

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; QUINALT 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

OPPOSED MOTION TO EXPEDITE BY APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

No. 18-11479

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; STATE OF
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JASON CLIFFORD; FRANK NICHOLAS LIBRETTI; STATE OF
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Plaintiffs-Appellees,

v.

CHEROKEE NATION; ONEIDA NATION; QUINALT 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.

State Plaintiffs-Appellees:

Texas

Indiana

Louisiana

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Intervenor Defendants-Appellants:

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Federal Defendants:

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John Tahsuda III, Bureau of Indian Affairs Principal Assistant Secretary for Indian Affairs

United States Department of the Interior

Ryan Zinke, Secretary of the Department of the Interior

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U.S. Department of Justice

/s/ Kyle D. Hawkins

KYLE D. HAWKINS

Counsel of Record for State Appellees

Plaintiffs-Appellees respectfully request that the Court enter an expedited briefing and oral argument schedule in this case.

1. This lawsuit concerns the constitutionality of the Indian Child Welfare Act, 25 U.S.C. §§ 1901-23, 1951-52, and its related rules, 25 C.F.R. §§ 23.106-22, .124-32, .140-41, which set federal standards for the placement of Indian children in foster care and adoptive homes. The challenge to its constitutionality was brought by a group of States, who are obligated to comply with the provisions of ICWA, and a group of individuals, whose adoptions of Indian children have been impacted by ICWA. Suit was brought against the United States and numerous federal defendants involved in promulgating the rules purporting to implement ICWA. Several Indian Tribes also intervened as defendants to defend ICWA.

2. On October 4, following extensive briefing and oral argument, the district court issued a thorough decision, detailing numerous constitutional violations and declaring the challenged statutes and rules unconstitutional. The defendant Tribes appealed and have asked this Court to stay the district court's judgment pending appeal.

3. The federal Defendants have not yet filed a notice of appeal, but their sixty-day deadline expires on December 3. The States nevertheless conferenced with both Defendants-Appellants Indian Tribes and the federal Defendants on this motion. The Tribes oppose this motion, believing it to be premature until it is known whether the federal Defendants will appeal. Counsel for the federal Defendants indicated that, should the federal Defendants decide to appeal, they would oppose expedited briefing and argument.

4. Plaintiffs-Appellees respectfully request that this Court enter an expedited briefing and oral argument schedule. Expedition is appropriate because of the interests involved in this lawsuit: The States need a definitive answer as to how to treat the Indian children within their care—whether they must treat them differently because of their Indian ancestry or whether they will be treated like all other children. The States have before them now dozens of cases involving Indian children, many of which are contested proceedings, and many more such contested cases are likely to arise during the pendency of the Tribes’ appeal. Finality in those proceedings will be elusive, if not impossible to achieve, until this Court rules. Expedition is appropriate to give the Indian children in the States’ care finality in the resolution of the child welfare and custody proceedings involving them and the permanency in their placements that follow. The interest of those Indian children in achieving permanency as promptly as possible warrants expedition of this appeal.

5. Expedition also is appropriate because several Individual Plaintiffs—the Cliffords—are currently involved in a contested adoption proceeding involving an Indian child that will be impacted by this Court’s ruling on the issues in this appeal, including by determining whether the federal regulations that purport to govern the Cliffords’ proceeding are lawful. Whatever the resolution of those state-court proceedings, the child at their center, Child P., is unlikely to achieve permanency in her placement until there is a final adjudication as to the constitutionality of ICWA. Child P.’s interest in achieving permanency in her placement further warrants expedition of this appeal.

6. Moreover, expedition is appropriate to ensure that other Individual Plaintiffs' claims are not mooted by the passage of time. Section 1913(d) of ICWA imposes a 2-year collateral-attack period on voluntary adoptions involving Indian children. 25 U.S.C. § 1913(d). After they filed the lawsuit giving rise to this appeal, Individual Plaintiffs Chad and Jennifer Brackeen were allowed to adopt the Indian child they had fostered for more than a year, A.L.M. That adoption was entered in January 2018, and accordingly Section 1913(d)'s collateral-attack period will expire in January 2020. Expedition of the appeal is appropriate to ensure the district court's judgment that Section 1913(d) is unconstitutional can be reviewed by this Court, and a decision issued, before that claim possibly is mooted by the passage of time.

7. There will be no prejudice to the Tribes by expediting this case. First, Plaintiffs-Appellees are not seeking to expedite the Tribes' opening brief, which is currently due on December 31, 2018. But the States do ask that this deadline not be extended for any appellant, including the federal Defendants, should they choose to appeal. Second, this case was thoroughly briefed in the district court. It should not take an unusual amount of time to brief on appeal.

8. Plaintiffs-Appellees seek the following briefing and oral argument schedule:

- Appellants Opening Briefs: December 31, 2018 (the current due date)
- Appellees Briefs: January 22, 2019
- Reply Briefs: February 1, 2019
- Oral Argument: March (or first available setting)

CONCLUSION

For the foregoing reasons, the Court should expedite briefing and oral argument in this appeal.

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

I certify that counsel for Appellees conferenced with Adam Charnes, counsel for Defendants-Appellants Indian Tribes, by e-mail on November 26, 2018, and the Tribes are opposed to the relief requested and intend to file an opposition. I certify that counsel for Appellees conferenced with JoAnn Kintz and Rachel Heron, counsel for the federal Defendants, by e-mail on November 26, 2018. They indicated that, should the federal Defendants appeal, they would oppose expedited briefing, but declined to say whether they would file an opposition.

/s/ Kyle D Hawkins
KYLE D. HAWKINS

CERTIFICATE OF SERVICE

On November 27, 2018, 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 778 words, excluding the parts of the brief exempted by Rule 27(a)(2)(B); and (2) the typeface and type style requirements of Rule 27(d)(1)(E) 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
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