Loyola University Chicago Law Journal

Volume 54 | Issue 4 Article 7

2023

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Kennedy Ray Fite
Loyola University Chicago Law School

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Haaland v. Brackeen: The Decision That Threatened the Indian Child Welfare Act's Protections of Native Families in Illinois

Kennedy Ray Fite[*]

The Indian Child Welfare Act has become a controversial piece of legislation since the Supreme Court heard oral argument on the case of Haaland v. Brackeen *in November 2022 and released its decision in June 2023. The statute was originally enacted in 1978 to remedy the United States' tragic history of family separation in tribal communities, including removal of native children who were subsequently placed into federal boarding schools or non-native homes by a child-welfare system grounded in white-American assumptions. Congress recognized the vital nature of Native American culture for native children and the importance of native children to tribal existence by including statutory placement preferences. Once intended to protect the best interests of native children, these placement preferences have been challenged as a violation of the Equal Protection Clause by individual states and three white families who attempted to adopt a native child. Under the authority afforded by the statute, during the adoption processes, tribal entities stepped in. They called for the application of the statute's placement preferences to ensure that the native children were placed in native homes and maintained their cultural identity through a connection with the Native American community. Ignoring the purpose of the ICWA, the statute's opponents have argued that this discriminates against non-native families.*

Named after the local Native American tribes that once called this state

* J.D. Candidate, Class of 2024, Loyola University Chicago School of Law; Fellow, Civitas ChildLaw Center. Thank you to the *Loyola University Chicago Law Journal* staff, friendly enthusiasts, and familial editors who supported this first-generation law student's effort to delve into the country's pervasive history of colonization, genocide, and oppression that still impacts Native American communities today. I would like to recognize that I grew up and continue to reside on lands once inhabited by the Council of the Three Fires (the Ojibwa, Ottawa, and Potawatomi tribes), and I would also like to emphasize the biblical call to "speak up" and "defend the rights" of those whose voices have been silenced (Proverbs 31:8-9). This Note is dedicated not only to the Native American communities of past and present but also to the loving homes that redefine the term "family."

"home," Illinois has its own history of profound prejudice and discrimination against native tribes and their children. However, recognizing its part in the forced assimilation of native children into white society, Illinois's decades-old precedent upholds the ICWA as constitutional. Its courts have correctly recognized that the political classification created by the statutory placement preferences is rationally related to the legitimate government interests of preventing native family separation and respecting tribal sovereignty. This Note advocates for the Supreme Court to recognize the United States' active participation in the destruction of native tribal entities and detrimental consequences to native children by upholding the ICWA as constitutional against future equal protection claims. By upholding the placement preferences, the Supreme Court could preserve and promote the vital protections afforded to native families through Illinois's precedent.

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INTRODUCTION

Years before the enactment of the Indian Child Welfare Act[1] ("the ICWA"), John Dall was taken at the age of three from his Native American mother and placed in non-native foster homes throughout Illinois.[2] After surviving abuse in eight foster homes, John was placed into a non-native home where he had no connection to his Ho-Chunk native culture or tribal community.[3] In his explicit support for the ICWA, John described the deprivation of tribal connection throughout his childhood as "identity theft."[4] Unfortunately, John's story is just one of many in the long American history of removing native children from their families.[5] By the 1970s, 25 percent of native children were no longer in their familial home and tribal community, but rather residing in non-native foster homes, adoptive homes, or boarding schools.[6] To combat this "cultural genocide"[7] and "prevent the breakup of Indian families,"[8] Congress drafted the ICWA that has since been upheld by Illinois courts, a state with its own history of Native American discrimination and native child removal.[9]

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1. 25 U.S.C. §§ 1901–1963.
2. Brendan Moore, *Identity Theft*, READER: CHICAGO'S ALTERNATIVE NONPROFIT NEWSROOM (Oct. 16, 2003), https://chicagoreader.com/news-politics/identity-theft/ [https://perma.cc/7YNA-AFMK].
3. *See id.* (describing the obsessive rules imposed by foster parents such as a four square limitation on toilet paper and consequential punishments like drinking a concoction of hot water, mustard powder, and pepper where "the goal was to drink it without throwing up–because if you did throw up, you would then have to lick it up off the floor."); *see also id.* (referring to classmates' questions throughout his childhood like, "[I]f you don't know what kind of Indian you are, how Indian could you really be?").
4. *Id.*
5. *See generally infra* Part I.A.
6. *Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affs.*, 93d CONG. 1 (1974) [hereinafter Hearings].
7. *Id.* at 2.
8. 25 U.S.C. § 1931; H.R. REP. NO. 95-1386, at 8 (1978) [hereinafter House Report] (stating that the purpose of the ICWA's federal standards is to not only "protect the best interests of Indian children" but also ensure "the stability and security of Indian tribes and families").
9. *See In re* Armell, 550 N.E.2d 1060, 1067–68 (Ill. App. Ct. 1990) (holding that the ICWA does not violate the Equal Protection Clause); *see generally infra* Part I.C..

However, since its enactment in 1978, the ICWA has faced numerous claims that its placement preferences violate the Equal Protection Clause of the Fourteenth Amendment.[10] These placement preferences require that any "Indian child" removed from their native[11] family must be placed with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."[12] Contentiously, an "Indian child" under the act is "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."[13] This definition has been emphasized by critics as applying the statutory preferences only to a subset of children who are "eligible for membership" in Native American tribes and not to those children ineligible for that affiliation.[14] Thus, the application of the ICWA's minimum federal standards have caused many to challenge its constitutionality.

While numerous attempts at challenging the ICWA have been unsuccessful, in 2018, a Texas federal district court caused a contentious debate when it found the placement preferences in the ICWA to be in violation of the Equal Protection Clause.[15] The plaintiffs included non-

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10. *See* Addie Rolnick & Kim Person, *Racial Anxieties in Adoption: Reflections on* Adoptive Couple, *White Parenthood, and Constitutional Challenges to the ICWA*, 2017 MICH. ST. L. REV. 727, 727 (2017) (describing the ICWA as "under fire" by constitutional challenges).

11. This Note will use the terms "native" and "Native American" rather than "Indian." While the statutory language of the ICWA and Bureau of Indian Affairs ("BIA") use "Indian" to distinguish the group as a political, rather than racial, category, the term originated from an early mistake by colonizers unfamiliar with Native Americans and tribal culture. *See generally* 25 U.S.C. §§ 1901–1963; Indian Entities Recognized By and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200, 1200 (Feb. 1, 2019); *see* ROBERT F. BERKHOFER, THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT 3–5 (Alfred A. Knopf, Inc., 1st ed. 1978) (noting the origins of "Indian" stemming from Christopher Columbus arriving in what would become America and calling the native people "los Indios" because he wrongly believed he was in India). As this Note argues, the ICWA plays a crucial role in maintaining tribal culture and native identity, so it is important to use the statutory language of "Indian" only when quoting governmental materials that use the mistaken term.

12. 25 U.S.C. § 1915.

13. 25 U.S.C. § 1903(4); *see* Lucy Dempsey, *Equity over Equality: Equal Protection and the Indian Child Welfare Act*, 77 WASH. & LEE L. REV. ONLINE 411, 425 (2021) (describing the debate over the constitutionality of applying the ICWA to native children who may only be eligible for tribal membership).

14. *See infra* notes 295–297 and accompanying text (detailing the argument often proffered by critics of the ICWA).

15. Brackeen v. Zinke, 338 F. Supp. 3d 514, 535–44 (N.D. Tex. 2018); *see Official Statement: Joint Statement on Indian Child Welfare Case* Brackeen v. Zinke *Ruling*, NAT'L CONG. OF INDIAN AM. (Oct. 8, 2018), https://www.ncai.org/news/articles/2018/10/08/official-statement-joint-statement-on-indian-child-welfare-case-brackeen-v-zinke-ruling [https://perma.cc/XY87-ZU4M] (describing the ruling as "egregious" and ignorant to the "decades of precedent that have upheld tribal sovereignty and the rights of Indian children and families").

native foster parents to a native child covered by the ICWA who faced problems with the statute's placement preferences during an attempted adoption.[16] After an appeal, a panel consisting of three judges from the United States Court of Appeals for the Fifth Circuit reversed the decision in favor of upholding the ICWA as constitutional.[17] Yet, in a rehearing of the case en banc, the Fifth Circuit narrowly affirmed the constitutionality of the ICWA's placement preferences.[18] Unsurprisingly, the Supreme Court consolidated four petitions and granted a writ of certiorari to review the constitutionality of the placement preferences for native children required by the ICWA.[19] Ultimately, the Supreme Court held in *Haaland v. Brackeen* that the petitioners did not have standing to bring an equal protection claim, so consequently, it did not reach the merits of the equal protection analysis.[20] This Note will argue that if it must determine the merits of an equal protection claim in the future, the Supreme Court should find the ICWA's placement preferences to be constitutional to maintain the protections afforded to native families through Illinois's precedent.

Part I of this Note will first briefly discuss the history of the ICWA and the native family separation that led to its enactment in 1978. Then, it will examine the Fourteenth Amendment's Equal Protection Clause and how the Supreme Court has handled equal protection claims against federal legislation regarding Native American tribes. Centering on Illinois, this Note will also discuss the history of Native Americans in the state, including the active role Illinois played in native family separation and its precedent upholding the ICWA as constitutional. Part II will provide a description of the claims heard by the Supreme Court in *Haaland v. Brackeen* and the case's procedural history including the district court's rationale in finding the ICWA to be unconstitutional and the Fifth Circuit's reversal. Part III will show that Illinois courts have properly held that the native children covered by the ICWA are not a suspect class, and that the ICWA satisfies rational basis review because

16. Petition for Writ of Certiorari, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), *cert. granted*, (No. 21-376) [hereinafter Petition for Cert.].

17. Brackeen v. Bernhardt, 937 F.3d 406, 425–30 (5th Cir. 2019).

18. Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), *cert. granted*, (No. 21-376).

19. Andrew Hamm, *Four Petitions on the Constitutionality of the Indian Child Welfare Act*, SCOTUSBLOG (Sept. 24, 2021, 2:59 PM), https://www.scotusblog.com/2021/09/four-petitions-on-the-constitutionality-of-the-indian-child-welfare-act/ [https://perma.cc/JW7B-TDS5]; *accord* Amy Howe, *Justices Agree to Review Constitutionality of Indian Child Welfare Act*, SCOTUSBLOG (Feb. 28, 2022, 10:32 PM), https://www.scotusblog.com/2022/02/justices-agree-to-review-constitutionality-of-indian-child-welfare-act/ [https://perma.cc/YTW9-JEW3]] (explaining the case's consolidation and grant of cert).

20. Haaland v. Brackeen, No. 21-376, slip op. at 34 (June 15, 2023) [hereinafter Halland v. Brackeen].

the placement preferences are rationally related to its three legitimate purposes. However, recognizing that the Supreme Court may find native children to be a suspect class in the future, this Note also argues that the ICWA withstands strict scrutiny because the preferences are narrowly tailored to furthering the statute's compelling purpose.

Part IV will detail the devastating consequences that could come to fruition if the Supreme Court finds the ICWA's placement preferences to be unconstitutional. Not only will it encroach upon the rights of native children and cause irreparable mental and physical health challenges unique to native children living in Illinois, but it will also decrease the vital recognition of tribal sovereignty and threaten tribal existence. Finally, this Note will briefly conclude by recognizing the extreme weight of the Supreme Court's decision in future equal protection claims against the ICWA on each native child living in Illinois and will provide a final argument for the Court to find the ICWA's placement preferences to be constitutional.

I. BACKGROUND

A. The ICWA

During its enactment of the ICWA in 1978, Congress recognized that for years, "an alarmingly high percentage of Indian families [had been] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies."[21] More often than not, these children were placed in non-native homes or boarding institutions.[22] This was not a new phenomenon as native family separation has been a staple throughout American history.[23] Starting with the colonists, native tribes were frequently attacked, and children were targeted and often used as hostages as a manipulation tactic to control tribal behavior.[24] Then, during the Revolutionary War, the practice of institutionalizing native children under the guise of education began and remained a common practice throughout the 1800s as a means to "kill the Indian . . . . and save

21. House Report, *supra* note 8, at 9.

22. *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32–33 (1989) (describing the ICWA as originating from "the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.").

23. *See* Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 889 (2017) (describing the history of native family separation); *see generally* JOHN GRENIER, THE FIRST WAY OF WAR: AMERICAN WAR MAKING ON THE FRONTIER, 1607–1814 (2005) (noting the impact of American colonization on Native American tribes and their native families).

24. *See* Fletcher & Singel, *supra* note 23, at 895–96 (indicating that American colonists played a part in native family separation).

the man within."[25] This practice spread throughout the 408 federal boarding schools across thirty-seven states.[26] In 1971, the Bureau of Indian Affairs ("BIA") reported that over 34,500 native children were still living in its federal boarding schools.[27] Some tribes had over 90 percent of their school-aged children placed in these institutions, which contributed to the "destruction of Indian famil[ies] and community life" by isolating the child from their native language and traditions.[28] Not only were native children separated from their families and tribes while held in these institutions, but the boarding schools were often abusive environments where native children would suffer from physical, sexual, emotional, and psychological abuse.[29]

Additionally, in the 1950s, the federal government created the Indian Adoption Project through which state and private agencies sent native children primarily to non-native families.[30] From 1958 to 1967, the Indian Adoption Project actively removed almost four hundred native children from their families and tribal communities and placed most of them in white homes located in the Midwest.[31] Of those children, forty-

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25. *Compare id.* at 911 (introducing removal of native children into federal boarding schools) *and* COLIN G. CALLOWAY, THE INDIAN HISTORY OF AN AMERICAN INSTITUTION: NATIVE AMERICANS AND DARTMOUTH 40–41 (2010) (describing how Dartmouth received money from Congress for the education of Native American boys, but later referred to the children as "hostages" rather than students and credited them for the lack of attacks on the school during the Revolutionary War), *with* Col. Richard Pratt, quoted in FRANK POMMERSHEIM, BROKEN LANDSCAPE 243 (2009). Pratt was the founder of Carlisle Indian Industrial School who proudly announced its primary goal as cited. *See generally* RICHARD H. PRATT, THE INDIAN INDUSTRIAL SCHOOL, CARLISLE, PENNSYLVANIA: ITS ORIGINS, PURPOSES, AND THE DIFFICULTIES SURMOUNTED (1908).

26. OFF. OF THE ASSISTANT SEC'Y—INDIAN AFFAIRS, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 4 (2022) (summarizing the lists of names and locations of the institutions found during the investigation).

27. House Report, *supra* note 8, at 9 (showing how over 17 percent of the school-aged native population lived in federal boarding institutions).

28. House Report, *supra* note 8, at 9; *see* Ann Piccard, *Death by Boarding School: The Last Acceptable Racism and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137, 141 (2013) (referring to the design of native boarding schools as "not to educate [native] children, but, instead, to instill in them the whites' belief that everything 'Indian' was bad, inferior, and evil"); *accord* B.J. JONES ET AL., THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN 2 (2nd ed. 2008).

29. *See* Katie L. Gojevic, *Benefit or Burden?:* Brackeen v. Zinke *and the Constitutionality of the Indian Child Welfare Act*, 68 BUFF. L. REV. 247, 253–54 (2020) (enumerating the horrific abuse native children had to withstand in institutions); *see generally* CLIFFORD E. TRAFZER, BOARDING SCHOOL BLUES: REVISITING AMERICAN INDIAN EDUCATIONAL EXPERIENCES (Clifford E. Trafzer et al. eds., 2006).

30. *See* ELLEN SLAUGHTER, UNIV. OF DENVER RSCH. INST., INDIAN CHILD WELFARE: A REVIEW OF THE LITERATURE 61 (1976) (detailing the "Indian extraction" policy as a way to satisfy a "large demand for Indian children on the part of Anglo parents").

31. *See* Moore, *supra* note 2 (indicating the practices of the Child Welfare League of America through the Indian Adoption Project).

eight were placed into white homes in Illinois.[32] John Dall, the native child separated from his Native American mother at three years old, describes the Illinois Department of Child and Family Services ("DCFS") staff as working "under the assumption . . . that if you were poor and Indian you couldn't take care of your kids."[33] Oftentimes, the social workers recommending the removal of the native child were non-native themselves and based reasons for removal on "neglect" or "social deprivation."[34] These vague justifications illustrate how social workers were often blinded by bias and lacked respect for cultural differences when making determinations regarding a native child's emotional risk and a native family's caregiving ability.[35] Based on these discriminatory actions, it is not surprising that by 1969, 85 percent of native children in foster homes were living with non-native families.[36]

Recognizing the nation's perpetual attempts to separate native families and failure to "recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families,"[37] Congress enacted the ICWA in 1978 to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."[38] Consequently, the statute proposed three primary objectives: "(1) eliminating the removal of Indian children due to cultural bias and ignorance; (2) placing validly-removed Indian children in foster or adoptive homes that reflect their unique culture and background; and (3) increasing tribal court adjudication of child custody proceedings."[39]

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32. *Id.*
33. *Id.*
34. *See* House Report, *supra* note 8, at 10 ("Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider[ed] leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights."); *see also* Barbara Ann Atwood, *Flashpoints under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 603–04 (2002) (noting that state child welfare officials were quick to find fault with traditional native child-rearing behavior such as "involving members of a child's extended family in significant caregiving").
35. *See* Dempsey, *supra* note 13, at 417–18 (differentiating "neglect" or "social deprivation" from less vague charges of physical abuse); *see also* House Report, *supra* note 8, at 10 (stating how Congress found social workers' decisions to be "wholly inappropriate" in the context of Indian cultural values and social norms).
36. House Report, *supra* note 8, at 9; *see* Allison Krause Elder, *"Indian" as a Political Classification: Reading the Tribe Back into the Indian Child Welfare Act*, 13 NW. J. L. & SOC. POL'Y 417, 418 n.10 (2018) (attributing the disproportionate number of native children placed in non-native homes to the Indian Adoption Project of the 1950s).
37. 25 U.S.C. § 1901(5); *see* House Report, *supra* note 8, at 9 ("The wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.").
38. 25 U.S.C. § 1902.
39. Dempsey, *supra* note 13, at 421 (citing 25 U.S.C. § 1902).

The ICWA applies in all state court child custody proceedings involving an "Indian child."[40] First, the statute defines "Indian child" 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."[41] Second, the statute defines a recognized child custody proceeding as: (1) foster care placements; (2) termination of parental rights; (3) pre-adoptive placement; and (4) adoptive placement.[42] Thus, specifically in foster care[43] and adoption[44] proceedings involving at least one native child encompassed by the statute, the ICWA creates a hierarchy by which state courts must ascribe so long as the placement is the "least restrictive setting appropriate to the particular needs of the child."[45] These unique placement preferences for native children have been the basis of many constitutional challenges claiming that the statute violates the Equal Protection Clause.[46]

B. Equal Protection

1. Equal Protection Analysis

The Fourteenth Amendment includes an Equal Protection Clause that prohibits states from making or enforcing any law which "den[ies] to any person within its jurisdiction the equal protection of the laws."[47] By means of the Fifth Amendment's Due Process Clause, federal laws must abide by the same equal protection requirement.[48] When an equal

40. *See generally* 25 U.S.C. ch. 21.

41. 25 U.S.C. § 1903(4); *see* Dempsey, *supra* note 13, at 425 (describing the debate over the constitutionality of applying the ICWA to native children who may only be eligible for tribal membership).

42. 25 U.S.C. § 1903(1).

43. *See* 25 U.S.C. § 1915(b) ("In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with (i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.").

44. *See* 25 U.S.C. § 1915(a) ("In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.").

45. 25 U.S.C. § 1915(c); *see* POMMERSHEIM, *supra* note 25, at 244 (describing the ICWA's placement preferences as "designed to facilitate placement with Indian families and institutions").

46. *See* Dempsey, *supra* note 13, at 424 (attributing equal protection violation claims to the differentiated treatment afforded to native children by the ICWA).

47. U.S. CONST. amend. XIV, § 1.

48. U.S. CONST. amend. V; *see* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (noting that due process and equal protection are not mutually exclusive).

protection claim is before a court, the analysis begins with whether the statute in question treats a suspect class of people differently because the court will apply different standards of review and grant Congress different degrees of deference depending on the class of people encompassed by the law.[49] Thus, in equal protection challenges against the ICWA, the pertinent question is usually whether the statute's definition of "Indian child" is a racial or political classification.

