RESOLVED, That the American Bar Association recognizes the constitutionality of the Indian Child Welfare Act, 25 U.S.C. §§1901-63 (“ICWA”) and its accompanying regulations, specifically that:

1. ICWA establishes a political, not racial, classification that serves a compelling governmental interest.
2. ICWA does not violate the non-delegation doctrine, because tribes retain their authority to regulate child welfare.
3. ICWA does not commandeer the states, because it is permissible to impose obligations on state courts to enforce federal prescriptions; and

FURTHER RESOLVED, That the American Bar Association recognizes both the unique government-to-government relationship between the United States and tribes and the trust responsibility owed by the United States to tribes.
REPORT

In 1978, after more than four years of hearings, testimony, and debate, Congress enacted the Indian Child Welfare Act1 (hereinafter “ICWA”) in response to the “alarmingly high percentage of Indian families … broken up by the removal, often unwarranted, of their children by nontribal public and private agencies.”2 Congress noted “that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”3 In 2016, the Bureau of Indian Affairs (“BIA”) released comprehensive regulations for ICWA.

In 2013, the American Bar Association (“ABA”) declared its support for the ICWA, urging for its full implementation and compliance in 2013 AM 111A.4 Implicit in that resolution was the endorsement that ICWA was constitutionally enacted. On October 4, 2018, for the first time in its forty-year history, a federal court in the Northern District of Texas found ICWA and its corresponding regulations to be unconstitutional.5 The court held ICWA and its corresponding regulations (“Final Rule”) unconstitutional, based on the following holdings:

1. ICWA violates the Fifth Amendment’s guarantee of equal protection under the law.
2. ICWA is unconstitutional because it delegates congressional power to Indian tribes in violation of the non-delegation doctrine outlined in Article 1 of the Constitution.
3. ICWA violates the Tenth Amendment of the Constitution by commandeering State courts and agencies.

This report tracks the district court’s decision in Brackeen v. Zinke (appealed to the Fifth Circuit as “Brackeen, et. al. v. Bernhardt, et. al.”)6 as basis for the ABA to confirm a formal policy in support of ICWA’s constitutionality.

The ABA has long-standing policy endorsing both ICWA and tribes operating within the child welfare field. In addition to 2013 AM 111A supporting ICWA as child welfare policy, the ABA Section of Family Law publishes a legal guide to ICWA called the Indian Child

2 Id. at 1901.
3 Id.
6 Brackeen, et. al. v. Bernhardt, et. al., No. 18-11479 (5th Cir. filed Jan. 16, 2019).
In August 2001, the ABA House of Delegates adopted 2001 AM 105C calling on Congress to amend Title IV-E of the Social Security Act to provide direct tribal access to federal Title IV-E foster care and adoption funding for children under tribal court jurisdiction. In August of 2008, the Commission on Youth at Risk’s policy on Addressing Racial Disparities in the Child Welfare System was adopted, calling on Congress to:

1. broaden federal reviews of the child welfare system to address racial and ethnic disproportionality and fund reporting, analysis and corrective action responses;
2. help racial and ethnic minority families have ready access to services to prevent removals from home in both state and tribal systems;
3. provide relevant cultural competence training;
4. provide for a racially and ethnically diverse legal and judicial workforce, and
5. make changes in law and policy to help decrease disproportionality by subsidizing permanent relative guardianships, giving relative caregivers financial support no less than non-relative caregivers, providing relative caregiver housing support and giving flexibility in having separate licensing and approval standards for kinship placements.

These policy recommendations mirror many of the goals of ICWA, including addressing the disproportionate number of AI/AN youth in the child welfare system, encouraging maintenance of the tribal kinship networks, and recognizing the need for a separate set of standards for identifying appropriate placements and interventions for AI/AN children and youth. They additionally support the ABA’s premise that federal legislation regarding both child welfare and American Indians/Alaska Natives are constitutional.

I. ICWA Does Not Violate Equal Protection

ICWA applies to proceedings involving an “Indian child”—which the statute defines as “either (a) a member of an Indian tribe or (b) [a person who] is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” ICWA and the Final Rule do not violate the Fifth Amendment’s equal protection guarantee. ICWA establishes a political, not racial, classification, which is subject to rational-basis review. Even were it race-based, the classification survives strict scrutiny.

