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## GENERAL MEMORANDUM 22-002

### U.S. Supreme Court to Review *Brackeen v. Haaland*

**U.S. Supreme Court Review.** On February 28, 2022, the U.S. Supreme Court granted and consolidated all four petitions for *certiorari* requesting review of *Brackeen v. Haaland*. This litigation challenges the constitutionality of the Indian Child Welfare Act (ICWA), including arguing ICWA is unconstitutionally race-based in violation of the Equal Protection Clause.

**Procedural History.** The U.S. District Court for the Northern District of Texas struck down ICWA as unconstitutional on three grounds: that its provisions violated the Fifth Amendment's Equal Protection Clause; that its provisions violated the Tenth Amendment's anticommandeering doctrine; and that its provisions violated the nondelegation doctrine. The District Court also held certain provisions of ICWA's implementing regulations violated the Administrative Procedure Act (APA). A panel of judges from the United States Court of Appeals for the Fifth Circuit reversed on all grounds, but the Fifth Circuit vacated the panel's decision and ordered rehearing *en banc*.

**Fifth Circuit *En Banc* Decision Before Court on Review.** The Fifth Circuit *en banc* court issued a 325-page decision, where the majority's holdings were set forth in two separate and conflicting principal opinions. Where the Fifth Circuit *en banc* court was equally split on a matter, the underlying decision of the District Court was left in place.

The Fifth Circuit *en banc* court held Congress had authority to enact ICWA and ICWA's "Indian child" classification is not unconstitutionally race-based in violation of the Equal Protection Clause. The court rejected the argument that ICWA violates the Equal Protection Clause because it applies to children who are not yet members of tribes. The District Court's ruling was affirmed, without a precedential opinion, that ICWA's adoptive placement preference for "other Indian families" and foster care placement preference for "Indian foster home[s]" both violate the Equal Protection Clause. The court also found that some of ICWA's provisions violate the anticommandeering doctrine, including its "active efforts" provision, and that some of ICWA's provisions instead validly preempt state law. Additionally, the court concluded ICWA's provisions allowing tribes to establish adoption and foster preferences do not violate the nondelegation doctrine. Last, it concluded that some provisions of ICWA's implementing regulations violate the APA, including the "good cause" provision, but that other portions of the regulations do not violate the APA.

Hobbs Straus has been closely following and participating in the defense of ICWA on behalf of a number of tribal clients. Please contact us if you would like to learn more.

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