

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL., Petitioners, v.	}	No. 21-376
CHAD EVERET BRACKEEN, ET AL., Respondents.		
CHEROKEE NATION, ET AL., Petitioners, v.	}	No. 21-377
CHAD EVERET BRACKEEN, ET AL., Respondents.		
TEXAS, Petitioner, v.	}	No. 21-378
DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL., Respondents.		
CHAD EVERET BRACKEEN, ET AL., Petitioners, v.	}	No. 21-380
DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL., Respondents.		

Pages: 1 through 209
Place: Washington, D.C.
Date: November 9, 2022

HERITAGE REPORTING CORPORATION

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 2 DEB HAALAND, SECRETARY)
 3 OF THE INTERIOR, ET AL.,)
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 4 Petitioners,)
 v.) No. 21-376
 5)
 5 CHAD EVERET BRACKEEN, ET AL.,)
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 9 v.) No. 21-377
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12 - - - - -
 12 TEXAS,)
 13)
 13 Petitioner,)
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 21 OF THE INTERIOR, ET AL.,)
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24 Washington, D.C.
 25 Wednesday, November 9, 2022

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

MATTHEW D. MCGILL, ESQUIRE, Washington, D.C.; on behalf of Chad Everet Brackeen, et al.

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EDWIN S. KNEEDLER, Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the federal parties.

IAN H. GERSHENGORN, ESQUIRE, Washington, D.C.; on behalf of the tribal parties.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 21-376, Haaland versus Brackeen, and the consolidated cases.

Mr. McGill.

ORAL ARGUMENT OF MATTHEW D. MCGILL
ON BEHALF OF CHAD EVERET BRACKEEN, ET AL.

MR. MCGILL: Thank you, Mr. Chief Justice, and may it please the Court:

According to the federal government, in 2020, there were over 11,000 Native American children in state foster care. The Indian Child Welfare Act deprives Native -- deprives Indian children of the best interests of the child test. It replaces that test with a hierarchy of placement preferences that puts Native -- non-Indian families at the bottom of the list.

As this Court explained in Holyfield, this effectuates a federal policy of sending Indian children to the Indian community. The problem is -- is that there are fewer than 2,000 Native American foster homes. That means each year hundreds, if not thousands, of Indian children are placed in non-Indian foster homes,

1 and sometimes there they bond with those
2 families. Yet, when those families try to adopt
3 those children, ICWA rears its head for a second
4 time, allowing tribes to play the proverbial
5 ICWA trump card at the eleventh hour.

6 This is happening now for a second
7 time to the Brackeens as they try to adopt YRJ,
8 who is now four-and-a-half years old. For a
9 second time, the Brackeens are asked to show
10 good cause to overcome the placement preferences
11 under a new regulatory standard that, in the
12 agency's words, is narrow, limited, and not a
13 best interests test. Not even YRJ's deep
14 attachment to the Brackeens after being part of
15 their family for four years is sufficient. For
16 both that child and her family, this flouts the
17 promise of equal justice under the law.

18 I welcome the Court's questions.

19 JUSTICE THOMAS: Would you spend a
20 minute on what the good cause standard is? I
21 think -- of course, you understand that there's
22 already a placement, there's already adoption in
23 process, but how does that work?

24 MR. MCGILL: Justice Thomas, the --
25 after the 2016 rule, what the -- what at 25

1 C.F.R. 23.132, you now -- there are now five
2 enumerated ways in which good cause can be
3 shown. The government says that it mere -- that
4 the regulation merely says that it should be one
5 of these five factors. But, you know, a
6 remarkable thing happens when a family court
7 judge in the states picks up a copy of the Code
8 of Federal Regulations. He treats it as binding
9 federal law. And that is how it happens on the
10 ground. It is treated as enumerated things that
11 must be shown.

12 Further, it excludes any consideration
13 of socioeconomic circumstances of the -- of the
14 competing families. And, finally, it says that
15 what the regulation describes as ordinary
16 bonding and attachment that arises from a
17 placement that's in violation of ICWA's
18 placement preferences shall not be a sufficient
19 or sole basis for showing good cause.

20 And, of course, the child at issue in
21 these proceedings has no stake in whether she or
22 he was placed in supposed violation of ICWA's
23 preferences at the foster care -- at the foster
24 care process.

25 JUSTICE SOTOMAYOR: Counsel, you

1 haven't challenged the regulation?

2 MR. MCGILL: Yes, we have, Your Honor.

3 We have a challenge to --

4 JUSTICE SOTOMAYOR: But not in the
5 cert granted question?

6 MR. MCGILL: Your Honor, we challenged
7 the -- we raised a challenge in our complaint to
8 the --

9 JUSTICE SOTOMAYOR: I'm not asking
10 about the complaint. The cert granted question
11 does not include challenges to the regulation?

12 MR. MCGILL: It -- it challenges the
13 --

14 JUSTICE SOTOMAYOR: It opposes the
15 statute?

16 MR. MCGILL: We challenged the
17 regulation as an unconstitutional -- as an
18 implementation of a --

19 JUSTICE SOTOMAYOR: Counsel, answer
20 the question. Is it part of the question
21 presented or not?

22 MR. MCGILL: I believe it is, Your
23 Honor.

24 JUSTICE SOTOMAYOR: Did you seek cert
25 on that question?

1 MR. MCGILL: We did not seek cert on
2 the question of the -- whether it is a
3 permissible construction of the statute. We
4 sought cert on whether the statute --

5 JUSTICE SOTOMAYOR: So, if it -- if
6 you don't seek cert on that, there's nothing on
7 that good cause standard?

8 MR. MCGILL: I don't -- I don't think
9 so, Your Honor.

10 JUSTICE SOTOMAYOR: Counsel, can I
11 turn to something you said, which was it
12 displaces the best interests of the child
13 standard. In most state custody proceedings,
14 the best interests of the child is what guides
15 those decisions.

16 Yet, we have the Hague Convention on
17 the abduction of children that basically says to
18 the court you can't make that determination, you
19 have to send the child back, and it gives a
20 session -- section of exceptions, et cetera, and
21 it even says standards of proof, et cetera.

22 Why is this case any different than
23 the Hague Convention?

24 MR. MCGILL: For, I think, a couple of
25 reasons, Your Honor. First, the Hague

1 Convention, as I understand it, would send the
2 child back to their place of their habitual
3 residence.

4 JUSTICE SOTOMAYOR: But that's not
5 necessarily in the best interests of the child.
6 There's no best interests standard there.

7 MR. MCGILL: What I was -- if I might
8 just finish my thought, Your Honor. That is --
9 that habitual residence standard is -- is
10 essentially duplicated in Section 1911(a), which
11 provides for tribes -- tribal courts to have
12 exclusive jurisdiction concerning children who
13 are domiciled on -- on tribal lands.

14 So I think that -- that that parallels
15 the Hague Convention. The other --

16 JUSTICE SOTOMAYOR: Well, how?
17 Meaning these children are in the U.S., they
18 have a relationship with an Indian tribe over
19 which we have recognized for over two centuries
20 Congress has plenary -- plenary authority.

21 If Congress in one enumerated power
22 can supersede a state standard, why can't it in
23 another?

24 MR. MCGILL: Well, Your Honor --

25 JUSTICE SOTOMAYOR: They can say the

1 best interests of the child shouldn't be the top
2 test or only test, either good cause or
3 something else, as ICWA does.

4 Why is that beyond Congress's power?

5 MR. MCGILL: I'm not aware that an
6 equal protection challenge has ever been
7 presented to the Hague Convention. If you -- if
8 you're referring --

9 JUSTICE SOTOMAYOR: You -- you -- you
10 think that Congress's foreign affairs powers
11 don't permit it to legislate with respect to the
12 relationships of a foreign country and its
13 competing custody issues?

14 MR. MCGILL: Your Honor, I think the
15 foreign affairs power is subject to the Fifth
16 Amendment. I think the question of whether
17 citizenship is a -- would be -- would rise to
18 the level -- a classification based on
19 citizenship would amount to race discrimination
20 would, you know, essentially be the question of
21 whether citizenship is being used as a proxy for
22 race. The government --

23 CHIEF JUSTICE ROBERTS: Counsel, to
24 what extent is the best interests of the child
25 or the same considerations that are taken into

1 account under the best interests of the child
2 incorporated in the good cause showing that
3 could be made under ICWA?

4 MR. MCGILL: I would say that they are
5 not, Your Honor. I mean, the -- the good cause
6 standard is -- is a holistic standard that takes
7 all of the child's circumstances and needs into
8 account.

9 What the good cause standard does is
10 sharply limit that under the 2016 rule to
11 enumerated factors. In the 2013, when the
12 adoptive couple case was before this Court, the
13 government described the good cause standard as
14 a safety valve. That's Footnote 2 of its brief.

15 It is no longer a safety valve. The
16 Interior Department has promulgated these
17 regulations with the specific purpose of making
18 it limited, narrow, and, in its own words, not a
19 best interest test. So it differs very much
20 from the -- what would be the traditional best
21 interest test.

22 CHIEF JUSTICE ROBERTS: So how do you
23 understand this to work? I mean, if you have,
24 for example, an Indian couple, non-tribal
25 members of the -- the tribe of the child,

1 exactly how does the state court adoption
2 authority take into account -- how -- how -- how
3 do they weigh the interests of the non-family
4 tribe member against -- you say you don't take
5 into account the best interests of the child?
6 What are you weighing on the other side?

7 MR. MCGILL: Well, I think you could
8 look to the Texas Court of Appeals decision in
9 the YRJ case as just an example of this. So the
10 question is whether -- whether the -- the person
11 challenging the placement preference has shown
12 one of the enumerated factors by, at that time,
13 clear and convincing evidence.

14 The that -- that standard of proof has
15 since fallen by the wayside. So that's how it
16 -- it plays out on the ground. Is one of those
17 five factors demonstrated by a preponderance of
18 the evidence?

19 It doesn't -- you know, it -- it does
20 not -- those five factors don't take into
21 account the bonding or attachment of the child,
22 which would be the most obvious and most
23 compelling part of the best interest standard.
24 It only says if there's, you know, a showing of
25 extraordinary needs that -- that -- that is, you

1 know, not just something that is from what the
2 regulation describes as ordinary bonding and
3 attachment that good cause can be shown.

4 I mean, the -- the -- after the 2016
5 regulation, the -- the placement preferences are
6 effectively dispositive in many cases.

7 JUSTICE BARRETT: Counsel, can I take
8 you to the scope of the Indian power? We've
9 described it as plenary. It's quite broad.
10 And, in area after area, we've -- well, the --
11 we've allowed Congress to far exceed anything
12 that we would think of as just commerce in the
13 sense of trade, you know, which is something
14 that you floated.

15 Are you asking us to overrule all of
16 those precedents?

17 MR. MCGILL: No, Your Honor. I -- I
18 am not going to speak for my colleagues on the
19 -- from the State of Texas, but, for our -- for
20 our part, no, we're not -- we don't think you
21 need to overrule any of the precedents.

22 JUSTICE BARRETT: Because you'd have
23 us just focus on the equal protection?

24 MR. MCGILL: No, Your Honor. I mean,
25 on -- on the Article I piece, the -- this cannot

1 be understood as within the -- the Court's
2 Indian Commerce Clause precedents. It's not
3 commerce in any -- in any normal sense of that
4 word.

5 The question is then whether it is
6 part of the plenary power that otherwise has
7 been described in this Court's precedents. And
8 our submission is that that plenary power is, if
9 -- if you -- in the Court's cases, as elaborated
10 in this Court's cases, that plenary power
11 applies to the tribe's areas of its sovereign
12 interests, tribal lands, treaty powers, its
13 internal affairs, its ability to self-govern.

14 It's not a power to regulate Indians
15 everywhere, wherever they might be in the
16 jurisdiction of the United States.

17 JUSTICE SOTOMAYOR: So what do you do
18 with that line of cases, like the Act of 1888,
19 setting the evidentiary standard for proving a
20 marriage in cases involving an Indian woman and
21 a white man? That wasn't limited territorially.
22 That set an evidentiary standard.

23 Or the Trade and Intercourse Act of
24 1834 set burdens of proof in all trials, whether
25 on reservations or outside of reservations,

1 about property rights between Indians and
2 non-Indians.

3 The Act of 19 -- 1799, state courts
4 must take proper bail when federal officers
5 detain offenders who trespassed into Indian
6 territory.

7 So that one arguably had something to
8 do with that, but there's a legion of cases, as
9 Justice Barrett alluded to, where Congress has
10 gone off of Indian lands, had nothing to do with
11 sovereignty, had to do -- nothing to do with
12 trade or commerce -- or commerce, but with
13 intercourse, with the relationship with Indians,
14 whether on or off reservations.

15 MR. MCGILL: Well, Your Honor, I -- I
16 guess my -- I would have two parts to my
17 response.

18 The first is that the -- the
19 Constitution confers a -- an authority to
20 regulate commerce, and that power, as
21 understood, as Justice Thomas's separate opinion
22 in Adoptive Couple, I think, would elaborate --

23 JUSTICE SOTOMAYOR: But that was a
24 separate opinion. We've described the power as
25 more plenary than that.

1 MR. MCGILL: Well, I -- and I think
2 this is just the -- the fundamental portion of
3 my submission, and I respect the fact that we
4 might not agree on this, but that there is a
5 commerce power that -- that allows the
6 government to regulate commerce wherever it
7 happens within the United States.

8 And then there is, in addition to
9 that, a plenary power that allows the tribes --
10 allows the government, the federal government,
11 to regulate the tribes, and that arises from the
12 federal government's, you know, role as the
13 subjugating sovereign of the tribes and its role
14 as the, now under Kagama, the protector of those
15 tribes. But that power is not unlimited. It
16 doesn't --

17 JUSTICE JACKSON: Well, why --

18 JUSTICE GORSUCH: Counsel --

19 JUSTICE JACKSON: -- is it limited by
20 geography? You -- you're suggesting that the
21 power, the plenary power that you describe is
22 limited by the tribal land demarcation, and I
23 don't understand where that comes from.

24 MR. MCGILL: Well, I -- I don't think
25 it's just tribal land, Your Honor, although, as

1 this Court's decision in Plains Commerce Bank
2 says, that is the -- the core of tribes'
3 sovereign interests, but it also would extend to
4 treaty rights, the internal affairs of the
5 tribe, and the laws that -- that address the
6 scope and form of tribe self-government.

7 JUSTICE JACKSON: All right. So you
8 concede that Congress has plenary power over
9 tribal sovereignty and self-government then?

10 MR. MCGILL: Tribe -- I believe that
11 Congress absolutely has the power to -- to
12 adjust and change the scope of tribes' power to
13 govern themselves.

14 JUSTICE JACKSON: All right. So what
15 do we do with the legislative history in regard
16 to this Act in which Congress repeatedly
17 referred to the kinds of -- of restrictions and
18 regulations in this area in ICWA as a matter of
19 tribal governance and self -- you know,
20 self-government and sovereignty?

21 I mean, Congress said things like
22 there's no resource that is more vital to the
23 continued existence and integrity of Indian
24 tribes than their children. They constantly
25 cast regulations regarding children, Indian

1 children, as a matter of tribal integrity,
2 self-governance, existence. So why isn't that
3 enough to bring it within the -- the -- the
4 scope of their plenary power?

5 MR. MCGILL: Addressing the tribal
6 existence point, I have four responses to that.

7 The first is that the third placement
8 preference doesn't even rationally advance that
9 objective. Placing a Seminole child with a
10 Cherokee family doesn't rationally advance the
11 existence of either tribe.

12 The second point is that placement
13 does not dictate membership. You need only look
14 as far as YRJ to show that. Tribes --

15 JUSTICE JACKSON: Right. I feel like
16 you're in the weeds of the actual regulation.
17 What I'm asking you is the broader question
18 about whether or not Congress has the ability to
19 regulate in this area.

20 MR. MCGILL: So --

21 JUSTICE JACKSON: I understood your
22 response to Justice Barrett to be not anything
23 outside of commerce or the plenary power
24 expanding to or extending to self-governance and
25 self-regulation. So I'm just asking as a matter

1 of categorization why aren't regulations that
2 concern whether or not Indian children are going
3 to remain in the tribes fitting within that
4 plenary power?

5 MR. MCGILL: Your Honor, in Williams
6 versus Lee, this Court described the power of
7 self-government as the power of reservation
8 Indians to make their own laws and to be ruled
9 by them. ICWA has nothing to do with that.

10 JUSTICE GORSUCH: Counsel --

11 MR. MCGILL: What --

12 JUSTICE GORSUCH: -- counsel, I'm
13 struggling to understand your argument. For the
14 first half of it, I heard policy complaints. It
15 took a while for me to even hear the words
16 "equal protection" or "Article I."

17 And I guess I'm -- I'm curious, first
18 of all, which do you think is your better
19 argument --

20 MR. MCGILL: We're --

21 JUSTICE GORSUCH: -- legally? Not --
22 not -- the policy arguments might be better
23 addressed across the street.

24 MR. MCGILL: Justice Gorsuch, as you
25 -- we are here to advance both arguments, but

1 I'd like to talk about the equal protection
2 argument.

3 JUSTICE GORSUCH: Okay. So, if equal
4 protection is your better argument, what do we
5 do about your standing problem? You've sued
6 federal officials, not the state courts who
7 actually are tasked with operating.

8 MR. MCGILL: I -- I think my answer to
9 that, Justice Gorsuch, starts with the
10 traceability standard, which is de facto
11 causation. And then I would say --

12 JUSTICE GORSUCH: No federal official
13 can dictate to a state family court what to do,
14 can he?

15 MR. MCGILL: I'm sorry, I did not hear
16 the question.

17 JUSTICE GORSUCH: Can any federal
18 official that you sued tell a state court what
19 to do?

20 MR. MCGILL: No, Your Honor.

21 JUSTICE GORSUCH: Okay. I would think
22 that might be the end of it. What am I missing?

23 MR. MCGILL: Two things, Your Honor.
24 First is the fact that the traceability standard
25 is de facto causation. And, as shown in the

1 Court's decision in Bennett versus Spear, the --
2 the agency that issues the regulation is the de
3 facto cause of a separate party that implements
4 it. That is what's going on here.

5 JUSTICE GORSUCH: We have a statute
6 here. You're asking us to enjoin somebody from
7 operating a statute.

8 MR. MCGILL: We also are --

9 JUSTICE GORSUCH: And the only people
10 who operate this statute are state court judges
11 --

12 MR. MCGILL: We're --

13 JUSTICE GORSUCH: -- and tribal
14 judges.

15 MR. MCGILL: We also are asking the
16 Court to affirm the judgment vacating the 2016
17 rule on the grounds that it implements an
18 unconstitutional statute.

19 JUSTICE GORSUCH: And then, in equal
20 protection --

21 MR. MCGILL: And that would provide --

22 JUSTICE GORSUCH: Fine. Let's say
23 you've got standing. I'm -- I'm -- I'll spot
24 you that for the purposes of this question. How
25 is this an invidious racial classification

1 rather than a political classification?

2 Tribes are -- are mentioned in the
3 Constitution, and, in fact, we have the treaty
4 power which mentions tribes as separate,
5 indicates that they're separate sovereigns.

6 MR. MCGILL: Your Honor, the Court
7 explained in Rice versus Cayetano that tribal
8 classifications cannot be used in regulation of
9 state affairs. It drew a line between the
10 regulation -- the use of tribal classifications
11 in regulating tribal internal affairs and
12 regulating the affairs of the state.

13 JUSTICE GORSUCH: You agree that the
14 Congress can treat with tribes, right?

15 MR. MCGILL: Of course, Your Honor.

16 JUSTICE GORSUCH: Of course. And, in
17 Mancari, we held this was a political
18 classification, right?

19 MR. MCGILL: With respect to the
20 hiring preference there at issue.

21 JUSTICE GORSUCH: Yeah. Okay. So
22 let's turn to your Article I. And I'm
23 struggling to understand what it is because you
24 seem to -- I'm sorry. I'll -- I'll -- I'll
25 carry on later, Chief.

1 CHIEF JUSTICE ROBERTS: Sure.

2 JUSTICE GORSUCH: Yeah.

3 CHIEF JUSTICE ROBERTS: Justice
4 Thomas?

5 JUSTICE THOMAS: Briefly, counsel, is
6 there a difference between regulating a tribe or
7 tribal affairs and regulating someone who
8 happens to be Indian?

9 MR. MCGILL: Your Honor, I think it
10 depends on the context. Somebody who -- if you,
11 by the word "Indian" --

12 JUSTICE THOMAS: Well, in this case,
13 what -- I mean, I -- I don't want to get the
14 whole range. We're talking about children who
15 do not reside on a reservation, right?

16 MR. MCGILL: They are covered by the
17 statute, yes.

18 JUSTICE THOMAS: Who are not
19 necessarily members of a tribe?

20 MR. MCGILL: Correct, Your Honor.

21 JUSTICE THOMAS: And that's what I'm
22 interested in. Is there a difference between
23 regulating a tribe or a reservation and
24 regulating someone who happens to be -- have
25 some Indian blood?

1 MR. MCGILL: Your Honor, I -- I would
2 submit certainly not in this case. Congress
3 here told us what it was doing. It was
4 identifying a class of persons who had blood in
5 common. That's at page 20 of the House report.
6 It wanted to put the -- that class of people in
7 the Indian community writ large.

8 JUSTICE THOMAS: I don't think that's
9 what I'm asking. And I'll stop with this. What
10 I'm asking is, assuming there is plenary
11 authority for the national government to treat
12 with or regulate tribal affairs and affairs on
13 reservations or related to reservations, is
14 there a difference when someone happens to be an
15 Indian not on a reservation, not a part of a
16 tribe, not associated with a tribe? Do we
17 consider them the same, or do we consider them
18 differently?

19 Because that someone is also a citizen
20 of the United States. And I'm asking you, are
21 we to just put them all in one ball simply
22 because you can regulate tribal affairs?

23 MR. MCGILL: No, Your Honor, because,
24 you know, at least in Mancari itself, it
25 recognized that the -- that the hiring

1 preference there was limited to tribal Indians.
2 And, there, the Court recognized that Mancari --
3 that the hiring preference was a -- in a sui
4 generis agency that had a special relationship
5 in the governance of tribes qua tribes.

6 And this, I think, is perhaps the --
7 you know, addresses the point of your question.
8 There is a difference between regulating tribes
9 as a polity and regulating persons who happen to
10 have tribal blood as persons.

11 CHIEF JUSTICE ROBERTS: Justice Alito?
12 Justice Sotomayor, anything further?

13 JUSTICE SOTOMAYOR: You're not
14 suggesting, but I think you may be, that
15 Congress's power is only with respect to tribes
16 and not Indians? They can't regulate the
17 relationship between Indians and others, whether
18 they're on the tribe or not? So all those laws
19 I read about previously at the founding, they
20 were unconstitutional to start with?

21 MR. MCGILL: Your Honor, I --

22 JUSTICE SOTOMAYOR: Because they had
23 nothing to do with reservations. They had to do
24 with individuals.

25 MR. MCGILL: Your -- I think, you

1 know, some of the laws you cited, I think, have,
2 you know, serious equal protection problems,
3 including, for instance, there's a law that's
4 still on the books that provides for the federal
5 government to forcibly enroll Indians in
6 boarding schools. That's 25 U.S.C. 302. So
7 there are some serious equal protection problems
8 in some of the cases that you cited --

9 JUSTICE SOTOMAYOR: That might be --

10 MR. MCGILL: -- the statutes.

11 JUSTICE SOTOMAYOR: -- but that has
12 nothing -- that doesn't talk to us about what
13 you're suggesting in answer to Justice Thomas,
14 which is that the plenary power is limited to
15 dealing with tribes and not in -- not the
16 treatment of individual members.

17 MR. MCGILL: What I was talking about
18 with Justice Thomas, Your Honor, is how -- the
19 -- the difference of a political classification
20 and a racial classification. And I -- the --
21 the -- our submission is that a classification
22 is political when it -- when it regulates the
23 tribe's, you know, sovereign interests, which is
24 to say regulating the tribe as a polity. When
25 it regulates Indian land, its treaty rights --

1 JUSTICE SOTOMAYOR: So you're saying
2 yes, they can't do only -- only individuals if
3 it has to do with the limited sovereignty
4 question? Is that what you're saying?

5 MR. MCGILL: As an equal protection
6 matter --

7 JUSTICE SOTOMAYOR: Okay.

8 MR. MCGILL: -- whether it --

9 JUSTICE SOTOMAYOR: I understand your
10 argument.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 JUSTICE KAGAN: I'm not sure I do, so
13 I'm going to continue on the same vein.

14 We have a long history of cases where
15 we've understood legislation relating to the
16 tribes as -- as political in nature and not as
17 racial. I think you have one case, which is
18 Rice.

19 And so I want to, on the one hand, say
20 what do you do with this long line of cases
21 which has consistently said, when you regulate
22 the tribes, you're regulating political
23 entities?

24 And then, on Rice, you know, a very
25 different situation. Number one, a Fifteenth

1 Amendment case not involved here, right to vote,
2 but even more important than that, really, the
3 classification did not relate to a tribe; it
4 related to some centuries-old affiliation with
5 Native Hawaiians, which was much harder to
6 understand as a current-day political entity.

