SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 81 (Ramos)
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Urgency: Yes
AWM

SUBJECT

Indian children: child custody proceedings

DIGEST

This bill codifies within State law certain provisions relating to Indian children[1] currently codified in the federal Indian Child Welfare Act of 1978 (ICWA), and renames the provisions of the Family Code, the Probate Code, and the Welfare and Institutions Code as the Californian Indian Child Welfare Act.

EXECUTIVE SUMMARY

For over a hundred years spanning the nineteenth and twentieth centuries, U.S. policy condoned and encouraged state governments and private to forcibly remove Indian children from their homes, their parents, and their tribes, with the explicit goal of cutting them off from their heritage so that they could be "civilized." It is impossible to overstate the damage this policy did to the children and families affected, as well as to the tribes who were deprived of their children and unable to pass on their culture. In 1978, when Congress could no longer overlook the destruction being wrought on Indian communities, it passed ICWA, which imposed minimum standards for proceedings involving the custody and placement of Indian children, as defined, with the overall goal of preserving the ties between an Indian child and their tribe whenever feasible.

While ICWA has been in effect for decades, it has recently been the subject of increased litigation from individuals who disagree with ICWA's goal of maintaining tribal ties, and from persons who appear to disagree with the concept of tribal sovereignty generally. These efforts reached the Supreme Court after an en banc panel of the United States Court of Appeals for the Fifth Circuit held that ICWA was unconstitutional; fortunately, the Supreme Court reversed the Fifth Circuit and confirmed ICWA's

[1] Because the relevant federal and state laws uses the term "Indian" and does not capitalize "tribe," this analysis does the same.

viability.[2] Nevertheless, the Supreme Court's ruling did not reach all of the arguments against ICWA—certain arguments were not considered because the petitioners lacked standing—so it is likely that efforts to challenge ICWA will continue.

Here in California, ICWA is partially codified in the Codes: some of ICWA's requirements are expressly repeated in State law, while others—such as certain definitions—merely incorporate ICWA provisions by reference. California would be required to follow ICWA even if it were not codified in state law, because of the Supremacy Clause of the United States Constitution, but having it in state law is more convenient, and also allows California to add protections on top of ICWA where appropriate.

This bill, on an urgency basis, fully incorporates ICWA into California law; the collective provisions are known as the California Indian Child Welfare Act. By expressly setting forth the definitions and other subject matter from ICWA in state law, this bill establishes a wholly independent state-law framework for ensuring that custody decisions involving Indian decisions properly account for the child's tribal relationships and the interest in maintaining those ties. These provisions could, therefore, allow California to continue providing these protections to Indian children in the event that a court prohibits the enforcement of ICWA at the federal level.

This bill is sponsored by the California Tribal Families Coalition and the Morongo Band of Mission Indians, and is supported by ACLU California Action, the Agua Caliente Band of Cahuilla Indians, the Cachil Dehe Band of Wintun Indians of the Colusa Indian Community, Habematolel Pomo of Upper Lake, the Hoopa Valley Tribe, the Jamul Indian Village of California, Seneca Family of Agencies, and the Torres Martinez Desert Cahuilla Indian Tribe. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing federal law:

1) Provides that Indian tribes are domestic independent nations that exercise inherent sovereign authority which can be modified only through Congressional action. (*E.g.*, *Michigan v. Bay Mills Indian Community* (2014) 572 U.S. 782, 788-789.)

2) Establishes ICWA, which requires states to establish specific adoption preferences for a child who is a member of a federally recognized Indian tribe, or who is eligible to be a member and is the child of a member of a federally recognized Indian tribe, and to make specified efforts to notify the child's tribe when an Indian child is placed in foster care. (25 U.S.C. §§ 1901 et seq.)

[2] *Haaland v. Brackeen* (Jun. 15, 2023) 143 S.Ct. 1609.

