The Story of Baby O—and the Case That Could Gut Native Sovereignty

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November 9, 2022

In March of 2016, a newborn baby was left at a hospital in Nevada. In court documents, the child is called "Baby O," but we will call her "Octavia." When she was 3 days old, Octavia went to live with a couple named Heather and Nick Libretti in the small city of Sparks, Nev., just outside of Reno. At the time, Heather did PR for a classic cars festival, while Nick worked as a mechanic. The couple, now in their early 40s, had fostered and adopted two boys—and taken in a third—but Heather had always wanted a girl.

Octavia had been left at the hospital under Nevada's Safe Haven law, which allows a parent to give up their child at a hospital, a firehouse, or a police station without fear of being arrested or prosecuted. In line with the statute, Octavia's mother voluntarily relinquished her parental rights. When she was asked by hospital staff to share the father's name, she refused. And so, when Octavia went home with the Librettis, there was no biological family to claim her. Given the circumstances, the Librettis felt certain they would be able to adopt her.

Then, three weeks after Octavia was born, her father's name was found, though it's not entirely clear how. He was contacted, as required by law, and, after a DNA test confirmed his paternity, said he wanted to raise the child. Since Octavia's father was homeless and struggling with substance use, however, the Washoe County Human Services Agency (HSA) determined that Octavia could be reunited with him only after he achieved sobriety.

And there was something else: Octavia's paternal grandmother was a citizen of the Ysleta del Sur Pueblo, a federally recognized tribe in El Paso, Tex. This meant Octavia was eligible for citizenship in the tribe and that her case would likely fall under a 1978 federal law known as the Indian Child Welfare Act (ICWA), which was created to prevent family separation in Native communities. Among other things, the law gave Octavia's tribe the right to intervene in her case and required social workers to prioritize placing Octavia with extended family or another member of her tribe. Social workers from the Ysleta del Sur Pueblo told the Washoe County HSA that they would intervene only if the child wasn't placed with relatives. Her placement with the Librettis would be temporary

The Librettis, however, did not accept the news that they might not be allowed to adopt Octavia. Instead, they decided to fight. Over the next year, they would contact Octavia's family members and talk them out of raising the child; ask her grandmother to renounce her tribal membership so

ICWA wouldn't apply; and hire lawyers to fight for custody. Eventually, the Librettis would prevail: They would adopt Octavia.

But the Librettis didn't stop there. In 2017, they joined a federal lawsuit seeking to strike down the Indian Child Welfare Act. That case, *Haaland v. Brackeen*, has now wound its way to the Supreme Court and brought the Librettis to the paradoxical place where they find themselves today: They have won custody of Octavia—over the child's blood relatives—but claim that ICWA harmed them so seriously that it violated their constitutional rights.

The Librettis didn't respond to multiple requests for comment. Their lawyer declined to comment about the details of the underlying custody case, stating it happened before he represented the couple.

On November 9, the Supreme Court heard arguments in *Haaland v. Brackeen*. It is a sprawling case—one of the most important of the term—with potentially seismic implications for Indigenous nations in the United States. In addition to the Librettis, it hinges on the stories of two other pairs of non-Native foster parents, who collectively wanted to adopt four Native children: Chad and Jennifer Brackeen of Texas and Danielle and Jason Clifford of Minnesota. The plaintiffs are joined in trying to overturn the law by the State of Texas; defending ICWA are four federally recognized tribes (the Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians) and the federal government.

For the last three years, I have researched *Brackeen*, digging through the underlying custody cases along with my colleagues Amy Westervelt, Maddie Stone, and Anh Gray. In the process, I found persistent and troubling similarities. Two of these stories—those of the Brackeens and Cliffords—became the basis of the second season of *This Land*, a podcast I host. This is the first time I'm sharing the story of the Librettis.

As the Librettis frame their case in their federal court filings, they simply wanted to give a child a loving home—a Native child they had raised from birth; they were nearly thwarted, however, because an outdated, ill-fitting law wouldn't let them keep her.

