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Yet while the Supreme Court upheld ICWA's constitutionality for now, legal experts who are both supporters and critics of the 45-year-old federal law say the Brackeen case doesn't rule out future challenges to tribal sovereignty.

What's more, justices declined to delve into the equal protection arguments in the case, stating only that the plaintiffs "lack standing" on that issue because the adoptions of Indigenous children they sought had been finalized. Some court watchers say that leaves open the possibility of future lawsuits on equal protection issues.

The 1978 law in question seeks to repair damage caused by centuries of forced attendance at Indian boarding schools and coercive adoptions into white, Christian homes. That legacy has endured in Indian Country, where

the rate of foster care removals remains far higher than in other racial and ethnic communities.

Under ICWA, state child welfare agencies must determine whether a child facing foster care, adoption or guardianship is a member of a Native American tribe. If they are an enrolled member or have a parent who is enrolled and are eligible for tribal membership, the case takes a different pathway than for other children. Tribes must be offered the opportunity to take jurisdiction from the state court; tribal members and Indigenous foster parents and kin must be prioritized for placements; and social service agencies must make "active" rather than "reasonable" efforts to help parents accused of maltreatment reunite with their children.

Kate Fort, director of the Indian Law Clinic at Michigan State University College of Law, outlined the most common reasons for an ICWA appeal in the March edition of the Juvenile and Family Court Journal.
She wrote that between 2017 and 2022, more than 40% of all such cases were remanded — sent back to lower courts — or reversed. Plaintiffs in 87% of the ICWA-based appeals were biological parents of an Indigenous child. About half the cases were appealed based on parents' belief that the court improperly determined ICWA's application to their child's case.

"These data indicate that agencies and courts are still struggling with the first step in an ICWA case — whether they have an ICWA case at all," Fort wrote in the paper.

Two ICWA-related cases were decided by the Alaska Supreme Court in July 2022.

They involved the federal law's provision requiring that a "qualified expert witness" testify about the Indigenous child's tribe, customs and traditions before their parent's rights can be terminated. Those challenges did not prevail.

Recent disputes over ICWA in state courts center on tribal jurisdiction, the definition of a Native child, and termination of parental rights, among other issues. The following is a summary of some recent cases:

Oklahoma

Tribal court jurisdiction in child welfare cases lost ground in an April ruling in Oklahoma. In the decision — involving a child identified as S.J.W. — the state Supreme Court gave lower courts increased ability to grant custody of Native children living on a reservation that is not their own.

S.J.W.'s parents argued that "the Chickasaw tribal court has exclusive jurisdiction regardless of the fact that S.J.W. is a nonmember Indian child," according to court documents. The state maintained it had shared jurisdiction on cases involving ICWA.

Critics call the ruling involving a Muscogee child living on Chickasaw Nation's reservation deeply flawed.

The state Supreme Court "misunderstands tribal sovereignty," the Choctaw Nation's senior executive officer of legal and compliance Brian Danker told a National Public Radio affiliate. "This ruling could impact a tribe's ability to protect tribal citizens' social, cultural and familial connections as it attempts to chip away at the foundations of tribal sovereignty in the state of Oklahoma."

Fort described the Oklahoma ICWA case as unique, and a "truly unfortunate opinion with absurdly weak analysis." Fort said tribes' ability to retain jurisdiction over child welfare cases remains an ongoing fight in multiple states.

Iowa and Nebraska

In another suit filed this past April by the Red Lake Band of Chippewa Indians, the Supreme Court in Nebraska denied the tribe's request to intervene, because it had previously been determined the child in question did not meet the criteria of an "Indian child." The child's mother was eligible for tribal enrollment, but was not yet enrolled.

The tribe argued the spirit of ICWA should apply to the case, but the state of Nebraska opposed that position, and was victorious in court. Ultimately, the state's highest court ruled that ICWA's specific requirements to determine a child's eligibility for its protections should be strictly applied.

In April 2022, the Iowa Supreme Court upheld a juvenile court's ruling that denied a child ICWA protections, affirming a prior decision to terminate the

rights of the child's parent. The juvenile court found the state's "reasonable efforts" to avoid out-of-home placement — instead of the "active efforts" required for tribal members under ICWA — were adequate because the child was deemed to be non-Native.

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Montana

ICWA was affirmed in a Montana case decided by the state Supreme Court in January, a ruling that underscored how the federal law applies to guardianships and third-party custody proceedings, in addition to adoption and foster care cases.

The child's mother, an enrolled member of the Native Village of Kotzebue Tribe in Alaska, provided the court with verification that her three children were eligible for ICWA protections. She asked the courts to remove her children from the Montana home of their paternal grandparents — who had full custodial rights — and restore her custody. The case was sent back to lower courts for further proceedings to determine if the children should be returned to their mother.

Minnesota

Nearly two weeks after the Brackeen decision in mid-June, the U.S. Supreme Court denied review of a recent Minnesota case making a related equal protection argument — that ICWA discriminates against non-Native foster and adoptive parents.

In March 2022, Hennepin County was sued by two Indigenous foster parents who were unsuccessful in the adoption of the Indigenous child they were fostering. Instead, the child's tribe, Red Lake Band of Chippewa, took over the proceedings and granted custody to the child's maternal grandmother.

The foster parents were considered “nonmembers” in the ICWA case, because one is enrolled in the Bois Forte Band of Chippewa and the other is a White Earth Nation descendant.

The plaintiffs in the case — who, under ICWA, lost priority in their adoption efforts in favor of the child’s relative despite having adopted the child’s siblings — were represented by Minnetonka attorney Mark Fiddler, a member of the Turtle Mountain Band of Chippewa Indians. He also represented the white adoptive couples seeking to overturn ICWA in Brackeen v. Haaland. The conservative Goldwater Institute filed amicus briefs in both cases, challenging ICWA’s constitutionality.
In an email, Fiddler said that while the institute attacked ICWA as unconstitutional, the plaintiffs did not. “Rather, they argued ICWA could and should be interpreted to be constitutional by not forcing nonmembers into a jurisdiction foreign to them,” he said.

“Petitioners were improperly subjected to the personal and subject matter jurisdiction of a state foreign to them, one where they have no right to vote,” plaintiffs stated in Denise Halvorson v. Hennepin County Children’s Services Department case documents. As a result, the lower court violated “their due process rights to fundamental fairness and equal protection.”

But the petition to the U.S. Supreme Court was denied on June 26.
Fiddler said despite the high court upholding ICWA in Brackeen and its denial of the Hennepin County case, establishing standing in an equal protection case against ICWA “would be easy,” and he fully expects continued challenges to the law on this issue and others.

“Any foster or adoptive parent would have the right to move to strike down ICWA in state court, so long as he or she was jeopardized by it somehow,” Fiddler stated shortly after the Brackeen decision.

ABOUT THE AUTHOR

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Nancy Marie Spears is currently based in Colorado covering Indigenous children and families with a focus on the Indian Child Welfare Act. She is an enrolled member of the Cherokee Nation.