3) Defines the following relevant terms within ICWA:
    a) An "extended family member" is as defined by the law or custom of the child's Indian tribe or, in the absence of such law or custom, is a person who has reached the age of 18 years of age and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.
    b) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation, as defined.
    c) "Indian child" means any unmarried person who is under 18 years of age and is either (1) a member of an Indian tribe or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.
    d) "Indian child's tribe" means (1) the Indian tribe in which an Indian child is a member or eligible for membership, or (b) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.
    e) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.
    f) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village, as defined.
    g) "Parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoption under tribal law or custom; it does not include the unwed father where paternity has not been acknowledged or established.
    h) "Reservation" means Indian country, as defined, and any other lands to which title is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.
    i) "Tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings. (25 U.S.C. § 1903.)

4) Establishes, in state proceedings involving the custody of an Indian child, or the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the child's Indian tribe, certain requirements relating to the proceedings, including:
    a) Granting jurisdiction of certain custody, foster care placement, and parental rights termination cases involving an Indian child to the child's tribe.

   b) Granting the right to intervene in any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child to the child's tribe and Indian custodian.
   c) Requiring the provision of notice to an Indian child's parent, Indian custodian, and the Indian tribe in an involuntary proceeding involving an Indian child, as specified; granting the child's tribe the right to examine the reports and documents filed with the court in connection with foster placement and parental termination proceedings; and requiring a showing that "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of an Indian family were made and were unsuccessful before a foster care placement is made or parental rights are terminated.
   d) Establishing adoption placement preferences for Indian children, 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, and similar foster care placement preferences.
   e) Authorizing states and Indian tribes to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between states and Indian tribes. (25 U.S.C. §§ 1911-1922.)

5) Provides that, in any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard. (25 U.S.C. § 1921.)

Existing state law:

1) Makes findings and declarations relating to the State's implementation of ICWA, including:
   a) That there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and the State of California has an interest in protecting Indian children who are members or citizens of, or are eligible for membership or citizenship in, an Indian tribe.
   b) It is in the interest of an Indian child that the child's membership or citizenship in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of an Indian child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled.

c) In all Indian child custody proceedings, as defined in ICWA, the court shall consider all of the findings contained in (a), strive to promote the stability and security of Indian tribes and families, comply with ICWA and other applicable federal law, and seek to protect the best interest of the child.
d) A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member or citizen of an Indian tribe or (2) eligible for membership or citizenship in an Indian tribe and a biological child of a member or citizen of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the ICWA and other applicable state and federal law to the proceedings.
e) In any case in which applicable state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child, or the Indian child's tribe, than the rights provided in ICWA, the court shall apply the higher standard.
f) Any Indian child, the Indian child's tribe, or the parent or Indian custodian from whose custody the child has been removed, may petition the court to invalidate an action in an Indian child custody proceeding for foster care or guardianship placement or termination of parental rights if the action violated ICWA. (Welf. & Inst. Code, § 224.)

2) Establishes the juvenile court, which is intended to provide for the protection and safety of the public and minors and nonminor dependents falling under its jurisdiction as dependents or wards. (Welf. & Inst. Code, §§ 202, 245.)

3) For purposes of matters relating to the juvenile court and other matters relating to children addressed in Division 10 of the Welfare and Institutions Code, defines, unless the context requires otherwise, the terms "Indian," "Indian child," "Indian custodian," "Indian tribe," "reservation," and "tribal court" as provided in ICWA; and when used in connection with an Indian child custody proceeding, defines "extended family member" and "parent" as provided in ICWA. (Welf. & Inst. Code, § 224.1)

4) For purposes of the Family Code, defines, unless the context otherwise requires, the terms "Indian," "Indian child," "Indian child's tribe," "Indian custodian," "Indian organization," "Indian tribe," "reservation," and "tribal court," re used as provided in ICWA; and when used in connection with an Indian child custody proceeding, defines "extended family member" and "parent" as provided in ICWA. (Fam. Code, § 170.)