If a court determines that the statute is classifying a political group, it will afford a great amount of deference to Congress and apply rational basis review.[50] For the statute to be upheld as constitutional, the government must prove that the law was rationally related to a legitimate government purpose.[51] The Supreme Court has held that legislative purposes like promoting public safety and administrative cost efficiency are legitimate purposes.[52] Conversely, it has ruled that fear, animus, and hostility toward politically unpopular communities are not legitimate.[53] Regarding the rational relation inquiry, the Supreme Court has often held that even significant over-inclusiveness is allowed under rational basis review so long as there is still some rational relation to the government's legitimate purpose.[54]

If a court determines that the statute is attempting to distinguish a racial group, it will apply "strict scrutiny."[55] For the act to be upheld as

49. *See* ERWIN CHIMERINSKY, CONSTITUTIONAL LAW 727 (5th ed. 2016) ("The Supreme Court has made it clear that differing levels of scrutiny will be applied depending on the type of discrimination.").

50. *See id.* at 732 ("There is a strong presumption in favor of laws that are challenged under the rational basis test." (citing McGowan v. Maryland, 366 U.S. 420, 425–26 (1961)); *see also* Morton v. Mancari, 417 U.S. 535 (1974) (holding that laws that "single out Indians for particular and special treatment" are subject to rational basis scrutiny, because they are "political rather than racial in nature.").

51. *See* CHIMERINSKY, *supra* note 49, at 732 (detailing the requirements to satisfy rational basis review).

52. *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106, 109 (1949) (upholding a law that promoted public safety on roads against an equal protection claim); Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974) (upholding a law that excluded women due to the substantial cost increase to the current program against an equal protection claim).

53. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (noting that the desire to harm persons with cognitive disabilities even out of fear is not a legitimate purpose under the Constitution); Romer v. Evans, 517 U.S. 620, 632 (1996) (holding Amendment 2 unconstitutional because it "seems inexplicable by anything but animus toward the class it affects); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973) (noting that the desire to harm a politically unpopular group, such as hippies, is not a legitimate interest under the Constitution).

54. *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (upholding a statute that disqualified all methadone users from employment even if they were using the drug with the help of medical assistance); Vance v. Bradley, 440 U.S. 93, 95 (1979) (upholding a statute that required retirement of federal employees under one retirement program and not others).

55. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (establishing strict scrutiny for racial classifications).

constitutional, the government must prove that the law was narrowly tailored to achieve a compelling purpose.[56] Generally, the Supreme Court has found military necessity and upholding public confidence in the democratic process to be examples of compelling government purposes.[57] Due to the lack of deference afforded to Congress by this high level of review, strict scrutiny is usually the downfall for a statute in question and often results in a finding of unconstitutionality.[58] However, most pertinent to this Note and the case at hand, the Supreme Court has held that the government may use race-based classifications with the purpose of responding to the "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country."[59]

In *Grutter v. Bollinger*,[60] the Supreme Court upheld an admissions policy at the University of Michigan ("the University") that emphasized diversity and reaffirmed the University's commitment to racial and ethnic diversity by enrolling a "'critical mass' of underrepresented minority students."[61] Barbara Grutter was a white prospective law student with above average grades and test scores who was rejected from the University's law school.[62] She filed a claim against the University on the grounds that it discriminated against her on the basis of race in violation of the Equal Protection Clause.[63] She believed her application was rejected due to the use of race as a "'predominant' factor," thereby giving minority applicants, including Native Americans, a significantly greater chance of admission.[64] The Supreme Court applied strict scrutiny, but pushed back on the concept that strict scrutiny is "strict in theory, fatal in

56. *See id.* (detailing the requirements to satisfy strict scrutiny).

57. *See id.* at 224 (affirming a civilian exclusion order against "all persons of Japanese Ancestry" against an equal protection constitutional claim due to the military's reported need for the order); *see also* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 197 (2008) (upholding a statute restricting voting as constitutional against an equal protection claim due to the state's stated purpose for safeguarding voter confidence).

58. *See* Roy G. Jr. Spece & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 312 (2015) (detailing the difficulty of withstanding strict scrutiny due to the implicit elements the government must meet in order to prevail).

59. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (dispelling the notion that strict scrutiny is "strict in theory, but fatal in fact" in all circumstances); *see* Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003) ("Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.").

60. *See generally Grutter*, 539 U.S. at 306.

61. *See id.* at 315–16 (describing the admissions policy at length).

62. *Id.* at 316.

63. *Id.* at 317.

64. *Id.*

fact."[65] Rather, it found the standard of review as "designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context."[66] Consequently, after reviewing the policy, the Supreme Court found the University's interest in attaining a diverse student body to be compelling, emphasizing that "diversity is essential to [a school's] educational mission."[67]

Additionally, the Supreme Court found that the means chosen were specifically and narrowly tailored to accomplish this purpose for four reasons.[68] First, the holistic policy was necessary because there was no alternative way to advance the goal of attaining a diverse student body.[69] Second, the University did not use impermissible methods like quotas, but rather considered race as just one factor in each applicant's file.[70] Third, the University had shown that previous attempts to increase diversity through race-neutral alternatives had failed.[71] Finally, the race-conscious admissions policy did not unduly harm individuals who were not members of the minority racial group.[72] Therefore, the Supreme Court's ruling indicated that it would uphold policies and legislation with a racial component like the ICWA so long as it could withstand strict scrutiny.[73]

2. Equal Protection Challenges to Legislation Involving Native Tribes

The Supreme Court has applied the equal protection analysis to challenges against federal legislation specifically involving Native American tribes. In the 1974 case, *Morton v. Mancari*, the Supreme Court upheld a provision of the Indian Reorganization Act of 1934 that gave hiring preference to native employees in the BIA.[74] For an applicant to be eligible for preferred hiring, they must have been "one-fourth or more degree Indian blood and be a member of a Federally recognized tribe."[75] The petitioners claimed that because the definition was in part

65. *See id.* at 326–27 (emphasizing that "[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it").
66. *Id.* at 327.
67. *Id.* at 328.
68. *Id.* at 333–34.
69. *Id.* at 333.
70. *Id.* at 334.
71. *Id.* at 339–40 (describing the failed alternatives but emphasizing that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative").
72. *Id.* at 341.
73. *Id.* at 326–27.
74. Morton v. Mancari, 417 U.S. 535, 537 (1974).
75. *Id.* at 553 n.24.

based on blood, it was a racial classification.[76] However, the Supreme Court disagreed by focusing on the "unique legal status of Indian tribes under federal law" and "the plenary power of congress . . . to legislate on behalf of federally recognized Indian tribes."[77] Founded on a historically-special relationship between Congress and the political bodies of tribes, the Supreme Court detailed that the preference was granted to Native Americans "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities."[78] Thus, it was determined to be a political rather than racial classification, and the Supreme Court applied rational basis review. Focusing on its narrowed application and "direct[] relat[ion] to a legitimate, nonracially based goal," the Supreme Court found that the hiring preference could be "tied rationally to the fulfillment of Congress's unique obligation toward the Indians."[79] Further reinforcing the notion that legislation categorizing Native Americans is a political classification, the Supreme Court has since reaffirmed its decision in *Mancari*.[80]

Conversely, in the 2000 case, *Rice v. Cayetano*, the Supreme Court limited *Mancari* to federally recognized tribes by striking down a statute limiting voting rights to those of "native Hawaiian" descent.[81] The statute in question limited voters for the trustees of the Office of Hawaiian Affairs to voters who were classified as "Hawaiian" or "native Hawaiian."[82] A citizen of Hawaii who was barred from voting claimed that the statute was unconstitutional on the grounds that it violated his Fifteenth Amendment right to vote regardless of race.[83] While Hawaii attempted to rely on *Mancari* to argue that the analogous classification

76. *Id.* at 551.
77. *Id.* at 551–52.
78. *Id.* at 554.
79. *Id.* at 554–55.
80. *See, e.g.*, Fisher v. District Court, 424 U.S. 382, 383, 390 (1976) (upholding a pre-ICWA adoption proceeding involving the Northern Cheyenne Tribe as a "quasi-sovereign status"); United States v. Antelope, 430 U.S. 641, 646 (1977) (upholding a federal criminal statute applied to respondents based on their native status) ("Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial group consisting of Indian . . . .'" (quoting Morton v. Mancari, 417 U.S. 535, 553 (1974))); Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976) (upholding a statute affording tribal immunity from Montana tax statutes by finding that the native preference was not racial and applying rational basis to determine if the statute was rationally related to "Congress's unique obligation toward the Indians" (citing *Mancari*, 417 U.S. at 555 (1974))).
81. Rice v. Cayetano, 528 U.S. 495, 522 (2000).
82. *Id.* at 510 (quoting the statute's definition of "Hawaiian" as a descendent of the aboriginal people in Hawaii in 1778 and "native Hawaiian" as a descendent of "not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778").
83. U.S. CONST. amend. XV, § 1.

was not racial, the Supreme Court disagreed.[84] It examined the history of the Fifteenth Amendment from invalidating statutes that clearly mention "race" to those that instead use the term "ancestry."[85] The Supreme Court reprimanded the state for using Hawaiian ancestry as a proxy for race.[86] It differentiated between native Hawaiians and Native Americans by emphasizing the tribes as unique "quasi-sovereign tribal entities" while native Hawaiians were not.[87] Although *Mancari* had a "racial component," the hiring preference was not applied to a "'racial' group consisting of 'Indians,' but rather only to members of 'federally recognized' tribes,'" thereby making it a political classification.[88] The native Hawaiian classification in question was not similarly political, but rather solely racial, and therefore, the Supreme Court was quick to strike the statute down under strict scrutiny.[89]

Most recently, in 2013, the Supreme Court interpreted the ICWA in *Adoptive Couple v. Baby Girl*.[90] In that case, a father who was part Cherokee agreed to surrender his parental rights and proceed with an adoptive placement of his child with a non-native couple.[91] Due to his Native American heritage, counsel for the child's biological mother notified the Cherokee tribe of the pending adoption,[92] and after two years of legal proceedings in the South Carolina courts, the father requested a stay of the adoption.[93] Because the adoptive parents were unable to show good cause to terminate the father's parental rights, the father received custody.[94] Then, the South Carolina Supreme Court affirmed the denial of the adoption after determining that the child was subject to the ICWA

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84. *Compare Rice*, 528 U.S. at 518 (describing the state's argument as attempting to analogize native Hawaiians to members of Indian tribes provided hiring preferences in *Mancari*), *with id.* at 499 ("Rejecting the State's arguments that the classification in question is not racial . . . .").

85. *Id.* at 513–14 (citing Guinn v. United States, 238 U.S. 347 (1915); Terry v. Adams, 345 U.S. 46 (1953); Smith v. Allwright, 321 U.S. 649 (1944)).

86. *Id.* at 514.

87. *Id.* at 519–20 (quoting Morton v. Mancari, 417 U.S. 535, 554 (1974)); *see also id.* at 522 ("Nonetheless, the elections for OHA trustee are elections of the State, not of a separate quasi-sovereign, and they are elections to which the Fifteenth Amendment applies.").

88. *Id.* at 519–20.

89. *Id.* at 522.

90. Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013). Also known as the Baby Veronica Case. Jane Burke, *The "Baby Veronica" Case: Current Implementation Problems of the Indian Child Welfare Act*, 60 WAYNE L. REV. 307, 307 (2014). This is the Court's second interpretation of the ICWA. *See infra* notes 100–105 and accompanying text (explaining the Court's first case interpreting the ICWA in Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)).

91. *Id.* at 643–44.

92. *Id.* at 644.

93. *Id.* at 645.

94. *Id.* at 645–46.

because the father was enrolled in the Cherokee Nation.[95] However, the Supreme Court ultimately reversed the lower court's decision because the statute was intended to protect the "continued custody" of native parents and the father had never been a custodial parent.[96] Although the Supreme Court's decision was focused on whether the ICWA should apply to non-custodial native fathers, in its reasoning, the majority continued to emphasize its reluctance to apply the statute when the child was only "3/256 Cherokee."[97] Due to this vague line of reasoning, the dissent criticized the majority's rhetoric for "hint[ing] at lurking constitutional problems [that are] irrelevant" and that only "create[d] a lingering mood of disapprobation of the criteria for [tribal] membership."[98]

Due to the Supreme Court's intentional avoidance of the ICWA's potential constitutionality issues in *Baby Girl* and its reinvigoration of the debate over the ICWA's constitutionality,[99] the only guidance on equal protection issues regarding the statute is its 1989 decision in *Mississippi Indians v. Holyfield.*[100] Although the decision did not definitively conclude whether "Indian" is a racial or political classification, its focus on whether two native children were "domiciled" on a reservation for purposes of the ICWA provided assistance in interpreting the statute.[101] In *Holyfield*, both children were eligible for tribal membership and their parents were both enrolled as members of the Mississippi Band of Choctaw Indians, subjecting the children to the ICWA.[102] After considering the ICWA's legislative history, the Supreme Court emphasized that the statute's purpose in protecting the best interests of native tribes corresponded with the best interests of native children and

95. *Id.* at 645.

96. *Id.* at 652–54.

97. *Compare id.* at 665 (admonishing a reading of the ICWA that allowed an absentee father to "play his ICWA trump card at the eleventh hour"), *with id.* at 646 ("It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption . . . .").

98. *Id.* at 691 (Sotomayor, J., dissenting).

99. *See, e.g.*, Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295, 336 (2015) (labeling the Court's references to equal protection concerns as "deliberately vague" and "built upon air"); Christopher Deluzio, *Tribes and Race: The Court's Missed Opportunity in* Adoptive Couple v. Baby Girl, 34 PACE L. REV. 509, 558 (2014) (reprimanding the Court for using "the ICWA's statutory text as a useful life raft to avoid the choppy waters of the ICWA's fundamental equal protection flaws" and "perpetuat[ing] the legal fiction necessary to justify rational basis review of Indian classifications").

100. 490 U.S. 30 (1989).

101. *See id.* at 32; Elder, *supra* note 36, at 429–31 (discussing how the case "reveals a larger debate about whether the ICWA is intended to protect tribes, Indian families, or both").

102. 25 U.S.C. § 1903(4)(b).

families.[103] While the majority concluded that the unique relationship of native children with their tribe necessitated that the tribal interest be represented in custody proceedings, the dissent focused primarily on the rights of the parents.[104] The dissent characterized the ICWA's purpose as to prevent the unjustified removal of native children from their parents so that where the native child's parents consented to an adoption, tribal jurisdiction should not be granted.[105] While the decision gave little guidance for lower courts who had been struggling with the ICWA equal protection claims for decades, some states like Illinois have taken it upon themselves to uphold the protections of the ICWA due to their active history in native family separation.[106]

C. Illinois's Treatment of Native American Families

As a state named after the local Native American tribes, Illinois's first residents consisted of up to twelve native tribes.[107] Eventually, the tribes consolidated into two, Kalkaska and Peoria, and their tribal culture and

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103. *Holyfield*, 490 U.S. at 49 ("Congress was concerned not solely about the interest of Indian children and families, but also about the impact on the tribes themselves of the large number of Indian children adopted by non-Indians.").

104. *Compare id.* at 52 ("This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States." (quoting *In re* Adoption of Halloway, 732 P.2d 962, 969 (Utah 1982))), *with id.* at 57 (Stevens, J., dissenting) ("The Act gives Indian tribes certain rights, not to restrict the rights of parents of Indian children, but to complement and help effect them.").

105. *Id.* at 60 ("[T]he Act also reflects a recognition that allowing the tribe to defeat the parents' deliberate choice of jurisdiction would be conducive neither to the best interests of the child nor to the stability and security of Indian tribes and families.").

106. *See* Elder, *supra* note 36, at 429 (describing the Court's decisions in *Baby Girl* and *Holyfield* as "highlight[ing] the difficulty of treating Indian legislation under traditional equal protection doctrine"); *see e.g.*, In re Marcus S., 638 A.2d 1158, 1159 (Me. 1994) (affirming the constitutionality of the ICWA's classifications and noting the special status of native children as "stemming from the historical relationship between the United States and a sovereign indigenous people."); In re Guardianship of L., 291 N.W.2d 278, 281 (S.D. 1980) (affirming the constitutionality of the ICWA's placement preferences on the grounds that they are based solely upon the political status of the parents and children and the quasi-sovereign nature of the tribe and does not constitute "invidious racial discrimination"); In re A.B., 663 N.W.2d 625, 636 (N.D. 2003) (affirming the constitutionality of the ICWA after applying the rational basis standard due to the "political" nature of the statute's classifications); In re Santos Y., 112 Cal. Rptr. 2d 692, 719–20 (Cal. Ct. App. 2001) (deciding not to uphold the ICWA's classification due to the application of the ICWA triggered by an Indian child's genetic heritage, "without substantial social, cultural, or political affiliations between the child's family and a tribal community, is an application based solely. . . upon race and is subject to strict scrutiny." (citing *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 528 (Cal. Ct. App. 1996))).

107. *See* BRUCE G. TRIGGER, HANDBOOK OF NORTH AMERICAN INDIANS: NORTHEAST VOL. 15, at 679–80 (William C. Sturtevant ed., 1978) (indicating that in the 1600s, the French used the term "Illinois" to refer to the Native Americans on the land); *see also id.* at 673 (notating the twelve native tribes originally living on the land that would become the state of Illinois). Eventually seven of the tribes incorporated into the five remaining tribes, but the overall Native American population did not change.

values were diluted into names of Illinois towns.[108] Today, although no federally recognized tribes remain in Illinois, Chicago is home to the third largest urban Native American population in the nation.[109] The city alone has more than 65,000 Native Americans representing over 175 different native tribes.[110] Yet, Illinois has been historically active in the attacks against this minority community, specifically with regard to the two federal boarding schools located in Illinois.[111] From 1883 to around 1888 in Brimfield, Illinois, Homewood Boarding School (later renamed to Jubilee College) contracted with the federal government to house twelve native children who had been separated from their families and tribal communities in exchange for $167 per child each year.[112] Similarly, St. Mary's Training School for Boys was started in 1883 in Des Plaines, Illinois and contracted with the federal government to confine forty-one native children removed from their families and tribal reservations at Devil's Lake and Standing Rock.[113] Although the contract required that the institution care for no more than one hundred young boys at a time, in 1884, records show that there were over 120 non-native and fifty-one native boys.[114] Rather than learning and playing, these children were exclusively required to complete daily farm work for the institution.[115] Despite the horrid conditions these native children had to endure away from their families, the school remains in operation today under the name Maryville Academy.[116]

Illinois has a decades-old precedent of supporting the ICWA's purpose to protect the sanctity of native families. In 1990, the Illinois Appellate

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108. *Id.*

109. *See* Daniel Hautzinger, *"We're Still Here": Chicago's Native American Community*, WTTW (Nov. 8, 2018), https://interactive.wttw.com/playlist/2018/11/08/native-americans-chicago [https://perma.cc/5W8H-JFZ9] (identifying Chicago's Native American population).

110. *Id.*; *see also Chicago*, AMERICAN INDIAN CTR., https://aicchicago.org/ [https://perma.cc/N9MC-WBKM] (last visited Jan. 29, 2023) (recognizing the strong Native American community).

111. *See supra* notes 25–29 and accompanying text (detailing the federal boarding schools that separated native families on a national level); *see also* OFF. OF THE ASSISTANT SEC'Y—INDIAN AFFS., FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 83 (2022) (noting that two federal boarding schools were located in Illinois).

112. *See* OFF. OF THE ASSISTANT SEC'Y—INDIAN AFFS., APPENDIX A AND APPENDIX B: LIST OF FEDERAL INDIAN BOARDING SCHOOLS 162 (2022) (indicating the institution's historical presence in native family separation).

113. *Id.* at 364.

114. *Id.*

115. *Id.*

116. *Id.*; *see also Our History*, MARYVILLE ACADEMY, https://maryvilleacademy.org/about/our-history/ [https://perma.cc/XW7E-E6BK] (last visited Jan. 29, 2023). The absence of the institution's harmful historical impact on native families throughout the materials discussing its history is further evidence of a blatant disregard and unwillingness of many Illinois actors to recognize the consequences of their actions on tribal communities.

