5-2024

Haaland v. Brackeen—A Window into Presenting Tribal Cases to the Court

IAN HEATH GERSHENGORN

CONNECTICUT
LAW REVIEW

VOLUME 56 MAY 2024 NUMBER 4

Essay

Haaland v. Brackeen—A Window into Presenting Tribal Cases to the Court

IAN HEATH GERSHENGORN

In this Essay, as I did at the Connecticut Law Review*'s Symposium, I draw on my experience representing Tribes in* Haaland v. Brackeen *to discuss more broadly the effective presentation of tribal arguments to the Court. I touch briefly on four main topics. First, I discuss how we collaborated with amici to ensure that the Court would have the full context as it considered the issues in* Brackeen*. Second, I discuss how we thought about preparing for the argument and the particular importance of understanding the practical operation of the Indian Child Welfare Act. Third, I offer a few observations on the oral argument itself, focusing on how the structure of the argument influences the substance of the argument. And fourth, I step back and discuss why this is a particularly interesting and challenging time to argue Indian law cases before the Supreme Court.*

ESSAY CONTENTS

Haaland v. Brackeen—A Window into Presenting Tribal Cases to the Court

IAN HEATH GERSHENGORN*

INTRODUCTION

I have been asked to contribute to this amazing symposium on *Haaland v. Brackeen*, not from the perspective of an Indian law expert or an accomplished academic—I am qualified as neither—but as a Supreme Court practitioner. And, in particular, as a Supreme Court practitioner who had the great honor and good fortune to argue *Brackeen* in the United States Supreme Court on behalf of the Tribes.[1]

In this Essay, as I did at the *Connecticut Law Review*'s Symposium, I draw on my experience representing Tribes in *Brackeen* to discuss more broadly the effective presentation of tribal arguments to the Court. I touch briefly on four main topics. First, I will discuss how we collaborated with amici to ensure that the Court would have the full context as it considered the issues in *Brackeen*. Second, I discuss how we thought about preparing for the argument and the particular importance of understanding the practical operation of the Indian Child Welfare Act. Third, I offer a few observations on the oral argument itself, focusing on how the structure of the argument influences the substance of the argument. And fourth, I step back and discuss why this is a particularly interesting and challenging time to argue Indian law cases in the Supreme Court.

I. PRESENTATION TO THE COURT

Let me start with the presentation to the Court. Winning a case like *Brackeen* truly takes a village. There are more people than I could possibly identify and thank in any discussion of presenting this case to the Court. I would start with my law partner Keith Harper, who brought this case with him when he joined Jenner & Block and trusted me to handle it in the Court. I would thank my amazing team at Jenner, led by Zach Schauf, Lenny Powell, and Matt Hellman, who put together the arguments in the brief. I am also grateful for our clients—Cherokee Nation, Oneida Nation, and

* Partner and Chair of the Appellate and Supreme Court Practice, Jenner & Block; Former Acting Solicitor General. The views in this piece are those of the author and do not necessarily represent the views of his employer or his clients.

[1] I want to thank Professor Bethany Berger, Dean Eboni Nelson, and the student organizers of the symposium, principally Symposium Editors Casey Corvino and Julia Vassallo. It was an honor to participate in this important discussion.

Morongo Band of Mission Indians—who trusted us with the case. And that would be just the beginning.

The collaborative approach is not unique to *Brackeen*. It is a hallmark of litigating federal Indian Law cases, which involve partnerships developed as part of the Tribal Supreme Court Project. The Project is a resounding success, greatly improving outcomes for tribal nations in cases before the Court. In Part I will first discuss the history of the Tribal Supreme Court Project, and then I will turn to the role of the Project in *Brackeen*.

A. *The Tribal Supreme Court Project: History and Foundations*

The history of the Tribal Supreme Court Project has been well documented.[2] It had its genesis more than two decades ago now, in the early 2000s.[3] At the time, the Tribes were doing poorly in the Court, losing more than seventy-five percent of the time.[4] The Project was the brainchild of lawyers at the Native American Rights Fund (NARF) and the National Congress of American Indians (NCAI) in conjunction with tribal practitioners—the idea was to assemble a group that would help Tribes in the Supreme Court.[5] The core concept was simple: marry experts in tribal law with Supreme Court practitioners, so the tribal practitioners would gain from the expertise of the Supreme Court practitioners, and the Supreme Court practitioners would learn more about tribal law.[6]

I was an early volunteer to the Project, having been brought into the fold by my good friend Riyaz Kanji, founding partner of Kanji & Katzen. Riyaz is a spectacular lawyer, and he was influential in the early days of the Project. I can confirm that the fundamental assumption of the Project was accurate: federal Indian law was something that most of us who practiced in the Supreme Court at that time knew almost nothing about. When I attended law school (I graduated in 1993), there were few federal Indian law classes. So, the ability to join with serious Indian law practitioners was an extraordinary learning opportunity for me. And at the same time, the Tribes and tribal practitioners got valuable advice about how to litigate most effectively in the Supreme Court.

