No. 18-11479

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; STATE OF TEXAS; ALTAGRACIA SOCORRO HERNANDEZ; STATE OF INDIANA; JASON CLIFFORD; FRANK NICHOLAS LIBRETTI; STATE OF LOUISIANA; HEATHER LYNN LIBRETTI; DANIELLE CLIFFORD,
***Plaintiffs-Appellees*,**

v.

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,
Intervenor Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas, Case No. 4:17-CV-00868-O

REPLY IN SUPPORT OF MOTION TO STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

Brackeen, et al. v. Cherokee Nation, et al., No. 18-11479.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Cherokee Nation (Intervenor-Defendant)
2. Oneida Nation (Intervenor-Defendant)
3. Quinault Indian Nation (Intervenor-Defendant)
4. Morongo Band of Mission Indians (Intervenor-Defendant)
5. Chad Everet and Jennifer Kay Brackeen (Plaintiffs)
6. Frank Nicholas and Heather Lynn Libretti (Plaintiffs)
7. Altagracia Socorro Hernandez (Plaintiff)
8. Jason and Danielle Clifford (Plaintiffs)
9. State of Texas (Plaintiff)
10. State of Louisiana (Plaintiff)
11. State of Indiana (Plaintiff)
12. United States of America (Defendant)

13. Bureau of Indian Affairs and its Director, Bryan Rice (Defendants)

14. John Tahsuda III, Bureau of Indian Affairs Principal Assistant Secretary for Indian Affairs (Defendant)

15. United States Department of the Interior and its Secretary, Ryan Zinke (Defendants)

16. United States Department of Health and Human Services and its Secretary, Alex Azar (Defendants)

17. Adam H. Charnes, Kilpatrick Townsend & Stockton LLP, counsel for Intervenor-Defendants

18. Christin J. Jones, Kilpatrick Townsend & Stockton LLP, counsel for Intervenor-Defendants

19. Keith M. Harper, Kilpatrick Townsend & Stockton LLP, counsel for Intervenor-Defendants

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23. David J. Hacker, Office of the Attorney General, counsel for State Plaintiffs

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26. Ken Paxton, Attorney General of Texas

27. Jeffrey C. Mateer, First Assistant Attorney General of Texas

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30. Matthew D. McGill, Gibson, Dunn & Crutcher LLP, counsel for Individual Plaintiffs

31. Lochlan F. Shelfer, Gibson, Dunn & Crutcher LLP, counsel for Individual Plaintiffs

32. David W. Casazza, Gibson, Dunn & Crutcher LLP, counsel for Individual Plaintiffs

33. Mark Fiddler, Fiddler Law Office, P.A., counsel for Libretti Plaintiffs and Clifford Plaintiffs

34. JoAnn Kintz, U.S. Department of Justice, counsel for Federal Defendants

35. Steven Miskinis, U.S. Department of Justice, counsel for Federal Defendants

36. Christine Ennis, U.S. Department of Justice, counsel for Federal Defendants

37. Ragu-Jara "Juge" Gregg, U.S. Department of Justice, counsel for Federal Defendants

38. Amber Blaha, U.S. Department of Justice, counsel for Federal Defendants

39. John Turner, U.S. Department of Justice, counsel for Federal Defendants

40. Jeffrey H. Wood, Acting Assistant Attorney General, counsel for Federal Defendants

41. Samuel C. Alexander, Section Chief, Indian Resources Section, counsel for Federal Defendants

42. Sam Ennis, United States Department of the Interior, Solicitor's Office, of-counsel for Federal Defendants.

43. Hon. Reed O'Connor, United States District Judge, Northern District of Texas

s/ Adam H. Charnes
Attorney for Appellants

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INTRODUCTION

Plaintiffs' arguments against a stay fail. They do not justify the district court's unprecedented order; they do not demonstrate they will suffer any harm from a stay; they do not refute the injuries the Tribes will suffer from the refusal of courts in Texas, Louisiana, and Indiana to apply the statute; and they do not show how the public interest supports immediately overriding, before appellate review, an Act of Congress that has benefited thousands of Indian children over the last 40 years. The Court should stay the judgment.

I. THE TRIBES ARE LIKELY TO SUCCEED ON APPEAL.

The Tribes made the requisite "strong showing" of likely success on appeal.

A. Equal Protection.—Plaintiffs unduly minimize *Morton v. Mancari*, 417 U.S. 535 (1974), while over-reading *Rice v. Cayetano*, 528 U.S. 495 (2000).

