No. _____

In The
Supreme Court of the United States

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

Petitioners,

v.

TARA KATUK MAC LEAN SWEENEY, in her official capacity as Assistant Secretary—Indian Affairs, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether claims for declaratory and damages relief to redress past injuries under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7, are moot when no prospective relief is available or sought.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs in the trial court and Appellants in the Ninth Circuit, are:

- Carol Coghlan Carter, next friend of minor children A.D., C.C., L.G., and C.R.;
- Dr. Ronald Federici, next friend of minor children A.D., C.C., L.G., and C.R.;
- S.H. and J.H., a married couple, who are adoptive parents of baby girl A.D.;
- M.C. and K.C., a married couple, who are adoptive parents of baby boy C.C.; and
- K.R. and P.R., a married couple, who are adoptive parents of baby girl L.G. and baby boy C.R.

These named Plaintiffs sued for themselves and on behalf of a putative class of similarly-situated individuals defined at ¶ 50 of the operative complaint. App.79a. The Plaintiff class has not been certified.

Respondents, who were Defendants in the trial court, and Appellees in the Ninth Circuit, are:

- Tara Katuk Mac Lean Sweeney, sued in her official capacity as Assistant Secretary—Indian Affairs, the Bureau of Indian Affairs. Before Ms. Sweeney, the relevant named Defendant and Defendant-Appellee were Bruce Washburn and John Tahsuda III, who previously served as Assistant Secretary—Indian Affairs.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT—Continued

- The United States Secretary of the Interior sued in official capacity. This office is vacant as of this filing. David Bernhardt currently serves as the Acting United States Secretary of the Interior. The relevant named Defendant and Defendant-Appellee were Ryan K. Zinke and Sally Jewell, who previously served as the United States Secretary of the Interior.
- Gregory A. McKay, sued in his official capacity as Director of the Arizona Department of Child Safety.

Respondents, who intervened as defendants in the trial court, and were Appellees in the Ninth Circuit, are:

- Gila River Indian Community ("GRIC"), a federally-recognized Indian Tribe; and
- Navajo Nation, a federally-recognized Indian Tribe.

Names of petitioning children and parents are sealed pursuant to a protective order. Their names are on file with the Clerk of the Court, filed along with this petition, in an appropriately sealed list.

None of the parties are corporations.

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INTRODUCTION

The Plaintiffs in this case challenged *de facto* race-, color-, or national-origin-based discrimination as violating civil-rights laws. They sought both relief against future injury and damages and declaratory relief for suffering discrimination in the past. The Ninth Circuit held, in conflict with other circuits, in disregard of the plain mandate of the operative statute, and in contradiction to this Court's precedents, that because the *future* discrimination claims had been rendered moot by a change in circumstances, the Plaintiffs' claim for relief for *past* discrimination was also moot.

This case therefore presents the important question of availability of remedies for past injuries in cases that do not seek remedies for future injuries. The question is whether, if retrospective remedies are available—as here, damages and declaratory relief—does that provide the requisite personal stake that continues throughout the existence of the litigation such that the case is not rendered moot due to a controversy-ending event that renders prospective-relief claims moot.

The question has long percolated in the lower courts, and this case is an ideal vehicle to resolve it. The opinion below has wide-ranging ramifications for the mootness doctrine, application of Title VI of the Civil Rights Act, and a centuries-long pedigree of what we understand about prospective and retrospective remedies.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not reported. App.1a–4a. The opinion of the United States District Court for the District of Arizona is not reported. App.5a–34a.

JURISDICTION

The Ninth Circuit issued its opinion on August 6, 2018. App.1a. It denied a timely-filed petition for rehearing *en banc* on October 15, 2018. App.36a. Petitioners request a writ of certiorari pursuant to 28 U.S.C. § 1254(1). This petition is filed within 90 days from the Ninth Circuit's denial of the petition for rehearing *en banc* per Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions are reproduced at App.39a–61a.

STATEMENT OF THE CASE

A. Statutory scheme: Title VI of the Civil Rights Act of 1964

Title VI was enacted so that no person "be subjected to discrimination under any program or activity

receiving Federal financial assistance" "on the ground of race, color, or national origin." 42 U.S.C. § 2000d. The elimination of such discrimination was so important to Congress that it expressly abrogated Eleventh Amendment immunity, and, for alleged violations of Title VI and some other civil-rights statutes, made available "remedies (including remedies both at law and in equity) . . . to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State." 42 U.S.C. § 2000d-7(a).

In the absence of Section 2000d-7, federal courts would be unable to award "retroactive" damages to redress past discrimination on the basis of race, color, or national origin, when those damages are to be paid by the state treasury because such claims for relief would be "barred by the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 651, 669 (1974).

The law therefore draws a distinction between prospective and retrospective relief. Because the Eleventh Amendment allows for only prospective relief under 42 U.S.C. § 1983 against state officials, *Ex Parte Young*, 209 U.S. 123 (1908), most civil rights cases involve prospective-relief claims in Section 1983 suits. Retrospective claims stem mainly from Title VI, which expressly abrogates Eleventh Amendment immunity. Thus in a case like this, which originally included both, the mootness of *prospective*-relief claims should leave the retrospective-relief claims unaffected—and those claims should remain alive as far as the redressability element of Article III standing is concerned.

In *Texas v. Lesage*, 528 U.S. 18 (1999), this Court expressly left undecided the issue of whether Title VI retrospective-relief claims keep a case alive when prospective injunctive relief claims are not available or not sought. In *Lesage*, an applicant for a Ph.D. program alleged that the University of Texas impermissibly "considered the race of its applicants at some stage during the review process," *id.* at 19, and sought both retrospective relief (because of the University's previous treatment of him) and prospective relief (to bar the University from acting similarly in the future). The Court of Appeals ruled on the merits that his retrospective-relief claim must be dismissed—but it then dismissed the entire case, without addressing his prospective-relief claims. This Court reversed. Because the "Court of Appeals did not distinguish between Lesage's retrospective claim for damages and his forward-looking claim for injunctive relief based on continuing discrimination," it remanded so that the lower court could determine "[w]hether [claims under 42 U.S.C. §§ 1981 and 2000d] remain, and whether [the plaintiff] has abandoned his claim for injunctive relief." *Id.* at 21–22.

This case presents that question—the question *Lesage* left unresolved. Here, Plaintiffs concede they do not seek prospective injunctive relief for themselves. Unlike *Lesage*, the children and parents here do not seek a "forward-looking claim for injunctive relief based on continuing discrimination," *id.* at 21–22, because the decision below was correct that *that* claim is moot after their adoptions were finalized. The question

here is whether the *other* claims—the retrospective Title VI damages and declaratory-judgment claims—remain alive. *Id.* at 22.

Pre-*Lesage* cases indicate that the answer should be yes. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), for example, assumed the answer to the *Lesage* question rather than deciding it. There, the plaintiff sued, among other things, under Title VI for an injunction to remedy his *past* rejections, not to prospectively enjoin an ongoing violation. *Id.* at 277–78. *Lesage* did not mention, much less overrule, *Bakke*'s holding that the Title VI retrospective-relief claim *was* available to the plaintiff where he was not seeking any prospective relief.

Retrospective claims and prospective-relief claims differ, as far as the standing inquiry is concerned, as a matter of both law and common sense. Where the plaintiff sues over both past and present discrimination, the defendant's cessation of that activity *today* renders the forward-looking relief moot—but it cannot alter the past injury or bar backward-looking relief claims stemming from that injury. Similarly, even where the Eleventh Amendment forecloses backward-looking damages claims, as in *Edelman* and *Ex Parte Young*, forward-looking relief claims can survive. This case presents the opposite side of the *Lesage* coin: do retrospective damages and declaratory-judgment claims under Title VI and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, remain viable when prospective-relief claims are foreclosed or not sought?

B. The Plaintiffs

Four children, then in the care of Arizona's foster-care system, and their then-foster parents (now adoptive parents) challenged the *de jure* discrimination they were experiencing in their child-custody proceedings under the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901–1963. They argued that ICWA creates a two-track system for child-welfare cases under which their cases were treated differently from cases involving non-Indian children in the care of Arizona's foster-care agency, the Department of Child Safety.

The Plaintiffs challenged five provisions of ICWA, 25 U.S.C. §§ 1911(b), 1912(d), 1912(f), 1915(a), 1915(b), and three corresponding Arizona state-law provisions, Ariz. Rev. Stat. ("A.R.S.") §§ 8-453(A)(20), 8-105.01(B), 8-514(C), as discriminating based on race, color, or national origin, and for violations of the First, Fifth, Tenth, and Fourteenth Amendments. App.100a–109a, App.111a–113a. The Plaintiffs specifically asked for "nominal damages, and declaratory and injunctive relief under Title VI," and separate declaratory and injunctive relief under 42 U.S.C. § 1983. App.65a ¶ 7.

The operative complaint alleges particularized injuries by alleging that the children and parents were affected "in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992). It alleges concrete injuries, that is, injuries that, although "intangible," do "actually exist" and are "not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

Specifically, they alleged the following injuries: being forced to expend extra time, effort, and cost as part of their child-custody proceedings which they would not have had to expend but for the classification imposed by ICWA; being forced to visit with strangers; undergoing the stigma of the discriminatory child-custody proceedings; experiencing emotional and psychological harm; experiencing the state's disregard of the dignity, stability and permanency of these families; having a badge of inferiority and race-, color-, or national-origin-based steering and conformity imposed on them. App.63a–64a, 65a–69a, 70a–79a, 81a–91a, 93a–109a, 111a–113a.

The Plaintiffs *particularly*, *concretely*, and *actually* suffered these and other injuries during their child-custody proceedings, and all on account of the Defendants' application of ICWA to their cases. The complaint's allegations therefore established a "causal connection between the injury and the conduct complained of." *Bennett v. Spear*, 520 U.S. 154, 167 (1997).

Moreover, those past injuries are redressable, *Spokeo*, 136 S. Ct. at 1547, by the award of the requested damages and declaratory relief.

When the operative complaint was filed, C.C. had already been adopted by M.C. and K.C. Thus, their claims for relief were based solely on *past* injuries and *past* discrimination they experienced at the hands of Defendants who were operating under the eight challenged statutory provisions. App.73a. The siblings L.G. and C.R. were adopted by K.R. and P.R. while this case

was pending in the district court. Their claims for relief were initially based on both ongoing injuries as well as past injuries and discrimination. App.73a–79a. S.H. and J.H. were able to adopt A.D. *after* the case was decided by the district court and while the appeal was pending in the Ninth Circuit. Their claims for relief were based both on present and past discrimination inflicted by Defendants acting under the challenged statutes. App.70a–71a, 77a–79a.

And of course, between the time the operative complaint was filed and the time when adoptions of all three Plaintiff families were finalized, the discrimination and injuries flowing from the Defendants' and Defendants-Intervenors' enforcement of the challenged provisions continued.

C. District Court decision

The Plaintiffs filed suit in July 2015, App.10a, and a motion for class certification in August 2015. Dist. Ct. Dkt. 22. The federal and state Defendants moved to dismiss, and two Indian tribes sought to intervene as Defendants. The class-certification motion was denied "without prejudice as premature," Dist. Ct. Dkt. 39, and the court proceeded to address the motions to dismiss and intervention. Oral argument on these motions was held in December 2015. App.10a.

In March 2016, Plaintiffs sought leave to amend their complaint. App.11a. This was granted in April 2016, and the district court denied the pending motions to dismiss as moot. App.11a. The first amended

complaint, therefore, is the operative complaint and is reproduced at App.62a–117a.

The state and federal Defendants again moved to dismiss arguing lack of standing. In September 2016, the court granted permissive intervention to the tribes. App.11a. In March 2017, it dismissed the complaint concluding that the children and parent Plaintiffs lacked Article III standing. App.34a. It did not address the redressability element of standing. Instead, the court concluded that injury-in-fact and fair-traceability elements had not been met. App.20a, 24a, 25a, 26a, 29a, 30a. The children and parent Plaintiffs appealed.

D. Ninth Circuit decision

The Ninth Circuit affirmed, but on different grounds. It concluded that although "[a]doption proceedings were pending at all times during the litigation in the district court," it would "not reach the standing inquiry." App.2a–3a. It concluded that the case was moot because "[t]he relief Plaintiffs sought to redress their alleged injuries [wa]s no longer available to them." App.3a.

The court of appeals reasoned that because all three adoptions had been finalized, the case had been rendered moot because *prospective* relief was no longer available ("plaintiffs are no longer subject to ICWA," App.3a) or was not sought ("plaintiffs . . . do not allege that they will be [subject to ICWA] in the imminent future," App.3a).

But with regard to the children and parents' claim for *retrospective* relief, it concluded that a Title VI damages claim "tacked on solely to rescue the case from mootness" renders the case nonjusticiable. App.4a. It derived that notion from this Court's statement in *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997), that "a claim for nominal damages . . . asserted solely to avoid otherwise certain mootness, b[ears] close inspection." App.4a.

As for the declaratory-judgment claim, the court did not address it. Thus, while the district court addressed only the injury-in-fact and fair-traceability elements of Article III standing, the Ninth Circuit addressed only mootness. App.3a.[1]

REASONS FOR GRANTING THE PETITION

The question before this Court is one of mootness. The children and parents ask this court whether their remaining claims for relief—retrospective damages and declaration—survive when their claim for prospective injunctive relief is no longer available or sought. If those claims do survive, the case is not moot, and on remand the lower court will have to determine in the first instance whether the district court erred in concluding that the Plaintiffs do not have Article III standing.

[1] *See Arizonans for Official English*, 520 U.S. at 66–67 (court may assume without deciding that standing exists in order to analyze mootness).

