STANDING MATTERS: *BRACKEEN*, ARTICLE III, AND THE LURE OF THE MERITS

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The Supreme Court's grant of certiorari in *Brackeen v. Haaland* and consolidated petitions[1] marks only the third time that the Court has taken up a case arising under the Indian Child Welfare Act of 1978 (ICWA).[2] From its inception in the Northern District of Texas to the Fifth Circuit's en banc decision, the litigation has been closely watched, not only because the constitutionality of ICWA and regulations promulgated in 2016 (the "Final Rule") are at issue but because foundational principles of federal Indian law[3] hang in the balance. Indeed, in *Brackeen* the Court is being asked to revisit the scope of congressional power under the Indian Commerce Clause; the constraints, if any,

* Many thanks to my colleagues Sylvia Lett, Melissa Tatum, and Rebecca Tsosie for their valuable feedback on this Article; to Haley Stewart, JD Class of 2023, for her excellent research assistance; and to Rachel Crisler, JD Class of 2023, for her careful editing. All mistakes are my own. In full disclosure, the author is signatory to an amicus brief arguing for the constitutionality of ICWA in *Brackeen*. *See* Brief of Indian Law Scholars as Amici Curiae in Support of Defendants-Appellants, Haaland v. Brackeen, No. 21-370 (filed Aug. 19, 2022).

1. The Court granted certiorari on the same day on four petitions arising out of the *Brackeen v. Haaland* litigation and consolidated the petitions, reported below at 994 F.3d 249 (5th Cir. 2021) (en banc), *cert. granted* ___ U.S. ___, 142 S. Ct. 1205 (2022). *See* Petitions for Writ of Certiorari, Haaland v. Brackeen, No. 21-376 (Sept. 23, 2021); Cherokee Nation v. Brackeen, No. 21-377 (Feb. 28, 2022); Texas v. Haaland, No. 21-378 (Sept. 23, 2021); Brackeen v. Haaland, No. 21-380 (Sept. 23, 2021).

2. 25 U.S.C. §§ 1901–1963. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013).

3. Because the Indian Child Welfare Act uses the term "Indian," any discussion of the Act necessarily must employ the term as well. At the same time, I recognize that "Indian" is offensive to many Native people and communities as a pejorative term linked to colonialism.

imposed by the Tenth Amendment in the exercise of that power; and the equal protection standard of review for laws based on tribal membership.[4]

But before the Court reaches the substantive questions in *Brackeen,* it must address a thicket of Article III justiciability issues. The litigation in *Brackeen* at the trial court and on appeal has required judges to delve deeply into whether the plaintiffs (three sovereign states and seven individuals) have established a concrete and present injury traceable to the defendants' challenged conduct and whether a ruling on the merits would redress their claimed injury. Although the en banc court unanimously concluded that at least one plaintiff had established standing to challenge Congress's authority to enact ICWA and the validity of the Final Rule, the court was divided on other standing issues, with a majority concluding that the plaintiffs had standing to challenge ICWA on equal protection grounds.[5] At the same time, dissenting judges vehemently disagreed with the recognition of standing to press equal protection claims and suggested that their colleagues had disregarded the requirements of Article III in their eagerness to reach the merits.[6]

Rather than add to the extensive literature defending ICWA's constitutionality,[7] this Article focuses

4. The significance of *Brackeen* to tribal nations is clear. *See* Brief of 497 Indian Tribes and 62 Tribal and Indian Organizations as Amici Curiae in Support of Federal and Tribal Defendants, Haaland v. Brackeen, No. 21-376 (Aug. 19, 2022) (advancing arguments for recognition of congressional authority to enact ICWA and principle that legislative distinctions based on tribal membership are political rather than racial classifications).

5. Brackeen v. Haaland, 994 F.3d 249, 267 (5th Cir. 2021) (per curiam).

6. *See infra* notes 168–70, 200–04 and accompanying text.

7. More recent additions to this impressive body of scholarship include Matthew Fletcher & Randall F. Khalil, *Preemption, Commandeering, and the Indian Child Welfare Act,* 2022 WIS. L. REV. 1199 (2022) (refuting Tenth Amendment claims raised in *Brackeen* and suggesting that ICWA falls within Congress's powers under section 5 of the Fourteenth Amendment); Matthew Fletcher & Wenona Singel*, Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885 (2017) (discussing ICWA as exercise of federal government's trust responsibility toward tribal families and children); Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491 (2017) (exploring historical

on the justiciability questions presented in *Brackeen*. Part I provides a brief overview of ICWA and the Supreme Court's two prior decisions, with an emphasis on those aspects of the Act and Final Rule that are at issue in *Brackeen*. Part II reviews the twists and turns of the *Brackeen* litigation and the pivotal rulings on standing that have kept alive the plaintiffs' broad-based constitutional challenges. The sweeping scope of the Fifth Circuit's en banc decision, a tome of over 200 pages, has provided the Supreme Court with an open canvas—driven home by the Court's grant of certiorari on all four petitions. Part III offers thoughts about the challenging justiciability issues the Court must resolve before reaching the merits.

The Court's rulings on Article III standing in *Brackeen* will determine the scope of the substantive holdings. The question most in dispute is whether plaintiffs have standing to challenge ICWA on equal protection grounds under the Fifth Amendment. Determinations of standing, of course, are always a prerequisite to the exercise of federal court jurisdiction, but *Brackeen*'s unique tangle of individual and state claimants asserting diverse constitutional and statutory claims complicates the standing inquiry. Also, some members of the Court have already made known their receptivity to arguments that ICWA's heightened procedural protections for parents of Indian children may raise equal protection concerns,[8] and one Justice has opined at length that Congress lacked power to enact ICWA in the first place.[9] If the desire to reach the merits of the constitutional claims drives the Justices' resolution of the standing questions, the decision in *Brackeen* could profoundly unsettle federal Indian law.

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justification for treating classifications based on tribal membership as political rather than racial); Gregory Ablavsky, *Beyond the Indian Commerce Clause,* 124 YALE L.J. 1012 (2015) (defending congressional authority to enact ICWA from an originalist perspective).

8. Adoptive Couple v. Baby Girl, 570 U.S. 637, 656 (2013) (suggesting that ICWA's heightened burdens of proof, if applied to the facts before the Court, "would raise equal protection concerns").

9. *Id.* at 656–66 (Thomas, J., concurring).

I. OVERVIEW OF THE INDIAN CHILD WELFARE ACT AND THE 2016 REGULATIONS

A. ICWA

Congress enacted ICWA in response to a brutal history of abusive boarding school practices and unwarranted and biased child welfare removals that led to the separation of an extraordinarily high percentage of American Indian children from their families and communities.[10] Senate oversight hearings in the 1970s documented the catastrophic impact of federal and state governmental policies that were aimed at the elimination of Native culture and the forced assimilation of Indian children into the broader society.[11]

According to surveys conducted by the Association on American Indian Affairs, 25% to 35% of all American Indian children had been separated from their families and placed in predominantly white foster and adoptive homes or institutions.[12] Much of the testimony during the hearings focused on the undeniable harm to Indian children and families perpetrated by state child welfare authorities[13] and by the Bureau of Indian Affairs (BIA) and affiliated religious entities through a network of

10. *See* 25 U.S.C. § 1901(4); Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32–36 (1989). For a searing account of the boarding school era with its draconian practices and the destructive child welfare systems targeting Native children, see MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD (2014).

11. *See Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affs. of the S. Comm. on Interior & Insular Affs.*, 93d Cong. 14–32 (1974) (statement of William Byler, executive director, Association on American Indian Affairs) [hereinafter *1974 Hearings*]; *Hearing on S. 1214 Before the S. Select Comm. on Indian Affs.*, 95th Cong. (1977) [hereinafter *1977 Hearings*]; *Hearings on S. 1214 before the Subcomm. on Indian Affs. & Pub. Lands of the H. Comm. on Interior and Insular Affs.*, 95th Cong. (1978) [hereinafter *1978 Hearings*].

12. *See 1978 Hearings*, *supra* note 11, at 29–31.

13. Witnesses reported that Native children were removed from their homes by child welfare workers acting out of ignorance of tribal culture regarding parenting and family relations and outright bias favoring white middle-class standards. *See 1978 Hearings*, *supra* note 11, at 191–92 (Testimony of Chief Calvin Isaac).

militaristic boarding schools.[14] Equally important, Congress heard compelling evidence that the very survival of tribes was at stake since children were the "only means of transmission of tribal heritage."[15]

Relying on the federal government's trust responsibility toward tribes and plenary congressional power over Indian affairs,[16] Congress crafted ICWA to directly address the history of rampant child welfare abuses. As stated in the Act, federal policy includes not only the protection of the "best interests of Indian children" but also the promotion of "the stability and security of Indian tribes and families."[17] Thus, the goal of protecting Indian children and families is coupled with the goal of ensuring the survival of tribes, and that dual focus is a key foundation for congressional power—a point of contention in *Brackeen*.

While Congress employed jurisdictional, procedural, and substantive mechanisms in ICWA to achieve its goals, the heightened procedural protections and substantive placement preferences are the focus of the *Brackeen* litigation. The Act defines "Indian child" as any unmarried person under the age of 18 who is either a member of a federally recognized tribe or is *eligible* for tribal membership and is the biological child of a member.[18] Thus, the applicability of the Act turns on tribal membership or eligibility for membership—a statutory requirement mischaracterized as "racial" by the plaintiffs in *Brackeen*. Under long-established principles, federal laws affecting tribal relations that

14. *See* JACOBS, *supra* note 10, at 5; Rukmini Callimachi, *Lost Lives, Lost Culture: The Forgotten History of Indigenous Boarding Schools*, N.Y. TIMES (July 19, 2021), https://www.nytimes.com/2021/07/19/us/us-canada-indigenous-boarding-residential-schools.html; BRYAN NEWLAND, ASSISTANT SEC'Y FOR INDIAN AFFS., DEP'T OF INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT (2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf (documenting experiences of Native children at boarding schools across United States).

15. 490 U.S. at 34 (quoting Chief Calvin Isaac, *1978 Hearings*, *supra* note 11, at 193).

16. *See* 25 U.S.C. § 1901 (Congressional findings).

17. 25 U.S.C. § 1902.

18. 25 U.S.C. § 1903(4).

depend on tribal membership are deemed to be based on political association rather than race.[19] In *Morton v. Mancari*, a key precedent on this issue, the Supreme Court upheld a hiring preference within the BIA for tribal members with one-fourth or more degree of Indian blood.[20] Rejecting an equal protection challenge, the Court reasoned that the hiring preference was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."[21] Under ICWA, similarly, Congress was legislating to protect Indian children and promote the survival of tribes and tribal culture and thus required a nexus of tribal membership or eligibility for membership coupled with membership of a biological parent.[22]

As reflected in the *Brackeen* litigation, the Act extends to involuntary child welfare proceedings involving state intervention into the family as well as voluntary relinquishments by parents.[23] In deference to the sovereign authority of tribes, the Act recognizes exclusive tribal jurisdiction over child custody proceedings involving an Indian child who resides or is domiciled within the tribe's reservation or is a ward of the tribal court, a jurisdictional premise that comports with pre-ICWA case law.[24] In cases within concurrent state/tribal jurisdiction, ICWA provides the option of transfer to tribal court on petition by either parent, Indian custodian, or tribe.[25] Sometimes characterized as

19. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (congressional power "over the tribal relations of the Indians" is political in nature); United States v. Antelope, 430 U.S. 641, 645 (1977) (federal legislation with respect to Indian tribes is not based on "impermissible racial classifications").

20. 417 U.S. 535, 551–54 (1974).

21. *Id.* at 554.

22. *See generally* Krakoff, *supra* note 7, at 506–09.

23. The Act uses the terminology of "child custody proceeding," defined as foster care placements, terminations of parental rights, and preadoptive and adoptive placements. 25 U.S.C. § 1903(1)(i)–(iv).

24. 25 U.S.C. § 1911(a). *See, e.g.*, Fisher v. District Court, 424 U.S. 382 (1976) (per curiam) (recognizing exclusive tribal jurisdiction over adoption dispute involving tribal members and reservation residents).

25. 25 U.S.C. § 1911(b).

"presumptive[] tribal jurisdiction,"[26] transfer requests must be granted unless a parent objects or there is "good cause" to the contrary, a term Congress chose not to define in the Act.[27]

Although tribal jurisdiction is not challenged in *Brackeen,* the Supreme Court's reasoning in *Mississippi Band of Choctaw Indians v. Holyfield*, where exclusive tribal jurisdiction was at issue, supports the recognition of congressional power to enact ICWA. In *Holyfield*, the Court ruled that the adoption of twin Choctaw infants by a non-Indian couple in Mississippi state court was void because the infants, while never physically present on the Choctaw reservation, were deemed to have the same reservation domicile as their Choctaw birth mother at the time of the adoption.[28] Over a dissent that would have given more weight to parental autonomy,[29] the majority emphasized that ICWA was "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."[30] The Court's robust endorsement of ICWA's jurisdictional provisions and underlying policies stands in stark contrast with the skepticism, if not hostility, toward ICWA expressed almost 25 years later in *Adoptive Couple v. Baby Girl.*[31]

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26. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989).

27. 25 U.S.C. § 1911(b). For guidance on the meaning of "good cause," see 25 C.F.R. § 23.118.

28. 490 U.S. at 51–53.

29. *Id.* at 54–65 (Stevens, J., dissenting).

30. *Id.* at 49. As Justice Brennan phrased it, "Permitting individual members of the tribe to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would, to a large extent, nullify the purpose the ICWA was intended to accomplish." *Id.* at 52. The majority acknowledged that separation of the twins from their adoptive parent would be traumatizing, given the passage of time, but noted that the issue before the Court was *who s*hould decide the custody question, not *what* the decision should be. *Id.* at 53–54.

31. *See infra* notes 48–57 and accompanying text.

As most Native families reside off reservation,[32] ICWA's predominant implementation is through state courts and state child welfare systems, a reality driven home by the *Brackeen* litigation. In light of the history of child welfare abuses, Congress mandated significant procedural protections for parents of Indian children and for tribes. These include the rights of intervention,[33] detailed notice requirements,[34] court-appointed counsel,[35] and access to evidence.[36] ICWA, in addition, imposes increased evidentiary requirements and heightened burdens of proof that have been targeted in *Brackeen* as unconstitutional "commandeering." Under the Act, any party—whether state or private—seeking foster care removal or termination of parental rights of an Indian child must show that "active efforts" have been made to provide services "to prevent the breakup of the Indian family" and that such efforts have been unsuccessful.[37] Further, no foster care placement may be ordered absent a determination "by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[38] Terminations of parental rights, moreover, must be supported by evidence beyond a reasonable doubt.[39] These heightened burdens of proof go beyond the

32. U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 12–14 (Jan. 2012), https://www.census.gov/history/pdf/c2010br-10.pdf.

33. 25 U.S.C. § 1911(c) (providing right to intervene for Indian custodian and child's tribe in any state court proceeding for foster care placement or termination of parental rights).

34. *Id.* at § 1912(a) (requiring notice by registered mail and specified period after receipt of notice before proceeding can commence).

35. *Id.* at § 1912(b) (providing right to court-appointed counsel for indigent parent or Indian custodian).

36. *Id.* at § 1912(c) (providing each party to foster care placement or termination of parental rights the right to examine documents filed with court on which any decision with respect to such action may be based).

37. *Id.* at § 1912(d).

38. *Id.* at § 1912(e).

39. *Id.* at § 1912(f).

constitutional baseline generally applicable to state child welfare systems,[40] a direct response to the lawless removals of Indian children by state authorities in the past.

The other key provisions of ICWA at issue in *Brackeen* are the substantive placement preferences. For adoptive placements, the Act prescribes a preference, absent good cause to the contrary (again undefined in the Act), for a member of the child's extended family, other members of the child's tribe, or "other Indian families."[41] Foster care or preadoptive placements, in turn, must follow a similar but different set of preferences: a member of the child's extended family, a foster home specified by the child's tribe, an "Indian foster home" approved by a non-Indian authority, or an institution for children approved by an Indian tribe or operated by an Indian organization.[42] The Act also recognizes a tribe's right to establish a different order of preference by resolution.[43] As will be seen, the plaintiffs in *Brackeen* have challenged the constitutionality of the preferences themselves on equal protection grounds, aiming especially at the third-tier preference in each category—"other Indian families" and "Indian foster home"—although none of the individual plaintiffs' cases involves these preferences. In addition, the state plaintiffs are challenging the recognition of tribal power in section 1915(c) as an invalid delegation of congressional authority—despite the sovereign status of tribes and their inherent role in overseeing the care of tribal children.

ICWA permits collateral attacks on voluntary adoptions for two years after the entry of the decree if

40. As a constitutional minimum, parental rights terminations must rest on clear and convincing evidence, Santosky v. Kramer, 455 U.S. 745 (1982), but most states apply the preponderance of evidence standard to temporary removals of children. *See* Yeoeun Yoon, *Building Broken Children in the Name of Protecting Them: Examining the Effects of a Lower Evidentiary Standard in Temporary Child Removal Cases*, 2019 U. ILL. L. REV. 743, 754–64.

41. *Id.* at § 1915(a).

42. *Id.* at § 1915(b).

43. *Id.* at § 1915(c).

consent was obtained through fraud or duress.[44] Also, foster care placements or terminations of parental rights entered in violation of the jurisdictional or procedural requirements of ICWA may be challenged by parents and tribes in any court of competent jurisdiction, with no express time limitation.[45] Again, the plaintiffs in *Brackeen* contend that these provisions for collateral attack amount to unconstitutional race discrimination.

Finally, ICWA imposes record-keeping requirements on states, both to ensure compliance with the Act and also to enable Indian adoptees to connect with their birth families and tribes. Thus, states must maintain a record of all placements and the states' efforts to comply with the order of preference[46] and must report on ICWA cases in the state's child welfare system.[47] The state plaintiffs in *Brackeen* have identified the record keeping requirements as overly burdensome and a violation of their sovereign domain under the Tenth Amendment.

In *Adoptive Couple v. Baby Girl*, the Supreme Court significantly narrowed the application of ICWA's heightened evidentiary requirements and placement preferences. In so doing, Justice Alito, writing for a five-Justice majority, expressed clear misgivings about ICWA's underlying policies, a perspective countered by a vehement dissent authored by Justice Sotomayor.[48] In that case, a Cherokee father had successfully overturned the adoption of his daughter, widely known as Baby Veronica, in the South Carolina courts because he had not been afforded his procedural rights under ICWA in the original adoption proceedings.[49] After the child had

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44. *Id.* at § 1913(d).

45. *Id.* at § 1914.

46. *Id.* at § 1915(e).

47. 25 U.S.C. § 1951.

48. Adoptive Couple v. Baby Girl, 570 U.S. 637, 655–56 (2013) (Alito, J.), 667–92 (Sotomayor, J., dissenting).

49. *See* Adoptive Couple v. Baby Girl, 731 S.E.2d 550 (S.C. 2012) (holding that father had not voluntarily consented to adoption of daughter in accordance with ICWA, that state had not shown requisite harm to child from father's prospective custody of child, and that child's best interests would be served by transferring custody to father).

been living with her father for over two years, the adoptive parents secured a reversal in the Supreme Court. The majority held that the father was not entitled to the heightened evidentiary protections of ICWA because he had never exercised physical or legal custody of the child at the time of the adoption.[50] Focusing on ICWA's use of the phrases "to prevent the breakup of the Indian family" and "continued custody," the Court reasoned that because the child at the time of the adoption had never been in an Indian family and the parent had never exercised custody, the provisions of ICWA requiring "active efforts" to prevent the breakup of the family and imposing a heightened burden of proof of harm from "continued custody" simply had no application.[51]

The Court went on to hold that the adoptive placement preferences under ICWA do not apply if there is only one party before the court petitioning to adopt. On the facts before it, since the couple originally seeking to adopt Baby Veronica were the only petitioners at that point in time, the preferences of section 1915 did not come into play.[52]

Beyond the bare holdings, Justice Alito's opinion bristled with antipathy toward ICWA's underlying policies. He emphasized Baby Veronica's small fraction of Cherokee blood,[53] the Cherokee father's "abandonment" of the child, and the "disadvantage" ICWA would impose on "certain vulnerable children" solely because of "remote" Indian ancestry if it had applied to the father under these circumstances.[54] "Such an interpretation," Justice Alito wrote, "would raise equal protection concerns."[55] That not-so-subtle

50. The father's alleged failure to assert his rights was a matter of considerable factual dispute. *See* Bethany Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295, 301–10 (2015).

51. 570 U.S. at 647–54.

52. *Id.* at 654–55.

53. *Id.* at 641, 646.

54. *Id.* at 655–56.

55. *Id.* at 656.

invitation to litigants to challenge ICWA on equal protection grounds has been accepted with gusto by the plaintiffs in *Brackeen*. In addition, Justice Thomas in a concurring opinion argued that Congress lacked authority under the Indian Commerce Clause of Article I to enact ICWA since, in his view, child welfare and adoption proceedings "involve neither 'commerce' nor 'Indian tribes.'"[56] Although no other Justice joined the concurrence, the Thomas opinion likewise has fueled arguments in *Brackeen* that ICWA exceeded congressional authority.[57]

In contrast to ICWA's portrayal in *Adoptive Couple*, the Act is characterized by child welfare organizations as the "gold standard" in child welfare policy because of its core emphasis on family preservation, the heightened requirements for removing children from their families, and the preference for placement with relatives before all others.[58] Due in part to ICWA, the alarming picture from the 1970s of the separation of one-third of all Native children from their families no longer holds true.[59] Still, the overrepresentation of Native children in foster care continues. Nationally, American Indian/Alaska Native children comprise 2% of all children in state foster care but only 1% of all children in the general population.[60] Moreover, Native children in several states continue to

56. *Id.* at 666.

57. Brackeen v. Haaland, 994 F.3d 249, 362, 374–75 (5th Cir. 2021) (en banc) (Duncan, J., concurring in part and dissenting in part).

58. Marcia Zug, *ICWA's Irony*, 45 AM. INDIAN L. REV. 1, 4 n.4 (2021); Tara Hubbard & Fred Urbina, *ICWA: The Gold Standard,* 58 ARIZ. ATT'Y 32, 33 (2022); Brief of Casey Family Programs and Twenty-Six Other Child Welfare and Adoption Organizations as Amici Curiae in Support of Federal and Tribal Defendants at 18–32, Haaland v. Brackeen, No. 21-376 (Aug. 19, 2022) [hereinafter Brief of Casey Family Programs].

59. According to national data, out of the approximately 1.6 million American Indian/Alaska Native children in the United States, fewer than 10,000 were in state foster care in 2020. ADMIN. CHILD. & FAMS., U.S. DEP'T OF HEALTH & HUM. SERVS., ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM REPORT NO. 27 (2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf.

60. CHILD.'S BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 2 (April 2021), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf.

be placed in foster care at stunningly disproportionate rates.[61] On the other hand, Native children have the highest occurrence of kinship care among children in foster care and the lowest rate of congregate or group care.[62] In addition, dedicated ICWA courts now exist in several states and report improvements for Native children in a number of child welfare measures.[63] In other words, where robust compliance with ICWA exists, the benefits for Native children and families are clear.

B. The 2016 Final Rule

In 1979, following ICWA's enactment, the Department of the Interior published non-binding guidelines for state courts to use in interpreting ICWA's provisions.[64] At that time, the BIA expressed the view that Congress had not authorized it to promulgate binding regulations.[65] While the 1979 guidelines were intended to help state courts render consistent interpretations of ICWA's jurisdictional, procedural, and substantive requirements, courts could ignore them at will. As a result, inconsistencies existed across the United States in interpreting ICWA, including the meaning of core provisions.[66] Concerned about erratic

61. Minnesota has the highest disproportionality rate of any state, with Native children representing just 1.7% of the child population and 27.2% of the children in foster care. *See* NAT'L INDIAN CHILD WELFARE ASSOC'N, 2019 REPORT ON DISPROPORTIONALITY OF PLACEMENTS OF INDIAN CHILDREN (2019), https://www.nicwa.org/wp-content/uploads/2019/08/Disproportionality-Table-2019.pdf. In total, seven states have a disproportionality rate greater than five, meaning that the proportion of Native children in foster care is more than five times that of the state population. Those states are South Dakota (9.4), Wisconsin (8.6), North Dakota (7.9), Iowa (6.3), Alaska (6), and Nebraska (6). *See* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., STATE-SPECIFIC FOSTER CARE DATA 2020 (2022), https://www.acf.hhs.gov/cb/report/state-foster-care-data-2020.

62. Brief of Casey Family Programs, *supra* note 58, at 18.

63. Hubbard & Urbina, *supra* note 58, at 35–37.

64. Guidelines for State Court; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (Nov. 26, 1979).

65. *Id.*

66. Under 25 U.S.C. § 1915(a) & (b), for example, the statutory preferences for adoptive and foster care placements must be followed in the absence of "good

implementation of ICWA, the Department of the Interior issued a revised set of guidelines in 2015 to promote uniformity.[67] While more comprehensive, these guidelines were still nonbinding and sparked recommendations that the Department issue binding regulations.

After engaging in a notice-and-comment process, the Department determined that its prior position had been in error and that it could indeed issue *binding* regulations pursuant to its authority "to promulgate such rules and regulations as may be necessary to carry out the provisions of the Act."[68] The regulations, known as the "Final Rule," became effective in December 2016.[69] In addition, the Department issued updated guidelines to replace the earlier versions.[70] Whether the Department's change of position was justified and whether it had the authority it asserted are points of dispute in *Brackeen*.

Key regulations implicated in the *Brackeen* litigation include directives governing the determination that a child is an Indian child,[71] the meaning of the "active efforts" requirement,[72] the qualified expert witness requirement,[73] the standard of evidence for termination of parental rights,[74] the operation of the

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cause to the contrary." With "good cause" being undefined by the Act, some state courts chose to follow the approach suggested in the 1979 guidelines while others developed their own approach. *See generally* Barbara Atwood, *Flashpoints under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 642–46 (2002).

67. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146 (Feb. 25, 2015).

68. 25 U.S.C. § 1952.

69. 25 C.F.R. § 23.143 (2016).

70. *See* BUREAU OF INDIAN AFFS., U.S. DEP'T OF INTERIOR, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT 6 (Dec. 2016) (describing the purpose of the Guidelines).

71. 25 C.F.R. § 23.107 (2016).

72. *Id.* at §§ 23.2, 23.120.

73. *Id.* at § 23.122.

74. *Id.* at § 23.121.

placement preferences and the good cause exception,[75] and the reporting requirements imposed on the states.[76]

The Final Rule, unlike the earlier guidelines, has the force of law. Still, the BIA distinguished between the use of the term "must," indicating that a directive was to be interpreted as mandatory, and the term "should," indicating that a directive was precatory. For example, the regulations provide that if there is reason to know a child is an Indian child but the court lacks sufficient information to determine the child's status definitively, "the court *must* . . . [t]reat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an 'Indian child.'"[77] In contrast, the regulation governing the good cause exception to the placement preferences states that the party seeking a departure "should" bear the burden of proving good cause "by clear and convincing evidence."[78] That heightened burden of proof, while only precatory, is the subject of attack in *Brackeen* as an overreach that goes beyond the statutory language.

II. *BRACKEEN* IN THREE ACTS

The *Brackeen* litigation, originally filed in October 2017, was one of several federal lawsuits challenging ICWA that ensued after the Supreme Court's decision in *Adoptive Couple*.[79] The Goldwater Institute, the National Council of Adoption Attorneys, and affiliated groups waged a campaign against the Act in multiple

75. *Id.* at § 23.130.

76. *Id.* at §§ 23.140–41.

77. 25 C.F.R. § 23.107 (emphasis added).

78. *Id.* at § 23.132(b).

79. *See, e.g.*, National Council of Adoption v. Jewell, No. 16-1110, 2017 WL 9440666 (4th Cir. Jan. 30, 2017) (challenge to 2015 ICWA Guidelines dismissed as moot after Guidelines were withdrawn); Watso v. Lourey, 929 F.3d 1024 (8th Cir. 2019) (challenge to tribal court jurisdiction under ICWA dismissed for failure to state claim), *cert. denied*, 140 S. Ct. 1265 (2020) (Mem.); Carter v. Tahsuda, 743 F. App'x 823 (9th Cir. 2018) (class action challenging constitutionality of ICWA dismissed as moot when named plaintiffs had succeeded in adopting Indian children).

venues,[80] but the district court's decision in *Brackeen* was the first federal court in the nation to declare ICWA unconstitutional.[81] With venue set in the Northern District of Texas, the assignment of the case to Judge Reed O'Connor was propitious. Judge O'Connor, appointed to the federal bench in 2007 by President George W. Bush, made national headlines in 2018 when he twice ruled that the Affordable Care Act was unconstitutional.[82] Although his decisions were not to last, they showed his willingness to issue controversial rulings with momentous national impact.

Brackeen marked the first time a state sued the United States in a challenge to ICWA. The states of Texas, Indiana, and Louisiana sued both in their sovereign capacities and as *parens patriae o*n behalf of their citizens. In the Second Amended Complaint filed in the spring of 2018—the controlling document for the litigation—the state plaintiffs broadly alleged that ICWA burdened them in their sovereign authority over child welfare administration within their borders.[83] In

80. *See* Leanne Gale & Kelly McClure, *Commandeering Confrontation: A Novel Threat to the Indian Child Welfare Act and Tribal Sovereignty,* 39 YALE L. & POL'Y REV. 292, 304–11 (2020) (describing efforts by the Goldwater Institute, the National Council for Adoption, and other advocacy groups to invalidate ICWA). In a series of podcasts, Cherokee journalist Rebecca Nagle recounts the lead-up to the litigation and the ulterior motives she ascribes to the lawyers and plaintiffs in attacking ICWA. *See* Rebecca Nagle, *This Land*, CROOKED MEDIA (2021), https://crooked.com/podcast-series/this-land/ (the *Brackeen* litigation is discussed in season 2).

81. *See* Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018); Linda D. Elrod & Robert G. Spector, *Review of the Year 2017–2018 in Family Law: Courts Tackle Immigration, Jurisdiction, and the Usual Family Law Disputes*, 52 FAM. L.Q. 519, 521 (2019) (noting that *Brackeen* marked "the first time in [ICWA's] forty-year history" that a federal court had held the Act to be unconstitutional).

82. *See* Texas v. United States, 300 F. Supp.3d 810 (N.D. Tex. 2018), *motion for reconsideration granted*, 336 F.Supp. 3d 664 (N.D. Tex. 2018), *aff'd in part, rev'd in part, vacated in part*, State v. Rettig, 987 F.3d 518 (5th Cir. 2021) (upholding constitutionality of certain provisions of Affordable Care Act and related administrative rules); Texas v. United States, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *aff'd in part, vacated in part*, 945 F.3d 355 (5th Cir. 2019), *rev'd, vacated*, California v. Texas, 141 S. Ct. 2104 (2021) (dismissing for lack of standing constitutional claims by state and individual plaintiffs against Affordable Care Act as amended by Tax Cuts and Jobs Act).

83. Second Amended Complaint and Prayer for Declaratory and Injunctive Relief at ¶¶ 23–26, Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (Civ.

addition, they asserted that they were representing as *parens patriae* the interests of "the many children within their custody and care" and "resident parents who are thinking about fostering and/or adopting a child."[84] The individual plaintiffs consisted of three non-Indian couples—the Brackeens, the Cliffords, and the Librettis—and a single woman, Socorro Hernandez, the birth mother of the child the Librettis sought to adopt. The defendants were the United States, the Department of Interior, the Bureau of Indian Affairs, the Department of Health and Human Services, and respective federal officers in their official capacities.[85]

The far-reaching impact of the substantive questions presented in *Brackeen*—potentially limiting federal authority to legislate for the benefit of tribes and tribal members—underscores the importance of the standing determination. The need for standing to sue has its roots in the "case or controversy" requirement of Article III and ensures that federal courts do not exceed their institutional authority.[86] The Supreme Court has identified three elements that must be established to satisfy the "irreducible constitutional minimum" for standing under Article III:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . .

Case No. 4:17-cv-00868-O) (filed Mar. 22, 2018) [hereinafter Second Amended Complaint].

84. *Id.* at ¶ 26.

85. *Id.* at ¶¶ 27–34. Over the course of the litigation, the individual defendants named in their official capacities changed as particular individuals resigned and new appointees took their place. Ryan Zinke, the first Secretary of Interior appointed by President Donald Trump, was replaced by Secretary David Bernhardt, who in turn was replaced by Secretary Deb Haaland, President Joe Biden's appointee.

86. *See, e.g.*, Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) (holding that consumer in suit against consumer reporting agency must establish invasion of legally protected interest that is not only concrete but also particularized).

> trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[87]

Thus, Article III requires concrete, particularized, and immediate injury traceable to the defendant's conduct that will be redressed by a favorable decision. Federal courts may not resolve claims that cannot affect the rights of litigants before them or render opinions advising "what the law would be upon a hypothetical state of facts."[88] Put differently, standing limits the category of litigants who can seek redress for a legal wrong in federal court and, in that sense, "confines the federal courts to a properly judicial role."[89]

The individual plaintiffs' arguments for traceablity in *Brackeen* are tenuous since the federal defendants played no role in their alleged injuries. In *California v. Texas*,[90] involving a constitutional challenge by individuals and states to the individual mandate of the Affordable Care Act (ACA), the Court drove home the causation nexus required for standing. Because Congress had amended the ACA to remove all means of enforcement of the mandate, the individual plaintiffs who had purchased insurance in response to the mandate failed to establish that governmental action was causally connected to their injury. The state plaintiffs, in turn, pointed to the increased cost of added enrollment to state health plans, but those increased costs depended on individuals' decisions to enroll, not on

87. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations omitted) (holding that environmental groups had not established concrete injury in challenge to administration of Endangered Species Act); *see also* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006) (state taxpayers lacked Article III standing to challenge award of state franchise tax credit to manufacturer).

88. Chafin v. Chafin, 568 U.S. 165, 172 (2013) (citations omitted).

89. Dep't of Commerce v. New York, 139 S. Ct. 2551, 2565 (2019) (internal quotes omitted).

90. 141 S. Ct. 2104 (2021).

governmental enforcement. Thus, the states likewise failed to allege an injury "fairly traceable" to the ACA's individual mandate.

The Supreme Court has also recognized a prudential dimension of standing as an aspect of judicial self-restraint that asks whether the litigant is the proper party to invoke judicial resolution of the claim in question.[91] In recent years, the Court has expressed misgivings about "prudential standing" doctrine, since it seemingly conflicts with the federal courts' "virtually unflagging" duty to hear and decide cases within their jurisdiction.[92] While the continued vitality of prudential standing concepts may be in question,[93] where Article III standing itself is in doubt, judicial self-restraint as a prudential matter may tip the scales toward dismissal. If injury and redressability are in question in cases involving constitutional issues of national import, as in *Brackeen*, the value of judicial self-restraint seems indisputable.[94]

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91. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (father lacked prudential standing to challenge on First Amendment grounds school district's practice of group recitations of Pledge of Allegiance where father did not have right to sue as next friend under state law).

92. Lexmark Intern., Inc. v. Static Control Components, Inc., 572 U.S. 118, 125–26 (2014). In *Lexmark,* the Court observed that "prudential standing" doctrines implicated general prohibitions against raising third-party rights, adjudicating generalized grievances, and asserting claims that fall outside a statute's intended zone of interests. Whether a plaintiff has stated a federal statutory cause of action, the Court noted, is not a prudential standing inquiry but turns on the plaintiff's ability to show injury within the intended scope of the statute, stating that that "'prudential standing' is a misnomer as applied to the zone-of-interests analysis." *Id.* at 127.

93. *See* June Medical Services L.L.C. v. Russo, 140 S. Ct. 2103, 2142–49 (2020) (Thomas, J., dissenting).

94. *See, e.g.*, Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99–106 (1979) (recognizing that federal courts have a duty "to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim").

A. District Court Proceedings

The *Brackeen* complaint sets forth factual narratives from the individual plaintiffs' perspectives, beginning with the efforts of Chad and Jennifer Brackeen to adopt A.L.M., a two-year-old boy whom they had fostered since infancy.[95] The Brackeens alleged that A.L.M.'s birth parents supported the adoption and that their petition to adopt in Texas family court had been denied initially because A.L.M. was an "Indian child" within the meaning of ICWA. Although A.L.M. was eligible for membership in both the Navajo Nation and the Cherokee Nation, the tribes agreed that the Navajo Nation would be designated as the child's tribe.[96] After the Navajo Nation identified a potential non-relative Navajo placement in New Mexico, the Texas family court ruled that the Brackeens had not established good cause to depart from the adoption preferences set out in ICWA.[97] When the Brackeens obtained an emergency stay on appeal to bar state officials from removing A.L.M. from their custody, the New Mexico placement withdrew. At that point, the Texas family court was presented with only one petition to adopt, making the placement preferences of § 1915 inapplicable under the holding in *Adoptive Couple*.

Although the Brackeens' adoption of A.L.M. was finalized in January 2018, they asserted that they retained a cognizable interest in the lawsuit because they intended to provide foster care for and possibly adopt other children in need, but because of their experience with ICWA and the Final Rule, they were "reluctant to provide a foster home for other Indian children in the future."[98] They further alleged that they and A.L.M. would be subject to prolonged uncertainty because of the possibility of collateral challenges under

95. Second Amended Complaint, *supra* note 83, at ¶¶ 127–55.
96. *Id.* at ¶ 138.
97. *Id.* at ¶ 143.
98. *Id.* at ¶ 154.

ICWA.[99] The Brackeens supplemented the record after final judgment in the district court to state that they were attempting to adopt A.L.M.'s infant half-sister.[100] A Navajo relative appeared in court to request adoption, and the Navajo Nation opposed the Brackeens' bid to adopt the child. In February 2019, the Texas court granted the Brackeens' motion to declare ICWA inapplicable as a violation of the Texas constitution. The court refrained from ruling on the federal constitutional claims, however, pending resolution of the case in the Fifth Circuit.[101]

The other individual plaintiffs likewise alleged sympathetic accounts of their attempts to adopt Native children. The Librettis, residents of Nevada, sought to adopt a child, identified as Baby O., who was eligible for membership in the Ysleta del Sur Pueblo Tribe.[102] The child's birth mother, plaintiff Hernandez, consented to the adoption. Although the Pueblo Tribe initially identified several placements among tribal members, the Librettis and the tribe entered a settlement permitting the Librettis to adopt Baby O. after the Librettis joined the *Brackeen* lawsuit and after the filing of the Second Amended Complaint. In December 2018, the Librettis successfully adopted Baby O.[103] They, like the Brackeens, assert that they intend to foster or adopt other children in the future and are reluctant to seek a Native child because of their experience with ICWA. They allege they thus continue to hold a stake in the outcome of the lawsuit.[104]

The Cliffords, a Minnesota couple, sought to adopt Child P., a child whose tribal affiliation was unclear for the first years of her life.[105] According to the alleged

99. *Id.* at ¶¶ 152–53.

100. *See* Brackeen v. Haaland, 994 F.3d 249, 294 n.15 (5th Cir. 2021) (en banc), *cert. granted* ___ U.S. ___, 142 S. Ct. 1205 (2022).

101. *Id.* at 289.

102. Second Amended Complaint, *supra* note 83, at ¶¶ 156–70.

103. *Brackeen*, 994 F.3d at 289.

104. Second Amended Complaint, *supra* note 83, at ¶ 170.

105. *Id.* at ¶¶ 171–77.

facts, the child's parents were unable to care for her due to drug-related offenses, and she moved among various foster homes. At the age of five, she was placed with the Cliffords, and the birth mother's parental rights were terminated. Once Child P.'s tribal membership in the White Earth Band of Ojibwe was confirmed, the state removed her from the Cliffords' custody and placed her with her maternal grandmother. The Cliffords unsuccessfully challenged the constitutionality of ICWA in the Minnesota court proceedings[106] while also joining the *Brackeen* litigation. Whether the Cliffords fully exhausted their state court remedies was questioned within the en banc court.[107]

All plaintiffs claimed that ICWA and the Final Rule, in defining "Indian child" and in the placement preferences, violate the equal protection rights of Indian children and of the individual plaintiffs under the Fifth Amendment as discrimination based on race and ancestry.[108] All plaintiffs also claimed that ICWA and the Final Rule usurped state authority over child welfare regulation and services. More specifically, they alleged that Congress lacked authority to enact ICWA under the Indian Commerce Clause,[109] that ICWA intruded into the states' traditional realm of domestic relations and burdened the states in violation of the Tenth Amendment,[110] and that the Final Rule was invalid under the Administrative Procedure Act (APA).[111] The state plaintiffs also contended that the right of tribes to adopt a different order of preference was an improper delegation of congressional authority.[112] Although not pursued on appeal, the state plaintiffs additionally

106. *See* In re Welfare of Child of S.B., No. 27-JV-15-483, 2019 WL 6698079 (Minn. Ct. App. Dec. 9, 2019) (rejecting equal protection, Tenth Amendment, and commandeering claims).

107. *Brackeen*, 994 F.3d at 437–41 (en banc) (Wiener, J., concurring in part and dissenting in part).

108. Second Amended Complaint, *supra* note 83, at ¶¶ 324–38.

109. *Id.* at ¶¶ 267–74.

110. *Id.* at ¶¶ 286–93.

111. *Id.* at ¶¶ 248–58.

112. *Id.* at ¶¶ 369–74.

alleged violations of Congress's spending powers, since Congress tied child welfare funding to compliance with ICWA.[113] The individual plaintiffs asserted yet another constitutional claim, the only one not sustained by Judge O'Connor: that their substantive due process rights under the Fifth Amendment in maintaining intimate familial relationships were violated by the placement preferences and corollary provisions of the Final Rule.[114]

Shortly after the case was filed, the Cherokee Nation, the Oneida Nation, the Quinault Indian Nation, and the Morongo Band of Mission Indians moved to intervene.[115] The tribes' motion reminded the court that in enacting ICWA, Congress protected "not only the interests of individual Indian children and families, but also of the tribes themselves,"[116] and that ICWA was "a law that is critical to the future of tribes as viable self-governing entities."[117] The unopposed motion was granted,[118] and the tribes have continued to participate fully in the litigation, including petitioning for certiorari in the Supreme Court. The Navajo Nation, in contrast, sought to intervene solely for the purpose of seeking dismissal, arguing that the Nation itself was an

113. Under the Social Security Act, states receiving child welfare funding through Title IV-B, Part I of the Act and foster care and adoption funding through Title IV-E of the Act must file annual reports including compliance with ICWA, and funding is partially contingent on how well the states demonstrate compliance. *See generally* Brackeen v. Zinke, 338 F. Supp. 3d 514, 522–23 (N.D. Tex. 2018).

114. Second Amended Complaint, *supra* note 83, at ¶¶ 342, 351–64.

115. Brief in Support of Cherokee Nation et al. Motion to Intervene as Defendants at 2–3, Brackeen v. Zinke (N.D. Tex. 2018) (Civ. Case No. 4:17-cv-00868-O) (filed Mar. 26, 2018). The four tribes vary in size and location, ranging from the Cherokee Nation, based in Oklahoma, the largest tribal nation in the United States with over 355,000 citizens, to the Morongo Band of Mission Indians in California, with about 1000 enrolled citizens. *Id.*

116. *Id.* at 6–7 (quoting Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989)).

117. *Id.* at 8. The tribes emphasized that as sovereigns, they are the intended beneficiaries of ICWA and should not be relegated to dependence on the positions of others in the litigation. *Id.* at 9.

118. The court granted the motion to intervene as defendants "of right and permissively" pursuant to Rule 24, FED. R. CIV. PRO. *See* Order, Brackeen v. Zinke, (N.D. Tex. 2018) (Civ. Case No. 4:17-cv-00868-O) (Mar. 28, 2018).

indispensable party but was immune from suit.[119] After losing that motion, the Nation did not renew efforts to intervene until after the district court's grant of summary judgment, a motion that succeeded in the Fifth Circuit.[120]

With the case docketed, the federal defendants joined later by the tribal intervenor/defendants, moved to dismiss for failure to establish federal subject-matter jurisdiction on multiple grounds, focusing primarily on standing.[121] Judge O'Connor denied the motion in its entirety.[122] He reasoned that the individual plaintiffs, as non-Indians seeking to adopt Indian children, had been burdened by the heightened statutory and regulatory requirements of ICWA and the Final Rule. Even when the desired adoption had succeeded, the risk of collateral attack under ICWA was a "concrete and particularized injury."[123] The plaintiffs' injuries were traceable to the defendants' conduct, in the court's view, since the defendants had promulgated the Final Rule, and the Rule, by its own terms, requires states to comply or face loss of funding for child welfare programs.[124]

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119. Motion of the Navajo Nation to Intervene as Defendant for the Limited Purpose of Seeking Dismissal Pursuant to Rule 19, Brackeen v. Zinke (N.D. Tex. 2018) (Civ. Case No. 4:17-cv-00868-O) (Apr. 26, 2018).

120. *See* Brackeen v. Bernhardt, 937 F.3d 406, 420 n.2 (5th Cir. 2019). After the en banc decision, the Nation chose not to petition for certiorari but announced that it would participate on the merits in supporting the other petitioners if the Supreme Court were to grant review. Letter from Navajo Nation, Off. Att'y Gen., to Scott S. Harris, Clerk of the Court, Sup. Ct. U.S. (Oct. 6, 2021) http://www.supremecourt.gov/DocketPDF/21/21-377/194680/20211006102243569_2021-10-06%20Ltr%20to%20Court%20re%20Cherokee%20v%20Brackeen%2021-377.pdf.

121. The defendants also argued that Nevada and Minnesota were indispensable parties, that the court should dismiss under *Younger* abstention, and that plaintiffs had waived their attacks on the Final Rule by not having submitted comments during the open comment period. Brackeen v. Zinke, Civ. Action No. 4:17-cv-00868-O, 2018 WL 10561971, slip op. at 11 (N.D. Tex. Oct. 4, 2018).

122. Brackeen v. Zinke, Civ. Action No. 4:17-cv-00868, 2018 WL 10561971 (N.D. Tex. July 24, 2018).

123. *Brackeen*, slip op. at 12.

124. *Id.* at 13.

The defendants maintained that a decision by the federal courts would not redress the individual plaintiffs' alleged injury since a declaratory judgment on the constitutionality of ICWA would not bind state courts.[125] Judge O'Connor reasoned, however, that the redressability requirement could be satisfied if a judgment "would at least make it easier" for the plaintiffs to achieve their desired result.[126] A decision striking down ICWA, he explained, would make it more likely that the plaintiffs would obtain relief since the federal defendants would be unable to require compliance with ICWA and the Final Rule. He also suggested that the Brackeens' injury would be redressed since their adoption of A.L.M. would be shielded from collateral attack.[127] The court concluded that the individual plaintiffs had standing to challenge ICWA's placement preferences as beyond congressional power and violative of equal protection and to challenge the Final Rule as unlawful under the APA and likewise violative of equal protection.[128]

The state plaintiffs asserted standing both as *parens patriae* representing the equal protection rights of their citizens and as sovereigns seeking to block federal intrusion into a realm of traditional state concern. In Judge O'Connor's view, the states had stated a sufficient injury-in-fact due to "their interests as quasi-sovereigns to control the domestic affairs within their states."[129] Accepting the plaintiffs' arguments that their injury was "directly traceable to the application of the ICWA and the Final Rule to the domestic authority of the state," he concluded that the state plaintiffs had standing to challenge ICWA as beyond Congress's Article I power and as violative of the Tenth Amendment.[130] The court

125. *Id.*

126. *Id.* (quoting Duarte v. City of Lewisville, 759 F.3d 514, 521 (5th Cir. 2014)).

127. *Id.*

128. *Id.* at 15–16.

129. *Id.* at 15.

130. *Id.* at 16.

also upheld the states' standing to assert their non-delegation claim and the claim attacking the Final Rule as a violation of the APA. In short, Judge O'Connor gave the green light to all plaintiffs, sustaining their standing to assert every claim in the complaint and dispatching the other justiciability defenses.[131]

With the procedural obstacles out of the way, the parties filed cross-motions for summary judgment on the merits. In October 2018, the court issued a declaratory judgment, ruling for the plaintiffs on almost every count.[132] Accepting the plaintiffs' equal protection arguments, he concluded that ICWA's definition of "Indian child" was not a political classification within the ambit of *Morton v. Mancari*,[133] but rather a classification based on race or ancestry similar to the voting restriction for "native Hawaiians" struck down in *Rice v. Cayetano*—a case arising under the Fifteenth Amendment that expressly distinguished statutes resting on membership in federally recognized Indian tribes.[134] As Judge O'Connor framed it, "By deferring to tribal membership *eligibility* standards based on ancestry, rather than *actual* tribal affiliation, the ICWA's jurisdictional definition of 'Indian children' uses ancestry as a proxy for race and therefore 'must be analyzed by a reviewing court under strict scrutiny.'"[135] Discounting the history of concerted state efforts to sever Native children's tribal identities, he concluded that ICWA was broader than necessary "because it establishes standards that are unrelated to specific tribal interests and applies those

131. *Id.* at 16–19 (rejecting arguments based on ripeness, sovereign immunity, *Younger* abstention, and waiver).

132. Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018).

133. 417 U.S. 535 (1974), discussed *supra* notes 20–21 and accompanying text.

134. 528 U.S. 495, 518 (2000) (striking down state law restricting voter eligibility in a statewide election for a state agency to "native Hawaiians" and those with "Hawaiian" ancestry as racial classification subject to strict scrutiny).

135. 338 F. Supp. 3d at 533–34 (emphasis in original) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)). Judge O'Connor turned down the defendants' request for additional time for briefing to address the compelling state interest inquiry, noting that defendants during oral argument had "failed to articulate any interest they viewed as compelling." *Id.* at 534 n.12.

standards to *potential* Indian children."[136] He also emphasized that the placement preferences of section 1915(a) include two preferences unrelated to tribal interests: placement with a child's extended family and placement with "other Indian families."[137] As will be seen, his analysis was soundly rejected by the Fifth Circuit panel but gained traction within the en banc court.

Judge O'Connor was equally receptive to the plaintiffs' remaining claims. In an expansive reading of *Murphy v. National Collegiate Athletic Association*,[138] he held that ICWA directs state governments in various respects and thus unconstitutionally commandeers state courts and executive agencies.[139] As noted on appeal, however, ICWA confers federal rights and duties on private individuals enforceable in state courts, thus resembling other federal laws sustained as examples of valid federal preemption.[140] Moreover, the duties imposed on state agencies under ICWA are intended to address widespread malfeasance by states in the era preceding ICWA—unlike the scenarios in which the Supreme Court has found unconstitutional commandeering.[141]

Judge O'Connor also sustained the plaintiffs' challenges to the Final Rule, holding that it violates the APA and that particular regulations exceeded the BIA's statutory authority.[142] As to Congress's authority under the Indian Commerce Clause, the court seemed to

136. *Id.* at 535.

137. *Id.* at 535–36.

138. 138 S. Ct. 1461 (2018) (holding that federal law prohibiting state legislatures from authorizing sports gambling violated anticommandeering principle).

139. 338 F. Supp. 3d at 538–41.

140. *See* Brackeen v. Bernhardt, 937 F.3d 406, 430–35 (5th Cir. 2019).

141. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997) (striking down federal law that required state law enforcement officers to conduct background checks on handgun purchasers); New York v. United States, 505 U.S. 144 (1992) (striking down federal law that required state to take title to radioactive waste or to regulate according to instructions from Congress).

142. 338 F. Supp. 3d at 542–46. The nondelegation claim regarding section 1915(c) succeeded as well. *Id.* at 536–37.

conflate the Tenth Amendment and Commerce Clause issues, cursorily announcing that "*Murphy* does not permit Congress to directly command the states in this regard, even when it relies on Commerce Clause power."[143] In the only loss for the plaintiffs, the court denied the individual plaintiffs' substantive due process claims under the Fifth Amendment, noting that the Supreme Court had never extended fundamental familial rights to foster families or prospective adoptive parents.[144]

The *Brackeen* plaintiffs had less than a year to savor their almost complete victory. In August 2019, a divided panel of the Fifth Circuit affirmed the district court as to standing on the core claims but reversed the judgment on the merits.[145]

B. Fifth Circuit Panel Ruling

The panel majority decision, authored by Judge Dennis, construed standing requirements generously, thus enabling the court to reach the substantive questions and decisively overturn the district court's blanket invalidation of ICWA. In addressing the standing of the individual plaintiffs, the Fifth Circuit focused primarily on the Brackeens, since the standing of at least one plaintiff was all that was needed. The court upheld the Brackeens' standing to assert an equal protection claim as to the definition of Indian child, the placement preferences of section 1915, and the Final Rule, agreeing with the district court that the increased burdens imposed by ICWA and the Final Rule were sufficient to demonstrate injury.[146] Although the Brackeens had adopted A.L.M., the court rejected the defendants' argument that the claims were moot. Viewing the dispute as one that was "capable of

143. *Id.* at 546.
144. *Id.*
145. Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019).
146. *Id.* at 422–23.

repetition, yet evading review,"[147] the court noted that the Brackeens would again be subject to ICWA's regulatory burdens in their attempt to adopt A.L.M.'s sister. Taking a lenient view of the requirement of redressability, the court reasoned that the Texas state court had indicated it would refrain from ruling on the Brackeens' constitutional claims pending a ruling from the Fifth Circuit.[148] Whether the Texas court's mere willingness to abide by a federal court decision, without more, is sufficient to meet the Article III requirement of redressabiity became a matter of debate within the en banc court.[149]

Importantly, the court rejected the argument that the risk of collateral challenge to a finalized adoption under sections 1913 and 1914 of ICWA posed a cognizable injury to the individual plaintiffs.[150] In the court's view, none of the individual plaintiffs had shown actual injury from the mere possibility of a collateral challenge, and the fear of such a challenge, without grounding in fact, was "too speculative to support standing."[151] Thus, at the panel stage, those provisions of ICWA were no longer at issue.

The Fifth Circuit recognized the standing of the state plaintiffs in their sovereign capacities to assert their core constitutional claims—that the regulatory burdens imposed by ICWA and the Final Rule violated the Tenth Amendment and that section 1915(c) was an invalid delegation of congressional authority.[152] The court likewise upheld the states' standing to challenge the Final Rule under the APA. The states failed, however, in their assertion of *parens patriae* standing to bring an equal protection challenge. In a cursory

147. *Id.* at 423.

148. *Id.* at 423–24.

149. *See* Brackeen v. Haaland, 994 F.3d 249, 372–73, 445–52 (5th Cir. 2021) (en banc), *cert. granted* ___U.S. ___, 142 S. Ct. 1205 (2022).

150. As noted by the Fifth Circuit, no individual plaintiff had shown a realistic risk of challenge under either provision. *Id.* at 422.

151. *Id.*

152. *Id.* at 424–25.

footnote, the court reiterated the longstanding principle that states may not bring *parens patriae* suits on behalf of their citizens against the United States.[153]

On the merits, all three members of the Fifth Circuit panel agreed that ICWA's definition of "Indian child" is a political rather than racial classification under established federal Indian law principles. The panel distinguished *Rice* and noted that nonmember children who come within ICWA's definition are within the scope of *Morton v. Mancari* because a child who is eligible for membership clearly has a tribal affiliation, albeit "not-yet-formalized."[154] As such, the statute was subject to rational basis review, and the court easily concluded that ICWA was rationally related to the legitimate goals of protecting the best interests of Indian children and promoting the stability and security of tribes.[155]

The plaintiffs' other claims met a similar fate. A majority rejected the district court's holding that ICWA impermissibly commandeers state agencies in violation of the Tenth Amendment. Applying the lessons of *Murphy,* Judge Dennis reasoned that ICWA's application to state courts was not commandeering but a proper exercise of congressional power, binding under the Supremacy Clause.[156] In other words, ICWA establishes federal standards for Indian child welfare proceedings, and those standards preempt contrary state law. As to ICWA's application to agencies, the majority concluded that because ICWA reaches both state and private actors in an even-handed manner, it does not constitute commandeering under *Murphy*.[157]

In a partial dissent, then-Judge Owen pointed to three sections of ICWA that apply directly to state agencies and, in her view, constitute impermissible

153. *Id.* at 422 n.4 (citing South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966), where the Supreme Court held that South Carolina lacked standing as the purported "parent of its citizens" to assert Fifth Amendment claims against the United States—"the ultimate parens patriae of every American citizen").

154. *Brackeen*, 937 F.3d at 428.

155. *Id.* at 429–30.

156. *Id.* at 431.

157. *Id.* at 431–33.

commandeering: section 1912(d) (active efforts), section 1912(e) (qualified expert witness), and section 1915(e) (recordkeeping).[158] Her analysis attracted majority support on rehearing.

The court gave short shrift to the remaining claims.[159] Concluding that the Department of Interior had sufficiently explained its reasons for promulgating the binding Final Rule after four decades of experience with the non-binding 1979 Guidelines, the Court rejected the APA challenge.[160] The court also upheld the Final Rule's provision on the burden of proof for establishing good cause to depart from the placement preferences.[161] Applying the deferential *Chevron* standard, the court noted that ICWA was silent as to burden of proof for establishing good cause and that the precatory suggestion was a reasonable interpretation of the statute.[162]

The defendants' victory on the merits was short-lived. The Fifth Circuit granted plaintiffs' petitions for en banc review, vacated the panel ruling, and ultimately announced its decision in April 2021. [163]

C. Rehearing En Banc

The 16-member en banc court delivered a lengthy and fractured decision, affirming in part and reversing in part—sometimes by a slim majority—or affirming by an equally divided court, the latter carrying no

158. *Id.* at 443–46.

159. A tribe's right to adopt a different order of preference under section 1915(c) was, in the panel's view, not an improper delegation but rather Congress's "incorporation of inherent tribal authority." *Id.* at 437. The court relied largely on United States v. Mazurie, 419 U.S. 544 (1975), where the Supreme Court rejected a charge of improper delegation as to a federal law allowing the Wind River Tribes to adopt ordinances governing alcohol on privately owned land within reservation boundaries.

160. 937 F.3d at 437–40.

161. *Id.* at 440–41.

162. *Id.* at 441 (applying Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

163. Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc), *cert. granted* ___ U.S. ___, 142 S. Ct. 1205 (2022).

precedential effect.[164] Judges Dennis and Duncan authored opposing opinions for a shifting coalition. Perhaps out of sympathy for the reader, the court outlined the decision in a per curiam introduction.[165]

On the question of standing, two holdings garnered unanimity: (1) at least one plaintiff had standing to challenge Congress's authority under Article I to enact ICWA and to assert anti-commandeering and nondelegation challenges to specific ICWA provisions; and (2) the plaintiffs had standing to challenge the Final Rule as unlawful under the APA.[166] In upholding the state plaintiffs' standing to assert anti-commandeering and non-delegation claims, the court reasoned that the plaintiffs had suffered ongoing injury from the increased regulatory burdens imposed by ICWA and thus satisfied the injury-in-fact and causation requirements for standing.[167] The court concluded that a favorable decision would redress the plaintiffs' injuries because state courts, while not bound, would likely defer to a ruling from the federal court.[168]

The en banc court divided on the pivotal question whether the *Brackeen* plaintiffs had Article III standing to assert equal protection claims.[169] Despite strong

164. The risks inherent in courts comprised of an equal number of judges came through loud and clear in *Brackeen*. Since an affirmance by an equally divided court binds only the court below, see United States v. Garcia, 604 F.3d 186, 190 n.2 (5th Cir. 2010), the various holdings of the district court that were affirmed by an equally divided court in *Brackeen* had no precedential effect in the Fifth Circuit, let alone in federal courts in other circuits. While there may be strong institutional arguments for an equal number of Justices on the United States Supreme Court, see Michael Miller & Samuel Thumma, *It's Not Heads or Tails: Should SCOTUS Have an Even or Odd Number of Justices?,* 31 S. CAL. INTERDISC. L.J. 1 (2021), the waste of judicial resources that results from affirmances by an equally divided federal court of appeals seems beyond dispute.

165. 994 F.3d at 267–69.

166. *Id.* at 267.

167. *Id.* at 297, 369.

168. *Id.* at 372–73.

169. *Compare id.* at 291–96 (Dennis, J., opinion) (upholding plaintiffs' standing), *with id.* at 432–33 (Owen, C.J., dissenting in part) (rejecting individual plaintiffs' standing on redressability grounds), *and id.* at 437–41 (Wiener, J., dissenting in part) (rejecting individual plaintiffs' standing for lack of present injury).

dissents, a majority held that individual plaintiffs had standing to challenge on equal protection grounds the placement preferences of sections 1915(a) and (b) and corresponding provisions of the Final Rule.[170] The judges were equally divided, however, on whether the plaintiffs had standing to target sections 1913 and 1914 (governing collateral challenges) and thus affirmed the district court's recognition of standing.[171] The plaintiffs' standing to challenge ICWA on equal protection grounds is examined in more detail Part III.

On the merits, the en banc court rendered a splintered assessment of ICWA. A majority held that Congress had authority to enact ICWA under the Indian Commerce Clause of Article I of the Constitution, relying on Congress's well-established plenary power over Indian affairs that extends beyond commerce per se.[172] Judge Duncan countered in dissent with a cramped view of congressional power to intrude on the child welfare domain of states.[173] As to equal protection, a majority recognized that ICWA's definition of "Indian child" is based on political association rather than race under *Morton v. Mancari* and rationally promotes tribal survival and tribal sovereignty.[174] In opposition, Judge Duncan opined that the court need not decide whether ICWA's classification is political or racial in nature because it fails to satisfy even the rational basis test.[175] He contended that because the classification applies to children with tenuous connections to tribes and allows parents' wishes to be overridden, it fails to rationally further tribal interests.[176] The en banc court was equally divided as to whether the plaintiffs should prevail on their equal protection claims regarding ICWA's third-tier placement preferences under section 1915(a)(3)

170. *Id.* at 267.
171. *Id.*
172. *Id.* at 306–07.
173. *Id.* at 373–79.
174. *Id.* at 267–68, 332–40.
175. *Id.* at 393–96.
176. *Id.* at 396.

("other Indian families") and section 1915(b)(iii) ("Indian foster home"), thus affirming the district court's ruling without precedential effect.[177]

Not surprisingly, the commandeering claim also garnered fragmented holdings. A majority ruled that ICWA, through section 1912's mandate for active-efforts, expert witness testimony, and recordkeeping, directly regulates state agencies in violation of the anti-commandeering principle, thus agreeing with Chief Judge Owen's dissent in the panel decision.[178] The court, however, was equally divided as to whether other sections of ICWA concerning placement preferences, notice to tribes, and recordkeeping likewise constitute unlawful commandeering. Thus, the district court's holding that those sections constitute commandeering was again affirmed without precedential impact. In contrast, a majority rejected the anti-commandeering claims as to certain procedural rights conferred on parents and tribes by ICWA, such as the right to intervene and the right to appointed counsel, reasoning that such provisions validly preempt state law.[179] Similarly, a majority rejected anti-commandeering claims as to the placement preferences and heightened burdens of proof to the extent they apply to state courts rather than state agencies.[180]

Lastly, the en banc court addressed the plaintiffs' various challenges to the Final Rule. A majority held that the promulgation of the Final Rule itself was not in violation of the APA, concluding that the BIA had reasonably determined that it had the power to issue regulations binding on state courts and that such regulations were needed to ensure compliance with

177. *Id.* at 268.

178. *Id.* at 268–69.

179. *Id.* at 268.

180. *Id.* at 268–69. The majority also rejected the state plaintiffs' nondelegation claim, ruling that section 1915(c) was a valid recognition of inherent sovereign authority of tribes. *See id.* at 269, 346–52.

ICWA.[181] In contrast, a majority sustained the claim that the Final Rule exceeded the scope of ICWA in its provision on burden of proof for good cause.[182]

Thus, the en banc court's complex rulings revealed sharp divisions among the judges. Taken together, the questions presented in the four petitions for certiorari ask whether Congress was within its Article I authority in enacting ICWA in the first place, whether particular requirements in ICWA constitute unlawful commandeering, and whether ICWA's definition of "Indian child" and its placement preferences violate the Fifth Amendment's implied equal protection component. The petitions also raise the constitutionality of ICWA's recognition of tribal authority to select a different order of preference as well as the validity of the Final Rule. Given the competing holdings on the constitutionality of ICWA and the Final Rule—and the inconclusive nature of affirmances by an equally divided court—the Supreme Court's grant of review came as no surprise.

III. QUESTIONING PLAINTIFFS' STANDING IN *BRACKEEN*

The substantive questions raised in *Brackeen* are complex and carry broad implications for federal Indian law, but preliminary questions of justiciability loom large. Most prominent among them is whether any plaintiff has presented justiciable claims under the equal protection component of the Fifth Amendment.

Considering the state plaintiffs' claims first, the states appear to have strong arguments for standing to challenge ICWA on Tenth Amendment grounds and the Final Rule under the APA. The states' "sovereign interest in controlling child custody proceedings in state courts" and the regulatory impact of ICWA and the Final Rule seem sufficient to establish injury.[183] Moreover,

181. *Id.* at 269, 353–58. A different majority, however, ruled that the Final Rule did violate the APA to the extent it implemented provisions of ICWA viewed by that majority to constitute commandeering. *Id.* at 269, 425–29.

182. *Id.* at 269, 429–31.

183. *Id.* at 296–97.

states suing as sovereigns are entitled to special solicitude, particularly when challenging agency action under the APA.[184] Likewise, the state plaintiffs can show causation and redressability since a ruling against the federal defendants would lift the mandatory application of ICWA and the Final Rule.[185]

On the other hand, the state plaintiffs have little basis for standing to assert equal protection claims. The due process clause of the Fifth Amendment with its implied equal protection component[186] protects persons, not states.[187] Thus, the states cannot assert equal protection claims on their own but only as *parens patriae* on behalf of their citizens. The Supreme Court has made clear, however, that states cannot assert their citizens' individual rights against the United States, since the United States is "the ultimate *parens patriae* of every American citizen."[188] Moreover, the states could not represent the interests of *all* citizens, since some portion of their citizenry would surely have divergent views on the claims being advanced. While the states may have standing to challenge ICWA and the Final Rule under Article I, their lack of standing to assert equal protection claims leaves that dimension of the case to the individual plaintiffs.

The individual plaintiffs likewise face significant hurdles in establishing justiciable equal protection claims. A majority of the en banc court recognized the Brackeens' standing to challenge on equal protection grounds the adoptive placement preferences under section 1915(a) and the Cliffords' standing to challenge the foster care preferences under section 1915(b). Recall

184. *See, e.g.*, Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 518–20 (2007) (state entitled to special solicitude if asserting injury in sovereign capacity and relying on statutory right to file suit).

185. *Brackeen*, 994 F.3d at 297.

186. Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954) (in challenge to racial segregation of District of Columbia public school, holding that due process clause of Fifth Amendment encompasses concept of equal protection and ideal of fairness).

187. South Carolina v. Katzenbach, 383 U.S. 301, 323–24 (1966).

188. *Id.* at 324.

that the Brackeens completed their desired adoption of A.L.M. To be entitled to injunctive or declaratory relief, they had to show present or imminent future injury, not simply that they had experienced past wrongs.[189] In their effort to establish a continued stake in the controversy and avoid a mootness determination, the plaintiffs alleged they were injured by the possibility of collateral challenges to the adoption under sections 1913 or 1914, a speculative injury dependent on the potential actions of birth parents or others.[190] Standing, however, cannot rest on the possible conduct of third parties without facts suggesting a "risk of real harm"—that is, a real probability that the conduct will ensue.[191]

Alternatively, the Brackeens alleged that they might seek to adopt in the future and would again encounter ICWA's constraints, and they supplemented the district court record after judgment with information about their unsuccessful efforts to adopt A.L.M.'s sister. That argument succeeded in the en banc court over strong dissents, Judge Dennis concluding that "even if the Brackeens had lacked standing at some point . . . , their supplementation of the record . . . cured any defect."[192] Standing, however, must exist at the time of judgment and cannot be cured retroactively, even if a dismissal might cause inefficiencies.[193] In *Summers v. Earth Island Institute*, the Supreme Court refused to consider late-filed affidavits in determining whether environmental groups had standing to seek a nationwide

189. *See, e.g.*, Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1619 (2020) (pension plan participants lacked standing to challenge plan under ERISA since participants had received all benefits due); City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (plaintiff who had been victim of past police misconduct lacked standing to seek injunctive relief against future police misconduct).

190. *See Brackeen*, 994 F.3d at 291–93 (Dennis, J.).

191. *See, e.g.*, TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2210 (2021) (consumers who alleged harm from risk that inaccurate credit alerts might be disseminated to third parties lacked Article III standing).

192. 994 F.3d at 294 n.15.

193. *See id.* at 440 (Wiener, J., dissenting in part) (noting that "a lack of standing cannot be cured by evidence entered into the record after final judgment").

injunction against the United States Forest Service.[194] The Court noted that the evidence was submitted after final judgment and after notice of appeal had been filed, suggesting that the plaintiffs' theory would place the Court "at the threshold of a brave new world of trial practice" in which finality has been swallowed by ease of amendment.[195] In *Brackeen,* the supplementation came only a few days after final judgment, presumably before notice of appeal. Thus, assessment of the Brackeens' present injury may turn on the propriety of considering facts submitted after judgment.

An alternative basis for the plaintiffs' standing might be the "capable of repetition yet evading review" exception to the mootness doctrine.[196] That exception applies only if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.[197] As recognized recently by the Ninth Circuit, child welfare and adoption proceedings can last for years, with ample opportunity for state courts to consider constitutional claims.[198] Likewise, unless the plaintiffs' post-judgment evidence is considered, their allegations that they might attempt to adopt Native children in the future would seem too speculative to meet the second requirement of "reasonable expectation."[199]

As to the Cliffords, their effort to adopt Child P. failed in the Minnesota courts, with the state courts rejecting the same constitutional claims raised in *Brackeen*. The Cliffords did not seek review in the United States Supreme Court but instead joined the *Brackeen*

194. 555 U.S. 488 (2009).

195. *Id.* at 500.

196. 994 F.3d at 370–71, 370 n.14 (Duncan, J.).

197. United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1540–41 (2018) (holding that case-or-controversy requirement is not satisfied by possibility that a party may be prosecuted in future for violating valid criminal laws).

198. *See, e.g.*, Carter v. Tahsuda, 743 F. App'x 823 (9th Cir. 2018) (dismissing class action challenge to ICWA as moot where named plaintiffs' adoptions had finalized).

199. *Sanchez-Gomez*, 138 S. Ct. at 1540–42.

litigation. Their asserted injury is, in effect, their continued dissatisfaction with the result in the Minnesota courts.[200] Even if that dissatisfaction constitutes a cognizable injury, the Cliffords, along with the Brackeens, also must show that a federal court judgment could provide redress.

As noted by en banc dissenters, the key elements of traceability and redressability are in doubt.[201] The federal defendants are not responsible for enforcing ICWA within the states; rather, state courts and state child welfare agencies implement ICWA. Thus, whether the individual plaintiffs' claimed injuries can be traced to any action by the defendants is dubious. Moreover, given that a lower federal court's holding on ICWA's constitutionality does not bind state courts,[202] the plaintiffs may fall short in establishing that declaratory or injunctive relief would redress their injuries. As noted in Part II, an en banc majority concluded that redressability was met because state courts, at least in Texas, indicated willingness to defer to federal court rulings.[203] Surprisingly, the en banc majority also reasoned that it is "substantially likely" that the Minnesota courts would abide by an interpretation of ICWA by the Fifth Circuit—without acknowledging that the Minnesota courts had already ruled on the very same constitutional claims.[204] In any event, the likely persuasiveness of a federal court judgment would seem to fall short of the requirement for redressability. As the Supreme Court recently emphasized, for redressability to be satisfied, the requested remedies must operate with respect to specific parties and "do not simply 'operate on

200. Child P., moreover, has been finally adopted, thus ending any claim for prospective relief. *See* Brief for Robyn Bradshaw, Grandmother and Adoptive Parent of P.S. ("Child P.") As Amicus Curiae in Support of Tribal and Federal Defendants at 1, Haaland v. Brackeen, No. 21-376 (Aug. 19, 2022).

201. 994 F.3d at 441 (Wiener, J., dissenting in part); *id.* at 446–51 (Costa, J., concurring in part and dissenting in part).

202. *See* Arizonans for Official Eng. v. Arizona, 520 U.S. 43, 58 n.11 (1997).

203. *See supra* note 168 and accompanying text.

204. *Brackeen*, 994 F.3d at 295.

legal rules in the abstract.'"[205] The fact that a holding from the Supreme Court would bind all courts as a matter of precedent does not cure the redressability problem, since the plaintiffs cannot rely on securing review in the high Court at the outset of litigation.

The posture of *Brackeen* as a facial challenge complicates the standing problems. Because the plaintiffs challenge the facial constitutionality of ICWA,[206] they must establish that "'no set of circumstances exists under which the law would be valid' or show that the law lacks 'a plainly legitimate sweep.'"[207] Generally disfavored, at least outside the First Amendment context, facial challenges are in tension with principles of judicial restraint—particularly the maxim that courts should avoid deciding constitutional questions unless "absolutely necessary to a decision of the case."[208] While facial and as-applied challenges may not be as distinct as once thought,[209] the risk that a facial challenge may invite advisory opinions seems all too real.

For example, no plaintiff alleged a direct impact of ICWA's third-tier placement preferences under section 1915(a)(3) and (b)(iii), but the en banc court nevertheless considered facial challenges to those provisions. Dividing equally on the merits, the judges disagreed about whether the third-tier preferences were sufficiently linked to the promotion of tribal interests.[210] Depending

205. California v. Texas, 141 S. Ct. 2104, 2115 (2021) (quoting Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018)).

206. *Brackeen*, 994 F.3d at 270.

207. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2387 (2021).

208. *See* Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g, P.C., 467 U.S. 138, 157 (1984); *see also* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450–51 (2008) (facial challenges run counter to principle that courts should not formulate rule of constitutional law broader than required by the precise facts to which it is applied).

209. *See generally* Richard H. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000) (suggesting that distinctions between facial and as-applied challenges are rooted in applicable constitutional doctrine).

210. *Brackeen*, 994 F.3d at 400–01 (Duncan, J., concurring in part, dissenting in part).

on the factual context, tribal interests may be directly advanced even by the third-tier preferences, since distinct tribes often share a common heritage and common cultural values. But without a firm grounding in a factual setting, the district court and Fifth Circuit addressed the constitutionality of third-tier preferences as an abstract question of law—an inevitable consequence of the plaintiffs' purported facial challenge.

In light of such slender bases for Article III standing, the posture of the individual plaintiffs' cases tilts against justiciability. Ordinarily, when people seek relief from ongoing state governmental action, the constitutional claims are resolved in the state court proceedings.[211] In *Brackeen,* however, the individual plaintiffs not only asserted constitutional claims in their adoption and foster care proceedings but simultaneously resorted to federal court for a facial constitutional challenge. The exercise of federal jurisdiction on those facts sends a message of disdain toward the state courts. As Judge Costa put it in dissent:

> To supposedly vindicate federalism, we offend it by deciding questions that state court judges are equipped to decide and have for decades—with the Supreme Court having a chance to review those rulings . . . . That we disregard the limits of federal jurisdiction to reach out and decide issues that are raised directly in adoption cases makes our lack of faith in our state court colleagues even more troubling.[212]

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211. *See, e.g.*, Whole Woman's Health v. Jackson, 142 S. Ct. 522, 538 (2021) (in refusing to resolve constitutional challenge to Texas abortion restriction known as "S.B. 8," the Supreme Court noted that federal constitutional rights are typically asserted as defenses to state-law claims rather than in federal pre-enforcement cases); Moore v. Sims, 442 U.S. 415 (1979) (holding federal court should have abstained in constitutional challenge to state child abuse proceedings); Oglala Sioux Tribe v. Fleming, 904 F.3d 603 (8th Cir. 2018) (holding federal court should have abstained from deciding tribes' and tribal members' due process and ICWA-based claims against state child welfare officials).

212. *Brackeen*, 994 F.3d at 451 (Costa, J., dissenting in part, concurring in part) (citations omitted).

Brackeen, then, presents a wholesale attack on ICWA and long-accepted equal protection doctrine, but the vehicle for such attack is a set of plaintiffs who are teetering at the edge of Article III standing requirements.

IV. CONCLUSION

Brackeen is indisputably a case of national import. The substantive questions go beyond the validity of ICWA and the Final Rule to core understandings of congressional authority to legislate for the benefit of tribes and Native children and families. Themes emerging in recent Indian law jurisprudence may have resonance in *Brackeen.*[213] The *Castro-Huerta* decision, in particular, evinces a high regard for state authority and concomitantly a disregard for tribal sovereignty and traditional allocations of criminal jurisdiction between states and tribes.[214] While *Castro-Huerta* turned ostensibly on the interpretation of the relevant criminal statute,[215] it opens a door to the recognition of expanded state sovereignty in realms of traditional state concern. The Tenth Amendment arguments advanced by the state plaintiffs in *Brackeen* may find traction in the Court, just as state sovereignty arguments did in *Castro-Huerta.* Moreover, some critics of ICWA see the Act as promoting

213. The Justices are likely to be closely divided in *Brackeen*, in keeping with Indian law cases in recent terms. *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (5–4 decision) (holding that Oklahoma had jurisdiction to prosecute state law offenses committed by non-Indians within Indian country); McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (5–4 decision) (holding that the Muscogee (Creek) Nation Reservation had not been disestablished and that Oklahoma therefore did not have jurisdiction to prosecute tribal member for crimes committed within reservation); Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (5–4 decision) (holding that biological father of Indian child was not entitled to invoke procedural protections of ICWA).

214. The majority in *Castro-Huerta* gave pivotal weight to the "inherent sovereignty" of the states and their presumptive criminal jurisdiction unless ousted by Congress. *See Castro-Huerta,* 142 S. Ct. at 2503–04.

215. At issue was whether 18 U.S.C. § 1152 created exclusive federal criminal jurisdiction or otherwise preempted state jurisdiction over crimes committed within Indian country. *Id.* at 2493–94.

a form of racial preferences, thus situating *Brackeen* alongside challenges to race-conscious remedies in other contexts.[216]

The ironies of *Brackeen* are stark. The complaint contends that ICWA has intruded on state sovereignty in an area of traditional state concern in violation of the Tenth Amendment, yet almost half the states have signed on to a brief defending the constitutionality of the Act, including the states of Minnesota and Nevada, where the Cliffords and the Librettis litigated their ICWA cases.[217] Texas, moreover, has maintained that its sovereign responsibility for child welfare administration is being threatened by ICWA, but at the same time Texas is defending a class action in which courts have found that the state was deliberately indifferent to the risks to children posed by state child welfare policies and practices.[218] Further, in litigation purportedly aimed at advancing state sovereignty, the en banc court's recognition of the individual plaintiffs' standing disrespects the competence of state judiciaries to resolve constitutional questions.[219] Finally, a substantial group within the en banc court wanted to invalidate ICWA as beyond congressional power—a cynical position, given the deployment of federal power for centuries to destroy tribal life and tribal families.[220]

If the Supreme Court holds that ICWA exceeded congressional authority or that certain provisions

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216. The Project on Fair Representation, for example, which opposes government-imposed racial preferences, filed an amicus brief in *Brackeen* in support of plaintiffs. *See* Brief for the Project on Fair Representation as Amicus Curiae in Support of Texas and Brackeen, et al., Haaland v. Brackeen, No. 21-376 (June 1, 2022).

217. *See* Brief for the States of California et al. in Support of the Federal and Tribal Parties, Haaland v. Brackeen, No. 21-376 (Aug. 19, 2022).

218. *See* M.D. v. Abbott, 907 F.3d 237 (5th Cir. 2018).

219. *See Brackeen*, 994 F.3d at 445 (Costa, J., dissenting in part, concurring in part).

220. As Judge Costa put it, "After more than two centuries of courts' recognizing sweeping federal power over Indian affairs when that power was often used to destroy tribal life, our court comes within a whisker of rejecting that power when it is being used to sustain tribal life." *Id.* at 452 (Costa, J., concurring in part, dissenting in part).

transgress the Tenth Amendment, the toppling of the 45-year-old act would remove the federal foundation from the framework of laws protecting Native families and children. It would be an undeniable setback for tribal nations. Still, states presumably would be free to continue to provide that protection through their own comprehensive Indian child welfare legislation—a step several have taken already.[221] But if the Court concludes that one or more plaintiffs have satisfied Article III standing to assert equal protection claims, then the stage will be set for a potentially far-reaching revision of governmental authority to benefit tribes and tribal members.

As explored in Part III, serious questions remain as to the *Brackeen* plaintiffs' ability to show concrete and present injury traceable to the defendants' conduct and redressable by a favorable ruling. One hopes that the Justices, in deciding *Brackeen*, will heed a fundamental principle of judicial restraint: "If it is not necessary to decide more to dispose of a case, then it is necessary not to decide more."[222] While the desire to reach the merits may be felt as strongly by those members of the Court who would sustain ICWA as by those who would strike it down, the requirements of Article III continue to loom large.

221. At least ten states have enacted comprehensive Indian child welfare legislation. The laws are collected at https://turtletalk.blog/icwa/comprehensive-state-icwa-laws/. Also, the Uniform Law Commission has appointed a committee to consider the development of a uniform or model state Indian child welfare act. Katie Robinson, ULC to Appoint New Study and Drafting Committees, UNIF. L. COMM'N: NEWS (July 17, 2022, 11:46 AM).

222. Dobbs v. Jackson Women's Heath Org., 142 S. Ct. 2228, 2311 (2022) (Roberts, C.J., concurring in judgment).