

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.		

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 2 DEB HAALAND, SECRETARY)
 3 OF THE INTERIOR, ET AL.,)
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 4 Petitioners,)
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 9 v.) No. 21-377
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 12 TEXAS,)
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 13 Petitioner,)
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 20 OF THE INTERIOR, ET AL.,)
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23
 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 -- at 25 C.F.R.

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

5 JUSTICE SOTOMAYOR: So, if -- if you
6 don't seek cert on that, there's nothing on that
7 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 2013, when the adoptive
12 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 person
11 challenging the placement preference has shown
12 one of the enumerated factors by, at that time,
13 clear and convincing evidence.

14 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, after the 2016 regulation, the
5 -- the placement preferences are effectively
6 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 curious, first of all,
18 which do you think is your better argument --

19 MR. MCGILL: We're --

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

23 MR. MCGILL: Justice Gorsuch, as you
24 -- we are here to advance both arguments, but
25 I'd like to talk about the equal protection

1 argument.

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

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

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

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

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

19 MR. MCGILL: No, Your Honor.

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

22 MR. MCGILL: Two things, Your Honor.
23 First is the fact that the traceability standard
24 is de facto causation. And, as shown in the
25 Court's decision in Bennett versus Spear, the --

1 the agency that issues the regulation is the de
2 facto cause of a separate party that implements
3 it. That is what's going on here.

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

7 MR. MCGILL: We also are --

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

11 MR. MCGILL: We're --

12 JUSTICE GORSUCH: -- and tribal
13 judges.

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

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

20 MR. MCGILL: And that would provide --

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

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

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

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

14 MR. MCGILL: Of course, Your Honor.

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

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

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

25 CHIEF JUSTICE ROBERTS: Sure.

1 JUSTICE GORSUCH: Yeah.

2 CHIEF JUSTICE ROBERTS: Justice
3 Thomas?

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

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

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

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

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

19 MR. MCGILL: Correct, Your Honor.

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

25 MR. MCGILL: Your Honor, I -- I would

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

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

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

22 MR. MCGILL: No, Your Honor, because,
23 you know, at least in Mancari itself, it
24 recognized that the -- that the hiring
25 preference there was limited to tribal Indians.

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

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

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

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

20 MR. MCGILL: Your Honor, I --

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

24 MR. MCGILL: I think, you know, some
25 of the laws you cited, I think, have, you know,

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

8 JUSTICE SOTOMAYOR: That might be --

9 MR. MCGILL: -- the statutes.

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

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

25 JUSTICE SOTOMAYOR: So you're saying

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

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

6 JUSTICE SOTOMAYOR: Okay.

7 MR. MCGILL: -- whether it --

8 JUSTICE SOTOMAYOR: I understand your
9 argument.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

23 And then, on Rice, you know, a very
24 different situation. Number one, a Fifteenth
25 Amendment case not involved here, right to vote,

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

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

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

22 That is the -- that is the line that
23 -- that Rice drew and how Rice understood
24 Mancari and the line that Mancari itself drew.
25 This -- this distinction that I'm drawing is

1 rooted in Mancari itself because Mancari says
2 that it would be a much more difficult question
3 if the hiring preference there extended to the
4 whole of the federal government.

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

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

11 JUSTICE KAGAN: Yeah, okay, I'm sorry.
12 I was -- you -- I was mistaken.

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

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

25 That -- that -- the Court assumed

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

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

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

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

25 So I -- I guess I can't imagine a -- a

1 -- a statute that's more wrapped up, given --
2 given the terms and given what we know about
3 what Congress was doing, is more wrapped up in
4 the continued flourishing of political
5 communities.

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

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

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

23 And Congress understood these
24 children's placement decisions as integral to
25 the continued thriving of Indian communities,

1 and Congress had a different view of the costs
2 and benefits of how these decisions were being
3 made. And that's not something that we can
4 second-guess, is it?

5 MR. MCGILL: It is under the
6 Constitution, Your Honor. I think that the --
7 the Congress does not have the power to treat
8 these children as property of the tribes --

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

10 MR. MCGILL: -- because of their
11 ancestry.

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

16 MR. MCGILL: Right.

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

23 MR. MCGILL: There -- I want to be
24 clear about this. There was a real problem that
25 -- that Congress was trying to address. We're

1 not denying that there -- the existence of a
2 problem. But the means Congress chose are
3 impermissible. Two wrongs do not make a right
4 here.

5 JUSTICE KAGAN: Thank you, Mr. McGill.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

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

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

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

20 MR. MCGILL: Congress can regulate --

21 JUSTICE GORSUCH: -- under Article I?

22 MR. MCGILL: Sorry to interrupt.

23 JUSTICE GORSUCH: Uh-huh.

24 MR. MCGILL: Congress may, under the
25 Indian commerce power, regulate commerce with

1 Indian tribes wherever it occurs.

2 JUSTICE GORSUCH: So -- so you agree,
3 for example, with our precedent going back to
4 1865 that says, in reference to any Indian tribe
5 or any person who is a member of such tribe, is
6 absolute without reference to the locality of
7 the tribe or the member of the tribe with whom
8 it's carried on? You agree with that?

9 MR. MCGILL: I'm not exactly sure
10 which case you're referring to, but I agree with
11 the --

12 JUSTICE GORSUCH: Holliday. Holliday.

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

14 JUSTICE GORSUCH: Holliday.

15 MR. MCGILL: Right, there's equal
16 protection problems there, but yes, yes.

17 JUSTICE GORSUCH: I'm asking you to
18 put that aside. So -- so Congress can regulate
19 off-reservation?

20 MR. MCGILL: It can regulate commerce
21 with -- with Indians off-reservation, yes.

22 JUSTICE GORSUCH: Okay. And would you
23 have us -- if your view of commerce is that
24 narrow, as -- as -- as portrayed in your brief,
25 what happens to Congress's power to regulate

1 healthcare for Indians off-reservation? That's
2 a major part of Title 25. Would that go?

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

7 JUSTICE GORSUCH: So that might go?

8 MR. MCGILL: No, I don't believe so.
9 I --

10 JUSTICE GORSUCH: That would stand?
11 They could regulate healthcare for Indians
12 off-reservation? Yes or no?

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

17 JUSTICE GORSUCH: Health -- healthcare
18 counts?

19 MR. MCGILL: It counts -- it comes
20 within the heartland of how Lopez defined
21 commerce as I understand it.

22 JUSTICE GORSUCH: Healthcare counts,
23 but this doesn't?

24 MR. MCGILL: This is treating children
25 as property.

1 JUSTICE GORSUCH: Forget about the
2 equal protection argument for a moment.

3 MR. MCGILL: No, but it -- it goes to
4 the commerce.

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

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

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

18 MR. MCGILL: This -- this is a family
19 law case, Your Honor.

20 JUSTICE GORSUCH: And that's the core
21 of the problem in your view, that Congress can't
22 regulate family law matters for Indians
23 off-reservation?

24 MR. MCGILL: I think that the core of
25 the problem is, if this is within Congress's

1 authority, then there is nothing that cannot be
2 regulated by Congress if it touches upon
3 Indians.

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

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

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

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

21 JUSTICE GORSUCH: How about the parent
22 kidnapping statute?

23 MR. MCGILL: I'm -- I will confess to
24 not being familiar with that one. But, if you
25 look at perhaps the --

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

5 What if Congress tomorrow adopted a
6 treaty with the tribes that replicated ICWA?
7 Would that be within its power?

8 MR. MCGILL: It would perhaps -- I --
9 I think it perhaps would be within its Article I
10 power.

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

15 MR. MCGILL: Well, that's how Congress
16 regulates the states in the Multi-Ethnic
17 Placement Act, and --

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

22 MR. MCGILL: I think that that is our
23 argument. We're not saying that Congress is
24 powerless in this area. Congress has power,
25 certainly, through the -- the Spending Clause to

1 do any number of things with respect to states,
2 how states govern themselves.

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

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

17 JUSTICE GORSUCH: How about the fact
18 that the federal government has been
19 historically involved in family law matters with
20 respect to native Americans for a long time? As
21 Justice Kagan pointed out, it passed this
22 statute in -- in -- in kind of -- to remedy its
23 prior actions in this area with respect to
24 boarding schools and the displacement of Native
25 American children. So could it -- could it have

1 done the boarding schools, or is -- you're
2 arguing that that would have been improper too?

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

8 JUSTICE GORSUCH: Under Article I?

9 MR. MCGILL: Yes, because it has
10 nothing to do with commerce in my -- would be my
11 submission.

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

22 MR. MCGILL: The -- the power that has
23 been recognized is the power to effectuate
24 Indian self-government, which is the power of
25 tribes to make their own laws and be ruled by

1 them.

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

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

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

20 JUSTICE GORSUCH: Has any -- have
21 state courts held that this is unconstitutional?

22 MR. MCGILL: There's the case -- the
23 cases that held that it -- under what was known
24 as the existing Indian family doctrine, that
25 said that it would be unconstitutional as

1 applied to a child who had no connection --

2 JUSTICE GORSUCH: Right.

3 MR. MCGILL: -- to a tribe.

4 JUSTICE GORSUCH: Fair. But I'm not
5 aware of anybody holding ICWA facially
6 unconstitutional in the manner that you're
7 asking us to do.

8 MR. MCGILL: No, I -- I -- I would
9 concede that no state court has -- has --

10 JUSTICE GORSUCH: Gone anywhere --

11 MR. MCGILL: -- done that.

12 JUSTICE GORSUCH: Yeah. Okay. Thank
13 you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh?

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

24 MR. MCGILL: I think I do, Justice
25 Kavanaugh.

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

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

20 JUSTICE KAVANAUGH: On the equal
21 protection issue, it'll be important for us to
22 figure out the scope and limits of Mancari. And
23 I'm going to ask two hypotheticals and then ask
24 you to explain what I think will be your answer.

25 So, one, would Mancari justify a

1 hiring preference for American Indians in other
2 agencies beyond the BIA, such as the Treasury
3 Department or the Justice Department, for
4 example, in your view?

5 MR. MCGILL: No, because, one, Mancari
6 itself casts doubt on that possibility. And,
7 two, there would be no tether to Indian
8 self-government.

9 JUSTICE KAVANAUGH: Second, would
10 Mancari alone justify a federally mandated
11 preference for state universities, college
12 admissions for American Indians, in your view?

13 MR. MCGILL: No, Your Honor.

14 JUSTICE KAVANAUGH: And why not?

15 MR. MCGILL: Again, because it would
16 have no tether to Indian self-government. I
17 think part of the flaw of the -- you know, the
18 arguments on the other side here is that it --
19 it reduces to anything that is good for Indians,
20 that could be characterized in that way or that
21 the government in its paternalistic judgment
22 thinks might be good for Indians can be -- is
23 permissible under their view.

24 JUSTICE KAVANAUGH: Well, wouldn't
25 that be good for Indian self-government in the

1 sense of ensuring additional, better education
2 for American Indians? Why wouldn't that
3 justification link up with tribal
4 self-government?

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

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

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

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice --
25 Justice Barrett?

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

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

13 And the government says, well, this
14 applies to both private parties and state
15 agencies. And so it's not directed at the state
16 agencies in compelling government action, in
17 compelling the state to take steps.

18 How does this work? Do private
19 agencies in the Brackeens' case -- I mean, do
20 private agencies initiate these proceedings, or,
21 really, is this something that falls on the
22 states?

23 MR. MCGILL: I think, on the ground,
24 it falls on -- on the states in the overwhelming
25 majority of -- of -- of cases. I mean, I can't

1 speak to the -- to the whole of the United
2 States and -- but my understanding is, in the
3 overwhelming majority of cases, it falls on the
4 states to do this. And that is the -- you know,
5 of course, they are the ones that have the
6 ability to do so.

7 JUSTICE BARRETT: Okay. Thanks.

8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson?

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

17 I keep hearing you say in response to
18 many of my colleagues' questions that you think
19 that regulation related to family affairs does
20 not have a sufficient connection to Indian
21 self-government. But, in the actual legislative
22 history of this -- of ICWA -- and I'm reading
23 from the Federal Register -- Congress says that
24 -- it indicates that ICWA reflects its "concern
25 about preserving the integrity of tribes as

1 self-governing sovereign entities and ensuring
2 that tribes could survive both culturally and
3 politically." That's 81 Fed. Reg. -- Federal
4 Register 38,781.

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

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

16 MR. MCGILL: I would -- first, I -- I
17 guess I have two responses to that, Justice
18 Jackson.

19 First is I would look to this Court's
20 cases that define the interest in
21 self-government, and I would start with Williams
22 versus Lee, which defines it as the right or the
23 ability of reservation Indians to make their own
24 laws and be ruled by them.

25 That -- that case has never been, you

1 know, to my knowledge, limited or abrogated.
2 And that is my understanding of how this Court
3 defines the interest in self-government.

4 JUSTICE JACKSON: But why would that
5 be our decision then? I'm still worried that
6 that would be this Court displacing Congress's
7 policy judgment around what counts.

8 MR. MCGILL: Because the text of the
9 statute and its -- you know, and its operative
10 effect does not advance the objective there.
11 The -- if the objective is preserving the
12 existence of tribes, the third placement
13 preference does nothing to effectuate that.

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

22 What I'm a little bit confused about
23 and concerned about is whether it's really
24 correct that we have to look at it so narrowly,
25 that is, the scope of Congress's authority as it

1 concerns Indian affairs, when we have said over
2 and over again that Congress has plenary and
3 exclusive authority, and when the history of our
4 Constitution indicates that the constitutional
5 design was about ensuring, in a way, that the
6 federal government had the authority over the
7 tribal relations, tribal affairs, and not the
8 states.

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

17 So, if that's the case, then what --
18 what would you say about the thought that rather
19 than, you know, searching for, you know, what
20 additional limits there are on Congress's
21 authority, we start with the premise that, with
22 respect to Indian affairs, Congress has plenary
23 authority and, therefore, as we've said in all
24 of these prior cases, as long as it involves
25 Indian affairs and Congress is making policy

1 judgments, they have a constitutional basis for
2 doing so?

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

10 And if we're talking about regulating
11 tribes as government -- governments, we are
12 talking about regulating their residual
13 sovereign interests, which are, as I described,
14 in Indian lands, they're treaty rights.

15 JUSTICE JACKSON: Yeah, but do you
16 dispute that there's a trust relationship? My
17 understanding was that, yes, we're talking
18 sovereign to sovereign but that as a part of
19 that was the understanding that the United
20 States was the greater sovereign, that it was
21 taking over the Indian sovereignty and,
22 therefore, had a trust relationship that arose
23 in that context and they were responsible for
24 Indian affairs as a result.

25 Do you dispute that?

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

7 JUSTICE JACKSON: So you're saying
8 that Congress -- Congress can carry out and
9 effectuate its trust relationship but only in
10 the limited ways that you are now articulating?

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

18 JUSTICE JACKSON: Even if Congress has
19 decided that -- that regulation in that area is
20 necessary to prevent the extinction of tribes,
21 they can't do it, you're saying, pursuant to the
22 trust relationship that you seem to concede
23 exists?

24 MR. MCGILL: Your Honor, we do not
25 concede that -- that, for the reasons that I

1 elaborated, that this is not a -- the -- the
2 tribes do not have a proprietary interest in
3 these children. They are also -- take a -- take
4 YRJ. She is --

5 JUSTICE JACKSON: Can I just -- I'm
6 sorry, can I just ask one more question? My
7 time is short.

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

15 And I'll tell you why I'm concerned
16 about it, because I think it's relatively recent
17 and I'm just trying to understand whether it
18 even conceivably applies to an area in which we
19 have already or long recognized that the federal
20 government has this sort of plenary authority
21 because states were interfering with Indian
22 affairs.

23 And so it seems to me odd that we
24 would suddenly say in this area using a
25 relatively new anti-commandeering principle that

1 the federal government can't do what it has long
2 done in terms of taking control of this area
3 away from the states related to Indian affairs.

4 MR. MCGILL: Your -- Your Honor, the
5 Court's anti-commandeering cases recognize that
6 the doctrine arises from the structure of the
7 Constitution and the Tenth Amendment. That was
8 obviously recognized fully by New York versus
9 United States. But, as I recall --

10 JUSTICE JACKSON: In 1992?

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

18 JUSTICE JACKSON: But we don't have
19 any anti-commandeering cases that -- that arise
20 in the Indian affairs context? This would be
21 the first time?

22 MR. MCGILL: I'm not aware of any,
23 Your Honor.

24 JUSTICE JACKSON: Thank you.

25 MR. MCGILL: I --

1 CHIEF JUSTICE ROBERTS: Do you have a
2 further --

3 MR. MCGILL: I -- I -- I would, just
4 except to the extent that Oklahoma, of course,
5 arose from once upon a time being Indian
6 territory.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 General Stone.

10 ORAL ARGUMENT OF JUDD E. STONE, II,
11 ON BEHALF OF TEXAS

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

14 Congress cannot require states to
15 administer a nationwide child custody regime.
16 As far as the state is aware, this Court has
17 upheld only three kinds of laws even under a
18 plenary congressional power over Indian tribes:
19 first, those regulating trade or implementing
20 treaties with tribes in the ordinary, original
21 understandings of those clauses; second, those
22 applying to Indians within U.S. territories or
23 on Indian lands; and, third, those regulating
24 tribal governments as such.

25 ICWA far exceeds this plenary power,

1 applying only to child custody proceedings in
2 state courts off reservations.

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

10 And I welcome the Court's questions.

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

18 MR. STONE: Certainly, Your Honor.
19 First and foremost, consistent with West
20 Virginia versus EPA from last term, Texas is, in
21 fact, the regulated party, the party obligated
22 to implement ICWA from beginning to end.

23 As this Court put it in West Virginia,
24 the fact that West Virginia and similar states
25 were the ones who were required to cut emissions

1 and otherwise alter their energy distribution,
2 that was enough to leave "little doubt" as to
3 their standing for the entirety of the clean
4 power plan.

