

IN THE
Supreme Court of the United States

DEB HAALAND, SECRETARY OF THE INTERIOR, et al.,
Petitioners, Cross-Respondents,

v.

CHAD EVERET BRACKEEN, et al.,
Respondents, Cross-Petitioners.

On Writ of Certiorari to the United States
 Court of Appeals for the Fifth Circuit



Scholarly Contribution from the Laidlaw Research and Leadership Program: “Child Removal and Religious Conversion: Toward a Religious Liberty Defense of the Indian Child Welfare Act”

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Brackeen v. Haaland threatens the Indian Child Welfare Act

From off-reservation boarding schools established in the late nineteenth century to twentieth century adoption projects, the systematic removal of Native American children from their families was at the heart of U.S. assimilationist policies, resulting in cultural genocide.¹ In response to the continued disproportionate removal of Native children by child welfare organizations into the 1970s, Congress passed the Indian Child Welfare Act (ICWA) in 1978. ICWA created minimum standards for removal and placement preferences intended to keep children with their parents or other tribal members.² On November 9, 2022, the Supreme Court will hear *Brackeen v. Haaland*, a case which threatens to repeal or severely undermine ICWA. Defenders of ICWA submitted over 20 amicus curiae briefs to the Court, yet absent from these briefs is an exploration centered on the religious nature of the projects separating Native families from the boarding school era to the present. Given that the Court’s current conservative supermajority is changing the landscape of U.S. “religious liberty,”³ one can consider how religious rights are relevant to Native child welfare.

Thus, my research confronted the **following questions**:

1. How have Native American religions been impacted historically regarding child removal and family separation?
2. To what extent have non-Native religions promoted the separation of Native children from their families and nations? Has this changed over time?
3. Are the Constitution’s “religious liberty” clauses effective mechanisms for protecting the rights of all people to diverse religious practices?

Objective: To contribute a religious studies perspective regarding *Brackeen* in the months prior to the hearing. Though this research will not be submitted to the Court in an official capacity, it aims to inform public discourse and offer religion-focused evidence in defense of ICWA.

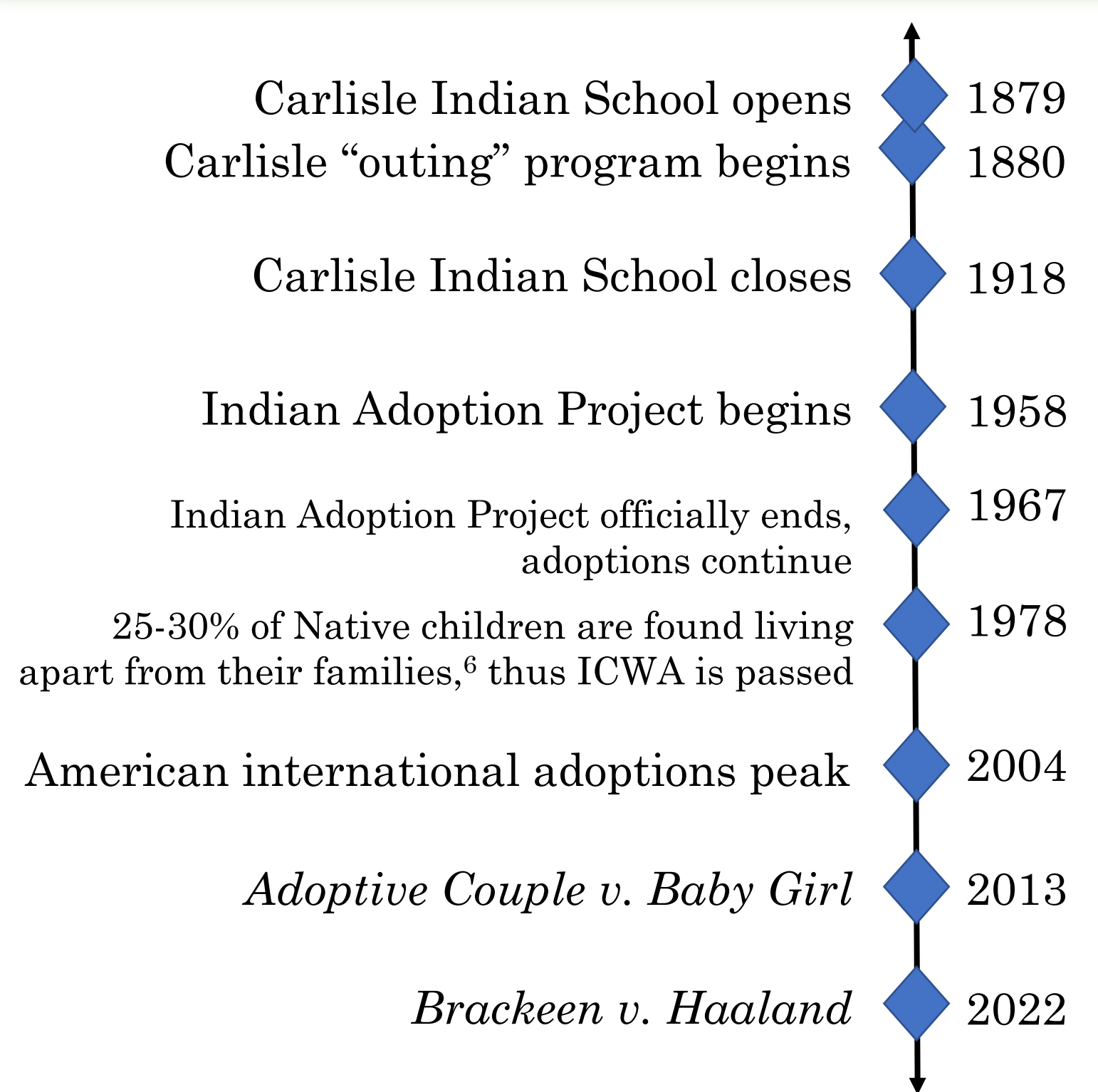
Hypothesis: The U.S. government historically acted to “civilize” Indigenous peoples by erasing Indigenous religions and converting Native peoples to Christianity, most significantly through child removal.⁴ Thus, a key element of Native child removal was losing access to one’s religion. Since “religious liberty” protections in the U.S. were legislated using western conceptions of “religion,” in the last 50 years Native American activists have found creative ways to claim legal protection for their religious practice beyond the First Amendment.⁵ Relying on this legacy and extending it to *Brackeen*, I hypothesize that ICWA is relevant to the religious rights of Native children.

