FAMILY LAW QUARTERLY

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Family Law Quarterly (ISSN 0014-729X; USPS: 185-280) welcomes submission of original articles, comments, notes, and book reviews. Articles should be of interest to family law attorneys, judges, and legislators.

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Associate Director, Programming	Danielle Pruger danielle.pruger@americanbar.org • 312-988-5149
Program Associate	Isabel Zavala isabel.zavala@americanbar.org • 312-988-5603

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Editor's Note: Family Law and the Supreme Court, 2022-2023

CAROLINE F. SHEA*

This issue of the *Family Law Quarterly* addresses recent and pending U.S. Supreme Court cases that are shaping family law for better or worse. The articles within this issue discuss what has been decided by the Supreme Court in *Dobbs v. Jackson Women's Health Organization* and *Golan v. Saada* and what the Supreme Court may decide regarding *Haaland v. Brackeen* and *303 Creative LLC v. Elenis*. I can speak on behalf of my peers when I say that as current law students, it has been fascinating to watch history unfold before our eyes.

The decided cases discussed in this issue cover the constitutionality of abortion restrictions (*Dobbs v. Jackson Women's Health Organization*), and the court's discretion under the Hague Convention to deny a child's return to another country if the return could pose a grave risk of harm to the child (*Golan v. Saada*). The pending cases deal with the constitutionality of the Indian Child Welfare Act (*Haaland v. Brackeen*) and if a website designer can refuse despite a state's anti-discrimination law to make a website for a same-sex wedding (*303 Creative LLC v. Elenis*).

While this issue of the *Family Law Quarterly* was being finalized, we received the dreadful news that Narkis Golan, of *Golan v. Saada*, died at thirty-two years old. She was a domestic violence survivor who stood up for herself and her young son, all the way to the Supreme Court. There are many unknowns about what will happen to her son and her case now that she has passed, but her legal team is working tirelessly to fight for her legacy.

We are living in a time where precedent is uncertain as the Supreme Court hears and decides cases revisiting legal principles that many Americans believed were long settled. The authors who are featured in this issue discuss the ever-changing state of family law in this country. They display a great passion for the issues before the Supreme Court, while some authors express unease about the impact of the Supreme Court ignoring stare decisis and

* Caroline F. Shea is the Student Editor in Chief of the *Family Law Quarterly*, 2022–2023, and a member of the New York Law School Class of 2023.

paving a new path. The decisions that the Justices of the Supreme Court made during the last term and are debating this term will have an immense impact on family law across the country and on countless individuals and families.

Several members of our Student Editorial Team had the opportunity of a lifetime of watching the *Haaland v. Brackeen* oral argument at the Supreme Court. Before watching the oral argument, Professor Kathryn Fort was gracious enough to speak to our team of Student Editors and discuss the history of *Haaland v. Brackeen*. I entered law school to make a difference and to represent clients who desperately want to be heard and given a fair chance. It was inspiring to watch the attorneys argue after reading this issue's articles concerning *Haaland v. Brackeen*. The articles helped me to understand the arguments and what is at stake for thousands of families.

I am honored to be following in the footsteps of the past two Student Editors in Chief who are a constant inspiration to me and the current Student Editors for the *Family Law Quarterly*. This issue would not have been possible without the hard work, long night editing sessions, and dedication of the New York Law School Student Editors, and for them, I am tremendously grateful. On behalf of the entire editorial team at New York Law School, I want to thank the American Bar Association's Family Law Section for their constant support.

Introduction: Family Law and the Supreme Court, 2022–23

SOLANGEL MALDONADO* & LISA F. GRUMET**

In these past two years, the Supreme Court has considered several significant cases impacting family law policy and practice in the United States. The authors in this issue discuss 2022 cases concerning abortion (*Dobbs v. Jackson Women's Health Organization*[1]) and international child custody disputes involving domestic violence (*Golan v. Saada*[2]), and pending cases concerning LGBT rights (*303 Creative LLC v. Elenis*[3]) and the Indian Child Welfare Act (*Haaland v. Brackeen*[4]). Their articles meaningfully explore the legal and policy issues before the Court as well as the impact of the cases on the lives of individuals and families. The issue concludes with a powerful tribute to Narkis Golan, the appellant in *Golan v. Saada*, who tragically passed away in October 2022.

This volume opens with what some believe to be the most consequential ruling for gender equality since the Court recognized a constitutional right to abortion in *Roe v. Wade*.[5] In "The Rise and Fall of a Reproductive Right: *Dobbs v. Jackson Women's Health Organization,"* Professor Carol Sanger discusses reproductive rights cases over the last century from *Buck*

* Solangel Maldonado is the Associate Dean for Faculty Research & Development & Eleanor Bontecou Professor of Law at Seton Hall University School of Law where she teaches in the areas of family law, gender and the law, and race and the law. She is an Associate Reporter of the American Law Institute's *Restatement of the Law*, *Children and the Law* and co-editor of two casebooks—Family Law: Cases and Materials (Foundation Press, 7th ed. 2019), with Judith Areen, Marc Spindelman, and Philomila Tsoukala; and Family Law in the World Community (Carolina Academic Press, 3rd ed. 2015), with D. Marianne Blair, Merle H. Weiner, and Barbara Stark.

** Lisa F. Grumet is the Editor in Chief of the *Family Law Quarterly*. She is also an Associate Professor of Law and Director of the Diane Abbey Law Institute for Children and Families at New York Law School.

1. 142 S. Ct. 2228 (2022).

2. 142 S. Ct. 1880 (2022).

3. 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2022), *cert. granted in part*, 142 S. Ct. 1106 (2022) (No. 21-476).

4. Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc), *cert. granted sub nom*. Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022), and *cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022).

5. 410 U.S. 113 (1973).

v. Bell[6] and *Skinner v. Oklahoma*[7] to *Roe*, and from *Planned Parenthood of Southeastern Pennsylvania v. Casey*[8] to *Whole Woman's Health v Hellerstedt*,[9] to examine the legal and social contexts of the development of constitutionally protected reproductive freedom. While acknowledging that there are many critiques that could be leveled against the *Dobbs* majority decision overruling *Roe*, she focuses on its omission of women and the reality of women's lives and its disregard of the liberty and privacy doctrines in the reproductive context.

While the *Dobbs* majority stated that its ruling was limited to abortion, the dissent expressed concern about the decision's implications for other cases, including the Court's marriage equality ruling in *Obergefell v. Hodges*.[10] As Professor Arthur Leonard observes in his article, "Same Sex Family Recognition and Anti-Discrimination Law: A Free Speech Battleground," the Court is currently considering for the third time since *Obergefell* "whether state or local jurisdictions can prohibit private agencies or businesses from refusing to provide services to same-sex couples who are married or intend to marry." *303 Creative LLC v. Elenis* was brought by a website designer who seeks to create wedding websites for heterosexual couples only, in violation of Colorado's anti-discrimination law. She argues that requiring her business to create websites for same-sex couples would infringe upon her First Amendment free speech rights by compelling her to speak contrary to her religious objections to same-sex marriage. Professor Leonard discusses the legal context for the dispute and the arguments of the parties before the Court, including the website designer's position that she is an artist engaged in expressive activity. He concludes that the Court should rule in favor of Colorado, given the state's interest in prohibiting discrimination in public accommodations and the implications of the designer's arguments for enforcement of nondiscrimination laws.

Three of the articles in this issue discuss *Haaland v. Brackeen*, in which non-Native American adoptive parents and several states challenge the constitutionality of the Indian Child Welfare Act (ICWA).[11] ICWA was enacted in 1978 to curb the unwarranted removal of Indian children, as defined by the statute, from their families and keep them connected to

6. Buck v. Bell, 274 U.S. 200 (1927).

7. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

8. 505 U.S. 833 (1992).

9. 579 U.S. 582 (2016).

10. 576 U.S. 644 (2015); *see Dobbs*, 142 S. Ct. at 2319, 2331–32 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

11. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified as 25 U.S.C. §§ 1901–63).

their families, tribal communities, and culture. ICWA provides that when a Native American child is removed from their home, the state ordinarily must attempt to place the child with relatives, members of the child's tribe, or members of other tribes before considering placement with non-Native families.[12] The plaintiffs allege that these preferences discriminate on the basis of race in violation of the Equal Protection Clause. They also allege that ICWA exceeds Congress's power over Indian affairs and impermissibly commandeers state governments and courts. The Supreme Court heard oral argument in *Brackeen* in November 2022 and a decision is expected this spring.[13]

The articles addressing *Brackeen* tackle a number of issues. First, in "*Brackeen* and the Domestic Supply of Infants," Professor Marcia Zug discusses the Supreme Court's decisions in *Dobbs* and *Fulton v. City of Philadelphia*[14] to demonstrate that the majority of the Justices on the current Supreme Court have supported policies that have the effect of increasing the number of infants available for adoption and helping prospective adoptive families that are deemed to be "deserving and desirable." She argues that the *Dobbs* majority saw adoption by "suitable home[s]"[15] as the solution to both unwanted pregnancies and the shortage of infants available for adoption. She further demonstrates how the Court's decision in *Fulton* allows faith-based agencies with government contracts to privilege certain types of prospective adoptive parents and effectively bar families that do not meet their religious criteria from adopting or fostering children at all. She then predicts that the Court in *Brackeen* is likely to hold that "some, if not all" of ICWA's placement preferences are unconstitutional because they would increase the supply of children available for adoption by parents who have been advantaged by the Court's decisions.

Second, in "After *Brackeen*: Funding Tribal Systems," Professor Kathryn Fort shows that the *Brackeen* case is the direct result of a state child protection system that incentivizes removal of children from their homes and placement in non-kinship foster homes. She demonstrates that tribal child protection systems that use non-adversarial healing and wellness models better address Native American families' needs but explains that most tribal governments face significant obstacles when trying to fund their own systems as access to federal funding is unnecessarily difficult. She argues

12. 25 U.S.C. § 1915.

13. *See* Transcript of Oral Argument, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Nov. 9, 2022).

14. 141 S. Ct. 1868 (2021).

15. *Dobbs*, 142 S. Ct. at 2259.

that regardless of the Court's decision in *Brackeen*, the federal government should fund tribal child protection systems because they are crucial to ensure that Native American families receive culturally appropriate services and are integral to ICWA's purpose to promote tribal sovereignty. She discusses potential solutions for funding that utilize a tribal self-governance model.

The final article about *Brackeen* features a winner of the Family Law Section Howard C. Schwab Memorial Essay competition. In "The Gold Standard of Child Welfare" Under Attack: The Indian Child Welfare Law and *Haaland v. Brackeen*," Julia Gaffney provides a brief history of federal and state actions separating Native American children from their families, tribes, and culture and argues that ICWA is crucial to protect the interests of Native American children and their communities. She describes ICWA's key provisions and explains how it has furthered the best interests of Native American children in the child welfare system by keeping them connected to their families and tribes. She shows, however, that despite ICWA's success, Native American children are still overrepresented in the child welfare system and experience disparate treatment while in foster care. Thus, she concludes, a decision in *Brackeen* invalidating ICWA or parts thereof would be detrimental to Native American children and communities.

While *Dobbs*, *303 Creative LLC*, and *Brackeen* involve Constitutional law, in 2022 the Supreme Court also issued an important ruling interpreting the Hague Convention on the Civil Aspects of International Child Abduction. Narkis Golan, a survivor of domestic violence who brought her child from Italy to the United States, had been ordered to return to Italy with the child subject to "ameliorative measures" intended to address the grave risk of harm to the child on return. The Supreme Court held the district court had discretion to decline to consider ameliorative measures, ruling in Ms. Golan's favor on the legal issue but remanding her case for further proceedings. In "*Golan v. Saada:* Protecting Domestic Abuse Survivors in International Child Custody Disputes," Molshree "Molly" A. Sharma reviews the legal issues before the Court in the case and discusses the Court's ruling and its significance.

This issue closes with "In Memory of Narkis Golan," a tribute to Ms. Golan's life and legacy by Nicole Fidler, one of Ms. Golan's attorneys. Ms. Fidler recounts the abuse and the legal challenges Ms. Golan faced, while honoring her dedication to her son, her support for other "Hague Moms," and the positive impact her Supreme Court victory has already begun to have for other domestic violence survivors and their children. As Ms. Fidler writes: "Through her passion, courage, and resilience, she created real and lasting change that will help survivors who follow in her footsteps."

The articles in this issue highlight the real-life impacts of the Court's decisions in the family law context, historically and in the years to come.

Acknowledgments

LISA F. GRUMET*

For the Editor's Note for this issue, I am pleased to introduce Caroline Shea, the *Family Law Quarterly* Student Editor in Chief for the 2022–23 academic year. Congratulations to Caroline and to all 2022–23 New York Law School Editorial Board members, Senior Editors, and Junior Editors for their work in reviewing and editing the articles for this issue.

Thank you and congratulations to our authors and to Professor Solangel Maldonado of the *FLQ* Board of Editors for all of their work in writing for and planning this issue; to ABA Managing Editor Susan Lorimor, ABA Copy Editor Betsy Blumenthal, and ABA Director of Digital Publishing Kyle Kolbe for their work in editing and producing the publication; and to ABA Family Law Section Chair Thad Woody, Family Law Section Director Cindy Swan, the Family Law Section Council, and all members of the *FLQ* Board of Editors for their leadership and support. Finally, thank you to NYLS Dean Anthony W. Crowell and Associate Dean William P. LaPiana; the NYLS faculty, administration, and staff; and Diane and Arthur Abbey.

* Lisa F. Grumet is the Editor in Chief of the *Family Law Quarterly*. She is also an Associate Professor of Law and Director of the Diane Abbey Law Institute for Children and Families at New York Law School.

The Rise and Fall of a Reproductive Right: *Dobbs v. Jackson Women's Health Organization*

CAROL SANGER*

Introduction

Although the phrase "Post-*Roe* Era" is still used by those who want to underscore the loss wrought last June by *Dobbs v. Jackson Women's Health Organization*, it is only a matter of time before the present state of reproductive constitutionalism solidifies into the more authoritarian "*Dobbs* Era."[1] In these early days of transition, states are still figuring out what they want the legal status of abortion to be, ever since *Dobbs* overruled both *Roe v. Wade*[2] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[3] thus tossing the issue of abortion's legality back to the states for resolution.[4] In Justice Alito's words, "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."[5]

* Barbara Aronstein Black Professor of Law, Columbia Law School. I am deeply grateful for discussions with Solangel Maldonado, Jeremy Waldron, Alice Kessler-Harris, and Lisa Grumet. Thanks also to Student Editor in Chief Caroline Shea, Executive Articles Editor Claudia Toth, Research and Reference Editor Rian Sirkus, and other student editors from the New York Law School *Family Law Quarterly* staff, whose insightful work improved this article greatly.

1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
2. 410 U.S. 113 (1973).
3. 505 U.S. 833 (1992).
4. *Dobbs*, 142 S. Ct. at 2243.
5. *Id.* Note that within three months of the *Dobbs* decision, Republican Senator Lindsay Graham of South Carolina introduced a bill to make abortion a federal crime across the entire country, boldly contradicting Justice Alito's commitment toward states' rights. *See* David Morgan, *Republican Graham Proposes National Ban on Abortion After 15 Weeks of Pregnancy*, REUTERS (Sept. 13, 2022), https://www.reuters.com/legal/us-senate-republican-lindsey-graham-unveils-abortion-bill-ahead-midterms-2022-09-13/.

So, should what was formerly regarded as a legal medical procedure remain so? Should it be legal and funded? Or should legal abortion migrate from a state's health regulations to the criminal code and be illegal? Or illegal with exceptions? Or illegal with extraterritorial reach? And who should bear the burden of the illegality? Pregnant women, their physicians, and anyone who aids or assists them?

There are also questions about the mechanism by which abortion's status is to be determined in each state—by extant trigger laws,[6] new legislative enactments[7] or referenda,[8] constitutional amendments, or judicial determinations when a state (Florida, for example) has conflicting provisions?[9] Still other decisions arise at the local level: For example, what priority should abortion investigations and prosecutions be assigned and by whose authority?[10] Whose discretion should prevail, if discretion is called for? Resolving these questions is the pressing task of citizens and lawmakers, and answers are now owed to women of child-bearing age—typically 15 to 44 years old—so that all 64.5 million[11] of them can know just where

6. Jesus Jimenez & Nicholas Bogel-Burroughs, *What Are Abortion Trigger Laws and Which States Have Them?*, N.Y. Times (June 24, 2022), https://www.nytimes.com/2022/06/25/us/trigger-laws-abortion-states-roe.html.

7. Amy Cheng, *Indiana Passes Near-Total Abortion Ban, the First State to Do So Post-*Roe, Wash. Post (Aug. 6, 2022), https://www.washingtonpost.com/nation/2022/08/06/indiana-abortion-ban-roe-holcomb/.

8. Dylan Lysen, Laura Zeigler & Blaise Mesa, *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, N.P.R. (Aug. 3, 2022), https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment; Jonathan Weisman & Nick Corasaniti, *First Kansas, Next Michigan and Beyond as Abortion Ballot Measures Spread*, N.Y. Times (Sept. 9, 2022), https://www.nytimes.com/2022/09/09/us/politics/michigan-abortion-referendum.html.

9. State v. Planned Parenthood of Sw. & Cent. Fla., 342 So. 3d 863 (Fla. Dist. Ct. App. July 21, 2022); *see also* Erik Larson, *ACLU Asks Florida Supreme Court to Review 15-Week Abortion Ban*, Bloomberg (Aug. 11, 2022), https://www.bloomberg.com/news/articles/2022-08-11/aclu-asks-florida-supreme-court-to-review-15-week-abortion-ban.

10. Everton Bailey Jr., *Dallas Council Committee Backs Plan to Limit City Resources Used to Investigate Abortions*, Dallas Morning News (Aug. 2, 2022), https://www.dallasnews.com/news/politics/2022/08/02/dallas-council-committee-backs-plan-to-limit-city-resources-used-to-investigate-abortions/; *see also* Patricia Mazzei, *DeSantis Suspends Tampa Prosecutor Who Vowed Not to Criminalize Abortion*, N.Y. Times (Aug. 4, 2022), https://www.nytimes.com/2022/08/04/us/desantis-tampa-prosecutor-abortion.html.

11. *Population Data for United States,* March of Dimes Peristats, https://www.marchofdimes.org/peristats/data?reg=99&top=14&stop=125&lev=1&slev=1&obj=3 (last updated Jan. 2022).

they stand under state law should they confront a pregnancy that is or has become unwanted or that endangers the woman's health.[12]

As well as provoking questions of "What next?" the *Dobbs* case also raises the backwards-looking question of "How did this happen?" Although we were forewarned of the decision's content through a mysterious and as-yet-unsolved leak in early May 2022,[13] there was a palpable sense of shock for many when the official decision actually came down in late June. How could one live (blithely, it now seems) into one's adulthood secure in the highest level of legal protection around reproduction—the constitutional *right* established in *Roe* and affirmed in *Casey*—only to have it felled with a few determined strokes from Justice Alito's pen in the *Dobbs* case?

To be sure, for pro-life advocates and supporters, the decision was not so much a shock as a long-awaited accomplishment.[14] The *Roe* decision had been a stunning shock to pro-life advocates who felt that "the Court erred in leaving the unborn without the protection they deserved."[15] Overturning *Roe* had been actively sought since the day it was decided in 1973. Over the next 50 years, opponents tried all sorts of approaches to undo *Roe*—tactical trial and error such as unsuccessful fetal personhood amendments,[16] mountains of restrictive legislation in the states,[17] regular appearances before the Supreme Court,[18] and political and spiritual consolidation (conservative

12. The fluidity of the categories is worth keeping in mind, as pregnancies can move from wanted to unwanted in the space of one telephone call: A boyfriend calls to say that he didn't sign up for this; an employer calls to say they are downsizing and come get your pink slip; a doctor's office calls with unhappy news regarding certain prenatal testing. *See* Denise V. D'Angelo et al., *Differences Between Mistimed and Unwanted Pregnancies Among Women Who Have Live Births*, 36 Persp. on Sexual & Reproductive Health 192, 193–96 (2004) (clarifying the difference between mistimed and unwanted pregnancies).

13. Adam Liptak, *A Supreme Court in Disarray After an Extraordinary Breach*, N.Y. Times (updated June 24, 2022), https://www.nytimes.com/2022/05/03/us/politics/supreme-court-leak-roe-v-wade-abortion.html.

14. *See* Ruth Graham, *"The Pro-Life Generation": Young Women Fight Against Abortion Rights*, N.Y. Times (July 3, 2022), https://www.nytimes.com/2022/07/03/us/pro-life-young-women-roe-abortion.html.

15. Mary Ziegler, After *Roe*: The Lost History of the Abortion Debate 29 (2015).

16. Kate Zernike*, Is a Fetus a Person? An Anti-abortion Strategy Says Yes*, N.Y. Times (Aug. 30, 2022), https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html.

17. *See An Overview of Abortion Laws*, Guttmacher Inst. (as of Nov. 1, 2022), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws.

18. *See* Roe v. Wade *and Supreme Court Abortion Cases*, Brennan Ctr. for Just. (Sept. 28, 2022), https://www.brennancenter.org/our-work/research-reports/roe-v-wade-and-supreme-court-abortion-cases.

Catholics, Evangelicals, and Republicans).[19] The "jewel in the crown"—scuttling *Roe*—was finally secured by President Trump's appointment of Justices Gorsuch (2017), Kavanaugh (2018), and Barrett (2020).[20] For this constituency, pure jubilation marked the 5–4 majority opinion in *Dobbs*, striking down not only *Roe* and *Casey*, but also the doctrines of privacy and much of *stare decisis* as well.[21]

But for those who experienced the *Dobbs* decision with something closer to "shock and awe," it is perhaps worth rewinding the reproductive script to look back and see how over the course of the 20th century, American law had developed the concept of constitutionally protected reproductive rights. Consideration of such rights began in the 1920s and progressed in roughly 20- to 30-year increments, ending (certainly for the present) almost 100 years later in 2022 with *Dobbs*, which shredded the right to abortion by denouncing the underlying doctrine of privacy, a move that also seems to leave open the possibility of taking down other privacy-derived rights in the future.[22]

In this article, I will trace the way in which this series of constitutional cases reflects both social attitudes and legal constraints on reproductive behavior during the 20th century. How do the decisions acknowledge or reject legal protections for such behaviors and desires? As we shall see, reproductive policies of the state and individual preferences of citizens may take a pronatalist slant, as women and men seek—sometimes demand—to be permitted to create children. Other policies and preferences are anti-natal, favoring decisions *not* to reproduce through such practices as abstinence, contraceptive use, or sterilization. Yet each additional decision, whether pro- or anti-natal, thickens our understanding of how, over time, different reproductive rights became defined and protected.

This article argues first that plotting the various legal constraints placed on reproductive behavior reveals the social and historical contexts in which different preferences arise. That is, depending on the applicable

19. *See* Daniel K. Williams, *This Really Is a Different Pro-Life Movement*, Atlantic (May 9, 2022), https://www.theatlantic.com/ideas/archive/2022/05/south-abortion-pro-life-protestants-catholics/629779/; Elizabeth Dias, *For Conservative Christians, the End of* Roe *Was a Spiritual Victory*, N.Y. Times (June 25, 2022), https://www.nytimes.com/2022/06/25/us/conservative-christians-roe-wade-abortion.html.

20. For the appointment dates of the justices, see *Current Members*, Supreme Ct. of the U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Oct. 20, 2022).

21. Adam Liptak, *In 6-to-3 Ruling, Supreme Court Ends Nearly 50 Years of Abortion Rights*, N.Y. Times (June 24, 2022), https://www.nytimes.com/2022/06/24/us/roe-wade-overturned-supreme-court.html.

22. *See generally* Mary Ziegler, Beyond Abortion: *Roe v. Wade* and the Battle for Privacy (2018).

legal doctrine and jurisprudence at any given time, reproductive behavior may be protected from state intrusion as a constitutional right, or it may be found subsidiary to positive law and subject to its regulation. The cases will be familiar to those who teach or practice family law and its offshoots, and certainly to those who deal with reproductive rights. The idea here is to follow their trajectory, beginning with the brutal decision in *Buck v. Bell*—upholding the coerced sterilization of "imbeciles" in 1927[23]—and then developing in *Skinner v. Oklahoma* (reversing compulsory vasectomy of a prisoner in 1942)[24] to *Griswold v. Connecticut* (striking down a ban on contraceptive access for married couples).[25] These cases contributed to the recognition of reproductive rights, which by the end of the 20th century culminated in recognizing the right to abortion.[26] *Roe v. Wade* established the abortion *right* as against state criminal prohibitions (1973),[27] and was followed by *Planned Parenthood v. Casey* (1992), which upheld abortion's status as a fundamental right while at the same time expanding the grounds for restricting it.[28] We see *Casey* at work in additional cases, including *Gonzales v. Carhart* (2007), where the Supreme Court upheld a federal ban on a particular abortion procedure,[29] and *Whole Woman's Health v. Hellerstedt* (2016), which struck down tighter Texas restrictions on access to abortion.[30]

These cases take us to the present,[31] where the rise of reproductive rights has been overtaken by *Dobbs*, marking an abrupt and decided plunge southward.[32]

This plunge leads to a second insight of this article. In contrast to nearly all the earlier cases, the integrity of the analysis in *Dobbs* regarding the social facts that underlie the holding appears unreliable; indeed, the center of its arguments does not hold. The decision lacks the integrity one would expect from a pre-leaked blockbuster that overturned the vested expectations of citizens of the last 50 years. And what truly stings here is that what the Court gets so wrong with its overconfident tone and its selection of facts is an appreciation of how women and girls (and often their partners) have

23. 274 U.S. 200 (1927).
24. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).
25. 381 U.S. 479 (1965).
26. *See infra* Part I.
27. 410 U.S. 113 (1973).
28. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
29. 550 U.S. 124 (2007).
30. 579 U.S. 582 (2016).
31. *See infra* Part II.
32. *See infra* Part III.

relied upon the holdings in *Roe* and *Casey*. Because *Dobbs* disregards most women's views on abortion, I want wherever possible to capture something of the voices of the women facing reproductive decisions under one or another of the regulatory regimes.

To conclude, there are many ways to critique *Dobbs*—its theocratic underpinnings, its peculiar historical choices, its doctrinal disregard of precedent, and so on. I focus here on these: first, its disquieting location as the endpoint in the trajectory of reproductive law cases from the 20th century forward; second, *Dobbs*' disregard of women as reproductive agents in the constitutional scheme; and third, its disregard of the developed doctrines of privacy and liberty regarding reproductive practices, an aspect of life that at one time or another envelops most of us.

I. The Road to *Roe*: 1927–1973

A. Buck v. Bell (1927)

I start with the bleak but scientifically confident and patriotically swelling case of *Buck v. Bell*, which held in 1927 that Virginia's Eugenical Sterilization Act was constitutional.[33] In that case, the compulsory sterilization of institutionalized residents of state asylums at the superintendent's say so was held to violate neither the Constitution's Due Process Clause nor the Equal Protection Clause.[34] According to its preamble, the 1924 Act had been passed to advance "the health of the individual patient and the welfare of society" by preventing the sexual reproduction of "mental defectives."[35] The legislation would prevent society from being "swamped with incompetence."[36] The Act reflected the popularity of what was then accepted as the science of eugenics in Virginia and beyond.[37] It was considered a simple exercise of police power in a matter of public health for the public benefit.[38]

Passage of the Act also represented Superintendent Albert Priddy's concern regarding litigation: He had earlier been sued after he sterilized a mother and daughter, whose husband and father also wrote Dr. Priddy

33. 274 U.S. 200 (1927).

34. *Id.* at 208.

35. An Act to Provide for the Sexual Sterilization of Inmates of State Institutions in Certain Cases, ch. 394, 1924 Va. Acts 569 (repealed 1974).

36. *Buck*, 274 U.S. at 207.

37. Nathalie Antonios, *Sterilization Act of 1924*, Embryo Project Encyclopedia (Apr. 14, 2011), https://embryo.asu.edu/pages/sterilization-act-1924.

38. *Id.*; Buck v. Bell, 130 S.E. 516, 519 (Va. 1925), *aff'd*, 274 U.S. 200 (1927).

to prevent the sterilization of yet another daughter.[39] Superintendent Priddy wanted a law and a validating judicial decision to protect him from liability in the future.[40] Thus, the case was carefully prepared as test case litigation: The personal and family history of Carrie Buck, with her low mental assessment score and assumed sexual promiscuity, became the ideal candidate for both the operation and the lawsuit.[41] Buck, a teenage resident of the Virginia "Colony for Epileptics and Feeble Minded," had been determined to have a mental age of nine and therefore to be a "Middle-grade Moron" based on the prevailing aptitude test and scale.[42] She became pregnant out of wedlock,[43] delivering a baby girl who herself was described as "abnormal," taken from Buck, and placed for adoption.[44] Because Buck's mother Emma had already been committed to the Colony on grounds of mental deficiency, her "feeble-minded" daughter Carrie became the perfect candidate to demonstrate the hereditary dangers of genetically transmitted deficiencies signaling moral and social decay.[45] As legal historian Victoria Nourse explains, "the scientific glue" holding these connections together was "the idea of feeblemindedness as fixed and permanent, an inherited trait of great danger."[46] The dangers were understood to go far beyond the costs of state support for one "defective" family. "Feeble-minded" immigrants produced waves of crime; newly tested army recruits were scoring just above "moron"; and the economy could not be sustained if the country were awash in mental mediocrity.[47]

Buck was appointed counsel to challenge the sterilization law (this legal challenge was also part of the preplanned test case).[48] According to the record, Buck uttered but one sentence in the entire sterilization proceeding.[49] At the end of her sterilization hearing, a single question was put to her by the superintendent's lawyer: "Do you care to say anything about having this

39. Nathalie Antonios & Christina Raup, *Buck v. Bell (1927)*, Embryo Project Encyclopedia (July 3, 2018), https://embryo.asu.edu/pages/buck-v-bell-1927; Adam Cohen, Imbeciles 82–83 (2016).

40. *See* Antonios & Raup, *supra* note 39.

41. *Id.*

42. *Id*.; Cohen, *supra* note 39, at 30. For more on the test used and scale and their deficiencies, see *id.* at 30–33.

43. Indeed, it later was known that Buck had been raped by her foster family's visiting nephew. *See* Antonios & Raup, *supra* note 39.

44. *Id*.

45. *Id*.

46. Victoria F. Nourse, In Reckless Hands: *Skinner v. Oklahoma* and the Near Triumph of American Eugenics 26 (2008).

47. *Id*. at 25–26.

48. Cohen, *supra* note 39, at 96.

49. *Id.*

operation performed on you?"[50] (He did not clarify what "this operation" was.) "'No, sir,' Carrie responded. 'I have not, it is up to my people.'"[51] Although she may have been relying on her counsel (my "people") to speak for her (her family was absent), neither her lawyer nor opposing counsel nor anyone else followed up to clarify her understanding.[52]

There is, however, other testimony that informs how we might think about the plight of others who were sterilized at the Colony. The first is from Carrie Buck's sister Doris, who in 1928 was also sterilized by Virginia officials; she was told that the operation was to remove her appendix.[53] In 1979, some 50 years after the surgery, Doris Buck was finally told why she had never been able to have a child: "I broke down and cried," she said.[54] "My husband and me wanted children desperately. We were crazy about them. I never knew what they'd done to me."[55]

The second speaker is Willie Mallory, whom Dr. Priddy had unconsensually sterilized in 1916, and whose suit against Priddy occasioned the plan to litigate the constitutionality of the Act for protection. Mrs. Mallory's testimony takes the form of the complaint she filed against Dr. Priddy. Willie Mallory's complaint stated that:

> [From Oct. 14, 1916] defendant [Dr. Priddy] . . . illegally and wrongfully deprived her of her liberty, and kept her wrongfully and illegally in his custody, and under his control for several months, by force, threats and personal violence, and by fear of bodily harm, and while so in his custody, and under his personal control, the said defendant by force, and violence, placed her under ether, or other anesthetic, and while she was then, and there, unconscious, performed an operation upon her by removing her genital organs, or sterilizing her, and unsexing her, and destroying her power to bear children, and caused her great mental and physical suffering by keeping her in dread of said operation. . . . And also thereby inflicted upon her great pain and discomfort of body, and worry of mind, and deprived her of the comfort & association of her family, and so deprived her, by said

50. *Id.*
51. *Id*.
52. *Id*. at 96–97.
53. Sara G. Boodman & Glenn Frankel, *Over 7,500 Sterilized by Virginia*, Wash. Post (Feb. 23, 1980), https://www.washingtonpost.com/archive/politics/1980/02/23/over-7500-sterilized-by-virginia/8002199e-709c-4e18-8b54-3b44c130828f/.
54. *Id.*
55. *Id.*

> illegal imprisonment, of her daily wages, to wit, $1.25 per day, from that time until, to wit, July 1st, 1917. . . .[56]

The language here is powerful. The plaintiff described herself as "unsex[ed]," her power to bear children "destroy[ed]."[57] These are mighty things to suffer, and we ought to keep them in mind.

By 1927, Buck's case found its way to the U.S. Supreme Court.[58] In a short and chilly opinion (five paragraphs including Justice Oliver Wendell Holmes's huzzah that "Three generations of imbeciles are enough."), the Supreme Court held that Buck's consent was not necessary.[59] Neither the Due Process Clause nor the Equal Protection Clause of the Constitution had been offended by the Virginia statute.[60] As Justice Holmes explained, Buck had received a hearing at the Colony supported by evidence, testimony, affidavits, and a transcript, and had had notice and the opportunity to appear and to appeal: "[I]n that respect [Buck] has had due process of law."[61] The equal protection claim—that the Act provided for the "sexual sterilization" only of institutionalized persons while similarly disabled people in the general population could not be so accosted—was also dismissed out of hand.[62] Holmes patiently explained that "the law does all that is needed when it does all that it can" ("you can't reasonably expect the state to take on everyone").[63] That ended the matter, after a quick jab by the Court at Buck's lawyer to the effect that everyone knows that equal protection arguments are raised only when counsel has nothing better to offer.[64] If anything, the justice added, sterilization might actually increase the equal treatment of the "feeble-minded": Once society was protected from the economic consequences of their sexual liaisons, the operation might in fact enable some of the "feeble-minded" "to be returned to the world, and thus open the asylum to others" so that the desired "equality aimed at will be more nearly reached."[65]

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56. Willie Mallory Complaint (1917), *in* Buck v Bell *Documents*, Paper 80, Ga. State Univ. Coll. of Law: Reading Room (Jan. 2009), https://readingroom.law.gsu.edu/buckvbell/80/.

57. *Id*.

58. Buck v. Bell, 274 U.S. 200 (1927).

59. *Id.* at 207.

60. *Id.*

61. *Id.*

62. *Id.* at 208.

63. *Id.*

64. *Id.* ("It is the usual last resort of constitutional arguments to point out shortcomings of this sort.").

65. *Id.*

But in addition to this tidy parsing of the 14th Amendment, it was the logic of eugenics, then accepted as a solid, necessary, and invigorated branch of science, that drove the decision in *Buck v. Bell*. What was at issue was the treatment owed to lesser citizens like Carrie Buck regarding their reproductive preferences. Although there was no language in the case regarding what we might now consider a "right to procreate," one sentence refers obliquely to Buck's claim that the loss of reproductive capacity was the harm: "It seems to be contended that in no circumstances could such an order [an order to sterilize the patient against her will] be justified."[66] But, scoffed Justice Holmes, that could not be right as a matter of patriotism, morality, or, indeed, equality between peoples so differently situated.[67] A Civil War veteran himself, Holmes wrote that:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence.[68]

Under this analysis, the deprivation suffered by Buck took on nobler meaning as a sacrifice, admittedly not as noble as risking death in military service, but on a par with her sacrificial role as a mother. Women's duty during the post-Revolutionary period was defined as that of "Republican Motherhood": the charge to bear and raise the upstanding male citizens of the future.[69] This was how gender played out for those held to be "feeble-minded." The duty of such a woman was not to produce children but explicitly not to do so.[70] Here, traits in addition to gender enter the mix: Her hereditary trait of "feeble-mindedness"[71] reduced her traditional status as a woman even further. The state was well within its police power to do this.[72] As we shall see, gender assumptions—tailored to present prejudices—usually play a role in legal dictates involving reproduction (or its antecedent

66. *Id.* at 207.
67. *Id*.
68. *Id*.
69. "Focusing attention on their sons and encouraging industry, frugality, temperance, and self-control, republican mothers would nurture virtuous citizens who served their communities; by educating their daughters, mothers would insure the virtue of future generations." Marilyn S. Blackwell, *The Republican Vision of Mary Palmer Tyler*, 12 J. Early Republic 11, 12 (1992).
70. *Buck*, 274 U.S. at 207.
71. *Id.*
72. *Id.*

of sexual activity). At the same time, contemporary views about categories of womanhood influence how laws are drawn and applied.

The point here is not to accept the eugenics-based holding in *Buck v. Bell*, but rather to highlight how the Supreme Court's opinion mirrored "beliefs of the times."[73] This is a thread I shall pull through this article at different points in time: the social context of the Court's views toward reproductive behavior and its regulation at different points on the trajectory of women's abortion right.

B. Skinner v. Oklahoma (1942)

Some 20 years after the decision in *Buck v. Bell*, a second forced-sterilization case made its way to the Supreme Court.[74] In this case, the operation was not imposed upon an institutionalized person as a purported public health measure, but as a statutory punishment for committing a crime.[75]

McAlester State Penitentiary inmate Jack Skinner had been sentenced under the Oklahoma Habitual Criminal Sterilization Act to sterilization by vasectomy on the statutory grounds he was a "habitual criminal" (convicted of three instances of a felony crime "involving moral turpitude").[76] Under the statute, vasectomy could be imposed for a "habitual criminal" who committed any such crimes in any state, but certain offenses were excluded from consideration (violation of revenue acts, embezzlement, and political offenses).[77] Skinner had been convicted three times of "felonies involving moral turpitude": once for stealing chickens and twice for armed robbery.[78]

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73. *The Right to Self-Determination: Freedom from Involuntary Sterilization*, Disability Just., https://disabilityjustice.org/right-to-self-determination-freedom-from-involuntary-sterilization/ (last visited Oct. 22, 2022).

74. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

75. *Id.* at 538.

76. *Id.* at 536. Vasectomies were introduced around the turn of the century by Dr. Albert Ochsner of Chicago, who in 1899 published a paper called *Surgical Treatment of Habitual Criminals* in the *Journal of the American Medical Association*. Cohen, *supra* note 39, at 65. Ochsner defended the vasectomy (in contrast to castration) because a vasectomy did not upset a man's hormonal balance, was not disfiguring, was not imposed as a punishment to the criminal himself, and did not "interfere with his enjoyment of life should he reform and become a useful member of society." ("Enjoyment of life" refers to sexual intercourse.) A.J. Ochsner, *Surgical Treatment of Habitual Criminals*, 16 JAMA 867, 867 (1899). Indeed, the only charge before the jury in Skinner's case was for them to determine whether the procedure would be harmful to Skinner's health. *Skinner*, 316 U.S. at 537.

77. *Skinner*, 316 U.S. at 536–37 (discussing Oklahoma Habitual Criminal Sterilization Act, Okla. Stat. Ann. tit. 57, §§ 171–95).

78. *Id.* at 537.

In the 1930s, eugenics was still a social and a legislative force.[79] In the context of "a growing sense of lawlessness," even President Roosevelt was concerned, "chid[ing] the public for its fascination with the public enemy. . . ."[80] U.S. Attorney General Homer Cummings began a "campaign against crime." [81] The "paradigmatic image [was] the public enemy, the habitual criminal, the repeater."[82] The latter categories were readily seized by criminologists as perfect targets for sterilization as a means of preventing crime itself (a product of a weak mentality) being passed from generation to generation.[83] Sterilization had never fallen out of vogue, but it now had a new and timely target: recidivists, or the "habitual felon."[84] Thus, in 1943, Oklahoma passed its Habitual Criminal Sterilization Act.[85] To be sure, there was some opposition to sterilization laws, including from the Catholic Church (on pronatalist grounds), and from some individuals and organizations (opposing cruelty).[86]

Our interest is in the vocal opposition from Skinner's fellow prisoners at McAlester State Prison in McAlester, Oklahoma.[87] They left no question about the grounds of their opposition: the de-gendering of men that was understood to result from the procedure.[88] As Professor Victoria Nourse observes, "[s]terilization laws had always been written not only with heredity, but also with sex in mind."[89]

At his trial, Skinner testified to the social and personal harm of sterilization. Being rendered unable to reproduce would induce in him "resentment":[90]

> [Skinner's attorney, Claud Briggs:] [Y]ou stated . . . that you might be able to . . . overcome this trouble of yours [criminal activity] by living an up right [sic] clean life and rearing a family?

79. Nourse, *supra* note 46, at 22.

80. *Id.* at 46.

81. Hon. Homer Cummings, Att'y Gen. of the U.S., *The Campaign Against Crime*, Justice.Gov (Nov. 22, 1933), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/11-22-1933.pdf.

82. Nourse, *supra* note 46, at 46.

83. Nancy J. King*, Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to* Apprendi, 97 Marq. L. Rev. 523, 532–33 (2014).

84. *Id.* at 533–34.

85. Oklahoma Habitual Criminal Sterilization Act, Okla. Stat. Ann. tit. 57, §§ 171–95.

86. Cohen, *supra* note 39, at 67–68; Nourse, *supra* note 46, at 74.

87. Nourse, *supra* note 46, at 55–63.

88. *Id.* at 61.

89. *Id.* at 60. "Eugenics preoccupied itself with sex, sliding between the sex that makes babies (procreation), the sex that makes populations (race), and the sex that brands one a cultural degenerate and social inferior." *Id*. at 61.

90. *Id.* at 107.

> [Skinner:] That is my hope.
>
> [Briggs:] Is it that [hope] that . . . makes you intensely dread and resent the forceful performance of this operation?
>
> [Skinner:] Yes, sir. . . . I would be out and alone and could not marry and rear a family and would not have any inspiration, I would be by myself without inspiration.[91]

In his testimony we hear Skinner's own voice expressing the magnitude of the proposed sterilization for him. It would leave him nothing and deny him the ability to have a sense of community and family.[92] (Consider the similar dread and shame expressed in Willie Mallory's complaint.)[93]

In his appeal from the Oklahoma Supreme Court's upholding the Act's constitutionality, Skinner's lawyer Briggs added more familiar legal arguments.[94] These included a lack of procedural due process compared to that provided to Carrie Buck, the inapplicability of the police power when the state of scientific knowledge about the inheritability of marginal traits was uncertain, and the proposition that vasectomy should fail as a cruel and unusual punishment.[95] Yet the U.S. Supreme Court bypassed these grounds because there was one overriding feature of the Act that "clearly condemns it": the Act's "failure to meet the requirements of the Equal Protection Clause of the Fourteenth Amendment."[96] The flaw was the Habitual Criminal Sterilization Act's division of criminals into two classes—those subject to sterilization and those not—based on an unconvincing, indeed, unexplained difference between thieving and one of the exceptions, embezzling.[97] (It may have been that embezzling was more often engaged in by white defendants in positions of control over another's funds.)[98] But neither crime was more violent, more premeditated, more anything than the other; and yet, what

91. *Id*. (testimony excerpted and reformatted).
92. *Id.*
93. *See supra* note 56 & accompanying text.
94. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 538 (1942).
95. *Id.*
96. *Id.*
97. *Id.* at 541–42.
98. *See* Ernest Poortinga et al., *A Case Control Study: White Collar Defendants Compared with Defendants Charged with Other Nonviolent Theft*, 34 J. Am. Acad. Psychiatry & L. 82 (2006) (finding that over a 12-year period, defendants charged with embezzlement were more likely to be white than defendants charged with other forms of nonviolent theft).

hinged on the difference was depriving the thief (but not the embezzler) of "a basic liberty": "the right to have offspring."[99]

That right, Justice William O. Douglas continued, "involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[100] This language did not mean that the Court found there was for Skinner a "right to procreate"—a right to choose—in today's terms.[101] But it refigured procreation from the back-handed dismissiveness it had received in *Buck v. Bell*. Harms to procreation were to be taken seriously, and that change prompted reconsideration of what was necessary to overcome the straightforward exercise of the police power.

Honing in on the precise harm of the deprivation, not only to Skinner but to society itself, the justice stated:

> The power to sterilize, if exercised, may have subtle, farreaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury.[102]

Here we are presented with an entirely different social understanding of Skinner's plight as compared to that of the sterilized Carrie Buck. The very point of sterilizing Buck was to make her group of persons—the "feeble-minded"—wither and disappear. Indeed, redemption of a kind was bestowed on her through the (unwilling) sacrifice of her procreative function, which might prove economically useful: Without administrative concerns about her producing more imbeciles, she might be able to leave the Colony through the revolving door of sterilization and self-sufficiency envisioned by eugenicists. In contrast, the Court in *Skinner* acknowledged the profound social, familial, and rights-based loss to Skinner of the vasectomy. Indeed, the relation between his loss and the state's exercise of authority for the public good (again, the police power) was so deeply and specially entwined as to occasion a new phrase to describe the appropriate constitutional review: strict scrutiny. In explaining why the Court goes on at some length describing the harms of sterilization, Justice Douglas states:

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99. *Skinner*, 316 U.S. at 536, 541.

100. *Id*. at 541.

101. *See* Gerber v. Hickman, 291 F.3d 617, 622 (9th Cir. 2002) (no constitutional right for inmate to provide his sperm to his wife for purposes of artificial insemination; "By no stretch of the imagination . . . did *Skinner* hold that inmates have the right to exercise their ability to procreate while still in prison.").

