IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHAD EVERET BRACKEEN, et al.,	§	
	§	
and	§	
	§	
STATE OF TEXAS,	§	
STATE OF LOUISIANA, and	§	
STATE OF INDIANA,	§	
	§	
Plaintiffs,	§	Civil Action No. 4:17-cv-868-O
	§	
v.	§	
	§	
RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior, et al.,	§	
	§	
Defendants,	§	
	§	
and	§	
	§	
CHEROKEE NATION, et al.,	§	
	§	
Intervenor-Defendants.	§	

REPLY IN SUPPORT OF MOTION FOR EXPEDITED CONSIDERATION AND MOTION TO STAY PENDING APPEAL OF CHEROKEE NATION, ONEIDA NATION, QUINAULT INDIAN NATION, AND MORONGO BAND OF MISSION INDIANS

Intervenor-Defendants Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians ("the Tribes") submit this reply in support of their motion for expedited consideration and an order staying the Court's final judgment (ECF No. 167) pending appeal.

Plaintiffs' pretensions of urgency, and insistence that a stay will leave them in "legal limbo," are belied by their own actions. The Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–1963, has been in effect for 40 years. The State Plaintiffs

waited four decades to challenge the constitutionality of the statute, but now contend that complying with it during the orderly appellate process all of a sudden would impose irreparable injury. Stating this assertion is refutation enough. They managed to live under ICWA for 40 years, so they certainly can manage while the Fifth Circuit reviews the decision of this Court. Further, the State Plaintiffs' supposed concern for "vulnerable youth" is a nice rhetorical ploy, but ignores two salient facts: first, child-welfare organizations *prefer* ICWA's procedures to those applicable to non-Indian children, so the State Plaintiffs actually seek to deprive Indian children of the "gold standard"; and, second, the State Plaintiffs' claims seek to vindicate *their* interests, not those of children in the child-welfare system.

The Individual Plaintiffs fare no better in establishing injury from a stay. They were content to amend their complaint twice, over five months, never seeking preliminary injunctive relief. Like the State Plaintiffs, having elected not to file a class action, they are litigating only for themselves, not for others. Indeed, contrary to the Plaintiffs' argument, the judgment will not benefit the Librettis and Cliffords at all, even with respect to the Final Rule. And any injury to the Brackeens is wholly speculative.

Finally, Plaintiffs ignore what the Supreme Court has said repeatedly in the context of stays of judgments invalidating federal legislation. As then-Justice Rehnquist stated: "where the decision of the District Court has invalidated a part of an Act of Congress, I think that the Act of Congress, presumptively constitutional as are all such Acts, should remain in effect pending a final decision on the merits

by this Court." *Marshall v. Barlow's, Inc.*, 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers). This principle governs here.

The Tribes' stay motion should be granted.

ARGUMENT

I. The Traditional Four Factors Support a Stay.

In their brief (ECF No. 169), the Tribes explained that all four of the traditional stay factors support a stay. Plaintiffs' responses in opposition are unavailing.

A. The Tribes are likely to succeed on the merits on appeal.

As an initial matter, Plaintiffs question whether the presumption of constitutionality applies in the context of a stay motion, noting that the Tribes cited no Fifth Circuit cases that apply the presumption. (Resp. 3–4.) But, as noted above, the Supreme Court has expressly and repeatedly applied the presumption in granting stays.[1] Plaintiffs also misunderstand *Nken v. Holder*, 556 U.S. 418 (2009). The "strong showing" of likelihood of success does not mean, as Plaintiffs apparently contend, that the stay movant must convince the district court that it was wrong on the merits; if that were so, hardly any stays would ever be granted.

In any event, the Tribes have demonstrated a "strong showing" of likely success on the merits.

Equal Protection.—Plaintiffs argue that because ICWA is based on "membership and eligibility for membership," it is necessarily based on race and not

[1] In addition to *Marshall*, see, *e.g.*, *Bowen v. Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers); *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323 (1984) (Rehnquist, J., in chambers).

political classification. (Resp. 4.) But under *Morton v. Mancari*, 417 U.S. 535 (1974), preferences that apply to members of federally recognized tribes are political, not racial, and ICWA requires just such a political tie—existing or inchoate—with a tribe. Though Plaintiffs repeat over and over again that ICWA's classification is a "proxy for race," they never explain how actual tribal membership is even possible for newborns, or how Congress could possibly protect newborns and their biological parents if only actual tribal membership were the statutory trigger.

Non-Delegation.—Plaintiffs repeat the arguments they previously made to this Court about the non-delegation doctrine, and they minimize the Supreme Court's decision in *United States v. Mazurie*, 419 U.S. 544 (1975), which this Court had overlooked. But *Mazurie* is not so narrow; indeed, as the Tribes explained, Congress repeatedly and extensively has delegated authority to tribes. Plaintiffs are noticeably silent about the impact of this Court's decision on the edifice of federal Indian law.