Court upheld the ICWA as constitutional in *In re Armell*.[117] The child involved was encompassed by the ICWA, but the public guardian asserted that the statute involved a suspect class for which no compelling governmental purpose was served, and thus violated the Equal Protection Clause of the Fourteenth Amendment.[118] However, the court clearly stated that the "ICWA does not involve a suspect class," and further pronounced that "[f]ederal legislation with respect to Indian tribes is not based upon impermissible racial classifications, but derives from the special status of Indians as members of quasi-sovereign tribal entities."[119] Based on the political classification, the court applied rational basis review and determined that Congress's "unique obligation" toward tribes is a legitimate goal to which laws specially protecting the "integrity of Indian families" are rationally related.[120] Thus, the court affirmed the constitutionality of the ICWA in Illinois.[121]

In doing so, the court notably recognized that the ICWA was enacted due to the disproportionate number of native children separated from their families and tribes and placed in non-native homes by state child-welfare entities.[122] It even referred to congressional findings leading to the act that show that the most vital resources to "the continued existence and integrity of native tribes are [their] children."[123] In preceding and subsequent cases, Illinois courts have voiced similar support for the ICWA, referring to its adoption as a response to a tribal "crisis" in which native children were removed from their families and placed in non-native homes and calling it a means for native tribes to "preserve their culture and identity."[124]

In sum, the ICWA was enacted in 1978 as a remedial measure for years of historical trauma caused by federally initiated native family

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117. 550 N.E.2d 1060, 1069 (Ill. App. Ct. 1990).

118. *Id.* at 1067 (laying out the public guardian's argument for the court to find the ICWA unconstitutional).

119. *Id.* at 1067 (citing United States v. Antelope, 430 U.S. 641, 646 (1977); Morton v. Mancari, 417 U.S. 535, 550–55 (1974)).

120. *Id.* at 1068 (citing *Mancari*, 417 U.S. at 555).

121. *Id.* at 1069.

122. *Id.* at 1064; *see infra* Part III.B.1 (discussing the concerning rates of native family separation prior to the ICWA).

123. *In re Armell*, 550 N.E.2d at 1064 (citing 25 U.S.C. § 1901).

124. *See, e.g.*, In re Stiarwalt, 546 N.E.2d 44, 47 (Ill. App. Ct. 1989) (citing Mississippi Band of Chactaw Indians v. Holyfield, 190 U.S. 30 (1989); *In re M.S.*, 706 N.E.2d 524, 527 (Ill. App. Ct. 1999) ("The importance of tribal primacy in matters of child custody and adoption cannot be minimized, for the ICWA is grounded on the premise that tribal self-government is to be fostered and that few matters are of more central interest to a tribe seeking to preserve its identity and traditions than the determination of who will have the care and custody of its children" (quoting In re Adoption of Halloway, 732 P.2d 962, 966 (Utah 1986))).

separation.[125] The statute provides placement preferences for "Indian children" taken from their native families and tribal culture.[126] However, the ICWA's constitutionality has been challenged many times due to the unique placement preferences afforded to native children.[127] The Supreme Court has applied an equal protection analysis to many federal statutes challenged under the Fourteenth Amendment.[128] While it affords great deference to Congress for political groups, it strictly reviews federal legislation classifying racial groups.[129] The Supreme Court has grappled with equal protection claims against the ICWA in cases like *Morton v. Mancari*, in which it upheld the challenged statute and found native tribes to be a political group,[130] and *Rice v. Cayetano*, in which it overturned the challenged statute classifying "Hawaiian natives" by distinguishing political native tribes.[131] The lack of guidance from the Supreme Court has caused states like Illinois to take it upon themselves to uphold the protections of the ICWA due to their active role in historical native family separation.[132] In *In re Armell*, Illinois set a decades-old precedent in support of the ICWA by finding that it makes a political classification and recognizing its adoption as a response to the crisis caused by removing native children from their families and placing them in non-native homes.[133] Unfortunately, this support was directly contradicted by a Texas district court in *Brackeen v. Zinke*[134] and continues to be threatened if the Supreme Court reviews the constitutionality of the ICWA under the Equal Protection Clause in the future.

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125. *See supra* notes 21–36 and accompanying text (detailing the prevalence of native family separation and tribal discrimination throughout American history).

126. 25 U.S.C. § 1915(b); *see also supra* notes 42–46 (detailing the placement preferences and their application to certain native children).

127. *See* Dempsey, *supra* note 13, at 424 (attributing equal protection violation claims to the differentiated treatment afforded to native children by the ICWA).

128. *See supra* notes 47–73 and accompanying text (detailing the Court's equal protection analysis including as to the admissions policy in *Grutter v. Bollinger*).

129. *Compare* CHEMERINSKY, *supra* note 49, at 727 (detailing the deference given to Congress when the Court applies rational basis review), *with* Spece & Yokum, *supra* note 58, at 312 (detailing the difficulty for a statute to withstand strict scrutiny).

130. *See supra* notes 74–80 and accompanying text (detailing the Court's holding and reasoning in *Mancari*).

131. *See supra* notes 81–89 and accompanying text (detailing the Court's holding and reasoning in *Rice*).

132. *See supra* notes 107–116 and accompanying text (detailing the history of native family separation in Illinois).

133. In re Armell, 550 N.E.2d 1060 (Ill. App. Ct. 1990); *see supra* notes 117–124 (detailing the Illinois court's holding and reasoning in *In re Armell*).

134. Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018) [hereinafter *Zinke*], *rev'd sub nom.* Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019) [hereinafter *Bernhardt*].

II. DISCUSSION

A. Brackeen v. Zinke

In the fall of 2018, the United States District Court for the Northern District of Texas found the ICWA's placement preferences to be unconstitutional in *Brackeen v. Zinke*.[135] The defendants arguing to uphold the statute included the secretary of the United States Department of the Interior, the director of the BIA, and the Cherokee, Navajo, and Oneida tribal nations ("the Defendants").[136] The initially successful plaintiffs included Texas, Louisiana, Indiana, and three non-native families attempting to adopt native children: the Brackeens, Librettis, and Cliffords ("the Plaintiffs").[137]

A.L.M., a native child, was placed with the Brackeens through foster care at ten months old.[138] After A.L.M. turned two years old and the state of Texas terminated parental rights, the Brackeens received approval to adopt the child from his biological parents, both of whom were enrolled members of native tribes.[139] Under the authority afforded to it by the ICWA, the Navajo tribe found a potential native adoptive placement who was not biologically related to A.L.M.[140] Although the Brackeens were ultimately allowed to adopt the native child, they claimed that they were now hesitant to consider native children in their future foster and adoption attempts.[141]

Baby O., a native child, was placed with the Librettis by her mother for the purpose of adoption.[142] Because the biological father of the child was a member, the Pueblo Tribe intervened in Baby O.'s custody proceedings and attempted to find a different placement under the preferences detailed in the ICWA.[143] Although the Librettis were ultimately allowed to adopt the native child, they claimed that they were also now hesitant to consider native children in their future adoption attempts.[144]

Child P., a native child, was placed with the Cliffords through foster

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135. *Zinke*, 338 F. Supp at 536 (granting the Plaintiffs' motion for summary judgment regarding the alleged equal protection violation).
136. *Id.* at 519–20.
137. *Id.* at 519.
138. *Id.* at 525.
139. *Id.*
140. *Id.*
141. *Id.* at 526.
142. *Id.*
143. *Id.*
144. *Id.* at 527.

care.[145] The child's grandmother was a member of the White Earth Ojibwe tribe, so pursuant to the ICWA's placement preferences, the child was removed from the Cliffords and placed with the grandmother even though the state had revoked her license to provide foster care.[146]

The Plaintiffs claimed that the ICWA's placement preferences violated the Fifth Amendment's Equal Protection Clause and consequently moved for summary judgment.[147] They contended that the statute classified a suspect class on the basis of race because, like the statute in *Rice*, the ICWA utilized "Indian" ancestry as a proxy for a racial classification.[148] Due to the racial suspect class, they argued that the court should apply strict scrutiny, which the ICWA does not satisfy.[149] In contrast, the Defendants argued that the ICWA did not violate the Equal Protection Clause because *Mancari* suggests that legislation classifying Native Americans are "based on political characteristics."[150] Therefore, the ICWA "distinguishes children based on political categories" and successfully satisfies rational basis review.[151]

To make its determination, the court began by parsing through the statutory language to determine whether the ICWA imposed a racial or political classification. Relying primarily on *Rice* and *Mancari*, the court sided with the Plaintiffs by finding the classification to be racial rather than political.[152] It analogized the ICWA's classification to that in *Rice* by emphasizing the statutory equivalent of an ancestral requirement as defining an "Indian child" as one who "is a member 'of an Indian tribe' as well as those children simply *eiligble* for membership who have a biological Indian parent."[153]

Simultaneously, the court rejected the Defendants' argument by distinguishing the ICWA's classification from that in *Mancari*.[154] It reasoned that the hiring preference challenged in *Mancari* limited its jurisdiction to "members of quasi-sovereign tribal entities" by only

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145. *Id.*

146. *Id.*

147. Although the plaintiffs also moved for summary judgment on several other claims including Tenth Amendment violations, improper scope of the Indian Commerce Clause, and anti-commandeering, that which is pertinent to this Note is the Equal Protection violation claim. *Id.* at 530.

148. *Id.* at 531.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 533.

153. *Id.* (citing Rice v. Cayetano, 528 U.S. 495 (2000)); *see also id.* ([The ICWA's definition of "Indian child"] "means one is an Indian child if the child is related to a tribal ancestor by blood" (referring to 25 U.S.C. § 1903(4))).

154. *Id.*

applying to "members of federally recognized tribes."[155] Whereas, the court referred to the ICWA's classification as a "blanket exemption for Indians," a phrase used by the *Mancari* court to suggest a classification that may "raise the difficult issue of racial preferences."[156] It found the ICWA's classification to be based on race due to its application not only to native children of federally recognized tribes as in *Mancari* but also to native children who are eligible for such membership.[157] Thus, unwilling to expand the *Mancari* reasoning to the facts of the case, the court determined that the classification was racial and consequently applied strict scrutiny.[158]

First, the court did not find a single compelling government interest served by the statute.[159] Second, the court found that the statute was not narrowly tailored because it was "overinclusive."[160] The placement preferences were "unrelated to specific tribal interests" because they prioritized any member of a tribal nation regardless of whether the child in question was eligible for membership in that same tribe.[161] The placement preferences were also broader than necessary because they applied to any "*potential* Indian children," consequently affecting not only those native children who were members of a tribe but also those who could become members at any future time.[162] This did nothing to support maintaining the native child's relationship with their tribe when the relationship may not yet have been established.[163] Therefore, the court granted the Plaintiffs' motion for summary judgment on their equal protection claims,[164] and an appeal followed.[165]

B. Brackeen v. Bernhardt *&* Brackeen v. Haaland

Reversing the district court's decision, in *Brackeen v. Bernhardt*, a

155. *Id.* at 532, 533.
156. *Id.* at 533 (quoting Morton v. Mancari, 417 U.S. 535, 554 (1974)).
157. *Id.*
158. *Id.* at 532–33; *see also id.* at 535 (setting the level of scrutiny as whether the ICWA was "narrowly tailored to further a compelling government interest" (quoting Grutter v. Bollinger, 539 U.S. 306, 326 (2003))).
159. *Id.* at 534 (admonishing the Defendants for not "prov[ing]— *or attempt[ing] to prove* —why the ICWA survives strict scrutiny").
160. *Id.* at 535 (citing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring)).
161. *Id.* (citing 25 U.S.C. § 1915(a)(3)).
162. *Id.* at 536.
163. *Id.* at 535–36 (recognizing that the government had a "goal of ensuring children remain with their tribes," while also holding that "potential Indian children, including those who will never be members of their ancestral tribe" is too broad a classification to withstand strict scrutiny).
164. *Id.* at 536.
165. Brackeen v. Bernhardt, 937 F.3d 406, 420 (5th Cir. 2019) (No. 18-11479), *cert. granted*, (No. 21-376) ("Defendants appealed.").

panel of three judges for the Fifth Circuit found that the ICWA was constitutional and did not violate the Equal Protection Clause.[166] The panel reasoned that the statute's classification of "Indian child" was political rather than racial, and the ICWA was "rationally related to the fulfillment of Congress's unique obligation toward Indians."[167] However, due to the contentious nature of the decision as evidenced by the district and panel split, in November 2019, the Fifth Circuit vacated the panel's opinion and issued an order for a rehearing en banc.[168] Then, on April 6, 2021, the en banc court issued a long, divided opinion in which the majority affirmed the notion that the ICWA's placement preferences were constitutional.[169]

The majority began by determining whether the ICWA's classification of "Indian child" was race-based or political in order to apply the correct level of scrutiny.[170] The court recognized both the history of Congress exercising a political, plenary power over native tribal relationships[171] and the fact that legislation involving native tribes often treat a subset of Native Americans differently for reasons distinct from their race.[172] Turning to the *Mancari* opinion, the court determined that it governed the present case due to the special legal status of Native American tribes under federal law.[173] The court disagreed with the district court's narrow

166. *Id.* at 441. Similar to the claims in the district court, although Plaintiffs also moved for summary judgment on several other claims, that which is pertinent to this Note is the equal protection violation claim. One panel member agreed with the majority's analysis of the Equal Protection violation and only dissented in regard to the Tenth Amendment violation claim. *Id.* at 441–46 (Owen, J., concurring in part and dissenting in part).

167. *Id.* (quoting Morton v. Mancari, 417 U.S. 535, 555 (1974)).

168. *See generally* Brackeen v. Bernhardt, 942 F.3d 287 (5th Cir. 2019).

169. Brackeen v. Haaland, 994 F.3d 249, 361 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, (No. 21-376) [hereinafter *Haaland*] (holding that the "Indian child" classification does "not offend equal protection principles because [it is] based on a political classification and [is] rationally related to the fulfillment of Congress's unique obligation toward Indians"); *see generally id.* at 249 (Owen, J., concurring in part), (Wiener, J., dissenting in part), (Higginson, J,. concurring in part). As with the two previous decisions, although the court addressed several other issues including standing, anticommandeering, the non-delegation doctrine, that which is pertinent to this Note is the equal protection violation claim.

170. *Id.* at 361 (noting how the level of scrutiny the court must apply depends on the primary question of what kind of classification terms such as "Indian child," "Indian family," and "Indian foster home" denote in the ICWA); *see supra* notes 47–49 and accompanying text (detailing how any court's first step in an equal protection challenge analysis is to determine whether the ICWA's placement preferences classify a suspect class).

171. *Id.* at 337 (defining the United States' relationship with Native American tribes as historically "political, rather than race-based" (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a] (Nell Jessup Newton ed., 2012))).

172. *Id.* at 333 ("The Supreme Court's decisions 'leave no doubt that federal legislation with respect to Indian tribes... is not based upon impermissible racial classifications.'" (quoting United States v. Antelope, 430 U.S. 641, 645 (1977))).

173. *Id.* at 334.

construction of *Mancari* for two reasons. First, it disagreed with limiting the application of *Mancari* to only laws directed at tribal self-governance.[174] Nevertheless, it found that the ICWA directly furthered the purpose of tribal self-governance because of the vital role native children play in the continued existence of tribes.[175] Second, the court disagreed with the district court's focus on the ICWA's classification causing eligibility to turn on having a blood relationship with a tribal member.[176] Within the context of the nation's historical recognition of native tribes as political entities, the court found that the ICWA's placement preferences are simply applied "on the basis of a [native] child's connection to a political entity based on whatever criteria that political entity may prescribe."[177]

Then, turning to the district court's analysis of *Rice*, the en banc majority strongly disagreed that the present case presented a similar "impermissible racial classification."[178] The court distinguished the facts of the present case from *Rice* for three reasons. First, unlike the statute in *Rice*, the ICWA's classification of "Indian child" would not exclude an entire community from participating in state affairs.[179] Second, unlike the statute in *Rice*, the ICWA's classification does not provide different treatment to a person solely because of their ancestry.[180] Third, and likely most importantly, the ICWA provides placement preferences for native children, members of the same tribal community deemed by the *Rice* Court to enjoy unique protections of federal law due to the lengthy history of federal regulation with native tribes.[181] The *Rice* majority emphasized the fact that unlike members of federally recognized Native American tribes, native Hawaiians do not hold a status as a constituent of a quasi-sovereign political community.[182] It was this difference between the two groups that led the Supreme Court to conclude that the statute in *Rice* was

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174. *Id.*

175. *Id.* at 335 ("Congress's finding that children are the most vital resource 'to the continued existence and integrity of Indian tribes,' which reflects Congress's intent to further tribal self-government." (citing 25 U.S.C. § 1901(3))).

176. *Id.* at 336 (noting how the ICWA's definition of "Indian child" as only those eligible for membership "does not equate to a proxy for race.").

177. *Id.* at 336–38 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n. 32 (1978)).

178. *Id.* at 339 (quoting Brackeen v. Zinke, 338 F.Supp.3d 514, 533 (N.D. Tex 2018), *rev'd sub nom.* Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019), *on reh'g en banc sub nom.* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), *aff'd in part, rev'd in part sub nom.* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021)).

179. *Id.*

180. *Id.*

181. *Id.* at 340.

182. *Id.* at 339 (citing *Rice*, 528 U.S. at 522).

an attempt to use the term "ancestry" as a proxy for race.[183] Therefore, based on the decision that *Rice* was distinguishable and *Mancari* was controlling, the Fifth Circuit decided that the ICWA's definition of "Indian child" was "a political classification subject to rational basis review."[184]

Finally, after applying rational basis review, the court concluded that the ICWA's definition of "Indian child" is rationally related to furthering tribal sovereignty and self-government.[185] Its discussion of the circumstances and needs recognized by Congress when enacting the statute indicate that the court found the purposes sufficiently legitimate.[186] Then, directly dismissing much of the district court's reasoning, the court found that the statute's placement preferences have some reasonable relation to Congress's goal of continuing its trust in tribes as sovereign entities.[187] The en banc majority noted that by statutorily favoring placement of native children within native tribes and families, Congress was able to ensure that the children who are eligible for tribal membership are raised in environments surrounded by tribal traditions and values, thereby increasing the likelihood that the native child will eventually become a member and contribute to "the continued existence and integrity of Indian tribes."[188] Therefore, the Fifth Circuit upheld the ICWA as constitutional and not in violation of the Equal Protection Clause.[189] Among the many opinions filed by the en banc court, some judges agreed with the majority's analysis of the equal protection violation claim,[190] some partially agreed,[191] and others did not discuss its merits for other reasons.[192] Only one judge disagreed,

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183. *Id.* (noting that, in reaching its ruling, "the *Rice* Court expressly reaffirmed *Mancari*'s central holding that, because classifications based on Indian tribal membership are 'not directly towards a "racial" group consisting of Indians,"' but instead apply 'only to members of "federally recognized" tribes,' they are 'political rather than racial in nature.'" (citing *Rice*, 528 U.S. at 519–20)).

184. *Id.* at 340.

185. *Id.* at 345.

186. *Id.*; *see infra* Part III.B.1 (describing the Congressional findings effectuating the ICWA's enactment).

187. *Id.* at 341 (citing Morton v. Mancari, 417 U.S. 535, 555 (1974)).

188. *Id.* (quoting 25 U.S.C. § 1901(3)).

189. *See id.*

190. *See Haaland*, 994 F.3d at 436 (Owen, J., concurring in part and dissenting in part) (dissenting only to the Tenth Amendment violation claim); *Id.* at 442–44 (Higginson, J., concurring in part and dissenting in part) (speaking only to the improper scope of the Indian Commerce Clause authority claim); *Id.* at 456–57 (Costa, J., concurring in part and dissenting in part) (finding the ICWA's placement preferences to further the federal government's special relationship with native tribes).

191. *See id.* at 442 (Haynes, J., concurring) (upholding the ICWA's first two placement preferences and overturning the last due to a lack of rational relation to Congress's goals of protecting Native American tribes).

