No. 18-11479

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; and DANIELLE CLIFFORD,
Plaintiffs-Appellees,

v.

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

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

Appeal from the United States District Court for the Northern District of Texas
No. 4:17-cv-00868-O (Hon. Reed O'Connor)

RESPONSE OF UNITED STATES TO PETITIONS FOR REHEARING EN BANC

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INTRODUCTION

The petitions for rehearing en banc do not satisfy the standard of Federal Rule of Appellate Procedure 35(a) and should be denied. The panel decision presents no conflict with Fifth Circuit or Supreme Court precedent, and Plaintiffs rewrite that precedent in contending otherwise. Instead, the panel properly reversed a lower court ruling that *itself* conflicted with binding precedent, recognizing — like myriad other courts over the last four decades — that the Indian Child Welfare Act of 1978 (ICWA) is constitutional. Nor does the panel decision raise any question of exceptional importance. The only exceptional component of the case was the now-corrected district court decision. Neither the panel's confirmation that a forty-year-old statute is constitutional nor the panel's rejection of novel theories that would upend settled law warrant the attention of the en banc Court.

STATEMENT

A. Legal background

The United States currently "recognizes" 573 Indian tribes as political entities and has a formal government-to-government relationship with each. *See* 25 U.S.C. § 5131; 84 Fed. Reg. 1200 (Feb. 1, 2019); *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008). The Supreme Court has consistently recognized Congress's "plenary power" to enact legislation "dealing with the special problems of" those recognized tribes and their members. *Morton v. Mancari*, 417

U.S. 535, 551-52 (1972). In so doing, Congress may single out tribal members for unique treatment "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id.* at 555.

In 1978, Congress utilized its plenary power to address the "massive removal" of children from Indian homes through "abusive child welfare practices" by non-tribal private and public agencies. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989). As the Supreme Court recognized, those widespread practices acutely impacted the welfare of individual children and threatened the continued viability of the tribes as discrete political units by severing ties between tribes and their future members. *Id.* at 32-34. In response, Congress enacted ICWA.

ICWA sets "minimum Federal standards" that act as an overlay on otherwise applicable state law in proceedings involving an "Indian child." 25 U.S.C. §§ 1902, 1903(1). The statute defines "Indian child" as "any unmarried person who is under age eighteen" and who has one of two present-day relationships to a federally recognized Indian tribe: the child must be either (a) "a member of an Indian tribe"; or (b) "eligible for membership in an Indian tribe and . . . the biological child of a member." *Id.* § 1903(4). In proceedings involving such children, federal standards preempt conflicting state law, except where state law provides a higher standard of protection. *Id.* § 1921.

B. Procedural background

Seven individuals, joined by three States whose courts have applied ICWA for decades, mounted a facial constitutional attack on ICWA in the district court. ROA.200. State courts — the courts that apply ICWA's standards in individual cases — have routinely sustained the constitutionality of ICWA.[1] Nevertheless, the district court held the forty-year-old Act of Congress unconstitutional on three distinct theories. ROA.4008-54. The court additionally held that a 2016 Department of the Interior rule interpreting ICWA violates the Administrative Procedure Act. *Id.*

The panel reversed, rejecting all of the district court's theories. Opinion 2. The panel's decision was unanimous with respect to equal protection and the non-delegation doctrine. Judge Owen, however, would have held that three discrete provisions of ICWA — Sections 1912(d), 1912(e), and 1915(e) — impermissibly commandeered state officers to administer, not merely adhere to, federal law. Opinion 47. Judge Owen did not dispute that those provisions are severable from

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[1] *E.g.*, *In re Appeal in Pima County Juvenile Action No. S-903*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); *In re Armell*, 550 N.E. 2d 1061, 1067-68 (Ill. App. Ct.), *cert. denied*, 498 U.S. 940 (1990); *In re Marcus S.*, 638 A.2d 1158, 1158-59 (Me. 1994); *In re Phoenix L.*, 708 N.W.2d 786, 799-805 (Neb. 2006); *In re A.B.*, 663 N.W.2d 625, 634-37 (N.D. 2003); *In re Baby Boy L.*, 103 P.3d 1099, 1106-07 (Okla. 2004); *Angus v. Joseph*, 655 P.2d 208, 213 (Or. Ct. App. 1982), *cert. denied*, 464 U.S. 830 (1983); *Matter of Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980); *In re K.M.O.*, 280 P.3d 1203, 1214-15 (Wyo. 2012).

