

IN THE SUPREME COURT OF THE UNITED STATES

No. 21-376

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

CHAD EVERET BRACKEEN, ET AL.

No. 21-377

CHEROKEE NATION, ET AL., PETITIONERS

v.

CHAD EVERET BRACKEEN, ET AL.

No. 21-378

STATE OF TEXAS, PETITIONER

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

No. 21-380

CHAD EVERET BRACKEEN, ET AL., PETITIONERS

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPLICATION FOR LEAVE FOR THE PARTIES TO FILE
OPENING, RESPONSE, AND REPLY BRIEFS IN EXCESS OF THE WORD LIMITS

Pursuant to Rules 22 and 33.1(d) of this Court, the Solicitor General, on behalf of the federal petitioners,¹ respectfully requests that the parties be granted leave to file opening, response, and reply briefs in these consolidated cases in excess of the word limits established by this Court's Rule 33.1(g)(v), (vi), and (vii). We request leave for Texas² and the individual petitioners³ to file consolidated opening briefs of no more than 20,000 words each; for the federal petitioners, the tribal petitioners,⁴ and Navajo Nation⁵ to file consolidated response briefs of no more than 22,500 words each; and for Texas and the individual petitioners to file consolidated reply briefs of no more than 8,000 words each. Texas, the individual petitioners, the tribal petitioners, and Navajo Nation have consented to this request.

1. These consolidated cases concern the constitutionality of the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901 et seq. In 2018, Texas and the individual petitioners filed the

¹ The federal petitioners are the petitioners in No. 21-376 and respondents in each of the other three cases.

² Texas is the petitioner in No. 21-378 and a respondent in each of the other three cases.

³ The individual petitioners are the petitioners in No. 21-380 and respondents in each of the other three cases.

⁴ The tribal petitioners are the petitioners in No. 21-377 and respondents in each of the other three cases.

⁵ Navajo Nation is a respondent in each of the four cases.

operative complaint against the federal petitioners, challenging the constitutionality of ICWA on various grounds. D. Ct. Doc. 35 (Mar. 22, 2018). The tribal petitioners intervened as defendants. D. Ct. Doc. 45 (Mar. 28, 2018). The district court granted summary judgment to Texas and the individual petitioners, declaring various provisions of the statute and its implementing regulations unconstitutional. 21-376 Pet. App. 463a-522a.

The federal petitioners and the tribal petitioners appealed, and the court of appeals permitted Navajo Nation to intervene in support of the appellants. C.A. Order 2 (Jan. 25, 2019). A divided panel of the court of appeals reversed the district court's grant of summary judgment and rendered judgment in the government's favor on all claims. 21-376 Pet. App. 397a-462a. The court of appeals then granted rehearing en banc and issued a fractured decision affirming in part and reversing in part the judgment of the district court. Id. at 1a-396a.

The parties filed four separate petitions for writs of certiorari seeking review of the en banc court of appeals' decision. The federal petitioners and the tribal petitioners sought review of the same three questions: (1) whether various provisions of ICWA violate the anticommandeering doctrine of the Tenth Amendment; (2) whether the individual petitioners have Article III standing to challenge ICWA's placement preferences for "other Indian families," 25 U.S.C. 1915(a)(3), and for "Indian foster home[s]," 25 U.S.C. 1915(b)(iii); and (3) whether Section 1915(a)(3)

and (b)(iii) are consistent with equal protection. See 21-376 Pet. I; 21-377 Pet. i-ii.

Texas sought review of four questions: (1) whether Congress had the power under the Indian Commerce Clause or otherwise to enact ICWA; (2) whether the Indian classifications used in ICWA and its implementing regulations violate equal protection; (3) whether ICWA and its implementing regulations violate the anticommandeering doctrine; and (4) whether ICWA and its implementing regulations violate the nondelegation doctrine by allowing individual tribes to establish a different order of placement preferences. See 21-378 Pet. I. The individual petitioners sought review of two questions: (1) whether ICWA's placement preferences violate equal protection; and (2) whether ICWA's placement preferences exceed Congress's Article I authority and violate the anticommandeering doctrine. See 21-380 Pet. i. Navajo Nation filed briefs in opposition to the certiorari petitions filed by Texas and the individual petitioners.

This Court granted all four petitions for writs of certiorari and consolidated the cases. 142 S. Ct. 1204-1205. The Court's order stated that the "[p]arties that were plaintiffs/appellees in the lower courts shall file opening and reply briefs in conformity with Rules 33.1(g)(v) and 33.1(g)(vii)," and that the "[p]arties that were defendants/appellants in the lower courts shall file briefs in conformity with Rule 33.1(g)(vi)." Id. at 1205.

2. The questions presented implicate numerous issues of constitutional law, including Article III's case-or-controversy requirement, Congress's power over Indian affairs, the anticommandeering doctrine, the nondelegation doctrine, and equal protection. Those questions involve several distinct statutory provisions, including the definition of "Indian child" in 25 U.S.C. 1903(4), the provisions governing the removal of Indian children in 25 U.S.C. 1912, the provisions governing the placement of Indian children in 25 U.S.C. 1915, and the recordkeeping provisions of 25 U.S.C. 1915(e) and 1951(a). The decision of the en banc court of appeals addressing the multiple constitutional questions and statutory provisions in the case spans nearly 400 pages. 21-376 Pet. App. 1a-396a.

In light of the multiple questions presented and the complexity of the legal issues involved, the word limits provided by this Court's Rules would be inadequate to allow for a thorough airing of the issues. The parties therefore request leave for Texas to file one consolidated opening brief of no more than 20,000 words and for the individual petitioners to file one consolidated opening brief of no more than 20,000 words. The parties further request leave for the federal petitioners to file one consolidated response brief of no more than 22,500 words, for the tribal petitioners to file one consolidated response brief of no more than 22,500 words, and for Navajo Nation to file one consolidated response brief of no more than 22,500 words. Finally, the parties request leave for

Texas to file one consolidated reply brief of no more than 8,000 words and for the individual petitioners to file one consolidated reply brief of no more than 8,000 words.

The Court has previously permitted parties to file briefs of similar length in cases of particular complexity. See, e.g., Turner v. United States, No. 15-1504 (permitting the government to file a consolidated response brief of no more than 22,500 words); Zubik v. Burwell, No. 14-1418 (permitting petitioners to file consolidated opening briefs of no more than 20,000 words, respondents to file a consolidated response brief of no more than 22,500 words, and petitioners to file consolidated reply briefs of no more than 8,000 words); Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., No. 08-1553 (permitting respondents to file a consolidated response brief of no more than 25,000 words).

3. Texas, the individual petitioners, the tribal petitioners, and Navajo Nation consent to this request. Pursuant to Rule 33.1(d), this application is being submitted at least 15 days before the filing date of Texas's and the individual petitioners' opening briefs, which are currently due on April 14, 2022.

Respectfully submitted.

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