192. *See id.* at 437 (Wiener, J., dissenting in part) (refusing to discuss the merits of the Equal Protection claim due to lack of standing).

conducting the same analysis as that applied by the district court in *Brackeen v. Zinke*.[193] So, the Plaintiffs filed a petition for certiorari to the Supreme Court.[194]

C. Haaland v. Brackeen

Vacating the judgment of the Court of Appeals, on June 15, 2023, the Supreme Court held that Texas and the individual petitioners in *Haaland v. Brackeen* did not have standing to bring an equal protection claim. Regarding the claim brought by the state of Texas, the Supreme Court noted that the state had no equal protection rights of its own.[195] It also disallowed any attempt by Texas to assert an equal protection claim on behalf of its citizens because it did not have standing as *parens patriae* to bring such an action against the federal government.[196] Then, the Supreme Court refused to accept any of Texas's "creative arguments" for why it had standing to bring an equal protection claim.[197] The Supreme Court reasoned that any requirement to consider race in child-custody proceedings was not the kind of "concerete" and "particularized" invasion of a legal right necesseary to demonstrate an injury required for standing, and any costs incurred by the state were not "fairly traceable" to the ICWA's placement preferences.[198]

Regarding the claim brought by the individual petitioners, the Supreme Court noted that the state officials allegedly causing an injury would not be bound by a declaratory judgment requested by the individual petitioners.[199] Consequently, it held that the individual petitioners had not shown that the alleged racial discrimination claimed to have caused them injury was "likely" to be "redressed by judicial relief."[200] Therefore, while the Supreme Court upheld the ICWA in *Haaland v. Brackeen*, it did so on procedural grounds. This leaves the door open for future equal protection claims against the ICWA that may require the Supreme Court to review the merits of the case through an equal

193. *Compare id.* at 437–40 (Wiener, J., dissenting in part) with *supra* notes 135–163 (discussing the opinions of *Bernhardt* and *Haaland*).

194. *See generally* Petition for Cert., *supra* note 16.

195. Brackeen v. Haaland, 143 S. Ct. 1609, 1640 (2023) (citing South Carolina v. Katzenback, 383 U.S. 301, 323 (1966)).

196. *Id.* (citing Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 610, n. 16 (1982)).

197. *Id.* Such creative arguments included that ICWA injures Texas by requiring it to look at race in child-custody proceedings and the costs that the state bears for appropriately apply the placement preferences.

198. *Id.* (first quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 569 (1992); then quoting California v. Texas, 141 S. Ct. 2104, 2120 (2021)).

199. *Id.* at 1639 (citing Taylor v. Stugell, 553 U.S. 880, 892–93 (2008)).

200. *Id.* at 1638 (quoting TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021)).

protection analysis of the statute.[201]

III. Analysis

A. Native Tribes Are Not a Suspect Class

Following the first step of an equal protection challenge analysis, the Supreme Court should determine that native children covered by the ICWA are not a suspect class. This determination is essential as it establishes what level of scrutiny the Supreme Court will apply and how much deference it will grant to Congress when reviewing the statute.[202] Thus, unsurprisingly, it is the most contentious issue to be decided in this case.[203] Many scholars agree with the Fifth Circuit's conclusion that the ICWA's placement preferences pertain to a political classification requiring rational basis review.[204] However, some critics side with the district court's finding of the classification as racial such that the Supreme Court should apply strict scrutiny.[205] As detailed below, the proper approach that should be undertaken by the Supreme Court is that utilized by the Fifth Circuit, which is also the precedent set in Illinois.[206]

The ICWA's placement preferences only apply to a child deemed to be an "Indian child" defined by the statute as a child who is (a) themselves a tribal member or (b) "eligible for membership in an Indian tribe and [are] the biological child[ren] of a member of an Indian tribe."[207] As

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201. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 45 (5th ed. 2016) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." (citing Warth v. Seldin, 422 U.S. 490, 498 (1975)); *see also id.* at 2 (Kavanaugh, J., concurring) ("[T]he equal protection issue remains undecided . . . Courts, including ultimately this Court, will be able to addresss the equal protection issue when it is properly raised by a plaintiff with standing.").

202. *Id.* (discussing the importance of the Court's determination of whether there is a suspect class involved in an act).

203. Dempsey, *supra* note 13 at 431 ("The varying standards of review used in equal protection inquiries, determined by whether a classification is race-based, distills many federal Indian law equal protection claims down to one question: whether the term 'Indian' should be interpreted as a racial or political classification.").

204. *See, e.g.*, Elder, *supra* note 36, at 419 (contending that the term "Indian child" should be interpreted as a political classification due to the Supreme Court's precedent and Congress's intent to protect tribal sovereignty through the enactment of the ICWA); *see also* Dempsey, *supra* note 13, at 453-60 ("Many scholars side with the Fifth Circuit's conclusion on the grounds that the term 'Indian' is a political, rather than racial category.").

205. *See* Timothy Sandefur, *Recent Developments in Indian Child Welfare Act Litigation: Moving Toward Equal Protection?*, 23 TEX. REV. L. & POL. 425, 430 (2019) (praising the *Zinke* decision for concluding that "the ICWA plainly falls on the racial, rather than the political, side of the *Rice/Mancari* division").

206. *See supra* notes 117–124 (describing the determination of the ICWA's classification as political in In re Armell, 550 N.E.2d 1060 (Ill. App. Ct. 1990)).

207. 25 U.S.C. § 1903(4).

evidenced by the district court and Fifth Circuit opinions, the determination of whether the ICWA's classification is racial or political comes down to whether the Supreme Court will apply *Rice* or *Mancari*.[208] Turning to the former, the Supreme Court should not apply *Rice* when reviewing the ICWA's placement preferences. Critics of the statute tend to liken the "impermissible racial classification" in *Rice* with the ICWA's preferences afforded to native children merely eligible for tribal membership.[209] However, as the Fifth Circuit reasoned, the two classifications are distinguishable for several reasons.[210] While the statute in *Rice* attempted to exclude an entire community from participating in state affairs, the ICWA provides assistance to judges and state courts making child custody decisions for children who were either themselves members of a tribe or were eligible for membership and had a parent who was a member.[211] Unlike elections, multiple interests are at stake in child custody proceedings including that of the native child, the parent, the state, the tribe, and the United States.[212] Consequently, it is imperative to place the proceedings within the context of the United States' long history of giving Native American tribes semi-sovereign status and self-autonomy.[213] Even prior to the ICWA, the Supreme Court upheld the exclusion of state judicial systems in native child custody proceedings.[214] It is this history that provided Native Americans a recognized protective status, which the Supreme Court in *Rice* not only acknowledged but used to distinguish the statute classifying native Hawaiians.[215] For these reasons, the Supreme Court should not rely upon

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208. *See supra* notes 74–80 and accompanying text (explicating the *Mancari* opinion in detail); *supra* notes 81–89 and accompanying text (explicating the *Rice* opinion in detail).

209. *See Zinke*, 338 F. Supp. 3d 514, 531 (N.D. Tex. 2018), *rev'd sub nom.* Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019) (analogizing the ICWA to *Rice*).

210. *See supra* notes 152–183 and accompanying text (detailing the Fifth Circuit's reasoning).

211. *See Haaland*, 994 F.3d 249, 339 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, (No. 21-376) (explaining how the Fifteenth Amendment violation in *Rice* is not implicated by the ICWA because it does not involve voter eligibility).

212. *See id.* at 343 (noting that state court adoption proceedings involving a native child are "simultaneously affairs of states, tribes, and Congress.").

213. *See* Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 670 (2016) (noting the paradox created between Congress's plenary power over tribal affairs and the "critical core of inherent tribal sovereignty"); *see, e.g.* U.S. CONST. art. I, § 8 (stating that "Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); 25 U.S.C. §§ 5123–5126 (allowing Native Americans to create formal tribal councils and courts to encourage tribal autonomy).

214. *See. e.g.*, Fisher v. Dist. Ct. of Sixteenth Jud. Dist., 424 U.S. 382, 387 (1976) ("State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the [tribe] and exercised through the Tribal Court.").

215. *See* Rice v. Cayetano, 528 U.S. 495, 518 (2000) (stating that native Hawaiians do not have a comparable status to Native American tribes); *see also Haaland*, 994 F.3d 249, 339 (5th Cir.

Rice when reviewing the ICWA as the statute relates to federally recognized Native American tribes and its child members.

Turning to *Mancari*, the Supreme Court should apply the same analysis when reviewing the ICWA's placement preferences. For decades, many state courts, including Illinois, have routinely rejected *Rice* and applied *Mancari* to preclude equal protection challenges to the ICWA.[216] Illinois recognizes the "quasi-sovereign" status of native tribes, and finds that federal legislation regarding Native American tribes is "not based upon impermissible racial classifications."[217] Consequently, the state of Illinois has a strongly followed precedent holding that the ICWA "does not involve a suspect class" and thus is analyzed under rational basis review.[218]

Those in opposition to the statute's placement preferences differentiate the ICWA's ancestral and racial classification from *Mancari*'s political classification dependent on individuals actually having been enrolled tribal members.[219] However, this argument fails to acknowledge that the statute in *Mancari* required not only tribal membership, but also that the native individual possess at least one-quarter "Indian blood."[220] While the upheld statute in *Mancari* contained this blood quantum requirement, the ICWA's classification requires only enrollment eligibility based on the individual tribe's criteria for membership.[221] Consequently, because the Supreme Court upheld the *Mancari* statute with an explicit blood

2021) (en banc) (per curiam), *cert. granted*, (No. 21-376) (describing the historical discrepancy between native Hawaiians and federally recognized Native American tribes).

216. *E.g.*, In re Armell, 550 N.E.2d 1060, 1067 (Ill. App. Ct. 1990) (holding that the ICWA does not involve a suspect class by applying *Mancari*); In re Baby Boy C., 805 N.Y.S.2d 313, 326 (N.Y. App. Div. 2005) (holding that federal laws differentiating native people are political by applying *Mancari*); In re Phoenix L., 708 N.W.2d 786, 795–98 (Neb. 2006), *rev'd on other grounds*, In re Destiny A., 742 N.W.2d 758 (Neb. 2007) (holding that legislation differentiating between parents of native and non-native children are not racial by applying *Mancari*); In re Application of Angus, 655 P.2d 208, 212 (Or. Ct. App. 1982) (holding that laws that treat Native Americans alone do not automatically violate equal protection by applying *Mancari*); In re A.B., 663 N.W.2d 625, 636 (N.D. 2003) (holding that different treatment of native and non-native children under the ICWA is a political status by applying *Mancari*); In re Marcus S., 638 A.2d 1158, 1158–59 (Me. 1994) (holding that laws that treat Native Americans differently do not automatically violate equal protection by applying *Mancari*).

217. *In re Armell*, 550 N.E.2d at 1067 (citing Morton v. Mancari, 417 U.S. 535, 550–55 (1974); United States v. Antelope, 430 U.S. 641, 646 (1977))).

218. *See id.* (applying rational basis review).

219. *See Zinke*, 338 F. Supp. 3d 514, 533–34 (N.D. Tex. 2018) ("By deferring to tribal membership *eligibility* standards based on ancestry, rather than *actual* tribal affiliation, the ICWA's jurisdictional definition of "Indian children" uses ancestry as a proxy for race").

220. *See* Morton v. Mancari, 417 U.S. 535, 553 n.24 (explaining that to be eligible for preference "an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe").

221. 25 U.S.C. § 1903(4).

quantum provision as a non-racial classification, the ICWA's silence on bloodlines suggests that there is an even stronger argument to uphold the statute.[222]

Those opposing the ICWA often contest the application of *Mancari* by emphasizing that this reasoning was intended to be limited to classifications based on tribal membership that advance[s] tribal self-government on or near Indian lands.[223] Yet, this position fails to recognize that the Supreme Court has upheld a law that did not deal with matters of tribal self-regulation under the *Mancari* reasoning, and the *Mancari* statute itself was a hiring preference in the BIA rather than a tribal membership issue.[224] Thus, the Fifth Circuit correctly determined that the district court's interpretation of *Mancari* was too narrow.[225]

Regardless, even if the Supreme Court were to agree with the district court and limit the *Mancari* reasoning in the manner proffered by the statute's opponents, the ICWA both classifies on tribal membership and was enacted to further tribal self-government.[226] Those in opposition of the statute and in support of a narrow *Mancari* application often try to argue that the ICWA's definition of "Indian child" is racial because many tribal eligibility standards depend exclusively on the child's biological ancestry.[227] However, this position ignores the fact that "Indian child" under the ICWA and a person of Native American race are not synonymous.[228] The ICWA's classification definition "operates to

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222. *See* Elder, *supra* note 36, at 428 (deeming a claim of racial discrimination as "even weaker [than *Mancari*] regarding the ICWA, since the legislation itself is silent on bloodlines.").

223. *See* Timothy Sandefur, *The Unconstitutionality of the Indian Child Welfare Act*, 26 TEX. REV. L. & POL. 55, 76 (2021) (referring to the en banc court's interpretation of *Mancari* as "unreasonably broad").

224. *See* United States v. Antelope, 430 U.S. 641, 646 (1977) (upholding a federal criminal statute applied to respondents based on their native status); *see also Mancari*, 417 U.S. at 539 n.4 (noting that none of the native individuals involved were even on or near a Native American reservation).

225. *Haaland*, 994 F.3d 249, 334 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, (No. 21-376) ("The district court erroneously construed *Mancari* narrowly."); *see supra* notes 154–158 and accompanying text (limiting the applicability of *Mancari* due to the narrow statute in question).

226. *See* Brief in Opposition of Respondents Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians at 16, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, (No. 21-376) (reasoning that the ICWA would still be upheld under the limits suggested by the Petitioners).

227. *See* Sandefur, *supra* note 205, at 428 (criticizing the ICWA for ignoring a native child's "political, religious, or cultural factors" and focusing solely on the child's blood); *but see* Brief for the United Keetoowah Band of Cherokee Indians in Oklahoma as Amicus Curiae Supporting Defendant at 14-15, Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019) ("Citizenship in a Tribal Nation, however, is not contingent on 'ancestry,' but rather hinges on an individual's contemporary political relationship with a sovereign nation.").

228. *See* Brief in Opposition of Respondents Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians at 3, Brackeen v. Haaland, 994 F.3d 249 (5th Cir.

exclude many individuals who are racially to be classified as 'Indians,'" while encompassing some children who are not racially Indian.[229] Similarly, this argument equally ignores the position taken by native tribes that determining whether a child is an "Indian child" under the ICWA depends on whether the child has a political affiliation to a certain tribe.[230] These tribes believe that they have held themselves out as separate sovereign bodies with exclusive autonomy over setting tribal membership standards in their own constitutions.[231] While race may be one of many factors for eligibility, it is not determinative of a native child's enrollment.[232] Additionally, the ICWA requires two things: the child be eligible for tribal membership as defined by the individual tribe's criteria and that the child have at least one biological parent who is a member of a tribe.[233] Thus, race or ancestry is merely one factor safeguarded by the political affiliation requirement when determining whether to apply the ICWA's placement preferences to a native child. The Supreme Court has held that using race as a factor does not make the entire classification race-based.[234] Also, the Supreme Court has expressly stated that "classifications based on tribal status" are not

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2021) (en banc) (per curiam), *cert. granted*, (No. 21-376) ("Some people who are 'Indian children' under the ICWA are not racially Indian. Many children who are racially Indian are not the ICWA 'Indian children.'").

229. *Compare* Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) (noting a reason why the classification was political rather than racial), *with Secretary Haaland Approves New Constitution for Cherokee Nation, Guaranteeing Full Citizenship Rights for Cherokee Freedman*, U.S. DEP'T OF THE INTERIOR (May 12, 2021), https://www.doi.gov/pressreleases/secretary-haaland-approves-new-constitution-cherokee-nation-guaranteeing-full [https://perma.cc/BMB6-ND84] (allowing a person who was not racially Native American to enroll in the tribe), *and* Treaty with the Shawnee, Shawnee-U.S., art. II, May 10, 1854, 10 Stat. 1053 (adopting descendants of non-native people into tribal membership).

230. *See* Brief for Intervenor-Defendants' at 17, Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (No. 4:17-cv-00868-O) (stating that the ICWA's emphasis on a child's citizenship in a federally recognized tribe makes ICW "triggered by a *political affiliation*: enrolled membership (and eligibility for it) in a sovereign nation—not ancestry . . .").

231. *See* Russell Thorton, *Tribal Membership Requirements and the Demography of "Old" and "New" Native Americans*, *in* CHANGING NUMBERS, CHANGING NEEDS: AMERICAN INDIAN DEMOGRAPHY AND PUBLIC HEALTH 103, 106 (Gary D. Sandefur & Ronald R. Rindfuss Barney Cohen eds., 1996) (describing how native tribes "won the right to determine their own membership").

232. *See id.* at 107 (1996) (utilizing BIA tribal enrollment data to illustrate that many tribes have no minimum blood quantum requirement).

233. 25 U.S.C. § 1903(4).

234. *See* Fisher v. Univ. of Texas, 579 U.S. 365, 374–75 (2016) (showing the Court's willingness to allow race to be a factor of a factor in an affirmative action context); *see also* Dempsey, *supra* note 13, at 457 (reasoning that the "highly political context of Indian federal tribe citizenship" allows race to be used as a factor within a factor without causing the legislation to undergo strict scrutiny).

"suspect."[235]

Additionally, the ICWA was enacted to further tribal self-government. Congress enacted the ICWA to "promote the stability and security of Indian tribes and families" after concluding that removal of native children threatened "the continued existence and integrity of Indian tribes."[236] This is precisely a purpose that supports tribal self-government, and thus meets the standard proposed by those who support a narrow interpretation of *Mancari*. Consequently, even under the "arbitrary" limits on the Supreme Court's *Mancari* reasoning proposed by critics and the ancestry-proxy theory, the ICWA's classification remains a political rather than racial classification.[237] Therefore, because the statute makes a non-suspect classification, the Supreme Court should apply rational basis review.[238]

B. The ICWA Satisfies Rational Basis Review under Equal Protection

If the Supreme Court correctly finds the ICWA's definition of "Indian child" to be a political classification, the statute is constitutional under rational basis review. Rational basis review requires political classifications to have a legitimate government purpose achieved through rationally related means.[239]

1. Legitimate Purpose

The ICWA itself incorporates five statements of findings based on a recognition of both "the Federal responsibility to Indian people" and "the special relationship between the United States and the Indian tribes and their members."[240] Three legitimate purposes can be derived from the statute's language, historical context, and congressional hearings. First, to "promote the stability and security of Indian . . . families,"[241] the ICWA was enacted to prevent the unwarranted removal of native children and consequential shattering of native families.[242] After completing a

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235. Washington v. Confederated Bands & Tribes, 439 U.S. 463, 501 (1979).

236. 25 U.S.C. §§ 1901(3)-(4), 1902.

237. *See* Brief in Opposition of Respondents Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians at 16, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, (No. 21-376) (describing the limiting of *Mancari* as "arbitrary").

238. *See supra* notes 49–50 and accompanying text (detailing how non-suspect classifications are analyzed under rational basis review).

239. *See supra* notes 51–54 and accompanying text (discussing the application of rational basis review).

240. 25 U.S.C. § 1901.

241. 25 U.S.C. § 1902.

242. *See* 25 U.S.C. § 1901(4) ("[A]n alarmingly high percentage of Indian families are broken up

formal investigation in the 1970s, Congress was faced with a chilling narrative: supported by state courts, state and private child-welfare agencies were systematically removing native children from their families without evidence of harm and without due process of law.[243] While the native child placement rate was double that for non-native children in some states, other states removed native children at a staggering rate that was twenty times higher than non-native children within the child-welfare system.[244] Nationwide, the adoption rate of native children was eight times that of non-native children.[245] Overall, the results of Congress's investigation was stunning and bleak: 25 to 35 percent of native children had been separated from their families.[246] Today, the ICWA still remains vital for the protection of native families because many states continue to have vastly disproportionate rates of native child removal compared to the general child-welfare population.[247] Therefore, as evidenced by the profound discrepancies that remain today, Congress enacted the ICWA's placement preferences to cease the separation of native families.

Second, to "protect the best interests of Indian children,"[248] the ICWA was enacted to prevent the placement of native children removed from their tribes into non-native homes, which perpetuates the failure to recognize the importance of tribal relationships, tribal culture, and social standards for native children.[249] The history of government-supported disparaging of tribal traditions, practices, and values for native children

by the removal, often unwarranted, of their children from them by nontribal public and private agencies . . . .").