Anti-Commandeering.—Plaintiffs do not dispute that Congress can command the state courts—a principle that this Court overlooked in its opinion. Instead, they contend that ICWA violates the Tenth Amendment because it commands state courts to apply federal rules of decision to state law causes of action. (Resp. 6–7.) But they cite no cases prohibiting Congress from doing so, and such a rule makes no sense. Here, for example, states have no authority over Indian tribes, *see Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996), so Congress could federalize the entirety of Indian child-welfare law and procedure. Instead, ICWA took the lesser step of respecting state laws and procedures to the

extent not inconsistent with ICWA. Finally, the Tribes did not "ignore" the contention that ICWA, in a few instances, may be read to direct agencies; they explained how in reality—and as a matter of constitutional avoidance—those provisions should actually be interpreted as directing state courts.

APA Claims.—Finally, Plaintiffs' argument that the Court's setting aside of the Final Rule will withstand appeal is wrong for several reasons. First, Plaintiffs ignore that ICWA unequivocally grants rule making authority to BIA. § 1952 ("[T]he Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter."). Second, *Chamber of Commerce v. U.S. Dep't of Labor,* 885 F.3d 360 (5th Cir. 2018), does not apply here, as the Tribes argued at length in their summary judgment brief. (ECF No. 118 at 42-43.) Third, Plaintiffs shift the goalposts on the question of whether the agency explained its change of position. This Court stated that BIA never explained the change, so the Tribes pointed to the Solicitor of Interior's memo, which provides just such an explanation. Now Plaintiffs apparently concede that the agency *did* offer an explanation, just an inadequate one based on legislative history. Their argument is wrong on the merits, but in any event does not justify this Court's reasoning. Finally, Plaintiffs wave away the widely disparate state court decisions on good cause, claiming that they merely show "state-court flexibility." But BIA was entitled to determine, in its expertise, that in this context flexibility undermined Congress's purpose.

B. The Tribes will be irreparably injured.

Plaintiffs argue that the Tribes failed to show that they will be irreparably injured. (Resp. 9–10.) But Plaintiffs' own pleadings demonstrate why they are wrong. Their recently filed motion to amend the record includes a letter to Texas agency officials that contends that, due to this Court's order, Texas (and Indiana and Louisiana) "cannot apply ICWA or Interior's 2016 regulations." (ECF No. 173 at 10.) Plaintiffs then contend that a child must be placed with a family in accordance with Texas law, not ICWA. (*Id.*) This position by Plaintiffs unequivocally demonstrates that, based on Plaintiffs' own reading of this Court's order, the Cherokee Nation will be deprived of their statutory rights with respect to at least 52 children in Texas who are "Indian children" under ICWA, and all Tribes will be deprived of their statutory rights in the three Plaintiff States. (Mot. 10.)

Further, in their opposition to the stay motion, Plaintiffs contend that the Court's decision invalidates the Final Rule on a nationwide basis. (Resp. 12.) We explain below why this contention is wrong, but if Plaintiffs are correct this is yet another category of injury the Tribes will suffer.

Finally, the Court should not take seriously Plaintiffs' contention that ICWA harms Indian children and that the Court should trust the State Plaintiffs' agencies and courts. To begin with, Plaintiffs seek to substitute their judgment for that of this Nation's elected representatives. Congress determined, after years of hearings, that ICWA was necessary *both* "to protect the best interests of Indian children *and* to promote the stability and security of Indian tribes and families." § 1902 (emphasis added). Moreover, the contention that Texas's, Louisiana's, and Indiana's

agencies and courts will better protect Indian children without ICWA is farcical. As the Supreme Court explained, when it adopted ICWA, "Congress was concerned with the rights of Indian families and Indian communities vis-a-vis state authorities," because "Congress perceived the States and their courts as partly responsible for the problem it intended to correct." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1989). Indeed, national "concern" about states' conduct with respect to Indian tribes is longstanding. *See United States v. Kagama*, 118 U.S. 375, 384 (1886) (acknowledging that the "States where [Indians] are found are often their deadliest enemies").

C. A stay does not threaten irreparable harm to any Plaintiff.

In their brief, the Tribes demonstrate why no Plaintiff would suffer any irreparable harm during a stay. (Mot. 11–13.) In response, Plaintiffs failed to demonstrate why this is wrong.

First, there is no risk of irreparable harm to the Brackeens, the only Individual Plaintiffs who live in a state governed by this Court's Order. *See Carter v. Tahsuda*, No. 17-15839, 2018 WL 3720025, at *1 (9th Cir. Aug. 6, 2018) (holding as moot a challenge to ICWA after the plaintiffs' adoption was finalized). Plaintiffs have not demonstrated that the Brackeens run *any* risk of a collateral attack to their adoption. And if the collateral attack period expires in 14 months, then any risk (and any potential harm caused by ICWA) also expires. *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279 (5th Cir. 2012), does not support their argument that being in a "legally disadvantaged category" is alone an irreparable injury. Rather, *Opulent Life Church* held that the deprivation of a constitutionally

guaranteed First Amendment right is irreparable harm. *Id.* at 295. During a stay the Brackeens will not be deprived of any of their constitutionally protected rights.

