Brackeen v. Haaland
Consolidated Docket 21-376
Excerpted Oral Argument
11/8/2022

P.53:8-25; 54:1-3. [SCOTUS, Jackson, J.]

With respect to commandeering, where Justice Barrett took you, **do you have a case that is older than the early 1990's related to the commandeering principle**? Is that the first time – I tried to look back to figure out where anti-commandeering came from as a constitutional concept?

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

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

P.54:4-9. [Brackeen Counsel, McGill]

Your Honor, **the Court's anti-commandeering cases recognize that the doctrine arises from the structure of the Constitution and the Tenth Amendment**. That was obviously recognized fully by ***New York v. United States***.

P.55:16-25; 56:1-9. [Texas Solicitor General Stone]

[T]his Court has upheld only three kinds of laws even under a plenary congressional power over Indian tribes: *first*, those regulating trade or implementing treaties with tribes in the ordinary, original understandings of those clauses; ***second,*** those applying to Indians within U.S. territories or on Indian lands ['Indian country']; and ***third*,** those regulating tribal governments as such.

ICWA far exceeds this plenary power, applying only to child custody proceedings in state courts off reservations. Even if Congress could establish such a scheme, it cannot order states to enforce it. **ICWA issues a dozen commands to states or their officials. Each obscures federal accountability for ICWA, and each foists uncompensated costs on to states**. Each is, therefore, prohibit under *Murphy*.

P.56:16-17. [SCOTUS, Thomas, J.]

I think it would be good to get an explanation of your standing.

P.57:19-25; 58:1-25. [Texas Solicitor General Stone]

First and foremost, **consistent with *West Virginia v. EPA*, from last term, Texas is, in fact, the regulated party, the party obligated to implement ICWA from beginning to end**.

As this Court put it in *West Virginia*, the fact that West Virginia and similar states were the ones who were required to cut emissions and otherwise alter their energy distribution, that was enough to leave 'little doubt' as to their standing for the entirety of the clean power plan.

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

And then, finally, **speaking as to their specific equal protection injury**, aside from the fact that **it costs us money to implement the equal protection violating provisions**, […] **we have to determine whether or not an individual is an Indian child pursuant to the regulations and the statute**.

[…T]her's a unique conjunction of constitutional obligations here that **because this Court has held in *Adarand* that the federal equal protection component of the Fifth Amendment and the Fourteenth Amendment's Equal Protection Clause essentially have the same commands**, **any command by the federal government that violates the Fifth Amendment, that imposes a mandatory requirement on states to essentially carry out that equal protection violative component, requires the states to violate equal protection**.

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

P.60:5-9. [Texas Solicitor General Stone]

We do not view these commands as permissible preemption under *NCAA v. Murphy*, but as commands to the states. Those [are] commands from the federal government.

P.60:24-25; 61:1-5. [Texas Solicitor General Stone]

[B]ecause that Fifth Amendment equal protection violation is coterminous with Texas' equal protection requirements, if Texas implements the Fifth Amendment violation, it itself violates the Fourteenth Amendment because they are, in fact coterminous.

P.61:11-15. [SCOTUS, Barrett, J.]

[I]s th[e] active efforts provision, one that imposes an obligation on the states alone, or its it something that could also fall on private agencies or private parties?

P.61:16-25; 62:1-6. [Texas Solicitor General Stone]

Well, **the final rules preamble […] states that the active efforts provision in ICWA was intended to make states provide substantive services to Indian families**. It comes out in **express language to make states, in, fact, incur that cost to provide social services**.

That's the heart of what Murphy was cautioning about, is that specifically a command best understood as **requiring a state to do a thing, especially when it either hides political accountability or foists uncompensated costs on the states, is in the heartland of the anti-commandeering doctrine**.

P.64:15-25; 65:1. [SCOTUS, Jackson, J.]

I understood from *New York v. United States*, that anti-commandeering rests on the premise that Congress has the power to regulate individuals and not states, which may well be true as a general matter, but, in terms of Indian affairs, we have long interpreted the Constitution to give Congress plenary authority precisely because the Constitution seems to be structured to give Congress, the federal government, power at the expense of the states with respect to Indian affairs.

