Child Removal and Religious Conversion:
Toward a Religious Liberty Defense of the Indian Child Welfare Act

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PREFACE

In its mission to "civilize" and Christianize Indigenous peoples, the United States enacted policies separating Native American children from their families. From boarding schools to later adoption projects, Native children were targeted and removed from their nations to promote assimilation into white culture. By the 1970s, 25 to 35 percent of Native children were still living apart from their families in institutions or foster care, or had been adopted by non-Native families.[1] Recognizing forced separation as unconstitutional,[2] Congress passed the Indian Child Welfare Act (ICWA) in 1978 to protect Native children from further removal and, when necessary, to place children in "foster or adoptive homes which will reflect the unique values of Indian culture."[3] Although ICWA has been lauded as the "gold standard in child welfare practice" by child welfare advocates and has widespread support across Native nations,[4] ICWA has been challenged in court repeatedly, including by evangelical Christian groups and representatives of the private adoption industry.[5] The U.S. Supreme Court granted certiorari to the latest ICWA challenge, known as *Brackeen v. Haaland*, in February 2022.

The *Brackeen* case was brought by the states of Indiana, Louisiana, Texas, and seven individual plaintiffs. The plaintiffs argue that Congress lacks power in child welfare cases and cannot commandeer states to uphold placement preferences which privilege extended family members and tribal members as adoptive parents for Native children.[6] Plaintiffs also claim that ICWA placement preferences disadvantage both Native children and non-Native adoptive

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[1] Tonya Gonnella Frichner, "The Indian Child Welfare Act: A National Law Controlling the Welfare of Indigenous Children," *American Indian Law Alliance* (2010): 1.
[2] Matthew L. M. Fletcher and Wenona T. Singel, "Indian Children and the Federal-Tribal Trust Relationship," *SSRN Electronic Journal* (2016): 891-2, https://doi.org/10.2139/ssrn.2772139.
[3] See ICWA summary at National Indian Child Welfare Association, "The Indian Child Welfare Act of 1978," 1.
[4] "Brackeen Headed to the U.S. Supreme Court," *Native American Rights Fund Legal Review* 47, no. 1 (2022): 1.
[5] Mary Annette Pember, "The New War On The Indian Child Welfare Act," *The Public Eye* (Fall 2019): 19.
[6] *Brackeen v. Haaland,* Merit Brief for Individual Petitioners, 26 May 2022, *Supreme Court*; see also *Brackeen v. Haaland,* Merit Brief for Petitioner the State of Texas, 26 May 2022, *Supreme Court.*

families based on race, in violation of the Equal Protection Clause.[7] This paper will not address these arguments because the defendants, including U.S. Secretary of the Interior Deb Haaland, and their amici, including 486 federally recognized tribes, have contributed numerous briefs to rebut these claims.[8] These briefs recount a long history of child removal which necessitated ICWA. Absent from the briefs, however, is an exploration of the religious projects motivating Native family separations from the boarding school era to the present. This paper will examine said religious projects and suggest that *Brackeen* is relevant within a broader analysis of religious liberty protections in the U.S. Additionally, this paper will reconceptualize the plaintiffs' argument that ICWA constitutes racial discrimination against non-Native adoptive parents as a religious liberty claim on behalf of white, evangelical Christian applicants.

If ICWA is repealed or severely undermined when the Supreme Court hears *Brackeen v. Haaland* in November, the consequences may extend beyond child welfare, threatening the federal-tribal trust relationship and tribal sovereignty. Given the Supreme Court's current conservative supermajority, which struck a blow against tribal sovereignty in its June 2022 ruling in *Castro-Huerta v. Oklahoma*, defenders of ICWA must succeed in a difficult balancing act. I aim to contribute a religious studies perspective in defense of ICWA to inform public discourse in the months prior to the hearing.

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[7] *Brackeen v. Haaland,* Merit Brief for Individual Petitioners, 20-8, 37-42.

[8] See generally *Haaland v. Brackeen,* Reply Brief for the Petitioners, 22 December 2021, *Supreme Court; Haaland v. Brackeen,* Brief of 180 Indian Tribes and 35 Tribal Organizations as Amici Curiae in Support of Cherokee Nation, et al, 8 October 2021, *Supreme Court; Brackeen v. Bernhardt,* Brief of Amicus Curiae 486 Federally Recognized Tribes, et al, 13 December 2019, *Native American Rights Fund Tribal Supreme Court Project; Brackeen v. Bernhardt,* Brief of Indian Law Scholars as Amici Curiae in Support of Defendants-Appellants, 13 December 2019, *Native American Rights Fund Tribal Supreme Court Project*. See also Fletcher and Singel, "Indian Children and the Federal-Tribal Trust Relationship," 962-4.

TABLE OF CONTENTS

RESEARCH QUESTIONS

1) How have Native American religions been impacted historically regarding child removal and family separation?
2) To what extent have non-Native American 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?

"RELIGIOUS LIBERTY" TODAY

A religious studies perspective is relevant to *Brackeen v. Haaland* because, historically, there has been a lack of separation between church and state regarding the welfare of Native American children.[9] This paper will demonstrate that religious projects motivated the separation of Native American families, denying Native parents the right to inculcate their children in tribal religion and culture and denying Native children the right to choose their religion. Furthermore, this paper will explain how the plaintiffs' argument that ICWA violates the equal protection of non-Native adoptive parents can be considered a religious liberty claim. To frame this discussion, this section will characterize the current landscape of religious liberty protections.

