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,

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,

Intervenor Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas, Civil Action No. 4:17-cv-00868

JOINT REPLY IN SUPPORT OF PETITIONS FOR REHEARING EN BANC

Counsel listed on inside cover

Ken Paxton
Attorney General of Texas
Jeffrey C. Mateer
First Assistant Attorney General
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Kyle D. Hawkins
Solicitor General of Texas
kyle.hawkins@oag.texas.gov
Beth Klusmann
Assistant Solicitor General
David J. Hacker
Special Counsel to the
First Assistant Attorney General

Jeff Landry
Attorney General of Louisiana
Louisiana Department of Justice
1885 North Third Street
Baton Rouge, Louisiana 70802
(225) 326-6766

Curtis Hill
Attorney General of Indiana
Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, Indiana 76204
(317) 232-6255

Counsel for State Plaintiffs-Appellees

Matthew D. McGill
Lochlan F. Shelfer
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-3680
mmcgill@gibsondunn.com

Counsel for Individual Plaintiffs-Appellees

Mark Fiddler
FIDDLER OSBAND, LLC
6800 France Ave. So., Suite 190
Minneapolis, MN 55435
(612) 822-4096
mark@icwafamilylaw.com

Counsel for Plaintiffs-Appellees Frank and Heather Libretti, and Jason and Danielle Clifford

CERTIFICATE OF INTERESTED PERSONS

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,

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,

Intervenor Defendants-Appellants.

Pursuant to Local Rule 28.2.1, the undersigned counsel of record certifies that the following list of persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate potential 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. Navajo Nation (Intervenor)

