

**Landmark SCOTUS Decisions:**  
 Impact of 21-376 *Haaland v. Brackeen*  
 SCOTUS Decision on Native American  
 Families

The National Association for Court  
 Management Webinar  
 February 22, 2024



**NICWA**  
 National Indian Child Welfare Association  
 Protecting Our Children • Preserving Our Culture

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**For Colonialism to Succeed**

- Take territory – land
- Take natural resources – energy/food
- Take sovereignty – disrupt leadership and governance
- Take away the legitimacy of thought – worldview, language, spirituality, healing
- Take the children




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**1976**  
**Indian Country Child Welfare Findings**

- 25–35% of all AI/AN children nationwide were removed from their homes—of these children, 85% were being placed in non-Indian homes.
- AI/AN children brought up in non-Indian homes suffered from a variety of adjustment and emotional disorders due to isolation from their families and culture.
- In many AI/AN adoption situations mothers were being pressured and coerced into “voluntarily” relinquishing their parental rights.



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## Indian Child Welfare Act

Passed as a response to the overwhelming evidence from Indian communities that the loss of their children meant the destruction of Indian culture.

Passed 1978

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## What Does ICWA Do?

- Establishes minimum federal standards for removal of Indian children from their families
- Recognizes tribes' inherent tribal jurisdiction over child custody proceedings
- Provides assistance to Indian tribes in the operation of child and family programs



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## *Haaland v. Brackeen*

- Constitutionality
  - ICWA found constitutional in 5<sup>th</sup> Circuit Court of Appeals
  - Congress has plenary power to enact legislation for the benefit of tribes and Indian people
  - Equal protection claims not valid
- Some specific requirements of ICWA found to violate the anti-commandeering clause of the Constitution
  - Active efforts
  - Qualified expert witness
  - Some data collection requirements
- Majority of ICWA requirements remain intact



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*Haaland v. Brackeen*

- Fifth Circuit Court of Appeals decision
  - Complexity (8 opinions, 325 pages)
  - *Was not applicable outside the states within the jurisdiction of the Fifth Circuit Court of Appeals (Texas, Louisiana, and Mississippi)*
- Both sides appealed to the Supreme Court of the United States (SCOTUS)



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**SCOTUS**

The Supreme Court of the United States was deciding:

- Is ICWA Constitutional?  
(Can Congress make such a law? Is it based on race or political status/citizenship?)
- Do provisions violate states' rights?  
(Using state resources to comply with federal purposes)
- Do White families have a right to adopt Indian children?



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**SCOTUS Implications**

Implications

- Tribal sovereignty under threat (opposition lawyers are filing other cases attacking other federal Indian laws with the same arguments)
- Dozens of federal laws could have been affected
- Provisions of ICWA could have been struck down



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**Haaland v. Brackeen Decision**

ICWA continues to be constitutional and enforceable!

Article 1 of the US Constitution


- Congress has broad authority to pass legislation impacting Native people and tribal nations
- Court cited Indian Commerce Clause, Treaty Clause, structure of US Constitution, and federal trust relationship as basis

Anti-Commandeering

- ICWA applies to both public and private parties and therefore does not meet the test for unlawfully commandeering states
- State courts apply placement preferences, not state officials
- Data requirements are ancillary to state court obligations to follow ICWA

Equal Protection and Delegation of Powers

- Court held that the plaintiffs did not have standing to raise these issues (no traceable harm to parties)



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**Haaland v. Brackeen Decision**

Justice Gorsuch concurring opinion

- Detailed history of federal-state removals of Native children and need for ICWA
- US Constitution provides safeguarding of tribal sovereignty
- ICWA is constitutional and necessary

Justice Kavanaugh concurring opinion

- Court did not address merits of equal protection and sees plaintiff's issues in this area as serious



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**Haaland v. Brackeen Decision**

Justice Thomas dissenting opinion

- No clear authority of Congress to enact ICWA

Justice Alito dissenting opinion

- ICWA exceeds congressional authority
- ICWA subordinates best interests of Indian children to tribal interests
- ICWA unlawfully applies to children who are not members of tribes



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**Remaining Concern**

The decision potentially leaves a door open for opponents to bring new lawsuits, especially on equal protection grounds

- Contested adoption cases are the target
- More and more, adoption cases start as foster care cases
- What are we doing to monitor, educate, and support foster care families?