102. *Skinner*, 316 U.S. at 541.

> We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.[103]

Our interest here is less where *Skinner* led in terms of constitutional doctrine than its recognition of the cruelty of sterilization to the individual and to groups. As the 1930s gave way to the Second World War, the techniques of Nazi Germany to rid itself of "non-Aryan" people became known and the Court's 1942 warning about "evil or reckless hands" was a clear reference to Germany's use of sterilization.[104] Thus, Justice Douglas began his opinion with the declaration that

> This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.[105]

To be sure, despite its use of the language of rights as regards procreation, *Skinner* did not overrule *Buck v. Bell*, and involuntary sterilizations in federally funded programs, largely of poor women who were disproportionately Black, continued into the 1970s.[106] Yet despite

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103. *Id*. Some have described *Skinner* as originating the constitutional doctrine of strict scrutiny, but as legal historian Stephen Siegel explains, although "Justice Douglas subjected a sterilization statute to heightened review . . . he did so through a non-deferential inquiry into whether the statute's classifications actually had a rational basis, employing the form of review that today would be called 'minimal scrutiny with bite.'" Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 Am. J. Legal Hist. 355, 359 (2006). *See also* Ben Horowitz, *A Shot in the Arm: What a Modern Approach to* Jacobson v. Massachusetts *Means for Mandatory Vaccinations During a Public Health Emergency*, 60 Am. U. L. Rev. 1715, 1723 n.72 (2011) (arguing that although the Court used the phrase "strict scrutiny" in *Skinner*, they "did not really apply . . . the non-deferential approach that is currently employed").

104. *Skinner*, 316 U.S. at 541. The matter is historically complex as historians have shown how Germany in the 1920s and 30s began studying state laws regarding the sterilization of the mentally ill and bans on interracial marriage as models for their own subsequent laws. *See* James Q. Whitman, Hitler's American Model: The United States and the Making of Nazi Race Law (2017) (discussing how American race law provided a blueprint for Nazi Germany).

105. *Skinner*, 316 U.S. at 536.

106. *See* Marlene H. Prendergast, Comment, *Sterilization Regulation: Government Efforts to Guarantee Informed Consent*, 18 Santa Clara L. Rev. 971, 977 (1978) (discussing the case *Relf v. Weinberger*, 372 F. Supp. 1196 (D.D.C. 1974), *vacated*, 565 F.2d 722 (D.C. Cir. 1977), where three sisters were coerced into sterilization in California); Linda Villarosa, *The Long Shadow of Eugenics in America*, N.Y. Times Mag. (June 8, 2022), https://www.nytimes.com/2022/06/08/magazine/eugenics-movement-america.html.

ongoing misuse of the procedure for women—most recently for women in federal immigration detention centers[107]—we see a shift from a general acceptance of eugenic sterilization practices in the first decades of the century to a sobered realization of their consequences when unfettered and endorsed by the state.

Skinner was paroled from McAlester in 1939, remarried, and moved to Visalia, California, where he opened a dry cleaning business. His obituary noted that he was survived by six grandchildren and 10 great-grandchildren.[108]

C. Griswold v. Connecticut (1965)[109]

The 1960s were indeed a swinging time. This was due not only to the British influence—Mary Quant, Vidal Sassoon, the Beatles—but also due to the U.S. Food and Drug Administration (FDA). In 1960 the FDA authorized the first use of an oral contraceptive, Enovid.[110] "Within [two] years . . . 1.2 million American women were using . . . the '[P]ill.' . . ."[111] "By the end of the decade, married couples had made [the Pill their] contraceptive of preference, a trend that was especially pronounced among wives in their twenties."[112] However, although medical technology had produced this shiny, new, easy-to-use, and relatively inexpensive form of contraception (compared to abstinence, condoms, the diaphragm, and sterilization), the sale or use of oral contraceptives for women across the United States seeking to control their fertility was restricted or prohibited outright in a number of states.[113]

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107. Brigitte Amiri, *Reproductive Abuse Is Rampant in the Immigration Detention System*, ACLU (Sept. 23, 2020), https://www.aclu.org/news/immigrants-rights/reproductive-abuse-is-rampant-in-the-immigration-detention-system.

108. David J. Krajicek, *Oklahoma Convict Went to Supreme Court to Fight Forced Sterilization*, N.Y. Daily News (June 4, 2016), https://www.nydailynews.com/news/national/okla-convict-supreme-court-fight-forced-sterilization-article-1.2661391.

109. 381 U.S. 479 (1965).

110. *A Brief History of Birth Control in the U.S.*, Our Bodies, Ourselves Today at Suffolk Univ., https://www.ourbodiesourselves.org/health-info/a-brief-history-of-birth-control/ (last visited Oct. 22, 2022).

111. Audiey Kao, *History of Oral Contraception*, AMA J. Ethics (June 2000), https://journalofethics.ama-assn.org/article/history-oral-contraception/2000-06#:~:text=The%20Food%20and%20Drug%20Administration,as%20it%20is%20popularly%20known.

112. Dolores Flamiano, *Covering Contraception: Discourses of Gender, Motherhood and Sexuality in Women's Magazines, 1938–1969*, Am. Journalism, Summer 2000, at 59, 74 (2000) (quoting John D'Emilio & Estelle B. Freedman, Intimate Matters: A History of Sexuality in America 251 (1989)).

113. Martha J. Bailey et al., *Early Legal Access: Laws and Policies Governing Contraceptive Access, 1960–1980* (Aug. 2011), http://www-personal.umich.edu/~baileymj/ELA_laws.pdf; *see also* Carol Flora Brooks, *The Early History of the Anti-Contraceptive Laws in Massachusetts and Connecticut*, 18 Am. Q. 3 (1966).

It was not until 1965 that the Supreme Court announced its decision in *Griswold v. Connecticut* that the use of contraception by married persons was protected by a constitutional right of privacy.[114] Indeed, it was *Griswold*, and not *Roe*, that first introduced the mysterious language of "penumbras" and "emanations" that became better known in the 1973 *Roe* decision.[115] The impact of the Pill in American society was, from the beginning, huge. One author lists the social magnitude as including "women's careers, health, fertility trends, laws and policies, religion, interpersonal relationships and family roles, feminist issues, and gender relations, as well as sexual practices among both adults and adolescents."[116] At the technical and the personal level, its revolutionary feature was that "[t]he spontaneity of sexual passion no longer had to be interrupted by inserting a diaphragm or putting on a condom";[117] it "separated intercourse from precautionary measures to prevent pregnancy."[118] For some, this made sex more natural and joyous; for others, the meaning of such spontaneity remained complicated and guilt-inducing. One unhappily pregnant young woman explained why she had never used birth control: "When we had sex, we couldn't use condoms, because having them around would have been admitting an intent to sin or an expectation of fallibility. For the same reasons, I couldn't take birth control pills. . . . To prepare to sin would be worse than to break in a moment of irresistible desire."[119] The point to underscore here is the link, whether moral or religious, between attitudes toward sex and the attitudes toward birth control.[120]

In this section, I want to focus on two aspects of *Griswold*. The first is the privacy doctrine that it sets out and the application of privacy to the use of contraception in 1965.[121] The second focus is to look at the treatment of the *Griswold* case at the state level. *Griswold* and a few earlier cases again surface the authority of the police power, first observed in *Buck*

114. *Griswold*, 381 U.S. at 486.

115. *Id.* at 484.

116. Louise Tyrer, *Introduction of the Pill and Its Impact*, 59 Contraception 11S, 15S (1999), https://reader.elsevier.com/reader/sd/pii/S0010782498001310?token=2B3B58EE6611B0D422471C3AD7FCB1BFB0E228AA750C8D33928B8EE124C8B482301F3B56D5DDB830F65050E30970664B&originRegion=us-east-1&originCreation=20220814210826.

117. John D'Emilio & Estelle B. Freedman, Intimate Matters: A History of Sexuality in America 250–51 (2d ed. 1997).

118. *Id.* at 250.

119. Merrill Tierce, *The Abortion I Didn't Have*, N.Y. Times Mag. (Dec. 5, 2021), https://www.nytimes.com/2021/12/02/magazine/abortion-parent-mother-child.html. The author explained the curious logic between faith and sin: "Our faith trapped us. . . . As long as I didn't take the birth-control pill, I could believe I wouldn't sin again." *Id.*

120. *Id.*

121. Griswold v. Connecticut, 381 U.S. 479, 479 (1965).

v. Bell.[122] *Griswold* also shows the role of religion, particularly religious views about sex in the politics of contraception, before *Griswold* recognized the constitutional right to privacy.[123] This foreshadows the treatment of contraception for the Post-*Roe* Era. As we shall see in the *Dobbs* section, there is no more constitutional privacy, there is to be greater deference to legislature opinions, and there is a newfound protection of religious beliefs with regard to legislative enactments.[124] Thus, at the conclusion of this article we can assess whether post-*Roe* state law treatment of contraceptive decision-making returns the law in a number of states to its 20th century pre-*Griswold* status and rationale.

And so the 1965 case of *Griswold v. Connecticut*. The statutes at issue were two Connecticut laws: the first criminalized the use of "any drug, medicinal article or instrument for the purpose of preventing conception;" the second authorized the prosecution of anyone who "assists, abets, counsels, causes, hires or commands another to commit" the offense of using contraception.[125] The appellants were employees of the Planned Parenthood League of Connecticut: the executive director (Estelle Griswold) and the medical director (Dr. C. Lee Buxton).[126] Having found that the defendants had standing to raise the rights of the married persons they counseled at the clinic, the Court turned to the issue of whether the use of contraception was constitutionally protected.[127]

The Court began with "the association of people," a right previously found to be protected by the First Amendment.[128] Marriage created such an association, as did membership in a political party.[129] Protected as well was the right to absorb "the spectrum of available knowledge," or at least not to have the spectrum contracted by the state.[130] The First, Third, Fourth, and Fifth Amendments create "zones of privacy"; for example, the Fifth Amendment "enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment."[131]

122. *Id.* at 485–86; Buck v. Bell, 274 U.S. 200, 207 (1927).
123. *Griswold*, 381 U.S. at 483–86.
124. *See infra* Part III.
125. *Griswold*, 381 U.S. at 480.
126. *Id.*; Lori Ann Brass, *An Arrest in New Haven, Contraception and the Right to Privacy*, Yale Med., Spring 2007, at 16, https://medicine.yale.edu/news/yale-medicine-magazine/ymspring07_348432_43933_v1.pdf.
127. *Griswold*, 381 U.S. at 481–82.
128. *Id.* at 482.
129. *Id.* at 483, 486.
130. *Id.* at 482.
131. *Id.* at 484.

Here the Court through Justice William O. Douglas—who also wrote for the Court in *Skinner*—explained the concept that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[132] They don't just grudgingly apply to the scope of their literal text: "Various guarantees create zones of privacy."[133] Moreover, the right to use contraceptives by married couples falls into a privacy zone

> created by several fundamental constitutional guarantees. And [*Griswold*] concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship.[134]

Douglas then pronounces the question that I think sends chills through many a family law professor each time one teaches the case: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"[135] The image takes one directly to the facts of the Court's subsequent decision in *Loving v. Virginia*,[136] where the local police burst into the Lovings' bedroom in the early morning hours, after they, a biracial couple married in the District of Columbia, had returned to Virginia to be near Mildred Loving's family. The police shone flashlights on the awakening couple, searching their walls for their illegal-in-Virginia District of Columbia marriage certificate.[137] Justice Douglas ends the *Griswold* case with perhaps flowery phrases—I prefer to think of them as fervent—including: "[Marriage] is an association for as noble a purpose as any involved in our prior decisions."[138]

One can see how *Griswold* leads to other forms of protected privacy. The next step was to include single persons on a theory of equal protection.[139] The next was to extend the nature of *forms* of privacy decisions to include abortion, same-sex sexual activity, and ultimately same-sex marriage.[140] We

132. *Id*. The "emanations" language and analysis first appeared in Justice Douglas's dissent in *Poe v. Ulman*, 367 U.S. 497, 516–22 (1961) (Douglas, J., dissenting).

133. *Griswold*, 381 U.S. at 484.

134. *Id*. at 485.

135. *Id.*

136. 388 U.S. 1 (1967).

137. Robert A. Pratt, *The Case of Mr. and Mrs. Loving: Reflections on the Fortieth Anniversary of* Loving v. Virginia, *in* FAMILY LAW STORIES 7, 14 (Carol Sanger ed., Foundation Press 2007).

138. *Griswold*, 381 U.S. at 486.

139. Eisenstadt v. Baird, 405 U.S. 438, 447 (1972).

140. *See* ZIEGLER, *supra* note 22 .

will pick up there with *Roe* after looking back once again to see what factors were at play in Connecticut when contraception was a matter of state court jurisprudence. Through the machinations of state politics, we get a sense of what women faced locally in the 20th century, and—importantly—what they may face again in the 21st.

Connecticut's first contraceptive prohibition was enacted in 1879 and remained in place until 1965.[141] In 1940, the Connecticut Supreme Court quoted approvingly from a Massachusetts case regarding the "plain purpose" behind the prohibition: "to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus to engender. . . a virile and virtuous race of men and women."[142] That is worth reading twice to see how much social control and perhaps social solidarity rests on depriving women of control over their fertility and family composition. It is also worth rereading for its resonance with the apotheosis of the Republican Family and reproductive patriotism in *Buck v. Bell*.

There was no wiggle room for any measure of reform. For example, as historian Mary Dudziak informs us, year after year, the legislature had the opportunity to accept a compromise measure.[143] It might, for example, have accepted a partial exception when a woman's life was at risk if she became pregnant.[144] But in an interesting form of reverse bootstrapping, because the legislature had never amended the statute, the Connecticut Supreme Court concluded that it was "[t]he manifest intention of the legislature" to have an "all-out prohibition" on contraceptives.[145]

The repeated inability of the Connecticut legislature to reform its unwaveringly strict birth control statutes was due to the role of religion—specifically the Catholic Church—in state politics.[146] Dudziak explains that the Church was so powerful that it didn't need to "openly enter" the periodic fights; without its active participation, "the legislators were fully aware of its position."[147] Later in the century, priests became more directly

141. *Connecticut and the Comstock Law*, CT HUMANITIES (Mar. 28, 2021), https://connecticuthistory.org/connecticut-and-the-comstock-law/.

142. State v. Nelson, 11 A.2d 856, 862 (Conn. 1940) (quoting Commonwealth v. Allison, 116 N.E. 265, 266 (Mass. 1917)); *see* Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before* Griswold v. Connecticut, 75 IOWA L. REV. 915, 926 (1990). Indeed, the Connecticut ban on contraceptives was "more restrictive" than that on abortion, "which allowed abortion when it was necessary to preserve a woman's life." *Id.* at 926.

143. Dudziak, *supra* note 142, at 925.

144. *Id.*

145. Tileston v. Ullman, 26 A.2d 582, 585 (Conn. 1942), *appeal dismissed*, 318 U.S. 44 (1943) (per curiam).

146. Dudziak, *supra* note 142, at 928.

147. *Id.* (citation omitted).

involved in defeating legislative attempts to ease birth control restrictions.[148] Not only were there anti–birth control sermons on Sundays, but the clergy participated in voter registration drives and supported anti–birth control candidates for the legislature.[149] After the Second World War, the Catholic War Veterans also prominently opposed reform legislation.[150] In 1948, "[t]he Reverend Austin B. Digman of Saint Mary's Church in Bethel told his parishioners that support for a candidate who favored reform of birth control laws 'would be a violation of the natural moral law which Catholics and the Catholic Church are duty bound to uphold and would be a direct violation of God's Sixth Commandment.'"[151] Indeed, religion permeated the Connecticut Legislature depending on the chamber.[152] The House, elected primarily by Protestants, often supported reform; but the Senate, with its "more heavily Catholic constituency,"[153] would defeat whatever came up.

In 1957 and 1958, Dr. Buxton, Fowler Harper (a Yale Law School professor), Estelle Griswold, and Catherine Roraback (a Connecticut attorney) began to plan a legal challenge to the birth control statutes.[154] The attorneys had to work from scratch, much like the inexperienced junior lawyers who, as we shall see, put together the complaint in *Roe v. Wade*.[155] As civil rights attorney Catherine Roraback recalled, "[a]t that time, in 1957 and 1958, public interest law as we now know it had not yet become an established part of our legal landscape; resort to the federal courts for civil relief from the impact of state criminal laws was not the usual practice."[156] Because the claims raised were basically the same as those raised in previous state cases, the Connecticut Supreme Court of Errors reaffirmed its ruling in an earlier case that, although contraceptives were "the best and safest preventive measure" for the plaintiffs, the legislature did not have to allow it when there was "another alternative, abstinence from sexual intercourse."[157]

148. *Id.* at 928–29.

149. *Id.* at 929 & n.96.

150. *Id.* at 928.

151. *Id.* at 929 (citation omitted).

152. *Id.* at 928–30.

153. *Id.* at 930.

154. *See* Catherine G. Roraback, Griswold v. Connecticut*: A Brief Case History*, 16 OHIO N.U. L. REV. 395, 396–97 (1989). Roraback notes, "Even for those of us who were there, it is hard to remember the attitudes toward birth control in the 1950's. The statutory prohibition . . . even [for] married persons was accepted by many as a legitimate exercise of the police powers of the state." *Id.* at 396.

155. *See* DAVID GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 605–31 (1998) (ebook).

156. Roraback*, supra* note 154, at 398.

157. Buxton v. Ullman, 156 A.2d 508, 514 (Conn. 1959), *appeal dismissed sub nom.* Poe v. Ullman, 367 U.S. 497 (1961).

In the court's view, the cases raised "an issue of public policy" reserved for the legislature.[158] Despite the occasional resulting hardship, the greater good would be served by leaving the statutes as they were. And it was clear where the hardship fell: Wealthier women could obtain a private prescription to be filled across state lines, but the absence of any public clinics left poorer women without the means to control their fertility or to protect their health.[159]

The U.S. Supreme Court's decision in *Griswold v. Connecticut* follows neatly upon *Skinner v. Oklahoma* in the trajectory of a developing reproductive right. The history of birth control legislation in Connecticut and local efforts to reform it seem largely a political story where no rights doctrine could draw the attention of the state's supreme court. As Dr. Buxton reported, women died as a result,[160] and it took the U.S. Supreme Court to save the day and the lives of women in the state. Now, however, *Griswold*'s more local Connecticut story reads less like an historical state/federal comparison than a premonition of what may become a broader post-*Dobbs* story across states.

II. The *Roe* Era: 1973–2022

A. Roe v. Wade (1973)

Right below the lead headline of the *New York Times* on January 23, 1973, announcing President Lyndon Johnson's death, a second headline also stretched across the front page. It read: *High Court Rules Abortions Legal the First 3 Months*.[161] And so began the public life of *Roe v. Wade*. That January date was the apex in the trajectory of the rise of the reproductive right to abortion, celebrated by pro-choice women who gathered in Washington, D.C., and decried by anti-abortion folks in their annual March for Life.[162]

In this section I want to draw attention to three aspects of the case. The first is simply its rationale, or the doctrine of privacy as articulated in *Griswold*. The second aspect is the holding, or the specific rules laid down by the case of how it would work in practice. Here the Court devised a

158. *Id.*

159. *See* Roraback, *supra* note 154, at 396–97; *see also* Harriet F. Pilpel, *Birth Control and a New Birth of Freedom*, 27 Ohio St. L.J. 679 (1966).

160. Dudziak, *supra* note 142, at 932.

161. Warren Weaver Jr., *High Court Rules Abortions Legal the First 3 Months*, N.Y. Times, Jan. 23, 1973, at A1. Other papers treated the decision with livelier copy: see Jeffrey Antevil, *Top Court Throws Out Abortion Bans*, N.Y. Daily News, Jan. 23, 1973, at 2; and the somewhat perplexing *Abortion Ruling: Mother Knows Best*, L.A. Times, Jan. 23, 1973, at 1.

162. *Compare* March for Life, https://marchforlife.org (last visited Oct. 20, 2022) *with History of Marches and Mass Actions*, Nat'l Org. for Women, https://now.org/about/history/history-of-marches-and-mass-actions/.

regulatory scheme that slotted pregnancy into a constitutional framework that was in effect for nearly 20 years. To foreshadow: We know that in 1992, *Roe* received permanent body blows from *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[163] But one has to understand what *Roe* originally posited in order to understand how seriously the decision was compromised by *Casey* in 1992, and how in 2022 *Roe* and *Casey* were obliterated by the coup de grace from *Dobbs*. The third aspect, one I have been trying to trace in each phase of this trajectory, is the Court's characterization of the position of women with unwanted pregnancies and what it would mean, by the Court's light, not to have the right to choose.

So, to the beginning: Just prior to *Roe*, four states—New York, Hawaii, Washington, and Alaska—had enacted legal abortion statutes.[164] Then, in 1970, Jane Roe, described by the Supreme Court as "a single woman . . . residing in Dallas County, Texas," filed suit in federal court against Henry Wade, the elected district attorney of Dallas County and the man responsible for enforcing Texas's criminal abortion statute.[165] In her complaint, Roe stated simply that she was "pregnant; that she wished to terminate her pregnancy by an abortion 'performed by a competent, licensed physician, under safe, clinical conditions'; that she was unable to get a 'legal' abortion in Texas" because her pregnancy did not appear to be life-threatening; and that she "could not afford to travel to another jurisdiction to secure a legal abortion. . . ."[166] Her legal claim was that "the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy. . . ."[167]

The Supreme Court, by Justice Harry Blackmun, ruled for Roe on the basis of a right to privacy. Acknowledging that "[t]he Constitution does not explicitly mention any right of privacy," it observed nonetheless that, in a line of cases going back to the late 19th century, "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[168] The "roots of that right" were found by "the Court or individual Justices . . . in the First Amendment; in

163. 505 U.S. 833 (1992).

164. Julia Jacobs, *Remembering an Era Before* Roe *When New York Had the "Most Liberal" Abortion Law*, N.Y. Times (July 19, 2018), https://www.nytimes.com/2018/07/19/us/politics/new-york-abortion-roe-wade-nyt.html.

165. Roe v. Wade, 410 U.S. 113, 120 (1973). For more on how Norma McCorvey became Jane Doe, see Garrow, *supra* note 155; Norma McCorvey & Andy Meisler, I Am Roe: My Life, *Roe v. Wade*, and Freedom of Choice (1994); and Joshua Praeger, The Family Roe: An American Story (2021).

166. *Roe*, 410 U.S. at 120.

167. *Id.*

168. *Id.* at 152.

the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment."[169] These sources of privacy were, of course, drawn from the opinion in *Griswold*. The *Roe* Court further stressed that these earlier cases had their foundations in private realms of domestic intimacy, such as marriage, contraception, family relationships, and procreation.[170] Deciding to terminate a pregnancy fit into these deeply personal decisions that went to the core of family composition and individual autonomy.[171]

The second concern was how *Roe* was to work in the real world. In his analysis, Justice Blackmun correlated the stages of pregnancy to the growing interest of the state in the pregnancy as it develops.[172] He noted that the state has two interests in the pregnancy: the health of the mother and a form of respect owed to the developing fetus.[173] In the first stage (basically, the first trimester), the state has almost no interest in the mother's health due to the medically accepted safety of an early abortion.[174] Thus, in this initial period, the state has very little stake in the woman's decision: She may make the decision to terminate her pregnancy herself in consultation with her doctor.[175] In the second trimester, as the fetus grows and develops, the abortion procedure becomes more complicated and states may regulate in the interests of the mother's health.[176] Finally, at the point of fetal "viability" or potential to live outside the womb—considered at that time to be during the third trimester—the state's interest in the prenatal life becomes compelling in the constitutional sense and states may, if they choose, ban abortion all together, except where necessary to save the life or health of the woman.[177] (It is not too much of a spoiler alert to say that the trimester system with its constitutionally weighted state interests was wiped out in *Casey*, and we shall soon see what took its place.)

Anticipating a very different story in *Dobbs*, I want lastly to look at the *Roe* Court's description of what women may confront in the absence of the abortion right. The Court states in brief that:

169. *Id*. (internal citations omitted).
170. *Id.* at 152–53.
171. *Id.* at 153–56.
172. *Id.* at 114.
173. *Id*. at 159.
174. *Id.* at 163.
175. *Id.*
176. *Id.* at 163–64.
177. *Id.* at 160 ("Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."), 163–65.

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[178]

We have a picture then of the physical, social, financial, and familial factors that a woman or girl may well take into consideration in making her decision. These are hardly trivial concerns but engage the woman's entire family, including her existing children, her health, her present well-being, and her future aspirations. And although the list was composed in 1972, it seems apt 50 years later, no matter how many contrary assurances the *Dobbs* Court tosses our way.

B. Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)

The final significant abortion case of the 20th century is *Casey*, though other cases between *Roe* and *Casey* were contenders for overturning *Roe*. The favorite for that achievement may have been *Webster v. Reproductive Health Services* in 1989.[179] Advocates on both sides anticipated that the case could ring the death knell for *Roe*.[180] But although in *Webster* the Supreme Court upheld the state's restrictions on government employees or facilities providing nontherapeutic abortions, and avoided ruling on a statutory preamble stating that "life . . . begins at conception," it declined the larger invitation by the appellants and the United States to overturn *Roe*.[181]

It took the case of *Casey*, decided three years later, to inch the law closer to that. Now, for those who have followed the abortion cases through the decades, it was possible to be confused in deciding where *Casey* should be plotted on the graph of the abortion right's rise and fall. This is because

178. *Id*. at 153.

179. 492 U.S. 490 (1989); *see* Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. Pa. L. Rev. 119 (1989). The arguments and analysis of the Estrich and Sullivan article bear surprising resemblance to the argumentation in *Dobbs* and the article is worth a 30-year retro look.

180. Estrich & Sullivan, *supra* note 179, at 121.

181. *Webster*, 492 U.S. at 504–07, 511, 521.

when *Casey* was decided in 1992, both camps of abortion advocates claimed a victory. Pro-choice advocates were elated that *Casey* had not overturned *Roe*, as parties, amici, and the U.S Solicitor General had urged.[182] The decision was therefore rightly celebrated: not only had *Roe* been upheld, but it was upheld on the basis of *stare decisis*, and by three center right members of the Court.[183]

On the other hand, *Casey* shook *Roe* to its roots. To begin, *Casey* endorsed a particular factual relationship between women and the fetus, one in which the Court had no doubt that "most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision."[184] Recall that in the first trimester of *Roe*, the Court was agnostic as to how the fetus might impact a woman's decision; indeed, the decision was between the woman and her doctor and the state itself could not intervene.[185] *Casey* concluded that in *Roe*, the Court had undervalued the importance of the state's interest in fetal life, a problem that it remedied by authorizing states to regulate abortion from the moment of conception.[186] As we shall see, *Dobbs* makes the fetus's impact dispositive, not relative; indeed, the decision is no longer the woman's to make in a state where abortion is illegal.[187]

A second and momentous change from *Roe* to *Casey* concerns the legal test that was to be used by courts to decide if a particular regulation on abortion was constitutional or not. *Casey* abolished the trimester analysis, which meant, among other things, that the state could now potentially regulate abortion from the moment of conception: The protected first trimester, which gave the state little or no interest in regulations, was gone.[188] To be sure, there had been nothing legally sacrosanct about trimesters; they served as a clunky but workable way to align constitutional doctrine within the schema of a developing pregnancy. Yet abandoning trimesters meant that some other marker for measuring the strength of the state's interest in prenatal life had to be found, for gone were the standard tiers of constitutional scrutiny used to assess governmental intrusion into other fundamental rights. In *Casey*, the Court rolled out a new test: measures that sought to "express profound respect for the life of the unborn" by persuading

182. Linda J. Wharton & Kathryn Kolbert, *Preserving* Roe v. Wade . . . *When You Win Only Half the Loaf*, 24 Stan. L. & Pol'y Rev. 143, 143–44, 148 n.32 (2013).

183. *Id.* at 143–44, 150–51; *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46, 854–69 (1992) (opinion of the Court).

184. *Casey*, 505 U.S. at 882 (opinion of O'Connor, Kennedy, & Souter, JJ.).

185. Roe v. Wade, 410 U.S. 113, 163 (1973).

186. *Casey*, 505 U.S. at 875–76 (opinion of O'Connor, Kennedy, & Souter, JJ.).

187. *See infra* Part III.

188. *Casey*, 505 U.S. at 875–78 (opinion of O'Connor, Kennedy, & Souter, JJ.).

women not to abort through a variety of state interventions were all right—were constitutional—so long as they did not create an "undue burden" on the right to choose to have an abortion before the fetus was viable.[189] To repeat: *Casey* wrought the end of the trimester analysis of *Roe*, replacing the test for the constitutionality of a contested abortion regulation with the new "undue burden test."[190]

Casey further defined "undue burden" to give the new test some substance. A regulation created an undue burden (and was therefore unconstitutional) if it "ha[d] the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[191] Consider similar state regulations decided first under *Roe* and then under *Casey*, such as disclosures to the pregnant woman about fetal appearance. In a 1986 case called *Thornburgh v. American College of Obstetricians & Gynecologists*, the Supreme Court struck down required disclosures of the likely gestational age of the fetus. Printed disclosure materials describing the fetus were also struck down on the ground that they were not medical in nature and were simply presented "[u]nder the guise of informed consent" to encourage women to think of their fetuses as infants.[192] However, in the *Casey* case, reviewing a disclosure quite similar to that in *Thornburgh*, the Supreme Court just six years later decided that the fetal appearance disclosures were perfectly fine. Stated the Court, to the extent that *Thornburgh* had found constitutional violations in such disclosures, it had gone "too far" and was overruled.[193] Indeed, the *Casey* Court upheld all the restrictions challenged in the case but one, requiring that wives generally had to notify their husbands about their intent to get an abortion.[194] The Court decided that in light of social science evidence about domestic violence, the spousal consent requirement might really place a substantial obstacle in a woman's path.[195]

But if *Casey* so dramatically *changed*—cut back on—the analysis a court was to apply from that in *Roe*, how did *Roe* and *Casey* become besties in the run-up to *Dobbs*? The two were constantly mentioned as a pair, in one breath, particularly in the discussion of *stare decisis*. The

189. *Id.* at 877.
190. *Id.* at 877–79.
191. *Id.* at 877.
192. 476 U.S. 747, 760–63 (1986). The materials included the "probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term. . . ." *Id.* at 761 (citation omitted).
193. *Casey*, 505 U.S. at 882 (opinion of O'Connor, Kennedy, & Souter, JJ.).
194. *Id*. at 893–94 (opinion of the Court).
195. *Id.* at 887–94.

answer is that even with all its revisionist treatment of *Roe*, by upholding the "central holding of *Roe*," *Casey* stood for the proposition that as with *Roe*, abortion was still legal; at least before fetal viability, it could still not be criminalized.[196] Therein lay the truly devastating risk inherent in the *Dobbs* decision for pro-life advocates: that the decision might whittle back *Roe* even further than *Casey* had done—perhaps by approving a pre-viability cutoff for abortion, at say 15 or even six weeks—without allowing states to reassign abortion generally to the realm of crime. (Indeed, this was exactly what Chief Justice Roberts would have done in his concurrence of one.[197] He would have upheld the Mississippi law generally banning abortions after 15 weeks, thereby overturning the viability requirement of *Roe*, but without reversing *Roe* itself.[198])

Yet for our purposes here, *Casey* remains extremely important. That is because it fills in even more details at the Supreme Court level of analysis of the relation between women's lives and reproductive regulation, specifically the right first laid out in *Roe* of the right to choose abortion. The facts that the Supreme Court highlights in *Casey* are not some measly dicta that can be ignored, but, rather, they are a part of the core discussion on *stare decisis*, as the Court examines the extent to which women have come to rely on the holding in *Roe.* Indeed, the Court supports the importance of reliance not merely for individual cases of relying on abortion but in a larger societal sense of behavior:

> To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.[199]

196. *Id.* at 853, 879; Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241 (2022).

197. *Dobbs*, 142 S. Ct. at 2310–17 (Roberts, C.J., concurring in the judgment). *Compare Casey*, 505 U.S. at 871 ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*.") (opinion of O'Connor, Kennedy, & Souter, JJ.), *with Dobbs*, 142 S. Ct. at 2312 (Roberts, C.J., concurring in the judgment) ("The viability line is a relic of a time when we recognized only two state interests warranting regulation of abortion: maternal health and protection of 'potential life.'").

198. *Dobbs*, 142 S. Ct. at 2313–14.

199. *Casey*, 505 U.S. at 856 (opinion of the Court).

Put simply, the ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives.[200] This differs hugely from *Dobbs*, where we shall see the Court suggests a kind of reliance by pregnant women on federal and state welfare provisions that help them get by with their unwanted pregnancies.[201] In contrast, *Casey* describes the relation between women's market participation and women's ability—their right—to control their own fertility.[202] Justice Alito has little time for sex equality as being of interest in a future analysis of an abortion right.[203] But the link between reproductive rights and human equality is not at all beside the point. It *is* the very point that leads to—if not produces—equality.

C. Whole Woman's Health v. Hellerstedt (2016)

One sees that *Casey* made it much harder to overturn an abortion regulation intended to make abortion harder to get. The case had broadened the scope of what counted as a justifiable interest of the state in protecting fetal life, or maternal health (to include a woman's mental as well as physical health, thus opening the door to such justifications as unproven concerns about suicide).[204] Thus, the last case I want to introduce before our trajectory of a reproductive right collapses is called *Whole Woman's Health v. Hellerstedt*.[205] I am particularly fond of the case because it regards women not as weak-minded ninnies who do not understand what an abortion is or what is in their own best reproductive interest. Instead, the case treats women as patients deserving of good treatment.

The case involves two provisions of Texas legislation. The first provision required all abortion providers to have their facilities operate on par with ambulatory surgical centers, so as to include a post-surgical suite, corridors wide enough to accommodate passing gurneys, and an increased nurse-to-patient ratio, among other things.[206] Such renovations and revisions were costly and would have forced some licensed clinics to close.[207] The second

200. Rosalind Pollack Petchesky, Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom 109, 133 (rev. ed. 1990).

201. *Dobbs*, 142 S. Ct. at 2258–59.

202. *Casey*, 505 U.S. at 894–97 (opinion of the Court).

203. *Dobbs*, 142 S. Ct. at 2245–46.

204. *Casey*, 505 U.S. at 883 (opinion of O'Connor, Kennedy, & Souter, JJ.).

205. 136 S. Ct. 2292 (2016).

206. *Id.* at 2300, 2314–15.

207. *Id.* at 2301–03, 2316*; see also* Alexa Ura, *State Officials Note Significant Drop in Texas Abortions*, Tex. Trib. (Mar. 17, 2016), https://www.texastribune.org/2016/03/17/number-abortions-performed-texas-continues-drop/. The ambulatory surgical center requirement was enjoined before it took effect. *Whole Woman's Health*, 136 S. Ct. at 2301–03; *see* Ura, *supra*.

provision required all abortion providers to have admitting privileges at a hospital within 30 miles of their clinic.[208] The district court determined that "as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20."[209] Among other challenges to meeting this requirement, hospitals didn't like to grant privileges to physicians unlikely to use them, and "the fact that abortions are so safe meant that providers were unlikely to have any patients to admit."[210] (It was also the case that a fair number of Texas hospitals and community members opposed both the procedure and the providers of abortion, which also impacted the ability of clinics to meet the admitting privileges requirement.)[211] The inability of clinics to meet these new regulations meant that more clinics closed and women seeking abortion had to travel substantially greater distances for medical care.[212]

Did this kind of burden—increased travel distance, time, and cost—rise to the level of an "undue burden" so that the obstacle placed on women seeking an abortion should be considered substantial and be struck down as a violation of the U.S. Constitution?[213] In his decision for the Court, Justice Breyer answered the question with a confident "Yes."[214] What was important about *Whole Woman's Health* was that Breyer interrogated the state's argument carefully. The two provisions were advertised as improving health care for pregnant women, and on face value, they may seem to do so. How can one dispute the health value of more equipment or a doctor with admitting privileges at a nearby hospital in contrast to one without? The answer was to examine how these provisions worked on the ground, and careful fact finding by the district court showed the *pretextual* nature

208. *Whole Woman's Health*, 136 S. Ct. at 2300, 2310.

209. *Id.* at 2312*; see also* Ura, *supra* note 207.

210. *Whole Woman's Health*, 136 S. Ct. at 2312.

211. *See id.* (citing amicus brief by Planned Parenthood Federation of America et al. "noting that abortion facilities in Waco, San Angelo, and Midland no longer operate because Planned Parenthood is 'unable to find local physicians in those communities with privileges who are willing to provide abortions due to the size of those communities and the hostility that abortion providers face'") (quoting Brief of *Amici Curiae* Planned Parenthood Fed. of Am. et al. at 14, *Whole Woman's Health* (No. 15-274)); *cf. id*. (noting that a clinic doctor "who estimates that he has delivered over 15,000 babies in his 38 years in practice was unable to get admitting privileges at any of the seven hospitals within 30 miles of his clinic").

212. *Whole Woman's Health*, 136 S. Ct. at 2313.

213. *See* Madeline M. Gomez, *More Than Mileage: The Preconditions of Travel and the Real Burdens of H.B.2*, 33 COLUM. J. GENDER & L. 49 (2016); Madeline M. Gomez, Note, *InterSections at the Border: Immigration Enforcement, Reproductive Oppression, and the Policing of Latina Bodies in the Rio Grande Valley*, 30 COLUM. J. GENDER & L. 84 (2015).

214. *Whole Woman's Health*, 136 S. Ct. at 2300.

of the law.[215] The actual impact of the provisions was to cause clinics to be shuttered since they could not comply.[216] But compliance would not have improved health care for abortion patients. That is because abortion is such a simple procedure that it does not require the high-tech machinery of an ambulatory surgical center.[217] Nor does a doctor need privileges to a local hospital to treat a patient in distress. That is because *any* patient can seek emergency room care even without special privileges for their physician.[218] In short, as the opinion made clear:

> [I]n the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered.[219]

What is so encouraging about this excerpt is that it treats pregnant women as deserving of high-quality health care and shows that the supposed advantages of the Texas law were but sleights of hand—that they sounded medically advanced but in fact were not. It is that aspect of integrity in examining the facts of the case that made *Casey* less threatening for future cases. The Supreme Court was insisting that *Casey* was not a rubber stamp but required that rules be measured against their own claims of achievement, and should they fail in that regard, the rules would not be waived through for courtesy's sake.[220]

Of course, the victory of *Whole Woman's Health* was short-lived, soon to be wiped away with the decision in *Dobbs*. But without getting too romantic about *Whole Woman's Health*, it was at least a decision where the Supreme Court took reproducing women seriously and insisted that with

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215. Michael Dorf, *The Wages of Guerrilla Warfare Against Abortion*, SCOTUSBLOG (June 27, 2016), https://www.scotusblog.com/2016/06/symposium-the-wages-of- guerrilla-warfare-against-abortion/.

216. *See* Ura, *supra* note 207.

217. As Justice Breyer notes, "Requiring scrub facilities; maintaining a one-way traffic pattern through the facility; having ceiling, wall, and floor finishes; separating soiled utility and sterilization rooms; and regulating air pressure, filtration, and humidity control can help reduce infection where doctors conduct procedures that penetrate the skin. App. 304. But abortions typically involve either the administration of medicines or procedures performed through the natural opening of the birth canal, which is itself not sterile." *Whole Woman's Health*, 136 S. Ct. at 2315–16.

218. *Id.* at 2311.

219. *Id.* at 2318.

220. *Id.* at 2309 ("The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.").

sufficient reliable proof as to the actual effect of anti-abortion legislation, such legislation could and would be struck down. *Casey* was no longer a master stamp. The value of *Whole Woman's Health* was rather short-lived, receiving the final kibosh from *Dobbs*. And while not quite a "Camelot moment,"[221] I do remember that June 27, 2016, was a splendid day.

III. The *Dobbs* Era: 2022–[Unknown]

And so we arrive at last at *Dobbs v. Jackson Women's Health Organization.* Having sketched the rise of the abortion right, it is time now to consider its fall. Mississippi was one of the many states vying for the honor of toppling *Roe*; legislatures competing for the prize sought it by enacting legislation that was clearly—defiantly—unconstitutional.[222] Of the many options—restrictions on types of abortion procedures, legislatively disfavored reasons for an abortion, and so on, unconstitutional pre-viability bans won the day. *Roe*, as affirmed by *Casey*, had set the chronological marker for banning abortion at viability, now medically considered at around 24 weeks,[223] approximating the time when a fetus can survive outside the womb, even with assistance.[224] The pro-life strategy was that when a pre-viability (or other) unconstitutional enactment came under review by the right Supreme Court—one with a clear conservative majority—the Court would nod at whatever legislation was on appeal before it, but would also do the real and serious work of reassessing *Roe* and *Casey*, and overrule them both.[225]

The strategy required patience regarding waiting out the Court's changing composition. During the first two years of the Trump administration, Justice Gorsuch was appointed to replace Justice Scalia, who had died nine months before the 2016 election; and Justice Kavanaugh replaced Justice Kennedy, who retired. But it took the death of Justice Ginsburg in September 2020

221. "Don't let it be forgot/ that once there was a spot/ for one brief shining moment/ that was known as Camelot." Alan Jay Lerner, *Camelot Reprise*, *in* Camelot (1960).

222. Zernike, *supra* note 16; Kate Zernike, *How Did Roe Fall?*, N.Y. Times (June 25, 2022), https://www.nytimes.com/interactive/2022/06/25/us/how-roe-ended.html.

223. Sumesh Thomas & Elizabeth Asztalos*, Gestation-Based Viability—Difficult Decisions with Far-Reaching Consequences*, 8 Children 593 (2021), https://doi.org/10.3390/children8070593 ("In the 1960s, delivery before 28 weeks completed gestation was considered 'previable'; however, by the 1990s, about 50% of babies born at 24 weeks survived with neonatal intensive care. Over the last two decades, further improvements in survival and functional outcomes of babies born at 24 weeks gestation has led to parents and care providers to offer active interventions for babies born at 23 and 22 weeks of gestational maturity.").

224. At the time of the *Roe* decision, viability was generally put at 28 weeks. Roe v. Wade, 410 U.S. 113, 160 (1973).

225. Zernike, *How Did Roe Fall?*, *supra* note 222.

to provide the tipping seat.[226] In a trice, President Trump nominated Judge Amy Coney Barrett, who, following a Rose Garden announcement, scooted through her Senate confirmation hearing and was sworn in on October 26, 2020.[227] Even with a discount for Chief Justice Roberts, an unreliable vote, a fixed majority of 5–3 was assured, with only Breyer, Sotomayor, and Kagan left to hold up their side.

With the newly composed Court coming into view, state legislators enjoyed newfound confidence in their strategy of the last few years and began enacting unconstitutional legislation by the ream. Perhaps the simplest were pre-viability bans—including the Mississippi ban on abortions after 15 weeks that was challenged in *Dobbs*.[228] (It is worth remembering that while the legal challenges were wending their way through state and federal courts, statutes that were not enjoined continued to reduce the number of abortions performed in any particular state.[229] This was always part of the goal of having an abortion-free country: not just legally but in fact.)

With Mississippi having won the race to the Court, I want now to approach the opinion in *Dobbs* from two intertwining perspectives. The first is the legal holding and rationale. The second is the Court's use of facts in its discussion of reliance on *Roe* as a possible ground for sustaining *Roe* and *Casey* under the doctrine of *stare decisis*. The argument I lay out is that there is a disturbing dissonance between the Supreme Court's use of social facts and its holding in *Dobbs*. Justice Alito's description of women and their use of law, particularly, does not easily map onto actual data about pregnant women today. Thus, the decision that brings the downfall of *Roe*—with a solid warning shot over the bow of contraception—aligns more with moral or religious or even fanciful beliefs about how women's

226. *See Current Members*, *supra* note 20; *Justices 1789 to Present*, SUPREME CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx.

227. *Oath Ceremony: The Honorable Amy Coney Barrett*, SUPREME CT. OF THE U.S., https://www.supremecourt.gov/publicinfo/press/oath/oath_barrett.aspx (last visited Oct. 23, 2022).

228. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (noting that Mississippi's statute "generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as 'viable' outside the womb"); *see State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (as of Aug. 17, 2022), https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions. Bans were also enacted on specific abortion procedures. *Bans on Specific Abortion Methods Used After the First Trimester*, GUTTMACHER INST. (Aug. 1, 2022), https://www.guttmacher.org/state-policy/explore/bans-specific-abortion-methods-used-after-first-trimester.

229. *See* Isaac Maddow-Zimet & Kathryn Kost, *Even Before* Roe *Was Overturned, Nearly One in 10 People Traveled Across State Lines for Care*, GUTTMACHER INST. (July 21, 2022), https://www.guttmacher.org/article/2022/07/even-roe-was-overturned-nearly-one-10-people-obtaining-abortion-traveled-across.

reproductive behavior and life choices ought to be rather than how they are in the real world of American life.

To take the law first, Justice Alito began by assuring readers that there was no judicial wiggle room in this case to consider the other side.[230] He and four other conservative judges could not have ruled otherwise; their hands were tied: "*Roe* and *Casey* must be overruled. . . ."[231] (Note that Chief Justice Roberts's concurrence in the judgment belies Alito's imperative; Roberts would have upheld Mississippi's 15-week ban and would *not* have overruled the two fundamental cases.)[232] Alito gave two reasons for his absolutism. First, *Roe* was "egregiously wrong."[233] Second, *Casey* "does not compel unending adherence" to *Roe*,[234] never mind that such adherence, also known in law as "following precedent," is generally thought to be a good thing, an inherent aspect of the rule of law.

