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It's Time To Treat All Adopted Kids The Same, No Matter Their Race

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The Indian Child Welfare Act strips basic constitutional rights from any child who is racially classified as "Indian." ICWA was initially created to prevent seizure of Native American children from their intact families by state actors. Modern-day applications, however, hurt the administrative process of foster families' adoption proceedings. Even in cases where the Native American parent(s), relatives, or affiliated tribe have no issue with the adoption, the process is still delayed by arbitrary administrative rules. In some cases, the child is even removed from stable adoptive parents to be placed in a neglectful, abusive situation. The U.S. Court of Appeals for the Fifth Circuit reversed a district court's decision to deem ICWA as applied to adoption unconstitutional under principles of equal protection, the Tenth Amendment, the nondelegation doctrine, and the Administrative Procedure Act.

This Fifth Circuit ruling creates a dangerous new precedent that eliminates the distinction between racial and political classifications, upholding ICWA's definition of a child's political classification based solely on her race (as determined by a minute blood quantum). This logic ignores the cultural and political identification of the child while bolstering the use of race in government decision making. At the very least, biological eligibility for tribal membership is a form of national-origin classification, which is subject to the same strict scrutiny that applies to racial classifications in other contexts.

The court asserted that because many racially Indian children do not fall under ICWA's definition of "Indian child," this term is not a racial classification—which is incorrect, in that legal precedent dictates that a state classification does not become race-neutral simply because it is over or underinclusive. Another ICWA provision requires children to be placed with "Indian" adults, regardless of tribal affiliation. In other words, a Sioux child must be placed with Seminole parents instead of a potentially better situation with black, white, Asian, or Hispanic parents. This "generic Indian" concept is a blatantly arbitrary racial identification.

Finally, the Fifth Circuit's ruling will, in fact, further harm the most at-risk minorities. Native American children are at greater risk of abuse, neglect, molestation, alcoholism, drug abuse, and suicide than any other demographic in the nation. Instead of providing these children with more

legal protection, ICWA creates heavier evidentiary burdens, thus forcing children to remain in abusive homes longer.

Fortunately, the full Fifth Circuit decided to hear the case *en banc*. Together with the Goldwater Institute and Texas Public Policy Foundation, Cato has filed an amicus brief on behalf of parent plaintiffs frustrated in a wish to adopt children of Native descent. (We likewise did so before the Fifth Circuit panel and on the plaintiffs' motion to rehear the case en banc.) We argue that under ICWA, "Indian child" is a genetics-based racial category and that ICWA does not constitutionally promote tribal sovereignty. The government may not treat American citizens differently, as it does here, based on whether their genetic ancestry would qualify them for tribal membership. For Congress to impose a racialized and non-neutral regime on parents and children is not only unwise and unfair, but unconstitutional.

This article by Ilya Shapiro first appeared at the Cato Institute.