243. *See, e.g.*, House Report, *supra* note 8, at 27–28 (divulging the practices used disproportionately against Native American families).

244. *See To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other purposes: Hearings on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th CONG. 1, 539–40 (1977) (reporting the discrepancies in the child welfare system).

245. *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33 (1989) (citing *Problems that American Indian Families Face in Raising Their Children and How These Problems are Affected by Federal Action or Inaction: Hearings Before the Subcomm. on Indian Affairs, S. Comm. on Interior and Insular Affairs*, 93rd CONG. 1, 75–83 (1974) (statement of William Byler)).

246. *See id.* at 32 (furthering the discrepancies of native child removal).

247. *See* NAT'L COUNCIL OF JUV. & FAMILY CT. JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE (FISCAL YEAR 2015) 5–6 (2017), https://www.ncjfcj.org/wp-content/uploads/2017/09/NCJFCJ-Disproportionality-TAB-2015_0.pdf [https://perma.cc/49UQ-KP52].

248. 25 U.S.C. § 1902.

249. *See* 25 U.S.C. § 1901(4) (1988) ("[A]n alarmingly high percentage of [native] children are placed in non-Indian foster and adoptive homes and institutions"); *see also id.* at § 1901(5) ("[T]he States... have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.").

is long and arduous.[250] In 1978 when the statute was enacted, up to one-third of native children were removed from their families and tribal communities by state actors who were ignorant of their unique cultural values.[251] In recognition of this history and the reports promulgated in the 1970s depicting the alarmingly high percentage of native children permanently separated from their family by government agencies and placed in non-native homes, the Senate held an oversight hearing in 1974.[252] These hearings confirmed that "serious emotional problems often occur as a result of placing" a native child in a home that "do[es] not reflect their special cultural needs."[253] Children placed in non-native homes often develop non-native cultural identities and suffer extreme identity confusion during adolescence.[254] These problems were exacerbated by the lack of support from a tribal community for the native child experiencing an inner crisis such that it was not in their best interests to be placed in a non-native home.[255] Therefore, noting the profound discrepancies and data-supported detrimental consequences, Congress enacted the ICWA's placement preferences to halt the immediate placement of native children into non-native homes.[256]

Third, to "promote the stability and security of Indian tribes,"[257] the ICWA was enacted due to the United States' responsibility to protect and preserve Native American tribes and their resources, including native

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250. *See supra* notes 21–29 and accompanying text (noting the historical importance of federal boarding schools in native family separation); *see, e.g.*, THE OFFICE OF THE ASSISTANT SECRETARY - INDIAN AFFAIRS, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 53 (2022) (discovering how the federal institutions employed "[s]ystematic identity-alteration methodologies.").

251. *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 35 (1989) (describing child welfare workers removing native children as "contempt of the Indian way").

252. *See Indian Child Welfare Act: Hearings Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th CONG. 31 (1978) [hereinafter 1978 House Hearings] (describing the history of the act).

253. *Id.* at 31; *see also Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs on Problems that American Indian Families Face in Raising Their Children and How these Problems Are Affected by Federal Action or Inaction*, 93rd CONG., 45 (1974) [hereinafter 1974 Senate Oversight Hearings] (emphasizing the importance of placing a native child in a home led by adults who are also Native American).

254. *See* 1974 Senate Oversight Hearings, *supra* note 253, at 45–46 (statement of Dr. Joseph Westermeyer, Psychiatrist, University of Minnesota) (describing his experience treating 120 native patients, half of whom had been placed in non-native homes).

255. *See id.* at 49 (indicating the native children placed in non-native homes did not "hav[e] around them other Indians [who could] support them through this difficult stage"); *see also* Brief of 180 Indian Tribes and 35 Tribal Organizations as Amici Curiae in Support of Cherokee Nation, et al., at 14, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, (No. 21-376) (noting that placement of native children to non-native homes was not in their best interests).

256. *See generally* 25 U.S.C. § §1901(4), 1901(5).

257. 25 U.S.C. § 1902.

children who are eligible for membership.[258] The combination of native child removal from their families and placement of native children in non-native homes resulted in a decrease in overall tribal membership.[259] After completing its investigation, Congress reprimanded states for failing to take into account the unique problems and circumstances of Native American families and the legitimate interests of the native tribe in protecting its community and preserving its own future.[260] While states were systematically separating native families, they were simultaneously depleting tribal communities of their current and future members.[261] Additionally, the removal of these future tribal members from their community often occurred without notice to the tribe.[262] Therefore, based on the evidence threatening tribal existence, Congress enacted the ICWA's placement preferences to support the Native American tribes themselves.

2. Rationally Related

The ICWA's placement preferences are rationally related to its aforementioned legitimate purposes. To redress the widespread harms caused by the child-welfare system, the statute establishes "minimum Federal standards" for removal of native children from their families and placement in foster or adoptive homes.[263] In the "absence of good cause," the statute first prefers placement of a native child within their extended family.[264] Then, the statute establishes a secondary preference for placement with a member of the native child's tribe.[265] These initial

258. *See* 25 U.S.C. § 1901(2) (1988) ("Congress... has assumed the responsibility for the protection and preservation of Indian tribes and their resources."); *see also id.* at § 1901(3) ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . .").

259. *See* 124 CONG. REC. 38103 (1978) (statement of Rep. Lagomarsino) (warning that "the continued wholesale removal of [a tribe's] children... constitutes a serious threat to their existence as ongoing, self-governing communities."); *see also id.* at 38102 (statement of sponsor Rep. Udall) ("Indian tribes and Indian people are being drained of their children, and as a result, their future as a tribe and a people is being placed in jeopardy.").

260. *See* House Report, *supra* note 8, at 19 (noting the States failure); *see also* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 45 (1989) ("Congress perceived the States and their courts as partly responsible for the child separation problem it intended to correct.").

261. *See* Dempsey, *supra* note 13, at 458 (recognizing the vital role native children play in tribal existence).

262. *See To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other purposes: Hearings on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95TH CONG. 1, 156 (1977) (Statement of Hon. Calvin Isaacs) (stating that "[r]emoval is generally accomplished without notice to or consultation with responsible tribal authorities.").

263. 25 U.S.C. § 1902.

264. 25 U.S.C. §§ 1915(a)(1), 1915(b)(i).

265. 25 U.S.C. §§ 1915(a)(2), 1915(b)(ii).

preferences help the ICWA achieve two of Congress's purposes: promoting the stability of Native American tribes and supporting Native American families.[266] However, when the primary and secondary placements are not available or not in the native child's best interests, the ICWA prefers placement with other native families.[267] This specifically assists the ICWA in achieving Congress's purpose to act in the best interest of the native child.[268] Congress determined that the placement preference would adequately protect native children and ensure that child-welfare actors would be unable to repeat the abuses that spurred the statute.[269] While many opponents find issue with this preference in particular, placement with a native family, even one affiliated with a different tribe than the native child, helps protect and preserve the child's Native American identity.[270] Additionally, it protects the native child's political identity as Native American, entitling them to certain benefits like housing assistance and employment preferences.[271]

The Illinois Appellate Court in particular has recognized that the ICWA is a "remedial statute" designed to protect the rights of "Indian children" to their families.[272] Furthering the rational relationship, the appellate court noted that if there is no native family for the ICWA to protect in a particular case, the placement preferences will not apply to a native child in the state.[273] It has found no native family requiring protection in cases where the native parent was already living separately

266. *See* Brief of 180 Indian Tribes and 35 Tribal Organizations as Amici Curiae in Support of Cherokee Nation, et al., at 16–17, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, (No. 21-376) (relating the placement preferences to the stated Congressional purpose).

267. 25 U.S.C. §§ 1915(a)(3), 1915(b)(iii).

268. *See* Brief of 180 Indian Tribes and 35 Tribal Organizations as Amici Curiae in Support of Cherokee Nation, et al., at 17–18, *Haaland*, 994 F.3d 249 (No. 21-376) (relating the placement preferences to the stated Congressional purpose).

269. *See* Brief in Opposition of Respondents Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians, at 23, *Haaland*, 994 F.3d 249 (No. 21-376) (calling Congress's decision to create the placement preferences logical).

270. *Compare* Consolidated Brief in Opposition, at 16, *Haaland*, 994 F.3d 249 (No. 21-376) (arguing that the third placement preference is unconstitutional because its goal is "to grow a specific race"), *and Haaland*, 994 F.3d at 442 (Haynes, J., concurring) (upholding the ICWA's first two placement preferences and arguing to overturn the last), *with* Lynn Klicker Uthe, *The Best Interests of Indian Children in Minnesota*, 17 AM. INDIAN L. REV. 237, 252–53 (1992) (indicating the significance of tribal cultural and native identity in the well-being of native children).

271. 25 U.S.C. § 4103(10); 20 U.S.C. § 4418; 25 U.S.C. § 5116; 25 U.S.C. § 1603(12).

272. In re Cari B., 763 N.E.2d 917, 923 (Ill. App. Ct. 2002) (classifying the statute as remedial (citing Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989)).

273. *See* In re Cari B., 763 N.E.2d 917, 923 (Ill. App. Ct. 2002) ("[U]nder appropriate circumstances a court may find that no Indian family exists for the ICWA to protect."); *see also* In re S.S. 657 N.E.2d 935, 943 (Ill. App. Ct. 1995) (Heiple J., concurring) ("[T]he ICWA does not apply where there is no existing Indian family.").

from the child due to incarceration for domestic violence.[274] In situations in which a parent's actions have broken the family prior to state intervention, Illinois courts have noted that the ICWA's placement preferences would not apply because the native family that the statute intends to protect was already separated.[275] Similarly, organizations have recognized the remedial nature of the statute and have encouraged states to follow in Illinois's footsteps and adopt the ICWA "in its entirety."[276] This support would likely not have been provided without some recognition of the positive outcomes created by the statute's placement preferences on the extensive native child removal problems prior to its enactment. Therefore, it follows that the ICWA's placement preferences have a sufficient rational relation to its purposes.

Like the district court, most critics of the statute have concentrated on the "eligible for membership" language in the ICWA.[277] They argue that by embracing all native children who could ever be eligible for membership, the statute is too broad and applies the placement preferences to children who might never have a connection to the tribe for which they are eligible for membership.[278] However, the Supreme Court has noted that legislation "does not violate the Equal Protection Clause merely because the classifications . . . are imperfect."[279] Likewise, the Supreme Court has often held that even significant over-inclusiveness is allowed under rational basis review so long as it is still rationally related to the government's legitimate purpose.[280] Consequently, although Congress may have implemented

274. *See In re Cari B.*, 763 N.E.2d at 922 (citing In re Dougherty, 599 N.W.2d 772 (Mich. Ct. App. 1999)) ("[T]he father did not reside with or support his children financially and was incarcerated for crimes committed against the children.").

275. *See id.* at 922 (noting that there was "no Indian family" for the ICWA to protect when the parent's conduct "had broken up the family before the State became involved.").

276. *See Resolution in Support of Full Implementation of the Indian Child Welfare Act*, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES (July 13, 2013), https://www.ncjfcj.org/wp-content/uploads/2019/08/in-support-of-full-implementation-of-the-indian-child-welfare-act-icwa.pdf [https://perma.cc/7EG4-83C7].

277. 25 U.S.C. § 1903(4); *see* Zinke, 338 F. Supp. 3d 514, 533 (N.D. Tex. 2018) (determining that the ICWA's definition was expensive by including children merely eligible for tribal membership); *see also* Dempsey, *supra* note 13, at 454 (noting that the "tougher question at the heart of the constitutional issue" is whether the ICWA's definition of "Indian child" can be extended to children who are merely eligible for membership).

278. *See Zinke*, 338 F. Supp. 3d 514, at 535 ("[T]he statute is broader than necessary because it . . . applies [the preferences] to *potential* Indian children.").

279. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970) (ruling that rational basis review requires only a reasonable basis rather than perfect classification); *see also* Phillips Chemical v. Dumas Ind. Sch. Dist., 361 U.S 376, 385 (1960) ("[P]erfection is by no means required under the equal protection test of permissible classification.").

280. *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (upholding a statute

broader language than critics deem necessary, the ICWA's placement preferences satisfy rational basis review because it is still rationally related to the aforementioned legitimate purposes.

C. The ICWA Satisfies Strict Scrutiny under Equal Protection

Even if the Supreme Court agrees with the petitioners that the statute pertains to a suspect class on the basis of race, the ICWA should still be upheld because it would withstand strict scrutiny.[281] This very situation was foreseen by one of the judges on the en banc review who agreed that the ICWA's placement preferences would "withstand even strict scrutiny."[282] Strict scrutiny requires a racial classification to have a compelling government purpose achieved through narrowly tailored means.[283]

1. Compelling Purpose

Like many federal Native American laws, the ICWA's compelling purpose stems from the government's unique obligation to federally recognized tribes.[284] Founded on the "general trust relationship" between the United States and Native American tribes, the government is responsible for the protection and preservation of native tribes.[285] The ICWA's purposes of protecting native families from unnecessary separation, acting in the best interests of native children, and supporting tribal sovereignty fall within this overarching trust relationship.[286] The

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that disqualified all methadone users from employment even if they were using the drug with the help of medical assistance); Vance v. Bradley, 440 U.S. 93, 95 (1979) (upholding a statute that required retirement of federal employees under one retirement program and not others).

281. *See* Dempsey, *supra* note 13, at 461–68.

282. *Haaland*, 994 F.3d 249, 442 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, (No. 21-376) (Haynes J., concurring); *see also* Dempsey, *supra* note 13, at 461–67 (supporting the alternative path to uphold the ICWA under strict scrutiny).

283. *See supra* notes 55–59 and accompanying text (discussing strict scrutiny review).

284. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 552–53 (1974) (noting that Congress's power to "regulate commerce... with the Indian Tribes" comes with an obligation of trust to protect the rights and interests of federally recognized tribes); Gibson v. Babbitt, 223 F.3d 1256, 1258 (11th Cir. 2000) ("[T]he Government has met its evidentiary burden of proving that it has a compelling governmental interest in fulfilling its treaty obligations with federally recognized Indian tribes."); United States v. Wilgus, 638 F.3d 1274, 1284–87 (10th Cir. 2011) ("[T]he interest found compelling arises from the federal government's obligations, springing from history and from the text of the Constitution, to federally-recognized Indian tribes.").

285. *See* United States v. Mitchell, 463 U.S. 206, 225 (1983) (suggesting that the fiduciary relationship created between the government and the tribe is a dominate principle in federal Indian law); *see also* 25 U.S.C. § 1901(2) (granting Congress responsibility for protection and preservation of Indian tribes).

286. *See* 25 U.S.C. § 1901 ("Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people . . . ."); *see also supra* notes 240–262 and accompanying text (explicating the ICWA's stated purposes in detail).

statute's placement preferences serve the larger compelling purpose of protecting native children by attempting to preserve as many of the child's connections with their native community as possible, allowing for customized consideration of each child's needs.[287] Today, the government's interest to protect native children and tribes remains just as compelling due to recent studies showing the proportion of native children ripped from their families and placed in foster care is still more than twice as high as the proportion of the general child population.[288]

Further, when completing the compelling purpose analysis, it is imperative that the Supreme Court recognizes its precedent holding that the government may use race-based classifications with the purpose of responding to the "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country."[289] The ICWA is a response to discrimination and systemic bias against native families.[290] In *Grutter v. Bollinger*, when upholding a race-based admissions policy under strict scrutiny, the Supreme Court described educational institutions as "occupy[ing] a special niche in our constitutional tradition."[291] It has been argued that the history of Native American law jurisprudence clearly indicates that federally recognized native tribes similarly occupy a unique "niche" in the nation's constitutional tradition.[292] In the context of quasi-sovereign native tribes, courts have demonstrated extreme deference to Native American tribes and their ability to exercise autonomy.[293] Therefore, due to the extensive

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287. *See supra* notes 263–271 and accompanying text (explicating how the ICWA's placement preferences are intended to serve the best interests of the native child in a unique tribal context).

288. Alicia Summers & Steve Wood, *Measuring Compliance with the Indian Child Welfare Act: An Assessment Toolkit*, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES 1, 4 (Feb. 28, 2014), https://perma.cc/PJH8-CV8N (PDF) (stating that many states have "[Indian foster] care rates more than 10 times the general population rate . . . .").

289. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (dispelling the notion that strict scrutiny is "strict in theory, but fatal in fact" in all circumstances (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)); *see* Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003) ("Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.").

290. *See supra* notes 21–46 (detailing the horrific history that led to the ICWA's enactment); *see also* Hearings, *supra* note 6, at 213–14 (identifying the white American cultural bias in a legal system that was depleting tribal populations deliberately because of prejudice and discrimination).

291. *Grutter*, 539 U.S. at 329 (describing that this tradition is associated with "the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment.").

292. Dempsey, *supra* note 13, at 463; *accord* Elizabeth Reese, *The Other American Law*, 73 STAN. L. REV. 555, 562 (2001) (describing tribal law as a niche topic).

293. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 542 (1974) (announcing an "overriding purpose" to foster "a greater degree of self-government, both politically and economically" among Native American tribes); *id.* at 541 (finding the BIA statute's purpose is "to give Indians a greater participation in their own self-government.").

history of discrimination against native families within their tribes and the unique position held by tribal sovereignties, the Supreme Court should find that the ICWA's purpose was sufficiently compelling to withstand strict scrutiny.

2. Narrowly Tailored

The ICWA's placement preferences set standards that prevent unwarranted removals of native children from tribal communities and are vital means to protect and stabilize the future of Native American tribes, thereby fulfilling the government's guardian role.[294] However, as mentioned above, critics of the statute have emphasized the ICWA's language encompassing "eligible for membership."[295] They argue that the statute is not narrowly tailored because it applies the placement preferences to all native children who could ever be eligible for tribal membership.[296] These opponents argue that the language must be narrowed to include only those children who are currently enrolled in a native tribe if the statute is to pass strict scrutiny.[297] However, Congress's use of the phrase "eligible for membership" rather than "currently enrolled" was intentional.[298] Tribes determine enrollment standards in a multitude of ways.[299] For example, some children may be 100 percent Native American by blood, but ineligible for enrollment due to a residency requirement or a native parent who is the wrong gender to begin the enrollment process.[300] Due to this wide variance, Congress used language in the ICWA that would allow tribes to make a sovereign determination defining membership for purposes of the statute.[301]

294. *See* House Report, *supra* note 8, at 1 ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . .").

295. *See. e.g.*, Brackeen v. Zinke, 338 F. Supp. 3d 514, 535 (N.D. Tex. 2018) *rev'd sub nom.* Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019) (finding issue with the ICWA's placement preferences as applied to all "*potential* Indian children."); Brief of Amici Curie Goldwater Institute et al., at 5, *Zinke*, 338 F. Supp. 3d (N.D. Tex. 2018) (No. 18-11479) (discussing how the broad definition of "Indian child" ensures that the "ICWA is predicated *not* on *tribal affiliation*, but on generic '*Indianness*.'").

296. *See Zinke*, 338 F. Supp. 3d at 535 ("Applying the preference to *any* Indian, regardless of tribe, is not narrowly tailored . . . .").

297. *See id.* at 535–36 (indicating that the racial classification is too wide because it includes "those who will never be members of their ancestral tribe, those who will ultimately be placed with non-tribal family members, and those who will be adopted by members of other tribes.").

298. *See* Terry L. Cross and Robert J. Miller, *The Indian Child Welfare Act of 1978 and Its Impact on Tribal Sovereignty and Governance*, *in* FACING THE FUTURE 13, 14 (Matthew L.M. Fletcher, Wenona T. Singel, & Kathryn E. Fort eds., 2009) (describing Congress's reasoning when determining who the ICWA would encompass).

299. *Id.*

300. *See id.* (expanding upon the "real-life problem[s]" of various enrollment processes).

301. *Id.*; *see also* 25 U.S.C. § 1903 (defining "Indian child").