The Project sought to help the Tribes in a number of important ways, two of which I will mention here. First, the Project understood that often the most important brief in a tribal case at the Supreme Court is the brief in opposition. That is, the best way to prevail on a tribal case at the Court is to

---

[2] *See, e.g.*, Bethany R. Berger, *Hope for Indian Tribes in the U.S. Supreme Court?:* Menominee, Nebraska v. Parker, Bryant, Dollar General . . . *and Beyond*, 2017 U. ILL. L. REV. 1901, 1909–11 (documenting the history of the Tribal Supreme Court Project).

[3] *Id.* at 1905.

[4] *See id.* (noting a twenty-three percent tribal success rate in the Rehnquist Court).

[5] *Id.* at 1909.

[6] *Id.*

keep the case away from the Court. One of the briefs I am most proud of was one I did early on. I represented a member of the Rosebud Sioux who had prevailed in the South Dakota courts on a question involving hot pursuit onto an Indian reservation.[7] The State filed a petition seeking United States Supreme Court review, and the case seemed ripe for disaster.[8] I worked with the Project to file a careful brief in opposition, and the Court denied certiorari.[9] This denial meant the Rosebud Sioux were able to prevent a significant state intrusion upon their sovereignty and, more broadly, were able to maintain a climate in which disputes between Tribes and States over law-enforcement jurisdiction are resolved by sovereign-to-sovereign negotiation rather than by unilateral assertions of state authority. That case is emblematic of the many important victories of the Tribal Supreme Court Project that never appear on anyone's scorecard because the whole point is we kept it out of the Court. The Project has been very effective at that.[10]

Second, and more relevant to *Brackeen*, the Project has sought to ensure that the amicus presentation to the Supreme Court at the merits stage of a tribal case is as effective and powerful as it can be. Effective amicus participation is an important goal in all cases, but particularly so in tribal cases. The Justices generally do not come to tribal cases with vast knowledge about tribal law or what happens in Indian Country. As a result, amicus briefs can be essential for educating the Court about the case and about the facts on the ground in Indian Country. Without the coordination provided by organizations like the Tribal Supreme Court Project, there is a real risk of either insufficient amicus participation or duplicative and somewhat haphazard amicus briefing.

B. *The Role of the Tribal Supreme Court Project in* Brackeen

We certainly benefitted from the Project's assistance in *Brackeen*. Zach Schauf and Lenny Powell from our team worked closely with Dan Lewerenz, who coordinated the amicus effort while he was at NARF. Broadly, we tried to have briefs in five main categories: Indian Child Welfare Act (ICWA)'s accomplishments in practice; constitutional history; history of the federal government's treatment of Indian children; discrete constitutional issues; and briefs from other entities directly impacted by the case.

First, we wanted to show what ICWA was accomplishing in practice. We thus had briefs from child rights organizations,[11] the Casey Family

---

[7] *See generally* Brief in Opposition, South Dakota v. Cummings, 543 U.S. 943 (2004) (No. 04-74).

[8] *See generally* Petition for Writ of Certiorari, *Cummings*, 543 U.S. 943 (No. 04-74).

[9] Brief in Opposition, *supra* note 7; South Dakota v. Cummings, 679 N.W.2d 484 (S.D. 2004), *cert. denied*, 543 U.S. 943 (2004).

[10] Berger, *supra* note 2, at 1909.

[11] Kate Fort, *Amicus Briefs in* Haaland v. Brackeen, TURTLE TALK (Aug. 21, 2022), https://turtletalk.blog/2022/08/21/amicus-briefs-in-haaland-v-brackeen/.

Programs,[12] the American Academy of Pediatrics,[13] and other child-focused organizations[14] to demonstrate that ICWA is working and is making a difference in the real world for Indian children.[15] These briefs made the point that ICWA creates better outcomes for children, and that it does so in part by reflecting the expert consensus that "[c]hildren are best served by preserving and strengthening their family and community relationships to the fullest degree that safety allows."[16]

Second, we had a number of briefs focused on constitutional history. We recognized that the history of the Articles of Confederation, of the principal Indian-related provisions of the Constitution, and of the legislation from the early Congresses would be important to many on the Court as they were being asked to dig into the foundations of federal Indian law.[17] Certainly, Professor Gregory Ablavsky—a fellow participant in this symposium—was a critical part of that effort. His brief canvassed the relevant sources and argued persuasively that "constitutional text, history, and early practice all support broad congressional authority over Indian affairs, including regulating the status and placement of Indian children."[18]

Third, we wanted not only the history of the Constitution, but also the history of the treatment of Indian children. We wanted to frame the case so that ICWA was seen for what it actually was: the latest iteration of the federal government's direct regulation of Indian children over the course of two centuries, sometimes for good and (unfortunately) often for ill. A brief from the American Historical Association focused on that point.[19] The brief noted that the "federal government has exercised authority over Native

---

[12] *See* Brief of Casey Fam. Programs et al. as Amici Curiae in Support of Fed. And Tribal Defendants, Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (Nos. 21-376, 21-377, 21-378, 21-380).

[13] *See* Brief of Am. Acad. Of Pediatrics and Am. Med. Ass'n as Amici Curiae in Support of Respondents, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21-380).

