



U.S. Department of Justice

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Lyle W. Cayce
Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
F. Edward Hebert Building
600 South Maestri Place
New Orleans, Louisiana 70130

Re: No. 18-11479, *Brackeen v. Bernhardt*
Division of Appellants' Time for Oral Argument

Dear Mr. Cayce:

This Court has scheduled oral argument in the above-captioned appeal for March 13, 2019, with each side to argue for 30 minutes. Defendants-Appellants United States of America, et al. (the United States) respectfully requests that it be permitted to argue for 22 of the 30 minutes allocated to appellants.

This appeal arises from a district court decision declaring unconstitutional a 40-year-old Act of Congress, the Indian Child Welfare Act (ICWA). The United States Department of Justice is the primary defender of federal statutes when those statutes are challenged on constitutional grounds in the federal courts. *See* 28 U.S.C. § 2403(a) (providing for mandatory intervention by the United States in any action questioning the constitutionality of an Act of Congress); Fed. R. App. P. 44(a) (requiring notice to the United States in challenges to the constitutionality of federal statutes in appeals to which the government is not yet a party). The United States is also the appropriate defendant in any action challenging regulations promulgated by federal agencies, including the Department of the Interior's 2016 rule interpreting ICWA, also at issue in this appeal. *See* 5 U.S.C. § 702. For these reasons, the United States should be allocated the majority of the time allotted to appellants — 22 minutes — in order to fully present to this Court the United States' defense of the challenged statute and agency rule. The remaining 8 minutes of the appellants' time may be allotted to the various Indian tribes that have intervened as defendants, who may share their experience as governmental entities affected by the statute and the rule.

Although the appellants tried to reach an accommodation, a group of four of those intervenor tribes has demanded that the 30 minutes allocated to appellants be split evenly between that group and the United States. Respectfully, such a division is inappropriate in this matter. As explained in the United States' successful motion to enlarge the time for oral argument from 20 minutes to 30 minutes per side, the decision below raises numerous constitutional questions regarding ICWA. Twenty-two minutes of time is necessary and appropriate for the primary defender of that statute to

aid this Court in answering each of those questions. The remaining 8 minutes of argument is sufficient for the intervenor tribes to supplement the United States' defense of the statute.

For the foregoing reasons, the Court should allot 22 of the 30 minutes allocated to appellants to the United States and the remaining 8 minutes to the intervenor tribes. The United States is prepared to make this request in a formal motion, should this Court decide that further airing of the issue is needed.

Sincerely,

s/ Eric Grant
Eric Grant
Deputy Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

Counsel for Defendants-Appellants
United States of America, et al.