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Five Times More Likely: Haaland v. Brackeen and What It Could Mean for Maine Tribes

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Eloise Melcher

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Eloise Melcher*

ABSTRACT

In the 1970s Native activists realized that states were removing Native children from their families at disproportional rates when compared to non-Native children. The activists pushed for the enactment of the Indian Child Welfare Act, which became law in 1978. The law increases the burden on states before Native children can be taken from their families. As part of a larger movement to attack the Equal Protection Clause in the courts, *Haaland v. Brackeen* reached the Supreme Court in 2022.

The plaintiffs in *Brackeen* argue that the Indian Child Welfare Act is unconstitutional for a variety of reasons, including that the law violates the Equal Protection Clause. Part of their Equal Protection argument rests on the assertion that classifying based on tribal membership or eligibility for tribal membership, which the Indian Child Welfare Act does, is a racial classification. If the Supreme Court agrees with the plaintiffs on this point, the whole of Federal Indian Law could be called into question. Such an outcome could put the sovereignty of tribes through the United States at risk. But the tribes of Maine, given their unique history, could be impacted differently. This Note analyzes *Brackeen* and how various outcomes could impact Maine tribes.

INTRODUCTION

I was taken away from my culture There was abuse of all types at the foster home. But the biggest thing is that I was not allowed to grow up with my culture, and I was made to feel ashamed of my culture. I was told very early on that my skin was light enough so that I could pass for white. And that I was really lucky because I never had to admit again that I was [Wabanaki].¹

This story, told by a Wabanaki woman to the Maine Truth and Reconciliation Commission in 2014,² is, tragically, not a unique one. By 1974, approximately twenty-five to thirty-five percent of all Native children were separated “from their families and placed in foster homes, adoptive homes, or institutions.”³ These Native children were often taken from their families not due to abuse but because

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1. ME. WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMM’N, BEYOND THE MANDATE CONTINUING THE CONVERSATION 26–27 (2015) [hereinafter TRUTH & RECONCILIATION].

2. *See id.*

3. REP. MORRIS K. UDALL, H.R. REP. NO. 95-1386, at 9 (1978), as reprinted in 1978 U.S.C.C.A.N. 7530, 7531.

their home environments did not conform to white, middle class standards.⁴ After realizing these statistics were commonplace in Native communities across the country, Native activists and tribal leaders began a grassroots movement to enact comprehensive federal legislation to combat the issue.⁵ That activism led to the passage of the Indian Child Welfare Act in 1978.⁶

The Indian Child Welfare Act (ICWA) established procedures and standards to govern state government removals of “Indian children” from their families and their placement in foster or adoptive homes.⁷ Under ICWA, an Indian child is defined as any “unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”⁸

Despite ICWA’s good reputation among child welfare experts,⁹ detractors believe ICWA is an equal protection violation that harms Native children and non-Native families who wish to foster or adopt Native children.¹⁰ In 2022, a case brought by some of those detractors, *Haaland v. Brackeen*, reached the United States Supreme Court.¹¹ The case argues, in part, that ICWA is a violation of equal protection under the Fifth Amendment.¹² The plaintiffs in the case are (i) three married couples who either adopted or attempted to adopt a Native child, (ii) a birth mother of one of the Native children in question, and (iii) three states.¹³ The defendants are the United States of America, several federal agencies, federal officials, and several Indian tribes that intervened in support of ICWA.¹⁴ In

4. See *id.* at 10; MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING & ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 86 (2014).

5. JACOBS, *supra* note 4, at 102, 128.

6. *Id.* at 128.

7. See 25 U.S.C. § 1902.

8. *Id.* § 1903(4).

9. See generally Brief of Casey Family Programs and Twenty-Six Other Child Welfare and Adoption Organizations as Amici Curiae Supporting Federal and Tribal Defendants at 8, *Haaland v. Brackeen*, 142 S. Ct. 1205 (2022) (Nos. 21-376, 21-377, 21-378, 21-380), 2022 WL 3648364, at *8 [hereinafter Brief of Casey Family Programs].

10. See, e.g., Timothy Sandefur, *Recent Developments in Indian Child Welfare Act Litigation: Moving Toward Equal Protection?*, 23 TEX. REV. L. & POL. 425, 427–28, 464–65 (2019).

11. *Brackeen v. Haaland (Brackeen II)*, 994 F.3d 249 (5th Cir. 2022), *cert. granted*, 142 S. Ct. 1205 (U.S. Feb. 28, 2022) (No. 21-376).

12. See Brief for Individual Petitioners at 20–21, *Haaland v. Brackeen*, (Nos. 21-376, 21-377, 21-378), 2022 WL 1786984, at *20–21 (2021) [hereinafter Brief for Individual Petitioners].

13. See *Brackeen v. Zinke (Brackeen I)*, 338 F. Supp. 3d 514, 519, 525, 526, 527 (N.D. Tex. 2018), *aff’d in part, rev’d in part sub nom.* *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (Feb. 28, 2022) (No. 21-376).

14. *Id.* Through amici curiae briefs, the defendants have the support of, among others, 23 states and the District of Columbia, 87 Members of Congress, and 497 federally recognized tribes. See generally Brief for the States of California, Arizona, Colorado, Connecticut, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Washington, and Wisconsin, and the District of Columbia, as Amici Curiae in Support of the Federal and Tribal Parties, *Haaland v. Brackeen*, 142 S. Ct. 1205 (2022) (Nos. 21-376, 21-377, 21-378, 21-380), 2022 WL 3691303; Brief for 87 Members of Congress as Amici Curiae Supporting Federal and Tribal Defendants, *Haaland v. Brackeen*, 142 S. Ct. 1205 (2022) (Nos. 21-376, 21-377, 21-378, 21-380), 2022 WL 3648373; Brief of 497 Indian Tribes and 62 Tribal and Indian Organizations as Amici Curiae in Support of Federal and Tribal Defendants,

addition to their equal protection claim, the plaintiffs also argue that ICWA violates the Tenth Amendment of the United States Constitution by commandeering the states,¹⁵ delegates authority to federally recognized tribes in violation of Article I,¹⁶ and exceeds Congress's authority granted by the Indian Commerce Clause of Article I.¹⁷

When states do not properly enforce ICWA, the removal rates of Native children are often very similar to rates before ICWA's passage in 1978.¹⁸ But when states properly enforce ICWA, it reduces the risk that Native children will be needlessly taken from their families.¹⁹ Maine is an example of both improper and proper enforcement of ICWA. In the decades following ICWA's passage, Maine struggled to properly implement the law.²⁰ This failure had clear repercussions: from 2000 to 2013, Native children in Maine "entered foster care on average '5.1 times the rate of non-Native children.'"²¹ However, after a concerted effort by the tribes and the state to improve ICWA compliance, Maine saw a decrease in the rate at which Native children entered foster care.²²

The State of Maine and Maine tribes are unique not just for their efforts to improve ICWA implementation, but also because these tribes are still fighting for the sovereignty held by all other federally recognized tribes.²³ Because of this status, *Haaland v. Brackeen* could impact Maine tribes differently than other tribes. As such, Part II of this Case Note explores the history of Maine tribes and ICWA. Part III then explains *Haaland v. Brackeen* in greater detail. Finally, Part IV examines how Maine tribes may be impacted if the Supreme Court strikes down ICWA as unconstitutional.²⁴

Haaland v. Brackeen 142 S. Ct. 1205 (2022) (Nos. 21-376, 21-377, 21-378, 21-380), 2022 WL 3682220 [hereinafter Brief of Federally Recognized Tribes].

15. Brief for Individual Petitioners, *supra* note 12, at 62–64.

16. Brief for Petitioner the State of Texas at 69–71, *Haaland v. Brackeen*, 142 S. Ct. 1205 (2022) (Nos. 21-376, 21-377, 21-378, 21-380) (May 26, 2022).

17. Brief for Individual Petitioners, *supra* note 12, at 19.

18. ICWA, KIDS MATTER INC., <https://www.kidsmatterinc.org/legal-help/native-american-children/icwa/> [<https://perma.cc/YQ6H-U8AR>]. For example, prior to the passage of a state-level ICWA intended to improve ICWA compliance with the federal ICWA, "Native American children in Wisconsin were about 1600 times more likely to be removed from their home . . . than non-Native children." *Id.*

19. See Brief of Casey Family Programs, *supra* note 9, at 8–9 ("When ICWA's standards are closely adhered to, they work.").

20. See TRUTH & RECONCILIATION, *supra* note 1, at 10.

21. *Id.* at 25.

22. Compare MAINE CHILD WELFARE OUTCOMES REPORT, U.S. DEP'T OF HEALTH & HUM. SERVS. pt. C, <https://cwoutcomes.acf.hhs.gov/cwdatasite/pdf/maine.html#footnote3> [<https://perma.cc/NK5H-KJXV>], with TRUTH & RECONCILIATION, *supra* note 1, at 24.

23. See, e.g., Colin Woodard, *Prospects Fade for Federal Bill to Expand Rights of Maine Tribes*, PORTLAND PRESS HERALD (Sept. 15, 2022), <https://www.pressherald.com/2022/09/15/prospects-fade-for-federal-bill-to-expand-maine-tribes-rights/>.

24. Court watchers anticipate that in *Haaland v. Brackeen*, the Supreme Court will strike down ICWA on equal protection grounds. See, e.g., Andrew Chung, *Behind U.S. Supreme Court Race Cases, a Contested Push for 'Color Blindness'*, REUTERS (Oct. 28, 2022), <https://www.reuters.com/legal/behind-us-supreme-court-race-cases-contested-push-color-blindness-2022-10-28/> (discussing the Court's inclination to consider the Fourteenth Amendment through a race-blind lens, which, if the Court

I. BACKGROUND

A. Maine's Tribal History

Because history is at the heart of federal Indian law, a brief historical background is essential to understand how *Brackeen* may impact Maine tribes.²⁵ Centuries ago, before the arrival of Europeans, there were twenty tribes that lived in what is today known as Maine and Nova Scotia.²⁶ These tribes, collectively known as the Wabanaki, had a population of roughly 100,000 people by the time Europeans began to settle along the coast in the late 1500s.²⁷ But with the Europeans came their European germs, igniting the “Great Dying” which decimated Native populations in New England.²⁸ Historians estimate that the Great Dying caused the New England Native population to drop sixty-five to ninety percent.²⁹

Over the following centuries there were “tit-for-tat massacres,”³⁰ “fault-line wars,”³¹ and governmental orders directing settlers to scalp Native people.³² The Wabanaki tribes eventually found themselves on tiny fractions of their original land.³³ As some tribes lost land or had their numbers dwindle, their members often joined one of the remaining tribes.³⁴

By the late 1700s, there were only three tribes remaining in the area that would become Maine that the Commonwealth of Massachusetts deemed significant

considers determines Indian child to be a race-based classification, would make the Court more likely to declare ICWA unconstitutional).