P.66:11-25; 67:1-8. [SCOTUS, Gorsuch, J.]

I want to understand your commandeering argument. It seems like it's centrally related to two rather modest aspects of ICWA. One is the recordkeeping requirement […a]nd the other major one that you cite […] is the active efforts provision.

[…] And with respect to active efforts, […] **does it apply equally to whomever is bring the action in state court, whether it's the state as it is sometimes or private parties as it is sometimes?** That active efforts requirement, does it apply to both equally?

P.67:9; 24-24; 68:1-7. [Texas Solicitor General Stone]

To both yes; equally, no.

[I]n *Murphy*, the Court said the way that the Court looks at it, *is this better looked at as a regulation of the sovereign or instead as something regulating private*. […] The active efforts provision specifically speaks to what a state court may do with its official power.

P.71:14-25; 72:1-13. [Texas Solicitor General Stone]

Congress may act if it is in one of three essentially parcels of power.

One of them isn't related to geography at all, for example, the exercise of the **treaty power,** the exercise of the **commerce power**. Of course, the exercise of the **territory clause** would be geographically related.

The second, […] as this Court has recognized, **the power goes specifically to the soil and the people within these limits** speaking of **Indian country**.

The third is the power that Congress has essentially **to act on Indian governments as governments**.

[…] **If Congress is acting pursuant to one of those three components, then it falls comfortably either within the Congress' enumerated powers as originally understood, or the plenary power**…

P.72:25; 73:1-3. [SCOTUS, Kagan, J.]

[T]here's no place we've said these are the three categories that define what the plenary power means, correct?

P.73:10-16. [Texas Solicitor General Stone]

[T]he U.S. Government enjoys essentially a complete power that tribal immunity or tribal sovereignty exists at Congress's sufferance. **Of course, to say something exists at Congress's sufferance is to say they have something like an absolute power**.

P.73:17-25; 74:1-6. [SCOTUS, Kagan, J.]

Yeah. I guess the only point I was making, **I'm sure that we can find places where the Court has said that Congress has power over each of these areas, but I don't think you'll be able to find a place where the Court has said what the plenary power means is these three things and these three things alone and the plenary power doesn't extend further**, because, after all, the Court has […] and I don't really believe in […] reading our opinions like statutes.

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

P.74:16-18. [Texas Solicitor General Stone]

First, **we agree that we are describing a power that has already left Article I constitutional bounds**…

P.76:2-25; 77:1-9. [Texas Solicitor General Stone]

[**R]egarding the trust obligation in *Menominee Tribe of Wisconsin*, or *Menominee Band of Wisconsin Indian*, and *Jicarilla Apache Nation*, this Court made clear that, of course, the Court has sometimes described a guardianship and ward relationship, a trust relationship**.

[…] But the obligations underneath that trust […] this is a core component of Jicarilla – come from positive law. They come from statutes which dictate obligations by the United States. […] **However, they do not have a common law component where because there is, in fact, a trust, a trust relationship, that, therefore, the United States has plenary power to do as it wishes to Indians wherever**.

So regarding the historical understanding of intercourse, speaking specifically about **Justice Story's commentaries**, which my friends on the other side cite, **he speaks about commerce and then speaks about trade and intercourse and compares intercourse with navigation**, just as this Court did in *Gibbons v. Ogden*, which is to say, in Story's example, **a rule […] about how foreign vessels are to dock in the United States, cover over channels of commerce**.

At no point did Story comment on their being a general Indian affairs power.

P. 104:4-21. [USG Solicitor General, Kneedler]

ICWA is a valid exercise of Congress's power over Indian affairs in several respects. That power is grounded in the text of the Constitution, including the Indian Commerce Clause. **It is grounded as well in the constitutional structure** in which Indian tribes occupy a unique status as dependent sovereigns to which the United States owes a duty of protection, as this Court observed in *Kagama*, **derives in large measure from the fact that the**

national government and the states aiding it, acting through treaty and war powers, diminished the tribes' ability put them in a position of dependency, and as this Court said in *Kagama*, *Seber*, and other cases, […] **gave rise to a duty of protection, which in turn encompassed a power of protection**.

