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)

SURREPLY OF UNITED STATES IN OPPOSITION TO PETITIONS FOR REHEARING EN BANC

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INTRODUCTION

Plaintiffs' reply brief in support of their petitions for rehearing en banc restates the same arguments made in those petitions. Those arguments fail for the reasons stated in the United States' response thereto. That brief also includes new arguments that could have been — but were not — made in Plaintiffs' petitions. This surreply is limited to briefly rebutting those new arguments. As set out below, Plaintiffs' additional arguments bring Plaintiffs no closer to clearing the high bar for rehearing en banc. *See* Fed. R. App. P. 35(a).

ARGUMENT

1. Equal protection. In their merits briefs, Plaintiffs attempted to evade the controlling rule of *Morton v. Mancari*, 417 U.S. 535 (1974), by arguing (contrary to that decision and others) that *Mancari* applies only to federal laws falling into two categories: (1) laws that relate intimately to tribal sovereignty; and (2) laws that relate closely to tribal land and reservations. *See* Individual Brief 44, 48; State Brief 36. In their petitions for rehearing, however, Plaintiffs presented only the first of those two proffered limitations. *See* Individual Petition 6-7; State Petition 8. Yet in their reply, Plaintiffs once again take up the argument that *Mancari* is limited to federal laws relating to tribal sovereignty *or* tribal land, and they attempt to distinguish the cases cited by the United States on the basis of a connection to tribal land. Reply 5-6.

Plaintiffs' tribal land-based argument fails for the reasons that the United States explained at the merits stage. *See* U.S. Reply Brief 6-12. In brief, Plaintiffs once again fail to cite a single controlling decision articulating their proffered rule that classifications based on tribal affiliation are political only when they relate to tribal self-government or to on-reservation activities. The numerous statutes upheld by the Supreme Court and by this Court do not all fit into those categories. Most obviously, this Court's decision in *Peyote Way v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991), on which Plaintiffs purport to rely, cuts squarely against their argument. That decision upheld a statute providing an exemption from criminal penalties for peyote use by members of the Native American Church — "most" *but not all* of whom lived on reservations — without any consideration whether the law promoted tribal sovereignty. *Id.* at 1212-16; *see also, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (upholding treaty authorizing tribal members to fish *off* reservation).

Plaintiffs raise one other new equal-protection argument in their reply brief. Having failed in their rehearing petitions to address the reality that tribal membership is generally triggered by an affirmative act of enrollment, *see, e.g.*, H.R. Rep. No. 95-1386, at 17 (1978), Plaintiffs now argue that a handful of the 573 federally recognized tribes either register children automatically upon birth or place certain restrictions on members' ability to disenroll. Reply 7. It does not follow from that

small grab-bag of examples, however, that children fall under ICWA's protections by the happenstance of biology, as opposed to the child's or the child's parent's affirmative decision either to enroll in or to remain affiliated with a tribe. More importantly, Plaintiffs still miss the fundamental point. As explained in the United States' response to the petitions, tribes have authority to set their own membership criteria, which may be based in part on biology or descent. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). That was as true when *Mancari* was decided as it is now. *Mancari* nevertheless deemed distinctions based on the fact of tribal membership to be political rather than racial, *regardless* of whether membership itself has a biological component — and *regardless* of when and how members may enroll or disenroll. *See Mancari*, 417 U.S. at 554.

The remainder of Plaintiffs' equal-protection arguments mirror those already rebutted by the United States' response to the en banc petitions. They present no grounds for rehearing en banc for the reasons stated in that response (at 4-11).

2. Anti-commandeering. The reply's non-delegation arguments merely repackage arguments already raised in the en banc petitions, which the United States has already rebutted. *See* U.S. Response 11-15.

3. Non-delegation. The reply's skeletal non-delegation argument likewise repackages arguments raised in the petitions, which the United States has already rebutted. *See id.* at 15-16.

4. Administrative Procedure Act (APA). The reply does not attempt to bolster the petitions' plainly deficient contention that the panel's APA holding meets the high standard for rehearing en banc. The United States rebutted that argument in its response. *See id.* at 16.

CONCLUSION

For these reasons and those stated in the United States' response, the petitions for rehearing en banc should be denied.[*]

Dated: November 1, 2019.

Respectfully submitted,

s/ Eric Grant

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[*] Several pages of Plaintiffs' reply brief are dedicated to the question of Article III standing. Reply 1-4. As previously stated, no party has sought rehearing on the panel's holding regarding such standing. U.S. Response 4 n.2. In any event, the defects in Plaintiffs' rehearsal of their standing case — which themselves pose a fatal impediment to en banc review of the merits arguments raised by Plaintiffs — have already been addressed in the parties' briefing to the panel. *See* U.S. Opening Brief 18-24; U.S. Reply 1-6; *see also* Intervenor Tribes' En Banc Response 19-21.

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 November 1, 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.

s/ Eric Grant
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CERTIFICATE OF COMPLIANCE

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