Certiorari should be granted because circuit courts are intractably divided, the question presented is critically important and recurring, this case is an ideal vehicle to resolve the question, and because the decision below is wrong on multiple levels.

I. The decision below deepens a recognized conflict in the circuits and directly contravenes this Court's precedents.

Central to the lower court's analysis is the fact that "Plaintiffs' adoptions [have] all bec[o]me final." App.3a. But the finalizing of the adoptions could not make the Plaintiffs whole, or deprive the district court of power to grant them relief under civil-rights laws. Adoption was not the "relief Plaintiffs sought" in federal court. *Id.* They sought, in addition to injunctive relief, damages and declaratory relief for *past* injury, because the challenged ICWA and state-law provisions should not have been applied to their cases, and such application was unconstitutional.

Civil-rights laws explicitly provide for such relief: Title VI authorizes damages for one who has been "subjected to" discriminatory laws in the past. 42 U.S.C. § 2000d. The completion of the adoptions is immaterial with regard to the Plaintiffs' past injuries. It did not redress those injuries or render it impossible for federal courts to remedy those injuries.

These retrospective-relief claims were live during all periods of this suit and continue to remain alive. The Ninth Circuit leaped to conclude that the "relief

Plaintiffs sought" was "no longer available to them." App.3a. But that holding deepens an acknowledged conflict in the circuits and directly contravenes this Court's precedents.

Usually Title VI cases in this Court provide no occasion to distinguish between prospective- and retrospective-relief claims, thus giving this Court no occasion to resolve the question this Court expressly reserved in *Lesage*. *See*, *e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003) (Plaintiff had requested retrospective and prospective relief under, *inter alia*, Title VI); *Gratz v. Bollinger*, 539 U.S. 244, 252 (2003) (same).

This case presents such an occasion. The lower court concluded that the prospective-relief claim based on allegations of continuing violation of federal law was moot because the parent Plaintiffs were successful in adopting the children Plaintiffs. But based on this conclusion, it held that the retrospective-relief claims based on *past* violations of federal law were also moot. App.3a–4a. This conclusion cannot be squared with any of this Court's cases. It also deepens several circuit splits that have percolated and persisted in the courts of appeals for decades.

A. Courts are intractably divided on the question of whether a sole claim for damages, however labeled, keeps the case alive.

A troubling thread runs through the lower court's decision. It concluded that the Title VI damages claim was moot because it is a claim for *nominal* damages, and suggested that had Plaintiffs "alleged actual or punitive damages," the court might have reached the opposite conclusion. App.4a. The court cited *Bernhardt v. County of Los Angeles*, 279 F.3d 862 (9th Cir. 2002) to support this point. In *Bernhardt*, the court noted, the complaint alleged claims for injunctive relief (which subsequently became moot) and "claims for compensatory and punitive damages." App.4a. But this disdain for nominal damages is unwarranted.

1. The idea that nominal-damage claims become moot while actual, compensatory, or punitive damage claims do not, finds no support in the vast majority of circuits that have addressed the issue. But there is an entrenched circuit split on this point. With this decision, the Ninth Circuit joined the Seventh and Eleventh Circuits in placing claims for nominal damages on a lower rung than claims for other types of damages. Other circuits have ruled to the contrary.

CMR D.N. Corp. v. City of Philadelphia, 703 F.3d 612, 622 (3d Cir. 2013) (citation omitted), held that "[c]laims for damages are retrospective in nature—they compensate for past harm. By definition, then, such claims cannot be moot." *Zatler v. Wainright*, 802

F.2d 397, 399 (11th Cir. 1986), held that release of the Plaintiff from prison mooted his claim for prospective injunctive relief but his claim for damages for past assaults remained alive. And the Second Circuit has held that an agreement to make employee benefits for the future (which is analogous to the adoptions getting finalized here) did not moot the claims to recover past payments. *Ottley v. Sheepshead Nursing Home*, 784 F.2d 62, 66 (2d Cir. 1986). *DeLancy v. Caldwell*, 741 F.2d 1246, 1247 (10th Cir. 1984) concluded that provision of a state-court transcript mooted the Plaintiff's demand for an injunction requiring the transcript, but did not moot his retrospective claim for damages for delay. Similarly, release of a prisoner on parole mooted his claim for injunctive relief against his prison classification, but did not moot his claim for damages. *Lucas v. Hodges*, 730 F.2d 1493, 1497 (D.C. Cir. 1984). And the Plaintiff's graduation from high school did not moot an action for damages challenging a rule restricting his eligibility to play football. *Niles v. Univ. Interscholastic League*, 715 F.2d 1027, 1030 n.1 (5th Cir. 1983).

In contrast, the Seventh Circuit has concluded that "[i]t is well settled that a viable claim for monetary relief, with the possible exception of a claim for only nominal or insubstantial damages, preserves the saliency of an action." *Sanchez v. Edgar*, 710 F.2d 1292, 1295–96 (7th Cir. 1983). And the Eleventh Circuit, acknowledging this well-developed circuit split, has concluded that nominal damages, if not coupled with some other relief, do not keep cases alive. *Flanigan's Enters.,*

Inc. v. City of Sandy Springs, 868 F.3d 1248 (11th Cir. 2017) (*en banc*).

But this Court has said that there is no such "two-tiered system of constitutional rights," *Memphis Community School District v. Stachura*, 477 U.S. 299, 309 (1986), because there is no such thing as "damages based on the 'value' or 'importance' of constitutional rights." *Id.* at 309 n.13. This is because damages available for alleged violations of constitutional rights "are not truly compensatory" anyway. *Id.* Thus, even if we were to label a damages award as "compensatory" it is hard to put a dollar value on intangible injuries such as emotional distress and humiliation as compared to tangible injuries like a broken leg.

For this reason, lower courts have treated the difference between nominal and compensatory damages as a question of the *degree of evidence* presented to show the actual damages suffered.[2] That is to say, once a constitutional violation is established, insufficient evidence to establish actual injury (or sufficient evidence establishing great difficulty in proving damages) will result in an award of only *nominal* or *presumed* damages. But if the trier of fact is given sufficient evidence of actual harm, then compensatory or actual damages are recoverable.

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[2] *See Price v. City of Charlotte*, 93 F.3d 1241 (4th Cir. 1996); *Sykes v. McDowell*, 786 F.2d 1098 (11th Cir. 1986); *Stewart v. Furton*, 774 F.2d 706 (6th Cir. 1985); *Trevino v. Gates*, 99 F.3d 911, 921–22 (9th Cir. 1996); *Parrish v. Johnson*, 800 F.2d 600 (6th Cir. 1986).

This case, which comes here from a motion to dismiss, thus far has only well-pleaded allegations of actual harm. Therefore, no federal court can yet say "beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). The issue is not whether the children and parents "will ultimately prevail but whether [they are] entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

2. Unlike the Ninth, Seventh, and Eleventh Circuits, other courts of appeals have held that a claim for nominal damages will survive the mootness of prospective claims. Some earlier cases seem to have suggested that a claim merely for nominal damages cannot avoid mootness,[3] but more recent decisions recognize that a claim for damages, nominal[4] or otherwise, will. *See* 13C Charles Alan Wright et al., FEDERAL PRACTICE &

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[3] *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 387 (2d Cir. 1973) (opn. of Timbers, J., joined by Lumbard, J.); *Kerrigan v. Boucher*, 450 F.2d 487 (2d Cir. 1971); *Doria v. Univ. of Vt.*, 589 A.2d 317, 319–20 (Vt. 1991); *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 610–11 (6th Cir. 2008); *Sanchez*, 710 F.2d at 1295–96.

[4] *Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 345 (5th Cir. 2017) ("The mootness doctrine . . . will not bar any claim for damages, including nominal damages."); *Bayer v. Neiman Marcus Grp.*, 861 F.3d 853, 868–74 (9th Cir. 2017); *Carver Middle Sch. Gay–Straight Alliance v. Sch. Bd. of Lake Cnty.*, 842 F.3d 1324, 1330–31 (11th Cir. 2016); *Sprint Nextel Corp. v. Middle Man, Inc.*, 822 F.3d 524, 528–29 (10th Cir. 2016); *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 631–32 (4th Cir. 2016); *C.F.* ex rel. *Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 983–84 (9th Cir. 2011).

PROCEDURE § 3533.3 nn.46–47 (3d ed. 2017) (collecting cases).

In *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1257–58 (10th Cir. 2004), Judge McConnell wrote the majority opinion concluding that a retrospective nominal-damage claim of $1 prevented the case from becoming moot when the prospective-injunctive-relief claim had been mooted. Judge McConnell also wrote a separate concurrence calling upon this Court to rule that retrospective nominal-damage claims do not keep a case or controversy alive. *Id.* at 1262–71 (McConnell, J., concurring). Judge Henry wrote a separate concurring opinion, *id.* at 1271–75 (Henry, J., concurring), explaining why "a claim for nominal damages in a constitutional case may vindicate rights that should be scrupulously observed, and hence, such a case is not, nor should it be, moot." *Id.* at 1275 (Henry, J., concurring).

This split has developed and percolated ever since this Court decided *Carey v. Piphus*, 435 U.S. 247, 248–51 (1978), which held that a plaintiff is "entitled to recover nominal damages" in such situations. Two students alleged that their school suspended them without due process. *Id.* They did not allege that they would be suspended in the imminent future, thus foreclosing prospective relief. *Id.* Yet they were "entitled to recover nominal damages" to vindicate their right to due process that was violated in the past. *Id.* at 247–48.

Stachura, 477 U.S. at 308 n.11, reaffirmed *Carey* and held that the same rule governs Section 1983 claims alleging the deprivation of *any* constitutional right. Nominal damages to redress past wrongs remain "the appropriate means of 'vindicating' rights" even where no allegation of future harm is made.

3. The post-*Stachura* decisions have been split. Some courts have been hostile to the suggestion that presumed damages, outside the voting rights context, survive *Stachura*.[5] Other courts see *Stachura* as leaving room for presumed damages.[6] Yet others see presumed damages as a surrogate for actual or compensatory damages when there is evidence that the plaintiff suffered an actual injury resulting from the constitutional violation, but the difficulty lies in the ability to measure the scope and extent of the injury.[7] A similar approach has been taken with respect to

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[5] *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 639 (1st Cir. 1990) (allowing only nominal damages award for the violation of First Amendment guarantees when the plaintiff offered no proof of actual injury), *cert. denied*, 502 U.S. 1029 (1992); *Spence v. Bd. of Educ. of Christina Sch. Dist.*, 806 F.2d 1198, 1200 (3d Cir. 1986) (refusing to presume distress damages from violation of First Amendment Constitutional right).

[6] *Kerman v. City of N.Y.*, 374 F.3d 93, 129–30 (2d Cir. 2004); *Hessel v. O'Hearn*, 977 F.2d 299, 301–02 (7th Cir. 1992) (Posner, J.) (suggesting that *Stachura* may not bar presumed damages for violations of the Constitution).

[7] *Pembaur v. City of Cincinnati*, 882 F.2d 1101, 1104 (6th Cir. 1989) (holding, post-*Stachura*, that presumed damages may be appropriate when they "approximate the harm that the plaintiff suffered and thereby *compensate* for harms that may be impossible to measure" (emphasis added)).

nominal damages awards that are presumed or presumed to compensate for a violation of the Plaintiff's rights.[8]

In the four decades since *Carey*, several courts of appeals have concluded that the absence of a live claim for *pro*spective relief is irrelevant to courts' power to decide nominal-damages claims for *retro*spective relief. Indeed, "the denial of" an asserted protected right is "actionable for nominal damages." *Carey*, 435 U.S. at 266. *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), for example, held that the Plaintiff's lack of standing to pursue injunctive relief did not mean that a "claim for damages" could not "meet all Article III requirements." And *Powell v. McCormack*, 395 U.S. 486, 497 (1969), held that "[w]here one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy."

This rule has been applied in cases involving a wide spectrum of claims—all of which conflict with the decision below. *See*, *e.g.*, *Green v. McKaskle*, 788 F.2d 1116 (5th Cir. 1986) (prison conditions); *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740 (5th Cir. 2009) (religious speech). And lower courts have held that it applies regardless of the reason the prospective-relief claim became moot. *See*, *e.g.*, *Brinsdon*, 863 F.3d at 345–46 (nominal-damages claim was live despite

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[8] *Briggs v. Marshall*, 93 F.3d 355, 360 (7th Cir. 1996) (noting these different variants or purposes of awarding nominal damages).

student's graduation); *Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006) (nominal-damages claim was live despite city's amendment of the challenged ordinance). For instance, a Plaintiff seeking both reinstatement and back pay for alleged discrimination can continue to pursue the case even if reinstatement is granted or no longer sought. *Firefighter's Local Union No. 1784 v. Stotts*, 467 U.S. 561, 568–70 (1984). That is true even if a small amount of money is involved because the "amount of money . . . at stake does not determine mootness." *Id.* at 571.

This rule makes sense because whether a case or controversy exists or is moot is determined claim-by-claim, not "in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). This means that a mooted *claim* for prospective relief (here, injunction) should not affect a separate, live *claim* for retrospective relief (here, declaration and damages).

The Declaratory Judgment Act also provides another reason why this should be the rule: 28 U.S.C. § 2201(a), in plain words, states that declaratory relief is available "whether or not further relief is or could be sought." This rule should carry all the more force in Title VI cases because the statute itself, 42 U.S.C. § 2000d-7, provides for retrospective relief. Congress has expressly authorized federal courts to provide *all* legal and equitable remedies "to the same extent" as are available "against any public or private entity," and removed the Eleventh Amendment bar to recovering damages paid out of the state treasury. *Id.*

The court below, instead, used the controversy-ending event that rendered the Plaintiffs' *prospective*-relief claim moot to assume that the same event renders the Plaintiffs' *retrospective*-relief claim moot. App.3a. But federal courts have "not merely the power but the *duty* to render a decree which will so far as possible eliminate the discriminatory effects of the past." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (emphasis added). And that duty is expressly preserved if not enhanced by the text of Title VI.

