HOBBS STRAUS DEAN & WALKER

1899 L Street NW Suite 1200
Washington DC 20036

T 202.822.8282
F 202.296.8834

HOBBSSTRAUS.COM

MEMORANDUM

November 11, 2022

TO: TRIBAL CLIENTS

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP

RE: **U.S. Supreme Court Oral Argument in *Haaland v. Brackeen***

INTRODUCTION

On November 9, 2022, the U.S. Supreme Court held oral argument in *Haaland v. Brackeen*.[1] This case challenges the Indian Child Welfare Act (ICWA) on various constitutional grounds, including equal protection requirements, the anti-commandeering doctrine, and the non-delegation doctrine.[2] It also addresses Congress's constitutional authority to enact ICWA. Embedded in this case are important questions about when and for whom the federal government can act to benefit Indian people and tribes.

The oral argument lasted over three hours and included targeted questions from all of the Justices. The oral argument began with the parties challenging ICWA, referred to herein as "Plaintiffs," including Matthew McGill arguing on behalf of the potential adoptive families and Solicitor General Judd Stone arguing on behalf of the State of Texas. The oral argument then shifted to the parties defending ICWA, referred to herein as "Defendants," including Deputy Solicitor General Edwin Kneedler arguing on behalf of the federal defendants and Ian H. Gershengorn arguing on behalf of the intervening tribes. Audio and a transcript of the argument can be found on the Native American Rights Fund's website here.

[1] The following parties filed separate petitions for *certiorari* before the U.S. Supreme Court: (1) the United States in Case No. 21-376; (2) the Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians in Case No. 21-377 (note that the Navajo Nation also intervened in the litigation below); (3) the Brackeens and other non-Indian families that have sought or are seeking to foster or adopt Indian children and an Indian mother seeking to facilitate the adoption of her Indian child by a non-Indian family in Case No. 21-380; and (4) the State of Texas in Case No. 21-378. The Court granted all four petitions and consolidated the cases under Case No. 21-376.

[2] There was no discussion of the non-delegation doctrine during the oral argument.

KEY TAKEAWAYS

Multiple Justices asked questions about whether Plaintiffs had standing to bring suit. These standing questions were coupled with many questions about how ICWA functions in practice, only for the Justices to be reminded that this case is a facial challenge to ICWA and thus no facts were before the Court. For these reasons, the Court may choose to dispose of this case on standing grounds rather than delve into the complicated legal questions.

The substantive legal questions the Justices spent the most time on were whether Congress's constitutional Indian affairs powers authorized it to enact ICWA and whether ICWA complies with the Constitution's equal protection requirements as applied to Indian affairs through *Morton v. Mancari*, 417 U.S. 535 (1974). The Justices' questions and the parties' arguments often conflated these two questions, and it was sometimes not clear which issue they were addressing.

Justice Gorsuch was particularly interested in clarifying the scope of Congress's constitutional Indian affairs powers, with Justice Alito joining him in attempting to better understand the scope and any limitations on these powers. Most of the Justices acknowledged the long history and precedent recognizing Congress's broad and sweeping constitutional Indian affairs powers.

Justice Kavanaugh was especially interested in clarifying the relevant equal protection test for Indian affairs as set forth in *Mancari*—questioning both when federal actions are political rather than racial, and questioning the appropriate rational basis test to apply to political Indian affairs classifications. Again, Justice Alito joined him in asking questions designed to elicit potential tests from the parties. Justice Thomas indicated that people with Indian ancestry who are not otherwise tribally affiliated do not fall under the Indian affairs political classification, while Justice Sotomayor repeatedly analogized to the political nature of foreign affairs. Most of the Justices seemed to acknowledge that, at least in most circumstances, federal actions taken on behalf of tribes or Indians are political in nature.

Justice Kavanaugh repeatedly took issue with ICWA's third placement preference, placing an Indian child with an Indian family from a different tribe. He questioned both whether it was within Congress's Indian affairs powers and whether it was racial. Justice Roberts expressed concern about whether ICWA's

placement preferences subverted the best interests of the Indian child.

There was some discussion that a tie to furthering tribal self-government may be necessary—both in the context of the scope of Congress's constitutional Indian affairs powers and in the scope of the equal protection test under *Mancari*. Multiple Justices attempted to apply this test, and the parties themselves, including Defendants, seemed to acknowledge this potential limitation. Limiting the scope of *Mancari* or Congress's Indian affairs powers to actions designed to further tribal self-government could potentially call into question many federal statutes and programs, and it could be prone to misinterpretation and uneven application by the federal courts.