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

22 And then, finally, speaking as to
23 their specific equal protection injury, aside
24 from the fact that it costs us money to
25 implement the equal protection violating

1 provisions, for example, we have to determine
2 whether or not an individual is an Indian child
3 pursuant to the regulations and the statute.

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

16 And that is a unique constitutional
17 injury that Texas as a state, as an actor,
18 suffers.

19 JUSTICE SOTOMAYOR: This is quite a
20 theory you have. Every time that a state has to
21 interpret a federal law that might be
22 unconstitutional, the state has standing even if
23 that law hurts somebody else. That's what
24 you're basically saying, because we would be
25 complicit in the act of violating someone else's

1 rights. That's how I hear your argument.

2 MR. STONE: Certainly not, Your Honor.
3 It actually is much narrower than that. So take
4 a --

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

11 I can understand your
12 anti-commandeering, your anti-delegation claims.
13 Potentially, that has to do with your expenses.
14 But those other equal protection violations of
15 being treated unequally belong to the parents,
16 not to Texas.

17 MR. STONE: Two components, Your
18 Honor. First of all, Texas suffers a classic
19 pocketbook injury when it has to actually
20 implement --

21 JUSTICE SOTOMAYOR: So you're saying
22 exactly what I started with. You're taking the
23 extraordinary position that anytime you have to
24 enforce an unconstitutional law you're complicit
25 and you have standing?

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

10 JUSTICE SOTOMAYOR: That's
11 anti-commandeering, so that's one factor.
12 What's second?

13 MR. STONE: The commands from the
14 federal government themselves violate the Fifth
15 Amendment's equal protection component. That
16 equal protection obligation --

17 JUSTICE SOTOMAYOR: As it applies to
18 the individuals?

19 MR. STONE: Yes.

20 JUSTICE SOTOMAYOR: Okay.

21 MR. STONE: That's correct.

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

24 MR. STONE: Your Honor, because --
25 because that Fifth Amendment equal protection

1 violation is coterminous with Texas's equal
2 protection requirements, if Texas implements the
3 Fifth Amendment violation, it itself violates
4 the Fourteenth Amendment because they are, in
5 fact, coterminous.

6 JUSTICE SOTOMAYOR: We're back --
7 we're back to my first point.

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

16 MR. STONE: Well, the final rules
17 preamble helps solve this question as
18 specifically to -- to the active efforts
19 provision, where the final rule states that the
20 active efforts provision in ICWA was intended to
21 make states provide substantive services to
22 Indian families. It comes out in -- in express
23 language to make states, in fact, incur that
24 cost to provide social services.

25 That's the heart of what Murphy was

1 cautioning about, is that specifically a command
2 best understood as requiring a state to do a
3 thing, especially when it either hides political
4 accountability or foists uncompensated costs on
5 the states, is in the heartland of the
6 anti-commandeering doctrine. This, under that
7 second branch, is an easy case for purposes --
8 for purposes specifically of active efforts.

9 We have other provisions we're
10 challenging with other bases I'd be happy to
11 discuss if you're curious, Your Honor.

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

15 MR. STONE: This Court reserved it in
16 Printz with some very specific caveats, I agree,
17 Your Honor. Specifically, the Court said it
18 might, in fact, be permissible, given that --
19 and as Justice Scalia noted, it was unclear in
20 that case -- given that those courts regarding
21 the naturalization oaths may well have
22 volunteered essentially to that jurisdiction.

23 And then it becomes a case of, if the
24 courts are willingly serving for purposes of
25 doing this federal thing, that then it's a much

1 smaller intrusion, commandeering or not, for
2 them to have an ancillary paperwork burden.

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

16 Two more essentially have nothing to
17 do with states at all, or one more has nothing
18 to do with states at all, which is the
19 Homesteading Act of 1862. Does not mention
20 state courts or state governments in any way.
21 Cannot possibly tell us anything about
22 anti-commandeering.

23 Two more past that make it permissible
24 but not mandatory for states to accept bail
25 regarding certain federal fugitives or federal

1 prisoners. And the only two left are the same
2 two that are mentioned in Printz regarding
3 recordkeeping for naturalizations, which this
4 Court looked at as essentially not enough to
5 determine the question even there.

6 So the laws they give as historical
7 evidence are far from something to demonstrate
8 even what Printz showed, let alone enough
9 generalized no courts component.

10 JUSTICE JACKSON: But, Mr. Stone --

11 JUSTICE GORSUCH: Counsel, before you
12 --

13 JUSTICE JACKSON: -- that assumes that
14 anti-commandeering applies in this entire area.
15 And can you speak to my concern about that? I
16 understood from New York versus United States
17 that anti-commandeering rests on the premise
18 that Congress has the power to regulate
19 individuals and not states, which may well be
20 true as a general matter, but, in terms of
21 Indian affairs, we have long interpreted the
22 Constitution to give Congress plenary authority
23 precisely because the Constitution seems to be
24 structured to give Congress, the federal
25 government, power at the expense of the states

1 with respect to Indian affairs.

2 It's sort of like the -- the -- the --
3 the background principle of all of this was that
4 states were getting involved in Indian affairs,
5 and the Constitution says no, Congress can -- is
6 the one that gets to direct it.

7 I don't understand why wrapped up in
8 that authority isn't Congress's authority to --
9 to direct the states to stay out of the way or
10 to do whatever it is that's necessary to ensure
11 that, you know, Indian affairs, Indian
12 sovereignty is protected?

13 MR. STONE: Two answers, Your Honor.

14 JUSTICE JACKSON: Yes.

15 MR. STONE: One coming from this
16 Court's case law and then one from the original
17 materials. One -- and this is the nearest
18 analogue of which I'm aware -- of course, this
19 Court was brought an argument that under the
20 Indian Commerce Clause was a sufficiently
21 plenary power to breach state sovereign
22 immunity. That's Seminole Tribe, and this Court
23 rejected that. It not only rejected that
24 argument, it overturned Union Gas in the
25 process.

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

8 JUSTICE GORSUCH: Counsel --

9 MR. STONE: That's the --

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

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

18 JUSTICE GORSUCH: And the other major
19 one that you -- you cite is -- is -- is the
20 active efforts provision.

21 MR. STONE: There are others we also
22 challenged. Those are two of the most major, we
23 agree.

24 JUSTICE GORSUCH: Okay. And -- and --
25 those are the major ones. All right. And with

1 respect to active efforts, I'm not sure I heard
2 an answer to Justice Barrett's question, and her
3 question was, does it apply equally to whomever
4 is bringing the -- the action in state court,
5 whether it's the state as it is sometimes or
6 private parties as it is sometimes? That active
7 efforts requirement, does it apply to both
8 equally?

9 MR. STONE: To both, yes; equally, no.
10 And so, to both, yes, it is under some
11 circumstances that private parties have to make
12 these efforts. Typically, that is the state,
13 as, again, was acknowledged in the -- in the
14 final rule.

15 JUSTICE GORSUCH: Typically because
16 it's the party active -- starting the
17 proceedings, right?

18 MR. STONE: Typically, yes, but also
19 --

20 JUSTICE GORSUCH: But not -- not
21 always?

22 MR. STONE: Not always, no, that's
23 correct. But also, later in the active efforts
24 provision, recall, again, in this -- in Murphy,
25 the Court said the -- the way that the Court

1 looks at it is, is this better looked at as a
2 regulation of the sovereign or instead as
3 something regulating private.

4 JUSTICE GORSUCH: Okay. I got it.

5 MR. STONE: The active efforts
6 provision specifically speaks to what a state
7 court may do with its official power.

8 JUSTICE GORSUCH: Right.

9 JUSTICE ALITO: May I come back to the
10 question whether the anti-commandeering doctrine
11 applies at all when Congress is exercising its
12 power over Indians?

13 Suppose Congress enacted a law
14 ordering the states to enact legislation
15 relating to Indians. Would that be a violation
16 of the anti-commandeering doctrine?

17 MR. STONE: I think it would be about
18 the most direct one conceivable, Justice Alito.

19 JUSTICE GORSUCH: Counsel, if we could
20 turn to Article I, we've had many variations of
21 this -- this argument. We've heard that it has
22 to relate strictly to commerce. We've heard,
23 no, later today we heard, no, it can be
24 off-reservation. It can be family law
25 sometimes. It just can't be this combination

1 here.

2 What is -- what exactly are you asking
3 us to adopt here? What is beyond the Article I
4 power?

5 MR. STONE: Certainly, Your Honor.
6 So, to clear up a few things that you first
7 mentioned, we are not claiming that there is a
8 domestic relations exception generally. We're
9 not saying that the powers that Congress enjoys
10 must only be exercised on reservations or
11 similarly.

12 JUSTICE GORSUCH: Okay. So -- so
13 Congress can act off-reservation sometimes?

14 MR. STONE: Yes, Your Honor.

15 JUSTICE GORSUCH: Okay. And it can do
16 domestic relations sometimes?

17 MR. STONE: Yes, Your Honor.

18 JUSTICE GORSUCH: Okay. So what --
19 what's -- what's the magic broth that makes this
20 somehow a problem having conceded both those
21 points?

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

25 The first, again, is, for example, the

1 implementation of treaties or acts that would be
2 ordinarily understood in commerce.

3 This Court has described, for example,
4 Congress as having a plenary power when Congress
5 has prohibited alcohol sales to tribes. Of
6 course, forbidding the sale of alcohol or
7 forbidding any other sale of good would just be
8 an ordinary regulation of commerce.

9 JUSTICE GORSUCH: But you -- we
10 disavowed that argument, that it's strictly
11 related to commerce. So, again, what -- what is
12 the rule you would have us write? I'm just --
13 I'm just trying to figure out, how do I write
14 the opinion?

15 MR. STONE: Certainly, Your Honor.
16 There's three components to the plenary power.
17 One are the ordinary applications of the various
18 powers in the Constitution --

19 JUSTICE GORSUCH: Right.

20 MR. STONE: -- which encompass more
21 than just --

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

24 MR. STONE: The limits come from
25 several of these Court's cases. One, this Court

1 has emphasized that Congress has special power.
2 This comes from Tiger versus Western Investment
3 Co. and Kagama itself, that the -- the
4 government has a power, specifically speaking,
5 on regulating Indian members or, rather, Indian
6 tribes on Indian lands themselves.

7 JUSTICE GORSUCH: Well, but we've --
8 we've -- we've said that's not the limit here
9 either. So, again, counsel, you've said it
10 doesn't have to be on reservation and it can be
11 domestic relations. So what's -- how do you
12 write this?

13 MR. STONE: Respectfully, Your Honor,
14 Congress may act if it -- if it is in one of
15 three essentially parcels of power.

16 One of them isn't related to geography
17 at all, for example, the exercise of the treaty
18 power, the exercise of -- of the commerce power.
19 Of course, the exercise of the territory clause
20 would be geographically related. But, in this
21 first bucket, there is not a geographic
22 component.

23 The second, there is one, because, as
24 this Court recognized, the power goes
25 specifically to the soil and the people within

1 these limits speaking of Indian country.

2 The third is the power that Congress
3 has essentially to act on Indian governments as
4 governments. So, for example, expanding or
5 investing them with tribal immunity, extending
6 or foreclosing their ability to prosecute crimes
7 or for other sovereigns to prosecute crimes on
8 their land.

9 If Congress is acting pursuant to one
10 of those three components, then it falls
11 comfortably either within the Congress's
12 enumerated powers as originally understood or
13 the plenary power, which we are not asking this
14 Court even to contract, let alone to overturn.

15 JUSTICE KAGAN: General, I'm -- I'm
16 curious as to where you get those three
17 categories?

18 MR. STONE: They're a normative
19 description of what this Court has, in fact,
20 done or --

21 JUSTICE KAGAN: I mean, there's no
22 place --

23 MR. STONE: -- a description, rather,
24 of what this Court --

25 JUSTICE KAGAN: -- there's no place

1 where we've said these are the three categories
2 that define what the plenary power means,
3 correct?

4 MR. STONE: There are two places where
5 Congress has specifically stated that there is a
6 special power that track the second and third
7 categories that I'm describing. One, for
8 example, being for the third category regarding
9 governance, being that the -- the tribal
10 power -- the U.S. Government enjoys essentially
11 a complete power that the -- that tribal
12 immunity or tribal sovereignty exists at
13 Congress's sufferance.

14 Of course, to say something exists at
15 Congress's sufferance is to say they have
16 something like an absolute power.

17 JUSTICE KAGAN: Yeah, I guess the only
18 point I was making, I'm sure that we can find
19 places where the Court has said that Congress
20 has power over each of these areas, but I don't
21 think you'll be able to find a place where the
22 Court has said what the plenary power means is
23 these three things and these three things alone
24 and the plenary power doesn't extend further,
25 because, after all, the Court has said -- I

1 mean, I -- I don't really believe in -- in
2 reading our opinions like statutes.

3 But, when the Court uses the phrase
4 "plenary power" tens and tens of times over
5 decades and decades, I mean, plenary means
6 unqualified. It means all-encompassing.

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

15 MR. STONE: Two points, Your Honor.
16 First, we agree that we are describing a power
17 that has already left Article I constitutional
18 bounds. Our core exhortation is, because it is
19 already beyond the original understanding of the
20 powers Congress has, that this Court shouldn't
21 extend it further.

22 This Court has not come out and said
23 these are the three categories and there shall
24 be no more.

25 JUSTICE SOTOMAYOR: Originally meaning

1 we have Justices Marshall and Story basically
2 using very broad language saying plenary powers
3 means all powers in every intercourse with
4 Indians. And we have a series of laws that were
5 not limited in the way that you talked about.
6 And we've had series of laws for 200 years not
7 limited.

8 You are excluding from that list all
9 of the trust obligations that include all of the
10 things that Justice Kavanaugh asked about you,
11 health clinics, education, marital relations,
12 Indian women who are married to white men.

13 These are all outside the three areas
14 you've talked about, but Congress has legislated
15 in them, and, certainly, as far back as the
16 founding of our Constitution, everyone
17 understood plenary meant anything that had to do
18 with the intercourse with Indians, and then,
19 clearly, with the trust obligation, the United
20 States took, as your colleague said at the
21 beginning, took over this dependent sovereign
22 nation and its members.

23 MR. STONE: Your Honor, I'd like to
24 begin with your observations regarding the trust
25 relationship and then go backwards to Story and

1 those uses of intercourse, if you will.

2 The -- regarding the trust obligation
3 in Menominee Tribe of Wisconsin, or Menominee
4 Band of Wisconsin Indians, and Jicarilla Apache
5 Nation, this Court made clear that, of course,
6 the Court has sometimes described a guardianship
7 and ward relationship, a trust relationship. It
8 has used a number of essentially metaphors to
9 describe the relationship between the United
10 States and the tribes.

11 But the obligations underneath that
12 trust -- this is a -- this is a core component
13 of Jicarilla -- come from positive law. They
14 come from statutes which dictate obligations by
15 the United States.

16 We certainly don't doubt that.
17 However, they do not have a common law component
18 where because there is, in fact, a trust, a
19 trust relationship, that, therefore, the United
20 States has plenary power to do as it wishes to
21 Indians wherever.

22 So regarding the historical
23 understanding of intercourse, speaking
24 specifically about Justice Story's commentaries,
25 which my friends on the other side cite, he

1 speaks about commerce and then speaks about
2 trade and intercourse and compares intercourse
3 with navigation, just as this Court did in
4 Gibbons v. Ogden, which is to say, in Story's
5 example, a rule, for example, about how foreign
6 vessels are to dock in the United States,
7 control over channels of commerce.

8 At no point did Story comment on there
9 being a general Indian affairs power.

10 JUSTICE GORSUCH: Counsel, I'm sorry
11 to interrupt, but this -- this new rule would --
12 would, I think, take a huge bite out of Title 25
13 of the U.S. Code, which regulates the federal
14 government's relationship with -- with tribal
15 members.

16 There are healthcare provisions that
17 Congress promises to Native Americans off
18 reservation. That doesn't seem to fall in any
19 of your buckets. Congress has permitted tribes
20 to exercise power over environmental regulations
21 that have indirect effects off reservation.
22 That would -- that would seem to go too.

23 We have laws that promise Native
24 Americans access to sacred sites off reservation
25 and religious liberties off reservation. That

1 -- that would seem to go. And I'm not even sure
2 maybe the liquor sale, those old precedents, but
3 maybe that's commerce. I don't know.

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

7 MR. STONE: I don't think that's the
8 case, Your Honor, and I'd like to start with
9 Morton, which I think provides the first clue
10 that that's not the case.

11 When Morton was describing why the
12 kind of preference that it -- that it recognized
13 would not violate equal protection, was a case
14 that's --

15 JUSTICE GORSUCH: I'm not talking
16 about equal protection. I'm talking about
17 Article I.

18 MR. STONE: I -- I -- I understand,
19 Your Honor, but it was describing that virtually
20 every Indian preference in Title 25 depended on
21 a conjunction of an identifiable tribe of
22 recognized Indians on reservations.

23 JUSTICE GORSUCH: But that's not --
24 that's simply not true. I mean, you can state
25 that at the podium, but, if I look through Title

1 25, there are healthcare promises to individual
2 Native Americans who live in urban areas.

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

4 JUSTICE GORSUCH: Let's just take that
5 one. Gone?

6 MR. STONE: First of all, Your Honor,
7 that strikes me as commerce, at least -- at
8 least as this Court has --

9 JUSTICE GORSUCH: Healthcare is ---

10 MR. STONE: -- construed interstate
11 commerce.

12 JUSTICE GORSUCH: So we're back to
13 that. Okay. So healthcare is commerce. It's
14 just this isn't --

15 MR. STONE: First of all --

16 JUSTICE GORSUCH: -- whatever this is.

17 MR. STONE: No, child adoptions are
18 not commerce. They simply are not. The
19 provision --

20 JUSTICE GORSUCH: But health -- but
21 healthcare is?

22 MR. STONE: Yes, Your Honor.

23 JUSTICE GORSUCH: Okay. And -- and
24 environmental laws allowing regulation
25 off-reservation effects, that's -- that's --

1 that falls within commerce, but this doesn't?

