THE INDIAN CHILD WELFARE ACT, POLITICAL CLASSIFICATION OF "INDIANS," AND PRESERVATION OF TRIBAL SOVEREIGNTY: CHILDREN, THE MOST PRECIOUS RESOURCE

Rachel Yost[*]

I. Introduction

Throughout the United States' history, Congress has consistently regulated Indian affairs as a matter of tribal political sovereignty, not as a matter of race. The Constitution itself enforces the use of political classification for Indians through Congress' power to "regulate Commerce," and "make Treaties" with Indian tribes.[1] Furthermore, the Supreme Court of the United States has also enforced the use of political classification for Indians through decades of case law.[2] In *United States v. Antelope*, the Supreme Court unambiguously held that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."[3] If the Supreme Court unexpectedly overturns centuries of precedent, declares that "Indian" is a racial classification subject to strict scrutiny review, and finds the Indian Child Welfare Act (ICWA) unconstitutional, the effect will wreak havoc on tribal sovereignty and potentially extinguish the field of federal Indian law.

As of writing this Note, three separate families want to adopt Indian children and currently are unable to do so either due to the child's respective tribe or ICWA. Each family brought its own lawsuit to adopt the respective child and conquer ICWA. Two provisions of ICWA are being challenged on equal protection grounds that they are classified on a racial,

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* J.D. 2024, the University of Oklahoma College of Law. Enrolled Member, Choctaw Nation of Oklahoma. Special thanks to Professor W. Murray Tabb for his never-ending support and invaluable insight.

1. U.S. CONST. art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2.

2. *See, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2477 (2020) (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832)); Washington v. Confederated Bands & Tribes of the Yakima Nation, 439 U.S. 463 (1979); United States v. Antelope, 430 U.S. 641 (1977); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Fisher v. Dist. Ct. of Sixteenth Judicial Dist. of Mont., 424 U.S. 382 (1976); Morton v. Mancari, 417 U.S. 535 (1974).

3. 430 U.S. 641, 645 (1977).

not political, basis.[4] Since the challenged provisions are "political rather than racial in nature," they are subject to the rational basis standard of review.[5] ICWA indisputably satisfies rational basis review because the "special treatment" it provides to Indian tribes and their children is rationally tied to "Congress' unique obligation towards the Indians."[6] ICWA is the "gold standard" for child welfare proceedings and thus, deserves strong protection to remain in force and safeguard Indian children that fall within the Act's application.[7]

The three families and other plaintiffs obtained a writ of certiorari to come before the Supreme Court and challenge the constitutionality of ICWA.[8] If ICWA is found unconstitutional and overturned, the states would once again be able to indiscriminately remove Indian children from their families and Indian communities. The removal of Indian children deprives tribes of future generations and creates a dangerous predicament for tribal sovereignty.

ICWA is constitutional because it is based on the political classification of "Indians." That political classification subjects the Act to rational basis review, which it easily satisfies. Part II will discuss the history of federal Indian law and dive into the political classification of "Indians." Part III will briefly summarize the factual and procedural set up of *Brackeen v. Haaland*. Part IV will give an overview of the Fifth Circuit Court of Appeal's decision in *Brackeen v. Haaland*. Part V will provide a narrow analysis of the Fifth Circuit Court's decision in *Brackeen v. Haaland* considering ICWA's severability and the Indian Canons of Construction. Part VI will give an overview of the Supreme Court's 2023 decision in *Haaland v. Brackeen*. Part VII will summarize the important contents of this Note.

II. Federal Indian Law and the Political Classification of "Indians"

Long before the United States was even a thought, North American land was "owned and governed by hundreds of Indian tribes."[9] These Indian

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

5. *Mancari*, 417 U.S. at 553 n.24.

6. *Id.* at 555.

7. Oral Argument at 2:34:30, Haaland v. Brackeen, 599 U.S. 255 (2023) (No. 21-380), https://www.oyez.org/cases/2022/21-376.

8. Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (28, 2022) (mem.).

9. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.01 (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN'S].

tribes were recognized as sovereigns under international law and came under the jurisdiction of the United States "through a colonial process that was partly negotiated and partly imposed."[10] The Constitution acknowledges and significantly treats Indian tribes as sovereigns in the same manner as the states and foreign nations.[11] However, a long-standing precedent from *Cherokee Nation v. Georgia* emphasizes that, under United States law, Indian tribes retain a unique position: they are "domestic dependent nations."[12]

As "domestic, dependent nations," Indian tribes reside within the United States, comply with federal power, and retain sovereign authority over matters relating to their self-governance.[13] Three key principles stem from the Indian tribes' "domestic dependent nation" status and establish the field of federal Indian law. First, Indian tribes possess "inherent powers of a limited sovereignty that has never been extinguished."[14] Based on Indian tribes' preserved sovereignty, they each enjoy "a 'government-to-government relationship' with the United States."[15] Second, the federal government has broad and exclusive powers in Indian affairs, and an ongoing trust obligation to use those powers to promote the well-being of the tribes.[16] The trust relationship compels the federal government to preserve tribal self-governance, advance tribal welfare, and uphold its fiduciary duty in managing all tribal assets.[17] "Nearly every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government."[18] Third, as a result of the federal government's broad power in Indian affairs, the supremacy of federal law, and the necessity that the United States speak with a single voice in its government-to-government relations, state authority is largely limited in federal Indian law.[19] In the

10. *Id.*

11. *See* U.S. CONST. art. I, § 8, cl. 3 (authorizing Congress "[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes"); Holden v. Joy, 84 U.S. (17 Wall.) 211, 242 (1872) (holding that the President's Article II, Section 2 power to make treaties with the Indian tribes is consistent with the power to make treaties with foreign nations).

12. 30 U.S. (5 Pet.) 1, 17 (1831).

13. COHEN'S, *supra* note 9.

14. *Id.*

15. *Id.*

16. *Id.*

17. MATTHEW L.M. FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW § 5.2 (1st ed. 2017).

18. COHEN'S, *supra* note 9, § 5.04(3)(a).

19. *Id.* § 1.01.

early days of the United States, federal legislation protective of Indians was paramount because the states were often regarded as the Indian tribes "deadliest enemies."[20] However, the federal government has not always sufficiently protected Indians nor has it fulfilled its fiduciary trust obligations to the tribes and individual Indians by adequately excluding state authority.