25. See FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.01 (2019) (“To understand twenty-first century Native American legal issues, one must be familiar with developments often dating back to the sixteenth, seventeenth, and eighteenth centuries.”).

26. See DAWN LAND, at 21:30 (Upstander Project, 2018); *Holding Up the Sky: Wabanaki People, Culture, History & Art*, MAINE. MEMORY NETWORK, <https://www.mainememory.net/sitebuilder/site/2976/page/4665/print#:~:text=Wabanaki%20people%2C%20including%20the%20Maliseet,accordi ng%20to%20the%20archaeological%20record> [<https://perma.cc/W6RL-FM8M>].

27. Rob Caldwell, *It’s a Tragic Chapter of New England History. You’ve Probably Never Heard of It*, NEWS CENTER MAINE (Mar. 11, 2022), <https://www.newscentermaine.com/article/news/local/207/its-a-tragic-chapter-of-new-england-history-youve-probably-never-heard-of-it-kenneth-davis-surviving-new-englands-great-dying/97-9a7d76ea-578e-46c3-ae50-dfb0a9e38597>.

28. *Id.*

29. *Id.*

30. NEIL ROLDE, UNSETTLED PAST, UNSETTLED FUTURE: THE STORY OF MAINE INDIANS 115 (Tilbury House 2004).

31. *Id.* at 105 (emphasis omitted) (footnote omitted) (explaining that fault-line wars are “protracted on-again, off-again flareups between different cultures and religions that can last for as long as a century or more. They are struggles not only for power over people but more especially for control of territory, and often lead to examples of the legal definition of genocide, which is ‘the denial of the right of existence of entire human groups’”).

32. David Sharp, *Penobscots Do Not Want Ancestors’ Scalping to Be Whitewashed*, PORTLAND PRESS HERALD (Dec. 4, 2021), <https://www.pressherald.com/2021/12/04/penobscots-dont-want-ancestors-scalping-to-be-whitewashed-2/>.

33. ROLDE, *supra* note 30, at 169 (“All in all, the Passamaquoddy [lost] 80 percent of their original territory.”).

34. *Id.* at 120.

enough to warrant treaties: the Passamaquoddy, Penobscot, and Maliseet.³⁵ The Passamaquoddy and Maliseet signed a treaty with the Commonwealth in 1794, agreeing to “relinquish *all* legal rights, claims, interests, and title in their land located in the northern district of the Commonwealth in exchange for 23,000 acres of reserved land, plus numerous small islands and tracts of land scattered about present-day Pleasant Point, Maine.”³⁶ The Penobscot signed a similar treaty with the Commonwealth in 1796, wherein they ceded all “right, [i]nterest and claim to all the lands on both sides of the River Penobscot, beginning near Colonol [sic] Johnathan Eddy’s dwelling house [] . . . and extending up the said River Thirty miles on a direct line.”³⁷ Maine took over responsibility for these treaties when it became a state in 1820.³⁸

Beyond being notable for what the Wabanaki tribes’ treaties did do, which was relegate the Wabanaki to tiny fractions of their ancestral land, the treaties are also notable for what they did not do—recognize the tribes’ sovereignty. This lack of recognition contrasts with the many treaties the United States federal government signed with tribes across the country, which were “similar in many respects to international treaties.”³⁹ Crucially, the treaties with the federal government established the “trust doctrine,” under which courts recognize a special relationship between the federal government and the tribes wherein the federal government acts as a “guardian or ward” to the tribes.⁴⁰ The Penobscot, Passamaquoddy, and Maliseet treaties established relationships only with the Commonwealth, and later the State of Maine, and therefore for centuries these tribes were not part of the special trust relationship with the federal government.

That would all change in the 1970s. It began with a land dispute between members of the Passamaquoddy tribe and a non-Native Maine citizen.⁴¹ A lawsuit was filed, and in the course of legal research, a question larger than anyone anticipated was uncovered: were any of the treaties signed by Maine tribes valid?⁴² The lawyers had unearthed the Indian Trade and Intercourse Act of 1790 (also known as the Nonintercourse Act), which required all land purchased from Native

35. See Joseph G.E. Gousse, *Waiting for Gluskabe: An Examination of Maine’s Colonialist Legacy Suffered by Native American Tribes Under the Maine Indian Claims Settlement Act of 1980*, 66 ME. L. REV. 535, 542 (2014).

36. *Id.*

37. Research Summary on the Passamaquoddy Issue, *Passamaquoddy / Penobscot Land Claims* in the *Bradley H. Files at the Gerald R. Ford Presidential Library*, NAT’L ARCHIVES CATALOG 28, <https://s3.amazonaws.com/NARAprodstorage/opastorage/live/13/1034/1103413/content/library/document/0142/1103413.pdf> [<https://perma.cc/2HGN-DTXS>]. In exchange for the land claims, the Penobscot were to receive, among other things, “yards of blue cloth for blankets, four hundred pounds of shot, one hundred pounds of Powder, thirty six hats, thirteen bushels of Salt . . . , one barrel of New England Rum, and one hundred bushels of Corn.” *Id.* at 27.

38. Gousse, *supra* note 35, at 543. Maine continued to negotiate for additional purchases of Native land from the tribes “until “the Penobscot, Passamaquoddy, and Maliseet people were relegated to miniscule reservations located at Indian Island, Princeton/Pleasant Point, and Houlton, respectively.” *Id.*

39. COHEN, *supra* note 25, § 1.01.

40. COHEN, *supra* note 25, § 5.04[3][a]. “Today the trust doctrine is one of the cornerstones of Indian law.” *Id.*

41. Gousse, *supra* note 35, at 544.

42. See *id.* at 544–45.

tribes after 1790 to be ratified by Congress for the purchase to be valid.⁴³ None of the treaties signed by the Maine tribes had ever been ratified by Congress.⁴⁴ After a federal judge ruled that the Nonintercourse Act applied to the Passamaquoddy,⁴⁵ the tribes, the state of Maine, and the federal government realized that the Wabanaki tribes had a claim to two-thirds of Maine's land area.⁴⁶

Rather than allow the case be settled in court, President Jimmy Carter appointed a special referee, Judge William Gunter, who encouraged compromise.⁴⁷ The final agreement was the Maine Indian Claims Settlement Act, enacted in 1980, wherein the Penobscot, Passamaquoddy, and Maliseet tribes gave up their land claims in return for federal recognition and millions of dollars to purchase land and invest in their tribes.⁴⁸ The Mi'kmaq Nation would later receive funds and federal recognition in 1991.⁴⁹

The Maine Indian Claims Settlement Act (MICSA) went a long way to support the Wabanaki, but came at a steep price: it designated the tribes as municipalities rather than sovereign nations.⁵⁰ In other words, under MICSA, Maine tribes are subject to Maine state law except for "internal tribal affairs."⁵¹ What's more, because of MICSA, federal laws that affect state jurisdiction and relate to federally recognized tribes do not apply to Maine tribes unless the tribes are explicitly included in the text of the bill.⁵² No other federally recognized tribes in the country are subject to similar limitations.⁵³ It is up to the State of Maine to decide whether the state's jurisdiction is impacted, and whether to intervene.⁵⁴

43. ROLDE, *supra* note 30, at 20. Specifically, the Act reads: "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177.

44. ROLDE, *supra* note 30, at 20–21.

45. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 655 (D. Me. 1975). This case determined whether the Nonintercourse Act applied to Eastern tribes. See ROLDE, *supra* note 30, at 24–25, 27–28. Therefore, even though the case only explicitly answered this question regarding the Passamaquoddy, it was determinative for all Maine tribes. *Id.*

46. ROLDE, *supra* note 30, at 21. There were 350,000 people living in the 12.5 million acre region. *Id.* at 33. Large paper companies and timber companies also held interests in that land. *Id.*

47. *Id.* at 35.

48. 30 M.R.S. §§ 6201–14 (2022).

49. ROLDE, *supra* note 30, at 32.

50. *Id.* at 51.

51. 30 M.R.S. § 6204 (2022); see also Marina Villeneuve, *Tribal Leaders, Lawmakers Mull Changes to Tribal Sovereignty*, TIMES REC. (July 24, 2019), <https://www.pressherald.com/2019/07/24/tribal-leaders-lawmakers-mull-changes-to-tribal-sovereignty/>.

52. E-mail from Evan Johnston, Legis. Dir. for Congresswoman Chellie Pingree, to Eloise Melcher, (Dec. 1, 2022, 12:03 EST) (on file with author). After decades of exclusion, in March 2022, the reauthorization of the Violence Against Women Act (VAWA) included incorporated language to explicitly include Maine tribes in VAWA's tribal jurisdiction provisions. Press Release, *Pres. Biden Signs Rep. Pingree's Long-Championed Fix to the Violence Against Women Act, Supporting Maine Tribes*, Congresswoman Chellie Pingree (Mar. 14, 2022), <https://pingree.house.gov/news/document/single.aspx?DocumentID=4029> [https://perma.cc/4VJR-TAWB].

53. Woodard, *supra* note 23.

54. E-mail from Evan Johnston, Legis. Dir. for Congresswoman Chellie Pingree, to Eloise Melcher (Dec. 1, 2022, 12:03 EST) (on file with author).