the remainder of the statute, *see* 25 U.S.C. § 1963, and she did not critique any other part of the panel's decision. Opinion 47-55.[2]

ARGUMENT

I. ICWA is constitutional.

A. ICWA comports with equal protection.

The Supreme Court has repeatedly held that federal statutes that single out individuals based on their membership in a federally recognized Indian tribe draw *political*, not *racial* classifications. *See Mancari*, 417 U.S. at 552-55; *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979); *United States v. Antelope*, 430 U.S. 641, 643-47 (1977); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479-80 (1976); *accord Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1214-16 (5th Cir. 1991). Such statutes, including ICWA, satisfy the Constitution's guarantee of equal protection "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555. The petitions do not dispute the panel's unanimous conclusion that the challenged

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[2] While reversing in full on the merits, the panel affirmed the district court's holding that Plaintiffs have Article III standing. Opinion 2, 11-19. Although the United States does not seek rehearing on that issue, it continues to contend that Plaintiffs failed to satisfy the requirements of Article III. *See* U.S. Opening Brief 18-24. The threshold jurisdictional defects in Plaintiffs' case — which the en banc court would need to address before considering the merits — independently counsel against granting the petitions.

provisions of ICWA satisfy the *Mancari* standard. Opinion 26. Instead, they argue that the panel erred in treating that standard as controlling. That argument is in error.

Plaintiffs proceed from the assumption that ICWA "divvies up families by race" and thus should be subject to strict scrutiny. Individual Petition 4. But *Mancari* and its progeny hold exactly the opposite: statutory distinctions based on tribal membership are political classifications subject to rational-basis review, not racial classifications subject to strict scrutiny. *Mancari*, 417 U.S. at 554-55; *see also, e.g.*, *Antelope*, 430 U.S. at 643-47; *Moe*, 425 U.S. at 479-80; *Peyote Way*, 922 F.2d at 1214-16. Like the federal laws upheld in those controlling cases, the challenged provisions of ICWA draw distinctions based on an individual's political affiliation with a tribe, not based merely on Indian ancestry. *E.g.*, 25 U.S.C. §§ 1903(3), 1915(a)(2), (3) (establishing non-dispositive preference for adoptive placement with *members* of tribes); *id.* § 1903(4) (extending the statute's protections only to those children that are either (1) members of a tribe, or (2) the biological children of a member *and* eligible for membership). They thus draw *political*, not racial, distinctions. *Mancari*, 417 U.S. at 554.

Plaintiffs' contrary arguments cannot be squared with *Mancari*. The petition assumes that tribal membership necessarily turns on biological descent from a racially homogenous group and, from that assumption, concludes that ICWA uses tribal membership as a proxy for race. Individual Petition 9-11. It is true that tribal

membership might coincide with a biological descent from the tribe's past members. *See* Opinion 23.[3] But the Supreme Court has held that the federal government's relationship with tribes — and consequently its special treatment of a tribe's members *qua* members — is political, even though membership itself may be based in part on ancestry. *Mancari*, 417 U.S. at 554.

The petition suggests that ICWA goes a step farther than *Mancari* because ICWA's second definition of "Indian child" includes children who are not yet tribal members but who are rather the biological children of members and eligible for membership. Individual Petition 9. The petition ignores, however, that membership in a tribe — unlike ancestry — is not necessarily automatic upon birth but generally requires an affirmative act of enrollment, which typically occurs later than infancy. *See* H.R. Rep. No. 95-1386, at 17 (1978); 81 Fed. Reg. 38,788, 38,783 (June 14, 2016). Therefore, children qualify for the second definition *not* solely based on biology, but because their parents have chosen to affiliate with a tribe and to benefit from the protections and be subject to the obligations of tribal members — including those codified in ICWA. In this context, the panel correctly recognized that the

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[3] The suggestion that federal law *requires* a tribe to base membership on biological descent from the tribes' historic predecessor group, *see* Individual Petition 9, is erroneous. Although a tribe seeking formal recognition from the federal government must demonstrate a connection between its present membership and a historical tribal entity, 25 C.F.R. §§ 83.2, 83.11(e), the relevant regulation does not displace a recognized tribe's authority to set its own membership criteria. *See Santa Clara*, 436 U.S. at 72 n.32.

second definition is "not a proxy for race . . . but rather for not-yet-formalized tribal affiliation, particularly where the child is too young to formally apply for membership in a tribe." Opinion 23.[4]

Perhaps recognizing that *Mancari* is contrary to their argument, Plaintiffs attempt to recast *Mancari* as strictly limited to its facts or as applicable only to federal statutes that are "closely tied to tribal self-government." Individual Petition 6-7. Even assuming *Mancari* is so limited, en banc review would be unwarranted, given the panel's amply supported determination that, by promoting continued relationships between tribes and potential members, ICWA *does* promote "tribal self-government and the survival of the tribes." Opinion 21 n.9 (quoting 25 U.S.C. § 1901(3)); *accord Holyfield*, 490 U.S. at 34. More importantly, *Mancari* is *not* so limited, and Plaintiffs' proffered limitation appears nowhere in that decision.