Even before the United States became a strong nation, the federal government significantly involved itself in the regulation of Indian children. During the late nineteenth century, the federal government itself acted in the removal of Indian children from their families and tribes to non-Indian homes.[21] The federal government started a campaign to civilize and "Christianize" the "savage Indians," a process that focused on the removal of Indian children to encourage assimilation.[22] Government officials took Indian children from their homes, tribes, and tribal lands, by force if necessary, to enroll them in off-reservation Indian boarding schools.[23] "These federally run or financed schools sought to stamp out all vestiges of Indian culture."[24] In 1896, the Commissioner of Indian Affairs wrote that the removal of Indian children was "for the strong arm of the nation to reach out, take [Indian children] in their infancy and place them in its fostering schools, surrounding them with an atmosphere of civilization, . . . instead of allowing them to grow up as barbarians and savages."[25] A common phrase used during this period to justify the forced removal of Indian children was, "Kill the Indian in him, to save the man."[26] In 1895, more than 15,000 Indian children resided across 157 boarding schools.[27] Even though Indian boarding schools predate the 1948 United Nations Genocide Convention, they meet the criteria set out in that

20. United States v. Kagama, 118 U.S. 375, 384 (1886).

21. FLETCHER, *supra* note 17, § 3.6.

22. *See id.*

23. *Id.*

24. Brackeen v. Haaland, 994 F.3d 249, 282 (5th Cir. 2021).

25. T.J. Morgan, Ex-U.S. Comm'r of Indian Affs., A Plea for the Papoose: An Address at Albany, N.Y. (Feb. 1892), *in* 18 BAPTIST HOME MISSION MONTHLY 402, 404 (1896), https://babel.hathitrust.org/cgi/pt?id=uiug.30112037619761&seq=432.

26. FLETCHER, *supra* note 17, § 3.6 (quoting Richard H. Pratt, The Advantages of Mingling Indians with Whites: Paper Presented at the Nineteenth Annual Conference of Charities and Correction (1892), *in* AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880–1900, at 260–61 (Francis Paul Prucha ed., 1973)).

27. Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45, 57 (2006).

Convention for the crime of "genocide" because Indian children were forcibly transferred from their tribal communities to non-Indian areas.[28] In creating Indian boarding schools, "[t]he intent of American policymakers and educators may not have been to harm Indian people," but "the end result was the near-destruction of tribal culture and religion across the United States."[29]

In the mid-1900s, state courts and child welfare agencies became highly involved in the removal of Indian children and eventually replaced off-reservation boarding schools.[30] During the 1960s and 1970s, the Association of American Indian Affairs (AAIA) performed surveys on states with large Indian populations.[31] AAIA's surveys revealed that between 25% and 35% of all Indian children were removed from their families.[32] "In 16 states surveyed in 1969, approximately 85 percent of all Indian children in foster care were living in non-Indian homes," even when fit and willing relatives were available, and "[i]n Minnesota, 90 percent of the adopted Indian children [were] in non-Indian homes."[33] The states' uninformed and abusive practices resulted in the removal of over a quarter of all Indian children from their families and tribes in states with large Indian populations.[34] "It is clear then that the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of

28. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf ("In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.").

29. FLETCHER, *supra* note 17, § 3.6.

30. COHEN'S, *supra* note 9, §§ 11.01–.02.

31. H.R. REP. No. 95-1386, at 9 (1978); *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affs. of the S. Comm. on Interior & Insular Affs.*, 93rd Cong. 15 (1974) (statement of William Byler, Exec. Dir., Ass'n on Am. Indian Affs.) [hereinafter *1974 Hearings Before the Subcomm. on Indian Affs.*].

32. *See 1974 Hearings Before the Subcomm. on Indian Affs.*, *supra* note 31.

33. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989); COHEN'S, *supra* note 9, § 11.01; H.R. REP. No. 95-1386, *supra* note 31; *1974 Hearings Before the Subcomm. on Indian Affs.*, *supra* note 31.

34. *See* H.R. REP. No. 95-1386, *supra* note 31.

involuntary separation than are typical of our society as a whole."[35] In 2000, the Bureau of Indian Affairs (BIA) Assistant Secretary issued a formal apology to the Indian tribes for the forced removal of Indian children and promised: "Never again will we seize your children, nor teach them to be ashamed of who they are. Never again."[36] Although the federal government acted with an intention to do good, like the majority of federal Indian policy, the removal of Indian children effected immense and long-lasting damage on the Indian tribes and individual Indians.[37]

Calvin Isaac, the Chief of the Mississippi Band of Choctaw Indians, explained to Congress how the effect of the removal of Indian children threatened the tribes' existence:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.[38]

The Supreme Court has historically emphasized the importance of family. The Supreme Court has said that "[t]he rights to conceive and to raise one's children" are "essential" and "basic civil rights of man" that are "far more precious . . . than property rights."[39] The Supreme Court has maintained the importance of "custody, care and nurture of the child resid[ing] first in the parents" because their "primary function and freedom

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35. *Id.*

36. Kevin Gover, Assistant Sec'y of Indian Affs., Dep't of the Interior, Remarks at the 175th Anniversary of the Establishment of the Bureau of Indian Affs. (Sept. 8, 2000), 146 CONG. REC. E1453–54 (daily ed. Sept. 12, 2000).

37. *See* FLETCHER, *supra* note 17, § 3.6.

38. *Holyfield*, 490 U.S. at 34 (quoting testimony of Mr. Calvin Isaac, Tribal Chief of the Miss. Band of Choctaw Indians & Rep. of the Nat'l Tribal Chairmen's Ass'n); *see id.* at 65 n.3. These sentiments were shared by the ICWA's principal sponsor in the House, Rep. Morris Udall, *see* 124 CONG. REC. 38102 (1978) ("Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy"), and its minority sponsor, Rep. Robert Lagomarsino, *see id.* ("This bill is directed at conditions which . . . threaten . . . the future of American Indian tribes").

39. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (alteration in original) (first quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923); then quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); and then quoting May v. Anderson, 345 U.S. 528, 533 (1953)).

include preparation for obligations the state can neither supply nor hinder."[40] Further, the Supreme Court has noted that "the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment."[41]

In response to the states' abusive practices of forced removal of Indian children from their families in an attempt to destroy tribes and erase Indian cultures and communities, Congress passed ICWA in 1978. In enacting ICWA, Congress found based on "the special relationship between the United States and the Indian tribes" that: (1) "Congress has plenary power over Indian affairs;"[42] (2) Congress has "assumed the responsibility for the protection and preservation of Indian tribes and their resources;"[43] (3) "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children;"[44] (4) "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions;"[45] and (5) "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the culture and social standards prevailing in Indian communities and families."[46] Based on these findings, Congress declared that the policy of the United States is

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance

40. *Id.* (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

41. *Id.* (citations omitted).

42. 25 U.S.C. § 1901(1) (citing U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.")).

43. *Id.* § 1901(2).

44. *Id.* § 1901(3) ("[T]he United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.").

45. *Id.* § 1901(4).

46. *Id.* § 1901(5).

> to Indian tribes in the operation of child and family service programs.[47]

III. Statement of Facts – Brackeen v. Haaland

A. Parties

1. Plaintiffs

The Plaintiffs in this case are the States of Louisiana, Indiana, and Texas, and seven individual Plaintiffs: the Brackeens, the Librettis, Altagracia Socorro Hernandez, and the Cliffords (collectively, Plaintiffs).[48]

a) The Brackeens and A.L.M.