A. ICWA is based on a political classification.

---

7 ABA Section of Family Law Indian Child Welfare Act Handbook 2018

8 ABA Commission on Homelessness and Poverty (Report Nos.105C). 2001 AM 105C
https://www.americanbar.org/content/dam/aba/directories/policy/2001_am_105c.authcheckdam.pdf

9 ABA Commission on Youth at Risk (Report Nos. 107). 2008 AM 107
https://www.americanbar.org/groups/youth_at_risk/attorneys/racial_disparitiesinchildwelfareinterventions/

The Supreme Court has consistently held that legislation giving special treatment to “Indians” is based on a political classification subject to rational-basis review. The seminal case *Morton v. Mancari* upheld a policy of the BIA that gave hiring preferences to tribal Indians over non-Indians. The Court explained that this issue “turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress … to legislate on behalf of federally recognized Indian tribes.” The Indian Commerce Clause “singles Indians out as a proper subject for separate legislation.” The Court noted that if legislation providing special treatment to Indians “were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased.”

The Court found that “[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasisovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.” The Court explained that “[t]he preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.” This was so even though the definition of “Indian” required “one-fourth or more degree Indian blood.” The Court concluded that “[a]s long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.” Federal regulation of Indian affairs “is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a ‘racial’ group consisting of ‘Indians.’” Courts generally use the rational-basis standard when (as here) the power of Congress is plenary. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (rational basis review over “exclusion of foreign nationals”); *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (Territories Clause).

Consistent with *Mancari*, under ICWA “Indian child” is a political, not racial, classification. “Indian child” is defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” "Indian tribe" is limited to federally

---

12 *Id.* at 552.
13 *Id.*
14 *Id.* at 553.
15 *Id.* at 554.
16 *Id.* at 553 n.24.
17 *Id.*
18 *Id.* at 555.
19 *Id.* at 646.
recognized tribes. ICWA thus applies only when a child (1) is already a citizen of a federally recognized tribe or (2) has a parent who is a citizen of a federally recognized tribe and herself is eligible to become a citizen. In short, the statute is triggered by political affiliation: enrolled membership (or eligibility for it) in a sovereign nation—not race—is the basis for application of ICWA. This can include children who are tribal members without Indian blood, and can exclude children who are racially Indian but are not eligible for enrollment and children with affiliations with non-federally recognized tribes. Unlike race, tribal membership is a voluntary status, see Duro v. Reina, 495 U.S. 676, 694 (1990), and, like U.S. citizenship, see 8 U.S.C. § 1484, can be renounced. The contention that ICWA is premised on a race-based classification is simply in error.

B. ICWA serves a compelling governmental interest.

Even if ICWA is race-based, it is still constitutional because it survives strict scrutiny. To survive strict scrutiny, “racial classifications ... must serve a compelling governmental interest, and must be narrowly tailored to further that interest.” The government has a compelling interest based on the “trust relationship between the United States and the Indian people,” under which the United States “has charged itself with moral obligations of the highest responsibility and trust.” Pursuant to those obligations, the federal government is responsible “for the protection and preservation of Indian tribes.” The protection of Indian children is essential to protecting tribes. Therefore, it is the public policy of the United States to protect the best interests of Indian children and tribes. Indeed, Congress documented the large-scale and unwarranted removal of Indian children from their families and tribes, a problem states had failed to correct.

C. ABA Policy Supporting Tribes as Political Entities

The Brakeen court’s conclusion that ICWA is a racial classification conflicts with ABA policy which specifically recognizes the law as a statute applying to Indian children and
families because of their unique political status and the federal government’s unique responsibility because of that status.\textsuperscript{33}

The report in support of the 2013 resolution, states that “ICWA recognizes the government-to-government relationship between the United States and Tribes, and affirms the political status of tribal members—ICWA is not based on either race or ethnicity.”\textsuperscript{34} In fact, “[s]tate courts should not be allowed to impose their own subjective values in determining what constitutes American Indian culture and who is an American Indian.”\textsuperscript{35} This determination must be left to the tribes, as it is not a racial classification. “The long-standing clash between Indian tribal values and those of Anglo-American culture is the very problem ICWA was designed to address.”\textsuperscript{36}

While the \textit{Brackeen} holding directly threatens the ICWA, to hold eligibility for tribal membership as an impermissible race-based classification is to threaten a tribe’s ability to self-determine and self-govern. The ABA has a long policy history of supporting tribes, and by extension Indian people, as separate sovereigns with the rights to self-determination and self-government.