Justice Alito's egregiousness point focuses on the fact that the word "privacy," from which the abortion right is derived, is not itself in the text of the Constitution.[235] Alito quotes Professor John Hart Ely's early criticism of *Roe* that the decision "[wasn't] constitutional law and g[ave] almost no sense of an obligation to try to be."[236] This lack does not distress these jurists, scholars, and advocates well satisfied that while the word "privacy" may be absent, the *principle* of privacy is found throughout the Constitution in an array of explicit protections, set out in both *Griswold* and *Roe* as including the First, Fourth, Fifth, Ninth, and 14th Amendments.[237] Of course, abolishing a right to privacy as the means of overturning *Roe* sets the stage for the dispiriting doctrinal work *Dobbs* has already been teed up to do in the post-*Roe* world with regard to any doctrine or right based in the now-vanquished right to privacy. Despite Justice Alito's assurance that *Dobbs* has no application beyond abortion,[238] Justice Thomas already announced in his *Dobbs* concurrence that "we should reconsider all of this Court's substantive due process [privacy] precedents. . . ."[239]

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230. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022).

231. *Id.*

232. *Id.* at 2314 (Roberts, C.J., concurring in the judgment); *see supra* note 197 & accompanying text.

233. *Dobbs*, 142 S. Ct. at 2265 (majority op.).

234. *Id.* at 2243.

235. *Id.* at 2245.

236. *Id.* at 2270.

237. Consider Ronald Dworkin on principles: Ronald Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 14 (1967).

238. *Dobbs*, 142 S. Ct. at 2258.

239. *Id.* at 2301 (Thomas, J., concurring).

The absence of specific words in the Constitution does much to sustain Justice Alito's conviction that *Roe* is rotten and ill-fated. Indeed, the justice goes beyond the standard criticism that the word "privacy" is missing to highlight that the word "abortion" has also gone AWOL.[240] But *of course* the word "abortion" is missing from our founding document. The Constitution is not an index listing every human activity that a state might address. Many topics or categories go unmentioned, but this has not deterred the Court from adjudicating where such things or activities—television, vaccinations, political parties, or vasectomies—fit into our constitutional order and the protection of rights.

But importantly for the analysis here, there is another word that is not in the Constitution, and it is "women" (not even in the 19th Amendment).[241] I argue here that "women" are also missing from the decision in *Dobbs* and that where they might appear, we get instead a fanciful account by Justice Alito of how the legal system protects the subcategory of unhappily pregnant women. The argument is introduced in a section explaining the pro-choice argument. It is that "[w]ithout the availability of [legal] abortion . . . people will be inhibited from exercising their freedom to choose the types of relationships they desire, and women will be unable to compete with men in the workplace and in other endeavors."[242] To this, Justice Alito responds with a legalistic form of Balderdash! He notes that pro-life Americans ("Americans who believe that abortion should be restricted") have observed a drastic change in attitudes to the pregnancies of unmarried women.[243] Consider that pregnancy discrimination is now banned by federal law;[244] that pregnancy leave is now guaranteed in many circumstances;[245] that medical care is covered by insurance (for some);[246] and that "safe haven" laws provide unwed mothers with a wholesome place to drop off

240. *Id*. at 2245.

241. *See* U.S. Const. amend. XIX. As the *Dobbs* dissenting justices wrote, "'[P]eople' did not ratify the Fourteenth Amendment. Men did." *Dobbs*, 142 S. Ct. at 2324 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

242. *Dobbs*, 142 S. Ct. at 2258.

243. *Id.*

244. *Id.*

245. *Id.* at 2258–59. *But see* Kristin M. Malone, Note, *Using Financial Incentives to Achieve the Normative Goals of the FMLA*, 90 Tex. L. Rev. 1307, 1308 (2012) ("Of primary significance, women still take [Family and Medical Leave Act] caretaking leave much more frequently than men do, and as a result, women continue to face stereotypes that hinder their professional advancement and keep men in superior and more stable positions in the workforce. The FMLA may in some cases even function to entrench these differences by recreating and validating social and market incentives for women to shoulder the burden of family responsibilities.").

246. *Dobbs*, 142 S. Ct. at 2259.

their newborns.[247] Indeed, the justice reminds us that there are plenty of couples who want to adopt newborn babies today.[248] This paints a picture of a sort of *Mister Rogers' Neighborhood*, or Justice Alito's, for unwed mothers where there isn't much to worry about during pregnancy or after, for that matter, and where everyone just wants to be your friend, especially the state and federal governments.

While this picture focuses primarily on economic security for pregnant women and new mothers, Justice Alito's citations lead us to the appropriate statutes but are not an accurate picture of economic life for these overstressed women and girls. Seventy-five percent of U.S. abortion patients are poor or of low income.[249] Restrictions on public and private insurance coverage for abortion services at both the federal and state levels prevent many from obtaining the coverage they need.[250] While the United States in general ranks poorly on standard measures related to maternal support and child outcomes, a state-by-state post-*Dobbs* survey shows that in the states most likely to ban abortion, the rates of uninsured women and maternal deaths are among the highest in the country and that no state with a ban has guaranteed paid maternity leave.[251] The researchers had posed the question, "What it's like to have a baby in the states that will ban abortion?" The empirical answers suggest "Not good," "Not easy", "Not *Dobbs*ian."

And finally, here are a few words on the introduction of Safe Haven laws in *Dobbs* as a panacea for a woman who might choose to abort rather than gestate, deliver, and give up her baby.[252] The issue of Safe Havens—a crisis form of adoption where in order to resist the impulse of smothering or disposing a newborn in a dumpster, the just-delivered mother is urged to bring the infant to a fire station or other officially designated location—first emerged in the oral argument in *Dobbs*. Justice Barrett asked the attorney for Jackson Women's Health whether, "insofar as you . . . focus on the ways in which forced parenting, forced motherhood, would hinder women's access

247. *Id.*

248. *Id.*

249. Jenna Jerman et al., Guttmacher Inst., Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008, at 7 (May 2016), https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf.

250. Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, 19 Guttmacher Pol'y Rev. 46 (2016), https://www.guttmacher.org/sites/default/files/article_files/gpr1904616_0.pdf.

251. Amy Joyce & Lauren Tierney, *What It's Like to Have a Baby in the States That Will Ban Abortion*, Wash. Post (May 6, 2022; updated July 1, 2022, 5:22 PM EDT), https://www.washingtonpost.com/parenting/2022/05/06/support-in-states-banning-abortion/.

252. *See* Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 Colum. L. Rev. 753 (2006).

to the workplace and to equal opportunities . . . [w]hy don't the safe haven laws take care of that problem?"[253] The thrust of the justice's question is this: If the mother can avoid the obligations of childrearing by legally disposing of the infant anonymously and with impunity, then abortion should not be necessary to avoid "forced motherhood."[254] But in fact, the Safe Haven procedure is filled with uncertainty for mother and babe especially when compared with the orderly and regulated process of adoption to which some pregnant women turn. In contrast, women may choose the Safe Haven option after they have gone into labor.[255] Throughout her pregnancy, the woman has forgone prenatal care because she didn't want anyone to know she was pregnant.[256] She delivers the baby by herself in whatever circumstances

253. Justice Barrett's question in full was:

So Petitioner points out that in all 50 states, you can terminate parental rights by relinquishing a child after [birth], and I think the shortest period might have been 48 hours if I'm remembering the data correctly.

So it seems to me, seen in that light, both *Roe* and *Casey* emphasize the burdens of parenting, and insofar as you and many of your amici focus on the ways in which forced parenting, forced motherhood, would hinder women's access to the workplace and to equal opportunities, it's also focused on the consequences of parenting and the obligations of motherhood that flow from pregnancy.

Why don't the safe haven laws take care of that problem?

Transcript of Oral Argument at 56, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392); *see also* Tayler Simone Mitchell, *Justice Amy Coney Barrett Questions Whether Adoption Laws Could Eliminate the "Burden" of Parenthood for Abortion Seekers*, Insider (Dec. 6, 2021), https://www.businessinsider.com/amy-coney-barrett-asks-safe-haven-laws-solutions-unwanted-motherhood-2021-12 (explaining Barrett's question).

254. Under the "safe haven option," the woman's obligation is arguably limited to gestation and labor and delivery. In response, the lawyer for Jackson Women's Health explained that pregnancy itself carries its own risks and burdens outside of parenting, a consideration that was available to the Court at the time of *Roe* and *Casey* (even though Safe Haven laws may not have existed when *Casey* was decided). Transcript of Oral Argument, *supra* note 253, at 57–58. See also Solicitor General Elizabeth Prelogar's response to similar questions from Justice Barrett:

I think where the analysis goes wrong in reliance on those safe haven laws is overlooking the consequences of forcing a woman upon her the choice of having to decide whether to give a child up for adoption. That itself is its own monumental decision for her.

And so I think that there's nothing new about the safe haven laws, the—or—or at least nothing new about the availability of adoption as an alternative. *Roe* and *Casey* already took account of that fact. And I think that there are certainly, of course, all of the—the bodily integrity interests that we've referred to, but, also, the autonomy interests retain in force as well. . . .

And I think, for many women, that is an incredibly difficult choice, but it's one that this Court for 50 years has recognized must be left up to them based on their beliefs and their conscience and their determination about what is best for the course of their lives.

Id. at 109–10 (internal question omitted).

255. *See* Sanger, *supra* note 252, at 800.

256. *See id.* at 789–90; Laury Oaks, Giving up Baby: Safe Haven Laws, Motherhood, and Reproductive Justice 120 (2015).

provide her with privacy, often without hygiene or assistance.[257] (Unassisted labor is one factor in maternal mortality or injury.)[258] Police sometimes track down the surrendering mother, thus violating the statute's pledge of anonymity.[259] In most cases, no information is taken about the parents' medical history, so the child or its adopted family has no information on the child's medical history or ethnicity or the identity of the parents.[260] Indeed, because the infant is supposed to be turned in secretly, there is also no way to show that it was even the mother herself who brought the baby in, thus casting doubt on the voluntariness of the surrender. The opinion in *Dobbs* takes no account of these serious factors so key to a proper adoption. As we can imagine, it may well be hard to decide what to do when one is unhappily pregnant. But the removal of lawful abortion as one of the options is a troubling, indeed tragic loss.

During the 50 years since *Roe*, and particularly after *Casey* became part of the canon, abortion has become harder to get—harder physically, financially, legally, and perhaps emotionally—in many states. Nonetheless, its basic legality and therefore its safety were secure everywhere. That is now otherwise. Pregnant girls and women in "illegal" states who determine that terminating their pregnancy is the best course for them at this moment will now follow in the steps of their post-war grandmothers and others who sought abortions before 1973. Women with "contacts" and resources will be able to obtain abortions from licensed doctors in the United States who perform them surreptitiously, some as a matter of conscience and some for pay or profit.[261] Assuming there are no applicable exceptions in their otherwise "illegal" state, still other women will have to travel, plan, and borrow to arrange for an abortion in a "safe" state, perhaps risking arrest upon return to their home state, although state law hasn't quite worked out the problem of extraterritoriality yet.[262] Still other pregnant women, unable

257. *See* Oaks, *supra* note 256, at 120; Sanger, *supra* note 252, at 795.

258. *Maternal Mortality*, World Health Org. (Sept. 19, 2019), https://www.who.int/news-room/fact-sheets/detail/maternal-mortality.

259. *See* Oaks, *supra* note 256, at 137–38, 140; Annette Baran, Evan B. Donaldson Adoption Inst., Unintended Consequences: "Safe Haven" Laws Are Causing Problems, Not Solving Them (2003).

260. *See* Sanger, *supra* note 252, at 771; Oaks, *supra* note 256, at 23, 25.

261. *Compare* Carole E. Joffe, Doctors of Conscience: The Struggle to Provide Abortion Before and After *Roe v. Wade* (1995), *with* Leslie Reagan, When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867–1973 (1997).

262. While Justice Kavanaugh wrote in his concurrence that a state could not "bar a resident of that State from traveling to another State to obtain an abortion" because of "the constitutional right to interstate travel," the majority did not address this issue. *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).

or unwilling to arrange an abortion, will continue their pregnancies, deliver their babies, and keep them or place the infant for adoption, hopefully in the latter case having organized this option ahead of time with a licensed adoption service in order to receive the benefits of prenatal care for their baby and increased agency over their decision for themselves.

Finally, to get the full picture of the constitutional scheme *Dobbs* leaves in place, we must return to the matter of what test is to be used by courts to decide the constitutionality of abortion regulations in states where abortion remains legal but is heavily regulated, as was the case in many states under *Roe*. Let us say that a state enacts a three-week chronological time limit from the moment of conception during which abortion can be performed. Assume now that a pregnant woman challenges that regulation because three weeks doesn't give a woman enough time to know if she even is pregnant. Under the now-defunct *Casey* undue burden test, one can see the argument that three weeks might indeed place a substantial obstacle in a woman's path to obtain an abortion. But *Casey*, and with it the undue burden test, is now defunct courtesy of *Dobbs*.

What to do? Have we come full circle? Certainly not, for as Justice Alito states, procuring an abortion is no longer "a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history."[263] Therefore, the rational relationship test applies, not strict scrutiny. This means that the challenged regulation "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."[264] Because these "legitimate interests include respect for and preservation of prenatal life at all stages of development,"[265] a three-week chronological ban would seem within constitutional bounds. Thus, while there is a test to apply, its application has been neatly jiggered so that it is hard to think of a regulation that falls outside a legislator's notion of a reasonable state interest.

While we cannot now know the numbers of babies that will be born in consequence of *Dobbs*, it seems likely that as abortion becomes criminalized in many or most circumstances in, say, half the American states,[266] more women will keep and raise their children themselves. Is it possible to know how these women and girls will think about their decisions? Some may be unable to negotiate or to afford the process of obtaining an out-of-state

263. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2283 (2022).

264. *Id.* at 2284.

265. *Id.*

266. *See Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (updated Dec. 12, 2022), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html.

abortion.[267] Others may be able to obtain the oral abortion pill through the U.S. mails.[268] Such "self-managed abortions" may distance unhappily pregnant women today from their sisters of 50 years ago who faced more isolated and often dangerous paths to a safe abortion, what one historian called "lonely, tragic, but . . . necessary pilgrimages."[269]

There are, however, some data—a few voices—from the *Roe* period. For this information, we can turn to an important 2020 study of two categories of women who sought abortions during the *Roe* years: The first were those who missed the chronological cutoff under their states' regulatory schemes and were "turned away" from abortion clinics; the second, those during that same period who fell within the legal chronological guidelines and received the legal abortions they sought.[270] Over the course of three years, from 2008 to 2010, Turnaway Study researchers recruited over 1,000 pregnant women from 30 abortion clinics in 21 states.[271] The Turnaway Study gives us some sense of how women and their infants fare and how women feel when they are unable to get the abortion they seek, thus proceeding into their futures as mothers.

The study found that "[f]or every outcome we analyzed, women who received an abortion were either the same or, more frequently, better off than women who were denied an abortion."[272] Their financial and employment situations were better, as well as their physical health.[273] They had more aspirations and a greater chance of subsequently "having a wanted pregnancy and being in a good romantic relationship. . . ."[274] Moreover, their existing children were better off, too.[275] In contrast, women who carried an unwanted pregnancy to term were more often hurt in a number of ways when compared

267. The Ezra Klein Show, *We're on the Precipice of a Post-*Roe *World*, N.Y. Times (Sept. 21, 2021) (interview with Leslie Reagan) ("The people who will be most hurt are the ones who don't have much information, don't have access to it, don't have money, and we will see struggles to raise the money to go out of state or go to Mexico.").

268. Pam Belluck, *F.D.A Will Permanently Allow Abortion Pills by Mail*, N.Y. Times (Dec. 16, 2021), https://www.nytimes.com/2021/12/16/health/abortion-pills-fda.html.

269. Beth Palmer, *Lonely, Tragic, but Legally Necessary Pilgrimages: Transnational Abortion Travel in the 1970s*, 92 Canadian Hist. Rev. 638 (2011) (discussing travel from Canada to the United States).

270. Diana Greene Foster, The Turnaway Study: Ten Years, a Thousand Women, and the Consequences of Having—or Being Denied—an Abortion (2020).

271. *Id.* at 16. "At each site, for every woman denied the abortion, [the Study] recruited two women who received an abortion just under the gestational limit and one who received an abortion in the first trimester." *Id.*

272. *Id.* at 21.

273. *Id.*

274. *Id.*

275. *Id.*

with the "women who received their wanted abortions"[276]: larger physical health risks, complications from delivery, increased anxiety, and economic hardship.

In time, of course, more economists, sociologists, and child development specialists will be armed with more data as more pregnant women will be "turned away" in likely response to shorter periods of legal abortions in states that so choose to enact them. We will then have access to the "empirical question" that Justice Alito emphatically told us was so particularly hard for judges to assess: that is, "the effect of the abortion right on society and in particular on the lives of women."[277]

At present, researchers have recorded sustained narratives from women who fell in both categories: those who turned down motherhood, at least for the present, and terminated their pregnancies, and those whose unwanted pregnancies continued to term as the law required. One finding was that all of these women seem keenly aware of the effect or absence of legal abortion on their lives. Turnaway Study Director Diana Greene Foster put it this way: "The Turnaway Study brings powerful evidence about the ability of women to foresee consequences and make decisions that are best for their lives and families."[278] In contrast, Justice Alito badly underestimates—or perhaps is simply not interested in—women's abilities to assess the meaning of motherhood for their lives and for their families. But that is only part of the explanation.

To honor the difficulties and the fortitude of those who will now live and reproduce under *Dobbs* rules, I would like to end this article by presenting a December 2021 article called "The Abortion I Didn't Have," by author Merritt Tierce.[279] Tierce presents a viewpoint rarely floated in discussions of abortion: the impact on the life of someone who chose not to abort an unwanted pregnancy, even though it was legal at the time to do so. Those circumstances make the story richer since she had the law on her side and yet chose against it. Tierce is a writer, scriptwriter, novelist, and mother of two.[280] Twenty years ago, Tierce, who was devoutly religious, had just graduated from a Christian liberal arts college in Texas, was heading to Yale Divinity School for a Master's degree in religion and literature, and was

276. *Id.* at 21–22.

277. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277 (2022) ("That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women.").

278. FOSTER, *supra* note 270, at 22.

279. Tierce, *supra* note 119.

280. *Id.*

unexpectedly pregnant.[281] Under great pressure from her parents (abortion was not discussed), she married her nice boyfriend, knowing that

> I knew so clearly this wasn't how I should feel on my wedding day. I felt as if I were carrying my son . . . for everyone else. . . . I did not feel the attachment a person can feel with a longed-for, wanted pregnancy . . . and I felt an unbearable load of guilt for being the mother my son had to have. He didn't get to choose, either.[282]

Yale, the master's degree, and eventually the marriage went out the window. And that wasn't quite all:

> I didn't abort the pregnancy I didn't plan, but I did have to abort the life I imagined for myself. It cost me a lot, to carry an unintended pregnancy to term, to have the baby, to live the different life. All I've been able to do is try to make sure I paid more of the cost than my son did, but he deserved better than that.[283]

"[W]hat I want to say," Tierce writes, "is, 'Yes, I do love [my son] so much that I wish he could have been born to someone who was ready and excited to be a mother.'"[284] Also: "I would never give my son back, for anything, but I would certainly give him a different mother."[285] She wasn't ready for motherhood, accepted it nonetheless, and both she and her son paid a price. According to Tierce, his was not having a mother who could have cared for him as fully as she might have had she wanted a child at that time. As Tierce says, he deserved better; he was innocent in the whole arrangement.[286]

These are feelings we almost never hear about, perhaps because women and girls are trained to identify good motherhood from around age five and dreading your baby isn't part of it. Of course, neither is aborting it, or so it might seem, but this is in fact the short view. Studies across time consistently

281. *Id.*; *see supra* note 119 and accompanying text. Tierce wrote: "[N]o, I don't know why I was able to have premarital sex, though I believed it was wrong, and yet I couldn't believe abortion was wrong and do it anyway; such are the vagaries of human action." *Id.*

282. *Id.*

283. *Id.*

284. *Id.* (emphasis omitted).

285. *Id.*

286. *Id.* ("The sadness was not only for me or only for my baby. The sadness was exactly for both of us. I didn't want to be sad about being pregnant, and I didn't want him to be growing inside a sad person, because it wasn't his fault.").

show that one of the main reasons women choose abortion is so they can be a better mother to the children they already have.[287] Many want to be the kind of mother who could "Give my child, like, everything in the world."[288] Fifty-nine percent of women who abort are mothers already.[289] They do know what is at stake for them. And that is the choice that *Dobbs v. Jackson Women's Health Organization* denies and that Merritt Tierce insists upon.

Conclusion

We have come a long way from *Buck v. Bell* and *Skinner v Oklahoma*, the 20th century cases that first addressed whether women and men of reproductive age were protected from the power of the state to deny them the right to act upon their "begetting" preferences. Only in *Skinner* did the Supreme Court include procreation within the bundle of rights that are part of a person's marital status. By 1972, that particular right had been extended to unmarried persons in the case of *Eisenstadt v. Baird*.[290] The right to beget, so called, had come to include the right *not* to reproduce through such practices as contraception and abortion, subject to restrictions on timing: Women could choose abortion only prior to fetal viability. Following the summer 2022 decision in *Dobbs v. Jackson Women's Health Organization*, the states may reclaim authority over women's reproductive agency by banning abortion at any time following conception, without even the safety net of the historically popular exceptions of rape, incest, and fetal anomaly.

This article is written around "a" reproductive right—the singular right of abortion. Yet there is enough in Justice Alito's decision, Justice Thomas's concurrence, and the dismayed dissents to alert us as lawyers, as citizens, and as women to the possibility of extending the *Dobbs* rationale to "reproductive practices" in the plural. The proponents of *Dobbs* already know their next move. Some forms of contraception and in vitro technologies seem ripe for the chopping.

I'm 74 years old and have a hard time envisioning the next trajectory count-down to whatever case will overrule *Dobbs*. But envision we must.

287. Rachel K. Jones et al., *"I Would Want to Give My Child, Like, Everything in the World": How Issues of Motherhood Influence Women Who Have Abortions*, 29 J. FAM. ISSUES 79 (2007).

288. *Id.*

289. JERMAN ET AL., *supra* note 249, at 7.

290. 405 U.S. 438, 453 (1972).

Same-Sex Family Recognition and Anti-Discrimination Law: A Free Speech Battleground

ARTHUR S. LEONARD*

Introduction

In *303 Creative LLC v. Elenis*,[1] the Supreme Court is considering for a third time since its 2015 marriage equality decision, *Obergefell v. Hodges*,[2] whether state or local jurisdictions can prohibit private agencies or businesses from refusing to provide services to same-sex couples who are married or intend to marry.[3] In this case, the Court will consider free speech claims asserted by 303 Creative LLC and its owner, Lorie Smith, a Colorado website designer who does not want to design and execute websites for same-sex couples planning to marry.[4]

In the first such case, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[5] the Court evaded the substantive issue by deciding the case on narrower grounds. A baker who styled himself a "cake artist" claimed both religious free exercise and free speech bases for declining to produce a custom-designed wedding cake for a same-sex couple.[6] The Colorado Civil Rights Commission and the state's court of appeals rejected his First

* Arthur S. Leonard is the Robert F. Wagner Professor of Labor and Employment Law, Emeritus, at New York Law School, and editor-in-chief of LGBT Law Notes, a monthly newsletter published by the LGBT Law Association Foundation of Greater New York.

1. 6 F.4th 1160 (10th Cir. 2022), *cert. granted in part*, 142 S. Ct. 1106 (2022) (No. 21-476).
2. 576 U.S. 644 (2015).
3. 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022) (No. 21-476).
4. *303 Creative*, 6 F.4th at 1169–70.
5. 138 S. Ct. 1719 (2018).
6. Brief for Petitioners at 5, 14–16, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16-111).

Amendment defenses.[7] The Supreme Court determined that the Colorado Civil Rights Commission had evinced hostility to the wedding vendor's religion, thus tainting the administrative process, and therefore ruled in the baker's favor on Free Exercise grounds.[8]

In the second case, *Fulton v. City of Philadelphia*,[9] the Court determined that a Catholic foster care agency that lost a municipal contract because it would not certify same-sex married couples as foster parents was not a place of public accommodation, and thus was not subject to the municipal respondent's anti-discrimination ordinance.[10] The Court also held that because an anti-discrimination provision in the contract between the municipal respondent and the Catholic agency allowed for exceptions at the discretion of the respondent's child welfare commissioner, the provision did not qualify as a rule of "general applicability."[11] Thus, strict scrutiny would be applied to the respondent's insistence that the Catholic agency provide its foster care vetting services to married same-sex couples.[12]

This "general applicability" test was derived from *Employment Division, Department of Human Resources of Oregon v. Smith*,[13] where the Court held that religiously neutral laws of general application whose enforcement incidentally burden an individual's free exercise of religion are not subject to strict scrutiny and therefore may be sustained if they rationally support a legitimate government interest.[14] A government policy that burdens free exercise of religion and does not fall within the "general application" category will consequently be subjected to strict scrutiny, requiring the government to prove, among other things, a compelling interest in applying its rule.[15] The Court in *Fulton* found that the respondent failed to show that its policy was necessary to serve a compelling interest, and noted that there were many other foster care service providers in the relevant metropolitan area that had no religious objections to serving same-sex couples.[16]

In *303 Creative*, the Court revisits the same state statute that applied in *Masterpiece Cakeshop*—Colorado's ban on discrimination in public accommodations because of sexual orientation.[17] This time the Court is

7. *Masterpiece Cakeshop*, 138 S. Ct. at 1726–27.
8. *Id*. at 1729–32.
9. 141 S. Ct. 1868 (2021).
10. *Id*. at 1881.
11. *Id*. at 1877–79.
12. *Id*. at 1881.
13. 494 U.S. 872 (1990).
14. *Id.* at 885.
15. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).
16. *Fulton*, 141 S. Ct. at 1875, 1881–82.
17. Colo. Rev. Stat. § 24-34-601(1), (2)(a).

focusing on freedom of speech rather than free exercise of religion as the claimed First Amendment basis for an exception to the general rule established by *Obergefell* that for legal purposes, same-sex marriages are entitled to the same treatment as different-sex marriages.[18]

The Court's decision in *Obergefell* answered the straightforward question of whether states were obligated to allow same-sex couples the same right to marry that was provided to different-sex couples but did not address how those same-sex married couples would be dealt with by nongovernmental actors. In his opinion for the Court, Justice Anthony M. Kennedy evaded the question, writing:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate.[19]

The opinion did not address whether opponents of same-sex marriage would be able to claim exemption from compliance with statutory prohibitions of discrimination in public accommodations based on sexual orientation as part of their advocacy, as a matter of either free exercise or freedom of speech.[20]

The question appears to be intensified when the goods or services at issue involve sufficient expressive quality to potentially fall within the ambit of free speech claims and not just claims based on religious beliefs. If one recognizes an expressive component in virtually any goods or

18. Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015). The Court made clear in *Obergefell* and its subsequent decision in *Pavan v. Smith* that "the Constitution entitles same-sex couples to civil marriage 'on the same terms and conditions as opposite-sex couples.'" Pavan v. Smith, 137 S. Ct. 2075, 2076 (2017) (per curiam) (quoting *Obergefell*, 576 U.S. at 676.). In *Pavan*, this equal treatment extended to a state's rules for naming parents on birth certificates, overriding the state's refusal to list the same-sex spouse of a birth mother as a parent. *Pavan*, 137 S. Ct. at 2077.

19. *Obergefell*, 576 U.S. at 679–80.

20. *Id.*

services customarily identified with marital rites, such as creating the text of printed wedding invitations,[21] custom-designed wedding cakes,[22] festive floral arrangements,[23] or photographs or videos documenting a wedding ceremony and its participants,[24] then free speech might theoretically always be implicated. When the government requires a wedding vendor to provide the same services for same-sex couples that it does for different-sex couples, the vendor might argue that requiring her to provide the goods or services would be a form of compelled speech in support, approval, or endorsement of the same-sex couple's marriage (or, more broadly, the concept of legal same-sex marriages), and the Free Exercise Clause would not need to be invoked as a defense.[25] *Employment Division v. Smith*, which concerns free exercise and not free speech claims, would not be an impediment to the plaintiff's constitutional free speech claim.[26]

This article will first discuss the development of the *303 Creative* case and the First Amendment Freedom of Religion and Speech arguments. Part II analyzes prior wedding vendor precedents starting with *Elane Photography LLC v. Willock*[27] in 2014 and ending in 2022 with *Klein v. Oregon Bureau of Labor & Industries*.[28] Part III examines the pending Supreme Court arguments and implications for anti-discrimination law. Finally, the conclusion explains why the Colorado Civil Rights Commission should prevail in *303 Creative*.

I. The Proceedings Below

Lorie Smith, the proprietor of 303 Creative LLC, made a double-barreled religion and speech argument in her claim against the Colorado Civil Rights Commission, and invoked 14th Amendment Due Process.[29] Smith, a website designer who had not previously designed wedding websites, alleged that she wanted to expand her business to include wedding websites but feared prosecution if she refused to provide her services to same-sex couples or gave notice of such a restriction on her website.[30] The Colorado statute

21. Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890 (Ariz. 2019).

22. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018).

23. State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019), *cert. denied*, 141 S. Ct. 1203 (2021).

24. Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019).

25. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 878–79 (1990).

26. *Id.*

27. 309 P.3d 53, 60 (N.M. 2013), *cert. denied*, 572 U.S. 1046 (2014).

28. 506 P.3d 1108 (Or. App.), *review denied*, 509 P.3d 119 (Or. 2022).

29. 303 Creative LLC v. Elenis, 405 F. Supp. 3d 907, 908 (D. Colo. 2019), *aff'd*, 6 F.4th 1160 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022).

30. *Id*. at 908.

prohibits both a denial of service because of a potential customer's sexual orientation, as well as communicating the business's policy of denying such services on the basis of a prohibited ground under the statute.[31] Smith brought suit against the members of the Colorado Civil Rights Commission and the Colorado Attorney General to immunize herself from such potential prosecution, noting that the *Masterpiece Cakeshop* litigation showed the willingness of the Colorado Civil Rights Commission to enforce its statute against a wedding vendor who had raised similar religious and free speech defenses.[32]

The district court found that Smith lacked standing to challenge the discrimination ban but that she could challenge the communication ban.[33] However, the court found that the provision forbidding communicating an unlawful policy did violate the First Amendment.[34]

The Tenth Circuit, to the contrary, found that Smith had standing to challenge both provisions but affirmed the ruling granting summary judgment to defendants.[35] It held that under *Employment Division v. Smith*, Lorie Smith did not enjoy a religious exemption because the state could rationally prohibit discrimination in business transactions.[36] As to the free speech claims, the court found that the Accommodation Clause provision was a content-based speech regulation to be evaluated under the strict scrutiny standard.[37] The court concluded that the state had a compelling justification to burden Smith's freedom of speech: "Excepting Appellants from the Accommodation Clause would necessarily relegate LGBT consumers to an inferior market because Appellants' unique services are, by definition, unavailable elsewhere."[38] Similarly, the Communications Clause did not violate Smith's First Amendment rights, as proposed language that Smith wanted to include on her website "expresse[d] an intent to deny service based on sexual orientation—an activity that the Accommodation Clause

31. Colo. Rev. Stat. § 24-34-601(1), (2)(a).

32. 303 Creative LLC v. Elenis, 385 F. Supp. 3d 1147, 1151–52, 1154–55 (D. Colo. 2019).

33. 303 Creative LLC v. Elenis, No. 16-CV-02372-MSK-CBS, 2017 WL 4331065, at *4 (D. Colo. Sept. 1, 2017), *appeal dismissed*, 746 F. App'x 709 (10th Cir. Aug. 14, 2018).

34. *303 Creative*, 385 F. Supp. 3d 1147. In May 2019, the district court denied the plaintiffs' motion for a preliminary injunction regarding the Communications Clause of the statute and invited further briefing prior to granting summary judgment to the defendants. *Id.* In September 2019, the court granted summary judgment to the defendants on all remaining claims. *303 Creative*, 405 F. Supp. 3d 907.

35. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1175, 1190 (10th Cir. 2021).

36. *Id.* at 1183–88 (citing Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990)).

37. *Id.* at 1178.

38. *Id.* at 1180.

forbids and that the First Amendment does not protect."[39] The leading case on this principle is *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, in which the Court rejected a free speech challenge to a municipal law that was interpreted as banning a newspaper from publishing separate help-wanted advertisements for "Male Interest" and "Female Interest" jobs.[40]

303 Creative's petition for certiorari sought a ruling on both the free exercise of religion and free speech issues, but the Supreme Court granted review only on the second, based on the petitioner's phrasing: "Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment."[41] The respondents' merits brief framed the question presented differently: "Does a public accommodations law violate the Free Speech Clause when it requires a business to offer all customers its goods and services—including customized goods and services—regardless of those customers' protected characteristics?"[42]

II. Prior Wedding Vendor Precedents

The first significant appellate ruling on this conflict of rights came from the New Mexico Supreme Court in 2013, when a member of a same-sex couple brought suit under the New Mexico Human Rights Act (NMHRA) against a wedding photographer who had refused to provide her usual services for their same-sex commitment ceremony.[43] The photographer asserted religious objections to same-sex unions and made a compelled speech argument, emphasizing the expressive and artistic functions of her photographic services, which went beyond taking pictures to include editing photographs and compiling digital wedding albums for customers.[44] As such, she argued, her business involved artistic and expressive functions that could

39. *Id.* at 1183. Smith presented to the court a draft of the language she intended to place on her website explaining her policy of not designing websites for same-sex marriages because of her religious beliefs. *Id.* at 1170.

40. 413 U.S. 376, 379–80, 389 (1973).

41. 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022); *see* Petition for a Writ of Certiorari at i, *303 Creative*, 142 S. Ct. 1106 (Sept. 2021) (No. 21-476) ("Whether applying a public-accommodation law to compel an artist to speak or stay silent, contrary to the artist's sincerely held religious beliefs, violates the Free Speech or Free Exercise Clauses of the First Amendment.").

42. Brief on the Merits for Respondents at i, *303 Creative*, 142 S. Ct. 1106 (Aug. 12, 2022) (No. 21-476).

43. Elane Photography LLC v. Willock, 309 P.3d 53, 60 (N.M. 2013), *cert. denied*, 572 U.S. 1046 (2014).

44. *Id.* at 63, 68.

be said to express approval of the marriages that she was documenting for her customers.[45]

With regard to the photographer's free speech claim, the court identified two lines of compelled speech cases: those in which the government was requiring a private actor to "speak the government's message"; and those in which the government was compelling a private actor to speak a customer or client's message.[46]

As to the former, the court rejected the photographer's argument that through the nondiscrimination law the government was compelling the photographer to speak the government's message, writing that "the NMHRA does not require Elane Photography to recite or display any message. It does not even require Elane Photography to take photographs. The NMHRA only mandates that if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation."[47] The court looked to *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,[48] in which the Supreme Court ruled that the "Solomon Amendment," a statute threatening to suspend federal financial assistance to educational institutions that did not provide "equal access" to military recruiters, did not violate the free speech rights of the educational institutions.[49] Although the institutions disapproved of the military's policies discriminating against lesbians and gay men, the Court found that complying with the congressional directive did not implicate the law schools as endorsing the military's exclusionary enlistment policies.[50] "The [Supreme] Court observed [in *Rumsfeld*] that the federal law 'neither limits what law schools may say nor requires them to say anything,'" wrote the New Mexico court.[51] "Schools were compelled only to provide the type of speech-related services to military recruiters that they provided to non-military recruiters. 'There [was] nothing . . . approaching a Government-

45. *Id.* at 63. The court concluded that neither the First Amendment's Free Exercise Clause nor New Mexico's religious freedom law were violated by a ruling that the photographer could not refuse to provide services to same-sex couples for their union ceremonies. *Id.* at 72–76. This case predated the availability of same-sex marriages in New Mexico, and the commitment ceremony planned by the couple would have no legal significance as to their status under state law. *Id.* at 59 n.1; *see* Griego v. Oliver, 316 P.3d 865 (N.M. 2013) (Dec. 19, 2013 decision finding prohibition on same-sex marriage violated New Mexico Constitution).

46. *Elane Photography*, 309 P.3d at 63.

47. *Id.* at 64.

48. 547 U.S. 47 (2006).

49. *Id.* at 61–68.

50. *Id*.

51. *Elane Photography*, 309 P.3d at 65 (quoting *Rumsfeld*, 547 U.S. at 60).

mandated pledge or motto that the school [had to] endorse.'"[52] Similarly, the New Mexico court found that the state was not compelling the photographer to endorse same-sex marriages, but merely requiring her to provide her services as a public accommodation without discriminating based on the sexual orientation of the customers.[53]

As to the second strand of compelled speech cases, the New Mexico court wrote, "[t]he United States Supreme Court has never found a compelled-speech violation arising from the application of anti-discrimination laws to a for-profit public accommodation. In fact, it has suggested that public accommodation laws are generally constitutional."[54] The photographer urged reliance on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[55] in which the Court held that Boston could not use its anti-discrimination ordinance to require the sponsor of a parade to include a group carrying a banner that proclaimed the gay identity of its members.[56] That case rested on the Court's conclusion that the annual St. Patrick's Day–Evacuation Day Parade sponsored by a war veterans group was a quintessentially expressive activity and the organizers of the parade must be free to determine the message of their activity and to exclude messages that they did not want to communicate through their expressive activity.[57] The New Mexico court rejected the contention that a commercial photography business fell into the same category as a "free-speech event[]" such as a parade.[58] "Elane Photography . . . is an ordinary public accommodation, a 'clearly commercial entit[y] that sells goods and services to the public,'"[59] wrote the court, which continued:

> Unlike the defendants in *Hurley* or the other cases in which the United States Supreme Court has found compelled-speech violations, Elane Photography sells its expressive services to the public. It may be that Elane Photography expresses its clients' messages in its photographs, but only because it is hired to do so. The NMHRA requires that Elane Photography perform the same services for a same-sex couple as it would for an opposite-sex couple; the fact that these services require

52. *Id.* (quoting *Rumsfeld*, 547 U.S. at 62) (internal citation omitted).
53. *Id*.
54. *Id.* at 65–66.
55. 515 U.S. 557 (1995).
56. *Id*. at 572–81.
57. *Id*. at 560, 568–69, 572–73.
58. *Elane Photography*, 309 P.3d at 66.
59. *Id.* at 66 (internal citation omitted).

photography stems from the nature of Elane Photography's chosen line of business.[60]

The baker in *Masterpiece Cakeshop* also posed his claim for exemption alternatively on the religious basis of his opposition to same-sex marriages and on the expressive function of the custom-designed wedding cakes he produced.[61] The Colorado courts rejected both arguments,[62] but, as noted above, the Supreme Court avoided addressing them by finding that bias against the baker's religious beliefs had infected the administrative proceedings, requiring that the Commission's decision against the baker be set aside.[63]

Other courts have been divided about how to deal with free speech defenses by wedding vendors who claimed that the expressive content of their services privileged them under the Free Speech Clause to decline business on compelled speech grounds. As examples, the Arizona Supreme Court found that a business providing customized wedding invitations need not comply with a municipal anti-discrimination ordinance.[64] Minnesota-based wedding videographers successfully defended a refusal to document same-sex marriages in the Eighth Circuit.[65] On the other hand, Washington and Oregon courts found no First Amendment privilege for a floral designer[66] or a wedding cake designer.[67]

III. Pending Supreme Court Arguments and Implications for Anti-Discrimination Law

The Tenth Circuit in *303 Creative* rejected the website designer's free speech defense on the ground that the challenged provisions survived strict scrutiny due to the state's compelling interest in preventing discrimination by businesses.[68] However, the New Mexico Supreme Court's theory of the case was not shared by the Tenth Circuit, which accepted Lorie Smith's argument that the burden imposed on her free speech rights under the

60. *Id.*

61. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1726 (2018).

62. *Id.* at 1726–27.

63. *Id.* at 1729–32.

64. Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890 (Ariz. 2019).

65. Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019).

66. State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019), *cert. denied*, 141 S. Ct. 1203 (2021).

67. Klein v. Or. Bureau of Lab. & Indus., 506 P.3d 1108 (Or. App.), *review denied*, 509 P.3d 119 (Or. 2022).

68. *See supra* Part I.

Colorado statute was a content-based regulation of speech and therefore subject to strict scrutiny.[69] The court pointed out that in support of her free speech claims, Lorie Smith claimed unique artistic and expressive skills as a website designer.[70] Her claims about her work led to the conclusion that a same-sex couple seeking website design services could not obtain the equivalent from an alternative website designer.[71] Consequently, the court found that the state's compelling interest in protecting same-sex couples from discrimination by businesses could not be achieved other than by requiring Smith to refrain from discriminating against them.[72] There was no narrow tailoring that could be applied to lessen the burden to her free speech rights that Smith claimed she would suffer, without sacrificing the same-sex couples' ability to obtain her unique services.[73] On that basis, the court concluded that this was the rare case in which a content-based regulation of speech could survive strict scrutiny.[74]

The case was decided by the district court and the Tenth Circuit based on a Joint Statement of Stipulated Facts (Joint Statement)[75] that provided the basis for the Tenth Circuit's conclusion that Smith's website design services were unique and thus could not be obtained elsewhere. However, the Joint Statement also states that "[t]here are numerous companies in the State of Colorado and across the nation that offer custom website design services, the areas of 303 Creative's specialization."[76] The Joint Statement identifies online directories that list several hundred website design firms in Colorado and several thousand nationally, although the Joint Statement does not specify how many of them specialize in designing wedding websites.[77] The appendix to the certiorari petition also provides a screen shot of a mock wedding website that Smith had designed to show the service she might provide if she could obtain a judgment that she is not subject to the state's nondiscrimination requirement.[78] Smith provided this mock-up to reinforce her claim that the text imparts a point of view about the couple's wedding,

69. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021) (citing Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990)).

70. *Id.* at 1180.

71. *Id*.

72. *Id*.

73. *Id*. at 1182.

74. *Id*.

75. The Joint Statement is attached as an appendix to 303 Creative's petition for certiorari. Joint Statement of Stipulated Facts (Joint Statement), Petition for a Writ of Certiorari, *supra* note 41, at 173a. It describes in detail how Smith develops a website for a customer. *Id.* ¶¶ 50–59.

76. *Id.* ¶ 98, Petition for a Writ of Certiorari, *supra* note 41, at 190a.

77. *Id*. ¶¶ 99–101.

78. Petition for a Writ of Certiorari, *supra* note 41, at 196a–99a.

arguably supporting the court's conclusion that the Free Speech Clause is relevant to this case.[79]

Responding to the grant of certiorari with its brief on the merits, Colorado disavowed the Tenth Circuit's approach to the free speech claims.[80] Without citing the New Mexico Supreme Court's analysis, Colorado essentially adopted and expanded upon it. They noted that Colorado had first prohibited businesses from discriminating during the 19th century, following a common law principle dating back to the early English common law that businesses providing goods and services to the public could not discriminate among customers but had to serve all comers.[81] As such, the state argued, the law was a regulation of business practice, not a content-based regulation of speech.[82] Any burden of the free speech rights on a particular business was merely incidental, subject "at most" to intermediate scrutiny; tests that the state asserted were easily met by both of the challenged provisions.[83] "Because the Act regulates sales, and not the products or services sold," argued the state, "it does not prohibit or compel the speech of any business."[84] The state also argued that the petitioner's proposed exemption from public accommodation laws would be "unworkable" because it would leave both businesses and customers to guess whether it applied in any particular case:[85]

> The Company offers no limiting principle to implement its various dividing lines for what or who is shielded by its proposed exemption. The Company's exemption cannot be limited to religiously motivated objections, public accommodations laws, or concerns about same-sex marriage. It offers no standard to determine who qualifies as an "artist," what a custom product is, or when a message is affected.
>
> Without workable standards, companies would challenge regulations of all kinds, requiring rank-and-file workers in civil rights agencies, and then reviewing courts, to exercise significant discretion in determining whether an exemption was appropriate. The Company's standardless exemption would require governments and courts to make difficult determinations about what level of customization, expression, or

79. *Id*. at 23.
80. Brief on the Merits for Respondents, *supra* note 42, at 12–23.
81. *Id*. at 3–5.
82. *Id.* at 12–20.
83. *Id.* at 25–28, 35–44.
84. *Id.* at 9.
85. *Id.* at 28–32.

curation would qualify for such an exemption. Such discretion would itself create constitutional concerns.[86]

A simple thought experiment will demonstrate the correctness of this argument. Suppose that Lorie Smith's sincere religious belief is that only marriages sanctified by a Christian church are moral and to be celebrated. Could she pose a religious test for any couple seeking her website design services and turn away those proposing marriages in some other faith (e.g., Judaism or Islam) or purely civil marriages because she believes that designing a website for them would communicate approval or celebration of marriages that violate her religious beliefs? What if her religious beliefs oppose mixed-race marriages? Would she enjoy an exemption, even though the Supreme Court has long since ruled that interracial couples enjoy a constitutional right to marry?[87] What if she was selling floral design for weddings rather than website design?[88] Would she qualify as an "artist" entitled to turn away customers due to her disapproval of their marriages and her concern that employing her skills for their wedding would express endorsement?[89]

IV. Conclusion: Who Should Prevail?

At first consideration, *303 Creative* and similar cases present an apparent direct clash of constitutional rights. The website designer feels that the state has effectively conditioned her ability to provide design services for marriage websites on her willingness to serve same-sex couples, which she believes would require her to endorse and celebrate same-sex marriages, contrary to her religious beliefs. The state asserts that it has a compelling interest in

86. *Id.* at 29–30. The "constitutional concerns" could arise under the 14th Amendment's Due Process Clause, on ground of vagueness. The Brief cites Justice Barrett's concurring opinion in *Fulton*, in which she noted the complications that would ensue from an overruling of *Employment Division v. Smith*, 494 U.S. 872 (1990). Brief on the Merits for Respondents, *supra* note 42, at 32 (citing Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., concurring)).