"[T]he Brackeens sought to adopt A.L.M.," an "Indian child" under ICWA's definition in § 1903(4).[49] "[A.L.M.'s] biological mother is an enrolled member of the Navajo Nation" whereas "his biological father is an enrolled member of the Cherokee Nation."[50] "Texas's Child Protective Services (CPS) removed [A.L.M.] from his paternal grandmother's custody and placed him in foster care with the Brackeens" when he was ten months old.[51] Both Indian tribes "were notified pursuant to the ICWA."[52] "A.L.M. lived with the Brackeens for sixteen months before [the Brackeens] sought to adopt him."[53] "In May of 2017, a Texas court, in voluntary proceedings, terminated the parental rights of A.L.M.'s biological parents" which made A.L.M. "eligible for adoption under Texas law."[54] Soon after, the Navajo Nation alerted the Texas court of a potential alternative placement for A.L.M. with non-relatives in New Mexico; however, this placement failed to come to fruition.[55] In July of 2017, the Brackeens filed an original petition for the adoption of A.L.M.[56] The Navajo Nation and the Cherokee Nation were notified and the two tribes reached an agreement designating the Navajo Nation as A.L.M.'s tribe for purposes of ICWA's application in

47. *Id.* § 1902.
48. Brackeen v. Haaland, 994 F.3d 249, 288 (2021).
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*

the state proceedings.[57] Because there was no intervention in the Texas adoption proceeding, the Brackeens were able to enter into a settlement agreement with the Texas state agency and A.L.M.'s guardian ad litem to determine that ICWA's placement preferences did not apply.[58] In January of 2018, the Brackeens were successful in their petition to adopt A.L.M.[59] Since then, the Brackeens have filed in Texas state court to adopt A.L.M.'s sister, Y.R.J.[60] Just like A.L.M., Y.R.J. is an "Indian child" under ICWA.[61] The Navajo Nation contested the adoption of Y.R.J.[62] In February of 2019, "the Texas court granted the Brackeens' motion to declare ICWA inapplicable as a violation of the Texas constitution, but 'conscientiously refrain[ed]' from ruling on the Brackeens' claims under the United States Constitution pending [the Fifth Circuit's] resolution."[63]

b) The Librettis and Baby O.

In Nevada, the Librettis "sought to adopt Baby O. when she was born in March of 2016."[64] Baby O.'s biological mother, Hernandez, desired to place Baby O. up for adoption at her birth.[65] Baby O.'s biological father, E.R.G., descends from members of the Ysleta del sur Pueblo Tribe (the Pueblo Tribe) which is in El Paso, Texas.[66] E.R.G. was a registered member of the Pueblo Tribe at the time Baby O. was born thus making Baby O. an "Indian child" under ICWA.[67] "The Pueblo Tribe intervened in the Nevada custody proceedings [and sought] to remove Baby O. from the Librettis."[68] After "the Librettis joined the challenge to the constitutionality of the ICWA and the Final Rule, the Pueblo Tribe indicated that it was willing to settle."[69] "The Librettis agreed to a settlement . . . that would permit them to petition for the adoption of Baby O." and "[t]he Pueblo Tribe agreed not to contest the Librettis' adoption of Baby O."[70] In December of 2018, "the

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 289.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*

Nevada state court issued a decree of adoption" of Baby O. to the Librettis.[71]

c) The Cliffords and Child P.

The Cliffords are from Minnesota and sought to adopt Child P.[72] Child P.'s "maternal grandmother is a registered member of the White Earth Band of Ojibwe Tribe (the 'White Earth Band')" making Child P. an "Indian child" under ICWA.[73] Child P. is a member of the White Earth Band for purposes of ICWA's application in the Minnesota state court proceedings.[74] In accordance with ICWA's § 1915 placement preferences, county officials removed Child P. from the Cliffords' custody and placed her with her maternal grandmother.[75] The Cliffords have the support of Child P.'s guardian ad litem in their adoption efforts.[76] In January of 2019, "the Minnesota court denied the Cliffords' motion for adoptive placement."[77]

2. Defendants

The Defendants in this case are the United States of America; the United States Department of the Interior (DOI) and its Secretary Deb Haaland, in her official capacity; the BIA and its Director Darryl La Counte, in his official capacity; and the Department of Health and Human Services (HHS) and its Secretary Xavier Becerra, in his official capacity.[78] The Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, and Quinalt Indian Nation moved to intervene and were granted intervention by the district court.[79] On appeal, the Fifth Circuit granted the Navajo Nation's motion to intervene as a defendant (collectively, Defendants).[80]

B. Procedural History

In October of 2017, the "Plaintiffs filed the instant action against the Federal Defendants . . . alleging that the Final Rule and certain provisions of the ICWA were unconstitutional [and sought] injunctive and declaratory

71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 289–90.

relief."[81] "Plaintiffs argued that the ICWA and the Final Rule violate[d] equal protection and substantive due process under the Fifth Amendment and the anticommandeering doctrine" instilled in the Tenth Amendment.[82] "Plaintiffs additionally sought a declaration that provisions of the ICWA and the Final Rule violate[d] the nondelegation doctrine and the [(Administrative Procedure Act)] APA."[83]

Defendants moved to dismiss and alleged that Plaintiffs lacked standing which the district court denied.[84] All parties filed cross-motions for summary judgment.[85] The district court granted Plaintiffs' motion for summary judgment in part and declared that ICWA and the Final Rule violated equal protection, the Tenth Amendment, and the nondelegation doctrine.[86] Additionally, the District Court held that the challenged portions of the Final Rule were invalid under the APA.[87]

Defendants appealed this partial grant of summary judgment to the Plaintiffs.[88] A panel of judges from the Fifth Circuit affirmed in part the District Court's rulings on standing but reversed with a judgment on the merits, with one judge concurring in part and dissenting in part.[89] The Fifth Circuit Court then granted en banc review.[90]

IV. Fifth Circuit Decision of Brackeen v. Haaland

The Fifth Circuit Court first determined that it would review the District Court's grant of summary judgment de novo.[91] Under the federal rules, it is proper for a court to grant summary judgment when the movant has shown "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[92]

The Fifth Circuit, en banc, affirmed in part and reversed in part.[93] The Fifth Circuit unanimously held that at least one Plaintiff had standing to

81. *Id.* at 290.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*; *see* Texas v. United States, 497 F.3d 491, 495 (5th Cir. 2007).
92. FED. R. CIV. P. 56(a).
93. *Brackeen*, 994 F.3d at 249 (per curiam).

challenge ICWA's constitutionality.[94] On the merits, the Fifth Circuit concluded that Congress had Article I authority to enact ICWA, that ICWA's "Indian child" classification satisfies the guarantee of equal protection, that ICWA's placement preferences validly preempt contrary state law, and that ICWA does not violate the APA.[95] However, the Fifth Circuit was evenly divided on whether ICWA's other preferences for prioritizing "other Indian families" in § 1915(a)(3) and "Indian foster home[s]" in § 1915(b)(iii) violate equal protection, and therefore affirmed the District Court's ruling that these preferences violate equal protection.[96] Significantly, the Fifth Circuit affirmed the District Court's holding that ICWA's § 1912(d) "active efforts" requirement, §§ 1912(e) and 1912(f) expert witness requirements, and § 1915(e) recordkeeping requirements violate the Tenth Amendment.[97]