Brackeen will be heard by a Supreme Court which has expanded the right to free exercise of religion, at least for certain beliefs and communities, and prioritized religious rights over other fundamental rights. Though the earliest interpretations of the Free Exercise Clause did not recognize a constitutional right to religious exemptions from laws that conflicted with one's religious activities, the Court's 1963 ruling in *Sherbert v. Verner* created a new standard entitling worshippers to exemptions from some laws which "burdened" their religious practice, even unintentionally.[10] The precedent set in *Sherbert* was then reversed in *Employment Division v. Smith* in 1990, when the Court ruled that two members of the Native American Church could constitutionally be denied state unemployment insurance after they had been fired for smoking peyote, an illegal substance, as part of a religious ceremony.[11] Bipartisan disdain for *Smith* inspired Congress to pass the Religious Freedom Restoration Act of 1993 (RFRA), effectively restoring the *Sherbert* standard. Though RFRA was limited in 1997 (thereafter providing

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[9] Fletcher and Singel, "Indian Children and the Federal-Tribal Trust Relationship," 939-43.
[10] Elizabeth Reiner Platt, Katherine Franke, Kira Shepard, and Lilia Hadjiivanova, "Whose Faith Matters? The Fight for Religious Liberty Beyond the Christian Right," Columbia Law School Law, Rights, and Religion Project, November 2019, 13-4.
[11] Platt, Franke, Shepard, and Hadjiivanova, "Whose Faith Matters," 15-6.

exemptions only from federal laws and policies), RFRA, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), and state laws modeled on the federal RFRA after 1997 collectively provide broad religious liberty protections beyond those granted under the Free Exercise Clause.[12] When passed, these laws were primarily intended to protect minority religions,[13] such as the respondents' practice in *Smith*. Yet since 2014, religious exemption lawsuits led by Christian conservatives, including *Burwell v. Hobby Lobby, Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission,* and *Fulton v. City of Philadelphia*, have aimed to secure exemptions for conservative Christian groups.[14] Furthermore, since Justice Amy Coney Barrett filled the seat of late Justice Ruth Bader Ginsburg in October 2020, the Court has shifted its policy toward religious liberty, granting exemptions to almost all new requests.[15] The Court's 2021 decision in *Tandon v. Newsom* exemplified this shift, providing novel protection to religious activity during the COVID-19 pandemic that had been denied only a year earlier.[16] The Court's most recent religious liberty decisions in *Kennedy v. Bremerton School District* and *Carson v. Makin* demonstrate that the current supermajority will continue changing the religious liberty landscape in favor of conservative Christian traditions.

However, as religion scholar Michael McNally underscores in his important 2020 work *Defend the Sacred: Native American Religious Freedom beyond the First Amendment,* to have religious liberty you first need religion. The legal and cultural dominance of western notions of religion in the U.S. has universalized Protestant Christianity and, as is clear from the continued

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[12] Platt, Franke, Shepard, and Hadjiivanova, "Whose Faith Matters," 16-21.
[13] Platt, Franke, Shepard, and Hadjiivanova, "Whose Faith Matters," 17.
[14] Platt, Franke, Shepard, and Hadjiivanova, "Whose Faith Matters," 19-21.
[15] Elizabeth Reiner Platt, 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, 9.
[16] Platt, Franke, and Hadjiivanova, "We The People (of Faith)," 11-3.

citing of *Smith,* marginalized the religious practices of Native American peoples.[17] Largely ignorant of the principal role sacred lands and waters play in the diverse religious practices of Native nations, U.S. courts have repeatedly denied religious liberty claims seeking to protect sacred sites. Notably, in *Lyng v. Northwest Indian Cemetery Protective Association* in 1988, *Navajo Nation v. U.S. Forest Service* in 2008, and *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* in 2017 courts ruled that "diminished spiritual fulfillment" resulting from restricted access to or defilement of sacred lands did not constitute a "substantial burden on religious exercise."[18] This demonstrates how western conceptions of religion can undermine legal protections for non-western religions, in these cases by both romanticizing and delegitimizing Native "nature piety" as a form of "spiritual fulfillment" rather than true religion.[19] Nevertheless, despite the challenges inherent in demonstrating "religion," Native American activists have found creative ways to claim legal protection for their religious traditions beyond RFRA and the Free Exercise Clause. These efforts have contributed to legislation including the American Indian Religious Freedom Act of 1978 (AIRFA) and its 1994 Peyote Amendment.[20]

Though the current Supreme Court has expanded free exercise rights, recent lower court decisions citing *Lyng* and *Smith* reveal that Native American religions continue to be undermined and misunderstood. This paper will demonstrate how religious liberty arguments are relevant to defending ICWA. By articulating a religious studies perspective regarding *Brackeen*, this paper aims to bolster public support for ICWA and to offer *Brackeen* as an example to future strategists defending Native American religious liberties pertaining to child welfare.