In the lawsuit, the Librettis allege that ICWA violated their constitutional rights because it gave preference to Native families over them. Their lawyer, a partner in the law firm of Gibson Dunn, claims his clients were treated like "fourth tier citizens" and that ICWA results in a "direct disadvantage to non-Indians." Both the Librettis and their lawyer argue that ICWA violates the equal-protection clause of the 14th Amendment because it discriminates against white foster parents. To put it simply, the Librettis claim they couldn't adopt Octavia—even though they did end up adopting her—because they aren't Native.

A lot is riding on the case. When Congress passed ICWA in 1978, about a third of Native children had been removed from their families and their tribes by the government. In the 1950s and '60s, the federal government sponsored a national program that actively sought to take Native children out of Native homes and place them in white homes. At the same time, state child welfare agencies were systematically removing Native children from their families for innocuous reasons like being raised by a grandparent or just being poor. Indigenous nations and

children’s rights organizations warn that overturning ICWA could lead to the loss of future generations of Native children to predatory adoption and abusive social work practices.

The Indian Child Welfare Act was passed with bipartisan support and, for the next 30 years, existed without much controversy. But in the past decade it has been challenged nearly as many times as the Affordable Care Act. The challenges are part of a coordinated strategy to strike ICWA down that’s being led by the private adoption industry, right-wing organizations like the Cato Institute, anti-Indigenous hate groups, and corporate law firms. Many legal scholars and Native advocates argue that the lawsuit isn’t even about ICWA—that it’s a Trojan horse designed to gut the legal rights of Indigenous nations.

“It literally could call into question all of federal Indian law,” Chrissi Ross Nimmo, the deputy attorney general of the Cherokee Nation, which has intervened in the case, told me.

The potential domino effect of the lawsuit rests in the way it seeks to reframe tribal membership as a racial rather than a political category. “The United States Supreme Court, federal courts, and state courts have repeatedly said that someone’s status as an Indian is not racial, because it’s based on membership in an Indian tribe,” Nimmo said. “That is a political classification, not a racial classification.” If the Supreme Court rules that ICWA is unconstitutional because the Librettis and their coplaintiffs were discriminated against based on race, it could reverse centuries of US law and precedent protecting the rights and sovereignty of Indigenous nations.

“We’re talking about laws that apply to individual Indians—you know, possession of eagle feathers,” Nimmo told me. “But we’re also talking about much, much broader laws that apply to tribes as governments. So issues like reservation status, land use, water rights, gaming—just any issue that you could ever think about that is a legal issue involving tribes is questionable if a court finds that ICWA is unconstitutional because it’s race-based.”

Last January, with a more senior member at the firm, the Librettis’ pro bono corporate lawyer filed a federal complaint on behalf of a non-Native casino developer challenging the legality of tribal casinos; the complaint cites a race-based argument similar to the one in *Brackeen*. Supreme Court watchers worry that if this argument prevails in *Brackeen*, the lawsuit to topple Indian gaming is already in the queue.

Amid such heady threats, it’s easy to lose sight of the stories at the center of *Brackeen*’s custody cases. But the stories matter, because they are the basis for the claims against ICWA. In the years I have spent looking into these stories, I have found that they’ve been misrepresented in the media and in federal court. The unvarnished versions of these stories suggest that factors other than ICWA were behind the challenges these couples faced on the way to adoption. More than that, they suggest that, far from being penalized for not being Native, the Librettis, like their coplaintiffs, were helped by it. Their story shows us not why ICWA should be overturned, but why the law is still needed.

To understand the distortions at the heart of the Librettis’ case, it helps to understand how the foster care system is supposed to work in the United States.

When stripped to its essence, the central harm Nick and Heather Libretti claim in federal court is that—for a period of time—they weren't allowed to adopt the child they were fostering. Within the broader context of foster care, however, this claim is perplexing. The overwhelming majority of children who leave foster care—some 87 percent in 2020—are not adopted by their foster parents. Indeed, if every foster parent who didn't adopt a child they had fostered had a case worthy of Supreme Court review, the court would see nearly 200,000 cases each year. But it doesn't, because adoption is not the purpose of foster care. The purpose of foster care is to provide a safe and temporary home while social workers work to reunite the child with their family.