Recently there have been efforts at the state and federal levels to provide greater sovereignty to Maine tribes.⁵⁵ In 2022, Maine Governor Janet Mills signed into law two pieces of legislation to expand tribal sovereignty.⁵⁶ Additionally, Maine State House Representative Rachel Talbot Ross sponsored a bill in the 2022 session to remove MICSAs' limits on Wabanaki sovereignty.⁵⁷ At the federal level, Congressman Jared Golden, Representative for Maine's Second Congressional District, introduced a bill in 2022 that would automatically include Maine tribes in new federal Indian laws.⁵⁸

B. Child Welfare Crisis

Due to tribal sovereignty and the unique trust relationship, the federal government has domain over many areas traditionally under state control that concern tribes, including child welfare.⁵⁹ The federal government used this power to begin the Federal Indian boarding school program.⁶⁰ In the United States, there were a total of 408 boarding schools, which operated between 1819 and 1969.⁶¹ Some Wabanaki were sent to the Carlisle Indian Industrial School in Pennsylvania.⁶² Other Wabanaki children were taken to the Shubenacadie Indian Residential School in Nova Scotia.⁶³

The mission of these schools was to “solve the so-called Indian problem through assimilation.”⁶⁴ After centuries of attempting to deal with the “Indian problem” through mass murder, reformers called for the boarding schools as a

55. See, e.g., Woodard, *supra* note 23; Randy Billings, *Rep. Rachel Talbot Ross Nominated by Democrats to be Maine's First Black House Speaker*, PORTLAND PRESS HERALD (Nov. 17, 2022), <https://www.pressherald.com/2022/11/17/rep-rachel-talbot-ross-nominated-by-democrats-to-be-maines-first-black-house-speaker/>; *Governor Mills Signs Historic Three-Part Tribal Legislation Into Law*, STATE OF MAINE, OFF. OF GOVERNOR JANET T. MILLS (May 2, 2022), <https://www.maine.gov/governor/mills/news/governor-mills-signs-historic-three-part-tribal-legislation-law-2022-05-02> [<https://perma.cc/XH89-MXRW>].

56. *Governor Mills Signs Historic Three-Part Tribal Legislation Into Law*, *supra* note 55; *Governor Mills Signs Passamaquoddy Drinking Water Legislation Into Law*, STATE OF MAINE, OFF. OF GOVERNOR JANET T. MILLS (Apr. 21, 2022), <https://www.maine.gov/governor/mills/news/governor-mills-signs-passamaquoddy-drinking-water-legislation-law-2022-04-21> [<https://perma.cc/96QM-MWXJ>].

57. Billings, *supra* note 55. This bill passed both the State House and Senate but died in appropriations. *Id.*

58. Woodard, *supra* note 23. Without a supporter in the Senate, this bill is not expected to become law. *See id.*

59. COHEN, *supra* note 25, § 5.04[2][b].

60. See JACOBS, *supra* note 4, at xxxi.

61. BRYAN NEWLAND, BUREAU OF INDIAN AFFAIRS, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 6 (May 2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf [<https://perma.cc/VM57-5S2E>].

62. WABANAKI REACH, *Historical Timeline of Wabanaki-Maine Relations* 3 (2021), https://assets.nationbuilder.com/mainewabanakireach/pages/1311/attachments/original/1647458495/Historical_Timeline_of_Wabanaki-Maine_Relations_%281%29.pdf?1647458495 [<https://perma.cc/7BR8-FXYH>]. Richard Henry Pratt, who is infamous for his line “kill the Indian, save the man,” founded this school. *See id.*

63. *Id.*

64. JACOBS, *supra* note 4, at 5.

more humane alternative.⁶⁵ However, these schools were anything but humane. The children sent to these schools suffered “[r]ampant physical, sexual, and emotional abuse; disease; malnourishment; overcrowding; and lack of health care.”⁶⁶ But the schools were certainly effective in achieving the government’s goal of cutting ties between the children and their cultures, which was key to assimilation and solving the “Indian problem.”⁶⁷

The boarding school program ended, not because of system reforms, but because the federal government came upon a more cost-effective solution: adoption.⁶⁸ The U.S. government established the Indian Adoption Project to promote adoption of Native children and to place those children in adoptive homes.⁶⁹ In the eyes of the federal government, adoption was the “ultimate solution to the Indian problem” because Native children “would have no contact with their Indian tribal communities . . . [and] adoptive families would bear the cost of raising the children.”⁷⁰ The Bureau of Indian Affairs made no secret of its goal was to assimilate Native children by placing them in non-Native homes.⁷¹ In 1966, the Bureau proudly announced its success to date: “[o]ne little, two little, three little Indians—and 206 more—are brightening the homes and lives of 172 American families, mostly non-Indians, who have taken the Indian waifs as their own.”⁷²

The Indian Adoption Project drove up demand for Native children as adoptees by portraying their adoption by non-Native families as a “benevolent act” and a way to “rectify[] past injustices.”⁷³ The propaganda worked; by 1968, there were more homes looking to adopt Native children than there were Native children available for adoption.⁷⁴ The Indian Adoption Project worked to address this issue of supply and demand by advancing narratives that Native families were unfit to raise their own children.⁷⁵ As a result of these narratives, states often removed Native children from their families without any evidence of abuse or neglect, and without regard for the legal rights of Native families.⁷⁶

The Indian Adoption Project achieved its goals; by 1974, approximately 25 to 35 percent of all Native children were separated “from their families and placed in

65. *Id.* at xxxii.

66. NEWLAND, *supra* note 61, at 56.

67. JACOBS, *supra* note 4, at xxxiii (“The viability of Indigenous cultures depended on rearing new generations of children who understood, were invested in, and carried on their groups’ practices and knowledge.”).

68. *Id.* at 6.

69. *Id.* at 6, 18–20.

70. *Id.* at 19.

71. See Press Release, Bureau of Indian Affairs, *Adoptions of Indian Children Increase*, BUREAU OF INDIAN AFFAIRS, (Apr. 14, 1966), <https://www.bia.gov/as-ia/opa/online-press-release/adoptions-indian-children-increase> [<https://perma.cc/86RK-CD63>].

72. *Id.*

73. JACOBS, *supra* note 4, at 59.

74. See *id.* at 60.

75. See *id.* at 60, 64.

76. *Id.* at 70.

foster homes, adoptive homes, or institutions.”⁷⁷ In Maine in 1972, the American Indian Policy Review Commission found that Native children were placed in foster care at a rate 25.8 times higher than non-Native children.⁷⁸ The situation was particularly dire in the northern-most county of Maine, Aroostook County, where in 1976, one out of every 3.3 Native children was in foster care.⁷⁹

Although the government tried to frame the adoptions as helpful to Native Americans, that is not how Native people saw it.⁸⁰ To them, it was yet another attempt to destroy Native people and undermine their sovereignty.⁸¹ Once Native children were “taken from [their] home and put in foster care, [they] were more likely [than non-Native children] to be adopted eventually and to lose all contact with their families and tribes of origin.”⁸² Removal of the children hurt tribes and their “ability to continue as self-governing communities.”⁸³

In the 1970s, Native activists began pushing for an end to the adoption crisis.⁸⁴ This activism led to a series of hearings before Congress featuring the testimony of Native people explaining the impact of child removal.⁸⁵ ICWA was eventually signed into law in 1978.⁸⁶

C. *The Indian Child Welfare Act*

ICWA sought to “protect the best interests of Indian children and [] promote the stability and security of Indian tribes and families” by establishing minimum federal standards for child removal proceedings, foster care, and adoptive placements involving Indian children.⁸⁷ ICWA was a carefully crafted piece of legislation, with each provision directly relating to a concern raised by Native activists.⁸⁸ For example, the Association on American Indian Affairs, which organized much of the activism and helped draft ICWA, raised concerns that Native parents often did not receive notice of court proceedings.⁸⁹ Section 1912 of ICWA requires states to notify the parent or custodian and their tribe of court proceedings.⁹⁰ Activists also pointed out that even if Native parents did get notice

77. H.R. Rep. No. 95-1386, at 9 (1978), as reprinted in 1978 U.S.C.C.A.N. at 7530, 7531. Additionally, “[i]n 16 states surveyed in 1969, approximately 85 percent of all Indian children in foster care were living in non-Indian homes.” *Id.*

78. TRUTH & RECONCILIATION, *supra* note 1, at 25.

79. *Id.* at 24.

80. JACOBS, *supra* note 4, at 31, 39.

81. *Id.* at 31.

82. *Id.* at 91.

83. *Id.* at 157. “Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.” *Id.*

84. *Id.* at 102.

85. *See id.* at 139. *See generally* Matthew L.M. Fletcher, *The Origins of the Indian Child Welfare Act: A Survey of the Legislative History*, Indigenous L. & Pol’y Ctr., Occasional Paper Ser. No. 2009-04, Mich. State Univ. L. (Apr. 10, 2009).

86. JACOBS, *supra* note 4, at 128.

87. 25 U.S.C. § 1902.

88. *See* JACOBS, *supra* note 4, at 140–53.

89. *Id.* at 140.

90. 25 U.S.C. § 1912(a).

of the proceedings, they often did not have access to legal counsel.⁹¹ ICWA requires parents of Indian children to have court-appointed counsel.⁹²

ICWA also recognized “the jurisdiction and sovereignty of Indian tribes.”⁹³ Under ICWA, tribes have exclusive jurisdiction over any child custody proceeding involving an Indian child who “resides or is domiciled within the reservation of such tribe.”⁹⁴ To prevent states from continuing to tear children away from their families on vague grounds,⁹⁵ foster care placements require “clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”⁹⁶ For termination of parental rights, the same must be proven but supported by evidence beyond a reasonable doubt.⁹⁷

If a state does terminate parental rights and an Indian child needs to be adopted, ICWA sets preference for placement first with “a member of the child’s extended family,” next with “other members of the Indian child’s tribe,” and last with “other Indian families.”⁹⁸ If a tribe establishes an order of placement preference different than the order laid out in ICWA, the state court is required to honor that preference.⁹⁹

Today, ICWA is considered by child welfare experts to be the gold standard and “a model for child welfare policies.”¹⁰⁰

D. Implementation of the Indian Child Welfare Act in Maine

Despite the strong language contained in the Act, many states, including Maine, struggled to implement ICWA. Two years after ICWA’s passage, a state task force criticized the practices of the Maine Department of Health and Human Services (DHHS), the agency tasked with child welfare oversight.¹⁰¹ Specifically, the task force “rais[ed] concerns about racial bias among caseworkers and assert[ed] the state was not doing enough to maintain the [Native] children’s

91. JACOBS, *supra* note 4, at 141.

92. 25 U.S.C. § 1912(b).