87. Loving v. Virginia, 388 U.S. 1 (1967).

88. *See* State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019), *cert. denied*, 141 S. Ct. 1203 (2021).

89. Respondents' Brief on the Merits points out other examples of businesses claiming to be artistic, including sandwich makers, plumbers, and tree care services, and asks, "[o]r is an 'artist' any business that provides a service or product that involves a sort of artistic expression or curation? That definition would cover millions of businesses, including bartenders making artisanal drinks, hair stylists, corporate photography studios, architects, and landscape designers. And if some sort of artistic expression or curation is required, what level of expression or curation qualifies?" Brief on the Merits for Respondents, *supra* note 42, at 30–31. The line-drawing difficulties are obvious.

making sure that same-sex couples do not encounter discrimination when they seek a website designer for their pending nuptials and argues that requiring any business selling goods or services to the public to refrain from discriminating on grounds specified by statute presents no content-based regulation of speech.[90] As the state points out, the website designer can refrain from providing the service of designing wedding websites, as she has done from the formation of her business to the present.[91] The statute does not compel her to sell this service. Furthermore, she can say whatever she believes about same-sex marriages on her website, disabusing visitors to the site of any belief that she celebrates or endorses same-sex marriages, without incurring any liability, so long as she offers the same service or product to any potential customer without discriminating because of their sexual orientation.[92]

The most effective part of the state's argument is its contention that the exemption proposed by the website designer is not workable because it could effectively neuter the civil rights law and defeat the state's interest in preventing discrimination in the marketplace.[93] Any business could argue that its goods or services have expressive content, or that its action in selling its goods or services could be construed as communicating endorsement or approval of the customers to whom it sells those goods or services. Such an argument is antithetical to the concept of a ban on discrimination in public accommodations. Yet, in *Masterpiece Cakeshop*, the Supreme Court commented, "[it] is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."[94]

For such protection to be meaningful, it should not be subject to unworkable, indeterminate exemptions that would leave both businesses and potential customers guessing about whether or not the business is free to discriminate based on the religious, philosophical, or moral beliefs of the business's owners or employees. The solution sketched briefly by the New Mexico Supreme Court and developed more fully by the Respondent's Brief on the Merits seems more correct than that proposed by the petitioner. The law regulates sales, not content or speech. Unless the Court is ready to

90. *See id.* at 12–18, 35–39.
91. *Id.* at 2, 6–7, 12.
92. *Id*. at 12, 15–17.
93. *Id.* at 28–35.
94. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1728 (2018).

disavow its rulings in *Rumsfeld* and *Pittsburgh Press*, it should affirm the Tenth Circuit's result, if not its reasoning.

Brackeen and the "Domestic Supply of Infants"

MARCIA ZUG*

Introduction

In November 2022, the Supreme Court heard oral arguments in *Brackeen v. Haaland*.[1] The case concerns the constitutionality of the Indian Child Welfare Act (ICWA), a statute enacted in 1978 to help keep Indian children connected to their families and culture.[2] Most Indian child and family advocates consider ICWA a success.[3] The Act is routinely referred to as

* Marcia Zug is the Miles and Ann Loadholt Professor of Family Law at the University of South Carolina School of Law. She thanks Professors Lisa Grumet, Solangel Maldonado, and Ned Snow for their valuable assistance with this piece.

1. *See* Transcript of Oral Argument, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Nov. 9, 2022).

2. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified as 25 U.S.C. §§ 1901–63).

3. *See* 149 Cong. Rec. 28327 (2003) (statement of Rep. Young). On the 25th anniversary of ICWA's enactment, Representative Don Young of Alaska spoke before the House of Representatives and described the Act as "the most important Indian law the Congress has enacted." *Id.* at 28328. *See also* Tara Hubbard & Fred Urbina, *ICWA—The Gold Standard: Golden Nuggets of Evidence from Arizona*, Ariz. Att'y, July/Aug. 2022, at 32, 38 (noting "[t]he data from the Pascua Yaqui Tribe and Pima County ICWA Courts show the success of ICWA and support the nickname ICWA has earned as the 'gold standard'").

one of the most important pieces of Indian legislation ever passed[4] and is commonly described as the "gold standard" in child welfare.[5] The Act restricts the unjustified removal of native children from their families and helps to ensure that when removals do occur, significant attempts will be made to place Indian children with relatives (native or non-native), with their tribe, or in other Indian homes before considering non-Indian placements.[6]

Preferring Indian placements over non-Indian ones has long been controversial.[7] Come spring, this provision, and possibly the entire ICWA, may be found unconstitutional. Such a ruling would contradict longstanding federal Indian law jurisprudence but closely aligns with the Court's recent adoption-related discussions in *Dobbs v. Jackson Women's Health Organization*[8] and *Fulton v. City of Philadelphia*.[9] Consequently, this article does not focus on the constitutional arguments being brought against ICWA. Instead, using *Dobbs* and *Fulton*, this article shows that a majority

4. Indian advocates routinely describe ICWA as one of the most important pieces of Indian legislation ever enacted. *See, e.g.*, Kathryn E. Fort & Peter S. Vicaire, *The Invisible Families: Child Welfare and American Indian Active Duty Servicemembers and Veterans*, Fed. Law., Apr. 2015, at 1 (describing ICWA as "one of the most important pieces of federal legislation for American Indian families"); Sheri L. Hazeltine, *Speedy Termination of Alaska Native Parental Rights: The 1998 Changes to Alaska's Child in Need of Aid Statutes and Their Inherent Conflict with the Mandates of the Federal Indian Child Welfare Act*, 19 Alaska L. Rev. 57, 59 (2002) (calling ICWA "one of the most important and far-reaching pieces of legislation protecting Indian tribes"); Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 Ariz. St. L.J. 253, 284 (2010) (referring to ICWA as "perhaps the most important legislation enacted during this [self-determination] era").

5. *See, e.g.*, Bethany R. Berger, *Savage Equalities*, 94 Wash. L. Rev. 583, 630 (2019) (noting "[t]he leading child welfare organizations in America have opined that ICWA's procedural protections are the 'gold standard' for adoption and child welfare cases, serving the interests of children as well as biological and adoptive families") (citing Brief for Casey Family Programs at 2–3, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399)). *See also* Brackeen v. Haaland, 994 F.3d 249, 270 (5th Cir. 2021) (en banc) (Dennis, J., opinion) (noting many states "view ICWA as the 'gold standard' for child welfare practices and a 'critical tool' in managing their relationships with the Indian tribes within their borders"), *cert. granted sub nom*. Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022), and *cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022).

6. 25 U.S.C. § 1915.

7. *See, e.g.*, Lucy Dempsey, *Equity over Equality: Equal Protection and the Indian Child Welfare Act*, 77 Wash. & Lee L. Rev. Online 411, 466 (2021); Kathleena Kruck, Note, *The Indian Child Welfare Act's Waning Power After* Adoptive Couple v. Baby Girl, 109 Nw. U. L. Rev. 445, 453 (2015) ("[The placement preference] is one of the most controversial sections of the ICWA because it necessarily requires the consideration of race when placing children in adoptive homes."); Timothy Sandefur, *The Unconstitutionality of the Indian Child Welfare Act*, 26 Tex. Rev. L. & Pol. 55, 60–61 (2021) (arguing, "[g]iven the drastic shortage of Native adoptive homes, and the extraordinary need for such options, these 'preferences' prevent 'Indian children' from obtaining the adoptive homes they often need").

8. 142 S. Ct. 2228 (2022).

9. 141 S. Ct. 1868 (2021).

of justices of the current Court have expressed strong support for policies that increase the supply of adoptable children as well as an inclination to aid adoptive families the legal system deems deserving and desirable.[10] It then argues that because *Brackeen* gives the Court the opportunity to do both, there is every reason to believe that it will.

I. *Brackeen* and the Challenge to ICWA

Brackeen concerns the potential adoption of Indian children by non-native couples.[11] Pursuant to ICWA, such placements should only occur after attempts to place a child with relatives or other Indian families fail.[12] The *Brackeen* case involves six non-Indian potential adoptive parents who wished to adopt Indian children and the biological mother of one of the children.[13] The trial court proceedings also included the states of Texas, Indiana, and Louisiana as plaintiffs as well as the Cherokee Nation, Oneida Nation, Quinalt Indian Nation, and Morengo Band of Mission Indians as intervening defendants.[14]

The titular case, *Brackeen v. Haaland*, arose when the Brackeens, a white, evangelical Christian couple, challenged the constitutionality of ICWA and specifically the Act's placement preferences.[15] The Brackeens had been fostering a Navajo child whom they wished to adopt. However, the child had a great aunt, Alvetta James, an enrolled member of the Navajo tribe, who was also "ready and willing to adopt" the child.[16] Under ICWA, as well as general family law principles preferring relative placements, James was

10. *See infra* Part II. *See also* Adoptive Couple v. Baby Girl, 570 U.S. 637, 644 (2013) (engaging in a tortured reading of the ICWA that enabled the adoptive couple to retain custody of an Indian child).

11. Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018), *aff'd in part*, *rev'd in part sub nom.* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), *cert. granted sub nom.* Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022), and *cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022).

12. 25 U.S.C. § 1915(a).

13. *Brackeen*, 338 F. Supp. 3d at 519, 525–27.

14. *Id.* at 519–20.

15. Complaint ¶¶ 235–46, *Brackeen*, 338 F. Supp. 3d 514 (No. 4:17-cv-00868), https://turtletalk.files.wordpress.com/2017/10/show_multidocs.pdf; Roxanna Asgarian, *How a White Evangelical Family Could Dismantle Adoption Protections for Native Children*, Vox (Feb. 20, 2020, 7:30 AM EST), https://www.vox.com/identities/2020/2/20/21131387/indian-child-welfare-act-court-case-foster-care.

16. Leanne Gale & Kelly McClure, *Commandeering Confrontation: A Novel Threat to the Indian Child Welfare Act and Tribal Sovereignty*, 39 Yale L. & Pol'y Rev. 292, 295 (2020); *see* Jan Hoffman, *Who Can Adopt a Native American Child? A Texas Couple vs. 573 Tribes*, N.Y. Times (June 5, 2019), https://www.nytimes.com/2019/06/05/health/navajo-children-custody-fight.html [https://perma.cc/CV6R-558L].

entitled to preference and the child should have been placed in her care.[17] Nevertheless, instead of acquiescing to the child's placement with a member of his family and tribe, the Brackeens challenged the constitutionality of the Act. Then, when "Ms. James learned that the appeals process could take years to complete," she withdrew her adoption petition out of concern"that the delay would ultimately make [her great-nephew's] transition harder."[18] This enabled the Brackeens to adopt the boy, but not before filing suit in federal court challenging ICWA. The Brackeens—together with the state of Texas—claimed in their October 2017 complaint that the law is unconstitutional because its placement preferences impermissibly discriminate on the basis of race, exceed Congress's power over Indian affairs, and impermissibly commandeer state governments and courts.[19]

The constitutional argument raised by the Brackeens is not new.[20] The Supreme Court has repeatedly confirmed that "Indian" is a political, not racial, designation[21] and that Congress has the power and the responsibility to enact legislation protecting Indian tribes and their citizens.[22] Thus, based on judicial precedent, the Brackeens' challenge should have been rejected. This is not what occurred. Ignoring long-standing precedent, the Texas

17. *See generally* Marcia Zug, *ICWA's Irony*, 45 Am. Indian L. Rev. 1, 1 (2021) (arguing that ICWA entails general child welfare best practices such as prioritizing kinship care placements).

18. Gale & McClure, *supra* note 16, at 295–96 (footnotes omitted).

19. Complaint, *supra* note 15.

20. *See, e.g.*, Gale & McClure, *supra* note 16, at 312 (noting "[t]he classic attack on ICWA is that it creates a racial classification, violating the Equal Protection Clause of the U.S. Constitution"); *see also id.* & n.132 (quoting Complaint at 2, A.D. *ex rel.* Carter v. Washburn, No. 2:15-cv-01259-DKD, 2017 WL 1019685 (D. Ariz. Mar. 16, 2017), *vacated as moot sub. nom.* Carter v. Tahsuda, 743 F. App'x 823 (9th Cir. 2018), alleging that "[c]hildren with Indian ancestry . . . are still living in the era of *Plessy v. Ferguson*[, 163 U.S. 537 (1896)]").

21. *See* Morton v. Mancari, 417 U.S. 535, 554 (1974); *see also* Gale & McClure, *supra* note 16, at 312 ("The problem with the [theory that ICWA discriminates based on race] is that it flies in the face of fundamental federal Indian law doctrine. Indian tribes are quasi-sovereign entities, with tribal membership functioning as a political status.").

22. The special government-to-government relationship between native nations and the U.S. government gives Congress the authority to pass legislation exempting or preferencing tribes and their members. In *Morton*, which involved an equal protection challenge to the Bureau of Indian Affairs' hiring preference for tribal citizens, the Supreme Court specifically rejected the claim that such legislative preferences were unconstitutional racial discrimination and held that, when Indian affairs legislation is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." 417 U.S. at 555; *see also* Rice v. Cayetano, 528 U.S. 495, 519 (2000) ("Of course . . . Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs.").

district court found the Act's placement preferences unconstitutional.[23] On appeal, the Fifth Circuit reversed this holding, but the Fifth Circuit, *en banc*, reheard the case and, in a very fractured opinion, reversed in part the lower court's finding that the Act was racially discriminatory while upholding other parts of the district court's opinion.[24] Finally, in February 2022, the Supreme Court granted certiorari to resolve the uncertainty created by the *Brackeen* litigation and determine the fate of ICWA.[25]

II. *Dobbs* and the Adoption Fantasy

Long-established precedent holds that ICWA's preference categories are constitutional.[26] However, in *Dobbs*, the Court rejected more than 40 years of case law when it overturned the constitutional right to abortion.[27] Consequently, although predicting Supreme Court decisions has always been difficult, judicial precedent may now be significantly less informative than in the past. In analyzing how the Court is likely to rule in *Brackeen*, it may be more helpful to consider the adoption policies promoted by the Court's recent adoption-related decisions rather than the Court's traditional Indian law jurisprudence.[28] In fact, while primarily an abortion case, *Dobbs* itself may provide a strong indication of how *Brackeen* will be decided.

The *Dobbs* Court's interest in adoption first appeared during oral arguments when Justice Amy Coney Barrett commented that since people could easily arrange for the adoption of their babies, "pregnancy

23. Brackeen v. Zinke, 338 F. Supp. 3d 514, 530–36 (N.D. Tex. 2018), *aff'd in part*, *rev'd in part sub nom.* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), *cert. granted sub nom*. Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022), and *cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022).

24. *Brackeen*, 994 F.3d at 268–69 (per curiam) ("An en banc majority . . . holds that ICWA's 'Indian child' classification does not violate equal protection. The district court's ruling to the contrary . . . is therefore reversed. The en banc court is equally divided, however, as to whether Plaintiffs prevail on their equal protection challenge to ICWA's adoptive placement preference for 'other Indian families,' and its foster care placement preference for a licensed 'Indian foster home.'") (internal citations and footnotes omitted).

25. Given the well-settled law regarding the constitutionality of Indian affairs legislation and that the Supreme Court has previously decided cases interpreting ICWA, the Court could easily have denied cert. *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013). The fact the Court chose to hear the case suggests it may have been the policy issues that were of particular interest to the Court.

26. *See supra* notes 21 and 22.

27. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

28. *Cf.* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (rejecting long-standing precedent regarding state criminal jurisdiction over crimes allegedly committed by non-Indians against tribal members in Indian country); *id.* at 2521 (Gorsuch, J., dissenting).

and parenthood" were no longer part of the "same burden."[29] This idea then became an important part of the majority's opinion. Justice Alito acknowledged that outlawing abortion would force women to remain pregnant, but he defended this decision by arguing it would not force them to parent.[30] According to Alito, unhappily pregnant women could simply put their unwanted children up for adoption and, due to the low "domestic supply of infants," they would be readily adopted.[31] Alito wrote, "[A] woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home."[32] Adoption, not abortion, was the Court's solution to unwanted pregnancy.[33] In addition, the Court suggested that the reverse was also true—unwanted pregnancies could be a solution to current adoption shortages.[34]

In *Dobbs*, Justice Alito noted the many "suitable home[s]" available for unwanted children.[35] And yet, one year earlier, in *Fulton v. City of Philadelphia*,[36] the Court held that foster care agencies could exclude potential adopters based on the organizations' religious beliefs that some homes were not "suitable." The specific issue in *Fulton* was whether Philadelphia could cancel its contract with a Roman Catholic foster care agency that refused to work with same-sex couples as foster parents.[37] The Court held it could not.[38] According to the Court, Philadelphia violated the Free Exercise Clause of the First Amendment by refusing to contract

29. Transcript of Oral Argument at 57, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

30. *Dobbs*, 142 S. Ct. at 2259 n.46.

31. *Id.* Alito quoted a 2008 report by the Centers for Disease Control and Prevention on why so many "suitable home[s]" are available: "'the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted [has] become virtually nonexistent.'" *Id.* (citation omitted). In other words: Demand for infants is high and supply is low.

32. *Id.* at 2259. It should be noted that not all children are in equally high demand. The greatest demand is for healthy white infants. The demand for Black infants and disabled infants is significantly lower. *See* Erwin A. Blackstone et. al., *Market Segmentation in Child Adoption*, 28 Int'l Rev. L. & Econ. 220, 225 (2008) (noting "healthy white babies are in excess demand while excess supply exists for older, minority or disabled children").

33. Gretchen Sisson, *Alito Touted Adoption as a Silver Lining for Women Denied Abortions*, Wash. Post (July 6, 2022), https://www.washingtonpost.com/made-by-history/2022/07/06/alito-touted-adoption-an-option-women-denied-abortions/.

34. *See Dobbs*, 142 S. Ct. at 2259 n.46 (quoting 2008 CDC report noting the supply of infants available for adoption was "virtually nonexistent") (citation omitted). It is estimated that more than one million American families are seeking to adopt. Sydney Trent, *Women Denied Abortion Rarely Choose Adoption. That's Unlikely to Change.*, Wash. Post (July 18, 2022), https://www.washingtonpost.com/dc-md-va/2022/07/18/adoption-abortion-roe-dobbs/.

35. *Dobbs*, 142 S. Ct. at 2259 n.46; *see also* Sisson, *supra* note 33.

36. Fulton v. City of Phila., 141 S. Ct. 1868 (2021).

37. *Id.* at 1874.

38. *Id.* at 1882.

with Catholic Social Services (CSS) once it learned that the organization would not certify same-sex couples for foster care.[39] It concluded that since the city could exempt child placement agencies from its contractual nondiscrimination requirements on a discretionary basis, the requirements were not neutral or generally applicable and, thus, must be analyzed under strict scrutiny. [40] Then, applying this heightened standard of review, the Court held the city could not deny CSS an exemption on religious grounds and that CSS had the right to make foster child placements based on its religious beliefs regarding marriage and sexuality. [41]

Given the discretion afforded under the Philadelphia contractual provision, it is possible the *Fulton* decision will be read narrowly, and the greater rights and protections afforded to certain religiously defined suitable foster and adoptive families will be limited to locales with foster care nondiscrimination requirements similar to Philadelphia's. However, that outcome seems unlikely. Although the *Fulton* Court did not overturn *Employment Division v. Smith*,[42] the case holding that neutral and generally applicable laws are ordinarily not subject to strict scrutiny, it gave few assurances it wouldn't do so in the future. In fact, it gave significant indications it was simply waiting for a more opportune fact pattern.[43] If that is the case, then *Fulton* is just the beginning and the privileging of certain types of foster and adoptive parents may soon become even more widely permissible.[44]

III. *Brackeen* and Adoption

At its core, *Brackeen* is an adoption case. It is about who can adopt and which kids get adopted. These were important issues in both *Dobbs* and *Fulton*. In fact, they were so important, they arguably blinded the Court to the negative repercussions of the adoption policies they were promoting. In

39. *Id.*

40. *Id.* at 1878–79.

41. *Id.* at 1875, 1881–82.

42. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

43. The *Fulton* majority noted the concurrence "chides the Court for seeking to 'sidestep the question'" of whether to overrule *Smith*. *Fulton*, 141 S. Ct. at 1881. According to the Court, it simply wasn't the right time or case to revisit *Smith* because the outcome in *Fulton* was the same regardless of *Smith*. *See id.* ("Because the City's actions are . . . examined under the strictest scrutiny regardless of *Smith*, we have no occasion to reconsider that decision here."). The implication, therefore, is it is simply waiting for a better case.

44. *See* Dahlia Lithwick, *The Horrifying Implications of Alito's Most Alarming Footnote*, SLATE (May 10, 2022), https://slate.com/news-and-politics/2022/05/the-alarming-implications-of-alitos-domestic-supply-of-infants-footnote.html (noting that "some of the same groups clamoring for more 'domestic' babies to be adopted by deserving families have sought to make it impossible for same-sex parents, or even non-Christian parents, to adopt them").

Dobbs, adoption was presented as the solution to unwanted parenthood even though there is little support for this supposition.[45] Most adoption experts predict only a small percentage of women with unintended pregnancies will ultimately choose adoption. Instead, the majority will be raised by their birth families.[46] In a *Washington Post* article, University of California San Francisco sociologist Gretchen Sisson, whose work focuses on abortion and adoption, predicted: "What we're going to see, I think, is many more people parenting children that they did not intend to have."[47] Consequently, the Court was overly optimistic about the likely increase in adoptable newborns as a result of its decision while simultaneously naïve about the case's likely effect on removal and foster care rates. Parenting unplanned children may increase the risk of abuse and neglect.[48] Therefore, while *Dobbs* may lead to a small increase in the number of newborn adoptions, it may also lead to an increase in the number of children entering foster care due to abuse and neglect.[49]

Like the *Dobbs* Court, the *Fulton* Court also ignored many of the child welfare repercussions of its decision. *Fulton* permits state-contracted foster and adoption agencies to define what is meant by "suitable homes" according to their religious beliefs.[50] However, in parts of the country, faith-based organizations are the only foster and adoption options. As a result, a significant number of prospective adoptive and foster parents, those who

45. *See* Trent, *supra* note 34.

46. *Id.* Comparisons with the pre-*Roe* rate of adoptions are misguided. Such modest adoption predictions make sense given that in the pre-*Roe* era, the inability to obtain an abortion was not the primary reason children were placed for adoption. Rather, it was the fact that large numbers of unintentionally pregnant women were denied the opportunity to parent. The period between World War II and the *Roe v. Wade* decision, often described as the "Baby Scoop Era," was a period of coercive and secretive adoptions in which as many as three to four million women had their newborns adopted. These birth mothers were typically young, unmarried, white women who were sent away to maternity homes, and then forced to give birth in secret and subsequently surrender their infants for adoption. Pema Levy, *When Abortion Was Illegal, Adoption Was a Cruel Industry. Are We Returning to Those Days?*, Mother Jones (July 5, 2022), https://www.motherjones.com/politics/2022/07/when-abortion-was-illegal-adoption-was-a-cruel-industry-are-we-returning-to-those-days/.

47. Trent, *supra* note 34.

48. *Id*. In commenting on this myopia regarding the adoption solution to abortion bans, Gabrielle Glaser, author of American Baby: A Mother, A Child, and the Shadow History of Adoption (2021), described this likely outcome, noting, "I don't think any legislators in those states who are anti-abortion are actually thinking, 'Oh, great, these single women are gonna raise more children.' No, their hope is that those children will be placed for adoption. But is that the reality? I doubt it.'" Levy, *supra* note 46.

49. *See* Trent, *supra* note 34 (noting that "[a]doption advocates have expressed concern that one result of decreasing access to abortion will be a spike in the number of children who wind up in foster care").

50. *See supra* Part II.

don't meet those organizations' requirements, now are effectively barred from receiving children.[51] This change should have little effect on the placement of healthy newborns, but it may drastically reduce the likelihood that less-sought-after children receive the opportunity to live in a safe and loving home.[52]

Most Indian child advocates believe overturning ICWA would be extremely harmful for Indian children and families.[53] However, the Court's recent adoption cases indicate it will not be particularly receptive to such concerns. Instead, *Dobbs* and *Fulton* suggest that some justices on the *Brackeen* Court may be primarily focused on the fact that ICWA makes

51. Faith-based foster-care and adoption agencies provide services to thousands of children every year. The CEO of the National Council for Adoption has said that "'[i]f [faith-based agencies] would disappear overnight the whole system would collapse on itself." Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. Contemp. Legal Issues 279, 310 (2013). As an example, in Arkansas, 40% of all foster parents are sourced through The CALL, a faith-based organization. William G. McGrath, Fulton v. City of Philadelphia*, and the Rights of Faith-Based Adoption and Foster Care Agencies*, 10 Ark. J. Soc. Change & Pub. Serv. 73, 81 (2020). *See also* Chris Stewart & Gene Schaerr, *Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act*, 46 J. Legis. 134, 190 (2020) (arguing for legislation that would help reduce "the number of places where a religious adoption provider holds something like a natural monopoly because of the financial disincentives for competition now in place"). *See generally* Jeremy Kohomban, Opinion, *A New Supreme Court Ruling Will Devastate LGBTQ Foster Families*, Politico (June 26, 2021), https://www.politico.com/news/magazine/2021/06/26/supreme-court-lgbtq-foster-families-fulton-philadelphia-496391.

52. Same-sex couples and single parents have long been those most likely to adopt harder-to-place children such as older children and those with disabilities. *See* Mary O'Hara, *The LGBT Couples Adopting "Hard to Place" Children*, Guardian (Mar. 4, 2015, 08:50 EST), https://www.theguardian.com/social-care-network/2015/mar/04/the-lgbt-couples-adopting-hard-to-place-children; Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 Harv. L. Rev. 835, 907 (2000) (explaining that adoption agencies favor married couples and "allow[] single-parent adoptions only in the case of hard-to-place children who are otherwise unlikely to be adopted at all").

53. *See, e.g.*, Brief of 497 Indian Tribes & 62 Tribal & Indian Orgs. as Amici Curiae in Support of Fed. & Tribal Defendants, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Aug. 19, 2022); Brief of Casey Family Programs & 26 Other Child Welfare & Adoption Orgs. as Amici Curiae in Support of Fed. & Tribal Defendants, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Aug. 19, 2022); Brief of Nat'l Ass'n of Counsel for Children & 30 Other Children's Rights Orgs. as Amici Curiae in Support of Fed. & Tribal Defendants, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Aug. 18, 2022).

adoptions more difficult, particularly for the types of families the law typically deems the most desirable, i.e. straight, married couples.[54]

IV. Adoption Regulations

For 50 years, reliable birth control and access to safe abortions dramatically reduced the number of unplanned pregnancies.[55] This in turn decreased the number of American children available for adoption.[56] In response to this diminished supply, especially the number of white newborns, prospective adoptive parents began to reconsider the stigmas that previously made children of color "unadoptable." Many became willing to adopt Latino, Asian, or American Indian children and, to a lesser extent, African American

54. For examples of state laws giving adoption placement preference to married couples, see, e.g., ARIZ. REV. STAT. ANN. § 8-103(C)(1) (factors to consider for adoptive home placements include "[t]he marital status and the length and stability of the marital relationship of the prospective adoptive parents"); UTAH CODE ANN. § 78B-6-117(3) (West) ("A child may not be adopted by an individual who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state unless the individual is a relative of the child or a recognized placement under the Indian Child Welfare Act.") (citation omitted); *see also* Marie-Amélie George, *Expanding LGBT*, 73 FLA. L. REV. 243, 305 (2021) (noting "[a]doption officials often express a preference for couples, and state laws may require them to place children with couples over single parents"); Ruth Colker, *The Freedom to* Choose *to Marry*, 30 COLUM. J. GENDER & L. 383, 418 (2016) (suggesting that in *Obergefell*, the Court "recognized the 'harm' and 'humiliation' to the children of unmarried parents"); *cf.* Adoptive Couple v. Baby Girl, 570 U.S. 637, 653–54 (2013) (worrying about the possibility that any other interpretation of the ICWA provision at issue in the case "would surely dissuade some [potential adoptive parents] from seeking to adopt Indian children. And this would, in turn, unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home, even in cases where neither an Indian parent nor the relevant tribe objects to the adoption.").

55. *See* Joerg Dreweke, *New Clarity for the U.S. Abortion Debate: A Steep Drop in Unintended Pregnancy Is Driving Recent Abortion Declines*, 19 GUTTMACHER POL'Y REV. 16, 19 (2016), https://www.guttmacher.org/sites/default/files/article_files/gpr1901916.pdf (concluding that "more and better contraceptive use" contributed to a decline in unintended pregnancies and abortions from 2008 to 2011); *see also* Naomi Cahn & June Carbone, *Family Classes: Rethinking Contraceptive Choice*, 20 U. FLA. J.L. & PUB. POL'Y 361, 368 (2009) (noting the "advent of the birth control pill and abortion produced dramatic declines in the overall number of unintended births"). *See generally* George A. Akerlof et al., *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q.J. ECON. 277, 279, 289–90, 291–96 (1996).

56. Anjanette Hamilton, Comment, *Privatizing International Humanitarian Treaty Implementation: A Critical Analysis of State Department Regulations Implementing the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 58 ADMIN. L. REV. 1053, 1054 n.2 (2006) (noting the reduced number of U.S. children available for adoption "can be attributed [in part] to a decline in unwanted pregnancies brought on by the increased use of abortion and birth control").

infants as well.[57] When there still weren't enough children to satisfy America's adoption demand, prospective adopters turned to international adoption. By the early 2000s, nearly 25,000 foreign children were adopted by American families every year.[58] However, in the early 2010s, legitimate fears of commodification, corruption, exploitation, and child laundering brought these adoptions to a near standstill. Since then, there have been attempts to revitalize international adoptions, but these have largely failed.[59]

The most well-known effort to increase international adoptions was the proposed Children in Families First Act (CHIFF),[60] which sought to eliminate the Hague Convention's preference for in-country care solutions in return for U.S. aid.[61] CHIFF was aimed at increasing the number of foreign children available for adoption by American families. CHIFF

57. The exception was African American children. These children remain harder to place for adoption. *See* Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 Fla. L. Rev. 295, 322 (2015) ("In this blatantly racially segmented market, however, the children that suffer are those of African American descent; Latino, Asian, and American Indian children are generally classified with the vanishingly small supply of white infants. A recent empirical analysis of applications to adopt available infants, for example, found that parents are seven times less likely to seek African American infants, but there were no differences between rates of application for White and Hispanic babies.") (footnotes omitted); Barbara Fedders, *Race and Market Values in Domestic Infant Adoption*, 88 N.C. L. Rev. 1687, 1697–98 (2010) ("[A]pproximately eighteen percent [of adoption agencies] charge higher fees for the adoption of white infants than black infants. One adoption expert estimates that up to one-half of all agencies employ race-based pricing.") (footnotes omitted); *see also* Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. Third World L.J. 61, 66–69 (2006) (discussing "Race-based Baby Valuing"); Malinda L. Seymore, *Sixteen and Pregnant: Minors' Consent in Abortion and Adoption*, 25 Yale J.L. & Feminism 99, 116 n.108 (2013) ("Perversely, this market reality may insulate mothers of African-American or bi-racial/African American infants from potentially coercive tactics used to ensure relinquishment.").

58. David M. Smolin, *The Missing Girls of China: Population, Policy, Culture, Gender, Abortion, Abandonment, and Adoption in East-Asian Perspective*, 41 Cumb. L. Rev. 1, 49 (2011) ("Intercountry adoptions to the United States roughly tripled, rising from 7,377 adoptions in 1993 to a peak of 22,990 adoptions in 2004.").

59. *See* Pamela Laufer-Ukeles, *Collaborative Family-Making: From Acquisition to Interconnection*, 64 Vill. L. Rev. 223, 225 (2019) ("Explicit references to markets and revelations of transfers of money have led to shutdowns and bans in [intercountry child adoptions], and the process of legally rooting out financial incentives has undermined the functioning of [intercountry child adoptions] in fundamental ways."); *see generally* Peter Selman, *The Rise and Fall of Intercountry Adoption in the 21st Century*, 52 Int'l Soc. Work 575, 578 (2009) (discussing adoption moratoriums).

60. Children in Families First Act of 2014 [hereinafter 2014 CHIFF], S. 2475, 113th Cong. (2014); *see also* Children in Families First Act of 2014, H.R. 4143, 113th Cong. (2014).

61. As Professor DeLeith Gossett described it, CHIFF served "the interests of privileged families from wealthy nations at the expense of the poorest." DeLeith Duke Gossett, *Take Off the [Color] Blinders: How Ignoring the Hague Convention's Subsidiarity Principle Furthers Structural Racism Against Black American Children*, 55 Santa Clara L. Rev. 261, 305 (2015).

failed to pass,[62] but the idea of increasing adoptions by removing children from poorer families and placing them with more privileged families did not disappear and has been greatly helped by the Supreme Court's recent adoption decisions.[63]

The case of immigrant child adoptions is illustrative. For years, immigrant children have been separated from their undocumented parents and adopted by American families.[64] In 2018, this practice garnered national attention when hundreds of immigrant children were removed from their families and placed in American homes.[65] The organization in charge of many of these placements, Bethany Christian Services, was a religiously affiliated adoption agency similar to the agency at issue in *Fulton*.[66] Such agencies have been accused of promoting adoptions through coercive and discriminatory tactics.[67] In an article for *The Guardian*, journalist Jill Filipovic described such agencies as essentially engaging in "baby-stealing . . . justified by the arrogant assumption that American Christian families provide better

62. *Id.* at 304 (noting, "Despite the bipartisan effort, the bill was not passed.").

63. *Dobbs* is expected to have the greatest impact on poor women and women of color and *Fulton* will compound these vulnerabilities. *See* Youyou Zhou & Li Zhou, *Who Overturning* Roe *Hurts Most, Explained in 7 Charts*, Vox (July 1, 2022), https://www.vox.com/2022/7/1/23180626/roe-dobbs-charts-impact-abortion-women-rights ("'It's going to fall on the women who are poor,' she said last year when the Court was hearing oral arguments in the *Dobbs* case. 'It's going to fall on the women who already have children and cannot leave; it's going to fall on women who are working three jobs; it's going to fall on young, young girls who have been molested and may not know they are pregnant until deep into the pregnancy.'" ((quoting Senator Elizabeth Warren)).

64. *See, e.g.*, Garance Burke & Martha Mendoza, *Separated from Parents, Some Migrant Children Are Adopted by Americans*, Christian Sci. Monitor (Oct. 9, 2018), https://www.csmonitor.com/USA/2018/1009/Separated-from-parents-some-migrant-children-are-adopted-by-Americans (discussing such removals and subsequent adoptions).

65. *See* Dana Chicklas, *Protests as Children Separated from Families at Border Now in Bethany Christian Services' Foster Care*, Fox 17 (June 20, 2018), https://www.fox17online.com/2018/06/20/protests-as-children-separated-from-families-at-border-now-in-bethany-christian-services-foster-care (quoting the Bethany Christian Services director of refugee and foster care of programs stating that the organization was placing children with American families "because we believe that these children will be separated . . . and we believe children should be in family. If the government's going to choose to do that, then children need to be protected and cared for."). *See also* Dan MacGuill, *Christian Non-profit Faces Scrutiny over Government Foster Care Contract for Separated Children*, Snopes (updated July 11, 2018), https://www.snopes.com/news/2018/06/26/bethany-christian-services-family-separation-betsy-devos/ (confirming that Bethany Christian Services had been placing border-separated children with American foster families).

66. Jill Filipovic, Opinion, *Adoption of Separated Migrant Kids Shows "Pro-Life" Groups' Disrespect for Maternity*, Guardian (Oct. 30, 2019), https://www.theguardian.com/commentisfree/2019/oct/30/adoption-separated-migrant-children-pro-lifers-deep-disrespect-for-maternity.

67. *Id*.

homes for children than, say, a poor Ethiopian mother ever could."[68] Both *Dobbs* and *Fulton* similarly express tacit, if not explicit, support for such tactics by encouraging unintended childbearing and adoption discrimination, respectively.[69] Now, *Brackeen* offers the Court another opportunity to further this adoption policy.

Today, Indian children continue to be removed from their families at much higher rates than non-native children.[70] However, these removal and adoption efforts are often thwarted by ICWA.[71] Notably, in 2015, the state of South Dakota was sued for removing hundreds of Indian children from their families and placing them in non-Indian homes.[72] Indian people comprise less than 9 percent of the state's population, yet Indian children made up 52 percent of the children in state foster care.[73] This means they were 11 times more likely to be placed in foster care than white children.[74] The 2015 class action lawsuit brought by the ACLU revealed that these foster care disparities were not accidental.[75] South Dakota Indian child removal hearings typically lasted fewer than five minutes (some as little as 60 seconds) and the state had a success rate of 100%.[76] These were

68. *Id.*

69. *Id.*

70. *See, e.g.*, Matthew L.M. Fletcher & Randall F. Khalil, *Preemption, Commandeering, and the Indian Child Welfare Act*, 2022 Wis. L. Rev. 1199, 1206–07 (2022) ("[T]he disproportionate removal of Indian children from their homes remains a serious problem and continues to justify the need for ICWA. 'According to 2018 data, American Indian/Alaska Native children didn't even account for 1% of the population, yet they made up 2.4% of children in foster care.'").

71. Tellingly, the success of ICWA is often used in attacks against the Act. For example, the litigation director for the Goldwater Institute (the most prominent anti-ICWA organization) contended that, "[s]o long as ICWA stands, countless children will be left in abusive homes and prevented from or delayed in becoming part of a permanent loving homes [sic]." Clint Bolick, *The Wrongs We Are Doing Native American Children*, Newsweek (Nov. 2, 2015, 3:48 PM EST), https://www.newsweek.com/wrongs-we-are-doing-native-american-children-389771. Many states have recognized the success of ICWA in preventing unwarranted removals of native children and have enacted state ICWAs to add further protections. *See Comprehensive State ICWA Laws*, Turtle Talk, https://turtletalk.blog/icwa/comprehensive-state-icwa-laws/ (last visited Jan. 9, 2022).

72. South Dakota also contracts with religiously affiliated foster and adoptive organizations that can make placements that conform to the agency's definition of desirable homes and families. Mark Joseph Stern, *South Dakota Allows State-Funded Adoption Agencies to Turn Away Same-Sex Couples*, Slate (Mar. 13, 2017), https://slate.com/human-interest/2017/03/south-dakota-allows-state-funded-adoption-agencies-to-turn-away-same-sex-couples.html.

73. Stephen Pevar, *In South Dakota, Officials Defied a Federal Judge and Took Indian Kids Away from Their Parents in Rigged Proceedings*, ACLU (Feb. 22, 2017), https://www.aclu.org/news/racial-justice/south-dakota-officials-defied-federal-judge-and-took.

74. *Id.*

75. Oglala Sioux Tribe v. Van Hunnik, 100 F. Supp. 3d 749 (D.S.D. 2015), *on reconsideration in part sub nom.* Oglala Sioux Tribe v. Hunnik, No. CV 13-5020-JLV, 2016 WL 697117 (D.S.D. Feb. 19, 2016), and *vacated sub nom.* Oglala Sioux Tribe v. Fleming, 904 F.3d 603 (8th Cir. 2018).

76. *See* Pevar, *supra* note 73.

blatant violations of ICWA, and the district court agreed, ordering the state to cease such actions.[77] Whether the *Brackeen* Court would consider this outcome—one that prevents hundreds of potential adoptions—as desirable is less clear.[78] *Dobbs* and *Fulton* suggest it would not.

Conclusion

ICWA makes the removal and adoption of Indian children by non-Indian families difficult. It reduces the number of children available for adoption and prevents "suitable" families from adopting them. This was the Act's intent. Nevertheless, this goal appears to conflict with the Court's current adoption policies. Both *Dobbs* and *Fulton* helped increase the number of children available for adoption by certain types of families. During oral arguments in *Brackeen*, Justice Kavanaugh expressed skepticism for the constitutionality of the Act by asking if Congress could "say that, you know, Catholic parents should get a preference[?]"[79] However, as this essay has argued, such parents frequently do get preference. Consequently, it is reasonable to expect that when faced with another opportunity to expand the number of adoptive placements for the "right" kind of families, the

77. *Oglala Sioux Tribe*, 100 F. Supp. 3d at 768. The decision was then vacated and remanded by the Eighth Circuit Court of Appeals, which held the district court should have abstained and allowed the ICWA claims to be raised in state court. *See* Oglala Sioux Tribe v. Fleming, 904 F.3d 603, 613 (8th Cir. 2018). However, the appellate court did not disturb the district court's conclusion that ICWA had been violated. Moreover, since the ACLU's lawsuit, the South Dakota Supreme Court has issued at least one decision, *In re C.H.*, sharply rebuking the lower court for violating the ICWA. Specifically, in *In re C.H.* the state supreme court rejected the lower court's conclusion that active efforts, as required under the Act, had been made to reunite the child with the mother. Instead, the court found "*no efforts* were made to reunite C.H. with Mother" and found the lower court decision was "clearly erroneous." People in Int. of C.H., 962 N.W.2d 632, 639–40 (S.D. 2021). *See also* People in Int. of T.P. & A.P., 974 N.W.2d 731, 2022 WL 2062726 (S.D. 2022) (reversing a termination of parental rights decision for failure to comply with the ICWA).

78. Certainly, there are some groups that believe that preferring Indian placements means children are more likely to be harmed. Angela Aleiss, *In Baby Veronica Case, Some Evangelicals Side with Adoptive Parents*, Religion News Serv. (Sept. 12, 2013), https://religionnews.com/2013/09/12/baby-veronica-case-evangelicals-side-adoptive-parents/ (highlighting organizations created based on a belief that ICWA harms children); *see also* George F. Will, Opinion, *The Brutal Racial Politics of the Indian Child Welfare Act*, Wash. Post (Jan. 5, 2022), https://www.washingtonpost.com/opinions/2022/01/05/brutal-indian-child-welfare-act/ (highlighting cases in which the ICWA preferences potentially led to the child's abuse or death).

79. Transcript of Oral Argument at 152, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Nov. 9, 2022).

Brackeen Court will choose to do so.[80] How the Court will effectuate this adoption preference remains uncertain. In the worst-case scenario, the Court may find the entire Act unconstitutional, but, even if that doesn't occur, given the Court's current pro-adoption policies, it seems almost certain it will eliminate some, if not all, of the placement preferences. ICWA was intended to reduce the adoption of Indian children by non-Indian potential parents. It has been successful in this goal and, ultimately, that may be why it (was/is) doomed.

80. Such sympathy was also readily apparent in the Court's last ICWA case, *Adoptive Couple v. Baby Girl*. For example, in Maureen Johnson's article *You Had Me at Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recent Hotly Contested U.S. Supreme Court Decisions*, she writes, "By this author's count, the majority opinion hammered-home the 'dead-beat dad' versus loving adoptive couple theme eleven times." 49 Ind. L. Rev. 397, 439 (2016).

After *Brackeen*: Funding Tribal Systems

KATHRYN E. FORT*

Introduction

The purpose of the Indian Child Welfare Act[1] was to allow tribes to make decisions for their own families, rather than state courts and agencies. Again and again, tribal leaders stated that they knew what to do for their tribes. Lost in our current fights over ICWA in the Supreme Court is the history of tribal leaders trying to secure funding for *tribal* systems of child welfare.[2] There are pages of testimony often overlooked today where tribal leaders

* Kathryn "Kate" E. Fort, J.D., is the Director of Clinics at Michigan State University College of Law, where she runs the Indian Law Clinic. She has taught the Indian Law Clinic for 17 years, and for the past 10 years she has directly represented tribes in complex Indian Child Welfare Act litigation across the country in state and federal courts. She represents the tribal intervenors in the U.S. Supreme Court case *Haaland v. Brackeen*. In addition, she works with The Whitener Group, a Native-owned consulting firm that contracts with the Bureau of Indian Affairs to conduct tribal court assessments. For the first time in 2016, the Bureau allowed tribes in Alaska to access these assessments, and since that time Professor Fort has assisted with nearly 100 Alaska assessments, as well as several assessments in the Pacific Northwest. She has traveled throughout the Yukon Kuskokwim Delta, the Copper River Delta, the Mat-Su Region, and Southeast Alaska working with tribal communities to further develop their tribal justice systems.

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1. 25 U.S.C. §§ 1901–63.