P. 105:6-14.

Petitioners' plea to this Court to set aside ICWA on its face would […] also gravely undermine this Court's Indian jurisprudence by **carving up Congress's plenary power into discrete categories**, which this Court has never recognized.

P. 106:18-22. [SCOTUS, Alito, J.]

[I]f **the plenary power has no limits**, then, of course, there isn't any Article I issue for us to decide. **Does it really have no limits** in your view?

P. 105:23-106:7. [USG Solicitor General, Kneedler]

No. […ICWA…] **is […] rationally related to the fulfillment of Congress's unique obligations to Indians. [I]t is an implementation of the dependent status and the protection, whether that comes just from the Indian. Commerce Clause or the amalgamation of Congress's various powers**…

P. 106:14-15. [SCOTUS, Alito, J.]

So rationally relate, is that our usual rational basis test?

P. 116:20-107:6. [USG Solicitor General, Kneedler]

I think Congress's judgment – whether it does serve that purpose is entitled to **great deference**. […] I think it's important to recognize that Congress has acted over the two centuries since the adoption of the Constitution in pragmatic ways. […] And this Court has said that deference to Congress's judgment about what is reasonably essential to carry out the trust responsibility is called for.

P. 109:6-23. [USG Solicitor General, Kneedler]

I think there are at least two things to bear in mind about […] the plenary power. […] I think **Congress, when dealing with a tribe in its political capacity, has a great deal of power to diminish the tribe's or regulate the tribe's exercise of its governmental authority, like under the Indian Civil Rights Act, etc. That's dealing with the tribes as tribes in a political capacity**. **[sovereign-to-sovereign]**

I think **where Congress is addressing the protections for individual Indians**, either children, adults, whoever, […] **that's what triggers the formulation of the trust responsibility or the dependent status of tribes. It has to be reasonably related to Congress's unique obligations to Indians**.
[sovereign to individual Indian]

P. 110:1-2. [USG Solicitor General, Kneedler]

[W]hich means it has to be protective, not harming.

P. 112:25-113:6. [USG Solicitor General, Kneedler]

[W]hat **plenary power means**, I think […] that it means **[t]here's no subject matter that is completely off limits just because it's Indians. There is no geographic component which renders something completely off limits**.

P. 124:9-16. [SCOTUS, Sotomayor, J.]

So now the issue is one of policy. Where will you place the child among these competing competent custodians? […] And that goes to the judgment of – who should make that judgment, and what you're saying is Congress…

P. 125:8-25. [USG Solicitor General, Kneedler]

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

And […] the framework that it set up in ICWA was in the best interests of the child because Congress made a judgment that placing the child with the extended family, failing that, with the tribe, which is **a kinship community interest, […] that was in the best interests of the child**…

P.126:18-24. [SCOTUS, Roberts, J.]

[I]s **competence the threshold**, **or** in this priority standard, **is the agency allowed to consider the relative best interests of the two different proposed placements**?

P.126:23-127:9. [USG Solicitor General, Kneedler]

I think ordinarily not. […I]n removing a child from its parents, **the question is not whether** the child would be better off somewhere else because **parents have a fundamental right in parenting their children**.

[…] Congress didn't say this was a fundamental right of extended family or tribes, but it though it was a very important right that should be recognized and not lightly taken away.

P.127:19-23. [SCOTUS, Roberts, J.]

Is the trust relationship, trust responsibility that the federal government owes in this area, is that responsibility **owed to individual members of the tribe?**

P.127:24-128:25. [USG Solicitor General, Kneedler]

I think Congress can conclude that it is owed to both, and it traditionally has. Congress's power and the *Holliday* decision that was referred to previously […] is very instructive on this point [for] a number of reasons. It upheld Congress's ability to engage in the prohibition on liquor sales in that case off-reservation. **It rejected the proposition that just because the Indians there were citizens, that was beyond what Congress could do**. And it said that that could be upheld because it was an appropriate exercise of Congress's power.