93. JACOBS, *supra* note 4, at 158.

94. 25 U.S.C. § 1911(a).

95. JACOBS, *supra* note 4, at 158.

96. 25 U.S.C. § 1912(e). Maine state law requires only that a court “specifically find that remaining in the home is contrary to the welfare of the child.” 22 M.R.S. § 4036-B(2) (2021).

97. 25 U.S.C. § 1912(f). Maine state law, on the other hand, requires only clear and convincing evidence to terminate parental rights. 22 M.R.S. § 4055(1)(B)(2) (2021).

98. 25 U.S.C. § 1915(a). There are similar placement preferences for foster care placements. *See id.* § 1915(b). These placement preferences honor “Indian extended family arrangements and the importance of sustaining tribes.” JACOBS, *supra* note 4, at 158.

99. 25 U.S.C. § 1915(c).

100. Brief of Casey Family Programs, *supra* note 9, at 8; Press Release, Wabanaki REACH, Wabanaki REACH and Maine Att’y Gen. in Solidarity to Protect Native Child. as the Sup. Ct. Prepares to Hear Oral Arguments (Oct. 31, 2022) (on file with author) (“ICWA is considered the *gold standard* in child welfare policy because of the higher standards of proof, best practice requirements such as active efforts to prevent removal and facilitate reunification . . . and the fact that the Tribe is considered the third parent.”).

101. TRUTH & RECONCILIATION, *supra* note 1, at 26.

cultural ties.”¹⁰² There were a great number of reasons behind Maine’s failings, including a lack of adequate training for state workers charged with compliance.¹⁰³ Without any training or education about ICWA and the issues that led to its passage, there was no check for the racism or prejudice held by some case workers.¹⁰⁴ Also prevalent among case workers was a resistance to kinship placements, despite its importance to ICWA implementation, based on a belief that “the apple doesn’t fall far from the tree.”¹⁰⁵ Finally, some caseworkers fundamentally misunderstood aspects of Wabanaki culture, which led to children being removed from their families not necessarily because they were in danger but because their homes did not match caseworkers’ ideas of middle class.¹⁰⁶

In 2013, the governor of Maine and the five tribal chiefs authorized the Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission to “investigate whether or not the removal of Wabanaki children from their communities has continued [since ICWA’s passage] to be disproportionate to non-Native children and to make recommendations[] . . . that ‘promote individual, relational, systemic and cultural reconciliation.’”¹⁰⁷ The Commission went to the five tribal communities in Maine and heard personal stories of Wabanaki people who, as children, were in foster care or adopted.¹⁰⁸

The Commission found that Maine’s issues implementing ICWA were not problems of the past. To the contrary, “from 2002 to 2013, Wabanaki children in Maine . . . [] entered foster care on average at 5.1 times the rate of non-Native children.”¹⁰⁹ “[F]ederal reviews in 2006 and 2009 indicate[d] that sometimes up to half of all [Maine] children coming into care [did] not have their Native heritage verified.”¹¹⁰ Further, the percentage of Native children in foster care in the early 2000s was essentially the same as it had been in the 1960s.¹¹¹ Ultimately, the Commission determined that these rates constituted ongoing cultural genocide.¹¹²

After its investigation, the Commission made a series of recommendations, including development of trainings on ICWA; a policy to monitor ICWA compliance; support for non-Native foster and adoptive families “so that Wabanaki children have the strongest possible ties to their culture;” expansion of tribal courts;

102. *Id.* Additionally, a federal pilot review in 1999 found Maine’s implementation of ICWA “wanting in several key areas.” *Id.* at 16.

103. *See id.* at 29.

104. *See id.* at 29–30.

105. *Id.* at 30.

106. *See id.* at 38; *see also* JACOBS, *supra* note 4, at 86.

107. TRUTH & RECONCILIATION, *supra* note 1, at 10. The Commission was the first of its kind in the United States. *Id.*

108. *See* DAWNLAND, *supra* note 26, at 4:30. Passamaquoddy has two locations: one at Sipayik and one at Motahkomikuk. *Tribal Map*, UNIV. OF MAINE HUDSON MUSEUM, <https://umaine.edu/hudson-museum/exhibits/online/tree/tribal-map/> [<https://perma.cc/NB6P-25PR>].

109. TRUTH & RECONCILIATION, *supra* note 1, at 25. In 2011, Maine was one of five states where Native children were overrepresented in foster care at a rate of 1.3 to 2.0 when compared to the general population. National Council of Juvenile and Family Court Judges, *Measuring Compliance with the Indian Child Welfare Act: An Assessment Toolkit*, 4 fig.1 (2013).

110. TRUTH & RECONCILIATION, *supra* note 1, at 10.

111. *Id.* at 25.

112. *Id.* at 128.

and investigation into the “problems surrounding blood quantum [and] census eligibility.”¹¹³

Since the Truth and Reconciliation Commission, it seems ICWA compliance in Maine has improved.¹¹⁴ In 2020, 46% of all Maine children in foster care were living in kinship care.¹¹⁵ Additionally, the state has continued to improve its training on ICWA and the law’s importance.¹¹⁶ Further, in 2020, 1.4% of children in foster care in Maine were Alaska Native/American Indian.¹¹⁷ While this is still disproportionate to the percentage of Native people in Maine (0.6% of the population), it is considerably less than the percentage of Native children in Maine foster care in the 1960s (4%) and between 2002 and 2014 (3.9%).¹¹⁸

These improvements and the work of the Truth & Reconciliation Commission were motivated by the goal of improving Maine’s compliance with ICWA.¹¹⁹ But if the pressures of ICWA were to disappear, would the state be as inclined to continue this progress? The State of Maine may soon need to answer this question if the plaintiffs in *Haaland v. Brackeen* are successful. *Haaland v. Brackeen* is certainly not the first constitutional challenge to ICWA, but it could very well be the last.

E. Prior Supreme Court Challenges to ICWA

ICWA has been challenged in state and federal court more times than the Affordable Care Act.¹²⁰ Several of these cases challenged the law’s constitutionality, focusing on “issues of federalism, equal protection, and the due process rights of children.”¹²¹ Despite all of these challenges, only three cases have made it to the Supreme Court: *Mississippi Band of Choctaw Indians v. Holyfield*, *Adoptive Couple v. Baby Girl*, and now, of course, *Haaland v. Brackeen*. The first ICWA case to reach the Supreme Court, *Mississippi Band of Choctaw Indians*, simply addressed what it meant to be “domiciled” on a reservation under ICWA.¹²²

113. *Id.* at 70.

114. See generally Valerie Vende Panne, *Reflecting on the Maine-Wabanaki Child Welfare TRC Commission Five Years Later*, NATIVE NEWS ONLINE (Nov. 5, 2020), <https://nativenewsonline.net/currents/reflecting-on-the-maine-wabanaki-child-welfare-trc-commission-five-years-later>.

115. *Id.* Kinship care places children with relatives and helps maintain the “children’s connections with their families, increases stability, and overall minimizes the trauma of family separation.” *Kinship Care*, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/outofhome/kinship/> (last visited Apr. 27, 2023). Kinship care also reflects traditional Native practices. JACOBS, *supra* note 4, at 77.

116. Panne, *supra* note 114.

117. U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD WELFARE OUTCOMES REPORT: STATE OF MAINE, <https://cwoutcomes.acf.hhs.gov/cwdatasite/pdf/maine.html#footnote3> [<https://perma.cc/CME6-RSQN>].

118. TRUTH & RECONCILIATION, *supra* note 1, at 25.

119. *Id.* at 57.

120. *This Land: Solomon’s Sword*, CROOKED MEDIA, at 40:20 (Sept. 13, 2021), <https://crooked.com/podcast/1-solomons-sword/>.

121. COHEN, *supra* note 25, at § 11.06.

122. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 (1989).

The Court held an Indian child's domicile was determined by federal, not state, law.¹²³

In 2013, the Supreme Court considered its second ICWA case: *Adoptive Couple v. Baby Girl*.¹²⁴ The central issue was whether ICWA's placement preferences meant that Baby Girl's biological father, a member of Cherokee Nation, who had "abandoned" his child, should be granted custody over the non-Native couple seeking to adopt the child.¹²⁵ Baby Girl's parents broke up before her birth, and her mother gave her up for adoption.¹²⁶ Baby Girl's father received late notice of the adoption proceedings and, misunderstanding the paperwork, agreed to not contest the proceedings.¹²⁷ He later intervened to seek custody of his daughter.¹²⁸ The Supreme Court held ICWA did not apply because the biological father never had custody of Baby Girl and thus there was no "continued custody" of the child to terminate.¹²⁹

This case did not address the constitutionality of ICWA, but hinted that some interpretations of the Act could violate equal protection.¹³⁰ The majority opinion portrayed the biological father as a "biological Indian father" playing "his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests" after abandoning his child.¹³¹ If playing such an "ICWA trump card" were possible, the Court went on, "many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA Such an interpretation would raise equal protection concerns."¹³² The Court also fixated on Baby Girl's ancestry,¹³³ despite the fact that ancestry is not relevant to determining who is an Indian child.¹³⁴

123. *Id.* at 43, 47. In this case, a mother gave birth to twins, who qualified as Indian children under ICWA, two-hundred miles from the reservation. *Id.* at 37. After the twins' birth, both parents consented to adoption proceedings with a non-Native couple. *Id.* at 37–38. The Court held that the twins were domiciled on the reservation when adoption proceedings began, giving the Choctaw tribal court (both parents were enrolled members of this tribe) exclusive jurisdiction. *Id.* at 53.