There's a reason for this. Research shows that foster children do better with relatives and people from their community, in what are often called "kinship placements." Foster children placed with kin are less likely to be moved around, reenter foster care, languish in foster care for long periods of time, or have mental health and behavioral problems later. Thanks in good measure to ICWA, Native children in foster care are more likely than white or Black children to be placed with kin, less likely to be placed in a group home or congregate care setting, and less likely to age out of the system. National child welfare organizations say that ICWA has become a "gold standard" and represents the "best practices" of child welfare policy. Because of this, state child welfare policies have begun to look more and more like ICWA.

This is ostensibly the case in Washoe County, where the Human Services Agency says it places children with relatives whenever possible—whether or not their case falls under ICWA. "Reunification with the biological parents is always goal number one," Amber Howell, the director of the Washoe County HSA, told Anh Gray and Amy Westervelt. "If reunification is not possible at the time, or ever, relatives are always second…. That's the next best option, because that keeps children with people that they're familiar with or have some family ties or a relationship with."

From early on, however, the Librettis appeared to reject the idea that fostering Octavia could lead to anything other than adoption. The language of their own legal declaration makes clear that the Librettis misunderstood their "foster-to-adopt" status as a guarantee. "We are listed with the County as foster-to-adopt parents," they wrote, "which means that the County would place a child with us only if we would be able to adopt and provide a permanent home for the child." But according to Howell, all foster-to-adopt parents in the county sign a legal form acknowledging that they understand foster-to-adopt placements are "no guarantee," because many things can happen during the course of a child welfare case, including relatives coming forward.

Despite this, the Librettis made it clear from early on that "their goal" was to adopt Octavia, according to one source familiar with the situation. Several sources we spoke with said that Heather asked Octavia's paternal grandmother to renounce her tribal membership so ICWA wouldn't apply to the case.

During the first six months of Octavia's case, this grandmother expressed interest in fostering and adopting her granddaughter. But after talking to Heather, she got the sense that the Librettis

were determined to keep Octavia, one source said. At some point, she changed her mind about the adoption.

Octavia's paternal uncle also expressed interest in raising her and started the foster care application process early on. "Everything was going through," said Leah Lopez, the social services coordinator for the Ysleta del Sur Pueblo. But then, "all of a sudden, we received a letter from this uncle stating that he had spoken to the Librettis and felt like Baby O was best with the Librettis." He withdrew.

The Librettis are not alone in turning to the foster care system as a way to adopt. "Foster to adopt," as it is often called, is the latest adoption trend in the United States. "A lot of people will come into our training [for foster parents] with the express desire to adopt," Cara Paoli, the director of the Children Services Division of the Washoe County HSA, said. "They're really not so much interested in ongoing fostering, but it gives them an opportunity to meet the kids that are free for adoption and to see if they think it's a good fit."

For Paoli, this is a positive development. "We love that, because we want our kids to find a forever home," she said.

To understand why prospective adoptive parents would go through foster care—a system in which adoption is not guaranteed—one has to understand the landscape of adoption in the US. While exact numbers are hard to come by, there are more people in the United States who want to adopt a child than there are children available for adoption (according to some sources, the number of prospective adoptive parents outstrips kids by a ratio of 30 to 1). The reasons are complicated, but there's a strong correlation between the dawn of the era of reproductive rights—when women won access to abortion and birth control and single motherhood became less stigmatized—and the declining number of US babies being placed for adoption. In the mid-1970s, about 8 percent of all children born in the United States were placed for adoption; today it is less than 1 percent.

At first, the adoption industry solved this problem by going overseas. At the peak of this trend in 2004, 23,000 children were adopted from other countries, such as China and Russia, by US parents. In response to numerous scandals—the most extreme of which included children being kidnapped and murdered—countries started restricting adoptions by families in the United States, and the US strengthened its own laws to curb abuse. Since then, the number of children available for adoption has plummeted: In 2021, only 1,738 children were adopted from abroad.

At the same time, the number of children being adopted from foster care started to increase. By the mid-2000s, roughly as many children were being adopted from foster care as through private domestic or international adoption. From 2011 to 2019, the number of children adopted from foster care increased by 30 percent.

