

No. 18-11479

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**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.

DAVID BERNHARDT, ACTING SECRETARY, U.S. DEPARTMENT OF THE INTERIOR; TARA SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, In his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,  
*Defendants-Appellants*

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

On Appeal from the United States District Court  
for the Northern District of Texas, Fort Worth Division

**UNOPPOSED MOTION FOR EXTENSION  
OF TIME TO FILE EN BANC PETITION**

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Counsel for Individual Appellees

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## CERTIFICATE OF INTERESTED PERSONS

No. 18-11479

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.

DAVID BERNHARDT, ACTING SECRETARY, U.S. DEPARTMENT OF THE INTERIOR; TARA SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, In his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,  
*Defendants-Appellants*

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

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.

### **Individual Plaintiffs-Appellees:**

Chad Everet Brackeen  
Jennifer Kay Brackeen  
Altagracia Socorro Hernandez  
Jason Clifford  
Danielle Clifford  
Frank Nicholas Libretti  
Heather Lynn Libretti

**Counsel for Individual Plaintiffs-Appellees:**

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**State Plaintiffs-Appellees:**

Texas  
Indiana  
Louisiana

**Counsel for State Plaintiffs-Appellees:**

Ken Paxton	Curtis Hill, Attorney General of
Jeffrey C. Mateer	Indiana
Kyle D. Hawkins (lead counsel)	Jeff Landry, Attorney General of
Beth Klusmann	Louisiana
John C. Sullivan	
David J. Hacker	
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**Intervenor Defendants-Appellants:**

Cherokee Nation  
Oneida Nation  
Quinault Indian Nation  
Morongo Band of Mission Indians

**Counsel for Intervenor Defendants-Appellants:**

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**Federal Defendants-Appellants:**

United States of America  
Bureau of Indian Affairs  
Bryan Rice, Director of Bureau of Indian Affairs  
John Tahsuda III, Bureau of Indian Affairs Principal Assistant Secretary for Indian Affairs  
Tara Sweeney, Acting Assistant Secretary for Indian Affairs  
United States Department of the Interior  
David Bernhardt, Acting Secretary of the Department of the Interior  
United States Department of Health and Human Services  
Alex Azar, Secretary of the Department of Health and Human Services

**Counsel for Federal Defendants-Appellants:**

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Christine Ennis	Sam Ennis
Ragu-Jara “Juge” Gregg	JoAnn Kintz
Amber Blaha	Rachel Heron
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**Intervenor**

Navajo Nation

**Counsel for Intervenor**

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Thomas P. Schmidt	Paul Spruhan
Maria Wyckoff Boyce	Kandis Martine
Catherine E. Bratic	Navajo Nation Department of Justice
Hogan Lovells US, LLP	

/s/ Kyle D. Hawkins  
KYLE D. HAWKINS  
*Counsel of Record for State Appellees*

Appellees respectfully request a 30-day extension of the deadline to file any petitions for rehearing en banc, which are currently due September 23, 2019. The requested extension would create a new deadline of October 23, 2019. This motion is unopposed.

The panel in this case issued its decision on August 9, 2019, and issued a modified decision that included Judge Owen's partial dissent on August 16, 2019. *Brackeen v. Bernhardt*, No. 18-11479, 2019 WL 3857613 (5th Cir. Aug. 9, 2019). Because the United States is a party, the current deadline for any en banc petition is September 23, 2019. *See* Fed. R. App. P. 35(c), 40(a)(1). Appellees seek a 30-day extension of that deadline, setting a new deadline of October 23, 2019.

This extension is not sought for purposes of delay, but to accommodate the schedules of counsel for the State Appellees (Texas, Indiana, and Louisiana). Lead counsel for the State Appellees, Kyle Hawkins, has had numerous obligations since the panel issued its opinion:

- **August 30** – Filed an appellants' brief in this Court in *Amawi v. Paxton*, No. 19-50384;
- **September 3** – Filed a conditional motion for review of a river master's 2019 final determination in the United States Supreme Court in *Texas v. New Mexico*, No. 22O65;
- **September 4** – Filed a States' amicus brief in the United States Supreme Court in *Remington Arms Co. v. Soto*, No. 19-168;
- **September 9** – Filed a cross-appellant/appellee brief in the Second Court of Appeals in Texas in *In re Y.J.*, No. 02-19-00235-CV; and
- **September 11** – Filed a petition for rehearing en banc in this Court in *Lucio v. Davis*, No. 16-70027.

Mr. Hawkins' upcoming deadlines include (1) **September 18** – filing a response to a CVSG request from the Texas Supreme Court that was issued on September 4 in *In re Pardo*, No. 19-0760; (2) **September 18** – oral argument in the Texas Supreme Court in *San Antonio River Authority v. Austin Bridge & Road, LP*, No. 17-0905; (3) **September 24** – oral argument before the en banc Fifth Circuit in *Williams v. Catoe*, No. 18-40825; (4) **October 10** – oral argument before this Court in *Freedom from Religion Foundation v. Abbott*, 18-50610; and (5) **October 21** – filing a reply brief in the Second Court of Appeals in Texas in *In re Y.J.*, No. 02-19-00235-CV.

Other counsel for the State Appellees are similarly busy or unavailable. Beth Klusmann was out of the office from August 24-29, filed an amicus brief in the Seventh Court of Appeals in Texas on September 3, argued in this Court on September 5, filed briefs in the First and Second Courts of Appeals in Texas on September 9, has oral argument in the Texas Supreme Court on September 24, may have oral argument in this Court on October 7, and has two briefs due in the Texas Supreme Court on October 11. John Sullivan has left the Attorney General's Office, and David Hacker has moved to a new position within the Office.

As demonstrated by the multiple intervenors, numerous amicus briefs, and expanded argument time, this is a case of importance to many, and the constitutional questions raised are significant. Mindful of the Court's admonition that rehearing en banc is "the most abused prerogative" and should be pursued rarely, 5th Cir. I.O.P., the State Appellees desire to file an en banc petition that is well-researched, thorough, and helpful to the en banc Court. To do so, and for the reasons described above, they request an extension of 30 days.

In order to keep all parties on the same schedule, and to ensure uniform response deadlines if any responses are requested, the Individual Appellees also request that their deadline be extended—creating a single deadline of October 23 for all Appellees. As demonstrated in the certificate of conference, this motion is unopposed.



## CONCLUSION

For the foregoing reasons, Appellees request a 30-day extension of their deadline to file any en banc petitions, creating a new deadline of October 23.

Respectfully submitted.

JEFF LANDRY  
Attorney General of Louisiana

CURTIS HILL  
Attorney General of Indiana

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/s/ Kyle D. Hawkins  
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Counsel for Individual Appellees

**CERTIFICATE OF CONFERENCE**

I hereby certify that on September 13, 2019, counsel for the State Appellees conferred by e-mail with counsel for the Federal Defendants (Rachel Heron), the Tribal Intervenors (Keith M. Harper), and the Navajo Nation (Paul Spruhan). All of the parties indicated that they are unopposed.

/s/ Kyle D. Hawkins  
KYLE D. HAWKINS

**CERTIFICATE OF SERVICE**

On September 13, 2019, this motion was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Kyle D. Hawkins  
KYLE D. HAWKINS

**CERTIFICATE OF COMPLIANCE**

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 656 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Kyle D. Hawkins  
KYLE D. HAWKINS