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.

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

NAVAJO NATION,
Intervenor Defendants – Appellants.

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

EN BANC BRIEF OF INTERVENOR NAVAJO NATION

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CERTIFICATE OF INTERESTED PERSONS

Brackeen, et. al. v. Bernhardt, 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. Navajo Nation (Intervenor)

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

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

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49. Colleen E. Roh Sinzdak, Hogan Lovells US LLP, counsel for the Navajo Nation

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53. Paul Spruhan, Assistant Attorney General, Navajo Nation Department of Justice, counsel for the Navajo Nation

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

s/ Paul Spruhan
Attorney for Intervenor

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INTRODUCTION

Pursuant to this Court's order, Intervenor Navajo Nation files its *en banc* brief. To avoid repetition of the Navajo Nation's prior briefs before the three-judge panel, submitted previously to this Court at its request, and to avoid duplication of arguments made by the United States and the other tribal nations in the current *en banc* briefing, the Navajo Nation files a short brief supplementing those prior pleadings.

In this brief, the Navajo Nation discusses several arguments of Appellees concerning equal protection, most recently raised in their pleadings seeking *en banc* review. The Navajo Nation adopts by reference its prior briefs, and the briefs filed by Appellants United States and the Cherokee and other tribal nations, including the factual and procedural statements included in each. As argued by all Appellants, the Indian Child Welfare Act (ICWA) does not violate the Fifth Amendment's equal protection requirement, and the District Court's decision concluding otherwise should be reversed.[1]

[1] While this brief focuses on Appellees' equal protection challenge, the Navajo Nation also agrees with the United States and the other tribal nations that Appellees lack standing, and that ICWA, its regulations, and the Social Security Act do not violate other provisions of the Constitution or the Administrative Procedures Act as asserted by Appellees. Also, even if one or more provisions do, under ICWA's severability clause, the rest of the statute and its regulations remain intact. *See* 25 U.S.C. § 1963.

ARGUMENT

I. ICWA APPLIES A POLITICAL DEFINITION, AND IS THEREFORE REVIEWED UNDER *MANCARI'S* RATIONAL BASIS TEST.

Setting aside the larger question of what "Indian" might mean generally under federal law, for the Court's purposes here, there is no ambiguity. Even if "Indian" might be a racial classification under some other federal law, the definitions of "Indian," "Indian child," and "Indian tribe" in ICWA are categorically political. As such, they are unquestionably appropriate and do not violate equal protection so long as there is a rational basis for the differential treatment. *Morton v. Mancari*, 417 U.S. 535 (1974).

A. Appellees create an improper presumption that all Indian legislation is racial.

Individual Appellees mischaracterize *Mancari* and *Rice v. Cayetano*, 528 U.S. 495 (2000), to create a presumption that Indian legislation is "racial," unless affirmatively proven otherwise. Individual Appellees Pet. at 7 ("[P]references for tribal Indians can be characterized as political classifications subject to rational-basis review *only* when the differential treatment is closely tied to tribal self-government."). Indeed, they further suggest that all Indian legislation is *per se* racial, except for the specific employment preference in *Mancari*, which they characterize as a narrow exception. *Id.* at 7. They provide no actual legal authority for these assertions, and there is none.

In fact, from the inclusion of tribal nations in the Constitution's text forward, the term "Indian" as applied in federal law includes dual elements of "race" and "political status," and congressional legislation has emphasized these dual elements more or less in specific situations. *See* U.S. Const., art. I., § 2, cl. 3; art. 1, § 8, cl. 3; amend. XIV, § 2; *see also* Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 Stan. L. Rev. 1025, 1035 (2018) ("Although early Americans employed both political and racial definitions of Indianness…if…["Indian"] should be read as a racial classification, then it is a racial category that appears in the Constitution itself"). Some statutes, such as ICWA, are purely political, defining "Indian" and "Indian child" as members of tribal nations with a government-to-government relationship to the United States. *See* 25 U.S.C. §§ 1903(3), (4); *see also* 25 U.S.C. § 1903(8) (defining "Indian tribe"). Other laws, such as the employment preference regulation in *Mancari*, include a hybrid definition that applies both blood quantum and membership in a federally-recognized tribe. *See, e.g.*, 417 U.S. at 553-54, and n.24 (discussing regulation defining "Indian" as member of federally-recognized tribe with one-quarter or more Indian blood); 25 U.S.C. § 5129 (defining "Indian" as members of recognized tribe, descendants of such members residing on a reservation, or other persons of one-half or more Indian blood). Still other laws explicitly invoke an Indian "race" unmoored from citizenship in a sovereign tribal nation. *See* 8 U.S.C.