7 So -- so I guess I think Rice doesn't
8 do much for you, and then all these other cases
9 really knock the legs out from this argument,
10 and I'm wondering whether you would comment on
11 that thought.

12 MR. MCGILL: Sure. Let me start with
13 Rice. I think Rice does explain those -- that
14 long line of cases that you refer to. It cites
15 them, you know, I think, at page 519. It cites
16 Moe, Fisher, Antelope. This is the line of
17 cases that I think you're referring to, and
18 these are cases that deal with tribes' sovereign
19 interests in Indian lands, treaty rights --
20 that's the fishing vessel case -- the ability of
21 Indians to govern themselves -- that's Fisher --
22 and its internal affairs.

23 That is the -- that is the line that
24 -- that Rice drew and how Rice understood
25 Mancari and the line that Mancari itself drew.

1 This -- this distinction that I'm drawing is
2 rooted in Mancari itself because Mancari says
3 that it would be a much more difficult question
4 if the hiring preference there extended to the
5 whole of the federal government.

6 JUSTICE KAGAN: I mean, Mancari is
7 such a different sort of case, right? Mancari
8 is Indians are -- are -- are -- on -- in a long
9 list of other racial classifications. It was
10 quite clear that -- that was the BIA one, is
11 that right?

12 MR. MCGILL: Yes, that's correct.

13 JUSTICE KAGAN: Yeah, okay, I'm sorry.
14 I was -- you -- I was mistaken.

15 But I -- I guess, again, I'm sort of
16 struggling with how different the classification
17 in Rice was to the classifications here.

18 MR. MCGILL: So I -- I understand the
19 question, Your Honor. Rice, this -- this was,
20 you know, the -- at the core of the Rice
21 decision. Rice starts by assuming what it calls
22 your premises not established in our case law,
23 both that Native Hawaiians should be treated as
24 an Indian tribe and, further, that Congress
25 delegated to the State of the -- Hawaii the

1 power to regulate them.

2 That -- that -- the Court assumed
3 that, assumed that they are an Indian tribe,
4 that Hawaii had the power to regulate, and then
5 it held that the tribe -- that Hawaii or
6 Congress could not regulate a tribe in this way
7 because it was regulating the affair of a state,
8 not the tribe's own self-government.

9 And I think, you know, the -- the
10 point I -- further point I would make about Rice
11 is that Rice -- the -- the -- the statute there
12 had a much closer tie to self-government. It
13 was the Office of Hawaiian Affairs. It had a
14 much closer tie to self-government than the
15 Indian Child Welfare Act.

16 JUSTICE KAGAN: Well, the first thing
17 you need for self-government is, you know, a --
18 a functioning polity. And Congress is very
19 clear in this statute that it thinks that this
20 statute is critical to the continuing existence
21 of the tribe as a political entity.

22 And that's, in fact, one of the
23 reasons it passes this statute, is the political
24 entity is itself being threatened because of the
25 way decisions on the placement of children are

1 being made.

2 So I -- I guess I can't imagine a -- a
3 -- a -- a statute that's more wrapped up, given
4 -- given the terms and given what we know about
5 what Congress was doing, is more wrapped up in
6 the continued flourishing of political
7 communities.

8 MR. MCGILL: Your Honor, the placement
9 preferences do not affect tribal membership.
10 You can be a member of the tribe wherever you
11 are placed. And it is, you know, the fact that
12 tribes often do unilaterally enroll children
13 regardless of where they are placed.

14 The further point I would make, Your
15 Honor, is that embedded in -- in the -- the
16 question is -- is a premise that tribes have a
17 proprietary interest in these children. And I
18 have to reject that premise. Tribes --

19 JUSTICE KAGAN: Well, this is
20 Congress's understanding of what it was doing,
21 you know, and, again, this goes back to Justice
22 Gorsuch's view of you can question the policy,
23 you cannot question the policy, but the policy
24 is for Congress's to make.

25 And Congress understood these

1 children's placement decisions as integral to
2 the continued thriving of Indian communities,
3 and Congress had a different view of the costs
4 and benefits of how these decisions were being
5 made. And that's not something that we can
6 second-guess, is it?

7 MR. MCGILL: It is under the
8 Constitution, Your Honor. I -- they -- the --
9 the -- the -- the Congress does not have the
10 power to treat these children as property of the
11 tribes --

12 JUSTICE KAGAN: We -- we can second --

13 MR. MCGILL: -- because of their
14 ancestry.

15 JUSTICE KAGAN: -- we can second-guess
16 things under the Constitution if you have made a
17 case about an equal protection violation or some
18 other constitutional violation.

19 MR. MCGILL: Right.

20 JUSTICE KAGAN: But what I'm
21 suggesting is that just the idea of standing up
22 there and saying this has nothing to do with the
23 continued thriving of Indian political
24 communities, that's a judgment for Congress to
25 make.

1 MR. MCGILL: There -- I want to be
2 clear about this. There was a real problem that
3 -- that Congress was trying to address. We're
4 not denying that there -- the existence of a
5 problem. But the means Congress chose are
6 impermissible. Two wrongs do not make a right
7 here.

8 JUSTICE KAGAN: Thank you, Mr. McGill.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch?

11 JUSTICE GORSUCH: Counsel, let's put
12 aside your equal protection complaints, which is
13 what I understand the heart of your response to
14 Justice Kagan.

15 On the Article I argument, you argued
16 this whole area is outside Congress's control.
17 All right? At least that's how I understood it
18 going in.

19 But I'm now wondering -- I am confused
20 by your argument. Do you acknowledge that
21 Congress has some off-reservation or off-tribal
22 land power --

23 MR. MCGILL: Congress can regulate --

24 JUSTICE GORSUCH: -- under Article I?

25 MR. MCGILL: Sorry to interrupt.

1 JUSTICE GORSUCH: Uh-huh.

2 MR. MCGILL: Congress may, under the
3 Indian commerce power, regulate commerce with
4 Indian tribes wherever it occurs.

5 JUSTICE GORSUCH: So -- so you agree,
6 for example, with our precedent going back to
7 1865 that says, in reference to any Indian tribe
8 or any person who is a member of such tribe, is
9 absolute without reference to the locality of
10 the tribe or the member of the tribe with whom
11 it's carried on? You agree with that?

12 MR. MCGILL: I'm not exactly sure
13 which case you're referring to, but I agree with
14 the --

15 JUSTICE GORSUCH: Holliday. Holliday.

16 MR. MCGILL: -- I think the -- pardon?

17 JUSTICE GORSUCH: Holliday.

18 MR. MCGILL: Right, there's equal
19 protection problems there, but yes, yes.

20 JUSTICE GORSUCH: I'm asking you to
21 put that aside. So -- so Congress can regulate
22 off-reservation?

23 MR. MCGILL: It can regulate commerce
24 with -- with Indians off-reservation, yes.

25 JUSTICE GORSUCH: Okay. And would you

1 have us -- if your view of commerce is that
2 narrow, as -- as -- as portrayed in your brief,
3 what happens to Congress's power to regulate
4 healthcare for Indians off-reservation? That's
5 a major part of Title 25. Would that go?

6 MR. MCGILL: I -- I -- I don't think
7 our -- our view of commerce is any more limited
8 than the Court described in Lopez. So I -- I
9 would --

10 JUSTICE GORSUCH: So that might go?

11 MR. MCGILL: No, I don't believe so.
12 I -- I --

13 JUSTICE GORSUCH: That would stand?
14 They could regulate healthcare for Indians
15 off-reservation? Yes or no?

16 MR. MCGILL: I think, to the extent
17 that it is a -- you're regulating articles of
18 commerce, it comes within the -- the heartland
19 of --

20 JUSTICE GORSUCH: Health -- healthcare
21 counts?

22 MR. MCGILL: It count -- it comes
23 within the heartland of how Lopez defined
24 commerce as I understand it.

25 JUSTICE GORSUCH: Healthcare counts,

1 but this doesn't?

2 MR. MCGILL: This is treating children
3 as property.

4 JUSTICE GORSUCH: Forget about the
5 equal protection argument for a moment.

6 MR. MCGILL: No, but it -- it goes to
7 the commerce.

8 JUSTICE GORSUCH: Counsel, if I -- so
9 commerce includes healthcare but not education,
10 is that -- and -- and -- and -- and -- and child
11 rearing, is that -- is that your view?

12 MR. MCGILL: No. It's -- you inserted
13 education. But our position is that the
14 commerce power does not extend to child
15 placement decisions.

16 JUSTICE GORSUCH: So -- okay. So
17 let's talk about that. If we've put aside the
18 off-reservation, so this really has to do with
19 something about family law, I -- I -- I take it,
20 the core of your complaint then?

21 MR. MCGILL: This -- this is a family
22 law case, Your Honor.

23 JUSTICE GORSUCH: And that's the core
24 of the problem in your view, that Congress can't
25 regulate family law matters for Indians

1 off-reservation?

2 MR. MCGILL: I think that the core of
3 the problem is, if this is within Congress's
4 authority, then there is nothing that cannot be
5 regulated by Congress if it touches upon
6 Indians.

7 JUSTICE GORSUCH: How about the fact
8 that the federal government does lots of other
9 family law mediation between sovereigns, the
10 Parent Kidnapping Act, for example, domestically
11 with respect to disputes among states, Congress
12 speaks there.

13 And, as Justice Sotomayor has
14 mentioned, when there's a dispute between
15 sovereigns, foreign sovereigns, it speaks there
16 and we don't question its authority to do so.

17 Wouldn't it be a little odd to think
18 that it couldn't do the same here?

19 MR. MCGILL: With respect to the
20 latter point, Congress, of course, has power to
21 enact laws to implement treaties, and so I -- I
22 think the Hague Convention-type legislation is
23 unremarkable. I think Congress acts in this --

24 JUSTICE GORSUCH: How about the Parent
25 Kidnapping statute?

1 MR. MCGILL: I'm -- I will confess to
2 be -- not being familiar with that one. But, if
3 you look at perhaps the --

4 JUSTICE GORSUCH: All right. Well,
5 we'll -- we'll put that aside then if you're not
6 familiar with it. You're saying it would be
7 possible to do it under the treaty power.

8 What if Congress tomorrow adopted a
9 treaty with the tribes that replicated ICWA?
10 Would that be within its power?

11 MR. MCGILL: It would perhaps -- I --
12 I think it perhaps would be within its Article I
13 power.

14 JUSTICE GORSUCH: That's my question,
15 yeah, it would be. Okay. And how about if it
16 did it under the Spending Clause? That -- could
17 that be within its Article I power?

18 MR. MCGILL: Well, that's how Congress
19 regulates the states in the Multi-Ethnic
20 Placement Act, and --

21 JUSTICE GORSUCH: So it could do these
22 things under Article I. You're just complaining
23 that it's done -- being done under the Indian
24 Commerce Clause?

25 MR. MCGILL: I think that that is our

1 argument. We're not saying that Congress is
2 powerless in this area. Congress has power,
3 certainly, through the -- the Spending Clause to
4 do any number of things with respect to state --
5 how states govern themselves.

6 JUSTICE GORSUCH: When it comes to
7 placement of children, is it a little
8 anachronistic to think that states have some
9 particular sovereign interest here when many of
10 them did not involve themselves at all in
11 placement matters directly until the 1960s? It
12 was mostly done privately for most of the
13 nation's history.

14 MR. MCGILL: I don't know that I would
15 describe it as anachronistic, but I think it --
16 the fact that things were done privately does
17 not change what this Court has said about the
18 state's primary role in the area of child
19 custody matters.

20 JUSTICE GORSUCH: How about the fact
21 that the federal government has been
22 historically involved in family law matters with
23 respect to Native Americans for a long time? As
24 Justice Kagan pointed out, it passed this
25 statute in -- in -- in kind of -- to remedy its

1 prior actions in this area with respect to
2 boarding schools and the displacement of Native
3 American children. So could it -- could it have
4 done the boarding schools, or is -- you're
5 arguing that that would have been improper too?

6 MR. MCGILL: I -- I think the boarding
7 schools statute requiring the -- or permitting
8 the forcible enrollment of Indian children in
9 boarding schools without the consent of their
10 parents is obviously unconstitutional.

11 JUSTICE GORSUCH: Under Article I?

12 MR. MCGILL: Yes, because it has
13 nothing to do with commerce in my -- would be my
14 submission.

15 JUSTICE GORSUCH: Okay. And then back
16 to Justice Kagan's questions, if commerce does
17 include things essential to Indian
18 self-governance, and I think you've conceded
19 that, tribal lands, tribal governmental
20 arrangements, I guess I'm struggling to
21 understand why -- why this falls on the other
22 side of the line when Congress makes the
23 judgment that this is essential to Indian self-
24 -- preservation of -- of Indian tribes.

25 MR. MCGILL: The -- the power that has

1 been recognized is the power to effectuate
2 Indian self-government, which is the power of
3 tribes to make their own laws and be ruled by
4 them.

5 And ICWA does not affect tribes'
6 ability to make their own laws. It doesn't
7 affect their ability to be ruled by them, except
8 with respect to Section 1911(a), which provides
9 for exclusive jurisdiction of children -- you
10 know, pertaining to children who are resident on
11 tribal lands.

12 JUSTICE GORSUCH: Lastly, is there
13 some irony to your position that you're here to
14 vindicate states' rights? We have 23 states
15 who've lined up on the other side. We've never
16 had a state court, near as I can tell, in the 40
17 some years since ICWA was adopted complaining
18 about this arrangement.

19 MR. MCGILL: I don't understand that
20 to be correct, Your Honor. I think there are
21 state courts that have recognized that ICWA has
22 -- it far exceeds Congress's --

23 JUSTICE GORSUCH: Has any -- has --
24 have state courts held that this is
25 unconstitutional?

1 MR. MCGILL: There's the case -- the
2 cases that held that it -- under what was known
3 as the existing Indian family doctrine, that
4 said that it would be unconstitutional as
5 applied to a child who had no connection --

6 JUSTICE GORSUCH: Right.

7 MR. MCGILL: -- to a tribe.

8 JUSTICE GORSUCH: Fair. But I'm not
9 aware of anybody holding ICWA facially
10 unconstitutional in the manner that you're
11 asking us to do.

12 MR. MCGILL: No, I -- I -- I would
13 concede that no state court has -- has --

14 JUSTICE GORSUCH: Gone anywhere --

15 MR. MCGILL: -- done that.

16 JUSTICE GORSUCH: Yeah. Okay. Thank
17 you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh?

20 JUSTICE KAVANAUGH: Earlier, in
21 response to Justice Jackson's question about the
22 legislative history, you said you had four
23 responses. You got out one and two about the
24 Cherokee, Seminole, and then the placement does
25 not equal membership. I was interested in what

1 three and four are, if you remember the
2 question.

3 MR. MCGILL: I think I do, Justice
4 Kavanaugh.

5 The third point is that the -- that
6 the placement -- to the extent we're talking
7 about tribal self-government, which is to say
8 the ability of tribes to make their own laws,
9 the ability under Williams, reservation Indians,
10 to make their own laws and be ruled by them, the
11 placement preferences do not even suggest that
12 any Indian child has to live on or near a
13 reservation.

14 And the fourth point, which is the
15 most fundamental point, which is that embedded
16 in this argument is that tribes have a
17 proprietary interest in these -- in these
18 children. And they are human beings. They are
19 citizens of the United States and the states in
20 which they reside. They are persons within the
21 meaning of the Fifth Amendment. And they have
22 liberty interests that the tribe cannot override
23 simply by unilaterally enrolling them.

24 JUSTICE KAVANAUGH: On the equal
25 protection issue, it'll be important for us to

1 figure out the scope and limits of Mancari. And
2 I'm going to ask two hypotheticals and then ask
3 you to explain what I think will be your answer.

4 So, one, would Mancari justify a
5 hiring preference for American Indians in other
6 agencies beyond the BIA, such as the Treasury
7 Department or the Justice Department, for
8 example, in your view?

9 MR. MCGILL: No, because, one, Mancari
10 itself casts doubt on that possibility. And,
11 two, there would be no tether to Indian
12 self-government.

13 JUSTICE KAVANAUGH: Second, would
14 Mancari alone justify a federally mandated
15 preference for state universities, college
16 admissions for American Indians, in your view?

17 MR. MCGILL: No, Your Honor.

18 JUSTICE KAVANAUGH: And why not?

19 MR. MCGILL: Again, because it would
20 have no tether to Indian self-government. I
21 think part of the flaw of the -- you know, the
22 arguments on the other side here is that it --
23 it reduces to anything that is good for Indians,
24 that could be characterized in that way or that
25 the government in its paternalistic judgment

1 thinks might be good for Indians can be -- is
2 permissible under their view.

3 JUSTICE KAVANAUGH: Well, wouldn't
4 that be good for Indian self-government in the
5 sense of ensuring additional, better education
6 for American Indians? Why wouldn't that
7 justification link up with tribal
8 self-government?

9 MR. MCGILL: It's too attenuated, Your
10 Honor. Rice, I think, explains this. Rice
11 draws this line between regulation of the
12 tribes' internal affairs and the use of tribal
13 classifications there and the use of tribal
14 classifications in the affairs of the state.

15 In your hypothetical, we're talking
16 about the affairs of the state. And I think
17 that, you know, the important point about Rice
18 is that there -- there -- in that case, there
19 was a -- not just a plausible, a fairly direct
20 tie to self-government of the indigenous people.

21 But the Court said Mancari could not
22 be extended to that new context because Mancari
23 was a limited exception based on the "sui
24 generis" role of the BIA in regulating Indian
25 tribes. And that's just simply not present in

1 your hypothetical.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice --
4 Justice Barrett?

5 JUSTICE BARRETT: Mr. McGill, I'd like
6 to ask you about the commandeering argument. So
7 I want to focus just on the active efforts
8 provision for right now. I want to get a grip
9 on how this works, you know.

10 So that provision requires the parties
11 seeking to effect a foster care placement or
12 termination of parental rights to satisfy the
13 court that active efforts have been made to
14 provide remedial services and rehabilitation
15 programs designed to prevent the breakup of the
16 Indian family.

17 And the government says, well, this
18 applies to both private parties and state
19 agencies. And so it's not directed at the state
20 agencies in compelling government action, in
21 compelling the state to take steps.

22 How does this work? Do private
23 agencies in the Brackeens' case -- I mean, do
24 private agencies initiate these proceedings, or,
25 really, is this something that falls on the

1 states?

2 MR. MCGILL: I think, on the ground,
3 it falls on -- on the states in the overwhelming
4 majority of -- of -- of -- of cases. I mean, I
5 can't speak to the -- to the whole of the United
6 States and -- but my understanding is, in the
7 overwhelming majority of cases, it falls on the
8 states to do this. And that is the -- you know,
9 of course, they are the ones that have the
10 ability to do so.

11 JUSTICE BARRETT: Okay. Thanks.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: Yes. So I -- I
15 think there's an aspect of your Article I
16 argument that really boils down to a fundamental
17 question that comes up in the law a lot, which
18 is who decides. Who decides whether regulation
19 in this area counts for Indian self-government,
20 promotes Indian self-government, has a
21 sufficient tether?

22 I keep hearing you say in response to
23 many of my colleagues' questions that you think
24 that regulation related to family affairs does
25 not have a sufficient connection to Indian

1 self-government. But, in the actual legislative
2 history of this -- of ICWA -- and I'm reading
3 from the Federal Register -- Congress says that
4 -- it -- it indicates that ICWA reflects its
5 "concern about preserving the integrity of
6 Tribes as self-governing sovereign entities and
7 ensuring that Tribes could survive both
8 culturally and politically." That's 81
9 Fed. Reg. -- Federal Register 38781.

10 So it seems to me that Congress has
11 made a decision that regulating in this area is
12 important for preserving the integrity of tribes
13 as self-governing, sovereign entities, and,
14 therefore, I don't think it's sufficient for you
15 to say to us that you think that that's not
16 true.

17 So tell me how we're supposed to
18 decide based on your view of whether or not this
19 is a sufficient tether, as opposed to what
20 Congress has said about it.

21 MR. MCGILL: I would -- first, I -- I
22 guess I have two responses to that, Justice
23 Jackson.

24 First is I would look to this Court's
25 cases that define the interest in

1 self-government, and I would start with Williams
2 versus Lee, which defines it as the right or the
3 ability of reservation Indians to make their own
4 laws and be ruled by them.

5 That -- that case has never been, you
6 know, to my knowledge, limited or abrogated.
7 And that is my understanding of how this Court
8 defines the interest in self-government.

9 JUSTICE JACKSON: But why would that
10 be our decision then? I'm still worried that
11 that would be this Court displacing Congress's
12 policy judgment around what counts.

13 MR. MCGILL: Because the text of the
14 statute and its -- you know, and its operative
15 effect does not advance the objective there.
16 The -- if the objective is preserving the
17 existence of tribes, the third placement
18 preference does nothing to effectuate that.

19 JUSTICE JACKSON: All right. Let me
20 ask you another question. You have seemed to be
21 very upset about Congress's exercise of plenary
22 authority over Indian affairs. You say we need
23 to look at it in a more narrow lens, I guess
24 consistent with the sort of general
25 understanding that Congress has limited

1 authority.

2 What I'm a little bit confused about
3 and concerned about is whether it's really
4 correct that we have to look at it so narrowly,
5 that is, the scope of Congress's authority as it
6 concerns Indian affairs, when we have said over
7 and over again that Congress has plenary and
8 exclusive authority, and when the history of our
9 Constitution indicates that the constitutional
10 design was about ensuring, in a way, that the
11 federal government had the authority over the
12 tribal relations, tribal affairs, and not the
13 states.

14 It seemed to me that baked into the
15 Constitution's structure related to this,
16 outside of just the Indian Commerce Clause
17 provision, is the notion that the federal
18 government, you know, vis-à-vis the states was
19 going to be taking charge of this, especially in
20 light of the Articles of Confederation
21 precedent.

22 So, if that's the case, then what --
23 what would you say about the thought that rather
24 than, you know, searching for, you know, what
25 additional limits there are on Congress's

1 authority, we start with the premise that, with
2 respect to Indian affairs, Congress has plenary
3 authority and, therefore, as we've said in all
4 of these prior cases, as long as it involves
5 Indian affairs and Congress is making policy
6 judgments, they have a constitutional basis for
7 doing so?

8 MR. MCGILL: Justice Jackson, if -- if
9 the -- if this arises from the constitutional
10 structure, as you suggested, then it has to be
11 the United States Govern -- the -- the United
12 States Government's regulation of tribes as on a
13 government-to-government basis. That's the
14 constitutional structure point.

15 And if we're talking about regulating
16 tribes as government -- governments, we are
17 talking about regulating their residual
18 sovereign interests, which are, as I described,
19 in Indian lands, it -- their treaty rights.

20 JUSTICE JACKSON: Yeah, but do you
21 dispute that there's a trust relationship? My
22 understanding was that, yes, we're talking
23 sovereign to sovereign but that as a part of
24 that was the understanding that the United
25 States was the greater sovereign, that it was

1 taking over the Indian sovereignty and,
2 therefore, had a trust relationship that arose
3 in that context and they were responsible for
4 Indian affairs as a result.

5 Do you dispute that?

6 MR. MCGILL: We don't -- of course, we
7 do not dispute the existence of the trust
8 relationship. All we're saying is that the
9 power that Congress exercises that has been
10 described as plenary is limited in some way by
11 the -- by the sovereign interests that --

12 JUSTICE JACKSON: So you're saying
13 that Congress -- Congress can carry out and
14 effectuate its trust relationship but only in
15 the limited ways that you are now articulating?

16 MR. MCGILL: No, Your Honor. I think
17 what we're saying is that there -- you don't
18 have to do anything with respect to -- the
19 federal government's trust relationship with
20 Indian tribes to recognize that that power does
21 not extend to regulating the placement of Indian
22 children in state courts.

23 JUSTICE JACKSON: Even if Congress has
24 decided that -- that regulation in that area is
25 necessary to prevent the extinction of tribes,

1 they can't do it, you're saying, pursuant to the
2 trust relationship that you seem to concede
3 exists?

4 MR. MCGILL: Your Honor, we do not
5 concede that -- that, for the reasons that I
6 elaborated, that this is not a -- the -- the
7 tribes do not have a proprietary interest in
8 these children. They are also -- take a -- take
9 YRJ. She is --

10 JUSTICE JACKSON: Can I just -- I'm
11 sorry, can I just ask one more question? My
12 time is short.

13 With respect to commandeering, where
14 Justice Barrett took you, do you have a case
15 that is older than the early 1990s related to
16 the commandeering principle? Is that the first
17 time -- I tried to look back to figure out where
18 anti-commandeering came from as a constitutional
19 concept.

20 And I'll tell you why I'm concerned
21 about it, because I think it's relatively recent
22 and I'm just trying to understand whether it
23 even conceivably applies to an area in which we
24 have already or long recognized that the federal
25 government has this sort of plenary authority

1 because states were interfering with Indian
2 affairs.