5) States that ICWA, and specified provisions of the Welfare and Institutions Code, shall apply in the following guardianship or conservatorship proceedings arising under the Probate Code:
   a) In any case in which the petition is a petition for guardianship of the person and the proposed guardian is not the natural parent or Indian custodian of

the proposed ward, unless the proposed guardian has been nominated by the natural parents and the parents retain the right to have custody of the child returned to them upon demand.

b) To a proceeding to have an Indian child declared free from the custody and control of one or both parents brought in a guardianship proceeding.

c) In any case in which the petition is a petition for conservatorship of the person of a minor whose marriage has been dissolved, the proposed conservator is seeking physical custody of the minor, the proposed conservator is not the natural parent or Indian custodian of the proposed conservatee and the natural parent or Indian custodian does not retain the right to have custody of the child returned to them upon demand. (Prob. Code, § 1459.5(b).)

This bill:

1) Provides that the sections of the Family Code, the Probate Code, and the Welfare and Institutions Code that apply to proceedings involving an Indian child, including the definitions set forth in Welfare and Institutions Code section 224.1, shall be collectively known as the California Indian Child Welfare Act (CalICWA).

2) States that the Legislature finds and declares that federally recognized tribes are sovereign nations with inherent rights to self-governance, including the right to regulate domestic relations involving their citizens. Tribes have been protecting and caring for their children from time immemorial. The State of California is committed to protecting essential tribal relations by recognizing a tribe's right to protect the health, safety, and welfare of its citizens.

3) Clarifies the following definitions within Welfare and Institutions Code section 224.1, as follows:
   a) "Indian" means any person who is any member of an Indian tribe, or who is an Alaska native and a member of a Regional Corporation, as defined.
   b) "Indian Custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control has been transferred by the parent of that child.
   c) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village, as defined.
   d) "Reservation" has the same meaning as "Indian country" as defined in federal law, and any other lands to which the title is held either by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.

e) "Tribal court" means a court with jurisdiction over child custody proceedings, which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any administrative body of that tribe that is vested with authority over child custody proceedings.
f) "Indian child" means:
   i. Any unmarried person who is under 18 years of age and either a member of an Indian tribe, or eligible for membership in an Indian tribe and is a biological child of a member of an Indian tribe.
   ii. An unmarried person who is 18 years of age or older but under 21 years of age, who is a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe, and who is under the jurisdiction of the dependency court.
g) As used in connection with an Indian child custody proceeding:
   i. "Extended family" means the same as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached 18 years of age and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.
   ii. "Parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom; "parent" does not include an unwed father where paternity has not been acknowledged or established.

4) Adds, to existing Family Code, Probate Code, and Welfare and Institutions Code sections that refer to ICWA, references to CalICWA.

COMMENTS

1. Author's comment

According to the author:

> The Indian Child Welfare Act was enacted nearly 45 years ago as the nation's first reverse-assimilation policy to prevent the documented pattern of unnecessary removals of Indian children from their families and communities. Although California has some of the strongest state ICWA statutes in the nation, there is still much work to be done. Since I came to the Assembly, I have authored four bills to strengthen ICWA in our state, including AB 81, which was recently approved by a 75-0 vote of the State Assembly, showing that the protection of Indian children and families is not partisan. Bills like AB 81 are crucial in the face of the ongoing attacks on ICWA, and while we've made tremendous progress, we must continue moving forward, because we will not go back to the days when one in three Indian children were taken from their homes

and their tribal communities. The data tells us it's good for the emotional and physical wellbeing of Indian children when they remain connected to their Native community and their culture. California must continue to stand with Tribes to uphold essential protections for Indian children and families and to ensure Tribes are empowered to take care of their own citizens.