But it also specifically rejected the argument that Congress can only deal with tribes. **It said tribes are made up of their members, of their constituents**. […**ICWA**…] **It operates on the basis of citizenship**, that the definition of Indian child is that the child must be a member of the tribe or, if not, […] the child has to be eligible for membership. **[equates tribal membership with tribal citizenship]**

P. 130:9-15. [SCOTUS, Kavanaugh, J.]

The third preference, for other Indian families, including families who are of a different tribe…[D]oes the third preference ever make a difference?

P. 132:2-17. [USG Solicitor General, Kneedler]

If you have a child who has a parent who's a member of two tribes, ICWA requires that one be selected as the primary tribe. [I]f for some reason there's not a suitable foster or adoptive parent who comes forward, the second tribe would be a logical place.

You also have situations where two tribes share the same reservation and there's a lot of interaction, intercourse between them. Or you have a situation where, you once had one great nation that is now divided up into discrete tribes on different reservations, but they have common cultural…

P. 132:20-25. [SCOTUS, Kavanaugh, J.]

I think, but tell me if you disagree, that Congress couldn't give a preference for white families for white children, for black families for black children, for Latino families for Latino children, for Asian families for Asian children.

P. 133:1. [USG Solicitor General, Kneedler]

Yeah.

P. 133:2-3. [SCOTUS, Kavanaugh, J.]

Do you agree with that?

P. 133:4-11. [USG Solicitor General, Kneedler]

[…] **Yes.**

That's purely based on race. [This is different b]ecause it has to do with Indian tribes.

P. 133:12-14. [SCOTUS, Kavanaugh, J.]

Including the third preference, which does not require it be of the same tribe?

P. 133:15-17. [USG Solicitor General, Kneedler]

It is a tribe with a political relationship to the United States.

P. 134:3-6. [SCOTUS, Barrett, J.]

[B]ut I thought the third preference would kick in and give preference to someone who – a couple that belonged to a different tribe altogether.

P. 134:10-14. [USG Solicitor General, Kneedler]

[I]t could, but ICWA operates on the basis of the child's primary tribe. […B] if you had a second tribe, that wouldn't come under the first or second preference. […] it would come under the third.

P.135:4-8. [SCOTUS, Barrett, J.]

[I]f you're thinking about that **from an equal protection point of view**, I mean, let's assume I agree with you that these are political classifications, this is just treating Indian tribes as fungible.

P. 135:13-136:18. [USG Solicitor General, Kneedler]

I don't think it rests on the idea that all tribes are fungible in the sense that they're all the same or that all their members are the same, but **what it does rest on is a recognition that each of those tribes has a political government-to-government relationship with the United States**. And they have that in common. The […] tribes have -- Congress certainly

thought this was true – some common cultural ties or practices or spiritual practices. […] **And it's not a property interest. Governments have an interest in their citizens and their children. […] It's not property**.

P. 136:22-137:10. [SCOTUS, Alito, J.]

[…] But **why isn't Mr. McGill right in referring to the concept that the tribes have a proprietary interest in children who are covered by ICWA? The children don't voluntarily join the tribe.** And in my hypothetical where the parents don't want the child to be treated as a member of the tribe, **this child is treated as an Indian under ICWA solely based on the child's status […] based on ancestry**.

P. 137:11-22. [USG Solicitor General, Kneedler]

[I]f the child is a member that is because either **the tribe automatically confers citizenship at birth**, which the United States does for – in some circumstances for a U.S. citizen abroad, if they give birth. It is not an unheard of proposition.

And the parallels between Congress's dealing with tribes and **Congress's dealing with foreign countries and foreign affairs** is very direct for these purposes. **It's dealing with another sovereign**.

P. 138:8-13. [USG Solicitor General, Kneedler]

Either citizenship could descend automatically at birth, **or** […] **when the child becomes 18**, the child might choose to be a member, which is another important consideration if the child is placed with somebody in the tribe.

