



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 10, 2020

The Honorable Ruben Gallego
Chairman
Natural Resources Committee
Subcommittee for Indigenous People of the
United States
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on bill H.R. 6535, the “Coverage for Urban Indian Health Providers Act.” As we explain below, the bill raises constitutional concerns.

H.R. 6535 would amend the Indian Health Care Improvement Act to provide that, under section 102(d) of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5321(d), urban Indian organizations and their employees shall be considered part of the Public Health Service in the Department of Health and Human Services for purposes of certain personal-injury claims resulting from the performance of health care services.

To the extent this provision would allocate benefits on the basis of race or ethnicity, they would be subject to strict scrutiny, requiring the government to show that the provision is narrowly tailored to serve a compelling government interest. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). Strict scrutiny would not necessarily apply to a preference for “federally recognized Indian tribes,” which the Supreme Court has viewed as a “political rather than racial” classification. *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974). But urban Indian organizations can encompass more than just members of federally recognized Indian tribes, such as members of state-recognized Indian tribes and descendants or relatives of tribe members, *see* 25 U.S.C. § 1603(13), (28), (29), which might trigger the strict scrutiny applicable to racial classifications, *cf., e.g., Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655–66 (2013) (a reading of the Indian Child Welfare Act that “would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian” would “raise equal protection concerns”). The bill might therefore need to be supported by a legislative record showing it is narrowly tailored to achieve a compelling government interest.

Thank you for the opportunity to present our views. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,



Mary Blanche Hankey
Deputy Assistant Attorney General