On June 15, 2023, the United States Supreme Court held, unreservedly, that all challenges made to the federal Indian Child Welfare Act are rejected, some on the merits and others for lack of standing. Justice Coney-Barrett wrote the 7-2 opinion of the Court. This ruling is a major victory for tribal nations in California, the best interests of children, and the future of tribal cultures and lifeways. The decision affirms what tribal nations have long known, ICWA is best practice in child welfare generally and deserves to be upheld as the Act is one of the first ever reverse assimilation policies that this country, and the State of California, have ever enacted. While the Supreme Court unequivocally rejected all claims against ICWA, there are legal nuances throughout the opinion that require updates to California state law.

We can do that through AB 81.

2. American efforts to destroy Indian families and, by extension, Indian tribes

For as long as America has been a country, Americans have used Indian children as weapons against their tribes. Following the ratification of the Constitution, "American military strategists, empowered by the foreign affairs and war powers, targeted Indian children for kidnapping and imprisonment as a means to undermine tribal resistance."[3] "Early American state papers make note of military plans to capture children, hold them in military jails, and use them as bargaining chips with tribal leaders."[4] Those who escaped kidnapping "remained vulnerable to the military strategy to deny food and shelter to Indian nations."[5] Treaties between the United States and various Indian tribes during the end of the eighteenth century and the early nineteenth century provided for the "education" of Indian children, which "intertwined western religions and religious entities with federal programs designed to educate—or 'civilize'—Indian nations."[6]

By the latter half of the nineteenth century, eradicating Indian culture by removing children from their homes, families, and tribes was official American policy, as captured in the slogan "Kill the Indian to Save the Man."[7] The "boarding school" model gained

[3] Fletcher & Sengel, Indian Children and the Federal-Tribal Trust Relationship, 95 Neb. L. Rev. 885, 889-890.
[4] *Id.* at p. 902.
[5] *Id.* at p. 890.
[6] *Id.* at pp. 910-911.
[7] Lacey, The White Man's Law and the American Indian Family in the Assimilation Era, 40 Ark. L. Rev. 327, 356–357 (1986) (internal quotation marks omitted).

prominence after Congress enacted federal legislation to compel Indian parents to send their children to government schools.[8] Indian children were removed from their families against their will, often for years at a time, forced to speak English and punished for speaking their native languages, and housed in deplorable conditions, with the goal of forcing them to reject their culture and embrace "whiteness."[9] Boarding schools practiced "systematic identity-alternation methods" to alienate Indian children from their families and tribes, including forcing them to adopt Christianity, cutting their hair, and "renaming Indian children from Indian names to different English names"—literally stealing their identities.[10] The boarding schools also employed the practice of "outing," which

> involved sending Indian boarding schools' students to non-Indian, Christian families to serve as manual workers on farms and in households. The "outing" system took Indian children even further from their homes, families, and cultures by immersing them in non-Indian cultures, and school officials did so intentionally.[11]

Destroying Indian families was the point—"taking [Indian children] from their parents when small and keeping them away until parents and children become strangers to each other…the problem of the [Indian] could be solved by educating the children, not to return to the reservation, but to be absorbed one by one into the white population."[12] Even worse, the "United States used monies resulting from Indian wealth depletion from cessions of territories, and held in Federal trust accounts for Indian tribes, to pay for the attempted assimilation process of Indians," with Indian trust fund monies making up to 95 percent of the funding.[13]

In the twentieth century, the project of forced assimilation changed its methods, but not its goal. As state governments developed child welfare programs, "[m]any states began to systematically remove Indian children from their homes in the mid-twentieth century to 'save' them from reservation life, intentionally placing the children in non-Indian homes as far away from their families as possible."[14] This policy held that mere Indian identity was sufficient to warrant taking a child: "most government officials deemed Indian families inherently and irreparably unfit," and one state policy "held that the