2 MR. STONE: Entirely plausible. It's
3 a function of either interstate or -- either
4 interstate commerce or --

5 JUSTICE GORSUCH: How about -- how
6 about religious liberties and -- and the right
7 to access sites off -- off-reservation? Is that
8 commerce?

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

12 JUSTICE GORSUCH: No.

13 MR. STONE: -- or in the commerce --
14 Congress's Section 5 powers.

15 JUSTICE GORSUCH: No, it's just
16 promising -- no, you're -- no, the law just says
17 you get access to -- to places, and it preempts
18 state law.

19 MR. STONE: Then there might be a
20 Title --

21 JUSTICE GORSUCH: That might ---

22 MR. STONE: There might be an Article
23 I problem for the same reason why there was in
24 RFRA.

25 JUSTICE GORSUCH: Like I say, I think

1 there's a lot that you're asking us to -- we're
2 going to be busy, counsel, if this is the line
3 we're going to draw. Very, very busy.

4 MR. STONE: We are not requesting that
5 this Court shrink the plenary power it's
6 recognized one bit. Everything that has been
7 upheld previously on the same bases it's been
8 upheld previously is --

9 JUSTICE GORSUCH: And do you agree
10 with your colleague on the -- who spoke earlier
11 that Congress could effectively do this same
12 law, maybe with a few nibbles around the edges,
13 commandeering, whatever, but could -- could --
14 could adopt something like ICWA through the
15 treaty power and through the Spending Clause?

16 MR. STONE: I think the problem on the
17 treaty power side is it would provoke the
18 question this Court left open in Bond, which is
19 the question of whether or not Congress may
20 legislate pursuant to a treaty in a way that
21 would exceed its Article I powers or other
22 limits in the Constitution. I don't know what
23 the answer to that question is, Your Honor, but
24 that would be squarely presented at that point.

25 JUSTICE GORSUCH: Spending Clause?

1 MR. STONE: Spending Clause, at least
2 the equal protection problem would remain at
3 least for that -- for purposes of the Spending
4 Clause. It would get around the
5 anti-commandeering problems --

6 JUSTICE GORSUCH: So this is a magic
7 words problem we have here today?

8 MR. STONE: Certainly not, Your Honor.
9 Congress is not free as a matter of fact to
10 regulate 50 state child -- 50 state child
11 adoption proceedings on the basis of race
12 regardless of what it calls it.

13 JUSTICE BARRETT: General --

14 JUSTICE SOTOMAYOR: Can I ask you a
15 question? I'm going to list a series of
16 statutes, and I just want a yes or no, does
17 Congress have the power to pass this statute,
18 and, second, why isn't it or is it
19 anti-commandeering, okay?

20 The statute protecting service members
21 from default judgments, including in child
22 custody cases, which requires notice,
23 appointment of counsel, stays of proceedings,
24 and in some cases, a setting aside of judgment.

25 Does Congress have the power to pass

1 that?

2 MR. STONE: Only under
3 anti-commandeering problems or Article I?

4 JUSTICE SOTOMAYOR: I said under
5 Article I.

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

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

10 MR. STONE: Yes, Your Honor.

11 JUSTICE SOTOMAYOR: The statute on
12 inter-country adoptions, which says that a state
13 court must verify certain evidence and make
14 certain determinations. Inter-country
15 adoptions, foreign power, right? Yes? Is this
16 anti-commandeering also?

17 MR. STONE: May I?

18 CHIEF JUSTICE ROBERTS: Yes.

19 MR. STONE: I would have to know more
20 about the treaty --

21 JUSTICE SOTOMAYOR: That's a --

22 MR. STONE: It would not violate
23 Article I because of the treaty.

24 JUSTICE SOTOMAYOR: I just said to
25 you it says that a --

1 MR. STONE: I would have to know more
2 details.

3 JUSTICE SOTOMAYOR: -- that a state
4 court must verify certain evidence and make
5 certain determinations before it permits the
6 inter-country adoption.

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

10 JUSTICE SOTOMAYOR: I've gone through
11 -- your light is on. I'll wait to finish my
12 examples.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas?

16 Justice Alito?

17 JUSTICE SOTOMAYOR: All right. Then
18 the 17 --

19 (Laughter.)

20 JUSTICE SOTOMAYOR: -- the 1799 Trade
21 and Intercourse Act, which requires state courts
22 to take proper bail for certain individuals
23 arrested by federal authorities. Can the
24 government do that to state courts?

25 MR. STONE: Article I, yes.

1 Anti-commandeering, no.

2 JUSTICE SOTOMAYOR: Okay. The 1834
3 Trade and Intercourse Act that sets the standard
4 of proof in property disputes involving Indians?

5 MR. STONE: Certainly, Your Honor, in
6 part because those were specifically applying to
7 either United States territories or, as this
8 Court observed in Castro-Huerta, on Indian
9 reservations, which at that point were
10 understood functionally like federal enclaves.
11 That's completely fine.

12 JUSTICE SOTOMAYOR: How about a law
13 from 1888 setting forth certain evidence that an
14 Indian woman could use in state court to prove
15 that there was a common law marriage? Could
16 they do that?

17 MR. STONE: I don't know, Your Honor.
18 I have to see more about the statute because,
19 for example, if there were a geographic
20 component and a tribal component, that might
21 justify it.

22 JUSTICE SOTOMAYOR: Assuming there's
23 not?

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

25 JUSTICE SOTOMAYOR: Anywhere in any

1 state court --

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

3 JUSTICE SOTOMAYOR: -- they -- they
4 don't have Article I and they -- it's
5 anti-commandeering violation, both?

6 MR. STONE: It's that it would be an
7 anti-commandeering violation. It might --
8 depending on the rest of the statute, it may or
9 may not be an Article I violation.

10 JUSTICE SOTOMAYOR: How about a
11 statute that says that state law enforcement can
12 enforce immigration law so long as they follow
13 certain minimum procedures? Why isn't that
14 anti-commandeering?

15 MR. STONE: Because it says "can." It
16 allows -- the statute allows the states to
17 choose to do so or not.

18 JUSTICE SOTOMAYOR: All right.

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

23 JUSTICE SOTOMAYOR: Thank you,
24 counsel.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 JUSTICE KAGAN: General, I thought I'd
2 just give you a chance to respond to a reaction
3 I had to your brief, and the reaction was that
4 there is an extraordinary amount of Texas's view
5 of policy in your brief. So I'll just read you
6 a few things.

7 You say that ICWA subordinates the
8 needs of Indian children, that it results in
9 chaotic and often tragic outcomes, that it
10 returns children to unsafe environments, that it
11 excuses physical abuse, that it contributes to
12 the alarming statistics surrounding Indian child
13 welfare. I could go on. I haven't really even
14 touched the surface.

15 Now this may be Texas's view. It's --
16 it's not a view that any other state has told us
17 it -- it shares. I don't know whether Texas's
18 view are right or not. I don't have any policy
19 views in this area to speak of. I don't know
20 enough.

21 I mean, the point is courts don't know
22 enough, really. This is a matter for Congress,
23 isn't it? It's not a matter for the courts to
24 decide whether ICWA does these terrible things
25 or whether ICWA doesn't do any of them. Isn't

1 that really Congress's judgment that we're
2 supposed to respect?

3 MR. STONE: Two parts, Your Honor.
4 The first is I agree that those observations,
5 those -- those statements of Texas's views have
6 nothing to do with non-delegation -- our
7 non-delegation and anti-commandeering or Article
8 I challenges whatsoever. Those live or die on
9 various legal principles that are not those.

10 JUSTICE KAGAN: They're just
11 atmosphere?

12 MR. STONE: They're in part
13 atmosphere, yes, Your Honor, in part because
14 there's a dispute about whether or not equal
15 protection -- the equal protection standard here
16 is rational basis or strict scrutiny.

17 Now my friends on the other side
18 haven't attempted to defend this as a matter of
19 strict scrutiny, and so, to the extent that
20 Congress is describing that it has a certain
21 purpose, the fact that that purpose has been
22 woefully unmet by the actual effects of ICWA is
23 relevant for purposes of this Court's albeit
24 quite forgiving rational basis standard.

25 JUSTICE KAGAN: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch?

3 JUSTICE GORSUCH: You agree that
4 Congress could do something like ICWA if it were
5 limited to children on reservations?

6 MR. STONE: Absolutely, Your Honor.
7 If it were limited to something -- if it were
8 only applying to tribal members on tribal
9 reservations.

10 JUSTICE GORSUCH: Okay.

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

13 JUSTICE GORSUCH: How do we deal with
14 the fact that -- you know, we talked about
15 reservations throughout this conversation and in
16 the briefs. But Indian land throughout the
17 western United States, as I'm sure you
18 appreciate, after the post- -- after the
19 allotment era is full of checkerboards, and so
20 you're going to have children who may be on
21 allotted Indian land or next door to it, not on
22 allotted Indian land.

23 And I -- part of what you're doing --
24 your argument would encourage is for people to
25 keep their children on Indian land, not

1 necessarily allow them to be foster-cared off
2 Indian land, create a disincentive and also just
3 a massive amount of confusion if everything
4 depends upon the happenstance of geography.

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

14 It might be the case that Congress
15 actually has to appropriate money to take title
16 to some of those provisions, but that would be
17 the sort of administrative work that Congress
18 can still do.

19 JUSTICE GORSUCH: The checkerboard
20 problem just would persist?

21 MR. STONE: Unless Congress took
22 actions --

23 JUSTICE GORSUCH: Yeah.

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

1 JUSTICE GORSUCH: And then, finally,
2 it -- it does seem like a lot of this focuses on
3 -- on the fact that this is family law, but I
4 just want to give you an opportunity to respond
5 to the same question I asked Mr. McGill on this,
6 which is really two parts of it.

7 One is the federal government often
8 plays a role in mediating disputes between
9 sovereigns in the family law area, whether it's
10 the Hague Convention internationally or whether
11 the Parent Kidnapping Act domestically. So why
12 would it be awkward to think that Congress could
13 exercise a similar authority with respect to
14 disagreements between state sovereigns and
15 tribal sovereigns?

16 MR. STONE: So -- so two points, Your
17 Honor. The first, speaking of the Hague, of
18 course, those are treaties between equal, full
19 sovereign nations that are agreed to or not on
20 the basis of whether those sovereigns each have
21 a chance to walk away.

22 The most fundamental difference here,
23 of course, is that states have no choice to walk
24 away from ICWA. ICWA --

25 JUSTICE GORSUCH: States have no

1 choice to walk -- they have to apply the Hague
2 Convention and they have to apply the Parent
3 Kidnapping Act. They've got no choice in the
4 matter.

5 MR. STONE: But the point is there's
6 no mediating as between tribes and states on
7 sovereigns. It's the United States saying you,
8 States, shall do this or through a combination
9 of --

10 JUSTICE GORSUCH: That's exactly what
11 it does in the Hague Convention, counsel, and
12 the Parent Kidnapping Act. It says, State
13 Courts, you shall do this. It's a rule of
14 decision that it sets forth.

15 MR. STONE: And -- and for purposes of
16 treaties, the Constitution recognizes that is an
17 exclusive federal operation by conjunction of
18 the power in Article II and removal of that from
19 the states in Article I, Section 10.

20 JUSTICE GORSUCH: Okay. So we're back
21 to, if they did this through treaty, it would be
22 okay?

23 MR. STONE: Or at least it would be a
24 lot closer.

25 JUSTICE GORSUCH: All right. And then

1 how about the fact that the federal government
2 has been heavily involved in domestic affairs on
3 -- with respect to Native American children
4 throughout our history, whether it's through
5 treaties, orphan children, or whether it was
6 through the -- the boarding school saga of the
7 last century? Why isn't that some evidence of
8 -- of -- of plenary power in this area too?

9 MR. STONE: Well, in part, because,
10 for example, with boarding schools, just the
11 ordinary powers over territory and property or
12 otherwise ordinary appropriations may explain
13 that.

14 JUSTICE GORSUCH: They took children
15 off-reservation, counsel.

16 MR. STONE: I -- I understand that,
17 Your Honor. And I understand that there's no
18 getting around the fact that both federal and
19 state history regarding Indian tribes carries a
20 variety of very shameful and terrible elements.

21 JUSTICE GORSUCH: You're -- you're --
22 you're saying it's all linked to territory.
23 That one wasn't.

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

25 JUSTICE GORSUCH: The same thing with

1 all the treaties with respect to Native American
2 orphans throughout the history of the country.

3 MR. STONE: The fact that there is a
4 terrible problem Congress is attempting to
5 remedy does not necessarily mean it has Article
6 I power.

7 After all, Congress attempted to -- to
8 remedy the nationwide problem of vicious
9 domestic violence. And this Court said that
10 VAWA, nonetheless, fell outside the Court's --
11 or outside Congress's Article I powers.

12 JUSTICE GORSUCH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Kavanaugh?

15 JUSTICE KAVANAUGH: I want to ask
16 about the equal protection issue quickly.

17 The equal protection issue is
18 difficult, I think, because we have to find the
19 line between two fundamental and -- fundamental
20 and critical constitutional values.

21 So, on the one hand, the great respect
22 for tribal self-government for the success of
23 Indian tribes with -- and Indian peoples with
24 recognition of the history of oppression and
25 discrimination against tribes and people. So

1 that's on the one hand.

2 On the other hand, the fundamental
3 principle we don't treat people differently on
4 account of their race or ethnicity or ancestry,
5 equal justice under law, I don't think we would
6 ever allow, as the Court suggested in *Palmore* in
7 1984, Congress to say that white parents should
8 get a preference for white children in adoption
9 or that Latino parents should get a preference
10 for Latino children in adoption proceedings. I
11 don't think that would be permitted under that
12 principle of equal justice that we recognized in
13 *Palmore*.

14 So those are the two principles on
15 equal protection that I think focus the inquiry.

16 How do we draw the line?

17 MR. STONE: Well, Your Honor, I think
18 first you look to *Mancari* itself, which took a
19 first attempt at drawing this line. And as
20 described in *Rice* and as applied from *Mancari* in
21 the six cases that immediately followed, there
22 were always at least two necessary
23 preconditions, again, describing *Rice* now.

24 One, that the preference or the
25 discriminatory rule or set-aside always reached

1 only -- and this is in Rice -- only members of a
2 federally recognized Indian tribe because that
3 was the component that made it clear that you
4 were dealing actually with the Indian tribe as a
5 body and the people who constituted that body
6 and not on the basis of race.

7 And then, second, Mancari saw as
8 significant that each of the preferences that it
9 otherwise understood operated on or at least
10 near an Indian reservation because the political
11 preference related to self-government and
12 analogizes -- analogized to a couple of things
13 to individuals who sought to serve a municipal
14 government, to be able to promote the efficient
15 delivery of services, to the territorial
16 requirements of serving an office in the United
17 States Constitution.

18 And so those are the two components
19 Mancari looked at as vital. ICWA includes
20 neither. It operates only off of tribal
21 reservations. It does not require a child who
22 will be subjected to ICWA to be a member of the
23 tribe. And I think that puts this clearly on
24 the invidious race discrimination side of that
25 very tricky line that you're highlighting.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett?

4 JUSTICE BARRETT: General Stone, I
5 want to take you back to the active efforts
6 provision.

7 One response that the government has
8 is that the state could just choose not -- could
9 walk away, essentially, and, certainly, private
10 parties have the option to participate or not in
11 termination-of-rights proceedings or seeking
12 foster care placement.

13 How would that work? Could Texas walk
14 away? You know, if you had a child who was a
15 member of a tribe and was in a situation in
16 which the child was in danger or, you know, like
17 the Brackeen children here, like, you know, YRJ,
18 could Texas choose -- could the Texas agency
19 choose not to intervene or seek a foster care
20 placement for the child?

21 MR. STONE: First of all, as a matter
22 of Texas substantive law, no. But putting that
23 aside, even if Texas substantive law allowed
24 that, it would be very strange for the federal
25 government to say this isn't commandeering

1 because you can always just stop, you would just
2 not do it altogether, when it's talking about a
3 core police power, which is saying the health --
4 the health, safety, and welfare of vulnerable
5 children.

6 So I think the fact that that is the
7 -- the sort of component they're offering, aside
8 from I have no idea how as a practical matter
9 Texas could do that, the fact they're saying do
10 it our way or else, I think, is more in the
11 nature of a confession than an explanation.

12 JUSTICE BARRETT: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Jackson?

15 JUSTICE JACKSON: Yes. So, in the
16 Mancari case, we said "the plenary power of
17 Congress to deal with the special problems of
18 Indians is drawn both explicitly and implicitly
19 from the Constitution itself."

20 Do you agree with that proposition?

21 MR. STONE: No, Your Honor, because we
22 believe that at least some components of the
23 plenary power are wrong as an original matter,
24 but we are not challenging them for purposes of
25 this case.

1 JUSTICE JACKSON: All right. So we
2 assume --

3 MR. STONE: To accept them, yes.

4 JUSTICE JACKSON: -- you accept this.
5 Okay. What -- what I'm worried about
6 is, what if the special problem of the Indians
7 is the manner in which a state is handling
8 custody determinations, is the manner in which
9 placement determinations are being made, are
10 these children being snatched from their homes,
11 et cetera, et cetera, as a historical matter?

12 I am not at all sure that
13 anti-commandeering principles would prohibit the
14 federal government, who has plenary power over
15 solving special problems of Indians, to direct a
16 state in light of this power to do something
17 about it.

18 Justice Alito says they couldn't --
19 could they legislate? I don't know that I can
20 see that they couldn't given the plenary power.

21 And I'm also worried about the -- the
22 sort of ahistorical gloss of this because it
23 seems to me that there is ample evidence
24 historically that the design of the Constitution
25 gave the federal government that very power at

1 the expense of the states, that we had had a
2 previous set of circumstances in which the
3 federal government and the state government
4 shared power related to Indian affairs and that
5 the Constitution came along and gave it to the
6 federal government.