§ 1359 (recognizing free passage rights of Canadian Indians "who possess at least 50 per centum of blood of the *American Indian race*." (emphasis added)); Act of Oct. 14, 1940, ch. 876, sec. 303, 54 Stat. 1137, 1140 (granting the right to naturalize to "descendants of *races* indigenous to the Western Hemisphere" (emphasis added)); *cf. Rice*, 528 U.S. at 514-17 (concluding definition of Hawaiians as "descendants" of "peoples" native to the Hawaiian Islands is a racial classification); *Davis v. Guam*, 932 F.3d 822, 828 (9th Cir. 2019) (same for definition of "Native Inhabitants of Guam"); *Davis v. Commonwealth Election Comm'n*, 844 F.3d 1087, 1090 (9th Cir. 2016) (same for definition of "person of Northern Marianas descent").

As statutory definitions of "Indian" vary, with some being unambiguously political, there can be no overarching presumption of race. Each law should be analyzed according to its specific definition, first to conclude whether Congress intended "Indian" to be a political category made up of citizens of sovereign tribal nations, or as a group of individuals with a common racial make-up. Once that analysis is complete, the underlying law should be analyzed under either rational basis or strict scrutiny review. This is the Supreme Court's approach in *Mancari*, and the one that this Court has applied previously to another statute concerning Indians.[2] *See Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216

[2] This Court need not decide in this case whether all congressional legislation concerning Indians is per se political or racial, or constitutional or unconstitutional. The equal protection questions actually presented are quite narrow: whether ICWA

(1991) (concluding definition of Native American Church members is political and "[t]hus, under [*Mancari*], we must now consider whether the preference given the NAC 'can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians'").

B. ICWA defines Indians as members of political sovereigns, not a race.

Under the appropriate analysis, "Indian" in ICWA is a political status, as "Indian," "Indian child," and "Indian tribe" are explicitly tied to membership in sovereign tribal nations, and include no reference to blood quantum, ancestry, or race. ICWA defines "Indian" as "any person who is a member of an Indian tribe[.]" 25 U.S.C. § 1903(3). "Indian child" is defined as a person under eighteen years old and "either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). Finally, ICWA defines "Indian tribe" as only those tribal nations recognized by the United States as sovereigns "eligible for the services provided to Indians by the Secretary [of Interior] because of their status as Indians[.]" 25 U.S.C. § 1903(8). There is no blood quantum requirement like the definition in *Mancari*,[3] or, in fact, any requirement of Indian racial ancestry at all. *Cf.* 25 U.S.C.

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defines "Indian" as a political or racial group, and, depending on that answer, whether ICWA fulfills either rational basis or strict scrutiny review.

[3] As discussed in detail in the Navajo Nation's prior briefs, the District Court's assertion that ICWA's definition is racial because some tribes allegedly apply blood

§ 5129 (defining "Indian" as "all persons *of Indian descent* who are members of any recognized Indian tribe" (emphasis added)). There is then no "proxy" for race to be discovered, as ancestry is not even an element of the definition. *See Rice*, 528 U.S. at 514 ("Ancestry can be a proxy for race").

Nonetheless, the U.S. Supreme Court considered the hybrid definition at issue in *Mancari* to be political, and not racial, as it was ultimately tied to membership in a federally-recognized tribe. *See Mancari*, 417 U.S. at 553, n.24; *Rice*, 528 U.S. at 519-20. If *Mancari's* hybrid definition is political, despite including a specific blood quantum requirement, the definition in ICWA is indisputably so.

Individual Appellees assert that tribal membership is inherently racial, again

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quantum as their sole citizenship criteria, is then wrong for several reasons. *See* Navajo Nation Op. Br., at 37-39. First, ICWA defers to all tribes' citizenship laws, whatever they might be at a given time. 25 U.S.C. §§ 1903(3), (4). Therefore, cherry-picking a handful of tribes and imputing their current criteria to ICWA's general definition of "Indian" is improper. That is particularly true here, where Appellees only make a facial challenge to ICWA, and not as-applied to specific children from specific tribal nations.