3 And so it seems to me odd that we
4 would suddenly say in this area using a
5 relatively new anti-commandeering principle that
6 the federal government can't do what it has long
7 done in terms of taking control of this area
8 away from the states related to Indian affairs.

9 MR. MCGILL: Your -- Your Honor, the
10 Court's anti-commandeering cases recognize that
11 the doctrine arises from the structure of the
12 Constitution and the Tenth Amendment. That was
13 obviously recognized in -- fully by New York
14 versus United States. But, as I recall --

15 JUSTICE JACKSON: In 1992?

16 MR. MCGILL: But, as I recall, there
17 -- there was a case called Coil that I think is
18 from the 1920s, maybe 1925, that involved the
19 federal government's dictating where Oklahoma
20 put its state capital. And I think that was the
21 earliest case I found that actually applied some
22 version of the anti-commandeering concept.

23 JUSTICE JACKSON: But we don't have
24 any anti-commandeering cases that -- that arise
25 in the Indian affairs context? This would be

1 the first time?

2 MR. MCGILL: I'm not aware of any,
3 Your Honor.

4 JUSTICE JACKSON: Thank you.

5 MR. MCGILL: I --

6 CHIEF JUSTICE ROBERTS: Do you have a
7 further --

8 MR. MCGILL: I -- I -- I would, just
9 except to the extent that Oklahoma, of course,
10 arose from once upon a time being Indian
11 territory.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 General Stone.

15 ORAL ARGUMENT OF JUDD E. STONE, II,
16 ON BEHALF OF TEXAS

17 MR. STONE: Thank you, Mr. Chief
18 Justice, and may it please the Court:

19 Congress cannot require states to
20 administer a nationwide child custody regime.
21 As far as the state is aware, this Court has
22 upheld only three kinds of laws even under a
23 plenary congressional power over Indian tribes:
24 first, those regulating trade or implementing
25 treaties with tribes in the ordinary, original

1 understandings of those clauses; second, those
2 applying to Indians within U.S. territories or
3 on Indian lands; and, third, those regulating
4 tribal governments as such.

5 ICWA far exceeds this plenary power,
6 applying only to child custody proceedings in
7 state courts off reservations.

8 Even if Congress could establish such
9 a scheme, however, it cannot order states to
10 enforce it. ICWA issues a dozen commands to
11 states or their officials. Each obscures
12 federal accountability for ICWA, and each foists
13 uncompensated costs on to states. Each is,
14 therefore, prohibited under Murphy.

15 And I welcome the Court's questions.

16 JUSTICE THOMAS: General Stone, it
17 would profit us that if you would address your
18 standing in this case, particularly since it
19 seems that, to the extent that you're
20 representing parents or potential parents, they
21 can represent themselves, and I think it would
22 be good to get an explanation of your standing.

23 MR. STONE: Certainly, Your Honor.
24 First and foremost, consistent with West
25 Virginia versus EPA from last term, Texas is, in

1 fact, the regulated party, the party obligated
2 to implement ICWA from beginning to end.

3 As this Court put it in West Virginia,
4 the fact that West Virginia and similar states
5 were the ones who were required to cut emissions
6 and otherwise alter their energy distribution,
7 that was enough to leave "little doubt" as to
8 their standing for the entirety of the Clean
9 Power Plan.

10 Second, Texas's -- Texas stands to
11 lose substantial amounts of Medicare -- or,
12 rather, Social Security Part IV-B and Part IV-E
13 money. In 2018, Texas received \$410 million
14 underneath those parts. Those parts are
15 expressly conditioned on Texas taking
16 affirmative steps to comply with ICWA. And the
17 regulations implementing those sections, 45
18 C.F.R. 1355.34 and 36, make clear in mandatory
19 language that if Texas does not, in fact, do so,
20 if any state does not do so, in mandatory
21 language, the -- the relevant administrative
22 entity shall withhold through a complex formula
23 up to 42 percent of that -- of that \$410
24 million. For Texas, that comes out to about
25 \$172 million for an agency with a \$2.4 billion

1 budget, so a very significant amount.

2 And then, finally, speaking as to
3 their specific equal protection injury, aside
4 from the fact that it costs us money to
5 implement the equal protection violating
6 provisions, for example, we have to determine
7 whether or not an individual is an Indian child
8 pursuant to the regulations and the statute.

9 Aside from that, there's a unique
10 conjunction of constitutional obligations here
11 that because this Court has held in Adarand that
12 the federal equal protection component of the
13 Fifth Amendment and the Fourteenth Amendment's
14 Equal Protection Clause essentially have the
15 same commands, any command by the federal
16 government that violates the Fifth Amendment,
17 that imposes a mandatory requirement on states
18 to essentially carry out that equal protection
19 violative component, requires the states to
20 violate equal protection.

21 And that is a unique constitutional
22 injury that Texas as a state, as an actor,
23 suffers.

24 JUSTICE SOTOMAYOR: This is quite a
25 theory you have. Every time that a state has to

1 interpret a federal law that might be
2 unconstitutional, the state has standing even if
3 that law hurts somebody else. That's what
4 you're basically saying, because we would be
5 complicit in the act of violating someone else's
6 rights. That's how I hear your argument.

7 MR. STONE: Certainly not, Your Honor.
8 It actually is much narrower than that. So take
9 a --

10 JUSTICE SOTOMAYOR: How narrower? You
11 don't have -- Justice Thomas pointed out the
12 Fifth Amendment in our cases are legion. You
13 can't represent individuals who have equal
14 protection claims. The parents are here before
15 us. They can defend their own claims.

16 I can understand your
17 anti-commandeering, your anti-delegation claims.
18 Potentially, that has to do with your expenses.
19 But those other equal protection violations of
20 being treated unequally belong to the parents,
21 not to Texas.

22 MR. STONE: Two components, Your
23 Honor. First of all, Texas suffers a classic
24 pocketbook injury when it has to actually
25 implement --

1 JUSTICE SOTOMAYOR: So you're saying
2 exactly what I started with. You're taking the
3 extraordinary position that anytime you have to
4 enforce an unconstitutional law you're complicit
5 and you have standing?

6 MR. STONE: No, Your Honor. No. It's
7 -- it results from a conjunction of a few
8 extremely unusual components of these commands.
9 One is -- and we can discuss this as part of the
10 anti-commandeering section. We do not view
11 these commands as permissible preemption under
12 NCAA versus Murphy but as commands to the
13 states. Those commands from the federal
14 government --

15 JUSTICE SOTOMAYOR: That's
16 anti-commandeering, so that's one factor.
17 What's second?

18 MR. STONE: The commands from the
19 federal government themselves violate the Fifth
20 Amendment's equal protection component. That
21 equal protection obligation --

22 JUSTICE SOTOMAYOR: As it applies to
23 the individuals?

24 MR. STONE: Yes.

25 JUSTICE SOTOMAYOR: Okay.

1 MR. STONE: That's correct.

2 JUSTICE SOTOMAYOR: And we're back to
3 what I said before. Now what's your third?

4 MR. STONE: Your Honor, because --
5 because that Fifth Amendment equal protection
6 violation is coterminous with Texas's equal
7 protection requirements, if Texas implements the
8 Fifth Amendment violation, it itself violates
9 the Fourteenth Amendment because they are, in
10 fact, coterminous.

11 JUSTICE SOTOMAYOR: We're back --
12 we're back to my first point.

13 JUSTICE BARRETT: General Stone, can I
14 ask you about the anti-commandeering point?
15 Because I'm trying to figure out how this works.
16 So the question that I asked Mr. McGill, is
17 this, the active efforts provision, one that
18 imposes an obligation on the states alone, or is
19 it something that could also fall on private
20 agencies or private parties?

21 MR. STONE: Well, the final rules
22 preamble helps solve this question as
23 specifically to -- to the active efforts
24 provision, where the final rule states that the
25 active efforts provision in ICWA was intended to

1 make states provide substantive services to
2 Indian families. It comes out in -- in express
3 language to make states, in fact, incur that
4 cost to provide social services.

5 That's the heart of what Murphy was
6 cautioning about, is that specifically a command
7 best understood as requiring a state to do a
8 thing, especially when it either hides political
9 accountability or foists uncompensated costs on
10 the states, is in the heartland of the
11 anti-commandeering doctrine. This, under that
12 second branch, is an easy case for purposes --
13 for purposes specifically of active efforts.

14 We have other provisions we're
15 challenging with other bases I'd be happy to
16 discuss if -- if you're curious, Your Honor.

17 JUSTICE BARRETT: Well, recordkeeping
18 seems to go a bit farther than some of our other
19 cases. We reserved that in Printz.

20 MR. STONE: This Court reserved it in
21 Printz with some very specific caveats, I agree,
22 Your Honor. Specifically, the Court said it
23 might, in fact, be permissible, given that --
24 and as Justice Scalia noted, it was unclear in
25 that case -- given that those courts regarding

1 the naturalization oaths may well have
2 volunteered essentially to that jurisdiction.

3 And then it becomes a case of, if the
4 courts are willingly serving for purposes of
5 doing this federal thing, that then it's a much
6 smaller intrusion, commandeering or not, for
7 them to have an ancillary paperwork burden.

8 Of course, states aren't volunteering
9 for ICWA in the first place. And I think the
10 thinness of the historical evidence specifically
11 on this point comes from the seven laws that
12 Respondents cite. Of those, two of them are
13 patently unconstitutional on other grounds. One
14 is one of the Alien and Sedition Acts. Another
15 is essentially a law that required a court make
16 a determination on pension eligibility that was
17 reviewable by an executive branch. So those
18 tell us nothing about the Constitution because
19 they're riven with a plain constitutional
20 violation.

21 Two more essentially have nothing to
22 do with states at all, or one more has nothing
23 to do with states at all, which is the
24 Homesteading Act of 1862. Does not mention
25 state courts or state governments in any way.

1 Cannot possibly tell us anything about
2 anti-commandeering.

3 Two more past that make it permissible
4 but not mandatory for states to accept bail
5 regarding certain federal fugitives or federal
6 prisoners. And the only two left are the same
7 two that are mentioned in Printz regarding
8 recordkeeping for naturalizations, with -- which
9 this Court looked at as essentially not enough
10 to determine the question even there.

11 So the laws they give as historical
12 evidence are far from something to demonstrate
13 even what Printz showed, let alone enough
14 generalized no courts component.

15 JUSTICE JACKSON: But, Mr. Stone --

16 JUSTICE GORSUCH: Counsel, before you
17 --

18 JUSTICE JACKSON: -- that assumes that
19 anti-commandeering applies in this entire area.
20 And can you speak to my concern about that? I
21 understood from New York versus United States
22 that anti-commandeering rests on the premise
23 that Congress has the power to regulate
24 individuals and not states, which may well be
25 true as a general matter, but, in terms of

1 Indian affairs, we have long interpreted the
2 Constitution to give Congress plenary authority
3 precisely because the Constitution seems to be
4 structured to give Congress, the federal
5 government, power at the expense of the states
6 with respect to Indian affairs.

7 It's sort of like the -- the -- the --
8 the background principle of all of this was that
9 states were getting involved in Indian affairs,
10 and the Constitution says no, Congress can -- is
11 the one that gets to direct it.

12 I don't understand why wrapped up in
13 that authority isn't Congress's authority to --
14 to direct the states to stay out of the way or
15 to do whatever it is that's necessary to ensure
16 that, you know, Indian affairs, Indian
17 sovereignty is protected?

18 MR. STONE: Two answers, Your Honor.

19 JUSTICE JACKSON: Yes.

20 MR. STONE: One coming from this
21 Court's case law and then one from the original
22 materials. One -- and this is the nearest
23 analogue of which I'm aware -- of course, this
24 Court was brought an argument that under the
25 Indian Commerce Clause was a sufficiently

1 plenary power to breach state sovereign
2 immunity. That's Seminole Tribe, and this Court
3 rejected that. It not only rejected that
4 argument, it overturned Union Gas in the
5 process.

6 So this Court has recognized -- it
7 actually made this explicit in Delaware versus
8 Weeks -- there may be a plenary power, but it is
9 not absolute. And the -- the lack of that
10 absolute component has been used -- has been
11 sort of applied for specifically preserving the
12 sovereign prerogatives of the states before.

13 JUSTICE GORSUCH: Counsel --

14 MR. STONE: That's the --

15 JUSTICE GORSUCH: -- if I might
16 interrupt, I'm sorry, but just -- I want to
17 understand your commandeering argument. It
18 seems like it's centrally related to two rather
19 modest aspects of ICWA. One is the
20 recordkeeping requirement, which you discussed
21 with Justice Barrett, is that right?

22 MR. STONE: That is one of them, yes.

23 JUSTICE GORSUCH: And the other major
24 one that you -- you cite is -- is -- is -- is
25 the active efforts provision.

1 MR. STONE: There are others we also
2 challenged. Those are two of the most major, we
3 agree.

4 JUSTICE GORSUCH: Okay. And -- and --
5 those are the major ones. All right. And with
6 respect to active efforts, I'm not sure I heard
7 an answer to Justice Barrett's question, and her
8 question was, does it apply equally to whomever
9 is bringing the -- the action in state court,
10 whether it's the state as it is sometimes or
11 private parties as it is sometimes? That active
12 efforts requirement, does it apply to both
13 equally?

14 MR. STONE: To both, yes; equally, no.
15 And so, to both, yes, it is under some
16 circumstances that private parties have to make
17 these efforts. Typically, that is the state,
18 as, again, was acknowledged in the -- in the
19 final rule.

20 JUSTICE GORSUCH: Typically because
21 it's the party active -- starting the
22 proceedings, right?

23 MR. STONE: Typically, yes, but also
24 --

25 JUSTICE GORSUCH: But not -- not

1 always?

2 MR. STONE: Not always, no, that's
3 correct. But also, later in the active efforts
4 provision, recall, again, in this -- in Murphy,
5 the Court said the -- the way that the Court
6 looks at it is, is this better looked at as a
7 regulation of the sovereign or instead as
8 something regulating private.

9 JUSTICE GORSUCH: Okay. I got it.

10 MR. STONE: The active efforts
11 provision specifically speaks to what a state
12 court may do with its official power.

13 JUSTICE GORSUCH: Right.

14 JUSTICE ALITO: May I come back to the
15 question whether the anti-commandeering doctrine
16 applies at all when Congress is exercising its
17 power over Indians? Excuse me.

18 Suppose Congress enacted a law
19 ordering the states to enact legislation
20 relating to Indians. Would that be a violation
21 of the anti-commandeering doctrine?

22 MR. STONE: I think it'd be -- I think
23 it would be about the most direct one
24 conceivable, Justice Alito.

25 JUSTICE GORSUCH: Counsel, if we could

1 turn to Article I, we've had many variations of
2 this -- this argument. We've heard that it has
3 to relate strictly to commerce. We've heard,
4 no, later today we heard, no, it can be
5 off-reservation. It can be family law
6 sometimes. It just can't be this combination
7 here.

8 What -- what is -- what exactly are
9 you asking us to adopt here? What is beyond the
10 Article I power?

11 MR. STONE: Certainly, Your Honor.
12 So, to clear up a -- a few things that you first
13 mentioned, we are not claiming that there is a
14 domestic relations exception generally. We're
15 not saying that the powers that Congress enjoys
16 must only be exercised on reservations or
17 similarly.

18 JUSTICE GORSUCH: Okay. So -- so
19 Congress can act off-reservation sometimes?

20 MR. STONE: Yes, Your Honor.

21 JUSTICE GORSUCH: Okay. And it can do
22 domestic relations sometimes?

23 MR. STONE: Yes, Your Honor.

24 JUSTICE GORSUCH: Okay. So what --
25 what's -- what's the magic broth that makes this

1 somehow a problem having conceded both those
2 points?

3 MR. STONE: Certainly, Your Honor.
4 It's because of the three components of what
5 this Court has recognized as plenary power.

6 The first, again, is, for example, the
7 implementation of treaties or acts of -- that
8 would be ordinarily understood in commerce.

9 This Court has described, for example,
10 Congress as having a plenary power when Congress
11 has prohibited alcohol sales to tribes. Of
12 course, forbidding the sale of alcohol or
13 forbidding any other sale of good would just be
14 an ordinary regulation of commerce.

15 JUSTICE GORSUCH: But you -- we
16 disavowed that argument, that it's strictly
17 related to commerce. So, again, what -- what is
18 the rule you would have us write? I'm just --
19 I'm just trying to figure out, how do I write
20 the opinion?

21 MR. STONE: Certainly, Your Honor.
22 There's three components to the plenary power.
23 One are the ordinary applications of the various
24 powers in the Constitution --

25 JUSTICE GORSUCH: Right.

1 MR. STONE: -- which encompass more
2 than just --

3 JUSTICE GORSUCH: But this goes beyond
4 that, so let's -- where is the limit?

5 MR. STONE: The limits come from
6 several of these Court's cases. One, this Court
7 has emphasized that Congress has special power.
8 This comes from *Tiger versus Western Investment*
9 *Co.* and *Kagama* itself, that the -- the -- the
10 government has a power, specifically speaking,
11 on regulating Indian members or, rather, Indian
12 tribes on Indian lands themselves.

13 JUSTICE GORSUCH: Well, but we've --
14 we've -- we've said that's not the limit here
15 either. So, again, counsel, you've said it
16 doesn't have to be on reservation and it can be
17 domestic relations. So what's -- how do you
18 write this?

19 MR. STONE: Respectfully, Your Honor,
20 Congress may act if it -- if it is in one of
21 three essentially parcels of power.

22 One of them isn't related to geography
23 at all, for example, the exercise of the treaty
24 power, the exercise of -- of the commerce power.
25 Of course, the exercise of the territory clause

1 would be geographically related. But, in this
2 first bucket, there is not a geographic
3 component.

4 The second, there is one, because, as
5 this Court recognized, the power goes
6 specifically to the soil and the people within
7 these limits speaking of Indian country.

8 The third is the power that Congress
9 has essentially to act on Indian governments as
10 governments. So, for example, expanding or
11 investing them with tribal immunity, extending
12 or foreclosing their ability to prosecute crimes
13 or for other sovereigns to prosecute crimes on
14 their land.

15 If Congress is acting pursuant to one
16 of those three components, then it falls
17 comfortably either within the Congress's
18 enumerated powers as originally understood or
19 the plenary power, which we are not asking this
20 Court even to contract, let alone to overturn.

21 JUSTICE KAGAN: General, I'm -- I'm
22 curious as to where you get those three
23 categories?

24 MR. STONE: They're a normative
25 description of what this Court has, in fact,

1 done or --

2 JUSTICE KAGAN: I mean, there's no
3 place --

4 MR. STONE: -- a description, rather,
5 of what this Court --

6 JUSTICE KAGAN: -- there's no place
7 where we've said these are the three categories
8 that define what the plenary power means,
9 correct?

10 MR. STONE: There are two places where
11 Congress has specifically stated that there is a
12 special power that track the second and third
13 categories that I'm describing. One, for
14 example, being for the third category regarding
15 governments, being that the -- the tribal
16 power -- the U.S. Government enjoys essentially
17 a complete power that the -- that tribal
18 immunity or tribal sovereignty exists at
19 Congress's sufferance.

20 Of course, to say something exists at
21 Congress's sufferance is to say they have
22 something like an absolute power.

23 JUSTICE KAGAN: Yeah, I guess the only
24 point I was making, that I'm sure that we can
25 find places where the Court has said that

1 Congress has power over each of these areas, but
2 I don't think you'll be able to find a place
3 where the Court has said what the plenary power
4 means is these three things and these three
5 things alone and the plenary power doesn't
6 extend further, because, after all, the Court
7 has said -- I mean, I -- I don't really believe
8 in -- in reading our opinions like statutes.

9 But, when the Court uses the phrase
10 "plenary power" tens and tens of times over
11 decades and decades, I mean, plenary means
12 unqualified. It means all-encompassing.

13 Now I don't doubt what you said
14 earlier, that it might have an occasional
15 exception here or there, but it strikes me as a
16 very odd way to think about plenary power to
17 just start, like, constructing categories and --
18 and saying everything else is left out when
19 we've said over and over everything, except
20 really rare things, are in.

21 MR. STONE: Two points, Your Honor.
22 First, we agree that we are describing a power
23 that has already left Article I constitutional
24 bounds. Our core exhortation is, because it is
25 already beyond the original understanding of the

1 powers Congress has, that this Court shouldn't
2 extend it further.

3 This Court has not come out and said
4 these are the three categories and there shall
5 be no more.

6 JUSTICE SOTOMAYOR: Original meaning
7 we have Justices Marshall and Story basically
8 using very broad language saying plenary powers
9 means all powers in every intercourse with
10 Indians. And we have a series of laws that were
11 not limited in the way that you talked about.
12 And we've had series of laws for 200 years not
13 limited.

14 You are excluding from that list all
15 of the trust obligations that include all of the
16 things that Justice Kavanaugh asked about you,
17 health clinics, education, marital relations,
18 Indian women who are married to white men.

19 These are all outside the three areas
20 you've talked about, but Congress has legislated
21 in them, and, certainly, as far back as the
22 founding of our Constitution, everyone
23 understood plenary meant anything that had to do
24 with the intercourse with Indians, and then,
25 clearly, with the trust obligation, the United

1 States took, as your colleague said at the
2 beginning, took over this dependent sovereign
3 nation and its members.

4 MR. STONE: Your Honor, I'd like to
5 begin with your observations regarding the trust
6 relationship and then go backwards to Story and
7 those uses of intercourse, if you will.

8 The -- regarding the trust obligation
9 in Menominee Tribe of Wisconsin, or Menominee
10 Band of Wisconsin Indians, and Jicarilla Apache
11 Nation, this Court made clear that, of course,
12 the Court has sometimes described a guardianship
13 and ward relationship, a trust relationship. It
14 has used a number of essentially metaphors to
15 describe the relationship between the United
16 States and the tribes.

17 But the obligations underneath that
18 trust -- this is a -- this is a core component
19 of Jicarilla -- come from positive law. They
20 come from statutes which dictate obligations by
21 the United States.

22 We certainly don't doubt that.
23 However, they do not have a common law component
24 where because there is, in fact, a trust, a
25 trust relationship, that, therefore, the United

1 States has plenary power to do as it wishes to
2 Indians wherever.

3 So regarding the historical
4 understanding of intercourse, speaking
5 specifically about Justice Story's commentaries,
6 which my friends on the other side cite, he
7 speaks about commerce and then speaks about
8 trade and intercourse and compares intercourse
9 with navigation, just as this Court did in
10 Gibbons v. Ogden, which is to say, in Story's
11 example, a rule, for example, about how foreign
12 vessels are to dock in the United States,
13 control over channels of commerce.

14 At no point did Story comment on there
15 being a general Indian affairs power.

16 JUSTICE GORSUCH: Counsel, I'm sorry
17 to interrupt, but this -- this new rule would --
18 would, I think, take a huge bite out of Title 25
19 of the U.S. Code, which regulates the federal
20 government's relationship with -- with tribal
21 members.

22 There are healthcare provisions that
23 Congress promises to Native Americans off
24 reservation. That doesn't seem to fall in any
25 of your buckets. Congress has permitted tribes

1 to exercise power over environmental regulations
2 that have indirect effects off reservation.
3 That would -- that would seem to go too.

4 We have laws that promise Native
5 Americans access to sacred sites off reservation
6 and religious liberties off reservation. That
7 -- that would seem to go. And I'm not even sure
8 maybe the liquor sale, those old precedents, but
9 maybe that's commerce. I don't know.

10 But there would be a lot that would be
11 bitten out of Title 25. We'd be busy for the
12 next many years striking things down.

13 MR. STONE: I don't think that's the
14 case, Your Honor, and I'd like to start with
15 Morton, which I think provides the first clue
16 that that's not the case.

17 When Morton was describing why the
18 kind of preference that it -- that it recognized
19 would not violate equal protection, was a case
20 that's --

21 JUSTICE GORSUCH: I'm not talking
22 about equal protection. I'm talking about
23 Article I.

24 MR. STONE: I -- I -- I understand,
25 Your Honor, but it was describing that virtually

1 every Indian preference in Title 25 depended on
2 a conjunction of an identifiable tribe of
3 recognized Indians on reservations.

4 JUSTICE GORSUCH: But that's not --
5 that's simply not true. I mean, you can state
6 that at the podium, but, if I look through Title
7 25, there are healthcare promises to individual
8 Native Americans who live in urban areas.

9 MR. STONE: So, first of all --

10 JUSTICE GORSUCH: Let's just take that
11 one. Gone?

12 MR. STONE: First of all, Your Honor,
13 that strikes me as commerce, at least -- at
14 least as this Court has --

15 JUSTICE GORSUCH: Healthcare is ---

16 MR. STONE: -- construed interstate
17 commerce.

18 JUSTICE GORSUCH: So we're back to
19 that. Okay. So healthcare is commerce. It's
20 just this isn't --

21 MR. STONE: First of all --

22 JUSTICE GORSUCH: -- whatever this is.

23 MR. STONE: No, child adoptions are
24 not commerce. They simply are not. The
25 provision --

1 JUSTICE GORSUCH: But health -- but
2 healthcare is?

3 MR. STONE: Yes, Your Honor.

4 JUSTICE GORSUCH: Okay. And -- and
5 environmental laws allowing regulation
6 off-reservation effects, that's -- that's --
7 that falls within commerce, but this doesn't?

