

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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3 DEB HAALAND, SECRETARY)
OF THE INTERIOR, ET AL.,)

4 Petitioners,)
v.) No. 21-376

5 CHAD EVERET BRACKEEN, ET AL.,)
6 Respondents.)

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8 CHEROKEE NATION, ET AL.,)
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9 v.) No. 21-377

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12 - - - - -
13 TEXAS,)
14 Petitioner,)
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15 DEB HAALAND, SECRETARY)
16 OF THE INTERIOR, ET AL.,)
Respondents.)

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Petitioners,)

19 v.) No. 21-380

20 DEB HAALAND, SECRETARY)
21 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 have
9 described it as plenary. It's quite broad. And
10 in area after area, we've -- well, the -- we've
11 allowed Congress to far exceed anything that we
12 would think of as just commerce in the sense of
13 trade, you know, which is something that you
14 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 an authority to regulate
20 commerce, and that power, as understood, as
21 Justice Thomas's separate opinion in *Adoptive*
22 *Couple*, I think, would elaborate --

23 JUSTICE SOTOMAYOR: But that was a
24 separate opinion. We 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 equal
16 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 sue tell a state court what to
18 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 the 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, and I'm struggling
22 to understand what it is because you seem to --
23 I'm 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 the hiring preference was a -- in a sui generis
3 agency that had a special relationship in the
4 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 -- not the treatment
15 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
2 has to do with the limited sovereignty question?
3 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.

20 Rice starts by assuming what it calls
21 your premises not established in our case law,
22 both that native Hawaiians should be treated as
23 an Indian tribe and, further, that Congress
24 delegated to the State of Hawaii the power to
25 regulate them.

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

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

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

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

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

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

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

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

24 And Congress understood these
25 children's placement decisions as integral to

1 the continued thriving of Indian communities.

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

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

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

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

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

18 MR. MCGILL: Correct.

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

25 MR. MCGILL: There -- I want to be

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

7 JUSTICE KAGAN: Thank you, Mr. McGill.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

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

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

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

22 MR. MCGILL: Congress can regulate --

23 JUSTICE GORSUCH: -- under Article I?

24 MR. MCGILL: Sorry to interrupt.

25 JUSTICE GORSUCH: Uh-huh.

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

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

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

14 JUSTICE GORSUCH: Holliday. Holliday.

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

16 JUSTICE GORSUCH: Holliday.

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

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

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

24 JUSTICE GORSUCH: Okay. And would you
25 have us -- if your view of commerce is that

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

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

9 JUSTICE GORSUCH: So that might go?

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

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

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

19 JUSTICE GORSUCH: Healthcare counts?

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

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

25 MR. MCGILL: This is treating children

1 as property.

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

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

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

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

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

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

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

25 MR. MCGILL: I think that the core of

1 the problem is, if this is within Congress's
2 authority, then there is nothing that cannot be
3 regulated by Congress if it touches upon
4 Indians.

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

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

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

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

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

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

1 look at perhaps the --

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

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

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

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

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

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

23 MR. MCGILL: I think that that is our
24 argument. We're not saying that Congress is
25 powerless in this area. Congress has power,

1 certainly, through the -- the Spending Clause to
2 do any number of things with respect to states,
3 how states govern themselves.

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

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

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

1 American children. So could it -- could it have
2 done the boarding schools, or is -- you're
3 arguing that that would have been improper too?

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

9 JUSTICE GORSUCH: Under Article I?

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

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

23 MR. MCGILL: The -- the power that has
24 been recognized is the power to effectuate
25 Indian self-government, which is the power of

1 tribes to make their own laws and be ruled by
2 them.

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

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

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

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

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

1 said that it would be unconstitutional as
2 applied to a child who had no connection --

3 JUSTICE GORSUCH: Right.

4 MR. MCGILL: -- to a tribe.

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

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

11 JUSTICE GORSUCH: Gone anywhere --

12 MR. MCGILL: -- done that.

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

15 CHIEF JUSTICE ROBERTS: Justice
16 Kavanaugh?

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

25 MR. MCGILL: I think I do, Justice

1 Kavanaugh.

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

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

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

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

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

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

14 MR. MCGILL: No, Your Honor.

15 JUSTICE KAVANAUGH: And why not?

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

25 JUSTICE KAVANAUGH: Well, wouldn't

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

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

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

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

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice --

1 Justice Barrett?

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

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

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

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

24 MR. MCGILL: I think, on the ground,
25 it falls on -- on the states in the overwhelming

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

8 JUSTICE BARRETT: Okay. Thanks.

9 CHIEF JUSTICE ROBERTS: Justice
10 Jackson?

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

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

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

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

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

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

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

1 That -- that case has never been, you
2 know, to my knowledge, limited or abrogated.
3 And that is my understanding of how this Court
4 defines the interest in self-government.

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

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

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

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

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

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

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

1 Indian affairs and Congress is making policy
2 judgments, they have a constitutional basis for
3 doing so?

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

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

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

1 Do you dispute that?

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

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

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

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

25 MR. MCGILL: Your Honor, we do not

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

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

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

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

24 And so it seems to me odd that we
25 would suddenly say in this area using a

1 relatively new anti-commandeering principle that
2 the federal government can't do what it has long
3 done in terms of taking control of this area
4 away from the states related to Indian affairs.

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

11 JUSTICE JACKSON: In 1992?

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

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

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

25 JUSTICE JACKSON: Thank you.

1 MR. MCGILL: I --

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

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

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 General Stone.

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

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

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

1 ICWA far exceeds this plenary power,
2 applying only to child custody proceedings in
3 state courts off reservations.

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

11 And I welcome the Court's questions.

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

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

24 As this Court put it in West Virginia,
25 the fact that West Virginia and similar states

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

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

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

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

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

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

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

1 complicit in the act of violating someone else's
2 rights. That's how I hear your argument.

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

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

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

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

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

1 and you have standing?

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

11 JUSTICE SOTOMAYOR: That's
12 anti-commandeering. So that's one factor.
13 What's second?

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

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

20 MR. STONE: Yes.

21 JUSTICE SOTOMAYOR: Okay.

22 MR. STONE: That's correct.

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

25 MR. STONE: Your Honor, because --

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

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

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

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

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

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

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

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

24 And then it becomes a case of, if the
25 courts are willingly serving for purposes of

1 doing this federal thing, that then it's a much
2 smaller intrusion, commandeering or not, for
3 them to have an ancillary paperwork burden.

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

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

24 Two more past that make it permissible
25 but not mandatory for states to accept bail

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

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

11 JUSTICE JACKSON: But, Mr. Stone --

12 JUSTICE GORSUCH: Counsel, before you
13 --

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

1 government, power at the expense of the states
2 with respect to Indian affairs.

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

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

14 MR. STONE: Two answers, Your Honor.

15 JUSTICE JACKSON: Yes.

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

1 process.

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

9 JUSTICE GORSUCH: Counsel --

10 MR. STONE: That's the --

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

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

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

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

25 JUSTICE GORSUCH: Okay. And -- and --

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

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

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

19 MR. STONE: Typically, yes, but also
20 --

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

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

1 the Court said the -- the way that the Court
2 looks at it is, is this better looked at as a
3 regulation of the sovereign or instead as
4 something regulating private.

5 JUSTICE GORSUCH: I got it.

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

9 JUSTICE GORSUCH: Right.

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

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

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

20 JUSTICE GORSUCH: Counsel, if we could
21 turn to Article I, we've had many variations of
22 this -- this argument. We've heard that it has
23 to relate strictly to commerce. We've heard,
24 no, later today we heard, no, it can be
25 off-reservation. It can be family law

1 sometimes. It just can't be this combination
2 here.

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

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

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

15 MR. STONE: Yes, Your Honor.

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

18 MR. STONE: Yes, Your Honor.

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

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

1 The first, again, is, for example, the
2 implementation of treaties or acts that would be
3 ordinarily understood in commerce.

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

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

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

20 JUSTICE GORSUCH: Right.

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

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

25 MR. STONE: The limits come from

1 several of these Court's cases. One, this Court
2 has emphasized that Congress has special power.
3 This comes from *Tiger versus Western Investment*
4 *Co.* and *Kagama* itself, that the -- the
5 government has a power, specifically speaking,
6 on regulating Indian members or, rather, Indian
7 tribes on Indian lands themselves.

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

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. We certainly don't doubt
16 that.

17 However, they do not have a common law
18 component where because there is, in fact, a
19 trust, a trust relationship, that, therefore,
20 the United States has plenary power to do as it
21 wishes to 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 -- no,
16 you're -- no, the law just says you get access
17 to -- to places, and it preempts state law.

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

20 JUSTICE GORSUCH: That might ---

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

24 JUSTICE GORSUCH: Like I say, I think
25 there's a lot that you're asking us to -- we're

1 going to be busy, counsel, if this is the line
2 we're going to draw. Very, very busy.

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

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

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

24 JUSTICE GORSUCH: Spending Clause?

25 MR. STONE: Spending Clause, at least

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

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

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

12 JUSTICE BARRETT: General --

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

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

24 Does Congress have the power to pass
25 that?

1 MR. STONE: Only under

2 anti-commandeering problems or Article I?

3 JUSTICE SOTOMAYOR: I said under

4 Article I.

5 MR. STONE: Under -- oh, under Article

6 I, yes, that's fine for Article I purposes.

7 JUSTICE SOTOMAYOR: Now you think it's

8 a violation of the anti-commandeering statute?

9 MR. STONE: Yes, Your Honor.

10 JUSTICE SOTOMAYOR: The statute on

11 inter-country adoptions, which says that a state

12 court must verify certain evidence and make

13 certain determinations. Inter-country an

14 adoptions, foreign power, right? Yes? Is this

15 anti-commandeering also?

16 MR. STONE: May I?

17 CHIEF JUSTICE ROBERTS: Yes.

18 MR. STONE: I would have to know more

19 about the treaty --

20 JUSTICE SOTOMAYOR: That's a --

21 MR. STONE: It would not violate

22 Article I because of the treaty.

23 JUSTICE SOTOMAYOR: I just said to

24 you it says that a --

25 MR. STONE: I would have to know more

1 details.

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

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

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

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas?

15 Justice Alito?

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

18 (Laughter.)

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

24 MR. STONE: Article I, yes.
25 Anti-commandeering, no.

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

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

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

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

21 JUSTICE SOTOMAYOR: Assuming there's
22 not?

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

24 JUSTICE SOTOMAYOR: Anywhere in any
25 state court --

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

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

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

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

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

17 JUSTICE SOTOMAYOR: All right.

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

22 JUSTICE SOTOMAYOR: Thank you,
23 counsel.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: General, I thought I'd

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

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

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

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

1 supposed to respect?

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

9 JUSTICE KAGAN: They're just
10 atmosphere?

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

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

24 JUSTICE KAGAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

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

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

9 JUSTICE GORSUCH: Okay.

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

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

22 And I -- part of what you're doing --
23 your argument would encourage is for people to
24 keep their children on Indian land, not
25 necessarily allow them to be foster-cared off

1 Indian land, create a disincentive and also just
2 a massive amount of confusion if everything
3 depends upon the happenstance of geography.