As further evidence of Congress's intention to narrowly tailor the statute, the legislative history shows that Congress originally considered, but ultimately rejected, a broader definition of "Indian child."[302] An earlier draft of the ICWA did not define "Indian child" specifically, but rather defined "Indian" as "any person who is a member of or who is eligible for membership in a federally recognized Indian tribe."[303] The final draft reformed this definition so as not to include children granted automatic membership through tribal law.[304] This eligibility language represents the drafters' intention to simultaneously ensure that the ICWA is not overinclusive, while also protecting tribal members and their children who have yet to become formally enrolled members.[305] Some supporters of the statute have even argued that in order for Congress to achieve its goals, the current definition of "Indian child" was necessary.[306] Because a native child does not have the ability to initiate the formal enrollment process into a tribe, Congress had to extend the ICWA's definition beyond native children who were already members.[307]

Contrary to the foundation on which critics base their argument, the use of the phrase "Indian child" serves as a means to ensure that the ICWA's placement preferences are narrowly applied. In Illinois, courts have emphasized the importance of the initial determination of whether the child in question is an "Indian child" as defined by the ICWA.[308] Courts in the state have warned that they should not "assume the ICWA applies without establishing whether the minor is an 'Indian child.'"[309] Similarly, Illinois courts have emphasized that a child in question is not

302. *See* Nielson v. Ketchum, 640 F.3d 1117, 1123–24 (10th Cir. 2011) (noting that "the final draft of the statute" limited membership to those children, otherwise eligible, who had a parent who was a member of a tribe).

303. *Id.* at 1124 (citing 123 CONG. REC. S37223 (1977)).

304. *Id.* at 1123–24.

305. *See* House Report, *supra* note 8, at 17 (noting that it is crucial to the ICWA's interests that Congress protect native children not yet enrolled in tribal membership and must "act to protect the valuable rights of a minor Indian who is eligible [for membership]").

306. *See* Brief in Opposition of Respondents Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians, at 6, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, (No. 21-380) ("For [the] ICWA to achieve its goals, Congress had to extend the 'Indian child' definition beyond children who were themselves enrolled members . . . .").

307. *See* House Report, *supra* note 8, at 17 (noting a native child's lack of capacity to complete the enrollment process).

308. *See* In re H.D., 797 N.E.2d 1112, 1117 (Ill. App. Ct. 2003) (admonishing the trial court that "assumed the ICWA applied"); *see also* In re C.N., 752 N.E.2d 1030, 1044–45 (Ill. 2001) (recognizing the circuit court's correct determination as to the applicability of the ICWA).

309. *See In re H.D.*, 797 N.E.2d at 1117; *see also* In re Stiarwalt, 546 N.E.2d 44, 47–48 (Ill. App. Ct. 1989) (ruling that the ICWA does not apply unless it is established that the minor is an "Indian child").

immediately subject to the placement preferences in the ICWA "merely because [they] are 'Indian,'" but rather, the sections apply only if the child meets the eligibility prerequisite.[310] Thus, for states like Illinois, the respect for the tribal eligibility requirement and stringent focus on determining whether the child in question is an "Indian child" to whom the placement preferences apply suggest that the ICWA's placement preferences are applied in a narrow manner that withstands strict scrutiny.[311]

However, beyond the direct language of the statute, the ICWA shares many other similarities with the policy upheld in *Grutter v. Bollinger*. First, like the admissions policy, the ICWA uses race as just one factor in determining whether a child is an "Indian child."[312] The statute requires that a native child be both eligible for tribal membership under the individual tribe's law and have at least one biological parent who is a member of the tribe.[313] While the variance in membership eligibility requirements among tribes is great, the additional political affiliation required by a parent to a federally recognized tribe ensures that the statute is not predominately race-based.[314] As it did in *Grutter*, the Supreme Court should view the holistic nature of the ICWA favorably, with race being a single factor rather than a definitive element requiring immediate application of the statute's placement preferences.[315]

Second, like the University in *Grutter*, it can be argued that the ICWA's placement preferences are necessary because all race-neutral alternatives have been considered and subsequently failed at preventing disproportionate levels of native family separation.[316] The legislative

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310. *In re Stiarwalt*, 546 N.E.2d at 48; *see* In re M.S., 706 N.E.2d 524, 527 (Ill. App. Ct. 1999) ("The ICWA is not applicable until the party asserting its applicability establishes that the child meets one or both of the criteria." (citing In re A.G.-G., 899 P.2d 319, 321 (Colo. App. 1995))).

311. *See In re H.D.*, 797 N.E.2d at 1117 (citing In re Appeal in Maricopa Cnty. Juv. Action No. A-25525, 667 P.2d 228 (Ariz. Ct. App. 1983)):

> The proper course of action in the initial proceedings below would have been for the trial court to explicitly enter findings regarding the status of the child as an Indian or non-Indian as early in the custody proceedings as possible. [Citation.] The trial court should not have assumed throughout the proceedings below that the ICWA applied without ascertaining with proof and on the record that (1) the child is enrolled in a tribe or that (2) the child is a biological child of an Indian who is a member of a tribe and that the child is eligible for membership in the tribe as well.

312. *See* Grutter v. Bollinger, 539 U.S. 306, 334 (2003) ("Universities can, however, consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant.").

313. 25 U.S.C. § 1903(4).

314. *Compare supra* notes 230–233 and accompanying text (explaining the variety of tribal eligibility standards irrespective of race), *with* 25 U.S.C. § 1903(4) (detailing the additional parental political affiliation requirement).

315. *Grutter*, 539 U.S. at 334–36.

316. *Id.* at 339–40.

history clearly portrays that the horrific experiences of native children ripped from their families and tribal communities left Congress little choice but to create federal standards unique to native child custody proceedings.[317] The practices of state social workers were deemed "wholly inappropriate" by Congress in the context of Native American cultural values and social norms.[318] Thus, it has been argued that a carefully tailored statute applicable to Native Americans and their children was necessary to take into account the burgeoning "realization that Native Americans have unique practices and traditions regarding child-rearing that are not susceptible to judgment using a non-[native] barometer."[319] This carefully calibrated placement preference framework that weighs tribal, state, federal, and individual interests, including those of the native child, ensures that the ICWA's means are narrowly tailored to further its compelling governmental interests, thereby withstanding strict scrutiny.[320]

In sum, the Supreme Court should find that the ICWA's classification is political rather than racial because it is more analogous to the statute upheld in *Mancari* than that overturned in *Rice*.[321] The long history of Native American tribal sovereignty and self-autonomy is recognized by Illinois precedent, which holds that ICWA "does not involve a suspect class."[322] If the Supreme Court correctly finds that the ICWA's definition of "Indian child" is political, it should uphold the statute as constitutional because it satisfies rational basis review.[323] Its legitimate purposes include to "promote the stability and security of Indian . . . families,"[324] to "protect the best interests of Indian

317. *See supra* notes 248–255 and accompanying text (explicating how the ICWA's placement preferences are intended to serve the best interests of the native child in a unique tribal context).

318. *See* House Report, *supra* note 8, at 10 (asserting that many social workers would make conclusions regarding native children's emotional risk and native parents' caregiving abilities that had been blinded by bias and a lack of respect for deep cultural differences).

319. JONES ET AL., *supra* note 28, at 12.

320. Dempsey, *supra* note 13, at 467 (describing this as a product of flexibility for judges in the statute).

321. *See supra* notes 207–238 and accompanying text (comparing the ICWA to *Rice* and *Mancari* respectively to determine that the statute's classification remains political rather than racial).

322. *See supra* notes 127, 213–215 and accompanying text (detailing the imperative history of affording Native American tribes a "quasi-sovereign" status); *see also* In re Armell, 550 N.E.2d 1060, 1067 ("[T]he ICWA does not involve a suspect class" (citing Morton v. Mancari, 417 U.S. 535, 550–55 (1974); United States v. Antelope, 430 U.S. 641, 646 (1977))).

323. *See supra* notes 240–280 and accompanying text (detailing how a proper application of rational basis review results in the Court ruling that the ICWA is constitutional).

324. 25 U.S.C. § 1902; *see also supra* notes 240-247 and accompanying text (detailing this first purpose).

children,"[325] and to "promote the stability and security of Indian tribes."[326] Recognized by Illinois as a "remedial statute,"[327] it is rationally related to these purposes by establishing minimum federal standards for removal of native children from their families and placement into non-native homes.[328] However, even if the Supreme Court diverges from Illinois precedent and finds that the ICWA classifies on the basis of race, the statute should still be upheld under strict scrutiny.[329] Its compelling purpose stems from the government's unique obligation to protect and preserve federally recognized Native American tribes.[330] Due to its similarities with the policy upheld in *Grutter*, the ICWA is narrowly tailored because race is just one factor when determining whether a child is an "Indian child" and the placement preferences are necessary to remedy the overrepresentation of native children in the child-welfare system still prevalent today.[331] If the Supreme Court conflicts with the above analysis, there will be detrimental impacts for individual Native American children and entire tribes;[332] if it agrees and upholds the ICWA as constitutional, it will place the United States among the rest of the world that recognizes a native child's right to tribal culture and identity.[333]

IV. IMPACT

A. Foreseeable Negative Impacts on Individual Native American Children

If the Supreme Court overturns the placement preferences in the ICWA on the grounds that they violate the Equal Protection Clause of the Constitution, it will actively endanger the mental and physical health of

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325. 25 U.S.C. § 1902; *see also supra* notes 248–256 and accompanying text (detailing this second purpose).

326. 25 U.S.C. § 1902; *see also supra* notes 257–262 and accompanying text (detailing this third purpose).

327. *See* In re Cari B., 763 N.E.2d 917, 923 (Ill. App. 2002) (classifying the statute as remedial (citing Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989))); *see also supra* notes 272–276 and accompanying text (detailing the reasoning in Illinois precedent to uphold the ICWA under rational basis review).

328. *See supra* notes 263–280 (detailing the ICWA's rational relation to the aforementioned legitimate purposes).

329. *See supra* notes 281–320 and accompanying text (detailing how an improper application of strict scrutiny still results in the Court ruling that the ICWA is constitutional).

330. *See supra* notes 284–288 and accompanying text (detailing the ways in which the ICWA's placement preferences serve the compelling purpose).

331. *See supra* notes 294–320 and accompanying text (detailing the ICWA's narrow tailoring to the aforementioned compelling purposes).

332. *See infra* PART IV.A.

333. *See infra* PART IV.C.

native children, especially in Illinois, to whom Congress intended to afford protections. The simple act of removing a native child from their tribe is equivalent to removing a non-native child from their extended family.[334] The concept of the Native American family is not that of a "nuclear family" often associated with non-native families.[335] Rather, a native child may consider themselves to have more than one hundred relatives who are close members of their family.[336] Many members of this extended native family have responsibilities and duties in childrearing, including grandparents who often take on day-to-day child care even when parents are living and well.[337] Studies show that community child-rearing causes the native child to know that they are "connected and fit within that supportive structure."[338] Due to the unique tribal community and culture within, a native child has two relationship systems: a "biological relational system" and a "clan or band relational system."[339]

The American Academy of Pediatrics has cautioned courts that the key to a child's healthy growth is to have supportive relationships and healthy childhood experiences contributed by a community that builds

334. *See* Lorie M. Graham, *"The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 5 (1998) ("For many Native American nations, 'family' denotes extensive kinship networks that reach far beyond the Western nuclear family.").

335. *See* Cynthia G. Hawkins-Leon, *The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis*, 36 BRANDEIS J. FAM. L. 201, 209 (1996) (distinguishing a Native American family from a "Western nuclear family consisting of two parents and their children"); *see also* Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327, 331 (1986) (recognizing tribal family structures to traditionally include "elaborate kinship networks").

336. *See Hearing on Indian Child Welfare Act Amendments Before the Senate Comm. on Indian Affs.*, 104th CONG. 2D SESS., 314 (1996) (statement by Jack F. Trope on behalf of the Association on American Indian Affairs, Inc.) (describing the extended family dynamics in tribal communities); *see also* JOHN G. RED HORSE ET AL., FAMILY PRESERVATION: CONCEPTS IN AMERICAN INDIAN COMMUNITIES 63 (Dec. 2000) ("[I]t is virtually impossible to separate the [native] individual from family and family from the [tribal] community.").

337. *See Hearing on Indian Child Welfare Act Amendments Before the Senate Comm. on Indian Affs.*, 104th CONG. 2D SESS., 314 (1996) (noting the customs and traditions providing childrearing responsibilities to extended family members in tribal communities); *see also* Christine Metteer, *Pigs in Heaven: A Parable of Native American Adoption Under the Indian Child Welfare Act*, 28 ARIZ. ST. L.J. 589, 617–18 (1996) (utilizing the Potowatomie tribe as an example to show how Native American culture has introduced the formation of a "kinship community").

338. MARILYN POITRAS & NORMAN ZLOTKIN, AN OVERVIEW OF THE RECOGNITION OF CUSTOMARY ADOPTION IN CANADA 27 (2013).

339. *See Indian Child Welfare Amendments: Hearings on S. 1976 Before the Senate Select Comm. on Indian Affs.*, 100TH CONG. 97 (1988) (statement of Evelyn Blanchard, Vice President of the National Indian Social Workers Association); *see generally* Donna J. Goldsmith, *Individual vs. Collective Rights: The Indian Child Welfare Act*, 13 HARV. WOMEN'S L. J. 1 (1990).

attachment, healing, and resilience.[340] Professionals agree that it is vital to understand the "broader familial relationships" held by native children because maintaining these strong relationships can contribute to success in adulthood.[341] In the unfortunate situation requiring a native child to be removed from their biological family, placement in a home with members of their broader family allows them to maintain the communal bonds that provide them with a sense of stability, identity, and belonging during an uncertain time.[342] Unsurprisingly, children placed in such homes experience better outcomes overall.[343] Therefore, the ICWA's placement preferences ensure that in the unfortunate situation requiring a native child to be removed from their biological family, placement in their extended family including their tribal community is in their best interest.[344]

Consequently, it is unsurprising that severing familial relationships with both a native child's biological family and tribal community can lead to devastating psychological consequences.[345] Psychological research

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340. Brief of American Academy of Pediatrics and American Medical Association as Amici Curiae in Support of Respondents, at 5–6, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, (No. 21-376) [hereinafter AAP Brief] (emphasizing that tribal relations serve a role similar to extended family networks in non-native communities).

341. *See id.* at 5–6 (linking the childhood relationships with tribal communities to adulthood success).

342. *See Stepping Up for Kids*, ANNIE E. CASEY FOUND. 2 (Jan. 1, 2012), https://assets.aecf.org/m/resourcedoc/AECF-SteppingUpForKids-2012.pdf [https://perma.cc/UBC9-TS2X] ("The notion that children do better in families is a fundamental value . . . .").

343. *See* Veronnie F. Jones et al., *Pediatrician Guidance in Supporting Families of Children Who are Adopted, Fostered, or in Kinship Care*, 146(6) PEDIATRICS 1, 3 (Dec. 2020) (finding that children in familial placements experienced less stigma and trauma from the separation from parents and were more likely to remain connected to siblings and maintain cultural traditions.); *see also* David M. Rubin et al., *Impact of Kinship Care on Behavioral Well-being for Children in Out-of-Home Care*, 162(6) ARCH. OF PEDIATRIC ADOLESCENT MED. 550, 552–53 (June 2008) (determining that rates of anxiety and depression are 30 percent lower in familial placements than general foster care). A meta-analysis of studies covering over 600,000 children found that children in kinship care "experience better outcomes in regard to behaviour problems, adaptive behaviours, psychiatric disorders, well-being placement stability (placement settings, number of placements, and placement disruption), guardianship, and institutional abuse than do children in foster care." *See* Marc Winokur et al., *Kinship Care for the Safety, Permanency, and Well-being of Children Removed from the Home for Maltreatment: A Systemic Review*, CAMPBELL SYSTEMATIC REVIEWS 1, 40 (2014).

344. *See* AAP brief, *supra* note 340, at 16 ("AAP policy promotes the use of kinship care as a primary consideration for placement of a child who cannot remain safely with the child's family of origin for a period of time." (citing Jones et al., *supra* note 343)).

345. *See, e.g.*, BARBARA ANN ATWOOD, CHILDREN, TRIBES, AND STATES: ADOPTION AND CUSTODY CONFLICTS OVER AMERICAN INDIAN CHILDREN 51 (2010) (quoting a Sioux woman who was adopted into a non-native family at birth):

> It was very hard for me to find my place in the world... It was hard to figure out because

has shown that a child's cultural identity is not merely intrinsic to their person, but rather shaped by their communal influences.[346] Removal of a native child from their family and tribal community prevents their ability to enculturate, a process by which a person "learn[s] about and identif[ies] with their ethnic minority culture."[347] Barring a native child's opportunity to develop a tribal identity precludes them from the many mental health benefits that can derive from enculturation.[348] These benefits include increased resiliency, greater overall happiness, and turning to spirituality rather than drugs and alcohol to cope with stress.[349] In contrast, native children deprived of the chance to enculturate into their Native American culture are more likely to experience greater mental health problems and abuse drugs and alcohol to cope with psychosocial stress.[350]

The American Psychological Association has stated that a critical

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> everybody else was living with their real parents and everybody else looked like each other and I just didn't fit in anywhere. But as I am growing older I've got my own identity and I've worked through a lot of it. It is just searching for the birth parents and the questions that I have for them when I do find them about my heritage and my background and my family history.

346. *See, e.g.*, Tamar Schapiro, *Childhood and Personhood*, 45 ARIZ. L. REV. 575, 588 (2003) (describing childhood as a formative period of "emerging personhood" during which multiple influences gradually progress toward self-definition); Martha Minow, *Identities*, 3 YALE J. L. & HUM. 97, 98 (1991) ("[C]ultural, gender, racial, and ethnic identities of a person are not simply intrinsic to that person, but depend upon that person's self-understanding in conjunction with communal understandings.").

347. *See* Christopher Wolsko et al., *Stress, Coping, and Well-Being Among the Yupik of the Yukon-Kuskokwim Delta: The Role of Enculturation and Acculturation*, 66 INT'L J. CIRCUMPOLAR HEALTH 51, 52 (2007) (defining enculturation also as engaging with "one's traditional cultural norms" and incorporating those values into everyday living).

348. *See, e.g.*, Teresa D. LaFromboise et al., *Psychological Impact of Biculturalism: Evidence and Theory*, 114 PSYCH. BULL. 395, 403 (1933) ("The more integrated the individual's identity, the better he or she will be able to exhibit healthy coping patterns[.]").

349. *See, e.g.*, Teresa D. LaFromboise et al., *Family, Community, and School Influences on Resilience among American Indian Adolescents in the Upper Midwest*, 34 J. OF CMTY. PSYCH. 193, 203–04 (Mar. 2006) ("For each increment in enculturation, the youth were . . . . more likely to be resilient."); Wolsko et al., *supra* note 347, at 58 (extrapolating results from a study of 488 Yup'ik participants).

350. Despite Congress's recognition of the serious problem threatening the existence of an entire culture, there has been surprisingly little empirical data addressing the impact of the removal of native children from their culture and their placement in non-native, predominantly Anglo-Saxon culture. The studies that do exist generally pertain to transracial adoptions and the effect of minority children, which are relevant to the struggles of native children. *See* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991); Jo Beth Eubanks, *Transracial Adoption in Texas: Should the Best Interests Standard Be Color-Blind?*, 24 ST. MARY'S L.J. 1225 (1993); Kim Forde-Masrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925 (1994). The existing studies suggest that the plights confronting native children who grow up in the non-native world are serious. *See* Wolsko et al., *supra* note 347, at 58 (identifying the mentally destructive effects of those who have less enculturation).

means of enculturation is for a native child to be raised by native adults and to learn from their experiences, regardless of whether the adults are biological, foster, or adoptive parents.[351] In Illinois, a state with a total population of over 12.6 million, only about 76,000 (less than 1 percent) identify as Native American.[352] Due to the small population, native children placed in non-native homes in Illinois are likely to be more isolated from meaningful opportunities to engage with their tribal culture, heritage, and identity.[353] Although John Dall, the native child taken from his Native American mother at three years old, was eventually placed in a supportive home in Illinois, he still felt "intensely isolated from his peers" because he "knew he was Native American but [] didn't know what that meant, didn't know which tribe he was from or what his cultural heritage was."[354] Due to increased difficulties accessing support networks through tribal communities, native children in Illinois placed in non-native homes could experience greater everyday stress and long-term mental health struggles.[355] While current Illinois precedent ensures that these native children are placed in a home with familial connection to the broader Native American community, the Supreme Court's decision in future equal protection challenges against the ICWA could prevent the state from providing those protections to native children.[356]

One of the worst outcomes of enculturation deprivation especially prevalent for native children in Illinois is suicide. Even without the state intervening under the ICWA, a native teenager is already 50 percent more likely to commit suicide than their peers.[357] In some tribes, the youth suicide rate is seven times higher than the already elevated rate.[358]

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351. APA Brief, *supra* note 340, at 6 (telling the Court that placing native children with extended family, tribal members, or other native adults facilitates their personal development and is tied to positive life outcomes).