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[17] Michael D. McNally, *Defend the Sacred: Native American Religious Freedom beyond the First Amendment* (Princeton, New Jersey: Princeton University Press, 2020), xvii, 14-6; see also Vine Deloria Jr., *For This Land: Writings on Religion in America*, (New York: Routledge, 1999), 122, 204-17.
[18] McNally, *Defend the Sacred,* 11-3; see also Michael D. McNally, "From Substantial Burden on Religion to Diminished Spiritual Fulfillment: the San Francisco Peaks Case and the Misunderstanding of Native American Religion," *Journal of Law and Religion* 30, no. 1 (2015): 36-64.
[19] McNally, *Defend the Sacred,* 13.
[20] McNally, *Defend the Sacred,* 9.

I. Native American religions and cultures are interconnected

This paper must foreground a brief note on Native American religions. There is no singular "Native American religion," but rather a great diversity of religions and religious practices important to different Native nations. Yet, some similarities exist across Native religions such as the relationship between religion and tribal cultures. For many Indigenous peoples, religion is inseparable from culture.[21] Whereas western notions of religion rely on the premise that religion can be distinguished from secular cultural activities and from politics, many Native American religions understand the world as infused with religious significance more holistically. As Vine Deloria Jr. explained throughout his seminal text *God is Red: A Native View of Religion,* Native American religious activity is indivisible from political activity, economic activity, social and intellectual activity because religion structures all aspects of tribal life and community.[22] Deloria emphasizes the communal nature of religion, writing, "[Religion is] a covenant between a particular god and a particular community. … There is no salvation in tribal religions apart from the continuance of the tribe itself."[23] In other words, to invoke Native American religions is to invoke what it means to be part of a specific tribal community. Thus, to advocate for free exercise of religion for Native American traditions is to advocate for the survivance of tribal nations themselves. This analysis renders religious autonomy essential to the political and economic autonomy of Native American nations.[24] This discussion is relevant to ICWA because when families must be separated, ICWA seeks to place Native children in "foster or adoptive homes which will reflect the unique values of Indian culture."[25] Given that Native American cultures and Native American religions are often interconnected, ICWA functions as a

[21] Bryan J. Rose, "A Judicial Dilemma: Indian Religion, Indian Land, and the Religion Clauses," *Virginia Journal of Social Policy & the Law* 7, no. 1 (Fall 1999): 106-8.
[22] Vine Deloria Jr., *God Is Red*, (New York: Grosset & Dunlap, 1973), 200-8.
[23] Deloria, *God Is Red*, 200.
[24] McNally, *Defend the Sacred,* 304-5.
[25] National Indian Child Welfare Association, "The Indian Child Welfare Act of 1978," 1.

religious protection while acting to preserve cultural ties. ICWA's placement preferences preserve Native American familial relationships, maintaining children's access to the religious practices of their Indigenous nation.

II. Boarding schools promoted "civilization" through Christian conversion at the expense of Native American religions

In the final chapters of *God is Red*, Deloria laments the centuries between the Allotment Act of 1887 and the Indian Reorganization Act of 1934 during which the U.S. government criminalized the practice of Native religions, disrupting the transfer of religious knowledge to younger generations and thereby threatening the lives of Native nations themselves.[26] He acknowledges the struggles of Native nations since to recover religious knowledge and to move forward with religious practices that authentically address the needs of contemporary Native peoples.[27] The policy of this era that inflicted the greatest damage to Native religions was the separation of Native children from Native nations. In its mission to control Native lands, the U.S. government collaborated with Christian missionaries to assimilate Native peoples by "civilizing" them. This policy was expanded and institutionalized in the form of government funded off-reservation boarding schools targeting children, who were presumed more adaptable to "civilized" ways.[28] The founder of the first off-reservation boarding school was Richard Henry Pratt, who famously said "Kill the Indian in him and save the man."[29] Pratt's maxim demonstrates that boarding schools separated children from their families based on the principle that to "save" the human, one must eradicate all that is culturally (that is, religiously) and racially

[26] Deloria, *God Is Red*, 248-53
[27] Deloria, *God Is Red*, 261-71.
[28] David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928*. (Lawrence, Kansas: University Press of Kansas, 1995), 28-49.
[29] Adams, *Education for Extinction,* 51-2; see also Andrea Smith, "Indigenous Peoples and Boarding Schools: A Comparative Study," (New York: Secretariat of the United Nations, 2009), 5-6.

Native. For the American public and for teachers at boarding schools, to civilize Natives was to fulfill western religious ideals of progress which were quintessentially American. Civilization was the "divine mission" of the U.S. at this time, defined by movement toward white ways, particularly the embrace of Christianity, Christian notions of morality, and Christian family values.[30]

Boarding schools intentionally and systematically erased Native American religious practices and actively converted Native children to Christianity, in large part by keeping Native children separated from their families for many years.[31] Attendance at boarding schools was compulsory, food was often insufficient, and children were prohibited from speaking Native languages and practicing Native religions.[32] Native religious objects and practices were viewed as "childish" and schools taught English using Christian hymns and Bible stories.[33] Native children living at boarding schools could not access tribal ceremonies occurring throughout the year and were thereby deprived of religious experiences important to Native nations, driving a wedge between Native children and their families. Students were expected to attend all Christian worship services and Sunday school in addition to their day-to-day religious instruction; students who formally converted to Christianity were celebrated.[34] This was especially evident at St. Boniface Indian School in Southern California where conversion to Catholicism was the school's paramount intention.[35] This history demonstrates that child removal was a primary means through which white Christian America sought to eliminate Native American religious practices considered uncivilized. Further, isolating children allowed boarding school teachers to convert