2015 MM 111A adopted the recommendations contained in the Indian Law and Order Commission’s Nov. 2013 Report, noting “tribes, as sovereign, should have the option to fully or partially opt out of [the] jurisdictional maze.”\textsuperscript{37} 2012 AM 301 urged Congress to strengthen tribal jurisdiction to address crimes of gender-based violence committed on tribal lands in the reauthorization of the Violence Against Women Act.\textsuperscript{38} These two resolutions called for the expansion of tribal criminal jurisdiction to include non-Indians. Like ICWA, this recognition of tribal sovereignty extends beyond enrolled members.

2008 AM 117A urged for long-term funding for tribal justice systems, noting “‘the effective operation of tribal courts is essential to promote the sovereignty and self-governance of the Indian tribes.’ As the Supreme Court has recognized: ‘Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development.’”\textsuperscript{39}

\begin{thebibliography}{9}
\bibitem{33} ABA 2013 AM 111A Policy (urging for the full implementation of, and compliance with, the Indian Child Welfare Act) \url{https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/feb-15-make-native-america-safer.authcheckdam.pdf}
\bibitem{34} ABA 2013 AM 111A at 4 \url{https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/feb-15-make-native-america-safer.authcheckdam.pdf}
\bibitem{35} Id. at 9.
\bibitem{36} Id. at 4.
\bibitem{37} ABA 2015 MM 111A \url{https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/feb-15-make-native-america-safer.authcheckdam.pdf}
\bibitem{38} ABA 2012 AM 301 \url{https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/aug-12-violence-against-women.authcheckdam.pdf}
\bibitem{39} ABA 2008 AM 117A, at 3, available at \url{https://www.americanbar.org/content/dam/aba/directories/policy/2008_am_117a.authcheckdam.pdf}
\end{thebibliography}
Recognizing tribes as political sovereigns impacts their government-to-government relationship with the United States, and the federal government’s authority to legislate regarding tribes and Indian peoples, such as the ICWA. Notably, in 1980, the ABA adopted resolution 110, urging strict adherence to Indian treaty obligations. The report to the resolution notes:

The internal powers of self-government were retained by the tribes, however, subject only to the power of Congress ... The authority of Congress over Indians derives, for the most part from the Treaty and Commerce clauses of the Constitution. Apart from the Constitution, however, an independent source of power derives from the federal relationship with Indians. In *Cherokee Nation v. Georgia*, supra. in attempting to define the relationship between the United States and the Cherokee nation, Chief Justice John Marshall characterized it as resembling that of a guardian and ward. Subsequently, the Supreme Court found that, from the Indians’ status as wards of the government, ‘there arises the duty of protection, and with it the power.’ *United States v. Kagama* 118 U.S. 375, 385 (1886).40

Under the trust responsibility to Indian tribes, specifically recognized by Congress and the courts and secured by the treaties, statutes, and 150 year of judicial precedent, Indian tribes should be able to look to the future confident that the federal government will approach its obligation to Indian tribes in a manner consistent with its duty of protection.41

The Treaty and Indian Commerce clauses of the Constitution, in addition to the federal trust responsibility to Indian tribes all support the federal authority to enact the ICWA.