By statute, the primary goal of child welfare cases involving foster care is to reunite the foster child with their family. "You go into it knowing that the state is to a certain extent working against you," said Sherri Statler, who runs a private adoption agency in Texas that licenses prospective adoptive parents to foster. But the benefit, she explained, is that it is much less

expensive than private adoption, which can cost $30,000 to $60,000. In foster care, "the state almost pays you to adopt," she said.

To be sure, there are children waiting to be adopted from foster care—over 100,000 in 2020. But the influx of people turning to foster care to adopt isn't the neat solution one might think. Most prospective adoptive parents want a newborn, or close to it. The children who are the least likely to be adopted from foster care are older. The heyday of international adoption saw a similar problem: Children who were older, sick, or had disabilities waited in orphanages, while younger, healthier children were taken from their families by methods that were often coercive and sometimes illegal. There is growing evidence that a similar mismatch is arising in the foster-to-adopt system. One statewide child welfare administrator told me her department had stopped recruiting foster-to-adopt families because those families only wanted children who were very young.

The Librettis claim that the source of the conflict in their custody case was ICWA. It's a belief they hold so fervently that they have taken it all the way to the Supreme Court. But what if the explanation is much simpler: What if the source of the conflict was using foster care to adopt?

If the Librettis were confused about the true purpose of the foster care system, one group of people should have known better: the social workers at the Washoe County HSA. In Nevada, under state law, the department is required not only to place children with relatives when possible but also to search "diligently" for those relatives. In Octavia's case, Washoe County social workers did not live up to that charge.

Social workers from Octavia's tribe, the Ysleta del Sur Pueblo, stayed involved in her case to ensure that she would be placed with family. But from their perspective, the Washoe County HSA was resistant. In Texas, where many of the tribe's ICWA cases are based, the Ysleta del Sur Pueblo enjoy "a great working relationship with the state," Leah Lopez said. But in Nevada, she added, "they didn't understand ICWA, didn't like ICWA, didn't enforce it." Washoe County declined to respond to the allegations.

By mid-September of 2016, when Octavia was 6 months old, she was enrolled as a citizen of the Ysleta del Sur Pueblo. By that time, Washoe County had changed the case plan from reunification with her father to terminating his parental rights. After Octavia's uncle withdrew as a foster placement, Ysleta del Sur Pueblo social workers started looking for other family.

They identified 39 relatives and gave the list to Washoe County social workers. But, according to Lopez, the Washoe County caseworker didn't contact anyone on the list, as required by law. The tribe had to get a judge to order the social worker to start making calls. And when that social worker did start calling people, "the worker seemed very pushy about not having Baby O placed with family here," Lopez remembers. Instead of explaining the process or helping people fill out paperwork, the Washoe County social worker tried to talk family members out of taking the baby, according to Lopez and family members we spoke with.

Sylvia Triste was one of those family members; she is also a citizen of the Ysleta del Sur Pueblo. Octavia's grandmother is Triste's cousin, which in their family makes them akin to siblings.

Triste was a single mother living with her youngest daughter, Savannah, in Las Cruces, N.M., when she learned of Octavia. She had just purchased a three-bedroom home and had space for another child; her two older children had gone to college and the Army and were out of the house. “I said, ‘Well, I’m positive that me and Savannah and the baby could be a happy family,’” she told me. “It was not even that I had to think about it. It’s just something we do as family.”

Triste had learned about Octavia’s case from her mother, who had received a letter early on about the baby but felt she was too old to care for a newborn. But when Triste reached out to the Washoe County HSA to say she was interested, she didn’t hear back for months. In the end, Triste got the phone number for a Washoe County caseworker from Lopez and called her.

But the call wasn’t what Triste expected. “That lady was just letting me know that they [the Librettis] were going to fight for this baby and they’ve had it since the baby was born,” Triste told me. “And I just felt that it was already going to be a done deal.” The caseworker told Triste she could try to win custody of Octavia, but she likely wouldn’t succeed.

“I do know about the ICWA law and what it does for us and how it tries to keep the Indian families together,” Triste told me. “But when I talked to them [the Washoe County social worker], it didn’t sound like we had a chance.”