V. Analysis of Brackeen v. Haaland

This Note discusses the more pertinent parts of the Fifth Circuit Court's decision, such as the political classification of "Indians," constitutionality of the challenged ICWA provisions, and the Indian Canons of Construction. In the Fifth Circuit's opening analysis on the merits of the facial constitutional challenges of ICWA, the Court correctly noted that ICWA is entitled to a "presumption of constitutionality" and "due respect" because the judicial branch only invalidates a congressional act "upon a plain showing that Congress has exceeded its constitutional bounds."[98]

A. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[99] The Equal Protection Clause is implicitly incorporated into the Fifth Amendment's guarantee of due process.[100] The Fifth Circuit correctly implemented the same analysis for equal protection claims under the Fifth and Fourteenth Amendments.[101] When a court evaluates an equal protection claim, strict scrutiny review applies to laws

94. *Id.* at 267.
95. *Id.* at 267–69.
96. *Id.* at 268.
97. *Id.*
98. *Id.* at 297 (quoting United States v. Morrison, 529 U.S. 598, 607 (2000)).
99. U.S. CONST. amend. XIV, § 1.
100. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
101. *Brackeen*, 994 F.3d at 332; *see* Richard v. Hinson, 70 F.3d 415, 417 (5th Cir. 1995).

that use classifications of people based on race,[102] but rational basis review applies to laws that use political classifications.[103] The determination of what classification "Indian" falls under triggers the appropriate level of scrutiny application.

1. Political Classification of "Indians"

Congress has exercised plenary power over "Indian affairs" since the conception of the United States.[104] Congress is authorized to use this plenary power, among other things, "[t]o regulate Commerce"[105] and "to make Treaties" with Indian tribes.[106] This plenary power is a constitutional power that relates to Indian tribes as political entities with a government-to-government relationship with the United States, akin to the constitutional powers to regulate commerce with the states and to make treaties with other sovereign nations. "Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations."[107] Because the Constitution uses the classifications of "Indians" and "Indian tribes," the Constitution affirms the singling out of Indians as a "proper subject for separate legislation."[108]

In line with the Constitution and Congress' plenary power, the Supreme Court's precedent unambiguously declares that "federal legislation with respect to Indian tribes . . . is not based upon impermissible racial classifications."[109] *Morton v. Mancari* is the cornerstone precedent for determining the classifications status of Indians. In holding that the classification of "Indian" is political in *Mancari*, the Supreme Court looked to "the unique legal status of Indian tribes under federal law . . . the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes."[110] Further, the Supreme Court reasoned that when legislation is limited in application to members of federally recognized tribes, it cannot be said to be "directed towards a 'racial' group constituting of 'Indians,'"

102. *Brackeen*, 994 F.3d at 332; *see Richard*, 70 F.3d at 417.
103. *Brackeen*, 994 F.3d at 332; *see* Morton v. Mancari, 417 U.S. 535, 555 (1974).
104. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).
105. U.S. CONST. art. I, § 8, cl 3.
106. *Id.* art. II, § 2, cl 2.
107. *Mancari*, 417 U.S. at 552.
108. *Id.*; *see* Brief of Indian Law Professors as Amici Curiae in Support of Federal and Tribal Defendants at 4–15, *Brackeen*, 994 F.3d 249 (Nos. 21-376, 21-377, 21-378, 21-380).
109. United States v. Antelope, 430 U.S. 641, 645 (1977).
110. *Mancari*, 417 U.S. at 551.

and thus solidifying "Indian" as a political classification.[111] This political distinction illuminates two centuries of precedent recognizing Indian tribes as sovereigns based upon the fact that "Indian tribes [are] 'distinct political communities,'" whose authority is "not only acknowledged, but guarantied by the United States."[112] This political distinction of "Indian" controls the outcome of the equal protection claims in *Brackeen v. Haaland*.

As the Constitution observes, considering ancestry in drawing political distinctions is common because such consideration is a "common feature" of federally accepted and enforced citizenship laws.[113] In fact, United States citizenship extends to children born abroad who have at least one parent who is a United States citizen.[114] The same postulate applies to Indian tribes because they enjoy exclusive authority to determine criteria for their own citizenship, that, like the United States, looks to descent for a basis of citizenship.[115] Since the creation of the cornerstone precedent in *Mancari*, the Supreme Court has reiterated and strictly adhered to *Mancari's* central holding that federal laws regarding Indians draw political—not racial—distinctions.[116] The Supreme Court's strict adherence to *Mancari* evidences the accuracy of *Mancari's* determination that "Indian" is a political classification. "If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized."[117] Thus, "Indian" is a political classification triggering rational basis review.

2. Political Classification of the Challenged ICWA Provisions

Plaintiffs challenge ICWA's definition of "Indian child" and its placement preferences under the Equal Protection Clause of the Fourteenth Amendment. Decisively, the provisions of ICWA utilize political, not racial, classifications and are therefore subject to rational basis review.

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111. *Id.* at 553 n.24.

112. McGirt v. Oklahoma, 140 S. Ct. 2452, 2477 (2020) (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832)).

113. Brackeen v. Haaland, 994 F.3d 249, 338 n.51 (2021).

114. *See* 8 U.S.C. § 1401(c)–(d), (g); 8 C.F.R. § 322.2.

115. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.").

116. *See, e.g.*, United States v. Antelope, 430 U.S. 641, 645 (1977); Fisher v. Dist. Ct., 424 U.S. 382, 390 (1976).

117. Morton v. Mancari, 417 U.S. 535, 552 (1974).

Under 25 U.S.C. § 1903(4), the phrase "Indian child" means "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[118] The key to falling within § 1903(4)'s definition of "Indian child" hinges on the child's connection to a federally recognized "Indian tribe"—a distinct political community—not the child's race. Because ICWA's definition of "Indian child" is not dependent on descent alone, § 1903(4)'s definition excludes many children who are the descendants of members of tribes but are neither members of, nor eligible for membership in, a federally recognized tribe. Additionally, § 1903(4)'s definition excludes children who might be considered "Indian" but are members of non-federally recognized tribes.[119] In simple terms, Indian children "[a]re not subject to [ICWA] because they are of the Indian race but because" they or their biological parents "are enrolled [tribal] members,"[120] or are eligible for such membership.[121] As further explained by federal regulations, specific tribal determination of "whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is *solely* within the jurisdiction and authority of the Tribe."[122] Accordingly, courts also defer to tribal determinations of membership.[123]

Under 25 U.S.C. § 1915(a) for adoptive placement preferences, ICWA furnishes that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."[124] Similarly, § 1915(b) provides a related preference scheme for foster care or pre-adoptive placement preferences:

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118. 25 U.S.C. § 1903(4).

119. *See id.* § 1903(3)–(4).

120. *Antelope*, 430 U.S. at 646.