124. *See generally* *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013).

125. *Id.* at 641.

126. *Id.* at 643.

127. *Id.* at 644.

128. *Id.*

129. *Id.* at 641.

130. *Id.* at 656.

131. *Id.* at 655–56.

132. *Id.*

133. *Id.* at 641, 647 ("This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee.").

134. Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295, 327 (2015) ("ICWA does not require any fraction of Indian blood."). Instead, ICWA defers to tribes, many of which require proof of ancestry dating back to when the tribe gained federal recognition. *Id.* at 328. Many focus, incorrectly, on this ancestry requirement and portray it as a blood requirement, and thus racial. *See, e.g.*, Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1, 3–5 (2017).

II. HAALAND V. BRACKEEN

Haaland v. Brackeen is the third case relating to ICWA to make it to the Supreme Court. Unlike the prior two cases, *Brackeen*, which the Supreme Court heard on November 9, 2022, directly challenges the constitutionality of ICWA.¹³⁵

A. Facts and Procedural Background

At the center of *Haaland v. Brackeen* are seven individuals: three prospective or successful adoptive couples, and one birth mother.¹³⁶ One of the couples is the Brackeens.¹³⁷ The Brackeens began to foster A.L.M., an Indian child as defined by ICWA,¹³⁸ after Texas Child Protective Services removed him from his paternal grandmother's custody at the age of ten months.¹³⁹ In 2017, a Texas court terminated A.L.M.'s biological parents' parental rights.¹⁴⁰ After the Brackeens petitioned to adopt A.L.M, the Navajo Nation identified a potential placement for A.L.M. with tribe members in New Mexico, but the placement did not work out.¹⁴¹ Ultimately, the Brackeens adopted A.L.M.¹⁴² Since filing their complaint in federal court, arguing ICWA is unconstitutional, they have also sought to adopt A.L.M.'s biological sister, Y.R.J., who is also an Indian child for the purposes of ICWA.¹⁴³

The next couple in *Brackeen* is the Librettis.¹⁴⁴ In March 2016, the Librettis sought to adopt Baby O.¹⁴⁵ Baby O.'s biological mother, who is also a party to the case, placed Baby O. up for adoption at birth.¹⁴⁶ But because Baby O.'s biological father is a registered member of the Ysleta del sur Pueblo Tribe (Pueblo Tribe), Baby O. is an Indian child as defined by ICWA, and the Pueblo Tribe was able to intervene in the adoption proceedings.¹⁴⁷ The Librettis joined the Brackeens' federal case, at which point the Pueblo Tribe agreed to allow the Librettis to adopt Baby O.¹⁴⁸ A Nevada state court finalized the adoption on December 19, 2018.¹⁴⁹

135. Jen Deerinwater, *Supreme Court Considers Dismantling Native Sovereignty in "Haaland v. Brackeen,"* TRUTHOUT (Nov. 12, 2022), <https://truthout.org/articles/supreme-court-considers-dismantling-native-sovereignty-in-haal-and-v-brackeen/>.

136. *Brackeen v. Haaland (Brackeen II)*, 994 F.3d 249, 288 (5th Cir. 2021), cert. granted, 142 S. Ct. 1205 (Feb. 28, 2022) (No. 21-376).

137. *Id.*

138. *Id.* Both of A.L.M.'s biological parents are enrolled members of federally recognized tribes. *Id.*

139. *Id.* The facts of the case as portrayed in the federal court documents do not match up with the facts as they are portrayed in the original family court documents. See *This Land: Behind the Curtain*, CROOKED MEDIA, at 21:32 (Aug. 23, 2021), <https://crooked.com/podcast/2-behind-the-curtain/>.

140. *Brackeen II*, 994 F.3d at 288.

141. *Id.*

142. *Id.*

143. *Id.* at 288–89. The Brackeens initially claimed in their complaint that ICWA's constraints and placement preferences made them less likely to attempt to foster or adopt an Indian child in the future. *Id.* at 288. Their standing argument was damaged by their choice to petition to adopt Y.R.J. *Id.* at 438–40 (Wiener, J., dissenting in part). The Navajo Nation is contesting Y.R.J.'s adoption, but those proceedings are paused until resolution of the Brackeens' constitutional challenge to ICWA. *Id.* at 289.

144. *Id.* at 288.

145. *Id.* at 289.

146. *Id.*

147. *Id.*

148. *Id.*

The final couple in the case is the Cliffords, who live in Minnesota.¹⁵⁰ The Cliffords sought to adopt Child P., who is classified as an Indian Child under ICWA because her maternal grandmother is a registered member of the White Earth Band of Ojibwe Tribe.¹⁵¹ Per ICWA's placement preferences, officials removed Child P. from the Cliffords' custody and placed her with her maternal grandmother, whose foster license was previously revoked.¹⁵² A year after Child P.'s placement with her grandmother, a Minnesota court denied the Cliffords' motion for adoptive placement.¹⁵³

In October 2017, the seven individual plaintiffs, joined by three states—Texas, Louisiana, and Indiana—filed suit in federal court arguing that ICWA and the Final Rule implementing ICWA violated a number of constitutional provisions, including the “equal protection requirements of the Fifth Amendment.”¹⁵⁴ The plaintiffs named the United States, several federal agencies, and the heads of those agencies as defendants.¹⁵⁵ After the plaintiffs filed their case, the Cherokee Nation, the Oneida Nation, Quinalt Indian Nation, and Morongo Band of Mission Indians intervened in the case as defendants.¹⁵⁶

On April 26, 2018, both the state and individual plaintiffs filed motions for summary judgement.¹⁵⁷ The district court granted in part and denied in part their motions.¹⁵⁸ First considering the question of equal protection, the court determined the definition of Indian child was a racial, rather than political, classification.¹⁵⁹ The court reasoned that because the definition “defe[red] to tribal membership *eligibility* standards based on ancestry, rather than *actual* tribal affiliation, the . . . definition of ‘Indian children’ uses ancestry as a proxy for race and therefore ‘must be analyzed by a reviewing court under strict scrutiny.’”¹⁶⁰ Applying strict scrutiny, the court found that the defendants had offered no compelling interest and, even assuming there was such an interest, the law was not sufficiently narrowly tailored.¹⁶¹ Considering section 1915(c) of ICWA, which allows tribes to require states use an order for child placement preference other than the baseline

149. *Id.* “Like the Brackeens, the Librettis alleged that they “inten[d] to provide foster care for and possibly adopt additional children in need but are reluctant to foster Indian children after this experience.” *Id.*

150. *Id.* at 288.

151. *Id.* at 289. Particularly for the Cliffords and Child P., the facts as portrayed in federal court documents differ greatly from the facts as portrayed in family court. See *This Land: Grandma Versus the Foster Parents*, CROOKED MEDIA, at 32:08 (Aug. 23, 2021), <https://crooked.com/podcast/3-grandma-versus-the-foster-parents/>.

152. *Brackeen II*, 994 F.3d at 289.

153. *Id.* Child P. was placed with her grandmother in January 2018. *Id.* The Minnesota court denied the Cliffords' motion in January 2019. *Id.*

154. *Brackeen v. Zinke (Brackeen I)*, 338 F. Supp. 3d 514, 530 (N.D. Tex. 2018), *aff'd in part, rev'd in part en banc sub nom. Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2022).

155. *Brackeen II*, 994 F.3d at 289–90.

156. *Id.* at 289. On appeal, the Fifth Circuit “granted the Navajo Nation’s motion to intervene as a defendant.” *Id.* at 289–90.

157. *Brackeen I*, 338 F. Supp. 3d at 519.

158. *Id.*

159. See *id.* at 533.

160. *Id.* at 533–34 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

161. *Id.* at 534–36.

order set by ICWA, the court held it violated the non-delegation doctrine.¹⁶² The court also found that, apart from a few provisions regarding grants and severability, the entire law violated the anti-commandeering doctrine.¹⁶³ Further, the court held that the Bureau of Indian Affairs “lacked statutory authority to enact the challenged portions of the Final Rule.”¹⁶⁴ The only portion of the plaintiff’s summary judgment motion denied by the court concerned their Fifth Amendment Due Process claim.¹⁶⁵ Finally, the court agreed with the plaintiffs that Congress did not have the power to pass ICWA under the Indian Commerce Clause.¹⁶⁶

B. The Fifth Circuit Decision

Following the district court’s decision, the defendants appealed to the Fifth Circuit Court of Appeals.¹⁶⁷ Initially the case was heard by a three-judge panel, which affirmed the district court’s rulings on standing, but reversed the decision as to the merits, upholding ICWA.¹⁶⁸ The court then held an en banc review.¹⁶⁹ The sixteen judges were unable to form a majority opinion on all issues.¹⁷⁰ There were disagreements about standing, Congress’s power to enact ICWA, and the merits of every one of the plaintiffs constitutional claims.¹⁷¹ Despite the division, there were majorities formed to hold the plaintiffs had standing for the majority of their claims, Congress had the authority to enact ICWA, some provisions of ICWA violated the anticommandeering doctrine, and the definition of Indian child did not violate the Equal Protection Clause.¹⁷² But the disorder of the decision meant that there was no majority or minority opinion, and instead two separate opinions, followed by several opinions that concurred or dissented in whole or in part.¹⁷³ For clarity, this Note will refer primarily to the two separate opinions using the name of the judge who authored that opinion. Judge Dennis’s opinion is supportive of

162. *Id.* at 538.

163. *Id.* at 541 (“Therefore, the Court finds that sections 1901–23 and 1951–52 of the ICWA violate the anti-commandeering doctrine.”). The Court held that ICWA violated the three anti-commandeering principles outlined by the Supreme Court “by commandeering States to impose federal standards in state created causes of action.” *Id.* at 539. Further, the court held that ICWA did not preempt state law through the Indian Commerce Clause. *Id.* at 541.

164. *Id.* at 546.