7 So can you help me to understand in
8 light of all of those concerns why we would have
9 anti-commandeering principles at work to thwart
10 the federal government from exercising the
11 plenary authority that's been -- it's been given
12 to deal with the special problems of Indians in
13 this way?

14 MR. STONE: If you'll allow me to
15 start with the historical materials and then
16 I'll turn back to essentially an argument from
17 precedent, and then, if there are any further
18 questions, I'd be happy to resolve them.

19 First, just speaking about just sort
20 of original materials, the original draft of
21 what eventually became the Indian Commerce
22 Clause was submitted by James Madison as a power
23 to -- I'm closely paraphrasing here -- regulate
24 Indian affairs within the U States.

25 That was revised down by the Committee

1 of 11 to a narrower power to regulate Indian
2 affairs, which was further revised down to a
3 power to regulate Indian commerce.

4 JUSTICE JACKSON: All right. So what
5 about the Articles of Confederation? What --
6 what do we do about the inferences that people,
7 historians, have told us that what was happening
8 with the shift from the way in which the power
9 was structured at that point to the Constitution
10 was about making sure that the federal
11 government had certain authority and that this
12 was one of those areas?

13 MR. STONE: Again, on this two points,
14 the first being Federalist 42 I think holds part
15 of the answer, which my friends on the other
16 side rely on. Federalist 42 specifically cites
17 the two limitations regarding what was then
18 Article IX of the Articles of Confederation.

19 And then later, when it describes how
20 it's removed itself of I think these -- these
21 embarrassments, it says, and then, therefore,
22 this whole power will allow regulation of trade.
23 It uses specifically the word "trade" to
24 describe the power that has been unshackled by
25 these two things. Not even commerce more

1 broadly but trade.

2 So the idea that Federalist 42's
3 understanding of the changes to -- to Article IX
4 of the -- of the Articles of Confederation would
5 have expanded to an -- to an all-encompassing
6 Indian affairs power I think is just in the
7 teeth of that historical evidence.

8 JUSTICE JACKSON: All right. But, in
9 the actual Constitution, we have commerce and we
10 have historians that have said that at the time
11 commerce meant more than trade. It included
12 intercourse. Justice Sotomayor has brought that
13 up several times. So what do you say in
14 response to that?

15 MR. STONE: The problem is here is the
16 syllogism they're relying on, which is that
17 commerce means -- can -- can mean trade and
18 intercourse. Intercourse can mean all
19 relationships in between men and groups of men.
20 Therefore, commerce means all relationships
21 between groups of men.

22 In Gibbons, in Story, in other
23 original sources, intercourse is paired up with
24 -- specifically in Gibbons, with the word
25 "navigation" so as to describe what we now would

1 refer to as the channels of commerce, the
2 ability to set rules as to what foreign boats
3 may dock in places.

4 So "intercourse" doesn't get
5 Respondents the way to ICWA. It doesn't even
6 get them beyond what we would ordinarily think
7 of as the Commerce Clause now.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Mr. Kneedler.

11 ORAL ARGUMENT OF EDWIN S. KNEEDLER
12 ON BEHALF OF THE FEDERAL PARTIES

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

15 As this Court recognized in Holyfield
16 and Adoptive Couple, ICWA was enacted in
17 response to serious harms caused by widespread
18 child welfare practices that resulted in the
19 separation of large numbers of Indian families,
20 often unwarranted, through adoption or foster
21 placement, usually in non-Indian homes.

22 Over the more than 40 years since its
23 enactment, ICWA has furnished vital protections
24 against those practices and has become
25 integrated in state child welfare practices.

1 There's no basis for uprooting those practices
2 or for overturning Congress's considered
3 judgment in enacting ICWA.

4 ICWA, in fact, is a valid exercise of
5 Congress's power over Indian affairs in several
6 respects. That power is grounded in the text of
7 the Constitution, including the Indian Commerce
8 Clause. It is grounded as well in the
9 constitutional structure in which Indian tribes
10 occupy a unique status as dependent sovereigns
11 to which the United States owes a duty of
12 protection, and that duty of protection, as this
13 Court observed in *Kagama*, derives in large
14 measure from the fact that the national
15 government and the states aiding it, acting
16 through treaty and war powers, diminished the
17 tribes' ability, put them in a position of
18 dependency, and, as this Court said in *Kagama*,
19 *Seber*, and other cases, with -- gave rise to a
20 duty of protection, which in turn encompassed a
21 power of protection.

22 Congress's efforts to address the
23 problems in ICWA, protecting family integrity,
24 kinship, unity, and the integrity and long-term
25 existence of tribes, lie at the core of

1 Congress's power under the plenary powers. It
2 does so by -- not by displacing state authority
3 but simply imposing minimum standards on states'
4 exercise of that authority by seeing foster care
5 and adoption in -- in state courts.

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

18 JUSTICE ALITO: Well, Mr. Kneedler, if
19 the plenary power has no limits, then, of
20 course, there isn't any Article I issue for us
21 to decide. Does it really have no limits in
22 your view?

23 MR. KNEEDLER: No. Mancari announces
24 the core of the test, which it has to be
25 rationally related to the fulfillment of

1 Congress's unique obligations to Indians. So,
2 in -- in that, there -- it is an implementation
3 of the dependent status and the protection,
4 whether that comes just from the Indian Commerce
5 Clause or the amalgamation of Congress's various
6 -- various powers, but it has to be in service
7 of the obligations to the Indians.

8 And this Court in Mancari said it has
9 to be reasonable and rationally related to
10 Congress's fulfillment of its unique powers.
11 There is, I think, a reasonableness there, but
12 this is at the core of something that is
13 reasonable.

14 JUSTICE ALITO: So rationally related,
15 is that our usual rational basis test?

16 MR. KNEEDLER: I think Congress's
17 judgment whether -- whether it -- it does serve
18 that purpose is entitled to great deference. I
19 think it may not go all the way to rational
20 basis because -- I -- I think it's important to
21 recognize that Congress has acted over the two
22 centuries since the adoption of the Constitution
23 in pragmatic ways. When it has been confronted
24 with a particular problem, it has assessed that
25 problem. It has come up with what it regards as

1 the appropriate solution to that problem and has
2 acted in -- in a reasonable manner. And this
3 Court has said that deference to Congress's
4 judgment about what is reasonably essential to
5 carry out the trust responsibility is called
6 for.

7 CHIEF JUSTICE ROBERTS: The --

8 JUSTICE ALITO: Could Congress say --

9 CHIEF JUSTICE ROBERTS: No, no, go
10 ahead.

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

15 MR. KNEEDLER: I think that would --
16 that would obviously go further, and I would
17 want to know the -- the -- the circumstances,
18 but I would think that would be a difficult law
19 to defend that --

20 JUSTICE ALITO: That's not rationally
21 related in the same way that this is? I mean,
22 it's -- it's more -- I honestly don't -- I've
23 had this -- had great difficulty dealing with
24 this Article I question because, if "plenary"
25 means plenary, Congress can do whatever it

1 wants, fine. As I said, it -- it's an easy
2 case. There's nothing there under Article I.

3 But, if there are limits, it's hard
4 for me to see where the limits are. That's
5 where I -- that's where I need help.

6 MR. KNEEDLER: Well, I -- I think -- I
7 think the place to start -- frankly, I think
8 it's difficult to start -- to state one rule
9 that applies across the board in all the various
10 circumstances where Congress might act, criminal
11 laws, education, and healthcare, as Justice
12 Gorsuch mentioned, child -- child welfare.

13 But what this Court has said -- and --
14 and, again, I want to come back to this. Seber
15 was an example where it involved tax exemptions
16 for property, but the Court -- the Court, in
17 upholding that, said these tax exemptions are
18 appropriate in aid of Congress's carrying out
19 its obligation to --

20 JUSTICE ALITO: What about the
21 boarding school law? Congress had the power to
22 do that?

23 MR. KNEEDLER: Congress -- Congress
24 had the power at the time, I -- I -- I think.

25 JUSTICE ALITO: Well, if it were to do

1 it --

2 MR. KNEEDLER: Seriously misguided.

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

6 MR. KNEEDLER: Well, I -- it has to be
7 -- the plenary power, I mean, I think there are
8 at least two -- two things to bear in mind about
9 this. I think Congress, when dealing with a
10 tribe in its political capacity, has a great
11 deal of power to diminish the tribe's or
12 regulate the tribe's exercise of its
13 governmental authority, like under the Indian
14 Civil Rights Act, et cetera. That's -- that's
15 dealing with the tribes as tribes in a political
16 capacity.

17 I think where Congress is addressing
18 the protections for individual Indians, either
19 children, adults, whoever, then that -- that's
20 what triggers the formulation of the -- of the
21 trust responsibility or the dependent status of
22 -- of tribes. It has to be reasonably related
23 to Congress's unique obligations to Indians --

24 JUSTICE ALITO: All right. Could
25 Congress -- could --

1 MR. KNEEDLER: -- which means it has
2 to be protective, not harming.

3 JUSTICE ALITO: Could -- could
4 Congress enact a law that alters the substantive
5 law that states apply in areas like -- like
6 contracts or torts or rules of evidence when one
7 of the parties in the case is an Indian?

8 MR. KNEEDLER: I think the mere fact
9 that the party is an Indian would probably not
10 be sufficient.

11 JUSTICE ALITO: Why? Why isn't that
12 rationally related to furthering the interests
13 of -- of Indians?

14 MR. KNEEDLER: I -- again, I think --
15 I think, in examining any hypothetical statute
16 or context, it is necessary to look at the
17 judgment that Congress made and to know why
18 Congress made the judgment that it did.

19 In -- in Indian contracts, for
20 example, there were many, many years where
21 contracts by individual Indians were not valid
22 unless approved by the Secretary of the Interior
23 because of a concern that they were going to be
24 taken advantage of.

25 So, if there -- if there was that sort

1 of justification -- and, presumably -- I don't
2 think we can assume Congress would act in an
3 arbitrary manner. It would be addressing a
4 real-world problem in a practical way.

5 JUSTICE ALITO: No, I understand.

6 CHIEF JUSTICE ROBERTS: Well --

7 JUSTICE ALITO: And --

8 CHIEF JUSTICE ROBERTS: No, go ahead.

9 JUSTICE ALITO: Just one -- one more.
10 Honestly, I -- I don't know how to analyze this
11 question because, if "plenary" means everything,
12 then -- then it means everything. And,
13 otherwise, what I've gotten from the briefs and
14 the arguments is that we have to try to extract
15 certain rules from our cases, which quite
16 honestly strike me as a mishmash.

17 But one -- one last one. Could
18 Congress have required that Indians get
19 preference in the -- in receiving the COVID
20 vaccines? Would that be an equal protection
21 violation in your view?

22 MR. KNEEDLER: Again, I think it might
23 depend -- if Congress decided to furnish
24 vaccines to tribes as part of a tribal health
25 program, I don't know whether you would call

1 that a preference or whether that's Congress --
2 aspect of Congress's delivering healthcare. It
3 might have -- it might have a disparate impact,
4 if you will, but -- but Congress has a duty to
5 Indians, and -- and it might buy a lot of
6 vaccines and deliver them.

7 CHIEF JUSTICE ROBERTS: Well --

8 MR. KNEEDLER: But a prescription --

9 CHIEF JUSTICE ROBERTS: -- I don't
10 want to --

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

13 CHIEF JUSTICE ROBERTS: I -- I do want
14 to follow up on Justice Alito's question.

15 There's a limited number of vaccines.
16 Can the federal government decide to distribute
17 those to -- to Indians and not others?

18 MR. KNEEDLER: Well --

19 CHIEF JUSTICE ROBERTS: It's a very
20 simple hypothetical.

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

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

25 MR. KNEEDLER: Well, answering what --

1 what plenary power means, I think, several
2 things that it means. There's no subject matter
3 that is completely off limits just be -- just
4 because it's Indians. There is no geographic
5 component which renders something completely off
6 limits.

7 CHIEF JUSTICE ROBERTS: But there's
8 something about distributing vaccines, a limited
9 supply, that is, you suggested, I guess, that it
10 may not be within the plenary power?

11 MR. KNEEDLER: Well, in -- in a
12 Court's reviewing of something of -- that
13 Congress has done in the exercise of its plenary
14 power, again, the -- the test the Court has
15 applied, it's used different formulations, but
16 --

17 CHIEF JUSTICE ROBERTS: Is that the
18 reasonably essential?

19 MR. KNEEDLER: Reasonably essential,
20 appropriate, not arbitrary.

21 CHIEF JUSTICE ROBERTS: What -- what
22 in the world does that mean? What -- I mean, if
23 it's essential, it's essential. If it's
24 reasonable -- but what's reasonably essential
25 mean?

1 MR. KNEEDLER: Well, reasonably
2 essential is not a familiar term in -- in -- in
3 -- in the way --

4 CHIEF JUSTICE ROBERTS: In English?
5 (Laughter.)

6 MR. KNEEDLER: But -- but -- in -- in
7 -- in jurisprudence, but that's followed by
8 deference has to be given to Congress. And --
9 and, you know, if -- if the -- if the furnishing
10 of vaccines to the tribe was part of a -- a
11 general program to furnish vaccines to
12 underserved communities, I mean, it would
13 depend.

14 CHIEF JUSTICE ROBERTS: No. I guess
15 this is the point. You're arguing for special
16 treatment with respect to Indians. So why does
17 it matter if it's part of a program to serve
18 underprivileged communities?

19 MR. KNEEDLER: It -- it -- it -- it
20 may not. But I -- but I don't think -- Congress
21 has not done the sort of thing that you are
22 describing. Congress --

23 JUSTICE JACKSON: But, Mr. Kneedler, I
24 thought that your answer to the Chief was going
25 to be that that issue was not really teeing up a

1 question about the plenary power, that the
2 issues that they have identified, I would think,
3 would be analyzed under the Equal Protection
4 Clause, and that's sort of a separate
5 constitutional basis for it.

6 MR. KNEEDLER: Yeah. No, that would
7 -- that -- that -- that -- that would be,
8 although that also has a rational basis
9 standard.

10 CHIEF JUSTICE ROBERTS: Well, but
11 there are two questions, one, whether you can do
12 it in the first place, which is the plenary
13 power question, then whether you can do it in a
14 way that distinguishes between polities that
15 have -- with which the federal government has a
16 special trust relationship.

17 MR. KNEEDLER: I -- I -- I -- I think
18 these two questions raise -- it may all be under
19 the plenary power -- they raise an ends mean.
20 There is no doubt that furnishing vaccines to
21 Indians, at -- at least if they have some tribal
22 connection or within the scope of people
23 eligible for Indian healthcare services, there's
24 no doubt that that is a valid means or valid end
25 for Congress's action.

1 The question would be whether the
2 approach it took is a reasonable one or, rather,
3 it is arbitrary. And those -- those require
4 some judgment -- some assessment of Congress's
5 judgment, to which --

6 CHIEF JUSTICE ROBERTS: But I have, I
7 mentioned to Mr. McGill, difficulty
8 understanding how the placement priorities work.
9 So maybe I'll try an example.

10 Let's say there's a six-month-old baby
11 that had been born to an Indian couple and the
12 Indian couple for whatever reason is no
13 longer -- no longer there. And there are also
14 no extended family members in -- in the tribe.

15 A non-Indian couple comes forward and
16 says we would like to adopt the six-month-old
17 baby, and they check all the boxes under, you
18 know, best interests of the child. In other
19 words, in normal circumstances, this would be a
20 perfect placement for the child.

21 But non-family members of the tribe
22 say that, no, they think it would be better for
23 the child to be raised with the tribe on the
24 reservation.

25 Does -- does that priority trump the

1 other best interest finding?

2 MR. KNEEDLER: Well, several questions
3 about that. When Congress enacted -- or, sorry,
4 answers. When Congress enacted ICWA, it was
5 very concerned about the application of the best
6 interests of the child standard because it led
7 to subjective judgments about -- by state
8 welfare agencies --

9 CHIEF JUSTICE ROBERTS: Okay. Let's
10 assume -- let's assume that it's a good faith
11 and reasonable application of the best interest
12 standard.

13 MR. KNEEDLER: But -- but what -- but
14 what -- what Congress did was to adopt objective
15 standards, which is the -- the child -- which is
16 the priorities, and, with respect to tribal
17 members, there is -- there is an extended
18 kinship proposition there.

19 CHIEF JUSTICE ROBERTS: So does that
20 priority displace the state court, state
21 adoption agency, determination of the best
22 interests of the child?

23 MR. KNEEDLER: Well, the -- the -- the
24 agency would have to determine that the -- that
25 the tribal family was qualified --

1 CHIEF JUSTICE ROBERTS: Yeah.

2 MR. KNEEDLER: -- first of all. And
3 then, secondly, the -- that placement, it --
4 it's a rebuttable presumption and is not
5 absolute. So there is a good cause --

6 CHIEF JUSTICE ROBERTS: Rebuttable
7 presumption that the child would be placed with
8 the non-family members of the child?

9 MR. KNEEDLER: Right, that's one way
10 -- that's one way to describe it. But then,
11 yes, I mean --

12 CHIEF JUSTICE ROBERTS: Well, so okay.
13 So my point is that in that particular
14 situation, the best interests of the child would
15 be subordinated to the interests of the tribe?

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

17 CHIEF JUSTICE ROBERTS: The interests
18 of non-family members.

19 MR. KNEEDLER: When Congress enacted
20 ICWA in Section 1902, it said it was
21 implementing the best interests of the child.
22 The -- the -- the -- the -- the -- the
23 proposition of best interests --

24 CHIEF JUSTICE ROBERTS: So then -- so
25 you're saying Congress in ICWA made a

1 determination that it is in the best interests
2 of the child to remain with non-family members
3 of the tribe on the reservation in every case,
4 regardless of what the alternative is?