8 MR. STONE: Entirely plausible. It's
9 a function of either interstate or -- either
10 interstate commerce or --

11 JUSTICE GORSUCH: How about -- how
12 about religious liberties and -- and the right
13 to access sites off -- off-reservation? Is that
14 commerce?

15 MR. STONE: Not commerce, Your Honor,
16 but that sounds especially if there's a
17 discriminatory component in the courts --

18 JUSTICE GORSUCH: No.

19 MR. STONE: -- or in the commerce --
20 Congress's Section 5 powers.

21 JUSTICE GORSUCH: No, it's just
22 promising -- no, you're -- no, the law just says
23 you get access to -- to places, and it preempts
24 state law.

25 MR. STONE: Then there might be a

1 Title --

2 JUSTICE GORSUCH: That might ---

3 MR. STONE: There might be an Article
4 I problem for the same reason why there was in
5 RFRA.

6 JUSTICE GORSUCH: Like I say, I think
7 there's a lot that you're asking us to -- we're
8 going to be busy, counsel, if this is the line
9 we're going to draw. Very, very busy.

10 MR. STONE: We are not requesting this
11 Court shrink the plenary power it's recognized
12 one bit. Everything that has been upheld
13 previously on the same bases it's been upheld
14 previously is --

15 JUSTICE GORSUCH: And do you agree
16 with your colleague on the -- who spoke earlier
17 that Congress could effectively do this same
18 law, maybe with a few nibbles around the edges,
19 commandeering, whatever, but could -- could --
20 could adopt something like ICWA through the
21 treaty power and through the Spending Clause?

22 MR. STONE: I think the problem on the
23 treaty power side is it would provoke the
24 question this Court left open in Bond, which is
25 the question of whether or not Congress may

1 legislate pursuant to a treaty in a way that
2 would exceed its Article I powers or other
3 limits in the Constitution. I don't know what
4 the answer to that question is, Your Honor, but
5 that would be squarely presented at that point.

6 JUSTICE GORSUCH: Spending Clause?

7 MR. STONE: Spending Clause, at least
8 the equal protection problem would remain at
9 least for that -- for purposes of the Spending
10 Clause. It would get around the
11 anti-commandeering problems --

12 JUSTICE GORSUCH: So this is a magic
13 words problem we have here today?

14 MR. STONE: Certainly not, Your Honor.
15 Congress is not free as a matter of fact to
16 regulate 50 state child -- 50 state child
17 adoption proceedings on the basis of race
18 regardless of what it calls it.

19 JUSTICE BARRETT: General --

20 JUSTICE SOTOMAYOR: Can I ask you a
21 question? I'm going to list a series of
22 statutes, and I just want a yes or no, does
23 Congress have the power to pass this statute,
24 and, second, why isn't it or is it
25 anti-commandeering, okay?

1 The statute protecting service members
2 from default judgments, including in child
3 custody cases, which requires notice,
4 appointment of counsel, stays of proceedings,
5 and in some cases, a setting aside of judgment.

6 Does Congress have the power to pass
7 that?

8 MR. STONE: Only under
9 anti-commandeering problems or Article I?

10 JUSTICE SOTOMAYOR: I said after --
11 under Article I.

12 MR. STONE: Under -- oh, under Article
13 I, yes, that's fine for Article I purposes.

14 JUSTICE SOTOMAYOR: Now you think it's
15 a violation of the anti-commandeering statute?

16 MR. STONE: Yes, Your Honor.

17 JUSTICE SOTOMAYOR: The statute on
18 inter-country adoptions, which says that a state
19 court must verify certain evidence and make
20 certain determinations. Inter-country
21 adoptions, foreign power, right? Yes? Is this
22 anti-commandeering also?

23 MR. STONE: May I?

24 CHIEF JUSTICE ROBERTS: Yes.

25 MR. STONE: I would have to know more

1 about the treaty --

2 JUSTICE SOTOMAYOR: That's a --

3 MR. STONE: It would not violate
4 Article I because of the treaty.

5 JUSTICE SOTOMAYOR: I just said to
6 you it says that a --

7 MR. STONE: I would have to know more
8 details.

9 JUSTICE SOTOMAYOR: -- that a state
10 court must verify certain evidence and make
11 certain determinations before it permits the
12 inter-country adoption.

13 MR. STONE: My first instinct is that
14 that is right on the line. The verify component
15 sounds as though it would be anti-commandeering.

16 JUSTICE SOTOMAYOR: I've gone through
17 -- your light is on. I'll wait to finish my
18 examples.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas?

22 Justice Alito?

23 JUSTICE SOTOMAYOR: All right. Then
24 the -- the -- 17 --

25 (Laughter.)

1 JUSTICE SOTOMAYOR: -- the 1799 Trade
2 and Intercourse Act, which requires state courts
3 to take proper bail for certain individuals
4 arrested by federal authorities. Can the
5 government do that to state courts?

6 MR. STONE: Article I, yes.
7 Anti-commandeering, no.

8 JUSTICE SOTOMAYOR: Okay. This 1834
9 Trade and Intercourse Act that sets the
10 standards of proof in property disputes
11 involving Indians?

12 MR. STONE: Certainly, Your Honor, in
13 part because those were specifically applying to
14 either United States territories or, as this
15 Court observed in Castro-Huerta, on Indian
16 reservations, which at that point were
17 understood functionally like federal enclaves.
18 That's completely fine.

19 JUSTICE SOTOMAYOR: How about a law
20 from 1888 setting forth certain evidence that an
21 Indian woman could use in state court to prove
22 that there was a common law marriage? Could
23 they do that?

24 MR. STONE: I don't know, Your Honor.
25 I have to see more about the statute because,

1 for example, if there were a geographic
2 component and a tribal component, that might
3 justify it.

4 JUSTICE SOTOMAYOR: Assuming there's
5 not?

6 MR. STONE: Assuming there's not --

7 JUSTICE SOTOMAYOR: Well, anywhere in
8 any state court --

9 MR. STONE: -- I don't think so.

10 JUSTICE SOTOMAYOR: -- they -- they
11 don't have Article I and they -- it's
12 anti-commandeering violation, both?

13 MR. STONE: It's that it would be an
14 anti-commandeering violation. It might --
15 depending on the rest of the statute, it may or
16 may not be an Article I violation.

17 JUSTICE SOTOMAYOR: How about a
18 statute that says that state law enforcement can
19 enforce immigration law so long as they follow
20 certain minimum procedures? Why isn't that
21 anti-commandeering?

22 MR. STONE: Because it says "can." It
23 allows -- the statute allows the states to
24 choose to do so or not.

25 JUSTICE SOTOMAYOR: All right.

1 MR. STONE: For the same reason that
2 if Congress says you may regulate or we will but
3 does not force states to do so. That's not a
4 commandeering violation.

5 JUSTICE SOTOMAYOR: Thank you,
6 counsel.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?

8 JUSTICE KAGAN: General, I thought I'd
9 just give you a chance to respond to a reaction
10 I had to your brief, and the reaction was that
11 there is an extraordinary amount of Texas's view
12 of policy in your brief. So I'll just read you
13 a few things.

14 You say that ICWA subordinates the
15 needs of Indian children, that it results in
16 chaotic and often tragic outcomes, that it
17 returns children to unsafe environments, that it
18 excuses physical abuse, that it contributes to
19 the alarming statistics surrounding Indian child
20 welfare. I could go on. I haven't really even
21 touched the surface.

22 Now this may be Texas's view. It's --
23 it's not a view that any other state has told us
24 its -- it shares. I don't know whether Texas's
25 view are right or not. I don't have any policy

1 views in this area to speak of. I don't know
2 enough.

3 I mean, the point is courts don't know
4 enough, really. This is a matter for Congress,
5 isn't it? It's not a matter for the courts to
6 decide whether ICWA does these terrible things
7 or whether ICWA doesn't do any of them. Isn't
8 that really Congress's judgment that we're
9 supposed to respect?

10 MR. STONE: Two parts, Your Honor.
11 The first is I agree that those observations,
12 those -- those statements of Texas's views have
13 nothing to do with non-delegate -- our
14 non-delegation anti-commandeering or Article I
15 challenges whatsoever. Those live or die on
16 various legal principles that are not those.

17 JUSTICE KAGAN: They're just
18 atmosphere?

19 MR. STONE: They're in part
20 atmosphere, yes, Your Honor, in part because
21 there's a dispute about whether or not equal
22 protection -- the equal protection standard here
23 is rational basis or strict scrutiny.

24 Now my friends on the other side
25 haven't attempted to defend this as a matter of

1 strict scrutiny, and so, to the extent that
2 Congress is describing that it has a certain
3 purpose, the fact that that purpose has been
4 woefully unmet by the actual effects of ICWA is
5 relevant for purposes of this Court's albeit
6 quite forgiving rational basis standard.

7 JUSTICE KAGAN: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

10 JUSTICE GORSUCH: You agree that
11 Congress could do something like ICWA if it were
12 limited to children on reservations?

13 MR. STONE: Absolutely, Your Honor.
14 If it were limited to something -- if it were
15 only applying to tribal members on tribal
16 reservations.

17 JUSTICE GORSUCH: Okay.

18 MR. STONE: At least for tribal
19 courts, it could give full jurisdiction to them.

20 JUSTICE GORSUCH: How do we deal with
21 the fact that -- you know, we -- we talked about
22 reservations throughout this conversation and in
23 the briefs. But Indian land throughout the
24 western United States, as I'm sure you
25 appreciate, after the post- -- after the

1 allotment era is full of checkerboards, and so
2 you're going to have children who may be on
3 allotted Indian land or next door to it, not on
4 allotted Indian land.

5 And I -- part of what you're doing --
6 your -- your argument would encourage is for
7 people to keep their children on Indian land,
8 not necessarily allow them to be foster-cared
9 off Indian land, create a disincentive and also
10 just a massive amount of confusion if everything
11 depends upon the happenstance of geography.

12 MR. STONE: Congress certainly has the
13 power, if it wished, to be able to take new
14 lands and essentially add them to allotments or
15 reservations or to sort of deem for purposes of
16 Article I a -- you know, an Indian land or a
17 place of Indian land. This is the reservation
18 or relevant Indian lands for purposes of what
19 we're discussing, how we're acting upon an
20 Indian tribe.

21 It might be the case that Congress
22 actually has to appropriate money to take title
23 to some of those provisions, but that would be
24 the sort of administrative work that Congress
25 can still do.

1 JUSTICE GORSUCH: The -- the
2 checkerboard problem just would persist?

3 MR. STONE: Unless Congress took
4 actions --

5 JUSTICE GORSUCH: Yeah.

6 MR. STONE: -- to fix it, which it
7 easily could with its enumerated powers.

8 JUSTICE GORSUCH: And then, finally,
9 it -- it -- it does seem like a lot of this
10 focuses on -- on the fact that this is family
11 law, but -- and I just want to give you an
12 opportunity to respond to the same question I
13 asked Mr. McGill on this, which is really two
14 parts of it.

15 One is the federal government often
16 plays a role in mediating disputes between
17 sovereigns in the family law area, whether it's
18 the Hague Convention internationally or whether
19 the Parent Kidnapping Act domestically. So why
20 would it be awkward to think that Congress could
21 exercise a similar authority with respect to
22 disagreements between state sovereigns and
23 tribal sovereigns?

24 MR. STONE: So -- so two points, Your
25 Honor. The first, speaking of the Hague, of

1 course, those are treaties between equal, full
2 sovereign nations that are agreed to or not on
3 the basis of whether those sovereigns each have
4 a chance to walk away.

5 The most fundamental difference here,
6 of course, is that states have no choice to walk
7 away from ICWA. ICWA --

8 JUSTICE GORSUCH: States have no
9 choice to walk -- they have to apply the Hague
10 Convention and they have to apply the Parent
11 Kidnapping Act. They've got no choice in the
12 matter.

13 MR. STONE: But the point is there's
14 no mediating as between tribes and states on
15 sovereigns. It's -- it's the United States
16 saying you, States, shall do this or through a
17 combination of --

18 JUSTICE GORSUCH: That's exactly what
19 it does in the Hague Convention, counsel, and
20 the Parent Kidnapping Act. It says, State
21 Courts, you shall do this. It's a rule of
22 decision that it sets forth.

23 MR. STONE: And -- and for purposes of
24 treaties, the Constitution recognizes that is an
25 exclusive federal operation by conjunction of

1 the power in Article II and removal of that from
2 the states in Article I, Section 10.

3 JUSTICE GORSUCH: Okay. So we're back
4 to, if they did this through treaty, it would be
5 okay?

6 MR. STONE: Or at least it would be a
7 lot closer.

8 JUSTICE GORSUCH: All right. And then
9 how about the fact that the federal government
10 has been heavily involved in domestic affairs on
11 -- with respect to Native American children
12 throughout our history, whether it's through
13 treaties, orphan children, or whether it was
14 through the -- the boarding school saga of the
15 last century? Why isn't that some evidence of
16 -- of -- of plenary power in this area too?

17 MR. STONE: Well, in part, because,
18 for example, with boarding schools, just the
19 ordinary powers over territory and property or
20 otherwise ordinary appropriations may explain
21 that.

22 JUSTICE GORSUCH: They took children
23 off-reservation, counsel.

24 MR. STONE: I -- I understand that,
25 Your Honor. And I understand that there's no

1 getting around the fact that both federal and
2 state history regarding Indian tribes carries a
3 variety of very shameful and terrible elements.

4 JUSTICE GORSUCH: You're -- you're --
5 you're saying it's all linked to territory.
6 That one wasn't.

7 MR. STONE: The problem, Your Honor --

8 JUSTICE GORSUCH: Same thing with all
9 the treaties with respect to Native American
10 orphans throughout the history of the country.

11 MR. STONE: The fact that there is a
12 terrible problem Congress is attempting to
13 remedy does not necessarily mean it has Article
14 I power.

15 After all, Congress attempted to -- to
16 remedy the nationwide problem of vicious
17 domestic violence. And this Court said that
18 VAWA, nonetheless, fell outside the Court's --
19 or outside Congress's Article I powers.

20 JUSTICE GORSUCH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh?

23 JUSTICE KAVANAUGH: I want to ask
24 about the equal protection issue quickly.

25 The equal protection issue is

1 difficult, I think, because we have to find the
2 line between two fundamental and -- fundamental
3 and critical constitutional values.

4 So, on the one hand, the great respect
5 for tribal self-government for the success of
6 Indian tribes with -- and Indian peoples with
7 recognition of the history of oppression and
8 discrimination against tribes and people. So
9 that's on the one hand.

10 On the other hand, the fundamental
11 principle we don't treat people differently on
12 account of their race or ethnicity or ancestry,
13 equal justice under law, I don't think we would
14 ever allow, as the Court suggested in *Palmore* in
15 1984, Congress to say that white parents should
16 get a preference for white children in adoption
17 or that Latino parents should get a preference
18 for Latino children in adoption proceedings. I
19 don't think that would be permitted under that
20 principle of equal justice that we recognized in
21 *Palmore*.

22 So those are the two principles on
23 equal protection that I think focus the inquiry.

24 How do we draw the line?

25 MR. STONE: Well, Your Honor, I think

1 first you look to Mancari itself, which took a
2 first attempt at drawing this line. And as
3 described in Rice and as applied from Mancari in
4 the six cases that immediately followed, there
5 were always at least two necessary
6 preconditions, again, describing Rice now.

7 One, that the preference or the
8 discriminatory rule or set-aside always reached
9 only -- and this is in Rice -- only members of a
10 federally recognized Indian tribe because that
11 was the component that made it clear that you
12 were dealing actually with the Indian tribe as a
13 body and the people who constituted that body
14 and not on the basis of race.

15 And then, second, Mancari saw as
16 significant that each of the preferences that it
17 otherwise understood operated on or at least
18 near an Indian reservation because the political
19 preference related to self-government and
20 analogizes -- analogized to a couple of things
21 to individuals who sought to serve a municipal
22 government, to be able to promote the efficient
23 delivery of services, to the territorial
24 requirements of serving an office in the United
25 States Constitution.

1 And so those are the two components
2 Mancari looked at as vital. ICWA includes
3 neither. It operates only off of tribal
4 reservations. It does not require a child who
5 will be subjected to ICWA to be a member of the
6 tribe. And I think that puts this clearly on
7 the invidious race discrimination side of that
8 very tricky line that you're highlighting.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 JUSTICE BARRETT: General Stone, I
13 want to take you back to the active efforts
14 provision.

15 One response that the government has
16 is that the state could just choose not -- could
17 walk away, essentially, and, certainly, private
18 parties have the option to participate or not in
19 termination-of-rights proceedings or seeking
20 foster care placement.

21 How would that work? Could Texas walk
22 away? You know, if you had a child who was a
23 member of a tribe and was in a situation in
24 which the child was in danger or, you know, like
25 the Brackeens' children here, like, you know,

1 YRJ, could Texas choose -- could the Texas
2 agency choose not to intervene or seek a foster
3 care placement for the child?

4 MR. STONE: First of all, as a matter
5 of Texas substantive law, no. But putting that
6 aside, even if Texas substantive law allowed
7 that, it would be very strange for the federal
8 government to say this isn't commandeering
9 because you can always just stop, you would just
10 not do it altogether, when it's talking about a
11 core police power, which is saying the health --
12 the health, safety, and welfare of vulnerable
13 children.

14 So I think the fact that that is the
15 -- the sort of component they're offering, aside
16 from I have no idea how as a practical matter
17 Texas could do that, the fact they're saying do
18 it our way or else, I think, is a more in the
19 nature of a confession than an explanation.

20 JUSTICE BARRETT: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Jackson?

23 JUSTICE JACKSON: Yes. So, in the
24 Mancari case, we said "the plenary power of
25 Congress to deal with the special problems of

1 Indians is drawn both explicitly and implicitly
2 from the Constitution itself."

3 Do you agree with that proposition?

4 MR. STONE: No, Your Honor, because we
5 believe that at least some components of the
6 plenary power are wrong as an original matter,
7 but we are not challenging them for purposes of
8 this case.

9 JUSTICE JACKSON: All right. So we
10 assume --

11 MR. STONE: To accept them, yes.

12 JUSTICE JACKSON: -- you accept this.

13 Okay. What -- what I'm worried about
14 is, what if the special problem of the Indians
15 is the manner in which a state is handling
16 custody determinations, is the manner in which
17 placement determinations are being made, are
18 these children being snatched from their homes,
19 et cetera, et cetera, as a historical matter?

20 I am not at all sure that
21 anti-commandeering principles would prohibit the
22 federal government, who has plenary power over
23 solving special problems of Indians, to direct a
24 state in light of this power to do something
25 about it.

1 Justice Alito says they couldn't --
2 could they legislate? I don't know that I can
3 see that they couldn't given the plenary power.

4 And I'm also worried about the -- the
5 sort of ahistorical gloss of this because it
6 seems to me that there is ample evidence
7 historically that the design of the Constitution
8 gave the federal government that very power at
9 the expense of the states, that we had had a
10 previous set of circumstances in which the
11 federal government and the state government
12 shared power related to Indian affairs and that
13 the Constitution came along and gave it to the
14 federal government.

15 So can you help me to understand in
16 light of all of those concerns why we would have
17 anti-commandeering principles at work to thwart
18 the federal government from exercising the
19 plenary authority that's been -- it's been given
20 to deal with the special problems of Indians in
21 this way?

22 MR. STONE: If you'll allow me to
23 start with the historical materials and then
24 I'll turn back to essentially an argument from
25 precedent, and then, if there are any further

1 questions, I'd be happy to resolve them.

2 First, just speaking about just sort
3 of original materials, the original draft of
4 what eventually became the Indian Commerce
5 Clause was submitted by James Madison as a power
6 to -- I'm closely paraphrasing here -- regulate
7 Indian affairs within the U States.

8 That was revised down by the Committee
9 of 11 to a narrower power to regulate Indian
10 affairs, which was further revised down to a
11 power to regulate Indian commerce.

12 JUSTICE JACKSON: All right. So what
13 about the Articles of Confederation? What --
14 what do we do about the inferences that people,
15 historians, have told us that what was happening
16 with the shift from the way in which the power
17 was structured at that point to the Constitution
18 was about making sure that the federal
19 government had certain authority and that this
20 was one of those areas?

21 MR. STONE: Again, on this two points,
22 the first being Federalist 42 I think holds part
23 of the answer, which my friends on the other
24 side rely on. Federalist 42 specifically cites
25 the two limitations regarding what was then

1 Article IX of the Articles of Confederation.

2 And then later, when it describes how
3 it's -- it removed itself of I think these --
4 these "embarrassments," it says, and then,
5 therefore, this whole power will allow
6 regulation of trade. It uses specifically the
7 word "trade" to describe the power that has been
8 unshackled by these two things. Not even
9 commerce more broadly but trade.

10 So the idea that Federalist 42's
11 understanding of the changes to -- to Article IX
12 of the -- of the Articles of Confederation would
13 have expanded to an -- to an all-encompassing
14 Indian affairs power I think is just in the
15 teeth of that historical evidence.

16 JUSTICE JACKSON: All right. But, in
17 the actual Constitution, we have commerce and we
18 have historians that have said that at the time
19 commerce meant more than trade. It included
20 intercourse. Justice Sotomayor has brought that
21 up several times. So what do you say in
22 response to that?

23 MR. STONE: The problem is here is the
24 syllogism they're relying on, which is that
25 commerce mean -- can -- can mean trade and

1 intercourse. Intercourse can mean all
2 relationships in between men and groups of men.
3 Therefore, commerce means all relationships
4 between groups of men.

5 In Gibbons, in Story, in other
6 original sources, intercourse is paired up with
7 -- specifically in Gibbons, with the word
8 "navigation" so as to describe what we now would
9 refer to as the channels of commerce, the
10 ability to set rules as to what foreign boats
11 may dock in places.

12 So "intercourse" doesn't get
13 Respondents the way to ICWA. It doesn't even
14 get them beyond what we would ordinarily think
15 of as the Commerce Clause now.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. Kneedler.

19 ORAL ARGUMENT OF EDWIN S. KNEEDLER

20 ON BEHALF OF THE FEDERAL PARTIES

21 MR. KNEEDLER: Thank you, Mr. Chief
22 Justice, and may it please the Court:

23 As this Court recognized in Holyfield
24 and Adoptive Couple, ICWA was enacted in
25 response to serious harms caused by widespread

1 child welfare practices that resulted in the
2 separation of large numbers of Indian families,
3 often unwarranted, through adoption or foster
4 placement, usually in non-Indian homes.

5 Over the more than 40 years since its
6 enactment, ICWA has furnished vital protections
7 against those practices and has become
8 integrated in state child welfare practices.
9 There's no basis for uprooting those practices
10 or for overturning Congress's considered
11 judgment in enacting ICWA.

12 ICWA, in fact, is a valid exercise of
13 Congress's power over Indian affairs in several
14 respects. That power is grounded in the text of
15 the Constitution, including the Indian Commerce
16 Clause. It is grounded as well in the
17 constitutional structure in which Indian tribes
18 occupy a unique status as dependent sovereigns
19 to which the United States owes a duty of
20 protection, and that duty of protection, as this
21 Court observed in *Kagama*, derives in large
22 measure from the fact that the national
23 government and the states aiding it, acting
24 through treaty and war powers, diminished the
25 tribes' ability, put them in a position of

1 dependency, and, as this Court said in *Kagama*,
2 *Seber*, and other cases, with -- gave rise to a
3 duty of protection, which in turn encompassed a
4 power of protection.

5 Congress's efforts to address the
6 problems in ICWA, protecting family integrity,
7 kinship, unity, and the integrity and long-term
8 existence of tribes, lie at the core of
9 Congress's power under the plenary powers. It
10 does so by -- not by displacing state authority
11 but simply imposing minimum standards on states'
12 exercise of that authority by seeing foster care
13 and adoption in -- in state courts.

14 Petitioners' plea to this Court to set
15 aside ICWA on its face would undermine those
16 vital protections that have worked well, as the
17 amicus brief by 23 states shows, since its
18 enactment. It would also gravely undermine this
19 Court's Indian jurisprudence by carving up
20 Congress's plenary power into discrete
21 categories, which this Court has never
22 recognized. And it would undermine the reliance
23 of Congress, of tribes, of individual members,
24 and, here, states on Congress's exercise of
25 power.

1 JUSTICE ALITO: Well, Mr. Kneedler, if
2 the plenary power has no limits, then, of
3 course, there isn't any Article I issue for us
4 to decide. Does it really have no limits in
5 your view?

6 MR. KNEEDLER: No. Mancari announces
7 the core of the test, which would have to be
8 rationally related to the fulfillment of
9 Congress's unique obligations to Indians. So,
10 in -- in that, there -- it is an implementation
11 of the dependent status and the protection,
12 whether that comes just from the Indian Commerce
13 Clause or the amalgamation of Congress's vary --
14 various powers, but it -- it has to be in
15 service of the obligations to the Indians.

