

# **Update: Plaintiffs in ICWA Litigation Petition Court for Rehearing**

Category: Policy Blog

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On October 1, Plaintiffs in *Brackeen v. Bernhardt*, the case centering on the constitutionality of the Indian Child Welfare Act (ICWA), filed petitions for rehearing of the case en banc. Essentially, the Plaintiffs are asking the entire 17-member U.S. Court of Appeals for the Fifth Circuit to rehear the case, in effect setting aside the decision a panel of three Fifth Circuit judges issued in August.

As previously reported, in its August [decision](#) the court overturned a District Court finding that held ICWA unconstitutional declaring it creates a separate set of practices for a racial group. In doing so, the Fifth Circuit affirmed that ICWA and its implementing regulations are constitutional, recognizing the unique political status of tribes, American Indians, and Alaska Natives. On October 2, the court ordered the U.S. and Intervenor Tribes (Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, Quinault Indian Nation, and Navajo Nation) to respond to the petitions by Tuesday, October 15.

During the 2018 litigation, NCUIH joined an amicus brief with nearly 400 Indian organizations and tribes in support of ICWA. Typically, courts deny petitions for rehearing and leave the court's prior decision to stand. However, there is no guarantee. The court could choose to rehear aspects of the case, the mechanics of which (timing, extent of new briefing, etc.) the court would subsequently determine, or it could change parts of its decision without even granting the petition.

NCUIH will continue to monitor progress in the case, along with other amici curiae, and will provide updates as we receive them. It is important to note that although the Fifth Circuit will first have to act on the petition for rehearing, Plaintiffs will still be able to petition the ruling to the U.S. Supreme Court.