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

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

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

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

22 JUSTICE GORSUCH: Yeah.

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

25 JUSTICE GORSUCH: And then, finally,

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

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

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

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

24 JUSTICE GORSUCH: States have no
25 choice to walk -- they have to apply the Hague

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

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

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

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

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

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

24 JUSTICE GORSUCH: All right. And then
25 how about the fact that the federal government

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

8 MR. STONE: Well, in part, because,
9 for example, with boarding schools, just the
10 ordinary powers over territory and property or
11 otherwise ordinary appropriation --

12 JUSTICE GORSUCH: They took children
13 off-reservation, counsel.

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

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

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

23 JUSTICE GORSUCH: The same thing with
24 all the treaties with respect to Native American
25 orphans throughout the history of the country.

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

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

10 JUSTICE GORSUCH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh?

13 JUSTICE KAVANAUGH: I want to ask
14 about the equal protection issue quickly.

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

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

25 On the other hand, the fundamental

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

12 So those are the two principles on
13 equal protection that I think focus the inquiry.

14 How do we draw the line?

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

22 One, that the preference or the
23 discriminatory rule or set-aside always reached
24 only -- and this is in *Rice* -- only members of a
25 federally recognized Indian tribe because that

1 was the component that made it clear that you
2 were dealing actually with the Indian tribe as a
3 body and the people who constituted that body
4 and not on the basis of race.

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

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

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

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

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

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

19 MR. STONE: First of all, as a matter
20 of Texas substantive law, no. But putting that
21 aside, even if Texas substantive law allowed
22 that, it would be very strange for the federal
23 government to say this isn't commandeering
24 because you can always just stop, you would just
25 not do it altogether, when it's talking about a

1 core police power, which is saying the health --
2 the health, safety, and welfare of vulnerable
3 children.

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

10 JUSTICE BARRETT: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

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

18 Do you agree with that proposition?

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

24 JUSTICE JACKSON: All right. So we
25 assume --

1 MR. STONE: To accept them, yes.

2 JUSTICE JACKSON: You accept this.

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

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

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

19 And I'm also worried about the -- the
20 sort of ahistorical gloss of this because it
21 seems to me that there is ample evidence
22 historically that the design of the Constitution
23 gave the federal government that very power at
24 the expense of the states, that we had had a
25 previous set of circumstances in which the

1 federal government and the state government
2 shared power related to Indian affairs and that
3 the Constitution came along and gave it to the
4 federal government.

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

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

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

23 That was revised down by the committee
24 of 11 to a narrower power to regulate Indian
25 affairs, which was further revised down to a

1 power to regulate Indian commerce.

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

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

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

25 So the idea that Federalist 42's

1 understanding of the changes to -- to Article IX
2 of the -- of the Articles of Confederation would
3 have expanded to an -- to an all-encompassing
4 Indian affairs power I think is just in the
5 teeth of that as --

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

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

20 In Gibbons, in Story, in other
21 original sources, intercourse is paired up with
22 -- specifically in Gibbons, with the word
23 "navigation" so as to describe what we now would
24 refer to as the channels of commerce, the
25 ability to set rules as to what foreign boats

1 may dock in places.

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

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Kneedler.

9 ORAL ARGUMENT OF EDWIN S. KNEEDLER
10 ON BEHALF OF THE FEDERAL PARTIES

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

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

20 Over the more than 40 years since its
21 enactment, ICWA has furnished vital protections
22 against those practices and has become
23 integrated in state child welfare practices.
24 There's no basis for uprooting those practices
25 or for overturning Congress's considered

1 judgment in enacting ICWA.

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

20 Congress's efforts to address the
21 problems in ICWA, protecting family integrity,
22 kinship, unity, and the integrity and long-term
23 existence of tribes, lie at the core of
24 Congress's power under the plenary powers. It
25 does so by -- not by displacing state authority

1 but simply imposing minimum standards on states'
2 exercise of that authority by seeing foster care
3 and adoption in -- in state courts.

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

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

21 MR. KNEEDLER: No. Mancari announces
22 the core of the test, which has to be rationally
23 related to the fulfillment of Congress's unique
24 obligations to Indians. So, in -- in that,
25 there -- it is an implementation of the

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

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

12 CHIEF JUSTICE ROBERTS: So rationally
13 related, is that our usual rational basis test?

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

1 has said that deference to Congress's judgment
2 about what is reasonably essential to carry out
3 the trust responsibility is called for.

4 CHIEF JUSTICE ROBERTS: The --

5 JUSTICE ALITO: Could Congress say --

6 CHIEF JUSTICE ROBERTS: No, no, go
7 ahead.

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

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

17 JUSTICE ALITO: That's not rationally
18 related in the same way that this is? I mean,
19 it's -- it's more -- I honestly don't -- I've
20 had this -- had great difficulty dealing with
21 this Article I question because, if "plenary"
22 means plenary, Congress can do whatever it
23 wants, fine. As I said, it's an easy case.
24 There's nothing there under Article I.

25 But, if there are limits, it's hard

1 for me to see where the limits are. That's
2 where I -- that's where I need help.

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

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

17 JUSTICE ALITO: What about the
18 boarding school law? Congress had the power to
19 do that?

20 MR. KNEEDLER: Congress -- Congress
21 had the power at the time, I -- I -- I think.

22 JUSTICE ALITO: Well, if it were to do
23 it --

24 MR. KNEEDLER: Seriously misguided.

25 JUSTICE ALITO: -- if it were -- yeah.

1 Okay. If it were to do it tomorrow, would that
2 fall outside Congress's plenary power?

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

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

20 JUSTICE ALITO: All right. Could
21 Congress -- could --

22 MR. KNEEDLER: -- which means it has
23 to be protective, not harming.

24 JUSTICE ALITO: Could -- could
25 Congress enact a law that alters the substantive

1 law that states apply in areas like -- like
2 contracts or torts or rules of evidence when one
3 of the parties in the case is an Indian?

4 MR. KNEEDLER: I think the mere fact
5 that the party is an Indian would probably not
6 be sufficient.

7 JUSTICE ALITO: Why? Why isn't that
8 rationally related to furthering the interests
9 of -- of Indians?

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

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

21 So, if there -- if there was that sort
22 of justification -- and, presumably -- I don't
23 think we can assume Congress would act in an
24 arbitrary manner. It would be addressing a
25 real-world problem in a practical way.

1 JUSTICE ALITO: No, I understand.

2 CHIEF JUSTICE ROBERTS: Well --

3 JUSTICE ALITO: And --

4 CHIEF JUSTICE ROBERTS: No, go ahead.

5 JUSTICE ALITO: Just one -- one more.

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

13 But one -- one last one. Could
14 Congress have required that Indians get
15 preference in the -- in receiving the COVID
16 vaccines? Would that be an equal protection
17 violation in your view?

18 MR. KNEEDLER: Again, I think it might
19 depend -- if Congress decided to furnish
20 vaccines to tribes as part of a tribal health
21 program, I don't know whether you would call
22 that a preference or whether that's Congress --
23 aspect of Congress's delivering healthcare. It
24 might have -- it might have a disparate impact,
25 if you will, but -- but Congress has a duty to

1 Indians, and -- and it might buy a lot of
2 vaccines and deliver them.

3 CHIEF JUSTICE ROBERTS: Well --

4 MR. KNEEDLER: But a prescription --

5 CHIEF JUSTICE ROBERTS: -- I don't
6 want to --

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

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

11 There's a limited number of vaccines.
12 Can the federal government decide to distribute
13 those to -- to Indians and not others?

14 MR. KNEEDLER: Well --

15 CHIEF JUSTICE ROBERTS: It's a very
16 simple hypothetical.

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

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

21 MR. KNEEDLER: Well, answering what --
22 what plenary power means, I think, several
23 things that it means. There's no subject matter
24 that is completely off limits just be -- just
25 because it's Indians. There is no geographic

1 component which renders something completely off
2 limits.

3 CHIEF JUSTICE ROBERTS: But there's
4 something about distributing vaccines, a limited
5 supply, that is, you suggested, I guess, that it
6 may not be within the plenary power?

7 MR. KNEEDLER: Well, in -- in a
8 Court's reviewing of something of -- that
9 Congress has done in the exercise of its plenary
10 power, again, the -- the test the Court has
11 applied, it used different formulations, but --

12 CHIEF JUSTICE ROBERTS: Is that the
13 reasonably essential?

14 MR. KNEEDLER: Reasonably essential,
15 appropriate, not arbitrary.

16 CHIEF JUSTICE ROBERTS: What -- what
17 in the world does that mean? What -- i mean, if
18 it's essential, it's essential. If it's
19 reasonable -- but what's reasonably essential?

20 MR. KNEEDLER: Well, reasonably
21 essential is not a familiar term in -- in -- in
22 -- in the way --

23 CHIEF JUSTICE ROBERTS: In English?

24 (Laughter.)

25 MR. KNEEDLER: But -- but -- in -- in

1 -- in jurisprudence, but that's followed by
2 deference has to be given to Congress. And --
3 and, you know, if -- if the -- if the furnishing
4 of vaccines to the tribe was part of a -- a
5 general program to furnish vaccines to
6 underserved communities, I mean, it would
7 depend.

8 CHIEF JUSTICE ROBERTS: No. I guess
9 this is the point. You're arguing for special
10 treatment with respect to Indians. So why does
11 it matter if it's part of a program to serve
12 underprivileged communities?

13 MR. KNEEDLER: It -- it -- it -- it
14 may not. But I -- but I don't think -- Congress
15 has not done the sort of thing that you are
16 describing. Congress --

17 JUSTICE JACKSON: But, Mr. Kneedler, I
18 thought that your answer to the Chief was going
19 to be that that issue was not really teeing up a
20 question about the plenary power, that the
21 issues that they have identified, I would think,
22 would be analyzed under the equal protection
23 clause, and that's sort of a separate
24 constitutional basis for it.

25 MR. KNEEDLER: Yeah. That would --

1 that -- that -- that -- that would be, although
2 that also has a rational basis, and --

3 CHIEF JUSTICE ROBERTS: Well, but
4 there are two questions: one, whether you can
5 do it in the first place, which is the plenary
6 power question, then whether you can do it in a
7 way that distinguishes between polities that
8 have -- with which the federal government has a
9 special trust relationship.

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

19 The question would be whether the
20 approach it took is a reasonable one or, rather,
21 it is arbitrary. And those -- those require
22 some judgment, some assessment of Congress's
23 judgment, to which --

24 CHIEF JUSTICE ROBERTS: But I have, I
25 mentioned to Mr. McGill, difficulty

1 understanding how the placement priorities work.
2 So maybe I'll try an example.

3 Let's say there's a six-month-old baby
4 that had been born to an Indian couple and the
5 Indian couple for whatever reason is no
6 longer -- no longer there. And there are also
7 no extended family members in -- in the tribe.

8 A non-Indian couple comes forward and
9 says we would like to adopt the six-month-old
10 baby, and they check all the boxes under, you
11 know, best interests of the child. In other
12 words, in normal circumstances, this would be a
13 perfect placement for the child.

14 But non-family members of the tribe
15 say that, no, they think it would be better for
16 the child to be raised with the tribe on the
17 reservation.

18 Does -- does that priority trump the
19 other best interest finding?

20 MR. KNEEDLER: Well, several questions
21 about that. When Congress enacted -- or, sorry,
22 answers. When Congress enacted ICWA, it was
23 very concerned about the application of the best
24 interests of the child standard because it led
25 to subjective judgments about -- by state

1 welfare agencies --

2 CHIEF JUSTICE ROBERTS: Okay. Let's
3 assume -- let's assume that it's a good faith
4 and reasonable application of the best interest
5 standard.