The story Heather and Nick Libretti tell in their lawsuit is very different. They claim they were the only people who wanted to adopt Octavia. According to the paperwork they filed in federal court, most of the family members the tribe identified “withdrew from consideration or were deemed unfit placements.”

“I was willing to adopt the baby,” Triste said when I read her the court document. “And I don’t know what they’re saying about ‘unfit.’ I mean, maybe we don’t come from money like they do.”

Triste was never found to be unfit, and Lopez said that at least one other family member finished going through the foster process, obtained her license, and even fostered other children. That family member never got to move forward with Octavia, however.

After Octavia celebrated her first birthday, the tribe was still working to place her with family. But Washoe County social workers argued that moving the child now would be harmful, because she had been with the Librettis for so long. The case went to mediation. According to the Librettis’ declaration, the tribe agreed to let them adopt Octavia only after the Librettis joined the federal lawsuit in 2017 seeking to strike ICWA down. But one source suggested that the situation was more complicated.

The source alleged that the Washoe County HSA put forward an unusual arrangement: If the Librettis couldn’t adopt Octavia, Washoe County social workers suggested that the child could be placed with her biological mother—but the birth mother would have custody only on paper; Octavia would actually stay with the Librettis. Since the birth mother was family, the placement would not violate ICWA. When asked about this alleged proposal, Howell, the HSA director, declined to comment, citing privacy concerns.

Uncertain it would prevail in court, the tribe decided to settle the case. Under the order, the Librettis agreed to take Octavia down to the reservation in El Paso once every three years.

Since custody cases in Nevada are sealed, we don't know all the details of Octavia's case. But from e-mails received via public records requests, we know social workers at the Washoe County HSA were struggling as recently as 2021 with how to apply and follow ICWA, despite the fact that they handle a number of ICWA cases each year.

The reappearance of Octavia's birth mother in the story raises complicated questions. Altagracia Hernandez, or "Gracie" as she goes by on social media, is a plaintiff in *Haaland v. Brackeen*. She and her lawyers suggest that ICWA violated her constitutional rights by not allowing her to choose her child's adoptive parents. The implication is that ICWA interfered with a mother's right to choose what was best for her child. "I strongly oppose any effort to relocate her away from the Librettis or out of Nevada to a strange place to live with people she has never met," Hernandez wrote in her declaration to the court. When contacted, Hernandez declined to comment.

While Hernandez's position as a birth mother trying to navigate what's best for her child is sympathetic, the argument that ICWA interfered with her right to choose isn't the full picture. In their declarations and court filings, Hernandez, the Librettis, and their attorneys all fail to mention that Hernandez surrendered Octavia under Nevada's Safe Haven law. Such laws were created in response to high-profile cases of newborns being abandoned and even dying. While the law allows parents to give up infants without fear of prosecution for abandonment, it also requires them to relinquish their parental rights. (While the law does allow parents to regain custody under limited circumstances, Hernandez got involved in Octavia's case to support the Librettis, according to her federal declaration, not to regain custody herself.)

When Ysleta del Sur Pueblo citizens are adopted—whether by members of the tribe or by non-Natives—the tribe holds a big ceremony, and it did so for Octavia and the Librettis. "It was just a traditional ceremony. Our Cacique, our chief, did a blessing over the family and over Baby O," Lopez told me. "And then we had the kids from our pre-K, they came down and they did dances for her."

Octavia's extended family was invited, and many came. Triste drove down from New Mexico with her aunt. But for them it wasn't a celebration. "That was the saddest thing, to see her and to see how much she looks like the family," Triste said. On the car ride home, she and her aunt cried.

I asked Triste if she ever regrets not fighting harder to adopt Octavia. "Yes, I do. I do. I really do," she told me. "I regret it because I feel that the baby would have been more at home being with true family and true blood, you know, with a Native Tigua family."

Under the custody agreement, the Librettis will continue to take Octavia to visit her reservation in El Paso once every three years. According to Heather Libretti's social media, they last visited in June 2022. On Instagram she called it "a great cultural experience for [Octavia]." In her federal court filings, however, she alleges that the visits are a "financial burden."