165. *Id.* The plaintiffs attempted to claim a due process violation, alleging that ICWA violated their right as foster parents to make decisions regarding their children. *Id.* The court held that the Supreme Court had never recognized such a right. *Id.*

166. *Id.*

167. See *Brackeen v. Haaland (Brackeen II)*, 994 F.3d 249, 290 (5th Cir. 2021) (en banc); Jenna Kunze, *Fifth Circuit Court Keeps and Strikes Portions of Indian Child Welfare Act*, NATIVE NEWS ONLINE (Apr. 8, 2021), <https://nativenewsonline.net/sovereignty/fifth-circuit-court-keeps-and-strikes-portions-of-indian-child-welfare-act>.

168. *Brackeen II*, 994 F.3d at 290. One judge on the panel concurred in part and dissented in part. *Id.*

169. *Id.*; Kunze, *supra* note 167.

170. *Brackeen II*, 994 F.3d at 267.

171. *Id.* The plaintiffs did not appeal their substantive due process claim but appealed all other claims. *Id.* at 290 n.11.

172. *Id.* at 267–68.

173. *Id.* at 267.

ICWA and would uphold the law in its entirety.¹⁷⁴ Judge Duncan's opinion largely agrees with the district court and would strike down ICWA.¹⁷⁵

This Note will briefly address each aspect of the case in part *i*, but will focus primarily, in part *ii*, on the equal protection arguments, because those will likely be determinative in the Supreme Court decision and have the most serious repercussions for tribal nations.¹⁷⁶

1. The Court's Analysis

First, as to standing, a majority formed to hold the plaintiffs had standing for almost all of their claims.¹⁷⁷ For the plaintiffs' standing on their equal protection claims under sections 1913 and 1914, however, no majority formed.¹⁷⁸ For sections 1913 and 1914, the plaintiffs' standing turned on whether the possibility that a third party could challenge the plaintiffs' adoptions under the statute constituted an injury in fact.¹⁷⁹ Judge Dennis concluded the plaintiffs' alleged injury under these sections was "too speculative to support standing."¹⁸⁰ Judge Duncan, on the other hand, reasoned that because the individual plaintiffs' adoptions were burdened "by ICWA's unequal treatment of non-Indians," they had standing.¹⁸¹

As to Congress's authority to pass ICWA, an en banc majority, written by Judge Dennis, held Congress did have the authority to enact ICWA under Congress's plenary powers.¹⁸² Congress's plenary power over Indian affairs comes from Article I, section 8, clause 3 of the United States Constitution, which gives Congress the power to "regulate Commerce . . . with Indian tribes," along with

174. See generally *id.* at 290–361.

175. See generally *id.* at 361–432.

176. See, e.g., Jessica Lambert, *This Supreme Court Case Threatens the Future of Tribal Lands*, THE NATION (Oct. 5, 2022), <https://www.thenation.com/article/politics/haaland-brackeen-supreme-court/>; *This Land: Pro Bono*, CROOKED MEDIA, at 13:40 (Sept. 13, 2021), <https://crooked.com/podcast/5-pro-bono/>.

177. See *Brackeen II*, 994 F.3d at 267. For the plaintiffs to have standing for any of their claims, they were required to "demonstrate (1) 'an injury in fact' that is (2) 'fairly traceable to the challenged action of the defendant,' and that is (3) likely to be 'redressed by a favorable decision.'" *Id.* at 291 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

178. See *id.* at 267. Section 1913 governs voluntary consent to foster care placement or termination of parental rights on the part of a parent of an Indian child. 25 U.S.C. § 1913. There are formal requirements for the consent and the parents may withdraw consent for foster care at any time and may withdraw consent to termination of parental rights or adoptive placement at any time before "the entry of a final decree of termination or adoption." *Id.* § 1913(a)–(c). Section 1914 allows any parent of an Indian child to petition the courts if their parental rights were terminated or their child placed in foster care in a manner that violated sections 1911, 1912, or 1913. *Id.* § 1914.

179. See *Brackeen II*, 994 F.3d at 293.

180. *Id.* at 292.

181. *Id.* at 370. Also at issue for the equal protection claims was redressability. See *id.* at 446 (Costa, J., concurring in part and dissenting in part). While Judges Dennis and Duncan quickly dispensed with redressability, Judge Costa concluded that the "redressability requirement proves fatal to at least the equal protection claim." *Id.* Because any opinion delivered by the court could not be mandatory for a state court, Judge Costa stated the Fifth Circuit's decision had as much power as a law review article. See *id.*

182. *Id.* at 267 (Dennis, J., separate opinion).

other constitutional authority.¹⁸³ The majority found ICWA fell within this power because it related to the unique trust relationship which “obligates the federal government to preserve self-governance, promote tribal welfare, and uphold its fiduciary duty in managing tribal assets.”¹⁸⁴ Further, there was historical precedent for federal government involvement in the “rearing” of Native children.¹⁸⁵ Thus, Congress had the requisite power to enact ICWA.

There was also an en banc majority, similarly written by Judge Dennis, which held that section 1915(c) was not a violation of the nondelegation doctrine.¹⁸⁶ “‘In a delegation challenge, the constitutional question is whether the statute has’ impermissibly ‘delegated legislative power.’”¹⁸⁷ The majority reasoned that, just as the federal government “may incorporate the laws of another sovereign into federal law without violating the nondelegation doctrine,” the laws of federally recognized tribes could be incorporated as the tribes are sovereign entities.¹⁸⁸ The majority also cited to Supreme Court precedent allowing the “delegation[] of congressional authority to Indian tribes without reference to federal incorporation of their law.”¹⁸⁹ Therefore, allowing the tribes to set their own placement preferences was a permissible delegation by Congress.¹⁹⁰

As to anticommandeering, a majority formed to hold that several provisions of ICWA improperly commandeered state actors.¹⁹¹ Many of the provisions deemed commandeering were those which required the states to take certain actions relating to court proceedings, such as the provisions requiring higher standards of proof.¹⁹² The court was unable to form a majority as to commandeering for the remaining provisions.¹⁹³

183. 25 U.S.C. § 1901(1).

184. *Brackeen II*, 994 F.3d at 279–81. The opinion written by Judge Duncan, on the other hand, found that ICWA’s “intrusion on state child-custody proceedings” brought it outside of the plenary powers’ scope. *Id.* at 373 (Duncan, J., separate opinion). Despite siding with the plaintiffs on this issue, the minority did not agree with the plaintiffs’ argument that ICWA is unconstitutional because it does not regulate tribal commerce. *Id.* at 374.

185. *Id.* at 281–82 (Dennis, J., separate opinion).

186. *Id.* at 269. Section 1915(c) allows federally recognized tribes to establish placement preference orders that differ from those outlined in ICWA. 25 U.S.C. § 1915(c).

187. *Brackeen II*, 994 F.3d at 346 (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001)).

188. *Id.* at 347.

189. *Id.*

190. The opinion written by Judge Duncan, dissenting on this point, reasoned that by allowing the tribes to change “substantive preferences” set by Congress, section 1915(c) improperly allowed the tribes to act in a legislative manner. *See id.* at 421 (Duncan, J., separate opinion). In response to the majority’s assertion that the tribes’ sovereignty made this provision constitutional, the minority reasoned that the tribes’ sovereignty was limited to land held by the tribe and tribal members within the reservation, and thus section 1915(c) was not within the tribes’ sovereignty powers and violates the nondelegation doctrine. *See id.* at 424 (Duncan, J., separate opinion).

191. *Id.* at 268 (per curiam). The court’s discussion of anticommandeering was particularly complicated, causing Judge Duncan to resort to a bulleted list to clarify the court’s holding as to which provisions of ICWA were and were not anticommandeering violations. *See id.* at 419 (Duncan, J., separate opinion).

192. *See id.* at 268 (per curiam); 5 U.S.C. § 1912(e)–(f).

193. *See Brackeen II* (per curiam), 994 F.3d at 268.

2. Equal Protection

The plaintiffs alleged that two separate provisions of ICWA constituted equal protection violations under the Fifth Amendment: the definition of Indian child, and the third placement preference, which prioritizes Native families over non-Native families.¹⁹⁴ To determine the constitutionality of these provisions, the court's first question was whether they are based on political or racial classifications.¹⁹⁵ Political classifications need only to withstand rational basis review, while racial classifications are subject to strict scrutiny.¹⁹⁶ Under rational basis review, courts only invalidate a law when it "bears no rational connection to any legitimate government purpose."¹⁹⁷ Strict scrutiny requires a law to "serve a compelling governmental interest, and must be narrowly tailored to further that interest."¹⁹⁸ The two equal protection challenges are each considered here.

a. "Indian Child" Definition

ICWA defines an Indian child as any "unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."¹⁹⁹ The en banc court held that this definition did not violate equal protection, reversing the decision of the district court.²⁰⁰

Tribal recognition is a decision made by the federal government, but the tribes have the power to decide who is eligible for membership.²⁰¹ Many tribes, though not all, require proof of ancestry, often dating back to when the tribe was recognized.²⁰² As such, some argue that because ICWA's definition of Indian child includes children who are "eligible" but not enrolled members of federally recognized tribes, it is a racial classification.²⁰³ Judge Duncan's opinion, arguing there was an equal protection violation, did not determine whether the definition of ICWA was a racial or political classification, but did state that "the fact that ICWA may apply depending on the degree of 'Indian blood' in a child's veins comes queasily close to a racial classification."²⁰⁴

194. See *id.* at 267–68.

195. See *id.* at 332–33 (Dennis, J., separate opinion).

196. *Id.* at 332.

197. *Id.* at 332–33.

198. *Brackeen v. Zinke* (Brackeen I), 338 F. Supp. 3d 514, 531 (N.D. Tex. 2018) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995)), *aff'd in part en banc, rev'd in part en banc sub nom. Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (Feb. 28, 2022) (No. 21-380).

199. 25 U.S.C. § 1903(4).

200. *Brackeen II* (per curiam), 994 F.3d at 267–68.

201. See Brief of Federally Recognized Tribes, *supra* note 14, at 15; *Tribal Enrollment Process*, U.S. Dep't of the Interior, <https://www.doi.gov/tribes/enrollment> (last visited Apr. 28, 2023). Each tribe, as a distinct political community, has the power to determine its own tribal membership. COHEN, *supra* note 25, § 4.01[2][b].

