

Breaking News: Fifth Circuit to Rehear ICWA Challenge En Banc

Category: News

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Today, the United States Court of Appeals for the Fifth Circuit [issued an order](#) directing a challenge to the Indian Child Welfare Act (ICWA) to be reheard *en banc* — before the entire Fifth Circuit. As previously reported, a three-judge panel of the Fifth Circuit [had ruled ICWA Constitutional](#) in August, finding it was not a race-based statute that would violate the Equal Protection Clause. The States of Texas, Louisiana, Indiana, and several adoptive parents had urged the Court to set aside and rehear the August decision, asserting similar arguments to the original briefing and that tribal membership is determined on an “overwhelmingly racial nature.”

The federal government filed a brief in response earlier this week, arguing that the plaintiffs “miss the fundamental point . . . [namely,] tribes have authority to set their own membership criteria, which may be based in part on biology or descent[.]” The Cherokee Nation, Oneida Nation, Quinault Indian Nation, Morongo Band of Mission Indians, and Navajo Nation (Intervenor) filed an opposition to the petitions for rehearing *en banc* last month, as did the federal government.

Today’s order does not necessarily mean that the Fifth Circuit will find ICWA unconstitutional, but does vacate its earlier decision and add another round of briefing to the case - which is scheduled for December and January. The Court seeks to hear oral argument during the week of January 20.

NCUIH will continue to monitor updates as they become available and will circulate a further analysis to urban Indian organizations at a later date.