6 MR. KNEEDLER: But -- but what -- but
7 what -- what Congress did was to adopt objective
8 standards, which is the -- the child -- which is
9 the priorities, and, with respect to tribal
10 members, there is -- there is an extended
11 kinship proposition there.

12 CHIEF JUSTICE ROBERTS: So does that
13 priority displace the state court, state
14 adoption agency, determination of the best
15 interests of the child?

16 MR. KNEEDLER: Well, the -- the -- the
17 agency would have to determine that the -- that
18 the tribal family was qualified --

19 CHIEF JUSTICE ROBERTS: Yeah.

20 MR. KNEEDLER: -- first of all. And
21 then, secondly, the -- that placement, it --
22 it's a rebuttable presumption and is not
23 absolute. So there is a good cause --

24 CHIEF JUSTICE ROBERTS: Rebuttable
25 presumption that the child would be placed with

1 the non-family members of the child?

2 MR. KNEEDLER: Right, that's one way
3 -- that's one way to describe it. But then,
4 yes, I mean --

5 CHIEF JUSTICE ROBERTS: Well, so okay.
6 So my point is that in that particular
7 situation, the best interests of the child would
8 be subordinated to the interests of the tribe?

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

10 CHIEF JUSTICE ROBERTS: The interests
11 of non-family members.

12 MR. KNEEDLER: When Congress enacted
13 ICWA in Section 1902, it said it was
14 implementing the best interests of the child.
15 The -- the -- the -- the -- the -- the
16 proposition of best interests --

17 CHIEF JUSTICE ROBERTS: So then -- so
18 you're saying Congress and ICWA made a
19 determination that it is in the best interests
20 of the child to remain with non-family members
21 of the tribe on the reservation in every case,
22 regardless of what the alternative is?

23 MR. KNEEDLER: Well, no, it's not
24 every case. What Congress did was enact a -- a
25 framework, an overall statute that, as -- as I

1 said -- and -- and this is, if you look at the
2 amicus brief by the -- by the Casey Foundation,
3 it described that this reflects child welfare
4 practices that -- that have come to more closely
5 resemble what ICWA does, in fact, by -- by
6 looking to not just the immediate family but to
7 extended kin. Congress made judgments when it
8 enacted --

9 CHIEF JUSTICE ROBERTS: So I guess --
10 and -- and I am having trouble figuring out how
11 this actually works in -- in practice in a
12 concrete case.

13 In the hypothetical -- hypothetical
14 that I posed, would the interests of non-family
15 members of the tribe trump the state agency
16 determination, they make these determinations
17 every day, of what's in the best interests of
18 the child?

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

1 MR. KNEEDLER: But ICWA does not
2 operate that way, with respect. The -- the
3 first question is that you -- if -- if no
4 extended family members, and extended family can
5 include how -- how the tribe --

6 CHIEF JUSTICE ROBERTS: No, no. My
7 hypothetical was members of the tribe.

8 MR. KNEEDLER: Was no -- right. So it
9 goes to -- it goes to the second preference for
10 a couple in -- or parents in that tribe. But
11 that is subject to the good cause exception. So
12 --

13 CHIEF JUSTICE ROBERTS: Okay. Does
14 the good cause exception -- how does that work?
15 Because it's not -- it's something different
16 than the best interests of the child?

17 MR. KNEEDLER: It -- it's not
18 articulated that way. Maybe some of the same
19 considerations could come in. But, again,
20 Congress was -- and, for example, if the parent
21 -- the -- the preference of the parents is given
22 weight, then sometimes --

23 CHIEF JUSTICE ROBERTS: Yeah, but,
24 again, my hypothetical said that the parents are
25 no longer on the scene.

1 MR. KNEEDLER: But -- okay. There --
2 there are cases where there are.

3 CHIEF JUSTICE ROBERTS: It happens.

4 MR. KNEEDLER: Yeah, no, no, it does,
5 but all I'm saying is that the -- I'm giving
6 examples of why the good cause exception is not
7 absolute. It could be rebutted in certain ways.

8 It also says should. It does not say
9 shall or must, which allows for the
10 consideration of other factors.

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

18 Now does the -- do the priorities in
19 ICWA trump that determination?

20 MR. KNEEDLER: That -- that -- that is
21 not the determination the -- the agency would
22 make at the outset, and, again, because that's
23 what ICWA was concerned about and -- and because
24 of the subjective judgments that could be made
25 by child welfare personnel in looking at the

1 family, looking at the financial status of the
2 family, looking at the housing, and make
3 judgments that this child should not be there.

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

12 MR. KNEEDLER: I think it probably
13 would, yes.

14 JUSTICE SOTOMAYOR: It -- what stops
15 --

16 MR. KNEEDLER: Absolutely would, sure.

17 JUSTICE SOTOMAYOR: -- that from
18 happening, obviously, is that that President
19 would obviously or more than likely not get
20 reelected.

21 All right. The same thing if there
22 was a political judgment that the Indian tribes
23 required the vaccine first for some rational
24 reason, 90 percent of the -- of the population
25 was dying or a huge number more or whatever the

1 reason was, it was a reasonable reason, that
2 would -- you'd have plenary power to do that,
3 correct, if you're the --

4 MR. KNEEDLER: As I said, the power to
5 furnish the vaccines is there whether the --
6 whether the criteria that it applied in a
7 particular case -- I mean, they would have to be
8 reasonable. But we shouldn't assume --

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

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

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

19 MR. KNEEDLER: Right.

20 JUSTICE SOTOMAYOR: An unfit -- all of
21 these parents, to even be in the running, have
22 to be competent parents, correct?

23 MR. KNEEDLER: Yes.

24 JUSTICE SOTOMAYOR: Competent care --
25 custodians.

1 MR. KNEEDLER: Yes.

2 JUSTICE SOTOMAYOR: So now the issue
3 is one of policy. Where will you place the
4 child among these competing competent
5 custodians, correct?

6 MR. KNEEDLER: Yes.

7 JUSTICE SOTOMAYOR: And that goes to
8 the judgment of -- who should make that
9 judgment, and what you're saying is Congress has
10 --

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

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

19 JUSTICE SOTOMAYOR: Could you let him
20 just finish that, Chief?

21 CHIEF JUSTICE ROBERTS: Oh, I'm sorry.
22 I thought you were --

23 JUSTICE SOTOMAYOR: Yeah. Just let
24 him finish that part. Go ahead.

25 MR. KNEEDLER: Congress -- Congress

1 was concerned about the sort of free-form or
2 free-floating application of the best interests
3 of the -- of the child standard, as this Court
4 recognized, and that's why it, for example,
5 imposed the burden of proof to remove -- to
6 remove the child or for -- or for placements of
7 the child with -- with someone else.

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

20 JUSTICE ALITO: Suppose the parents
21 are --

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

24 CHIEF JUSTICE ROBERTS: Well --

25 JUSTICE SOTOMAYOR: Well, I think --

1 JUSTICE ALITO: Chief?

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

4 MR. KNEEDLER: Yes.

5 (Laughter.)

6 MR. KNEEDLER: Yes.

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

9 (Laughter.)

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

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

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

1 not lightly -- and not lightly taken away
2 because of the -- the huge numbers of Indian
3 children who were being taken away from their
4 families, from their extended families, from
5 their tribes, from their kin, from their
6 community, and that was damaging the long-term
7 interests --

8 CHIEF JUSTICE ROBERTS: Last --

9 MR. KNEEDLER: -- of the tribes.

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

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

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

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

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

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

17 MR. KNEEDLER: -- membership.

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

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

9 JUSTICE ALITO: But it would still be
10 --

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

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

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

25 JUSTICE KAVANAUGH: Can I follow up on

1 the Chief's questions? The third preference,
2 for other Indian families, including families
3 who are of a different tribe, correct?

4 MR. KNEEDLER: Yes.

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

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

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

16 MR. KNEEDLER: Well --

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

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

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

24 MR. KNEEDLER: Yeah. Because --

25 JUSTICE KAVANAUGH: That's --

1 MR. KNEEDLER: -- you could have a
2 child, for example, who has parents who are
3 members of two tribes. ICWA --

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

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

8 JUSTICE KAVANAUGH: Yeah.

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

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

17 JUSTICE KAVANAUGH: Go ahead.

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

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

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

18 MR. KNEEDLER: Yeah.

19 JUSTICE KAVANAUGH: Do you agree with
20 that?

21 MR. KNEEDLER: Yes.

22 JUSTICE KAVANAUGH: Okay.

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

25 JUSTICE KAVANAUGH: And this is

1 different because? And I'll let you explain.

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

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

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

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

24 MR. KNEEDLER: Well, it --

25 JUSTICE BARRETT: Am I

1 misunderstanding that?

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

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

9 MR. KNEEDLER: It would come --

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

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

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

1 MR. KNEEDLER: Well --

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

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

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

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

1 connection to the child.

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

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

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Alito, anything further?

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

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

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

1 solely based on the child's status as a -- based
2 on ancestry.

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

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

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

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

25 Either citizenship could descend

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

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

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

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

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

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

1 And -- and, if there are problems with
2 that in a particular case, the -- the person
3 seeking custody could appeal. That was done in
4 -- in one of the cases in this case.

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

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

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

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

1 protection --

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

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

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

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

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

1 very serious question. Maybe a hundred years
2 ago people had a different idea of that.

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

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

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

18 MR. KNEEDLER: Well, and with --

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

22 MR. KNEEDLER: Again, I think it comes
23 up both with respect to Article I as it
24 rationally related to Congress's fulfillment of
25 its power and then a rational basis test for

1 equal protection, and they overlap, and one
2 could think of the issues here.

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

6 JUSTICE ALITO: Okay. Thank you.

7 MR. KNEEDLER: I think Congress has to
8 -- has to be acting --

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

11 JUSTICE SOTOMAYOR: I think that what
12 you were trying to say but I'm not sure is ICWA
13 has two components: one, if you're a child
14 who's an Indian member, and we haven't even
15 addressed that, it seems to me that that's the
16 quintessential part of ICWA that I find hard to
17 overturn.

18 If you're a member of a tribe and the
19 government wants to protect you in a certain
20 way, you should be -- the government should be
21 unfettered from that.

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

25 JUSTICE SOTOMAYOR: All right. But

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

6 MR. KNEEDLER: Yes.

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

9 MR. KNEEDLER: Yes.

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

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

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

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

25 JUSTICE SOTOMAYOR: So the bottom line

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

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

11 JUSTICE SOTOMAYOR: Correct.

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

20 JUSTICE SOTOMAYOR: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

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

22 There are -- there's aid to schools
23 that Indian children attend. There -- but there
24 would -- there would also be other concerns
25 historically. And what Congress has done in the

1 past by -- and I mentioned the Holliday case,
2 which was created criminal offenses for conduct
3 occurring off a reservation by individual
4 Indians, and there the Court said it's not just
5 commerce, it's intercourse, which means
6 interaction between Indians and non-Indians.