16 And this Court in Mancari said it has
17 to be reasonable and rationally related to
18 Congress's fulfillment of its unique powers.
19 There is, I think, a reasonableness there, but
20 this is at the core of something that is
21 reasonable.

22 JUSTICE ALITO: So rationally related,
23 is that our usual rational basis test?

24 MR. KNEEDLER: I think Congress's
25 judgment whether -- whether it -- it does serve

1 that purpose is entitled to great deference. I
2 think it may not go all the way to rational
3 basis because -- I -- I think it's important to
4 recognize that Congress has acted over the two
5 centuries since the adoption of the Constitution
6 in pragmatic ways. When it has been confronted
7 with a particular problem, it has assessed that
8 problem. It has come up with what it regards as
9 the appropriate solution to that problem and has
10 acted in -- in a reasonable manner. And this
11 Court has said that deference to Congress's
12 judgment about what is reasonably essential to
13 carry out the trust responsibility is called
14 for.

15 CHIEF JUSTICE ROBERTS: The --

16 JUSTICE ALITO: Could Congress say --

17 CHIEF JUSTICE ROBERTS: No, no, go
18 ahead.

19 JUSTICE ALITO: Could Congress go
20 further than it has gone in ICWA and say that an
21 Indian child may not be adopted by an -- by a
22 non-Indian couple under any circumstances?

23 MR. KNEEDLER: I think that would --
24 that would obviously go further, and I would
25 want to know the -- the -- the circumstances,

1 but I would think that would be a difficult law
2 to defend that --

3 JUSTICE ALITO: That's not rationally
4 related in the same way that this is? I mean,
5 it's -- it's more -- it -- it -- I honestly
6 don't -- I've had this -- had great difficulty
7 dealing with this Article I question because, if
8 "plenary" means plenary, Congress can do
9 whatever it wants, fine. As I said, it -- it's
10 an easy case. There's nothing there under
11 Article I.

12 But, if there are limits, it's hard
13 for me to see where the limits are. That's
14 where I -- that's where I need help.

15 MR. KNEEDLER: Well, I -- I -- I think
16 -- I think the place to start -- frankly, I
17 think it's difficult to start -- to state one
18 rule that applies across the board in all the
19 various circumstances where Congress might act,
20 criminal laws, education, and healthcare, as
21 Justice Gorsuch mentioned, child -- child
22 welfare.

23 But -- but what this Court has said --
24 and -- and, again, I want to come back to this.
25 Seber was an example where it involved tax

1 exemptions for property, but the Court -- the
2 Court, in upholding that, said these tax
3 exemptions are appropriate in aid of Congress's
4 carrying out its obligation to --

5 JUSTICE ALITO: What about the
6 boarding school law? Congress had the power to
7 do that?

8 MR. KNEEDLER: Congress -- Congress
9 had the power at the time, I -- I -- I think.

10 JUSTICE ALITO: Well, if it were to do
11 it --

12 MR. KNEEDLER: Seriously misguided.

13 JUSTICE ALITO: -- if it were -- yeah.
14 Okay. If it were to do it tomorrow, would that
15 fall outside Congress's plenary power?

16 MR. KNEEDLER: I -- I well, I -- I --
17 I -- it has to be -- the -- the plenary power, I
18 -- I think there are at least two -- two things
19 to bear in mind about this. I think Congress,
20 when dealing with a tribe in its political
21 capacity, has a great deal of power to diminish
22 the tribe's or regulate the tribe's exercise of
23 its governmental authority, like under the
24 Indian Civil Rights Act, et cetera. That's --
25 that's dealing with the tribes as tribes in a

1 political capacity.

2 I think where Congress is addressing
3 the protections for individual Indians, either
4 children, adults, whoever, then that -- that's
5 what triggers the formulation of the -- of the
6 trust responsibility or the dependent status of
7 -- of tribes. It has to be reasonably related
8 to Congress's unique obligations to Indians --

9 JUSTICE ALITO: All right. Could
10 Congress -- could --

11 MR. KNEEDLER: -- which means it has
12 to be protective, not harming.

13 JUSTICE ALITO: Could -- could --
14 could Congress enact a law that alters the
15 substantive law that states apply in areas like
16 -- like contracts or torts or rules of evidence
17 when one of the parties in the case is an
18 Indian?

19 MR. KNEEDLER: I think the mere fact
20 that the party is an Indian would probably not
21 be sufficient.

22 JUSTICE ALITO: Why? Why isn't that
23 rationally related to furthering the interests
24 of -- of Indians?

25 MR. KNEEDLER: I -- again, I think --

1 I think, in examining any hypothetical statute
2 or context, it is necessary to look at the
3 judgment that Congress made and to know why
4 Congress made the judgment that it did.

5 In -- in Indian contracts, for
6 example, there were many, many years where
7 contracts by individual Indians were not valid
8 unless approved by the Secretary of the Interior
9 because of a concern that they were going to be
10 taken advantage of.

11 So, if there -- if there was that sort
12 of justification -- and, presumably -- I don't
13 think we can assume Congress would act in an
14 arbitrary manner. It would be addressing a
15 real-world problem in a practical way.

16 JUSTICE ALITO: No, I understand.

17 CHIEF JUSTICE ROBERTS: Well --

18 JUSTICE ALITO: And --

19 CHIEF JUSTICE ROBERTS: No, go ahead.

20 JUSTICE ALITO: Just one -- one more.
21 Honestly, I -- I don't know how to analyze this
22 question because, if "plenary" means everything,
23 then -- then it means everything. And,
24 otherwise, what I've gotten from the briefs and
25 the arguments is that we have to try to extract

1 certain rules from our cases, which quite
2 honestly strike me as a mishmash.

3 But one -- one last one. Could
4 Congress have required that Indians get
5 preference in the -- in receiving the COVID
6 vaccines? Would that be an equal protection
7 violation in your view?

8 MR. KNEEDLER: Again, I think it might
9 depend -- if Congress decided to furnish
10 vaccines to tribes as part of a tribal health
11 program, I don't know whether you would call
12 that a preference or whether that's Congress --
13 aspect of Congress's delivering healthcare. It
14 might have -- it might have a disparate impact,
15 if you will, but -- but Congress has a duty to
16 Indians, and -- and it might buy a lot of
17 vaccines and deliver them.

18 CHIEF JUSTICE ROBERTS: Well -- would
19 --

20 MR. KNEEDLER: But a prescription --

21 CHIEF JUSTICE ROBERTS: -- I don't
22 want to --

23 MR. KNEEDLER: -- a prescription to a
24 state, for example, might be quite different.

25 CHIEF JUSTICE ROBERTS: I -- I -- I --

1 may -- I -- I do want to follow up on Justice
2 Alito's question.

3 There's a limited number of vaccines.
4 Can the federal government decide to distribute
5 those to -- to Indians and not others?

6 MR. KNEEDLER: Well --

7 CHIEF JUSTICE ROBERTS: It's a very
8 simple hypothetical.

9 MR. KNEEDLER: Well, probably not, but
10 I -- but I -- I just want to caveat that --

11 CHIEF JUSTICE ROBERTS: So the plenary
12 power doesn't include something like that?

13 MR. KNEEDLER: Well, answering what --
14 what plenary power means, I think, several
15 things that it means. There's no subject matter
16 that is completely off limits just be -- just
17 because it's Indians. There is no geographic
18 component which renders something completely off
19 limits.

20 CHIEF JUSTICE ROBERTS: But there's
21 something about distributing vaccines, a limited
22 supply, that is, you suggested, I guess, that it
23 may not be within the plenary power?

24 MR. KNEEDLER: Well, in -- in a
25 Court's reviewing of something of -- that

1 Congress has done in the exercise of its plenary
2 power, again, the -- the test the Court has
3 applied, it's used different formulations, but
4 --

5 CHIEF JUSTICE ROBERTS: Is that the
6 reasonably essential?

7 MR. KNEEDLER: Reasonably essential,
8 appropriate, not arbitrary.

9 CHIEF JUSTICE ROBERTS: What -- what
10 in the world does that mean? What -- what I
11 mean, if it's essential, if it's essential. If
12 it's reasonable -- but what's reasonably
13 essential mean?

14 MR. KNEEDLER: Well, reasonably
15 essential is not a familiar term in -- in -- in
16 -- in the way --

17 CHIEF JUSTICE ROBERTS: In English?
18 (Laughter.)

19 MR. KNEEDLER: But -- but -- in -- in
20 -- in jurisprudence, but that's followed by
21 deference has to be given to Congress. And --
22 and, you know, if -- if the -- if the furnishing
23 of vaccines to the tribe was part of a -- a
24 general program to furnish vaccines to
25 underserved communities, I mean, it would

1 depend.

2 CHIEF JUSTICE ROBERTS: No. I guess
3 this is the point. You're arguing for special
4 treatment with respect to Indians. So why does
5 it matter if it's part of a program to serve
6 underprivileged communities?

7 MR. KNEEDLER: It -- it -- it -- it
8 may not. But I -- but I don't think -- Congress
9 has not done the sort of thing that you are
10 describing. Congress --

11 JUSTICE JACKSON: But, Mr. Kneedler, I
12 thought that your answer to the Chief was going
13 to be that that issue was not really teeing up a
14 question about the plenary power, that the
15 issues that they have identified, I would think,
16 would be analyzed under the Equal Protection
17 Clause, and that's sort of a separate
18 constitutional basis for it.

19 MR. KNEEDLER: Yeah. No, that would
20 -- that -- that -- that -- that would be,
21 although that also has a rational basis
22 standard.

23 CHIEF JUSTICE ROBERTS: Well, but
24 there are two questions, one, whether you can do
25 it in the first place, which is the plenary

1 power question, then whether you can do it in a
2 way that distinguishes between polities that
3 have -- with which the federal government has a
4 special trust relationship.

5 MR. KNEEDLER: I -- I -- I -- I think
6 these two questions raise -- it may all be under
7 the plenary power -- they raise an ends mean.
8 There is no doubt that furnishing vaccines to
9 Indians, at -- at least if they have some tribal
10 connection or within the scope of people
11 eligible for Indian healthcare services, there's
12 no doubt that that is a valid mean or -- or
13 valid end for Congress's action.

14 The question would be whether the
15 approach it took is a reasonable one or, rather,
16 it is arbitrary. And those -- those require
17 some judgment -- some assessment of Congress's,
18 to which --

19 CHIEF JUSTICE ROBERTS: But I have, I
20 mentioned to Mr. McGill, difficulty
21 understanding how the placement priorities work.
22 So maybe I'll try an example.

23 Let's say there's a six-month-old baby
24 that had been born to an Indian couple and the
25 Indian couple for whatever reason is no

1 longer -- no longer there. And there are also
2 no extended family members in -- in the tribe.

3 A non-Indian couple comes forward and
4 says we would like to adopt the six-months-old
5 -- old baby, and they check all the boxes under,
6 you know, best interests of the child. In other
7 words, in normal circumstances, this would be a
8 perfect placement for the child.

9 But non-family members of the tribe
10 say that, no, they think it would be better for
11 the trial -- child to be raised with the tribe
12 on the reservation.

13 Does -- does that priority trump the
14 other best interest finding?

15 MR. KNEEDLER: Well, several questions
16 about that. When Congress enacted -- or, sorry,
17 answers. When Congress enacted ICWA, it was
18 very concerned about the application of the best
19 interests of the child standard because it led
20 to subjective judgments about -- by state
21 welfare agencies --

22 CHIEF JUSTICE ROBERTS: Okay. Let's
23 assume -- let's assume that it's a good faith
24 and reasonable application of the best interest
25 standard.

1 MR. KNEEDLER: But -- but what -- but
2 what -- what Congress did was to adopt objective
3 standards, which is the -- the child -- which is
4 the priorities, and, with respect to tribal
5 members, there is -- there is an extended
6 kinship proposition there.

7 CHIEF JUSTICE ROBERTS: So does that
8 priority displace the state court, state
9 adoption agency, determination of the best
10 interests of the child?

11 MR. KNEEDLER: Well, the -- the -- the
12 agency would have to determine that the -- that
13 the tribal family was qualified --

14 CHIEF JUSTICE ROBERTS: Yeah.

15 MR. KNEEDLER: -- first of all. And
16 then, secondly, the -- that placement, it --
17 it's a rebuttable presumption and is not
18 absolute. So there is a good cause --

19 CHIEF JUSTICE ROBERTS: Rebuttable
20 presumption that the child would be placed with
21 the non-family members of the child?

22 MR. KNEEDLER: Right, that's one way
23 -- that's one way to describe it. But -- but
24 then, yes, I -- I mean --

25 CHIEF JUSTICE ROBERTS: Well, so okay.

1 So my point is that in that particular
2 situation, the best interests of the child would
3 be subordinated to the interests of the tribe?

4 MR. KNEEDLER: No, but -- but I --

5 CHIEF JUSTICE ROBERTS: The interests
6 of non-family members.

7 MR. KNEEDLER: When Congress enacted
8 ICWA in Section 1902, it said it was
9 implementing the best interests of the child.
10 The -- the -- the -- the -- the -- the
11 proposition of best interests --

12 CHIEF JUSTICE ROBERTS: So then -- so
13 you're saying Congress in ICWA made a
14 determination that it is in the best interests
15 of the child to remain with non-family members
16 of the tribe on the reservation in every case,
17 regardless of what the alternative is?

18 MR. KNEEDLER: Well, no, it's not
19 every case. What Congress did was enact a -- a
20 framework, an overall statute that, as -- as I
21 said -- and -- and this is, if -- if you look at
22 the amicus brief by the -- by the Casey
23 Foundation, it described that this reflects
24 child welfare practices that -- that have come
25 to more closely resemble what ICWA does, in

1 fact, by -- by looking to not just the immediate
2 family but to extended kin. Congress made
3 judgments when it enacted --

4 CHIEF JUSTICE ROBERTS: So I guess --
5 and -- and I am having trouble figuring out how
6 this actually works in -- in practice in a
7 concrete case.

8 In the hypothetical -- hypothetical
9 that I posed, would the interests of non-family
10 members of the tribe trump the state agency
11 determination, they make these determinations
12 every day, of what's in the best interests of
13 the child?

14 Not with respect to placement with the
15 other -- the other couple we're talking about.
16 It's not that they're saying, you know, it's not
17 going to be in the best interests of the child
18 to be placed with the family on the reservation,
19 but there are other things that they take into
20 account.

21 MR. KNEEDLER: But ICWA does not
22 operate that way, with respect. The -- the
23 first question is that you -- if -- if no
24 extended family members, and extended family can
25 include how -- how the tribe --

1 CHIEF JUSTICE ROBERTS: No, no. My
2 hypothetical was members of the tribe.

3 MR. KNEEDLER: Was no -- right. So it
4 goes to -- it goes to the second preference for
5 a couple in -- or parents in that tribe. But
6 that is subject to the good cause exception. So
7 --

8 CHIEF JUSTICE ROBERTS: Okay. Does
9 the good cause exception -- how does that work?
10 Because it's not -- it's something different
11 than the best interests of the child?

12 MR. KNEEDLER: It -- it's not
13 articulated that way. Maybe some of the same
14 considerations could come in. But, again,
15 Congress was -- and, for example, if the
16 parental -- the -- the preference of the parents
17 is given weight, then sometimes --

18 CHIEF JUSTICE ROBERTS: Yeah, but,
19 again, my hypothetical said that the parents are
20 no longer on the scene.

21 MR. KNEEDLER: But -- okay. There --
22 there are cases where there are.

23 CHIEF JUSTICE ROBERTS: It happens.

24 MR. KNEEDLER: Yeah. No, no, it does,
25 but all I'm saying is that the -- I'm giving

1 examples of why the good cause exception is not
2 absolute. It could be rebutted in certain ways.

3 It also says should. It does not say
4 shall or must, which allows for the
5 consideration of other factors.

6 CHIEF JUSTICE ROBERTS: Could it be
7 rebutted by the agency saying we have gone
8 through our normal determinations of what's in
9 the best interests of the child that we do in
10 every case, whether, you know, not involving
11 Indians, and we think that's where the child
12 should be placed with that couple.

13 Now does the -- do the priorities in
14 ICWA trump that determination?

15 MR. KNEEDLER: That -- that -- that is
16 not the determination the -- the agency would
17 make at the outset, and, again, because that's
18 what ICWA was concerned about and -- and because
19 of the subjective judgments that could be made
20 by child welfare personnel in looking at the
21 family, looking at the -- at the financial
22 status of the family, looking at the housing,
23 and make judgments that this child should not be
24 there.

25 JUSTICE SOTOMAYOR: Mr. Kneedler, can

1 I? One can assume two -- two things, following
2 up on Justice Alito and Justice Roberts' initial
3 question: If the United States had agreed with
4 England to supply it first with the vaccine
5 before it supplied the states, would our foreign
6 powers permit -- plenary foreign powers permit
7 the U.S. to do that?

8 MR. KNEEDLER: I think it probably
9 would, yes.

10 JUSTICE SOTOMAYOR: It -- what stops
11 --

12 MR. KNEEDLER: Absolutely would, sure.

13 JUSTICE SOTOMAYOR: -- that from
14 happening, obviously, is that that President
15 would obviously or more than likely not get
16 reelected.

17 All right. The same thing if there
18 was a political judgment that the Indian tribes
19 required the vaccine first for some rational
20 reason, 90 percent of the -- of the population
21 was dying or a huge number more or whatever the
22 reason was, it was a reasonable reason, that
23 would -- you'd have plenary power to do that,
24 correct, if you're the government?

25 MR. KNEEDLER: The -- the -- as I

1 said, the power to furnish the vaccines is there
2 whether the -- whether the criteria that it
3 applied in a particular case -- I mean, they
4 would have to be reasonable. But we shouldn't
5 assume Congress --

6 JUSTICE SOTOMAYOR: All right. On
7 this best interests of the child point, okay,
8 going back to that, one is presuming that the
9 best interests of the child is to remain with X
10 or Y. That's a court --

11 MR. KNEEDLER: With what? I'm sorry.

12 JUSTICE SOTOMAYOR: To remain with X
13 or Y, meaning with a custodian or not. But it
14 doesn't mean a child is going to be placed with
15 an unfit parent, correct?

16 MR. KNEEDLER: Right.

17 JUSTICE SOTOMAYOR: An unfit -- all of
18 these parents, to even be in the running, have
19 to be competent parents, correct?

20 MR. KNEEDLER: Yes.

21 JUSTICE SOTOMAYOR: Competent care --
22 custodians.

23 MR. KNEEDLER: Yes.

24 JUSTICE SOTOMAYOR: So now the issue
25 is one of policy. Where will you place the

1 child among these competing competent
2 custodians, correct?

3 MR. KNEEDLER: Yes.

4 JUSTICE SOTOMAYOR: And that goes to
5 the judgment of -- who should make that
6 judgment, and what you're saying is Congress has
7 --

8 MR. KNEEDLER: Congress made that
9 judgment in particular because it was concerned
10 about the ordinary operation of the -- and this
11 Court's decision in Smith versus Organization of
12 Families makes this point.

13 JUSTICE SOTOMAYOR: Got it.

14 CHIEF JUSTICE ROBERTS: So there's --
15 so just so I understand, there's a level. It
16 has to be competent --

17 JUSTICE SOTOMAYOR: Could you let him
18 just finish that, Chief?

19 CHIEF JUSTICE ROBERTS: Oh, I'm sorry.
20 I thought you were --

21 JUSTICE SOTOMAYOR: Yeah. Just let
22 him finish that part. Go ahead.

23 MR. KNEEDLER: Congress -- Congress
24 was concerned about the sort of free-form or
25 free-floating application of the best interests

1 of the -- of the child standard, and as this
2 Court recognized, and that's why it -- it, for
3 example, imposed the burden of proof to
4 remove -- to remove the child or for -- or for
5 placements of the child with -- with someone
6 else.

7 And what it determined is the
8 arrangement that -- the framework that it set up
9 in ICWA was in the best interests of the child
10 because Congress made a judgment that placing
11 the child with the extended family, failing that
12 with the tribe, which is an -- which is a
13 kinship community interest, which is -- which is
14 taken into account in the non-Indian context
15 under child welfare practices, that was in the
16 best interests of the child, with the -- with
17 the occasion or the possibility or the prospect
18 of individualized exceptions to that --

19 JUSTICE ALITO: Suppose the parents
20 are --

21 MR. KNEEDLER: -- in a particular
22 case.

23 CHIEF JUSTICE ROBERTS: Well --

24 JUSTICE SOTOMAYOR: Well, I think --

25 JUSTICE ALITO: Chief?

1 CHIEF JUSTICE ROBERTS: Are -- are you
2 finished with your answer?

3 MR. KNEEDLER: Yes.

4 (Laughter.)

5 MR. KNEEDLER: Yes.

6 CHIEF JUSTICE ROBERTS: Okay. Because
7 I -- yeah.

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: Now is -- is
10 competence the threshold, or, in this priority
11 standard, is the agency allowed to consider the
12 relative best interests of the two different
13 proposed placements?

14 MR. KNEEDLER: I -- I -- I think
15 ordinarily not, but -- but, as this Court has
16 said elsewhere, for example, in -- in removing a
17 child from its parents, the question is not
18 whether the child would be better off somewhere
19 else because parents have a fundamental right in
20 parenting their children.

21 And what -- Congress didn't say this
22 was a fundamental right of extended family or
23 tribes, but it -- it thought it was a very
24 important right that should be recognized and
25 not lightly -- and not lightly taken away

1 because of the -- of the huge numbers of Indian
2 children who were being taken away from their
3 families, from their extended families, from
4 their tribes, from their kin, from their
5 community, and that was damaging the long-term
6 interests --

7 CHIEF JUSTICE ROBERTS: Last --

8 MR. KNEEDLER: -- of the tribes.

9 CHIEF JUSTICE ROBERTS: -- last
10 question. Is the trust relationship, trust
11 responsibility that the federal government owes
12 in this area, is that responsibility owed to the
13 tribe, or is it owed to individual members of
14 the tribe?

15 MR. KNEEDLER: I -- I think Congress
16 can conclude that it is owed to both, and it
17 traditionally has. Congress's power -- and --
18 and the Holliday decision that was referred to
19 previously, I think, is very instructive on this
20 point in a number of reasons. It involved -- it
21 upheld Congress's ability to engage in the
22 prohibition on -- on liquor sales in that case
23 off-reservation. It rejected the proposition
24 that just because the Indians there were
25 citizens, that that was beyond what -- what

1 Congress could do. And it -- and it said that
2 that could be upheld because it was an
3 appropriate exercise of -- of Congress's power.

4 But it also specifically rejected the
5 argument that the -- that Congress can only deal
6 with tribes. It said tribes are made up of
7 their members, of their constituents.

8 And that's an important thing to
9 understand about the way ICWA operates. It
10 operates on the basis of citizenship, that the
11 definition of Indian child is that the child
12 must be a member of the tribe or, if not, it has
13 to -- the -- the child has to be eligible for --

14 JUSTICE ALITO: Well, along those
15 lines --

16 MR. KNEEDLER: -- membership.

17 JUSTICE ALITO: -- along those lines,
18 Mr. Kneedler, suppose the parents of a child
19 that is going to be adopted say we don't want
20 our child treated as an Indian under ICWA. And
21 the tribe says, well, this child is eligible for
22 tribal membership. Or maybe we have enrolled --
23 we have unilaterally enrolled the child as a
24 member of the tribe. What happens then?

25 MR. KNEEDLER: Well, if the -- I'm --

1 I'm not sure. Of all the facts in the
2 hypothetical, if -- if the parents are giving
3 the child up for adoption, then that wouldn't
4 necessarily trigger the -- the preferences or
5 they wouldn't get dispositive weight because the
6 -- the parents' desires can be given great
7 weight in that -- in that circumstance.

8 JUSTICE ALITO: But it would still be
9 --

10 MR. KNEEDLER: So, if that's --

11 JUSTICE ALITO: -- it would still be
12 governed by ICWA?

13 MR. KNEEDLER: It's still -- it's
14 still subject to ICWA, yes. But -- but the --
15 but -- and this is an important point to
16 understand. This is a facial challenge to a
17 statute that has operated for 40 years day to
18 day in state child welfare agencies. It's
19 integrated in what they do. And, you know,
20 there -- there could be -- I mean, what happens
21 in a particular case depends upon the -- the
22 state agencies or the private agencies or the --
23 or the adopting couple --

24 JUSTICE KAVANAUGH: Can I follow up on
25 the Chief's questions? The third preference,

1 for other Indian families, including families
2 who are of a different tribe, correct?

3 MR. KNEEDLER: Yes.

4 JUSTICE KAVANAUGH: Okay. And does
5 the third preference, that preference, ever make
6 a difference?

7 MR. KNEEDLER: I mean, I don't know
8 empirically, but they -- but it -- it can in the
9 following circumstance -- I mean, first of all,
10 it's important to understand --

11 JUSTICE KAVANAUGH: Meaning that the
12 decision would have been to give it -- the best
13 interests would have been with a -- a different
14 family but for that third preference?

15 MR. KNEEDLER: Well --

16 JUSTICE KAVANAUGH: Does it ever make
17 a difference?

18 MR. KNEEDLER: -- it -- it very well
19 could, but there would be very strong reasons
20 why it would, if I could just explain.