II. Section 1915 Does Not Violate the Non-Delegation Doctrine.

A. Section 1915 Does Not Violate the Non-Delegation Doctrine.

Section 1915 of ICWA sets default placement preferences for children. However, Congress also recognized that because of factors unique to each tribe, flexibility is essential. Congress expressly mandated that placements must be made with consideration of “the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.”42 ICWA therefore permits a tribe—exercising

---

41 Id.
inherent governmental authority—to enact a law that reorders the placement preferences.43

Before the founding of the United States, “tribes were self-governing sovereign political communities.”44 Today tribes “remain separate sovereigns … [and] unless and until Congress acts, the tribes retain their historic sovereign authority.”45 Moreover, the Court has confirmed that Indian tribes fully “retain their inherent power … to regulate domestic relations among members.”46; see Fisher v. District Court, 424 U.S. 382, 390 (1976) (holding that tribe had exclusive jurisdiction in child-custody proceedings)47; Cohen’s Handbook of Federal Indian Law 216 (2012 ed.) (“One area of extensive tribal power is domestic relations among tribal members.”). Section 1915(c) is properly viewed as congressional confirmation of inherent tribal power over the proper placement of Indian children and, at most, “relax[es] restrictions on the bounds of the inherent tribal authority.”48

Even if Congress did delegate federal authority to tribes, it is permissible to do so. In United States v. Mazurie, 419 U.S. 544 (1975), the Court upheld Congress’s delegation to an Indian tribe to control the introduction of alcoholic beverages into the tribal community.49 The Court held that “the independent tribal authority is quite sufficient to protect Congress’ decision to vest in tribal councils this portion of its own authority.”50

B. ABA Policy Supporting Tribal Independent Sovereign Authority to Legislate Child Welfare

The ICWA does not delegate any legislative function to tribes to reorder the placement preferences established by Congress. Rather, Congress recognizes that tribes possess independent sovereign authority, including law-making authority. In recognition of this inherent sovereignty, Congress affirmed that foster care and adoptive placement of a child (who is a tribal citizen or has a parent who is a tribal citizen and the child is eligible for citizenship) is at the core of a tribe’s inherent authority.51 Congress has the authority

---

49 Id. at 557.
50 Id.
to recognize, reaffirm, or relax limitations on the inherent powers of tribes, as articulated in ABA 1980 MM 110 urging for the full implementation of tribal treaties. 

To the extent the tribal placement preferences of ICWA is a delegation at all, instead of merely recognizing the inherent power of tribes, it is permissible for Congress to delegate federal authority to tribes because of their sovereign status. The ABA has long recognized the inherent sovereignty of tribes. In ABA Resolution 111A (Feb. 2015) (adopting the recommendations contained in the Indian Law and Order Commission’s Nov. 2013 Report), the ABA recognized Congressional plenary power over Indian affairs and supported the Congressional reaffirmation of tribal criminal jurisdiction, arguably a much larger “delegation” than that alleged in ICWA. Recommendation 1.1 of the Indian Law and Order Commission report notes that “[u]pon a Tribe’s exercise of opting out, Congress would immediately recognize the Tribe’s inherent criminal jurisdiction over all persons within the exterior boundaries of the Tribe’s lands…” Like supporting the call to lift congressionally-imposed limitations on tribal authority to prosecute, the ABA has also expressed support for the congressional relaxation of tribe’s sovereign authority to determine placement preferences for its youth in supporting ICWA.

III. ICWA Does Not Unconstitutionally Commandeer the States

A. ICWA Does Not Unconstitutionally Commandeer the States

“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.” But the anticommandeering principle has a significant exception: it does not restrict federal dictates to state courts. Printz explained that “the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.” ICWA and the Final Rule impose obligations on state courts and, therefore, are immune from a commandeer challenge. Each of the challenged provisions of ICWA is directed at procedural rules applied by state courts, or apply evenhandedly to both state agencies and private parties.

ICWA additionally is not an intrusion into state child-welfare courts. Federal law imposes numerous mandates on state courts in the context of adoption and custody. See

---

52 Supra note 39.
54 Supra note 36.
55 ABA 111A MM 2015 at 1 (emphasis added).
57 Id. at 907

B. Supportive ABA Policy

While states may exert extensive authority over domestic relations, that authority is limited when it overlaps with areas of federal power. This prominently includes Indian affairs, including Indian child welfare. Congress has plenary power over Indian affairs, dating back to the foundation of the country. ABA Resolution 110 (1980) urged strict adherence to Indian treaty obligations.\(^{61}\) The resolution states that the ABA “urges the federal government to continue to recognize the special relationship between the United States and the American Indian tribes and their members and the federal responsibility to Indian people.” The report to the resolution notes “[tribal sovereignty] exists only at the sufferance of Congress and is subject to complete defeasance.”\(^{62}\) This policy has been restated and reinforced by subsequent ABA policy supporting federal legislation regarding Indian affairs, including 111A AM 2013 (urging the implementation of and compliance with ICWA).\(^{63}\)