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[8] United States Department of the Interior, Federal Indian Boarding School Initiative: Investigative Report (May 2022), p. 35
[9] The White Man's Law and the American Indian Family in the Assimilation. *Supra*, at pp. 356-358.
[10] Federal Indian Boarding School Initiative: Investigative Report, *supra*, at p. 53. The full list of horrors experienced by Indian children is too long to list in this analysis; as the Department of the Interior notes, "[r]ampant physical, sexual, and emotional abuse; disease; malnourishment; overcrowding; and lack of health care" at the boarding schools are all well-documented. (*Id.* at p. 56.)
[11] Fletcher & Stengel, *supra*, at p. 943.
[12] Federal Indian Boarding School Initiative: Investigative Report, *supra*, at p. 38.
[13] *Id.* at p. 41.
[14] Fletcher & Stengel, *supra*, at p. 952.

reservation was, by definition, and unacceptable environment for children."[15] "State actors removed children with 'few standards and no systematic review of judgments' by impartial tribunals" and "Indian parents rarely received adequate notice, almost never received paid counsel, and generally had no meaningful opportunity to respond" to the removals.[16] After decades of this practice:

> It was estimated that state governments removed between 25 [percent] and 30 [percent] of all Indian children nationwide from their families, placing about 90 [percent] of those removed children in non-Indian homes. No one will ever know the exact numbers; far too many removals were paperless and lacked even rudimentary process.[17]

3. The passage of ICWA

In 1948, the United Nations Convention on the Prevention and Punishment of the Crime of Genocide included, in its definition of "genocide," "[f]orcibly transferring children of the group to another group" with the "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group."[18] The United States did not halt the states' practice of wantonly removing Indian children from their families until 1978, with the passage of ICWA. ICWA recognized "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."[19] The stated policy of ICWA is:

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minim Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[20]

Among other things, ICWA requires states, in adoptive and foster placement decisions involving a child who is a member of a federally recognized tribe or eligible to be a member of a federally recognized tribe, to give certain preferences to the child's extended family, other members of the child's tribe, or another Indian family.[21]

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[15] *Id.* at pp. 954-955 (internal modifications omitted).
[16] *Id.* at p. 954.
[17] *Id.* at pp. 954-955.
[18] U.N. Convention on the Prevention and Punishment of the Crime of Genocide, approved Dec. 9, 1948, art. II.
[19] *See* 25 U.S.C. § 1901(4).
[20] *Id.*, § 1902.
[21] *Id.*, § 1915.

California has implemented ICWA primarily through the Welfare and Institutions Code,[22] with additional references in the Family and Probate Codes. In some cases, California's protections go beyond what is required by ICWA.[23]

ICWA's preferences for Indian children are based on a political classification, i.e., persons who members or eligible to be members in a federally recognized Indian tribe.[24] Indian tribes have a "unique legal status" under federal law, "based on a history of treaties and the assumption of a 'guardian-ward' status by the federal government over tribes.[25] As such, statutes addressing Indians specifically have generally understood to treat Indians as members of quasi-sovereign tribal entities.[26]

4. *Haaland v. Brackeen* and the continued attacks on ICWA

ICWA has been federal law for over 50 years. The past decade or so, however, has seen a rise in litigation challenging ICWA; generally speaking, the challengers are white potential adoptive parents who feel entitled to adopt Indian babies free of ICWA's placement preferences that would keep a baby within their tribe.[27] This effort won a major victory when an en banc panel of the United States Court of Appeals for the Fifth Circuit held that ICWA is unconstitutional.[28]

On June 15, 2023, the United States reversed the Fifth Circuit and upheld ICWA in *Haaland v. Brackeen*.[29] The Court expressly rejected the Fifth Circuit's holding that ICWA is unconstitutional under Article I and the Tenth Amendment to the United States Constitution.[30] On the question of whether ICWA violates the Equal Protection Clauses of the Fifth and Fourteenth Amendments, the Court declined to reach the merits of the issue, instead holding that the parties raising the equal protection challenge lacked the necessary standing.[31]

Haaland was celebrated by many as "a major victory for tribes in California and across the nation, and most importantly, [as] a victory for tribal children, tribal families and the future of tribal nations."[32] But *Haaland* is unlikely to stem the tide of legal challenges