21 JUSTICE KAVANAUGH: No, I -- I think
22 it would. That's -- yeah.

23 MR. KNEEDLER: Yeah. Because --

24 JUSTICE KAVANAUGH: That's --

25 MR. KNEEDLER: -- you could have a

1 child, for example, who has parents who are
2 members of two tribes. ICWA --

3 JUSTICE KAVANAUGH: No, just -- it
4 applies beyond that circumstance.

5 MR. KNEEDLER: No, no, I know. But
6 I'm explaining the reasons why it --

7 JUSTICE KAVANAUGH: Yeah.

8 MR. KNEEDLER: -- why it is there.
9 Again, this is a -- first of all, it hasn't --
10 the third preference has not been raised in this
11 case at all. Nobody -- no plaintiff in this
12 case has been affected by it.

13 And -- but -- but I was trying to give
14 an explanation for why it is there and why
15 applications of it would -- would, I think --

16 JUSTICE KAVANAUGH: Go ahead.

17 MR. KNEEDLER: -- be obviously okay.
18 If you have a child who has a parent who's a
19 member of two tribes, ICWA requires that one be
20 selected as the primary tribe. But -- but, if
21 -- if that -- if for some reason there's not a
22 suitable foster or adoptive parent who comes
23 forward, the second tribe would be a logical
24 place.

25 You also have situations where two

1 tribes share the same reservation and -- and
2 there's a lot of interaction, intercourse
3 between them. Or you have a situation where --
4 and this is true with the breakup of the great
5 Sioux Nation in the northern plains, you once
6 had one -- one great nation that is now divided
7 up into discrete tribes on different
8 reservations, but they have common cultural --

9 JUSTICE KAVANAUGH: So -- so, to get
10 to the heart of my concern about this, you would
11 agree, I think, but tell me if you disagree,
12 that Congress couldn't give a preference for
13 white families for white children, for black
14 families for black children, for Latino families
15 for Latino children, for Asian families for
16 Asian children.

17 MR. KNEEDLER: Yeah.

18 JUSTICE KAVANAUGH: Do you agree with
19 that?

20 MR. KNEEDLER: Yes.

21 JUSTICE KAVANAUGH: Okay.

22 MR. KNEEDLER: That -- that's purely
23 based on race. But this is --

24 JUSTICE KAVANAUGH: And this is
25 different because? And I'll let you explain.

1 MR. KNEEDLER: Because it has to do
2 with Indian tribes. Indian --

3 JUSTICE KAVANAUGH: Including the
4 third preference, which does not require it be
5 of the same tribe?

6 MR. KNEEDLER: But it -- but it is a
7 tribe. It is a tribe with a political
8 relationship to -- to the United States. If the
9 child goes there, that -- the child's --
10 somebody in that -- in that family will be a
11 tribe -- a member of that tribe.

12 JUSTICE BARRETT: But why -- I don't
13 understand that. I thought that it swept more
14 broadly than that, as Justice Kavanaugh was
15 saying. I thought that you could have -- I
16 mean, even in your hypothetical where you have a
17 mother who belongs to one tribe and a father who
18 belongs to another, maybe I'm misunderstanding
19 how the third preference works, but I thought
20 the third preference would kick in and give
21 preference to someone who -- a couple that
22 belonged to a different tribe altogether.

23 MR. KNEEDLER: Well, it --

24 JUSTICE BARRETT: Am I
25 misunderstanding that?

1 MR. KNEEDLER: -- it could, but ICWA
2 operates on the basis of -- of the child's
3 primary tribe. And if -- and -- but, if you had
4 a second tribe, that would not -- that wouldn't
5 come under the first or second preference.

6 JUSTICE BARRETT: It would come under
7 the third?

8 MR. KNEEDLER: It would come --

9 JUSTICE BARRETT: And so I'm saying --

10 MR. KNEEDLER: -- it would come under
11 the third.

12 JUSTICE BARRETT: -- if there's no --
13 there's -- right. I'm saying -- I'm assuming,
14 as Justice Kavanaugh's question was -- was
15 assuming, that you get down to the third, so you
16 didn't have a placement available. The first or
17 the second preference didn't kick in. You get
18 down to the third preference. And I guess -- I
19 mean, I'll get to the heart of my concern, is,
20 you know, if -- if you're thinking about that
21 from an equal protection point of view, I mean,
22 let's assume I agree with you that these are
23 political classifications, this is just treating
24 Indian tribes as fungible.

25 MR. KNEEDLER: Well --

1 JUSTICE BARRETT: So let's imagine the
2 child is a member of the Navajo and is placed
3 under the third preference with the Cherokee.

4 MR. KNEEDLER: I don't -- I don't
5 think it rests on the idea that all -- that all
6 tribes are fungible in the sense that they're
7 all the same or that all their members are the
8 same, but what it does rest on is a recognition
9 that each of those tribes has a political
10 government-to-government relationship with the
11 United States.

12 And they have that in common. They --
13 tribes -- tribes have aligned over the years in
14 common interests. They have -- Congress
15 certainly thought this was true -- some common
16 cultural ties or practices or spiritual
17 practices. They -- they may not be dispositive,
18 but it's a recognition that that could be true.

19 The -- the third preference doesn't
20 come up. In -- in fact, the Petitioners in this
21 case have not identified any case that -- that
22 fits the paradigm that -- that -- that I think
23 Justice Kavanaugh might have been talking about,
24 where you have somebody -- another tribe with no
25 other sort of connection to the child.

1 A tribe is not just going to
2 arbitrarily reach out and grab -- grab a child.
3 They will do it because they have some interest.

4 And it's not a property interest.
5 Governments have an interest in their citizens
6 and their children. Consular protection for
7 aliens from other countries in our -- in our
8 country is a -- is a vital thing. It's not
9 property.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Alito, anything further?

13 JUSTICE ALITO: Well, adults can
14 change their -- their country of their
15 citizenship.

16 But why isn't Mr. McGill right in
17 referring to the concept that the tribes have a
18 proprietary interest in children who are covered
19 by -- by ICWA?

20 The -- the children don't voluntarily
21 join the tribe. And in my hypothetical where
22 the -- the parents don't want the child to be
23 treated as a member of the -- a member of the
24 tribe, this child is treated as an Indian under
25 ICWA solely based on the child's status as a --

1 based on ancestry.

2 MR. KNEEDLER: Well, if the child --
3 if the child is a member, that is because either
4 the tribe automatically confers citizenship at
5 birth, which the United States does for -- in
6 some circumstances for a U.S. citizen abroad, if
7 they give birth. It is not an unheard of
8 proposition.

9 And the parallels between Congress's
10 dealing with tribes and Congress's dealing with
11 foreign countries and foreign affairs is -- is
12 very direct for these purposes. It's dealing
13 with another sovereign.

14 In fact, that parallel is present in
15 the Indian Commerce Clause, which -- which is
16 written in terms of commerce with foreign
17 governments and with states.

18 So there's -- there is -- there is
19 that parallel. And it's also common where, if
20 the -- if the parents once enrolled the child
21 but didn't want them to be treated as -- as a
22 tribal member, children follow -- children don't
23 make their own decisions. Someone else does.

24 Either citizenship could descend
25 automatically at birth, or -- or, when the child

1 becomes 18, the child might choose to be a -- a
2 member, which is another important consideration
3 if the child is placed with somebody in the
4 tribe.

5 JUSTICE ALITO: What if it's an older
6 child, not 18, but an older child who can
7 express the child's preferences, and the child
8 says I don't want to be treated as an Indian
9 under ICWA?

10 MR. KNEEDLER: The good cause --
11 Interior's regulations explicating the good
12 cause exception say that the wishes of the -- of
13 the child of -- of a sufficient age, to -- for
14 his preferences to be taken into account.

15 That is a factor and -- and perhaps a
16 very important one.

17 JUSTICE ALITO: It's taken into
18 account, but it's not dispositive.

19 MR. KNEEDLER: No, but -- but family
20 law cases, custody cases are very fact --
21 fact-specific. And so you can hypothesize a
22 situation in which maybe it should have been
23 dispositive but not, but some -- some -- a state
24 court judge has to make a difficult judgment.

25 And -- and, if there are problems with

1 that in a particular case, the -- the person
2 seeking custody could appeal. That was done in
3 -- in one of the cases in this case.

4 But this is a facial challenge. The
5 idea that -- that in all of its operations,
6 under Salerno, it would be necessary to say in
7 all of its operations it either exceeds
8 Congress's Article I powers or is a violation of
9 equal protection. And I think that that is an
10 untenable position.

11 This statute has been operating for 40
12 years, and we have 23 states who say it is
13 working well. We have numerous tribes saying
14 it's critical to tribal preservation, and that
15 Congress's judgment 40 years ago remains sound.

16 JUSTICE ALITO: One -- one last
17 question. Does -- is rational basis the
18 standard for all classifications that treat
19 Indians differently from other people, even if
20 -- even if the classification disfavors them?

21 MR. KNEEDLER: I -- I think ordinarily
22 the first question there would be whether that
23 is a -- a valid Article I exercise of power. If
24 that's what you're asking, you're asking equal
25 protection --

1 JUSTICE ALITO: Yeah, in equal
2 protection. What's the -- what's the level of
3 scrutiny for a classification that disfavors
4 Indians, a rational basis?

5 MR. KNEEDLER: Well, as I said before,
6 if -- if what Congress does is act on the tribe
7 in a political manner, saying your -- you know,
8 your -- your -- your powers are diminished or
9 expanded, that -- that's a political
10 classification. And Congress can do things that
11 tribes might think are -- are not worthy.

12 But, if Congress is acting on
13 individual members of tribes in a way that is
14 harmful to them, I don't think that that is
15 rationally related to the fulfillment of
16 Congress's obligations to the tribes.

17 That's -- that -- that's a -- that's a
18 -- a -- a -- I think an important marker that
19 what Congress is doing has to be reasonably
20 understood as promoting the welfare of the --
21 the individuals involved.

22 I think that's an important
23 limitation. If -- if the boarding school
24 example were going to arise now, that would be a
25 very serious question. Maybe a hundred years

1 ago people had a different idea of that.

2 But -- but now it is, I think,
3 uniformly thought to have been harmful, and
4 Congress cannot gratuitously do harmful things
5 to individual -- individual tribal members, just
6 like it -- it can't do anyone else.

7 This Court's decision in Moreno with
8 respect to equal protection -- equal protection
9 challenge to a statute that -- that the Court
10 thought was just outright -- disliked.

11 JUSTICE ALITO: Well, that sounds like
12 something -- I'll stop with this -- that sounds
13 like a level of scrutiny that is different from
14 ordinary rational basis review, and at least
15 something with -- at least something more than
16 ordinary rational basis for you ought to be
17 applied.

18 MR. KNEEDLER: Well, and it -- and
19 with --

20 JUSTICE ALITO: So is it -- does --
21 does that apply either way or only to
22 classifications that disfavor Indians?

23 MR. KNEEDLER: Again, I think it comes
24 up both with respect to Article I as it
25 rationally related to Congress's fulfillment of

1 its power and then a rational basis test for
2 equal protection, and they overlap, and one
3 could think of the issues here.

4 But, under -- under the Article I
5 power, I think it -- it -- it -- it -- it
6 doesn't cut both ways.

7 JUSTICE ALITO: Okay. Thank you.

8 MR. KNEEDLER: I think Congress has to
9 -- has to be acting in favor of tribes.

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor, anything further?

12 JUSTICE SOTOMAYOR: I think that what
13 you were trying to say but I'm not sure is ICWA
14 has two components: one, if you're a child
15 who's an Indian member -- and we haven't even
16 addressed that -- it seems to me that that's the
17 quintessential part of ICWA that I find hard to
18 overturn. If you're a member of a tribe and the
19 government wants to protect you in a certain
20 way, you should be -- the government should be
21 unfettered from that.

22 MR. KNEEDLER: Right, and I -- I
23 thought that might have been one -- one part of
24 Justice Alito's question, but I -- but I wasn't
25 sure.

1 JUSTICE SOTOMAYOR: All right. But
2 the second part of ICWA subjects a child who's
3 not a member yet but whose parent is an Indian
4 tribe membership, and that one, it seems to me
5 that most of our laws presume that a child will
6 follow its parents, correct?

7 MR. KNEEDLER: Yes.

8 JUSTICE SOTOMAYOR: Until they're of
9 age?

10 MR. KNEEDLER: Yes.

11 JUSTICE SOTOMAYOR: Even with
12 citizenship. Children who are born of parents
13 abroad I don't think in all circumstances are
14 automatically considered citizens.

15 MR. KNEEDLER: It depends on the
16 parents' connection to --

17 JUSTICE SOTOMAYOR: But they can
18 travel to the U.S. They can -- there's all
19 sorts of benefits they're given because they're
20 children of American citizens, but they have to
21 declare their intent to be a citizen at 18 or
22 something, correct?

23 MR. KNEEDLER: And -- and the -- this
24 Court's decision in Holyfield, you know, I
25 think, reinforces that, that domiciled --

1 JUSTICE SOTOMAYOR: So the bottom line
2 is that ICWA says that if you're eligible to be
3 a member because you're born of an Indian
4 parent, is no different than any of those laws,
5 correct?

6 MR. KNEEDLER: Right. No, I think
7 it's -- citizenship passing by descent is a --
8 is a common -- has been common throughout our
9 history. And -- and -- but, here, it's
10 important to recognize that tribal membership,
11 tribal citizenship is defined by the tribe.

12 JUSTICE SOTOMAYOR: Correct.

13 MR. KNEEDLER: That's an important --
14 that's an important aspect of tribal
15 sovereignty. The United States is not defining
16 the membership. And that is part and parcel of
17 recognizing the sovereignty of Indian nations,
18 which, by the way, are -- not by the way --
19 centrally mentioned in the Constitution, Indian
20 tribes. It -- it defines them by being Indians.

21 JUSTICE SOTOMAYOR: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 JUSTICE KAGAN: Mr. -- Mr. Kneedler,
24 I'm wondering if you could comment on the
25 various ramifications of adopting some of

1 Petitioners' theories of the Article I power,
2 and we've heard a few different iterations, but
3 I'll take General Stone's perhaps as the
4 clearest cut one.

5 General Stone says Congress has power
6 where it -- where it is acting out of a
7 particular treaty and its obligations, where
8 it's regulating on tribal lands, or where it's
9 regulating tribal governments qua governments.
10 And those are the three areas in which Congress
11 has power, and everything else is outside of
12 Congress's power.

13 And I'm just wondering what in Article
14 -- in -- in -- in Title 25 would that exclude?

15 MR. KNEEDLER: Well, the Indian
16 healthcare program furnishes a lot of services
17 to Indians who -- some of whom are not actually
18 formal tribe -- tribal members, but they are --
19 a -- the judgment's been made that they are
20 sufficiently affiliated with a state tribe or
21 something like that. There's -- a lot of the
22 Indian Health Service care is furnished
23 off-reservation.

24 There are -- there's aid to schools
25 that Indian children attend. There -- but there

1 would -- there would also be other concerns
2 historically. And what Congress has done in the
3 past by -- by -- and I mentioned the Holliday
4 case, which was created criminal offenses for
5 conduct occurring off a reservation by
6 individual Indians, and there the Court said
7 it's not just commerce, it's intercourse, which
8 means interaction between Indians and
9 non-Indians.

10 So any -- anytime there could be
11 abuses arising in the context of interaction
12 between Indians and non-Indians, the potential
13 is there. It's -- it's not necessarily going to
14 be all the time. But it's very important in --
15 not to cut off Congress's ability to make
16 context-specific judgments when a practical
17 problem arises.

18 And I think, if the -- if the import
19 of your question is that if something is behind
20 -- is -- doesn't fall into one of those
21 categories precisely, first of all, there would
22 be litigation about whether it does fall into
23 that category, but if that means Congress is
24 about to step into strict scrutiny land under
25 racial discrimination, that would be, I -- I --

1 I think, an enormous --

2 JUSTICE KAGAN: Well, not just the --
3 I -- I took General Stone to be saying Congress
4 just can't do it. It just doesn't fall within
5 --

6 MR. KNEEDLER: Yes. No.

7 JUSTICE KAGAN: -- Congress's Article
8 I powers, you know.

9 MR. KNEEDLER: Right. Right. Right.
10 But, I mean -- so there are two aspects to that.
11 If it's beyond the powers, is it -- is it racial
12 discrimination? But I think -- I think that
13 would be -- that is essentially the shackling of
14 -- of the federal government's powers under the
15 Indian Commerce Clause or its more general
16 powers of protection coming about from the
17 exercise of the war and treaty powers.

18 That would be in the teeth of -- of
19 Congress -- the framers' shedding of those
20 shackles. Whether those shackles were all under
21 the Indian Commerce Clause or -- or elsewhere,
22 that -- that was a deliberate choice by the
23 framers to give Congress plenary power over
24 Indian affairs. That was reflected in the
25 contemporary understanding and the Trade and

1 Intercourse Act, which enacted criminal
2 penalties for crimes -- over the years, crimes
3 by Indians against Indians. The classic
4 intercourse or interaction between Indians and
5 non-Indians.

6 JUSTICE KAGAN: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch?

9 Justice Kavanaugh?

10 JUSTICE KAVANAUGH: On your point that
11 this is a political classification, not a racial
12 classification, including the third preference,
13 as I think you said, you're relying on Mancari,
14 and I just want to understand what you see as
15 the limits of Mancari, and a couple of the
16 hypotheticals I asked earlier, could Congress
17 grant a hiring preference to American Indians
18 for federal agencies other than the BIA, such as
19 Treasury or Justice or --

20 MR. KNEEDLER: I -- I think that would
21 be much more difficult as I stand here.

22 JUSTICE KAVANAUGH: And -- and why is
23 that?

24 MR. KNEEDLER: Because the preference
25 in Mancari was at the BIA. It was the agency

1 that was regulating tribal affairs, individual
2 Indian affairs. So there was a particular --
3 particularly close nexus, frankly, to -- to the
4 Indian tribe and -- and tribal members who were
5 going to work for it.

6 So I think -- I think, other than that
7 it arose in an unusual situation, where it was a
8 preference in -- in federal employment, it was
9 very closely related to the tribe. But I think,
10 if you -- if you get away from that, it would be
11 much more difficult to defend if --

12 JUSTICE KAVANAUGH: How about Congress
13 decides for the -- to help the tribes and tribal
14 members that it's going to mandate that states
15 give a preference in college admissions to
16 American Indians?

17 MR. KNEEDLER: Again, I think that
18 would -- that would be much more difficult to
19 defend. I -- I'm not sure what the defense of
20 it would --

21 JUSTICE KAVANAUGH: And why, though?
22 I just want to understand. You -- you've had an
23 instinct to both these questions. That's much
24 more difficult, but why?

25 MR. KNEEDLER: I -- I think it's

1 because the -- the relationship to -- the tribal
2 relationship to the -- tribal relationship is --
3 is more attenuated and bumps up against
4 interests that other people might have. I think
5 that that may be an important consideration.

6 But contrast that perhaps to
7 Congress's long-furnished funds to educate
8 Indians. In fact, some colleges and
9 universities have -- have had that as part of
10 their mission for years, for 200 years.

11 JUSTICE KAVANAUGH: And then --

12 MR. KNEEDLER: That might present
13 different questions.

14 JUSTICE KAVANAUGH: Okay. And then
15 you've -- you suggested that everything's been
16 operating smoothly, you know, we leave well
17 enough alone, but I just want you to speak to
18 the concern on the other side, which is, you
19 know, you come in as an adoptive couple, you
20 want to adopt a child, the state court otherwise
21 would say the best interests of the child would
22 be to go with you, and then you're told no,
23 you're the wrong race.

24 MR. KNEEDLER: No. I mean, with
25 respect, what you're told is, if -- if it's one

1 of the preferences, that there is a tribal
2 political citizenship aspect to the -- to the
3 determination. And it -- it -- that's when --

4 JUSTICE KAVANAUGH: Even -- even with
5 the third preference?

6 MR. KNEEDLER: Yes. The -- it -- it
7 has to -- it has to be a member of -- of another
8 tribe. It has --

9 JUSTICE KAVANAUGH: Mm-hmm.

10 MR. KNEEDLER: And that -- that means
11 that there -- that political -- that's a
12 political relationship as well.

13 Now, whether -- whether there could be
14 a rational basis challenge to that in a
15 particular case, we don't have anything like
16 that here. And -- and the -- the -- I think the
17 core --

18 JUSTICE KAVANAUGH: And -- and with
19 the --

20 MR. KNEEDLER: -- of the third
21 preference is where -- is where that tribe --
22 either it occupies the same reservation or it
23 has another parent --

24 JUSTICE KAVANAUGH: Well, you say the
25 core, but it can apply even when it's a

1 completely different tribe with none of that,
2 correct?

3 MR. KNEEDLER: But -- but if -- but if
4 --

5 JUSTICE KAVANAUGH: Is that -- is that
6 a yes?

7 MR. KNEEDLER: It's possible but -- I
8 mean, yes, yes, you would have to look at it.

9 JUSTICE KAVANAUGH: Yeah.

10 MR. KNEEDLER: But the good cause
11 exception might allow greater flexibility --

12 JUSTICE KAVANAUGH: And I think you
13 referred --

14 MR. KNEEDLER: -- when the child is --

15 JUSTICE KAVANAUGH: -- I think you
16 referred earlier to common spiritual practices
17 that may exist in those circumstances. Does
18 that suggest that Congress could say that, you
19 know, Catholic parents should get a preference
20 --

21 MR. KNEEDLER: No. No, not -- not at
22 all.

23 JUSTICE KAVANAUGH: And why not?

24 MR. KNEEDLER: Not at all.

25 JUSTICE KAVANAUGH: Why not?

1 MR. KNEEDLER: No. No --

2 JUSTICE KAVANAUGH: You -- you said
3 spiritual preferences.

4 MR. KNEEDLER: Yes.

5 JUSTICE KAVANAUGH: Yeah.

6 MR. KNEEDLER: And all I meant to say
7 by that was Congress made a judgment that there
8 are common cultural characteristics among tribes
9 or it had that -- it had that judgment or at
10 least that the preferences it set up allow for
11 taking that into account because it's extended
12 family, it's extended kin, another tribe with
13 cultural similarities.

14 And so I -- tribal members, I mean, it
15 varies. Obviously, not all members are alike,
16 but some people -- some tribal members feel a
17 very strong affinity for their tribe in terms of
18 their heritage going back to before the founding
19 of this country. It's an important part of
20 their cultural stability, their kinship, and --
21 and stability in growing up.

22 JUSTICE KAVANAUGH: Yeah.

23 MR. KNEEDLER: And if you have a young
24 child --

25 JUSTICE KAVANAUGH: You have -- you

1 have strong interests, and I respect those, on
2 one side. I'm just trying to say there are --
3 there are strong interests on the other side
4 too, which is why the case is hard, but I'll
5 finish there. Thank you.

6 MR. KNEEDLER: Okay.

7 JUSTICE BARRETT: Mr. Kneedler, I want
8 to pick up where Justice Kavanaugh left off.
9 You -- you said that it would be a harder case
10 in some of the hypotheticals that Justice
11 Kavanaugh presented, say, you know, Treasury
12 instead of the BIA, a preference in employment.

13 Is that because you would say -- you
14 know, I think that the classifications for
15 Indians are difficult because it's difficult --
16 there's a racial component and the political
17 identity component.

18 MR. KNEEDLER: Right.

19 JUSTICE BARRETT: Are you struggling
20 with those hypotheticals -- or, sorry, I don't
21 mean to say struggling. Are you finding those
22 more difficult to answer because you would say
23 that there are some circumstances in which the
24 classification of Indian operates more like a
25 racial classification because it is unconnected

1 to tribal sovereignty?

2 MR. KNEEDLER: Yes.

3 JUSTICE BARRETT: For the BIA, for
4 example, you know, you can see the connection
5 between the classification and tribal
6 sovereignty, and so it's easier to say that
7 that's a political classification subject to
8 rational basis scrutiny. If you move farther
9 away from that, if you're talking about
10 Treasury, then would you say that it operates as
11 a -- as a political classification but doesn't
12 satisfy rational basis scrutiny, or would you
13 say it's a racial classification and fails
14 strict scrutiny?

15 MR. KNEEDLER: I -- you could think
16 about it either way. I think it's still -- I
17 think it's still a political classification but
18 -- but perhaps an unreasonable one because there
19 -- there -- there is, as the Court's cases that
20 have looked at this, Holliday and others, there
21 -- there is, I think, at some point a
22 proportionality aspect to it. Would -- would
23 other people in the society be -- be greatly
24 adversely affected or something -- something
25 like that.

1 But, on the equal protection side, I
2 think Adarand is a very good example of that
3 because there was a -- a preference for
4 contracting within a series of Black, Asian,
5 white -- you know, other minority groups. It --
6 it was expressed in racial terms, and the Court
7 said that was subject to strict scrutiny.

