

# Four petitions on the constitutionality of the Indian Child Welfare Act

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This week we highlight cert petitions that ask the Supreme Court to consider, among other things, whether the Indian Child Welfare Act of 1978 violates equal protection under the Fifth Amendment and the anti-commandeering doctrine of the 10th Amendment and whether BB&T's arbitration agreement as to a predecessor bank's accountholders is valid under the Federal Arbitration Act.

Four petitions involve a decision by the en banc U.S. Court of Appeals for the 5th Circuit striking down some provisions of the Indian Child Welfare Act. Congress passed ICWA to respond to concerns that state child-welfare practices were causing large numbers of Native American children to be inappropriately removed from their families and tribes and placed with non-Native foster families or adoptive parents. ICWA established minimum federal standards for most child-custody proceedings involving Native American children.

In March 2018, three states and seven individuals challenged many provisions of ICWA as unconstitutional. Although the district court largely agreed with the challengers, the en banc 5th Circuit later upheld various provisions. However, the en banc 5th Circuit also affirmed — at times with a majority, at times by an equally divided court — other rulings by the district court. According to the 5th Circuit, some ICWA provisions violate the 10th Amendment because they impermissibly “commandeer” the states. Those provisions include, among others, a requirement that state agencies bear the cost and burden of providing expert testimony to justify placing Native children in foster care, a requirement that state agencies provide remedial services to Native families, and a requirement that state agencies maintain certain child-placement records. The 5th Circuit also affirmed the district court’s judgment that ICWA’s preference for adoptive placement with “other Indian families” and “Indian foster home[s]” violates the equal-protection component of the Fifth Amendment.

In *Haaland v. Brackeen*, the federal government asks the justices to review and to reverse the 5th Circuit. In addition to disputing the rulings under the Fifth and 10th Amendments, the government argues that the individual plaintiffs do not have legal standing to challenge ICWA’s placement preferences for “other Indian families” and “Indian foster home[s].” In *Cherokee Nation v. Brackeen*, the Cherokee Nation and three other tribes have filed a companion petition in defense of ICWA’s constitutionality. In *Texas v. Haaland*, Texas has filed a petition asking the justices to review ICWA provisions that, in the state’s view, the 5th Circuit erroneously upheld. Finally, in *Brackeen v. Haaland*, the individual challengers have filed their own petition for review.

In *Branch Banking & Trust Company v. Sevier County Schools Federal Credit Union*, BB&T asks the justices to review a decision of the U.S. Court of Appeals for the 6th Circuit invalidating BB&T’s modification to its bank services agreement to resolve disputes with accountholders through arbitration. To the 6th Circuit, the modification, though now nearly 20 years old, was invalid as to the accountholders whose accounts pre-dated the modification because their original agreement (with a predecessor bank) did not include any sort of dispute-resolution provision at all. BB&T argues that this reasoning conflicts with the Supreme Court’s modern Federal Arbitration Act jurisprudence.

These and other petitions of the week are below:

*Ortiz v. Breslin*

20-7846

**Issues:** (1) Whether the 14th Amendment prohibits prison authorities from indefinitely detaining supervisees based on an assumption that a municipality will not provide legally-mandated compliant housing; and (2) whether the Eighth Amendment bars prison authorities from extending incarceration for individuals based on their homelessness and indigence.

*Belmora LLC v. Bayer Consumer Care AG*

21-195

**Issues:** (1) Whether, in view of the principle of trademark territoriality, the zone of interests encompassed by Lanham Act Sections **43(a)** and **14(3)** extends to the foreign owner of a foreign trademark that has not registered or used the mark in the United States; and (2) whether, in the absence of an express limitations period in the Lanham Act, the timeliness of a Section 43(a) suit for false association and false advertising is governed by the most analogous state-law statute of limitations, or instead, by laches.

*Branch Banking & Trust Company v. Sevier County Schools Federal Credit Union*

21-365

**Issue:** Whether the Federal Arbitration Act displaces a state common-law rule forbidding companies from adding an arbitration requirement to their standard-form contract with customers unless the contract already includes a dispute-resolution clause.