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[22] *See* Welf. & Inst. Code, §§ 224-224.6.
[23] *Compare*, *e.g.*, 25 U.S.C. § 1912 *with* Welf. & Inst. Code, § 224.2. Additional requirements at the federal level have been imposed via regulations. (*See*, *e.g.*, 25 C.F.R. §§ 23.2, 23.120.)
[24] 25 U.S.C. § 1903(3), (4), (5), (8).
[25] *Morton v. Mancari* (1974) 417 U.S. 535, 551.
[26] *Id.* at p. 554.
[27] *E.g.*, *Adoptive Couple v. Baby Girl* (2013) 570 U.S. 637.
[28] *Brackeen v. Haaland* (5th Cir. 2021) 994 F.3d 249 (en banc), revd. *sub nom. Haaland v. Brackeen* (Jun. 15, 2023) 143 S.Ct. 1609.
[29] *Haaland*, *supra*, 146 S.Ct. at pp. 1622-1623.
[30] *Id.* at pp. 1628-1638.
[31] *Id.* at p. 1638.
[32] California Tribal Families Coalition, Press Release: California Tribal Families Coalition Statement re U.S. Supreme Court Ruling on the Indian Child Welfare Act (Jun. 15), *available at*

to ICWA. The Goldwater Institute, a right-wing legal organization, has an ongoing project to challenge ICWA in the courts in hopes of having it invalidated.[33] For example, they represented Chad and Jennifer Brackeen—two of the plaintiffs in *Haaland*—in a second case, wherein the Brackeens sought to adopt another Indian child and fought the Navajo Nation's request that the child be placed with a relative, and again challenged the constitutionality of ICWA.[34] The Supreme Court also recently denied a petition for a writ of certiorari in *Halvorson v. Hennepin County*, a case that challenged a Minnesota state court's decision to transfer a child protection matter to a tribal court under ICWA;[35] the Goldwater Institute filed a motion for leave to file an amicus curiae brief in connection with the petition, which was granted.[36]

5. This bill codifies provisions of ICWA as the California Indian Child Welfare Act

While the State is obviously required to comply with ICWA—and has chosen as a matter of policy to provide protections greater than those in ICWA— the State's adoption of ICWA in statute currently relies on cross-references to federal statute. For example, in the Welfare and Institutions Code, several relevant ICWA terms of art are identified "as provided in Section 1903 of the Indian Child Welfare Act."[37] Without an independent statutory basis for the protections currently set forth in ICWA, California's protections for Indian children and families could be in limbo if a federal court decision called ICWA's viability into question.

This bill is intended to fully incorporate the provisions of ICWA into State law, the provisions of which will be referred to as the California Indian Child Welfare Act. The bill adds to the Welfare and Institutions Code definitions of terms such as "Indian," "Indian tribe," and "Reservation," so that they have an independent basis in State law. The bill also modifies provisions of the Family Code, the Probate Code, and the Welfare and Institutions Code that refer to ICWA so that they also refer to the relevant State definitions and provisions—thereby ensuring that State law is consistent with the federal ICWA while also establishing a sturdier State-law basis for the existing framework. In light of the ongoing challenges to ICWA, the bill contains an urgency clause.

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https://caltribalfamilies.org/haaland-v-brackeen-supreme-court-ruling/. All links in this analysis are current as of July 11, 2023.

[33] *See* Goldwater Institute, Ensuring Equal Protection for Native American Children: Challenging the Indian Child Welfare Act, https://www.goldwaterinstitute.org/indian-child-welfare-act/.

[34] *See Interest of Y.J.* (Tx. Ct. App., Aug. 25, 2022) Case No. 02-22-00245-CV, 2019 WL 6904728; Goldwater Institute, Providing Equal Protection Rights to Native American Children, *In re Y.J.*, https://www.goldwaterinstitute.org/case/providing-equal-protection-rights-to-native-american-childrenin-re-y-j/.