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[30] Adams, *Education for Extinction,* 12-5.
[31] Smith, "Indigenous Peoples and Boarding Schools," 5.
[32] Smith, "Indigenous Peoples and Boarding Schools," 6-8; Adams, *Education for Extinction,* 112-21, 210-5; Clifford E.Trafzer, Jean A. Keller, and Lorene Sisquoc, eds, *Boarding School Blues: Revisiting American Indian Educational Experiences*, Electronic resource, (Lincoln: University of Nebraska Press, 2006), 25.
[33] Adams, *Education for Extinction,* 23, 42-3.
[34] Adams, *Education for Extinction,* 166-72.
[35] Trafzer, Keller, and Sisquoc, *Boarding School Blues*, 155-71.

students to Christianity more easily. The U.S. government empowered Christian educators to evangelize through boarding schools while denying Native children religious liberty to maintain tribal religious practices.

III. Foster and adoptive care continued the boarding school legacy of Native American cultural erasure

The removal of Native children from their families paired with forced religious conversion neither started nor ended with boarding schools.[36] The height of the boarding school era was followed by an "adoption era" which has continued through the present. This transition can best be understood through the ethos of Pratt's "outing" system, a program initially implemented at the Carlisle Indian Industrial School in Pennsylvania to complement the boarding school experience. Rather than send students home between school years and risk cultural backsliding, Pratt mandated that students live with white, Christian families during the summers.[37] Students would work domestically and on family farms in exchange for minimal wages and, most valuable to Pratt, elevated English language skills and exposure to civilized, Christian behaviors. Pleased with its effectiveness, Pratt expanded the outing system, assigning students to live with white families for a school year at a time and enrolling students in local public schools.[38] Pratt aspired to disperse the entire population of Native children nationwide by placing children into white homes in a one-to-one ratio. The permanent separation of Native children from their families, he believed, would fix the problem of assimilation once and for all.[39]

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[36] Fletcher and Singel, "Indian Children and the Federal-Tribal Trust Relationship," 938-55.
[37] Adams, *Education for Extinction,* 54; Fletcher and Singel, "Indian Children and the Federal-Tribal Trust Relationship," 943.
[38] Adams, *Education for Extinction,* 54; Fletcher and Singel, "Indian Children and the Federal-Tribal Trust Relationship," 943; Trafzer, Keller, and Sisquoc, *Boarding School Blues*, 14.
[39] Adams, *Education for Extinction,* 54

State social services espoused Pratt's ideology throughout the twentieth century as many off-reservation boarding schools closed in the early twentieth century. The federal government encouraged states to remove Native children from their family homes and place them with non-Native families to "save" them, federal guidance which only ended with the passing of ICWA.[40] States' child removal efforts often resorted to kidnapping. When a boarding school shut down, public schools in the same state would ensure Native students did not return to their parents, but rather enrolled directly into public schools and lived near their school in foster or adoptive care. This created, in effect, a boarding school to "ward of the state" pipeline.[41] However, the adoption industry's existing racial matching practices stalled interracial adoptions; racial roadblocks rendered Native children ineligible for adoption by white families.[42] To overcome these administrative and legal barriers, the Bureau of Indian Affairs collaborated with the U.S. Children's Bureau in 1958 to create the Indian Adoption Project (IAP) managed by a private nonprofit, the Child Welfare League of America.[43]

The IAP removed transracial adoption obstacles to allow white families to adopt Native children.[44] Like the outing system, the IAP was intended to assimilate Native children into white, Christian society by severing connections between children and tribal customs and religions. From then-President Lyndon Johnson to white social workers, America justified this cultural genocide clinging to the racist notion that Native parents were "inherently and irreparably unfit" to raise Native children because many Native families were living in poverty.[45] These judgments

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[40] Fletcher and Singel, "Indian Children and the Federal-Tribal Trust Relationship," 952-3.
[41] Fletcher and Singel, "Indian Children and the Federal-Tribal Trust Relationship," 952-4.
[42] Claire Palmiste, "From the Indian Adoption Project to the Indian Child Welfare Act: The Resistance of Native American Communities," *Indigenous Policy Journal* XXII, no.1 (Summer 2011); see also Karen Dubinsky, *Babies Without Borders: Adoption and the Symbolic Child in a Globalizing World*, Canadian Electronic Library, (Toronto: University of Toronto Press, 2010), 8.
[43] Palmiste, "From the Indian Adoption Project"; Dubinsky, *Babies Without Borders,* 85.
[44] Palmiste, "From the Indian Adoption Project."
[45] Palmiste, "From the Indian Adoption Project"; Fletcher and Singel, "Indian Children and the Federal-Tribal Trust Relationship," 954.

also reflect a devaluation of Native religions; losing one's religion and tribal culture was considered a small price to pay in exchange for a "better life" in an affluent household with America-approved parents—that is, white and Christian.[46] Before ICWA was passed in 1978, foster care and adoptions had displaced 25 to 30 percent of all Native children, 90 percent of whom were placed into non-Natives homes.[47] Tracing a throughline from boarding schools to the outing system to the IAP reveals that a civilizing and Christianizing mission motivated Native child removal for at least a century, rooted in the belief that Native parents were incapable of rearing Native children according to the standards of white, Christian society. The religious conversion once entrusted to boarding schools would thereafter be the responsibility of individual foster and adoptive families.