[14] *See* Brief of Amici Curiae Former Foster Children in Support of Fed. And Tribal Defendants, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21-380); Brief of Nat'l Ass'n of Couns. For Children et al. as Amici Curiae in Support of Fed. And Tribal Defendants, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21-380); Brief of Amici Curiae Fam. Def. Providers in Support of Petitioners in Nos. 21-376 and 21-377, and in Support of Respondents in Nos. 21-378 and 21-380, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21-380).

[15] *See, e.g.*, Brief of Casey Fam. Programs et al., *supra* note 12, at 1 (arguing that ICWA "serves the best interests of children covered by the Act").

[16] Brief of Casey Fam. Programs et al., *supra* note 12, at 8. The Casey brief, for example, noted that

> [T]he data show that ICWA compliance achieves better outcomes: Children are reunified with their families more often than not. They are more often placed with extended family. And those children in need of a loving adoptive family are more likely to get one: American Indian and Alaska Native children have a lower rate of "aging out" of foster care without a permanent family than other children.

Id. at 9.

[17] *See* Brief of Amicus Curiae Professor Gregory Ablavsky in Support of Fed. Parties and Tribal Defendants at 2, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21-380) (advancing an originalist argument supporting ICWA).

[18] *Id.*

[19] Brief of Amici Curiae Am. Hist. Ass'n and Org. of Am. Historians in Support of Fed. and Tribal Parties at 2–3, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21-380).

people through its treaty and foreign affairs power since the founding," including in treaty provisions that "obligated the federal government to provide for the general protection of Native people, as well as for the specific care and education of Native children."[20] The brief also described the "infamous" federal Indian boarding school policy that tore Indian children from their families.[21]

Fourth, we had briefs from Indian law and constitutional law scholars. Those briefs were tailored to address each of the discrete constitutional issues presented by the case. We had briefs arguing that Congress had plenary power under Article I of the Constitution to adopt ICWA; that the role of state officials and state courts in ICWA did not violate the Court's anti-commandeering doctrine; and that ICWA's preferences for Indian children to be placed with families in their communities was consistent with equal protection.[22]

Finally, we had briefs from various other entities that had important perspectives on the case, as much for who they were as for what they said. One brief, for example, was on behalf of 497 Tribes and 62 Indian organizations, a truly spectacular show of tribal unity.[23] We had a brief from States who supported ICWA.[24] And we had a brief from individuals who had been involved in some of the individual adoptions, like Robyn Bradshaw, who was the grandmother and adoptive parent of one of the children discussed in the litigation.[25]

The net result of this tremendous effort was a series of briefs carefully organized to address each important aspect of the case. Structuring the briefs this way—carefully tailoring each brief to reduce redundancy and ensure complete coverage—substantially strengthened the presentation to the Court. We could not have done it without the amazing work of the Tribal Supreme Court Project.

II. ARGUMENT PREPARATION

So then how did we prepare for argument? For these purposes, I am not going to dwell on the endless questions to the team, or the moot courts held

---

[20] *Id.*

[21] *Id.* at 11.

[22] Brief of Indian Law Professors as Amici Curiae in Support of Fed. and Tribal Defendants at 2, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21-380); Brief of Const. Accountability Ctr. as Amicus Curiae in Support of Petitioners in 21-376 & 21-377 and Respondents in 21-378 & 21-380 at 2, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21-380); Brief of Amici Curiae Nat'l Indigenous Women's Res. Ctr., Stephanie Benally, and Sandy White Hawk et al. at 5, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21-380).

[23] Brief of 497 Indian Tribes and 62 Tribal and Indian Orgs. as Amici Curiae in Support of Fed. and Tribal Defendants, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21-380).

[24] Brief for the States of California et al. as Amici Curiae in Support of the Fed. and Tribal Parties, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21-380).

[25] Brief for Robyn Bradshaw, Grandmother and Adoptive Parent of P.S. ("Child P.") as Amicus Curiae in Support of Tribal and Fed. Defendants at 1, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21-380).

by Jenner & Block and by the Stanford Supreme Court Clinic, or the countless index cards that I studied, each of which contained one question, case, or provision on the front and a series of proposed talking points on the back. Instead, I am going to focus on preparing to meet the challenges that I noted earlier: the Justices are not familiar with Indian law, and, in particular, they are not familiar with how Indian law works on the ground.

Now, none of that is unique to Indian law. Supreme Court Justices are generalists. They must decide difficult questions in complicated areas of the law—think bankruptcy, patent, antitrust, tax, copyright, admiralty, Medicaid, etc.—without being experts. The Justices may have little idea of what happens in the real world in those areas. They must often decide cases without detailed knowledge, at least prior to briefing and argument, of the potential consequences of their decisions. That means that one of the most important jobs of a Supreme Court advocate is to talk to generalist Justices about the specifics of the case.

Accordingly, in *Brackeen*, a substantial part of my job as the advocate for the Tribes was to learn as much as I could about ICWA and to understand how it worked in the real world. Again, the need to understand the real-world consequences of the issues is common in tribal cases. Often, that means going out to Indian Country. My first Supreme Court argument was in *Wagnon v. Prairie Band Potawatomi Nation*, a case that involved the authority of a State to tax a tribally-run gas station operating on a tribal reservation.[26] To prepare, I went out to the reservation. I walked around the gas station; I walked to the Tribe's casino; and I walked to the reservation roads that connected the gas station to the State's larger network of roads. I did all that so that I could explain to the Court how all these pieces fit together. Trust me, it was relevant to the case!