6. Chad Everet and Jennifer Kay Brackeen (Plaintiffs)

7. Frank Nicholas and Heather Lynn Libretti (Plaintiffs)

8. Altagracia Socorro Hernandez (Plaintiff)

9. Jason and Danielle Clifford (Plaintiffs)

10. State of Texas (Plaintiff)

11. State of Louisiana (Plaintiff)

12. State of Indiana (Plaintiff)

13. United States of America (Defendant)

14. Bureau of Indian Affairs and its Director, Bryan Rice (Defendants)

15. John Tahsuda III, Bureau of Indian Affairs Principal (Defendant)

16. Tara Sweeney, Acting Assistant Secretary for Indian Affairs (Defendant)

17. United States Department of the Interior and its Secretary, Ryan Zinke (Defendants)

18. United States Department of Health and Human Services and its Secretary, Alex Azar (Defendants)

19. Adam H. Charnes, Kilpatrick Townsend & Stockton LLP, counsel for Intervenor-Defendants

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

21. Keith M. Harper, Kilpatrick Townsend & Stockton LLP, counsel for Intervenor-Defendants

22. Venus McGhee Prince, Kilpatrick Townsend & Stockton LLP, counsel for Intervenor-Defendants

23. Thurston H. Webb, Kilpatrick Townsend & Stockton LLP, counsel for Intervenor-Defendants

24. Kathryn E. Fort, Michigan State University College of Law, counsel for Intervenor-Defendants

25. David J. Hacker, Office of the Attorney General, counsel for State Plaintiffs

26. Jeff Landry, Attorney General of Louisiana

27. Curtis Hill, Attorney General of Indiana

28. Ken Paxton, Attorney General of Texas, counsel for State Plaintiffs

29. Kyle D. Hawkins, Solicitor General of Texas, counsel for State Plaintiffs

30. Jeffrey C. Mateer, First Assistant Attorney General of Texas, counsel for State Plaintiffs

31. John C. Sullivan, Assistant Solicitor General of Texas, counsel for State Plaintiffs

32. Beth Klusmann, Assistant Solicitor General of Texas, counsel for State Plaintiffs

33. Matthew D. McGill, Gibson, Dunn & Crutcher LLP, counsel for Individual Plaintiffs

34. Lochlan F. Shelfer, Gibson, Dunn & Crutcher LLP, counsel for Individual Plaintiffs

35. Mark Fiddler, Fiddler Osband, LLC counsel for Libretti Plaintiffs and Clifford Plaintiffs

36. JoAnn Kintz, U.S. Department of Justice, counsel for Federal Defendants

37. Jeffrey Bossert Clark, Assistant Attorney General, U.S. Department of Justice, counsel for Federal Defendants

38. Eric Grant, Deputy Assistant Attorney General, U.S. Department of Justice, counsel for Federal Defendants

39. William B. Lazarus, U.S. Department of Justice, counsel for Federal Defendants

40. Rachel Heron, U.S. Department of Justice, counsel for Federal Defendants

41. Steven Miskinis, U.S. Department of Justice, counsel for Federal Defendants

42. Christine Ennis, U.S. Department of Justice, counsel for Federal Defendants

43. Ragu-Jara “Juge” Gregg, U.S. Department of Justice, counsel for Federal Defendants

44. Amber Blaha, U.S. Department of Justice, counsel for Federal Defendants

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

46. Jeffrey H. Wood, Acting Assistant Attorney General, counsel for Federal Defendants

47. Samuel C. Alexander, Section Chief, Indian Resources Section, counsel for Federal Defendants

48. Sam Ennis, United States Department of the Interior, Solicitor's Office, of-counsel for Federal Defendants

49. Paul Spruhan, Navajo Nation Department of Justice, counsel for Intervenor

50. Kandis Martine, Navajo Nation Department of Justice, counsel for Intervenor

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

<u>/s/ Matthew D. McGill</u>
Matthew D. McGill
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. N.W.
Washington, D.C. 20036

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS i

TABLE OF CONTENTS vi

TABLE OF AUTHORITIES...vii

INTRODUCTION...1

ARGUMENT 2

I. All Of Plaintiffs' Claims Are Justiciable. 2

II. The Panel Decision Conflicts With Supreme Court Jurisprudence. 5

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases

Adoptive Couple v. Baby Girl,
570 U.S. 637 (2013) 6

Allstate Insurance v. Abbott,
495 F.3d 151 (5th Cir. 2007) 3

Cherokee Nation v. Nash,
267 F. Supp. 3d 86 (D.D.C. 2017) 8

Contender Farms, LLP v. USDA,
779 F.3d 258 (5th Cir. 2015) 3

Del. Tribal Bus. Comm. v. Weeks,
430 U.S. 73 (1977) 10

Loving v. United States,
517 U.S. 748 (1996) 11

In re M.K.T.,
368 P.3d 771 (Okla. 2016) 7

Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation,
425 U.S. 463 (1976) 5

Morton v. Mancari,
417 U.S. 535 (1974) 5, 6

Murphy v. NCAA,
138 S. Ct. 1461 (2018) 8, 9

Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs,
145 F.3d 1399 (D.C. Cir. 1998) 3

Nielson v. Ketchum,
640 F.3d 1117 (10th Cir. 2011) 7

TABLE OF AUTHORITIES
(continued)

Page(s)

Peyote Way Church of God, Inc. v. Thornburgh,
922 F.2d 1210 (5th Cir. 1991)....................5, 6

Printz v. United States,
521 U.S. 898 (1997)....................9

Rice v. Cayetano,
528 U.S. 495 (2000)....................8

Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.,
547 U.S. 47 (2006)....................2

United States v. Antelope,
430 U.S. 641 (1977)....................5

Utah v. Evans,
536 U.S. 452 (2002)....................1, 3

Washington v. Washington State Commercial Passenger Fishing Vessel Association,
443 U.S. 658 (1979)....................5

Statutes

25 U.S.C. § 1912(d)-(f)....................9

25 U.S.C. § 1915(e)....................9

28 U.S.C. § 1915(c)....................10

Regulations

Indian Child Welfare Act Proceedings,
81 Fed. Reg. 38,778 (June 14, 2016)....................9

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

11 Cherokee Nation Citizenship Act § 11A 7

Hopi Enrollment Ordinance No. 33 § 11.1(B)(III) 7

Navajo Nation Code § 701 7

INTRODUCTION

Plaintiffs respectfully submit this reply to correct multiple misstatements of law in the response briefs filed by the United States and the tribes ("Respondents").

First, Respondents renew their repeatedly rejected contention that Plaintiffs lack standing to challenge the very law that regulates them and interferes with their adoption efforts. But Plaintiffs undeniably are harmed by the Indian Child Welfare Act ("ICWA") and the Final Rule, and the "practical consequence" of this Court declaring ICWA unconstitutional would "amount to a significant increase in the likelihood that the[y] would obtain relief" redressing that injury. *Utah v. Evans*, 536 U.S. 452, 464 (2002). Nothing more is needed.