P. 138:14-18. [SCOTUS, Alito, J.]

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

P. 138:19-25. [USG Solicitor General, Kneedler]

Interior's regulations explicating the good cause exception says that **the wishes of the child of a sufficient age for his preferences [are] to be taken into account**. That is a factor and perhaps a very important one.

P. 139:1-2. [SCOTUS, Alito, J.]

It's taken into account, but it's not dispositive.

P. 139: 3. [USG Solicitor General, Kneedler]

No…

P. 139:13-19. [USG Solicitor General, Kneedler]

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

P. 139:25-140:4-13. [SCOTUS, Alito, J.]

[**I]s rational basis the standard for all classifications that treat Indians differently** from other people, **even if the classification disfavors them?**

[…] Yeah, **in equal protection. What's the level of scrutiny for a classification that disfavors Indians, a rational basis?**

P. 140:15-25; P. 141:1-7. [USG Solicitor General, Kneedler]

[**I]f what Congress does is act on the tribe in a *political manner*, saying your powers are diminished or expanded, that's a *political classification*. And Congress can do things that tribes might think are not worthy**. **[UNLIMITED PLENARY POWER]**

But, if Congress is acting on *individual members of tribes* in a way that is harmful to them, I don't think that is rationally related to the fulfillment of Congress's obligations to the tribes. **[LIMITED PLENARY POWER SUBJECT TO EQUAL PROTECTION]**

That's […] I think an important marker that what Congress is doing has to be reasonably understood **as *promoting the welfare of the individuals* involved. I think that's an important limitation**…

P. 141:21-25; 142:1-5. [SCOTUS, Alito, J.]

[**T]hat sounds like a level of scrutiny that is different from ordinary rational basis review, and at least something more than ordinary rational basis […] ought to be applied**.

[D]oes that apply either way or only to classifications that disfavor Indians?

P. 142:6-14. [USG Solicitor General, Kneedler]

[…] **I think it comes up both with respect to** Article I, as it [is] rationally related to Congress's fulfillment of its power and then **a rational basis test for equal protection**, and they overlap…**But, under the Article I power, I think it doesn't cut both ways**.

P.145:5-21. [SCOTUS, Kagan, J.]

[Texas Solicitor] **General Stone says Congress has power where it is acting out of a particular treaty and its obligations, where its regulating on tribal lands, or where it's regulating tribal governments qua governments**. And **those are the three areas in which Congress has [enumerated] power**, and everything else is outside of Congress's power. […W]hat in Title 25 would that exclude?

P.145:11-12. [SCOTUS, Kagan, J.]

Congress's Article I powers, you know.

P. 147:15-25; 148:1-9. [USG Solicitor General, Kneedler]

If it's beyond the powers, is it racial discrimination? But I think that […] is essentially **the shackling of the federal government's powers under the Indian Commerce Clause or its more general powers of protection coming about from the exercise of the war and treaty powers**. That would be in the teeth of […] the framer's shedding of those shackles. **Whether those shackles were all under the Indian Commerce Clause or elsewhere, that was a deliberate choice by the framers to which Congress plenary power over Indian affairs**. That was reflected in the contemporary understanding and the Trade and Intercourse Act, which enacted criminal penalties for crimes – over the years, crimes by Indians against Indians. The classic intercourse or interaction between Indians and non-Indians.

P. 154:22-25; 155:1-4. [SCOTUS, Barrett, J.]

Are you struggling with those hypotheticals […] Are you finding those more difficult to answer because you would say that **there are some circumstances in which the classification of Indian operates more like a racial classification because it is unconnected to tribal sovereignty?**

P. 155:5. [USG Solicitor General, Kneedler] **Yes**.

P. 155:12:17. [SCOTUS, Barrett, J.]

If you move farther away from that [preferences for Indians in the BIA], if you're talking about Treasury, then would you say it operates as a political classification but doesn't satisfy rational basis scrutiny, or would you say it's a racial classification and fails strict scrutiny?

P.155:18-25; 156:1-12. [USG Solicitor General, Kneedler]

I think it's still a political classification, but perhaps an unreasonable one because there is, as the Court's cases that have looked at this, *Holliday* and others, there is […] at some point a proportionality aspect to it. Would other people in society be greatly adversely affected or something like that.