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13

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**NICWA and Partner's Planned Responses**

- State level action – e.g., tribal/state agreements, state ICWA laws
- National action – e.g., monitoring cases, staying on guard, compliance
- Tribal action – express sovereignty to the fullest extent possible, build tribal capacity to keep Native kids out of the state systems
- Overall – continue to protect ICWA



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14

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**Why is ICWA considered the "gold standard" in child welfare?**

- All Amici supporting ICWA referred to it as the "gold standard" in child welfare
- What is it about ICWA that has earned this reputation?



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## Connection

- A sense of belonging can only be said to exist if it exists in the mind of the child
- Our job is to protect and promote that sense
- It is the cornerstone of a positive outcome



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16

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## Permanency: An Indigenous Perspective

- Concept Of Belonging—
- The Heart Of Permanency
- Is Central To Indigenous Culture



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17

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## Family Relations and Beyond

• Family	• Tribe
• Extended Family	• Mother Earth
– Nurturing Networks	• Grandfather Creator
– Fictive Kin	• All my relations
• Clan	
• Community	



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18

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## Grandmas Matter



**grandmas matter**  
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## Reference Points For Belonging



- Sense of Trust
- Continuity
- Identity
- Persist over time

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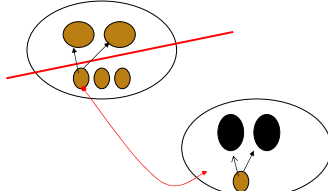

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## Psychological Parent Model



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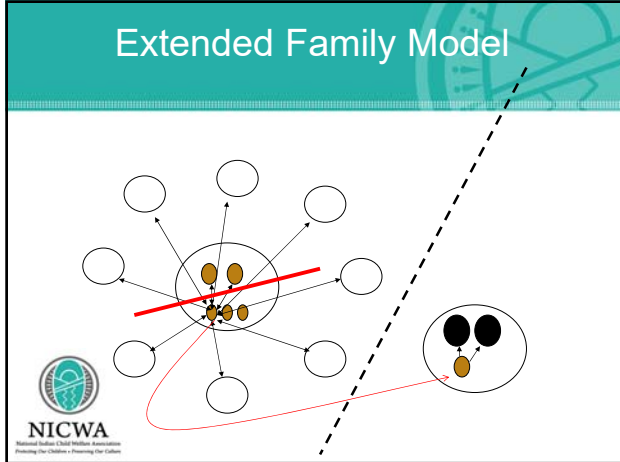
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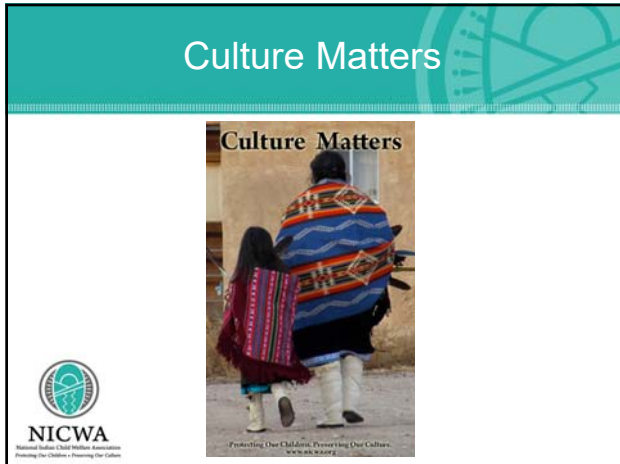
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- ### Key Points
- Blood degree does not indicate cultural identification
  - Colonial process inflicted deep complex trauma and lateral oppression. It happened to us but...
  - Racial healing is desired internally, and with other cultures
  - Native peoples are here to stay
  - Race equity includes making the invisible visible
- The NICWA logo is in the bottom left corner.