IV. Native American religions are threatened by evangelical Christian adoptions today

Though the IAP ended its official operations in 1967,[48] adoptions of Native children by white families continued and IAP efforts to encourage these adoptions were taken up by the private adoption industry and gained traction among Christian communities. The IAP and the private adoption industry had a symbiotic relationship: private adoptions of Native children by white families fulfilled the IAP's assimilationist mission, while the IAP was founded in part to satisfy the adoption industry's supply chain problem.[49] Increased access to contraception for white women and the availability of abortion care in some states reduced the number of white babies for adoption beginning in the 1950s. A media campaign supported by IAP director Arnold Lyslo successfully motivated hundreds of white couples to adopt Native children, commonly

[46] Palmiste, "From the Indian Adoption Project."
[47] Fletcher and Singel, "Indian Children and the Federal-Tribal Trust Relationship," 954-5.
[48] Palmiste, "From the Indian Adoption Project."
[49] Palmiste, "From the Indian Adoption Project."

using religious messaging.[50] Notable headlines advocating for the transracial adoption of Native children included "My forty-five Indian godchildren" and "God forgotten Children."

Though there are many private adoption agencies which do not require adoptive parents to be Christian, the industry's desire to profit has aligned with the rising inclination of Christians, particularly evangelical Protestants, to adopt. Article titles like "My forty-five Indian godchildren" demonstrate a religious mission inspiring the adoption of Native children which aided the adoption industry's business model. High adoption agency fees have historically been accessible to only white, middle class couples, excluding most Native families from eligibility.[51] Adoption has continued to be dominated by white couples, non-Hispanic whites comprising 73 percent of adoptive parents yet only 37 percent of adoptees as of 2013.[52] Furthermore, Barna Group found in 2013 that practicing Christians were over two times more likely than the average American to adopt.[53] The IAP and the private adoption industry successfully encouraged thousands of Christians to adopt Native children,[54] and American Christians have continued to adopt abundantly in this spirit. The Bible states in James 1:27, "Pure religion is this, to help the widows and the orphans in their need."[55] Though Christians have heeded this message regarding orphans over the centuries, American Christians have responded to this call en masse in recent decades through a concerted focus on private adoption.[56] In mostly southern, conservative, and predominantly white evangelical churches, adoption has gained popularity within entire congregations; some churches reported their patrons adopting over one hundred children in the

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[50] Palmiste, "From the Indian Adoption Project."
[51] Palmiste, "From the Indian Adoption Project."
[52] Barna Group, "5 Things You Need to Know About Adoption," November 4, 2013. https://www.barna.com/research/5-things-you-need-to-know-about-adoption/.
[53] Barna Group, "5 Things You Need to Know About Adoption."
[54] Palmiste, "From the Indian Adoption Project."
[55] Kathryn Joyce, *The Child Catchers: Rescue, Trafficking, and the New Gospel of Adoption*, (New York: PublicAffairs, 2013), x.
[56] For an account of the contemporary American Christian adoption movement focused on international adoption projects, see Joyce, *The Child Catchers: Rescue, Trafficking, and the New Gospel of Adoption.*

span of a few years, a phenomenon which has been termed the new "gospel of adoption" movement.[57] International adoptions were favored as a means to evangelize and "bring the mission field home" by saving children from poverty and damnation.[58] However, international adoptions by Americans peaked at almost 23,000 in 2004, then fell sharply as systemic "paper orphan" scandals came to light—entire towns of "orphans" adopted by Americans were not orphans at all—prompting countries including Guatemala and Liberia to close their borders to U.S. couples.[59] With the popularity of adoption only increasing among Christians since that time, the industry has relied on American-born babies, including Native American children (despite ICWA), to satisfy demands. Following the lead of the Southern Baptist Convention and megachurch pastors like Rick Warren, evangelicals have championed domestic adoption reforms, demanding policies that make adoption easier for adoptive parents.[60] It is in this vein that *Brackeen* challenges ICWA. Members of the "gospel of adoption" movement consider adoption a means to rescue poor and non-Christian children by raising them in a Christian home.[61] Thus, adoptive parents associated with this movement inculcate adoptees' in Christian religious practice at the expense of Native children's abilities to access Native religions and cultures.

From boarding schools to the contemporary "gospel of adoption" movement, white Christian Americans have acted with the intent of saving Native communities from themselves. The ethos routinely guiding these actions—that Native parents and Native religions harm Native children—is both racist and Christian-centric, evocative of Teju Cole's "White-Savior Industrial

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[57] Joyce, *The Child Catchers,* xii.
[58] Joyce, *The Child Catchers,* xii.
[59] Kathryn Joyce, "The Adoption Crunch, the Christian Right, and the Challenge to Indian Sovereignty," Political Research Associates, February 23, 2014. https://politicalresearch.org/2014/02/23/adoption-crunch-christian-right-and-challenge-indian-sovereignty; Joyce, *The Child Catchers,* x, xiii, 3-15.
[60] Joyce, "The Adoption Crunch."
[61] Joyce, *The Child Catchers,* xii.