Last, Justice Barrett repeatedly raised concerns about whether ICWA, and specifically its active efforts requirements, commandeered states. Justice Jackson, on the other hand, posited that the traditional anti-commandeering doctrine may not apply to Indian affairs.

DISCUSSION

I. Whether Congress Had Constitutional Power to Enact ICWA

A. Parties' Arguments

Plaintiffs. Plaintiffs argued that Congress's Indian affairs powers are limited to on or near reservations, tribal self-governance, or regulation of commerce. The prospective adoptive parents argued the Constitution's Indian commerce clause authorizes Congress to regulate commerce, in the traditional sense, with Indians wherever located. They asserted that Congress's plenary powers over Indian affairs are limited to tribal self-government and do not apply to the regulation of Indians wherever located. When articulating what tribal self-government means, they referred to tribes' power to make their own laws and be ruled by them, a standard that has been interpreted narrowly by the Supreme Court in recent decades.

Plaintiffs argued that placement of children, especially with Indian families not of the same tribe under ICWA's third placement preference, does not sufficiently relate to tribal self-government to meet this standard.

Defendants. Defendants argued ICWA falls under Congress's broad plenary powers recognized in the text and structure of the Constitution, which supports the trust responsibility. They said no subject matter falls outside that plenary power, although external limitations such as equal protection requirements may apply to limit it.

B. Justices' Questions

Clarification of Test. Justice Gorsuch repeatedly brought the parties back to discussing the scope of Congress's power to act with regard to Indian affairs. He asked Plaintiffs what they were asking the Court to adopt and how he should write the opinion and measure the limits, noting that Plaintiffs did not take the position that Congress's powers extend only to reservations or never extend to domestic relations. He said the factors discussed by the parties were a "magic broth"—implying that these factors did not create a clear test. Justice Alito said that, if Congress's plenary powers do not mean "all" powers, it is hard to see where the limits are.

Justice Alito posed a hypothetical to the parties, asking whether prohibiting non-Indian couples from adopting Indian children would extend beyond Congress's plenary power. Justice Roberts asked whether Congress had authority to send limited vaccines to Indians only, and Justice Sotomayor raised this same hypothetical in the foreign affairs context. Defendants conceded that these situations would be harder to defend, but they did not clearly articulate why, and they said it would be hard for the Court to lay down a blanket rule without regard to the specific facts of a given case.

Narrow Reading. In posing equal protection questions, Justice Thomas said he was assuming for purposes of his questions that Congress's plenary powers extend to regulating tribal affairs and affairs on or near reservations.

Broad Plenary Power. Justice Barrett acknowledged the precedent broadly interpreting Congress's constitutional plenary powers with regard to Indian affairs, including a broad interpretation of the Indian commerce clause. Justice Jackson said the Court has always looked broadly at these powers, and that the Constitution is designed to ensure the federal government has authority over tribal affairs.

Authority to Implement Trust Responsibility. Justice Jackson said that the

federal government in restricting the exercise of tribal sovereignty took on a trust responsibility, and she asked whether Congress could carry out that trust responsibility. Justice Sotomayor said that for many years Congress has exercised its plenary powers to implement the trust obligation.

No Support for Three-Category Test. Justice Kagan said Congress's plenary powers have generally been interpreted broadly and that the Court has never limited them to the three categories Defendants provided. Justice Sotomayor similarly said there have been many cases addressing instances where Congress has legislated with respect to matters that are off Indian lands or addressed matters unrelated to tribal sovereign interests or commerce.

Not Limited by Geography. Justice Jackson questioned why Congress's power would be limited by geography, even if the measure for plenary powers is congressional action addressing tribal self-government. Justice Gorsuch asked Plaintiffs whether they acknowledged Congress has some power off Indian lands, noting the provision of healthcare off tribal lands and questioning why healthcare is different from family law matters related to education and childrearing. Justice Gorsuch noted the reality that reservation lands are checker boarded and that the federal government has played a role in removing Native children from their lands.

Application to Individual Indians. Justice Sotomayor asked whether Plaintiffs were suggesting Congress's plenary powers do not extend to regulating individual Indians, noting the many statues that do so. Justice Roberts similarly asked whether the trust responsibility extends to individual Indians or tribes.