2. *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: Hearing on S. 1214 Before the S. Select Comm. on Indian Affs.*, 95th Cong. 163–65 (1977) [hereinafter *1977 Hearings*] (statement of Ramona Bennett, Chairwoman, Puyallup Tribe).

and tribal child welfare workers tried to pin down the section of law that would fund their systems and ensure the purpose of ICWA wasn't lost.[3]

The ability for tribal governments to fund their own tribal child welfare systems is a critical component of promoting tribal sovereignty, as well as ensuring Native children and families receive culturally appropriate services. The issue is not whether tribes want to provide these services to their communities; it is often whether they have the necessary resources and access to implement these services. Under the current U.S. child protection funding model, tribes are faced with challenges and barriers that prevent them from accessing the necessary funding needed.[4] Given that only 3 percent, or 18 out of 574 federally recognized tribes, have successfully completed the requirements to the federal government's satisfaction to access the primary source of federal child protection funding, a new approach is desperately needed.[5]

The current state child welfare system in the United States is broken. Tribes have a unique opportunity and ability to use and create systems that work for their communities. They are not currently bound to follow the system created for states. But today tribes must follow that system to

3. *Problems That American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction: Hearing Before the Subcomm. on Indian Affs. of the S. Comm. on Interior & Insular Affs.*, 93d Cong. 7, 9, (1974) [hereinafter *1974 Hearings*] (statement of William Byler, Exec. Dir., Ass'n on Am. Indian Affs.); *id.* at 35–36 (statement of Bertram Hirsch, Staff Att'y, Ass'n of Am. Indian Affs.); *id.* at 104 (statement of Dr. James H. Shore, Psychiatry Training Program, Portland, Or.); *id.* at 157 (statement of Richard Lone Dog, Rosebud Detention Ctr., Rosebud, S.D.); *id.* at 168–70 (statement of Betty Jack, Chairman, Bd. of Dirs., Am. Indian Child Dev. Program, Milwaukee, Wis.); *id.* at 219 (statement of Dr. Carl Hammerschlag, Phoenix, Ariz.); *id.* at 371 (statement of Thomas Peacock, Dir., Indian Youth Program, Duluth, Minn.); *1977 Hearings*, *supra* note 2, at 290 (letter from Goldie M. Denney, Dir., Soc. Servs., Quinault Indian Nation); *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: Hearing on S. 1214 Before the H. Subcomm. on Indian Affairs and Public Lands* 78 (1978) [hereinafter *1978 Hearings*] (statement of Faye LaPointe, Coordinator of Social Serv, for Child Welfare, Puyallup Tribe of Wash.); *id.* at 99 (statement of Donald Reeves, Legis. Sec'y, Friends Comm. on Nat'l Legis.); *id.* at 109 (statement of Elizabeth Cagey, Admin. Assistant, Tacoma Urban Indian Ctr.); *id.* at 114–15 (statement of Mike Ranco, Exec. Dir., Health & Soc. Serv., Cent. Me. Indian Ass'n).

4. *See infra* Part III.

5. As of January 2022, the U.S. government recognized 574 Indian tribes. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636 (Jan. 28, 2022). As of July 2021, 17 tribes had approved Title IV-E plans. *Tribes with Approved Title IV-E Plans*, CHILD.'S BUREAU, ADMIN. FOR CHILD. & FAMS., U.S. DEP'T OF HEALTH & HUM. SERVS. (current as of July 1, 2021), https://www.acf.hhs.gov/cb/grant-funding/tribes-approved-title-iv-e-plans. The author is aware of one more that is not yet on the list, Kenaitze Indian Tribe, making it 18 total.

access significant funding.[6] *That* system incentivizes breaking up families and placing children in care. *Tribal* systems disrupt that understanding of care and use non-adversarial healing to wellness models to better serve their families.[7] They should receive the funding to do so.

Haaland v. Brackeen,[8] a challenge to ICWA that is currently pending before the U.S. Supreme Court, is a direct result of a state system privileging removal and placement with stranger foster care, as opposed to kinship or relative care. Indeed, the challenges to ICWA are often a result of this system. This article explains the challenges and then identifies the limitations and hurdles tribal governments face when attempting to secure funding for their own tribal child welfare systems through the current child protection framework. Additionally, this article proposes possible funding solutions for expansion in future articles. Part I of this article will discuss ICWA and the current *Brackeen* case. Part II will describe how the child protection system is funded in the United States, while Part III describes how tribal governments currently fund tribal child welfare systems in Native communities. Part IV will succinctly propose potential solutions for how tribal child welfare systems could be funded under either ICWA's provisions or a self-governance model.

I. ICWA and *Brackeen v. Haaland*

In 2013, Indian Country was rocked by the Supreme Court decision in *Adoptive Couple v. Baby Girl*.[9] Holding that certain ICWA protections did not apply to the biological daughter of a citizen of the Cherokee Nation, the U.S. Supreme Court overturned the South Carolina Supreme Court's holding that ICWA provided protections to her father.[10] After a few months of back and forth at the state and tribal court levels, the father voluntarily and tearfully gave up his child to the adoptive couple demanding her.[11] That

6. *See infra* Part III.

7. *See* Tribal Law & Pol'y Inst., Tribal Healing to Wellness Courts: The Key Components (2d ed. 2014) (Typically called "drug courts" in state systems, healing to wellness courts incorporate current addiction science, a team model, and significant training to address the issues that brought the individuals to the court in the first place. This is diametrically in opposition to traditional adversarial proceedings.).

8. 994 F.3d 249 (5th Cir. 2021), *cert. granted sub nom.* Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022), *and cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022).

9. 570 U.S. 637 (2013).

10. *Id.*

11. Heide Brandes, *Biological Father, Tribe Give Up the Fight over Baby Veronica*, Reuters (Oct. 10, 2013), https://www.reuters.com/article/us-usa-adoption-southcarolina/biological-father-tribe-give-up-the-fight-over-baby-veronica-idUKBRE99911B20131010.

case kicked off a decade of fighting at the state and federal levels over the constitutionality of the law, including the *Brackeen* litigation.[12]

A. The Indian Child Welfare Act

Congress passed ICWA[13] in 1978 in response to organizing by Native families, tribal leaders, and nonprofit organizations. After years of testimony,[14] the law passed with a voice vote and was accompanied by a House report presaging arguments made by anti-ICWA forces more than four decades later.[15]

ICWA provides certain protections to families involved in child custody proceedings if the child involved is an Indian child. Both the type of the proceedings[16] and "Indian child"[17] are defined in the law. ICWA covers a broad swath of cases but is primarily used in foster care proceedings and termination of parental rights proceedings initiated by state agencies. In some instances, the federal law preempts state law, but most of the time it requires courts to make parallel holdings for both state and federal requirements.[18]

When a court knows or has reason to know there is an Indian child involved in an involuntary child custody proceeding, the court or agency must send notice of the proceeding to the Indian child's tribe, parents, and

12. *See* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), *cert. granted sub nom.* Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022), *and cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022); *see also* Stipulation of Voluntary Dismissal, C.E.S. v. Nelson, No. 15-cv-982 (W.D. Mich. Jan. 27, 2016); Nat'l Council of Adoption v. Jewell, No. 16-1110, 2017 WL 9440666 (4th Cir. Jan. 30, 2017); Order, Doe v. Hembree, No. 15-cv-471 (N.D. Okla. Mar. 3, 2017); Doe v. Piper, No. 15-2639, 2017 WL 3381820 (D. Minn. Aug. 4, 2017); Carter v. Tahsuda, 743 F. App'x 823 (9th Cir. 2018); Watso v. Jacobson, 929 F.3d 1024 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 1265 (2020); Order Dismissing Case, Fisher v. Cook, No. 19-cv-2034 (W.D. Ark. May 28, 2019); Voluntary Dismissal, Americans for Tribal Court Equality v. Piper, No. 17-cv-4597 (D. Minn. Sept. 6, 2019); Notice of Dismissal, Whitney v. Bernhardt, No. 19-cv-299 (D. Me. Aug. 23, 2019); *In re* Alexandria P., 204 Cal. Rptr. 3d 617 (Ct. App. 2016), *cert. denied sub nom.* R.P. v. Los Angeles Cnty. Dep't of Child. & Fam. Servs., 137 S. Ct. 713 (2017); S.S. v. Stephanie H., 388 P.3d 569 (Ariz. Ct. App. 2017), *cert. denied sub nom.* S.S. v. Colo. River Indian Tribes, 138 S. Ct. 380 (2017); Renteria v. Superior Ct., *cert. denied*, 138 S. Ct. 986 (2018); *In re* Adoption of B.B., 417 P.3d 1 (Utah 2017), *cert. denied sub nom.* R.K.B. v. E.T., 138 S. Ct. 1326 (2018).

13. 25 U.S.C. §§ 1901–63.

14. *See 1974 Hearings*, *supra* note 3; *1977 Hearings*, *supra* note 2; *1978 Hearings*, *supra* note 3.

15. H.R. Rep. No. 95-1386 (1978).

16. 25 U.S.C. § 1903(1).

17. *Id.* § 1903(4).

18. Kathryn Fort, American Indian Children and the Law: Cases and Materials 143 (2019); *In re* England, 887 N.W.2d 10 (Mich. Ct. App. 2016); *In re* Brandon M., 63 Cal. Rptr. 2d 671 (Ct. App. 1997).

Indian custodian.[19] If the state court properly has jurisdiction, the tribe has an opportunity to intervene in the proceedings[20] and request that the case be transferred to tribal court.[21] If the case is not transferred, usually due to the objection of a parent or a good cause determination to the contrary,[22] the case proceeds under ICWA's protections in state court.

For a state court to place the child in foster care, the state agency must demonstrate by clear and convincing evidence the child will likely suffer from serious physical or emotional damage if they are returned to their parents.[23] In addition, the agency must provide active efforts to reunify and rehabilitate the Indian family.[24] The state must also find a qualified expert witness who can testify about the cultural parenting practices of the Indian child's tribe and support the foster care proceeding.[25]

When a child is placed in foster care, ICWA provides for certain placement preferences to ensure the child is kept close to their family and community.[26] The preferences include a member of the Indian child's family; a foster home licensed, specified, or designated by the Indian child's tribe; an Indian foster home licensed by the state; or a group home run by the child's tribe.[27] If none of these are available after a diligent search, the court may find there is good cause to deviate from the placement preference.[28]

If reunification fails, ICWA also provides standards for a termination of parental rights proceeding.[29] To terminate parental rights, courts must find beyond a reasonable doubt that returning the child to the parents is likely to result in serious emotional or physical harm to the child.[30] That finding

19. 25 U.S.C. § 1912(a).

20. *Id.* § 1911(c).

21. *Id.* § 1911(b).

22. *See id*.

23. 25 U.S.C. § 1912(e). Emergency removals prior to judicial proceedings are permitted on a limited basis. *Id.* § 1922 ("Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. . . ."); *see In re* J.M.W., 514 P.3d 186 (Wash. 2022).

24. 25 U.S.C. § 1912(d).

25. *Id.* § 1912(e).

26. *Id.* § 1915.

27. *Id.* § 1915(b).

28. *Id.*; 25 C.F.R. § 23.132(c)(5) (2016).

29. 25 U.S.C. § 1912(f).

30. *Id.*

must be supported by the qualified expert witness,[31] and the court must find there were active efforts provided to avoid the termination.[32]

Once an Indian child is a legal orphan, there are placement preferences in place for their adoption as well.[33] These include placing the child with a member of the Indian child's family, the child's tribe, or members of other federally recognized tribes.[34]

Finally, and perhaps most importantly, ICWA contains jurisdictional provisions that ensure state courts send Native children to tribal courts.[35] Specifically, section 1911 discusses tribal jurisdiction over Indian child custody proceedings.[36] Subsection (a) includes information about exclusive jurisdiction and identifies that tribes "shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law."[37] This section also gives tribes exclusive jurisdiction over cases where an Indian child is a ward of a tribal court, regardless of the child's domicile or residence.[38]

ICWA has most of the procedural mechanisms and substantive rights in place necessary for tribal sovereignty, self-governance, and autonomy. Particularly, subchapter II, Indian Child and Family Programs, houses the grants that would provide the support necessary for states and tribes to implement the supports families need.[39] However, ICWA is not self-funding, and these grants have been unfunded or underfunded since Congress passed the law.[40] Without proper funding, most tribes are not able to successfully implement the tribal child welfare systems that are the essence of ICWA preferences.

While ICWA does not address all the challenges that tribal communities face, it is a significant step in the right direction toward further protecting Native children and families and promoting tribal self-governance. This is one of the reasons why ICWA has been considered the gold standard for

31. *Id.*
32. *Id.* § 1912(d).
33. *Id.* § 1915(a).
34. *Id.*
35. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).
36. 25 U.S.C. § 1911.
37. *Id.* § 1911(a).
38. *Id.*
39. *Id.* §§ 1931–34.
40. Nat'l Cong. of Am. Indians, Fiscal Year 2021 Indian Country Budget Request: Advancing Sovereignty Through Certainty & Security 70, https://www.ncai.org/resources/ncai-publications/indian-country-budget-request/NCAI_FY_2021_FULL_BUDGET.pdf.

child welfare practices for over 40 years.[41] Even so, those looking to get rid of the law for various reasons have periodically attacked it under various constitutional arguments.[42]

B. Adoptive Couple v. Baby Girl

When the Supreme Court heard *Adoptive Couple*, it was only the second time an ICWA case made it up to the Court, and both cases involved voluntary adoptions.[43] Because of this, the Court's view of the law has focused on arguments involving ICWA's "intrusion" into placement decisions by fit parents to put their child up for adoption.[44] In the case of *Adoptive Couple*, the child's mother decided to put the child up for a-doption without a release or consent from the father.[45] ICWA has limited protections for parents involved in adoptions, specifically that they must wait 10 days after the birth of the child to consent to an adoption, and they must do it in the presence of a judge.[46]

In *Adoptive Couple*, by the time the child was born, the father was in pre-deployment to Iraq.[47] The pre-adoptive couple filed their adoption in South Carolina but did not notify the father for four months—days before he was set to deploy to Iraq.[48] He immediately contacted a lawyer, and the case was stayed under the Servicemember's Civil Relief Act.[49] After the case went through the South Carolina court system, the state supreme court found that the proceeding was involuntary as to the father.[50] The ICWA protections detailed above protected the father, and his child was returned to him after the court's decision.

Almost immediately, the prospective adoptive couple filed a certiorari petition with the Supreme Court, and the Court accepted review.[51] Justice

41. *See* Brief of Casey Family Programs et al. as Amici Curiae in Support of Respondent Birth Father, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1279468.

42. *See* Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 Emory L.J. 587 (2002); *In re* Santos Y., 112 Cal. Rptr. 2d 692 (Ct. App. 2001).

43. Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989).

44. Brief for Petitioners at 2–3, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399); Brief of Amica Curiae Birth Mother in Support of Petitioners and Baby Girl at 24–28, 30–31, *Adoptive Couple*, 570 U.S. 637 (No. 12-339).

45. Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 630 (S.C. 2012), *rev'd*, 570 U.S. 637 (2013).

46. 25 U.S.C. § 1913(a).

47. *See Adoptive Couple*, 731 S.E.2d at 555.

48. *Id.*

49. *Id.*; *see* 50 U.S.C. §§ 3901–4043.

50. *Adoptive Couple*, 731 S.E.2d at 561.

51. Adoptive Couple v. Baby Girl, 568 U.S. 1081 (2013).

Alito's decision in *Adoptive Couple* was ultimately a narrow one, and subsequently quite limited in practice.[52] But his reasoning and language, which specifically referred to the child's blood quantum rather than her eligibility for tribal citizenship[53]—and noted that in certain cases there might be equal protection concerns under ICWA[54]—both worried Indian Country and emboldened ICWA opponents. Perhaps even more importantly for ICWA opponents, Justice Thomas's concurrence questioned the very ability of Congress to pass ICWA in the first place and provided an ahistorical reading of the Indian Commerce Clause to make his argument.[55] Ultimately, the reasoning in this decision prompted the actions that have led to the current case in front of the Court, *Haaland v. Brackeen*.

After the *Adoptive Couple* decision came down, the Obama administration sent out a Dear Tribal Leader letter asking for comments on how the administration could better support tribes and a robust ICWA enforcement. The Environment and Natural Resources division of the Department of Justice, the division responsible for most Indian law issues, started filing pro-ICWA amicus briefs in state courts.[56] The administration released the first updated set of federal guidelines since 1979, and not long after began a long and somewhat contentious regulation process.[57]

Almost as soon as the 2015 ICWA guidelines were released, the National Council for Adoption filed a federal lawsuit in the eastern district of Virginia,

52. Perhaps the case has been most used in Montana against fathers; *see, e.g.*, *In re* J.S., 321 P.3d 103, 110–13 (Mont. 2014).

53. Adoptive Couple v. Baby Girl, 570 U.S. 637, 641, 642 n.1, 646 (2013).

54. *Id.* at 656.

55. *Id.* at 665–66, (Thomas, J., concurring); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1015–17 (2015).

56. *See, e.g.*, Brief for the United States as Amicus Curiae in Support of Appellant, Native Vill. of Tununak v. State of Alaska, Dep't of Health & Soc. Servs., 334 P.3d 165 (Alaska 2014) (No. S-14670); Application of the United States for Leave to File Amicus Curiae Brief and [Proposed] Brief in Support of Petitioner and Appellant Ashlee R., *In re* Isaiah W., 373 P.3d 444 (Cal. 2016) (No. S221263).

57. *See* Mem. from Barbara Atwood, et al. to Assistant Sec'y Washburn, Comments on BIA Guidelines (April 30, 2014); Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38784 (June 14, 2016); Bureau of Indian Affairs, Indian Child Welfare Act (ICWA) Proceedings, Rulemaking Docket, https://www.regulations.gov/docket/BIA-2015-0001/document. The notice and comment period included more than 2,000 written comments for and against the regulations as well as six public meetings. Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38784; Kathryn Fort, *Additional Comments on Proposed ICWA Regulations*, Turtle Talk (June 11, 2015), https://turtletalk.blog/2015/06/11/additional-comments-on-proposed-icwa-regulations/. The author attended the Portland, Oregon, hearing where at least one commentator yelled at the audience. Public Meeting Transcript, Proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings "ICWA Proposed Rule"—25 CFR 23, at 37–45 (Portland, Or., Apr. 22, 2015).

claiming the guidelines and parts of the law were unconstitutional.[58] In a string of cases after that, various parties and organizations filed federal lawsuits across the country, all taking swipes at ICWA's constitutionality, primarily on equal protection grounds.[59] All of the attempts failed, except one that was filed in the fall of 2017.[60]

C. Haaland v. Brackeen

During the same week as the annual Tribal In-House Counsel Association conference in October of 2017, Texas and a foster family filed a complaint in the U.S. District Court for the Northern District of Texas, arguing that ICWA was unconstitutional under a myriad of claims.[61] This complaint was immediately different than the others in that it was the first time a state brought the argument that it shouldn't have to follow ICWA. The complaint was also different because it was filed in a federal district notoriously favorable to Texas's increasingly outlandish lawsuits[62] and was also the first time ICWA was challenged during the Trump administration.

The plaintiffs eventually filed amended complaints, bringing in two additional foster families and suing the entire federal government.[63] Realizing this case would be the biggest fight against ICWA and that its posture meant no tribal voices would be parties to the case, four tribes across the country agreed to intervene and defend ICWA alongside the

58. Nat'l Council for Adoption v. Jewell, No. 1:15-cv-675-GBL-MSN, 2015 WL 12765872 (E.D. Va. Dec. 9, 2015), *vacated*, No. 16-1110, 2017 WL 9440666 (4th Cir. Jan. 30, 2017).

59. *See* cases cited *supra* note 12.

60. Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018), *aff'd in part and rev'd in part sub nom* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc), *cert. granted sub nom.* Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022), *and cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022).

61. Complaint & Prayer for Declaratory & Injunctive Relief, *Brackeen*, 338 F. Supp. 3d 514 (No. 17-cv-00868). The author organized the conference, and was in attendance. The conference was October 26 and 27, 2017. *2017 ILPC/TICA Law Conference*, Turtle Talk, https://turtletalk.blog/indigenous-law-program/indigenous-law-program-events/2017-indigenous-law-conference/. The complaint was filed on October 25, 2017. Complaint & Prayer for Declaratory and Injunctive Relief, *Brackeen*, *supra*.

62. Steve Vladeck, *Texas Judge's Covid Mandate Exposes Federal Judge-Shopping Problem*, MSNBC (Jan. 11, 2022), https://www.msnbc.com/opinion/texas-judge-s-covid-mandate-ruling-exposes-federal-judge-shopping-n1287324.

63. Second Amended Complaint & Prayer for Declaratory & Injunctive Relief, *Brackeen*, 338 F. Supp. 3d 514 (No. 17-cv-00868) [hereinafter Second Amended Complaint].

federal government.[64] The Navajo Nation later intervened for the purpose of a Rule 19 motion, and then fully intervened on appeal.[65]

The three foster families, the Brackeens, the Cliffords, and the Librettis, all claimed that ICWA interfered with their ability to adopt Native children out of the foster care system.[66] The child in the *Brackeen* case was eligible for membership at both Cherokee Nation and Navajo Nation, and after reunification with the parents failed, the Navajo Nation provided a permanent placement on the reservation.[67] Both Nations and the state agency agreed this was an appropriate change of placement and the state court ordered the change.[68] The Brackeens immediately appealed in state court[69] and filed their challenge in federal court. Relatively quickly, the Navajo placement became uncomfortable due to the appeals and arguments from the Brackeens and ultimately they withdrew,[70] making it possible for the Brackeens to adopt the child.

The Cliffords wanted to adopt an older child in Minnesota who was eligible for membership in the White Earth Nation.[71] She had often lived with her grandma growing up, and when she was removed from her parents and placed in a stranger's foster home, Robyn Bradshaw quickly moved to become a kin placement for her granddaughter.[72] The Cliffords fought the change, but the state agency, the Tribe, and the court agreed the change in placement was in the child's best interest.[73] Not long after this change, Bradshaw adopted her granddaughter.[74]

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64. Motion of Cherokee Nation, Oneida Nation, Quinault Indian Nation & Morongo Band of Mission Indians to Intervene as Defendants, *Brackeen*, 338 F. Supp. 3d 514 (No. 17-cv-00868). These tribes are represented by the author at the Michigan State University Indian Law Clinic as well as attorneys at Jenner & Block LLP and Kilpatrick Townsend & Stockton LLP.

65. Brief in Support of the Navajo Nation's Motion to Intervene as Defendant for the Limited Purpose of Seeking Dismissal Pursuant to Rule 19, *Brackeen*, 338 F. Supp. 3d 514 (No. 17-cv-00868); En Banc Brief of Intervenor Navajo Nation, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc) (No. 18-11479), *cert. granted sub nom.* Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022), *and cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022).

66. Second Amended Complaint, *supra* note 63, ¶¶ 12–13, 15.

67. Brief in Support of the Navajo Nation's Motion to Intervene as Defendant for the Limited Purpose of Seeking Dismissal Pursuant to Rule 19, *supra* note 65, at 1–2.

68. *Id.* at 2.

69. *Id.* at 3.

70. *Id.*

71. Second Amended Complaint, *supra* note 63, ¶¶ 6–7, 171–774.

72. Brief for Robyn Bradshaw, Grandmother & Adoptive Parent of P.S. ("Child P.") as Amicus Curiae in Support of Tribal & Federal Defendants, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Aug. 11, 2022).

73. *Id*.

74. *Id*.

The Librettis wanted to adopt a newborn child who was in the hospital as a result of a "safe haven" drop off.[75] The child was eligible for membership in the Ysleta del Sur Pueblo tribe, which had a potential placement for the child, but soon agreed to the placement with the Librettis.[76] They were able to adopt the child during the pendency of the trial court proceedings.[77]

In all, all three foster families had their state proceedings completed during or immediately after the decision from the district court in Texas, though the courts have nonetheless permitted their federal challenge to ICWA to proceed.[78]

After some unorthodox motion practice in the district court, including combining the briefing for a motion to dismiss and a motion for summary judgment,[79] Judge Reed O'Connor found ICWA to be unconstitutional on virtually all of the grounds the plaintiffs argued.[80] In a stunning paragraph with one citation, he found that Congress's Article I power could not overcome a commandeering argument, creating a completely new legal precedent with no citation to any relevant legal authority.[81]

The intervening tribes and the federal government sought and received a stay from the Fifth Circuit pending an appeal of the decision.[82] A three-judge panel found that ICWA was constitutional and overturned the lower court's decision.[83] Texas and the foster parents asked for an en banc review, which they received. The 15 judges of the Fifth Circuit issued a highly

75. Second Amended Complaint, *supra* note 63, ¶ 4; Rebecca Nagle, *The Story of Baby O—and the Case That Could Gut Native Sovereignty*, NATION (Nov. 9, 2022), https://www.thenation.com/article/society/icwa-supreme-court-libretti-custody-case/.

76. Second Amended Complaint, *supra* note 63, ¶¶ 5, 164, 166.

77. Brief for Tribal Defendants at 49, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Aug. 12, 2022).

78. Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018), *aff'd in part and rev'd in part sub nom.* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc), *cert. granted sub nom.* Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022), *and cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022).

79. Order, Brackeen v. Zinke, No. 17-cv-868 (N.D. Tex. Apr. 25, 2018).

80. *Brackeen*, 338 F. Supp. 3d at 546.

81. *Id.*

82. Brackeen v. Cherokee Nation, No. 18-11479 (5th Cir. Dec. 3, 2018).

83. Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019), *on reh'g en banc sub nom. Brackeen*, 994 F.3d 249.

fractured, long decision that had virtually no impact on ICWA practice[84] but did attract the attention of the Supreme Court.[85]

The en banc decision consists of a brief per curiam opinion summarizing the outcome of the case; and essentially two full opinions by the left and right sides of the court, portions of which represent the opinion of the court on certain issues.[86] Judge Dennis wrote that while the parties had standing to bring the case, ICWA is constitutional and does not have either equal protection or commandeering concerns.[87] Judge Duncan wrote that ICWA is broadly unconstitutional in that it is beyond Congress's power to pass, and violates equal protection with the definition of Indian children and Indian families.[88] The rest of the judges joined in some or all of the decision while writing their own dissents and concurrences.[89]

Ultimately, the only clear holdings from the case were that the active efforts and qualified expert witness requirements violate the commandeering doctrine by forcing state agencies to follow a federal law not properly based on preemption grounds, that the rest of ICWA was within congressional power and constitutional on preemption grounds, and that a provision of the 2016 federal regulations governing ICWA cases was beyond the scope of the law and violated the Administrative Procedure Act.[90] A majority rejected the equal protection challenge to the "Indian child" classification but other equal protection arguments garnered no majority.[91] Otherwise,

84. According to the Westlaw citing references, as of the time of a search conducted by the author in December 2022, since its release in 2021, only 38 cases cited to this decision, and only 11 of those involved ICWA. This tracks the author's experience that very few advocates contacted her regarding the use of this opinion in trial or appellate ICWA cases.

85. *Brackeen*, 994 F.3d 249.

86. *Id*. at 267 (per curiam opinion), 269 (opinion of Dennis, J.), 362 (opinion of Duncan, J.).

87. *Id*. at 361 (opinion of Dennis, J.).

88. *Id*. at 362–63 (opinion of Duncan, J.)

89. *See* West opinion synopsis, *id*. at 249 ("Dennis, Circuit Judge, filed opinion concurring in part and dissenting in part, in which Stewart and Graves, Circuit Judges, joined, and Wiener, Higginson, Southwick, and Costa, Circuit Judges, joined in part, and Owen, Chief Judge, joined in part. Duncan, Circuit Judge, filed opinion concurring in part and dissenting in part, in which Smith, Elrod, Willett, Engelhardt, and Oldham, Circuit Judges, joined, and Jones, Southwick, Haynes, Circuit Judges, joined in part, and Owen, Chief Judge, joined in part. Haynes, Circuit Judge, filed opinion concurring in part. Owen, Chief Judge, filed opinion concurring in part and dissenting in part. Wiener, Circuit Judge, filed opinion dissenting in part. Costa, Circuit Judge, filed opinion concurring in part and dissenting in part, in which Owen, Chief Judge, and Wiener, Higgenson, and Southwick, Circuit Judges, joined in part.").

90. *See* Brackeen *Judicial Breakdown Chart*, TURTLE TALK, https://turtletalk.files.wordpress.com/2022/09/screen-shot-2022-09-26-at-2.35.37-pm.png (last visited Oct. 24, 2022).

91. *Brackeen*, 994 F.3d at 267–68 (per curiam opinion). The court split equally on the equal protection challenge to the third preference for both adoption and foster placements, allowing children to be placed with Indian families from tribes other than that for which the child is a member or eligible for membership. *Id.*

as Judge Costa wrote, the decision "has no more legal force than a law review article."[92]

Almost all of the parties submitted petitions of certiorari to the Supreme Court, the federal government and tribal intervenors with the hope of limiting the questions presented,[93] and Texas and the foster families with the hope of having the constitutional questions broadly considered.[94] The Court granted all of the petitions, leaving multiple questions presented and the constitutional issues around ICWA open for Court review.[95] There has been a tremendous amount of ink spilled on these questions, including principal briefs that contain more than 20,000 words, plus over 20 amicus briefs in support of ICWA and eight opposing it.[96] While a full analysis of the arguments for the case are beyond the scope of this article, a short description of the three primary issues the Court will consider is below.

1. Equal Protection

In many ways, the most shocking argument Texas and the foster parents bring is the claim that ICWA violates the Equal Protection Clause.[97] Their argument is twofold. The first is that tribal citizenship is based on descendancy, which means it is inextricably tied to race.[98] Their second is that two provisions of the law that have to do with the placement preferences are not tied directly to the Indian child's tribe and, as such, insert a racial preference rather than a political one.[99]

Since at least 1974, the Supreme Court has held that the classification of Indians for the purpose of legislation is not a race-based determination, but rather a political one.[100] In the first instance, the inclusion of Indians as a

92. *Id* at 446 (Costa, J., concurring in part and dissenting in part).

93. Petition for a Writ of Certiorari, Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (No. 21-377); Petition for a Writ of Certiorari, Haaland v. Brackeen, 142 S. Ct. 1205 (No. 21-376).

94. Petition for a Writ of Certiorari at i, Texas v. Haaland, 142 S. Ct. 1205 (No. 21-378); Petition for a Writ of Certiorari at i, Brackeen v. Haaland, 142 S. Ct. 1205 (No. 21-380). Indiana and Louisiana, which had joined Texas in the litigation, did not file a petition for certiorari.

95. Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc), *cert. granted sub nom.* Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022), *and cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022).

96. *See* Haaland v. Brackeen *(No. 21-376) Supreme Court Documents*, Turtle Talk, https://turtletalk.blog/texas-v-zinke-documents-and-additional-materials/texas-v-haaland-supreme-court-documents/ (last visited Oct. 24, 2022).

97. Brief for Petitioner the State of Texas at 37–57, Texas v. Haaland, 142 S. Ct. 1205 (2022) (No. 21-378), 2022 WL 1785628.

98. *Id.* at 42.

99. *Id.* at 47–48.

100. Morton v. Mancari, 417 U.S. 535, 554 (1974).

political class is illustrated in the Constitution in both the Indian Commerce Clause and the Indians Not Taxed provisions.[101] Both require Congress to determine who is an "Indian" for the purposes of lawmaking, an inherently political determination.[102]

In the second, treaties between the United States and tribes, combined with the language in the Constitution and Supreme Court case law, make clear that the United States has a trust relationship with, and plenary authority to pass laws affecting, Indian tribes and people.[103] If these laws are subject to a strict scrutiny analysis as race-based laws, to quote the Court, all of Title 25 would be unconstitutional.[104]

Finally, tribes alone hold the power to determine their own citizenship.[105] This often means that Native people who may be racially American Indian or Alaska Native may not meet the requirements of a tribe's citizenship laws. There is perhaps nothing more political for a tribe than the determination of its citizenry.[106]

2. Congressional Power to Enact ICWA

Related to the argument about the nature of tribal citizenship and race, Texas and the foster parents argue that Congress simply does not have the power to intrude in state domestic matters to protect Native families.[107] Congress's power in Indian affairs has been described as exclusive and plenary by the Supreme Court.[108] Based on the trust responsibility, the Indian Commerce Clause, and treaties, Congress has significant power to pass laws on behalf of both tribes and individual Indians.[109] This had not been questioned significantly by the Court until Justice Thomas wrote in

101. U.S. Const. art. I, §§ 2, cl. 3 & 8, cl. 3.

102. *See* Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 Calif. L. Rev. 495, 551 (2020).

103. Matthew L.M. Fletcher, Federal Indian Law 43–44 (2016).

104. *Morton,* 417 U.S. at 552 ("Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.").

105. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978).

106. *See, e.g.*, Gerald Vizenor & Jill Doerfler, The White Earth Nation Ratification of a Native Democratic Constitution (2012); *Martinez*, 436 U.S. at 55–56; Gloria Valencia-Weber, Santa Clara Pueblo v. Martinez*: Twenty-Five Years of Disparate Cultural Visions*, 14 Kan. J.L. & Pub. Pol'y 49 (2004–05).

107. Brief for Petitioner the State of Texas, *supra* note 97, at 20–34.

108. *See* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989).

109. Fletcher, *supra* note 103, at 44.

Adoptive Couple and in *Lara*.[110] Justice Thomas's concurrences questioned the source of congressional power in Indian affairs given the perceived limitations of the Indian Commerce Clause.[111] His argument was essentially that Congress only has power to address literal issues of commerce, rather than broad policy enactments that fulfill treaty promises and the trust responsibility.[112] Therefore, Justice Thomas believes ICWA to be beyond the scope of congressional power.[113]

Justice Thomas's reasoning may have a destructive but appealing clarity that is belied by the actual history of the Clause and the history of the United States.[114] ICWA's preamble makes clear it is tied directly to the trust responsibility of Congress to protect tribes and Native people.[115] Without their children, the very existence of tribal communities and nations is threatened. By allowing the continued removal of Native children and their subsequent placement in non-Native families, the federal government would be encouraging the end of tribal nations and the destruction of Native families.

3. Commandeering[116]

In recent years, the Supreme Court has expanded the judicially created doctrine of anti-commandeering.[117] Arguably based on interpretations of the 10th Amendment,[118] Congress does not have the power to pass laws that would "commandeer" state agencies to enact a "federal regulatory program."[119] However, Congress can, and does, use incentives through the Spending Clause to "encourage" state action.[120]

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110. Adoptive Couple v. Baby Girl, 570 U.S. 637, 659 (2013) (Thomas, J., concurring); United States v. Lara, 541 U.S. 193, 215 (2004) (Thomas, J., concurring).

111. *See Lara*, 541 U.S. at 224 (Thomas, J., concurring).

112. *Adoptive Couple*, 570 U.S. at 658–64 (Thomas, J., concurring).

113. *Id.* at 666.

114. *See* Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship and Original Constitutionalism*, 70 Stan. L. Rev. 1025, 1047–48 (2018) ("Justice Thomas has made a separate point with respect to enumerated powers, arguing that the Constitution's grant of congressional power to regulate commerce 'with the Indian *tribes*' does not provide congressional authority to regulate individual Indians, as ICWA does. This distinction finds no support in constitutional history, regardless whether Native communities are described as nations or as tribes.").

115. 25 U.S.C. § 1901.

116. *See* Leanne Gale & Kelly McClure, *Commandeering Confrontation: A Novel Threat to the Indian Child Welfare Act and Tribal Sovereignty*, 39 Yale L. & Pol'y Rev. 292 (2020) (delving into commandeering in great detail).

117. Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. Rev. 7, 15–16 (2006).

118. Josh Blackman, *Improper Commandeering*, 21 U. Pa. J. Const. L. 959, 963 (2019).

119. New York v. United States, 505 U.S. 144, 161 (1992).

120. *Id*. at 166–67. This is particularly important for the discussion in Part II *infra*, as Congress uses its Spending Clause power to direct state child protection requirements.

Texas argues that ICWA's provisions requiring the state courts and agencies to follow the burdens of proof required to either place an Indian child in foster care or terminate the parental rights of their parents constitute a commandeering violation.[121] Their arguments intersect in that if Congress does not have the power to pass the law under Article I, discussed above, then the law must necessarily be commandeering the states.[122]

Congress addressed a version of this argument in its House Report accompanying the bill, discussing the Supremacy Clause in the context of ICWA.[123] Stating that the law does not "oust the State" from the legitimate police powers in domestic relations, Congress stated, "it is clear that Congress has full power to enact laws to protect and preserve the future and integrity of Indian tribes. . . ."[124] The Report explains how Congress may impose "certain procedural burdens to protect the substantive rights of Indian children, Indian parents, and Indian tribes in State court proceedings. . . ."[125]

D. An Uncertain Future

Though the Court may not issue a decision until June of 2023, the question that arises time and again is how to preemptively fix what the Court might do to ICWA and federal Indian law. If the Court accepts virtually any of Texas's arguments, the legal landscape of federal Indian law may be fundamentally changed. At a minimum, it is likely ICWA practice will change at least in some respects. The Court's ultimate decision, however, does not mean tribes will suddenly stop fighting to protect their children and families. In addition, advocates will continue to fight for just solutions to the massive issues created by the current child welfare system.[126]

In order for tribes to continue that fight, there must be a solution to the funding structure in place now for tribal child welfare and justice systems. The *Brackeen* litigation has laid bare the importance of tribal governments administering their own child protection and justice systems separate and apart from the states. Tribal governments must have the ability to successfully secure sources of funding for tribal child welfare systems. Without significant changes to the amount of funding and the funding

121. Brief for Petitioner the State of Texas, *supra* note 97, at 60–62.

122. *Id.* at 66.

123. H.R. Rep. No. 95-1386, at 12–19 (1978).

124. *Id*. at 17.

125. *Id*. at 18.

126. *See* Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World 10 (2022). Professor Roberts has been writing path-marking scholarship in this area for more than 20 years, and while her frustration shines through in the prologue, she also has very obviously not stopped doing the work.

structure, tribes will continue to be at a massive disadvantage, and will be unable to serve their member children and families.

Tribal justice systems and social service agencies vary as widely as over 500 separate sovereigns can.[127] Some tribes have a system that is relatively similar to a state system.[128] Other tribes have very traditional justice systems, with elders acting as judges or counselors, and very limited or no agency.[129] Some use pieces of both.[130] Some tribes have a culture of involving many in the community in a family's problems, and others are the opposite. Even given that variety, there is often an understanding that family problems aren't best solved in an adversarial process, parents need services and support, children should stay with extended family, and state systems don't serve Native families.[131] Tribes develop systems based on their knowledge and tradition that do not look like state systems[132] and are disrupted when children are taken into state systems.[133] Tribal systems are built on, and intended to create, resiliency.[134]

Because the ultimate goal of ICWA was not only to ensure states followed federal minimum standards to protect Indian families in their courts,[135] but also to ensure tribes had the opportunity to make decisions regarding their own children,[136] strengthening tribal child protection systems must be at the heart of any post-*Brackeen* advocacy. One of the many effects of the federal

127. There are 574 federally recognized tribes in the United States. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636 (Jan. 28, 2022); *Tribal Leaders Directory*, U.S. Dep't of the Interior, Indian Affs., https://www.bia.gov/service/tribal-leaders-directory (reporting number of federally recognized tribes as of Jan. 28, 2022). *See 1977 Hearings*, *supra* note 2, at 79 (statement of Goldie Denny, Dir. of Soc. Servs., Quinault Nation, & Nat'l Cong. of Am. Indians) ("These are some of the advantages of a tribe operating its own social services delivery system. You can be innovative. You do not have to be restricted by the old ways of doing things that the non-Indian people have taught you to do.").

128. *See, e.g.*, Tulalip Tribal Codes, Juvenile and Family Code, tit. 4, ch. 4.05, https://www.codepublishing.com/WA/Tulalip/#!/Tulalip04/Tulalip0405.html#4.05; Cherokee Nation Tribal Code, tit. 10, ch. 1 (2019).

129. *See Kongiganak Tribal Court*, Native Vill. of Kongiganak, https://sites.google.com/alaska.edu/nativevillageofkongiganak/kong-tribal-court?authuser=0.

130. *See* Aullarripta Qaunagisaqlugich Miqliqtuvut Pitqurrianich Native Vill. of Barrow's Children's Code (2020).

131. Carrie Garrow, *Changing Family Courts to Help Heal and Build Resilient Families*, 2018 B.Y.U. L. Rev. 1277 (2018).

132. Joseph Flies Away & Carrie Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence* +, 2013 Mich. St. L. Rev. 403 (2013).

133. *See, e.g.*, *In re* Payne/Pumphrey/Fortson, 874 N.W.2d 205, 208 (Mich. Ct. App. 2015) (qualified expert witness opposed termination of the mother's parental rights as "it was generally against the tribe's practice to support termination").

134. Michalyn Steele, *Indigenous Resilience*, 62 Ariz. L. Rev. 305 (2020).

135. 25 U.S.C. § 1902.

136. *Id.* § 1911(a).

funding of state child welfare systems has been to force Native families to stay in state court to ensure their children have access to funding and services. When that happens, ICWA is vulnerable to challenges that arise from the fundamental structure of state systems—breaking up families, placing children in stranger foster care, providing children with poor representation, and, most importantly, showing a fundamental disrespect of tribal culture and systems.[137]

Tribal leaders advocated for funding of tribal systems.[138] Testimony after testimony of tribal child welfare agency directors and tribal leaders raised concerns about funding tribal child welfare systems.[139] ICWA's protections are all well and good, the testimony implies, but mean very little without significant support and funding for tribal systems.[140]

As such, subchapter II of the law, which is mostly ignored by advocates today, includes provisions for funding systems and services.[141] The law gives the Secretary of the Interior discretion to make grants to tribes and organizations for their child welfare programs, including for licensing foster homes, maintaining counseling facilities, and providing family assistance, home improvement, training and education of tribal court judges and staff, adoption subsidies, and legal representation for Indian families involved in proceedings.[142] The money provided can also be used as a "non-federal" match for Social Security Act funding.[143]

The law includes a section specifically authorizing the Secretary to fund *off*-reservation services including foster homes, facilities and services, family assistance, and legal representation to Indian families involved in the child welfare system.[144] The Secretary is also authorized to enter into agreements with the Secretary of Health and Human Services (HHS) to appropriate HHS funds as needed for the services listed.[145] Some of these grants have never been appropriated by Congress, while others are so underfunded they make very little difference for families.[146] The on-reservation program, which in

137. *See In re* Nicole B., 927 A.2d 1194, 1201–04 (Md. Ct. App. 2007) (where a trial judge, among other things, compared tribal membership with being a member of the Boy Scouts), *rev'd*, 976 A.2d 1039 (Md. 2009).

138. *See* congressional hearing testimony cited *supra* note 3.

139. *See id.*

140. *See id*.

141. 25 U.S.C. §§ 1931–1934.

142. *Id.* § 1931(a).

143. *Id.* § 1931(b); see Part II *infra* explaining that Social Security Act funding for child welfare is done on a matching, reimbursable basis, making it difficult for tribes to access the funds.

144. 25 U.S.C. § 1932.

145. *Id.* § 1933(a).

146. Nat'l Cong. of Am. Indians, *supra* note 40, at 66.

1978 Congress assumed would require $26 million to $62 million to fund, was funded in 2020 at $14.431 million for *all* of Indian Country.[147] In today's dollars, the 1978 assumptions would require $200 to $500 million for full funding.[148] Congress could, and should, fully fund these grants. The off-reservation program has been and remains at $0.[149]

Tribes have access to other threads of funding that may be used to fund their social service and tribal justice systems, including the Bureau of Indian Affairs (BIA) Tiwahe program, the Indian Child Welfare Act program, and the off-reservation ICWA program. All three of these were funded at approximately $15 million total for all 576 tribes in 2020.[150] The BIA social services program received $51.4 million in 2020.[151] One program addresses child abuse prevention, though that amount is approximately half a million dollars for tribes and is shared with migrant populations.[152] None of these lines of funding begin to approach the amount of money available to states to run their systems through the Social Security Act.[153] However, even if tribes could fully access that funding, the attendant requirements force them to run systems that look like state systems.

II. Child Welfare Funding

In 1977, the then-Deputy Assistant Secretary of Health, Education, and Welfare (HEW)[154] had an exchange with Chairman Abourezk during hearings on S. 1214, a bill that would become the Indian Child Welfare Act. Nancy Amidei, the HEW official, told the Senate committee of a new bill HEW was moving—S. 1928.[155] S. 1928 would create standards for state systems and, finally, fully invest in a child welfare system—or, as Amidei described it, "an adequately financed, official backed, ongoing system that would

147. *Id.* at 70.
148. *Id*.
149. *Id.*
150. *Id.*
151. *Id.* at 71.
152. *Id.* at 74.
153. *See* Emilie Stoltzfus, Cong. Rsch. Serv., R47080, Child Welfare in the President's FY2023 Budget (Apr. 26, 2022), https://crsreports.congress.gov/product/pdf/R/R47080#:~:text=The%20President's%20FY2023%20budget%20requests,Victims%20of%20Child%20Abuse%20Act (reporting that in fiscal year 2022, over $11 billion were provided to fund Title IV-B and IV-E and almost $200 million under the Child Abuse Prevention and Treatment Act grants).
154. The department that is now the Department of Health and Human Services (HHS) and a separate Department of Education.
155. *1977 Hearings*, *supra* note 2, at 53 (statement of Nancy Amidei, Deputy Assistant Sec'y for Legislation/Welfare, Dep't of Health, Educ. & Welfare).

address the needs of children and support the rights of their families."[156] Amidei stated the fact they were invited to give testimony on S. 1214 had them revisit their own bill and note there were "some gaps" that could be addressed by bringing some of S. 1214's provisions into S. 1928.[157]

The chairman and the official went back and forth, with Amidei trying to explain to the chairman how this new funding source would work, and how it would address many of the provisions in S. 1214.[158] At the end of the testimony, HEW agreed that it could create programs for Indian people that do not have a racial or ethnic basis, and Amidei explained they could incorporate portions of S. 1214 into S. 1928, such as involving tribal governments and tribal courts, and keeping children in their homes. The benefit would be to "insure that the moneys available generally would also be available on behalf of Indian children in ways that they are not now."[159]

That afternoon, the influential lawyer Bert Hirsch testified that merging S. 1214 with S. 1928 would be an awful idea.[160] Others submitted testimony to the same.[161] The suspicion—rightfully based on years of dealing with the federal government—appeared to be that none of the provisions of the nascent ICWA would actually make it into the broader federal law.[162] ICWA passed in 1978, and two years later, S. 1928 passed as a different law, one we now know as the Adoption Assistance and Child Welfare Act of 1980 (CWA).[163] CWA included all of the protections that Amidei discussed with the chairman, while also creating the single largest source of child welfare funding in the country.[164] What the law didn't include were any provisions to protect Native children or recognize tribal courts or agencies. Forty-five years later, tribes are still struggling with unfunded and underfunded ICWA grants, while states receive millions of dollars from the IV-E system.