5 MR. KNEEDLER: Well, no, it's not
6 every case. What Congress did was enact a -- a
7 framework, an overall statute that, as -- as I
8 said -- and -- and this is, if you look at the
9 amicus brief by the -- by the Casey Foundation,
10 it described that this reflects child welfare
11 practices that -- that have come to more closely
12 resemble what ICWA does, in fact, by -- by
13 looking to not just the immediate family but to
14 extended kin. Congress made judgments when it
15 enacted --

16 CHIEF JUSTICE ROBERTS: So I guess --
17 and -- and I am having trouble figuring out how
18 this actually works in -- in practice in a
19 concrete case.

20 In the hypothetical -- hypothetical
21 that I posed, would the interests of non-family
22 members of the tribe trump the state agency
23 determination, they make these determinations
24 every day, of what's in the best interests of
25 the child?

1 Not with respect to placement with the
2 other -- the other couple we're talking about.
3 It's not that they're saying, you know, it's not
4 going to be in the best interests of the child
5 to be placed with the family on the reservation,
6 but there are other things that they take into
7 account.

8 MR. KNEEDLER: But ICWA does not
9 operate that way, with respect. The -- the
10 first question is that you -- if -- if no
11 extended family members, and extended family can
12 include how -- how the tribe --

13 CHIEF JUSTICE ROBERTS: No, no. My
14 hypothetical was members of the tribe.

15 MR. KNEEDLER: Was no -- right. So it
16 goes to -- it goes to the second preference for
17 a couple in -- or parents in that tribe. But
18 that is subject to the good cause exception. So
19 --

20 CHIEF JUSTICE ROBERTS: Okay. Does
21 the good cause exception -- how does that work?
22 Because it's not -- it's something different
23 than the best interests of the child?

24 MR. KNEEDLER: It -- it's not
25 articulated that way. Maybe some of the same

1 considerations could come in. But, again,
2 Congress was -- and, for example, if the parent
3 -- the -- the preference of the parents is given
4 weight, then sometimes --

5 CHIEF JUSTICE ROBERTS: Yeah, but,
6 again, my hypothetical said that the parents are
7 no longer on the scene.

8 MR. KNEEDLER: But -- okay. There --
9 there are cases where there are.

10 CHIEF JUSTICE ROBERTS: It happens.

11 MR. KNEEDLER: Yeah. No, no, it does,
12 but all I'm saying is that the -- I'm giving
13 examples of why the good cause exception is not
14 absolute. It could be rebutted in certain ways.

15 It also says should. It does not say
16 shall or must, which allows for the
17 consideration of other factors.

18 CHIEF JUSTICE ROBERTS: Could it be
19 rebutted by the agency saying we have gone
20 through our normal determinations of what's in
21 the best interests of the child that we do in
22 every case, whether, you know, not involving
23 Indians, and we think that's where the child
24 should be placed with that couple.

25 Now does the -- do the priorities in

1 ICWA trump that determination?

2 MR. KNEEDLER: That -- that -- that is
3 not the determination the -- the agency would
4 make at the outset, and, again, because that's
5 what ICWA was concerned about and -- and because
6 of the subjective judgments that could be made
7 by child welfare personnel in looking at the
8 family, looking at -- at the financial status of
9 the family, looking at the housing, and make
10 judgments that this child should not be there.

11 JUSTICE SOTOMAYOR: Mr. Kneedler, can
12 I? One can assume two -- two things, following
13 up on Justice Alito and Justice Roberts' initial
14 question: If the United States had agreed with
15 England to supply it first with the vaccine
16 before it supplied the states, would our foreign
17 powers permit -- plenary foreign powers permit
18 the U.S. to do that?

19 MR. KNEEDLER: I think it probably
20 would, yes.

21 JUSTICE SOTOMAYOR: It -- what stops
22 --

23 MR. KNEEDLER: Absolutely would, sure.

24 JUSTICE SOTOMAYOR: -- that from
25 happening, obviously, is that that President

1 would obviously or more than likely not get
2 reelected.

3 All right. The same thing if there
4 was a political judgment that the Indian tribes
5 required the vaccine first for some rational
6 reason, 90 percent of the -- of the population
7 was dying or a huge number more or whatever the
8 reason was, it was a reasonable reason, that
9 would -- you'd have plenary power to do that,
10 correct, if you're the government?

11 MR. KNEEDLER: As I said, the power to
12 furnish the vaccines is there whether the --
13 whether the criteria that it applied in a
14 particular case -- I mean, they would have to be
15 reasonable. But we shouldn't assume Congress --

16 JUSTICE SOTOMAYOR: All right. On
17 this best interests of the child point, okay,
18 going back to that, one is presuming that the
19 best interests of the child is to remain with X
20 or Y. That's a court --

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

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

1 MR. KNEEDLER: Right.

2 JUSTICE SOTOMAYOR: An unfit -- all of
3 these parents, to even be in the running, have
4 to be competent parents, correct?

5 MR. KNEEDLER: Yes.

6 JUSTICE SOTOMAYOR: Competent care --
7 custodians.

8 MR. KNEEDLER: Yes.

9 JUSTICE SOTOMAYOR: So now the issue
10 is one of policy. Where will you place the
11 child among these competing competent
12 custodians, correct?

13 MR. KNEEDLER: Yes.

14 JUSTICE SOTOMAYOR: And that goes to
15 the judgment of -- who should make that
16 judgment, and what you're saying is Congress has
17 --

18 MR. KNEEDLER: Congress made that
19 judgment in particular because it was concerned
20 about the ordinary operation of the -- and this
21 Court's decision in Smith versus Organization of
22 Families makes this point.

23 JUSTICE SOTOMAYOR: Got it.

24 CHIEF JUSTICE ROBERTS: So there's --
25 so just so I understand, there's a level. It

1 has to be competent --

2 JUSTICE SOTOMAYOR: Could you let him
3 just finish that, Chief?

4 CHIEF JUSTICE ROBERTS: Oh, I'm sorry.
5 I thought you were --

6 JUSTICE SOTOMAYOR: Yeah. Just let
7 him finish that part. Go ahead.

8 MR. KNEEDLER: Congress -- Congress
9 was concerned about the sort of free-form or
10 free-floating application of the best interests
11 of the -- of the child standard, as this Court
12 recognized, and that's why it, for example,
13 imposed the burden of proof to remove -- to
14 remove the child or for -- or for placements of
15 the child with -- with someone else.

16 And what it determined is the
17 arrangement that -- the framework that it set up
18 in ICWA was in the best interests of the child
19 because Congress made a judgment that placing
20 the child with the extended family, failing that
21 with the tribe, which is -- which is a kinship
22 community interest, which is -- which is taken
23 into account in the non-Indian context under
24 child welfare practices, that was in the best
25 interests of the child, with the -- with the

1 occasion or the possibility or the prospect of
2 individualized exceptions to that --

3 JUSTICE ALITO: Suppose the parents
4 are --

5 MR. KNEEDLER: -- in a particular
6 case.

7 CHIEF JUSTICE ROBERTS: Well --

8 JUSTICE SOTOMAYOR: Well, I think --

9 JUSTICE ALITO: Chief?

10 CHIEF JUSTICE ROBERTS: Are -- are you
11 finished with your answer?

12 MR. KNEEDLER: Yes.

13 (Laughter.)

14 MR. KNEEDLER: Yes.

15 CHIEF JUSTICE ROBERTS: Okay. Because
16 I -- yeah.

17 (Laughter.)

18 CHIEF JUSTICE ROBERTS: Now is -- is
19 competence the threshold, or, in this priority
20 standard, is the agency allowed to consider the
21 relative best interests of the two different
22 proposed placements?

23 MR. KNEEDLER: I -- I -- I think
24 ordinarily not, but -- but, as this Court has
25 said elsewhere, for example, in -- in removing a

1 child from its parents, the question is not
2 whether the child would be better off somewhere
3 else because parents have a fundamental right in
4 parenting their children.

5 And what -- Congress didn't say this
6 was a fundamental right of extended family or
7 tribes, but it -- it thought it was a very
8 important right that should be recognized and
9 not lightly -- and not lightly taken away
10 because of the -- the huge numbers of Indian
11 children who were being taken away from their
12 families, from their extended families, from
13 their tribes, from their kin, from their
14 community, and that was damaging the long-term
15 interests --

16 CHIEF JUSTICE ROBERTS: Last --

17 MR. KNEEDLER: -- of the tribes.

18 CHIEF JUSTICE ROBERTS: -- last
19 question. Is the trust relationship, trust
20 responsibility that the federal government owes
21 in this area, is that responsibility owed to the
22 tribe, or is it owed to individual members of
23 the tribe?

24 MR. KNEEDLER: I think Congress can
25 conclude that it is owed to both, and it

1 traditionally has. Congress's power -- and --
2 and the Holliday decision that was referred to
3 previously, I think, is very instructive on this
4 point in a number of reasons. It involved -- it
5 upheld Congress's ability to engage in the
6 prohibition on -- on liquor sales in that case
7 off-reservation. It rejected the proposition
8 that just because the Indians there were
9 citizens, that that was beyond what -- what
10 Congress could do. And it -- and it said that
11 that could be upheld because it was an
12 appropriate exercise of -- of Congress's power.

13 But it also specifically rejected the
14 argument that the -- that Congress can only deal
15 with tribes. It said tribes are made up of
16 their members, of their constituents.

17 And that's an important thing to
18 understand about the way ICWA operates. It
19 operates on the basis of citizenship, that the
20 definition of Indian child is that the child
21 must be a member of the tribe or, if not, it has
22 to -- the child has to be eligible for --

23 JUSTICE ALITO: Well, along those
24 lines --

25 MR. KNEEDLER: -- membership.

1 JUSTICE ALITO: -- along those lines,
2 Mr. Kneedler, suppose the parents of a child
3 that is going to be adopted say we don't want
4 our child treated as an Indian under ICWA. And
5 the tribe says, well, this child is eligible for
6 tribal membership. Or maybe we have enrolled --
7 we have unilaterally enrolled the child as a
8 member of the tribe. What happens then?

9 MR. KNEEDLER: Well, if the -- I'm --
10 I'm not sure. Of all the facts in the
11 hypothetical, if -- if the parents are giving
12 the child up for adoption, then that wouldn't
13 necessarily trigger the -- the preferences or
14 they wouldn't get dispositive weight because the
15 -- the parents' desires can be given great
16 weight in that -- in that circumstance.

17 JUSTICE ALITO: But it would still be
18 --

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

20 JUSTICE ALITO: -- it would still be
21 governed by ICWA?

22 MR. KNEEDLER: It's still -- it's
23 still subject to ICWA, yes. But -- but the --
24 but -- and this is an important point to
25 understand. This is a facial challenge to a

1 statute that has operated for 40 years day to
2 day in state child welfare agencies. It's
3 integrated in what they do. And, you know,
4 there -- there could be -- I mean, what happens
5 in a particular case depends upon the -- the
6 state agencies or the private agencies or the --
7 or the adopting couple --

8 JUSTICE KAVANAUGH: Can I follow up on
9 the Chief's questions? The third preference,
10 for other Indian families, including families
11 who are of a different tribe, correct?

12 MR. KNEEDLER: Yes.

13 JUSTICE KAVANAUGH: Okay. And does
14 the third preference, that preference, ever make
15 a difference?

16 MR. KNEEDLER: I mean, I don't know
17 empirically, but they -- but it can in the
18 following circumstance -- I mean, first of all,
19 it's important to understand --

20 JUSTICE KAVANAUGH: Meaning that the
21 decision would have been to give it -- the best
22 interests would have been with a -- a different
23 family but for that third preference?

24 MR. KNEEDLER: Well --

25 JUSTICE KAVANAUGH: Does it ever make

1 a difference?

2 MR. KNEEDLER: -- it -- it very well
3 could, but there would be very strong reasons
4 why it would, if I could just explain.

5 JUSTICE KAVANAUGH: No, I -- I think
6 it would. That's -- yeah.

7 MR. KNEEDLER: Yeah. Because --

8 JUSTICE KAVANAUGH: That's --

9 MR. KNEEDLER: -- you could have a
10 child, for example, who has parents who are
11 members of two tribes. ICWA --

12 JUSTICE KAVANAUGH: No, just -- it
13 applies beyond that circumstance.

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

16 JUSTICE KAVANAUGH: Yeah.

17 MR. KNEEDLER: -- why it is there.
18 Again, this is a -- first of all, it hasn't --
19 the third preference has not been raised in this
20 case at all. Nobody -- no plaintiff in this
21 case has been affected by it.

22 And -- but -- but I was trying to give
23 an explanation for why it is there and why
24 applications of it would -- would, I think --

25 JUSTICE KAVANAUGH: Go ahead.

1 MR. KNEEDLER: -- be obviously okay.
2 If you have a child who has a parent who's a
3 member of two tribes, ICWA requires that one be
4 selected as the primary tribe. But -- but, if
5 -- if that -- if for some reason there's not a
6 suitable foster or adoptive parent who comes
7 forward, the second tribe would be a logical
8 place.

9 You also have situations where two
10 tribes share the same reservation and -- and
11 there's a lot of interaction, intercourse
12 between them. Or you have a situation where --
13 and this is true with the breakup of the great
14 Sioux Nation in the northern plains, you once
15 had one -- one great nation that is now divided
16 up into discrete tribes on different
17 reservations, but they have common cultural --

18 JUSTICE KAVANAUGH: So -- so, to get
19 to the heart of my concern about this, you would
20 agree, I think, but tell me if you disagree,
21 that Congress couldn't give a preference for
22 white families for white children, for black
23 families for black children, for Latino families
24 for Latino children, for Asian families for
25 Asian children.

1 MR. KNEEDLER: Yeah.

2 JUSTICE KAVANAUGH: Do you agree with
3 that?

4 MR. KNEEDLER: Yes.

5 JUSTICE KAVANAUGH: Okay.

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

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

10 MR. KNEEDLER: Because it has to do
11 with Indian tribes. Indian --

12 JUSTICE KAVANAUGH: Including the
13 third preference, which does not require it be
14 of the same tribe?

15 MR. KNEEDLER: But it -- but it is a
16 tribe. It is a tribe with a political
17 relationship to -- to the United States. If the
18 child goes there, that -- the child's --
19 somebody in that -- in that family will be a
20 tribe -- a member of that tribe.

21 JUSTICE BARRETT: But why -- I don't
22 understand that. I thought that it swept more
23 broadly than that, as Justice Kavanaugh was
24 saying. I thought that you could have -- I
25 mean, even in your hypothetical where you have a

1 mother who belongs to one tribe and a father who
2 belongs to another, maybe I'm misunderstanding
3 how the third preference works, but I thought
4 the third preference would kick in and give
5 preference to someone who -- a couple that
6 belonged to a different tribe altogether.

7 MR. KNEEDLER: Well, it --

8 JUSTICE BARRETT: Am I
9 misunderstanding that?

10 MR. KNEEDLER: -- it could, but ICWA
11 operates on the basis of -- of the child's
12 primary tribe. And if -- and -- but, if you had
13 a second tribe, that would not -- that wouldn't
14 come under the first or second preference.

15 JUSTICE BARRETT: It would come under
16 the third?

17 MR. KNEEDLER: It would come --

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

19 MR. KNEEDLER: -- it would come under
20 the third.

21 JUSTICE BARRETT: -- if there's no --
22 there's -- right. I'm saying -- I'm assuming,
23 as Justice Kavanaugh's question was -- was
24 assuming, that you get down to the third, so you
25 didn't have a placement available. The first or

1 the second preference didn't kick in. You get
2 down to the third preference. And I guess -- I
3 mean, I'll get to the heart of my concern, is,
4 you know, if -- if you're thinking about that
5 from an equal protection point of view, I mean,
6 let's assume I agree with you that these are
7 political classifications, this is just treating
8 Indian tribes as fungible.

9 MR. KNEEDLER: Well --

10 JUSTICE BARRETT: So let's imagine the
11 child is a member of the Navajo and is placed
12 under the third preference with the Cherokee.

13 MR. KNEEDLER: I don't -- I don't
14 think it rests on the idea that all -- that all
15 tribes are fungible in the sense that they're
16 all the same or that all their members are the
17 same, but what it does rest on is a recognition
18 that each of those tribes has a political
19 government-to-government relationship with the
20 United States.

21 And they have that in common. They --
22 tribes -- tribes have aligned over the years in
23 common interests. They have -- Congress
24 certainly thought this was true -- some common
25 cultural ties or practices or spiritual

1 practices. They -- they may not be dispositive,
2 but it's a recognition that that could be true.

3 The -- the third preference doesn't
4 come up. In fact, the Petitioners in this case
5 have not identified any case that fits the
6 paradigm that -- that I think Justice Kavanaugh
7 might have been talking about, where you have
8 somebody -- another tribe with no other sort of
9 connection to the child.

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

13 And it's not a property interest.
14 Governments have an interest in their citizens
15 and their children. Consular protection for
16 aliens from other countries in our -- in our
17 country is a -- is a vital thing. It's not
18 property.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Alito, anything further?

22 JUSTICE ALITO: Well, adults can
23 change their -- their country of their
24 citizenship.

25 But why isn't Mr. McGill right in

1 referring to the concept that the tribes have a
2 proprietary interest in children who are covered
3 by -- by ICWA?

4 The children don't voluntarily join
5 the tribe. And in my hypothetical where the --
6 the parents don't want the child to be treated
7 as a member of the -- a member of the tribe,
8 this child is treated as an Indian under ICWA
9 solely based on the child's status as a -- based
10 on ancestry.

11 MR. KNEEDLER: Well, if the child --
12 if the child is a member, that is because either
13 the tribe automatically confers citizenship at
14 birth, which the United States does for -- in
15 some circumstances for a U.S. citizen abroad, if
16 they give birth. It is not an unheard of
17 proposition.

18 And the parallels between Congress's
19 dealing with tribes and Congress's dealing with
20 foreign countries and foreign affairs is -- is
21 very direct for these purposes. It's dealing
22 with another sovereign.