121. 25 U.S.C. § 1903(4).

122. 25 C.F.R. § 23.108(b) (emphasis added); *see also* Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10153 (Feb. 25, 2015) ("Only the Indian tribe(s) . . . may make the determination whether the child is [an Indian child] . . . .").

123. *See, e.g.*, Aguayo v. Jewell, 827 F.3d 1213, 1217 (9th Cir. 2016) (holding that BIA did not act arbitrarily or capriciously in determining that it had "no authority to intervene in a tribal membership dispute"); Cahto Tribe of the Laytonville Rancheria v. Dutschke, 715 F.3d 1225, 1230 (9th Cir. 2013) (holding that a federal agency would have jurisdiction to review membership decisions only if the tribe authorized it).

124. 25 U.S.C. § 1915(a).

> [A] preference shall be given, in the absence of good cause to the contrary, to a placement with—
>
> (i) a member of the Indian child's extended family;
>
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
>
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
>
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.[125]

As with "Indian child," Congress defined the term "Indian," used within the placement preferences, in terms of tribal membership, not race, because § 1903(3) clarifies that "Indian" means "any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43."[126]

ICWA's definition of "Indian child" and placement preferences are clearly political classifications. As such, because § 1915(a)(1) provides first preference to members of a child's "extended family," any family member comes first in line regardless of their race or tribal membership, including non-Indian family members.[127] And under § 1915(a)(2)–(3), preference applies to all members of federally recognized tribes, including those that are of other races, such as Freedmen.[128] Furthermore, Indians who are not members of a federally recognized tribe are not granted placement preference as would-be adoptive parents or guardians; unless they are members of the child's extended family, in which case the foundation for placement is familial, not racial.[129] Consequently, ICWA's placement preferences stand on consideration of a child's "extended family" and link to federally recognized tribes, not race.

3. Appropriate Level of Review – Rational Basis

Rational basis is the appropriate level of review to be applied by the Supreme Court since "Indian" is a non-suspect, political classification.

125. *Id.* § 1915(b).
126. *Id.* § 1903(3).
127. *Id.* § 1915(a)(1).
128. *Id.* § 1915(a)(2)–(3).
129. *Id.*

Rational basis review affords a strong presumption of constitutionality to a law and thus, a law is invalidated under rational basis only when "the classification bears no rational connection to any legitimate government purpose."[130] Specifically, federal Indian law has signaled that rational basis is satisfied when "the special treatment [of Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians."[131] The testimony Congress heard before the passage of ICWA unequivocally informed Congress' finding that children are the most vital resource "to the continued existence and integrity of Indian tribes," reinforcing Congress' intent to further tribal self-governance.[132] Furthermore, the Supreme Court emphasized that in enacting ICWA, "Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians."[133] Thus, Congress intended ICWA to further both tribal self-governance and the survival of tribes.[134]

The Supreme Court has long recognized Congress' plenary power broadly to regulate Indians and Indian tribes on and off reservations.[135] Additionally, the Supreme Court has stated that "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs."[136] ICWA does exactly that by responding to the "circumstances and needs" in the removal

130. Brackeen v. Haaland, 994 F.3d 249, 333 (5th Cir. 2021); *see* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–15 (1993).

131. Morton v. Mancari, 417 U.S. 535, 554–55 (1974); *see also, e.g.*, Washington v. Confederated Band & Tribes of Yakima Indian Nation, 439 U.S. 463, 500–01 (1979) ("It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive." (quoting *Mancari*, 417 U.S. at 551–52)).

132. 25 U.S.C. § 1901(3); *Hearing on S. 1214 Before the S. Select Comm. on Indian Affs.*, 95th Cong. 157 (1977) (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians).

133. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 50 (1989).

134. *See* 25 U.S.C. § 1901(3); *see also* COHEN'S, *supra* note 9, § 11.01(2) ("ICWA's objective of promoting the stability and security of Indian tribes and families encompasses the interest of Indian nations in their survival as peoples and self-governing communities.").

135. *See, e.g.*, United States v. McGowan, 302 U.S. 535, 539 (1938) ("Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States." (quoting United States v. Ramsey, 271 U.S. 467, 471 (1926)).

136. Rice v. Cayetano, 528 U.S. 495, 519 (2000) (citing Wash. State Comm. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979)).

of Indian children from tribal communities.[137] Congress therefore enacted ICWA "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."[138] Even though ICWA incidentally disadvantages some groups in state court proceedings, ICWA classifies on a political basis and so this issue is of "no moment."[139] ICWA easily satisfies the rational basis standard because its provisions are rationally designed to protect the best interests of Indian children and to further Congress' trust responsibility to federally recognized Indian tribes. Therefore, the Fifth Circuit Court's rational basis review decision rejecting Plaintiff's equal protection challenge on the challenged ICWA provisions should be affirmed.

4. Strict Scrutiny Review

For the foregoing reasons, the challenged ICWA provisions need only satisfy rational basis review. But even if strict scrutiny were to be applied, ICWA also satisfies strict scrutiny review. Strict scrutiny is satisfied when the government has a "strong basis in evidence" for its compelling interests, and the legislative action "substantially addresses" those interests.[140] "Context matters" when strict scrutiny is applied.[141] The relevant context for ICWA is the federal government's specific, constitutionally based obligation to Indian tribal members. The existence of this obligation signifies that laws treating Indian tribal members differently are not inherently suspect, but rather grounded in the Constitution itself. Thus, ICWA is not suspect. Strict scrutiny has never been applied to the government's regulation of Indian affairs and its modern form should not apply now in this context. However, if the Supreme Court were to apply strict scrutiny, ICWA would still stand. Strict scrutiny is satisfied where there is a compelling government interest, and the act is narrowly tailored to fulfill the compelling government interests it furthers.

By its own terms, ICWA furthers at least two compelling government interests: (1) "protect[ing] the best interests of Indian children"; and (2)

137. *See* 25 U.S.C. § 1901(4)–(5).

138. *Id.* § 1902.

139. Brackeen v. Haaland, 994. F.3d 249, 342 (2021); *see* Romer v. Evans, 517 U.S. 620, 632 (1996) ("[A] law will be sustained [on rational basis review] if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.").

140. Bush v. Vera, 517 U.S. 952, 977 (1996) (plurality opinion) (first quoting Shaw v. Reno (*Shaw I*), 509 U.S. 630, 656 (1996); and then quoting Shaw v. Hunt (*Shaw II*), 517 U.S. 899, 918 (1996)).

141. Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

"promot[ing] the stability and security of Indian tribes."[142] These interests are rooted in the "special relationship between the United States and the Indian tribes and their members,"[143] and the "fulfillment of Congress' unique obligation" to address "special problems" affecting Indian tribes.[144] In enacting ICWA, Congress recognized that the removal of Indian children had historically been a tool to harm Indian children and to exterminate Indian tribes altogether. These interests are undoubtedly compelling.