Lower courts have accordingly held that a nominal-damages claim for past violations of constitutional and statutory civil rights remains alive even if the defendant ceases to act in a way that injures the plaintiff—a point on which the circuit split is well-developed, as explained above. Because retrospective-relief claims such as a claim for nominal damages or declaration exist to vindicate the plaintiff's rights, *Bayer*, 861 F.3d at 872, the fact that the defendant later changes his conduct or that facts have changed such that the plaintiff's *compensatory* claim or other injuries are remedied does not render a properly pleaded nominal-damages claim moot.

Ultimately, under this Court's precedents, the distinction between nominal damages and other types of damages—compensatory, actual, presumed, punitive, exemplary, etc.—is not salient for ascertaining Article III questions. At the merits stage, an award of damages can be nominal as to amount but compensatory as to purpose. And the mootness inquiry does not devolve into a game of which adjective is appended to the word

"damages." The "*amount* of money" has no bearing on "mootness." *Stotts*, 467 U.S. at 571 (emphasis added). And a prayer for $1 in damages does not automatically render that claim a claim for "nominal damages." *Crue v. Aiken*, 370 F.3d 668, 677 (7th Cir. 2004) (characterizing an award of "$1,000 to plaintiffs" as "nominal damages"); *see also Farrar v. Hobby*, 506 U.S. 103, 121 (1992) (O'Connor, J., concurring) (noting "nominal relief does not necessarily a nominal victory make"). The actual monetary value of the retrospective damages award is "determined according to principles derived from the common law of torts," *Stachura*, 477 U.S. at 306, which is and should be a liability-phase question, not a mootness or Article III question.

B. Lower courts are divided on the question of whether retrospective declaratory relief, either standing alone, or as a "predicate" of retrospective damages relief, keeps cases alive.

The lower court did not separately consider availability of retrospective declaratory relief. App.3a–4a. Under this Court's precedents and some lower-court decisions, that question remains open.

In *Gratz*, Plaintiffs had requested retrospective declaratory relief asking the court to "find[] that respondents violated [their] 'rights to nondiscriminatory treatment.'" 539 U.S. at 252. There was no need to separately decide that question in *Gratz*. This Court assumed that such relief is available.

In *Lippoldt v. Cole*, 468 F.3d 1204, 1217–18 (10th Cir. 2006), the court held that parade participants lacked standing to seek a permanent injunction after the district court issued a temporary restraining order and ordered the city to allow the parades. Once the plaintiffs held the parades, they lacked standing to seek a permanent injunction, and the plaintiffs had not alleged a concrete, present plan to apply for another permit in the future. However, the parade participants' claim for *declaratory* relief that the city violated the First Amendment by denying applications for parade permits did not become moot after the parades were held. *Id.* at 1217. And *Crue v. Aiken*, 370 F.3d 668, 677 (7th Cir. 2004), held that when the claim for prospective injunctive relief is moot, a declaratory judgment as a predicate to a retrospective damages award survives.

The lower court seems to have assumed that the Plaintiffs' declaratory-relief claim is a predicate of the injunctive-relief claim, which is "now moot." App.3a–4a. But as *Crue* demonstrates, declaratory judgments do not always have to go hand-in-hand with injunctive relief; they can be "a predicate to a damages award." 370 F.3d at 677. Judge Henry in *Utah Animal Rights*, 371 F.3d 1248, provided a comprehensive analysis of why retrospective declaratory relief, apart from or in conjunction with any damages relief, keeps a case alive: "Our society still recognizes that constitutional rights may have to be declared, even if they do not give rise to easily calculated damages." *Id.* at 1275 (Henry, J., concurring). This Court has also touched upon the

question of availability of retrospective declaratory relief as a predicate to retrospective damages relief in *Wolff v. McDonnell*, 418 U.S. 539 (1974).

Wolff, a Section 1983 case, involved the administration of a state prison. The Court held that the "actual restoration of good-time credits," 418 U.S. at 554—like the actual adoption of children Plaintiffs by the parent Plaintiffs—is a remedy available in state court, not in federal court. But a claim for retrospective "damages" under 42 U.S.C. § 1983 against a political subdivision was properly brought in federal court and was alive. 418 U.S. at 554. Because the damages claim "required determination of the validity of the procedures employed," "a declaratory judgment as a predicate to a damages award" is also available where prospective injunctive relief is foreclosed. *Id.* at 554–55.

And *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 8–9 (1978), another Section 1983 case decided four years after *Wolff*, expressly reserved this question. As the *Memphis Light* litigation progressed, the plaintiffs' claims for prospective relief became moot. *Id.* at 8 & n.7. But plaintiffs' "damages and declaratory relief" claims remained. *Id.* at 8. Without deciding whether retrospective declaratory relief is available and saves the case from mootness separate and apart from any damages relief that remains alive, *Memphis Light* concluded that the plaintiffs' claim for "damages . . . saves this cause from the bar of mootness." *Id.*

This Court has not expressly extended *Wolff* and *Memphis Light* to cover Title VI retrospective damage claims, and retrospective declaratory-judgment claims that either stand alone, or act as a "predicate" to the retrospective-damages claim. This case presents a clean vehicle to decide whether the *Wolff* and *Memphis Light* rule should be extended to Title VI cases, a question on which the split in lower courts has long percolated.

C. The tension between *Arizonans for Official English* and *Texas v. Lesage*, *Carey v. Piphus*, and *Stachura* needs to be reconciled.

The lower court's decision not only deepens the unresolved circuit split and departs from several of this Court's cases, it also stretches this Court's decision in *Arizonans for Official English* beyond recognition. The court below reasoned that if "a claim for nominal damages [is] asserted solely to avoid otherwise certain mootness," then such a claim "b[ears] close inspection." App.4a (quoting *Arizonans for Official English*, 520 U.S. at 71). The lower court's reasoning brings to light the tension between that case and cases such as *Lesage*, *Carey*, and *Stachura*—a tension that this Court should grant certiorari to resolve.

In *Arizonans for Official English*, a government employee "commenced and maintained her suit" challenging the constitutionality of Arizona's official-English law. 520 U.S. at 48. She then left the state's employ,

which "made her claim for prospective relief moot." *Id.* The Ninth Circuit had "read into" her complaint "a plea for nominal damages" which her complaint did "not expressly request," *id.* at 48, 60, and had "ultimately announced" that she was "entitled to nominal damages" as the only surviving retrospective-relief claim. *Id.* at 63.

When the case came to this Court, it concluded that the nominal-damages relief the Ninth Circuit implied in the complaint "was nonexistent" because "§ 1983 creates no remedy against a State." *Id.* at 69. The most straightforward way to read that portion of *Arizonans for Official English* is that it dealt with unavailability of retrospective relief against state officials due to settled immunity doctrines. But *Arizonans for Official English* leaves open the question of whether that rule applies in Title VI cases, which expressly abrogates Eleventh Amendment immunity.

In extending *Arizonans for Official English* and applying it to the Plaintiffs' Title VI claims, the lower court extended its reach beyond recognition, and imposed the no-retrospective-relief limit derived from Section 1983, *Edelman*, and *Ex Parte Young*, on Title VI cases where it does not apply. Indeed, Congress (using its Fourteenth Amendment § 5 power) has specifically relaxed any such limit, at least in cases involving discrimination based on "race, color, or national origin," as this one does. 42 U.S.C. § 2000d.

There are also good reasons to cabin *Arizonans for Official English* to its facts, given the procedural

anomalies in that case. There, the Ninth Circuit allowed the case to proceed to the merits under an *implied* Section 1983 retrospective-damages prayer for relief. It compounded that error by assuming such relief lies against "an intervenor the court had designated [as] a nonparty," against whom the lower court "nevertheless" imposed "an obligation to pay damages." 520 U.S. at 70.

Given that odd procedure, this Court, unremarkably, concluded that "[i]t should have been clear to the Court of Appeals that a claim for nominal damages, extracted [*by the court*] late in the day from [the] general prayer for relief and asserted solely to avoid otherwise certain mootness, bore close inspection." *Id.* at 71. The court below ignored this context when it concluded that the Plaintiffs' retrospective-relief claims were moot. App.4a.

Here, the children and parents expressly stated a claim for retrospective declaratory and nominal-damages relief under Title VI—not under 42 U.S.C. § 1983 as in *Arizonans for Official English*. App.112a. That claim was asserted by the Plaintiffs (not devised by the court from the general prayer for relief as in *Arizonans for Official English*) in the first and only amended complaint filed at a time when all but C.C.'s child-custody proceedings were pending. App.113a, App.73a. And Plaintiffs asserted that claim against a full-fledged party defendant, not against a nonparty participant as in *Arizonans for Official English*. App.111a. *Arizonans for Official English*, simply put, is not on point. But given the confusing nature of that precedent, it is

likely that other lower courts will interpret it in a similarly misguided fashion. This Court should prevent that consequence by making clear that the mootness question involved here and in many other civil rights cases should be decided based on the sound foundation provided by *Lesage*, *Carey*, and *Stachura*.

II. Review is needed because the decision below implicates critically important personal liberties guaranteed by the Constitution.

1. Implicit in the Ninth Circuit's decision is the assumption that getting their adoptions finalized is an adequate and exclusive remedy and that no further remedy is therefore available in federal court. But if that is true, federal courts could never address whether a Plaintiff was wronged *after* the injury is complete. Federal prison reform litigation would never happen, for example. Constitutionality of bond hearings would never be decided by federal courts. *Cf. Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

2. The question is important and recurring. As our society distances itself from the overt race-, color-, or national-origin-based discrimination of the past, instances of such discrimination are thankfully one-off occurrences that are not sustained over a long course of time. While that is a good thing, the result is that, if the lower-court decision stands, such instances will go unredressed under Title VI, which was designed to uproot such *de jure* discrimination. In other words, under the decision below, once discrimination has occurred,

and a Plaintiff seeks redress, her prayer for retrospective damages or declaratory relief for *past* injury will be mooted by a Defendant changing its *future* conduct—with the result that federal courts cannot redress as deplorable a wrong as racial discrimination.

Such an outcome would frustrate Congress' purpose in enacting Title VI. It did not want any state agencies receiving federal financial assistance to take federal taxpayer money to pursue *de jure* discrimination based on the race, color, or national origin of the persons such an agency regulates. Before Title VI's enactment, no damages were recoverable in such situations. Rosa Parks, who was prosecuted for sitting in the wrong section of the bus due to her skin pigmentation, could obtain only forward-looking relief. *See*, *e.g.*, *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956), *affirmed sub nom. by*, *Owen v. Browder*, 352 U.S. 903 (1956). Governmental bodies against whom such suits were brought could easily moot the forward-looking claims by confessing error and ceasing the complained-of conduct, or by pointing to the on-principle decision of people like Parks to not take the bus until the segregation was halted, and use that to show that no prospective relief could be awarded. That is no longer the law—but will be, if the decision below is not reversed.

Put differently, the lower court's decision would require Plaintiffs to make allegations to keep prospective-relief claims alive. The parents here, who do not have Indian ancestry, would need to allege they will make an expressly race-, color-, or national-origin-based decision in the future and seek foster or adoptive

placement of another "Indian child," 25 U.S.C. § 1903(4), in the future. And Plaintiffs like the children, whose adoptions are now final, would have to allege they will seek race-, color-, or national-origin-blind foster or adoptive placements in the future. That is both absurd and contrary to the whole point of retrospective relief under Title VI—which is to point to how government actors discriminated against Plaintiffs in the past and violated the rights guaranteed to them by the Constitution.

3. The lower-court decision "confuses mootness with the merits." *Chafin v. Chafin*, 133 S. Ct. 1017, 1024 (2013). The argument that an action is moot because the plaintiff is not entitled to the requested relief—"[t]he relief Plaintiffs sought to redress their alleged injuries is no longer available to them," App.3a—is no more than an argument on the *merits*, and should be decided on the merits, not on appeal from a motion to dismiss.

4. The decision below not only implicates "fundamental principles of justiciability," *Utah Animal Rights*, 371 F.3d at 1263 (McConnell, J., concurring), it also implicates "equal protection concerns," *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013), and individual rights guaranteed by the First, Fifth, Tenth, and Fourteenth Amendments. The Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901–1963, creates a two-track system under which the child-custody proceedings of children classified as "Indian" are conducted under a different and substandard set of substantive and procedural rules than those of all other children.

The ICWA statutory scheme subordinates an individualized best-interest determination of Indian children to the interests of the tribes. In contrast, the best interest of a child is given foremost consideration in child-custody cases of all other children that arise out of foster care placements.

Under ICWA, Indian children must be placed in a race-, color-, or national-origin-matched foster or adoptive home. 25 U.S.C. §§ 1915(a)–(b). For all other children, that determination is based on a child's particular and individualized circumstances and best interests. This Court addressed one part of the troubling problem of "put[ting] certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Adoptive Couple*, 570 U.S. at 655. But tribes and state agencies have not received the message yet.

Under ICWA's placement-preferences provisions, tribal officials repeatedly proposed race-matched foster and adoptive placements for these Plaintiff children. In A.D.'s case, GRIC sought several such placements. All of them "fell through." *GRIC v. Dep't of Child Safety*, 379 P.3d 1016, 1019 n.8 & n.9 (Ariz. App. 2016), *affirmed by*, 395 P.3d 286 (Ariz. 2017). In C.C.'s case, the Navajo Nation repeatedly proposed race-, color-, or national-origin-matched placements, all of which turned out—after protracted "active efforts" were taken—to be inappropriate. App.72a–73a ¶¶ 26–27. In L.G. and C.R.'s case, GRIC similarly proposed alternative placements. App.75a–76a ¶ 39.