I did the same when I prepared to argue *Carpenter v. Murphy*[27] and *McGirt v. Oklahoma*.[28] I went not only to the prisons in Oklahoma to meet my clients, but to the Muscogee (Creek) Nation. I took a drive around the reservation. I saw the police station, the fire station, and the hospital that the Tribe had built and was operating. I met with the Tribe's Attorney General and with judges from the tribal courts. I did all of that so I could explain to the Supreme Court how things worked on the ground, and so I could explain to the Court that the Tribe exercises sovereignty in just the same way that other sovereigns do.

So, what did that mean in *Brackeen*? Well, what that meant here was, among other things, a series of conversations—I am sure from her perspective endless conversations—with Kate Fort. Kate was, of course, a participant in this symposium, and she is the Director of Clinics at Michigan

[26] 546 U.S. 95 (2005).
[27] 139 S. Ct. 398 (2018).
[28] 140 S. Ct. 2452 (2020).

State University College of Law and runs the Indian Law Clinic there.[29] In 2015, Kate started the Indian Child Welfare Act Appellate Project, which represents Tribes in complex ICWA litigation across the country.[30] Kate was also, I am fortunate to say, one of our co-counsel in *Brackeen*. It was a blessing to have one of the nation's leading ICWA experts on our team. We were able to draw on Kate's vast knowledge and experience, not just to discuss the legal issues—which of course we did—but also to understand at a granular level how ICWA operates in practice. For example, how does ICWA impact children, families, and people who are trying to adopt? How do family law judges perceive it? Who uses it? Where are kids going? To which Tribes? Under what standards? Which statutory provisions matter most, and why? What is the difference between voluntary and involuntary adoptions? How does ICWA vary State by State and reservation by reservation? And on and on and on.

Being able to pick Kate's brain was critical. Part of it, to be sure, was to give me the confidence that I knew what I was talking about as I was standing at the podium. But the more important part, as became clear during the argument, was that the Justices were interested in those same questions. They wanted to know about the standards that the family law judges were using to place children.[31] They wanted to know about the ages and experiences of the kids affected by ICWA.[32] They wanted to know about the ties that bound the kids with the tribal families with whom they were placed.[33]

I was able, at argument, to respond to those questions and say, this is the way ICWA works on the ground and in the real world.[34] I was able to do that with credibility because my conversations with Kate had enabled me to do so. Or, as I said at argument with reference to Kate: "[I]n my experience, or I should say my experience talking with people who actually experienced this, which is as close as I've gotten, is that the way this comes up most often actually is . . . individual Indians living . . . on the reservation of another."[35]

In fact, the highest compliment I got after argument was one that Kate passed along. She showed me a text she had gotten from a family member who had listened to the oral argument. The text said something like "Kate: It was so strange to hear your voice coming out of Ian Gershengorn's

---

[29] *Faculty & Staff, Kathryn E. Fort: Director of Clinics, Director of Indian Law Clinic, Academic Specialist*, MICH. STATE UNIV. https://www.law.msu.edu/faculty_staff/profile.php?prof=490 (last visited Feb. 29, 2024).

[30] *Id.*

[31] Transcript of Oral Argument at 4–5, Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (Nos. 21-376, 21-377, 21-378, 21-380) [hereinafter Brackeen Tr.].

[32] *Id.* at 184.

[33] *Id.* at 183–86.

[34] *Id.* at 186.

[35] *Id.* at 185.

mouth." And I knew at that point that I had succeeded in my preparation for argument.[36]

III. THE ORAL ARGUMENT

As for the argument itself, I thought I would describe a few areas in which the structure of oral argument at the Court affects how the argument unfolds. In this Part, I discuss the importance of framing the case properly for the Justices at the start. I then talk about how changes to the way the Justices conduct their questioning affects the presentation of arguments.

A. *The Argument Introduction: Brief, Uninterrupted Time to Speak*

The first thing to note is that, under the approach the Court uses today, an advocate gets either one minute or two minutes to speak uninterrupted and explain the case.[37] That has not always been how oral argument works—advocates could not count on getting out more than a sentence or two before being hit with questions, and there were times (particularly for respondents) where there might be a question asked before the advocate could even start.[38] The chance to address the Court is a gift; as experienced advocates recognize, those opening moments constitute extraordinarily valuable real estate.

In making the best use of that time, I tried to identify the four main points that seemed to me the core of the case. *First*, enacting ICWA was something Congress had the power to do.[39] The challengers to ICWA argued broadly that Congress lacked plenary power in Indian affairs, and more narrowly that Congress lacked power to legislate in family matters such as adoptions and foster placements.[40] We thought both arguments were plainly wrong, but we feared that the second might have surface appeal to some Justices. So, we wanted to quickly and assuredly eliminate that argument. Thus, in the introduction, I included the following statement:

---

[36] As amazing as Kate was, she was not my only source of information. I spoke to participants in the family law system such as judges and advocates. I reviewed state and tribal materials designed to explain the workings of the system. I reviewed the helpful briefs and record materials from the proceedings below. Basically, I did all that I could to understand how the system worked for Indian children and their families.