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

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

24 JUSTICE KAGAN: Well, not just the --
25 I took General Stone to be saying Congress just

1 can't do it. It just doesn't fall within --

2 MR. KNEEDLER: Yes. No.

3 JUSTICE KAGAN: -- Congress's Article
4 I powers, you know.

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

14 That would be in the teeth of -- of
15 Congress -- the framers' shedding of those
16 shackles. Whether those shackles were all under
17 the Indian Commerce Clause or -- or elsewhere,
18 that -- that was a deliberate choice by the
19 framers to give Congress plenary power over
20 Indian affairs. That was reflected in the
21 contemporary understanding and the Trade and
22 Intercourse Act, which enacted criminal
23 penalties for crimes -- over the years, crimes
24 by Indians against Indians. The classic
25 intercourse or interaction between Indians and

1 non-Indians.

2 JUSTICE KAGAN: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch?

5 Justice Kavanaugh?

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

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

18 JUSTICE KAVANAUGH: And -- and why is
19 that?

20 MR. KNEEDLER: Because the preference
21 in Mancari was at the BIA. It was the agency
22 that was regulating tribal affairs, individual
23 Indian affairs. So there was a particular --
24 particularly close nexus, frankly, to -- to the
25 Indian tribe and -- and tribal members who were

1 going to work for it.

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

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

13 MR. KNEEDLER: Again, I think that
14 would -- that would be much more difficult to
15 defend. I -- I'm not sure what the defense of
16 it would --

17 JUSTICE KAVANAUGH: And why, though?
18 I just want to understand. You -- you've had an
19 instinct to both these questions. That's much
20 more difficult, but why?

21 MR. KNEEDLER: I -- I think it's
22 because the -- the relationship to -- the tribal
23 relationship to the -- tribal relationship is --
24 is more attenuated and bumps up against
25 interests that other people might have. I think

1 that that may be an important consideration.

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

7 JUSTICE KAVANAUGH: And then --

8 MR. KNEEDLER: That might present
9 different questions.

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

20 MR. KNEEDLER: No. I mean, with
21 respect, what you're told is, if -- if it's one
22 of the preferences, that there is a tribal
23 political citizenship aspect to the -- to the
24 determination. And it -- that's when --

25 JUSTICE KAVANAUGH: Even -- even with

1 the third preference?

2 MR. KNEEDLER: Yes. The -- it has to
3 -- it has to be a member of -- of another tribe.
4 It has --

5 JUSTICE KAVANAUGH: Mm-hmm.

6 MR. KNEEDLER: And that means that
7 there -- that political -- that's a political
8 relationship as well.

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

14 JUSTICE KAVANAUGH: And with the --

15 MR. KNEEDLER: -- of the third
16 preference is where -- is where that tribe --
17 either it occupies the same reservation or it
18 has another parent --

19 JUSTICE KAVANAUGH: Well, you say the
20 core, but it can apply even when it's a
21 completely different tribe with none of that,
22 correct?

23 MR. KNEEDLER: But -- but if -- but if
24 --

25 JUSTICE KAVANAUGH: Is that -- is that

1 a yes?

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

4 JUSTICE KAVANAUGH: Yeah.

5 MR. KNEEDLER: But the good cause
6 exception might allow greater flexibility --

7 JUSTICE KAVANAUGH: And I think you
8 referred --

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

10 JUSTICE KAVANAUGH: -- I think you
11 referred earlier to common spiritual practices
12 that may exist in those circumstances. Does
13 that suggest that Congress could say that, you
14 know, Catholic parents should get a preference
15 --

16 MR. KNEEDLER: No. No, not -- not at
17 all.

18 JUSTICE KAVANAUGH: And why not?

19 MR. KNEEDLER: Not at all.

20 JUSTICE KAVANAUGH: Why not?

21 MR. KNEEDLER: No. No --

22 JUSTICE KAVANAUGH: You said spiritual
23 preferences.

24 MR. KNEEDLER: Yes.

25 JUSTICE KAVANAUGH: Yeah.

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

9 And so I -- tribal members, I mean, it
10 varies. Obviously, not all members are alike,
11 but some people -- some tribal members feel a
12 very strong affinity for their tribe in terms of
13 their heritage going back to before the founding
14 of this country. It's an important part of
15 their cultural stability, their kinship, and --
16 and stability in growing up.

17 JUSTICE KAVANAUGH: Yeah.

18 MR. KNEEDLER: And if you have a young
19 child --

20 JUSTICE KAVANAUGH: You have -- you
21 have strong interests, and I respect those, on
22 one side. I'm just trying to say there are --
23 there are strong interests on the other side
24 too, which is why the case is hard, but I'll
25 finish there. Thank you.

1 MR. KNEEDLER: Okay.

2 JUSTICE BARRETT: Mr. Kneedler, I want
3 to pick up where Justice Kavanaugh left off.
4 You -- you said that it would be a harder case
5 in some of the hypotheticals that Justice
6 Kavanaugh presented, say, you know, Treasury
7 instead of the BIA, a preference in employment.

8 Is that because you would say -- you
9 know, I think that the classifications for
10 Indians are difficult because it's difficult --
11 there's a racial component and the political
12 identity component.

13 MR. KNEEDLER: Right.

14 JUSTICE BARRETT: Are you struggling
15 with those hypotheticals -- or, sorry, I don't
16 mean to say struggling. Are you finding those
17 more difficult to answer because you would say
18 that there are some circumstances in which the
19 classification of Indian operates more like a
20 racial classification because it is unconnected
21 to tribal sovereignty?

22 MR. KNEEDLER: Yes.

23 JUSTICE BARRETT: For the BIA, for
24 example, you know, you can see the connection
25 between the classification and tribal

1 sovereignty, and so it's easier to say that
2 that's a political classification subject to
3 rational basis scrutiny. If you move farther
4 away from that, if you're talking about
5 Treasury, then would you say that it operates as
6 a -- as a political classification but doesn't
7 satisfy rational basis scrutiny, or would you
8 say it's a racial classification and fails
9 strict scrutiny?

10 MR. KNEEDLER: I -- you could think
11 about it either way. I think it's still -- I
12 think it's still a political classification but
13 -- but perhaps an unreasonable one because there
14 -- there -- there is, as the Court's cases that
15 have looked at this, Holliday and others, there
16 is, I think, at some point a proportionality
17 aspect to it. Would -- would other people in
18 the society be -- be greatly adversely affected
19 or something -- something like that.

20 But, on the equal protection side, I
21 think Adarand is a very good example of that
22 because there was a -- a preference for
23 contracting within a series of black, Asian,
24 white -- you know, other minority groups. It
25 was expressed in racial terms, and the Court

1 said that was subject to strict scrutiny.

2 But that's -- that's why it's
3 important to look at the context in which
4 Congress is acting. And because Congress --
5 Congress doesn't make sweeping judgments in this
6 area. It looks at --

7 JUSTICE BARRETT: But just --

8 MR. KNEEDLER: -- the practical
9 problem.

10 JUSTICE BARRETT: -- just to clarify
11 to make sure I understand your position,
12 sometimes the classification can operate as
13 racial and sometimes it would be political,
14 depending on the context in which Congress is --

15 MR. KNEEDLER: I think if it's
16 expressly based on tribal citizenship here,
17 either the child or the parent where the child
18 is not --

19 JUSTICE BARRETT: I'm not talking
20 about ICWA. I'm talking about some of Justice
21 Kavanaugh's hypotheticals.

22 MR. KNEEDLER: What I'm saying, if it
23 turns on tribal membership or tribal
24 citizenship, then I think it is political in its
25 -- in its essence. Whether it goes too far in

1 giving a benefit to a -- a -- a -- someone with
2 that political connection --

3 JUSTICE BARRETT: Okay.

4 MR. KNEEDLER: -- I think would be the
5 first -- the first way to look at it. Otherwise
6 there could be certainly --

7 JUSTICE BARRETT: Well, I'll -- I'll
8 move on.

9 MR. KNEEDLER: -- challenges to many
10 things.

11 JUSTICE BARRETT: I'll move on. It
12 just seems to me that it is always going to be
13 tied to tribal membership in some way. But I'll
14 move on, just very quickly I am going to
15 summarize what I understand you to be saying
16 about the Article I issue, and I just want you
17 to tell me if I have got it right or correct me
18 if I don't.

19 In response to Justice Alito's
20 questions, in particular, and some of Justice
21 Kagan's questions as well, you were saying
22 plenary is plenary. So you would say that
23 Congress's power to regulate Indian affairs is
24 plenary so as long as it's rationale or, you
25 know, reasonably related or whatever standard we

1 want to use, it's within Congress's power and
2 the only limitation is if it bumps up against
3 some external limit, like the equal protection
4 clause or like sovereign immunity --

5 MR. KNEEDLER: No, I -- I -- I think
6 -- I think there are -- I think there are
7 built-in restraints like if it -- if it -- if
8 what it's doing is disproportionate, perhaps. I
9 mean, it's hard to articulate this because this
10 Court has never struck down a statute of that
11 sort.

12 And with respect to the Adarand case,
13 there's no express -- there was no express
14 reference for supposition about tribal
15 membership there. And so it was easy to
16 identify it as --

17 JUSTICE BARRETT: Okay. But -- but --
18 but on my Article I question.

19 MR. KNEEDLER: No, on the -- on the
20 Article I question, I think plenary at its core
21 means there are no --

22 JUSTICE BARRETT: No --

23 MR. KNEEDLER: -- subject matters
24 geographic areas categorically beyond its power.

25 JUSTICE BARRETT: But external limits

1 from the Constitution would apply, like equal
2 protection or in Seminole Tribe, state sovereign
3 immunity.

4 MR. KNEEDLER: Yes, they would apply.
5 And this -- I just want to reiterate this
6 doesn't just come from the Indian Commerce
7 Clause.

8 JUSTICE BARRETT: Right.

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

11 JUSTICE BARRETT: -- trust
12 relationships?

13 MR. KNEEDLER: -- the federal
14 government, which in turn comes from
15 constitutional powers, likes the war power and
16 all of that that renders the tribes dependent
17 and, therefore, in need of protection.

18 And so I think it's very hard for this
19 Court to lay down a standard rule about what's
20 necessary to protect the tribes and to fulfill
21 the obligation to the Indians.

22 CHIEF JUSTICE ROBERTS: Justice
23 Jackson?

24 JUSTICE JACKSON: Yes. So I -- I
25 agree to some extent with Justice Kavanaugh that

1 there are strong interests on both sides of
2 these issues. What I'm mostly concerned about
3 is that we might be taking it upon ourselves to
4 weigh those interests, where really our role
5 should be thinking about what the framers
6 intended with respect to the scope of Congress's
7 authority as it regards Indian affairs and what
8 Congress believed was necessary to protect
9 Indians, given that exercise of authority.

10 So I guess I'm -- that makes me wonder
11 whether we shouldn't be giving more weight to
12 the statements in the legislative history from
13 Congress in terms of its decision that ICWA and
14 its provisions were, in fact, related to tribal
15 sovereignty necessary to preserve tribal
16 sovereignty. So let me just ask you how -- how
17 much weight, if any, should we be giving to
18 clear, direct statements from Congress that this
19 was being done pursuant to its understanding of
20 its plenary authority as given it -- given to it
21 in the Constitution and that it was necessary
22 from Congress's perspective to solve for the
23 problem of these state welfare practices that
24 were causing harm to Indian children, given its
25 responsibility as a trust relationship for

1 Indian affairs?

2 MR. KNEEDLER: I think very, very
3 great deference. And I think that is the
4 message of cases like Holliday and Perrin and
5 cases like that. And you don't have to look to
6 legislative history for that. It's set out in
7 the -- it's set out in the beginning of ICWA
8 itself.