Complex."[62] Savior-minded child removal practices have effected a cultural genocide; as of 2018, Native children in 13 states were overrepresented in the foster care system at a rate 14 times higher than their percentage of the population.[63] Systemic biases direct that Native American parents are investigated for and found guilty of abuse twice as often as white parents, and that Native children are placed in foster care four times more often than white children.[64] Social workers accustomed to western nuclear family structures have historically viewed, and continue to view, child rearing practices common among Native nations, such as extended family involvement in childcare, as "neglect" and sufficient grounds to remove a child from their parents.[65] Christianization has been central to Native family separations just as the evangelical adoption movement has been at the forefront of challenges to ICWA in court. Influential adoption industry coalitions including the National Council for Adoption have joined forces with evangelical churches including the Southern Baptist Convention against ICWA in the last decade.[66] Notably, ICWA challenges in courts have increased since 2013, when the Supreme Court heard *Adoptive Couple v. Baby Girl* and ruled in favor of a non-Native couple, the Capobiancos, who were attempting to adopt Veronica, an infant citizen of Cherokee Nation.[67] The case, championed by Nightlight Christian Adoptions, stopped short of a constitutional review of ICWA, ruling that "ICWA simply did not apply" to the respondent, Veronica's biological father and citizen of Cherokee Nation.[68] In other words, *Adoptive Couple* sidestepped

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[62] Teju Cole, "The White-Savior Industrial Complex," *The Atlantic*, March 21, 2012. https://www.theatlantic.com/international/archive/2012/03/the-white-savior-industrial-complex/254843/.
[63] National Indian Child Welfare Association, "Setting the Record Straight: The Indian Child Welfare Act," National Indian Child Welfare Association. Fact Sheet, 2018.
[64] National Indian Child Welfare Association, "Disproportionality Table 2019," National Indian Child Welfare Association, 2019.
[65] Frichner, "The Indian Child Welfare Act," 4; Michael Fitzgerald, "Rising Voices For 'Family Power' Seek to Abolish Child Welfare System," *The Imprint*, July 9, 2020. https://imprintnews.org/child-welfare-2/family-power-seeks-abolish-cps-child-welfare/45141.
[66] Pember, "The New War On The Indian Child Welfare Act," 19-23.
[67] Pember, "The New War On The Indian Child Welfare Act," 20.
[68] Pember, "The New War On The Indian Child Welfare Act," 23; Bethany R. Berger, "In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl," *Florida Law Review* 67 (2016): 315.

ICWA while exposing its vulnerabilities to succeeding ICWA challengers. The plaintiffs in *Brackeen* now question every aspect of ICWA's constitutionality, compelling the Court to review ICWA in its entirety.

The lead plaintiffs in *Brackeen*, Jennifer and Chad Brackeen, are a white couple who attend biweekly services at an evangelical Church of Christ in Fort Worth, Texas.[69] The couple, "self-conscious about their material success," told the New York Times that adoption was a means to "rectify [their] blessings" and God's plan for them to "serve a higher purpose." The Brackeens were informed upon receiving 10-month-old foster child A.L.M., as the child is called in court documents, that they would not be able to adopt A.L.M. because their birth mother is Navajo and their birth father is Cherokee.[70] Under ICWA, federal law prioritizes Native American families to adopt A.L.M. Nevertheless, the Brackeens battled ICWA all the way to the Supreme Court, persevering in their effort to overturn ICWA despite their adoption of A.L.M. being finalized in January 2019.[71] "Culture is important but attachment is, too," Jennifer Brackeen told the Times. This demonstrates a lack of understanding of the religious impacts of this adoption for A.L.M. given the holistic nature of Native religions. The Brackeen's adoption of A.L.M. was animated by their evangelical Christian faith and was granted at the expense of A.L.M.'s access to Navajo religious practice.

V. ICWA supports Native American children by sustaining ties with Native religions

Staying connected to their cultural community benefits the mental health and psychological well-being of Native children throughout their lives.[72] Indigenous peoples in the U.S. have endured colonization and cultural genocide, traumatic experiences with vastly negative

[69] Jan Hoffman, "Who Can Adopt a Native American Child? A Texas Couple vs. 573 Tribes," *The New York Times*, June 5, 2019, sec. Health. https://www.nytimes.com/2019/06/05/health/navajo-children-custody-fight.html.
[70] Hoffman, "Who Can Adopt a Native American Child?"
[71] Hoffman, "Who Can Adopt a Native American Child?"
[72] National Indian Child Welfare Association, "Setting the Record Straight," 2.

health impacts. Trauma can alter gene structures to "switch on" negative responses to stressors more often.[73] "Intergenerational trauma" occurs when affected genes are inherited by offspring, perpetuating negative symptoms of trauma such as mental illness, substance abuse, and suicide.[74] Overcoming trauma rooted in acculturation requires participation in enculturation, that is, "helping Native youth to identify with their cultural background and feel pride in it."[75] Enculturation is linked with increased academic performance and self-esteem and decreased mental health issues including substance abuse.[76] When Native children are adopted by non-Native parents, acculturation continues because non-Native parents cannot effectively transfer Native cultural knowledge or identity to Native children.[77] Lacking protective cultural and religious connections, adoptees report experiencing long-term mental and spiritual health issues at higher rates than the general Native American population.[78] For many Native peoples, healing from acculturation trauma is a religious endeavor involving spiritual practices accessible only within Native nations.[79] Thus, ICWA protects the mental and spiritual health of Native children by prioritizing placements with Native American guardians who can provide the religious tools and enculturation necessary to combat intergenerational suffering.

