



## **Indian Child Welfare Case Could Have a Larger Impact on U.S. Relationship with Tribes**

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November 7, 2022

The premise of *Brackeen v. Haaland* is that the Indian Child Welfare Act is a race-based law that violates the rights of non-Native parents by excluding them from adopting Native children. Commonly known as ICWA, the Indian Child Welfare Act was passed in 1978 on the heels of the boarding school era when thousands of Native children were taken from their parents and placed with non-Native foster parents or federal boarding schools. It was an effort to assimilate children and strip them of their Indigenous languages, traditions and culture.

David Simmons, a policy expert with the National Indian Child Welfare Association, said that policy within the Bureau of Indian Affairs left Native families teetering on the edge of extinction.

"25% to 35% of all Native children were estimated to have been removed and placed in some kind of out-of-home care, whether it be foster care or institutional care," Simmons said.

So, Congress passed ICWA to prevent what some called cultural genocide. The law said that when Native kids were removed from their parents' home for cause, all efforts had to be made to place the kids with Native relatives. If relatives were unavailable, efforts must be made to place the kids with another Native family. If those options were exhausted, they could be placed a non-Native foster family.

Some called ICWA the 'gold standard' in child welfare because of the efforts it required to keep children connected to their heritage, but it hasn't been without controversy. *Brackeen v. Haaland* marks the third time the law's constitutionality has been challenged in the U.S. Supreme Court.

### **One Family's Story**

One of the parties to file an amicus brief in the case is Robyn Bradshaw.

Bradshaw is a citizen of the White Earth Band of the Ojibwe and lives in Minnesota.

Before her granddaughter was born, she went to ultrasounds with her daughter and helped to care for the girl after she was born.

But things changed in 2014, when Bradshaw's daughter struggled with addiction. Robyn became the full-time caregiver for the child -we're calling Piper to protect her identity. Things were difficult. Bradshaw was evicted because she didn't have enough money to support her daughter's recovery and pay rent.

Piper's parents lost their parental rights two years later, and the child was sent to foster care because the court incorrectly said she wasn't eligible to be a foster parent.

"I was scared - scared I was never going to see her again," said Bradshaw. It reinforced her own trauma of being taken from her family and being forced to attend a residential boarding school. She vowed to never allow her granddaughter to feel abandoned in the same way she did. She went to every hearing, visited Piper and got help getting her foster care license.

Piper was placed with Jason and Danielle Clifford, a non-Native family in Minnesota. Bradshaw became qualified as a foster parent, but even after Piper went back to live with her grandmother, the Cliffords challenged Bradshaw's fitness to have custody.

Bradshaw said she was unfairly accused of being an unfit caregiver because she is older and cannot afford a larger home or other comforts that the Cliffords could. She was also accused of allowing Piper to gain too much weight and to receive cards from her birth mother.

These kinds of accusations were common during the 1950s and 1960s when Native children were taken from their families through a Bureau of Indian Affairs program known as the Indian Adoption Project.

Officials from The National Indian Child Welfare Association said large, out-of-home placements for Native children were done in part due to poverty, which state agencies classified as "neglect."

A 1964 Bureau of Indian Affairs press release repeated a racist trope while celebrating Native child removal: "One little, two little, three little Indians — and 206 more — are brightening the homes and lives of 172 American families, mostly non-Indians, who have taken the Indian waifs as their own."

"And oftentimes, neglect really is code for families who are struggling with poverty or unemployment or substandard housing, lack of transportation — all of those basic needs," Simmons said.

Ultimately, Bradshaw prevailed in court and adopted Piper in 2020. They live in a Minneapolis suburb, where Robyn has hung Ojibwe words on the walls. She's teaching Piper to speak the language, and they have a handmade drum to sing Ojibwe songs.

The Cliffords were not excluded from adopting Piper because of ICWA, but they are still party to *Brackeen v. Haaland*.

"Applying Minnesota's eleven-factor best-interests- of-the-child test, the Minnesota court presiding over P.S.'s adoption found that "Ms. Bradshaw deeply loves [P.S.]," that she "consistently puts [P.S.]'s needs first," that "they share a strong bond and a secure attachment,"

and that “[i]t is in [P.S.]’s best interests to be placed for adoption with Ms. Bradshaw,” stated a brief filed before the U.S. Supreme Court.