Indeed, the primary source of funding for all child protection systems in the United States is the Social Security Act—specifically Titles IV-B and

156. *Id.* at 54.

157. *Id.* at 55.

158. *Id.* at 71–75.

159. *Id.* at 75.

160. *Id.* at 150 (statement of Bertram Hirsch, Ass'n on Am. Indian Affs.).

161. *1978 Hearings*, *supra* note 3, at 66 (statement of Goldie Denny, Dir. of Soc. Servs., Quinault Nation, representing Nat'l Cong. of Am. Indians).

162. *Id.* ("General child welfare legislation, no matter how well meaning, does not address the unique legal, cultural status of Indian people"); *1977 Hearings*, *supra* note 2, at 150 (statement of Bertram Hirsch, Ass'n on Am. Indian Affs.).

163. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500.

164. *See Introduction to Child Welfare Funding*, Child Welfare Info. Gateway, https://www.childwelfare.gov/topics/management/funding/intro/ (last visited Dec. 28, 2022).

IV-E.[165] Since those hearings in 1977, those acts have grown in size and complexity as Congress used its Spending Clause power to direct state child protection policies.[166] Prior to 1961, child welfare costs fell entirely on the states, to the extent they offered any services at all.[167] The years 1961 to 1980 marked a transitional period in which the federal government and states shared child welfare costs.[168] Beginning in 1980, significant funds were authorized under Title IV-E of the Social Security Act.[169] In 1997 Congress passed the Adoption and Safe Families Act.[170] On October 7, 2008, the Fostering Connections Act was passed.[171] Most recently, in 2018, the Families First Prevention Services Act (FFPSA) passed in Congress and is the biggest rewrite of Title IV-E in 21 years.[172]

As many have pointed out, these policies swing wildly between supporting parents and limiting the removal of children and punishing parents and encouraging the use of foster care.[173] Twenty years ago, Professor Dorothy Roberts wrote *Shattered Bonds*, an influential book detailing a depressing trek through problems all too familiar to the system today.[174] Roberts' points have proved to be just as valid and emphatic today, despite considerable studies and sizable amounts of money devoted to the cause. Just this past year she revisited the system in *Torn Apart*. The subtitle speaks volumes: "how the child welfare system destroys Black families—and how abolition can build a better world."[175] For years, child protection professionals and

165. *Id*.

166. Roberts, *supra* note 126, at 141–45.

167. Laura Radel, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Servs., Federal Foster Care Financing: How and Why the Current Funding Structure Fails to Meet the Needs of the Child Welfare Field 3 (Off. of the Assistant Sec'y for Plan. & Evaluation et al. eds., ASPE Issue Brief. 2005), https://aspe.hhs.gov/reports/federal-foster-care-financing-how-why-current-funding-structure-fails-meet-needs-child-welfare-field-0.

168. *Id*.

169. *Id*.

170. *Id*.

171. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949–81; Jack F. Trope & Shannon Keller O'Loughlin, A Survey and Analysis of Select Title IV-E Tribal-State Agreements Including Template of Promising Practices (Ass'n on Am. Indian Aff. & Casey Fam. Programs 2014), https://www.indian-affairs.org/uploads/5/4/7/6/54761515/fulltitleiv-ereport.pdf.

172. Family First Prevention Services Act of 2018, Pub. L. No. 115-123, 132 Stat. 64, 170, 232; Roberts, *supra* note 126, at 144.

173. Roberts, *supra* note 126, at 144; Dorothy Roberts & Jill Lepore, *Baby Doe: A Political History of Tragedy*, New Yorker (Jan. 24, 2016); Child Welfare Info. Gateway, Child.'s Bureau, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Servs., How Federal Legislation Impacts Child Welfare Service Delivery (Mar. 2022), https://www.childwelfare.gov/pubPDFs/impacts.pdf.

174. Dorothy Roberts, Shattered Bonds: the Color of Child Welfare (2002).

175. Roberts, *supra* note 126.

academics have warned that having state social workers as first responders in a child protection context rarely has a beneficial outcome for families.[176] That is, in many ways, due to the nature of child welfare funding.

A. Title IV-B

Title IV-B of the Social Security Act is the smaller of the two pots of money states (and tribes) access for their child welfare systems. Title IV-B offers funding to child welfare systems to facilitate child and family services. It has two subparts: (1) the Stephanie Tubbs Jones Child Welfare Services Program, which is a discretionary grant program; and (2) the Promoting Safe and Stable Families Program, which can be used for family preservation and support.[177] The purpose of the first subpart of Title IV-B "is to promote State flexibility in the development and expansion of a coordinated child and family services program that utilizes community-based agencies and ensures all children are raised in safe, loving families."[178] In fiscal year 2016, 179 tribes, tribal organizations, or tribal consortia received a total of $6,437,417 under the first subpart.[179]

The Promoting Safe and Stable Families Program (subpart 2) only allows tribes of a certain size to access the funding, and in fiscal year 2016, 130 tribes, tribal organizations, and tribal consortia received $10,320,750.[180] The grants ranged from approximately $10,225 to $1,546,523.[181] The

176. *See* Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. L. & Soc. Change 523, 526 (2019); Virginia Sawyer Radding, *Intention v. Implementation: Are Many Children, Removed from Their Biological Families, Being Protected or Deprived?*, 6 U.C. Davis J. Juv. L. & Pol'y 29, 32, 37, 45, 48 (2001); Marsha B. Freeman, *Lions Among Us: How Our Child Protective Agencies Harm the Children and Destroy the Families They Aim to Help*, 8 J. L. & Fam. Stud. 39, 43, 49–50, 64 (2006); Kay P. Kindred, *Of Child Welfare and Welfare Reform: The Implications for Children When Contradictory Policies Collide*, 9 Wm. & Mary J. Women & L. 414, 417–18, 450 (2003).

177. John Sciamanna, *What Are the IV-B Programs?*, Child Welfare League of Am., https://www.cwla.org/what-are-the-iv-b-programs/; *Promoting Safe and Stable Families: Title IV-B, Subpart 2, of the Social Security Act*, Child.'s Bureau, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Servs. (May 17, 2021), https://www.acf.hhs.gov/cb/grant-funding/promoting-safe-and-stable-families-title-iv-b-subpart-2-social-security-act.

178. 42 U.S.C. § 621.

179. Capacity Building Center for Tribes, Title IV-B Funding Overview (July 2018), https://capacity.childwelfare.gov/tribes/resources/title-iv-b-funding-overview; *see also Promoting Safe and Stable Families: Title IV-B, Subpart 2, of the Social Security Act*, *supra* note 177.

180. *Promoting Safe and Stable Families: Title IV-B, Subpart 2, of the Social Security Act*, *supra* note 177.

181. *Id.*

minimum grant for subpart 2 is $10,000[182] and funding is restricted to four areas: family preservation, family support, family reunification, and adoption promotion and support services.[183] Previously, subpart 2 funding was restricted to time-limited family reunification in addition to the other three areas. However, FFPSA changed this requirement as part of an effort to undo the limits of when a family may receive services.[184]

B. Title IV-E

The purpose of Title IV-E is to encourage "each State to provide, in appropriate cases, foster care and transitional independent living programs for children who otherwise would have been eligible for assistance under the State's plan approved under part A, adoption assistance for children with special needs, kinship guardianship assistance, and prevention services programs specified in section 471(e)(1)."[185] The Act and its accompanying regulations are tremendously complex, and this article will only give a basic overview of the funding mechanism.

Title IV-E is an uncapped entitlement and uses a reimbursement system that is means tested.[186] Only certain families qualify for the funding, and states only receive a percentage of funds from the government.[187] States must use other funding to cover both the matching costs and the remaining costs of child protection systems. Regardless, the amount received from the federal government drives huge policy changes.

Overall, there are three primary funding streams associated with major categories of child welfare costs: the costs of keeping the child in foster care, the associated administrative costs, and related training costs.[188] In

182. *Id.* There has been at least one legislative attempt to allow all tribes to receive the minimum $10,000. Tribal Family Fairness Act, H.R. 4348, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/4348/text?q=%7B%22search%22%3A%5B%22To+remove+administrative+barriers+to+participation+of+Indian+tribes+in+Federal+child+welfare+programs%2C+and+increase+Federal+funding+for+tribal+child+welfare+programs%2C+and+for+other+purposes.%22%5D%7D&r=1&s=2.

183. Admin. for Child. & Fams., U.S. Dep't of Health & Human Services, Program Instruction ACYF-CB-PI-19-04, at 9 (Mar. 18, 2019) [hereinafter ACYF-CB-PI-19-04].

184. *Id.*

185. 42 U.S.C. § 670.

186. Cong. Rsch. Serv., Child Welfare: An Overview of Federal Programs and Their Current Funding 14–15 (2018), https://crsreports.congress.gov/product/pdf/R/R43458.

187. *Id*. at 15.

188. Nat'l Council of Juv. & Fam. Ct. Judges, Child Welfare Finance Reform Policy Statement (2011), https://www.ncjfcj.org/wp-content/uploads/2019/08/child-welfare-finance-reform-policy-statement.pdf.

other words, the funding stream is separated into foster care maintenance payments, administrative costs, and training costs.

There are a wide range of services under Title IV-E. The following are the available services and programs for which Title IV-E funding is available:

- Title IV-E Foster Care—Assistance with costs of foster care for eligible children and associated administrative and training costs.
- Title IV-E Adoption Assistance—Financial and medical assistance for the adoption of children with special needs and associated administrative and training costs.
- Title IV-E Guardianship Assistance—Financial and medical assistance for guardianship of eligible children and associated administrative and training costs.
- John H. Chafee Foster Care Independence Program—Funds to help older youth in foster care and former foster care youth acquire training and independent living skills so they can become self-sufficient.[189]

These categories of services overlap with the aforementioned funding streams. For example, the funding stream that covers administrative costs could be used to fund administrative activities in the provision of foster care, adoption assistance, and guardianship assistance.

The Title IV-E Foster Care and Adoption Assistance program provides federal funds for foster care, adoption assistance, and relative guardianship payments for children who meet Title IV-E eligibility requirements.[190] These requirements are: "(1) the child's family has an income below the level set by the Title IV-E statute, and (2) certain legal findings have been made by a court of competent jurisdiction, or in the case of a voluntary placement, there is an agreement between the parent(s) and the agency administering the Title IV-E program."[191]

A Title IV-E plan has 37 unique elements that must be met, and many of those elements have subparts.[192] If a state or tribe satisfies these requirements, "[t]he Secretary shall approve any plan which complies."[193] The 37 requirements for plan approval are relatively general and straightforward,

189. *Title IV-E Program Funding*, Nat'l Child Welfare Res. Ctr. for Tribes, http://nrc4tribes.org/Direct-Tribal-Title-IV-E-Funding.cfm (last visited Dec. 12, 2022).

190. Cong. Rsch. Serv., Child Welfare, *supra* note 186, at 15.

191. Jack F. Trope, Title IV-E: Helping Tribes Meet the Legal Requirement (Mar. 2010), https://narf.org/nill/resources/title-iv-e/2010_iv-e_legal_requirements.pdf.

192. 42 U.S.C. § 671(a).

193. *Id.* § 671(b).

comprising approximately 12 pages of text.[194] Additionally, more specific requirements for the provision of foster care maintenance payments and adoption assistance are outlined in further detail in 42 U.S.C. §§ 672 and 673, respectively. However, in practice, to access funding, states must do significantly more than simply meet the 37 basic requirements set out in Title IV-E:

> To be in compliance with the title IV-E plan requirements and to be eligible to receive Federal financial participation (FFP) in the costs of foster care maintenance payments and adoption assistance under this part, a title IV-E agency must have a plan approved by the Secretary that meets the requirements of this part, part 1355, section 471(a) of the Act and for Tribal title IV-E agencies, section 479B(c) [42 U.S.C. § 679c] of the Act. The title IV-E plan must be submitted to the appropriate Regional Office, ACYF, in a form determined by the title IV-E agency.[195]

The implementing regulations are found in 45 C.F.R. §§ 1355 and 1356. The implementing regulations elaborate on parts of the statutory requirements, such as 45 C.F.R. § 1356.21, which details the foster care maintenance payments program implementation requirements.[196]

In the submitted plan, HHS generally requires that compliance with each of the Title IV-E statutory criteria be proven by reference to written official records based on the tribe's lawful exercise of sovereign authority.[197]

III. Barriers for Tribal Systems

Since ICWA was first considered, the conversation about which agency would be responsible for funding tribal child welfare systems has been in question. At the time, the BIA opposed section II of the law, stating that:

> As regards title II of the bill, we believe that it also needs to be rewritten. The Secretary of the Interior already possesses many of

194. *Id.* § 671(a) (includes elements such as coordination of local programs; personnel requirements; reporting and monitoring; standards for foster family homes and institutions; reasonable efforts guidance for reunification of families and placements; development of case plans; preference to relative caregivers; procedures for criminal records checks; health insurance for children; training of foster parents; home study timelines; timelines for notifying relatives after removal; educational placements; placement with siblings; and licensing standards and reporting).

195. 45 C.F.R. § 1356.20(a).

196. *Id.* § 1356.21.

197. Trope, *supra* note 191, at 11.

> the authorities contained in title II. Our principal concern with the title, however, is that the Secretary of the Interior would be granted certain authorities that are now vested in the Secretary of Health, Education, and Welfare. We are unclear which Department would be required to provide what services; and we would be hesitant, without an increase in manpower and money, to assume responsibilities for providing services which are now being provided by the Department of Health, Education, and Welfare.[198]

Since then, the question of both funding and the trust responsibility in the area of Indian child welfare has been the topic of dispute between the BIA and HHS, with very few positive results for tribes.[199] At the time of ICWA's passage, most tribal testimony stated it didn't matter much which agency assisted with funding, so long as one did.[200]

Today, the problems with current federal policy funding for all children are notorious, and even those who work or have worked within the Children's Bureau know this.[201] The system is currently designed to promote the termination of parental rights—the legal relationship between a parent and their child—rather than provide the kind of services and create the kinds of systems that keep families together. And while Title IV-E is a massive pot of funds (Congress appropriates over $10 billion annually),[202] it does not match the needs of state systems.[203]

Even though everyone who works in the system seems to agree there is at least one thing wrong,[204] if not the whole process, there is little room

198. *1978 Hearings*, *supra* note 3, at 55 (statement of Rick Lavis, Deputy Assistant Sec'y for Indian Affs., U.S. Dep't of the Interior).

199. *See, e.g.*, Calif. Tribal Fams. Coal. v. Azar, No. 4:20-CV-06018 (N.D. Cal. 2020) (a still-unresolved lawsuit attempting to hold HHS responsible for collecting data on American Indian and Alaska Native children, as well as LGBTQIA+ children, as part of their federal data collection process).

200. 1978 Hearings, *supra* note 3, at 117.

201. Jerry Milner & David Kelly, *The Need for Justice in Child Welfare*, 99 CHILD WELFARE J. (2020), *reprinted online at* https://www.cwla.org/the-need-for-justice-in-child-welfare/.

202. *See* STOLTZFUS, *supra* note 153.

203. *See Federal Foster Care Financing: How and Why the Current Funding Structure Fails to Meet the Needs of the Child Welfare Field*, OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION (July 31, 2005), https://aspe.hhs.gov/reports/federal-foster-care-financing-how-why-current-funding-structure-fails-meet-needs-child-welfare-field-0; Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 219–21 (2013).

204. Jerry Milner & David Kelly, *The Need to Replace Harm with Support Starts with the Adoption and Safe Families Act*, 1 FAM. INTEGRITY & JUST. Q. 6, 7 (Winter 2022). https://publications.pubknow.com/view/752322160/6/; Ashley Albert et al., *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE & L. 861 (2021).

for pilot projects or variances from the Social Security Act requirements.[205] And because of this, tribal governments are stuck with no real way to access the most significant source of funds set aside for child protection in the United States.

Under the current system, tribes can more easily access Title IV-B funds than Title IV-E funds. And after years of advocacy, there are now two ways that a tribe can access Title IV-E funds: (1) tribal-state Title IV-E agreements or (2) direct funding.[206] That access comes at a cost, however. The damaging assumption that tribes do not know how to care for their children has continued, following centuries of forced assimilation, forced removal, and disparagement of Indigenous family structures.[207] Current federal funding policies still start from a place of doubt regarding tribal systems.[208] Forcing tribes to adapt to the Social Security requirements—especially Title IV-E—not only forces them to adapt to broken systems, but to systems that may contribute to the destruction of Native families.[209]

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205. *See* Elliott Graham, Title IV-E Waiver Demonstrations: History, Findings, and Implications for Child Welfare Policy and Practice (Child.'s Bureau, U.S. Dep't of Health & Hum. Servs., Mar. 2021), https://www.acf.hhs.gov/sites/default/files/documents/cb/2020-waiver-summary-508.pdf (From 1995 to 2019, states were allowed to apply for certain waivers to the usual funding mechanisms. Most states created subsidized guardianship programs.). In 2008, the Fostering Connections to Success and Increasing Adoptions Act included kinship guardianship payments in Title IV-E. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949; *see* Child Welfare Info. Gateway, Child.'s Bureau, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Servs., Kinship Guardianship as a Permanency Option 5 & n.12 (July 2018), https://www.childwelfare.gov/pubPDFs/kinshipguardianship.pdf.

206. Capacity Bldg. Ctr. for Tribes, Title IV-E Guide for Tribal Governments and Leaders, Considerations and Lessons Learned 3–4 (2020), https://tribalinformationexchange.org/files/products/titleiveguide.pdf.

207. *See* Fort, *supra* note 18, at 6–28.

208. The clearest example of this is the Children's Bureau's requirement for termination of parental rights petitions, an anathema to many tribes. *See Child Welfare Policy Manual* § 8.3C.2e, Question 5, Children's Bureau, https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=61 (last visited Dec. 29, 2022) ("While we recognize that termination of parental rights and adoption may not be a part of an Indian tribe's traditional belief system or legal code, there is no statutory authority to provide a general exemption for Indian tribal children from the requirement to file a petition for TPR. If an Indian tribe that receives title IV-B or IV-E funds has placement and care responsibility for an Indian child, the Indian tribe must file a petition for TPR or, if appropriate, document the reason for an exception to the requirement in the case plan, on a case-by-case basis.").

209. Josh Gupta Kagan, *The New Permanency*, 19 U.C. Davis J. Juv. L. & Pol'y 1 (2015) (discussing the failure of Fostering Connections to promote guardianships rather than termination of parental rights and adoption; the article discusses the considerable power of state and local agencies, and the way the federal law still privileges termination and adoption).

However, before discussing this issue in more detail, here is an example of the problem.[210] The example is a small Native village in Alaska. The total population is between two and three hundred people. The only way to get to the village is by a small plane from a hub town. The village received enough funding from the BIA to underpay an Indian Child Welfare worker to track its child welfare cases. It may now also receive some funding from Tribal Justice Support at the BIA for its tribal justice system. The village has between two and five children in state care in any given year. There is no question that having the children placed in the village with their relatives, and being able to go to a local tribal court rather than fly to a hub for state court, is the preferable outcome. However, if the village does that, the kinship placement receives absolutely no Title IV-E maintenance funding to help take care of the child. The tribal ICW worker is not paid by Title IV-E administrative funding and does not receive education that IV-E training funding would pay for.

In order to access that funding, the village would have to enter into an agreement with Alaska to access it indirectly. Alaska is notorious for its unwillingness to enter into Title IV-E agreements, only adding two pilots for maintenance funding in the past 10 years.[211] The village does have the opportunity to receive the funding directly from the federal government, if it can complete a complex 200-page application called a "pre-print" that has to be approved by a regional HHS officer. That application is the same for the state of California as it is for this village. The village would also have to put up all of the initial funding, since IV-E money is a reimbursement program.[212] This would all be to make sure a grandmother can receive a small amount of funding to help care for her grandchild in the village. The system makes no sense, and the numbers bear that out.

Since tribes were first allowed to access Title IV-E funding directly, of over 500 tribes, only 42 have requested the federal grant to start the

210. This example arises from the author's discussions and experience in participating in nearly 100 tribal court assessments in Alaska for The Whitener Group on behalf of Tribal Justice Services, Bureau of Indian Affairs, from 2016 to the present.

211. Trope & O'Loughlin, *supra* note 171, at 11.

212. *See supra* note 186 & accompanying text.

process,[213] and of those, only 17 tribes have an approved Title IV-E plan to operate foster care, adoptive assistance, guardianship assistance, or a tribal option.[214] What's far more difficult to ascertain is how many tribes are actually running the program. Based on the author's inquiries with tribal attorneys and social workers, not even half of the 17 tribes with approved plans have decided to move forward and implement them.

A. Title IV-B

Many tribes qualify for direct Title IV-B funding. While the requirements are technically subpart-specific, there is significant overlap and tribes can satisfy them through the same process. Under subpart 1, a tribe is eligible for direct payments if the tribe is within a state with an approved child welfare services plan under the subpart.[215] The Secretary of Health and Human Services must make a determination for when direct funding is appropriate.[216]

Under subpart 2, a tribe generally must comply with the same requirements as the states to access direct funding.[217] A tribe may be exempt from the requirement under subpart 2 that not more than 10 percent of funding for any fiscal year go to administrative costs and "significant portions" of expenditures go to each of the four areas if the Secretary determines the requirements are "inappropriate."[218]

Formulas for both subparts are based on the population of a tribe under the age of 21.[219] Tribal funding under subpart 1 is diverted from the grants

213. For reasons that aren't clear, the Children's Bureau has restricted access to who can see the awarded Development grants, https://www.acf.hhs.gov/cb/grant-funding/childrens-bureau-discretionary-grant-awards, though they have maintained their annual discretionary award site, *FY 2022 Children's Bureau Discretionary Grant Awards*, Child.'s Bureau, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Servs. (Sept. 30, 2022), https://www.acf.hhs.gov/cb/grant-funding/fy-2022-discretionary-grant-awards. Prior to this development, the author created a spreadsheet with the list of tribes that have received grants and have approvable plans from 2009 through 2022, including their ACF region. She is personally aware that no tribes received the award in 2021.

214. *Tribes with Approved Title IV-E Plans*, *supra* note 5.

215. 42 U.S.C. § 628.

216. *Id*.

217. *Id.* § 629b.

218. ACYF-CB-PI-19-04, *supra* note 183, at 5 n.4; 42 U.S.C. § 629b(b)(2)(A) ("The Secretary may exempt a plan submitted by an Indian tribe or tribal consortium from the requirements of subsection (a)(4) of this section to the extent that the Secretary determines those requirements would be inappropriate to apply to the Indian tribe or tribal consortium, taking into account the resources, needs, and other circumstances of the Indian tribe or tribal consortium.").

219. ACYF-CB-PI-19-04, *supra* note 183, at 19; Div. of Program Implementation, Child.'s Bureau, Overview of the Children's Bureau and Tribal Child Welfare Programs 5 (Dec. 9, 2016), http://www.tribal-institute.org/2016/F1PP2.pdf.

otherwise proportioned out to the state in which a tribe is located.[220] Subpart 2 includes a 3 percent set-aside for Indian tribes or tribal consortia.[221]

The tribe or tribal organization must submit a five-year Child and Family Services Plan (CFSP) developed jointly with HHS and an Annual Progress and Services Report (APSR) to access grants.[222] A tribe's plan must meet the mandated regulations, which include certain requirements for state plans.[223] The CFSP serves a primary purpose of "facilitat[ing] tribes' integration of the programs that serve children and families," and consolidates plans for four programs: the Chafee Foster Care Program for Successful Transition to Adulthood, the Education Training Voucher Program, and both subparts under Title IV-B.[224]

Additionally, a tribe must send in an APSR for each intermittent year between CFSPs, with the purpose of reviewing annual progress on the goals outlined in a tribe's CFSP.[225] At the end of the five-year cycle, a tribe submits a Final Report, which is substantively similar to the APSR but looks back over the entire five-year period.[226]

In general, a tribe must provide information on the administrating agency, goals, objectives, measures of progress, consultation and service coordination, service descriptions, program supports, and the population under 21.[227] The required forms have both a narrative and budgetary component to effectively incorporate all this information.[228] Consultation between states and tribes is also a statutory requirement.[229] A state must consult with tribes in regard to ICWA compliance, but tribes must explain how states in which the tribe is located have consulted with the tribe and provide any concerns.[230] Tribes must also explain their own welfare system and the arrangements made with the state for all tribal children under state or tribal jurisdiction.[231]

Under subpart 1, a tribe is also required to address the manner in which it will satisfy the requirements of three additional targeted plans: the Foster and Adoptive Parent Diligent Recruitment Plan, the Health Care Oversight

220. 42 U.S.C. § 628.
221. *Id.* § 629g(b)(3); Div. of Program Implementation, *supra* note 219, at 5.
222. ACYF-CB-PI-19-04, *supra* note 183, at 4–5, 10–12.
223. *Id*. at 4.
224. *Id*.
225. *Id.* at 5.
226. *Id*.
227. *Id.* at 6–19. For detailed requirements, see 45 C.F.R. § 1357.15.
228. ACYF-CB-PI-19-04, *supra* note 183, at attachment H.
229. *Id.* at 14, 16.
230. *Id*.
231. *Id.* at 12–20.

and Coordination Plan, and the Disaster Plan.[232] Special rules also apply to tribes that formerly received funding as a tribal consortium and now are seeking funding independently.[233] Finally, tribes must match Title IV-B subpart 1 and 2 grants at 25 percent of the total program funding.[234]

Title IV-B is more accessible to tribes as compared to Title IV-E, yet it mandates annual reporting to access funds directly, so it nevertheless presents major administrative costs for tribes and tribal organizations.

B. Title IV-E

Title IV-E presents significant obstacles for tribal governments' abilities to secure funding for tribal child welfare systems. Prior to 2008, tribes could not access Title IV-E funding at all and "the federal government had no statutory mechanism to directly fund tribal foster care programs through Title IV-E."[235] Also during that time, states were under no legal obligation to enter into agreements with tribes or provide them with Title IV-E funding for eligible children under the jurisdiction of the tribe.[236] During an amendment process to Title IV-E, Congress added a section that required states to negotiate with tribes for pass-through agreements. So called because the money "passes through" the state from the Feds on its way to the tribes, these agreements can vary dramatically in length and requirements.[237] These agreements are also dependent on the state's willingness to negotiate with tribes, and while some states have long had straightforward and relatively simple Title IV-E agreements with tribes, others have stubbornly refused to enter into them, or require extreme concessions from tribes.

1. Tribal Access—Indirect or Pass-Through

A 2014 report titled *A Survey and Analysis of Select Title IV-E Tribal-State Agreements* analyzed 98 agreements between tribes and 16 states.[238] The results indicated that there is substantial variation among tribal-state agreements. Many of the practices address issues of self-determination and the practical realities faced by tribes seeking to implement child welfare services and exercise more autonomy in the process. This is especially notable because Title IV-E does not address issues of relationships between tribes and states, nor how the federal government's trust responsibility to

232. *Id*. at 17–19.
233. *Id*. at 19–20.
234. *Id.* at 4, 33.
235. Trope & O'Loughlin, *supra* note 171, at 18.
236. *Id.*
237. *Id*. at 18–71.
238. *Id.*

tribes is to be realized through Title IV-E. In several tribal-state agreements, states have recognized their government-to-government relationship to tribes and "included language supporting Indian Nation sovereignty, self-determination, and federal law and policy regarding Indian children."[239]

Under a tribal-state agreement, there are a wide variety of provisions that are funded by funds passed through the state—from a simple notification program to comprehensive child welfare system operation. The individual agreements vary from tribe to tribe and specify which services will be funded through the agreement. For example, in Alaska, most tribal-state agreements include "reimbursement for administrative and training costs, but . . . not . . . maintenance funding for tribally licensed foster care."[240] But in California, a tribal-state agreement with the Karuk and Yurok tribes provides administration and maintenance costs.[241] Tribal-state agreements describe how ICWA will be implemented and address services provided to American Indian/Alaska Native children in non-kinship out-of-home care. They also specify procedures, roles, and responsibilities for tribal notification when the state receives a referral for an Indian child; when and how state or tribal law enforcement is involved; the roles of the BIA and state and tribal courts; guidance dealing with transfers of jurisdiction to tribes that have their own child protection programs and courts; and procedures for establishing eligibility for Title IV-E payments.[242]

There are several types of tribal-state agreements. The first "allows tribes to access Title IV-E funding for children under the placement and responsibility of the Tribal Court."[243] This funding includes maintenance payments, guardianship assistance payments for eligible children, adoption assistance payments, administrative reimbursement for staffing and training, and training of foster parents.[244]

The second major type of agreement allows for additional funding for the tribe to "assume the full provision of child protection services from intake of reports, in-home services, placement services, [and] services to achieve a child's permanent plan and licensing of placement resources."[245]

239. *Id*. at 18.

240. *Id*. at 5.

241. *Id*. at 6–7. However, the author is aware that this agreement has never been operationalized due to reluctance by California. This further points to the issue that pass-through agreements are overly controlled by state partners.

242. *Title IV-E Program Funding*, Nat'l Child Welfare Res. Ctr. for Tribes, http://nrc4tribes.org/Direct-Tribal-Title-IV-E-Funding.cfm (last visited Jan. 28, 2023).

243. Capacity Bldg. Ctr. for Tribes, Pathways to Tribal Title IV-E 3 (2017), https://capacity.childwelfare.gov/sites/default/files/media_pdf/tribal-title-ive-cp-00168.pdf.

244. *Id*.

245. *Id*. at 4.

When a full agreement of this type is enacted, the tribe no longer relies on the state to provide the services directly; rather, the state provides technical assistance and oversight of Title IV-E requirements.[246]

Tribal-state agreements are overseen in part by the Administration for Children and Families, specifically by its regional offices. There are 10 regional offices, each with Regional Directors, and all overseen by the Office of Regional Operations (ORO), which is in turn led by a Director.[247] The ORO is tasked with advising the Assistant Secretary for ACF on "regional-state relations."[248] Regional offices also have a role to assist in resolving disagreements between states and tribes.[249] However, many report difficulties in the administration of the regional offices. In 1996, one of the most commented on issues with the Children's Bureau was "[v]ariations across and sometimes within regions on interpreting the regulations and policies. . . ."[250] These issues exist in the oversight and execution of tribal-state agreements, which end up further burdening a tribe by including sometimes superfluous requirements. This regional structure is also a massive issue when it comes to tribes attempting to get their direct plan approved, which is discussed below.

Two examples show the limitations that are built into a pass-through agreement by both a layer of state involvement and federal agency involvement. First, the Bay Mills Indian Community agreement with Michigan is a total of five pages long and includes procedures on ICWA compliance and the administration of Title IV-E programs.[251] The agreement

246. *Id*.

247. *What We Do*, Off. of Reg'l Operations, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Servs., https://www.acf.hhs.gov/oro/about/what-we-do (last visited Dec. 8, 2022).

248. *Leadership*, Off. of Reg'l Operations, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Serv, https://www.acf.hhs.gov/oro/about/leadership- (last visited Dec. 8, 2022).

249. *Children's Bureau Response to Tribal Comments*, Child.'s Bureau, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Servs. (Dec. 5, 2005; current as of July 1, 2022), https://www.acf.hhs.gov/cb/resource/childrens-bureau-response-to-tribal-comments?page=all.

250. Soc. Work Pol'y Inst., Educating Social Workers for Child Welfare Practice: The Status of Using Title IV-E Funding to Support BSW & MSW Education 1 (Sept. 2012) https://www.socialworkers.org/LinkClick.aspx?fileticket=1m8kTUtr9sQ%3D&portalid=0. This is particularly acute where tribes are negotiating direct agreements, discussed *infra.* These regional differences are notorious among those who work in the area, where "everyone" knows that if a tribe is in one region, it will be very difficult to get an approvable plan. *See* U.S. Gov't Accountability Off., GAO-15-273, Foster Care: HHS Needs to Improve the Consistency and Timeliness of Assistance to Tribes, 26–30 (2015), https://www.gao.gov/assets/gao-15-273.pdf [hereinafter GAO Report].

251. Bay Mills Indian Community Title IV-E Agreement, Bay Mills Indian Cmty.-Mich. Fam. Indep. Agency, July 21, 1999, *in* Michigan Dep't of Health & Hum. Services, Tribal Agreements Policy Manuals, NAB 2013-001 (Apr. 1, 2013), http://dhhs.michigan.gov/OLMWeb/ex/NA/Mobile/TAM/TAM%20Mobile.pdf.

is short, simple, and straightforward. This does not mean the tribe and state don't sometimes disagree on reimbursement, but the agreement itself is a relatively simple document.

On the other hand, the Central Council of Tlingit and Haida Indian Tribes of Alaska (CCTHITA) also has an agreement. Its agreement with Alaska is 161 pages long. While the agreement is technically nine pages, there are extraordinarily long "attachments" that do everything from make substantive procedural requirements and demands on the tribe to require the tribe to waive its sovereign immunity for civil actions or proceedings brought by the State of Alaska relating to the agreement.[252] Because they cannot acquire this funding directly from the federal government, Alaskan Native communities are essentially placed in the position to either agree to Alaska's conditions, including waiver of sovereign immunity, or be foreclosed from access to this large funding stream.

As demonstrated with these agreements, significant differences exist among the various Title IV-E agreements between states and tribes, and even tribes within the same state may have agreements with substantively different provisions.

2. Tribal Access—Direct

While the 2008 Fostering Connections Act provided a new opportunity for tribes to access federal child welfare funding for the care of their children, the act also required tribes to meet Title IV-E's complex program requirements, which were originally designed for states.[253] Due to "existing tribal resource constraints, many tribes have faced challenges in developing approvable Title IV-E plans. These challenges have been further complicated by inconsistent guidance from HHS."[254] Fostering Connections allowed tribes to access Title IV-E funds directly from the federal government, rather than developing tribal-state agreements, in order to administer their own foster care programs, as well as the option of administering kinship guardianship assistance and adoption assistance programs.[255]

252. Tribal Title IV-E Maintenance Program, An Agreement Between: The State of Alaska & Central Council Tlingit and Haida Indian Tribes of Alaska, attach. 13 (2016), https://firstalaskans.org/wp-content/uploads/2018/08/Title-IV-E-Agreement-CCTHITA-2016.pdf. Alaska and Montana are the only two states that require such a waiver. In addition, Alaska is the only state that does not allow for a *mutual* waiver, meaning that while the state can sue the tribe, the tribe cannot sue the state. Trope & O'Loughlin, *supra* note 171, at 30–31.

253. GAO Report, *supra* note 250.

254. *Id*. at 30.

255. *Id*. at 5–7.

To get approval for direct funding, tribes must provide local matching funds, be operating a Title IV-B (subpart 1 or 2) program,[256] and submit an approvable Title IV-E plan.[257] The plan must be developed using the pre-print from ACF.[258] The pre-print was designed by the Children's Bureau and is part of the application process for tribes seeking direct funding through Title IV-E. While it was presumably intended to provide additional guidance and assist tribes in navigating the process of satisfying the statutory requirements of Title IV-E for the purposes of direct funding, in practice the pre-print is an overly complicated bureaucratic morass for tribes.

In addition, the plan must be approved by the regional bureaucrat. Differences between administrative regions create burdens on tribes because of the significant variation. Depending on a tribe's administrator, they may face additional challenges that effectively prevent them from pursuing Title IV-E funding directly. This decentralized approach not only creates a system that is challenging to understand because of the different regional requirements, but also further entrenches the outdated idea that a tribe needs federal oversight in creating a child welfare system.

To create an "approvable plan," the tribe will usually need to make extensive modifications to the tribal code, court rules, and/or administrative regulations or policies.[259] In addition to the 42 U.S.C. § 671 requirements, tribes must also comply with additional obligations: tribal-specific statutory obligations under 42 U.S.C. § 679, the implementing regulations, and the pre-print. Just a sample of the legal issues that tribes must address include legal standards related to determination that a child is in need of care, removal of a child, placement preferences, termination of parental rights, guardianships, adoptions, and voluntary placements.[260] Issues related to judicial/administrative proceedings include developing systems and procedures for case review, permanency hearings, and appeals of denial of benefits. Further, there are required administrative procedures for licensing of foster homes, background checks, case plans, employment practices, home studies, payments, provision of services, training, eligibility determinations, and reports and evaluation. Tribes must also address a variety of jurisdictional issues such as territorial definition and tribal court structure. And, finally, tribes must address third-party rights/obligations for

256. Capacity Bldg. Ctr. for Tribes, *supra* note 243, at 5.

257. *Id*. at 6.

258. *PI-18-09, State Requirements for Electing Title IV-E Prevention and Family Services and Programs*, Child.'s Bureau, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Servs., https://www.acf.hhs.gov/cb/policy-guidance/pi-18-09 (last visited Dec. 8, 2022).

259. Trope, *supra* note 191, at 11–12.

260. *Id*. at 11–20.

foster parents, relatives, families receiving benefits, reporting child abuse, Medicaid, and privacy concerns.[261]

The pre-print is complicated and divergent from the requirements of the statute and allows for very little variation from a state style program. The relationship between the statute, the implementing regulations, and the pre-print makes clear that even when the Children's Bureau attempted to facilitate the application process, the result is subjectively ineffective and frustrating for tribes. This process is a classic example of the incompatibility of federal bureaucratic management with effective tribal self-determination. Moreover, the requirements and the Children's Bureau's divergent regional implementation reflect a particular image of what they think child welfare should be, which is a limited conception that excludes the realities and needs of tribes.

Because of these barriers, this process continues to be widely unavailable to most tribes. In fiscal year 2018, zero tribes applied for Title IV-E direct planning grants; in fiscal year 2019, three applied; and in fiscal year 2020, only two applied. There is no evidence any tribe applied in fiscal year 2021.[262] And even the tribes that have successfully navigated the planning process sometimes still don't receive funding. Moreover, the ability of a tribe to successfully secure funding depends in large part on the region in which the tribe is located, due to the discretionary nature of the application process and the differences in ACF leadership across regions.[263] In other words, some tribes can access funding when others can't, simply because of their geographic location. This arbitrary and capricious disparity further demonstrates why self-governance is necessary for tribal child welfare systems.

IV. Proposed Solutions

As this article illustrates, there is an urgent need to find better ways to fund tribal child welfare systems. One easy solution would be for Congress to fully fund the ICWA grants. This money is already authorized by statute, the funding comes through the BIA, and the funds are covered in far less red tape than Social Security funding is. The National Congress of American Indians regularly asks Congress for more funding in this area in its budget proposal. Tribal governments must push to get real and significant congressional appropriation for child welfare programs.

261. *Id*. at 20–31.

262. Research on file with author. *See supra* note 213.

263. GAO Report, *supra* note 250.

However, the likelihood that those grants would ever reach the level of funding that should be available to tribes under the Social Security Act is slim. Social Security funds are due to the children and families in child welfare systems, whether they be tribal or state. That's one reason both tribes and the federal government should be considering changes for this funding. Initial pilot projects or variances for tribes like those that existed for states prior to 2019 could lead to changes such as a full self-governance model.

This article cannot describe the full complexities of this solution but provides the initial idea here: utilize a self-governance model to fund tribal child welfare systems. Tribes have already successfully implemented this self-governance model in other areas of tribal governance no less complicated than child protection.[264] Additionally, the tribal self-governance model for tribal child welfare systems has proven to be a feasible expansion of the self-governance structure already in place within HHS.[265]

Therefore, both Title IV-B and Title IV-E are ready for a transition to self-governance implementation by tribal governments. While there are other potential solutions available for achieving self-governance in this area, the self-governance model is the likely place to start due to its pre-established infrastructure. Self-governance is not a perfect solution. Tribes would still be subject to some of the requirements in federal law. But it might open doors to flexibility and pilot projects that are desperately needed in this area.

In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (ISDEAA).[266] The purpose of this Act was to promote tribal self-governance by allowing tribes to operate programs that were previously provided by the BIA.[267] Under the ISDEAA, a tribe can contract with the federal government in one of two ways—self-determination contracts or self-governance compacts.[268] This has been primarily limited to programs

264. *See* Stephen D. Osborne, *Tribal Self-Governance Extended to U.S. Department of Transportation*, Advocate, Oct. 2016, at 29 (2016); Geoffrey D. Strommer et al., *Tribal Sovereign Authority and Self-Regulation of Health Care Services: The Legal Framework and the Swinomish Tribe's Dental Health Program*, 21 J. Health Care L. & Pol'y 115, 129–30 (2018).

265. Ken Lucero et al., Self-Governance Tribal Federal Workgroup, Final Report 15–16 (U.S. Dep't of Health & Hum. Servs. 2013).

266. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450–450n, 455–458e, 458aa–458hh, 458aaa–458aaa-18 (2012)).

267. *See Contracts Under Indian Self-Determination and Education Assistance Act, Generally*, 19 Fed. Proc. § 46:339 (Lawyers ed.).

268. David H. Greches et al., Cases and Materials on Federal Indian Law 463 (7th ed. 2016).

administered by the BIA, except for one large exception—the Indian Health Service, a massive program run under HHS.[269]

In the past, tribal leaders and representatives have pushed for self-governance of other HHS programs, including tribal child welfare.[270] A workgroup study determined it was feasible and provided recommendations to HHS and proposed legislation.[271] Unfortunately, HHS did not support the legislation or negotiate with tribal leaders in good faith. This early failed attempt has made this conversation even more difficult. The federal government's reasons for denying self-governance in tribal child welfare are based on the decisions made by the federal government in structuring the child welfare bureaucracy and funding systems. These decisions have had the cumulative effect of cutting most tribes out of meaningful access to child welfare funding. A solution will require rethinking and reconsideration of these past decisions, while keeping in mind the goal of tribal self-governance. This is not a question of authorization; it is about administration and implementation.[272]

Fortunately, there is already a foundation for responsive federal action with respect to child welfare and tribes. ICWA itself stands for the principle that tribal child welfare requires special considerations and processes. Congress has already designed a tribal set-aside through direct funding agreements. However, this process isn't working. Instead, the time has come for HHS to accept that it, too, is subject to the trust responsibility and to expand self-governance to tribal child welfare, under the authority of ISDEAA.

While the current system allows the Children's Bureau to treat tribes as though they lack the requisite capacity for sovereign control of their child welfare systems (see, e.g., the pre-print and regional approval by bureaucrats not familiar with tribal governance), self-governance could provide tribes the resources and freedom to use this capacity as they determine it should

269. *Office of Tribal Self-Governance*, Indian Health Serv., https://www.ihs.gov/selfgovernance/ (last visited Dec. 29, 2022).

270. Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 Am. Indian L. Rev. 1, 63–67 (2015).

271. Lucero et al., *supra* note 265.

272. *See, e.g.*, Osborne, *supra* note 264, at 29.

be used.[273] Tribes are already operating quasi-self-governance systems within child welfare under existing funding agreements and have already demonstrated the capacity to run their own child welfare systems.[274]

Another significant aspect of Title IV-E is the structure of three separate streams of funding. This compartmentalized funding structure means that tribes could strategically select a level of funding that is appropriate for their resources and capacity for self-governance. For example, a tribe could focus on self-governance in the culturally relevant training of foster parents but might continue a tribal-state agreement for the operation of the rest of its child welfare services. This flexibility means tribes don't need to reinvent the wheel; they will be able to use existing structures to provide services in ways that are appropriate for their unique situations. Further, tribes already can and do form consortiums when applying for Title IV-E funding. This benefits under-resourced tribes as tribes can pool resources, much like health consortiums have done under the Indian Health Service.

Because of the administrative burdens and complexity of the pre-print and the direct funding process, many tribes lack the resources to navigate the process to get this funding. Thus, if tribes want to operate a child welfare system, they are often forced to go through a tribal-state agreement. This places tribes in the unpalatable situation of negotiating with states—which often have no desire or incentive to work cooperatively with tribes—in order to develop agreements. Not only does this create an unwanted burden for tribes *and* states, but it also represents a dereliction of federal duties to work with tribes.

Finally, the statutory requirements of Title IV-E could feasibly be translated into requirements for a self-governance model. The failure of the Children's Bureau to translate these requirements into a form that works for tribes underscores that even the best attempts of the federal government are still lacking and indicates the need for more tribal control in the process. Adopting a self-governance model for child welfare that recognizes the statutory requirements of Title IV-E is a promising way forward.

273. *See generally* Patrice H. Kunesh, *The Significance of Belonging for Indigenous Peoples: The Power of Place and People—Creating a Vision for Community in Indian Country Through Self-Governance and Self-Determination*, 30 J. Affordable Hous. & Cmty. Dev. L. 23 (2021); Strommer & Osborne, *supra* note 270; Monte Mills & Martin Nie, *Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-management on Federal Public Lands*, 44 Pub. Land & Res. L. Rev. 49 (2021).

274. Trope, *supra* note 191.

Conclusion

The long-running litigation attack on ICWA only further illustrates the need for tribes to fully run their own systems for their families. Regardless of what happens after the Court decides *Brackeen*, tribes will still need to operate social services and justice systems. And it is unnecessarily difficult for tribes to successfully access significant funding from the largest pot of federal foster care funding. While the option to access the funding is available to tribal governments, the path is so difficult and unnecessarily complicated that it makes it nearly impossible for a vast majority of tribes to navigate it. This has led to the increased need for tribal governments to rethink the way they access federal child protection funding.