Mancari addressed employment preferences to Indians at the Bureau of Indian Affairs. While one purpose of these preferences was, as Plaintiffs suggest (Opp. 8), related to Indian self-government, the preferences advanced other governmental interests, ones similar to those animating ICWA—"to further the Government's trust obligation

toward the Indian tribes" and "to reduce negative effect of having non-Indians administer matters that affect Indian tribal life." 417 U.S. at 541-42; *compare* § 1901(2), (3), § 1902. Although the preferences applied to *individual* Indians, the Court found them justified by "the unique legal status of Indian tribes under federal law and upon the plenary power of Congress … to legislate on behalf of federally recognized Indian tribes." 417 U.S. at 551. Indeed, the Court explained, if federal "laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Id.* at 552. *Mancari* noted that "[o]n numerous occasions this Court has upheld legislation that singles out Indians for particular and special treatment," *id.* at 554-55, and the Court continued to do so after that decision. *See, e.g.*, *Wash. v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979); *United States v. Antelope*, 430 U.S. 641 (1977).

Under *Mancari* and progeny, "[i]t is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal

Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive." *Yakima Nation*, 439 U.S. at 500-01. Moreover, though Plaintiffs emphasize that *Mancari* justified the preferences in part based on BIA's "unique" role (Opp. 8), the Court subsequently applied that decision more broadly, including cases involving state taxes, *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), and federal criminal law, *Antelope*, *supra.*

Conversely, the holding in *Rice* is not as expansive as Plaintiffs suggest. The challenged law limited voting for members of a state agency charged with overseeing state property to members of a particular racial group. 528 U.S. at 509-10. After a lengthy discussion of the history and purpose of the 15th Amendment, *id.* at 511-14, the Court explained that sometimes "[a]ncestry can be a proxy for race," *id.* at 514. On the unique facts of *Rice*, the Court found that Hawaii "used ancestry as a racial definition and for a racial purpose." *Id.* at 515. *Rice* then expressly distinguished *Mancari*, explaining that the Indian hiring preference "was not directed towards a racial group consisting of Indians, but rather only to members of federally recognized tribes. In

this sense, the Court held, the preference was political rather than racial in nature." *Id.* at 519-20 (cleaned up) (quoting *Mancari*, 417 U.S. at 553 n.24). This *same* reasoning from *Mancari*, ratified in *Rice*, applies to ICWA.

Plaintiffs opposition misleads in other respects. Plaintiffs assert that ICWA requires states to "maintain parallel child-welfare systems" (Opp. 10), but ICWA applies *alongside* state child-welfare laws within the states' *existing* child-welfare courts, *see* § 1921. Plaintiffs contend that ICWA does not "fulfill treaty obligations" or trust duties (Opp. 10), but as far back as the Founding era, federal Indian policy included Indian child welfare and adoption. *See* Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 Neb. L. Rev. 885, 892-912 (2017). And Plaintiffs contend that only a "minuscule number" of Americans who are racially Indian are excluded from ICWA, and that the Court "rejected" an "underinclusiveness" argument. (Opp. 11-12.) But they err on both counts: hundreds of thousands of Indians who are not enrolled members of federally recognized tribes fall outside ICWA (App. 180-81), and *Mancari* specifically relied on the fact that the preference there

"operate[d] to exclude many individuals who are racially to be classified as 'Indians,'" 417 U.S. at 553 n.24.

B. Non-Delegation Doctrine.—Plaintiffs contend that "Congress may delegate authority to tribes only to regulate enrolled members or tribal lands." (Opp. 14.) As the Tribes explained (Mot. 13-14), this assertion is inconsistent with *Montana v. United States*, 450 U.S. 544 (1981). Rather than address *Montana*, Plaintiffs simply ignore it. Moreover, Plaintiffs ignore tribes' inherent authority over child welfare, so § 1915(c) is not so much a delegation but confirmation of their pre-existing power. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 (1989) ("Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA."); *Fisher v. Dist. Court*, 424 U.S. 382, 386-89 (1976).

C. Anti-Commandeering.—Plaintiffs' opposition makes no serious effort to defend the district court's commandeering holding. As explained (Mot. 15; *see* App. 193-95), ICWA imposes procedural and substantive requirements on state *courts*, which the Supreme Court has held is perfectly constitutional. Plaintiffs' contend that Congress's ability to issue commands to state courts "would be a surprising

loophole in the anti-commandeering principle." (Opp. 16.) But surprising or not, the Court has expressly and clearly adopted the principle, which derives from the Supremacy Clause. (Mot. 14-15.) Plaintiffs also suggest that Congress cannot "rewrit[e] state law" (Opp. 16)—but, like the district court, they cite not a single case supporting that assertion. And it is wrong. *See, e.g.*, *Jinks v. Richland Cnty.*, 538 U.S. 456 (2003) (upholding Congress's authority to modify state statutes of limitations).