While ICWA has proven helpful,[145] its work is far from complete. Congress retains a compelling interest in keeping Indian families together for the best interest of Indian children. Present day studies steadily find that "[Indian] children . . . are still disproportionately more likely to be removed from their homes and communities than other children," and are still "unnecessarily removed from their families and placed in non-Indian settings; where the rights of Indian children, their parents, or their Tribes [are] not protected."[146] These current studies estimate that Indian parents "are up to four times more likely to have their children taken and placed into foster care than their non-[Indian] counterparts."[147] For example, in Alaska, Alaska Natives/American Indians represent roughly 16% of its population[148] while 69% of the total number of children in out-of-home care are Alaska Native/American Indian.[149] In Nebraska, the percentage of Indian children in foster care is four times greater than the percentage of

142. 25 U.S.C. § 1902.

143. *Id.* § 1901.

144. Morton v. Mancari, 417 U.S. 535, 551–52, 555 (1974).

145. *See* Brief of Casey Family Programs et al. as Amici Curiae in Support of Federal and Tribal Defendants at 16–18, Brackeen v. Haaland, 994 F. 3d 249 (2021) (Nos. 21-376, 21–377, 21–378, 21–380) [hereinafter Casey Family Programs Amici Curiae Brief].

146. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38779 (June 14, 2016).

147. *Disproportionate Representation of Native Americans in Foster Care Across the United States*, CITIZEN POTAWATOMI NATION BLOG (Apr. 6, 2021), https://tinyurl.com/2s9eb27m; *see also Child Welfare and Foster Care Statistics*, THE ANNIE E. CASEY FOUND. (May 30, 2023), https://www.aecf.org/blog/child-welfare-and-foster-care-statistics [https://perma.cc/3J39-LYKC] (finding that Indian children were still "overrepresented among those entering foster care," at nearly double the nationwide rate).

148. ALASKA DEP'T OF LABOR & WORKFORCE DEV., ALASKA POPULATION OVERVIEW: 2019 ESTIMATES 10 & tbl. 1.3 (2020), https://tinyurl.com/yc3cy85x.

149. *Alaska Office of Children's Services Statistical Information*, ALASKA DEP'T OF FAM. & CMTY. SERVS., OFF. OF CHILD.'S SERVS. (Dec. 2023), https://tinyurl.com/ycra2bu2 [https://perma.cc/NJG2-49WT].

Indians in its population.[150] In Oklahoma, Indians represent around 9% of its population while Indian children make up "more than 35 percent of those in foster care."[151] In South Dakota, "52 percent of the children in the state's foster care system are American Indians," and "[a]n Indian child is 11 times more likely to be placed in foster care than a white child."[152] In 2017, a study reported that Indian children who had been placed for foster care or adoption in non-Indian homes exhibited higher rates than non-Indian adoptees "on all mental health problems measures (e.g., substance abuse, mental health, self-injury, and suicide)."[153] Additionally, this 2017 study acknowledged that Indian children "have a number of unique experiences . . . that may distinctly affect their mental health."[154] Although ICWA has helped placement rates for Indian children,[155] the interests that elicited Congress's protection of Indian children through ICWA remain compelling today.

ICWA also satisfies Congress' "broad and enduring trust obligations to the Indian tribes."[156] In the adoption of ICWA, Congress unequivocally acknowledged that the United States "through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources."[157] According to the "trust relationship between the United States and the Indian people,"[158] the government "has charged itself with moral obligations of the highest responsibility and trust, obligations 'to the fulfillment of which the national honor has been committed."[159] Consequently, Congress has a

150. Bayley Bischof, *Special Report: A Look at Nebraska's Foster Care System and How Teens Need More Help*, 10 11 NOW [KOLN-TV] (May 12, 2022), https://tinyurl.com/muxhzrb3.

151. *Disproportionate Representation of Native Americans in Foster Care Across the United States*, *supra* note 147.

152. Stephen Pevar, *In South Dakota, Officials Defied a Federal Judge and Took Indian Kids Away from Their Parents in Rigged Proceedings*, ACLU NEWS & COMMENT. (Feb. 22, 2017), https://tinyurl.com/mtavckbb.

153. Ashley L. Landers et al., *American Indian and White Adoptees: Are There Mental Health Differences?*, 24 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RES., no. 2, 2017, at 54, 54, https://coloradosph.cuanschutz.edu/docs/librariesprovider205/journal_files/vol24/24_2_2017.pdf?sfvrsn=7cc4e0b9_2.

154. *Id.* at 56.

155. *See* CAPACITY BUILDING CTR. FOR CTS., ICWA BASELINE MEASURES PROJECT FINDINGS REPORT 17, 19 (2020), https://tinyurl.com/spa68nm.

156. Brackeen v. Haaland, 994 F.3d 249, 341 (2021).

157. 25 U.S.C. § 1901(2).

158. United States v. Mitchell, 463 U.S. 206, 225 (1983).

159. United States v. Jicarilla Apache Nation, 564 U.S. 162, 176 (2011).

distinct and compelling interest in fulfilling its own trust obligations to preserve the integrity and stability of Indian tribes through their members and prospective members.[160] Federal courts have recognized this tribal interest as compelling.[161] The tribal interest in ICWA is also compelling because "the protection of the tribal interest is at the core of ICWA."[162] In ICWA, Congress precisely notes that nothing "is more vital to the continued existence and integrity of Indian tribes than their children," and that Indian tribes are in the best position to preserve Indian culture, traditions, and communities.[163] "[T]here can be no greater threat to essential tribal relations, and no greater infringement on the right of the . . . (t)ribe to govern themselves than to interfere with tribal control over the custody of their children."[164] And thus, even if strict scrutiny is applied, ICWA satisfies the compelling interest component because it furthers the federal government's interests in protecting the best interests of Indian children and promoting Indian tribes.

Additionally, ICWA is narrowly tailored to fulfill the compelling government interests it furthers. In 25 U.S.C. § 1902, Congress set forth a thoughtfully crafted definition of "Indian child" and embraced a "minimum" protection measure regulating the "removal of Indian children from their families and the placement of such children in foster or adoptive homes."[165] Both of the challenged ICWA provisions are narrowly tailored to achieve the compelling interests as detailed above.

First, ICWA narrowly defines "Indian child" in § 1903(4) to hinge on the child's connection to a federally recognized tribe because this definition excludes those children who are descendants of tribal members but are not themselves a member or eligible for membership in a federally recognized

160. *See* 25 U.S.C. § 1902 ("[I]t is the policy of this Nation to . . . promote the stability and security of Indian tribes . . . .").

161. *See* United States v. Wilgus, 638 F.3d 1274, 1285–86 (10th Cir. 2011) (holding that the federal government has a compelling interest in the "protection of the culture of federally-recognized Indian tribes" and explaining that this tribal interest "arises from the federal government's obligations, springing from history and from the text of the Constitution, to federally-recognized Indian tribes" and "[Congress'] 'obligation of trust to protect *the rights and interests of federally-recognized* [Indian] *tribes* and to promote their self-determination'" (quoting United States v. Hardman, 297 F.3d 1116, 1128–29 (10th Cir. 2002))).