The *de jure* discriminatory treatment does not end there. With placement preferences come active efforts, 25 U.S.C. § 1912(d), and termination of parental rights, 25 U.S.C. § 1912(f). Which means, in order to comply with ICWA, the children Plaintiffs who were happy in the foster homes of the parent Plaintiffs, and considered them their mom and dad in the true sense of those words, had to visit with strangers, and face the trauma of separation from the only family they had ever known. In addition, A.D., S.H., and J.H., faced unique injuries under the jurisdiction-transfer provision, 25 U.S.C. § 1911(b).

Under such circumstances, the fact that their adoptions were ultimately finalized by state courts is hardly a redress for the systemic and systematic discrimination they underwent throughout. To put it simply, the Plaintiffs were forced to jump through additional hoops to complete their adoptions—hoops they would not have had to jump through if the children had been white, black, Asian, or Hispanic or the foster parents had been race-, color-, or national-origin-matched with the children. The fact that they made it through that race-, color-, or national-origin-based obstacle course cannot defeat their claim for damages for being forced to go through it.

If the fact of adoption truly provides complete and exclusive redress for these injuries, it is tantamount to saying that Homer Plessy's injury was not redressable because, after all, he got to ride the train, albeit in a segregated coach. *Plessy v. Ferguson*, 163 U.S. 537 (1896). Obviously, that is not true, because *Plessy*

reached the merits even though it reached the wrong result. Getting to ride the segregated coach of the East Louisiana Railway company—or ICWA—cannot moot such cases.

III. This case is an ideal vehicle.

This case is an ideal vehicle to resolve the question. The case comes to this Court from the trial court's grant of a motion to dismiss for lack of standing. No factual disputes that would change the outcome on the merits, or muddy the waters on the question presented, exist yet. The only pertinent jurisdictional facts to answer the presented question are: The children Plaintiffs are classified as "Indian children." Their then-foster (now adoptive) parents, have no Native American ancestry. Because their adoptions are now final, they do not seek prospective injunctive or declaratory relief. They only claim retrospective damages and declaratory relief. Moreover, the question presented is central to the lower-court decision—and confusion—such that reversal would give the children and parents significant relief. They ask this Court to clarify only whether damages and declaratory relief is available such that the case remains alive, not whether such relief is ultimately recoverable on the merits in this case.

Retrospective declaratory and damages relief under Title VI remains a critically important, and perhaps the only remedy available to vindicate past violations of civil rights. This is especially true in race-, color-, or national-origin-discrimination cases such as this one.

The question involves bedrock principles of Article III jurisdiction, and however resolved, will affect countless individuals and government officials, and will be a pathmarker informing litigants on how to effectively plead (or seek dismissal of) retrospective relief in Title VI cases in federal court. Certiorari should, therefore, be granted.

This case is also the better vehicle to resolve the question than, say, *Davenport v. City of Sandy Springs*, No. 17-869, *cert. denied*, 138 S. Ct. 1326 (2018). In the Section 1983, not Title VI, context, *Davenport* asked the question whether "the mootness of claims for prospective relief renders federal courts powerless to decide a claim for nominal damages." Pet. i, 2017 WL 6492872. There, the *en banc* Eleventh Circuit had acknowledged that there is intractable conflict among the circuit courts on the question of whether "nominal damages alone can save a case from mootness." *Flanigan's Enters.*, 868 F.3d at 1265 ("a majority of our sister circuits to reach this question have resolved it differently than we do today").

This case is a cleaner vehicle than *Davenport* for two reasons. One: *Davenport* was truly moot. The Eleventh Circuit panel had decided the merits, and a week after the court decided to hear the case *en banc*, the city repealed the relevant portion of the challenged ordinance. Two: unlike *Davenport*, where only the Section 1983 nominal-damage claim was extant, here, Plaintiffs claim damages and declaratory relief under Title VI and the Declaratory Judgments Act. The Eleventh Circuit's decision in *Davenport* only deepens the

intractable conflict on a fundamental and recurring question of constitutional law.

IV. The decision below is wrong.

The decision below marks a sea change in how courts analyze mootness. Pegging its analysis on *Arizonans for Official English*, the Ninth Circuit created a brand new "belated[ness]" factor to determine mootness. App.3a–4a. Because the Title VI claims were added in the first and only amended complaint and did not appear in the original complaint, the court below concluded that such a "belated addition of a claim" does not keep the case alive. App.3a. This belatedness analysis finds no support in governing law.

On the contrary, the whole point of "freely giv[ing] leave" to amend complaints, Fed. R. Civ. P. 15(a)(2), is to permit amendment of pleadings for virtually any purpose, including to add claims, alter legal theories or request different or additional relief. *Foman v. Davis*, 371 U.S. 178, 181–82 (1962). Indeed, an "amendment [that] asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading" "*relates back* to the date of the original pleading." Fed. R. Civ. P. 15(c)(1)(B) (emphasis added). Such relation back is "mandatory" and not left to the court's "equitable discretion." *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 553 (2010); *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574, 580–81 (1945) (applying relation back specifically under Rule 15(c)(1)(B)).

Other than *Arizonans for Official English*, the court below provided no basis for creating a belatedness factor to evaluate mootness. Even the case it cited to support this new factor—*Bernhardt*, 279 F.3d 862—does not support it. There, the court held that a claim for "compensatory, punitive *or* nominal damages . . . presents a sufficient live controversy to avoid mootness." *Id.* at 873 (emphasis added). Indeed, a contrary conclusion—that a case is moot because there is a live claim that prevents the case from becoming moot—would have defied logic.

This Court has already pronounced that a case is not moot if Plaintiffs' "requisite personal interest . . . continue[s] throughout [the] existence" of the suit. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980). The absence of a live claim for prospective relief is therefore irrelevant to a court's power to issue retrospective relief. *Carey*, 435 U.S. at 266–67. The court below jettisoned this well-honed rule and, in conflict with other circuits, fashioned a rule whereby the controversy-ending event that rendered moot Plaintiffs' prospective-relief claims also moots their retrospective-relief claims. App.3a–4a.

This exceptionally important question warrants review. There is an acknowledged and irreconcilable split among the courts of appeals that can only be settled by this Court. This case presents an ideal vehicle to resolve the question given a lower-court decision that is plainly wrong.

CONCLUSION

The writ should be granted.

Respectfully submitted, in January 2019.

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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* (Filed Aug. 6, 2018)

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

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

Argued and Submitted June 13, 2018
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.

** 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.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

A.D., C.C., L.G., and C.R., by Carol Coghlan Carter, and Dr. Ronald Federici, their next friends; S.H. and J.H., a married couple; M.C. and K.C., a married couple; K.R. and P.R., a married couple; for themselves and on behalf of a class of similarly-situated individuals,

Plaintiffs,

v.

Kevin Washburn, in his official capacity as Assistant Secretary of Indian Affairs, Bureau of Indian Affairs; Sally Jewell, in her official capacity as Secretary of the Interior, U. S. Department of the Interior; Gregory A. McKay, in his official capacity as Director of Arizona Department of Child Safety,

Defendants,

Gila River Indian Community and the Navajo Nation,

Intervenor Defendants.

No. CV-15-01259-PHX-NVW

ORDER

(Filed Mar. 16, 2017)

Before the Court are motions to dismiss the First Amended Complaint by the Federal Defendants (Doc.

178) and the State Defendant (Doc. 179), the Responses, and the Replies. Also before the Court are motions to dismiss the First Amended Complaint by the Intervenor-Defendants Gila River Indian Community (Doc. 217) and the Navajo Nation (Doc. 218), the response, and the replies. Amicus curiae briefs have been filed in support of and in opposition to the motions to dismiss.

In this action the adult Plaintiffs and those who have undertaken to speak for the child Plaintiffs attempt to challenge parts of the Indian Child Welfare Act ("ICWA") as unconstitutional racial discrimination. They also challenge Congress's power to enact laws regulating state court proceedings and ousting state laws concerning foster care placement, termination of parental rights, preadoptive placement, and adoptive placements of some off-reservation children of Indian descent. More specifically, these are children whose parents elected to leave Indian Country and take up residence off reservation with the benefits of and obligations under state law of all other persons within the jurisdiction of the state and outside Indian Country.

Plaintiffs seek a declaration that certain provisions of the Indian Child Welfare Act and of the Guidelines for State Courts and Agencies in Indian Child Custody Proceedings published on February 25, 2015

("2015 Guidelines")[1] by the Department of the Interior, Bureau of Indian Affairs ("BIA"), violate the United States Constitution, federal civil rights statutes, and Title VI of the Civil Rights Act by requiring State courts to treat Indian children differently than non-Indian children in child custody proceedings. They seek to enjoin the Federal Defendants from enforcing these provisions and the State Defendant from complying with and enforcing these provisions. The Guidelines do not have the force of law. They might be viewed uncharitably as avoiding the rule-making requirements of the Administrative Procedures Act but still having enough of the look of regulations that judges and others will follow them anyway.

In ICWA, adopted in 1978, Congress responded to the increasing adoption by non-Indian families of Indian children resident off-reservation and subject to the exclusive jurisdiction of state courts. Congress enacted ICWA:

> . . . to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the

[1] 80 Fed. Reg. 10146–10159 (Feb. 25, 2015) (superseding and replacing the guidelines published at 44 Fed. Reg. 67584–67595 (Nov. 28, 1979)).

> operation of child and family service programs.

25 U.S.C. § 1902.

From the outset Plaintiffs have grounded sweeping challenges to ICWA and the 2015 Guidelines on vague or narrow allegations of their own experience with ICWA. The motions to dismiss probe the jurisdictional specifics of each Plaintiff's allegations.

I. REGULATORY BACKGROUND

Congress authorized the Department of the Interior to make rules and regulations necessary for carrying out provisions of ICWA. 25 U.S.C. § 1952. The Department promulgated regulations to govern funding and administering Indian child and family service programs as authorized by ICWA. 25 C.F.R. § 23.1. The regulations also addressed notice procedures for involuntary child custody proceedings involving Indian children, but they "did not address the specific requirements and standards that ICWA imposes upon State court child custody proceedings, beyond the requirements for contents of the notice." 80 Fed. Reg. 10146, 10147. To supplement the regulations, the Department published guidelines for State courts to use in interpreting many of ICWA's requirements in Indian child custody proceedings. *Id.* In 2015, the Department published the updated 2015 Guidelines to supersede and replace the guidelines published in 1979. *Id.* Like the previous guidelines, the 2015 Guidelines are not tethered to regulations.

The 2015 Guidelines "provide standard procedures and best practices to be used in Indian child welfare proceedings in State courts." 80 Fed. Reg. 10146, 10147. They state, "In order to fully implement ICWA, these guidelines should be applied in all proceedings and stages of a proceeding in which the Act is or becomes applicable." *Id.* at 10150. Although the 2015 Guidelines are not binding, Arizona courts nevertheless have considered them in interpreting ICWA. *Gila River Indian Cmty. v. Dep't of Child Safety*, 238 Ariz. 531, 535 (Ct. App. 2015); *Gila River Indian Cmty. v. Dep't of Child Safety*, 240 Ariz. 385, 389 n.12 (Ct. App. 2016).

In June 2016, the Department added a new subpart to its regulations implementing ICWA, which "addresses requirements for State courts in ensuring implementation of ICWA in Indian child-welfare proceedings and requirements for States to maintain records under ICWA." 81 Fed. Reg. 38778, 38778 (June 14, 2016). The regulations in the new subpart "clarify the minimum Federal standards governing implementation of [ICWA] to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families." 25 C.F.R. § 23.101.

The new subpart became effective on December 12, 2016. None of the provisions of the new subpart affects a proceeding under State law that was initiated before December 12, 2016, but the provisions of the new subpart do apply to any subsequent proceeding in

the same matter or affecting the custody or placement of the same child. 23 C.F.R. § 23.143. For example, the new subpart does not apply to a foster care placement proceeding initiated in November 2016, but it does apply to an adoptive placement proceeding initiated in January 2017 for the same child.

In conjunction with the new subpart of ICWA regulations, on December 12, 2016, the Department published Guidelines for Implementing the Indian Child Welfare Act ("2016 Guidelines"), which replaced the 1979 and 2015 versions. Under each heading, the 2016 Guidelines provide the text of the regulation (if there is one), guidance, recommended practices, and suggestions for implementation.

The Amended Complaint does not challenge any regulations or the 2016 Guidelines. It challenges only certain provisions of ICWA and the 2015 Guidelines.

II. THE AMENDED COMPLAINT

A. Procedural Background

On July 6, 2015, Plaintiffs filed a Civil Rights Class Action Complaint for Declaratory and Injunctive Relief. (Doc. 1.) On December 18, 2015, during oral argument regarding standing issues raised in motions to dismiss, Plaintiffs' counsel indicated that Plaintiffs would like to amend their complaint to add additional plaintiffs. (Doc. 122.) On February 22, 2016, the Court ordered Plaintiffs to file a status report stating whether and when they planned to amend their

complaint to add additional plaintiffs. (Doc. 145.) On February 29, 2016, Plaintiffs reported they wanted to amend their complaint to add two children and their foster/preadoptive parents as plaintiffs and to update facts regarding pending State court proceedings. (Doc. 149.) On March 2, 2016, Plaintiffs sought leave to file an amended complaint, which Defendants opposed by arguing, among other things, that both the proposed additional plaintiffs and the original plaintiffs lacked standing. (Docs. 150, 160, 162.) On April 4, 2016, the Court granted Plaintiffs leave to amend their complaint and denied the pending motions to dismiss as moot. (Doc. 172.)