Respondents also try to reconcile the panel majority's decision with controlling Supreme Court authority, but in reality, the panel majority broke with Supreme Court precedent and undermined the Constitution's federalism and equal-protection guarantees. These errors warrant en banc review.

ARGUMENT

I. All Of Plaintiffs' Claims Are Justiciable.

Repeating twice-rejected arguments, the tribes (at 19-21) contend that Plaintiffs lack standing to challenge ICWA and the Final Rule. That is incorrect, and poses no impediment to rehearing these crucial constitutional issues en banc.[1] "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," and once standing is established for one claim, any plaintiff may argue in its support. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). The panel correctly held that Individual Plaintiffs have standing to raise the equal-protection claims, and State Plaintiffs have standing to bring the other claims. A12-19. And Plaintiffs also have standing on numerous other grounds.

---

[1] Indeed, if these standing arguments had any merit, that would only *support* rehearing en banc, because that would mean that the panel should have vacated the judgment below. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998). Even if there were a serious question as to Plaintiffs' Article III standing, the correct result would be for the en banc court to "vacate[] the panel opinion," Fifth Cir. R. 41.3, and allow plenary review of the case, including Respondents' jurisdictional contentions.

First, State Plaintiffs, as "objects" of the Final Rule's requirements, have standing to challenge it, *Contender Farms, LLP v. USDA*, 779 F.3d 258, 266 (5th Cir. 2015)—as do Individual Plaintiffs, given that vacatur of the Final Rule would end its application to them in ongoing state proceedings, *see Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). Plaintiffs can advance *any* argument for why the Final Rule is invalid—including that it implements an unconstitutional statute—and may thereby raise *each* constitutional challenge to ICWA.

Second, the tribes (at 19-20) concede that State Plaintiffs have standing to raise their anti-commandeering and APA claims. They also have standing to bring the non-delegation claim, because at least one tribe in Texas has reordered the placement preferences. A18.

Third, the tribes (at 20) do not deny that the Cliffords have suffered injury-in-fact, but contend that those injuries are not redressable because Minnesota is not a party here. But redressability is satisfied if the "practical consequence" of a ruling in the Cliffords' favor would "amount to a significant increase in the likelihood that the[y] would obtain relief." *Utah*, 536 U.S. at 464; *see also Allstate Insurance v. Abbott*, 495 F.3d 151,

159-60 & n.19 (5th Cir. 2007) (injury redressable because state courts, though not bound by federal court, "could be expected to amend their conduct in response to a court's declaration"). The likelihood of a Minnesota court declining to apply ICWA to the Cliffords would obviously increase if this Court declares ICWA unconstitutional, and Minnesota courts would be bound if the Supreme Court affirmed.

Finally, the Brackeens currently seek to adopt Y.R.J. in state court, where the Navajo Nation insists that ICWA's preferences bar that placement. *See In the Interest of Y.J.*, No. 02-19-235-CV (Tex. App.). The Brackeens' injury is thus *ongoing*. The tribes (at 20) protest that Y.R.J. "is not mentioned in the complaint." But the complaint stated that the Brackeens "intend to provide foster care for, and possibly adopt, additional children." ROA.444. Moreover, the district court allowed the Brackeens to supplement the record with information about their attempts to adopt Y.R.J. because this was "relevant to [ongoing] subject matter jurisdiction." ROA.4314 n.3. Finally, the panel took judicial notice of Y.R.J.'s adoption proceedings. A14-16.

Standing poses no obstacle to reexamining the majority opinion's numerous constitutional errors.

II. The Panel Decision Conflicts With Supreme Court Jurisprudence.

Respondents' attempts to reconcile the panel majority opinion with the Supreme Court's cases all fail. Only rehearing en banc can realign this Court with binding precedent.