8 But that's -- that's why it's
9 important to look at the context in which
10 Congress is acting and -- because Congress --
11 Congress doesn't make sweeping judgments in this
12 area. It looks at --

13 JUSTICE BARRETT: But just --

14 MR. KNEEDLER: -- the practical
15 problem.

16 JUSTICE BARRETT: -- just to clarify
17 to make sure I understand your position,
18 sometimes the classification can operate as
19 racial and sometimes it would be political,
20 depending on the context in which Congress is
21 acting.

22 MR. KNEEDLER: I -- I think, if it's
23 expressly based on tribal citizenship here,
24 either the child or the parent where the child
25 is not --

1 JUSTICE BARRETT: I'm not talking
2 about ICWA.

3 MR. KNEEDLER: No, no, I know.

4 JUSTICE BARRETT: I'm talking about
5 some of Justice Kavanaugh's hypotheticals.

6 MR. KNEEDLER: But what I -- what I'm
7 saying, if it turns on tribal membership or --
8 or -- or tribal citizenship, then I think it is
9 political in -- in -- in its -- in its essence.
10 Whether it goes too far in giving a benefit to a
11 -- a -- a -- someone with that political
12 connection --

13 JUSTICE BARRETT: Okay.

14 MR. KNEEDLER: -- I think would be the
15 first -- the first way to look at it.
16 Otherwise, there -- there could be strict
17 scrutiny --

18 JUSTICE BARRETT: Well, I'll -- I'll
19 -- I'll move on.

20 MR. KNEEDLER: -- challenges to -- to
21 many things affecting --

22 JUSTICE BARRETT: Yeah, I'll move on.
23 I mean, it just seems to me that it's always
24 going to be tied to tribal membership in some
25 way. But I'll -- I'll move on. Just very

1 quickly, I'm going to summarize what I
2 understand you to be saying about the Article I
3 issue, and I just want you to tell me if I've
4 got it right or correct me if I don't.

5 In response to Justice Alito's
6 questions in particular and some of Justice
7 Kagan's questions as well, you were saying
8 plenary is plenary. So you would say that
9 Congress's power to regulate Indian affairs is
10 plenary so long as it's rational or, you know,
11 reasonably related or whatever standard we want
12 to use, it's within Congress's power and the
13 only limitation is if it bumps up against some
14 external limit, like the Equal Protection Clause
15 or like sovereign immunity --

16 MR. KNEEDLER: No, I -- I -- I think
17 there are -- I think there are built-in
18 restraints if it -- if it -- if the -- if what
19 it's doing is disproportionate perhaps. I mean,
20 it's -- it's hard to articulate this because
21 this Court has never struck down a statute of
22 that sort.

23 And, with respect to the Adarand case,
24 there's no express -- there was no express
25 reference or supposition about tribal membership

1 there. And so it was easy to identify it as --

2 JUSTICE BARRETT: Okay. But -- but --
3 but on my Article I question.

4 MR. KNEEDLER: No, on the -- on the
5 Article I question, I think plenary at its core
6 means there are no --

7 JUSTICE BARRETT: No --

8 MR. KNEEDLER: -- subject matters,
9 geographic areas categorically beyond its power.

10 JUSTICE BARRETT: But external limits
11 from the Constitution would apply, like equal
12 protection or, in Seminole Tribe, state
13 sovereign immunity?

14 MR. KNEEDLER: Yes, they -- they would
15 -- they would apply. And this -- I just want to
16 reiterate this doesn't just come from the -- the
17 Indian Commerce Clause.

18 JUSTICE BARRETT: Right.

19 MR. KNEEDLER: There is the inherent
20 power that comes from Congress's --

21 JUSTICE BARRETT: Trust relationships?

22 MR. KNEEDLER: -- the federal
23 government, which in turn comes from
24 constitutional powers, like the war power and
25 all of that that renders the tribes dependent

1 and, therefore, in need of protection.

2 And so I think it's very hard for this
3 Court to lay down a standard rule about what's
4 necessary to protect the tribes and to fulfill
5 the obligation to the Indians.

6 CHIEF JUSTICE ROBERTS: Justice
7 Jackson?

8 JUSTICE JACKSON: Yes. So I -- I
9 agree to some extent with Justice Kavanaugh that
10 there are strong interests on both sides of
11 these issues. What I'm mostly concerned about
12 is that we might be taking it upon ourselves to
13 weigh those interests where, really, our role
14 should be thinking about what the framers
15 intended with respect to the scope of Congress's
16 authority as it regards Indian affairs and what
17 Congress believed was necessary to protect
18 Indians given that exercise of authority.

19 So I guess I'm -- that makes me wonder
20 whether we shouldn't be giving more weight to
21 the statements in the legislative history from
22 Congress in terms of its decision that ICWA and
23 its provisions were, in fact, related to tribal
24 sovereignty, necessary to preserve tribal
25 sovereignty. So let me just ask you, how -- how

1 much weight, if any, should we be giving to
2 clear, direct statements from Congress that this
3 was being done pursuant to its understanding of
4 its plenary authority as given it -- given to it
5 in the Constitution and that it was necessary
6 from Congress's perspective to solve for the
7 problem of these state welfare practices that
8 were causing harm to Indian children given its
9 responsibility as a trust relationship for
10 Indian affairs?

11 MR. KNEEDLER: I think very, very
12 great deference, and I think that is the message
13 of cases like Holliday and Perrin and cases like
14 that. And you don't have to look to legislative
15 history for that. It's set out in the -- it's
16 set out in the -- in the beginning of ICWA
17 itself.

18 It starts by saying Clause 3 of
19 Article I provides that Congress shall have the
20 power to regulate commerce with Indians, and
21 through this and other authority it has plenary
22 power. Congress is saying that, through
23 statutes, treaties, et cetera, and -- and the
24 course of dealing with tribes, it has assumed --
25 assumed the responsibility for the protection of

1 Indians. Those are in 1901.

2 1902 says that Congress hereby
3 declares that it is the policy of this nation to
4 protect the best interests of Indian children by
5 establishing minimum standards in state child
6 welfare proceedings because that was the problem
7 they were addressing.

8 Yes, the boarding school issue was
9 also out there, but Congress saw, again, in the
10 considered, focused way that it deals with
11 problems, it saw a major problem. It thought
12 that this was in the best interests, that the
13 standards and the protections and the framework
14 it set out were in the best interests of the
15 child.

16 And if that displaces ordinary child
17 welfare law in particular cases, Congress made a
18 judgment that the objective factors it set out,
19 which take into account extended family and
20 kinship principles, that family law has, but the
21 way this statute implements them in state
22 proceedings is in the best interests of Indian
23 children, and that judgment by Congress based on
24 extensive hearings is entitled to great
25 deference.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Gershengorn.

4 ORAL ARGUMENT OF IAN H. GERSHENGORN
5 ON BEHALF OF THE TRIBAL PARTIES

6 MR. GERSHENGORN: Mr. Chief Justice,
7 and may it please the Court:

8 Congress enacted ICWA because Indian
9 children were being torn from their families and
10 tribes through the operation of state family law
11 in state courts. I want to emphasize three
12 points at the start.

13 First, there is no -- Congress has
14 plenary power over Indians, and there is no
15 exception in that power for state court child
16 custody proceedings. Since the founding, the
17 health and safety of Indian children has been
18 the province of the federal government and
19 tribes, not the states.

20 And, indeed, when Congress attempted
21 to give states authority over Indian children in
22 the 20th Century, states resisted and said it
23 was an exclusive federal responsibility.

24 Second, Plaintiffs' equal protection
25 claims should be rejected. A facial challenge

1 in a case without standing is just about the
2 worst way to consider the constitutionality of a
3 major federal statute. And, in any event, ICWA
4 draws distinctions that are political three
5 times over; it applies only to tribes that the
6 federal government has recognized, it
7 incorporates membership criteria established by
8 sovereign tribes, and it relies on the political
9 decisions of parents to remain tribal members.

10 Third, ICWA protects the best
11 interests of children. It adopts a system of
12 structured decision-making that combines
13 evidence-based presumptions with flexibility to
14 make individualized determinations. It protects
15 child safety, facilitates access to critical
16 remedial services to keep families intact, and
17 it keeps -- works to keep family -- keep
18 children with their families and communities.
19 That's why ICWA is viewed as the gold standard.

20 I'd be happy to take the Court's
21 questions. If not, I will start with -- with
22 the -- I'll take the Court's questions.

23 (Laughter.)

24 MR. GERSHENGORN: But I'm also happy
25 to keep going. Sorry, though.

1 CHIEF JUSTICE ROBERTS: Not that easy.
2 Do you think that ICWA incorporates
3 the familiar best interests of the child inquiry
4 that are -- are applied in family courts
5 throughout the country?

6 MR. GERSHENGORN: So I think I'd have
7 to say the answer to that is no. What ICWA does
8 is modify that because Congress made the
9 judgment that the best interests standard was
10 being applied in a way that resulted in
11 unwarranted removals.

12 What Congress did was create a system
13 it thought was in the best interests of the
14 child but not by adopting the "state best
15 interests of the child standard" because it
16 found that that was being applied in a
17 discriminatory way.

18 Now, so, Your Honor, there's been a
19 lot of back and forth about good cause, and it
20 seems like good cause is important in the
21 statute.

22 I will say candidly, having looked at
23 the cases, there are three -- the -- the state
24 courts are in a little bit of disarray as to
25 whether the preferences are sort of binding,

1 whether there's a straight free -- free-floating
2 best interest standard that sort of -- that --
3 that works through good cause, or whether, as I
4 think is probably the way Congress intended it,
5 that there's a -- the placements are the default
6 setting and good cause provides a -- a way to
7 rebut the presumption.

8 Now Interior has -- has explained how
9 good cause works. It involves you can take into
10 account the decisions of the -- the views of the
11 parents, the views of the child, if the child is
12 old enough to express them. You can take into
13 account sibling attachment. You can take into
14 account bonding with foster parents as long as
15 it was not done illegally through ICWA. The
16 thing you cannot take into account is
17 socioeconomic status.

18 So what the Casey brief and others say
19 and what -- the reason why medical professionals
20 are here, states are here, family rights
21 advocates are here, is because ICWA is the gold
22 standard. It adopts that -- those
23 evidence-based presumptions and allows for
24 flexibility to protect the best interests of the
25 child.

1 So, with respect to sort of the power
2 debate which has been going on, I want to make a
3 couple of points. First, this is at the core of
4 the plenary power doctrine. From the beginning,
5 the -- the plenary power doctrine was used to
6 protect Indians from non-Indians. There is no
7 doubt that if states had moved in and done a
8 wholesale physical removal of Indian children,
9 that would have been within the duty of
10 protection. The fact that this is being done
11 through state courts, through state family law,
12 doesn't deprive Congress of power.

13 Justice Barrett, you were asking about
14 limits. Obviously, when we're talking about
15 plenary power, limits are hard to find, but I
16 will say this Court has identified some. What I
17 would say is, when Congress acts directly on
18 Indians, the limits on plenary power, as opposed
19 to the other provisions, are hard to find, but
20 what Congress said in Perrin was that when
21 Congress acts on non-Indians to protect Indians,
22 then there may be limits.

23 And, in that case, it was the question
24 of banning alcohol sales outside of
25 reservations. And what Congress said -- what

1 the Court said was that if you're doing it in
2 counties where there are a lot of Indians,
3 probably okay. If you're doing it statewide
4 when Indians are concentrated in a -- a number
5 of counties, not okay. And so that's a limit
6 that this Court has identified.

7 The limit that does not exist is the
8 one that's tied to land. I -- I've already
9 addressed the limit for state custody
10 proceedings, which, you know, Congress has acted
11 for servicemen to say deployment is not
12 something you can take into -- it cannot be
13 dispositive in a best interest finding, right.
14 Congress has acted pursuant to other federal
15 powers to do exactly what it did in ICWA.

16 The -- the rule that makes no sense is
17 land. Why does it make no sense? From the
18 beginning, Congress has -- from the 17 -- from
19 the Trade and Intercourse Act forward, Congress
20 has legislated off-reservation. It -- it
21 prohibited in the 1834 Act in Section 15
22 alienating the confidence of Indians. In the
23 earlier acts, it -- it required non-Indians to
24 report Indian invasions to the federal
25 government. It prohibited land sales by Indians

1 on and off the reservation. In the liquor sale
2 context, what this Court said in McGowan was
3 Congress has the authority to legislate wherever
4 Indians may be. In Holliday, Forty-Three
5 Gallons, Perrin, all those cases are off
6 reservation. In the treaty cases, this Court
7 has seen in Fishing Vessel, in Cougar Den,
8 right, those were off reservation. And then
9 Indian Health Care Improvement Act, the Indian
10 Housing -- Native American Housing Assistance
11 Program, the Indian Education Program, all of
12 those are off reservation.

13 Why does land make no sense? Land
14 makes no sense because, in the Articles of
15 Confederation, there was a land carveout. It
16 was exactly the kind of reason that we had the
17 change in the Constitution to prevent that.

18 Why does land make no sense? There
19 are landless tribes, right? There are landless
20 tribes in California and Montana. Land is just
21 not a sensible way to divide and limit
22 congressional power.

23 JUSTICE ALITO: There were --

24 JUSTICE KAVANAUGH: What --

25 JUSTICE ALITO: -- several questions

1 --

2 JUSTICE KAVANAUGH: Go ahead.

3 JUSTICE ALITO: There were several
4 questions earlier about the justification for
5 granting preference for foster or adoptive
6 parents who are members of an entirely different
7 tribe. Could you speak to that?

8 MR. GERSHENGORN: Certainly, Your
9 Honor.

10 JUSTICE ALITO: Does that -- is that
11 based on -- on -- on the assumption that all
12 tribes are fungible --

13 MR. GERSHENGORN: No, Your Honor.

14 JUSTICE ALITO: -- or sufficiently
15 similar to justify that?

16 MR. GERSHENGORN: No, Your Honor.

17 JUSTICE ALITO: What is it based on?

18 MR. GERSHENGORN: It is based on the
19 view that -- that -- that all federally
20 recognized -- all federally recognized tribes
21 and members of those tribes share a common
22 political relationship with the United States.
23 That's what renders it political rather than
24 racial. Every member of a federally recognized
25 tribe shares that political relationship.

1 Now that then begs the question that a
2 number of the Justices have focused on about, is
3 it rational? That's a fair question, and that's
4 a fair debate.

5 Let me explain why I think it clearly
6 is rational. And some of this Mr. Kneedler
7 touched on and I agree with. It has a clearly
8 -- remember, we're talking about a -- a
9 preference -- a prong that was never applied to
10 any of the -- of the plaintiffs here. And on a
11 facial challenge, right? All I -- all it has to
12 have is a plainly legitimate scope, which it
13 does.

14 In Alaska, for example, it is quite
15 common for Indian members of one tribe to live
16 on the reservation of another. The preference
17 applies quite often there, right? What the --
18 what your Court -- what the Court has been
19 worrying about is this kind of Maine to Arizona
20 hypo, right, that we identify some tribe in
21 Maine that's going to somehow get a preference.

22 Well, that case has never happened
23 that we have been able to find and able counsel
24 on the other side has been able to find, and I
25 would submit on a facial challenge in a

1 situation where it's never applied that would be
2 very odd to strike down a congressional statute.

3 I will say, though, that I -- for the
4 reasons I've said, I think it's -- it is
5 actually quite rational. If the Court
6 disagreed, it's also clearly severable. If I
7 give a -- if I say I would like, you know,
8 Italian food, Chinese food, and any steak joint,
9 and it turns out there's a vegan in the group,
10 that I can't do the steak joint, the first two
11 preferences remain, okay? There's no --

12 JUSTICE ALITO: But why is it
13 rational? I understand that it's a facial
14 challenge, but why -- why is it rational?
15 Before the arrival of Europeans, the tribes were
16 at war with each other often, and they were
17 separated by an entire continent. And I -- I
18 don't know how many cultural similarities you
19 would identify if you compared a tribe in
20 Florida with a tribe in Alaska.

21 MR. GERSHENGORN: So, Your Honor, I
22 think it's been pretty clear I am not basing
23 this on cultural similarity. I'm basing it on a
24 political relationship with the United States
25 that all the tribes share.

1 Now I take Your Honor's point. If we
2 had a case -- and this is why you wait for --
3 for actual -- for actual as-applied challenges
4 as opposed to facial challenges. If we had a
5 case where a family was denied because a tribe
6 in Maine with no ties to the child was given
7 preference over a Cherokee or a Navajo Indian,
8 we would be talking about a pretty serious -- a
9 pretty serious as-applied challenge.

10 But, of course, we're -- we're a
11 million miles from that. We're the exact
12 opposite. What you're hearing and what the --
13 what is actually happening on the ground is this
14 is used in situations which are quite
15 unremarkable, as I say, when a member of one
16 tribe is living on the reservation of another,
17 has built exactly the kind of community that
18 ICWA is hoping to preserve.

19 So, you know, from -- from my
20 perspective, I certainly am not here to defend
21 the -- the what I'll call the Maine to Arizona
22 hypo. But I -- what I am here to say is it has
23 a plainly legitimate sweep; it is political, not
24 racial; and that -- that -- that even if Your
25 Honors disagree with that, it's also plainly

1 severable.

2 CHIEF JUSTICE ROBERTS: Counsel, on
3 the political and racial point, I'd like to
4 return to the dialogue between Justice Barrett
5 and Mr. Kneedler, which, if I understand it,
6 raised a question, because there are several
7 hypotheticals where Mr. Kneedler, I think,
8 properly recognized that that would present a
9 harder case.

10 And I think the suggestion was, well,
11 is it a harder case because the racial aspect of
12 what is a combined, in most cases anyway,
13 combined polity and blood characterization, in
14 that case, that the racial aspect predominates
15 in some particular way.

16 MR. GERSHENGORN: Right.

17 CHIEF JUSTICE ROBERTS: Did that seem
18 to resonate with you?

19 MR. GERSHENGORN: No, Your Honor.
20 You'd be perhaps unsurprised -- no. The way I
21 would view it is -- and this was, I think, one
22 of the ways Justice Barrett framed it, which is
23 how I think about it, which is that's a
24 political characterization. If we're basing --
25 if -- if Congress is making a judgment on

1 federally recognized tribes, remember, that's
2 excluding people who have left the tribe.
3 That's excluding state-recognized tribes.

4 CHIEF JUSTICE ROBERTS: So your answer
5 --

6 MR. GERSHENGORN: But -- but could I
7 finish? Because I -- I want to respond directly
8 to your question. I'm not finishing on a -- on
9 a tangent. Directly to your question.

10 (Laughter.)

11 MR. GERSHENGORN: It is a political
12 justification, but it has to meet the Mancari
13 standard, special treatment tied rationally to
14 the fulfillment of Congress's unique obligations
15 to the Indians. What does that mean?

16 Well, I think what it means is that a
17 bare desire to help individual Indians doesn't
18 satisfy it. That's what Mancari suggests,
19 right? Mancari says you can't just give a
20 preference to any Indian, even a federally -- a
21 member of a federally recognized tribe,
22 throughout the government. A bare desire to --
23 to help is not enough.

24 You know, we could go -- I don't want
25 to parse agency by agency. I think DOJ, which

1 does all the litigation for the government and
2 Indian tribes, probably is a situation where you
3 could justify a preference.

4 But the main point, Your Honor, is
5 that Mancari has some bite, right? Mancari says
6 you can't just decide you're going to help any
7 individual Indians and then, you know, close the
8 book.

9 CHIEF JUSTICE ROBERTS: All right. So
10 you disagree with Mr. Kneedler, who did say that
11 in those variety of cases that they would
12 present a harder -- a harder case?

13 MR. GERSHENGORN: I'm not saying I
14 disagree that it's a harder case. I'm just
15 saying I view them as political.

16 CHIEF JUSTICE ROBERTS: You'd win it
17 just because of --

18 MR. GERSHENGORN: No.

19 CHIEF JUSTICE ROBERTS: -- despite the
20 fact --

21 MR. GERSHENGORN: Well, I'd have to
22 hear the particular hypos, Your Honor, but let
23 me -- I want to be clear about the method of
24 analysis, and then I'm happy to answer whatever
25 hypos Your Honor wants.

1 The -- the -- my method of analysis
2 is, if the federal government imposes it on
3 federally recognized tribes, it's political. It
4 then has to meet the test that was set forth in
5 Mancari. It has -- the reason -- justification
6 has to be tied rationally to the fulfillment of
7 Congress's unique obligations to the Indians.

8 Some of those, you know, Mancari said
9 BIA, okay; federal government-wide, not okay.
10 And, you know, then I need to see what Congress
11 said. What makes this case so easy, right, is
12 Congress studied this for four years, right?
13 Congress told you exactly why, not in
14 legislative history, but in legislative findings
15 that it said this is what we're worried about,
16 right?

17 We -- this is -- this is going to the
18 -- this is not a peripheral mere desire to
19 benefit individual Indians. This is going to
20 the core of tribal self-government.

21 JUSTICE ALITO: What about the
22 hypothetical about providing COVID vaccines?
23 And suppose Congress says Indians -- the Indian
24 population on the whole has more people with
25 complications -- with -- with factors that make

1 them more vulnerable to serious consequences
2 from getting COVID, and, therefore, they should
3 get preference over others in the -- in the
4 distribution of vaccines.

5 MR. GERSHENGORN: So, Your Honor, the
6 way you posed the hypo, I would consider that a
7 racial classification, not a political one. If
8 Congress were to say just Indians undefined,
9 that might well be a -- a racial classification,
10 might well be.

11 If Congress were to say we're giving
12 it to members of federally recognized Indian
13 tribes first because we find on reservations
14 where the individuals are concentrated that
15 there's a particular problem because they don't
16 have access to healthcare and hospitals in -- in
17 the same way, then I think that would be
18 defensible. That would be a political
19 classification.

20 JUSTICE ALITO: All right. Well, let
21 me modify it. It applies to members of
22 federally recognized tribes but it not -- it's
23 not limited to what happens on the reservation.
24 It's everywhere.

25 MR. GERSHENGORN: So I think that -- I

1 think that would be harder. And it goes back to
2 the bare -- bare desire, that would be a
3 political classification, but the bare desire to
4 help members of tribes is not, we think, is
5 not -- forget what we think -- is not what the
6 Court has said is sufficient under Mancari.

7 And so, you know, I think that -- that
8 that's how I -- that's how I think about it.
9 You know, look, any of the hypos could have hard
10 questions. I've tried to give the Court a sense
11 of what I think this Court's cases demand and,
12 therefore, how we think about it.

13 JUSTICE SOTOMAYOR: I -- I'd like you
14 to finish that.

15 MR. GERSHENGORN: No, I'm done.

16 JUSTICE SOTOMAYOR: You say helping
17 Indians is not enough. But what's the helping
18 Indians plus what?

19 MR. GERSHENGORN: So I think some
20 link, Your Honor, to tribal self-government is
21 sort of at the core, and that's why I think ICWA
22 is really so easy, because what -- what makes --
23 Congress made the findings, and -- and a number
24 of the Justices have touched on it this
25 morning -- Congress made the findings that the

1 wholesale unwarranted removal of 25 to
2 35 percent of Indian children was devastating
3 tribes and tribal self-government.

4 There is nothing more core -- this is
5 a place where I disagree quite strongly with my
6 friends on the other side -- like, there is
7 nothing more central to self-government than
8 deciding who --

9 JUSTICE SOTOMAYOR: So how about --

10 MR. GERSHENGORN: -- you know, who's a
11 member.

12 JUSTICE SOTOMAYOR: -- how does --
13 health --

14 MR. GERSHENGORN: And you don't have
15 to take my word for it. That's what Congress
16 said.

17 JUSTICE SOTOMAYOR: -- how does
18 healthcare, the education, the housing
19 allotments, how do they fit in?

20 MR. GERSHENGORN: I -- I think that --

21 JUSTICE SOTOMAYOR: Those are the
22 other Title 25.

23 MR. GERSHENGORN: Yeah, I think that
24 those are -- that shows, Your Honor, a -- a
25 number of things.

1 First of all, it shows that Congress
2 has routinely -- there's not -- you know,
3 there's this sense, I think, that Mancari sprung
4 up from -- you know, from the -- from the earth,
5 you know, 40 years ago.

6 And -- but -- but -- what -- what --
7 Congress has been legislating to help Indians
8 since the beginning, right? It is in the
9 Constitution, and it is there not just -- I'm
10 not using that as sort of an, a-ha, it's in the
11 Constitution. It's in the Constitution because
12 tribes are -- Indians are treated in the
13 Constitution like political entities, right?

14 Congress -- they're treated parallel
15 in the -- in the -- in the -- in the Commerce
16 Clause with foreign nations and with states.
17 There -- Congress has the power to treat -- to
18 conduct treaties with Indians, right?

19 They are -- they are political from
20 the beginning and, like, I mean, I don't want to
21 list all of the Indian-specific statutes, right,
22 but the Dawes Act, the Indian Civil Rights Act,
23 the Indian Reorganization Act, you know, ICWA,
24 IGRA, I mean, Congress has routinely singled out
25 members of federally recognized tribes for

1 legislation.

2 JUSTICE KAGAN: Mr. Gershengorn, I
3 want to go back to something you said because
4 you said it -- you know, it's obvious that when
5 you remove 30 percent of children from a
6 political community, you harm that political
7 community.