On April 5, 2016, Plaintiffs' First Amended Civil Rights Class Action Complaint for Declaratory, Injunctive, and Other Relief ("Amended Complaint") was filed. (Doc. 173.) On April 22, 2016, the Federal Defendants and the State Defendant filed motions to dismiss the Amended Complaint. (Docs. 178, 179.) On September 29, 2016, the Gila River Indian Community and the Navajo Nation were granted permissive intervention, and their proposed motions to dismiss the Amended Complaint were filed. (Doc. 216.)

B. Plaintiffs' Claims for Relief

Count 1 of the Amended Complaint alleges that 25 U.S.C. §§ 1911(b), 1912(d), 1912(e), 1912(f), 1915(a), 1915(b) and §§ A.2, A.3, B.1, B.2, B.4, B.8, C.1, C.2, C.3, D.2, D.3, F.1, F.2, F.3, F.4 of the 2015 Guidelines violate the equal protection guarantee of the Fifth

Amendment. Count 2 alleges that the same statutes and provisions of the 2015 Guidelines violate the due process guarantee of the Fifth Amendment. Count 3 alleges that the State Defendant's compliance with the challenged statutes and sections of the 2015 Guidelines violates the substantive due process and equal protection clauses of the Fourteenth Amendment.

Count 4 alleges that ICWA exceeds the federal government's power under the Indian Commerce Clause and the Tenth Amendment and impermissibly commandeers State courts and State agencies. Count 5 alleges that the challenged statutes and sections of the 2015 Guidelines violate Plaintiffs' associational freedoms under the First Amendment by forcing them to associate with tribes and tribal communities. Count 6 alleges that the BIA exceeded its authority by publishing §§ C.1, C.2, and C.3 of the 2015 Guidelines, which expand application of § 1911(b) beyond its terms. Count 7 seeks nominal damages of $1 to each of the named Plaintiffs and to each of the members of the class they seek to represent under Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000d–2000d-7.[2]

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[2] Section 2000d states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 2000d-7 provides that in a suit against a State for violating § 2000d, remedies are available to the same extent they are available in a suit against any public or private entity other than a State.

C. The Parties

The Amended Complaint is filed on behalf of Plaintiffs and all off-reservation Arizona-resident children with Indian ancestry and all off-reservation Arizona-resident foster, preadoptive, and prospective adoptive parents in child custody proceedings involving children with Indian ancestry.

Plaintiff A.D. is an enrolled member of the Gila River Indian Community. Parental rights of A.D.'s biological parents have been terminated by the State court. Plaintiffs S.H. and J.H., a married couple, are foster/preadoptive parents of A.D. and have taken care of A.D. since birth. Their petition to adopt A.D. was pending in the State court on April 5, 2016. Neither S.H. nor J.H. is an enrolled member of an Indian tribe or eligible for membership in an Indian tribe.

Plaintiff C.C. is an enrolled member of the Navajo Nation. Parental rights of C.C.'s biological parents were terminated, and adoption of C.C. by Plaintiffs M.C. and K.C. was finalized by the State court in November 2015. C.C. continuously remained in foster care with M.C. and K.C. for four years before the adoption was finalized. Neither M.C. nor K.C. is an enrolled member of an Indian tribe or eligible for membership in an Indian tribe.

Plaintiff C.R. is eligible for membership in and is a child of a member of, or is already an enrolled member of, the Gila River Indian Community. Plaintiff L.G. is C.R.'s half-sibling and is not eligible for membership in the Pascua Yaqui Tribe of Arizona. L.G. and C.R.

were taken into protective custody when C.R. was born and L.G. was about two years old. As of April 5, 2016, the parental rights of C.R.'s and L.G.'s biological parents had not been terminated by the State court, which is treating C.R.'s and L.G.'s cases as one. C.R. and L.G. have continuously remained in foster care with Plaintiffs K.R. and P.R., a married couple, who want to adopt C.R. and L.G.

The Amended Complaint names Carol Coghlan Carter and Dr. Ronald Federici as "next friends" to A.D., C.C., C.R., L.G., and all off-reservation children with Indian ancestry in the State of Arizona in child custody proceedings.

The Federal Defendants are Kevin Washburn in his official capacity as Assistant Secretary of Indian Affairs, BIA, and Sally Jewell in her official capacity as Secretary of the Interior, U.S. Department of the Interior. The State Defendant is Gregory McKay in his official capacity as Director of Arizona Department of Child Safety. Intervenor Defendants are the Gila River Indian Community and the Navajo Nation, both federally recognized tribes.

III. LEGAL STANDARD

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), all allegations of material fact are assumed to be true and construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). To avoid dismissal, a complaint need contain only "enough facts to state a

claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The principle that a court accepts as true all of the allegations in a complaint does not apply to legal conclusions or conclusory factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Under Rule 12(b)(1), a defendant may challenge the plaintiff's jurisdictional allegations by either (1) attacking the plaintiff's allegations as insufficient on their face to invoke federal jurisdiction or (2) contesting the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). The first, a facial attack, is resolved by the district court as it would be under Rule 12(b)(6), *i.e.*, accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are legally sufficient to invoke the court's jurisdiction. *Id.* The second, a factual attack, requires the plaintiff to support its jurisdictional allegations with competent proof, under the same evidentiary standard applied on summary judgment. Thus, the plaintiff bears the burden of proving by a preponderance of the evidence that each of the requirements for subject matter jurisdiction has been met. *Id.*

IV. STANDING

A. Requirements for Article III Standing

"A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." *Braunstein v. Arizona Dep't of Transp.*, 683 F.3d 1177, 1184 (9th Cir. 2012). "Standing must be shown with respect to each form of relief sought, whether it be injunctive relief, damages or civil penalties." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)).

To satisfy Article III standing, a plaintiff must show:

> (1) [he or she] has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

For an equal protection claim, a plaintiff may show an "injury in fact" caused by denial of equal treatment:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Ne. Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville, 508 U.S. 656, 666 (1993). "[E]qual treatment under the law is a judicially cognizable interest that satisfies the case or controversy requirement of Article III, even if it brings no tangible benefit to the party asserting it." *Davis v. Guam*, 785 F.3d 1311, 1316 (9th Cir. 2015) (citing *Heckler v. Matthews*, 465 U.S. 728, 739 (1984)). "Unequal treatment is an injury even if curing the inequality has no tangible consequences." *Id.*

However, even in the equal protection context, "a plaintiff must assert a particularized injury, rather than a generalized grievance." *Braunstein*, 683 F.3d at 1185. "Even if the government has discriminated on the basis of race, only those who are 'personally denied' equal treatment have a cognizable injury under Article III." *Id.* (finding plaintiff had not provided any evidence the government's racial preference program affected him personally or had impeded his ability to compete for work on an equal basis).

Ordinarily, the existence of federal jurisdiction depends on the facts as they existed when the complaint was filed. *Lujan*, 504 U.S. at 569 n.4.

B. Injury in Fact that Is Concrete and Particularized, Actual or Imminent, and Fairly Traceable to the Challenged Action

The Amended Complaint challenges 25 U.S.C. §§ 1911(b), 1912(d), 1912(e), 1912(f), and 1915(b) and certain sections of the 2015 Guidelines on multiple grounds, including denial of equal treatment, due process, and associational freedoms.

1. Section 1911(b): Jurisdiction-Transfer Provision

Section 1911(b) requires State courts to transfer any proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the child's tribe to the tribal court upon petition of either parent, the Indian custodian, or the Indian child's tribe, in the absence of good cause to the contrary, objection by either parent, or declination by the tribal court of such tribe. The Amended Complaint does not allege that transfer of jurisdiction has been sought for any of the child Plaintiffs except for A.D.

In A.D.'s case, the Arizona Court of Appeals affirmed the juvenile court's denial of the Gila River Indian Community's motion to transfer jurisdiction. *Gila*

River Indian Cmty. v. Dep't of Child Safety, 240 Ariz. 385, 379 P.3d 1016 (Ct. App. Aug. 11, 2016). The court explained that ICWA defines four types of child custody proceedings: foster care placement, termination of parental rights proceedings, preadoptive placement, and adoptive placement. *Id.* at 390, 379 P.3d at 1021. Section 1911(b) provides only for transfer of foster care placement or termination of parental rights proceedings. The court explained that under ICWA the term "foster care placement" is limited to "where parental rights have not been terminated," and therefore § 1911(b) does not allow transfer to tribal court of State preadoptive and adoptive placement proceedings occurring after parental rights have terminated. *Id.* The court found:

> In this case, neither A.D.'s biological parents nor the Community sought to transfer the proceedings from the juvenile court to the Community's Children's Court before termination of parental rights. By the time the Community moved to transfer, A.D.'s case had progressed to the point where the biological parents' rights had been terminated and legal custody had been permanently placed with DCS [the Arizona Department of Child Safety], the juvenile court had found the foster parents were an adoptive placement, and the court had authorized DCS to facilitate permanent placement of A.D. through adoption. Further, an adoption petition had been filed. By not moving to transfer jurisdiction before termination of the biological parents' rights, the Community effectively waived its

> right to seek transfer of jurisdiction under 25 U.S.C. § 1911(b).

Id. at 391, 379 P.3d 1022. Thus, the Gila River Indian Community did not seek to enforce § 1911(b), but rather it sought a transfer of jurisdiction not authorized by § 1911(b).

It can be inferred that A.D. and her foster parents suffered a concrete and particularized injury as a result of the Gila River Indian Community's litigation. However, their injury resulted from the Gila River Indian Community's frivolous invocation of § 1911(b) for a proceeding it plainly does not authorize. Their injury is fairly traceable to the Gila River Indian Community's groundless intrusion into their preadoptive and adoptive proceeding beyond the scope of § 1911(b), but not to § 1911(b) itself.[3]

Thus, the Amended Complaint does not allege facts showing that any of the Plaintiffs suffered a concrete and particularized injury, actual or imminent, and fairly traceable to § 1911(b).

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[3] Neither the Amended Complaint nor the appellate decision in A.D.'s case states that the Gila River Indian Community sought transfer of jurisdiction based on §§ C.1, C.2, and C.3 of the 2015 Guidelines, which fail to explain that transfer under § 1911(b) is limited to proceedings for foster care placement or termination of parental rights.

2. Section 1912(d): Active Efforts Provision

Section 1912(d) requires State officials to make "active efforts . . . to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family" and to show "that these efforts have proved unsuccessful" before an Indian child may be placed in foster care or parental rights may be terminated. Although ICWA does not define "active efforts," § A.2 of the 2015 Guidelines defines "active efforts" as:

> *Active efforts* are intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act (42 U.S.C. § 671(a)(15)).

80 Fed. Reg. 10146, 10150. Section A.2 also states: "'Active efforts' are separate and distinct from requirements of the Adoption and Safe Families Act (ASFA), 42 U.S.C. § 1305" and "ASFA's exceptions to reunification efforts do not apply to ICWA proceedings." *Id.* at 10150–51.[4] *See also* 2015 Guidelines, §§ A.3, B.1, B.2, B.4, B.8, D.2.

Under 42 U.S.C. § 671(a)(15)(B), in order for a State to obtain federal financial assistance for foster care programs, the State plan must require that

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[4] The 2016 Guidelines expressly avoid comparison of "active efforts" and "reasonable efforts." They do not refer to ASFA's exceptions.

"reasonable efforts shall be made to preserve and reunify families [] prior to the placement of a child in foster care." Section 671(a)(15)(D) provides exceptions to the "reasonable efforts" requirement if a court of competent jurisdiction has determined that the parent has subjected the child to "aggravated circumstances," such as abandonment, torture, chronic abuse, and sexual abuse, or has committed murder or other specific crimes.

The Amended Complaint alleges that because § 1912(d) does not include ASFA's exceptions, it requires "active efforts" to reunify families even when the children were abandoned, tortured, chronically abused, or sexually abused by family members. However, § 671(a)(15) applies only to foster care placement, and the Amended Complaint does not allege that any reunification attempts were made before foster care placement for any of the child Plaintiffs. Moreover, it does not allege that attempts were made to reunify any of the child Plaintiffs with family members who had abandoned, tortured, chronically abused, or sexual [sic] abused them.

The Amended Complaint also alleges that the "active efforts" provision of § 1912(d) requires more than the "reasonable efforts" required under § 671(a)(15), and it delays child custody proceedings, thereby depriving Indian children and their foster parents legal recognition of their family status, resulting in uncertainty and great distress. Section 1912(d) requires reunification attempts only before foster care placement and termination of parental rights, and the Amended

Complaint does not allege that any reunification attempts were made before the child Plaintiffs were placed in foster care. Therefore, the only possible particularized injury fairly traceable to § 1912(d) that any of the Plaintiffs could have suffered is delay in termination of parental rights.[5]

The Amended Complaint alleges that C.R. and L.G. were placed in foster care with P.R. and K.R. at the time of C.R.'s birth. It alleges that State officials initially attempted reunification with C.R.'s biological mother through weekly supervised visits, but changed the case management plan to severance in September 2015. It does not allege that any reunification attempts were made other than weekly supervised visits with the biological mother. As of April 5, 2016, the parental rights of C.R.'s and L.G.'s birth parents had not been terminated. The Amended Complaint does not allege that parental rights for C.R. and L.G. would have been terminated more quickly if "reasonable efforts" under § 671(a)(15) had been made instead of "active efforts" under § 1912(d).

The Amended Complaint does not allege that any attempt was made to reunify C.C.'s family or A.D.'s family before parental rights were terminated.

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[5] The Amended Complaint also alleges that "active efforts" provision requires Indian children to associate with tribes and tribal communities, but it cites only to a section of the 2015 Guidelines regarding designating an Indian child's tribe. The Amended Complaint does not allege that any of the child Plaintiffs was required to associate with tribes or tribal communities during reunification attempts.