Relevance of Tribal Self-Government. As Plaintiffs put forward a tribal-self government limitation on Congress's plenary powers, the Justices discussed what that test might look like in practice. Justice Jackson said that, if plenary powers are limited to tribal self-government, ICWA still meets this test, as Congress when enacting ICWA said it was a matter of tribal integrity. Justice Gorsuch similarly asked why ICWA does not satisfy the tribal self-government test Plaintiffs set out.

Whether Extends to Harmful Actions. Justice Gorsuch, Justice Sotomayor, and Justice Alito asked the parties whether Congress had authority to enact federal legislation requiring enrollment in boarding schools and thus harming tribes, attempting to elicit an explanation of why this would not be permitted within the context of a broader test.

Examples of Statutes that Would Fall. Justice Gorsuch said that Plaintiffs' position, especially regarding limited congressional power to act outside Indian lands, would take a "huge bite" out of Title 25, where the Indian affairs statutes are codified. He noted as examples urban Indian healthcare, off-reservation sacred sites, and environmental regulation with off-reservation impacts. He said such a test would keep the Court busy determining which statutes and federal benefits are unconstitutional. Justice Kagan similarly invited Defendants to list what in Title 25 would fall under Plaintiffs' test.

Federal Regulation of Family Law. Justice Gorsuch noted that the federal government regularly regulates family law, including for Native children.

Other Constitutional Powers. Justice Gorsuch asked Plaintiffs whether Congress could have enacted ICWA if it did so through a treaty or through its spending powers.

Interplay Between Plenary Power and Equal Protection. Justice Alito asked whether equal protection requirements might limit plenary powers. Justice Barrett asked whether there were internal limits on Congress's plenary powers, or whether there were only external limits, such as equal protection. Justice Jackson and Justice Roberts indicated their understanding that the question of plenary power asks whether Congress can act in the first place, and the question of equal protection is a separate question.

II. Whether ICWA Violates Equal Protection Requirements

A. Parties' Arguments

Plaintiffs. Plaintiffs argued there is a difference between regulating tribes' sovereign interests as polities, which would be political under *Mancari*, and regulating people with Indian blood, which would be racial. As examples of regulating tribes' sovereign interests, Plaintiffs listed Indian lands, treaty rights, internal affairs, and tribes' ability to govern themselves—and they highlighted as important that preferences operate on or near reservations and are tied to tribal self-government. They repeatedly said federal actions not tethered to tribal self-government would not satisfy *Mancari*. With regard to individual Indians, they said federal actions are only political when they address members of federally

recognized tribes because tribes are the political body.

Plaintiffs argued ICWA is racial rather than political because it applies off reservation and to children who are not tribal members. They also said ICWA is racial because it is not tethered to self-government, and especially ICWA's third placement preference.

Defendants. Defendants argued individual Indians are a political rather than racial classification due to their political connections with their tribes and the United States. Thus, they said, federal actions directed at tribal members or tied to tribal membership in some way are political. The defendant tribes acknowledged that actions taken towards non-member Indians could be racial.

Defendants further argued that *Mancari* requires federal actions directed at individual Indians to be rationally related to the fulfillment of the trust responsibility, as Congress assesses in its judgment. The federal defendants went on to argue that, when Congress deals with tribes in their political capacity, Congress is not so limited, and it may even diminish tribal exercise of sovereignty. The federal defendants conceded that, when a government action is unconnected to tribal sovereignty, it may not meet rational basis review. The tribal defendants at one point said there must be some link to tribal self-government to satisfy the *Mancari* rational basis test.

Defendants argued that ICWA is tied to tribal membership and thus is political rather than racial. They also argued that ICWA carries out important purposes in furtherance of the trust responsibility, including by building objective best interest tests into ICWA to replace states' subjective tests that were harming Indian children. With regard to the third placement preference, they said that members of tribes share a common political relationship with the United States, and they explained that non-member Indian families are usually within the Indian child's tribal community.

B. Justice's Questions

Clarification of *Mancari* Test. Justice Kavanaugh indicated his interest in establishing or understanding the scope of and limits to *Mancari*. He said the equal protection question is hard and that the Court must find a line between the constitutional values of tribal self-government and equal protection under the law.

Justice Alito similarly discussed the need to extract rules, asking about the appropriate level of equal protection scrutiny. Justice Barrett asked the parties to discuss when an action is political versus racial, and then how they satisfy the applicable level of review.