“The tribe helps out. Let me just say that,” Lopez told me. “The tribe helps out with financial costs.”

Lopez maintains contact with Heather Libretti. She was nervous about discussing the details of the custody case with a reporter, because she didn’t want it to damage the tribe’s relationship with the adoptive couple. “I’ve never doubted for a second that they [the Librettis] love her, but it was really hard for us… having a child that belongs to our tribe stay with a non-tribal family,” Lopez said.

“[Heather] was given this little girl thinking that it was a done deal. And it wasn’t. And so I can understand what came from that,” Lopez continued. “I do wish that things were probably explained better to her during the initial stages of the [custody] case. But it is what it is, and we just want to move forward.”

Heather and Nick Libretti have split up since filing the lawsuit. Heather now works at the Washoe County Human Services Agency. Based on social media posts, Hernandez maintains contact with Heather Libretti and Octavia.

The Supreme Court will likely issue its ruling in *Haaland v. Brackeen* in the late spring, potentially overturning the law and, with it, the futures of scores of Native families. One family it will not affect, however, is the Librettis. The outcome of the lawsuit will not change who raises Octavia, because her adoption is final. One might have thought the Librettis would have been satisfied that they won custody. But they are still suing the federal government to strike down ICWA.

One of the big questions raised by the Librettis’ legal opponents is whether or not they should be able to bring the case in the first place. Normally, to have standing in a federal lawsuit, a plaintiff has to prove, among other things, that they experienced harm as a direct result of that law and that winning the lawsuit would fix that harm. The harm the Librettis claim is not that ICWA prevented them from adopting Octavia, but that it made the adoption harder. This claim is a little odd; it’s like a white college student suing a university over its affirmative action policy—after the student was accepted by the school.

“In order to have a case in federal or state court, you have to have controversy,” University of Michigan law professor Matthew Fletcher explained. But the controversy here—the custody dispute—has been settled. In fact, all of the underlying custody cases in *Brackeen* have been finalized and won’t be affected by the Supreme Court’s decision. The case “is moot completely,” Fletcher said.

Yet *Haaland v. Brackeen* is still moving forward.

The narrative that ICWA disadvantaged the Brackeens, Cliffords, and Librettis is an upside-down version of the truth. The Native children the plaintiffs sought to adopt entered foster care because their biological parents had substance use disorders. All the Native children had an extended family member who wanted to raise them. Every Native relative got pushback—from a social worker, foster parent, family court judge, or all three. Compared with the white foster parents, the Native family members faced more hurdles in these custody battles. In the end, only

one grandma was able to adopt her granddaughter—Child P—after fighting for *six years*. (To argue that placement was inappropriate, the plaintiffs told federal courts the grandmother's foster license had been revoked—but that never happened, as we reported on *This Land*.)

These three cases tell a story worthy of national attention, but that story is not that ICWA disadvantages non-Native foster parents. Rather, it's how, in a biased system, Native families still struggle to keep their children.

At a time when the Supreme Court is hearing challenges to affirmative action and civil rights legislation, *Haaland v. Brackeen* could help lower the bar of what constitutes legal harm when it's experienced by white people. The Librettis and the Brackeens got what they wanted but, for a period of time, worried they wouldn't. If that's enough to undo a decades-old law protecting millions of Native families, what legislation protecting the rights of the vulnerable is safe?

Because issues affecting Native American rights rarely make headlines in this country, it is unlikely *Brackeen* will be one of the closely watched, blockbuster cases this term. But it should be. The *Brackeen* case is a test for the Supreme Court. And everyone concerned about the integrity of the high court should be watching. Will the court follow decades of court precedent and centuries of federal law that say Native Americans are a political, not a racial, category? Will the court follow the rules of civil procedure and challenge whether the individual plaintiffs have legal standing? And will the court seek out the truth in a case where plaintiffs misrepresented the underlying facts?

Given the court's very mixed decisions on tribal sovereignty in the past three terms, it's difficult to say. Whatever the outcome, *Haaland v. Brackeen* will either demonstrate that the court is still tethered to federal law, court precedent, and the rules of civil procedure—or it will show that the court is so unmoored that even the truth no longer matters.