There is no one-size-fits-all approach to this problem. However, the solution may be found in a funding system that already exists under a tribal self-governance model. This model has proven to be successful in other areas of tribal self-governance. Additionally, studies have shown that applying a self-governance model to the tribal child welfare system is indeed feasible. This is not an easy solution, but we are long past easy solutions to difficult problems. The benefits and problems with a tribal self-governance approach to funding tribal child welfare systems will be further explored and discussed in subsequent articles, but at this point, all options must be on the table.

"The Gold Standard of Child Welfare" Under Attack: The Indian Child Welfare Act and *Haaland v. Brackeen*

JULIA GAFFNEY*

Introduction

Our country was built on the systemic erasure of Indigenous persons, their communities, and their culture. While one might consider this erasure a thing of the past—a phenomenon belonging more to colonization or the country's period of Western expansion—many of the legal, social, and political structures in the United States still operate in ways that disparately affect Indigenous communities. One such structure is the child welfare system. In 1978, Congress enacted the Indian Child Welfare Act (ICWA) to rectify the historic wrongs that the U.S. government has committed against Indigenous tribes, namely the forced removal of Indigenous children from their tribes with the intent to whitewash them and systemically eradicate Indigenous communities.[1]

While ICWA has made strides in helping repair Indigenous communities and ensuring that the "best interests" of Indigenous children and their tribes are represented in child welfare proceedings, the law's constitutionality is under attack in federal court. Having just been granted certiorari by the U.S. Supreme Court in February 2022, the case *Haaland v. Brackeen* is the first case in which a federal circuit court struck down ICWA provisions

* Julia Hope Gaffney is a J.D. candidate at the Northeastern University School of Law (2023), where she serves as the managing editor of the Northeastern University Law Review. She received her B.A. in English literature and Spanish from Providence College (2020). This article placed third in the American Bar Association Family Law Section's 2022 Howard C. Schwab Memorial Essay Contest.

1. 25 U.S.C. §§ 1901–03, 1911–23.

since the law's enactment.[2] While the outcome of this case is still uncertain, there is legitimate cause for concern that the results of the case will put both ICWA and the best interests of Indigenous communities at risk. This article explores these risks, provides history and legal context to the discussion of ICWA, and analyzes why this law is fundamental to ensuring the protection of the interests and existence of Indigenous communities.

I. The Horrific History Behind ICWA

A. The Systemic Removal of Indigenous Children

In a 1978 report, the House of Representatives' Committee on Interior and Insular Affairs recognized that a "wholesale removal of Indian[3] children from their homes" was occurring at a drastic rate in the United States.[4] According to studies completed by the Association of American Indian Affairs in 1969 and 1974, "approximately 25–35 [percent] of all Indian children [were] separated from their families and placed in foster homes, adoptive homes, or institutions."[5] Furthermore, according to a 1969 survey of 16 states, 85 percent of Indian children in foster care were placed with non-Indigenous families.[6]

Since the 1880s, the forced assimilation of Indigenous children into white America has been a formal project of the U.S. government.[7] This project began when the Bureau of Indian Affairs (BIA) established many boarding schools specifically intended for the whitewashing of Indigenous

2. Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc), *cert. granted sub nom*. Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022), and *cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022).

3. The term "Indian" will only appear in this article when quoted from other sources and in reference to groups and laws that use the word. Otherwise, the term "Indigenous" will be used, as it can be used to broadly describe the original persons and communities of the Americas.

4. *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affs. of the S. Comm. on Interior and Insular Affs.*, 93d Cong. 3 (1974) (statement of William Byler, Exec. Dir., Ass'n on Am. Indian Affs.) [hereinafter *1974 Hearings*], https://narf.org/nill/documents/icwa/federal/lh/hear040874/hear040874.pdf.

5. *Id.* at 15.

6. *Id.* at 17.

7. *Boarding Schools and the History of ICWA*, Kids Matter Inc., https://kidsmatterinc.org/legal-help/native-american-children/boarding-schools-and-the-history-of-icwa/ (last visited Oct. 28, 2022).

children.[8] After forcibly removing Indigenous children from their families and communities, the schools followed the canon of assimilation employed by Captain Richard Henry Pratt, who founded the first federal boarding school for Indigenous children: "Kill the Indian in him, and save the man."[9] Methods of whitewashing included completely separating the children from their families and tribes and harshly punishing them when they attempted to engage with their native culture in any way.[10]

In 1958, the BIA shifted gears to focus on a different means of assimilation: placing Indigenous children in the homes of non-Indigenous families.[11] The Indian Adoption Project, which "promote[d] adoption of Native children from sixteen western states by white adoptive families in the East,"[12] was put into effect by the Child Welfare League of America and was active from 1958 to 1967.[13] Following the Indian Adoption Project was the Adoption Resource Exchange of North America, which was established in 1966 as "the first national adoption resource exchange devoted to finding homes for hard-to-place children."[14] This program continued the government's assimilation scheme by placing Indigenous children with predominately white families.[15]

These federal assimilation projects were carried out by a child welfare system run by non-Indigenous judges and social workers who had deep explicit and implicit biases against Indigenous persons, as well as a blatant disregard for, and clear ignorance of, Indigenous social norms, cultural values, and customs of childrearing.[16] Furthermore, when Indigenous custom conflicted with the white American conceptualization of childrearing, the

8. Kelly Gaines-Stoner et al., The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children 1, 3 (3d ed. 2018); Brackeen v. Haaland, 994 F.3d 249, 282 (5th Cir. 2021) (en banc) (Dennis, J., opinion) ("Although the total number of children enrolled in the boarding schools is unknown, in 1895 alone 157 boarding schools housed more than 15,000 Indian children."), *cert. granted sub nom*. Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022), and *cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022).

9. R.H. Pratt, *The Advantages of Mingling Indians with Whites*, 19 Ann. Proc. of the Nat'l Conf. of Charities & Correction 45, 46 (1892); *Boarding Schools and the History of ICWA*, *supra* note 7.

10. Gaines-Stoner et al., *supra* note 8, at 3.

11. *Indian Adoption Project*, Upstander Project, https://upstanderproject.org/firstlight/iap (last visited Aug. 29, 2022).

12. *Id.*

13. *The Adoption History Project*, Univ. of Or., https://pages.uoregon.edu/adoption/topics/IAP.html (updated Feb. 24, 2012) (395 children were placed with white families in Illinois, Indiana, New York, Massachusetts, Missouri, and other states).

14. *Id.*

15. *Id.*

16. Gaines-Stoner et al., *supra* note 8, at 3–4.

Indigenous parents and families were deemed unfit to raise their children.[17] For example, the practice of communal childrearing or the involvement of extended family in caring for a child, which is common in many Indigenous cultures, was seen from a Euro-American viewpoint as being neglectful and sometimes prompted a child's removal on the grounds that their biological parents had abandoned them.[18] Furthermore, once the child was removed, "[d]iscriminatory standards [] made it virtually impossible for most Indian couples to qualify as foster or adoptive parents, since [the standards] are based on middle-class values."[19]

The government also discriminated against Indigenous families by disproportionately using issues that exist among families of all races and identities as grounds for removing indigenous children from their homes.[20] For example, alcoholism, a disease that does negatively affect many Indigenous communities, was a common ground for the removal of Indigenous children.[21] However, "the number of Native American children removed from their homes because of this malady was disproportionate compared to other families afflicted by the disease."[22]

The separation scheme that displaced thousands of Indigenous children employed both the state and federal government.[23] This interference with Indigenous communities was legal due to the understanding that the U.S. government has paramount control over Indigenous tribes, despite legal precedent that purports tribal sovereignty. For example, the Commerce Clause of the U.S. Constitution, which entrusts with Congress the power "to regulate Commerce with foreign nations, and among the several states, and with the Indian tribes,"[24] simultaneously recognizes Indigenous tribes as being other than the United States, while also asserting that the U.S. government has overarching authority over the tribes.

While the U.S. Supreme Court has long-since declared Indigenous tribes to be "sovereign and independent states; possessing both the exclusive right to their territory, and the exclusive right of self-government within that territory," their sovereignty is not absolute.[25] The U.S. government's relationship to the tribes has been described as "resembl[ing] that of a ward

17. *Id.*
18. *Id.* at 3.
19. *Id.* at 21.
20. *Id.* at 4.
21. *Id.* at 3–4.
22. *Id.* at 4.
23. *Id.* at 2–3.
24. U.S. Const. art. I, § 8, cl. 3.
25. Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).

to his guardian,"[26] as well as a "trust relationship,"[27] in which the federal government owes the tribes certain obligations and protections.[28] State governments, on the other hand, are purported to be "on equal footing" with tribal governments.[29] However, in 1953 Congress enacted Public Law 280,[30] which "grants certain states concurrent jurisdiction over child custody proceedings in cases that otherwise would fall within the exclusive jurisdiction of the tribe."[31] Thus, this law has allowed states to interfere with custody proceedings regarding Indigenous children.

Through many government programs, the United States achieved its project of Indigenous erasure on more than one level: Not only were Indigenous children physically separated from their families and communities, but their placement in BIA schools and non-Indigenous homes isolated them from their culture, forcing them to assimilate to the white colonizer narrative of what it means to be "civilized" and "American." By targeting Indigenous children, who are the future of their tribes, the U.S. government was halting "the transmission of tribal heritage"[32] and ensuring that Indigenous communities would wither away.

B. Legislative History and ICWA's Enactment

In the late 1960s and early 1970s, Indigenous rights activists called on Congress to rectify the wrongs suffered by Indigenous communities.[33] In 1974, the Senate Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs held hearings to discuss the discriminatory practices conducted by welfare agencies and the courts in regard to their removal of Indigenous children from their families.[34] Committee members also heard testimony regarding the negative effects that such removal has

26. *Id*. at 10.

27. United States v. Mitchell, 463 U.S. 206, 224–25 (1983).

28. *Id.* (this relationship was primarily established in the General Allotment Act, which gave the federal government control over the management of tribal resources and lands for the tribes' purported benefit).

29. *Separation of Powers: State-Tribal Relations and Interstate Compacts*, Nat'l Conf. of State Leg., https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-tribal-interstate-relations.aspx (last visited Oct. 16, 2022).

30. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953).

31. *ICWA Guide Online: Jurisdiction*, Nat'l Indian L. Libr., https://narf.org/nill/documents/icwa/faq/jurisdiction.html#Q12.

32. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 34 (1989) (quoting Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians & Rep. of the Nat'l Tribal Chairmen's Ass'n).

33. *The Adoption History Project*, *supra* note 13.

34. *1974 Hearings*, *supra* note 4, at 2.

upon Indigenous communities and the trauma experienced by the children who were taken from their homes and forced to conform to white American ideals and social norms.[35] More hearings were held in 1977 and 1978, with Congress ultimately finding:

> that there 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;
>
> that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> that the 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.[36]

In 1978, the Indian Child Welfare Act was enacted.[37] Congress made its legislative intent clear: ICWA was "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families. . . ."[38]

C. ICWA Provisions and Legislative Development

ICWA established that tribes have "exclusive jurisdiction"[39] over "child custody proceedings"[40] involving an "Indian child," defined as "any unmarried person who is under age eighteen and is either (a) a member of

35. *Id.*

36. 25 U.S.C. § 1901 (paragraph numbering omitted).

37. *About ICWA*, Nat'l Indian Child Welfare Ass'n, https://www.nicwa.org/about-icwa/ (last visited Aug. 29, 2022).

38. 25 U.S.C. § 1902.

39. *Id.* §1911(a).

40. "Child custody proceedings" under ICWA include foster care placements, terminations of parental rights, preadoptive placements, and adoptive placements. *Id.* § 1903(1); *see also* Nat'l Indian Child Welfare Ass'n, A Guide to Compliance with the Indian Child Welfare Act 2 (Nov. 2016), https://www.nicwa.org/wp-content/uploads/2016/11/Guide_ICWA_Compliance.pdf.

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]

For involuntary proceedings, an Indian child's parent or custodian and tribe must be given written notification "of the pending proceedings and of their right of intervention."[42] When pursuing removal of an Indian child from their family under state law, ICWA requires that "active efforts [are] made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. . . ."[43] Additionally, ICWA prohibits the placement of Indian children in foster care "in the absence of a determination, supported by clear and convincing evidence," that "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child"[44] and prohibits the termination of parental rights absent "a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[45]

If the ICWA requirements are met and it is determined that an Indian child's removal from their family is necessary, then "[i]n 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."[46]

Furthermore, any Indian child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his or her special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. 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;

41. 25 U.S.C. § 1903(4).
42. *Id.* § 1912(a).
43. *Id.* § 1912(d).
44. *Id.* § 1912(e).
45. *Id.* § 1912(f).
46. *Id.* § 1915(a).

(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.[47]

In the years following ICWA's enactment, 33 states adopted legislation aimed at "clarify[ing] and expand[ing] upon the ICWA's requirements."[48] Developments in the federal law also occurred in the wake of the law's enactment, including revisions of ICWA regulations and the addition of various guidelines.[49] In February 2015 and then in December 2016, the BIA issued new guidelines concerning ICWA implementation.[50] While those guidelines are not legally binding, [51] in June 2016 the BIA promulgated "the first-ever comprehensive federal regulations addressing ICWA implementation for state courts and public and private agencies," which are referred to as the Final Rule.[52] Unlike the BIA guidelines, which "complement" the regulations, the Final Rule is legally binding.[53]

II. ICWA in Practice: Successes and Shortcomings

A. ICWA's Success

ICWA has been characterized as "the gold standard of child welfare for all children and families."[54] The Act serves the "interests in stability, relational permanency, and community and cultural connections" that are paramount in child welfare best practices.[55] Furthermore, ICWA's provisions have

47. *Id.* § 1915(b).
48. Gaines-Stoner et al., *supra* note 8, at 27.
49. *About ICWA*, *supra* note 37.
50. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146 (Feb. 25, 2015); Guidelines for Implementing the Indian Child Welfare Act, 81 Fed. Reg. 96476 (Dec. 30, 2016). The December 2016 guidelines replaced guidelines from 1979 and the 2015 guidelines. Guidelines for Implementing the Indian Child Welfare Act, 81 Fed. Reg. at 96477.
51. Guidelines for Implementing the Indian Child Welfare Act, 81 Fed. Reg. at 96477.
52. *About ICWA*, *supra* note 37; *see* Indian Child Welfare Act Proceedings, Final Rule, 81 Fed. Reg. 38778 (June 14, 2016).
53. *About ICWA*, *supra* note 37; Guidelines for Implementing the Indian Child Welfare Act, 81 Fed. Reg. at 96476–77.
54. Brief of Casey Family Programs & Ten Other Child Welfare and Adoption Organizations as Amici Curiae in Support of Petitioners at 6, Haaland v. Brackeen, Nos. 21-376 & 21-377 (U.S. Oct. 8, 2021)) (citation omitted) [hereinafter Casey *Brackeen* cert. brief].
55. *Id.* at 16.

helped to keep Indigenous children in the child welfare system connected to their cultures, tribes, and families.[56]

While research indicates that a child's best interests are served when they are able to stay with their immediate family, there are also instances where a child's removal from their immediate relations is the best and safest option.[57] According to the National Indian Child Welfare Association, ICWA has helped to "[l]essen[] the trauma of removal [for Indigenous children] by promoting placement with family and community," has "[m]andate[d] that families receive intensive services ('active efforts') to prevent child abuse and neglect," has "[p]romote[d] the best interest of Indian children by keeping them connected to their culture, extended family, and community, which are proven protective factors," and has "[p]romote[d] placement stability by ensuring that voluntary adoptions are truly voluntary."[58] Finally, ICWA has also helped to facilitate states' relationships with tribes, allowing them to work together in the best interests of Indigenous children.[59]

While it is difficult to fully assess the success of ICWA on an empirical level, seeing as federal data only report whether a state identifies a child as "American Indian or Alaska Native," studies indicate that, in practice, compliance with ICWA provisions differs among the states.[60] When an Indigenous child is removed from their home, their placement preferences generally follow ICWA guidelines, and many are placed with extended family.[61] Furthermore, federal data reveal that "American Indian/Alaska Native children have the highest rate of kinship care . . . [,] the lowest rate of congregate care, *i.e.*, placement in institutional settings, and have one of

56. *Id.* at 21–22.

57. *Id.* at 5, 7, 10–11.

58. Nat'l Indian Child Welfare Ass'n, *Setting the Record Straight: The Indian Child Welfare Act Fact Sheet* (Sept. 2015), https://www.nicwa.org/wp-content/uploads/2017/04/Setting-the-Record-Straight-ICWA-Fact-Sheet.pdf (emphasis omitted).

59. *Id.*

60. Casey *Brackeen* cert. brief, *supra* note 54, at 21; Gordon E. Limb et al., *An Empirical Examination of the Indian Child Welfare Act and Its Impact on Cultural and Familial Preservation for American Indian Children*, 28 Child Abuse & Neglect 1279, 1287 (2004), https://doi.org/10.1016/j.chiabu.2004.06.012.

61. Limb et al., *supra* note 60, at 1287.

the lowest rates of children aging out of care without an adoptive family."[62] These statistics indicate that ICWA has worked in practice to achieve many of the goals identified by Congress.

B. Issues That Still Exist

Despite ICWA's apparent success, there are still many concerns and issues regarding the treatment of Indigenous children in the child welfare system. Indigenous children are three times more likely to be removed from their families by state child welfare systems than non-Indigenous children.[63] This means that Indigenous children are overrepresented in the child welfare system, which makes the states' compliance with ICWA even more essential. However, state noncompliance with ICWA is a relevant issue that is often the result of "inadequate training, misinterpretations of the law, lack of data, and willful ignorance."[64] Three common instances of noncompliance include the "[f]ailure to identify ICWA-eligible children early on and ensure they are receiving the protections of the law," "[p]roviding inadequate—or no—notice of proceedings to key parties," and failing to place children with extended family or other members of their tribal community "without good cause, or placing children in a more restrictive setting than necessary."[65]

Studies have also shown that Indigenous children in the child welfare system disproportionately suffer from a number of other issues. For example, Indigenous children are disproportionately victims of maltreatment: "15% of American Indian children are likely to be victims of substantiated maltreatment between birth and 18 years old. . . ."[66] Oftentimes, challenges in identifying Indigenous children result in the underreporting of such

62. Casey *Brackeen* cert. brief, *supra* note 54, at 21. The brief cited a study by Casey Family Programs showing that in 2016, 35% of American Indian or Alaska Native children were in kinship foster care placements, compared to 32% for white children and 31% for Black children; 8% of Indigenous children were in congregate care, compared to 12% for white children and 14% for Black children; and 6% of Indigenous children aged out of care without an adoptive family, compared to 7% for white children and 11% for Black children. Casey Fam. Programs, *Native American/Alaska Native Children Overview* (2019), https://www.casey.org/media/Native-American-Alaska-Native-data-trends.pdf (cited in Casey *Brackeen* cert. brief, *supra* note 54, at 21).

63. *Setting the Record Straight: The Indian Child Welfare Act Fact Sheet*, *supra* note 58.

64. *Id.*

65. *Id.* (emphasis omitted).

66. Erin J. Maher et al., Placement Patterns of American Indian Children Involved with Child Welfare: Findings from the Second National Survey of Child and Adolescent Well-Being 4 (Casey Fam. Programs 2015), https://www.casey.org/media/NSCAW-Placement-Patterns-Brief.pdf.

statistics, which means that maltreatment of Indigenous children is likely more ubiquitous than it appears.[67]

The underreporting of issues faced by Indigenous children in the child welfare system is exposed in other contexts as well. Studies indicate that "Indigenous Only" children in foster care "are disproportionately *under*-indicated to have disabilities, emotional disturbance, other medical issues, sensory deficits in vision and hearing, and intellectual or developmental disability," even though children in the child welfare system are at higher risk for experiencing these conditions.[68] Similarly, "Indigenous Only" children in the system "are under-indicated for sexual abuse, physical abuse, child behavior concerns, or parents' inability to cope as reasons for entry."[69] The underreporting of these issues continues to put many of these children at risk and counteracts ICWA's goals by perpetuating the disparate treatment of Indigenous children in this system.

III. ICWA Case Law and Constitutional Challenges

The U.S. Supreme Court has only elected to hear two ICWA cases since the law's enactment.[70] First, in the 1989 case *Mississippi Band of Choctaw Indians v. Holyfield*, the lower court held ICWA's exclusive jurisdiction in the tribal court did not apply to twins who were born off the reservation, although the twins' parents were members of the Choctaw Tribe and had permanent residence on the reservation.[71] The Supreme Court held that "[s]ince, for the purposes of the ICWA, the twin babies in this case were domiciled on the reservation when adoption proceedings were begun, the Choctaw tribal court possessed exclusive jurisdiction pursuant to 25 U.S.C. § 1911(a)," and thus the adoption decree entered by the state court must be vacated.[72] The holding in this case provided guidance to state courts by establishing that "Congress intended a uniform federal law of domicile for the ICWA" and, therefore, that the definition of "domicile" was not a matter of state law.[73]

67. *Id.*

68. Claudette Grinnell Davis, Allison Dunnigan & Bailey B. Stevens, *Indigenous-Centered Racial Disproportionality in American Foster Care: A National Population Study*, J. Pub. Child Welfare 17 (2022), https://doi.org/10.1080/15548732.2021.2022565.

69. *Id.* at 18.

70. Gaines-Stoner et al., *supra* note 8, at 23.

71. 490 U.S. 30, 38–40 (1989).

72. *Id.* at 53.

73. *Id*. at 47.

The second ICWA case heard by the Supreme Court was *Adoptive Couple v. Baby Girl*, which was decided in 2013.[74] In this case, an Indigenous child's biological father, who was a member of the Cherokee Nation, sought custody of his child once adoption proceedings were initiated.[75] The Court held that the ICWA provision regarding the termination of parental rights pursuant to 25 U.S.C. § 1912(f) did not apply to the child's father due to his lack of "legal or physical custody" of the child at the time the adoption process was initiated.[76] While this holding constituted a narrow interpretation of the ICWA provisions, the Association on American Indian Affairs and the National Indian Child Welfare Association observed that "some of the majority opinion's holdings are stated in broad terms that some parties will likely reference in attempts to apply the Court's limitations upon the application of ICWA more broadly."[77]

In terms of other ICWA challenges, prior to 2018 most constitutional challenges to ICWA claiming that the Act allows unequal treatment of parties on the basis of race had failed.[78] The notion that "as long as a rational basis existed for Congress to legislate as it did, the authority of Congress extended to the legislative purpose achieved by the ICWA" was generally accepted among courts.[79]

IV. *Haaland v. Brackeen*

A. Background

In April 2021, a federal circuit court struck down parts of the ICWA statute.[80] The plaintiffs in *Brackeen* included the states of Texas, Louisiana,

74. 570 U.S. 637, 644–45 (2013); *see* Gaines-Stoner et al., *supra* note 8, at 23–24.

75. *Adoptive Couple*, 570 U.S. at 644–45.

76. *Id.* at 650.

77. Ass'n on Am. Indian Affs. & Nat'l Indian Child Welfare Ass'n, A Guide to the Supreme Court Decision in *Adoptive Couple v. Baby Girl* 3, https://www.indian-affairs.org/uploads/8/7/3/8/87380358/analysis_of_adoptive_couple_v__baby_girl_-_final.pdf.

78. Gaines-Stoner et al., *supra* note 8, at 25–26. *See In re* Marcus S., 638 A.2d 1158 (Me. 1994); *In re* D.L.L. & C.L.L., 291 N.W.2d 278 (S.D. 1980); *In re* Appeal in Pima Cnty. Juv. Action No. S-903, 635 P.2d 187 (Ariz. Ct. App. 1981); *In re* Miller, 451 N.W.2d 576 (Mich. Ct. App. 1990); State *ex rel.* C.S.D v. Graves, 848 P.2d 133 (Or. App. 1993); *In re* Application of Angus, 655 P.2d 208 (Or. Ct. App. 1982).

79. Gaines-Stoner et al., *supra* note 8, at 26.

80. Brackeen v. Haaland, 994 F.3d 249, 288–89 (5th Cir. 2021) (en banc), *cert. granted sub nom*. Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022), and *cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022) .

and Indiana,[81] and non-Indigenous couples who sought to adopt children who are "Indian Children" per ICWA's definition.[82] The defendants in this case are the United States; the U.S. Department of Interior and its Secretary Deb Haaland, in her official capacity; the BIA and its Director Darryl LaCounte, in his official capacity; and the Department of Health and Human Services and its Secretary Xavier Becerra, in his official capacity ("Federal Defendants").[83] The Cherokee Nation, the Oneida Nation, the Quinalt Indian Nation, the Morengo Band of Mission Indians, and the Navajo Nation were all granted motions to intervene as defendants ("Tribal Defendants).[84]

The lead plaintiffs are the Brackeens, who are from Texas.[85] They pursued adoption of A.L.M., whose biological mother is an enrolled member of the Navajo Nation and whose father is an enrolled member of the Cherokee Nation.[86] When A.L.M. was removed from his paternal grandmother's custody and placed into foster care with the Brackeens, the couple "sought to adopt him with the support of his biological parents and paternal grandmother," and with the state's notification to both the Navajo and Cherokee Nations.[87] During the adoption proceedings, the Brackeens "entered into a settlement with the Texas state agency and A.L.M's guardian ad litem specifying that, because no one else sought to adopt the child, ICWA's placement preferences did not apply."[88] After successfully adopting A.L.M. in 2018, the Brackeens attempted to adopt A.L.M's sister, but the Navajo Nation contested the adoption.[89] Two other couples joined the Brackeens in challenging ICWA: the Librettis and the Cliffords, who alleged that they also ran into barriers when trying to adopt Indigenous children due to ICWA's provisions.[90]

In October 2017, the plaintiffs filed a complaint against the Federal Defendants, "argu[ing] that ICWA and the Final Rule violate equal protection and substantive due process under the Fifth Amendment and

81. Unlike the other parties, Indiana and Louisiana did not file a petition for certiorari in the U.S. Supreme Court. Andrew Hamm, *Four Petitions on the Constitutionality of the Indian Child Welfare Act*, SCOTUSblog (Sept. 24, 2021), https://www.scotusblog.com/2021/09/four-petitions-on-the-constitutionality-of-the-indian-child-welfare-act/.

82. *Brackeen*, 994 F.3d at 288–89 (Dennis, J., opinion).

83. *Id.* at 290.

84. *Id.* at 289–90.

85. *Id.* at 288.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 289.

90. *Id.* at 289–90.

the anticommandeering doctrine that arises from the Tenth Amendment," and "sought a declaration that the provisions of ICWA and the Final Rule violate the nondelegation doctrine and the [Administrative Procedure Act (APA)]."[91] In 2018, the district court held that ICWA and the Final Rule violate equal protection, the Tenth Amendment, and the nondelegation doctrine, and that the challenged provisions of the Final Rule are invalid under the APA.[92] The defendants appealed the decision, and the case was heard by the Fifth Circuit Court of Appeals.[93] In 2019, a three-judge panel reversed the portions of the district court's decision invalidating parts of ICWA, with one judge concurring in part and dissenting in part. [94]

B. Fifth Circuit En Banc Decision

In 2021, the Fifth Circuit produced a highly fractured *en banc* opinion, in which the judges ultimately upheld the general constitutionality of ICWA, but also struck down a number of ICWA provisions.[95] Specifically, the en banc court held that "ICWA's 'active efforts,' § 1912(d), expert witness, § 1912(e) and (f), and recordkeeping requirements, § 1915(e), unconstitutionally commandeer state actors."[96] The en banc majority also ruled that, consistent with its holding regarding §§ 1912(d), 1912(e) and (f), and 1915(e), "the Final Rule violated the APA to the extent that it implemented these unconstitutional provisions" and that "25 C.F.R. § 23.132(b)—the part of the Final Rule interpreting § 1915's 'good cause' standard to require proof by clear and convincing evidence—violated the APA."[97] Finally, the court was deadlocked on the district court's ruling that § 1915(a)(3), the ICWA adoptive placement preference for "other Indian

91. *Id.* at 290.

92. *Id.*; *see* Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018), *aff'd in part, rev'd in part sub nom.* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc), *cert. granted sub nom*. Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022), and *cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022).

93. *Brackeen*, 994 F.3d at 291 (Dennis, J., opinion).

94. Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019), *reh'g en banc sub nom.* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021).

95. *Brackeen*, 994 F.3d 249.

96. *Id.* at 268 (per curiam opinion); Kate Fort, *Brackeen Decision Summary*, Turtle Talk (Apr. 7, 2021), https://turtletalk.blog/2021/04/07/brackeen-decision-summary/; Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 Annals of Am. Acad. of Pol. Sci. 158 (2001) ("The anti-commandeering doctrine . . . announced by the Supreme Court in *New York v. United States* and *Printz v. United States*, prohibits the federal government from commandeering state governments: more specifically, from imposing targeted, affirmative, coercive duties upon state legislators or executive officials.").

97. *Brackeen*, 994 F.3d at 269 (per curiam opinion).

families," and § 1915(b)(iii), "its foster care placement preference for a licensed 'Indian foster home,'" violate equal protection.[98]

C. Supreme Court Case

In September 2021, the state of Texas, the individual plaintiffs, the Federal Defendants, and the Tribal Defendants all filed petitions for certiorari with the U.S. Supreme Court.[99] All the petitions asked the Court to review the Fifth Circuit decision and assess ICWA's constitutionality.[100] Collectively, the petitions asked that the Court address the minimum federal standards set forth in ICWA, the law's placement preferences for Indigenous children, the anticommandeering claims, the recordkeeping claims, and standing.[101] On February 28, 2022, the Supreme Court granted certiorari for all four petitions.[102] The Court heard oral arguments on November 9, 2022.[103]

The Federal Defendants and the Tribal Defendants ask that the Fifth Circuit's decision on the anticommandeering claims be overturned and that the Supreme Court reject the claims that ICWA's placement preferences are racially discriminatory.[104] In terms of the placement preferences issue, these parties argue that ICWA's placement preferences are political classifications based on tribal membership, rather than racial classifications, and therefore are subject to rational basis scrutiny.[105] They further argue that ICWA's placement preferences survive rational basis scrutiny because "applying ICWA's protections to children who are tribal members or the children

98. *Id.* at 268.

99. Brief for Petitioner the State of Texas, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. May 26, 2022); Brief for Individual Petitioners, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. May 26, 2022); Brief for the Federal Parties, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Aug. 2022); Brief for Tribal Defendants, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Aug. 12, 2022); *see also* Kate Fort, *Brackeen/ICWA CLE from Fort*, Turtle Talk (Mar. 2, 2022), https://turtletalk.blog/tag/brackeen-v-haaland/.

100. Brief for Petitioner the State of Texas, *supra* note 99; Brief for Individual Petitioners, *supra* note 99; Brief for the Federal Parties, *supra* note 99; Brief for Tribal Defendants, *supra* note 99.

101. Brief for Petitioner the State of Texas, *supra* note 99; Brief for Individual Petitioners, *supra* note 99; Brief for the Federal Parties, *supra* note 99; Brief for Tribal Defendants, *supra* note 99.

102. Haaland v. Brackeen, 142 S. Ct. 1205 (2022); Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022); Brackeen v. Haaland, 142 S. Ct. 1205 (2022); Texas v. Haaland, 142 S. Ct. 1205 (2022).

103. Transcript of Oral Argument, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Nov. 9, 2022).

104. Brief for the Federal Parties, *supra* note 99; Brief for Tribal Defendants, *supra* note 99; *see also* Matt Ford, *The Supreme Court Could Save Tribal Sovereignty—or Demolish It*, New Republic: The Soapbox (Oct. 6, 2021), https://newrepublic.com/article/163875/supreme-court-icwa-tribal-sovereignty.

105. *See* Brief for the Federal Parties, *supra* note 99, at 8.

of tribal members and eligible for tribal membership clearly advances Congress's distinctive duty to protect the 'continued existence and integrity of Indian tribes.'"[106] Therefore, these parties rely on the original legislative intent behind ICWA's enactment and hope that the justices will recognize a lasting government interest in both keeping Indigenous children with their tribal communities and continuously working to rectify the historic atrocities committed by the United States against Indigenous tribes and children.

On the other hand, in both Texas's brief and the individual plaintiffs' brief, the parties ask the Court to affirm the rulings in their favor and to invalidate the challenged parts of the statute that the Fifth Circuit upheld.[107] Regarding placement preferences, the parties contend that the provision discriminates against would-be adoptive families on the basis of race and thus is unconstitutional.[108] To garner support for this argument, the parties depict ICWA as disadvantaging Indigenous children by depriving them of suitable foster and adoptive placements because the placements are not with Indigenous families.[109]

Four separate amicus briefs were submitted by 497 tribal nations and 62 Native organizations,[110] 23 states and the District of Columbia,[111] 87 congresspeople,[112] and 27 child welfare and adoption organizations[113] specifically supporting the Federal and Tribal Defendants. Each brief tackles an essential argument in support of ICWA. For example, the Tribal Amicus Brief delves into the history behind ICWA's enactment, the United States' role in the systemic removal of Indigenous children from their tribes, and the importance of protecting tribal sovereignty.[114] An amicus brief filed by California and 22 other states and the District of Columbia describes ICWA

106. *Id.* at 73.

107. Brief for Petitioner the State of Texas, *supra* note 99; Brief for Individual Petitioners, *supra* note 99; *see also* Ford, *supra* note 104.

108. *See* Brief for Petitioner the State of Texas, *supra* note 99, at 11; Brief for Individual Petitioners, *supra* note 99, at 37–45.

109. Brief for Petitioner the State of Texas, *supra* note 99, at 14.

110. Brief of 497 Indian Tribes & 62 Tribal & Indian Orgs. as Amici Curiae in Support of Federal & Tribal Defendants, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Aug. 19, 2022).

111. Brief for the States of California et al. as Amici Curiae in Support of the Federal & Tribal Parties, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Aug. 19, 2022).

112. Brief for 87 Members of Congress as Amici Curiae in Support of Federal & Tribal Defendants, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Aug. 2022).

113. Brief of Casey Family Programs & Twenty-Six Other Child Welfare & Adoption Organizations as Amici Curiae in Support of Federal & Tribal Defendants, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Aug. 19, 2022).

114. Brief of 497 Indian Tribes & 62 Tribal & Indian Orgs. as Amici Curiae in Support of Federal & Tribal Defendants, *supra* note 110.

as "a critical tool for protecting Indian children and fostering state-tribal collaboration."[115] This brief also displays bipartisan support for ICWA, seeing as the participating states' attorneys general represent both sides of the aisle.[116] Finally, the Casey Family Programs Brief speaks from a child welfare point of view, noting that "ICWA exemplifies child welfare best practices."[117]

V. Looking Forward—Possible Outcomes and Effects of *Brackeen*

The Supreme Court could issue a ruling in favor of the United States and the Tribal Defendants, and ICWA would remain in place. However, given the highly fissured nature of the Fifth Circuit's decision, the Court could also issue a similarly splintered decision that invalidates parts of ICWA, which could manifest in different ways.

A. Ruling That ICWA Employs Race-Based Decision-Making

If the Supreme Court were to rule that tribal affiliation constitutes a racial designation, the ruling could significantly crack the foundation of federal Indigenous law. A ruling that ICWA violates Equal Protection could "caus[e] a 'radical' and 'fundamental reordering' of the federal government's relationships to tribes"[118] and "set off a chain reaction, one that could impact the constitutionality of tribal land, police, health services, gaming,

115. Brief for the States of California et al. as Amici Curiae in Support of the Federal & Tribal Parties, *supra* note 111, at 4 (capitalization removed). States that joined California include Arizona, Colorado, Connecticut, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Washington, and Wisconsin. *Id*.

116. *See Mich. A.G. Nessel Joins Bipartisan Coalition in Defense of Indian Child Welfare Act Protections Before the U.S. Supreme Court*, Targeted News Serv. (Oct. 19, 2021), https://www.proquest.com/docview/2582985790; Brief for the States of California et al. as Amici Curiae in Support of the Federal & Tribal Parties, *supra* note 111.

117. Brief of Casey Family Programs & Twenty-Six Other Child Welfare & Adoption Organizations as Amici Curiae in Support of Federal & Tribal Defendants, *supra* note 113, at 18 (capitalization removed).

118. Nancy Marie Spears, *The Fate of Indian Child Welfare Before the Supreme Court*, Imprint (Nov. 8, 2022), https://www.nhonews.com/news/2022/nov/08/fate-indian-child-welfare-supreme-court/ (quoting federal Indigenous law scholar Kate Fort).

even tribal governments."[119] Ultimately, federal principles regarding tribal sovereignty would be severely disrupted, thus putting the tribes at risk of once again being entirely subjected to the rules of a nation that is not their own.[120]

The Equal Protection argument also asks that the definition of an "Indian child," which plaintiffs argue is a racial classification, be subject to strict scrutiny.[121] Subject to strict scrutiny, the definition of an "Indian child" could be significantly narrowed, which would not only limit the protections available for Indigenous children, but also undermine their membership in their ancestral tribes and nations. Ultimately, if the Court were to recognize an Indigenous classification as a racial classification, rather than continuing the long-standing tradition of treating it as a political classification, then "the entire legal structure defending the legal rights of Indigenous nations could crumble."[122] The sovereignty of Indigenous nations would be put at risk.[123]

However, given the current composition of the Court, such a drastic ruling appears unlikely. The only justice who has indicated that he would reconsider the "basics of federal Indian law" is Justice Thomas; the other justices have not made similar implications.[124] Furthermore, Justice Gorsuch has been particularly vocal in his commitment to "holding the federal government accountable for promises made to tribes," which can be seen in *McGirt v. Oklahoma*, where he wrote for the majority and held that the land in the Creek Nation reservation, established in the 19th century, remains in the tribe's possession under the Major Crimes Act since Congress has not asserted otherwise.[125] Thus, given the apparent lack of interest among

119. Ford, *supra* note 104 (quoting Rebecca Nagle, host of *This Land*); Noah Y. Kim, *Understanding the Battle over the Indian Child Welfare Act*, PolitiFact (Nov. 1, 2021), https://www.politifact.com/article/2021/nov/01/understanding-battle-over-indian-child-welfare-act/ ("Laws in danger of being overturned include the Major Crimes Act, which establishes the role that the federal government plays in law enforcement on Native land, Environmental Protection Agency policies that allow some tribes to ensure that the oil and gas industry adheres to environmental regulations, and federal programs that provide services like welfare or health care to Native Americans."). It is well-settled law that tribes are political entities, not racial groups. *See*, *e.g.*, Morton v. Mancari, 417 U.S. 535, 554 (1974); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 479–80 (1976); Washington v. Confederated Bands & Tribes of the Yakima Nation, 447 U.S. 134, 152 (1980).

120. Ford, *supra* note 104.

121. Brief for Individual Petitioners, *supra* note 99, at 28–37.

122. Rebecca Nagle, *The Supreme Court Case That Could Break Native American Sovereignty*, Atlantic (Nov. 8, 2022), https://www.theatlantic.com/ideas/archive/2022/11/scotus-native-american-sovereignty-brackeen-v-haaland/672038/.

123. *Id*.

124. Ford, *supra* note 104.

125. 140 S. Ct. 2452 (2020).

the justices to totally reverse foundational Indigenous law, the Court would be unlikely to issue such a drastic ruling in *Brackeen*.

B. Ruling That Parts of ICWA Violate the "Anti-commandeering" Doctrine

One alternative to a ruling that ICWA is racially discriminatory would be a "narrowly tailored decision striking down portions of ICWA on the basis of the Tenth Amendment's 'anti-commandeering' principle, along the lines of the Fifth Circuit's ruling."[126] In its decision, the Fifth Circuit determined that ICWA's "active efforts" provision under § 1912(d) and its "expert witness" requirement under § 1912(e) and (f) violate the anti-commandeering doctrine by forcing the states to comply with these provisions in child welfare proceedings, which is a traditionally state-run process.[127] If this decision were to be affirmed, it could be "part of a much broader movement by conservative judges really limiting the power of the federal government to pass laws that states have to follow."[128] While there are many other ways that the Court could issue a "narrowly tailored decision" given the varied nature of the Fifth Circuit's holdings, this potential decision could create many problems for the future of ICWA.

C. Other Effects

A Supreme Court ruling invalidating part of the ICWA statute could also affect public opinion of ICWA. For those who do not know of the history of tribal sovereignty and the relationship between the U.S. government and federally recognized tribes, they might read about *Brackeen* and simply assume that ICWA prevents Indigenous children from receiving placements in the child welfare system due to what they might consider to be racial discrimination against non-Indigenous families. However, what is important to recognize is that "ICWA applies to children who are citizens . . . of a federally recognized tribe. . . . ICWA does not apply to individuals who merely self-identify as American Indian or Alaska Native."[129] Thus, without more context, people could make incorrect assumptions that ICWA is racially discriminatory and fail to recognize that the law concerns an individual's

126. Kim, *supra* note 119.

127. Brackeen v. Haaland, 994 F.3d 249, 268 (5th Cir. 2021) (en banc) (per curiam opinion), *cert. granted sub nom*. Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022), and *cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022); *id.* at 404–06.

128. Kim, *supra* note 119 (citation omitted).

129. *Setting the Record Straight: The Indian Child Welfare Act Fact Sheet*, *supra* note 58.

citizenship in a tribe, rather than their racial identification as an Indigenous person.

Like the individual plaintiffs contend, others could also come to view ICWA as no longer serving a legitimate legislative purpose because the government is no longer engaged in the "overtly racist" behavior of removing Indigenous children from their families without just cause.[130] However, despite the strides that ICWA has made in terms of rectifying the child welfare system's treatment of Indigenous children, Indigenous children today continue to be overrepresented in the child welfare system.[131] Given this overrepresentation, and the identification of various issues that reveal the disparate treatment of Indigenous children within the child welfare system, ICWA is still needed to guide the system in its treatment of Indigenous children.

Conclusion

ICWA was intended "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. . . ."[132] However, *Haaland v. Brackeen* ushers in a new reality—one in which ICWA could be completely destroyed, or broken apart bit by bit. This would be detrimental for many reasons, but primarily because ICWA's work is not done, despite some believing the law has served its purpose. The overrepresentation of Indigenous children in the child welfare system, as well as the disparate treatment they suffer, signifies that tribes are still being robbed of their future in the loss of their children and that Indigenous families are still at the mercy of explicit and implicit biases. Moreover, no legislative action will ever be able to completely atone for the sins of the U.S. government and its repugnant, disturbing, and racist history of systemic Indigenous annihilation. Therefore, the United States needs laws like ICWA, laws that do whatever they can to give back to Indigenous people what this country has been taking from them for centuries. Otherwise, Indigenous erasure will continue, and the United States will remain a colonizer, one that is unworthy of being characterized as a country that champions "liberty and justice for all."

130. Ford, *supra* note 104; *see* Brief for Individual Petitioners, *supra* note 99, at 42.
131. *Setting the Record Straight: The Indian Child Welfare Act Fact Sheet*, *supra* note 58.
132. 25 U.S.C. § 1902.

Golan v. Saada: Protecting Domestic Abuse Survivors in International Child Custody Disputes

MOLSHREE "MOLLY" A. SHARMA*

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction (Convention) is a multilateral treaty with 102 signatories that provides for the expeditious return of children to their country of habitual residence when one parent removes the child to another country without legal permission or agreement of the other parent.[1] However, if a court finds that an exception applies, the court may deny return even when a child was wrongfully removed, including in the case of a child who would be placed in a "grave risk" of physical or psychological harm or an "intolerable situation."[2] In many cases, this "grave risk" of harm involves domestic

*Molshree "Molly" A. Sharma is a partner at Birnbaum Gelfman Sharma & Arnoux LLC. Her family law practice includes international custody disputes under the Hague Convention on the Civil Aspects of International Child Abduction. With special gratitude to Cora Leeuwenburg, Associate Attorney, Birnbaum Gelfman Sharma & Arnoux LLC, who did extensive research and work on this article.

1. Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1980, T.I.A.S. No. 11,670, 1243 U.N.T.S. 89 [hereinafter Convention]; *Status Table, 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Hague Conf. on Priv. Int'l Law, https://www.hcch.net/en/instruments/conventions/status-table/?cid=24 (last updated Oct. 18, 2022) [hereinafter Convention Status Table].

2. Convention, *supra* note 1, art. 13 (stating that "[n]otwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child" if a listed exception is established by the party opposing return).

violence, including violence by one parent directed at the other parent—as was seen in the 2022 Supreme Court case *Golan v. Saada*.[3]

Before 2022, there was a split in U.S. courts regarding whether a child should be returned even when the "grave risk" exception was proven by clear and convincing evidence, based on the availability of "ameliorative measures" that could help to protect the child.[4] In an effort to balance the well-being of the child with the overarching purpose of the Convention, some circuit courts required consideration of whether "ameliorative measures" or "undertakings" were available that could limit the risk to the child.[5] Other circuits did not mandate consideration of these measures, which are not specifically mentioned anywhere in the Convention.[6] This issue was recently clarified by the Supreme Court through its ruling in *Golan v. Saada* on June 15, 2022.[7]

This article will discuss the competing concerns that the courts have attempted to balance in implementing the Convention, review the previous split in the circuits and weight given to ameliorative measures, and summarize the ultimate decision in *Golan v. Saada*. Part I provides an overview concerning the Convention and the "grave risk" exception to return. Part II discusses the lower court proceedings in *Golan v. Saada*. Part III reviews the issues before the Supreme Court as presented in the certiorari petition and response. Part IV summarizes the circuit split that preceded the *Golan* decision. Part V reviews the Supreme Court's decision in favor of Narkis Golan, the mother and survivor of domestic violence who had asserted the "grave risk" defense in this case. Part VI discusses the proceedings on remand and Ms. Golan's tragic death. The Conclusion considers the decision's significance.