When the parties were unable to provide a workable test, the Justices presented hypotheticals in an effort to elicit an explanation of the tests they were applying. Justice Kavanaugh asked the parties whether an Indian hiring preference applicable outside the Bureau of Indian Affairs would satisfy *Mancari*. He also asked them whether a federal mandate for Indian students in state university admissions would satisfy *Mancari*. Defendants said these actions would be harder to defend, but they did not provide clear responses when Justice Kavanaugh asked them why.

Constitutional Basis for and Scope of Political Classification. Justice Gorsuch said that tribes are mentioned in the Constitution, including authorizing treaty-making, which indicates they are separate sovereigns and thus political rather than racial. Additionally, he said, the Supreme Court in *Mancari* said they are a political classification. Justice Jackson quoted *Mancari*'s language recognizing that the Constitution creates Indian affairs powers, and many of her questions highlighted that the structure of the Constitution alters doctrines like anti-commandeering and equal protection when applied to Indian affairs. In connection with this, Justice Jackson observed multiple times that the Constitution intentionally shifted Indian affairs powers away from the states and to the federal government exclusively.

Inherent Political Status of Tribes as Basis for and Scope of Political Classification. Justice Kagan said that, when the federal government regulates tribes, it regulates political entities, and there is a long history of the United States regulating tribes as such. She said that *Rice v. Cayetano*, a case in which a statute addressing Native Hawaiians was struck down on equal protection grounds, was different because Native Hawaiians were not a current-day political entity. Justice Sotomayor similarly highlighted Indians' ties to their tribes as the basis for their political status—saying ICWA addresses Indian children who are members of their tribes and children who are not yet members but whose membership follows their parents, like many foreign countries.

Indians Unaffiliated with Tribes as Racial. Justice Thomas said there is a

difference between regulating tribes and reservations as opposed to a person who "happens to have some Indian blood" but does not reside on a reservation, is not a tribal member, and is not associated with a tribe.

Relevance of Tribal Self-Government. As Plaintiffs framed whether a federal action furthered tribal self-government as relevant to the equal protection test, many of the Justices asked questions about how ICWA may or may not further tribal self-government. Justice Kagan distinguished *Rice* as lacking a political entity and thus not furthering self-government. Justice Kavanaugh asked why, for example, ensuring better education for children did not further tribal self-government. Justice Jackson asked who decides whether a federal action is tethered to tribal self-government. Justice Barrett asked whether there are circumstances where an action is racial because it is unconnected to tribal sovereignty.

Analogy to International Law for Political Status. Justice Sotomayor repeatedly asked the parties how ICWA is different from domestic requirements that implement international treaties with respect to family law matters, such as the Hague Convention. She said that, even when it is not in the best interests of the child, these international agreements can require the United States to send a child back. She said that Congress has foreign affairs powers that authorize it to legislate in this area, and she analogized to Congress's plenary powers over tribes and Indian children.

Relevance of On or Near Reservation. Justice Kavanaugh questioned whether *Mancari* supported limiting the political classification to federal actions singling out Indians living on or near reservations.

Traditional Rational Basis Test. Justice Alito asked Defendants whether the usual rational basis test applies to Indian affairs, telling them the standards they discussed sounded different from ordinary rational basis.

Third Placement Preference as Racial. Justice Barrett and Justice Alito questioned whether ICWA's third placement preference treats tribes as fungible. Justice Kavanaugh questioned whether it is racial rather than political. Justice Roberts questioned how it furthers the interest of keeping Indian children on their tribal lands, when a child could be placed with an Indian family very far away from his own tribe. Justice Gorsuch asked Defendants to confirm that no party has

ever brought an as-applied challenge to the third placement preference under equal protection.

Whether ICWA Subverts Best Interests of Indian Children. Justice Roberts asked whether ICWA prioritizes tribal communities raising Indian children over the Indian child's best interests or whether ICWA incorporates the best interest standard. Justice Alito asked whether tribes have a proprietary interest in Indian children. Justice Kavanaugh questioned whether a child could be placed under ICWA's third placement preference in contravention of his best interests. Justice Kagan noted that some have strong feelings because they think ICWA may place the interests of tribal communities over the interests of Indian children, asking Defendants to explain why this is not so.

Whether Good Cause Standard Helps ICWA Ensure Best Interests. Justice Thomas and Justice Roberts both asked the parties to explain ICWA's good cause standard that allows a state to place a child outside ICWA's placement preferences. Justice Roberts asked how state courts weigh the interests when applying this standard. Justice Alito asked whether Indian children or Indian parents can opt out of ICWA and its placement preferences.