But, on the equal protection side, I think *Adarand* is a very good example of that because there was a **preference for contracting with**in a series of black, Asian, white – other **minority groups. It was expressed in racial terms, and the Court said that was subject to strict scrutiny**. […**T[hat's why it's important to look at the context in which Congress is acting**.

P.156:18-23. [SCOTUS, Barrett, J.]

[J]ust to clarify to make sure I understand your position, **sometimes the classification can operate as racial and sometimes it would be political, depending on the context in which Congress is acting**.

P.156:24-24; 157:8-19. [USG Solicitor General, Kneedler]

[**I]f it turns on tribal membership or tribal citizenship, then I think it is political in its essence**. […] **Otherwise, there could be strict scrutiny**.

P.157:25-158:2. [SCOTUS, Barrett, J.]

[I]t just seems to me that it's always going to be tied to tribal membership in some way.

P.158:7-17. [SCOTUS, Barrett, J.] (summarizing what Kneedler was saying about the Art. I issue):

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

P.158:18-25; 159:1-2. [USG Solicitor General, Kneedler]

I think there are built-in restraints. […**I]t's hard to articulate this because this Court has never struck down a statute of that sort. And with respect to the *Adarand* case, there was no express reference or supposition about tribal membership there**.

P.159:4. [SCOTUS, Barrett, J.]

But […] **on my Article I question**?

P.159:5-10. [USG Solicitor General, Kneedler]

No. [O]n the Article I question, I think plenary at its core means there are no […] subject matters, geographic areas categorically beyond its power.

P.159:11-14. [SCOTUS, Barrett, J.]

But external limits from the Constitution would apply, like equal protection, or in Seminole Tribe, state sovereign immunity?

P.159:15-18.; 20-25; 160:1-6. [USG Solicitor General, Kneedler]

Yes, they would apply. And […] I just want to reiterate that this doesn't just come from the Indian Commerce Clause.

[…] **There is the inherent power that comes from Congress's […] the federal government, which in turn comes from *constitutional powers, like the war power* and all of that renders the tribes dependent and, therefore, in need of protection**. And so I think it's very hard for this Court to lay down a standard rule about what's necessary to protect the tribes and to fulfill the obligation to the Indians.

P.161:1-11. [SCOTUS, Jackson, J.]

[H]ow much weight, if any, should we be giving to clear, direct statements from Congress that this was being pursuant to its understanding of its plenary authority as given it – given to it in the Constitution and that it was necessary from Congress's perspective to solve for the problem of these state welfare practices that were causing harm to Indian children given its responsibility as a trust relationship for Indian affairs?

P.161:12-25; 162:1-25; 163:1. [USG Solicitor General, Kneedler]

I think very, very great deference, and I think that is the message of cases like *Holliday* and *Perrin* and cases like that.

[…] It's set our in the beginning of ICWA itself. It starts by saying **Clause 3 of Article I provides that Congress shall have the power regulate commerce with Indians, and through and other authority it has plenary power**. **Congress is saying that, through statutes, treaties, etc. and the course of dealing with tribes, it has**

assumed the responsibility for the protection of Indians. Those are in [25 U.S.C.] 1901.

[25 U.S.C.] 1902 says that Congress hereby declares that it is the policy of this nation to protect the best interests of Indian children by establishing minimum standards in state child welfare proceedings because that was the problem they were addressing.

[…] It though that […] the protections and the framework it set out were in the best interests of the child. And if that displaces ordinary child welfare law in particular cases, **Congress made a judgment that the objective factors it set out, which take into account extended family and kinship principles, that family law has, but the way this statute implements them in state proceedings is in the best interests of Indian children, and that judgment by Congress based on extensive hearings is entitled to great deference**.

P.163:12-20. [Navajo Counsel, Geshengorn]

I want to emphasize three points at the start. First, Congress has plenary power over Indians, and there is no exception in that power for state court child custody proceedings. Since the founding, the health and safety of Indian children has been the province of the federal government and tribes, not the states.