[37] CLERK OF THE COURT, GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES 7 (2023).

[38] *See* Timothy R. Johnson, Ryan C. Black & Justin Wedeking, *Pardon the Interruption: An Empirical Analysis of Supreme Court Justices' Behavior During Oral Arguments*, 55 LOY. L. REV. 331, 332–51 (2009) ("[T]he conversations that transpire [in the Supreme Court] are often more of a dialogue among the Justices than they are a discussion between the Court and counsel."). *See also* Carrie Severino, *Justice Thomas has Made the New Oral Argument Format a Winner*, SCOTUSBLOG (Aug. 18, 2021, 12:37 PM), https://www.scotusblog.com/2021/08/justice-thomas-has-made-the-new-oral-argument-format-a-winner/ (describing past oral argument practices).

[39] Brackeen Tr., *supra* note 31, at 164.

[40] *Id.* at 13–14, 36–37.

> 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.[41]

So, right from the start, we made clear our position that Congress had the power to enact ICWA.

Second, the challengers lacked standing. Or, as we said in the introduction, "[a] facial challenge in a case without standing is just about the worst way to consider the constitutionality of a major federal statute."[42] We argued that this was a powerful argument for the Tribes, and a place where the Fifth Circuit and the plaintiffs had plainly overreached[43]—and the Court agreed.[44] The decision below was not binding in a court in which an ICWA proceeding would actually take place; plaintiffs thus lacked standing.

Third, ICWA relies on a political classification. The centerpiece of the challengers' argument was that ICWA's preferences for Indian families operate as a racial classification that disadvantages non-Indian families (and Indian children) because of their race. In the challengers' view, because ICWA adopts a racial classification, it is subject to the strictest constitutional scrutiny and cannot survive. Our view was that the challengers were fundamentally mistaken—ICWA's preferences are restricted to members of federally recognized Tribes, and thus rely on political (not racial) classifications that are subject to a less exacting standard of review. As I put it in the introduction: "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."[45] So this is political, political, political. It is not racial, and therefore, the equal protection challenge should fail.

Finally, ICWA is in the best interests of Indian children. This was clearly a critical point. And at the outset, we wanted to make clear that ICWA protects child safety, facilitates access to critical remedial services to keep families intact, and keeps children with their families and communities. Or, as I was able to say at argument,

> ICWA protects the best interests of children. It adopts a system of structured decision-making 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 . . .

---

[41] *Id.* at 164.
[42] *Id.* at 164–65.
[43] *Id.* at 187–88.
[44] Haaland v. Brackeen, 143 S. Ct. 1609, 1638 (2023).
[45] Brackeen Tr., *supra* note 31, at 165.

> works to keep . . . children with their families and communities. That's why ICWA is viewed as the gold standard.[46]

We felt that if I could get that out—and I did—we would have expressed as clearly and succinctly as we could the key points that should decide this case. Looking at where the Court ended up, both at argument and in the final opinion, I feel good about the judgments the team made.

B. *Preparing for the Supreme Court's New Argument Format*

The Court's new argument format has changed the way cases are presented in significant ways. In the pre-pandemic Court, argument was a free-for-all, where Justices routinely interrupted each other and the oralist, and often it was hard for bench or bar to get a word in edgewise.[47] In the post-pandemic world, the Court has changed the format. For each advocate, the questioning session still begins with the familiar free-for-all, but when the allotted argument time has passed, each Justice is given a chance to ask one-on-one questions of the advocate.[48]

One of the striking things about that format is that it allows Justices sympathetic to one's position to ask a relative softball question or give an advocate the chance to elaborate on a prior answer. Then, the advocate gets to speak for a minute or more uninterrupted, which would have been almost unheard of in the prior questioning regime. Trust me, for a Supreme Court advocate, that is a gift. To be clear, I have been on both sides of those types of questions, as has just about every experienced advocate in the Court. During oral argument for *McGirt*, for example, the Solicitor General of Oklahoma (my opponent in the case) got the following question from Justice Alito:

> Mr. Gershengorn has a section of his brief that's labeled The Sky Is Not Falling, and his argument is that you and the federal government are exaggerating the effect of this decision, that it won't have such a major impact either in the criminal or in the civil area. Is he right in that?[49]

The Solicitor General of Oklahoma then spent more than two pages of oral argument transcript explaining all the perceived bad consequences that would befall Oklahoma if Mr. McGirt were to prevail.[50]

In *Brackeen*, this dynamic played out in a way that may have been important to the outcome. Justice Kagan asked me during the one-on-one time the following question: "You, in your opening statement, you said that

---

[46] *Id.* at 165.
[47] Severino, *supra* note 38.
[48] CLERK OF THE COURT, *supra* note 37.
[49] Transcript of Oral Argument at 54, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526).
[50] *Id.* at 54–56.

this is a bad case to deal with this question because the individual plaintiffs don't have standing. Why not?"[51] With just one additional prompt from the Justice,[52] that question allowed me to speak uninterrupted about why neither the private parties nor Texas should be allowed to raise their equal protection challenges to ICWA here.