23 In fact, that parallel is present in
24 the Indian Commerce Clause, which -- which is
25 written in terms of commerce with foreign

1 governments and with states.

2 So there's -- there is -- there is
3 that parallel. And it's also common where, if
4 the -- if the parents once enrolled the child
5 but didn't want them to be treated as -- as a
6 tribal member, children follow -- children don't
7 make their own decisions. Someone else does.

8 Either citizenship could descend
9 automatically at birth, or -- or, when the child
10 becomes 18, the child might choose to be a -- a
11 member, which is another important consideration
12 if the child is placed with somebody in the
13 tribe.

14 JUSTICE ALITO: What if it's an older
15 child, not 18, but an older child who can
16 express the child's preferences, and the child
17 says I don't want to be treated as an Indian
18 under ICWA?

19 MR. KNEEDLER: The good cause --
20 Interior's regulations explicating the good
21 cause exception say that the wishes of the -- of
22 the child of -- of -- of a sufficient age, to --
23 for his preferences to be taken into account.

24 That is a factor and -- and perhaps a
25 very important one.

1 JUSTICE ALITO: It's taken into
2 account, but it's not dispositive.

3 MR. KNEEDLER: No, but -- but family
4 law cases, custody cases are very fact --
5 fact-specific. And so you can hypothesize a
6 situation in which maybe it should have been
7 dispositive but not, but some -- some -- a state
8 court judge has to make a difficult judgment.

9 And -- and, if there are problems with
10 that in a particular case, the -- the person
11 seeking custody could appeal. That was done in
12 -- in one of the cases in this case.

13 But this is a facial challenge. The
14 idea that -- that in all of its operations,
15 under Salerno, it would be necessary to say in
16 all of its operations it either exceeds
17 Congress's Article I powers or is a violation of
18 equal protection. And I think that that is an
19 untenable position.

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

25 JUSTICE ALITO: One -- one last

1 question. Does -- is rational basis the
2 standard for all classifications that treat
3 Indians differently from other people, even if
4 -- even if the classification disfavors them?

5 MR. KNEEDLER: I -- I think ordinarily
6 the first question there would be whether that
7 is a -- a valid Article I exercise of power. If
8 that's what you're asking, you're asking equal
9 protection --

10 JUSTICE ALITO: Yeah, in equal
11 protection. What's the -- what's the level of
12 scrutiny for a classification that disfavors
13 Indians, a rational basis?

14 MR. KNEEDLER: Well, as I said before,
15 if -- if what Congress does is act on the tribe
16 in a political manner, saying your -- you know,
17 your -- your -- your powers are diminished or
18 expanded, that -- that's a political
19 classification. And Congress can do things that
20 tribes might think are -- are not worthy.

21 But, if Congress is acting on
22 individual members of tribes in a way that is
23 harmful to them, I don't think that that is
24 rationally related to the fulfillment of
25 Congress's obligations to the tribes.

1 That's -- that -- that's a -- that's a
2 -- a -- a -- I think an important marker that
3 what Congress is doing has to be reasonably
4 understood as promoting the welfare of the --
5 the individuals involved.

6 I think that's an important
7 limitation. If -- if the boarding school
8 example were going to arise now, that would be a
9 very serious question. Maybe a hundred years
10 ago people had a different idea of that.

11 But -- but now it is, I think,
12 uniformly thought to have been harmful, and
13 Congress cannot gratuitously do harmful things
14 to individual -- individual tribal members, just
15 like it -- it can't do anyone else.

16 This Court's decision in *Moreno* with
17 respect to equal protection -- equal protection
18 challenge to a statute that -- that the Court
19 thought was just outright -- disliked.

20 JUSTICE ALITO: Well, that sounds like
21 something -- I'll stop with this -- that sounds
22 like a level of scrutiny that is different from
23 ordinary rational basis review, and at least
24 something with -- at least something more than
25 ordinary rational basis for you ought to be

1 applied.

2 MR. KNEEDLER: Well, and with --

3 JUSTICE ALITO: So is it -- does --
4 does that apply either way or only to
5 classifications that disfavor Indians?

6 MR. KNEEDLER: Again, I think it comes
7 up both with respect to Article I as it
8 rationally related to Congress's fulfillment of
9 its power and then a rational basis test for
10 equal protection, and they overlap, and one
11 could think of the issues here.

12 But, under -- under the Article I
13 power, I think it -- it -- it -- it -- it
14 doesn't cut both ways.

15 JUSTICE ALITO: Okay. Thank you.

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

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor, anything further?

20 JUSTICE SOTOMAYOR: I think that what
21 you were trying to say but I'm not sure is ICWA
22 has two components: one, if you're a child
23 who's an Indian member -- and we haven't even
24 addressed that -- it seems to me that that's the
25 quintessential part of ICWA that I find hard to

1 overturn. If you're a member of a tribe and the
2 government wants to protect you in a certain
3 way, you should be -- the government should be
4 unfettered from that.

5 MR. KNEEDLER: Right, and I -- I
6 thought that might have been one -- one part of
7 Justice Alito's question, but I wasn't sure.

8 JUSTICE SOTOMAYOR: All right. But
9 the second part of ICWA subjects a child who's
10 not a member yet but whose parent is an Indian
11 tribe membership, and that one, it seems to me
12 that most of our laws presume that a child will
13 follow its parents, correct?

14 MR. KNEEDLER: Yes.

15 JUSTICE SOTOMAYOR: Until they're of
16 age?

17 MR. KNEEDLER: Yes.

18 JUSTICE SOTOMAYOR: Even with
19 citizenship. Children who are born of parents
20 abroad I don't think in all circumstances are
21 automatically considered citizens.

22 MR. KNEEDLER: It depends on the
23 parents' connection to --

24 JUSTICE SOTOMAYOR: But they can
25 travel to the U.S. They can -- there's all

1 sorts of benefits they're given because they're
2 children of American citizens, but they have to
3 declare their intent to be a citizen at 18 or
4 something, correct?

5 MR. KNEEDLER: And -- and the -- this
6 Court's decision in Holyfield, you know, I
7 think, reinforces that, that domiciled --

8 JUSTICE SOTOMAYOR: So the bottom line
9 is that ICWA says that if you're eligible to be
10 a member because you're born of an Indian
11 parent, is no different than any of those laws,
12 correct?

13 MR. KNEEDLER: Right. No, I think
14 it's -- citizenship passing by descent is a --
15 is a common -- has been common throughout our
16 history. And -- and -- but, here, it's
17 important to recognize that tribal membership,
18 tribal citizenship is defined by the tribe.

19 JUSTICE SOTOMAYOR: Correct.

20 MR. KNEEDLER: That's an important --
21 that's an important aspect of tribal
22 sovereignty. The United States is not defining
23 the membership. And that is part and parcel of
24 recognizing the sovereignty of Indian nations,
25 which, by the way, are -- not by the way --

1 centrally mentioned in the Constitution, Indian
2 tribes. It -- it defines them by being Indians.

3 JUSTICE SOTOMAYOR: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

5 JUSTICE KAGAN: Mr. -- Mr. Kneedler,
6 I'm wondering if you could comment on the
7 various ramifications of adopting some of
8 Petitioners' theories of the Article I power,
9 and we've heard a few different iterations, but
10 I'll take General Stone's perhaps as the
11 clearest cut one.

12 General Stone says Congress has power
13 where it -- where it is acting out of a
14 particular treaty and its obligations, where
15 it's regulating on tribal lands, or where it's
16 regulating tribal governments qua governments.
17 And those are the three areas in which Congress
18 has power, and everything else is outside of
19 Congress's power.

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

22 MR. KNEEDLER: Well, the Indian
23 healthcare program furnishes a lot of services
24 to Indians who -- some of whom are not actually
25 formal tribal members, but they are -- a

1 judgment's been made that they are sufficiently
2 affiliated with a state tribe or something like
3 that. There's -- a lot of the Indian Health
4 Service care is furnished off-reservation.

5 There are -- there's aid to schools
6 that Indian children attend. There -- but there
7 would -- there would also be other concerns
8 historically. And what Congress has done in the
9 past by -- and I mentioned the Holliday case,
10 which was created criminal offenses for conduct
11 occurring off a reservation by individual
12 Indians, and there the Court said it's not just
13 commerce, it's intercourse, which means
14 interaction between Indians and non-Indians.

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

23 And I think, if the -- if the import
24 of your question is that if something is behind
25 -- is -- doesn't fall into one of those

1 categories precisely, first of all, there would
2 be litigation about whether it does fall into
3 that category, but if that means Congress is
4 about to step into strict scrutiny land under
5 racial discrimination, that would be, I think,
6 an enormous --

7 JUSTICE KAGAN: Well, not just the --
8 I took General Stone to be saying Congress just
9 can't do it. It just doesn't fall within --

10 MR. KNEEDLER: Yes. No.

11 JUSTICE KAGAN: -- Congress's Article
12 I powers, you know.

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

22 That would be in the teeth of -- of
23 Congress -- the framers' shedding of those
24 shackles. Whether those shackles were all under
25 the Indian Commerce Clause or -- or elsewhere,

1 that -- that was a deliberate choice by the
2 framers to give Congress plenary power over
3 Indian affairs. That was reflected in the
4 contemporary understanding and the Trade and
5 Intercourse Act, which enacted criminal
6 penalties for crimes -- over the years, crimes
7 by Indians against Indians. The classic
8 intercourse or interaction between Indians and
9 non-Indians.

10 JUSTICE KAGAN: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch?

13 Justice Kavanaugh?

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

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

1 JUSTICE KAVANAUGH: And -- and why is
2 that?

3 MR. KNEEDLER: Because the preference
4 in Mancari was at the BIA. It was the agency
5 that was regulating tribal affairs, individual
6 Indian affairs. So there was a particular --
7 particularly close nexus, frankly, to -- to the
8 Indian tribe and -- and tribal members who were
9 going to work for it.

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

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

21 MR. KNEEDLER: Again, I think that
22 would -- that would be much more difficult to
23 defend. I -- I'm not sure what the defense of
24 it would --

25 JUSTICE KAVANAUGH: And why, though?

1 I just want to understand. You -- you've had an
2 instinct to both these questions. That's much
3 more difficult, but why?

4 MR. KNEEDLER: I -- I think it's
5 because the -- the relationship to -- the tribal
6 relationship to the -- tribal relationship is --
7 is more attenuated and bumps up against
8 interests that other people might have. I think
9 that that may be an important consideration.

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

15 JUSTICE KAVANAUGH: And then --

16 MR. KNEEDLER: That might present
17 different questions.

18 JUSTICE KAVANAUGH: Okay. And then
19 you've -- you suggested that everything's been
20 operating smoothly, you know, we leave well
21 enough alone, but I just want you to speak to
22 the concern on the other side, which is, you
23 know, you come in as an adoptive couple, you
24 want to adopt a child, the state court otherwise
25 would say the best interests of the child would

1 be to go with you, and then you're told no,
2 you're the wrong race.

3 MR. KNEEDLER: No. I mean, with
4 respect, what you're told is, if -- if it's one
5 of the preferences, that there is a tribal
6 political citizenship aspect to the -- to the
7 determination. And that's when --

8 JUSTICE KAVANAUGH: Even -- even with
9 the third preference?

10 MR. KNEEDLER: Yes. The -- it has to
11 -- it has to be a member of -- of another tribe.
12 It has --

13 JUSTICE KAVANAUGH: Mm-hmm.

14 MR. KNEEDLER: And that means that
15 there -- that political -- that's a political
16 relationship as well.

17 Now, whether -- whether there could be
18 a rational basis challenge to that in a
19 particular case, we don't have anything like
20 that here. And -- and the -- I think the core
21 --

22 JUSTICE KAVANAUGH: And with the --

23 MR. KNEEDLER: -- of the third
24 preference is where -- is where that tribe --
25 either it occupies the same reservation or it

1 has another parent --

2 JUSTICE KAVANAUGH: Well, you say the
3 core, but it can apply even when it's a
4 completely different tribe with none of that,
5 correct?

6 MR. KNEEDLER: But -- but if -- but if
7 --

8 JUSTICE KAVANAUGH: Is that -- is that
9 a yes?

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

12 JUSTICE KAVANAUGH: Yeah.

13 MR. KNEEDLER: But the good cause
14 exception might allow greater flexibility --

15 JUSTICE KAVANAUGH: And I think you
16 referred --

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

18 JUSTICE KAVANAUGH: -- I think you
19 referred earlier to common spiritual practices
20 that may exist in those circumstances. Does
21 that suggest that Congress could say that, you
22 know, Catholic parents should get a preference
23 --

24 MR. KNEEDLER: No. No, not -- not at
25 all.

1 JUSTICE KAVANAUGH: And why not?

2 MR. KNEEDLER: Not at all.

3 JUSTICE KAVANAUGH: Why not?

4 MR. KNEEDLER: No. No --

5 JUSTICE KAVANAUGH: You said spiritual
6 preferences.

7 MR. KNEEDLER: Yes.

8 JUSTICE KAVANAUGH: Yeah.

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

17 And so I -- tribal members, I mean, it
18 varies. Obviously, not all members are alike,
19 but some people -- some tribal members feel a
20 very strong affinity for their tribe in terms of
21 their heritage going back to before the founding
22 of this country. It's an important part of
23 their cultural stability, their kinship, and --
24 and stability in growing up.

25 JUSTICE KAVANAUGH: Yeah.

1 MR. KNEEDLER: And if you have a young
2 child --

3 JUSTICE KAVANAUGH: You have -- you
4 have strong interests, and I respect those, on
5 one side. I'm just trying to say there are --
6 there are strong interests on the other side
7 too, which is why the case is hard, but I'll
8 finish there. Thank you.

9 MR. KNEEDLER: Okay.

10 JUSTICE BARRETT: Mr. Kneedler, I want
11 to pick up where Justice Kavanaugh left off.
12 You -- you said that it would be a harder case
13 in some of the hypotheticals that Justice
14 Kavanaugh presented, say, you know, Treasury
15 instead of the BIA, a preference in employment.

16 Is that because you would say -- you
17 know, I think that the classifications for
18 Indians are difficult because it's difficult --
19 there's a racial component and the political
20 identity component.

21 MR. KNEEDLER: Right.

22 JUSTICE BARRETT: Are you struggling
23 with those hypotheticals -- or, sorry, I don't
24 mean to say struggling. Are you finding those
25 more difficult to answer because you would say

1 that there are some circumstances in which the
2 classification of Indian operates more like a
3 racial classification because it is unconnected
4 to tribal sovereignty?

5 MR. KNEEDLER: Yes.

6 JUSTICE BARRETT: For the BIA, for
7 example, you know, you can see the connection
8 between the classification and tribal
9 sovereignty, and so it's easier to say that
10 that's a political classification subject to
11 rational basis scrutiny. If you move farther
12 away from that, if you're talking about
13 Treasury, then would you say that it operates as
14 a -- as a political classification but doesn't
15 satisfy rational basis scrutiny, or would you
16 say it's a racial classification and fails
17 strict scrutiny?

18 MR. KNEEDLER: I -- you could think
19 about it either way. I think it's still -- I
20 think it's still a political classification but
21 -- but perhaps an unreasonable one because there
22 -- there -- there is, as the Court's cases that
23 have looked at this, Holliday and others, there
24 is, I think, at some point a proportionality
25 aspect to it. Would -- would other people in

1 the society be -- be greatly adversely affected
2 or something -- something like that.

3 But, on the equal protection side, I
4 think Adarand is a very good example of that
5 because there was a -- a preference for
6 contracting within a series of black, Asian,
7 white -- you know, other minority groups. It
8 was expressed in racial terms, and the Court
9 said that was subject to strict scrutiny.

10 But that's -- that's why it's
11 important to look at the context in which
12 Congress is acting and -- because Congress --
13 Congress doesn't make sweeping judgments in this
14 area. It looks at --

15 JUSTICE BARRETT: But just --

16 MR. KNEEDLER: -- the practical
17 problem.

18 JUSTICE BARRETT: -- just to clarify
19 to make sure I understand your position,
20 sometimes the classification can operate as
21 racial and sometimes it would be political,
22 depending on the context in which Congress is
23 acting.

24 MR. KNEEDLER: I think, if it's
25 expressly based on tribal citizenship here,

1 either the child or the parent where the child
2 is not --

3 JUSTICE BARRETT: I'm not talking
4 about ICWA.

5 MR. KNEEDLER: No, no, I know.

6 JUSTICE BARRETT: I'm talking about
7 some of Justice Kavanaugh's hypotheticals.

8 MR. KNEEDLER: But what I -- what I'm
9 saying, if it turns on tribal membership or --
10 or -- or tribal citizenship, then I think it is
11 political in -- in -- in its -- in its essence.
12 Whether it goes too far in giving a benefit to a
13 -- a -- a -- someone with that political
14 connection --

15 JUSTICE BARRETT: Okay.

16 MR. KNEEDLER: -- I think would be the
17 first -- the first way to look at it.
18 Otherwise, there -- there could be strict
19 scrutiny --

20 JUSTICE BARRETT: Well, I'll -- I'll
21 -- I'll move on.

22 MR. KNEEDLER: -- challenges to -- to
23 many things affecting --

24 JUSTICE BARRETT: Yeah, I'll move on.
25 I mean, it just seems to me that it's always

1 going to be tied to tribal membership in some
2 way. But I'll move on. Just very quickly, I'm
3 going to summarize what I understand you to be
4 saying about the Article I issue, and I just
5 want you to tell me if I've got it right or
6 correct me if I don't.

7 In response to Justice Alito's
8 questions in particular and some of Justice
9 Kagan's questions as well, you were saying
10 plenary is plenary. So you would say that
11 Congress's power to regulate Indian affairs is
12 plenary so long as it's rational or, you know,
13 reasonably related or whatever standard we want
14 to use, it's within Congress's power and the
15 only limitation is if it bumps up against some
16 external limit, like the Equal Protection Clause
17 or like sovereign immunity --

18 MR. KNEEDLER: No, I -- I -- I think
19 there are -- I think there are built-in
20 restraints if it -- if it -- if the -- if what
21 it's doing is disproportionate perhaps. I mean,
22 it's hard to articulate this because this Court
23 has never struck down a statute of that sort.