Second, even if appropriate, the District Court mischaracterized the substance of those tribal laws it did cite, including the Navajo Nation's citizenship criteria. The Navajo Nation does not "solely" require a minimum blood quantum requirement for membership. *See* Navajo Nation Op. Br., at 34-35. The Navajo Nation also requires an applicant to show one parent is a member, and that he or she is not a member of any other federally-recognized tribe. 1 N.N.C. §§ 701(C), 703 (2005). If an applicant does not have an enrolled parent, he or she must fulfill several cultural criteria and be approved by an Enrollment Screening Committee. 1 N.N.C. § 753(B) (2005). Further, the Navajo Nation does not unilaterally enroll minor children, as an application affirmatively filed by a parent or guardian is required in all cases. 1 N.N.C. § 751 (2005).

with no actual legal support. Individual App. Pet. at 9. The regulation Appellees cite applies to the process for the Bureau of Indian Affairs to recognize tribes currently lacking a government-to-government relationship with the United States. *See* 25 C.F.R. § 83.11(e). It does not control membership for tribes with that existing political relationship, which may define their membership as sovereign nations, as they see fit. *See Santa Clara v. Martinez,* 436 U.S. 49, 72, n.32 (1978) ("A tribe's right to its own membership for tribal purposes has long been recognized as central to its existence as an independent *political community*." (emphasis added)).

Further, tribal membership is not *per se* racial now, and has never been purely racial. As noted by the Cherokee Nation, descendants of Freedmen without documented Indian ancestry currently are citizens of that tribal nation. Op. Br. of Appellants Cherokee Nation et. al at 29-30. Further, tribal nations and the federal government throughout the history of federal Indian policy have recognized people without Indian ancestry as tribal members through naturalization. *See, e.g.*, Act of April 21, 1904, ch. 1402, 33 Stat. 189, 204 (releasing from alienation restrictions on their allotments "Indians who are not of Indian blood"); Act of May 2, 1890, § 30, 26 Stat. 81 (recognizing exclusive tribal jurisdiction over members "by nativity or adoption"); *United States ex rel. West v. Hitchcock*, 205 U.S. 80, 83 (1907) (discussing adoption of white man as member of Wichita tribe); *Lucas v. United States*, 163 U.S. 612, 614-15 (1896) (referring to naturalized African-American

tribal citizens as "Indians, in a jurisdictional sense"); Sen. Ex. Doc. 51, 51st Cong. 1st Sess. 289-92 (1890) (recognizing white men married to Sioux women as members of the Sioux Nation for land cession). Tribes have recognized, and can now or in the future recognize, persons without ancestry from that specific tribe, or another tribe, as citizens of political sovereigns.

Contrary to Appellees' repeated assertions, ICWA then in no way applies to a subset of an Indian "race," as the Supreme Court concluded the definition of "Hawaiian" did in *Rice*, as it is not tied to any racial distinction at all. *See* 528 U.S. at 516-17 ("Simply because a class *defined by ancestry* does not include all members of the race does not suffice to make the classification race neutral." (emphasis added)). Instead it applies its protections to members of a subset of tribal sovereigns. Indeed, ICWA excludes many people who are politically Indian: members of tribal nations recognized by State governments but not by the United States, members of Canadian First Nations, and members of indigenous peoples from Central and South America with recognized political autonomy under their specific country's laws. *Cf. Mancari*, 417 U.S. at 553, n.24 (preference definition "operates to exclude many individuals who are racially to be classified as 'Indians'" and therefore "the preference is political rather than racial in nature"). The distinction has nothing to do with a "race" of Indians, and *Rice* is inapplicable.

Further, contrary to Individual Appellees' argument, ICWA's reference to a

child being the "biological" child of an Indian parent does not render the second prong of the "Indian child" definition racial. Individual Appellees Pet. at 9-10. That term merely describes the tie that exists between a child and a parent who is a member of a federally-recognized tribe. 25 U.S.C. § 1903(4). It does not refer to any racial ancestry requirement, only a familial link to a tribal citizen.