Obviously, Justice Kagan knows much about the Court's dynamics that I, as the advocate, do not. Clearly, she thought the standing argument had the potential to be a critical part of the case. So, she allowed me to put forth our best arguments as to why the individual plaintiffs did not have standing, and why Texas did not have rights under the Equal Protection Clause at all. In the end, that argument was dispositive.[53]

In short, *Brackeen* was a case in which there was a marriage of format and substance that had a powerful effect on how the argument unfolded. Perhaps here it contributed to the success of the case, at least to the extent that an oral argument ever contributes to the success of the case.

IV. THE CURRENT COURT

Finally, I want to close by broadening the lens a little and offering a few thoughts on why this is a particularly interesting and challenging time to be arguing tribal cases in the Supreme Court. For me, it comes down to two Justices: Justice Gorsuch and Justice Thomas.

A. *Justice Gorsuch*

Let's start with Justice Gorsuch. As is by now clear to all who follow tribal issues at the Court, Justice Gorsuch has emerged as an extraordinary voice for tribal interests, both on substance and—almost as importantly—in the way he writes.[54] As to substance, Justice Gorsuch has been one of the most pro-tribal Justices to serve on the Court in recent times, and perhaps ever. From a pure voting perspective, he has voted in favor of tribal interests in virtually every case. He provided the critical vote in the Court's 5-4 decision in *Washington State Department of Licensing v. Cougar Den, Inc.*, stating in his concurring opinion that the Yakama Nation treaty "guarantees tribal members the right to move their goods to and from market freely. So

---

[51] Brackeen Tr., *supra* note 31, at 186–87.

[52] Justice Kagan interrupted me with this additional prompt: "[D]oes it make a difference that our ruling would bind state officials?" *Id.* at 188.

[53] Justice Gorsuch asked me a question on the topic of commandeering: "You haven't had a chance to address the commandeering arguments in particular with respect to the active efforts provision." *Id.* at 190. That opening allowed me then to lay out our principal commandeering arguments.

[54] *See, e.g.*, *McGirt*, 140 S. Ct. at 2459 (holding that the Creek Nation's reservation is not disestablished); Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2505 (2022) (Gorsuch, J., dissenting) (disagreeing with the Court's decision granting states jurisdiction over crimes by non-Indians against Indians on Indian territory); Haaland v. Brackeen, 143 S. Ct. 1609, 1641–47 (Gorsuch, J., concurring) (agreeing with the Court's upholding of ICWA and providing historical context regarding the adoption of ICWA).

that tribal members may bring goods, including gasoline, from an out-of-state market to sell on the reservation without incurring taxes along the way."[55] In *McGirt*, a case near and dear to my heart, Justice Gorsuch wrote for a 5–4 Court majority holding that the reservation of Muscogee (Creek) Nation had not been disestablished.[56] In *Ysleta del Sur Pueblo v. Texas*, he wrote the majority opinion in favor of tribal interests in a dispute over state regulation of gaming on tribal lands in Texas.[57] And, of course, he joined the Court's majority and penned a lengthy and powerful concurrence in *Brackeen*.[58]

Even when Tribes have not prevailed at the Court, Justice Gorsuch has been a stalwart defender of tribal interests. He wrote the dissent for four Justices in *Oklahoma v. Castro-Huerta*, which repudiated more than a century of case law and held that States have jurisdiction to prosecute crimes committed against Indians by non-Indians even in Indian Country.[59] He wrote the dissent for the same four Justices in *Arizona v. Navajo Nation*, which rejected efforts by Navajo Nation to enforce treaty rights to adequate water on their reservation.[60] And he wrote a solo dissent in *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, the Court's 8–1 decision holding that the Bankruptcy Code abrogated tribal sovereign immunity for certain Code provisions.[61]

The mere tally of votes, however, fails to capture the full power of Justice Gorsuch's impact. On substance, Justice Gorsuch's approach to Indian law has been noteworthy. He has applied the Indian canons of construction with vigor and enthusiasm,[62] required Congress to speak clearly before abrogating tribal sovereignty,[63] read treaties as Tribes would have

---

[55] Washington State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring).

[56] *McGirt*, 140 S. Ct. at 2459.

[57] Ysleta del Sur Pueblo v. Texas, 142 S. Ct. 1929, 1934 (2022).

[58] *Brackeen*, 143 S. Ct. at 1641–61 (Gorsuch, J., concurring).

[59] *Castro-Huerta*, 142 S. Ct. at 2505–27 (2022) (Gorsuch, J., dissenting). *See id.* at 2491 (majority opinion) ("We conclude that the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.").

[60] Arizona v. Navajo Nation, 143 S. Ct. 1804, 1819–33 (2023) (Gorsuch, J., dissenting).

[61] Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689, 1704–13 (2023) (Gorsuch, J., dissenting).