Finally, Plaintiffs contend that the Tribes' Spending-Clause argument is waived because it was not pressed below and is erroneous because ICWA operates as a mandate. (Opp. 17.) Wrong on both counts. The Tribes specifically argued below that ICWA was a permissible condition on federal spending. (App. 490-92.) And ICWA's mandatory language is no different from other exercises of Congress's Spending-Clause authority—*e.g.*, the provisions of the Adoption and Safe Families Act cited in the Motion (at 16).

D. APA claim.—Plaintiffs largely ignore the Tribes' argument, instead simply rehashing the district court's incorrect reasoning. They contend that "BIA … lacked authority to issue binding regulations"

(Opp. 18), but ICWA says precisely the opposite: "[T]he Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." § 1952. Further, the district court invalidated the Final Rule because, it held, BIA never explained why it changed its view of its authority to issue regulations. (App. 559.) Plaintiffs abandon that reasoning, apparently conceding—as the Tribes explained (Mot. 17)—that the agency *did* offer a robust explanation. (Opp. 18 n.1.)

II. THE TRIBES WILL SUFFER IRREPARABLE INJURY IF THE JUDGMENT IS NOT STAYED.

Plaintiffs' argument that the Tribes are not harmed by the judgment (Opp. 19-22) is puzzling. They do not dispute that Texas has directed its child-welfare agency and courts not to comply with ICWA—a fact they hid from the district court. They do not dispute that, as a result, the Tribes will lose the whole panoply of procedural and substantive rights provided by ICWA and summarized in the Motion (at 18-19). But they contend that the loss of those vital statutory rights is not a harm. That unexplained contention is preposterous. The fact that the Tribes won't receive statutory notice, or be permitted to intervene as of right, or to exercise exclusive jurisdiction over on-reservation

children is precisely the harm at issue. *Cf. Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1553 (2016) (Thomas, J., concurring).

Finally, Plaintiffs contend that it is "utterly outrageous" to suggest that the State Plaintiffs will "subject Indian children to the sorts of harms that Congress … identified" in ICWA. (Opp. 21-22.) But Texas subjects *all children* in its child-welfare system to the unconstitutional "serious risk of abuse, neglect, and harm to their physical and psychological well-being," *M.D. v. Abbott*, 907 F.3d 237, 243 (5th Cir. 2018), and failure to issue a stay will subject additional Indian children to that constitutional violation.[1]

III. PLAINTIFFS WILL SUFFER NO INJURIES FROM A STAY.

Plaintiffs do not dispute, as the Tribes noted (Mot. 22), this Court's recent holding that injuries inflicted on Plaintiffs from a stay are "not enough, standing alone, to outweigh the other factors." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d

[1] Plaintiffs' contention that "the district court severed the unconstitutional provisions of ICWA" (Opp. 22-23 n.2) is wrong. The opinion contains no severability analysis, and it invalidated all substantive provisions of ICWA wholesale.

406, 419 (5th Cir. 2013). But even considering this factor, Plaintiffs fail to demonstrate that they will suffer *any* injuries from a stay.

First, the Brackeens risk no harm. As explained (Mot. 23-24), the collateral-attack provision applicable to the Brackeens (§ 1914) adopts the *state* limitations period. They repeat their contention that § 1913(d)'s longer limitations period applies—but do not explain why the Tribes are wrong. Instead, they assert that this is "the first time" the Tribes asserted this argument and that non-party Navajo Nation previously contended that § 1913(d) applies.[2] (Opp. 23 n.3.) Wrong. First, the Tribes argued below that § 1913(d) did not apply to the Brackeens. (Dkt. 57, at 11, *adopted by* Dkt. 58.) Second, while Navajo referred generically to the "collateral attack provisions" of ICWA (Dkt. 89, at 3), it never contended that § 1913(d) applies to A.L.M. Finally, *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279 (5th Cir. 2012), does not support their argument that being in a "legally disadvantaged category" is alone an irreparable injury. Rather, *Opulent*

[2] They also cite a misstatement in a summary of ICWA in dicta in *Morrow v. Winslow*, 94 F.3d 1386, 1395 n.6 (10th Cir. 1996).

Life Church held that the deprivation of a First Amendment right is irreparable harm, *id.* at 295—a principle inapplicable here.