202. Brief of Federally Recognized Tribes, *supra* note 14, at 15.

203. *Brackeen I*, 338 F. Supp. 3d 514, at 533.

204. *Brackeen II*, 994 F.3d at 396 (Duncan, J., separate opinion). This opinion specifically cited *Adoptive Couple v. Baby Girl* for support that ICWA might violate equal protection. *Id.* at 395.

Judge Dennis's opinion, on the other hand, stated that "[t]ribal eligibility does not inherently turn on race, but rather on the criteria set by tribes, which are present-day political entities. Just as the United States or any other sovereign may choose to whom it extends citizenship, so too may the Indian tribes."²⁰⁵ Tribes using ancestry to determine membership eligibility did not mean that ICWA was based on race, "instead, ICWA's Indian child designation classifies on the basis of a child's connection to a political entity based on whatever criteria that political entity may prescribe."²⁰⁶

To determine classification, the judges looked to Supreme Court precedent, primarily *Morton v. Mancari*.²⁰⁷ *Mancari* held that the Bureau of Indian Affairs' hiring preferences for federally recognized tribal members were not an equal protection violation.²⁰⁸ The hiring practices in question gave preference to tribal members both at the initial hiring stage and when considered for promotions against non-tribal members.²⁰⁹ In determining that the hiring preference was a political classification, rather than a racial classification, the Court in *Mancari* explained that the 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 [Bureau of Indian Affairs] in a unique fashion," and the preference was "reasonably and directly related to a legitimate, nonracially based goal."²¹⁰

Judge Dennis, writing for the majority on this point, identified *Mancari* and "its progeny[']s" holdings as "confirm[ing] that classifications relating to Indians need not be specifically directed at Indian self-government to be considered political classifications."²¹¹ Judge Duncan's opinion, dissenting on this point, asserted that *Mancari*, and the Supreme Court's holdings since *Mancari*, have "clarified" the classification question, and showed that political classifications only exist if the classification relates to the internal affairs of a tribe.²¹² Judge Dennis reasoned that even if such a limitation did exist, ICWA was "aimed squarely" at furthering tribal self-government because it protected children, who are "the most vital resource 'to the continued existence and integrity of Indian tribes.'"²¹³

Next, both opinions applied rational basis review.²¹⁴ Judge Dennis concluded the Indian child definition is constitutional because it fulfills "Congress'[s] unique obligation toward the Indians."²¹⁵ These obligations can be met by "enacting

205. *Id.* at 337–38 (Dennis, J., separate opinion).

206. *Id.* at 338.

207. *Id.* at 333.

208. *Morton v. Mancari*, 417 U.S. 535, 553 (1974). This case is at the very foundation of federal Indian law. COHEN, *supra* note 25, § 3.03[4] (citing to *Mancari* and explaining that "[f]ederal definitions of who is an Indian that demand enrolled membership do not raise equal protection concerns, because the classification is deemed political rather than racial").

209. *Mancari*, 417 U.S. at 538.

210. *Id.* at 554.

211. *Brackeen II*, 994 F.3d at 334 (Dennis, J., separate opinion).

212. *Id.* at 394–95 (Duncan, J., separate opinion). Although, again, Judge Duncan's opinion did not decide whether the Indian child definition was a political or racial classification. *Id.* at 396.

213. *Id.* at 335 (quoting 25 U.S.C. § 1901(3)).

214. *Id.* at 340, 397.

215. *Id.* at 340 (quoting *Rice v. Cayetano*, 528 U.S. 495, 520 (2000)).

legislation dedicated to [Indians'] circumstances and needs" which, Judge Dennis concluded, ICWA did.²¹⁶ Judge Dennis emphasized the low bar of rational basis,²¹⁷ and found that promoting stability and security of the tribes had some "rational connection to Congress's goal of fulfilling its broad and enduring trust obligations to the Indian tribes."²¹⁸ In response to Judge Duncan's conclusion that ICWA was an overinclusive classification,²¹⁹ Judge Dennis reasoned that such overinclusive classifications are allowed within rational basis review.²²⁰ It was enough to satisfy rational basis review that ICWA "could further legitimate goals in some instances."²²¹

b. "Other Indian Famil[y]"

For both adoptive and foster care placements, ICWA outlines placement preferences for states to follow: First with a member of the child's extended family, next with a member of the child's tribe, then a member of any tribe or any tribal foster home ("other Indian famil[y]"), and finally a non-Native home.²²² The plaintiffs in this case challenged the other Indian family preference as an equal protection violation.²²³ The en banc court was unable to reach a majority opinion on this challenge.²²⁴

The classification arguments echo those made for the definition of Indian child and will not be reiterated here. The en banc court failed to reach a majority opinion on this specific provision because the court further split on the question of rational basis review for the other Indian family provision.²²⁵ As such, this section will focus on the rational basis review of the other Indian family provision.

Judge Duncan agreed with the plaintiffs that this provisions of ICWA failed rational basis review, stating "a naked preference for Indian over non-Indian families does nothing to further ICWA's stated aim of ensuring that Indian children are linked to their tribe."²²⁶ Judge Duncan rejected the idea that these provisions

216. *Id.* at 340–41 (quoting *Rice*, 528 U.S. at 519).

217. *Id.* at 341 ("One can imagine any number of overbearing measures that would advantage Indians at the expense of the states or other members of society that would nonetheless promote Indian welfare."). And provided there was "no debate that the law rationally furthered the well-being of tribes" that would be "sufficient to overcome an *equal protection challenge* when rational basis review applies." *Id.*

218. *Id.*

219. *Id.* at 399–400. Judge Duncan reasoned that the Indian child definition did not align with the governmental purpose of preventing the break-up of Indian families because "ICWA overrides the wishes of biological parents who support their child's adoption outside the tribe." *Id.* (Duncan, J., separate opinion). This application of ICWA, Judge Duncan concluded, did nothing to further Congress's original goal. *Id.* at 400.

220. *Id.* at 343 (Dennis, J., separate opinion).

221. *Id.* at 344.

222. *Id.*

223. En Banc Brief of Individual Plaintiffs-Appellees at 40–47, *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (No. 18-11479).

224. *Brackeen II* (per curiam), 994 F.3d at 268.

225. *Id.* at 442 (Haynes, J., concurring).

226. *Id.* at 401 (Duncan, J., separate opinion).

reflected the historic and cultural connections between tribes.²²⁷ Instead, because there was a preference for “any tribe . . . over all non-Indian families,” Judge Duncan concluded that “ICWA’s classification . . . does not rationally further linking children to their tribes.”²²⁸

Judge Dennis, on the other hand, concluded “[i]t is rational to think that ensuring that an Indian child is raised in a household that respects Indian values and traditions makes it more likely that the child will eventually join an Indian tribe—thus ‘promot[ing] the stability and security of Indian tribes.’”²²⁹ Further, Judge Dennis echoed the argument made by the defendants that “many contemporary tribes descended from larger historical bands and continue to share close relationships and linguistic, cultural, and religious traditions, so placing a child with another Indian family could conceivably further the interest in maintaining the child’s ties with his or her tribe or culture.”²³⁰ Finally, in response to Judge Duncan’s worry that a child could be sent to any tribe, Judge Dennis noted that “Congress could rationally conclude that placing an Indian child with a different tribe would fortify the ranks of that other tribe, contributing to the continued existence of the Indian tribes as a whole.”²³¹

C. Supreme Court

Following the Fifth Circuit’s decision, Texas, the individual plaintiffs, the United States, and the intervening tribal nations petitioned for writ of certiorari.²³² The Supreme Court granted writ of certiorari on February 28, 2022.²³³

In oral argument, the Supreme Court considered every issue discussed by the Fifth Circuit including standing, Congress’s power to pass ICWA, and anti-commandeering.²³⁴ There was also some discussion as to whether ICWA was a political or racial classification.²³⁵ Like in the Fifth Circuit’s decision, the Supreme Court’s equal protection discussion focused on the scope of *Mancari*.²³⁶ Beyond the question of classification, the discussion about equal protection focused on the “other Indian family” provision rather than the definition of Indian child.²³⁷

227. *Id.*

228. *Id.*

229. *Id.* at 345 (second alteration in original) (quoting 25 U.S.C. § 1902).

230. *Id.*

231. *Id.*

232. Kate Fort, *Four Cert Petitions Filed in Texas v. Haaland [Brackeen ICWA Case]*, TURTLE TALK (Sept. 3, 2021), <https://turtletalk.blog/2021/09/03/four-cert-petitions-filed-in-texas-v-haaland-brackeen-icwa-case/>.

233. *Brackeen v. Haaland*, 142 S. Ct. 1205 (2022); *Texas v. Haaland*, 142 S. Ct. 1205 (2022); *Haaland v. Brackeen*, 142 S. Ct. 1205 (2022); *Cherokee Nation v. Brackeen*, 142 S. Ct. 1205 (2022) (Feb. 28, 2022) (No. 21-376).

234. Transcript of Oral Argument at 13–17, 19, 46–47, 186–88, *Haaland v. Brackeen*, 142 S.Ct. 1205 (2022) (No. 21-376).

235. *E.g., id.* at 21–33.

236. *See generally id.* at 43, 95–96.

237. *See, e.g., id.* at 5, 18, 130.

Those watching *Haaland v. Brackeen* expect the Court will strike down ICWA.²³⁸ As seen above, there are many avenues the Court could take to make such a ruling. But experts anticipate the Court to rule that ICWA classifies based on race and is an equal protection violation.²³⁹ Such a ruling would have wide-reaching implications for all of Indian law.²⁴⁰ What such a decision could mean for the Wabanaki specifically will be discussed in the next section.