Mancari involved a Bureau of Indian Affairs-specific hiring preference for tribal members, and it discussed that federal agency's role in promoting Indian self-government. 417 U.S. at 553-54. But *Mancari* held the preference political rather than racial not because of its subject matter, but because of whom it targeted: not

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[4] The snippet of legislative history cited by the petition is not to the contrary. Individual Petition 10. The full comment expressed concern that the second definition might require some persons to litigate child-custody proceedings in tribal court even where no tribal member was party to the proceeding, but it agreed that "no constitutional problem arises" where "a parent who is a tribal member has legal custody of a child who is merely eligible for membership at the time of a proceeding." H.R. Rep. No. 95-1386, at 39.

"individuals who are racially to be classified as 'Indians,'" but rather "members of quasi-sovereign tribal entities." *Id.* at 553 n.24, 554. That the preference promoted tribal self-government was relevant only to the subsequent inquiry whether such political classification was "tied rationally" to fulfilling Congress's responsibilities toward the tribes. *Id.* at 554-55.[5] Moreover, the Supreme Court made clear that promoting tribal self-government was only *one* "legitimate, nonracially based goal" that would satisfy the test. *Id.* at 555; *cf. id.* at 552 (warning that if laws that "single out for special treatment a constituency of tribal Indians living on or near reservations . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased").

Unsurprisingly, the Supreme Court and this Court have applied *Mancari* to uphold federal statutes that have nothing to do with the BIA and no obvious, intimate connection to tribal self-government. As just one example, the Supreme Court upheld against an equal-protection challenge a federal treaty allowing tribal members to fish outside their reservation without adhering to generally applicable state regulations. *Washington*, 443 U.S. at 673 n.20; *see also, e.g.*, *Antelope*, 430 U.S. at 643-47 (upholding federal statute subjecting tribal members to federal rather

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[5] Likewise, *Mancari*'s recognition that a *government-wide* preference for tribal members would present a closer question speaks to the possible relative difficulty of satisfying that rational-basis test — not, as individual Plaintiffs suggest, whether that test applies. *See* 417 U.S. at 554.

than state prosecution for certain offenses); *Moe*, 425 U.S. at 479-80 (upholding federal court's application of tax immunity to tribal members). Likewise, this Court upheld an exemption from federal drug laws for peyote use by tribal members affiliated with the Native American Church — without inquiring into whether that exemption promoted tribal self-government. *Peyote Way*, 922 F.2d at 1214-16.

Rather than reckoning with that conflicting precedent, the petition repeats Plaintiffs' argument that the Supreme Court's decision in *Rice v. Cayetano*, 528 U.S. 495 (2000), fundamentally rewrote *Mancari* along Plaintiffs' preferred lines, asserting that all three members of the panel failed to recognize *Rice*'s "landmark" change in the law. Individual Petition 8. Not so.[6]

Rice involved a state statute that limited the right to vote in certain elections for state office based on whether a person's distant ancestors had lived in Hawaii. 528 U.S. at 509. *Rice* held that the state statute violated the Fifteenth Amendment's specific prohibition of racial discrimination in voting. The Court recognized that the Hawaii statute was fundamentally different from the hiring preference at issue in *Mancari* because it drew distinctions based on ancestry alone, rather than based on

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[6] If *Rice* had worked such a sea change, one would expect to see some recognition of that change in the intervening two decades. Yet the petition points only to two Ninth Circuit decisions to support its reading, neither of which invalidated a statutory classification based on membership in a federally recognized tribe, and one of which predates *Rice*. *See* Individual Petition 7. In subsequent cases involving federally recognized tribes, that court has applied *Mancari*. *E.g.*, *Means v. Navajo Nation*, 432 F.3d 924, 932-33 (9th Cir. 2005).