Further, the ICWA is far from the only federal child welfare law that might directly regulate states. See e.g. ABA Family Law policy positions (page 66).\(^{64}\) For example, Congress established uniform national standards for the assertion of child-custody jurisdiction in the Parental Kidnapping Prevention Act, supported by ABA Resolution of 1988, urging Congress to confirm that District Courts have the power to resolve the issue of conflicting state claims based on the Federal Parental Kidnapping Prevention Act (Aug. 1988).

In 2015, the ABA adopted Resolution 113 (2015), urging the prompt implementation of certain recommendations of the U.S. Attorney General’s Advisory Committee on American Indian/Alaska Native Children Exposed to Violence report. It includes recommendation 2.1, calling for ICWA compliance. The report calls for both the legislative

\(^{58}\) International Child Abduction Remedies Act, 22 U.S.C. § 9003
http://uscode.house.gov/view.xhtml?path=/prelim@title22/chapter97&edition=prelim

\(^{59}\) Intercountry Adoption Act of 2000, 42 U.S.C. § 14932
https://www.law.cornell.edu/uscode/text/42/14932

\(^{60}\) Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679c

\(^{61}\) Supra note 39

\(^{62}\) Id. at 497, citing United States v. Wheeler, 435 U.S. 313 (1978).

\(^{63}\) Supra note 33

\(^{64}\) ABA Family Law policy positions (page 66)
https://www.americanbar.org/content/dam/aba/uncategorized/GAO/LEGISSAugust2016.authcheckdam.pdf
and executive branches of the federal government to encourage tribal-state ICWA compliance.\textsuperscript{65}

Conclusion

The Indian Child Welfare Act remains an important effort to preserve and protect American Indian/Alaska Native families. The \textit{Brackeen} holding conflicts with numerous other similarly-situated cases that have found ICWA to be not only constitutional, but have referred to it as the gold standard of child welfare policy. In addition to its broad negative implications for the child welfare legal field, the \textit{Brackeen} holding also threatens the foundation of Indian law by calling into doubt the legal status of tribes and Indian peoples as distinct political entities, and thereby their ability to self-govern. The ABA has supported ICWA and its implementation, and tribal sovereignty, for more than two decades. An ABA policy reaffirming ICWA’s constitutionality would allow for a neutral third party to share its voice in support of ICWA and its stated goals.

Respectfully submitted,

Wilson Adam Schooley  
Chair, Section of Civil Rights and Social Justice  
August 2019

\textsuperscript{65} ABA Resolution 113 (2015)  
GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Wilson Adam Schooley, Chair

1. **Summary of Resolution.** This resolution calls for the American Bar Association to reaffirm the constitutionality of the Indian Child Welfare Act (ICWA), specifically in reference to *Brackeen v. Zinke* (appealed to the Fifth Circuit as *Brackeen, et. al. v. Bernhardt, et. al.*). The *Brackeen et. al. v. Zinke, et. al.* decision ruled that ICWA and its regulations of “Final Rules” were unconstitutional. Due to such a ruling, it sets dangerous precedent for tribes to not have legal authority in protecting American Indians/Alaska Natives children and their families. Additionally, this will further disavow tribes’ independent status and ability to rule as political entities.

2. **Approval by Submitting Entity.** The Council of the Section of Civil Rights and Social Justice approved sponsorship of the Resolution during its Spring Meeting on April 12, 2019.

   The Commission on Domestic and Sexual Violence approved cosponsorship of this resolution on April 11, 2019.

   The Center on Children and the Law approved sponsorship of the Resolution on May 7, 2019.

   The Commission on Youth at Risk approved sponsorship of the Resolution on May 7, 2019.

   The National Native American Bar Association approved cosponsorship of this resolution on May 6, 2019.

3. **Has this or a similar resolution been submitted to the House or Board previously?**

   No

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

   The Commission on Homelessness and Poverty sponsored ABA Policy 2001 AM 105C calling for congressional action to grant Title IV-E foster care funds access to Tribes.