III. POSSIBLE REPERCUSSIONS OF *HAALAND V. BRACKEEN* FOR MAINE TRIBES

A. ICWA Struck Down on non-Equal Protection Grounds

Should the Supreme Court hold ICWA is not an equal protection violation, but does violate the anti-commandeering doctrine, Maine could follow the lead of other states that have passed state-level ICWAs.²⁴¹ Currently, there are eleven states that have codified ICWA.²⁴² One state, Washington, enacted its state level ICWA prior to federal enactment.²⁴³ Another state, Wisconsin, enacted its law to improve ICWA compliance.²⁴⁴ Other states did so to provide even greater protections than the federal law or include tribes recognized at the state, but not federal, level.²⁴⁵ New Mexico passed its own law explicitly in response to *Haaland v. Brackeen*.²⁴⁶

Provided the Supreme Court does not hold that ICWA violates the Equal Protection Clause, a state level statute could be an excellent solution to ensure Maine continues the work begun by the Truth & Reconciliation Commission.

238. See, e.g., Mary Annette Pember, *Supreme Court Takes up the Indian Child Welfare Act*, SOURCE NM (Nov. 8, 2022), <https://sourcennm.com/2022/11/08/supreme-court-takes-up-the-indian-child-welfare-act/> (“The Supreme Court justices’ lack of experience in Indian law, an ultra-conservative stance on race and a demonstrated support for a federalist agenda raises the likelihood that the ICWA could be dismantled by the court, Indian law experts say.”).

239. See, e.g., *id.*; Pema Levy, *This Supreme Court Term is All About White Grievance*, MOTHER JONES (Oct. 24, 2022), <https://www.motherjones.com/politics/2022/10/this-supreme-court-term-is-all-about-white-grievance/>.

240. See, e.g., Lambert, *supra* note 176 (“If the Supreme Court sides with the plaintiffs and rules that the ICWA violates the Equal Protection Clause, thus disregarding an immense body of federal and tribal law and establishing a new precedent that Indian identity is a racial identity, the consequences for Tribal Nations would be catastrophic.”).

241. The federal ICWA would be struck down if the Court holds it improperly commandeers states, but such a ruling would not limit the states’ ability to enact or enforce similar legislation. See generally Augusta McDonnell, *ICWA Protections Now Law in Wyoming, Montana Considers Similar Move*, KTVQ (Mar. 17, 2023) <https://www.ktvq.com/news/icwa-protections-now-law-in-wyoming-montana-considers-similar-move>.

242. Those states are California, Iowa, Michigan, Minnesota, Nevada, Oklahoma, New Mexico, Wisconsin, Washington, Oregon, and Wyoming. Nancy Marie Spears, et. al., *With ICWA Under Threat, More States Shore Up Laws to Protect Native Families from Foster Care Separation*, THE IMPRINT (Apr. 6, 2022), <https://imprintnews.org/foster-care/states-enact-icwa-type-laws/>; McDonnell, *supra* note 241.

243. JACOBS, *supra* note 4, at 131.

244. ICWA, Kids Matter Inc., <https://kidsmatterinc.org/legal-help/native-american-children/icwa/> [<https://perma.cc/64FP-5RQL>].

245. Spears et al., *supra* note 242.

246. *Id.* In direct response to *Brackeen*, Wyoming enacted a state-level ICWA. McDonnell, *supra* note 241.

Further, the Maine legislature could work with the four Maine tribes to tailor the bill as needed to directly address concerns raised in the Truth & Reconciliation Commission's report—and any concerns raised since.

B. ICWA Struck Down on Equal Protection Grounds

1. Implications for State Level Indian Child Welfare Acts

If the Supreme Court determines that ICWA classifies based on race and fails strict scrutiny, most, if not all, existing state level ICWAs would likely also be unconstitutional. This is because most of the state level acts define Indian child in the same manner as the federal ICWA.²⁴⁷ Unless the states are able to provide the Supreme Court with a sufficiently compelling interest to which their law is narrowly tailored, their laws, if challenged would be struck down in the same manner as the federal ICWA.²⁴⁸

2. Greater Implications

Indian law experts are worried about *Brackeen*, not just because ICWA is crucial to protect tribes and Native families,²⁴⁹ but also because a ruling that ICWA classifies based on race would call the entirety of federal Indian law into question.²⁵⁰ This result implicates broader concerns: The “consensus among Native leaders is that the attack on ICWA is really about tribal sovereignty. In other words, the future existence of tribes.”²⁵¹ Rights for tribes including “reservation

247. Compare 25 U.S.C. § 1903(4) with MINN. STAT. § 260.755(8) (2022); WASH. REV. CODE ANN. § 13.38.040(7) (West 2022); MICH. COMP. LAWS ANN. § 712B.3(k) (West 2023); NEV. REV. STAT. ANN. § 128.0128 (West, 2022); Or. Rev. Stat. § 419B.603(5); CAL. WELF. & INST. CODE § 224.1(a)–(b) (West 2023); WYO. STAT. ANN. § 14-6-702(a)(iv); IOWA CODE ANN. § 232B.3(6) (West 2023) (defining Indian child as “an unmarried Indian person who is under eighteen years of age or a child who is eighteen years of age that an Indian tribe identifies as a child of the tribe’s community”). Three of the states’ statutes do not define Indian child. OKLA. STAT. ANN. tit. 10, § 40.2 (West 2022); N.M. STAT. ANN. § 32A-28-2 (West 2023); WIS. STAT. ANN. § 48.028 (West 2023).

248. If the Court rules the “other Indian family” placement preference is a racial classification which violates the Equal Protection Clause, the state-level ICWAs that have similar placement preferences could simply sever those provisions, allowing the rest of the law to stand. See, e.g., WASH. REV. CODE ANN. § 13.38.180 (West 2022); MICH. COMP. LAWS ANN. § 712B.23 (West 2023).

249. ICWA, as discussed above, provides protections to prevent states from separating Native children from their families needlessly, and ensures that if such a separation is necessary, the children remain connected to their culture. See discussion *supra* Section I.C. Striking down ICWA could “open[] the floodgates . . . for predatory adoption of Native babies.” Rebecca Nagle, *The Government Is Attacking Native Families Through Their Children*, THE ESTABLISHMENT (Aug. 8, 2018), <https://medium.com/the-establishment/the-government-is-attacking-native-families-through-their-children-5d49fd341e4>. Further, without ICWA, Native children will be subject to a system that disproportionately targets children of color and children living in poverty. See Dorothy E. Roberts, *I Have Studied Child Protection Services for Decades. It Needs to Be Abolished.*, MOTHER JONES (Apr. 5, 2022), <https://www.motherjones.com/crime-justice/2022/04/abolish-child-protective-services-torn-apart-dorothy-roberts-book-excerpt/>.

250. Lambert, *supra* note 176.

251. *This Land: Pro Bono*, CROOKED MEDIA, *supra* note 176, at 14:40 (Sept. 13, 2021), <https://crooked.com/podcast/5-pro-bono/>; see also Press Release, Wabanaki REACH, Wabanaki REACH and Maine Attorney General in Solidarity to Protect Native Children as the Supreme Court

status, land use, water rights, gaming, any issue that you could ever think about involving tribes is questionable if a court finds that ICWA is unconstitutional because it's race based."²⁵² These concerns are not coming out of nowhere. In *Mancari*, the Supreme Court indicated that if courts held legislation relating to Indian tribes and reservations was racial discrimination, all of Title 25 of the United States Code, which contains legislation for tribes, "would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized."²⁵³

Of course, as discussed above, Maine tribes do not have access to all the rights considered at risk. In fact, only this year did the Passamaquoddy acquire the right to seek out groundwater sources without State approval.²⁵⁴ And after decades of being the only state with tribes unable to operate gambling businesses,²⁵⁵ in 2022 Maine tribes gained the exclusive right to operate mobile sports wagering.²⁵⁶ Also in 2022, Maine Governor Janet Mills signed into law legislation exempting wild blueberries grown on tribal land from state taxes.²⁵⁷ If the Court rules that legislation singling out tribes is a racial classification, all of this recent legislation could be called into question. If challenged, the state would need to prove there was a compelling interest to, for example, allow the Passamaquoddy Tribe to seek groundwater sources without state approval, and that the law was narrowly tailored to that interest.

In 2022 there was also legislation proposed to remove MICSA's limitations on Wabanaki sovereignty.²⁵⁸ Passage of this bill would place the Wabanaki on the same footing as all other federally recognized tribes.²⁵⁹ But if the Plaintiffs in *Brackeen* get their way, the Wabanaki could find themselves, finally, on the same ledge as all other tribes, only to be shoved off together by a misguided notion of equal protection.

Prepares to Hear Oral Arguments (Oct. 31, 2022) (on file with author) ("At the heart of this case being heard by the Supreme Court is tribal sovereignty—the right of tribes to determine citizenship, to protect their children and raise them within tribal standards of care, ensuring the health and continuity of the tribe.").

252. *This Land: Pro Bono*, CROOKED MEDIA, *supra* note 176, at 16:45 (Sept. 13, 2021), <https://crooked.com/podcast/5-pro-bono/>. The motivation for challenges to these rights is clear: money. Energy resources on tribal lands, held in trust for tribes, have an estimated value of \$1.5 trillion. *Id.* at 21:45. Annual revenue from tribal gaming exceeds \$30 billion. *Id.* at 14:08.

253. *Morton v. Mancari*, 417 U.S. 535, 552 (1974). Justice Gorsuch expressed similar concern in oral argument: "[The new rule proposed by plaintiff's counsel] would . . . take a huge bite out of Title 25 of the U.S. code which regulates the federal government's relationship with [] tribal members." Transcript of Oral Argument at 77, *Haaland v. Brackeen*, 142 S.Ct. 1205 (2022) (No. 21-376).

254. *Governor Mills Signs Passamaquoddy Drinking Water Legislation Into Law*, *supra* note 56.

255. See ROLDE, *supra* note 30, at 306–10.

256. 8 M.R.S. § 1207(2) (2022).

257. 36 M.R.S. § 4303-B (2022). Through the same law, potatoes grown on tribal lands are also exempt from state taxes. § 4605(1-A)(C) (2022).

258. Billings, *supra* note 55.

259. *Id.*

CONCLUSION

With the whole of federal Indian law hanging in the balance, there is uncertainty as to how the Wabanaki and Maine should proceed. But regardless of the outcome of *Brackeen*, Maine should continue what it started with the Truth & Reconciliation Commission: listening to Native people and working with them to find solutions so we can heal our systems and heal ourselves.