1. The United States (at 8) argues that "the Supreme Court and this Court have applied [*Morton v. Mancari*, 417 U.S. 535 (1974)] to uphold" laws with "no obvious, intimate connection to tribal self-government." But the United States' own cases involve laws that are tightly linked to tribal land and sovereignty. *Washington v. Washington State Commercial Passenger Fishing Vessel Association* allowed the federal government to grant "Indian tribes" preferential fishing rights. 443 U.S. 658, 673 n.20 (1979). *United States v. Antelope* permitted Congress to give tribal courts jurisdiction over crimes committed by "enrolled members" "within the confines of Indian country." 430 U.S. 641, 645-47 & n.7 (1977). *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation* allowed Congress to authorize tribes to tax tribal members for property "located within the reservation." 425 U.S. 463, 480-81 (1976). And *Peyote Way Church of God, Inc. v. Thornburgh* held that an exemp-

tion from peyote prohibition for the Native American Church was "a political classification" because Church "membership [was] limited to Native American members of federally recognized tribes," "most" of the Church's members lived on a reservation, and each chapter was "incorporated" by a tribe. 922 F.2d 1210, 1212, 1215-16 (5th Cir. 1991). The law thus "single[d] out for special treatment a constituency of tribal Indians living on or near reservations." *Mancari*, 417 U.S. at 552.

ICWA bears no resemblance to these statutes. It applies even if the child has *no* connection to a reservation or tribe, based solely on the child's biological connection to a tribal member and tribes' racially based membership criteria. *See, e.g.*, *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641 (2013) (discussing ICWA's potential application to a child that is 3/256 Cherokee with no other connection to any tribe).

The United States (at 6) tries to shield ICWA from constitutional scrutiny by insisting that tribal membership "is not *necessarily* automatic upon birth but *generally* requires an affirmative act of enrollment, which *typically* occurs later than infancy." (emphases added). In fact, many tribes, including those here, *automatically* deem newborns to be tribal members if they satisfy blood-quantum requirements, Navajo Nation

Code § 701(c), even if *neither* parent is a tribal member, 11 Cherokee Nation Citizenship Act § 11A.

Although the Tenth Circuit rejected this "gamesmanship," *Nielson v. Ketchum*, 640 F.3d 1117, 1124 (10th Cir. 2011), the Cherokee Nation continues to defend its power to "automatically" enroll every eligible newborn—"without [any] paperwork" or any "request" at all—for "long enough" to allow the "Tribe to step in to" unilaterally impose membership. Pet. 7, 16, *Ketchum*, 132 S. Ct. 2429 (2012), 2011 WL 6019917. Tribes also prohibit minors from relinquishing membership without simultaneously enrolling in a different tribe, *see* Hopi Enrollment Ordinance No. 33 § 11.1(B)(III), or restrict biological parents' ability to save their children from ICWA by renouncing their membership, *see In re M.K.T.*, 368 P.3d 771, 797 (Okla. 2016), thereby ensuring that the children remain within ICWA's grasp.

The tribes (at 9) maintain that ICWA is saved because some small number of the descendants of freed Cherokee slaves are eligible for tribal membership. But *Rice v. Cayetano* "reject[ed]" Hawaii's identical argument that its law was not racial because some inhabitants of the islands in 1778 were not Polynesian but rather came from the Pacific Northwest.

528 U.S. 495, 514 (2000). Moreover, the Cherokee spent decades trying to *remove* the Freedmen's descendants from its membership rolls so that tribal membership would be limited to those "of Cherokee blood." *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 110 (D.D.C. 2017). The Cherokee gave up this crusade for racial homogeneity only two years ago, when ordered to grant citizenship to the Freedmen's descendants. *Id.* at 90, 139. The example of the Freedmen only underscores the overwhelmingly racial nature of tribal membership.

2. The United States (at 12-13) contends that ICWA is not unlawful commandeering because it merely preempts inconsistent state law. But to preempt a state law, the federal law must be aimed at *private* actors, *Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018), whereas ICWA imposes obligations on state agencies and courts, requiring them to devote hundreds of thousands of dollars and man-hours to conform to federal dictates. *See Indian Child Welfare Act Proceedings*, 81 Fed. Reg. 38,778, 38,839, 38,863-64 (June 14, 2016). Congress thus "unequivocally dictate[d]" what States must do. *Murphy*, 138 S. Ct. at 1478.

The tribes, meanwhile, assert (at 12) that the anti-commandeering principle "does not apply to congressional commands to state courts." But

just as Congress cannot force States to enact state law, *Murphy*, 138 S. Ct. at 1477-78, it cannot force States to alter their state-court child-custody proceedings, rather than supplying a *federal* cause of action to govern the adoptions.