[35] *See Matter of Welfare of Child of F.J.V.* (Minn. Ct. App., Oct. 25, 2021), Case No. A-21-0522, 2021 WL 4944677; Order List, 599 U.S. —, Case No. 21-1471, 2023 WL 4163367 (Jun. 26, 2023) (denial of certiorari).

[36] *Halvorson v. Hennepin County* (Jun. 26, 2023), 2023 WL 4163367 (Jun. 26, 2023).

[37] Welf. & Inst. Code, § 224.1.

6. Arguments in support

According to the California Tribal Families Coalition, one of the sponsors of the bill:

> Although ICWA was enacted over 40 years ago, Indian children continue to be overrepresented in the child welfare system at a rate at least two times that of White children – in some counties in California, the rate is as high as four times. This is because meaningful implementation has not yet been achieved consistently across the state. However, the federal ICWA is so important and so effective at rolling back past practices of Indian family separation, that California passed similar legislation as early as 2006. As attacks on the federal ICWA continue throughout the nation, California's codification of its provisions may also be threatened.
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> This bill was introduced to strengthen California child welfare provisions leading up to a United States Supreme Court case known as *Haaland v. Brackeen*. In a 7-2 opinion on June 15, 2023, the Supreme Court unreservedly held that all challenges made to the federal Indian Child Welfare Act (ICWA) were rejected, some on the merits and others for lack of standing. The decision affirms what tribal nations in California have always known and advocated for – that Indian children and families require remedial protections to reduce disproportionality in child welfare and ICWA provides the protections needed to improve outcomes.
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> Although the Supreme Court decision was overwhelmingly positive, there are legal nuances throughout the opinion that California now has the opportunity to address in its own state law version of ICWA. AB 81 (Ramos) would strengthen California protections, in part, by including California state law citations in addition to references to the federal Indian Child Welfare Act. This provides clarity for practitioners in the courtroom to cite to state law and ensures that state law provisions remain regardless of what changes may happen to the federal Act moving forward.

SUPPORT

California Tribal Families Coalition (co-sponsor)
Morongo Band of Mission Indians (co-sponsor)
ACLU California Action
Agua Caliente Band of Cahuilla Indians
Cachil Dehe Band of Wintun Indians of the Colusa Indian Community
Habematolel Pomo of Upper Lake
Hoopa Valley Tribe
Jamul Indian Village of California
Seneca Family of Agencies
Torres Martinez Desert Cahuilla Indian Tribe

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation: SB 824 (Ashby, 2023) expands the Department of Social Services' (DSS) authority to grant an exemption to restrictions on a person serving as a resource family for a specific child when that person has a criminal conviction, to permit DSS to grant an exception, among others, a person who is an extended family member of an Indian child as defined in ICWA. SB 824 is pending before the Assembly Appropriations Committee.

Prior Legislation:

AB 1862 (Ramos, 2022) would have established the Tribally Approved Homes Compensation Program to provide funding to eligible tribes and tribal organizations in California to assist in funding the costs associated with recruiting and approving homes for the purpose of foster or adoptive placement of an Indian child pursuant to ICWA. AB 1862 died in the Senate Appropriations Committee.

AB 686 (Waldron, Ch. 434, Stats. 2019) required the Judicial Council to authorize the use of telephonic or other remote access by an Indian child's tribe in proceedings were ICWA apply and required, when a tribe does not exercise its right to approve a home for a specific child, the county and foster family agency to apply prevailing social and cultural standards of the Indian community when approving a resource family for that child.

AB 3176 (Waldron, Ch. 833, Stats. 2018) revised and recast the state statutes implementing ICWA to comply with federal regulations, including revising the specific steps a social worker, probation officer, or court is required to take in making an inquiry of a child's possible status as an Indian child and the various notice requirements that are mandated during an Indian child custody proceeding.

PRIOR VOTES:

Assembly Floor (Ayes 75, Noes 0)
Assembly Judiciary Committee (Ayes 9, Noes 0)

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