Second, Plaintiffs are simply wrong that the other Individual Plaintiffs will suffer injury during a stay. As the Tribes explained, none of them live in a state bound by this Court's order. (Mot. 12–13.) Apparently conceding that this Court's judgment invalidating ICWA would not apply in Minnesota and Nevada, they contend only that the Order setting aside the Final Rule would apply to the Individual Plaintiffs' supposedly impending proceedings in Nevada and Minnesota. (Of course, there is no evidence before this Court about such proceedings.) But this is doubly wrong. First, it is well established that an agency can decline to acquiesce in a court's decision invalidating its regulations or other regulatory actions in a court not bound by that decision. *See, e.g.*, *Schisler v. Sullivan*, 3 F.3d 563, 565 (2d Cir. 1993) ("Indeed, a district court had ordered the Secretary to apply the rule in all cases, an unprecedented intrusion into an agency's right to non-acquiesce in the rule of one circuit."); *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1261 (D.C. Cir. 1996) ("[I]ntercircuit nonacquiescence is permissible, especially when the law is unsettled."); Getzel Berger, 92 N.Y.U. L. Rev. 1068, 1099 (2017) ("While the idea that an agency can keep doing something that a federal court held unlawful might come as a surprise to some, intercircuit nonacquiescence is commonplace, and its legitimacy is widely accepted by courts and commentators."). Courts outside of the Northern District of Texas are thus still obligated to abide by the Final Rule.

Moreover, state courts are not obligated to apply this Court's holding. *See Omniphone, Inc. v. Sw. Bell Telephone Co.,* 742 S.W.2d 523, 526 n.3 (Tex. App.

Austin 1987) ("While a decision of a federal court, other than the Supreme Court, may be persuasive in a state court on a federal matter, it is, nevertheless, not binding, *since the state court owes obedience to only one federal court, namely, the Supreme Court*.") (emphasis in original); *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 20 (Minn. Ct. App. 2003) (same); *Blanton v. N. Las Vegas Mun. Court*, 748 P.2d 494, 500 (Nev. 1987) (same).

Third, Plaintiffs fail to show any irreparable injury to the State Plaintiffs. That some of the State Plaintiffs voluntarily abide by ICWA demonstrates that it does not cause irreparable harm. And, as explained above, the fact that the State Plaintiffs have been subject to ICWA for 40 years—39 of them without complaint—refutes their contention of irreparable harm.

D. The public interest favors a stay.

Finally, Plaintiffs argue that a stay should be denied to "protect the public" from a law that is unconstitutional. But this argument ignores that the public interest is not dictated by Plaintiffs or by this Court. Rather, the public interest is defined by Congress. And Congress has determined that it is in the public interest for state courts to abide by ICWA. § 1902.

In any event, Plaintiffs fail to rebut that ICWA is the gold standard among national child welfare organizations. (Mot. 13.) Nor do Plaintiffs offer any explanation for why the United States' trust relationship with the Indians does not support the continued application of ICWA. This factor thus favors a stay.

II. A Stay Is Also Warranted Under Bryant.

In their motion, the Tribes demonstrated that because this case presents a serious legal question and the equities weigh heavily in favor a stay, a stay is warranted. (Mot. 14–15.) Plaintiffs suggest that this "alternative standard" is wrong both legally and factually. Plaintiffs are wrong on both counts.

First, Plaintiffs argue that this standard was abrogated by *Nken*, but the Fifth Circuit applied this standard (along with *Nken*) five years after *Nken* in *Campaign for Southern Equality v. Bryant*, 773 F.3d 55 (2014). The Fifth Circuit noted that while *Nken* reaffirmed the standard for a traditional stay, the standard established in *Ruiz v. Estelle*, 650 F.2d 555 (5th Cir. 1981), still applied. *Bryant*, 773 F.3d at 57. Plaintiffs are simply wrong that the standard established in *Ruiz*, and utilized in *Bryant*, is not binding on this Court. Nor is this standard reserved for "extraordinary circumstances not present here." (Resp. 15.) If this standard were actually only for extraordinary circumstances, then the Fifth Circuit in *Bryant* would have said so. No such limitations were applied.

Finally, the equities heavily favor a stay. As discussed *supra*, the Tribes will suffer irreparable injury whereas Plaintiffs will not. Indeed, Plaintiffs again ignore that ICWA has been in effect for over 40 years, and issuing a stay will simply maintain the status quo.

CONCLUSION

The Tribes respectfully request that the Court grant their Motion and stay this court's judgment pending appeal.

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Respectfully submitted,

By: /s/ *Adam H. Charnes*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served this 17th day of October, 2018, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(d).

/s/ *Adam H. Charnes*
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