9 It starts by saying clause 3 of
10 Article I provides that Congress shall have the
11 power to regulate commerce with Indians, and
12 through this and other authority it has plenary
13 power. And Congress is saying that, through
14 statutes, treaties, et cetera, and -- and the
15 course of dealing with tribes, it has assumed --
16 assumed the responsibility for the protection of
17 Indians. Those are in 1901.

18 1902 says the Congress hereby declares
19 that it is the policy of this nation to protect
20 the best interests of Indian children by
21 establishing minimum standards in state child
22 welfare proceedings because that was the problem
23 they were addressing.

24 Yes, the boarding school issue was
25 also out there, but Congress saw, again, in the

1 considered focused way that it deals with
2 problems, it saw a major problem. It thought
3 that this was in the best interests, that the
4 standards and the protections and the framework
5 it set out were in the best interests of the
6 child.

7 And if that displaces ordinary child
8 welfare law in particular cases, Congress made a
9 judgment that the objective factors it set out,
10 which take into account extended family and
11 kinship principles, that family law has, but the
12 way this statute implements them in state
13 proceedings is in the best interests of Indian
14 children and that judgment by Congress based on
15 extensive hearings was entitled to great
16 deference.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 ORAL ARGUMENT OF IAN H. GERSHENGORN

20 ON BEHALF OF THE TRIBAL PARTIES

21 MR. GERSHENGORN: Mr. Chief Justice
22 and may it please the Court:

23 Congress enacted ICWA because Indian
24 children were being torn from their families and
25 tribes through the operation of state family law

1 in state courts. I want to emphasize three
2 points at the start.

3 First, there is no -- Congress has
4 plenary power over Indians and there is no
5 exception in that power for state court child
6 custody proceedings. Since the founding, the
7 health and safety of Indian children has been
8 the province of the federal government and
9 tribes, not the states.

10 And, indeed, when Congress attempted
11 to give states authority over Indian children in
12 the 20th century, states resisted and said it
13 was an exclusive federal responsibility.

14 Second, Plaintiff's equal protection
15 claims should be rejected. A facial challenge
16 in a case without standing is just about the
17 worst way to consider the constitutionality of a
18 major federal statute. And, in any event, ICWA
19 draws distinctions that are political three
20 times over; it applies only to tribes that the
21 federal government has recognized, it
22 incorporates membership criteria established by
23 sovereign tribes, and it relies on the political
24 decisions of parents to remain tribal members.

25 Third, ICWA protects the best

1 interests of children. It adopts a system of
2 structured decisionmaking that combines
3 evidence-based presumptions with flexibility to
4 make individualized determinations. It protects
5 child -- child safety, facilitates access to
6 critical remedial services to keep families
7 intact, and it keeps -- works to keep families
8 -- keep children with their families and
9 communities. That's why ICWA is viewed as the
10 gold standard.

11 I'd be happy to take the Court's
12 questions. If not, I will start with -- with
13 the -- I will take the Court's questions.

14 (Laughter.)

15 MR. GERSHENGORN: But I'm also happy
16 to keep going.

17 CHIEF JUSTICE ROBERTS: Not that easy.

18 Do you think that ICWA incorporates
19 the familiar best interest of the child inquiry
20 that are -- are applied in family courts
21 throughout the country?

22 MR. GERSHENGORN: So I think I would
23 have to say the answer to that is no. What ICWA
24 does is modify that because Congress made the
25 judgment that the best interest standard was

1 being implied in a way that resulted in
2 unwarranted removals.

3 What Congress did was create a system
4 it thought was in the best interests of the
5 child, but not by adopting the "state best
6 interests of the child standard" because it
7 found that that was being applied in a
8 discriminatory way.

9 Now, so, Your Honor, there's been a
10 lot of back and forth about good cause. And it
11 seems good cause is important in the statute.

12 I will say candidly, having looked at
13 the cases, there are three -- the -- the state
14 courts are in a little bit of disarray as to
15 whether the preferences are sort of binding,
16 whether there's a straight free -- free-floating
17 best interest standard that sort of -- that
18 works through good cause or whether, as I think
19 is probably the way Congress intended it, that
20 there's a -- the placements are the default
21 setting and good cause provides a -- a way to
22 rebut the presumption.

23 Now, Interior has explained how good
24 cause works. It involves you can take into
25 account the decisions of the -- the views of the

1 parents, the views of the child, if the child is
2 old enough to express them. You can take into
3 account sibling attachment. You can take into
4 account bonding with foster parents, as long as
5 it was not done illegally through ICWA. The
6 thing you cannot take into account is
7 socioeconomic status.

8 So what the Casey brief and others say
9 and what -- the reason why medical professionals
10 are here, states are here, family rights
11 advocates are here is because ICWA is the gold
12 standard. It adopts that -- those
13 evidence-based presumptions and allows for
14 flexibility to protect the best interests of the
15 child.

16 So, with respect to sort of the power
17 debate which has been going on, I want to make a
18 couple of points. First, this is at the core of
19 the plenary power doctrine. From the beginning,
20 the -- the plenary power doctrine was used to
21 protect Indians from non-Indians. There is no
22 doubt that if states had moved in and done a
23 wholesale physical removal of Indian children,
24 that would have been within the duty of
25 protection. The fact that this is being done

1 through state courts, through state family law,
2 doesn't deprive Congress of power.

3 Justice Barrett, you were asking about
4 limits. Obviously, when we're talking about
5 plenary power, limits are hard to find, but I
6 will say this Court has identified some. What I
7 would say is, when Congress acts directly on
8 Indians, the limits on plenary power, as opposed
9 to the other provisions, are hard to find, but
10 what Congress said in Perrin was that when
11 Congress acts on non-Indians to protect Indians,
12 then there may be limits.

13 And, in that case, it was the question
14 of banning alcohol sales outside of
15 reservations. And what Congress said -- what
16 the Court said was that if you're doing it in
17 counties where there are a lot of Indians,
18 probably okay. If you're doing it statewide
19 when Indians are concentrated in a -- a number
20 of counties, not okay. And so that's a limit
21 that this Court has identified.

22 The limit that does not exist is the
23 one that's tied to land. I already addressed
24 the limit for state custody proceedings, which,
25 you know, Congress has acted for servicemen to

1 say deployment is not something you can take
2 into -- it cannot be dispositive in a best
3 interest finding, right. Congress has acted
4 pursuant to other federal powers to do exactly
5 what it did in ICWA.

6 The -- the rule that makes no sense is
7 land. Why does it make no sense? From the
8 beginning, Congress has -- from the 17 -- from
9 the Trade and Intercourse Act forward, Congress
10 has legislated off-reservation. It -- it
11 prohibited in the 1834 Act in Section 15
12 alienating the confidence of Indians. In the
13 earlier acts, it -- it required non-Indians to
14 report Indian invasions to the federal
15 government. It prohibited land sales by Indians
16 on and off the reservation. In the liquor sale
17 context, what this Court said in McGowan was
18 Congress has the authority to legislate wherever
19 Indians may be. In Holliday, Forty-Three
20 Gallons, Perrin, all those cases are off
21 reservation. In the treaty cases, this Court
22 has seen in Fishing Vessel, in Cougar Den,
23 right, those were off reservation. And then
24 Indian Health Care Improvement Act, the Indian
25 Housing -- Native American Housing Assistance

1 Program, the Indian Education Program, all of
2 those are off reservation.

3 Why does land make no sense? Land
4 makes no sense because, in the Articles of
5 Confederation, there was a land carveout. It
6 was exactly the kind of reason that we had the
7 change in the Constitution to prevent that.

8 Why does land make no sense? There
9 are landless tribes, right? There are landless
10 tribes in California and Montana. Land is just
11 not a sensible way to divide and limit
12 congressional power.

13 JUSTICE ALITO: There were --

14 JUSTICE KAVANAUGH: What --

15 JUSTICE ALITO: -- several questions
16 --

17 JUSTICE KAVANAUGH: Go ahead.

18 JUSTICE ALITO: There were several
19 questions earlier about the justification for
20 granting preference for foster or adoptive
21 parents who are members of an entirely different
22 tribe. Could you speak to that?

23 MR. GERSHENGORN: Certainly, Your
24 Honor.

25 JUSTICE ALITO: Is that -- is that

1 based on -- on -- on the assumption that all
2 tribes are fungible --

3 MR. GERSHENGORN: No, Your Honor.

4 JUSTICE ALITO: -- or sufficiently
5 similar to justify that?

6 MR. GERSHENGORN: No, Your Honor.

7 JUSTICE ALITO: What is it based on?

8 MR. GERSHENGORN: It is based on the
9 view that -- that -- that all federally
10 recognized -- all federally recognized tribes
11 and members of those tribes share a common
12 political relationship with the United States.
13 That's what renders it political rather than
14 racial. Every member of a federally recognized
15 tribe shares that political relationship.

16 Now that then begs the question that a
17 number of the Justices have focused on about, is
18 it rational? That's a fair question, and that's
19 a fair debate.

20 Let me explain why I think it clearly
21 is rational. And some of this Mr. Kneedler
22 touched on and I agree with. It has a clearly
23 -- remember, we're talking about a -- a
24 preference -- a prong that was never applied to
25 any of the -- of the plaintiffs here. And on a

1 facial challenge, right? All I -- all it has to
2 have is a plainly legitimate scope, which it
3 does.

4 In Alaska, for example, it is quite
5 common for Indian members of one tribe to live
6 on the reservation of another. The preference
7 applies quite often there, right? What the --
8 what your Court -- what the Court has been
9 worrying about is this kind of Maine to Arizona
10 hypo, right, that we identify some tribe in
11 Maine that's going to somehow get a preference.

12 Well, that case has never happened
13 that we have been able to find and able counsel
14 on the other side has been able to find, and I
15 would submit on a facial challenge in a
16 situation where it's never applied that it would
17 be very odd to strike down a congressional
18 statute.

19 I will say, though, that I -- for the
20 reasons I've said, I think it's -- it is
21 actually quite rational. If the Court
22 disagreed, it's also clearly severable. If I
23 give a -- if I say I would like, you know,
24 Italian food, Chinese food at any steak joint,
25 and it turns out there's a vegan in the group,

1 that I can't do the steak joint, the first two
2 preferences remain, okay? There's no --

3 JUSTICE ALITO: But why is it
4 rational? I understand that it's a facial
5 challenge, but why -- why is it rational?
6 Before the arrival of Europeans, the tribes were
7 at war with each other often, and they were
8 separated by an entire continent. And I -- I
9 don't know how many cultural similarities you
10 would identify if you compared a tribe in
11 Florida with a tribe in Alaska.

12 MR. GERSHENGORN: So, Your Honor, I
13 think it's been pretty clear I am not basing
14 this on cultural similarity. I'm basing it on a
15 political relationship with the United States
16 that all the tribes share.

17 Now I take Your Honor's point. If we
18 had a case -- and this is why you wait for --
19 for actual -- for actual as-applied challenges
20 as opposed to facial challenges. If we had a
21 case where a family was denied because a tribe
22 in Maine with no ties to the child was given
23 preference over a Cherokee or a Navajo Indian,
24 we would be talking about a pretty serious -- a
25 pretty serious as-applied challenge.