current-day affiliation with a political entity. *Id.* at 518-20. The Court noted that whether Congress has granted Native Hawaiians a status like that of Indian tribes or delegated States authority to enact special rules regarding that group are undecided and fraught questions. *Id.* at 518. *Rice* declined to extend the "limited exception of *Mancari*" to that "new and larger dimension." *Id.* at 520. Even assuming arguendo that Congress had authorized States to treat native Hawaiians as Indian tribes, the Court reasoned: "It does not follow from *Mancari* . . . that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians to the exclusion of all non-Indian citizens." *Id.*

The hypothetical limit on *Mancari* articulated in *Rice* — that under the Fifteenth Amendment legislatures may not bar non-Indians from voting in state elections — simply has no relevance to ICWA, as the panel correctly recognized. Opinion 24-26. ICWA does not concern voting and does not bar any person — tribal member or otherwise — from participating in child-custody proceedings to which the statute applies. To the contrary, many provisions of ICWA work to *prevent* States from excluding persons and tribes from those proceedings. *E.g.*, 25 U.S.C. § 1912(a). Moreover, the panel was correct that, unlike state elections subject to the Fifteenth Amendment, child-welfare proceedings under ICWA are "simultaneously affairs of states, tribes, and Congress." Opinion 25-26. Plaintiffs' contrary arguments overlook that, while regulating domestic relations is of unquestionable

importance to States, tribes have an equally important interest in the domestic affairs of their members. *See Santa Clara*, 436 U.S. at 55-56.

Plaintiffs finally turn to a statement in *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), to support their recasting of *Mancari* — specifically, the observation that certain provisions of ICWA (not at issue here) "would raise equal protection concerns" if read to confer certain rights on a tribal-member parent that had already severed his relationship with his child. 570 U.S. at 655-56. But that language merely reflects a concern that would arise in a case where there was no relationship with a tribal member, not an indication that *Mancari* does not apply to ICWA.

Therefore, the panel properly applied the *Mancari* test — rather than Plaintiffs' gloss on that test.

B. ICWA comports with the Tenth Amendment.

ICWA crafts "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes," which standards preempt less protective state laws. 25 U.S.C. §§ 1902, 1921. Such preemption of state law does not unlawfully commandeer state officers under the Tenth Amendment, as twenty-one States have correctly recognized. Opinion 27-35; Brief of Amicus States California, et al. 9-14; *see generally New York v. United States*, 505 U.S. 144, 178-79 (1992). Plaintiffs nevertheless repeat their prior argument that ICWA's imposition of federal standards *does* unlawfully commandeer

states, for two principal reasons: (1) that Congress lacked Article I authority to enact ICWA in the first place; and (2) that ICWA conflicts with *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), by regulating the States themselves rather than individuals. Both arguments lack merit.

First, Plaintiffs' contention that Congress lacks Article I authority to address the mass removal of children from tribal communities is insubstantial. The Supreme Court has repeatedly held that Congress's authority to legislate regarding tribes and their members is "plenary." *E.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979); *Mancari*, 417 U.S. at 551. Plaintiffs cite no controlling precedent to support their contradictory view that Congress's authority is limited to regulating *trade* with tribes. *See* Individual Petition 15; State Petition 9. Plaintiffs ignore basic law and facts in attempting to manufacture a conflict between Congress' broad authority under the *Indian* Commerce Clause, art. I, § 8, cl. 3, and the narrower interpretation of Congress's authority to regulate *interstate* commerce in *United States v. Lopez*, 514 U.S. 549 (1995). State Petition 9. Most obviously, Plaintiffs ignore that Congress' authority regarding tribes stems not only from the Indian Commerce Clause, but also from other sources, including the Treaty Clause, art. II, § 2, cl. 2, and "the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government," *Lara*, 541 U.S. at 201. They also disregard

the Supreme Court's warning against treating Congress's Indian Commerce Clause and Interstate Commerce Clause authorities as equivalent. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

Second, Plaintiffs have demonstrated no conflict with *Murphy*. That decision struck down a federal statute that effectively required States to enact *state* laws prohibiting sports betting. 138 S. Ct. at 1477-78. ICWA, by contrast, guarantees minimum substantive and procedural protections to individual Indian children, their families, and tribes as a matter of *federal* law. In so doing, it supplies through the Supremacy Clause a valid "rule of decision" in such proceedings. *Id.* at 1479. To be sure, ICWA thereby affects state actors participating in such proceedings — just as it affects all other actors (private and tribal) likewise participating in such proceedings. But that is true of any federal law that preempts conflicting state laws: it affects state actors participating in proceedings where that federal law applies.