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

163. 25 U.S.C. § 1901(3).

164. *In re* Adoption of Buehl, 555 P.2d 1334, 1342 (Wash. 1976) (alterations in original) (internal quotation marks omitted) (quoting Wakefield v. Little Light, 347 A.2d 228, 237–38, (Md. Ct. App. 1976)).

165. 25 U.S.C. § 1902.

tribe.[166] Section 1903(4)'s definition also excludes Indian children who are members of tribes not federally recognized[167] because those tribes lack government-to-government relationship with the United States which is the core of "Indians" political status.[168] ICWA's definition of "Indian child" depends on affiliation with a federally recognized tribe, and is thus narrowly tailored to the government's compelling interest in fulfilling its trust obligations to federally recognized tribes.

Second, ICWA's placement preferences in § 1915(a)-(b) are specially tailored to recognize Congress' finding that vague and discriminatory standards had resulted in the failure of "administrative and judicial bodies" to "recognize . . . the cultural and social standards prevailing in Indian communities and families."[169] Section 1915(a) for adoptive placement and (b) for foster care or pre-adoptive placement respond exactly to this problem by prioritizing placement with an Indian child's family or tribe.[170] Thus, ICWA's placement preferences aspire to maintain the connection between Indian children and their families, tribes, and culture, which is the recognized best practice for all children in today's child welfare practices—to strengthen families instead of removing children from families considered "unfit."[171] Moreover, the "good cause" deviation within ICWA also ensures that it is narrowly tailored to meet the Indian child's best interest in every case.[172] BIA regulations provide five grounds for establishing "good cause":

166. *Id.* § 1903(4).

167. *Id.*

168. *See, e.g.*, *In re* A.L., 862 S.E.2d 163, 168 (N.C. 2021) (holding that an Indian child eligible only for membership in state-recognized (i.e., not federally recognized) tribe is not an "Indian child" for purposes of the ICWA's application); U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-936T, TESTIMONY BEFORE THE COMMITTEE ON INDIAN AFFAIRS, U.S. SENATE: BASIS FOR BIA'S TRIBAL RECOGNITION DECISIONS IS NOT ALWAYS CLEAR 1 (2002) (statement of Barry T. Hill, Director, Nat. Res. & Envt.) ("[Federal] [r]ecognition . . . establishes a formal government-to-government relationship between the United States and a tribe.").

169. 25 U.S.C. § 1901(5); *id.* § 1915.

170. *See id.* § 1915(a)–(b).

171. *See* Casey Family Programs Amici Curiae Brief, *supra* note 145, at 12.

172. *See* 25 U.S.C. § 1915(a)–(b); *see, e.g.*, *In re* Interest of Bird Head, 331 N.W.2d 785, 791 (Neb. 1983) (explaining that the ICWA's placement preferences and "good cause" exception reinforce "the cardinal rule that the best interests of the child are paramount").

> (1) The request of one or both of the Indian child's parents . . . ;
>
> (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
>
> (3) The presence of a sibling attachment . . . ;
>
> (4) The extraordinary physical, mental, or emotional needs of the Indian child . . . ;
>
> (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted . . . .[173]

Thus, the "good cause" exception certifies that ICWA is neither over- nor under-inclusive because it provides a methodical scheme for preserving an Indian child's connections to their Indian community, while still allowing for deviations as the best interests of an Indian child may necessitate.

Third, ICWA is tailored to demonstrate that Indian families and tribes are best positioned to care for their children, benefiting both the best interest of the Indian child and the sovereignty of the tribe. As it was appropriately stated in the Senate Subcommittee Hearing regarding the enactment of ICWA: "[T]he chances of Indians survival are significantly reduced if our children, the only real means for the transmission of tribal heritage, are raised in non-Indian homes and denied exposure to the ways of their people."[174]

Fourth, ICWA applies uniformly nationwide because a "narrower" state-by-state approach would be a defective fit that falls short of solving the problems that led to ICWA's passage in the first place.[175] Fifth, ICWA sustains its narrowly tailored approach because it provides for an exception for all circumstances when "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[176] Sixth, ICWA appropriately encompasses Indian families of

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173. 25 C.F.R. § 23.132(c)(1)–(5) (2016).

174. *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the Subcomm. on Indian Affs. & Public Lands of the H. Comm. on Interior & Insular Affs.*, 95th Cong. 193 (1978) (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians).

175. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 47 (1989) ("We therefore think it beyond dispute that Congress intended a uniform [national application of the ICWA].").

176. 25 U.S.C. § 1912(f).

tribes other than the Indian child's in its placement preference scheme.[177] As Judge Dennis aptly noted in *Brackeen*, "many contemporary tribes descended from larger historical bands and continue to share close relationships and linguistic, cultural, and religious tradition[al]" customs today.[178] Thus, an Indian family from any tribe is specially situated to integrate a child into Indian cultures and to provide support to a child in connecting with their own tribe and tribal resources. Lastly, ICWA is suitably tailored to consider the unique structure of Indian families by recognizing that an Indian "family" includes "the child's extended family."[179] Specifically, an Indian child's "extended family" often includes non-Indian relatives.

In conclusion, even if strict scrutiny were applicable to this case, ICWA's definition of "Indian child" and placement preferences are narrowly tailored to further its compelling interests in protecting Indian children and federally recognized Indian tribes. For all of the above reasons, the Fifth Circuit Court's decision rejecting Plaintiff's equal protection challenge on the challenged ICWA provisions should be affirmed. ICWA is clearly constitutional under strict scrutiny and rational basis reviews.

B. Indian Canons of Interpretation

The Indian Canons of Interpretation ("Indian Canons") are a cardinal principle of federal Indian law stemming from *Worcester v. Georgia*.[180] "[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law" because the "[Indian] canons of construction . . . are rooted in the unique trust relationship between the United States and the Indians."[181] The Indian Canons are external to the text, so they are substantive canons. Substantive canons require the text be read in a certain way. The Indian Canons command that ambiguities in agreements and legislation regarding Indian tribes and their members be "construed liberally in favor of the Indians."[182] The Indian Canons evidence a historically-based judicial perspective because they are "not simply a method of breaking ties" because the Indian Canons "reflect[] an altogether

177. *Id.* § 1915(b).

178. Brackeen v. Haaland, 994 F.3d 249, 345 (Dennis, J., concurring).

179. 25 U.S.C. § 1915(a).

180. *See generally* 31 U.S. (6 Pet.) 515 (1832).

181. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (quoting Oneida County v. Oneida Indian Nation, 470 U.S. 226, 247 (1985)).