Method:

- ❖ Consulted secondary source material on the history of Native child removal during the off-reservation boarding school era beginning in 1879, the “outing system,” the Indian Adoption Project of 1958, and the modern evangelical Christian adoption movement. Concentrated on the role of non-Native religions in these periods and the impacts on Native religions.
- ❖ Analyzed publications from organizations including the United Nations reporting on the effectiveness of ICWA. Sought perspectives of Indigenous-led organizations and Native American scholars.
- ❖ Surveyed briefs already submitted to the Court and recent scholarship regarding advocacy for diverse religious liberty claims.

Findings & Discussion:

- ❖ ICWA protects against the cultural erasure of the diverse traditions of Indigenous peoples. Acknowledging more holistic conceptions of religion used among many Native American communities, the “Indian culture” protected by ICWA includes religion.
- ❖ Child removal and the suppression of Native religions have historically been inextricable. Tracing a through line from the off-reservation boarding school era to the Indian Adoption Project to the modern “gospel of adoption” movement, a pattern emerges in which Native children lose access to Native religious traditions as they are made to assimilate into white, Christian culture. The lead plaintiffs, the Brackeens, perpetuate this trend.
- ❖ ICWA protects the ability of Native children to access Native religious practices. Thus, ICWA can be considered a vital protection for the free exercise of religion for Indigenous children in the U.S.



Next Steps:

1. To ensure adequate legal protections exist for all religions in the U.S., religious protections must not be limited by western definitions of religion.
2. Given the unique political status of Native nations in the U.S. and the intentional destruction of Native religions perpetrated by the U.S. government through child removal, the U.S. should accommodate, through legislation like ICWA, special religious protections for Native communities.
3. Further research centering the perspectives of Indigenous communities would be necessary to discover how religious protections like ICWA can best be supported and imitated.

References:

¹Fletcher, Matthew L. M., and Wenona T. Singel. “Indian Children and the Federal-Tribal Trust Relationship.” *SSRN Electronic Journal*, 2016.
²Frichner, Tonya Gonnella. “The Indian Child Welfare Act: A National Law Controlling the Welfare of Indigenous Children.” United Nations, 2010.
³Platt, Elizabeth Reiner, Katherine Franke, and Lilia Hadjiivanova. “We The People (of Faith): The Supremacy of Religious Rights in the Shadow of a Pandemic.” *Columbia Law School Law Rights and Religion Project*, June 2021.
⁴Adams, David Wallace. *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928*. Lawrence, Kansas: University Press of Kansas, 1995.
⁵McNally, Michael D. *Defend the Sacred: Native American Religious Freedom beyond the First Amendment*. Princeton, New Jersey: Princeton University Press, 2020.
⁶Fletcher and Singel. “Indian Children and the Federal-Tribal Trust Relationship.”