And, contrary to the tribes' claim (at 12-13), ICWA controls not only state courts, but also state agencies and employees, as Judge Owen's partial dissent recognized. *See, e.g.*, 25 U.S.C. §§ 1912(d)-(f), 1915(e).[2] ICWA requires States to dedicate their agencies, employees, and resources to carrying out a federal regulatory scheme. It controls procedures, evidence, burdens of proof, parties, records, and the ultimate placement decision—substituting Congress's racial preferences for the child's best interest. That state courts enforce ICWA does not change the fact that Congress forced States to implement ICWA in the first place. ICWA's commandeering of state actors is no different than *Printz v. United States*, where the Brady Act conscripted state actors to carry out back-

---

[2] The tribes (at 11-12) contend that ICWA is Spending Clause legislation, but ICWA applies of its own accord—regardless of any funding offered by the federal government.

ground checks. 521 U.S. 898, 904-05 (1997). As in *Printz*, ICWA's commandeering of state actors to carry out the federal government's regulatory scheme is unconstitutional.

3. The tribes (at 16) bizarrely claim that the district court rejected Plaintiffs' argument that ICWA exceeds Congress's power under the Indian Commerce Clause. Just the opposite: The court "GRANTED" Plaintiffs' claim that "Congress did not have the constitutional authority to" enact ICWA "under the Indian Commerce Clause." ROA.4053-54. Congress's "plenary" power over tribes "is not absolute." *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977). Respondents' arguments would obliterate all constitutional limits on Congress's ability to legislate with respect to Indian tribes.

Finally, the United States (at 12-13) refers to the Treaty Clause as a source of congressional authority, but never identifies any treaty that would permit Congress to enact ICWA.

4. The tribal power to reorder the placement preferences under 28 U.S.C. § 1915(c) is not simply an exercise of tribes' authority over their members (Tribes Br. 18). ICWA controls non-member children, their families, and prospective parents, and requires state courts to give effect

to an Indian tribe's reordering of ICWA's preferences. Nor did Congress "incorporate" tribal resolutions through Section 1915(c) (U.S. Br. 15); that provision invites tribes to change federal law—thereby binding States. But Congress may not convey its lawmaking function to another entity. *Loving v. United States*, 517 U.S. 748, 758 (1996).

CONCLUSION

Rehearing en banc should be granted.

Dated: October 30, 2019

Respectfully submitted,

Ken Paxton
Attorney General of Texas
Jeffrey C. Mateer
First Assistant Attorney General
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

/s/ Kyle D. Hawkins
Kyle D. Hawkins
Solicitor General of Texas
kyle.hawkins@oag.texas.gov
Beth Klusmann
Assistant Solicitor General
David J. Hacker
Special Counsel to the
First Assistant Attorney General

Jeff Landry
Attorney General of Louisiana
Louisiana Department of Justice
1885 North Third Street
Baton Rouge, Louisiana 70802
(225) 326-6766

Curtis Hill
Attorney General of Indiana
Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, Indiana 76204
(317) 232-6255

Counsel for State Appellees

/s/ Matthew D. McGill
Matthew D. McGill
Lochlan F. Shelfer
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-3680
mmcgill@gibsondunn.com

Counsel for Individual Plaintiffs-Appellees

Mark Fiddler
FIDDLER OSBAND, LLC
6800 France Ave. So., Suite 190
Minneapolis, MN 55435
(612) 822-4096
mark@icwafamilylaw.com

Counsel for Plaintiffs-Appellees Frank and Heather Libretti, and Jason and Danielle Clifford

CERTIFICATE OF COMPLIANCE

1. This brief contains 1,948 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century font.

DATED: October 30, 2019

/s/ Matthew D. McGill

Matthew D. McGill
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. N.W.
Washington, D.C. 20036

CERTIFICATE OF SERVICE

I hereby certify that, on October 30, 2019, I filed the foregoing Reply using the Court's ECF system. Service on all counsel of record for all parties was accomplished electronically using the Court's CM/ECF system.

DATED: October 30, 2019

/s/ Matthew D. McGill
Matthew D. McGill
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. N.W.
Washington, D.C. 20036