Thus, the Amended Complaint does not allege facts showing that any of the Plaintiffs suffered a concrete and particularized injury, actual or imminent, and fairly traceable to § 1912(d).

3. Section 1912(e): Higher Evidentiary Standard for Foster Care Placement

Section 1912(e) prohibits foster care placement "in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." *See also* 2015 Guidelines, § D.3(a). The Amended Complaint alleges that Arizona law requires only a showing of "reasonable grounds," "probable cause," "reasonable efforts," or "preponderance of the evidence" at various stages of proceedings leading to foster care placement of children. It further alleges that "ICWA's higher burden of proof requires [the Department of Child Safety] to disregard to a greater extent the safety and security of children with Indian ancestry based solely on the race of these children."

The Amended Complaint alleges that C.C. was taken into protective custody after his biological mother was convicted of a felony. It alleges that A.D. and C.R. were taken into protective custody at birth. L.G., who shares the same biological mother as C.R., was taken into protective custody at the same time as C.R., and ICWA had no application to L.G. before C.R.

was born. The Amended Complaint does not allege facts showing that foster care placement for any of the child Plaintiffs was delayed or that any of the child Plaintiffs was exposed to greater risk of harm because of ICWA's higher evidentiary standard.

Thus, the Amended Complaint does not allege facts showing that any of the Plaintiffs suffered a concrete and particularized injury, actual or imminent, and fairly traceable to § 1912(e).

4. Section 1912(f): Higher Evidentiary Standard for Termination of Parental Rights

Section 1912(f) prohibits termination of parental rights "in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." *See also* 2015 Guidelines, § D.3(b). The Amended Complaint alleges that ICWA's requirement of evidence "beyond a reasonable doubt" is greater than what would otherwise be required. Arizona law requires that the party seeking termination of parental rights establish statutory grounds by "clear and convincing evidence" and establish the best interests of the child by "a preponderance of the evidence." The Amended Complaint alleges that the parental rights of the biological parents of A.D. and C.C. have been terminated, and the parental rights of the

biological parents of C.R. and L.G. have not been terminated. It does not allege that the termination proceedings were affected by the evidentiary standard required by § 1912(f) in any way.

Thus, the Amended Complaint does not allege facts showing that any of the Plaintiffs suffered a concrete and particularized injury, actual or imminent, and fairly traceable to § 1912(f).

5. Section 1915(a): Adoptive Placement Preferences

The Amended Complaint alleges that the foster care/preadoptive and adoption placement preferences imposed by §§ 1915(a) and 1915(b) and by the 2015 Guidelines §§ F.1, F.2, F.3, and F.4 "single out and treat differently children with Indian ancestry . . . [and] the non-Indian adults involved in the care and upbringing of children with Indian ancestry." (Doc. 173 at 27, ¶ 115.) It also alleges that §§ 1915(a) and 1915(b) "violate the substantive due process rights of children with Indian ancestry and those of adults involved in their upbringing who have an existing family-like relationship with the child" because each of them "deserves an individualized, race-neutral determination under uniform standards when courts make foster/preadoptive care and adoption placement decisions." (*Id.* at 28, ¶ 121.)

Section 1915(a) requires:

> In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

Although ICWA does not define "good cause," § F.4 of the 2015 Guidelines states: "The good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child in light of the purposes of the Act." 80 Fed. Reg. 10146, 10158.[6]

For all adoptive placements, Arizona law requires the Department of Child Safety or an adoption agency to "place a child in an adoptive home that best meets the safety, social, emotional, physical and mental health needs of the child." A.R.S. § 8-103(C). Other relevant factors for consideration include placement with the child's siblings, placement with a member of the child's extended family or a person or foster parent who has a significant relationship with the child, and established relationships between the child and the

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[6] The 2016 Guidelines, § H.4, state: "Congress determined that a placement with the Indian child's extended family or Tribal community will serve the child's best interest in most cases. A court may deviate from these preferences, however, when good cause exists." Section H.4 and 25 C.F.R. § 23.132 explain how a determination of "good cause" to depart from the placement preferences should be made.

prospective adoptive family. *Id.* Adoption proceedings include certification of the adoptive parents, completion of a social study, a court hearing, consideration of multiple factors, and judicial findings on the record regarding the best interests of the child pursuant to law.

The Amended Complaint does not allege that the Gila River Indian Community has proposed or likely will propose any adoptive placements under § 1915(a) for A.D. It does not allege that A.D.'s adoption has been delayed by § 1915(a)'s placement preferences.

The Amended Complaint alleges that C.C.'s adoption was delayed by the Navajo Nation's repeated efforts to find an adoption placement compliant with § 1915(a)'s preferences because M.C. and K.C. could not file a petition for adoption until the State court declared that there was good cause to deviate from ICWA's adoption placement preferences. It alleges that C.C. was repeatedly required to visit with strangers who were proposed as potential ICWA-compliant placements. But it does not allege facts, rather than mere conclusions, showing that C.C.'s adoption would have been completed more quickly and C.C. would not have been introduced to strangers if § 1915(a) did not apply.

The Amended Complaint alleges that the Gila River Indian Community has proposed and will continue to propose ICWA-compliant adoption placements for C.R. and L.G. and that but for the application of ICWA, C.R. and L.G. likely would have been cleared for adoption by P.R. and K.R. It alleges that C.R. and L.G.

were placed together in foster care with P.R. and K.R., as required by Arizona law, because C.R. and L.G. are well-bonded siblings. The Amended Complaint does not allege facts, rather than mere conclusions, showing that the consolidated adoption proceeding for C.R. and L.G. would have been completed more quickly if § 1915(a) did not apply.

Thus, the Amended Complaint does not allege facts showing that any of the Plaintiffs suffered a concrete and particularized injury, actual or imminent, and fairly traceable to § 1915(a).

6. Section 1915(b): Foster Care/Preadoptive Placement Preferences

Section 1915(b) states:

> Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—
>
> > (i) a member of the Indian child's extended family;
> >
> > (ii) a foster home licensed, approved, or specified by the Indian child's tribe;

> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
>
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

The Amended Complaint alleges that A.D. was taken into protective custody at birth, A.D. was placed in foster care with S.H. and J.H., and they have taken care of A.D. ever since. It alleges that C.C. was taken into protective custody when he was less than one year old and he continuously remained in foster care with M.C. and K.C. for four years before they adopted him in November 2015. The Amended Complaint alleges that C.R. was taken into protective custody at birth and placed in foster care with K.R. and P.R. At the same time, C.R.'s half-sibling L.G. was placed in foster care with K.R. and P.R. The Amended Complaint does not allege any delay in, or effect on, the foster care placements of the child Plaintiffs caused by § 1915(b).

Thus, the Amended Complaint does not allege facts showing that any of the Plaintiffs suffered a concrete and particularized injury, actual or imminent, and fairly traceable to § 1915(b).

7. Sections C.1, C.2, and C.3 of the 2015 Guidelines

Count 6 of the Amended Complaint alleges that the BIA exceeded its authority by issuing §§ C.1, C.2,

and C.3 of the 2015 Guidelines, which make transfer of jurisdiction available during all child custody proceedings, including preadoptive placement and adoptive placement proceedings. (Doc. 173 at 32.) Under 25 U.S.C. § 1911(b), the right to request a transfer to tribal jurisdiction is available only in proceedings for foster care placement or termination of parental rights.[7]

Section C.1(a) refers to "each distinct Indian child custody proceeding." 80 Fed. Reg. 10146, 10156. Section C.1(b) states, "The right to request a transfer occurs with each proceeding" and provides an example involving only foster care placement and termination of parental rights. *Id.* Section C.1(c) states, "The right to request a transfer is available at any stage of an Indian child custody proceeding, including during any period of emergency removal." *Id.* Section C.3(c) states: "In determining whether good cause [not to transfer] exists, the court may not consider whether the case is at an advanced stage or whether transfer would result in a change in the placement of the child. . . ." *Id.* These provisions are inconsistent with § 1911(b)'s limitation to proceedings for foster care placement and termination of parental rights.

However, the Amended Complaint does not allege that transfer was requested during a preadoptive or adoptive placement proceeding for C.C., C.R., or L.G.

[7] Consistent with § 1911(b), the 2016 Guidelines and 25 C.F.R. § 23.115 expressly limit the right to request a transfer to proceedings for foster care placement and termination of parental rights.

Although the Gila River Indian Community sought transfer of A.D.'s proceedings after termination of parental rights, the Amended Complaint does not allege that the Gila River Indian Community contended that the 2015 Guidelines authorized transfer of preadoptive and adoptive placement proceedings. Therefore, the Amended Complaint does not allege facts showing that any of the Plaintiffs suffered a concrete and particularized injury, actual or imminent, and fairly traceable to §§ C.1, C.2, and C.3 of the 2015 Guidelines.

Therefore, all of the pending motions to dismiss the Amended Complaint will be granted, and the Amended Complaint will be dismissed for lack of jurisdiction and lack of standing.

Plaintiffs have not sought leave to further amend their complaint, and leave to do so will not be granted. Although leave to amend a pleading should be freely given "when justice so requires," Fed. R. Civ. P. 15(a)(2), courts should consider five factors: bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint. *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). Courts have "especially broad" discretion to deny leave to amend where the plaintiff already has had one or more opportunities to amend a complaint. *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1161 (9th Cir. 1989); *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989) ("Leave to amend need not be given if a complaint, as amended, is subject to dismissal.").

Plaintiffs initiated this action on July 6, 2015, alleging a putative class so numerous that joinder of all members is impracticable, but despite being granted leave to amend, they have not named any plaintiffs with standing to challenge any provisions of ICWA or the 2015 Guidelines. Further leave to amend would cause undue delay and likely would be futile.

The legal questions Plaintiffs wish to adjudicate here in advance of injury to themselves will be automatically remediable for anyone actually injured. The very allegations of wrongfulness are that such injuries will arise in state court child custody proceedings, directly in the court processes or in actions taken by state officers under the control and direction of judges in those proceedings. Any true injury to any child or interested adult can be addressed in the state court proceeding itself, based on actual facts before the court, not on hypothetical concerns. If any Plaintiffs encounter future real harm in their own proceedings, the judge in their own case can discern the rules of decision. They do not have standing to have this Court preadjudicate for state court judges how to rule on facts that may arise and that may be governed by statutes or guidelines that this Court may think invalid.

IT IS THEREFORE ORDERED that the Federal Defendants' Motion to Dismiss First Amended Complaint (Doc. 178), the State Defendant's Motion to Dismiss Plaintiffs' First Amended Civil Rights Complaint for Declaratory, Injunctive, and Other Relief (Doc. 179), the Gila River Indian Community's Motion to Dismiss

(Doc. 217), and the Navajo Nation's Amended Motion to Dismiss (Doc. 218) are granted.

IT IS FURTHER ORDERED that the First Amended Civil Rights Class Action Complaint for Declaratory, Injunctive, and Other Relief (Doc. 173) is dismissed for lack of standing.

IT IS FURTHER ORDERED that the Clerk of the Court enter judgment dismissing this action without prejudice for lack of jurisdiction and lack of standing.

Dated this 16th day of March, 2017.

/s/ Neil V. Wake
Neil V. Wake
Senior United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Carol Coghlan Carter, et al., Plaintiffs, v. Kevin Washburn, et al., Defendants.	**NO. CV-15-01259-PHX-NVW** **JUDGMENT OF DISMISSAL IN A CIVIL CASE** (Filed Mar. 16, 2017)

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed March 16, 2017, judgment of dismissal is entered without prejudice for lack of jurisdiction and lack of standing.

Brian D. Karth
District Court Executive/
Clerk of Court

March 16, 2017

s/ D. Draper
By Deputy Clerk

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.; UNKNOWN PARTY, named as S.H., a married couple; UNKNOWN PARTY, named as J.H., a married couple; UNKNOWN PARTY, named as K.C., a married couple; for themselves and on behalf of a class of similarly-situated individuals; UNKNOWN PARTY, named as M.C., a married couple; for themselves and on behalf of a class of similarly-situated individuals; RONALD FEDERICI, Dr., 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.; UNKNOWN PARTY, P.R., a married couple; for themselves and on behalf of a class of similary-situated individuals; UNKNOWN PARTY, named as K.R., a married couple; for themselves and	D.C. No. 2:15-cv-01259-NVW District of Arizona, Phoenix ORDER (Filed Oct. 15, 2018)

on behalf of a class of similary-situated individuals,

Plaintiffs-Appellants,

v.

JOHN TAHSUDA, in his official capacity as Assistant Secretary of Bureau of Indian Affairs; RYAN K. ZINKE, in his official capacity as Secretary of Interior, United States Department of the Interior; GREGORY MCKAY, named as Gregory A. McKay, in his official capacity as Director of Arizona Department of Child Safety,

Defendants-Appellees,

GILA RIVER INDIAN COMMUNITY; NAVAJO NATION,

Intervenor-Defendants-Appellees.

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

Judge Owens has voted to deny Plaintiffs-Appellants' petition for rehearing en banc, and Judge Schroeder has so recommended.

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

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Plaintiffs-Appellants' petition for rehearing en banc is denied.

U.S. CONST. art. I, § 8, cl. 3(Indian Commerce Clause). The Congress shall have Power . . . [t]o regulate Commerce . . . with the Indian Tribes.

U.S. CONST. amend. I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. X. The powers not delegated to the United States by the Constitution, nor prohibited

by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend. XIV, § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

---

25 U.S.C. § 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through

administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

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25 U.S.C. § 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

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25 U.S.C. § 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

> **(1)** "child custody proceeding" shall mean and include—
>
> > **(i)** "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where

the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not

include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

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25 U.S.C. § 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

25 U.S.C. § 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law

makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or

Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

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25 U.S.C. § 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or

preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

42 U.S.C. § 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

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42 U.S.C. § 2000d-1. Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to Congressional committees; effective date of administrative action

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall

become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

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42 U.S.C. § 2000d-2. Judicial review; administrative procedure provisions

Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter.