1 But, of course, we're -- we're a
2 million miles from that. We're the exact
3 opposite. What you're hearing and what the --
4 what is actually happening on the ground is this
5 is used in situations which are quite
6 unremarkable, as I say, when a member of one
7 tribe is living on the reservation of another,
8 has built exactly the kind of community that
9 ICWA is hoping to preserve.

10 So, you know, from -- from my
11 perspective, I certainly am not here to defend
12 the -- what I'll call the Maine to Arizona hypo.
13 But I -- what I am here to say is it has a
14 plainly legitimate sweep; it is political, not
15 racial; and that -- that -- that even if Your
16 Honors disagree with that, it's also plainly
17 severable.

18 CHIEF JUSTICE ROBERTS: Counsel, on
19 the political and racial point, I'd like to
20 return to the dialogue between Justice Barrett
21 and Mr. Kneedler, which, if I understand it,
22 raised a question, because there are several
23 hypotheticals where Mr. Kneedler, I think,
24 properly recognized that that would present a
25 harder case.

1 And I think the suggestion was, well,
2 is it a harder case because the racial aspect of
3 what is a combined, in most cases anyway,
4 combined polity and blood characterization, in
5 that case, that the racial aspect predominates
6 in some particular way.

7 MR. GERSHENGORN: Right.

8 CHIEF JUSTICE ROBERTS: Did that seem
9 to resonate with you?

10 MR. GERSHENGORN: No, Your Honor.
11 You'd be perhaps unsurprised -- no. The way I
12 would view it is -- and this was, I think, one
13 of the ways Justice Barrett framed it, which is
14 how I think about it, which is that's a
15 political characterization. If we're basing --
16 if -- if Congress is making a judgment on
17 federally recognized tribes, remember, that's
18 excluding people who have left the tribe.
19 That's excluding state-recognized tribes.

20 CHIEF JUSTICE ROBERTS: So your answer
21 --

22 MR. GERSHENGORN: But -- but could I
23 finish? Because I -- I want to respond directly
24 to your question. I'm not finishing on a -- on
25 a tangent. Directly to your question.

1 (Laughter.)

2 MR. GERSHENGORN: It is a political
3 justification, but it has to meet the Mancari
4 standard, special treatment tied rationally to
5 the fulfillment of Congress's unique obligations
6 to the Indians. What does that mean?

7 Well, I think what it means is that a
8 bare desire to help individual Indians doesn't
9 satisfy it. That's what Mancari suggests,
10 right? Mancari says you can't just give a
11 preference to any Indian, even a federally -- a
12 member of a federally recognized tribe,
13 throughout the government. A bare desire to --
14 to help is not enough.

15 You know, we could go -- I don't want
16 to parse agency by agency. I think DOJ, which
17 does all the litigation for the government and
18 Indian tribes, probably is a situation where you
19 could justify a preference.

20 But the main point, Your Honor, is
21 that Mancari has some bite, right? Mancari says
22 you can't just decide you're going to help any
23 individual Indians and then, you know, close the
24 book.

25 CHIEF JUSTICE ROBERTS: All right. So

1 you disagree with Mr. Kneedler, who did say that
2 in those variety of cases, that they would
3 present a harder -- a harder case?

4 MR. GERSHENGORN: I'm not saying I
5 disagree that it's a harder case. I'm just
6 saying I view them as political.

7 CHIEF JUSTICE ROBERTS: You'd win it
8 just because of --

9 MR. GERSHENGORN: No.

10 CHIEF JUSTICE ROBERTS: -- despite the
11 fact --

12 MR. GERSHENGORN: Well, I'd have to
13 hear the particular hypos, Your Honor, but let
14 me -- I want to be clear about the method of
15 analysis, and then I'm happy to answer whatever
16 hypos Your Honor wants.

17 The -- the -- my method of analysis
18 is, if the federal government imposes it on
19 federally recognized tribes, it's political. It
20 then has to meet the test that was set forth in
21 Mancari. It has -- the reason -- justification
22 has to be tied rationally to the fulfillment of
23 Congress's unique obligations to the Indians.

24 Some of those, you know, Mancari said
25 BIA, okay; federal government-wide, not okay.

1 And, you know, then I need to see what Congress
2 said. What makes this case so easy, right, is
3 Congress studied this for four years, right?
4 Congress told you exactly why, not in
5 legislative history, but in legislative findings
6 that it said this is what we're worried about,
7 right?

8 We -- this is -- this is going to the
9 -- this is not a peripheral mere desire to
10 benefit individual Indians. This is going to
11 the core of tribal self-government.

12 JUSTICE ALITO: What about the
13 hypothetical about providing COVID vaccines?
14 And suppose Congress says Indians -- the Indian
15 population on the whole has more people with
16 complications -- with -- with factors that make
17 them more vulnerable to serious consequences
18 from getting COVID, and, therefore, they should
19 get preference over others in the -- in the
20 distribution of vaccines.

21 MR. GERSHENGORN: So, Your Honor, the
22 way you have posed the hypo, I would consider
23 that a racial classification, not a political
24 one. If Congress were to say just Indians
25 undefined, that might well be a -- a racial

1 classification, might well be.

2 If Congress were to say we're giving
3 it to members of federally-recognized Indian
4 tribes first because we find on reservations
5 where the individuals are concentrated that
6 there's a particular problem, because they don't
7 have access to healthcare and hospitals in -- in
8 the same way, then I think that would be
9 defensible. That would be applicable --

10 JUSTICE ALITO: All right. Well, let
11 me modify it. It applies to members of
12 federally-recognized tribes but it not -- it's
13 not limited to what happens on the reservation.
14 It's everywhere.

15 MR. GERSHENGORN: So I think that -- I
16 think that would be harder. And it goes back to
17 the bare, bare desire, that would be a political
18 classification, but the bare desire to help
19 members of tribes is not, we think, is not --
20 forget what we think -- is not what the Court
21 has said is sufficient under Mancari.

22 And so, you know, I think that -- that
23 that's how I -- that's how I think about it.
24 You know, look, any of the hypos could have hard
25 questions. I've tried to give the Court a sense

1 of what I think this Court's cases demand, and,
2 therefore, how we think about it.

3 JUSTICE SOTOMAYOR: I -- I'd like you
4 to finish that.

5 MR. GERSHENGORN: No, I'm done.

6 JUSTICE SOTOMAYOR: You say helping
7 Indians is not enough. But what's the helping
8 Indians plus what?

9 MR. GERSHENGORN: So I think some
10 link, Your Honor, to tribal self-government is
11 sort of at the core. And that's why I think
12 ICWA is really so easy, because what -- what
13 makes -- Congress made the findings, and -- and
14 a number of the Justices have touched on it this
15 morning -- Congress made the findings that the
16 wholesale unwarranted removal of 25 to
17 35 percent of Indian children was devastating
18 tribes and tribal self-government.

19 There is nothing more core -- this is
20 a place where I disagree quite strongly with my
21 friends on the other side -- like there is
22 nothing more central to self-government than
23 deciding who --

24 JUSTICE SOTOMAYOR: So how --

25 MR. GERSHENGORN: -- is -- who's a

1 member.

2 JUSTICE SOTOMAYOR: -- how does --

3 MR. GERSHENGORN: And you don't have
4 -- to take my word for it. That's what Congress
5 said.

6 JUSTICE SOTOMAYOR: -- how does
7 healthcare, the education, the housing
8 allotments, how do they fit in?

9 MR. GERSHENGORN: I -- I think the --

10 JUSTICE SOTOMAYOR: Those are the
11 other Title 25.

12 MR. GERSHENGORN: Yeah, I think that
13 those are -- that shows, Your Honor, a -- a
14 number of things.

15 First of all, it shows that Congress
16 has routinely -- there's not, you know, there's
17 this sense, I think, that Mancari sprung up
18 from, you know, from the earth, you know, 40
19 years ago.

20 And -- but what -- what -- Congress
21 has been legislating to help Indians since the
22 beginning, right, it is in the Constitution, and
23 it is there not just -- I'm not using that as
24 sort of an, aha, it's in the Constitution. It's
25 in the Constitution because tribes are --

1 Indians are treated in the Constitution like
2 political entities. Right?

3 Congress -- they're treated parallel
4 in the -- in the -- in the -- in the Commerce
5 Clause with foreign nations and with states.
6 There -- Congress has the power to treat -- to
7 conduct treaties with Indians. Right?

8 They are -- they are political from
9 the beginning and, like, I mean, I don't want to
10 list all of the Indian-specific statutes, right,
11 but the Dawes Act, the Indian Civil Rights Act,
12 the Indian Reorganization Act, you know, ICWA,
13 IGRA, I mean, Congress has routinely singled out
14 members of federally-recognized tribes for
15 legislation.

16 JUSTICE KAGAN: Mr. Gershengorn, I
17 want to go back to something you said, because
18 you said it, you know, it's obvious that when
19 you remove 30 percent of children from a
20 political community, you harm that political
21 community.

22 I think some of the strong feelings
23 about this case come from a sense of, yes, but
24 what about the children? I mean, you do harm
25 the political community, but are you saying that

1 the political community is more important than
2 the welfare of the children? And -- and -- and
3 -- and so that's the thing that I think people
4 are going, whoa.

5 MR. GERSHENGORN: Yeah.

6 JUSTICE KAGAN: I mean, so --

7 MR. GERSHENGORN: I -- I'm glad you
8 asked that, Your Honor. I think it's critical
9 that what Congress found is not just that ICWA
10 was -- was important for preserving the tribal
11 community. Congress found that ICWA was in the
12 best interests of the children. Right?

13 I -- I don't think I could emphasize
14 it more than -- than that. What Congress found
15 was that it was -- it was in the interest of the
16 children. And the reason that Congress found
17 that is because -- and the reason ICWA has
18 become the gold standard, is because Congress
19 made the judgment and recognized that separating
20 children from their families and communities too
21 soon caused harm.

22 I -- I think it's important to
23 recognize that the average age of people in ICWA
24 is over six-years-old. This is discussed in the
25 Casey brief. These are children who have formed

1 school mates, school bonds. They are children
2 who are playing on sports teams. They are
3 children who have interacted, have a group of
4 friends. They've been -- made connections on
5 the community.

6 And what ICWA realizes is that these
7 children were being taken from their communities
8 too soon. Why? Well, sometimes there was abuse
9 at home. Right? But what ICWA says is a lot of
10 times that is remediateable, which is why we had
11 the active efforts provision. Right?

12 It's substance abuse. Right? It's --
13 it's the ability, if you can get the child out
14 of the home, get the care to the parents, then
15 the child will actually thrive when the child is
16 returned to the home and community.

17 CHIEF JUSTICE ROBERTS: What --

18 MR. GERSHENGORN: So I --

19 CHIEF JUSTICE ROBERTS: -- what --
20 what about the third preference, which is
21 preference for members of another tribe, how
22 does that have to do with keeping the Indian
23 child on the reservation?

24 MR. GERSHENGORN: So, Your Honor, as I
25 suggested the --

1 CHIEF JUSTICE ROBERTS: With the --
2 with the familiar environment as you suggested.

3 MR. GERSHENGORN: Sure. And -- and
4 the -- the -- the -- the quickest answer to
5 that, Your Honor, is that -- that in my
6 experience, or I should say my experience
7 talking with people who actually experienced
8 this, which is -- is as close as I've gotten, is
9 that the way this comes up most often actually
10 is tribes -- is individual Indians living on the
11 -- on the reservation of another.