352. *See Illinois Quick Facts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/IL,US/RHI325221#RHI325221 [https://perma.cc/D6Y6-RM6L] (last visited Jan. 29, 2023).

353. *See* APA Brief, *supra* note 340, at 18 (linking lacking Native American populations to decreased enculturation (citing Raven Sinclair, *Identity Lost and Found: Lessons from the Sixties Scoop*, 3 FIRST PEOPLES CHILD & FAM. REV. 65, 71 (2007)).

354. Moore, *supra* note 2.

355. *See, e.g.*, *id.* (noting how at twelve years old, John was diagnosed as "emotionally mentally handicapped"); *see* LaFromboise et al., *supra* note 349, at 194 ("[U]rban American Indian youth may well experience greater stress in daily living . . . ."); *see also* RED HORSE ET AL., *supra* note 336, at 46 (observing that many native people who live away from reservations are "not up to speed about Indian ways").

356. *See supra* BACKGROUND Part III (examining the Illinois precedent holding the ICWA's placement preferences as constitutional).

357. *See* Shaquita Bell, et al., *Caring for American Indian and Alaska Native Children and Adolescents*, 147 PEDIATRICS, Apr. 2021, at 4 (noting the disparity).

358. *See* M.A. Herne et al., *Suicide Mortality Among American Indians and Alaska Natives, 1999-2009*, 104 AM. J. PUB. HEALTH S336, S336 (2014) (noting the further disparity).

Unsurprisingly, disruption of familial and tribal relationships is another significant risk factor for a child already within this struggling community.[359] However, native children who form strong identities and communities through enculturation have lower rates of youth suicide.[360] The best suicide prevention strategies for native children are culturally centered and involve incorporating family and tribal ties as buffers against suicide risk.[361] Many organizations in Chicago and across Illinois have recognized native children's need for tribal culture incorporation and have responded by arranging different events to teach attendees about Native American traditions.[362] These events stretch from oral history presentations to annual powwows involving traditional drum roll calls and intertribal dance contests.[363] However, native children separated from their families and placed into non-native homes often are prevented from participating in these principal tribal events.[364] Consequently, if the Supreme Court were to overturn the current protections afforded to native families by the ICWA, it could trigger the native child suicide rate in Illinois to increase from its already frighteningly high numbers.

Conversely, some critics in opposition to the ICWA attempt to minimize the consequences of overturning its placement preferences by

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359. *See* Giorgia Falgares et al., *Attachment Styles and Suicide-Related Behaviors in Adolescence: The Mediating Rold of Self-Criticism and Dependency*, 8 FRONTIERS IN PSYCHIATRY 1, 3 (Mar. 2017) (recognizing the increased risk posed by child removal); *see also* NAT'L INST. OF MENTAL HEALTH, SUICIDE, HOMICIDE, AND ALCOHOLISM AMONG AMERICAN INDIANS: GUIDELINES FOR HELP 10 (1973) (classifying "social characteristics" that increased the risk of suicide as whether the native child "lived with a number of ineffective or inappropriate parental substitutes because of family disruption" and whether "he has spent time in boarding schools").

360. *See* Christopher Lalonde, *Identity Formation and Cultural Resilience in Aboriginal Communities*, *in* PROMOTING RESILIENCE IN CHILD WELFARE 66-67 (Flynn, Dunning, Barber eds., 2006) (finding that youth suicide rates were lowest in indigenous communities that had the greatest number of markers of cultural continuity).

361. *See generally* James Allen et al., *Multi-Level Cultural Intervention for the Prevention of Suicide and Alcohol Use Risk with Alaska Native Youth: A Nonrandomized Comparison of Treatment Intensity*, 19 PREVENTION SCI. 174 (2018).

362. *See generally Illinois American Indian Organizations*, NATIVE AM. CHAMBER OF COM. OF ILL., https://www.nacc-il.org/illinois-american-indian-organizations [https://perma.cc/9PRV-NQZ8] (last visited Jan. 29, 2023).

363. *See The Black Hawk Performance Company*, AMER. INDIAN ASS'N OF ILL., https://www.chicago-american-indian-edu.org/chicago-american-indian-university-education/Black-Hawk-Performance-Company.html [https://perma.cc/357L-VV8Q] (last visited Jan. 29, 2023) (using oral history, storytelling, flute playing, and traditional music as a way to honor the many tribes who have made Illinois their home); *see also 69th Annual Chicago Powwow*, AMER. INDIAN CTR., https://aicchicago.org/69th-annual-chicago-powwow/ [https://perma.cc/N883-6D9Y] (last visited Jan. 29, 2023) (describing the plan for 2022 annual Chicago Powwow).

364. *See generally* RITA J. SIMON & SARAH HERNANDEZ, NATIVE AMERICAN TRANSRACIAL ADOPTEES TELL THEIR STORIES (2008) (detailing interviews conducted with 20 native children adopted into non-native homes, most of whom were not encouraged to participate in such events promoting Native American culture).

emphasizing a situation where a native child is placed in a non-native home that is supportive of the child's native culture and intentionally encourages maintaining relationships with the tribal community.[365] Even if a native child is so fortunate to be placed in a non-native home with such support, identity formation after removal from tribal communities is extraordinarily challenging.[366] Many in this position feel as though they are acquiring knowledge about their tribal culture indirectly rather than from relatives who shared a similar native identity.[367] Thus, these children often lack "an understanding of their native language and ha[ve] no memory or comprehension of tribal history, culture, customs, and strivings."[368] This can lead to short-term frustration and embarrassment and long-term effects like addiction, anxiety, eating disorders, and suicidal ideation.[369] Even if a native child attempts to reconnect with their tribal members, it is difficult to reenter a community after years of attempting to assimilate into non-native culture.[370] Therefore, even if the Supreme Court were to assume that every native child would be placed in a home that not only allowed but encouraged enculturation, it would still be denying each child the mental health benefits that accompany identity formation in a native family and tribal community.

Additionally, the devastating health effects on native children that could reverberate if the Supreme Court were to find the ICWA's placement preferences unconstitutional are not just mental. Native children removed from their families experience grave health inequities into adulthood due to the traumatic stress experienced in childhood.[371]

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365. *See, e.g.*, Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 543, 548–49 (1996) (concluding that native children "can develop normally in non-Indian homes" and citing studies supporting that "placement of an Indian child in a non-Indian home is not harmful to the child").

366. *See* Irving N. Berlin, *Anglo Adoptions of Native Americans: Repercussions in Adolescence*, 17 J. AM. ACAD. CHILD PSYCHIATRY 387, 388 (1978) (noting that attempts by native children to return to their tribes is difficult).

367. *See* THERESE DELEANE O'NELL, DISCIPLINED HEARTS: HISTORY, IDENTITY, AND DEPRESSION IN AN AMERICAN INDIAN COMMUNITY 62 (1998) (recognizing the rejection that native children might face when attempting to claim their tribal identity based on indirect learning).

368. Berlin, *supra* note 366, at 388.

369. *See* Jeannine Carriere, *Connectedness and Health for First Nation Adoptees*, 10 PAEDIATRIC CHILD HEALTH 545, 547–48 (2005) (enumerating the effects in the table).

370. *See, e.g.*, Moore, *supra* note 2 ("[The tribe] didn't know how to trust me . . . because of the way that I speak, the way I carry myself—it's different than the way that they do."); *id.* (explaining the questions John had to grapple with when meeting his tribal community as an adult such as "Will I be accepted? Am I going to make new friends? Are they going to like me? It's the new kid coming into the new school thing.").

371. *See* AAP Brief, *supra* note 340, at 12 (establishing that a native child's adverse experiences can lead to future harms); *see also* Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood*

Prolonged or persistent traumatic stress can result in psychological disruptions that can impede development of the child's brain, cardiovascular system, and immune system.[372] Similarly, cultural loss experienced by native children removed from their families and tribal community has been linked with substance dependence, further jeopardizing the child's health in adulthood.[373] Thus, because the ICWA is currently a vital part of a policy framework designed to redress the harms that can lead to this health disparity and promote the wellbeing of native children in Illinois, any consideration of overturning the statute's placement preferences could treaten to reduce these protections.[374]

B. Foreseeable Negative Impacts on Native American Tribes

If the Supreme Court overturns the placement preferences in the ICWA on the grounds that they violate the Equal Protection Clause of the Constitution, it will threaten native tribal communities in two ways. First, there will be decreased recognition of tribal sovereignty. Second, native tribes will be further dismantled through a decline in membership.

1. Decreased Recognition of Tribal Sovereignty

Overturning the ICWA would encroach upon tribal sovereignty historically recognized by the United States and protected by the Supreme Court. The Constitution mentions Native Americans and tribes twice: the Commerce Clause[375] and the Apportionment Clause's exclusion of "Indians not taxed" from the determination of "free Persons" to be counted for the number of representatives and taxes.[376] Some have argued that these references alone strongly suggest a recognition of tribes

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Experience (ACE) Study, 14 AM. J. PREVENTIVE MED. 245, 254 (1998) (linking high levels of adverse childhood exposure to the prevalence and risk of heart attack, cancer, stroke, COPD, and diabetes).

372. *See* Jack P. Shankoff & Andrew S. Garner, *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 PEDIATRICS e232, e243 (2012) (enumerating the effects of early childhood adversity); *see also* Wolsko et al., *supra* note 347, at 52 (confirming that various types of trauma experienced by native people are significant factors contributing to high rates of substance abuse, traumatic depression, and PTSD).

373. *See generally* Cindy L. Ehlers et al., *Measuring Historical Trauma in an American Indian Community Sample: Contributions of Substance Dependence, Affective Disorder, Conduct Disorder and PTSD*, 133 DRUG & ALCOHOL DEPENDENCE (2013) (linking disparities in the prevalence of substance use and mental health issues to removal and children and bans on cultural practices).

374. *See* AAP Brief, *supra* note 340, at 12 (indicating that the ICWA is a part of a policy framework created to address the disproportionate experiences had by native children).

375. U.S. CONST. art. I, § 8, cl. 3 (empowering Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes").

376. U.S. CONST. art. I, § 2, cl. 3; *see* U.S. CONST. amend. XIV (restating the exclusion).

as their own separate sovereigns.[377] This opinion is bolstered by the Supreme Court's complex history of recognizing the country's relationship with tribes as more protective in nature while also respecting tribal powers of self-government. Chief Justice Marshall once characterized native tribes as "domestic dependent nations" that were also in a protectorate relationship with the United States "resembl[ing] that of a ward to his guardian."[378] Simultaneously, Marshall recognized that tribes possessed preexisting powers of self-government that must be "insulated . . . from [s]tate [i]nterference."[379] Notably, Illinois precedent simultaneously recognizes the power given to Congress to regulate Native Americans while acknowledging the "quasi-sovereign" nature of tribes.[380] Thus, while the federal government has a plenary power over native tribes, the tribes have a unique sovereign status that must be respected.[381]

The ICWA's placement preferences delineate respect for tribal sovereignty by allowing tribes to determine membership for whom the statute will encompass.[382] When making the determination of whether the child in question is an "Indian child" to whom the ICWA's placement preferences apply, tribal entities themselves declare whether the child is either a member or eligible for membership.[383] The only limiting aspect for this authority is that the method of proof offered by the tribe must satisfy the state's evidentiary rules.[384] Tribal entities should be afforded this deference due to the United States' historical precedent recognizing

377. *See* ATWOOD, *supra* note 345, at 25–29 (2010).

378. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (rejecting the Cherokee Nations' attempt at invoking federal jurisdiction as a foreign nation).

379. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 340 n. 25 (1983) (holding that New Mexico's hunting and finishing law could not be applied on the reservation in question in conflict with the Mescalero Apache Tribe's authority granted by Congress).

380. *See* In re Armell, 550 N.E.2d 1060, 1067–68 (Ill. App. Ct. 1990) (recognizing "the special status of Indians as members of quasi-sovereign tribal entities" and how "the Commerce Clause . . . gives Congress plenary power to regulate [Native Americans] . . . .").

381. *See generally* ATWOOD, *supra* note 345, at 26–29 (detailing the complex relationship between the United States and tribal sovereigns).

382. *See Testimony of W. Ron Allen, President, National Congress of American Indians, Indian Child Welfare Joint Hearings of Senate Committee on Indian Affairs and House Resources Committee*, 105TH CONG. 115 (June 18, 1997) ("An Indian tribe's right to freely determine its membership criteria goes to the heart of self-governance and tribal sovereignty.").

383. 25 U.S.C. § 1903(4); *see also* Cross & Miller, *supra* note 298, at 14 (indicating that Congress allows tribes to determine the ICWA jurisdiction).

384. *See generally* In re Quinn, 881 P.2d 795 (Or. 1994) (reversing a lower court's decision to allow a Native American mother to withdraw her consent to adoption made the day of the child's birth on the grounds that the mother failed to show that the child involved was an "Indian child" because the affidavit from the tribe was inadmissible hearsay). *But see* In re Phillip A.C. II, No. 45119, 2006 Nev. LEXIS 150, ***28, ***29–30 (2006) (holding affidavit from enrollment officer of tribe sufficient to prove the child was an "Indian child" under the ICWA).

that native tribes have the inherent authority to determine their own membership[385] and that those determinations have a binding effect on the federal and state governments.[386] Additionally, the BIA guidelines for state courts also clearly designate respect for tribal sovereignty by affirming that a tribal determination of membership is conclusive.[387] Even if a state like Illinois disagrees, it may not look beyond the native tribe's determination that the child falls under the definition of "Indian child" in the ICWA.[388] Therefore, the ICWA itself is consistent with Illinois precedent and the historically recognized tribal sovereignty afforded by the federal government to native tribal entities.

Historically, the United States has caused lingering distrust among native families toward the federal government and state welfare systems through forced removal from or diminished used of tribal homelands,[389] broken agreements,[390] federal expansion and assimilation policies,[391] placement of native children in federal boarding schools,[392] and the

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385. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (holding that tribes have the power to create "their own substantive law in internal matters" including membership (citing Roff v. Burney, 168 U.S. 218 (1987))).

386. *See generally* In re Dependency of A.L.W., 32 P.3d 297 (Wash. Ct. App. 2001) (holding that tribal determination of membership of a child is conclusive).

387. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67586 (Nov. 26, 1979).

388. *See* In re Dependency & Neglect of A.L., 442 N.W.2d 233, 235 (S.D. 1989) (holding that a native tribe's enrollment of a white child required the lower court to apply the ICWA to the proceedings).

389. The Indian Removal Act of 1830 afforded President Jackson the authority to exchange lands in the west to Native American tribes for leaving land in the east currently existing in a U.S. state or territory. This policy ignored the native tribal groups already occupying the land. *See generally* DOCUMENTS OF UNITED STATES INDIAN POLICY, n. 42, 52–53 (Francis Paul Prucha, ed., University of Nebraska Press 1975). Additionally, while 156 million acres of land was guaranteed by treaties to native tribes in 1881, there is currently only about 56 million acres within the United States. *See Land Issues*, INDIAN LAND TENURE FOUND., https://iltf.org/land-issues/issues/ [https://perma.cc/YA8P-BZJY] (last visited Jan. 29, 2023) (noting that about 90 million acres of land were taken away from Indian ownership).

390. *See* PETER NABOKOV, NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT, 1492-2000 117 (rev ed., Penguin Books 1999) ("Native Americans lost far more land and independence by the bloodless process of signing treaties than they ever did on the battlefield. Indeed, most of the violence between Indians and whites flared up because Native Americans were being deprived of the very land promised them in earlier treaties.").

391. *See* Douglas H. Ubelaker, *North American Indian Population Size, A.D. 1500 to 1985*, 77 AM. J. OF PHYSICAL ANTHROPOLOGY 289, 291 (1988) (estimating the North American Indian population around 1,894,350 around A.D. 1500 and 530,000 in 1900 due to federal policy changes).

392. *See supra* notes 21–29 and accompanying text; *see, e.g.*, THE OFFICE OF THE ASSISTANT SECRETARY – INDIAN AFFAIRS, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 53 (May 2022) (discovering how the federal institutions employed "[s]ystematic identity-alteration methodologies.").

termination of federally recognized tribes.[393] As described above, Illinois played an active role in breaking this trust with the Native American tribes in the past.[394] If the Supreme Court were to overturn the ICWA's placement preferences, it would consequently add "continuous erosion of tribal sovereignty" to the list of historical events occurring in Illinois that have contributed to the pervasive distrust by native people and tribes toward federal and state agencies.[395] Conversely, the Illinois courts have recognized the importance of tribal sovereignty and upheld the ICWA accordingly.[396] Therefore, the Supreme Court must find the ICWA's placement preferences to be constitutional in order to honor native tribes' inherent sovereign authority recognized by Illinois.[397]

2. Dismantling Tribes by Depleting Membership

If the Supreme Court rules that the ICWA's placement preferences are unconstitutional in the future, it will dismantle tribes one child at a time. Tribal courts have often noted that its children are essential to continued tribal existence, and Congress acknowledged this idea in its findings preceding the statute.[398] In drafting legislation to implement the ICWA, Illinois similarly recognized that native children "are central in the maintenance of [Native American] tribal culture, traditions and values."[399] Consequently, one of Congress's purposes in enacting the

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393. During the 1950s, Congress terminated the federal relationship with more than one hundred tribes. *See generally* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 11 (5th ed. 2005).

394. *See supra* notes 111–116 and accompanying text (explicating the ways Illinois has historically harmed native tribes).

395. *See* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 279–86 (2001) (discussing the impact of Supreme Court decision on tribal sovereignty during the Rehnquist court).

396. *See, e.g.*, In re Armell, 550 N.E.2d 1060, 1067 (Ill. App. Ct. 1990) (recognizing that tribes are "quasi-sovereign" entities causing any federal legislation regarding Native Americans and their tribes to be constitutional under the Commerce Clause).

397. *See* Carol L. Tebben, *In Defense of ICWA: The Constitution, Public Policy, and Pragmatism*, *in* FACING THE FUTURE 270, 279 (Matthew L.M. Fletcher, Wenona T. Singel, & Kathryn E. Fort eds., 2009) ("[I]t is also compelling that inherent tribal sovereign authority be honored.").

398. *See* In re Matter of A.O., No. A-CV-20-86 (Navajo Feb. 10, 1987), *available at* http://www.tribal-institute.org/opinions/1987.NANN.0000014.htm [https://perma.cc/NQ98-MYW7] ("the most precious resource of the Navajo Nation is indeed its children"); *see also* Burbank v. Clarke, 2 AM. TRIBAL L. 424, 428 (Navajo 1999) ("Children are viewed as the future, ensuring the existence and survival of the Navajo people in perpetuity."); *see also* 124 CONG. REC. 38102 (1978) (statement of Rep. Udall) ("Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy"); *accord* 25 U.S.C. § 1901(3) (2006) ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.").

399. Ill. Admin. Code. tit. 89, § 307.10(a) (2009).

ICWA was "for the protection and preservation of Indian tribes."[400] Native tribes are unique because their culture centers on the passing down of traditional values, culture, and ways of living through oral testimony in order to "ensure cultural continuity."[401] John Dall, a native child from Illinois taken from his native mother at three years old, noted that a tribal member is "supposed to come in and be a part of the community" to advance the community as a whole over many generations.[402] Accordingly, removing native children from tribes effectively prevents meaningful tribal acculturation from occurring.[403] Tribal languages become extinct;[404] traditional native healing techniques are forgotten;[405] customary songs vanish;[406] celebratory rituals cease.[407] Recognizing these unique qualities endangered by native child removal, it follows that the ICWA is essential for the future existence of tribes not only in regard to the sustainability of membership numbers but also cultural continuation.[408]

Despite the ICWA's efforts to protect the survival of native tribal communities, over forty years later, the statistics still show

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400. 25 U.S.C. §1901(2); *see also supra* notes 257–262 and accompanying text (detailing Congress's legitimate purpose for enacting the ICWA).

