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Tribes, Feds Urge Justices To Back Indian Child Welfare Act

By **Andrew Westney**

Law360 (August 12, 2022, 8:21 PM EDT) -- Five Native American tribes and the federal government urged the U.S. Supreme Court on Friday to uphold the Indian Child Welfare Act, with the tribes saying Congress constitutionally used its power in the law to keep Indian families together and shield tribes from "destruction."

Texas and others have urged the high court to rule that the 1978 ICWA, which imposes federal standards for state child custody cases involving Native American children, is unconstitutional, claiming the law is race-based and that Congress overstepped its powers to shape Native American affairs by enacting it.

The Cherokee Nation, Oneida Nation, Quinault Indian Nation, Morongo Band of Mission Indians and Navajo Nation said in **a brief filed Friday** that the ICWA "operates at the core of the trust obligation" the federal government owes tribes, and Congress' authority to fulfill that trust is much broader than Texas paints it.

"Accepting plaintiffs' invitation to narrowly limit Congress' authority would rewrite history, break the United States' promises and wreak havoc across the U.S. Code," the tribes said.

The Supreme Court has backed the principle that tribal affiliations are political classifications and not racial ones, and the ICWA "furthers Indian self-government in the most fundamental way — by preventing tribes' very destruction," according to the brief.

In their own brief Friday, the U.S. Department of the Interior and the U.S. Department of Health and Human Services said that ICWA is "a valid exercise of Congress's plenary power over Indian affairs" that is "a necessary consequence of the constitutional structure, in which Indian tribes occupy a unique status as domestic dependent sovereigns."

That understanding is backed by "centuries of constitutional history dating to the Founding, when early Congresses enacted Trade and Intercourse Acts to protect Indians from numerous threats, including the breakup of their lands," the government added.

"ICWA carries on that historical tradition by preventing the unwarranted breakup of Indian families — and in so doing, falls well within Congress's power over Indian affairs," according to the government's brief.

The high court is now weighing four petitions challenging aspects of a **highly complex en banc Fifth Circuit decision** on the ICWA. The ruling featured two principal opinions that provided wins and losses both for the tribes defending the law, and for Texas and other states attacking it.

The ICWA seeks to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" in adoption and foster care placement.

The circuit court overturned a Texas federal judge's ruling that the law was unconstitutionally race-based and that the federal government didn't have authority to enact the law, scoring important victories for the tribes as well as the U.S. Department of the Interior.

But Texas, Louisiana and Indiana, along with Chad and Jennifer Brackeen — a non-Native American

couple who fostered a Native American child — also made inroads against the ICWA in the decision, including the court's finding that the law's requirements ran afoul of the Constitution's prohibition against commandeering state officials.

Texas **said in a May brief** that the ICWA violates equal protection under the Constitution "by categorizing children based on genetics and ancestry and potential adoptive parents based on their race."

In the tribes' brief Friday, they said tribes "are separate sovereigns, and the Constitution expressly authorizes Congress to legislate specifically for Indians."

And the ICWA "poses no anti-commandeering problem," the tribes said.

"When Congress exercises its enumerated powers to create rights and duties in state court, that is not commandeering. It is preemption," the tribes said, adding that state judges are bound by federal law, and "if such rules of decision constituted impermissible commandeering, myriad statutes would fall."

"With all their broad arguments so unsustainable, plaintiffs retreat to cutting an ICWA-shaped hole in the Constitution" by arguing that Congress can't regulate state court child custody proceedings, the tribes said.

"But no text supports these narrower arguments either," the tribes said.

"In truth, plaintiffs blue-pencil the Constitution with their own policy views," the tribes said. "Plaintiffs do not represent Indian tribes, families or children but fill their briefs with claims about Indians' best interests. They trumpet that they know best; that Congress, Indian tribes and Indian families are all benighted; and that if only this court returns Indian children to states, all will be well.

"But even if this court sat to arbitrate policy disputes, a mountain of evidence — from 1978 to today — shows that ICWA provides an essential buffer against practices that continue to yield the unwarranted removal of Indian children," the tribes said.

The law also "does not unconstitutionally delegate Congress' legislative power," but instead "prospectively incorporates tribes' own preferences into federal law," according to the brief.