*Haaland v. Brackeen*

21-376

**Issues:** (1) Whether various provisions of the Indian Child Welfare Act of 1978 — namely, the minimum standards of **Section 1912(a), (d), (e), and (f)**; the placement-preference provisions of **Section 1915(a) and (b)**; and the recordkeeping provisions of **Sections 1915(e) and 1951(a)** — violate the anticommandeering doctrine of the 10th Amendment; (2) whether the individual plaintiffs have Article III standing to challenge ICWA's placement preferences for "other Indian families" and for "Indian foster home[s]"; and (3) whether Section 1915(a)(3) and (b)(iii) are rationally related to legitimate governmental interests and therefore consistent with equal protection.

*Cherokee Nation v. Brackeen*

21-377

**Issues:** (1) Whether the en banc U.S. Court of Appeals for the 5th Circuit erred by invalidating six sets of Indian Child Welfare Act provisions — **25 U.S.C. §§1912(a), (d), (e)-(f), 1915(a)-(b), (e), and 1951(a)** — as impermissibly commandeering states (including via its equally divided affirmance); (2) whether the en banc 5th Circuit erred by reaching the merits of the plaintiffs' claims that ICWA's placement preferences violate equal protection; and (3) whether the en banc 5th Circuit erred by affirming (via an equally divided court) the district court's judgment invalidating two of ICWA's placement preferences, 25 U.S.C. §1915(a)(3), (b)(iii), as failing to satisfy the rational-basis standard of ***Morton v. Mancari***.

*Texas v. Haaland*

21-378

**Issues:** (1) Whether Congress has the power under the Indian commerce clause or otherwise to enact laws governing state child-custody proceedings merely because the child is or may be an Indian; (2) whether the Indian classifications used in the **Indian Child Welfare Act** and its implementing regulations violate the Fifth Amendment's equal-protection

guarantee; (3) whether ICWA and its implementing regulations violate the anticommandeering doctrine by requiring states to implement Congress's child-custody regime; and (4) whether ICWA and its implementing regulations violate the nondelegation doctrine by allowing individual tribes to alter the placement preferences enacted by Congress.

*Texas v. Commissioner of Internal Revenue*

21-379

**Issues:** (1) Whether an agency rule delegating rulemaking authority to a private entity violates the nondelegation doctrine; and (2) whether the statute of limitations applicable to a challenge to an agency rule that delegates rulemaking authority to a private entity starts to run when the agency delegates the authority or when the private entity exercises the delegated authority.

*Brackeen v. Haaland*

21-380

**Issues:** (1) Whether the **Indian Child Welfare Act of 1978**'s placement preferences — which disfavor non-Indian adoptive families in child-placement proceedings involving an "Indian child" and thereby disadvantage those children — discriminate on the basis of race in violation of the U.S. Constitution; and (2) whether ICWA's placement preferences exceed Congress's Article I authority by invading the arena of child placement — the "virtually exclusive province of the States," as stated in **Sosna v. Iowa** — and otherwise commandeering state courts and state agencies to carry out a federal child-placement program.

*Weiss v. National Westminster Bank, PLC*

21-381

**Disclosure:** Goldstein & Russell, P.C., whose attorneys contribute to SCOTUSblog in various capacities, is counsel to the petitioners in this case.

**Issue:** Whether a person who knowingly transfers substantial funds to a designated foreign terrorist organizations aids and abets that organization's terrorist acts for purposes of civil liability under **Justice Against Sponsors of Terrorism Act**.

*Strauss v. Credit Lyonnais, S.A.*

21-382

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Cases: Ortiz v. Breslin, Belmora LLC v. Bayer Consumer Care AG, Branch Banking & Trust Company v. Sevier County Schools Federal Credit Union, Haaland v. Brackeen, Cherokee Nation v. Brackeen, Texas v. Haaland, Texas v. Commissioner of Internal Revenue, Brackeen v. Haaland, Weiss v. National Westminster Bank, PLC, Strauss v. Credit Lyonnais, S.A.

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