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Federal judge throws out Arizona challenge to Indian Child Welfare Act

By Howard Fischer Capitol Media Services Mar 19, 2017 Updated 10 hrs ago

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PHOENIX — A judge has thrown out a challenge to a federal law that critics claim is racist because it places the desires and rights of Native American tribes over the constitutionally protected best interests of children.

In an extensive ruling, U.S. District Court Judge Neil Wake said the Goldwater Institute had not proven that any children it claimed to represent were harmed because of the requirements of the Indian Child Welfare Act. And Wake said if there is a child who may be in danger, that claim can be handled by the state courts that are hearing that adoption or foster-care proceeding.

Goldwater Institute attorney Timothy Sandefur called that “disturbing,” saying it amounts to saying he has to wait until children are actually harmed.

"The whole point of federal civil rights law is that we can go to a federal judge and get an injunction that prevents racist discriminatory law from being applied to children," he said. "We shouldn't have to suffer the imposition of racist laws. We should be able to get a court to stop the government from imposing the separate and unequal standard on these children."

The federal law at issue was adopted in 1978 amid concerns that state courts were severing parental rights and approving adoptions of Native American children who did not live on reservations. The Congressional Record shows that Congress was concerned these children were being increasingly adopted by non-Indian families.

The Indian Child Welfare Act requires state courts, when placing for adoption Indian children who do not live on a reservation, to give preference to a member of the child's extended family. That is followed by priority for other members of the child's tribe and, ultimately, other Indian families.

There also are provisions that Sandefur says require active efforts to reunite a Native American child with a family, something he said "requires these children to be sent back to the parents that have abused them."

According to the Goldwater Institute, that overrules state laws requiring courts to give prime consideration to the "best interests of the child," regardless of whether that means placement with a tribal member or someone else.

The lawsuit was filed in 2015 on behalf of two children with some Native American blood who currently are placed with non-Indian families where they have lived since they were infants.

It claims the Indian Child Welfare Act gives tribes pretty much unfettered authority to decide placement of children with some native blood, "even those who have never set foot on a reservation."

The claim most immediately sought to protect these two children from being taken from their current homes. Other children were subsequently added to the claim.

But the lawsuit also asked Wake to certify the complaint as a class action on behalf of every Native American child not living on a reservation and currently placed with a non-Indian family, barring application of the Indian Child Welfare Act in any of their cases. In Arizona alone, the lawsuit said there were more than 1,300 Native American children in out-of-home care in 2014.

The federal government and tribes sought to have the case thrown out. They were joined by Dawn Williams, an assistant state attorney general.

"The federal law was enacted to remediate generations of forced assimilation," Williams wrote in her pleadings.

She also said the lawsuit cites only “nebulous speculative harm” to the children at issue in this case.

It was that argument that formed much of the basis for Wake’s ruling.

He said the lawsuit did not allege any facts showing that the foster-care placement of any child was delayed, or that any of the children were exposed to greater risk because of the federal law.

Wake said the lawsuit sought a ruling on the law in advance of any injury.

“Any true injury to any child or interested adult can be addressed in the state court proceeding itself, based on actual facts before the court, not on hypothetical concerns,” Wake wrote.

Because Wake threw the case out on the grounds there was no basis for a lawsuit, at least not yet, he never addressed the question of whether the federal law amounts to illegal racism.

Attorneys for both the state and the Bureau of Indian Affairs never disputed that the law provides disparate treatment in state courts for children of Indian blood versus non-Indian children. But they argued that the preference in placing a child with a tribal family does not amount to illegal racial discrimination.

They said the U.S. Supreme Court has ruled that classifications based on tribal membership — like those in this law — “are political, not racial classifications.” And they said such distinctions, particularly for sovereign entities like Native American tribes, are permitted.

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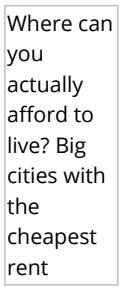

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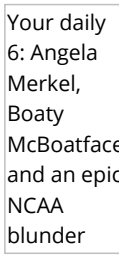

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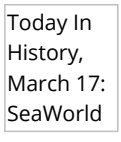

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