401. Puneet Chawla Sahota, *Kinship Care for Children who are American Indian/Alaska Native: State of the Evidence*, 97 CHILD WELFARE 63, 74 (2019); *see also* CHARLOTTE GOODLUCK & ANGELA A.A. WILLETO, NATIVE AMERICAN KIDS 2000: INDIAN CHILD WELL-BEING INDICATORS 17–20 (2000) (describing the rich oral histories and indigenous knowledge passed down through tribes reflecting centuries of existence on tribal homelands).

402. *See* Moore, *supra* note 2 ("Indian people have never done anything for the sprint. They do it for the long haul–generation after generation. It's about sustainability.").

403. *See* Maylinn Smith, *Where Have All the Children Gone? When Will They Ever Learn?*, *in* FACING THE FUTURE 245, 245 (Matthew L.M. Fletcher, Wenona T. Singel, & Kathryn E. Fort eds., 2009) (noting the harms of native child removal on tribal communities' ability to pass down its culture).

404. In many tribes, only the middle-aged and elders remain fluent speakers. In the United States, there are only thirty-six tribes with more than 1,000 fluent speakers. *See* CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 358–67 (2005) (discussing the effects of losing tribal languages). Language preservation is essential for the tribal tradition of orating history. *See id.* at 363 ("[For the s]ame reason you don't burn down your libraries . . . we keep our language. Our language is our library . . . For example, in Blackfeet, there is no gender, so the world can be suddenly seen in a different fashion.").

405. *See* DAVID HURST THOMAS ET AL., THE NATIVE AMERICANS: AN ILLUSTRATED HISTORY 39–40 (Betty Ballantine & Ian Ballantine, eds., 1993) (exemplifying knowledge regarding the protection and use of medicinal native plants); *see generally* Tarrell A.A. Portman & Michael T. Garrett, *Native American Healing Traditions*, 53 INT'L J. DISABILITY, DEV. & EDUC. 435–69 (2006).

406. *See* JOSEPHA SHERMAN, INDIAN TRIBES OF NORTH AMERICA 11 (1990) (indicating the songs used by native tribes to praise the spirits for food provisions).

407. *See id.* at 11, 74, 86, 92, 124, 128 (describing the ceremonies connected to welcoming a child into the world, puberty, and rites of passage).

408. *See* Smith, *supra* note 403, at 245 ("Every tribe is one generation away from cultural and political extinction.").

disproportionate representation of Native American children in the foster care system.[409] Today, it is up to four times more likely for native children to be taken from their families and placed into foster care than their non-native peers.[410] Currently, there are 574 tribal entities in the United States.[411] Although none of these native tribes are recognized as Illinois tribal entities, the state's strong Native American community is still in danger of depletion if the Supreme Court removes the protections afforded by the ICWA's placement preferences. Chicago alone has more than 65,000 Native Americans representing over 175 different native tribes.[412] These are the individuals and communities tasked with maintaining tribal culture and preventing the assimilation of Illinois native children into white society.[413]

Many experts have suggested that the overrepresentation of native children in the child-welfare system is the result of variances among states in their compliance with the statute's protections against native family separation.[414] Specifically in Illinois, Native American child welfare experts and ICWA supporters say that the statute's placement preferences were once "being ignored" because DCFS social workers

409. *See Setting the Record Straight: The Indian Child Welfare Act Fact Sheet*, NAT'L INDIAN CHILD WELFARE ASS'N (2018), https://www.nicwa.org/wp-content/uploads/2018/10/Setting-the-Record-Straight-2018.pdf [https://perma.cc/6LMJ-4GKW] ("13 states have significant overrepresentation of AI/AN children in their foster care systems . . . .").

410. *Disproportionate Representation of Native Americans in Foster Care Across United States*, POTAWATOMI NATION (Apr. 6, 2021), https://www.potawatomi.org/blog/2021/04/06/disproportionate-representation-of-native-americans-in-foster-care-across-united-states/ [https://perma.cc/E92N-H8CX].

411. For a listing of the 574 tribal entities recognized as of January 2021, *see* Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554–58 (January 29, 2021).

412. *See* Daniel Hautzinger, *"We're Still Here": Chicago's Native American Community*, WTTW (Nov. 8, 2018), https://interactive.wttw.com/playlist/2018/11/08/native-americans-chicago [https://perma.cc/5W8H-JFZ9] (identifying Chicago as the third-largest urban Native American population in the United States).

413. *See* Dahleen Glanton & Chicago Tribune Reporter, *American Indians in Chicago Struggle to Preserve Identity, Culture, and History*, CHI. TRIB. (Aug. 13, 2012, 12:00 AM), https://www.chicagotribune.com/news/ct-xpm-2012-08-13-ct-met-american-indians-20120813-story.html [https://perma.cc/6JYU-DLCL]; *see generally* AMERICANIZING THE AMERICAN INDIAN: WRITINGS BY "FRIENDS OF THE INDIAN" 1880-1990 (Francis Paul Prucha ed., 1973) (describing the historical effort of the United States federal government to distance native children from their tribes and encourage their assimilation into white society).

414. *See* Victoria White, *Disproportionately of American Indian Children in Foster Care*, ST. CATHERINE UNIV. at 5 (2017) ("[The] ICWA compliance has varied across the United States and has not met its full promise as a way to preserve Native American families."); *see also* Thomas L. Crofoot & Marian S. Harris, *An Indian Child Welfare Perspective on Disproportionality in Child Welfare*, 34 CHILD. & YOUTH SERV. R. 1667, 1670 (noting how "over the years . . . compliance with the ICWA [has] decreased.").

were unaware of the statute and its implications.[415] In recognition of the statute's invisibility in Illinois and the beneficial impact its placement preferences can have on native children in the state, Loyola University's School of Social Work collaborated with DCFS and Native American service groups to develop a curriculum to teach the principles of the ICWA to those who work in the state's child-welfare field.[416] If the Supreme Court decides to overturn the ICWA's placement preferences, it will negate the decades of work put forth by Illinois to protect native tribes by halting the removal of future tribal members.[417] Therefore, in the future, the Supreme Court should not overrule the protections afforded to native families by the ICWA when statistics suggest that they are just as vital in Illinois today as they were in 1978 when the statute was enacted.

C. Constitutionality as Consistent with International Law

If the Supreme Court upholds the ICWA's placement preferences as constitutional through the merits of an equal protection analysis, it would finally be consistent with every other country in the world that recognizes that native children have individual rights. The United Nations Convention on the Rights of the Child ("the Convention") protects native children by detailing specific rights to which they are entitled.[418] One significant right extended by the Convention to native children is that of cultural identity:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.[419]

Despite its major influence in the Convention's creation, the United States is not yet bound by this beneficial work because it is the only nation

415. *See* Moore, *supra* note 2 (quoting Dale Francisco of the Chicago-based Native American Foster Parents Association and Robert Mindell, a DCFS staff member of twenty years).

416. *See id.* (referring to Maria Vidal de Haymes, *The Indian Child Welfare Act of 1978: An Act of Conscience*, LOYOLA UNIV. CTR. FOR INSTRUCTIONAL DESIGN (2003)).

417. *See* Ill. Admin. Code. tit. 89, § 307.10(a) (2009) (indicating that Illinois has drafted policies to "provide servives that assure all the additional protections afforded by the [ICWA].").

418. CONVENTION ON THE RIGHTS OF THE CHILD, G.A. Res. 44/25, U.N. GAOR, 44th Sess., at art. 1, U.N. doc. A/Res/44/25 (1989), *available at* 28 I.L.M. 1448 (1989) [hereinafter CRC]; *see* Cynthia Price Cohen, *Development of the Rights of the Indigenous Child Under International Law*, 9 ST. THOMAS L. REV. 231, 236 (1996).

419. CRC, *supra* note 418, at art. 30.

in the world yet to ratify the Convention.[420] However, a few American courts have recognized that the norms encompassed by the Convention have become so widely accepted that its content should be deemed core principles of customary international law.[421] Accordingly, in Illinois, legislation has been passed urging the adoption of the Convention in the state.[422] This has been based on the work of children's legal rights advocates from Illinois that have called for recognition of the benefits that could be derived by following the principles outlined in the Convention.[423] Currently, there is a bill pending that pledges that all government agencies in the state of Illinois shall review their policies and practices in comparison to the "recommendations of the Convention on the Rights of the Child."[424]

Glaring similarities arise when comparing this international stance mirrored in Illinois with the ICWA's placement preferences. In an effort to ensure that the decision regarding where to place a native child was not based on a white, middle-class standard, Congress included placement preferences in the ICWA to establish "a Federal policy that, where possible, an Indian child should remain in the Indian community."[425] Thus, if the Supreme Court upholds the ICWA's placement preferences that encourage placing native children into families that share tribal culture and further recognize a native child's right to their tribal identity as stated in the Convention, it will be supporting states like Illinois that

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420. Although the United States is the only nation in the world that has not yet ratified the Convention due to strong conservative opposition, it was a major force in its drafting. *Compare* ATWOOD, *supra* note 345, at 32 n.73 (discussing the United States' effort in drafting the Convention (citing Cynthia Price Cohen, *Role of United States in Drafting the Convention on the Rights of the Child: Creating a New World for Children*, 4 LOY. POV. L. J. 9 (1998))), *with* Sen. James M. Inhofe and Sen. Jim DeMint, *U.N. Treaties Mean LOST U.S. Sovereignty*, WASH. TIMES (July 25, 2012), https://www.washingtontimes.com/news/2012/jul/25/un-treaties-would-separate-americans-from-the-cons/ [https://perma.cc/M496-YUUC] (indicating the opposition's argument that "[t]he American people's God-given and constitutionally protected right to self-government must be protected.").

421. *See* Beharry v. Reno, 183 F. Supp. 2d 584, 596 (E.D.N.Y. 2002), *rev'd on other grounds*, Beharry v. Ashcroft, 329 F.3d 51 (2nd Cir. 2003) (recognizing the impact of CRC on American law despite its nonbinding nature in the United States); *see also* Roper v. Simmons, 543 U.S. 551, 576 (2005) (citing the CRC to show the strength of world opinion against the juvenile death penalty).

422. H.R. 1143, 99th Cong. (Ill. 2010).

423. *See* Kendall Marlowe, *The U.N. Convention on the Rights of the Child: after 25 Years, Should Americans Still Care?*, BOS. UNIV. SCH. OF L. INT'L L.J., https://www.bu.edu/ilj/2015/10/29/the-u-n-convention-on-the-rights-of-the-child-after-25-years-should-americans-still-care/ [https://perma.cc/6NH5-QQ9R] (last visited Jan. 29, 2023) (discussing that the Convention is more of an aspirational document than international law).

424. H.R. 0544, 101st Cong. § 3 (Ill. 2021) ("[W]e call upon all government agencies in the State of Illinois... to review their policies and practices in comparison to the recommendations of the Convention on the Rights of the Child and the Global Study on Children Deprived of Liberty.").

425. *See* House Report, *supra* note 8, at 23.

have been leaders in protecting children and promoting their rights—states whose efforts are consistent with every other nation in the world.[426]

Although some may argue that a native child can still maintain their right to tribal identity, oftentimes placement in non-native homes requires a child to reject any tribal culture and fully assimilate into the lives of those in the home.[427] The repressed children in these homes often do not ever get the chance to engage with their Native American culture or struggle through a gradual exposure process due to the lack of encouragement from adoptive parents.[428] One Sioux woman who was adopted into a non-native family as an infant without any connection to her tribal culture believes that struggling with identity formation produced her strong opposition to placing native children in white homes.[429] Similarly, one Ojibwa woman who was adopted into a non-native family expressed opposition to placing native children in non-native homes because of the "horrible life" she had to live as a teenager while deprived of enculturation into her Native American culture.[430] These are just two examples of the many native children who have been unjustifiably deprived of their right to tribal community and culture due to placement in non-native homes.

However, even for non-native homes in which tribal culture is celebrated, native children are often still deprived of their right to enjoy this culture due to the residual missing connection with the tribe.[431] In an interview, a Navajo child adopted into a non-native family explained, "[N]o matter how much [my non-native adoptive parents] tried to help me and support me, and did help me and support me, I needed a Native reflection. At some points in my life I needed affirmation from other

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426. *Compare* H.R. 0544, 101st Cong. § 1 (Ill. 2021) (explaining how Illinois developed the first juvenile court in 1899 and has a history of demonstrating "its dedication to providing all children with a better today and a better tomorrow."), *and* Marlowe, *supra* note 423 (recognizing the efforts of children's legal rights advocates in Illinois to have the state recognize a native child's right to their tribal culture and identity), *with* CRC, *supra* note 418, at art. 30 (indicating international support for the recognition of a native child's legal right to their tribal culture and identity), *and* Marlowe, *supra* note 423, at 1 (indicating that the United States is the only country that has not ratified the Convention).

427. *See generally* SIMON & HERNANDEZ, *supra* note 364 (detailing interviews conducted with 20 native children adopted into non-native homes and currently between the ages of eighteen and forty).

428. *Id.* at 41.

429. *Id.* at 43 ("[W]hen I was adopted . . . nobody could teach me about my heritage, nobody could say this and that. . . . I don't think Indian babies should go out to white people. I don't think so, because it just causes too much confusion for them.).

430. *Id.* at 228.

431. *See* ATWOOD, *supra* note 345, at 51 (indicating a missing link in identity formation for native children in all non-native homes regardless of respect toward tribal culture).

Natives to make me feel like I belonged."[432] Similarly, in an unpublished essay, Christine Porter, a member of the Salt River Pima-Maricopa Indian Community openly described her adoption into a non-native family she deeply loved.[433] While her adoptive family permitted Christine to meet her Pima Indian family, the immediate connection with her native relatives revealed the cultural disconnect apparent with her non-native adoptive family. Christine's connection with her native family was not just based on their welcoming nature, but the fact that they "looked more like" her and shared stories that made her feel like family from the start.[434] She is just one example of the many native children planted in a non-native world in which they are deprived of the tribal culture that a non-native family is unable to provide.[435] Therefore, although a non-native family may attempt to maintain tribal culture in a native child's life, there are some vital cultural aspects that the child will be unable to "enjoy" despite a recognized right to do so.[436] Consequently, if the Supreme Court were to uphold the ICWA's placement preferences as constitutional through the merits of an equal protection analysis, it would maintain protections that were created to encourage a native child's connection to their tribal culture; a connection to which it can be argued they are entitled.[437]

In sum, if the Supreme Court properly upholds the ICWA's placement preferences as constitutional, it will support Native American children's mental and physical health.[438] This could save the lives of native children living in Illinois by protecting their enculturation process during a young age.[439] Additionally, as Illinois has recognized, to uphold the statute's placement preferences would be consistent with the United States' history of recognizing the sovereignty held by Native American tribes.[440]

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432. SIMON & HERNANDEZ, *supra* note 364, at 225.

433. ATWOOD, *supra* note 377, at 50–51 (citing Christine Porter, *Essay on Thanksgiving* (Dec. 31, 2008)).

434. *Id.* at 51.

435. *See* SIMON & HERNANDEZ, *supra* note 364, at 152 (Chickasaw/Cree child stating that "I don't think that a non-Native person or a person who hasn't been raised around Native culture is capable of really teaching their children about that stuff.").

436. CRC, *supra* note 418, at art. 30.

437. *See supra* notes 418–424 and accompanying text (recognizing the UN's foundation behind such an argument).

438. *See supra* notes 334–374 and accompanying text (detailing the health consequences to a native child when they are ripped from their native family and placed in a non-native home).

439. *See supra* notes 357–364 and accompanying text (detailing the already devastating levels of native child suicide and the ways in which removing the protections afforded by the ICWA could worsen this sad situation).

440. *See* In re Armell, 550 N.E.2d 1060, 1067 (Ill. App. Ct. 1990) (recognizing that tribes are "quasi-sovereign" entities causing any federal legislation regarding Native Americans and their

It would also protect tribal existence by terminating the dismantling of tribes one native child removal at a time.[441] Lastly, if the Supreme Court properly finds the ICWA's placement preferences to be constitutional under the Fourteenth Amendment in the future, the United States will finally be among nearly every other nation in the world that recognizes a native child's right to cultural identity.[442] Therefore, to minimize the foreseeable consequences of overturning the statute and maintain the protections already afforded to native children, families, and tribes by states like Illinois, the Supreme Court should uphold the ICWA's placement preferences as constitutional under the Fourteenth Amendment against future equal protection claims.

CONCLUSION

At forty-three years old, John Dall recognizes the detrimental consequences resulting from removal from his Ho-Chunk tribal community.[443] With disappointment in his voice, he has said, "I got started late . . . I lost a lot of years."[444] Not wanting his children to feel the same loss, John has actively worked to immerse his children into the Native American culture starting with the tribal communities in Illinois.[445] While he is now fully immersed in his Ho-Chunk culture and volunteering in a Chicago neighborhood to serve the 230 Ho-Chunk people living in Illinois, John's struggles could have been mitigated by applying the ICWA's placement preferences.[446] Through the statute's minimum federal standards, an "Indian child" who has been removed

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tribes to be constitutional under the Commerce Clause (citing U.S. CONST. art. I, § 8)); *see also supra* notes 375–397 and accompanying text (detailing the historical significance indicating that the Court should honor native tribes' inherent sovereign authority).

441. *See supra* notes 398–413 and accompanying text (detailing the importance of native children to Native American tribes and tribal culture).

442. *See supra* notes 418–424 (detailing the nearly unanimous view of the world that native children are entitled to a connection to their tribal culture).

443. *See* Moore, *supra* note 2 (exemplifying how powwows are customary in Native American culture but that he is disappointed in his inability to learn the tradition so late in his life).

444. *Id.*

445. *See id.* ("It's neat to see my kids go into the Indian community, go up to the elders, and be totally accepted–and be totally accepting of the things they are being told. . . . They know that's who they are. There is no odd learning curve. They dive right into it."). There are many Native American organizations in Illinois actively working to educate all people about various Native American cultural issues and support native people in the state by fostering tribal communities, promoting the economic advancement of native people, and perpetuating native cultural values. For more information, visit the website for the Native American Chamber of Commerce of Illinois. *Illinois American Indian Organizations*, NATIVE AM. CHAMBER OF COM. OF ILL., https://www.nacc-il.org/illinois-american-indian-organizations [https://perma.cc/9PRV-NQZ8] (last visited Jan. 29, 2023).

446. *See* Moore, *supra* note 2 (noting John's numerous attempts to reintegrate into his tribal culture as an adult).

from their home must be placed with (1) a member of the child's extended family, (2) other members of the child's native tribe; or (3) other native families.[447]

While this statute has been upheld for decades in Illinois as constitutional, the Supreme Court of the United States threatened to eliminate its protection against native family separation in its review of *Haaland v. Brackeen*. The case originated from a Texas district court finding of the ICWA's placement preferences as an unconstitutional racial classification unable to withstand strict scrutiny, a holding that was later reversed by the Fifth Circuit on the grounds that the statute created a political classification satisfying rational basis review.[448] Ultimately, the Supreme Court determined that the state of Texas and the individual petitioners did not have standing to bring an equal protection claim.[449] Therefore, it will review the merits of an equal protection claim against the ICWA in the future.

In such an instance, if the Supreme Court incorrectly agrees with the district court, it will have devastating consequences on both native children's mental and physical health and tribal communities as a whole in regard to a lack of recognition of tribal sovereignty and threating tribal existence by separating potential members. However, if the Supreme Court were to correctly agree with the Fifth Circuit and Illinois precedent to uphold the statute, it would be consistent with all other nations who agree that native children are entitled to a Native American cultural identity. Therefore, after reviewing future equal protection claims, the Supreme Court should find the ICWA's placement preferences to be constitutional to maintain the protections afforded to native families through Illinois's precedent.

447. 25 U.S.C. §§ 1903(4), 1915.

448. *Compare* Zinke, 338 F. Supp. 3d 514, 531 (N.D. Tex. 2018) *rev'd sub nom.* Bernhardt, 937 F.3d 406 (5th Cir. 2019); *with* Haaland, 994 F.3d 249, 334 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, (No. 21-376) (*Zinke* finding that the statute used ancestry as a proxy for race, whereas *Haaland* found the classification to be political and subject to rational basis review).

449. Brackeen v. Haaland, No. 21-376, slip op. at 34 (June 15, 2023).