Second, the other Individual Plaintiffs will suffer no injury during a stay. As explained, none of them lives in a state bound by the judgment. (Mot. 24.) Apparently conceding that the judgment does not apply in Minnesota and Nevada, they contend only that the Order setting aside the Final Rule would apply to the Librettis' and Cliffords' impending proceedings in Nevada and Minnesota. But courts outside the Northern District of Texas remain obligated to abide by the Final Rule. It is well established that an agency can decline to acquiesce in a court's decision invalidating its regulations or other regulatory actions in a court not bound by that decision.[3] *See Indep. Petroleum Ass'n v. Babbitt*, 92 F.3d 1248, 1261 (D.C. Cir. 1996) ("[I]ntercircuit nonacquiescence is permissible, especially when the law is unsettled."); Getzel Berger, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. Rev. 1068, 1099 (2017) ("While the idea that an agency can keep doing something that a federal court held

[3] In suggesting that the Final Rule is invalidated nationwide, Plaintiffs cite only dicta in a case addressing unrelated issues. (Opp. 24, citing *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989).)

unlawful might come as a surprise to some, intercircuit nonacquiescence is commonplace, and its legitimacy is widely accepted by courts and commentators.").

Moreover, Nevada and Minnesota state courts are not obligated to apply the district court's holding. *See Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 20 (Minn. Ct. App. 2003) ("This court is bound by decision of the Minnesota Supreme Court and the United States Supreme Court. We are not, however, bound by any other federal courts' opinion, even when interpreting federal statutes." (citation omitted)); *Blanton v. N. Las Vegas Mun. Court*, 748 P.2d 494, 500 (Nev. 1987) ("the decisions of the federal district court and panels of the federal circuit court of appeal are not binding upon this court").

Third, the State Plaintiffs will suffer no cognizable harm. They do not explain why—if ICWA inflicts injuries on them—they waited *40 years* to challenge the statute. They do not explain why—if ICWA inflicts injuries on them—Louisiana just this year adopted ICWA as a matter of state law. Nor do Plaintiffs explain why—if ICWA inflicts injuries on them—each of the State Plaintiffs has enacted statutes that

defer to ICWA over state law in certain circumstances. Ind. Code Ann. § 31-21-1-2; La. Stat. Ann. § 13:1804; Tex. Fam. Code Ann. § 152.104.

Finally, demonstrating "impressive chutzpah," *duPont v. S. Nat. Bank of Houston, Tex.*, 771 F.2d 874, 884 (5th Cir. 1985), Plaintiffs also purport to be concerned that a stay would impose "substantial harm to Indian children in State Plaintiffs' care." (Opp. 25.) But the State Plaintiffs litigated to advance *their* interests, not those of Indian children in their custody; they lack *parens patriae* standing to litigate on behalf of any child, *see Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982), and the district court denied them standing to assert the equal protection claim (Dkt. 155 at 33). Likewise, the Individual Plaintiffs litigate only for themselves—not even for the children they seek to adopt.[4] And Plaintiffs subordinated the interests of Indian children to their own—obtaining a judgment that will subject additional Indian children to Texas's unconstitutional child-welfare system where sexual abuse "is the norm." *M.D.*, 907 F.3d at 291 (concurring and dissenting). Further, Plaintiffs seek to override

[4] The district court rejected the due process claim (App. 564), the only one asserted on behalf of A.L.M., Baby O., and Child P.

Congress's determination that ICWA is necessary "to protect the best interests of Indian children," § 1902.

For these reasons, no Plaintiffs have shown harm from a stay. But even if the Brackeens, the Cliffords, and/or the Librettis could show sufficient injury, that would not justify allowing the State Plaintiffs—who waited 40 years to challenge ICWA—to benefit from the judgment, and inflict substantial harm on the Tribes, pending appeal. Moreover, the Individual Plaintiffs did not file a class action, instead litigating only for themselves. Therefore, to the extent that this Court finds that any Individual Plaintiff would incur substantial injury outweighing the other stay factors, any stay should be limited to that specific Individual Plaintiff.

IV. THE PUBLIC INTEREST SUPPORTS A STAY.

Plaintiffs ignore the fact that child-welfare organizations consider ICWA to represent the "gold standard," that Congress determined that ICWA advances the public interest, and that ICWA effectuates the United States' trust obligations to Indians. (Mot. 24-25.) Instead, they contend that any time a court invalidates a statute, the public interest opposes a stay. That simply is not correct; this Court would not have

issued a stay in *Campaign for Southern Equality v. Bryant*, 773 F.3d 55 (5th Cir. 2014), if Plaintiffs were right.

V. *BRYANT* REQUIRES A STAY.

Plaintiffs fail to meaningfully address *Bryant*. If a stay was appropriate there, it is here as well.

CONCLUSION

The Court should stay the judgment.

Respectfully submitted,

s/ Adam H. Charnes

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Counsel for Appellants

CERTIFICATE OF COMPLIANCE

1. This reply complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this response contains 2,591 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

2. This reply complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Century Schoolbook 14-point font using MS Word 2016.

DATED: November 30, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2018, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

DATED: November 30, 2018.

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