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42 U.S.C. § 2000d-3. Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

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42 U.S.C. § 2000d-4. Federal authority and financial assistance to programs or activities by way of contract of insurance or guaranty

Nothing in this subchapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

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42 U.S.C. § 2000d-4a. "Program or activity" and "program" defined

For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of—

> **(1)(A)** a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> **(B)** the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
>
> **(2)(A)** a college, university, or other postsecondary institution, or a public system of higher education; or
>
> **(B)** a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

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42 U.S.C. § 2000d-5. Prohibited deferral of action on applications by local educational agencies seeking Federal funds for alleged noncompliance with Civil Rights Act

The Secretary of Education shall not defer action or order action deferred on any application by a local educational agency for funds authorized to be appropriated by this Act, by the Elementary and Secondary Education Act of 1965, by the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), or by the Cooperative Research Act, on the basis of alleged

noncompliance with the provisions of this subchapter for more than sixty days after notice is given to such local agency of such deferral unless such local agency is given the opportunity for a hearing as provided in section 2000d-1 of this title, such hearing to be held within sixty days of such notice, unless the time for such hearing is extended by mutual consent of such local agency and the Secretary, and such deferral shall not continue for more than thirty days after the close of any such hearing unless there has been an express finding on the record of such hearing that such local educational agency has failed to comply with the provisions of this subchapter: *Provided*, That, for the purpose of determining whether a local educational agency is in compliance with this subchapter, compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with this subchapter, insofar as the matters covered in the order or judgment are concerned.

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42 U.S.C. § 2000d-6. Policy of United States as to application of nondiscrimination provisions in schools of local educational agencies

(a) Declaration of uniform policy

It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966

dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation.

(b) Nature of uniformity

Such uniformity refers to one policy applied uniformly to de jure segregation wherever found and such other policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found.

(c) Prohibition of construction for diminution of obligation for enforcement or compliance with nondiscrimination requirements

Nothing in this section shall be construed to diminish the obligation of responsible officials to enforce or comply with such guidelines and criteria in order to eliminate discrimination in federally assisted programs and activities as required by title VI of the Civil Rights Act of 1964.

(d) Additional funds

It is the sense of the Congress that the Department of Justice and the Secretary of Education should request such additional funds as may be necessary to apply the policy set forth in this section throughout the United States.

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42 U.S.C. § 2000d-7. Civil rights remedies equalization

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

(b) Effective date

The provisions of subsection (a) shall take effect with respect to violations that occur in whole or in part after October 21, 1986.

A.R.S. § 8-453. Powers and duties

A. The director shall:

. . .

20. Ensure the department's compliance with the Indian child welfare act of 1978 (P.L. 95-608; 92 Stat. 3069; 25 United States Code §§ 1901 through 1963).

A.R.S. § 8-105.01. Adoption; racial preferences; prohibition; exception

A. Notwithstanding any law to the contrary, the division, an agency or the court shall not deny or delay a placement or an adoption certification based on the race, the color or the national origin of the adoptive parent or the child.

B. This section does not apply to the placement or adoption of children pursuant to the Indian child welfare act (25 United States Code § 1901).

A.R.S. § 8-514. Placement in foster homes

B. The department shall place a child in the least restrictive type of placement available, consistent with the needs of the child. The order for placement preference is as follows:

1. With a parent.

2. With a grandparent.

3. In kinship care with another member of the child's extended family, including a person who has a significant relationship with the child.

4. In licensed family foster care.

5. In therapeutic foster care.

6. In a group home.

7. In a residential treatment facility.

C. Notwithstanding subsection B of this section, the order for placement preference of a native American child is as follows:

1. With a member of the child's extended family.

2. In a licensed family foster home approved or specified by the child's tribe.

3. In an Indian foster home licensed or approved by an authorized non-Indian licensing authority.

4. In an institution approved by the Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs pursuant to 25 United States Code chapter 21.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

A.D., C.C., L.G., and C.R., by CAROL COGHLAN CARTER, and DR. RONALD FEDERICI, their next friends; S.H. and J.H., a married couple; M.C. and K.C., a married couple; K.R. and P.R., a married couple; for themselves and on behalf of a class of similarly-situated individuals, Plaintiffs, vs.	No. CV-15-1259-PHX-NVW **FIRST AMENDED CIVIL RIGHTS CLASS ACTION COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF** (Filed Apr. 5, 2016)

KEVIN WASHBURN, in his official capacity as Assistant Secretary of Indian Affairs, BUREAU OF INDIAN AFFAIRS; SALLY JEWELL, in her official capacity as Secretary of the Interior, U.S. DEPARTMENT OF THE INTERIOR; GREGORY A. McKAY, in his official capacity as Director of ARIZONA DEPARTMENT OF CHILD SAFETY,
Defendants.

INTRODUCTION

1. By honoring the moral imperatives enshrined in our Constitution, this nation has successfully shed much of its history of legally sanctioned discrimination on the basis of race or ethnicity. We have seen in vivid, shameful detail how separate treatment is inherently unequal. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). There can be no law under our Constitution that creates and applies pervasive separate and unequal treatment to individuals based on a quantum of blood tracing to a particular race or ethnicity. This country committed itself to that principle when it ratified the Fourteenth Amendment and overturned *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and when it abandoned *Plessy v. Ferguson*, 163 U.S. 537 (1896).

2. In 1994 and again in 1996, Congress recognized that race and ethnicity should play no role in

state-approved adoptions when it enacted the Multiethnic Placement Act, Pub. L. 103-382, §§ 551–553, *codified at* 42 U.S.C. § 5115a (1994), and the Interethnic Placement Act, Pub. L. 104-188, § 1808, *codified at* 42 U.S.C. §§ 671(a), 674(d), 1996b (1996), which forbid discrimination in adoptions and foster care placements.

3. Children with Indian ancestry, however, are still living in the era of *Plessy v. Ferguson*. Alone among American children, their adoption and foster care placements are determined not in accord with their best interests but by their ethnicity, as a result of a well-intentioned but profoundly flawed and unconstitutional federal law, the Indian Child Welfare Act ("ICWA"), *codified at* 25 U.S.C. §§ 1901–1963.

4. This civil rights class action is filed by Plaintiffs baby girl A.D., baby boy C.C., baby girl L.G., and baby boy C.R., by Carol Coghlan Carter and Dr. Ronald Federici, their next friends, and S.H. and J.H., foster/adoptive parents of baby girl A.D., M.C. and K.C., adoptive parents of baby boy C.C., and P.R. and K.R., foster/adoptive parents of baby girl L.G. and baby boy C.R. They file this action on behalf of themselves and all off-reservation Arizona-resident children with Indian ancestry and all off-reservation Arizona-resident foster, preadoptive, and prospective adoptive parents in child custody proceedings involving children with Indian ancestry.

5. They seek a declaration by this Court that certain provisions of ICWA, and Guidelines issued by the

Bureau of Indian Affairs (BIA), both facially and as applied, violate the United States Constitution. They also seek an injunction from this Court against the application of certain provisions of ICWA and the accompanying BIA Guidelines, and nominal damages under Title VI of the Civil Rights Act (42 U.S.C. § 2000d–2000d-7).

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction under 28 U.S.C. § 1331.

7. This Court is authorized to grant declaratory and injunctive relief under 5 U.S.C. §§ 701 through 706, 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. § 1983, Federal Rules of Civil Procedure ("FRCP") 57 and 65, and by the general and equitable powers of the federal judiciary. This Court is authorized to grant nominal damages, and declaratory and injunctive relief under Title VI of the Civil Rights Act (42 U.S.C. §§ 2000d–2000d-7).

8. Venue is proper under 28 U.S.C. § 1391(b), (e).

PARTIES

9. Plaintiff A.D. is a citizen of the United States and the State of Arizona, and domiciled in the State of Arizona. Baby girl A.D. is approximately 1 year and 6 months old. Baby girl A.D. is an enrolled member of the Gila River Indian Community, a federally-recognized tribe. Parental rights of A.D.'s birth parents have

already been terminated by the state court properly having jurisdiction over the matter. Baby girl A.D., on information and belief, has more than 50% non-Indian blood.

10. Plaintiff C.C. is a citizen of the United States and the State of Arizona, and domiciled in the State of Arizona. Baby boy C.C. is 5 years old. Baby boy C.C is an enrolled member of the Navajo Nation, a federally-recognized tribe. Parental rights of C.C.'s birth parents were terminated by the state court properly having jurisdiction over the matter. Adoption of C.C. by M.C. and K.C. was finalized by the state court properly having jurisdiction over the matter in November, 2015. Baby boy C.C., on information and belief, has more than 50% Hispanic blood.

11. Plaintiff L.G. is a citizen of the United States and of the State of Arizona, and domiciled in the State of Arizona. Baby girl L.G. is approximately 3.5 years old. Baby girl L.G., on information and belief, is not eligible for membership in the Pascua Yaqui Tribe of Arizona, a federally-recognized tribe. Parental rights of L.G.'s birth parents have not been terminated by the state court properly having jurisdiction over the matter. Baby girl L.G., on information and belief, has more than 50% non-Indian blood.

12. Plaintiff C.R., baby girl L.G.'s half-sibling, is a citizen of the United States and of the State of Arizona, and domiciled in the State of Arizona. Baby boy C.R. is approximately 1.5 years old. Baby boy C.R., on information and belief, is eligible for membership in

and is a child of a member of, or is already an enrolled member of, the Gila River Indian Community, a federally-recognized tribe. Parental rights of C.R.'s birth parents have not been terminated by the state court properly having jurisdiction over the matter. Baby boy C.R., on information and belief, has more than 50% non-Indian blood.

13. Carol Coghlan Carter is a citizen of the United States and the State of Arizona, and domiciled in the State of Arizona. She is an attorney licensed to practice in the State of Arizona. She has practiced in the area of family law for several decades. In the course of her legal career, she has represented during all stages of child custody proceedings children, including children with Indian ancestry as their court-appointed guardian-ad-litem; birth parents, including birth parents with Indian ancestry; and foster/adoptive parents, including foster/adoptive parents with Indian ancestry and those in child custody proceedings involving children with Indian ancestry. She is "next friend" to baby girl A.D., baby boy C.C., baby girl L.G., and baby boy C.R., and all off-reservation children with Indian ancestry in the State of Arizona in child custody proceedings. *See* FRCP 17(c).

14. Dr. Ronald Federici is a citizen of the United States and the State of Virginia, and domiciled in the State of Virginia. He is a clinical neuropsychologist and clinical psychopharmacologist. He has over two decades of experience completing complex neuropsychiatric evaluations of adults and children. He is a professional consultant to physicians, schools, mental

health clinics, pediatric and adolescent medicine clinics. He has served as an expert witness in child custody proceedings throughout the United States and abroad. He conducts training and education in Clinical Neuropsychology throughout the United States, and in Europe, Eastern Europe, United Kingdom, Australia, Canada, Iceland, and China. He serves as President of the Care for Children International, Inc., which is a humanitarian aid organization providing medical care, supplies, training and education to the Romanian Department of Child Protective Services. A short documentary on Dr. Federici's work in Romania is available at https://www.youtube.com/watch?v=AC37H1W1P1I (last visited February 18, 2016). He is "next friend" to baby girl A.D., baby boy C.C., baby girl L.G., and baby boy C.R., and all off-reservation children with Indian ancestry in the State of Arizona in child custody proceedings. *See* FRCP 17(c).

15. Plaintiffs S.H. and J.H. are foster/preadoptive parents of baby girl A.D. Plaintiffs S.H. and J.H., a married couple, are both citizens of the United States and the State of Arizona, and are residents of and are domiciled in the State of Arizona. Neither S.H. nor J.H. are enrolled members of a tribe or eligible for membership in an Indian tribe. S.H. and J.H. are the only family baby girl A.D. has ever known as she was placed in foster care with them since her birth. Their petition to adopt baby girl A.D. is pending before the state court properly having jurisdiction over the matter.

16. Plaintiffs M.C. and K.C., a married couple, are both citizens of the United States and the State of Arizona, and are residents of and are domiciled in the State of Arizona. Neither M.C. nor K.C. are enrolled members of a tribe or eligible for membership in an Indian tribe. M.C. and K.C. were foster parents to baby boy C.C. for approximately four years. M.C. and K.C. adopted baby boy C.C. in November, 2015.

17. Plaintiffs K.R. and P.R. are foster parents of baby girl L.G. and baby boy C.R. Plaintiffs K.R. and P.R., a married couple, are both citizens of the United States and the State of Arizona, and are residents of and are domiciled in the State of Arizona. Neither K.R. nor P.R. are enrolled members of a tribe or eligible for membership in an Indian tribe. K.R. and P.R. are the only family baby boy C.R. has ever known as he was placed in foster care with them since birth. K.R. and P.R. have been foster parents to baby girl L.G. and baby boy C.R. for approximately 1.5 years and want to adopt L.G. and C.R.

18. Defendant Kevin Washburn is the Assistant Secretary of Indian Affairs of the Bureau of Indian Affairs ("BIA"). He has primary authority to enforce ICWA and the BIA Guidelines at issue. He is sued in his official capacity only.

19. Defendant Sally Jewell is the Secretary of the Interior, United States Department of the Interior. The Department of the Interior is the cabinet agency of which BIA is a part and which is assigned

enforcement powers under ICWA and Title 25 of United States Code. She is sued in her official capacity only.