24 And, with respect to the Adarand case,
25 there's no express -- there was no express

1 reference or supposition about tribal membership
2 there. And so it was easy to identify it as --

3 JUSTICE BARRETT: Okay. But -- but --
4 but on my Article I question.

5 MR. KNEEDLER: No, on the -- on the
6 Article I question, I think plenary at its core
7 means there are no --

8 JUSTICE BARRETT: No --

9 MR. KNEEDLER: -- subject matters,
10 geographic areas categorically beyond its power.

11 JUSTICE BARRETT: But external limits
12 from the Constitution would apply, like equal
13 protection or, in Seminole Tribe, state
14 sovereign immunity?

15 MR. KNEEDLER: Yes, they -- they --
16 they would apply. And this -- I just want to
17 reiterate this doesn't just come from the -- the
18 Indian Commerce Clause.

19 JUSTICE BARRETT: Right.

20 MR. KNEEDLER: There is the inherent
21 power that comes from Congress's --

22 JUSTICE BARRETT: Trust relationships?

23 MR. KNEEDLER: -- the federal
24 government, which in turn comes from
25 constitutional powers, like the war power and

1 all of that that renders the tribes dependent
2 and, therefore, in need of protection.

3 And so I think it's very hard for this
4 Court to lay down a standard rule about what's
5 necessary to protect the tribes and to fulfill
6 the obligation to the Indians.

7 CHIEF JUSTICE ROBERTS: Justice
8 Jackson?

9 JUSTICE JACKSON: Yes. So I -- I
10 agree to some extent with Justice Kavanaugh that
11 there are strong interests on both sides of
12 these issues. What I'm mostly concerned about
13 is that we might be taking it upon ourselves to
14 weigh those interests where, really, our role
15 should be thinking about what the framers
16 intended with respect to the scope of Congress's
17 authority as it regards Indian affairs and what
18 Congress believed was necessary to protect
19 Indians given that exercise of authority.

20 So I guess I'm -- that makes me wonder
21 whether we shouldn't be giving more weight to
22 the statements in the legislative history from
23 Congress in terms of its decision that ICWA and
24 its provisions were, in fact, related to tribal
25 sovereignty, necessary to preserve tribal

1 sovereignty. So let me just ask you, how -- how
2 much weight, if any, should we be giving to
3 clear, direct statements from Congress that this
4 was being done pursuant to its understanding of
5 its plenary authority as given it -- given to it
6 in the Constitution and that it was necessary
7 from Congress's perspective to solve for the
8 problem of these state welfare practices that
9 were causing harm to Indian children given its
10 responsibility as a trust relationship for
11 Indian affairs?

12 MR. KNEEDLER: I think very, very
13 great deference, and I think that is the message
14 of cases like Holliday and Perrin and cases like
15 that. And you don't have to look to legislative
16 history for that. It's set out in the -- it's
17 set out in the -- in the beginning of ICWA
18 itself.

19 It starts by saying Clause 3 of
20 Article I provides that Congress shall have the
21 power to regulate commerce with Indians, and
22 through this and other authority it has plenary
23 power. Congress is saying that, through
24 statutes, treaties, et cetera, and -- and the
25 course of dealing with tribes, it has assumed --

1 assumed the responsibility for the protection of
2 Indians. Those are in 1901.

3 1902 says that Congress hereby
4 declares that it is the policy of this nation to
5 protect the best interests of Indian children by
6 establishing minimum standards in state child
7 welfare proceedings because that was the problem
8 they were addressing.

9 Yes, the boarding school issue was
10 also out there, but Congress saw, again, in the
11 considered, focused way that it deals with
12 problems, it saw a major problem. It thought
13 that this was in the best interests, that the
14 standards and the protections and the framework
15 it set out were in the best interests of the
16 child.

17 And if that displaces ordinary child
18 welfare law in particular cases, Congress made a
19 judgment that the objective factors it set out,
20 which take into account extended family and
21 kinship principles, that family law has, but the
22 way this statute implements them in state
23 proceedings is in the best interests of Indian
24 children, and that judgment by Congress based on
25 extensive hearings is entitled to great

1 deference.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Gershengorn.

5 ORAL ARGUMENT OF IAN H. GERSHENGORN
6 ON BEHALF OF THE TRIBAL PARTIES

7 MR. GERSHENGORN: Mr. Chief Justice,
8 and may it please the Court:

9 Congress enacted ICWA because Indian
10 children were being torn from their families and
11 tribes through the operation of state family law
12 in state courts. I want to emphasize three
13 points at the start.

14 First, there is no -- Congress has
15 plenary power over Indians, and there is no
16 exception in that power for state court child
17 custody proceedings. Since the founding, the
18 health and safety of Indian children has been
19 the province of the federal government and
20 tribes, not the states.

21 And, indeed, when Congress attempted
22 to give states authority over Indian children in
23 the 20th Century, states resisted and said it
24 was an exclusive federal responsibility.

25 Second, Plaintiffs' equal protection

1 claims should be rejected. A facial challenge
2 in a case without standing is just about the
3 worst way to consider the constitutionality of a
4 major federal statute. And, in any event, ICWA
5 draws distinctions that are political three
6 times over; it applies only to tribes that the
7 federal government has recognized, it
8 incorporates membership criteria established by
9 sovereign tribes, and it relies on the political
10 decisions of parents to remain tribal members.

11 Third, ICWA protects the best
12 interests of children. It adopts a system of
13 structured decisionmaking that combines
14 evidence-based presumptions with flexibility to
15 make individualized determinations. It protects
16 child -- child safety, facilitates access to
17 critical remedial services to keep families
18 intact, and it keeps -- works to keep families
19 -- keep children with their families and
20 communities. That's why ICWA is viewed as the
21 gold standard.

22 I'd be happy to take the Court's
23 questions. If not, I will start with -- with
24 the -- I'll take the Court's questions.

25 (Laughter.)

1 MR. GERSHENGORN: But I'm also happy
2 to keep going. Sorry, though.

3 CHIEF JUSTICE ROBERTS: Not that easy.
4 Do you think that ICWA incorporates
5 the familiar best interests of the child inquiry
6 that are -- are applied in family courts
7 throughout the country?

8 MR. GERSHENGORN: So I think I'd have
9 to say the answer to that is no. What ICWA does
10 is modify that because Congress made the
11 judgment that the best interests standard was
12 being applied in a way that resulted in
13 unwarranted removals.

14 What Congress did was create a system
15 it thought was in the best interests of the
16 child but not by adopting the "state best
17 interests of the child standard" because it
18 found that that was being applied in a
19 discriminatory way.

20 Now, so, Your Honor, there's been a
21 lot of back and forth about good cause, and it
22 seems like good cause is important in the
23 statute.

24 I will say candidly, having looked at
25 the cases, there are three -- the -- the state

1 courts are in a little bit of disarray as to
2 whether the preferences are sort of binding,
3 whether there's a straight free -- free-floating
4 best interest standard that sort of -- that --
5 that works through good cause, or whether, as I
6 think is probably the way Congress intended it,
7 that there's a -- the placements are the default
8 setting and good cause provides a -- a way to
9 rebut the presumption.

10 Now Interior has -- has explained how
11 good cause works. It involves you can take into
12 account the decisions of the -- the views of the
13 parents, the views of the child, if the child is
14 old enough to express them. You can take into
15 account sibling attachment. You can take into
16 account bonding with foster parents as long as
17 it was not done illegally through ICWA. The
18 thing you cannot take into account is
19 socioeconomic status.

20 So what the Casey brief and others say
21 and what -- the reason why medical professionals
22 are here, states are here, family rights
23 advocates are here, is because ICWA is the gold
24 standard. It adopts that -- those
25 evidence-based presumptions and allows for

1 flexibility to protect the best interests of the
2 child.

3 So, with respect to sort of the power
4 debate which has been going on, I want to make a
5 couple of points. First, this is at the core of
6 the plenary power doctrine. From the beginning,
7 the -- the plenary power doctrine was used to
8 protect Indians from non-Indians. There is no
9 doubt that if states had moved in and done a
10 wholesale physical removal of Indian children,
11 that would have been within the duty of
12 protection. The fact that this is being done
13 through state courts, through state family law,
14 doesn't deprive Congress of power.

15 Justice Barrett, you were asking about
16 limits. Obviously, when we're talking about
17 plenary power, limits are hard to find, but I
18 will say this Court has identified some. What I
19 would say is, when Congress acts directly on
20 Indians, the limits on plenary power, as opposed
21 to the other provisions, are hard to find, but
22 what Congress said in Perrin was that when
23 Congress acts on non-Indians to protect Indians,
24 then there may be limits.

25 And, in that case, it was the question

1 of banning alcohol sales outside of
2 reservations. And what Congress said -- what
3 the Court said was that if you're doing it in
4 counties where there are a lot of Indians,
5 probably okay. If you're doing it statewide
6 when Indians are concentrated in a -- a number
7 of counties, not okay. And so that's a limit
8 that this Court has identified.

9 The limit that does not exist is the
10 one that's tied to land. I already addressed
11 the limit for state custody proceedings, which,
12 you know, Congress has acted for servicemen to
13 say deployment is not something you can take
14 into -- it cannot be dispositive in a best
15 interest finding, right. Congress has acted
16 pursuant to other federal powers to do exactly
17 what it did in ICWA.

18 The -- the rule that makes no sense is
19 land. Why does it make no sense? From the
20 beginning, Congress has -- from the 17 -- from
21 the Trade and Intercourse Act forward, Congress
22 has legislated off-reservation. It -- it
23 prohibited in the 1834 Act in Section 15
24 alienating the confidence of Indians. In the
25 earlier acts, it -- it required non-Indians to

1 report Indian invasions to the federal
2 government. It prohibited land sales by Indians
3 on and off the reservation. In the liquor sale
4 context, what this Court said in McGowan was
5 Congress has the authority to legislate wherever
6 Indians may be. In Holliday, Forty-Three
7 Gallons, Perrin, all those cases are off
8 reservation. In the treaty cases, this Court
9 has seen in Fishing Vessel, in Cougar Den,
10 right, those were off reservation. And then
11 Indian Health Care Improvement Act, the Indian
12 Housing -- Native American Housing Assistance
13 Program, the Indian Education Program, all of
14 those are off reservation.

15 Why does land make no sense? Land
16 makes no sense because, in the Articles of
17 Confederation, there was a land carveout. It
18 was exactly the kind of reason that we had the
19 change in the Constitution to prevent that.

20 Why does land make no sense? There
21 are landless tribes, right? There are landless
22 tribes in California and Montana. Land is just
23 not a sensible way to divide and limit
24 congressional power.

25 JUSTICE ALITO: There were --

1 JUSTICE KAVANAUGH: What --

2 JUSTICE ALITO: -- several questions

3 --

4 JUSTICE KAVANAUGH: Go ahead.

5 JUSTICE ALITO: There were several
6 questions earlier about the justification for
7 granting preference for foster or adoptive
8 parents who are members of an entirely different
9 tribe. Could you speak to that?

10 MR. GERSHENGORN: Certainly, Your
11 Honor.

12 JUSTICE ALITO: Does that -- is that
13 based on -- on -- on the assumption that all
14 tribes are fungible --

15 MR. GERSHENGORN: No, Your Honor.

16 JUSTICE ALITO: -- or sufficiently
17 similar to justify that?

18 MR. GERSHENGORN: No, Your Honor.

19 JUSTICE ALITO: What is it based on?

20 MR. GERSHENGORN: It is based on the
21 view that -- that -- that all federally
22 recognized -- all federally recognized tribes
23 and members of those tribes share a common
24 political relationship with the United States.
25 That's what renders it political rather than

1 racial. Every member of a federally recognized
2 tribe shares that political relationship.

3 Now that then begs the question that a
4 number of the Justices have focused on about, is
5 it rational? That's a fair question, and that's
6 a fair debate.

7 Let me explain why I think it clearly
8 is rational. And some of this Mr. Kneedler
9 touched on and I agree with. It has a clearly
10 -- remember, we're talking about a -- a
11 preference -- a prong that was never applied to
12 any of the -- of the plaintiffs here. And on a
13 facial challenge, right? All I -- all it has to
14 have is a plainly legitimate scope, which it
15 does.

16 In Alaska, for example, it is quite
17 common for Indian members of one tribe to live
18 on the reservation of another. The preference
19 applies quite often there, right? What the --
20 what your Court -- what the Court has been
21 worrying about is this kind of Maine to Arizona
22 hypo, right, that we identify some tribe in
23 Maine that's going to somehow get a preference.

24 Well, that case has never happened
25 that we have been able to find and able counsel

1 on the other side has been able to find, and I
2 would submit on a facial challenge in a
3 situation where it's never applied that it would
4 be very odd to strike down a congressional
5 statute.

6 I will say, though, that I -- for the
7 reasons I've said, I think it's -- it is
8 actually quite rational. If the Court
9 disagreed, it's also clearly severable. If I
10 give a -- if I say I would like, you know,
11 Italian food, Chinese food in any steak joint,
12 and it turns out there's a vegan in the group,
13 that I can't do the steak joint, the first two
14 preferences remain, okay? There's no --

15 JUSTICE ALITO: But why is it
16 rational? I understand that it's a facial
17 challenge, but why -- why is it rational?
18 Before the arrival of Europeans, the tribes were
19 at war with each other often, and they were
20 separated by an entire continent. And I -- I
21 don't know how many cultural similarities you
22 would identify if you compared a tribe in
23 Florida with a tribe in Alaska.

24 MR. GERSHENGORN: So, Your Honor, I
25 think it's been pretty clear I am not basing

1 this on cultural similarity. I'm basing it on a
2 political relationship with the United States
3 that all the tribes share.

4 Now I take Your Honor's point. If we
5 had a case -- and this is why you wait for --
6 for actual -- for actual as-applied challenges
7 as opposed to facial challenges. If we had a
8 case where a family was denied because a tribe
9 in Maine with no ties to the child was given
10 preference over a Cherokee or a Navajo Indian,
11 we would be talking about a pretty serious -- a
12 pretty serious as-applied challenge.

13 But, of course, we're -- we're a
14 million miles from that. We're the exact
15 opposite. What you're hearing and what the --
16 what is actually happening on the ground is this
17 is used in situations which are quite
18 unremarkable, as I say, when a member of one
19 tribe is living on the reservation of another,
20 has built exactly the kind of community that
21 ICWA is hoping to preserve.

22 So, you know, from -- from my
23 perspective, I certainly am not here to defend
24 the -- what I'll call the Maine to Arizona hypo.
25 But I -- what I am here to say is it has a

1 plainly legitimate sweep; it is political, not
2 racial; and that -- that -- that even if Your
3 Honors disagree with that, it's also plainly
4 severable.

5 CHIEF JUSTICE ROBERTS: Counsel, on
6 the political and racial point, I'd like to
7 return to the dialogue between Justice Barrett
8 and Mr. Kneedler, which, if I understand it,
9 raised a question, because there are several
10 hypotheticals where Mr. Kneedler, I think,
11 properly recognized that that would present a
12 harder case.

13 And I think the suggestion was, well,
14 is it a harder case because the racial aspect of
15 what is a combined, in most cases anyway,
16 combined polity and blood characterization, in
17 that case, that the racial aspect predominates
18 in some particular way.

19 MR. GERSHENGORN: Right.

20 CHIEF JUSTICE ROBERTS: Did that seem
21 to resonate with you?

22 MR. GERSHENGORN: No, Your Honor.
23 You'd be perhaps unsurprised -- no. The way I
24 would view it is -- and this was, I think, one
25 of the ways Justice Barrett framed it, which is

1 how I think about it, which is that's a
2 political characterization. If we're basing --
3 if -- if Congress is making a judgment on
4 federally recognized tribes, remember, that's
5 excluding people who have left the tribe.
6 That's excluding state-recognized tribes.

7 CHIEF JUSTICE ROBERTS: So your answer
8 --

9 MR. GERSHENGORN: But -- but could I
10 finish? Because I -- I want to respond directly
11 to your question. I'm not finishing on a -- on
12 a tangent. Directly to your question.

13 (Laughter.)

14 MR. GERSHENGORN: It is a political
15 justification, but it has to meet the Mancari
16 standard, special treatment tied rationally to
17 the fulfillment of Congress's unique obligations
18 to the Indians. What does that mean?

19 Well, I think what it means is that a
20 bare desire to help individual Indians doesn't
21 satisfy it. That's what Mancari suggests,
22 right? Mancari says you can't just give a
23 preference to any Indian, even a federally -- a
24 member of a federally recognized tribe,
25 throughout the government. A bare desire to --

1 to help is not enough.

2 You know, we could go -- I don't want
3 to parse agency by agency. I think DOJ, which
4 does all the litigation for the government and
5 Indian tribes, probably is a situation where you
6 could justify a preference.

7 But the main point, Your Honor, is
8 that Mancari has some bite, right? Mancari says
9 you can't just decide you're going to help any
10 individual Indians and then, you know, close the
11 book.

12 CHIEF JUSTICE ROBERTS: All right. So
13 you disagree with Mr. Kneedler, who did say that
14 in those variety of cases that they would
15 present a harder -- a harder case?

16 MR. GERSHENGORN: I'm not saying I
17 disagree that it's a harder case. I'm just
18 saying I view them as political.

19 CHIEF JUSTICE ROBERTS: You'd win it
20 just because of --

21 MR. GERSHENGORN: No.

22 CHIEF JUSTICE ROBERTS: -- despite the
23 fact --

24 MR. GERSHENGORN: Well, I'd have to
25 hear the particular hypos, Your Honor, but let

1 me -- I want to be clear about the method of
2 analysis, and then I'm happy to answer whatever
3 hypos Your Honor wants.