[62] *See, e.g.*, *Navajo Nation*, 143 S. Ct. at 1819, 1826 (Gorsuch, J., dissenting) (explaining the use of one Indian law canon). The Indian law canons of construction are explained in COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (Nell Jessup Newton ed., 2019) ("The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor. In addition, treaties and agreements are to be construed as the Indians would have understood them, and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous.") (footnotes omitted).

[63] *See, e.g.*, *Lac Du Flambeau*, 143 S. Ct. at 1704–05 (Gorsuch, J., dissenting) (expressing that a decision by Congress to abrogate tribal sovereignty must be clear and explicit in the language of the statute).

understood them,[64] and he has been a forceful advocate for inherent tribal sovereignty, especially with respect to intrusions by the States.[65]

But, in truth, Justice Gorsuch's impact has gone beyond even "mere" substance. Two areas merit brief mention. First, one of the challenges of litigating tribal cases in the Court is countering state assertions—uniformly presented without evidentiary support—that it would be impractical to rule for the Tribes. Indeed, one of the major aims of the Tribal Supreme Court Project is to address these claims through amicus filings to show the Court what is happening on the ground and to refute the States' dire predictions.[66] In case after case, States invoke the specter of chaos, subtly (or unsubtly) asking the Court to bypass what the text or the law requires in the name of "workability" and avoiding "disruption." "How can the Court be expected to follow the law," the States appear to ask, "when the sky will fall?" Yet, with Justice Gorsuch, the Tribes have seen something new: a skeptic! It is not as though the States' appeals to purported disruption have stopped or their strategy has changed.[67] It is just that the States' purported concerns are being challenged as factually dubious and legally irrelevant. So, in *Ysleta del Sur Pueblo*, the Court explained that "[i]t is not our place to question whether Congress adopted the wisest or most workable policy, only to discern and apply the policy it did adopt."[68] And in *Cougar Den*, Justice Gorsuch observed that "[i]t turns out, too, that the State's parade of horribles isn't really all that horrible."[69] And in *McGirt*, the Court characterized the State's concerns as "admittedly speculative" and noted that "[i]n any event, the magnitude of a legal wrong is no reason to perpetuate it."[70] Imagine that!

Second, and harder to measure, is that Justice Gorsuch's writing style has reinforced the substance. If few in Indian Country expected to see the holding of a case like *McGirt* notwithstanding the merits of the claim, surely many fewer thought they would read the words that opened the opinion:

---

[64] *See, e.g.*, Washington State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring) (stating that the Court should assign meaning to treaty terms as Indians would have understood them); *Navajo Nation*, 143 S. Ct. at 1819, 1826 (Gorsuch, J., dissenting) (expressing the sentiment that the Court should interpret treaty terms as the Indians would understand them).

[65] *See, e.g.*, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2505, 2511, 2513–14, 2527 (2022) (Gorsuch, J., dissenting) (expressing throughout the dissent that tribal sovereignty is long-recognized and cannot be intruded upon by the States); Haaland v. Brackeen, 143 S. Ct. 1609, 1641, 1647 (2023) (Gorsuch, J., concurring) (advocating for the right of tribal sovereignty).

[66] Berger, *supra* note 2, at 1909; *What is the Tribal Supreme Court Project?*, NATIVE AM. RTS. FUND, https://sct.narf.org (last visited Feb. 29, 2024).

[67] *See, e.g.*, Ysleta del Sur Pueblo v. Texas, 142 S. Ct. 1929, 1943 (2022) ("In the end, Texas retreats to the usual redoubt of failing statutory interpretation arguments: an unadorned appeal to public policy."); *Cougar Den*, 139 S. Ct. at 1020 (Gorsuch, J., concurring) ("Alternatively yet, the State warns us about the dire consequences of a ruling against it."); McGirt v. Oklahoma, 140 S. Ct. 2452, 2478 (2020) ("In the end, Oklahoma abandons any pretense of law and speaks openly about the potentially 'transform[ative]' effects of a loss today.").

[68] *Ysleta del Sur Pueblo*, 142 S. Ct. at 1943–44.

[69] *Cougar Den*, 139 S. Ct. at 1020 (Gorsuch, J., concurring).

[70] *McGirt*, 140 S. Ct. at 2479, 2480.

> On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever. . . . Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.[71]

Or these:

> If anything, the persistent if unspoken message here seems to be that we should be taken by the "practical advantages" of ignoring the written law. . . . But just imagine what it would mean to indulge that path. A State exercises jurisdiction over Native Americans with such persistence that the practice seems normal. Indian landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for long enough that a reservation that was once beyond doubt becomes questionable, and then even farfetched. Sprinkle in a few predictions here, some contestable commentary there, and the job is done, a reservation is disestablished. None of these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. That would be the rule of the strong, not the rule of law.[72]

From a tribal perspective, Justice Gorsuch gets it. He gets the substance; he gets the history; and he gets the injustice reflected in States' arguments. And to have someone who gets it in the room where it happens, where the cases are decided, and speaks as a serious judicial conservative, who takes seriously originalism and textualism and who still comes out in support of the Tribes, well, . . . that is extraordinary.