12 And so they are building exactly that
13 community. This is not some random tribe
14 plucked from the ether that all of a sudden gets
15 a preference in the real world.

16 CHIEF JUSTICE ROBERTS: Well, there's
17 no limitation of that.

18 MR. GERSHENGORN: Absolutely, Your
19 Honor. And I am not here to say -- in fact, I
20 think I have conceded -- that it would be an
21 extraordinarily difficult as-applied challenge
22 in the kinds of, again, I'm using as a shorthand
23 the Maine to Arizona hypo, but I don't think
24 this is at all difficult on a facial challenge
25 in the real world where this plays out.

1 Because what's happening in the real
2 world, remember, we're -- we're talking about
3 not a single example of this appears in any of
4 the briefing that I have seen. Okay?

5 And so what's happening in the real
6 world is that individuals are -- are --
7 individual members are living on the
8 reservations of another and -- and then the
9 preference is going to that tribe.

10 CHIEF JUSTICE ROBERTS: Justice
11 Thomas?

12 Justice Alito?

13 Justice Sotomayor?

14 JUSTICE KAGAN: You, in your opening
15 statement, you said that this is a bad case to
16 deal with this question because the individual
17 plaintiffs don't have standing.

18 Why not?

19 MR. GERSHENGORN: Your Honor, thank
20 you. So they don't have standing for a number
21 of reasons. First, redressability. Right?

22 This is a law review article. It does
23 not bind a single state court judge that
24 actually adjudicates a -- a -- a -- a -- a state
25 court adoption proceeding.

1 Second, there is no injury in fact.
2 There is not a single individual plaintiff who
3 has had an adoption that existed from the time
4 of the amended complaint through the Fifth
5 Circuit judgment. And so there is no injury in
6 fact.

7 And, third, there has been some
8 suggestion that the APA, the challenge to the
9 APA, regs under the APA might save the equal
10 protection challenge. That is incorrect.

11 The injury to the Plaintiffs is coming
12 from the preferences in the statute. There is
13 nothing about the challenge to the regs that
14 eliminates the preferences in the statute or the
15 definition of Indian child. And so there is no
16 standing on the equal protection side for --

17 JUSTICE KAGAN: Does it make a
18 difference that our ruling would bind state
19 officials?

20 MR. GERSHENGORN: Absolutely not, Your
21 Honor. The -- the Court has been crystal clear
22 that standing needs -- that standing needs to be
23 established in the lower court.

24 Every case would have standing. There
25 would be no advisory opinions because, of

1 course, what this Court says binds everybody.

2 And so the fact that -- that it's made
3 it this far for an erroneous standing ruling
4 does not cure the -- the standing problem that
5 existed at the start.

6 And then I will say, although Your
7 Honor asked me about individuals, Texas has no
8 equal protection rights here. Texas goes on and
9 on, we heard all the numbers this morning about
10 their injury. That's nice, but injury does not
11 create an equal protection right.

12 And basically what Texas's view would
13 do is completely eviscerate third-party
14 standing. Georgia v. McCollum could have been a
15 very short opinion. It could have just said
16 Texas is participating in an unconstitutional
17 scheme, thank you very much, but it didn't to
18 that.

19 It looked to see whether there were
20 third-party rights that Georgia could assert
21 that for some reason the third-party was
22 unlikely to assert.

23 And but regardless of whether teenage
24 drinkers or excluded jurors have a disincentive
25 to -- to bring court cases, that has no

1 application to the situation here where the
2 individual plaintiffs are in court litigating.

3 So there is no justification for Texas
4 to assert rights. And obviously the *parens*
5 *patriae* is not available against the federal
6 government. So there is no standing, in
7 addition to the fact that the preferences that
8 have most troubled, for example, Justice
9 Kavanaugh and Justice Barrett, they were never
10 applied to any -- like, it's like standing on
11 standing on standing problems. It's like an
12 inverse of turtles all the way down. It's like
13 the absence of turtles anywhere.

14 I need a better metaphor.

15 JUSTICE KAGAN: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch?

18 JUSTICE GORSUCH: You haven't had a
19 chance to address the commandeering arguments in
20 particular with respect to the active efforts
21 provision.

22 MR. GERSHENGORN: So the active
23 efforts provision, I think I would say two
24 things on that.

25 First of all, the main point from our

1 perspective is that, and this is at Footnote 44
2 of -- Footnote 54 on page 85 of our brief, is
3 that it applies even, evenhandedly to -- this
4 does not single out Texas or does not single out
5 states for particular treatment. It applies
6 just as much in private placements and that's
7 set forth in the brief.

8 I also think that it is -- it is right
9 to view this as a situation in which a private
10 right is created. You have the -- the
11 individual Indian child. The tribe has a right
12 to -- you know, to -- to have the placement done
13 only after active efforts are -- you know,
14 active efforts are done.

15 And so I -- I think that with respect
16 to the active efforts provisions, under this
17 Court's case law, a provision that applies
18 even-handedly to private parties and to states
19 and creates private rights is -- is not
20 commandeering -- not impermissible
21 commandeering.

22 JUSTICE GORSUCH: I think we heard
23 from Texas that it disproportionately affects
24 them because most of these are initiated by
25 state entities and also that they'd have to do

1 some work, even in the event of a
2 private-initiated suit.

3 MR. GERSHENGORN: Yeah, I think, Your
4 Honor, that way madness lies. If this Court is
5 going to evaluate even-handed restrictions to
6 see whether, on balance, they affect more states
7 than private parties, we've really extended
8 the -- you know, the anti-commandeering doctrine
9 and I think the -- this Court's caseload quite
10 substantially because, you know, what the -- you
11 know, it's one thing to say -- you know, not to
12 mention cases like *Reno v. Condon*. I mean, once
13 you start to say, yes, it regulates
14 even-handedly, yes, in the real world, there are
15 private and state parties at issue, but we're
16 going to look to it and say it more often
17 affects, you know, states -- and I think *Reno v.*
18 *Condon* is sort of against that. I think that
19 was one where the state may have been more
20 affected. But, in any event, I don't think that
21 that's a sensible line that this Court could
22 ever draw to look at, statute by statute, in the
23 real world, does this affect states more than
24 private citizens.

25 JUSTICE GORSUCH: Is there any

1 inhibition to a private party raising an
2 as-applied equal protection challenge to the
3 third preference in state court litigation?

4 MR. GERSHENGORN: Absolutely not.

5 JUSTICE GORSUCH: And it hasn't
6 happened in 40 years that you're aware of?

7 MR. GERSHENGORN: I'll just say it has
8 not been brought to our attention either as
9 we've done our research or the other side. As
10 Your Honor knows, recordkeeping in family law
11 cases is tricky, but I'm not aware -- I'm not
12 aware of an Equal Protection Clause challenge to
13 the third placement. And, indeed, I just want
14 to reemphasize, as I said before, it has not
15 been applied to any of the plaintiffs here.

16 JUSTICE GORSUCH: And, finally, I
17 understand this Court sometimes speaks when
18 Congress hasn't in Indian affairs, but -- but,
19 here, we have a statute by Congress, and are you
20 aware of any time this Court in 200 years has
21 struck down as facially invalid an exercise of
22 Congress's plenary powers over Indian affairs?

23 MR. GERSHENGORN: I am not.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh?

1 JUSTICE KAVANAUGH: Yeah, two
2 questions. First, you mentioned the average age
3 is six and a half. I assume that means there
4 are hundreds or thousands of children who are
5 relative newborns, one, two, three, over the
6 years, who are affected by this statute.
7 There's no age cutoff in the statute, or are you
8 -- correct?

9 MR. GERSHENGORN: There is no age
10 cutoff in the statute.

11 JUSTICE KAVANAUGH: And are you aware
12 that it's been applied differently with newborns
13 or --

14 MR. GERSHENGORN: So, Your Honor --

15 JUSTICE KAVANAUGH: -- younger
16 children?

17 MR. GERSHENGORN: -- that's a trickier
18 question because -- I mean, that's one that I
19 don't think anybody has the empirical research
20 on. I think, as a practical matter, it would
21 surprise me if it weren't, that the statute, the
22 -- the good cause exception itself provides a
23 different application. It says that the wishes
24 of a -- of a child who is old enough to express
25 them are taken into account.

1 The cultural bonds that an older child
2 would have almost certainly would be taken into
3 account if the child comes in and says, you
4 know, I have a friend group, I have a sports
5 team, I have after school activities. So I --

6 JUSTICE KAVANAUGH: But you're not --
7 those are good points, but you're not aware that
8 that's reflected in any case law --

9 MR. GERSHENGORN: We're on a facial
10 challenge, Your Honor --

11 JUSTICE KAVANAUGH: Yeah.

12 MR. GERSHENGORN: -- so I'm not aware
13 of --

14 JUSTICE KAVANAUGH: Yeah.

15 MR. GERSHENGORN: -- anything in the
16 record one way or the other on that.

17 JUSTICE KAVANAUGH: Right.

18 MR. GERSHENGORN: That's the problem,
19 I think, not the solution.

20 JUSTICE KAVANAUGH: No, a fair point.

21 Secondly, on the land question, I just
22 want to get -- make sure this sentence from
23 Mancari -- that you can respond to it:
24 "Literally every piece of legislation dealing
25 with Indian tribes and reservations and

1 certainly all legislation dealing with BIA
2 single out for special treatment a constituency
3 of tribal Indians living on or near
4 reservations."

5 Is that accurate then? Is it still
6 accurate now?

7 MR. GERSHENGORN: I think it was -- I
8 think the scope of history of Indian law
9 suggests that it is not accurate and was never
10 accurate. They -- Congress has legislated for
11 tribal -- tribal members off the land and has
12 legislated for non-Indians under the Indian
13 powers from the beginning.

14 But, as I said, like, to me, the
15 bigger problem is -- is -- two -- two points,
16 Your Honor. One is I really think it's
17 important that Mancari isn't the root of the
18 Congress's special treatment of Indians. That
19 dates back to the text of the Constitution and
20 from the very first Trade and Intercourse Acts,
21 that -- that started, and then for the reasons
22 I've said and I won't repeat --

23 JUSTICE KAVANAUGH: That's fair.

24 MR. GERSHENGORN: -- I think land is
25 like -- is just a nonsensical -- a nonsensical

1 way to crosscut given what the Constitution was
2 trying to do vis-à-vis the Articles of
3 Confederation, given the history of the
4 treatment, and given --

5 JUSTICE KAVANAUGH: Your --

6 MR. GERSHENGORN: -- what this Court
7 has said over --

8 JUSTICE KAVANAUGH: -- your point --
9 sorry, because time --

10 MR. GERSHENGORN: I'm sorry. I'm
11 sorry.

12 JUSTICE KAVANAUGH: -- is running.
13 Your -- you point is the sentence is not
14 accurate? I mean, the tip-off should have been
15 the word "literally," I suppose, but it's in
16 there.

17 (Laughter.)

18 JUSTICE KAVANAUGH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 JUSTICE BARRETT: Active efforts, I'm
22 just trying to get a picture for how this works.
23 You're saying it applies to private parties and
24 the state. And this is just because I'm having
25 a difficult time imagining how this actually

1 happens on the ground.

2 You have to show that efforts have
3 been made to provide remedial services and
4 rehabilitation programs designed to prevent the
5 breakup of the Indian family. Who -- I mean,
6 Texas says, well, that's -- those are state-run
7 programs that would be those efforts, like the
8 rehabilitation.

9 MR. GERSHENGORN: Yeah.

10 JUSTICE BARRETT: How does that work
11 in the context --

12 MR. GERSHENGORN: So, Your Honor --

13 JUSTICE BARRETT: -- of a private
14 party?

15 MR. GERSHENGORN: -- I have to confess
16 I don't know, and I -- I apologize for that.

17 JUSTICE BARRETT: No.

18 MR. GERSHENGORN: I don't know how
19 that works in the real world in private
20 placements. It doesn't seem to me that it
21 inevitably has to go through the state services,
22 but the candid answer to your question is I just
23 don't know.

24 JUSTICE BARRETT: Okay. And then one
25 other quick question. Would your client have

1 any objection -- I -- I asked General Stone,
2 okay, well, one -- one argument that the
3 government makes is this isn't commandeering
4 because you can walk away. You know, you can
5 decide not to do this. Would your client have
6 any objection then if the State of Texas --
7 General Stone said our substantive law requires
8 us to undertake efforts to place children in
9 foster care in these circumstances, and it would
10 be unmanageable for us to discern when a child
11 is Indian or a member of a tribe or not?

12 Let's imagine Texas says, okay, we
13 want to walk away, we don't want to engage in
14 these active efforts, so we're just going to get
15 out of the business, and if we can discern that
16 a child is a member of a tribe, our agencies
17 will not be involved in placing the children in
18 foster care.

19 MR. GERSHENGORN: So, Your Honor, I --
20 I mean, I think that would be a disaster on the
21 ground --

22 JUSTICE BARRETT: But -- but could --

23 MR. GERSHENGORN: -- if that's what
24 Your Honor is asking.

25 JUSTICE BARRETT: -- but would it be

1 legal for Texas to do that? Would there be an
2 equal protection challenge that someone could
3 bring against Texas for treating Indian children
4 differently when it comes to foster placement?

5 I mean, you're saying --

6 MR. GERSHENGORN: I don't -- yeah.

7 JUSTICE BARRETT: -- that there would
8 be political consequences or practical
9 consequences to Texas walking away from foster
10 care. And I agree.

11 MR. GERSHENGORN: Yeah.

12 JUSTICE BARRETT: And General Stone
13 made that point. I guess what I'm --

14 MR. GERSHENGORN: I think it would be
15 hard to argue, Your Honor -- I'm sorry to cut
16 you off. Finish your question.

17 JUSTICE BARRETT: Oh, no, I was just
18 going to say, but what I'm asking is, if we're
19 thinking about whether Texas has a legal choice,
20 it --

21 MR. GERSHENGORN: Yeah.

22 JUSTICE BARRETT: -- there might be
23 practical considerations. I guess I'm trying to
24 figure out is this really voluntary --

25 MR. GERSHENGORN: So I think I would

1 have to say, Your Honor, given that there were
2 no -- for the first 150 some odd years of our
3 country, there was no childcare system at all,
4 that it would be hard for me to say that Texas
5 is constitutionally required to have one.

6 But that's --

7 JUSTICE BARRETT: But, if they have
8 one, could they cut Indian children out of it,
9 is my question? Because they don't have to --

10 MR. GERSHENGORN: No. I think --

11 JUSTICE BARRETT: -- obey ICWA with
12 respect to -- or follow --

13 MR. GERSHENGORN: I think, if Texas --
14 I think that would raise serious equal
15 protection problems if that --

16 JUSTICE BARRETT: So they don't have a
17 choice then --

18 MR. GERSHENGORN: Well, they have --

19 JUSTICE BARRETT: -- about complying?

20 MR. GERSHENGORN: -- a choice whether
21 to participate in the proceedings at all. They
22 may or may -- they -- what they may not be able
23 to do is say I'm doing it only for non-Indian
24 children.

25 JUSTICE BARRETT: Participate in

1 proceedings --

2 MR. GERSHENGORN: In -- in --

3 JUSTICE BARRETT: -- you mean in
4 foster care?

5 MR. GERSHENGORN: Correct.

6 JUSTICE BARRETT: In the foster care
7 system?

8 MR. GERSHENGORN: Correct. I don't
9 think there's any constitutional requirement
10 they have a foster care system --

11 JUSTICE BARRETT: But, if they have a
12 foster care system, they couldn't say because of
13 what ICWA requires us to undertake in these
14 active efforts and the -- you know, they
15 complain about the recordkeeping, we just want
16 none of that, so we're going to walk away from
17 that, we're not going to let the federal
18 government impose those obligations on us?

19 MR. GERSHENGORN: So I think that's
20 right, but I have to say, of all the answers
21 I've given today, that's the one I'm least
22 confident of.

23 (Laughter.)

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: Yeah. So is the
3 reason that you, in response to Justice Barrett,
4 the first part of her question, said that you
5 don't really know the details of how ICWA would
6 play out in the ways that she indicated is
7 because we're here on a facial challenge and not
8 an as-applied challenge? You focused on that a
9 couple times.

10 MR. GERSHENGORN: I think it's most
11 honest to say yes, compounded by my own
12 ignorance.

13 (Laughter.)

14 JUSTICE JACKSON: Okay. Well, can you
15 just help me to understand the implications of
16 the facial versus as-applied --

17 MR. GERSHENGORN: Yes.

18 JUSTICE JACKSON: -- nature of the
19 challenge that's being --

20 MR. GERSHENGORN: Sure.

21 JUSTICE JACKSON: -- that's being
22 brought here?

23 MR. GERSHENGORN: I think it comes in
24 -- in two important ways. First of all, I think
25 it completely changes the standard of review

1 that this Court -- that this Court uses. What
2 the Court has said in facial challenges is
3 statutes -- congressional statutes survive if
4 they have a plainly legitimate scope. And so I
5 think that, like, it completely changes the way
6 we talk about, for example, the -- the third --
7 the third preference.

8 And, you know, then I think, on the
9 flip side, in addition to sort of the change in
10 legal standard, it changes how we talk about it.
11 What we are talking about here is a series of
12 hypotheticals. Honestly, we don't even have the
13 facts of the individual cases before us.
14 Remember, these aren't childcare proceedings. I
15 mean, there's a debate about -- about Child P,
16 and then there's an amicus brief from the
17 grandmother. They're -- they're presenting
18 starkly different views of what happened.

19 The reason we're doing this is because
20 we're on facial challenge. Right? How this
21 plays out in the real world, what the limits
22 are, this is a very, very difficult area of the
23 law as the last two or three hours have shown.

24 And -- and to decide it on the basis
25 of hypotheticals that never arise in the real

1 world and yet take away a statute that has made
2 such a meaningful difference for so many
3 children seems to me just like not the way this
4 Court should be deciding questions.

5 Go back to what I said at the start.
6 Deciding a facial challenge to a statute in a
7 situation where there is no standing seems to me
8 like a very poor way to resolve major challenges
9 to critical legislation.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel. The case is submitted -- no? I'm
12 sorry, Mr. McGill.

13 (Laughter.)

14 CHIEF JUSTICE ROBERTS: It is late.

15 REBUTTAL ARGUMENT OF MATTHEW D. MCGILL
16 ON BEHALF OF CHAD EVERET BRACKEEN, ET AL.

17 MR. MCGILL: Thank you very much, Mr.
18 Chief Justice. I will take the hint.

19 (Laughter.)

20 MR. MCGILL: I -- I -- I want to start
21 with how this works in practice. I assure you
22 it is not at all hypothetical. It starts with
23 the Brackeens and families like them being on a
24 list of willing foster care providers.

25 Joint Appendix 108 says we are willing

1 to be foster parents for other children in the
2 future. When a child comes into the foster care
3 system, the preferences are applied. That's
4 1915(b).

5 The final rule is applied. The good
6 cause requirement to the final rule is applied.
7 And it is applied each and every time an Indian
8 child comes into the system. This is not like
9 Halley's Comet. It comes around a lot.

10 In Texas alone, in -- in Footnote 4 of
11 the district court opinion, 39 children, Indian
12 children in the state foster care system. Joint
13 Appendix 108, Texas alleges this happens several
14 times a year.

15 How does the good cause requirement
16 get applied on the ground? I would ask the
17 Court to please look at the -- the court of
18 appeals decision in YRJ's case called Interest
19 of YRJ.

20 It says that seeking to establish good
21 cause for not following the placement
22 preferences, the -- the party must bring forth
23 by clear and convincing evidence of good cause,
24 that good cause must be based on at least one of
25 several considerations.

1 My friend on the other side says this
2 is a disarray in the state courts. I would
3 respectfully suggest it is regulatory design.

4 The government, in any event, has
5 conceded that this is intended to override the
6 normal application of the best interest tests.
7 We heard a little bit about the third
8 preference. The government suggests that it
9 applies to maybe only related tribes. We know
10 why it applies. It's in this Court's decision
11 in Holyfield.

12 There is a federal policy to send
13 Indian children to the Indian community, not
14 their community, as the government seeks to
15 alter it in the brief, the Indian -- Indian
16 community writ large.

17 We heard that the proprietary interest
18 is maybe just a duty of protection. I would
19 submit YRJ was a citizen of Texas before she was
20 given her -- her certificate of Indian blood.
21 Texas has at least as much proprietary interest
22 as the Navajo Nation does here.

23 The third preference and the
24 biological component of the Indian child
25 definition is the smoking gun textual evidence

1 here that Congress was acting with a racial
2 purpose.

3 And it's backstopped by the House
4 Report, which talks about identifying the
5 children who have common blood. It says that
6 blood relationship is the very touchstone of the
7 ability to remain, to enjoy the benefits of a
8 tribe.

9 The government here is making, in
10 fact, the same argument it made in Rice on the
11 equal protection point. You can see that from
12 Justice Ginsburg's one paragraph dissent. But
13 there's one notable exception.

14 In Rice at oral argument the
15 government was prepared to -- to concede that
16 these preferences could not be applied in the
17 outer world. It -- and it recognized that this
18 distinction was rooted in Mancari itself.

19 So that's why Rice concludes that the
20 administration of state laws by a state agency
21 is that outer world.

22 It's the new and larger dimension to
23 which Mancari could not possibly be applied.
24 That -- the government here is even broader than
25 it made in Rice. And it can't be squared with

1 Rice's holding that a tribal classification can
2 be a proxy for race.

3 The classification was political in
4 Mancari because it directly advanced tribes'
5 ability to govern themselves. The justice in
6 treasury hypotheticals, Justice Kavanaugh,
7 present more difficult questions. It was
8 conceded because the tie to self-governance in
9 those cases is -- is much more attenuated.

10 Rice held that the Hawaii statute's
11 advancement of indigenous self-government was
12 insufficient to make that classification
13 political because it operated in the sphere of
14 administration of state laws by a state agency.

15 ICWA has no connection to tribal
16 government at all. Whether YRJ is adopted by
17 the Brackeens will not affect one iota the
18 Navajo Nation's ability to pass its own laws or
19 to govern themselves. It doesn't apply on
20 Indian lands at all.

21 It doesn't even affect tribal
22 existence. She is already a member of the
23 Navajo Nation, and will remain so.

24 YRJ is subjected to a different legal
25 standard here based on a status that she has

1 zero ability to control. That differing legal
2 standard, the placement preferences, is at best
3 a set of stereotypes about what is best for the
4 child that's -- that has Indian ancestry.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, at 1:15 p.m., the case was
8 submitted.)

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