United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 6, 2021
Lyle W. Cayce
Clerk

No. 18-11479

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; STATE OF TEXAS; ALTAGRACIA SOCORRO HERNANDEZ; STATE OF INDIANA; JASON CLIFFORD; FRANK NICHOLAS LIBRETTI; STATE OF LOUISIANA; HEATHER LYNN LIBRETTI; DANIELLE CLIFFORD,

Plaintiffs—Appellees,

versus

DEB HAALAND, *Secretary, United States Department of the Interior*; DARRYL LACOUNTE, *Acting Assistant Secretary for Indian Affairs*; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES OF AMERICA; XAVIER BECERRA, *Secretary, United States Department of Health and Human Services*; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants—Appellants,

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,

Intervenor Defendants—Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CV-868

Before OWEN, *Chief Judge*, and JONES, SMITH, WIENER, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, DUNCAN, ENGELHARDT, and OLDHAM, *Circuit Judges*.*

PER CURIAM:

This en banc matter considers the constitutionality of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 *et seq.*, and the validity of implementing regulations promulgated by the Bureau of Indian Affairs (BIA) in its 2016 Final Rule (Final Rule). Plaintiffs are several couples who seek to adopt or foster Indian children, a woman who wishes for her Indian biological child to be adopted by non-Indians, and the States of Texas, Louisiana, and Indiana. Defendants are the United States, federal agencies and officials charged with administering ICWA and the Final Rule, as well as several Indian tribes that intervened in support of ICWA. The district court granted Plaintiffs summary judgment in part, declaring that ICWA and the Final Rule contravene multiple constitutional provisions and the Administrative Procedure Act (APA). Defendants appealed. A panel of this court reversed and rendered judgment for the Defendants. *See Brackeen v. Bernhardt*, 937 F.3d 406, 414 (5th Cir. 2019). One panel member partially dissented, concluding that several provisions of ICWA violated the Tenth Amendment's anticommandeering doctrine. *See id.* at 441–46 (OWEN, J., concurring in part and dissenting in part). This case was then reconsidered en banc.

Neither JUDGE DENNIS's nor JUDGE DUNCAN's principal opinion nor any of the other writings in this complex case garnered an en banc majority on all issues. We therefore provide the following issue-by-issue summary of the en banc court's holdings, which does not override or amend the en banc opinions themselves.

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* JUDGE HO was recused and did not participate. JUDGE WILSON joined the court after the case was submitted and did not participate.

First is the issue of standing. The en banc court unanimously holds that at least one Plaintiff has standing to challenge Congress's authority under Article I of the Constitution to enact ICWA and to press anticommandeering and nondelegation challenges to specific ICWA provisions. The en banc court also unanimously holds that Plaintiffs have standing to challenge the Final Rule as unlawful under the APA. The en banc court is equally divided as to whether Plaintiffs have standing to challenge two provisions of ICWA, 25 U.S.C. §§ 1913 and 1914, on equal protection grounds, and the district court's conclusion that Plaintiffs can assert this claim is therefore affirmed without a precedential opinion.[1] An en banc majority also holds that Plaintiffs have standing to assert their equal protection challenges to other provisions of ICWA.

On the merits, an en banc majority agrees that, as a general proposition, Congress had the authority to enact ICWA under Article I of the Constitution.[2] An en banc majority also holds that ICWA's "Indian child" classification does not violate equal protection.[3] The district court's ruling to the contrary on those two issues is therefore reversed. The en banc court is equally divided, however, as to whether Plaintiffs prevail on their equal protection challenge to ICWA's adoptive placement preference for "other

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[1] *See United States v. Garcia*, 604 F.3d 186, 190 n.2 (5th Cir. 2010) ("Decisions by an equally divided en banc court are not binding precedent but only affirm the judgment by operation of law.").

[2] *See* Part II(A)(1) of JUDGE DENNIS's opinion *and* Part II of JUDGE COSTA's opinion.

[3] Part II(B) of JUDGE DENNIS's opinion is the en banc majority opinion on this issue, except as to the constitutionality of "other Indian families" in § 1915(a)(3) and "Indian foster home" in § 1915(b)(iii).

Indian families," 25 U.S.C. § 1915(a)(3), and its foster care placement preference for a licensed "Indian foster home," § 1915(b)(iii).[4] The district court's ruling that provisions of ICWA and the Final Rule are unconstitutional because they incorporate the "Indian child" classification is therefore reversed, but its ruling that § 1915(a)(3) and (b)(iii) violate equal protection is affirmed without a precedential opinion.