3. 142 S. Ct. 1880 (2022); Julianne McShane, *Family Questions Death of Domestic Violence Victim Whose Case Made It to Supreme Court Following Yearslong Custody Battle*, NBC NEWS (Oct. 26, 2022, 2:43 PM EDT), https://www.nbcnews.com/news/crime-courts/supporters-vow-continue-fight-deceased-domestic-violence-victim-whose-rcna53966 ("Although there are no definitive statistics, research estimates that domestic violence could be a factor in up to 70% of Hague Convention child abduction cases.").

4. *Golan*, 142 S. Ct. at 1891 & n.6; *see* Tracy Bateman Farrell, *Construction and Application of Grave Risk of Harm Exception in Hague Convention on the Civil Aspects of International Child Abduction as Implemented in International Child Abduction Remedies Act, 42 U.S.C.A. § 11603(e)(2)(A)*, 56 A.L.R. Fed. 2d 163 (2011).

5. *Golan*, 142 S. Ct. at 1887, 1890 n.4.

6. *Id.* at 1891 n.6, 1892; *see* Convention, *supra* note 1.

7. *Golan*, 142 S. Ct. 1880.

I. The Convention on the Civil Aspects of International Child Abduction

The Convention, which is implemented in the United States through the International Child Abduction Remedies Act (ICARA), governs the unlawful removal of children from one foreign state to another through parental child abduction.[8] As stated in the preamble, the Convention aims to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence. . . ."[9] The Convention further dictates that wrongfully removed children must be returned to their "habitual residence" unless an exception is found to apply, in which case the court has discretion to deny return.[10] For example, Article 13(b) provides that return of a child is not required if a party establishes that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[11]

The Convention was established "in response to the problem of international child abductions during domestic disputes."[12] In order to satisfy the aims of the Convention, the concept of a child's "habitual residence" was established.[13] However, the Convention itself does not define habitual residence, and the ambiguity resulted in extensive U.S. case law attempting to define the term.[14] In 2020, in *Monasky v. Taglieri*, the U.S. Supreme Court determined that habitual residence is a fact-driven finding that requires courts to consider "the totality of the circumstances specific to the case."[15]

Following a determination that the child has been wrongfully removed or retained away from the child's habitual residence, the court must order return of the child unless one of the exceptions to the prompt return of the child is

8. *See* Convention, *supra* note 1; 22 U.S.C. §§ 9001–11 [hereinafter ICARA]. The Convention entered into force on December 1, 1983, and the United States became a signatory on April 29, 1988. Convention Status Table, *supra* note 1.

9. Convention, *supra* note 1, pmbl.

10. *Id.* arts. 1 ("The objects of the present Convention are—a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."), 13.

11. *Id.* art. 13(b).

12. *Golan*, 142 S. Ct. at 1888 (citation omitted).

13. Convention, *supra* note 1, art. 3; *see* Ann Laquer Estin, *Where Is the Child at Home? Determining Habitual Residence After* Monasky, 54 Fam. L.Q. 127, 128 (2020).

14. Convention, *supra* note 1; *see* Estin, *supra* note 13, at 128–31.

15. 140 S. Ct. 719, 723 (2020); *see* Estin, *supra* note 13, at 131–36.

established.[16] A party invoking the "grave risk" exception bears the burden of showing by clear and convincing evidence that the exception applies.[17]

A. Grave Risk of Harm

The Convention's "grave risk" exception applies in cases where the return of the child to the habitual residence would "expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[18] U.S. courts have applied the grave risk exception in a variety of circumstances. Some courts have found that the harm to the child "must be something greater than would normally be expected on taking a child away from one parent and passing [the child] to another."[19] Courts have found grave risk in cases where there is evidence of sexual abuse.[20] Courts have also noted that returning the child to a "zone of war, famine, or disease" could qualify as a grave risk of harm.[21] Grave risk has also been applied more broadly when there is evidence of "serious abuse or neglect, or extraordinary emotional dependence."[22] And in some cases, the grave risk exception has been considered based on a risk of harm to the removing parent, such as when one parent flees a situation of domestic abuse.[23]

16. Convention, *supra* note 1; 22 U.S.C. § 9003(e)(2).

17. 22 U.S.C. § 9003(e)(2)(A).

18. Convention, *supra* note 1, art. 13(b).

19. da Silva v. de Aredes, 953 F.3d 67, 73 (1st Cir. 2020) (citation and internal quotation marks omitted); *In re* S.L.C., 4 F. Supp. 3d 1338, 1350 (M.D. Fla. 2014); De Aguiar Dias v. De Souza, 212 F. Supp. 3d 259, 270 (D. Mass. 2016) (finding that "[t]he risk must be 'more than serious,' though it need not be 'immediate,'" and "[t]he harm involved 'must be a great deal more than minimal'") (citation omitted); Madrigal v. Tellez, 848 F.3d 669, 676 (5th Cir. 2017) (finding that "[t]he alleged harm 'must be a great deal more than minimal' and 'greater than would normally be expected on taking a child away from one parent and passing him to another'") (citation omitted); Marquez v. Castillo, 72 F. Supp. 3d 1280, 1287 (M.D. Fla. 2014); LM v. JF, 75 N.Y.S.3d 879, 890 (Sup. Ct. Nassau Cnty. 2018) (finding that "[t]he parent opposing the child's return must show that the risk to the child is grave, not just serious, and the harm must be more than a potential harm").

20. *See* Diaz-Alarcon v. Flandez-Marcel, 944 F.3d 303, 312–13 (1st Cir. 2019); Luis Ischiu v. Gomez Garcia, 274 F. Supp. 3d 339, 351 (D. Md. 2017).

21. *In re* R.V.B., 29 F. Supp. 3d 243, 258 (E.D.N.Y. 2014) (citation omitted); *see also* Velozny *ex rel.* R.V. v. Velozny, 550 F. Supp. 3d 4, 18 (S.D.N.Y. 2021), *aff'd*, No. 21-1993-cv, 2021 WL 5567265 (2d Cir. Nov. 29, 2021); Salguero v. Argueta, 256 F. Supp. 3d 630, 637 (E.D.N.C. 2017); Babcock v. Babcock, 503 F. Supp. 3d 862, 881 (S.D. Iowa 2020); De La Riva v. Soto, 183 F. Supp. 3d 1182, 1198 (M.D. Fla. 2016).

22. *See* Mohasci v. Rippa, 346 F. Supp. 3d 295, 320 (E.D.N.Y. 2018) (citation omitted), *aff'd sub nom. In re* Nir, 797 F. App'x 23 (2d Cir. 2019).

23. *See* Colchester v. Lazaro, 16 F.4th 712, 717–18, 729 (9th Cir. 2021).

B. Ameliorative Measures and Undertakings

Prior to the Supreme Court decision in *Golan v. Saada*, some U.S. courts required consideration of ameliorative measures after making a finding of a grave risk of harm to the child.[24] Ameliorative measures are steps that can be taken by the parties or by government officials in the return country to adequately protect the child from harm upon their return to the habitual residence for custody proceedings.[25] It is important to note that there is nothing in the text of the Convention that specifically necessitates consideration of any ameliorative measures.[26] Before *Golan*, there was a split in the courts as to whether such ameliorative measures must be considered following a court's finding of a grave risk of harm.[27]

II. Lower Court Decisions in *Golan v. Saada*

Golan v. Saada began in the Eastern District of New York when the father and petitioner, Isacco Jacky Saada, brought the case against the mother and respondent, Narkis Aliza Golan, for the return of the parties' child (born in Italy in 2016 after the parties' 2015 marriage), referred to as B.A.S.[28] Mr. Saada, an Italian citizen, alleged that Ms. Golan, a U.S. citizen who had lived with Mr. Saada and B.A.S. in Italy, wrongfully kept the child in the United States in August 2018.[29] Upon review of the facts, the trial court found on March 22, 2019, that the child's habitual residence was Italy.[30] The trial court also determined that based on the presented facts, Ms. Golan had "established by clear and convincing evidence that returning the child to Italy would subject the child to a grave risk of harm."[31] The finding came after a review of numerous instances of abuse by Mr. Saada against Ms. Golan, often in the presence of the child, and the testimony of multiple child psychologists who agreed that exposure to such domestic violence would cause significant psychological harm to the child.[32]

Following the finding of a grave risk of harm to B.A.S., the court considered ameliorative measures that would allow for the safe return of Ms.

24. Golan v. Saada, 142 S. Ct. 1880, 1891 & n.6 (2022); *see* Farrell, *supra* note 4.
25. *Golan*, 142 S. Ct. at 1887.
26. *Id.* at 1892.
27. *See infra* Part IV; *see also Golan*, 142 S. Ct. at 1891 & n.6; Farrell, *supra* note 4.
28. Saada v. Golan, No. 18-CV-5292, 2019 WL 1317868, at *1–2 (E.D.N.Y. Mar. 22, 2019), *aff'd in part, vacated in part*, 930 F.3d 533 (2d Cir. 2019).
29. *Id.* at *1–3.
30. *Id.* at *17.
31. *Id.* at *18.
32. *Id.* at *4–12, *18.

Golan and the child.[33] The trial court instructed the parties to each propose ameliorative measures that would satisfy the aims of the Convention and permit the speedy return of the child to Italy for custody proceedings, but also would protect the child from the harm determined to be a grave risk.[34]

The trial court ordered the following ameliorative measures for Mr. Saada to take, consistent with what he had proposed: (1) provide Ms. Golan with $30,000 prior to the child's return, for housing in Italy without limitations regarding location, financial support, and legal fees for custody proceedings in Italy; (2) establish a mutual agreement to stay away from Ms. Golan until the Italian courts determined custody; (3) seek dismissal of criminal charges against Ms. Golan for abducting B.A.S.; (4) partake in cognitive behavioral therapy in Italy; and (5) waive any rights to legal fees or costs for the return proceeding.[35] The court also ordered Mr. Saada to provide all records relating to the U.S. proceedings to the Italian court presiding over the forthcoming custody proceedings, to provide a sworn statement regarding the measures he would take "to assist Ms. Golan in obtaining legal status and working papers in Italy," and to withdraw any civil actions against Ms. Golan.[36] The trial court determined that such ameliorative measures were sufficient to grant Mr. Saada's petition, and ordered the return of the child to Italy for custody proceedings.[37]

Ms. Golan appealed the trial court's decision to the Second Circuit. On July 19, 2019, the decision was affirmed in part, vacated in part, and remanded.[38] Among other things, the appellate court considered the trial court's ordered ameliorative measures.[39]

The Second Circuit found that a number of the ameliorative measures ordered by the trial court were unenforceable as they were ultimately based upon Mr. Saada's agreement to comply.[40] The court found that the condition requiring Mr. Saada to stay away from Ms. Golan was insufficient as "[t]he District Court's factual findings provide ample reason to doubt that Mr. Saada will comply. . . ."[41] The court also noted that "[t]here is some dispute concerning whether it is appropriate for courts in the United States to condition orders of return on a foreign court's entry of an order containing

33. *Id.* at *18–19.
34. *Id.* at *18.
35. *Id.* at *19–20.
36. *Id.* at *20.
37. *Id*. at *19–20.
38. Saada v. Golan, 930 F.3d 533, 543 (2d Cir. 2019).
39. *Id*. at 539–42.
40. *Id.* at 540.
41. *Id.*

similar protective measures."[42] Nonetheless, the Second Circuit stated that by their assessment, international comity did not preclude district courts from ordering a party to "apply to courts in the country of habitual residence for any available relief that might ameliorate the grave risk of harm to the child."[43]

The Second Circuit ultimately concluded that following a finding of grave risk of harm, undertakings that are unenforceable are generally disfavored, especially when there is reason to believe that the ordered party may not comply with such an undertaking.[44] The court determined that, based on Mr. Saada's credibility and the lack of "sufficient guarantees of performance," the trial court erred in granting Mr. Saada's petition for return subject to largely unenforceable measures.[45] Nonetheless, the court did not find that "*no* protective measures" existed that would be sufficient to protect the child upon return.[46] Thus, the Second Circuit remanded the case for further consideration of ameliorative measures.[47] The court directed the district court "to consider whether there exist alternative ameliorative measures that are either enforceable by the District Court or supported by other sufficient guarantees of performance" in order to ensure the child's safe return to Italy.[48]

Upon remand, the district court determined on May 5, 2020, that certain measures already taken by Mr. Saada in Italy, coupled with a series of additional measures, were both enforceable and sufficient to protect the child upon return.[49] One key factor considered by the court was that on December 12, 2019, an order was issued by the Court of Milan providing for the protection of Ms. Golan and B.A.S., directing that Mr. Saada stay away from both Ms. Golan and the child at the child's place of residence, Ms. Golan's place of work, the child's school, and other places frequented by them, effective immediately upon their return to Italy.[50] The Milan order also required Mr. Saada to submit to cognitive behavioral therapy overseen by Italian Social Services, and granted Mr. Saada supervised parenting time.[51] The district court found that the Milan order, coupled with Mr. Saada

42. *Id.* at 541.
43. *Id*. at 541–42.
44. *Id.* at 540–41.
45. *Id*. at 542–43.
46. *Id*. at 543 (emphasis added).
47. *Id.*
48. *Id.*
49. Saada v. Golan, No. 1:18-CV-5292, 2020 WL 2128867, at *1, *3 (E.D.N.Y. May 5, 2020), *aff'd*, 833 F. App'x 829 (2d Cir. 2020), *vacated and remanded*, 142 S. Ct. 1880 (2022).
50. *Id.* at *3; *Saada*, 833 F. App'x at 832.
51. *Saada*, 2020 WL 2128867, at *3–4.

paying Ms. Golan $150,000 before her return to cover expenses and provide her with stability during the pending proceedings in Italy, were sufficient measures to ameliorate the risk to the child, and again granted Mr. Saada's petition for return of the child.[52]

Ms. Golan again appealed the decision to the Second Circuit. On October 28, 2020, the Second Circuit affirmed the district court's decision, finding that the undertakings ordered by the district court this time were "either enforceable by the District Court or . . . supported by other sufficient guarantees of performance."[53] Ms. Golan's petition for a writ of certiorari was granted by the Supreme Court on December 10, 2021.[54]

III. Question Before the Supreme Court

The question before the Court as presented by the petitioner (Ms. Golan) was as follows:

> Whether, upon finding that return to the country of habitual residence places a child at grave risk, a district court is required to consider ameliorative measures that would facilitate the return of the child notwithstanding the grave risk finding.[55]

The question before the Court as stated by the respondent (Mr. Saada) was as follows:

> Whether a District Court, after a finding of grave risk, or as part of a grave risk analysis, is required to examine "the range of remedies" that, in its discretion, would permit the return of children to their habitual residence with sufficient "protection from harm" so that custody proceedings can commence in the country of habitual residence.[56]

This section reviews the parties' arguments as to whether certiorari should be granted, as they provide context for the issue before the Court.

52. *Id.* at *5.

53. *Saada*, 833 F. App'x at 833 (quoting Saada v. Golan, 930 F.3d 533, 541 (2d Cir. 2019)).

54. Golan v. Saada, 142 S. Ct. 638 (2021).

55. Petition for a Writ of Certiorari at I, Golan v. Saada, 142 S. Ct. 1880 (2022) (No. 20-1034) [hereinafter Petition].

56. Affirmation in Opposition to Petition for a Writ of Certiorari at i, Golan v. Saada, 2021 WL 327756 (No. 20-1034) [hereinafter Opposition].

A. Ms. Golan's Petition for Writ of Certiorari

1. Separation of Powers

Noting that "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text," Ms. Golan argued that ameliorative measures should not be considered following the finding of a grave risk of harm.[57] Ms. Golan pointed to the text of Article 13(b), which itself does not require ameliorative measures to be considered following a grave risk finding.[58] Therefore, requiring courts to consider such measures encroached on the separation of powers through judicial overreach.[59]

2. Enforceability

Ms. Golan also raised certain policy concerns, including the international enforceability of undertakings ordered in U.S. courts but necessarily enforced in a foreign country.[60] Ms. Golan stated that U.S. courts "retain no power to enforce [conditional return] orders across national borders."[61] Ms. Golan noted that lack of enforceability was especially concerning in cases of domestic abuse, as studies have shown abusers to be likely to violate court orders protecting victims of abuse.[62]

3. Domestic Abuse

In her petition, Ms. Golan cited U.S. State Department guidance providing that "when there is 'unequivocal evidence that return would cause the child a "grave risk" of physical or psychological harm,' it would be 'less appropriate for the court to enter extensive undertakings than to deny the return request.'"[63] Ms. Golan noted that despite discussion regarding the possibility of the use of ameliorative measures, only two circuit court cases, both from the Second Circuit, had actually ordered the return of a child following a grave risk finding.[64] Further, she argued that the aim of the Convention is to protect children first and foremost, and to see their return

57. *See* Petition, *supra* note 55, at 18 (citing Medellin v. Texas, 552 U.S. 491, 506 (2008)).

58. *Id.* at 6, 18–19.

59. *Id.* at 19 ("[T]he judicially created requirement that courts fashion ameliorative measures to allow return of children in circumstances of grave risk—measures that are not mentioned in the text of the treaty that Congress ratified—raises serious separation-of-powers concerns.").

60. *Id.*

61. *Id.* (quoting Baran v. Beaty, 526 F.3d 1340, 1350 (11th Cir. 2008)).

62. *Id.* at 19–20.

63. *Id.* at 4, 23–24 (quoting Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, U.S. Dep't of State, to Michael Nicholls, Lord C.'s Dep't, Child Abduction Unit, United Kingdom (Aug. 10, 1995)).

64. *Id.* at 5.

to their country of habitual residence second.[65] She cited various guidance issued by family law journals and reports to support this argument.[66] Ms. Golan also pointed to the State Department's advisory, which counsels against extensive ameliorative measures in cases of abuse.[67] Additionally, she cited evidence that in cases of domestic abuse, an abuser is not likely to be deterred by protective orders.[68]

Ms. Golan discussed how her own circumstances demonstrated flaws in the Second Circuit's rulings:

> The instant case illustrates the problem with the court of appeals' approach. Applying the Second Circuit's framework, the district court ordered the return of B.A.S. to Italy—despite finding that B.A.S. would be subject to the grave risk of an abusive father upon that return—because his father was willing to consent to a protective order and pay some money. That approach ignores the facts that domestic violence by definition demonstrates indifference to the law, and that the authorities in the home country did not prevent or stop the abuse, leading the victim to flee. And, as a result, it threatens the safety of children and their caregivers.[69]

B. Mr. Saada's Brief in Opposition

1. Implementation and Discretion

Conversely, in his response, Mr. Saada argued that certiorari was not necessary in this case, nor was it needed for direction regarding undertakings, as the text of the Convention permits judicial discretion even following a grave risk finding.[70] He further argued that not only was the court's discretion central to a grave risk and subsequent return analysis, but that the split in the circuit courts' analysis of the Convention was not a concern regarding the implementation of the Convention.[71]

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65. *Id.* at 20.

66. *Id.*

67. *Id.* at 23–24 (citations omitted).

68. *Id.* at 19–20.

69. *Id.* at 22 (internal citation omitted).

70. *See* Opposition, *supra* note 56, at 11–12 (quoting Article 13(b) text stating that "the judicial or administrative authority of the requested State is *not bound* to order the return of the child if . . . there is a grave risk that his or her return would expose the child to physical or psychological harm") (emphasis in Opposition).

71. *Id.* at 13–15.

He also cited a U.S. State Department analysis that stated that "a finding that one or more of the exceptions provided by Articles 13 and 20 are applicable does not make refusal of a return order mandatory."[72] Furthermore, "[t]he courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies."[73] Mr. Saada argued that because the court acted within its discretion, granting review would not change the outcome.[74]

2. Safe Harbor Orders

Mr. Saada also discussed "safe harbor" orders in the country of habitual residence as an ameliorative measure.[75] Safe harbor orders are generally secured from the court of habitual residence and set forth safeguards that permit an order of return.[76] As these orders are issued by the habitual residence court, that court would have jurisdiction to enforce its own orders, alleviating the concerns about enforceability.[77]

3. Comity and Examples of Sister Signatories

Mr. Saada also argued that requiring consideration of ameliorative measures promoted international comity between signatory states.[78] He cited the Hague Conference explanatory report stating that:

> [T]he practical application of this principle requires that the signatory States be convinced that they belong . . . to the same legal community within which the authorities of each State acknowledge that the authorities of one of them—those of the child's habitual residence[—] are in principle best placed to decide upon questions of custody and access.[79]

The cited Explanatory Report further stated that "substituting the forum chosen by the abductor for that of the child's residence would lead to the

72. *Id.* at 12 (quoting U.S. Dep't of State, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,509 (Mar. 26, 1986)).

73. *Id.* (quoting U.S. State Dep't Text & Legal Analysis, 51 Fed. Reg. at 10,509).

74. *Id.* at 1.

75. *Id.* at 17–19.

76. *Id.* at 19.

77. *Id.* at 17–19.

78. *Id.* at 22.

79. *Id.* at 23 (quoting Elisa Pérez-Vera, Explanatory Report, *in* 3 Acts and Documents of the Fourteenth Session of the Hague Conference on Private International Law 426, 434–35 ¶ 34 (1982)).

collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration."[80]

Mr. Saada ultimately implored the Court to deny the petition and allow district courts to utilize their discretion in the consideration of ameliorative measures in grave risk cases, while arguing that consideration of "all available remedies" should be required.[81]

IV. Analysis of the Different Approaches and Split in the Circuits

Both parties acknowledged a split in the circuits regarding the issuance of ameliorative measures, although they disagreed as to the scope or significance of the split.[82] Ms. Golan emphasized that the First, Eighth, and Eleventh Circuits had indicated that courts "need not consider any ameliorative measures" once a grave risk of harm had been proven.[83] However, the Second, Third, and Ninth Circuits had indicated the opposite, that a court must take into account any ameliorative measures that could be taken by the parents and authorities.[84]

The Sixth and Seventh Circuits had essentially held that it was within the court's discretion to consider ameliorative measures, but "cautioned against the use of ameliorative measures in cases involving domestic abuse and suggested that consideration of ameliorative measures is inappropriate in such cases."[85] The Sixth Circuit in *Simcox v. Simcox* went as far as to provide a three-tier approach in cases of domestic violence, which shall be discussed in detail below.[86] The Seventh Circuit in *Van De Sande v. Van De Sande* noted that the safety of the children is "paramount" and indicated that it was "less appropriate" for courts to consider undertakings where there was "unequivocal evidence" of abuse.[87]

The Supreme Court described the different approaches as follows:

80. *Id.* (quoting Pérez-Vera, *supra* note 79, at 435 ¶ 34).

81. *Id.* at 28.

82. *See* Petition, *supra* note 55; Opposition, *supra* note 56, at 1 ("The circuit split discussed by the Petitioner amounts to a distinction without a significant difference."). State courts were also divided. Petition, *supra* note 55, at 17–18.

83. *See* Petition, *supra* note 55, at 11.

84. *See id.* at 13 (stating that "the Second, Third, and Ninth Circuits require a district court to consider a full range of ameliorative measures that would permit return of the child, even when the court finds that there is a grave risk that a child's return would expose that child to physical or psychological harm").

85. *Id.* at 14–15.

86. *See id.* at 15–16 (discussing Simcox v. Simcox, 522 F.3d 594 (6th Cir. 2007)); *see also infra* Part IV.C.

87. 431 F.3d 567, 572 (7th Cir. 2005) (citation omitted).

> This Court granted certiorari to decide whether the Second Circuit properly required the District Court, after making a grave risk finding, to examine a full range of possible ameliorative measures before reaching a decision as to whether to deny return, and to resolve a division in the lower courts regarding whether ameliorative measures must be considered after a grave risk finding. [footnote citation: Compare *In re Adan*, 437 F.3d 381, 395 (C.A.3 2006) (requiring consideration of ameliorative measures); *Gaudin v. Remis*, 415 F.3d 1028, 1035 (C.A.9 2005) (same); *Blondin II*, 238 F.3d 153, 163, n. 11 (C.A.2 2001) (same), with *Acosta v. Acosta*, 725 F.3d 868, 877 (C.A.8 2013) (consideration not required in all circumstances); *Baran v. Beaty*, 526 F.3d 1340, 1346–1352 (C.A.11 2008) (same); *Danaipour v. McLarey*, 386 F.3d 289, 303 (C.A.1 2004) (same).][88]

A. Courts That Denied Return Based on Grave Risk Alone

In *Danaipour v. McLarey,* the First Circuit found that the evidence supported the fact that the father had sexually abused one of the children and that the return of both children to the habitual residence of Sweden would cause the children psychological harm, regardless of any possible ameliorative measures to protect the children from their father.[89] As such, the court stated that it was not required to consider any further remedies or protections the state of habitual residence had to offer before denying the return of the children.[90] In *Walsh v. Walsh*, the First Circuit considered undertakings that had been ordered by the district court but found that the father's violent conduct and history of repeatedly violating orders in the United States and Ireland demonstrated that the undertakings would not protect the children upon their return.[91]

The Eighth Circuit, in the case of *Acosta v. Acosta*, affirmed the district court's decision to deny the return of the children to the father in Peru, where the mother had proved that there would be a grave risk of physical and psychological harm to the children.[92] The court found it was within the district court's discretion to deny return without consideration of ameliorative measures and cited to other courts also reluctant to consider

88. Golan v. Saada, 142 S. Ct. 1880, 1891 & n.6 (2022).

89. 386 F.3d 289, 301–03 (1st Cir. 2004); *see also* Diaz-Alarcon v. Flandez-Marcel, 944 F.3d 303, 314 (1st Cir. 2019).

90. *Danaipour*, 386 F.3d at 303.

91. 221 F.3d 204, 220–22 (1st Cir. 2000).

92. 725 F.3d 868, 875–77 (8th Cir. 2013).

these measures where a parent is violent, rejecting the notion that the existence of social service agencies in the habitual residence was sufficient to guarantee the child's and the mother's safety.[93]

In *Baran v. Beaty*, the Eleventh Circuit affirmed the denial of return of the children to Australia, where there was evidence of domestic violence, no "specific proposal for appropriate undertakings" was presented at the evidentiary hearing, and the trial court determined "any proposed undertakings would be inappropriate given the nature of the case."[94]

B. Courts That Required Consideration of Ameliorative Measures

Conversely, other courts had determined that following a grave risk finding, alternative remedies that would allow for the safe return of the child must be considered before return is denied.[95] For instance, in *Valles Rubio v. Veintimilla Castro*, the Second Circuit determined that "ameliorative measures such as litigation in Ecuadorian courts" and specific terms agreed to by the parties were sufficient to protect the child, and ordered the child's return.[96] In *Blondin v. Dubois*, while the Second Circuit ultimately denied the return of the children, the court first required consideration of the available arrangements and other remedies that could allow for the return of the children to their habitual residence of France.[97] Further, in *Turner v. Frowein*, the Connecticut Supreme Court, following *Blondin* and other cases, found that while the evidence supported a finding of grave risk due to the father's sexual abuse of the child, the trial court erred in failing to conduct a full

93. *Id.* at 877; *see also* Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 377 (8th Cir. 1995) (rejecting father's argument that the Article 13(b) "intolerable situation" exception is only applicable if the government and court of the country of habitual residence, in this case, Mexico, are "unable to protect the child" upon return).

94. 526 F.3d 1340, 1352 (11th Cir. 2008).

95. Blondin v. Dubois, 189 F.3d 240, 248–50 (2d Cir. 1999) [*Blondin I*]; Blondin v. Dubois, 238 F.3d 153, 156, 158–163 (2d Cir. 2001) [*Blondin II*]; Turner v. Frowein, 752 A.2d 955, 960–69 (Conn. 2000).

96. 813 F. App'x 619, 621–23 (2d Cir. 2020).

97. *Blondin I*, 189 F.3d at 248–50; *Blondin II*, 238 F.3d at 156, 158–164. While the court in *Blondin I* found that the district court was required to consider potential ameliorative measures for the children to be safely returned to France, in *Blondin II* the court affirmed the district court's determination (supported by expert testimony) that "as France was the scene of their trauma," return "under *any* circumstances would cause them psychological harm," and thus return was denied. *Blondin II*, 238 F.3d at 157, 163; *see also* Elyashiv v. Elyashiv, 353 F. Supp. 2d 394, 408–09 (E.D.N.Y. 2005) (denying return petition where the court found that the father might refuse to comply with any possible orders entered in Israel to protect the children from abuse, and returning to the home country would likely trigger the children's post-traumatic stress disorder); Jacquety v. Baptista, 538 F. Supp. 3d 325, 337, 381 (S.D.N.Y. 2021); Reyes Olguin v. Cruz Santana, No. 03 CV 6299 JG, 2005 WL 67094, at *7–8, 12 (E.D.N.Y. Jan. 13, 2005).

evaluation of placement options and legal safeguards that would protect the child upon return to the Netherlands for the custody proceedings.[98]

The Third Circuit similarly ruled in *In re Application of Adan* that courts *must* take into account ameliorative measures.[99] Likewise, the Ninth Circuit in *Gaudin v. Remis* reversed the district court's decision without reaching a determination on the question of grave risk of psychological harm because the trial court failed to consider "alternative remedies" to safely return the children.[100]

C. Simcox Framework

The court in *Simcox v. Simcox* created three categories for determining whether undertakings were sufficient to order the return of the child in cases of abuse.[101] First, the court noted that cases of "relatively minor" abuse would likely not rise to the level of "grave risk" as required by Article 13(b), and undertakings were therefore "largely irrelevant. . . ."[102] Second, for "cases in which the risk of harm is clearly grave, such as where there is credible evidence of sexual abuse, other similarly grave physical or psychological abuse, death threats, or serious neglect," undertakings would "likely be insufficient to ameliorate the risk of harm, given the difficulty of enforcement and the likelihood that a serially abusive petitioner [would] not be deterred by a foreign court's orders."[103] The third category captured all cases of grave risk that fall in the middle; the grave risk determination in these cases involved "a fact-intensive inquiry that depends on careful consideration of several factors, including the nature and frequency of the abuse, the likelihood of its recurrence, and whether there are any enforceable undertakings that would sufficiently ameliorate the risk of harm to the child caused by its return."[104] The court found that even in this "middle" category, undertakings should only be adopted "where the court satisfies itself that the parties are likely to obey them."[105]

98. 752 A.2d 955, 960, 969, 974, 976–77 (Conn. 2000). The court found that "before a trial court may properly deny a petition under article 13b, it must evaluate the full range of placement options and legal safeguards that might facilitate the child's repatriation under conditions that would ensure his or her safety, thereby preserving the home country's jurisdiction over the underlying custody dispute without endangering the child." *Id.* at 969.

99. *See* 437 F.3d 381, 395, 398–99 (3d Cir. 2006).

100. *See* 415 F.3d 1028, 1035, 1037–38 (9th Cir. 2005).

101. 511 F.3d 594, 607 (6th Cir. 2007).

102. *Id.*

103. *Id.* at 607–08.

104. *Id.* at 608.

105. *Id.*

V. Supreme Court Decision

Against this background of a split in the circuits and inconsistency in state courts, the U.S. Supreme Court unanimously held in *Golan v. Saada* that while courts have discretion to consider ameliorative measures when ordering or denying the return, the court may decline to consider these measures "where it is clear that they would not work because the risk is so grave" or where the court "reasonably expects" the parent will not comply.[106] The Court rejected Mr. Saada's position that the consideration of ameliorative measures was "implicit" to the requirement that the court determine "whether a grave risk of harm exists."[107] The Court stated while there may be "overlap" between the inquiry of whether grave risk exists and consideration of ameliorative measures to protect the child from harm, they are not the same question: "The question whether there is a grave risk . . . is separate from the question whether there are ameliorative measures that could mitigate that risk."[108]

The Court concluded that the Second Circuit erred in elevating the court's discretion to consider ameliorative measures to a mandate, and remanded the case to the district court for application of the correct legal standard.[109] The Court noted, "[t]he fact that a court may consider ameliorative measures concurrent with the grave risk determination . . . does not mean that the Convention imposes a categorical requirement on a court to consider any or all ameliorative measures before denying return once it finds that a grave risk exists."[110]

On the contrary, the Court found that the Convention "constrain[s] courts' discretion to consider ameliorative measures in at least three ways."[111] First, any consideration of ameliorative measures must be in accordance with the purposes and objectives of the Convention and "prioritize the child's physical and psychological safety," which "may overcome the return remedy."[112]

Further, Justice Sotomayor's unanimous opinion emphasized that courts must steer clear of making custody determinations and ensure that any ameliorative measures are "limit[ed] . . . in time and scope" to facilitating the "safe return" of the child.[113] The scope should be limited in order to "abide

106. 142 S. Ct. 1880, 1894 (2022).
107. *Id.* at 1892.
108. *Id.*
109. *Id.* at 1888, 1895.
110. *Id.* at 1892.
111. *Id.* at 1893.
112. *Id.* (citation omitted).
113. *Id.* at 1894.

by the Convention's requirement that courts addressing return petitions do not usurp the role of the court that will adjudicate the underlying custody dispute."[114]

Finally, the Court found that the Convention requires an expeditious result, and delay is a detriment.[115] Therefore, "[c]onsideration of ameliorative measures should not cause undue delay in resolution of return petitions."[116]

The Court concluded:

> To summarize, although nothing in the Convention prohibits a district court from considering ameliorative measures, and such consideration often may be appropriate, a district court reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings. The court may also find the grave risk so unequivocal, or the potential harm so severe, that ameliorative measures would be inappropriate. Ultimately, a district court must exercise its discretion to consider ameliorative measures in a manner consistent with its general obligation to address the parties' substantive arguments and its specific obligations under the Convention.[117]

The Court vacated the Second Circuit decision and remanded the case for the district court to apply "the correct legal standard" and to "determine whether the measures in question are adequate to order return in light of its factual findings concerning the risk to [the child], bearing in mind that the Convention sets as a primary goal the safety of the child."[118]

VI. Subsequent Events

Upon remand, the trial court reviewed the matter pursuant to the standards outlined in the Supreme Court ruling and determined that "under the circumstances of this case, it [was] appropriate to consider, as a matter of discretion, whether the existence of ameliorative measures . . . ma[d]e it possible for B.A.S. to return safely to Italy."[119] This review ultimately did

114. *Id.*
115. *Id.* at 1894–95.
116. *Id.* at 1895.
117. *Id.*
118. *Id.* at 1895–96.
119. Saada v. Golan, No. 1:18-CV-5292, 2022 WL 4115032, at *1 (Aug. 31, 2022), *vacated and remanded sub nom. In re* B.A.S., No. 22-1966, 2022 WL 16936205 (2d Cir. Nov. 10, 2022).

not change the trial court's decision, and on August 31, 2022, the court again granted Mr. Saada's petition and ordered the return of the child to Italy.[120]

In the trial court's decision, the court discussed the "robust measures" taken by the Italian courts to ensure the minor child's safety.[121] The trial court also reaffirmed its view that the Italian courts were entitled to comity, which served the overarching purpose of the Convention.[122] Additionally, the trial court noted that the domestic abuse was directed at Ms. Golan and not the minor child.[123]

Ms. Golan again appealed the trial court's decision.[124] It is profoundly sad that on October 18, 2022, Ms. Golan was found dead in her apartment in New York City.[125] After her death, the Second Circuit dismissed Ms. Golan's appeal as moot due to her passing, vacated the district court's order, and remanded the case for further proceedings.[126] The Second Circuit instructed that "[o]n remand, in the first instance, the District Court should entertain any motions for intervention or substitution of parties."[127]

Conclusion

The overarching purpose of the Hague Convention is to protect the well-being of children, which is generally done when the court of the child's habitual residence makes substantive custody decisions. The Convention preamble states "that the interests of children are of paramount importance in matters relating to their custody."[128] The Convention seeks to prevent disruption to children's lives, forum shopping, and child abduction. While the general and overarching principle is that the interests of children are served when the court of the child's habitual residence decides the merits of custody proceedings, the Convention also recognizes that the physical, social, emotional, and mental safety of a child may not always be served by return. Abuse by a parent causes damage to a child. In the absence of explicit text, courts have attempted to balance the goal of returning the child to their habitual residence with the need to protect the child. In a way,

120. *Id.*

121. *Id.* at *6.

122. *Id.* at *8–9; *see also* Navani v. Shahani, 496 F.3d 1121, 1128–29 (10th Cir. 2007) ("The Hague Convention rests implicitly upon the principle that any debate on the merits of . . . custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal.") (quoted in *Saada*, 2022 WL 4115032, at *8).

123. *Saada*, 2022 WL 4115032, at *5.

124. *See In re* B.A.S., No. 22-1966, 2022 WL 16936205 (Nov. 10, 2022).

125. *See* McShane, *supra* note 3.

126. *In re B.A.S.*, 2022 WL 16936205, at *1.

127. *Id*.

128. Convention, *supra* note 1, pmbl.

these attempts are also adaptations to the reality of abductions in instances of domestic abuse.

It is relevant to note that there have been changes concerning the most common circumstances for abductions since the time when the Convention was drafted:

> The aim of the [Convention] was to protect the child from a change of environment, the rupture of its caring parent, the change of the native tongue and new cultural conditions and relatives. This implies that the abductor is not the caring parent, the country and relatives are strange or unknown to the child, and the environment is new.
>
> Indeed, at the time of drafting the [Convention], the abducting parent used to be the father (non-custodial parent). However, according to the statistics available on the website of the Hague Conference, nowadays, the large majority (80 percent) of abducting parents are the primary carers, or the "joint primary carer" of the child. Where the taking person is the mother, this figure increases to 91 percent. Mothers were the abducting parents in 73 percent of all cases. In total 58 percent of taking persons travelled to a state of which they were nationals.[129]

Essentially, while there was a premise that child abduction would be most commonly perpetrated by fathers, in fact it is mothers who are still more often the primary caregivers who more frequently resort to child abduction or retention. Moreover, "[a]lthough there are no comprehensive statistics on how many 1980 Convention cases involve allegations or findings of domestic violence, empirical research has confirmed that this phenomenon frequently plays a role in parental child abduction cases and may be present in about 70 percent of parental child abduction cases."[130] Ultimately, the Supreme Court has made it clear that the court has discretion in deciding whether to order return of a child subject to ameliorative measures after determining that the return presents a grave risk of harm. However, the *Golan* decision also appears to suggest a conservative approach to these

129. Adriana De Ruiter, 40 Years of the Hague Convention on Child Abduction: Legal and Societal Changes in the Rights of a Child 7–8 (Pol'y Dep't for Citizens' Rts. & Const. Affs., Directorate-Gen. for Internal Policies 2020), https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/660559/IPOL_IDA(2020)660559_EN.pdf.

130. Katarina Trimmings & Onyója Momoh, *Intersection Between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings*, 35 Int'l J.L., Pol'y & Fam. 1, 2 n.2 (2021).

ameliorative measures, limiting them in scope and nature, especially in instances where there has been a proven history of domestic abuse.

In Memory of Narkis Golan

NICOLE FIDLER*

Narkis Golan was a U.S. citizen and mother who fled Italy in 2018 with her then-two-year-old son to escape physical, psychological, and sexual abuse perpetrated by her husband. After Ms. Golan fled to New York, her husband filed a petition seeking an order to return their son to Italy pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention"). In January 2019, before the Eastern District of New York, Ms. Golan's legal team laid out a chilling and irrefutable record of domestic violence. The team focused on proving the Hague Convention's Article 13(b) "grave risk" exception to return. The District Court found that the child would face a grave risk of harm if returned to Italy, but nonetheless ordered his return pursuant to a number of so-called ameliorative measures, which the Court was obliged to consider under then-Second Circuit precedent requiring the court to "examine the full range of options that might make possible the safe return of a child" even after grave risk has been established. Because of a Circuit split in the way ameliorative measures are treated, the U.S. Supreme Court agreed to hear the case.

In 2022, Ms. Golan and her legal team were successful in setting a new precedent: in a unanimous opinion, the Supreme Court found in favor of Ms. Golan's legal argument, holding that a court is not "categorical[ly] require[d]" to "consider all possible ameliorative measures" before denying a Hague Convention petition for return of a child where it has already found that return would expose the child to a grave risk of harm. Golan v. Saada, 142 S. Ct. 1880, 1893 (2022). The Court also noted that there may be certain grave risks that might preclude consideration of ameliorative measures altogether, and under certain circumstances, domestic violence might be one such instance. The decision is a huge victory for survivors of domestic

* Nicole Fidler, Esq. is the Director of the Pro Bono Project at Sanctuary for Families, a non-profit organization dedicated to assisting survivors of domestic violence, sex trafficking, and other forms of gender-based violence. In addition to managing Sanctuary's robust pro bono practice, which consists of approximately 1,000 pro bono attorneys, Nicole also represents survivors seeking assistance from Sanctuary's family and matrimonial law practice. Prior to joining Sanctuary, Nicole was a litigator at Milbank, Tweed, Hadley & McCloy, LLP. While at Milbank, she was actively involved in pro bono work, focusing primarily on family, criminal, and immigration matters. Nicole regularly trains attorneys on topics related to domestic violence and trauma-informed lawyering. She is co-chair of the New York City Bar Association's Pro Bono & Legal Services Committee and a member of the Public Interest Pro Bono Association (PIPBA). In her pre-law life, Nicole worked in communications and development for the Organization for Autism Research, a national non-profit organization dedicated to funding applied autism research.

violence asserting the "grave risk" defense. Unfortunately, the case was remanded to the District Court for further proceedings in light of the Supreme Court's decision. In the midst of ongoing proceedings on remand, Ms. Golan tragically and unexpectedly passed away in October 2022 at the age of 32.

Even from a young age Narkis Golan, who grew up in a Jewish community in Brooklyn, believed in standing up for those she considered to be underdogs. Her sister Morin Golan remembers Narkis as a strong-willed and compassionate child who once brought home a hamster that only had one eye because she was worried that nobody else would want it. Narkis was bold and brave, and when she was 25 she agreed to marry an Italian man whom she had met at a wedding the year before. He wanted her to start a family with him in Italy. They married in Israel in 2015 and then moved to Italy. Almost immediately after the wedding, Narkis' new husband began abusing her. For three years, Narkis was the target of her husband's incredibly angry outbursts. She suffered horrible physical, sexual, and psychological abuse, including abuse that occurred while she was pregnant with her son, B.A.S, and later while B.A.S. was present in the apartment. Summoning incredible strength and bravery, Narkis sought help in Italy multiple times but was never able to get the protection and assistance she needed. Again summoning that same strength and bravery, and understanding that both she and her young son faced grave risk if they were to continue living with her violent husband, Narkis and B.A.S. fled Italy in 2018 and sought safety and security in the Brooklyn community where she was raised. But instead of being allowed to protect her son, Narkis' courageous journey home to the U.S. marked the beginning of a grueling four-year battle in the U.S. court system in which her son's safety was constantly in jeopardy.

As one of the attorneys working with Narkis during her four-year struggle, I witnessed the devastating toll it took on her: the trauma of an exhausting nine-day trial where she had to recount every horrible incident of abuse that she suffered; the pained bewilderment of learning that the District Court Judge agreed her husband was dangerous and that her son would face a grave risk of physical or psychological harm if he were returned to Italy—but nonetheless ordered his return; and the agony of four anxiety-ridden years of worrying that her son could be ripped from her at any moment. Narkis was made to bear more than any young mother should ever have to. But that is not what I think about when I reflect on Narkis' life. I describe the darkness she faced only to better highlight the light she brought.

Narkis was a tireless fighter. She fought passionately for the safety and well-being of her son as well as all of her "Hague Moms," as she called them. The Hague Moms are women who, like Narkis, fled abuse across

international borders to protect themselves and their children, and then faced great adversity in a judicial system that can be incredibly hostile to domestic violence survivors. Narkis always kept her eye on the bigger picture. She knew that her case was important not only to protect her son, but also because of the opportunity to create positive case law that would help future survivors asserting the Hague Convention's Article 13(b) "grave risk" defense—the defense most often invoked by survivors fleeing violence. Narkis never stopped talking about how her case could set precedent that would help future survivor-mothers in situations like hers. That was her dream, and the possibility that she could make positive change helped keep her going despite her own profound heartache. Narkis always believed that her case would be heard by the U.S. Supreme Court, even after we counseled her that a mere 1 percent of cases are accepted by the Court for consideration. But she had faith. She believed that the adversity she suffered had a higher purpose. And so she fought.

Narkis was a mother who loved her son more than anything in the world. Even during the hardest times, her face lit up with pure joy whenever she told us stories about him. She dedicated her life to protecting her son and surrounding him with love, peace, and happiness.

She was a rock and a constant source of support for her Hague Moms. Through social media and word of mouth, Narkis connected with other Hague Moms going through similar circumstances and provided comfort, resources, and advice. It wasn't until after her death that the depth of her support for other Hague Moms became clear. Her sister Morin began hearing from women who had forged strong bonds with Narkis and who reached out to offer their condolences. Narkis "didn't talk a lot about what she was doing for others," Morin explained. "She just harnessed a strength that is unimaginable," Morin said. "I didn't even know she possessed it until I spoke with some of these Hague Moms and they shared with me what an anchor she was for them. They knew that at any point if they were feeling down on themselves and like they couldn't carry the weight anymore and fight this battle, they could come to her and she would give them the strength that they needed to continue. She helped them stay grounded and stay motivated and determined to continue their fight."

Narkis is a hero. Through her passion, courage, and resilience, she created real and lasting change that will help survivors who follow in her footsteps. In fact, very soon after her case was decided at the Supreme Court, lower courts began citing it in decisions that found in favor of survivor-mothers seeking protection. This is her legacy, forged by a boundless love for her son and a selfless determination to help others.

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