The federal agencies said in their brief Friday that state agencies "like any other party … must satisfy ICWA's standards if they seek to justify a child's removal or placement," but "such evenhanded conditions present no anticommandeering problem."

Texas and the adoptive parents lack standing to bring their equal protection claims, and those claims fail in any event, the government said.

The law's "challenged provisions draw classifications based on membership in or close connection to an Indian tribe," and "those classifications are not suspect," the agencies said.

"Indeed, the Constitution itself singles Indians out as a proper subject for separate legislation, and this Court has held in an unbroken line of precedents that such classifications are political rather than racial and thus subject to rational-basis review," they said.

And the provisions "readily satisfy that review" because they are rationally connected to the carrying out the federal government's duties to tribes, according to the brief.

In a statement Friday, Cherokee Nation Principal Chief Chuck Hoskin Jr., Morongo Band of Mission Indians Chairman Charles Martin, Navajo Nation President Jonathan Nez, Oneida Nation Chairman Tehassi Hill and Quinault Indian Nation President Guy Capoeman said the tribes brief shows "not only the tremendous benefits that ICWA has brought to the health and safety of children, but also demonstrates how the law adheres to the Constitution and the principles of tribal citizenship dating back to America's founding."

"If those attacking ICWA are successful, they would not only dismantle a law that is central to our

sovereign interests in protecting our children but also create chaos and instability throughout the country by overturning the basic framework of Indian law and the political nature of tribal citizenship," the tribal leaders said.

Oral arguments are scheduled in the case for Nov. 9.

"We are confident that the court will rule on the side of ICWA, of the Constitution, of history, of child welfare experts, of states and of children and families," the tribal leaders said. "To do otherwise, the court would be ignoring decades of precedent, overriding congressional authority and putting our tribal children's safety at risk."

Representatives for Texas and the individual plaintiffs did not immediately respond to request for comment Friday.

Texas is represented by Ken Paxton, Brent Webster, Judd E. Stone II, Lanora C. Pettit, Kathryn M. Cherry and Beth Klusmann of the Texas Office of the Attorney General.

The Brackeens and other individual plaintiffs are represented by Mark D. Fiddler of Fiddler Osband LLC and Matthew D. McGill, Lochlan F. Shelfer, David W. Casazza, Aaron Smith, Robert A. Batista, Todd W. Shaw and Ashley E. Johnson of Gibson Dunn & Crutcher LLP.

The Cherokee Nation, Oneida Nation and Morongo Band of Mission Indians are represented by Ian Heath Gershengorn, Keith M. Harper, Matthew S. Hellman, Zachary C. Schauf, Leonard R. Powell, Victoria Hall-Palerm and Kevin J. Kennedy of Jenner & Block LLP, Kathryn E. Fort of the Indian Law Clinic at Michigan State University College of Law and David A. Strauss and Sarah M. Konsky of the Jenner & Block Supreme Court and Appellate Clinic at the University of Chicago Law School. The Quinault Indian Nation is represented by Adam H. Charnes and Rob Roy Smith of Kilpatrick Townsend & Stockton LLP. The Navajo Nation is represented by Attorney General Doreen N. McPaul, Assistant Attorney General Paul Spruhan, and Louis Mallette, Colleen Silversmith, Sage Metoxen and Aidan Graybill of the Navajo Nation Department of Justice, Jeffrey L. Fisher of the Stanford Law School Supreme Court Litigation Clinic and Ephraim A. McDowell of O'Melveny & Myers LLP.

The federal government is represented by Elizabeth B. Prelogar, Todd Kim, Edwin S. Kneedler, Frederick Liu, Christopher G. Michel, Samuel E. Alexander, Amber Blaha and Rachel Heron of the U.S. Department of Justice, Robert T. Anderson of the U.S. Department of the Interior, and Samuel R. Bagenstos of the U.S. Department of Health and Human Services.

The cases are Deb Haaland, Secretary of the Interior et al. v. Chad Everet Brackeen et al., Cherokee Nation et al. v. Brackeen et al., Texas et al. v. Haaland et al., and Brackeen et al. v. Haaland et al., case numbers 21-376, 21-377, 21-378 and 21-380, all in the Supreme Court of the United States.

--Additional reporting by Joyce Hanson. Editing by Stephen Berg.

Update: This story has been updated with material on the federal government's brief.