ICWA does not harm Native children but rather creates positive outcomes for Native families; advocates in ICWA cases acted to keep Native families together and, when necessary,

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[73] Mary Annette Pember, "Intergenerational Trauma: Understanding Natives' Inherited Pain," Indian Country Today Media Network, 2016, 3 http://mapember.com/historical-trauma-in-indian-country/all-about-generations-trauma-report/.
[74] Pember, "Intergenerational Trauma," 3; Marlene EchoHawk, "Suicide: The Scourge of Native American People," *Suicide & Life-Threatening Behavior* 27, no. 1 (Spring 1997): 60, 66.
[75] National Indian Child Welfare Association, "Attachment and Bonding in Indian Child Welfare," National Indian Child Welfare Association. Summary of Research, Winter 2016.
[76] National Indian Child Welfare Association, "Attachment and Bonding," 1.
[77] National Indian Child Welfare Association, "Attachment and Bonding," 2.
[78] Kathy D. LaPlante, "The Indian Child Welfare Act and Fostering Youth Cultural Identity," *American Psychological Association*. https://www.apa.org/pi/families/resources/newsletter/2017/12/indian-child-welfare; National Indian Child Welfare Association, "Attachment and Bonding," 2.
[79] Pember, "Intergenerational Trauma," 8; LaPlante, "The Indian Child Welfare Act"; EchoHawk, "Suicide," 66.

placed most Native children with family or other tribal members.[80] Under ICWA, courts have largely refrained from removing Native children from their parents unless the testimony of a qualified expert witness proves that continued custody of the parent is "likely to result in serious physical and emotional harm to the child."[81] Additionally, Native American customs were taken into account in 94% of ICWA cases involving foster care placements considered in a 2004 study.[82] Thus, ICWA works to maintain bonds between Native children and tribal cultures. Challengers of ICWA, including Jennifer Brackeen, cite attachment theory to argue that removing a child from a non-Native foster parent to which they have bonded is more harmful than separating the child from their nation and religious traditions until emancipation.[83] This understanding of attachment is limited; recent child development research reveals that evaluating children's best interests requires attention to their complete "psychosocial environment."[84] Consistent messaging regarding cultural identity and values are critical, communications which among Native communities are imparted orally by Native caregivers.[85] Furthermore, ICWA challengers consider only western methods of child rearing in their analyses of attachment theory; cross-cultural studies demonstrate that children thrive within diverse family structures.[86] Beyond the singularly important infant-mother relationship discussed in western attachment theory, children raised in extended family structures develop attachments to multiple guardians. Attachment to multiple parental figures inspires among Native children feelings of responsibility

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[80] Frichner, "The Indian Child Welfare Act," 11-12; Gordon E. Limb, Toni Chance, and Eddie F. Brown, "An empirical examination of the Indian Child Welfare Act and its impact on cultural and familial preservation for American Indian children," *Child Abuse & Neglect* 28, no. 12 (December 2004): 1279–89. https://doi.org/10.1016/j.chiabu.2004.06.012.
[81] Limb, Chance, and Brown, "An empirical examination of the Indian Child Welfare Act," 1285.
[82] Limb, Chance, and Brown, "An empirical examination of the Indian Child Welfare Act," 1285.
[83] Hoffman, "Who Can Adopt a Native American Child?"
[84] National Indian Child Welfare Association, "Attachment and Bonding," 2.
[85] National Indian Child Welfare Association, "Attachment and Bonding," 2-3.
[86] National Indian Child Welfare Association, "Attachment and Bonding," 2-3.

for their Native nation broadly.[87] This orientation toward tribal survivance can be regarded as religious. In this way, ICWA protects bonds between Native children and Native nations which are both important to mental health and religious in nature. ICWA, then, can be considered a religious protection for Native children.

VI. Plaintiffs' racial discrimination claim implies a religious discrimination claim

Regarding the colonization of Indigenous lands in the modern U.S., race and religion are inextricable. Inaugurating what is now termed the "doctrine of Christian discovery," the pope authorized European Christians to assert total control over non-Christian lands beginning in the fifteenth century.[88] Western Christian leaders ordered that Indigenous peoples who refused the gospel be either "subjected to force" until they converted or killed.[89] In *The Christian Imagination: Theology and the Origins of Race*, author Willie James Jennings examines the "earliest moments of modern colonialism" in which western Christian theology and the material desires of imperialism embraced.[90] Jennings demonstrates that modern conceptions of "race" originated in this embrace as Christians left their homelands to proclaim power over new places and trafficked non-Christians abroad. Whiteness emerged as the default race, atop the racial hierarchy on the seat of colonial power and carrying the highest innate salvific potential.[91] Western Christianity, he argues, has yet to surrender its "sensibilities" toward colonialist dominance and remains tethered to hegemonic whiteness.[92] From boarding schools to the IAP to the savior-oriented "gospel of adoption" movement, it is evident that these "sensibilities" endure.