### The Brackeens

In 2016, a 10-month-old boy with a Navajo mother and a Cherokee father was placed in Chad and Jennifer Brackeen’s Texas home when he went into foster care. The boy lived with the Brackeens for a year.

Then, the boy’s parent’s rights were terminated by a Texas court. The Brackeens started adoption proceedings, but they were challenged by the Navajo Nation. The argument was that under ICWA, all efforts needed to be made to place the boy with a Native family on the Navajo Reservation in Arizona.

They were eventually allowed to adopt the boy at the center of the case, but they agreed to be plaintiffs in a case challenging ICWA being brought by Texas, Louisiana and Indiana.

The plaintiffs argue that ICWA is a race-based law that violates the rights of non-Native parents trying to adopt Native children. They also argue that ICWA’s provision calling for ‘active efforts’ to place children with biological family or Native foster parents creates an undue burden for states.

And several high-profile names are part of the case including the Goldwater Institute.

"It quite actually ends up harming Native American children and their parents in a variety of ways," Timothy Sandefur, Goldwater Institute’s chief litigator, said during a recent talk at the Cato Institute.

Respondents include the Cherokee, Oneida, Morongo, Quinalt and Navajo Nations. They say this is another attack on tribal sovereignty and a ruling to dismantle the law could further set back the efforts to protect their children after decades of boarding school policies that forcibly assimilated and attempted to wipe out Native language and culture.

They also say that Indian tribes are political groups of people, not racial groups of people. Tribal governments determine who is eligible for citizenship.

### The Potential Effects

If the petitioners succeed in their claims of attacking the legal framework that recognizes sovereign rights of tribes, tribal leaders say the ruling could chip away at other rights for tribal nations across the United States.

This isn't about the welfare of Indian children, leaders of the tribal nations and others say in this case. Rather, they claim it's a political attack on tribes. It could affect land and water rights, gaming and criminal jurisdiction. The existence of Indian Country could be open for debate if the Court agrees with the argument that the tribal relationship between tribal citizens and their government is not political, but is wholly based on race.

The plaintiffs in *Brackeen v. Haaland* are represented by Gibson Dunn, a law firm that is also part of a challenge in Washington State against the Indian Gaming and Regulatory Act.

Oklahoma is one of the states that has filed a brief in support of the Brackeen's position that the law is outdated and is discriminatory.

Cherokee Nation, an Oklahoma-based tribe, is on the other side of the argument. They were at the center of the 2013 challenge to ICWA.

Chrissi Ross Nimmo is Cherokee Nation Deputy Attorney General, and she said the Brackeen's predicament is rare. Most of the time, she said Native children are placed with biological family members or Native foster parents.

"In cases where there is some issue of placement, those cases are typically resolved at the district court level one way or the other, and there are not appeals from that," said Nimmo.

The goal of foster care in any context, she said, is to always provide reunification with the parent, which can sometimes make family placement with a relative out of state difficult. She said the court is usually good at recognizing when that sometimes cannot take place.

The [ICWA Baseline Study](#), examined tribal involvement in dependent children's cases across a few jurisdictions. That data showed children spent less time in the child welfare system when their tribe was involved early in a case.

According to the Oklahoma Department of Human Services, there are 6,730 children in state custody in November 2022. There are 245 approved tribal approved foster homes and 303 DHS foster homes that have at least one foster parent who is Native American.

And when ICWA is challenged, Nimmo said it's sometimes easy to forget real people are involved. She was heavily involved in *Adoptive Couple v. Baby Girl*. The case is more commonly known as the "Baby Veronica Case".

In 2013, when the Court ruled that a North Carolina couple had the right to adopt the girl over her biological father who is a Cherokee citizen, she was there.

"I actually carried her from her father's arms to the arms of the adoptive couple," Nimmo said. And I mean, it's emotional, I still get emotional talking about it."

When the U.S. Supreme Court rules in *Brackeen v. Haaland*, several things could happen. Legal experts say they could rule narrowly and strike down portions of the law as they did in *Adoptive Couple v. Baby Girl*. They could also give state courts control because many states including Oklahoma already have state ICWA laws in place. They could also strike the entirety of the law down, which could change the trust relationship between the United States and tribal nations.