[…] Second, Plaintiffs' equal protection claims should be rejected [b/c a]facial challenge in a case without standing is just about the worst way to consider the constitutionality of a major federal statute. […] **ICWA** draws distinctions that are political three times over; it applies only to tribes that the federal government has recognized, it incorporates membership criteria established by sovereign tribes, and **it relies on the political decisions of parents to remain tribal members**.

Third, **ICWA protects the best interests of children**. It adopts a system of structured decisionmaking that combines evidence-based presumptions with flexibility to make individualized determinations. It protects child safety, facilitates access to critical remedial services to keep families intact, and it works to keep families – keep children with their families and communities.

P.167:3-24. [Navajo Counsel, Geshengorn]

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

[…] **Obviously, when we're talking about plenary power, limits are hard to find**, but I will say this Court has identified some. […**W]hen Congress acts directly on Indians, the limits on plenary power, as opposed to the other provisions are hard to find**, but what Congress said in *Perrin* was that **when Congress acts on non-Indians to protect Indians, then there may be limits**.

P.168:9-169:25. [Navajo Counsel, Geshengorn]

The limit that does not exist is the one that's tied to land. […]. Congress has acted pursuant to other federal powers to do exactly what it did in ICWA. The rule that makes no sense is land. […] From the beginning, Congress has […] from the Trade and Intercourse Act forward, Congress has legislated off-reservation. It prohibited in the 1834 Act in Section 15 alienating the confidence of Indians. In the earlier acts, it required non-Indians to report Indian invasions to the federal government. It prohibited land sales by Indians on and off reservation. In the liquor sale context, what this Court said in *McGowan* was Congress has the authority to legislate wherever Indians may be. In *Holliday*, *Forty-Three Gallons*, *Perrin*, all those cases are off-reservation. In the treaty cases, this Court has seen in *Fishing Vessel*, in *Cougar Den*, those were off-reservation. And then the Indian Health Care Improvement Act, the Indian Housing – Native American Housing Assistance Program, the Indian Education Program, all of those are off-reservation.

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

P.182:4-15. [SCOTUS, Kagan, J.] (speaking to Navajo Counsel, Geshengorn):

It's obvious that when you remove 30 percent of children from a political community, you harm that political community. I think some of the strong feelings about this case come from a sense of, yes, but about the children? I mean, you do harm to the political community, **but are you saying that the political community is more important than the welfare of the children?**

P.182:18. [Navajo Counsel Geshengorn]

Yeah.

P.183:1-21. [Navajo Counsel, Geshengorn]

What Congress found was that it [ICWA] was in the best interests of the children. And the reason that Congress found that is because […] **Congress made the**

judgment and recognized that separating children from their families and communities too soon caused harm. I think it's important to recognize that the average age of people in ICWA is over six years old. […] These are children who have formed school mates, school bonds. They are children who are playing on sports teams. They are children who have interacted, have a group of friends. They've made connections in the community. And what ICWA realizes is that these children were being taken from their communities too soon.

P.184:7-11. [SCOTUS, Roberts, J.]

What about the third preference, which is a preference for members of another tribe? How does that have to do with keeping the Indian child on the reservation? With […] the familiar environment as you suggested?

P. 184:21-25; 185:1- . [Navajo Counsel, Geshengorn]

[T]he way this comes most often actually is tribes – is **individual Indians living on the reservation of another**. […] This is not some random tribe plucked from the ether that all of a sudden gets a preference in the real world.

P.185:4-5. [SCOTUS, Roberts, J.]

Well, there's no limitation of that.

P.185-6-11; 18-22. [Navajo Counsel, Geshengorn]

[…] **I've conceded that it would be an extraordinarily difficult as-applied challenge in the […] Maine to Arizona hypo, but** I don't think that this is at all difficult on a facial challenge in the real world where this plays out […].

And so what's happening in the real world is that individual members are living on the reservations of another and then the preference is going to that tribe.

P.189:5-8. [SCOTUS, Gorsuch, J.]

You haven't had a chance to address **the commandeering arguments in particular with respect to the active efforts provision**.