The Ninth Circuit recently discussed the difference between biology and race in *Davis v. Guam (Guam)*. In that case, the court observed that state and federal laws are replete with provisions referencing biological descent without being racial classifications, such as laws of intestate succession, automatic citizenship for biological descendants of U.S. citizens, immigrant visa preference for biological children of U.S. citizens, and, notably, child custody laws. 932 F.3d at 836. *Guam* thus concluded that "biological descent or ancestry is often a feature of a race classification, but an ancestral classification is not always a racial one." *Id*. ICWA fits the latter category; the biological connection is between parent and child, and not between members of an identified Indian "race."

II. ICWA FULFILLS TREATY OBLIGATIONS OF THE UNITED STATES, AND THEREFORE FULFILLS EITHER EQUAL PROTECTION TEST.

As discussed above, ICWA sits squarely within well-settled precedent that "Indian" is a political rather than a racial classification. Even so, whether considered under *Mancari's* rational basis test, or the strict scrutiny test applied by the District

Court, ICWA is constitutional because it fulfills promises made in a number of treaties with tribal nations.[4]

Although the use of race subjects a statute to strict scrutiny, it does not automatically invalidate it. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). Indeed, racial classifications are constitutional when they are "narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Notably, courts do not apply this analysis in a vacuum. "Context matters when reviewing race-based governmental action," and should be taken into consideration when applying strict scrutiny. *Grutter*, 539 U.S. at 327. As such, "not every decision influenced by race is equally objectionable" and the courts should keep in mind the "importance and sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." *Id.*

For tribes like the Navajo Nation, the political relationship with the federal government is enshrined in bilateral treaties authorized by the Treaty Clause of the U.S. Constitution, agreements by definition between sovereigns, and not

[4] As ICWA fulfills strict scrutiny, it would fulfill *Mancari's* less demanding rational basis test. As more fully discussed below, ICWA fulfills specific treaty provisions to the Nation and other tribes that promise to provide for the welfare of the tribe and its children, and therefore is "rationally tied to Congress's unique obligations towards the Indians." *Mancari*, 417 U.S. at 554.

"races." *See* U.S. Const., art. II, § 2, cl. 2. However, even if "Indian" is somehow racial, ICWA is a fulfillment of treaty promises to provide for the welfare of tribal sovereigns and their children. 25 U.S.C. § 1901(2) (finding that "Congress, through . . . *treaties* . . . has assumed the responsibility for the protection and preservation of Indian tribes and their resources," and that "there is no resource more vital to the continued existence and integrity of Indian tribes than their children, and that the United States has a direct interest, as trustee, in protecting Indian children" (emphasis added)).[5] ICWA is then authorized by the Treaty Clause, as well as the Indian Commerce Clause.

The duty to uphold treaty obligations with tribal nations demonstrates the government's compelling interest in ICWA. For the Navajo Nation, the United States has entered into two treaties promising to protect Navajo people and their

[5] More than forty treaties specifically provide for the welfare of Indian children. *See, e.g.*, Treaty with the Senecas, et. al. art. XIX, Feb. 23, 1867, 15 Stat. 513 (requiring that the tribes' children "be subsisted, clothed, educated, and attended in sickness," and that the tribe's chiefs shall determine "guardianship of orphan children"); Treaty with the Creeks & Seminoles art. IX, Aug. 7, 1856, 11 Stat. 699 (providing that each child receive "a blanket, pair of shoes, and other necessary articles of comfortable clothing"); Treaty with the Sauk & Foxes art. X, Sept. 21, 1832, 7 Stat. 374 (promising cattle, pork, salt, flour, and maize "principally for the use of the Sac and Fox women *and children*" (emphasis added)); Treaty with the Seminole art. 3, May 9, 1832, 7 Stat. 368 (promising to provide "a blanket and a homespun frock" to each Seminole child); Treaty with the Chickasaw art. 3, Oct. 19, 1818, 7 Stat. 192 (showing that the United States intended, by treaty, "to perpetuate the happiness of the Chickesaw [sic] nation of Indians").

children. In the Treaty of 1849, the United States promised to "so legislate and act as to secure the permanent prosperity and happiness of said Indians." Treaty with the Navajo art. XI, Sept. 9, 1849, 9 Stat. 974; *accord*, Treaty with the Apache art. XI, July 1, 1852, 10 Stat. 979. Again, in the Treaty of 1868, the United States promised to secure the education and welfare of Navajo children. Treaty with the Navajo art. VI, June 1, 1868, 10 Stat. 655. To the Navajo Nation, ICWA is a direct fulfillment of treaty obligations to promote the care and education of Navajo children and the preservation of the Nation's prosperity, through continuing the culture of the Nation through its ongoing connection to its children.