Federal law does not offend the Tenth Amendment merely because the rights or protections granted to individuals that may thereby constrain States. *See New York*, 505 U.S. at 178-79; *see also, e.g.*, *Washington*, 443 U.S. at 684-85 (recognizing that federal treaty securing tribal right to fish prevented State from applying certain regulations); *Antoine v. Washington*, 420 U.S. 194, 204, 207 (1975) (same regarding tribal hunting); *Deer Park Independent School District v. Harris County*, 132 F.3d 1095, 1099 (5th Cir. 1998) (upholding federal statute granting

exemption from state tax). Indeed, the Supreme Court in *Murphy* specifically distinguished on these very grounds the impermissible commandeering effected by the statute there from permissible preemption of state laws. *See* 138 S. Ct. at 1479-81. Like the constitutionally valid statutes discussed in *Murphy*, ICWA is aimed at private parties.

Judge Owen's limited dissent does not bolster either of Plaintiffs' flawed anti-commandeering arguments. With regard to Plaintiffs' contention about Congress's Article I Power, the dissent does not dispute that Congress had the constitutional authority to legislate in this area. *See* Opinion 47-55.

With regard to Plaintiffs' contention that ICWA regulates States not individuals, the dissent identifies just three provisions of ICWA — all severable, *see* 25 U.S.C. § 1963 — that it views as impermissibly burdening States. Opinion 54. But respectfully, those provisions do not offend controlling precedent. Two of those provisions secure rights to individual Indian children and to their parents: specifically, the right not to be removed from their home or have parental rights terminated (1) without proof that "active efforts have been made to provide remedial services and rehabilitative programs" and (2) without an expert determination that leaving the child in place will likely cause serious harm. 25 U.S.C. § 1912(d), (e). Certainly, those federally conferred rights constrain state child-protection agencies that wish to remove Indian children from their home of origin. But as explained

above, the ordinary operation of the Supremacy Clause is not tantamount to commandeering. *See Deer Park*, 132 F.3d at 1099.

The third provision simply requires States to make a record of an Indian child's placement available to the federal government. 25 U.S.C. § 1915(e). The Supreme Court has declined to hold that information-sharing requirements, as distinguished from "forced participation . . . in the actual administration of a federal program," offend the Tenth Amendment. *Printz v. United States*, 521 U.S. 898, 918 (1997); *see also id.* at 936 (O'Connor, J., concurring). Such a requirement is particularly warranted with respect to the placement of tribally associated Indian children, for whom the Constitution empowers Congress to afford special vigilance.

Because the panel's decision is consistent with controlling precedent on commandeering, en banc review is not warranted.

C. ICWA poses no non-delegation problem.

Plaintiffs' final constitutional argument in favor of en banc review reflects a misunderstanding. State Plaintiffs argue that the panel decision is inconsistent with *Loving v. United States*, 517 U.S. 748 (1996), because Section 1915(c) of ICWA allegedly contains an unconstitutional delegation of legislative power to tribal governments. *See* State Petition 9-10, 12-13. As the panel recognized, however, Section 1915(c) contains no delegation at all, permissible or otherwise; it merely incorporates into federal law certain types of tribal resolutions. Opinion 35-38.

Accordingly, Plaintiffs fail to demonstrate a conflict warranting en banc review on any of the constitutional issues that they raise.

II. Interior's 2016 Rule is valid.

Individual Plaintiffs also offer two cursory non-constitutional arguments in favor of en banc review, which likewise fail to show any actual conflict between the panel's decision and governing precedent.

First, the panel's unanimous decision to defer to Interior's 2016 conclusion that it had authority to issue binding regulations interpreting ICWA does not conflict with *Chamber of Commerce v. DOL*, 885 F.3d 360 (5th Cir. 2018). Unlike in that case, Interior did not simply "discover" authority to issue binding regulations in 2016. Instead, it reached that conclusion after an intervening Supreme Court decision directing that ICWA's terms should have uniform national meanings and after decades of observing that prior non-binding guidance had failed to produce such uniformity. *Holyfield*, 490 U.S. at 46; 81 Fed. Reg. at 38,782.

Second, *Grogan v. Garner*, 498 U.S. 279 (1991), is irrelevant because the 2016 Rule encourages but does not *require* state courts to use a heightened evidentiary standard. 25 C.F.R. § 23.132(b); 81 Fed. Reg. at 38,843.

CONCLUSION

For the foregoing reasons, the petitions for rehearing en banc should be denied.

Dated: October 23, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on October 23, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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