Haaland v. Brakeen, --- S. Ct. ---, 2023 WL 4002951 (June 15, 2023).

- **Holding**: Petitioners failed to demonstrate that the Fifth Circuit erred in holding that the provisions of the Indian Child Welfare Act (ICWA) were within Congress' authority to enact, and ICWA's placement preferences, recordkeeping requirements, and mandate that active efforts be made to prevent the breakup of Indian families did not violate the anticommandeering provisions of the Tenth Amendment.
- **Summary**: Justice Barrett authored the majority opinion, joined by Chief Justice Roberts and Justices Sotomayor, Kagan, Gorsuch, Kavanaugh, and Jackson.
  Holding 1: Petitioners fail to demonstrate that ICWA exceeds Congress' authority, leaving intact the Fifth Circuit's conclusion that ICWA is consistent with Article 1. The majority concluded that Congress has plenary, but not unbounded, authority over Indian affairs, grounded in the Indian Commerce Clause (Art. I, § 8, cl. 3), the Treaty Clause (Art. II, § 2, cl. 2), "principles inherent in the Constitution's structure," and the "trust relationship between the United States and the Indian people," which "informs the exercise of legislative power." Petitioners' argument that "ICWA takes the 'commerce' out of the Commerce Clause" was rejected because "our precedent states that Congress's power under the Indian Commerce Clause encompasses not only trade but also 'Indian affairs.'" Notably, the majority 's holding left room for future challenges: it stated that while "[w]e have often sustained Indian legislation without specifying the source of Congress' power," the petitioners failed "to offer a theory for rationalizing this body of law," leading to the conclusion that "[i]f there are arguments that ICWA exceeds Congress's authority as our precedent stands today, petitioners do not make them. We therefore decline to disturb the Fifth Circuit's conclusion that ICWA is consistent with Article I."
  Holding 2: ICWA's requirement that an initiating party demonstrate "active efforts" to keep the Indian family together (25 U.S.C. § 1912(d)) does not violate the anticommandeering provisions of the Tenth Amendment. The petitioners asserted that ICWA violated the Tenth Amendment by requiring that "[a]ny party" seeking to effect an involuntary foster care placement or termination of parental rights must "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." The majority characterized such argument as being fundamentally flawed, because "the provision applies to 'any party' who initiates an involuntary proceeding, thus sweeping in private individuals and agencies as well as government entities." "Legislation that applies 'evenhandedly' to state and private actors does not typically implicate the Tenth Amendment."
  Holding 3: The other provisions of 25 U.S.C. § 1912, including the notice requirement, expert witness requirement, and evidentiary standards, apply to the State as a litigant and likely do not "implicate the Tenth Amendment … in any event, these provisions, like § 1912(d), apply to both private and state actors, so they too pose no anticommandeering problem."

Holding 4: The placement preferences of 25 U.S.C. § 1915 do not violate the Tenth Amendment because they do not command state agencies to do anything, but rather place the burden of producing a higher-ranked placement on the tribe or other objecting party.
Holding 5: The requirement that state courts apply the placement preference in making custody determinations is consistent with the Supremacy Clause requirement that "the Judges in every State shall be bound" by the "laws of the United States."
Holding 6: ICWA's recordkeeping requirements (25 U.S.C. § 1915(e)) are consistent with the Tenth Amendment. The Tenth Amendment's anticommandeering doctrine "applies 'distinctively' to a state court's adjudicative responsibilities." Under the structure of the Constitution, state courts must enforce federal prescriptions, and, "[s]ince Article III established only the Supreme Court and made inferior federal courts optional, Congress could have relied almost entirely on state courts to apply federal law." Thus, "Congress may impose ancillary recordkeeping requirements related to state court proceedings without violating the Tenth Amendment."
Holding 7: Neither the individual petitioners nor the State of Texas had standing to pursue their equal protection challenge to ICWA's placement preferences and a nondelegation challenge to the provision allowing tribes to alter the placement preferences. The individual petitioners failed to show that their alleged injury (increased difficulty in attempting to adopt Indian children based on the petitioners' race) would be redressed by injunctive or declaratory relief aimed at federal officials, "because state courts apply the placement preferences, and state agencies carry out the court-ordered placements." Texas could not pursue the equal protection claim on behalf of its citizens because states do not have standing as *parens patriae* to bring actions against the federal government, and Texas' claims of fiscal injury associated with recordkeeping costs would be incurred regardless of whether they were required to apply ICWA's placement preferences.
Concurring Opinions:

Justice Gorsuch, joined in part by Justices Jackson and Sotomayor, filed a concurring opinion. The three justices agreed that "at its core, ICWA restricts how non-Indians (States and private individuals) may engage with Indians [a power that] falls in the heartland of Congress's constitutional authority." Justice Gorsuch's concurrence also includes an extended discourse (not joined by Jackson and Sotomayor) laying out his vision for the "corrective steps" necessary to reign in the plenary power doctrine that had "injected incoherence into our Indian-law jurisprudence" and "recover fully the original meaning of the Indian Commerce Clause," which Gorsuch characterized as "confirm[ing], rather than abridg[ing], principles of tribal sovereignty."

Justice Kavanaugh filed a short concurrence emphasizing that "the Court today does not address or decide the equal protection issue that can arise when the Indian Child Welfare Act is applied in individual foster care or adoption proceedings."
Dissenting Opinions:

Justice Thomas, dissenting, stated that "in the normal course, we would say that the Federal Government has no authority to enact any of this," and criticized any reliance on the plenary power doctrine "which appears to have been born of loose language and

judicial *ipse dixit*," and rejected any assertion that the "Founders thought the term 'commerce' in the Commerce Clause meant different things for Indian tribes that it did for commerce between States."

Justice Alito likewise criticized the plenary power doctrine, recognized the fact that "the field of domestic relations 'has long been regarded as a *virtually exclusive* province of the States,'" (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)) and would have held that "[t]he ICWA provisions challenged here do not simply run up against this traditional state authority, they run roughshod over it …."

- **Relevant (2023) Deskbook Sections**: 1:1, 1:2, 1:3, 1:4, 13:1, 13:3, 13:24, 13:29
- **Comment**: Justice Gorsuch clearly intends for his dissent to serve as a blueprint for the future restoration of the Court's Indian law jurisprudence to the principles established in *Worcester v. Georgia*, namely "an understanding that Tribes enjoy a power to rule themselves that no other governmental body—state or federal—may usurp."