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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, et al. v. Bernhardt, et al.*
Response to Federal Defendants' Letter Regarding Division of Appellants' Time
for Oral Argument

Dear Mr. Cayce:

Appellants the Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians (the "Tribes") submit this letter in response to the February 25, 2019 letter from Mr. Grant requesting that the Federal Defendants be given 22 minutes of the allotted 30 minutes of oral argument time. The Tribes request that the Court allocate 15 minutes to the Federal Defendants and 15 minutes to the Tribes at oral argument. (Counsel for intervenor Navajo Nation informed the parties that it does not seek to participate in the oral argument.)

The Tribes apologize that this issue has come before the Court and was not worked out between counsel for the Tribes and for the Federal Defendants. The Tribes previously conferred with the Federal Defendants regarding oral argument time, but were unable to agree on an equitable division of the 30 minutes allotted. The Federal Defendants, ignoring the fact that the Tribes are full parties to this appeal, have now requested that counsel for the Federal Defendants be allotted the vast majority of the argument time—22 of the 30 minutes. The Federal Defendants apparently believe that the Tribes should be treated as second-class litigants and should rely on the Federal Defendants to represent their interests in this case. This is unwarranted for two primary reasons.

First, there is no justification for not allowing the Tribes equal time to argue as the Federal Defendants. The Tribes are equal parties in this action. They fully briefed summary judgment before the district court; they filed their own notice of appeal—which was the first one filed; and they filed a successful motion to stay the district court's judgment with this Court—a motion that the Federal Defendants did not join or file on their own. The Tribes have also fully briefed all issues before this Court.

Lyle W. Cayce
February 26, 2019
Page 2

The Federal Defendants seek to downplay the Tribes' role, claiming that the Federal Defendants can present a full defense of ICWA, while the Tribes can then spend the remaining eight minutes to "share their experience as governmental entities affected by the statute and the rule." Respectfully, the Court should reject the Federal Defendants' patronizing and paternalistic effort to minimize the Tribes' role in this appeal. The Tribes' arguments on appeal are not limited to "their experience as governmental entities"—rather, they present a full legal argument in support of ICWA and the Final Rule, the same as the Federal Defendants. Further, the Federal Defendants' assertion ignores the fact that, though the Tribes and the Federal Defendants challenge the same judgment, they make different (though complimentary) arguments in support of reversal. Finally, in all events, the Federal Defendants fail to acknowledge that Indian tribes are not merely another governmental entity "affected" by ICWA, but are direct, intended beneficiaries of the statute, and that in ICWA Congress acknowledged that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3). While the Department of Justice has a general interest in supporting federal statutes, the Tribes in this case are litigating for their "continued existence and integrity." *Id.* For this reason, they deserve a full share of argument time.

Second, in seeking additional argument time, the Federal Defendants told this Court that 30 minutes was necessary because of "the number of parties with distinct perspectives on these issues." (App. Dkt. 00514823393). Now that the Court has allowed each side 30 minutes at argument, the Federal Defendants demand for themselves the lion's share of appellants' collective time—indeed, more time than the Court initially allotted to all appellants. The Court should hold the Federal Defendants to their word, and equitably allocate the 30 minutes allotted.

For these reasons, the Court should provide 15 minutes to the Federal Defendants and 15 minutes to the Tribes at oral argument.

Respectfully submitted,

/s/ Adam H. Charnes

Adam H. Charnes
Counsel for Appellants Cherokee Nation,
Oneida Nation, Quinault Indian Nation, and
Morongo Band of Mission Indians

cc: All counsel of record via ECF