

**FILED**

AUG 06 2018

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U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAROL COGHLAN CARTER, next  
friend of A.D., C.C., L.G. and C.R.,  
minors next friend of A.D. next friend of  
C.C. next friend of L.G. next friend of  
C.R.; et al.,

Plaintiffs-Appellants,

v.

JOHN TAHSUDA, in his official capacity  
as Assistant Secretary of Bureau of Indian  
Affairs; et al.,

Defendants-Appellees,

GILA RIVER INDIAN COMMUNITY  
and NAVAJO NATION,

Intervenor-Defendants-  
Appellees.

No. 17-15839

D.C. No. 2:15-cv-01259-NVW

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Arizona  
Neil V. Wake, District Judge, Presiding

Argued and Submitted June 13, 2018

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by Ninth Circuit Rule 36-3.

San Francisco, California

Before: SCHROEDER, EBEL,\*\* and OWENS, Circuit Judges.

Plaintiffs-Appellants include Indian children, their adoptive parents and next friends. They filed this action in the United States District Court in Arizona against the Assistant Secretary of Indian Affairs for the Bureau of Indian Affairs, the United States Secretary of the Interior, and the Director of the Arizona Department of Child Safety, seeking to challenge the constitutionality of various provisions of the Indian Child Welfare Act (“ICWA”), 25 U.S.C. § 1901 *et seq.* The Gila River Indian Community and the Navajo Nation intervened to defend the constitutionality of the Act. The district court concluded Plaintiffs lack Article III standing. Plaintiffs appeal from this dismissal. We hold this action is now moot.

Adoption proceedings were pending at all times during the litigation in the district court. Defendants moved to dismiss the action, contending that Plaintiffs lacked Article III standing and could not state a constitutional claim upon which relief could be granted. The district court examined the complaint with respect to each of the challenged provisions and ruled that Plaintiffs lacked standing because none had been harmed by any conduct traceable to ICWA.

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\*\* The Honorable David M. Ebel, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

We do not reach the standing inquiry, however, because a subsequent development has rendered this action moot. Plaintiffs have never suggested they suffered any economic damages. Their original complaint sought only declaratory and injunctive relief relating to ICWA's application to their adoption proceedings. While Plaintiffs' appeal from the district court's dismissal was going forward, however, Plaintiffs' adoptions all became final. The relief Plaintiffs sought to redress their alleged injuries is no longer available to them.

Appellees argue, and we agree, that the case is therefore now moot. The named plaintiffs are no longer subject to ICWA, and they do not allege that they will be in the imminent future. *See Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 864–68 (9th Cir. 2017). Plaintiffs counter that there will be members of a yet-to-be-certified class that have redressable claims, but this argument is unavailing. At least one named plaintiff must present a justiciable claim unless an exception applies. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022–23 (9th Cir. 2003). None of these Plaintiffs do, and no exception applies here, *cf. Pitts v. Terrible Herst, Inc.*, 653 F.3d 1081, 1090 (9th Cir. 2011).

Plaintiffs' suggestion that their belated addition of a claim for nominal damages saves the case from mootness fails. While Plaintiffs were still in the

district court, they had seen the possibility that all their claims for injunctive and declaratory relief could become moot, so they filed an amended complaint adding a claim for nominal damages under Title VI of the Civil Rights Act against the Director of Arizona's Department of Child Safety. The Supreme Court has admonished this Court that "a claim for nominal damages . . . asserted solely to avoid otherwise certain mootness, b[ears] close inspection." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997).

Here the claim does not survive such inspection. Plaintiffs have never alleged actual or punitive damages. They can cite no case supporting the proposition that a claim for nominal damages, tacked on solely to rescue the case from mootness, renders a case justiciable. *See id.* at 68–71. Plaintiffs cite *Bernhardt v. County of Los Angeles*, 279 F.3d 862 (9th Cir. 2002), where, in addition to mooted claims for injunctive relief, the original complaint alleged claims for compensatory and punitive damages. *Id.* at 872. We said in *Bernhardt* that the possibility of nominal damages avoided mootness of the entire case, *see id.* at 872–73, but there was no belated claim asserted solely to avoid mootness as there was in this case, and which the Supreme Court frowned upon in *Arizonans for Official English*.

We vacate the district court's judgment dismissing for lack of standing and remand to the district court with instructions to dismiss the action as moot.

**VACATED AND REMANDED.**

## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings

#### Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

#### Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

#### (1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

#### B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

### United States Court of Appeals for the Ninth Circuit

### BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

**Note:** If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v.  9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>				
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<b>TOTAL:</b>				\$ <input type="text"/>	<b>TOTAL:</b>				\$ <input type="text"/>

\* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

\*\* *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

*Continue to next page*

**Form 10. Bill of Costs - Continued**

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

*(To Be Completed by the Clerk)*

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk