***Brackeen v. Bernhardt***
**Case Summary**
**October 17, 2019**

## I. Overview of the Case

*Brackeen v. Bernhardt* originated in the U.S. District Court for the Northern District of Texas, where three states (Texas, Indiana, and Louisiana) along with non-Native prospective adoptive parents, sought to have the Indian Child Welfare Act (ICWA) declared unconstitutional. Judge Reed O'Connor agreed with the Plaintiffs, finding that ICWA: (1) violated the Equal Protection Clause as an unconstitutional "race-based" statute, (2) inserted the federal government into state affairs by "commandeering" state courts and agencies and thus violated the Tenth Amendment, and (3) impermissibly delegated federal powers to Tribes through Section 1915(c). Judge O'Connor also struck down the 2016 ICWA regulations (known as the "Final Rule"), finding that it implemented an unconstitutional statute and that it exceeded federal authority. The Defendants in the case—the intervening Tribes and the federal government—appealed to the Fifth Circuit Court of Appeals, and were supported along the way by the 325 Tribes who signed the Tribal Amicus Brief, and other amici curiae including child welfare experts, 21 states, members of Congress, Indian law and Constitutional law scholars, and others.

## II. The Fifth Circuit's Decision

On appeal, the case was heard by a three judge panel. We are delighted to report that the Fifth Circuit overturned the District Court's opinion and affirmed the constitutionality of ICWA.

### A. Equal Protection

The court first held that ICWA's definition of "Indian child" is a political, not racial, classification. The court noted that Congress historically has dealt with Indians based on their political status. Opinion at 20. In addition, the court made two very important points: it held that ICWA is "related to tribal self-government and the survival of tribes," *Id.* at 21 fn.10; and it held that Congress's

Indian affairs power is not limited to Indian Country, but instead extends to "Indians and Indian tribes on and off the reservation." *Id.* at 22. These are arguments that the Defendants included in their briefing and that we emphasized on behalf of Tribes and Indian organizations in the Tribal Amicus Brief. We are happy to see such strong language in the opinion. The court then held that non-member children who fall within ICWA's ambit are not swept in solely on the basis of ancestry, but rather because they have a "not-yet-formalized tribal affiliation." *Id.* at 23. Finally, the court went to great lengths to show why *Rice v. Cayetano*—a case involving Native Hawaiians that Plaintiffs relied heavily upon—does not control here. *Id.* at 25-26. Having concluded that ICWA is not race-based, the court easily found that Congress had a "rational basis" for enacting ICWA, and that therefore ICWA passes constitutional muster. *Id.* at 26.

### B. Tenth Amendment / Commandeering

The court rejected the district court's finding that ICWA impermissibly commandeered state agencies. First, it held that ICWA's directives to state courts were proper because the Constitution requires state judges to enforce federal law, *id.* at 28-29, and that ICWA's impact on state agencies was likewise permissible, because ICWA "evenhandedly regulate[s] an activity in which both states and private actors engage." *Id.* at 31. Second, the court held that ICWA properly preempts conflicting state laws. The Constitution's Supremacy Clause establishes that, within those spheres, such as Indian affairs, where Congress is empowered to act, federal law trumps conflicting state law. Because ICWA falls within Congress's Indian affairs power, ICWA does not infringe on state prerogatives, but instead preempts conflicting state laws as the Constitution intended. *Id.* at 33-35. In a partial dissent, Judge Priscilla Owen wrote that she would have found that three sections of ICWA do improperly commandeer the states: § 1912(d) (active efforts), § 1912(e) (qualified expert witnesses), and § 1915(e) (recordkeeping).

### C. Nondelegation

The court found that ICWA was not an unconstitutional delegation of federal power to Tribes. The court first looked to the long history of Congress incorporating into federal law the law of other sovereigns—both states and Tribes—and recognized the inherent authority of Tribes to exercise authority over their membership, as well as domestic relations. *Id.* at 36. In particular, the court focused on the U.S. Supreme Court's decision in *United States v. Mazurie* (as both Tribal amici and the Defendants encouraged the court to do), and held that Section 1915(c)—which provides that a Tribe's established placement preferences control over those specified in ICWA—is not a delegation, but instead is an incorporation of tribal law into federal law. *Id.* at 37-38.

### D. Final Rule

The court found that the Department of the Interior, in issuing the Final Rule, sufficiently explained its reasons for doing so after 40 years of reliance on the 1979 non-binding guidelines, *id.* at 41-42, and also rejected the Plaintiffs' argument that the regulations unfairly placed the burden of proving "good cause" upon the party seeking to depart from ICWA's placement preferences. *Id.* at 43-44.

Finally, the court accepted the federal government's argument that the Final Rule's "clear and convincing evidence" standard for proving good cause is merely a recommendation and is not binding upon the states. *Id.* at 44.

Having resolved all of the issues in favor of the federal government and the Tribes, the court ordered that judgment be entered in favor of the Defendants.

## III. What's Next

The Fifth Circuit reversed the district court's opinion and rendered judgment in favor of the federal government and Tribes on all claims. Accordingly, no court should be relying on the district court's opinion. If you see any court citing to or discussing the district court's opinion that found ICWA to be unconstitutional, please let us know.

The Fifth Circuit's decision, as most federal appeals decisions, came from a panel of three judges, but a party may petition either for rehearing by the same panel or for rehearing en banc, which could include the full Fifth Circuit bench of 17 judges. On October 1, the Plaintiffs petitioned the Fifth Circuit to rehear the case en banc. The federal government and intervening Tribes have until October 23 to respond.

If the panel or full en banc court grants review, it may either uphold the Fifth Circuit panel's decision or replace it with a new decision, and that opinion would be the basis for any future Supreme Court review. It is rare for appellate courts to accept cases en banc, and we hope that the Fifth Circuit denies the Plaintiffs' request.

Regardless of what happens, we anticipate the Plaintiffs will not stop at the Fifth Circuit and will petition the United States Supreme Court for certiorari. As the Plaintiffs requested rehearing en banc, the usual deadlines for filing a petition to the Supreme Court could be extended while the Fifth Circuit considers their request. Extensions are not uncommon in a complex, high-stakes cases such as this.

Once certiorari has been briefed, the Supreme Court will meet in conference to determine whether to take the case. If it does take the case, Plaintiffs will brief first, followed by their amici, then the federal government and the Tribes, and then their amici, including us. The Plaintiffs' will then have an opportunity to file their reply briefs, and once briefing is completed oral argument will be scheduled and held.