Defer to Congressional Judgments. Justice Kagan said that, when Congress enacted ICWA, it said it did so to protect tribal political entities so that they could flourish. She said this is a decision for Congress to make. Justice Jackson similarly asked who decides whether there is a sufficient tie to tribal self-governance, urging that it is Congress rather than the courts that should decide. She further said that the Constitution gave Congress plenary powers over Indian affairs, and Congress weighed the interests in exercising those powers when enacting ICWA, and thus the Court should defer to Congress that it was necessary. Justice Sotomayor also said Congress should make judgment calls regarding reasonable Indian affairs measures rather than the Court. Justice Roberts similarly questioned who should weigh interests regarding Indian affairs.

III. Whether ICWA Violates the Anti-Commandeering Doctrine

A. Parties' Arguments

Plaintiffs. Plaintiffs claimed ICWA forces states to take burdensome actions in violation of the anti-commandeering doctrine. Plaintiffs argued that, in reality,

ICWA's active efforts requirements in a majority of cases will fall on the states and not private parties, and thus they are not evenhanded.

Defendants. Defendants said the Court should not look behind rules that apply evenhandedly to examine how those rules are actually applied, and ICWA's active efforts requirements apply evenhandedly to states and private parties.

B. Justices' Questions

Active Efforts as Commandeering. Justice Barrett repeatedly asked the parties to explain how ICWA's active efforts requirements work. She asked whether these requirements really fall on states in practice—both because it is usually states initiating the proceedings that trigger ICWA and because it is state social services that are used to provide active efforts. Justice Gorsuch asked Plaintiffs if active efforts requirements apply equally to any party bringing the ICWA-triggering action or whether in practice states must usually comply with them.

States' Option to Walk Away. Justice Barrett asked the parties whether a state could walk away from child custody proceedings such that ICWA would not apply to them. She then questioned whether a state's decision to not provide child welfare services to Indian children would put a state in violation of equal protection requirements.

Inapplicability of Anti-Commandeering Doctrine in Indian Affairs. Justice Jackson noted that the case law on the anti-commandeering doctrine is somewhat new, whereas Congress has long been recognized to have constitutional plenary powers in Indian affairs. She said that, because the Constitution gives Congress plenary powers over Indian affairs to the exclusion of states, it is not like other commandeering questions, where the anti-commandeering doctrine usually says the federal government can regulate individuals but not states. Justice Alito countered this line of thinking by posing the question of whether the federal government could require a state to enact legislation for Indians. Justice Jackson responded that the Constitution gave Congress Indian affairs powers at the expense of states, and Congress may be able to enact such legislation to address problematic state practices.

Other Examples. Justice Sotomayor posed a series of Indian law and other

statutes to Plaintiffs and asked whether they would violate the anti-commandeering doctrine under their test, demonstrating the impacts of that test.

Amendments to ICWA. In describing potential "nibbles" around the edges of ICWA that may be necessary, Justice Gorsuch noted anti-commandeering issues as potentially requiring a change.

IV. Whether Plaintiffs Had Standing

Prospective Adoptive Parents. Justice Gorsuch told the plaintiff prospective adoptive parents they had a standing problem, saying they sued federal officials rather than state actors and asking whether any of those federal officials could tell the state what to do. He said that should be the end of it.

Texas. Justice Thomas asked Texas why it was before the Court and whether it had standing, opening the door for Texas to claim the harms that support its anti-commandeering claims support its standing. Justice Sotomayor said that, if Texas has standing simply because it is required to enforce a federal statute it believes to be unconstitutional, that test would give states standing too often.

Redressability. Justice Kagan asked whether the required redressability, meaning the ability of the Court to resolve the issue, was present to create standing. She questioned whether redressability could be based on the fact that the Court's decision would be binding on states, opening the door for Defendants to explain that redressability must be present in the below court.

Facial Challenge. Justice Gorsuch, Justice Kagan, and Justice Barrett asked fact-based questions that ended up highlighting that the challenge to ICWA before the Court was facial rather than as-applied. This meant there were no facts to show how ICWA actually functions in practice. Justice Jackson reiterated that these questions were difficult to answer on a facial challenge.

CONCLUSION

We do not expect the Court to issue a decision soon, due to the complicated issues in the case and the length of the oral argument. However, the Court plans to hand down its opinion before July 1, 2023. Please let us know if you have any questions regarding the issues discussed in this report.