5. **What Urgency exists which requires action at this meeting of the House?**

   In light of the October 4, 2018 ruling of a Judge in the Northern District of Texas in the case, *Brackeen, et. al. v. Zinke*, et. al., 04:17-cv-00868 (October 4, 2018), there is immediate need for the ABA to reaffirm its policy in support of the constitutionality
of the Indian Child Welfare Act. The decision has the likely and potential effect of severely eroding the stated purpose and intent of the Act.

6. **Status of Legislation.** N/A

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

   If adopted, the ABA would be supporting this resolution in the effort to endorse the constitutionality of ICWA despite the *Brakeen, et. al. v. Zinke, et. al.* decision. The ABA supporting such a resolution would encourage Congress to further recognize tribal sovereignty and tribes inherit powers in regards to child welfare.

8. **Cost to the Association.** (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. **Disclosure of Interest.** (If applicable) None

10. **Referrals.**

    - ABA Judicial Division, Tribal Court Council
    - Center for Human Rights
    - Family Law Section
    - Criminal Justice Section
    - Commission on Youth at Risk
    - Coalition on Racial and Ethnic Justice
    - Commission on Disability Rights
    - Commission on Hispanic Legal Rights and Responsibilities
    - Commission on Sexual Orientation and Gender Identity
    - Commission on Domestic and Sexual Violence
    - Commission on Racial and Ethnic Diversity in the Profession
    - Commission on Women in the Profession
    - Commission on Immigration
    - Commission on Homelessness and Poverty
    - National Native American Bar Association
    - Center on Children and the Law
    - Coalition on Racial and Ethnic Justice
    - Center for Public Interest Law
    - Standing Committee on Pro Bono and Public Interest
    - Standing Committee on Legal Aid and Indigent Defense
    - Section on State and Local Government Law
    - Section of Litigation
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Lauren van Schilfgaarde, Tribal Law Specialist
Tribal Law and Policy Institute
8235 Santa Monica Blvd., Suite 211
West Hollywood, CA 90046
Phone: (323) 650-5467 ~ Fax: (323) 650-8149
E-mail: Lauren@TLPI.org

Gerald Brian Gardner (Co-Chair)
Tribal Law & Policy Institute
8235 Santa Monica Boulevard., Suite 211
West Hollywood, CA 90046
Tel.: 323-650-5467 (work)
Fax: 323-650-8149
E-mail: jerry@tlpi.org

Paula Shapiro, Acting Director
Section of Civil Rights and Social Justice
1050 Connecticut Avenue NW
Washington, DC 20036
Tel: (202) 662-1029
E-mail: Paula.Shapiro@americanbar.org

Prudence Beidler Carr, Director
Center for Children and the Law
1050 Connecticut Avenue NW
Washington, DC 20036
Tel: 202-662-1740
E-mail: Prudence.BeidlerCarr@americanbar.org

12. Contact Name and Address Information (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Mark I. Schickman, CRSJ Section Delegate
Freeland Cooper & Foreman LLP
150 Spear Street, Suite 1800
San Francisco, CA
115C

Tel.: (415) 541-0200
E-mail: schickman@freelandlaw.com

Estelle H. Rogers, CRSJ Section Delegate
111 Marigold Ln
Forestville, CA 95436-9321
Tel.: (202) 337-3332 (Work)
E-mail: estellerogers@gmail.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution supports the constitutionality of the Indian Child Welfare Act (ICWA), specifically in reference to Brackeen v. Zinke (appealed to the Fifth Circuit as Brackeen, et. al. v. Bernhardt, et. al.).

2. Summary of the Issue that the Resolution Addresses

The Brackeen et. al. v. Zinke, et. al. decision ruled that ICWA and its regulations of “Final Rules” were unconstitutional. Due to such a ruling, it sets dangerous precedent for tribes to not have legal authority in protecting American Indians/Alaska Natives children and their families. Additionally, this will further disavow tribes’ independent status and ability to rule as political entities.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The proposed policy proposition will allow the ABA to act in support of ICWA, which would extend to tribal jurisdiction over a stronger child welfare system and its goals for recognizing ethnic disproportionality.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

No minority views or opposition have been identified.