The Navajo Nation is not unique in this regard. The United States made similar commitments to numerous other tribes in treaties.[6] The repeated promises

[6] *See* Treaty with the E. Band of Shoshonees & Bannack Tribe of Indians art. VII, July 3, 1868, 15 Stat. 673 (Promising a school house and a teacher "competent to teach elementary branches of an English education", so long as the tribes pledge to "compel their children" to attend school, and emphasizing that it is the duty of the federal agent to ensure compliance); *accord* Treaty with the Sioux Indians art. VII, Apr. 29, 1868, 15 Stat. 635; Treaty with the Tabeguache Band of Ute Indians et. al. art. VIII, March 2, 1868, 15 Stat. 619; Treaty with the Kiowa & Comanche Tribes of Indians art. VII, Oct. 21, 1867, 15 Stat. 581. *See also* Treaty with the Sauk & Foxes art. IX, Feb. 18, 1867, 13 Stat. 495 (promising a manual-labor school); Treaty with the Ottawa Indians of Blanchard's Fork & Roche De Bœuf art. VI, June 24, 1862, 7 Stat. 1237 (setting aside twenty thousand acres for a school, and requiring that "the children of the Ottawas and their descendants, no matter where they may emigrate, shall have the right to enter said school and enjoy all the privileges thereof, the same as though they had remained upon the lands by this treaty allotted"); Treaty with the Nez Percé Indians art. V, June 11, 1855, 12 Stat. 957 (providing two schools supplied with books, furniture, stationery and teachers for free to the children of the tribe); Treaty with the Delawares, Sept. 24, 1829, 7

made for the welfare of tribal children manifest a trust obligation not only to tribal nations as a whole, but also to individual Indian children.

ICWA then reflects these promises to tribes and their children by maintaining, where possible, the connections between an Indian child, that child's family, and the child's tribal nation. *See* 25 U.S.C. §§ 1911-1917, 1920-22 (setting out minimum standards for child placements in state child custody proceedings for an "Indian child").

ICWA's provisions are also narrowly tailored to those promises by preferring, but not mandating in every case, placement with the child's family, a family of the child's tribe, or, if none are available, a family of another tribal nation. 25 U.S.C. § 1915(a), (b) (setting out hierarchy of placement for adoption and foster care placements to apply "absent good cause to the contrary").

Stat. 327 (requiring that "thirty-six sections of the best land" be sold for "the support of schools for the education of Delaware children"); Treaty with the Creeks, Nov. 15, 1827, 7 Stat. 307 (providing $5,000 for "the education and support of Creek children at the school in Kentucky"); Treaty with the Osage art. 6, June 2, 1825, 7 Stat. 240 (providing land "to be laid off…and sold, for the purpose of raising a fund to be applied to the support of schools, for the education of the Osage children"); Treaty with the Wyandot, et. al. art. 16, Sept. 29, 1817, 7 Stat. 160 (providing that, in exchange for a land grant to "the college at Detroit," the Ottawa, Chippewa, and Potawatomi could use the college, "believing they may wish some of their children hereafter educated"); Treaty with the Kaskaskia art. I, Aug. 13, 1803, 7 Stat. 78 (acknowledging that Kaskaskia tribal leaders agreed to cede their lands partly to ensure "a more certain and effectual support for their women and children"), art. 3 (providing funding for a Catholic priest "to instruct as many of their children as possible in the rudiments of literature").

CONCLUSION

Based on the above, and the prior briefs filed by the Navajo Nation, the United States, and the other tribal nations, the ruling of the District Court should be reversed.

Respectfully Submitted this 13th day of December 2019

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this response contains 3,635 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief 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 Times New Roman 14-point font using Microsoft Word 2016.

DATED 13th day of December 2019.

s/Paul Spruhan

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2019, 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 the 13th of December 2019.

s/Paul Spruhan