B. *Justice Thomas*

At the same time, and in the same room, there is another powerful and extraordinary voice seeking to influence the Court's path on Indian law, but in a significantly different direction. That is the voice of Justice Thomas. Justice Thomas is a voice for rethinking, in a fundamental way, nearly every aspect of Indian law. While I surely disagree with many of Justice Thomas's conclusions in this area, there is no denying that the issues he raises are important, challenging, and serious.

Consider just last term. In three different cases, Justice Thomas authored separate opinions, each of which proposed overturning foundational

---

[71] *Id.* at 2459.
[72] *Id.* at 2474.

doctrines in Indian law. In *Brackeen*, Justice Thomas, echoing points he had made in prior opinions, disputed the notion of federal "plenary power" over Indian affairs.[73] In this rejection of the federal plenary power doctrine—and perhaps in this alone—his opinion echoed that of Justice Gorsuch, as Justice Gorsuch, too, expressed some doubts about the provenance of the plenary power doctrine.[74] However, Justice Thomas diverged sharply from Justice Gorsuch on the implications of those doubts. For Justice Gorsuch, the result was the default application of tribal sovereignty, at the expense of state control.[75] For Justice Thomas, the absence of congressional plenary power would place control over the Tribes solidly in the States' hands.[76]

In *Navajo Nation*, Justice Thomas wrote a concurrence in which he expressed concerns with a long-standing and long-settled aspect of the Court's Indian law jurisprudence: the existence of a general "trust relationship" between the United States and federal Indian Tribes.[77] As Justice Thomas saw it, the concept of the trust relationship has influenced the Court's jurisprudence in a number of areas: it has been "the source of pro-Indian canons of construction," and it has been used to "provide[] the Federal Government with an additional power, not enumerated in the Constitution, to do all that [is] required to protect Indians."[78] Justice Thomas found the Court's long-standing reliance on the trust relationship to be "troubling" because "the trust relationship appears to lack any real support in our constitutional system."[79] He thus suggested that "[i]n future cases, we should clarify the exact status of this amorphous and seemingly ungrounded 'trust relationship.'"[80]

Likewise, in *Lac du Flambeau*, Justice Thomas again wrote separately. This time he reiterated his view that "to the extent that tribes possess sovereign immunity at all, that immunity does not extend to 'suits arising out of a tribe's commercial activities conducted beyond its territory.'"[81] He thus again urged a substantial reconsideration of settled Indian law: "Rather than accepting the flawed premise of tribal immunity and deciding the abrogation question beyond the looking glass, the Court should simply abandon its judicially created tribal sovereign immunity doctrine."[82]

---

[73] Haaland v. Brackeen, 143 S. Ct. at 1662 (Thomas, J., dissenting).

[74] *Id.* at 1657–58 ("Instead of examining the text and history of the Indian Commerce Clause, the Court offered a free-floating and purposivist account of the Constitution . . . . Building on that move, the Court would later come to describe the federal power over the Tribes as 'plenary.'").

[75] *Id.* at 1653.

[76] *Id.* at 1662.

[77] Arizona v. Navajo Nation, 143 S. Ct. 1804, 1817 (2023) (Thomas, J., concurring).

[78] *Id.* at 1818 (internal quotations omitted).

[79] *Id.*

[80] *Id.* at 1819.

[81] Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689, 1702 (2023) (Thomas, J., concurring) (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 815 (2014)).

[82] *Id.* at 1703.

Again, Justice Thomas's changes to the law are not ones I support, and thus far he speaks for himself—no Justice joined his opinions calling for the end of federal plenary power, the general trust relationship, or tribal sovereign immunity.[83] But you can see why this is such an extraordinary time to argue in the Court. We have on the Court and in the room these two competing visions: one Justice who is advocating a fundamental reorientation of Indian law to expand tribal rights, and one who is seeking a fundamental reconsideration of Indian law that would eliminate even the few protections that Indian law currently provides. In *Brackeen*, and indeed over the course of the last term, we saw these two competing visions play out in case after case.

CONCLUSION

Brackeen was an extraordinarily important case for Indian Country, as it felt existential. On the ground, ICWA itself (as Congress found) is critical to stemming the destruction of Indian families and—ultimately—Indian Tribes. And doctrinally, the Article I and equal protection challenges threatened to eliminate or vastly constrain Congress' power to help Tribes. So, *Brackeen*'s preservation of ICWA and the Court's rejection (and deferral) of plaintiffs' doctrinal attacks are cause for celebration.

As I have tried to suggest here, moreover, *Brackeen* is instructive as a road map for presenting tribal cases to the Court: collaboration with effective amici, deep understanding of the facts on the ground, effective use of oral argument, and firm understanding of the doctrinal crosscurrents at the Court. All of these are necessary to maximize tribal chances for success at the Court.

Of course, so often, even these best efforts are not sufficient. But I firmly believe it is important to learn from these efforts—both those that succeed and those that do not—as much as we can. As I noted above, with competing visions for Indian law playing out in the Court on a regular basis, so much is up for grabs, and much hangs in the balance.

[83] Haaland v. Brackeen, 143 S. Ct. 1609, 1610 (2023); Arizona v. Navajo Nation, 143 S. Ct. 1804, 1804 (2023); *Lac du Flambeau*, 143 S. Ct. at 1689.