4 The -- the -- my method of analysis
5 is, if the federal government imposes it on
6 federally recognized tribes, it's political. It
7 then has to meet the test that was set forth in
8 Mancari. It has -- the reason -- justification
9 has to be tied rationally to the fulfillment of
10 Congress's unique obligations to the Indians.

11 Some of those, you know, Mancari said
12 BIA, okay; federal government-wide, not okay.
13 And, you know, then I need to see what Congress
14 said. What makes this case so easy, right, is
15 Congress studied this for four years, right?
16 Congress told you exactly why, not in
17 legislative history, but in legislative findings
18 that it said this is what we're worried about,
19 right?

20 We -- this is -- this is going to the
21 -- this is not a peripheral mere desire to
22 benefit individual Indians. This is going to
23 the core of tribal self-government.

24 JUSTICE ALITO: What about the
25 hypothetical about providing COVID vaccines?

1 And suppose Congress says Indians -- the Indian
2 population on the whole has more people with
3 complications -- with -- with factors that make
4 them more vulnerable to serious consequences
5 from getting COVID, and, therefore, they should
6 get preference over others in the -- in the
7 distribution of vaccines.

8 MR. GERSHENGORN: So, Your Honor, the
9 way you posed the hypo, I would consider that a
10 racial classification, not a political one. If
11 Congress were to say just Indians undefined,
12 that might well be a -- a racial classification,
13 might well be.

14 If Congress were to say we're giving
15 it to members of federally recognized Indian
16 tribes first because we find on reservations
17 where the individuals are concentrated that
18 there's a particular problem because they don't
19 have access to healthcare and hospitals in -- in
20 the same way, then I think that would be
21 defensible. That would be a political
22 classification.

23 JUSTICE ALITO: All right. Well, let
24 me modify it. It applies to members of
25 federally recognized tribes but not -- it's not

1 limited to what happens on the reservation.

2 It's everywhere.

3 MR. GERSHENGORN: So I think that -- I
4 think that would be harder. And it goes back to
5 the bare -- bare desire, that would be a
6 political classification, but the bare desire to
7 help members of tribes is not, we think, is
8 not -- forget what we think -- is not what the
9 Court has said is sufficient under Mancari.

10 And so, you know, I think that -- that
11 that's how I -- that's how I think about it.
12 You know, look, any of the hypos could have hard
13 questions. I've tried to give the Court a sense
14 of what I think this Court's cases demand and,
15 therefore, how we think about it.

16 JUSTICE SOTOMAYOR: I -- I'd like you
17 to finish that.

18 MR. GERSHENGORN: No, I'm done.

19 JUSTICE SOTOMAYOR: You say helping
20 Indians is not enough. But what's the helping
21 Indians plus what?

22 MR. GERSHENGORN: So I think some
23 link, Your Honor, to tribal self-government is
24 sort of at the core, and that's why I think ICWA
25 is really so easy, because what -- what makes --

1 Congress made the findings, and -- and a number
2 of the Justices have touched on it this
3 morning -- Congress made the findings that the
4 wholesale unwarranted removal of 25 to
5 35 percent of Indian children was devastating
6 tribes and tribal self-government.

7 There is nothing more core -- this is
8 a place where I disagree quite strongly with my
9 friends on the other side -- like, there is
10 nothing more central to self-government than
11 deciding who --

12 JUSTICE SOTOMAYOR: So how about --

13 MR. GERSHENGORN: -- you know, who's a
14 member.

15 JUSTICE SOTOMAYOR: -- how does --

16 MR. GERSHENGORN: And you don't have
17 to take my word for it. That's what Congress
18 said.

19 JUSTICE SOTOMAYOR: -- how does
20 healthcare, the education, the housing
21 allotments, how do they fit in?

22 MR. GERSHENGORN: I -- I think that --

23 JUSTICE SOTOMAYOR: Those are the
24 other Title 25.

25 MR. GERSHENGORN: Yeah, I think that

1 those are -- that shows, Your Honor, a -- a
2 number of things.

3 First of all, it shows that Congress
4 has routinely -- there's not -- you know,
5 there's this sense, I think, that Mancari sprung
6 up from -- you know, from the -- from the earth,
7 you know, 40 years ago.

8 And -- but what -- what -- Congress
9 has been legislating to help Indians since the
10 beginning, right? It is in the Constitution,
11 and it is there not just -- I'm not using that
12 as sort of an, a-ha, it's in the Constitution.
13 It's in the Constitution because tribes are --
14 Indians are treated in the Constitution like
15 political entities, right?

16 Congress -- they're treated parallel
17 in the -- in the -- in the -- in the Commerce
18 Clause with foreign nations and with states.
19 There -- Congress has the power to treat -- to
20 conduct treaties with Indians, right?

21 They are -- they are political from
22 the beginning and, like, I mean, I don't want to
23 list all of the Indian-specific statutes, right,
24 but the Dawes Act, the Indian Civil Rights Act,
25 the Indian Reorganization Act, you know, ICWA,

1 IGRA, I mean, Congress has routinely singled out
2 members of federally recognized tribes for
3 legislation.

4 JUSTICE KAGAN: Mr. Gershengorn, I
5 want to go back to something you said because
6 you said it -- you know, it's obvious that when
7 you remove 30 percent of children from a
8 political community, you harm that political
9 community.

10 I think some of the strong feelings
11 about this case come from a sense of, yes, but
12 what about the children? I mean, you do harm
13 the political community, but are you saying that
14 the political community is more important than
15 the welfare of the children? And -- and -- and
16 -- and so that's the thing that I think people
17 are going, whoa.

18 MR. GERSHENGORN: Yeah.

19 JUSTICE KAGAN: I mean, so --

20 MR. GERSHENGORN: I -- I'm glad you
21 asked that, Your Honor. I think it's critical
22 that what Congress found is not just that ICWA
23 was -- was important for preserving the tribal
24 community. Congress found that ICWA was in the
25 best interests of the children, right?

1 I -- I don't think I could emphasize
2 it more than -- than that. What Congress found
3 was that it was -- it was in the interests of
4 the children. And the reason that Congress
5 found that is because -- and the reason ICWA has
6 become the gold standard is because Congress
7 made the judgment and recognized that separating
8 children from their families and communities too
9 soon caused harm.

10 I -- I think it's important to
11 recognize that the average age of people in ICWA
12 is over six years old. This is discussed in the
13 Casey brief. These are children who have formed
14 school mates, school bonds. They are children
15 who are playing on sports teams. They are
16 children who have interacted, have a group of
17 friends. They've been -- made connections on
18 the community.

19 And what ICWA realizes is that these
20 children were being taken from their communities
21 too soon. Why? Well, sometimes there was abuse
22 at home, right? But what ICWA says is a lot of
23 times that is remediateable, which is why we
24 have the active efforts provision, right?

25 It's substance abuse, right? It's --

1 it's the ability, if you can get the child out
2 of the home, get the care to the parents, then
3 the child will actually thrive when the child is
4 returned to the home and community.

5 CHIEF JUSTICE ROBERTS: What --

6 MR. GERSHENGORN: So I --

7 CHIEF JUSTICE ROBERTS: -- what --
8 what about the third preference, which is a
9 preference for members of another tribe? How
10 does that have to do with keeping the Indian
11 child on the reservation?

12 MR. GERSHENGORN: So, Your Honor, as
13 I've suggested, the -- the --

14 CHIEF JUSTICE ROBERTS: With the --
15 with the familiar environment as you suggested.

16 MR. GERSHENGORN: Sure. And -- and
17 the -- the -- the -- the quickest answer to
18 that, Your Honor, is that in my experience, or I
19 should say my experience talking with people who
20 actually experienced this, which is as close as
21 I've gotten, is that the way this comes up most
22 often actually is tribes -- is individual
23 Indians living on the -- on the reservation of
24 another.

25 And so they are building exactly that

1 community. This is not some random tribe
2 plucked from the ether that all of a sudden gets
3 a preference in the real world.

4 CHIEF JUSTICE ROBERTS: Well, there's
5 no limitation of that.

6 MR. GERSHENGORN: Absolutely, Your
7 Honor. And I am not here to say -- in fact, I
8 think I've conceded that it would be an
9 extraordinarily difficult as-applied challenge
10 in the kinds of -- again, I'm using as a
11 shorthand the Maine to Arizona hypo, but I don't
12 think this is at all difficult on a facial
13 challenge in the real world where this plays
14 out, because what's happening in the real
15 world -- and, remember, we're -- we're talking
16 about not a single example of this appears in
17 any of the briefing that I have seen, okay?

18 And so what's happening in the real
19 world is that individuals are -- are --
20 individual members are living on the
21 reservations of another and -- and then the
22 preference is going to that tribe.

23 CHIEF JUSTICE ROBERTS: Justice
24 Thomas?

25 Justice Alito?

1 Justice Sotomayor?

2 JUSTICE KAGAN: You, in your opening
3 statement, you said that this is a bad case to
4 deal with this question because the individual
5 plaintiffs don't have standing. Why not?

6 MR. GERSHENGORN: Your Honor, thank
7 you. So they don't have standing for a number
8 of reasons. First, redressability, right?

9 This is a law review article. It does
10 not bind a single state court judge that
11 actually adjudicates a -- a -- a -- a -- a state
12 court adoption proceeding.

13 Second, there is no injury-in-fact.
14 There is not a single individual plaintiff who
15 has had an adoption that existed from the time
16 of the amended complaint through the Fifth
17 Circuit judgment. And so there is no
18 injury-in-fact.

19 And, third, there has been some
20 suggestion that the APA, the challenge to the
21 APA, regs under the APA might save the equal
22 protection challenge. That is incorrect.

23 The injury to the Plaintiffs is coming
24 from the preferences in the statute. There is
25 nothing about the challenge to the regs that

1 eliminates the preferences in the statute or the
2 definition of Indian child. And so there is no
3 standing on the equal protection side for --

4 JUSTICE KAGAN: Does it make a
5 difference that our ruling would bind state
6 officials?

7 MR. GERSHENGORN: Absolutely not, Your
8 Honor. The -- the Court has been crystal clear
9 that standing needs -- that standing needs to be
10 established in the lower court.

11 Every case would have standing. There
12 would be no advisory opinions because, of
13 course, what this Court says binds everybody.

14 And so the fact that -- that it's made
15 it this far through an erroneous standing ruling
16 does not cure the -- the standing problem that
17 existed at the start.

18 And then I will say, although Your
19 Honor asked me about individuals, Texas has no
20 equal protection rights here. Texas goes on and
21 on, we heard all the numbers this morning, about
22 their injury. That's nice, but injury does not
23 create an equal protection right.

24 And, basically, what -- what Texas's
25 view would do is completely eviscerate

1 third-party standing. Georgia v. McCollum could
2 have been a very short opinion. It could have
3 just said Texas is participating in an
4 unconstitutional scheme, thank you very much,
5 but it didn't do that. It looked to see whether
6 there were third-party rights that Georgia could
7 assert that for some reason the third party was
8 unlikely to assert.

9 And -- but regardless of whether
10 teenage drinkers or excluded jurors have a
11 disincentive to -- to bring court cases, that
12 has no application to the situation here, where
13 the individual plaintiffs are in court
14 litigating.

15 So there is no justification for Texas
16 to assert rights. And, obviously, the *parens*
17 *patriae* is not available against the federal
18 government. So there is no standing, in
19 addition to the fact that the preferences that
20 have most troubled, for example, Justice
21 Kavanaugh and Justice Barrett, they were never
22 applied to any -- like, it's like standing on
23 standing on standing problems. It's like an
24 inverse of turtles all the way down. It's like
25 the absence of turtles anywhere.

1 I need a better metaphor.

2 JUSTICE KAGAN: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch?

5 JUSTICE GORSUCH: You haven't had a
6 chance to address the commandeering arguments in
7 particular with respect to the active efforts
8 provision.

9 MR. GERSHENGORN: So the active
10 efforts provision, I think I would say two
11 things on that.

12 First of all, the main point from our
13 perspective is that -- and this is at Footnote
14 44 of -- Footnote 54 on page 85 of our brief --
15 is that it applies even -- evenhandedly to --
16 this does not single out Texas or does not
17 single out states for particular treatment. It
18 applies just as much in private placements, and
19 that's set forth in the brief.

20 I also think that it is -- it is right
21 to view this as a situation in which a private
22 right is created. You have the -- the
23 individual Indian child. The tribe has a right
24 to -- you know, to -- to have the placement done
25 only after active efforts are -- you know,

1 active efforts are done.

2 And so I -- I think that with respect
3 to the active efforts provisions, under this
4 Court's case law, a provision that applies
5 even-handedly to private parties and to states
6 and creates private rights is -- is not
7 commandeering -- not impermissible
8 commandeering.

9 JUSTICE GORSUCH: I think we heard
10 from Texas that it disproportionately affects
11 them because most of these are initiated by
12 state entities and also that they'd have to do
13 some work, even in the event of a
14 private-initiated suit.

15 MR. GERSHENGORN: Yeah, I think, Your
16 Honor, that way madness lies. If this Court is
17 going to evaluate even-handed restrictions to
18 see whether, on balance, they affect more states
19 than private parties, we've really extended
20 the -- you know, the anti-commandeering doctrine
21 and I think the -- this Court's caseload quite
22 substantially because, you know, what the -- you
23 know, it's one thing to say -- you know, not to
24 mention cases like *Reno v. Condon*. I mean, once
25 you start to say, yes, it regulates

1 even-handedly, yes, in the real world, there are
2 private and state parties at issue, but we're
3 going to look to it and say it more often
4 affects, you know, states -- and I think *Reno v.*
5 *Condon* is sort of against that. I think that
6 was one where the state may have been more
7 affected. But, in any event, I don't think that
8 that's a sensible line that this Court could
9 ever draw to look at, statute by statute, in the
10 real world, does this affect states more than
11 private citizens.

12 JUSTICE GORSUCH: Is there any
13 inhibition to a private party raising an
14 as-applied equal protection challenge to the
15 third preference in state court litigation?

16 MR. GERSHENGORN: Absolutely not.

17 JUSTICE GORSUCH: And it hasn't
18 happened in 40 years that you're aware of?

19 MR. GERSHENGORN: I'll just say it has
20 not been brought to our attention either as
21 we've done our research or the other side. As
22 Your Honor knows, recordkeeping in family law
23 cases is tricky, but I'm not aware -- I'm not
24 aware of an Equal Protection Clause challenge to
25 the third placement. And, indeed, I just want

1 to reemphasize, as I said before, it has not
2 been applied to any of the plaintiffs here.

3 JUSTICE GORSUCH: And, finally, I
4 understand this Court sometimes speaks when
5 Congress hasn't in Indian affairs, but -- but,
6 here, we have a statute by Congress, and are you
7 aware of any time this Court in 200 years has
8 struck down as facially invalid an exercise of
9 Congress's plenary powers over Indian affairs?

10 MR. GERSHENGORN: I am not.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh?

13 JUSTICE KAVANAUGH: Yeah, two
14 questions. First, you mentioned that the
15 average age is six and a half. I assume that
16 means there are hundreds or thousands of
17 children who are relative newborns, one, two,
18 three, over the years, who are affected by this
19 statute. There's no age cutoff in the statute,
20 or are you -- correct?

21 MR. GERSHENGORN: There is no age
22 cutoff in the statute.

23 JUSTICE KAVANAUGH: And are you aware
24 that it's been applied differently with newborns
25 or --

1 MR. GERSHENGORN: So, Your Honor --

2 JUSTICE KAVANAUGH: -- younger
3 children?

4 MR. GERSHENGORN: -- that's a trickier
5 question because -- I mean, that's one that I
6 don't think anybody has the empirical research
7 on. I think, as a practical matter, it would
8 surprise me if it weren't, that the statute, the
9 -- the good cause exception itself provides a
10 different application. It says that the wishes
11 of a -- of a child who is old enough to express
12 them are taken into account.

13 The cultural bonds that an older child
14 would have almost certainly would be taken into
15 account if the child comes in and says, you
16 know, I have a friend group, I have a sports
17 team, I have after school activities. So I --

18 JUSTICE KAVANAUGH: You're not --
19 those are good points, but you're not aware that
20 that's reflected in any case law --

21 MR. GERSHENGORN: We're on a facial
22 challenge, Your Honor --

23 JUSTICE KAVANAUGH: Yeah.

24 MR. GERSHENGORN: -- so I'm not aware
25 of --

1 JUSTICE KAVANAUGH: Yeah.

2 MR. GERSHENGORN: -- anything in the
3 record one way or the other on that.

4 JUSTICE KAVANAUGH: Right.

5 MR. GERSHENGORN: That's the problem,
6 I think, not the solution.

7 JUSTICE KAVANAUGH: No, a fair 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 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 -- tribal members off the land and has
24 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 started, and then
9 for the reasons I've said and I won't repeat --

10 JUSTICE KAVANAUGH: That's fair.

11 MR. GERSHENGORN: -- I think land is
12 like -- is just a nonsensical -- a nonsensical
13 way to crosscut given what the Constitution was
14 trying to do vis-à-vis the Articles of
15 Confederation, given the history of the
16 treatment, and given --

17 JUSTICE KAVANAUGH: Your --

18 MR. GERSHENGORN: -- what this Court
19 has said over --

20 JUSTICE KAVANAUGH: -- your point --
21 sorry, because time --

22 MR. GERSHENGORN: I'm sorry. I'm
23 sorry.

24 JUSTICE KAVANAUGH: -- is running.
25 Your -- you point is the sentence is not

1 accurate? I mean, the tip-off should have been
2 the word "literally," I suppose, but it's in
3 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 to argue, Your Honor -- I'm sorry to cut
3 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: Yes.

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 aren't 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 requirement
2 get applied on the ground? I would ask the
3 Court to please look at the -- the court of
4 appeals decision in YRJ's case called Interest
5 of YRJ. It says that seeking to establish good
6 cause for not following the placement
7 preferences, the -- the party must bring forth
8 by clear and convincing evidence of -- of good
9 cause, that good cause must be based on at least
10 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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Official - Subject to Final Review

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