24

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## Community Matters

- Clan/tribal/community members
- Native organizations
- Environment/belonging
- Natural helpers and healers
- Gathering
- Traditional ceremonies
- Sports/recreation
- Culture




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## Spiritual Supports Matter

- Smudging
- Eagle feathers
- Medicine bags
- Traditional foods
- Talking Circles
- Generosity
- Gratitude
- Sweat Lodge
- Dance
- Drumming
- Traditional ceremonies




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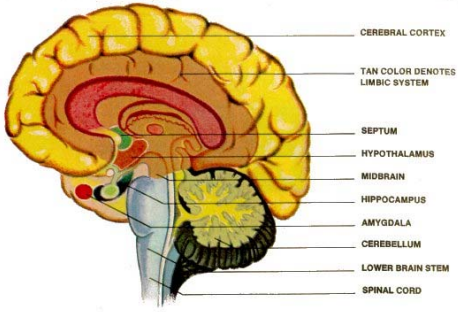

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## Brain Chemistry Matters

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## The ACE Study

- The ACE Score is a count of the total number of ACE indicators for an individual.
- The score ranges from 1 (low trauma) to 9 (high trauma).
- In the mainstream population, as an ACE score increases, the risk for numerous health problems increases.

(Division of Adult and Community Health, National Center for Chronic Disease Prevention and Health Promotion, CDC, 2010)

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## RISK FACTORS

### What is an Adverse Childhood Experience (ACE)?

The experience of “significant abuse or household dysfunction during childhood”

Specific Indicators:

- Recurrent physical abuse
- Recurrent emotional abuse
- Contact sexual abuse
- An alcohol and/or drug abuser in the household
- An incarcerated household member
- Someone who is chronically depressed, mentally ill, institutionalized, or suicidal in the household
- Mother is treated violently
- One or no parents
- Emotional or physical neglect



(Division of Adult and Community Health, National Center for Chronic Disease Prevention and Health Promotion, CDC, 2010)

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## ACE Study Model



(Division of Adult and Community Health, National Center for Chronic Disease Prevention and Health Promotion, CDC, 2010)

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The good news...




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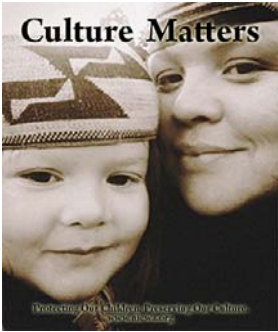
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Culture Matters

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**PROTECTIVE FACTORS**  
 What is a Protective Childhood Experience (PCE)?

Positive relationships and experiences while growing up that protect young people from negative influences and behaviors.

Specific Indicators:

- Supportive adults
- Positive peer groups
- School activities
- Family resources
- Spiritual/religious connection
- Connection with tribal elders, learning a tribal language
- Safe and strong Community



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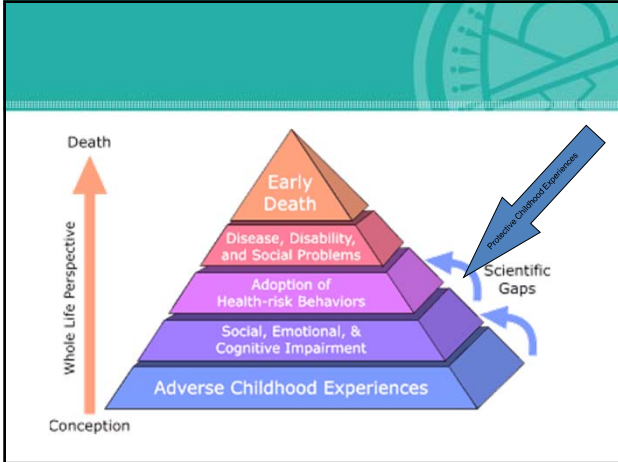
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### ACE Scores, PCE Scores, and Juvenile Delinquency

We examined how ACEs and PCEs relate to delinquency by grouping people according to both ACEs and PCEs

- The group with **low** ACEs and **high** PCEs had the lowest delinquency (14%)
- The group with **high** ACEs and **low** PCEs had the highest delinquency (67%)
- Even when ACEs were high, the group with high PCEs had lower delinquency (39%) than the group with low ACEs and low PCEs (46%)

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### ACE Scores, PCE Scores and Depression

We also examined how ACEs and PCEs relate to depression.