8 I think some of the strong feelings
9 about this case come from a sense of, yes, but
10 what about the children? I mean, you do harm
11 the political community, but are you saying that
12 the political community is more important than
13 the welfare of the children? And -- and -- and
14 -- and so that's the thing that I think people
15 are going, whoa.

16 MR. GERSHENGORN: Yeah.

17 JUSTICE KAGAN: I mean, so --

18 MR. GERSHENGORN: I -- I'm glad you
19 asked that, Your Honor. I think it's critical
20 that what Congress found is not just that ICWA
21 was -- was important for preserving the tribal
22 community. Congress found that ICWA was in the
23 best interests of the children, right?

24 I -- I don't think I could emphasize
25 it more than -- than that. What Congress found

1 was that it was -- it was in the interests of
2 the children. And the reason that Congress
3 found that is because -- and the reason ICWA has
4 become the gold standard is because Congress
5 made the judgment and recognized that separating
6 children from their families and communities too
7 soon caused harm.

8 I -- I think it's important to
9 recognize that the average age of people in ICWA
10 is over six years old. This is discussed in the
11 Casey brief. These are children who have formed
12 school mates, school bond. They are children
13 who are playing on sports teams. They are
14 children who have interacted, have a group of
15 friends. They've been -- made connections on
16 the community.

17 And what ICWA realizes is that these
18 children were being taken from their communities
19 too soon. Why? Well, sometimes there was abuse
20 at home, right? But what ICWA says is a lot of
21 times that is remediateable, which is why we
22 have the active efforts provision, right?

23 It's substance abuse, right? It's --
24 it's the ability, if you can get the child out
25 of the home, get the care to the parents, then

1 the child will actually thrive when the child is
2 returned to the home and community.

3 CHIEF JUSTICE ROBERTS: What --

4 MR. GERSHENGORN: So I --

5 CHIEF JUSTICE ROBERTS: -- what --

6 what about the third preference, which is a
7 preference for members of another tribe? How
8 does that have to do with keeping the Indian
9 child on the reservation?

10 MR. GERSHENGORN: So, Your Honor, as
11 I've suggested, the -- the --

12 CHIEF JUSTICE ROBERTS: With the --
13 with the familiar environment as you suggested.

14 MR. GERSHENGORN: Sure. The -- and --
15 and the -- the -- the -- the quickest answer to
16 that, Your Honor, is that -- that in my
17 experience, or I should say my experience
18 talking with people who actually experienced
19 this, which is as close as I've gotten, is that
20 the way this comes up most often actually is
21 tribes -- is individual Indians living on the --
22 on the reservation of another.

23 And so they are building exactly that
24 community. This is not some random tribe
25 plucked from the ether that all of a sudden gets

1 a preference in the real world.

2 CHIEF JUSTICE ROBERTS: Well, there's
3 no limitation of that.

4 MR. GERSHENGORN: Absolutely, Your
5 Honor. And I am not here to say -- in fact, I
6 think I've conceded that it would be an
7 extraordinarily difficult as-applied challenge
8 in the kinds of -- again, I'm using as a
9 shorthand the Maine to Arizona hypo, but I don't
10 think this is at all difficult on a facial
11 challenge in the real world where this plays
12 out, because what's happening in the real
13 world -- and, remember, we're -- we're talking
14 about not a single example of this appears in
15 any of the briefing that I have seen, okay?

16 And so what's happening in the real
17 world is that individuals are -- are --
18 individual members are living on the
19 reservations of another and -- and then the
20 preference is going to that tribe.

21 CHIEF JUSTICE ROBERTS: Justice
22 Thomas?

23 Justice Alito?

24 Justice Sotomayor?

25 JUSTICE KAGAN: You, in your opening

1 statement, you said that this is a bad case to
2 deal with this question because the individual
3 plaintiffs don't have standing. Why not?

4 MR. GERSHENGORN: Your Honor, thank
5 you. So they don't have standing for a number
6 of reasons. First, redressability, right?

7 This is a law review article. It does
8 not bind a single state court judge that
9 actually adjudicates a -- a -- a -- a -- a state
10 court adoption proceeding.

11 Second, there is no injury-in-fact.
12 There is not a single individual plaintiff who
13 has had an adoption that existed from the time
14 of the amended complaint through the Fifth
15 Circuit judgment. And so there is no
16 injury-in-fact.

17 And, third, there has been some
18 suggestion that the APA, the challenge to the
19 APA, regs under the APA might save the equal
20 protection challenge. That is incorrect.

21 The injury to the Plaintiffs is coming
22 from the preferences in the statute. There is
23 nothing about the challenge to the regs that
24 eliminates the preferences in the statute or the
25 definition of Indian child. And so there is no

1 standing on the equal protection side for --

2 JUSTICE KAGAN: Does it -- does it
3 make a difference that our ruling would bind
4 state officials?

5 MR. GERSHENGORN: Absolutely not, Your
6 Honor. The -- the Court has been crystal clear
7 that standing needs -- that standing needs to be
8 established in the lower court.

9 Every case would have standing. There
10 would be no advisory opinions because, of
11 course, what this Court says binds everybody.

12 And so the fact that -- that it's made
13 it this far through an erroneous standing ruling
14 does not cure the -- the standing problem that
15 existed at the start.

16 And then I will say, although Your
17 Honor asked me about individuals, Texas has no
18 equal protection rights here. Texas goes on and
19 on, we heard all the numbers this morning, about
20 their injury. That's nice, but injury does not
21 create an equal protection right.

22 And, basically, what -- what Texas's
23 view would do is completely eviscerate
24 third-party standing. Georgia v. McCollum could
25 have been a very short opinion. It could have

1 just said Texas is participating in an
2 unconstitutional scheme, thank you very much,
3 but it didn't do that. It looked to see whether
4 there were third-party rights that Georgia could
5 assert that for some reason the third party was
6 unlikely to assert.

7 And -- but regardless of whether
8 teenage drinkers or excluded jurors have a
9 disincentive to -- to bring court cases, that
10 has no application to the situation here, where
11 individual plaintiffs are in court litigating.

12 So there is no justification for Texas
13 to assert rights. And, obviously, the *parens*
14 *patriae* is not available against the federal
15 government. So there is no standing, in
16 addition to the fact that the preferences that
17 have most troubled, for example, Justice
18 Kavanaugh and Justice Barrett, they were never
19 applied to any -- like, it's like standing on
20 standing on standing problems. It's like an
21 inverse of turtles all the way down. It's like
22 the absence of turtles anywhere.

23 I need a better metaphor.

24 JUSTICE KAGAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 JUSTICE GORSUCH: You haven't had a
3 chance to address the commandeering arguments in
4 particular with respect to the active efforts
5 provision.

6 MR. GERSHENGORN: So the active
7 efforts provision, I -- I think I would say two
8 things on that.

9 First of all, the main point from our
10 perspective is that -- and this is at Footnote
11 44 of -- Footnote 54 on page 85 of our brief --
12 is that it applies even -- evenhandedly to --
13 this does not single out Texas or does not
14 single out states for particular treatment. It
15 applies just as much in private placements, and
16 that's set forth in the brief.

17 I also think that it is -- it is right
18 to view this as a situation in which a private
19 right is created. You have the -- the -- the
20 individual Indian child. The -- the tribe has a
21 right to -- you know, to -- to have the
22 placement done only after active efforts are --
23 you know, active efforts are done.

24 And so I -- I think that with respect
25 to the active efforts provisions, under this

1 Court's case law, a provision that applies
2 even-handedly to private parties and to states
3 and creates private rights is -- is not
4 commandeering -- not impermissible
5 commandeering.

6 JUSTICE GORSUCH: I think we heard
7 from Texas that it disproportionately affects
8 them because most of these are initiated by
9 state entities and also that they'd have to do
10 some work, even in the event of a
11 private-initiated suit.

12 MR. GERSHENGORN: Yeah, I think, Your
13 Honor, that way madness lies. If this Court is
14 going to evaluate even-handed restrictions to
15 see whether, on balance, they affect more states
16 than private parties, we've really extended
17 the -- you know, the anti-commandeering doctrine
18 and I think the -- this Court's caseload quite
19 substantially because, you know, what the -- you
20 know, it's one thing to say -- you know, not to
21 mention cases like *Reno v. Condon*. I mean, once
22 you start to say, yes, it regulates
23 even-handedly, yes, in the real world, there are
24 private and state parties at issue, but we're
25 going to look to it and say it more often

1 affects, you know, states -- and I think Reno v.
2 Condon is sort of against that. I think that
3 was one where the state may have been more
4 affected. But, in any event, I don't think that
5 that's a sensible line that this Court could
6 ever draw to look at, statute by statute, in the
7 real world, does this affect states more than
8 private citizens.

9 JUSTICE GORSUCH: Is there any
10 inhibition to a private party raising an
11 as-applied equal protection challenge to the
12 third preference in state court litigation?

13 MR. GERSHENGORN: Absolutely not.

14 JUSTICE GORSUCH: And it hasn't
15 happened in 40 years that you're aware of?

16 MR. GERSHENGORN: I'll just say it has
17 not been brought to our attention either as
18 we've done our research or the other side. As
19 Your Honor knows, recordkeeping in family law
20 cases is tricky, but I'm not aware of -- of --
21 I'm not aware of an Equal Protection Clause
22 challenge to the third placement. And, indeed,
23 I just want to reemphasize, as I said before, it
24 has not been applied to any of the plaintiffs
25 here.

1 JUSTICE GORSUCH: And, finally, I
2 understand this Court sometimes speaks when
3 Congress hasn't in Indian affairs, but -- but,
4 here, we have a statute by Congress, and are you
5 aware of any time this Court in 200 years has
6 struck down as facially invalid an exercise of
7 Congress's plenary powers over Indian affairs?

8 MR. GERSHENGORN: I -- I am not.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh?

11 JUSTICE KAVANAUGH: Yeah, two
12 questions. First, you mentioned that the
13 average age is six and a half. I assume that
14 means there are hundreds or thousands of
15 children who are relative newborns, one, two,
16 three, over the years, who are affected by this
17 statute. There's no age cutoff in the statute,
18 or are you -- correct?

19 MR. GERSHENGORN: There is no age
20 cutoff in the statute.

21 JUSTICE KAVANAUGH: And are you aware
22 that it's been applied differently with newborns
23 or --

24 MR. GERSHENGORN: So, Your Honor --

25 JUSTICE KAVANAUGH: -- younger

1 children?

2 MR. GERSHENGORN: -- that's a trickier
3 question because -- I mean, that's one that I
4 don't think anybody has the empirical research
5 on. I think, as a practical matter, it would
6 surprise me if it weren't, that the statute, the
7 -- the good cause exception itself provides a
8 different application. It says that the wishes
9 of a -- of a child who is old enough to express
10 them are taken into account.

11 The cultural bonds that an older child
12 would have almost certainly would be taken into
13 account if the child comes in and says, you
14 know, I -- I have a friend group, I have a
15 sports team, I have after school activities. So
16 I --

17 JUSTICE KAVANAUGH: You're not --
18 those are good points, but you're not aware that
19 that's reflected in any case law --

20 MR. GERSHENGORN: We're on a facial
21 challenge, Your Honor --

22 JUSTICE KAVANAUGH: Yeah.

23 MR. GERSHENGORN: -- so I'm not aware
24 of --

25 JUSTICE KAVANAUGH: Yeah.

1 MR. GERSHENGORN: -- anything in the
2 record one way or the other on that.

3 JUSTICE KAVANAUGH: Right.

4 MR. GERSHENGORN: That's the problem,
5 I think, not the solution.

6 JUSTICE KAVANAUGH: No -- no, a fair
7 point.

8 Secondly, on the land question, I just
9 want to get -- make sure this sentence from
10 Mancari -- that you can respond to it:
11 "Literally every piece of legislation dealing
12 with Indian tribes and reservations and
13 certainly all legislation dealing with the BIA,
14 single out for special treatment a constituency
15 of tribal Indians living on or near
16 reservations."

17 Is that accurate then? Is it still
18 accurate now?

19 MR. GERSHENGORN: I think it was -- I
20 think the scope of history of Indian law
21 suggests that it is not accurate and was never
22 accurate. They -- Congress has legislated for
23 tribal -- and tribal members off the land and
24 has legislated for non-Indians under the Indian
25 powers from the beginning.

1 But, as I said, like, to me, the
2 bigger problem is -- is -- two -- two points,
3 Your Honor. One is I really think it's
4 important that Mancari isn't the root of the
5 Congress's special treatment of Indians. That
6 dates back to the text of the Constitution and
7 from the very first Trade and Intercourse Acts,
8 that -- that -- that -- that -- that started,
9 and then for the reasons I've said and I won't
10 repeat --

11 JUSTICE KAVANAUGH: That's fair.

12 MR. GERSHENGORN: -- I think land is
13 like -- is just a nonsensical -- a nonsensical
14 way to crosscut given what the Constitution was
15 trying to do vis-à-vis the Articles of
16 Confederation, given the history of the
17 treatment, and given --

18 JUSTICE KAVANAUGH: Your --

19 MR. GERSHENGORN: -- what this Court
20 has said over --

21 JUSTICE KAVANAUGH: -- your point --
22 sorry, because time --

23 MR. GERSHENGORN: I'm sorry. I'm
24 sorry.

25 JUSTICE KAVANAUGH: -- is short. Your

1 -- your point is the sentence is not accurate?
2 I mean, the tip-off should have been the word
3 "literally," I suppose, but it's in there.

4 (Laughter.)

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 JUSTICE BARRETT: Active efforts, I'm
9 just trying to get a picture for how this works.
10 You're saying it applies to private parties and
11 the state. And this is just because I'm having
12 a difficult time imagining how this actually
13 happens on the ground.

14 You have to show that efforts have
15 been made to provide remedial services and
16 rehabilitation programs designed to prevent the
17 breakup of the Indian family. Who -- I mean,
18 Texas says, well, that's -- those are state-run
19 programs that would be those efforts, like the
20 rehabilitation.

21 MR. GERSHENGORN: Yeah.

22 JUSTICE BARRETT: How does that work
23 in the context --

24 MR. GERSHENGORN: So, Your Honor --

25 JUSTICE BARRETT: -- of a private

1 party?

2 MR. GERSHENGORN: -- I have to confess
3 I don't know, and I -- I apologize for that.

4 JUSTICE BARRETT: No.

5 MR. GERSHENGORN: I don't know how
6 that works in the real world in private
7 placements. It doesn't seem to me that it
8 inevitably has to go through the state services,
9 but the candid answer to your question is I just
10 don't know.

11 JUSTICE BARRETT: Okay. And then one
12 other quick question. Would your client have
13 any objection -- I -- I asked General Stone,
14 okay, well, one -- one argument that the
15 government makes is this isn't commandeering
16 because you can walk away. You know, you can
17 decide not to do this. Would your client have
18 any objection then if the State of Texas --
19 General Stone said our substantive law requires
20 us to undertake efforts to place children in
21 foster care in these circumstances, and it would
22 be unmanageable for us to discern when a child
23 is Indian or a member of a tribe or not.

24 Let's imagine Texas says, okay, we
25 want to walk away, we don't want to engage in

1 these active efforts, so we're just going to get
2 out of the business, and if we can discern that
3 a child is a member of a tribe, our agencies
4 will not be involved in placing the children in
5 foster care.

6 MR. GERSHENGORN: So, Your Honor, I --
7 I mean, I think that would be a disaster on the
8 ground --

9 JUSTICE BARRETT: But -- but could --

10 MR. GERSHENGORN: -- if that's what
11 Your Honor is asking.

12 JUSTICE BARRETT: -- but would it be
13 legal for Texas to do that? Would there be an
14 equal protection challenge that someone could
15 bring against Texas for treating Indian children
16 differently when it comes to foster placement?

17 I mean, you're saying --

18 MR. GERSHENGORN: I don't -- yeah.

19 JUSTICE BARRETT: -- that there would
20 be political consequences or practical
21 consequences to Texas walking away from foster
22 care. And I agree.

23 MR. GERSHENGORN: Yeah.

24 JUSTICE BARRETT: And General Stone
25 made that point. I guess what I'm --

1 MR. GERSHENGORN: I think it would be
2 hard for me to argue, Your Honor -- I'm sorry to
3 cut you off. Finish your question.

4 JUSTICE BARRETT: Oh, no, I was just
5 going to say, but what I'm asking is, if we're
6 thinking about whether Texas has a legal choice,
7 it --

8 MR. GERSHENGORN: Yeah.

9 JUSTICE BARRETT: -- there might be
10 practical considerations. I guess I'm trying to
11 figure out is this really voluntary --

12 MR. GERSHENGORN: So I think I would
13 have to say, Your Honor, given that there were
14 no -- for the first 150 some odd years of our
15 country, there was no childcare system at all,
16 that it would be hard for me to say that Texas
17 is constitutionally required to have one.
18 But that's --

19 JUSTICE BARRETT: But, if they have
20 one, could they cut Indian children out of it,
21 is my question, because they don't have to --

22 MR. GERSHENGORN: No. I think --

23 JUSTICE BARRETT: -- obey ICWA with
24 respect to -- or follow --

25 MR. GERSHENGORN: I think, if Texas --

1 I think that would raise serious equal
2 protection problems --

3 JUSTICE BARRETT: So they don't have a
4 choice then --

5 MR. GERSHENGORN: Well, they have --

6 JUSTICE BARRETT: -- about complying?

7 MR. GERSHENGORN: -- a choice whether
8 to participate in the proceedings at all. They
9 may or may -- they -- what they may not be able
10 to do is say I'm doing it only for non-Indian
11 children.

12 JUSTICE BARRETT: Participate in
13 proceedings --

14 MR. GERSHENGORN: In -- in --

15 JUSTICE BARRETT: -- you mean in
16 foster care?

17 MR. GERSHENGORN: Correct.

18 JUSTICE BARRETT: In the foster care
19 system?

20 MR. GERSHENGORN: Correct. I don't
21 think there's any constitutional requirement
22 they have a foster care system --

23 JUSTICE BARRETT: But, if they have a
24 foster care system, they couldn't say because of
25 what ICWA requires us to undertake in these

1 active efforts and the -- you know, they
2 complain about the recordkeeping, we just want
3 none of that, so we're going to walk away from
4 that, we're not going to let the federal
5 government impose those obligations on us?

6 MR. GERSHENGORN: So I think that's
7 right, but I have to say, of all the answers
8 I've given today, that's the one I'm least
9 confident of.

10 (Laughter.)

11 JUSTICE BARRETT: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: Yes. So is the
15 reason that you, in response to Justice Barrett,
16 the first part of her question, said that you
17 don't really know the details of how ICWA would
18 play out in the ways that she indicated is
19 because we're here on a facial challenge and not
20 an as-applied challenge? You focused on that a
21 couple times.

22 MR. GERSHENGORN: I think it's most
23 honest to say yes, compounded by my own
24 ignorance.

25 (Laughter.)

1 JUSTICE JACKSON: Okay. Well, can you
2 just help me to understand the implications of
3 the facial versus as-applied --

4 MR. GERSHENGORN: Yeah.

5 JUSTICE JACKSON: -- nature of the
6 challenge that's being --

7 MR. GERSHENGORN: Sure.

8 JUSTICE JACKSON: -- that's being
9 brought here?

10 MR. GERSHENGORN: I think it comes in
11 -- in two important ways. First of all, I think
12 it completely changes the standard of review
13 that this Court -- that this Court uses. What
14 the Court has said in facial challenges is
15 statutes -- congressional statutes survive if
16 they have a plainly legitimate scope. And so I
17 think that, like, it completely changes the way
18 we talk about, for example, the -- the third --
19 the third preference.

20 And, you know, then I think, on the
21 flip side, in addition to sort of the change in
22 legal standard, it changes how we talk about it.
23 What we are talking about here is a series of
24 hypotheticals. Honestly, we don't even have the
25 facts of the individual cases before us.

1 Remember, these are childcare proceedings. I
2 mean, there's a debate about -- about Child P,
3 and then there's an amicus brief from the
4 grandmother. They're -- they're presenting
5 starkly different views of what happened.

6 The reason we're doing this is because
7 we're here on facial challenge, right? How this
8 plays out in the real world, what the limits
9 are, this is a very, very difficult area of the
10 law, as the last two, three hours have shown.

11 And -- and to decide it on the basis
12 of hypotheticals that never arise in the real
13 world and yet take away a statute that has made
14 such a meaningful difference for so many
15 children seems to me just like not the way this
16 Court should be deciding questions.

17 Go back to what I said at the start.
18 Deciding a facial challenge to a statute in a
19 situation where there is no standing seems to me
20 like a very poor way to resolve major challenges
21 to critical legislation.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted -- no? I'm
24 sorry, Mr. McGill.

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: It is late.

2 REBUTTAL ARGUMENT OF MATTHEW D. MCGILL
3 ON BEHALF OF CHAD EVERET BRACKEEN, ET AL.

4 MR. MCGILL: Thank you very much, Mr.
5 Chief Justice. I will take the hint.

6 (Laughter.)

7 MR. MCGILL: I -- I -- I want to start
8 with how this works in practice. I assure you
9 it is not at all hypothetical. It starts with
10 the Brackeens and families like them being on a
11 list of willing foster care providers.

12 Joint Appendix 108 says we are willing
13 to be foster parents for other children in the
14 future. When a child comes into the foster care
15 system, the preferences are applied. That's
16 1915(b). The final rule is applied. The good
17 cause requirement to the final rule is applied.
18 And it is applied each and every time an Indian
19 child comes into the system.

20 This is not like Halley's Comet. It
21 comes around a lot. In Texas alone, in -- in
22 Footnote 4 of the district court opinion, 39
23 children, Indian children in -- in the state
24 foster care system. Joint Appendix 108, Texas
25 alleges this happens several times a year.

1 How does the good cause get --
2 requirement get applied on the ground? I would
3 ask the Court to please look at the -- the court
4 of appeals decision in YRJ's case called
5 Interest of YRJ. It says that in -- seeking to
6 establish good cause for not following the
7 placement preferences, the -- the party must
8 bring forth by clear and convincing evidence of
9 -- of good cause, that good cause must be based
10 on at least one of several considerations.

11 My friend on the other side says this
12 is a disarray in the state courts. I would
13 respectfully suggest it is regulatory design.

14 The government, in any event, has
15 conceded that this is intended to override the
16 normal application of the best interest tests.
17 We heard a little bit about the third
18 preference. The government suggests that it
19 applies to maybe only related tribes. We know
20 why it applies. It's in this Court's decision
21 in Holyfield.

22 There is a federal policy to send
23 Indian children to the Indian community, not
24 their community, as the government seeks to
25 alter it in the brief, the Indian -- Indian

1 community writ large.

2 We heard that the proprietary interest
3 is maybe just a duty of protection. I would
4 submit YRJ was a citizen of Texas before she was
5 given her -- her certificate of Indian blood.
6 Texas has at least as much proprietary interest
7 as the Navajo Nation does here.

8 The third preference and the
9 biological component of the Indian child
10 definition is the smoking gun textual evidence
11 here that Congress was acting with a racial
12 purpose.

13 And it's backstopped by the House
14 report, which talks about identifying children
15 who have common blood. It says that blood
16 relationship is the very touchstone of the
17 ability to remain, to enjoy the benefits of a
18 tribe.

19 The government here is making, in
20 fact, the same argument it made in Rice on the
21 equal protection point. You can see that from
22 Justice Ginsburg's one-paragraph dissent. But
23 there's one notable exception.

24 In Rice, at oral argument, the
25 government was prepared to -- to concede that

1 these preferences could not be applied in the
2 outer world. It -- and it recognized that this
3 distinction was rooted in Mancari itself.

4 So that's why Rice concludes that the
5 administration of state laws by a state agency
6 is that outer world. It's the new and larger
7 dimension to which Mancari could not possibly be
8 applied. That -- the government here is even
9 broader than it made in Rice. And it can't be
10 squared with Rice's holding that a tribal
11 classification can be a proxy for race.

12 The classification was political in
13 Mancari because it directly advanced tribes'
14 ability to govern themselves. The Justice and
15 Treasury hypotheticals, Justice Kavanaugh,
16 present more difficult questions, it was
17 conceded, because the tie to self-governance in
18 those cases is -- is much more attenuated.

19 Rice held that the Hawaii statute's
20 advancement of indigenous self-government was
21 insufficient to make that classification
22 political because it operated in the sphere of
23 administration of state laws by a state agency.

24 ICWA has no connection to tribal
25 government at all. Whether YRJ is adopted by

1 the Brackeens will not affect one iota the
2 Navajo Nation's ability to pass its own laws or
3 to govern themselves. It doesn't apply on
4 Indian lands at all. It doesn't even affect
5 tribal existence. She is already a member of
6 the Navajo Nation and will remain so.

7 YRJ is subjected to a different legal
8 standard here based on a status that she has
9 zero ability to control. That differing legal
10 standard, the placement preferences, is at best
11 a set of stereotypes about what is best for the
12 child that's -- that has Indian ancestry.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel. The case is submitted.

15 (Whereupon, at 1:15 p.m., the case was
16 submitted.)

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