182. *Id.* at 766; *see also* McClanahan v. Ariz. St. Tax Comm'n, 411 U.S. 164, 174 (1973).

proper reluctance by the judiciary to assume that Congress has chosen further to disadvantage a people whom [the United States] long ago reduced to a state of dependency."[183] Application of the Indian Canons is "particularly appropriate when the statute in question was passed primarily for the benefit of the Indians."[184] Since the unique trust relationship has never been invalidated, the Indian Canons therefore remain "eminently sound and vital."[185]

As discussed above, ICWA was passed solely for the benefit of Indians and thus, application of the Indian Canons is paramount. As the Supreme Court considers ICWA, the Indian Canons will command that ICWA be resolved in favor of the Indians. Therefore, to resolve ICWA in favor of the Indians, "Indian" will necessarily be determined a political classification subject to rational basis review. If the Supreme Court finds a racial classification subjecting ICWA to strict scrutiny, the Indian Canons will support ICWA's satisfaction of strict scrutiny. If the Supreme Court fails to employ the Indian Canons at all, it will be egregiously ignoring precedent and the federal government's trust obligations to the Indians.

C. Severability Argument – 25 U.S.C. § 1963

In § 1963, ICWA contains a severability clause that states: "If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby."[186] A "severability clause" is "[a] provision that keeps the remaining provisions of a . . . statute in force if any portion of that . . . statute is judicially declared void, unenforceable, or unconstitutional."[187] Congress included the severability clause to ensure ICWA's security and longevity. Thus, since ICWA contains a severability clause, if the Supreme Court declares any portion to be unconstitutional, the rest of ICWA remains valid and enforceable law.

VI. Supreme Court's Ruling on Haaland v. Brackeen

The Supreme Court of the United States delivered its opinion on June 15, 2023, stating: "[T]he bottom line is that we reject all of petitioners'

183. South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 520 (1986) (Blackmun, J., dissenting).

184. *Id.*

185. Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

186. 25 U.S.C. § 1963.

187. *Severability Clause*, BLACK'S LAW DICTIONARY (11th ed. 2019).

challenges to the [ICWA], some on the merits and others for lack of standing."[188] The Supreme Court agreed with the Fifth Circuit regarding Congress's Article I constitutional authority to enact ICWA.[189] The Court characterized Congress's power to legislate with respect to Indian tribes as "'plenary and exclusive'"[190] and tied it's power to the Indian Commerce Clause.[191] The Court noted that it has consistently interpreted the Indian Commerce Clause "to reach not only trade, but certain 'Indian affairs' too."[192] Further, it anchored Congress's power to the federal government's trust relationship with the Indian tribes.[193] Thus, the Supreme Court correctly determined that Congress had Article I authority to enact ICWA.

The Supreme Court reversed the Fifth Circuit on the anticommandeering claims.[194] The Court determined that § 1912(d)'s "active efforts" requirement applied "evenhandedly" to state and private actors and thus did not implicate the Tenth Amendment.[195] Significantly, the Congressional findings in § 1901 note that both public and private actors played a part in the wrongful removal and separation of Indian children from their families and tribal communities.[196] Likewise, the Court determined that the rest of § 1912's requirements pertaining to notice, expert witnesses, and evidentiary standards applied to both state and private actors and thus posed no anticommandeering problem.[197] In response to ICWA's record keeping provision in § 1915(e), the Supreme Court confirmed its suggestion in *Printz v. United States*[198] that "Congress may impose ancillary recordkeeping requirements related to state-court proceedings without violating the Tenth Amendment."[199] Additionally, the Court concluded that § 1915's placement preferences for Indian children "does not require

188. Haaland v. Brackeen, 599 U.S. 255, 263 (2023). The majority of this Note was written prior to the Supreme Court's decision in 2023.

189. *Id.* at 296.

190. *Id.* at 272–73 (quoting United States v. Lara, 541 U.S. 193, 200 (2004), Washington v. Confederated Bands & Tribes of Yakima Nation, 439 U.S. 463, 470 (1979), Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903)).

191. *Id.* at 273; U.S. CONST. art. I, § 8, cl. 3 ("To regulate Commerce . . . with the Indian Tribes.").

192. *Haaland*, 599 U.S. at 273 (quoting Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989)).

193. *Id.* at 275; United States v. Mitchell, 463 U.S.206, 225–26 (1983).

194. *Haaland*, 599 U.S. at 296.

195. *Id.* at 281–83.

196. *Id.* at 282; 25 U.S.C. § 1901.

197. *Haaland*, 599 U.S. at 285.

198. 521 U.S. 898, 907–09 (1997).

199. *Haaland*, 599 U.S. at 291.

anyone, much less the States, to search for alternative placements."[200] The decision cited the Supremacy Clause[201] as grounds for preempting contrary state law to §§ 1915(a) and (b) because "when Congress enacts a valid statute pursuant to its Article I powers, 'state law is naturally preempted to the extent of any conflict with a federal state.'"[202] Thus, the Supreme Court correctly determined that ICWA does not violate the Tenth Amendment.

The Court completely disagreed with the Fifth Circuit on the equal protection and nondelegation claims and vacated the Fifth Circuit's judgment with remand instructions to dismiss for lack of jurisdiction.[203] The Supreme Court failed to even reach the merits of the equal protection and nondelegation claims because it determined that "no party before the Court has standing to raise them."[204] The Court concluded that although the individual Petitioners allege an Article III injury, they have not shown that their injury is "likely to be redressed by judicial relief" because neither an injunction nor a declaratory judgment would provide protection from the allegedly imminent harm.[205] Likewise, the Court concluded that Texas lacked standing because "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government" to assert an equal protection claim.[206] Thus, the Supreme Court correctly determined that no party had standing to assert equal protection or nondelegation claims against ICWA. There is hope that if a future party had standing to assert an equal protection claim against ICWA, the Supreme Court would follow the longstanding precedent of categorizing "Indian" as a political classification, rather than racial, and subject ICWA to rational basis review.

VII. Conclusion

Children are inherent to tribal self-determination and existence. ICWA has succeeded in ending the arbitrary removal of Indian children from their families and heritage by actively keeping Indian children within Indian

200. *Id.* at 286.

201. U.S. CONST. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

202. *Haaland*, 599 U.S. at 287 (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000)).

203. *Id.* at 296.

204. *Id.* at. 291.

205. *Id.* at 292–93.

206. *Id.* at 294–95 (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rice *ex rel.* Barez, 458 U.S. 592, 610, n. 16 (1982)).

communities. However, without ICWA, states would once again be able to strip Indian children away at unproportionally high rates to destroy tribal sovereignty. ICWA should be upheld and maintained because it is based on the political classification of "Indian" which subjects the Act to rational basis review. Further, ICWA easily satisfies rational basis review because it is rationally tied to the fulfillment of Congress' unique obligation toward the Indians and is thus constitutional. Conversely, if ICWA is subject to strict scrutiny, ICWA will still be constitutional because it is narrowly tailored to further its compelling interests in protecting Indian children and federally recognized Indian tribes. However, if the Supreme Court unexpectedly finds "Indian" to be a racial classification, then the entire basis for the government-to-government relationship between the Indian tribes and the United States will be called into question potentially unraveling the entire field of federal Indian law. ICWA, Indian children, and tribal sovereignty warrant vigorous protection:

> The Indian plays much the same role in our American society that the Jew played in Germany. Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.[207]

207. Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).