Depression was related to the following:

- Gender (female)
- Higher sexual abuse (ACE)
- Lower safe and strong community (PCE)
- Lower spirituality (PCE)

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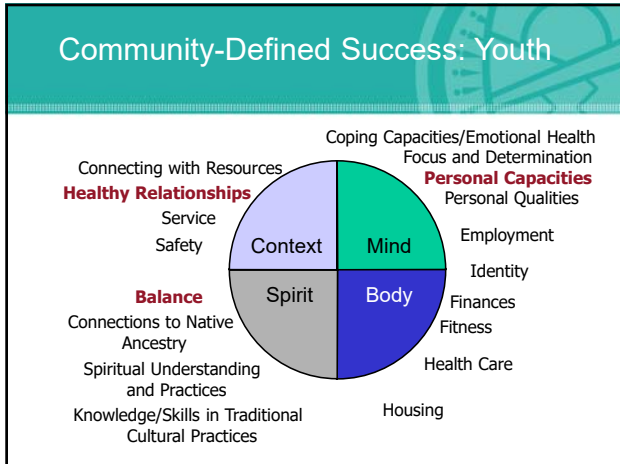
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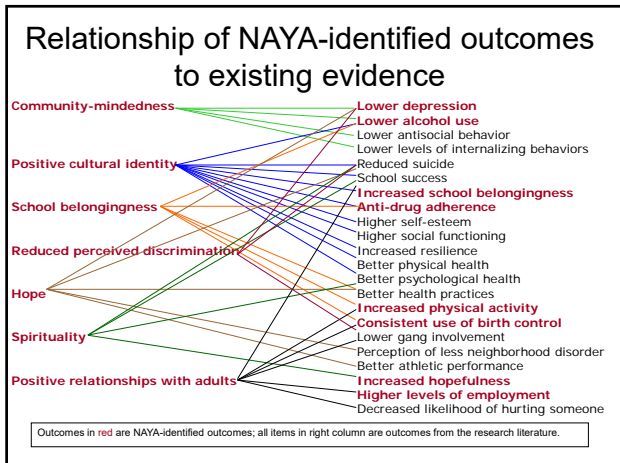
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## What Can Judges Do?

**Ask about Active Efforts: for example,**

- Engaging the child, parents, extended family and tribe
- Taking the steps necessary to keep siblings together
- Identifying services and actively assisting parents in obtaining these services
- Identifying, notifying and inviting representatives of the tribe to participate in the case
- Diligent search for extended family for assistance and placement



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**FR A.2**

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## What Can Judges Do?

**Ask about Active Efforts: more examples**

- Offering and employing all available and culturally appropriate preservation services
- Notifying and consulting with extended family to support the child, assure cultural connection and serve as a placement resource
- Making arrangements for interaction and visitation in the most natural setting possible
- Supporting regular visits and tribal home visits consistent with the child's safety



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## Ensure "Active Efforts"


Provide remedial and rehabilitation services to PREVENT removal

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Remove the child from the home ONLY if imminent physical or emotional damage to the child is present

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Provide remedial and rehabilitative services to ENSURE reunification if removal has occurred



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## Using Other Federal Policies

- Take advantage of other state and federal child welfare laws
  - Notification of relatives (Title IV-E)
  - Relative preference in placement (Title IV-E)
  - Sibling placement (Title IV-E)
  - Waiver of non-safety foster care standards (Title IV-E)
  - State plan re: ICWA compliance (Title IV-B)
  - Not denying placement outside state jurisdiction (Title IV-E)
  - Use of tribal placements and licensing standards/approval (ICWA and Title IV-E)



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43

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## National Adoption Competency Mental Health Training Initiative



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## Culture Matters



No  
Face  
and her  
black  
and  
white  
necklace



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Thank You



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