The court's holdings on Plaintiffs' various anticommandeering claims are more intricate. An en banc majority holds that ICWA's "active efforts," § 1912(d), expert witness, § 1912(e) and (f), and recordkeeping requirements, § 1915(e), unconstitutionally commandeer state actors.[5] The district court's judgment declaring those sections unconstitutional under the anticommandeering doctrine is therefore affirmed. However, the en banc court is equally divided on whether the placement preferences, § 1915(a)–(b), violate anticommandeering to the extent they direct action by state agencies and officials[6]; on whether the notice provision, § 1912(a), unconstitutionally commandeers state agencies[7]; and on whether the placement record provision, § 1951(a), unconstitutionally commandeers

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[4] *Compare* Part II(B) of JUDGE DENNIS's opinion *with* Part III(A)(3) of JUDGE DUNCAN's opinion.

[5] Parts III(B)(1)(a)(i), (ii), (iv); III(B)(1)(b); and III(B)(2)(b) (insofar as it addresses §§ 1912(d)–(f) and 1915(e)) of JUDGE DUNCAN's opinion are the en banc majority opinion on these issues.

[6] *Compare* Part II(A)(2)(a)(i) of JUDGE DENNIS's opinion *with* Part III(B)(1)(a)(iii) of JUDGE DUNCAN's opinion.

[7] *Compare* Part II(A)(2)(b) of JUDGE DENNIS's opinion *with* Part III(B)(1)(a)(v) of JUDGE DUNCAN's opinion.

state courts.[8] To that extent, the district court's judgment declaring those sections unconstitutional under the anticommandeering doctrine is affirmed without precedential opinion.

Furthermore, an en banc majority holds that several challenged ICWA provisions validly preempt state law and so do not commandeer states. Those are provisions granting certain private rights in state child custody proceedings—namely, the right to intervene, § 1911(c), to appointed counsel, § 1912(b), to examine documents, § 1912(c), to explanation of consent, § 1913(a), to withdraw consent, § 1913(b), (c), and (d), to seek invalidation, § 1914, to seek return of custody, § 1916(a), and to obtain tribal information, § 1917.[9] In addition, an en banc majority holds that the following provisions validly preempt contrary state law to the extent they apply to state courts (as opposed to state agencies): the placement preferences, § 1915(a) and (b), and the placement and termination standards, § 1912(e) and (f).[10] The district court's rulings to the contrary are therefore reversed.

Next, an en banc majority holds that § 1915(c), which permits Indian tribes to establish an order of adoptive and foster preferences that is different from the order set forth in § 1915(a) and (b), does not violate the non-

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[8] *Compare* Parts II(A)(2)(a)(ii) of JUDGE DENNIS's opinion *with* Part III(B)(2)(c) of JUDGE DUNCAN's opinion.

[9] Part III(B)(2)(a) of JUDGE DUNCAN's opinion is the en banc majority opinion on this issue, except as to the appointed counsel provision in § 1912(b).

[10] Part III(B)(2)(c) of JUDGE DUNCAN's opinion is the en banc majority opinion on this issue, except as to the placement record requirement in § 1951(a).

delegation doctrine.[11] The district court's ruling to the contrary is therefore reversed.

Last are Plaintiffs' claims that the Final Rule violates the APA. An en banc majority holds that the BIA did not violate the APA by concluding in the Final Rule that it may issue regulations binding on state courts.[12] But an en banc majority also holds that—consistently with the en banc court's holding that §§ 1912(d), 1912(e), and 1915(e) commandeer states—the Final Rule violated the APA to the extent it implemented these unconstitutional provisions.[13] Finally, an en banc majority determines that 25 C.F.R. § 23.132(b)—the part of the Final Rule interpreting § 1915's "good cause" standard to require proof by clear and convincing evidence—violated the APA.[14] An en banc majority holds that the Final Rule did not violate the APA in any other respect. The district court's grant of relief under the APA is affirmed to the extent it is consistent with these holdings and reversed to the extent it is inconsistent with these holdings.

The judgment of the district court is therefore AFFIRMED in part and REVERSED in part, and judgment is accordingly RENDERED.

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[11] Part II(C) of JUDGE DENNIS's opinion is the en banc majority opinion on this issue.

[12] Part II(D)(2) of JUDGE DENNIS's opinion is the en banc majority opinion on this issue.

[13] Part III(D)(1) of JUDGE DUNCAN's opinion is the en banc majority opinion on this issue, insofar as it applies to §§ 1912(d)–(e) and 1915(e).

[14] Part III(D)(3) of JUDGE DUNCAN's opinion is the en banc majority opinion on this issue.

DENNIS, J., delivered the opinion of the en banc court with respect to Parts II(B), II(C), and II(D)(2) of his opinion (except as otherwise noted in the PER CURIAM opinion, *supra*).

DUNCAN, J., delivered the opinion of the en banc court with respect to Parts III(B)(1)(a)(i)–(ii), III(B)(1)(a)(iv), III(B)(2)(a)–(c), III(D)(1), and III(D)(3) of his opinion (except as otherwise noted in the PER CURIAM opinion, *supra*).