P.189:15-25; 190:1-8. [Navajo Counsel, Geshengorn]

[**I]t applies evenhandedly. […T]his does not single out Texas or does not single out states for particular treatment. It applies just as much in private placements**…

I also think that it is right to view this as a situation in which a private right is created. […] **The tribe has a right […] to have the placement done only after active efforts are done.**

I think that with respect to the active efforts provisions, under this Court's case law, a provision that applies evenhandedly to private parties and to states and creates private rights is not commandeering – not impermissible commandeering.

P.192:6-9. [SCOTUS, Gorsuch, J.]

[H]ere we have a statute by Congress, and are you aware of **any time this Court in 200 years has struck down as facially invalid an exercise of Congress's plenary powers over Indian affairs?**

P.192:10. [Navajo Counsel, Geshengorn]

I have not.

P.192:14-20. [SCOTUS, Kavanaugh, J.]

First, you mentioned that the average age is six and a half. I assume that means **there are hundreds of thousands of children who are relative newborns, one, two, three, over the years, who are affected by this statute. There's no age cutoff in the statute**, or are you correct?

P.192:21-22. [Navajo Counsel, Geshengorn]

There is no age cutoff in the statute.

P.192:23-25. [SCOTUS, Kavanaugh, J.]

[A]re you aware it's been applied differently with newborns?

P.193:9-17. [Navajo Counsel, Geshengorn]

[T]he good cause exception itself provides a different application. It says that the wishes of a child who is old enough to express them are taken into account. The cultural bonds that an older child would have almost certainly would be taken into account if the child comes in and says, you know, I have a friend group, I have a sports team, I have after school activities.

P.196:8-25; 197:1. [SCOTUS, Barrett, J.]

Active efforts […] You have to show that efforts have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian family.

[…T]hose are state-run programs that would be those efforts, like the rehabilitation. […] **How does that work in the context of a private party?**

P.197:3. [Navajo Counsel, Geshengorn]

I don't know.

P.197:14-25; 198:1-5; 12-16. [SCOTUS, Barrett, J.]

[O]ne argument that the government makes is this isn't commandeering because you can walk away. […] You can decide not to do this. […] Let's **imagine Texas says, okay, we want to walk away, we don't want to engage in these active efforts, so we're just going to get out of the business,** and **if we can discern that a child is a member of a tribe, our agencies will not be involved in placing the children in foster care**.

[…**W]ould it be legal for Texas do that? Would there be an equal protection challenge that someone could bring against Texas for treating Indian children different when it comes to foster placement?**

P.198:18. [Navajo Counsel, Geshengorn]

[**Y]eah.**

P.198:19-25. [SCOTUS, Barrett, J.]

[T]hat there would be political consequences or practical consequences to Texas walking away from foster care. **And I agree**. […] And General Stone made that point.

P. 199:5-7; 10-11. [SCOTUS, Barrett, J.]

[…I]f we're thinking about **whether Texas has a legal choice**, […] I guess I'm trying to figure out **is this really voluntary**?

P.199:16-17. [Navajo Counsel, Geshengorn]

[…I]t would be hard for me to say that Texas is constitutionally required to have one [a childcare system].

P.199:19-20. [SCOTUS, Barrett, J.]

[…**I]f they have one, could they cut Indian children out of it?**

P.200:1-2; 7-11. [Navajo Counsel, Geshengorn]

[…] **I think that would raise serious equal protection problems**. […A] choice whether to participate in the [foster care system] proceedings at all. […**W]hat they may not be able to do is say I'm doing it only for non-Indian children**.

P.200:20-22. [Navajo Counsel, Geshengorn]

I don't think there's any constitutional requirement they have a foster care system.

P.200:23-25; 201:1-5. [SCOTUS, Barrett, J.]

But, if they have a foster care system, they couldn't say because of what ICWA requires us to undertake in these active efforts and […] they complain about the recordkeeping, we just want none of that, so we're going to walk away from that, we're not going to let the federal government impose those obligations on us?

P.201:6-8. [Navajo Counsel, Geshengorn]

So I think that's right, but I have to say, of all the answers I've given today, that's the one I'm least confident of.