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[87] National Indian Child Welfare Association, "Attachment and Bonding," 3.
[88] Deloria, *God Is Red*, 273-8.
[89] Deloria, *God Is Red*, 276-7.
[90] Willie James Jennings, *The Christian Imagination: Theology and the Origins of Race* (New Haven: Yale University Press, 2010), 27, 289.
[91] Jennings, *The Christian Imagination*, 23-5, 35-6, 59, 245.
[92] Jennings, *The Christian Imagination*, 8-9.

Jennings' argument is relevant to *Brackeen* because the plaintiffs claim ICWA constitutes racial discrimination against non-Native families by preferencing members of Native nations over non-Native couples to adopt Native children.[93] Lead plaintiffs Jennifer and Chad Brackeen are joined by Danielle and Jason Clifford, another couple inspired by their Christian faith to adopt; Jason is white and Danielle does not identify as Indigenous in court proceedings though she has Indigenous ancestry in Canada.[94] The plaintiffs in the landmark ICWA challenge *Adoptive Couple v. Baby Girl*, Melanie and Matt Capobianco, are also white.[95] Thus a pattern surfaces revealing that the "non-Native" couple ostensibly discriminated against in ICWA cases is usually white and often Christian. Applying Jennings' thesis, it is clear that ICWA challengers claiming racial discrimination actually enjoy privileged positions in America's racial-religious hierarchy. Given the intertwined nature of whiteness and Christianity in U.S. power structures rooted in the colonization of Indigenous lands, to claim racial discrimination against white couples is to claim religious discrimination against Christian couples. Though the Cliffords and the Brackeens do not claim that their right to free exercise of religion has been violated in court documents, their equal protection claims invite scrutiny because they are white and Christian. ICWA was created in response to the systemic removal of Native children from their families by white Christians; ICWA protects Native children's access to Native religions. To claim that ICWA is unconstitutional because it does not prioritize white families equally with Native families is to claim that white desires should always come first, that is, to invoke a "sensibility" toward colonialist dominance and hegemonic whiteness indivisible from western Christianity. In this way, religion is central to the plaintiffs' equal protection claim. By asserting white families

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[93] *Brackeen v. Haaland,* Merit Brief for Individual Petitioners, 20-8, 37-42.
[94] Rebecca Nagle, "Grandma Versus The Foster Parents," *This Land*, August 30, 2021. https://crooked.com/podcast/3-grandma-versus-the-foster-parents/.
[95] Greg Henderson, "Court: 'Baby Veronica' To Live With White Adoptive Parents," July 17, 2013. http://www.capradio.org/news/npr/story?storyid=203135843.

must be able to adopt Native children, plaintiffs perpetuate the racist and Christian-centric notion that white, Christian households are the ideal locations for child rearing. Put another way, plaintiffs ask the Court to continue the U.S.' historic prioritization of Christian family values and to hold that the failure to do so violates equal protection. Thus, an argument for the free exercise of Christian religion is embedded in the plaintiffs' racial discrimination claims.

CONCLUSION

Despite the fact that, under U.S. law, all faiths are supposed to be treated equally, the plaintiffs in *Brackeen* show that advocating for Christian primacy in 2022 is mainstream. This is unsurprising given that the U.S. was built on the subjugation of Native religions; Christianizing institutions like off-reservation boarding schools and the IAP were official government policies. As such, religious rights protections legislated by a young, Christian-dominated U.S. could not hope to meet the needs of diverse religions now at home here. Western notions of "religion" can only protect what the west considers religion. For instance, Deloria suggested that for Native communities, the survivance of tribal nations themselves is a collective religious matter. Yet the Free Exercise Clause was intended to protect individuals, not religious collectives, and contains no mechanism for religious preservation. Given its orientation toward religious survivance, this paper's argument that ICWA protects the free exercise of religion for Native American children might be perceived by the Court as outside the bounds of Free Exercise. Additionally, the Constitution does not address circumstances in which race and religion are inextricable. As McNally demonstrates in *Defend the Sacred*, Native American activists have responded to this reality by finding creative ways to advocate for Native religions practices beyond the U.S. Constitution. Given the unique political status of Native American nations in the U.S. and the

intentional destruction of Native religions perpetrated by the U.S. government through child removal, it seems appropriate to accommodate, through legislation like ICWA, special religious protections for Indigenous peoples. Further research centering the perspectives of Native American communities would be necessary to discover how protections of this nature could best be implemented, both legislatively and otherwise.[96]

Oral arguments for *Brackeen v. Haaland* will be heard on November 9. In light of *Castro-Huerta* which ruled against tribal sovereignty with a 5-4 majority in 2022, ICWA is seriously threatened. Despite conservative Justice Gorsuch's history defending Native American rights, the five conservatives who ruled in *Castro-Huerta* remain on the bench. If *Brackeen* overturns ICWA, it will be a loss for the free exercise of religion for Native American children.

[96] See Tiffany Hale, "Reflections on the Power of Relentless Creativity," *Journal of Law and Religion* 37, no. 1 (January 2022): 196–98. https://doi.org/10.1017/jlr.2021.85.

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