20. Defendant Gregory A. McKay is the Director of the Arizona Department of Child Safety ("DCS"). The Director has statutory duty under Ariz. Rev. Stat. ("A.R.S.") § 8-451 *et seq*. to "protect children." The Director is also required to "[e]nsure the department's compliance with the Indian child welfare act of 1978 (P.L. 95-608; 92 Stat. 3069; 25 United States Code §§ 1901 through 1963)." A.R.S. § 8-453(A)(20). He is sued in his official capacity only.

FACTS COMMON TO ALL CLAIMS

I. Baby Girl A.D.

21. DCS took baby girl A.D. into protective custody at birth as she was severely drug-exposed due to her biological mother's ingestion of several controlled substances, and placed her with S.H. and J.H. They have taken care of baby girl A.D. ever since, and although she has some developmental delays due to her exposure to controlled substances, she has shown remarkable recovery from the deleterious effects of second-hand addiction under the loving care of S.H. and J.H.

22. A.D.'s biological mother named two possible birth fathers for baby girl A.D. Paternity tests on both ruled out the possibility that they were A.D.'s birth

fathers. Consequently, the state court severed parental rights of the birth mother and the absent birth father.

23. S.H. and J.H., as foster parents, have taken care of baby girl A.D. since birth. S.H. and J.H., along with their adopted son who has Indian ancestry, are the only family that baby girl A.D. has ever known. The tribe sought in state court a transfer of the case to tribal court. The state juvenile court denied the tribe's motion to transfer jurisdiction to tribal court and the tribe appealed. That appeal is now pending in the Arizona Court of Appeals Case No. JV16-0038. If the appellate court reverses the state trial court's decision and their case is transferred to tribal court, it would force A.D., S.H. and J.H., who do not have any contact with the tribal forum, to submit to that forum's jurisdiction over them. Such transfer and the resulting exercise of jurisdiction, if successful, would be solely based on baby girl A.D.'s race.

24. But for ICWA, A.D. would likely have been cleared for adoption by S.H. and J.H. If they are awarded adoption, they are willing to provide and encourage appropriate visitation and cultural acclimatization opportunities to A.D. DCS has and continues to follow, implement, and support the position that ICWA and the BIA Guidelines control all aspects of the state court child custody proceeding of A.D., S.H., and J.H., including but not limited to the provisions challenged here. In A.D.'s child custody proceeding, all actions were taken and decisions reached because of A.D., S.H., and J.H.'s race.

II. Baby Boy C.C.

25. DCS took baby boy C.C. into protective custody when he was less than one year old when his biological mother was convicted of a non-drug related felony. His birth father is unknown. The birth mother is on record saying she supports baby boy C.C.'s adoption by M.C. and K.C.

26. The Navajo Nation repeatedly proposed alternative ICWA-compliant placements, all of which turned out to be inappropriate for placement of baby boy C.C. Baby boy C.C.'s extended family members expressly declined to have him placed with them. Other ICWA-compliant placements the tribe proposed also declined to have baby boy C.C. placed with them. The tribe repeatedly asked for additional opportunities from state court to find other ICWA-compliant placements. Consequently, baby boy C.C. continuously remained in foster care with M.C. and K.C. for four years. M.C. and K.C. were not able to file a petition for adoption until the state court declared that baby boy C.C. is available for adoption and that there was good cause to deviate from ICWA's adoption placement preferences.

27. Each time the tribe proposed an ICWA-compliant placement, pursuant to a court-supervised and DCS-supported case plan, M.C. and K.C. had to drive each week with baby boy C.C., sometimes over 100 miles, to visit with the proposed placement to give baby boy C.C. an opportunity to bond with the proposed placement until that placement became

unavailable for any reason. Baby boy C.C. calls M.C. and K.C. "mommy" and "daddy," but he was reminded by some proposed placements that M.C. and K.C. are not his "mommy" and "daddy." This caused significant emotional and psychological harm to baby boy C.C. who, through no fault of his own, had to leave the security of his home and visit with strangers solely because he was born with Indian ancestry.

28. Due to the application of ICWA, baby boy C.C. had languished in foster care for approximately four years. But for ICWA, baby boy C.C. would have likely been cleared for adoption by M.C. and K.C.

29. M.C. and K.C. were not granted intervention in the dependency matter of C.C.

30. In November 2015, after this lawsuit was filed, the state court properly having jurisdiction over the matter cleared C.C., with DCS and Navajo Nation consent, for adoption by M.C. and K.C.

31. The Indian Child Welfare Act applied to all aspects of C.C.'s child custody proceeding. All actions that delayed or denied C.C.'s adoption by M.C. and K.C. were taken because of C.C., M.C., and K.C.'s race. DCS continued to follow, enforce and support the application of ICWA in C.C.'s child custody proceeding.

III. Baby Girl L.G. and Baby Boy C.R.

32. L.G. and C.R. are siblings who have the same birth mother but different birth fathers. L.G. was born in August, 2012, C.R. in August, 2014. During C.R.'s

pregnancy, the birth mother tested positive for several controlled substances. Baby boy C.R. was born nine weeks premature, was drug-exposed when born, and spent three weeks in a ventilator. He is determined to be medically fragile. In or about August 2014, DCS took baby girl L.G. and baby boy C.R. into protective custody and placed the siblings in the care of P.R. and K.R. Thus, DCS took L.G. into protective custody when she was about 2 years old; DCS took C.R. into protective custody at birth. P.R. and K.R. is the only family that baby boy C.R. has ever known; L.G., on information and belief, lived with her birth mother before she was placed in the care of P.R. and K.R. If they are awarded adoption, P.R. and K.R. are willing to provide and encourage appropriate visitation and cultural acclimatization opportunities to L.G. and C.R.

33. Both L.G. and C.R.'s birth fathers are known. On information and belief, both are in federal prison on conviction for violent felonies. L.G. and C.R.'s birth mother and maternal grandmother were arrested on charges of shoplifting. On information and belief, the maternal grandmother was given a two-year prison sentence and the birth mother is currently on probation.

34. L.G. and C.R.'s birth mother, on information and belief, is a member of the Gila River Indian Community with 25% Indian blood.

35. After L.G. and C.R. were placed in the foster care of P.R. and K.R., L.G.'s birth father, on information and belief, tried to obtain membership in the Pascua

Yaqui Tribe, a federally-recognized tribe, but was unable to obtain membership. Consequently, L.G. is not eligible for membership in, nor is she a child of a member of, the Pascua Yaqui Tribe. L.G. is also not eligible for membership in, nor is she a member of, the Gila River Indian Community.

36. C.R.'s birth mother and birth father are members of the Gila River Indian Community. C.R. is eligible for membership in, and is a child of a member of, the Gila River Indian Community.

37. Initially, the case management plan for L.G. and C.R. was reunification with their birth mother. Due to C.R.'s low birth weight and medical complications due to inutero exposure to controlled substances, DCS consented to, and the state court authorized, one weekly 4-hour-long visit with the birth mother that is supervised by DCS employees. In September 2015, the state court properly having jurisdiction over the child custody proceeding, changed the case management plan to severance. The parental rights of L.G. and C.R.'s birth parents have not been terminated.

38. Foster parents P.R. and K.R. are not party intervenors in the state child custody proceeding of L.G. and C.R. Plaintiffs L.G., C.R., K.R. and P.R. do not have any contacts or ties with any tribal forum.

39. The Gila River Indian Community has and will continue to propose alternative ICWA-compliant homes for C.R. in the consolidated child custody proceeding of L.G. and C.R. for the sole purpose of ensuring that C.R.'s child custody proceeding is subject to

ICWA and the BIA Guidelines. DCS has and continues to follow, implement, and support the position that ICWA and the BIA Guidelines control all aspects of the state court child custody proceeding of C.R., including but not limited to the provisions challenged here.

40. L.G. has Indian ancestry but is not an "Indian child" within the meaning of ICWA. However, she is discriminated against in her consolidated child custody proceeding because her half-sibling, C.R., is an "Indian child" within the meaning of ICWA. L.G. has known C.R. since birth, both share a strong sibling bond, and both consider K.R. and P.R. as *de facto* and psychological parents. Both call K.R. and P.R. their "mommy" and "daddy."

41. Arizona state policy, mandated by state law, is to place well-bonded siblings with the same foster and adoptive parents. *See, e.g.*, A.R.S. § 8-513(D). But for ICWA and the federal and state statutes and Guidelines that implement it, L.G. and C.R. would be placed together due to their bonding and attachment, pursuant to state law.

42. The relevant state court properly having jurisdiction over the matter has not declared L.G. and C.R. as available for adoption. L.G. and C.R. have continuously remained in foster care with P.R. and K.R. for about one year and six months. P.R. and K.R. cannot file a petition for adoption until the state court declares that L.G. and C.R. are available for adoption and that there is good cause to deviate from ICWA's adoption placement preferences.

43. Due to the application of ICWA, L.G. and C.R. have been languishing in foster care for more than one and a half years. But for ICWA, they would likely have been cleared for adoption by P.R. and K.R.

IV. <u>All Plaintiffs</u>

44. But for ICWA, a strong likelihood exists that these families—baby girl A.D., and her foster/preadoptive parents, S.H. and J.H., baby boy C.C., and his adoptive parents M.C. and K.C., and L.G. and C.R., and their foster parents, K.R. and P.R.—would be allowed to become permanent under race-neutral Arizona laws permitting individualized race-neutral evaluation by state court of what is in the children's best interests. But under ICWA, these families are subjected to different and more onerous procedural and substantive provisions that are based solely on the race of the children and the adults involved, which lead to severe disruption in their lives contrary to the children's best interests.

45. In many instances, children subject to ICWA are removed from caring, loving homes and forced into placements, which sometimes leads to abuse, psychological harm, or even physical trauma and death.

46. In many instances, prospective adoptive parents who otherwise would be allowed to adopt children they have raised since infancy and grown to love are deprived of the opportunity to form permanent families as a result of ICWA.

47. In many instances, children are left in abusive or neglectful Indian families where they are subjected to grave physical or psychological harm as a result of ICWA.

48. Subjecting these children and families to ICWA creates delay and uncertainty in the journey to permanent family status, and the prospect and reality of displacement from stable, loving families causes great harm to children and great distress to prospective adoptive parents.

49. All named children and parent plaintiffs, and the members of the class they seek to represent, have in the past been, are currently, or in the course of their constantly evolving state court child custody proceedings will surely be, subject to the separate, unequal and substandard treatment under provisions of ICWA and the BIA Guidelines challenged here: 25 U.S.C. §§ 1911(b), 1912(d), 1912(e), 1912(f), 1915(b), 1915(a); BIA Guidelines, 80 Fed. Reg. 10146 (February 25, 2015), §§ A.2, A.3, B.1, B.2, B.4, B.8, C.1, C.2, C.3, D.2, D.3, F.1, F.2, F.3, F.4. Once a determination is made that a child is an "Indian child" within the meaning of ICWA, all of the provisions of ICWA and the BIA Guidelines challenged here inexorably become applicable to that child's child custody proceeding beginning with DCS taking the child into protective custody up to and including either the finalization of the child's adoption or the child's reunification with birth family. DCS has and continues to follow, implement, and support the position that ICWA and the BIA Guidelines control all aspects of the state court child custody

proceeding of Indian children, including but not limited to the provisions challenged here.

CLASS ALLEGATIONS

50. The named plaintiffs bring this lawsuit on behalf of themselves and a class of all off-reservation Arizona-resident children with Indian ancestry and all off-reservation non-Indian Arizona-resident foster, preadoptive, and prospective adoptive parents who are or will be in child custody proceedings involving a child with Indian ancestry and who are not members of the child's extended family.

51. The Arizona Department of Child Safety's semi-annual Report to the Governor for the period of April 1, 2015 through September 30, 2015, attached as Exhibit 1 to this Amended Complaint, and *available at* https://dcs.az.gov/sites/default/files/SEMIANNUAL-CHILD-WELFARE-REPORTING-REQUIREMENTS-4-15-9-15_FINAL-Revised.pdf (last visited *March 2*, 2016), reports that as of September 30, 2015 there were 1,506 American Indian children in out-of-home care in Arizona. *Id.* at 42. The number of foster, preadoptive, and prospective adoptive parents of these children is similarly numerous. Their identities are easily ascertainable through DCS records that are not open for inspection to the public. This putative class is so numerous that joinder of all members is impracticable. *See* FRCP 23(a)(1).

52. There are questions of law or fact common to the class, namely, the facial and as-applied

constitutionality of several provisions of ICWA and accompanying Guidelines to the members of the class. *See* FRCP 23(a)(2).

53. The circumstances of baby girl A.D., S.H. and J.H., baby boy C.C., M.C. and K.C. and baby girl L.G., baby boy C.R., P.R. and K.R., are typical of children with Indian ancestry and other foster, preadoptive and prospective adoptive families of children with Indian ancestry. *See* FRCP 23(a)(3).

54. The named plaintiffs will fairly and adequately protect the interests of the class. *See* FRCP 23(a)(4).

55. Plaintiffs' attorneys are experienced in representing litigants before federal courts. Plaintiffs' counsel include nationally recognized constitutional lawyers who have litigated extensively at every level of the federal judiciary. Plaintiffs' attorneys are well qualified to be appointed class counsel by this Court.

56. Separate actions by individual class members would create the risk of inconsistent or incompatible standards of conduct for the defendants, and separate actions by individual class members would substantially impair their ability to protect their interests. *See* FRCP 23(b)(1).

57. Defendants have acted or refused to act on grounds that apply generally to the putative class. Thus, final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. *See* FRCP 23(b)(2).

58. Questions of law or fact common to the members of the class predominate over questions affecting individual class members as individual class members are denied equal protection under the law and deprived of their constitutional rights. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, inasmuch as the individual class members are deprived of the same rights. *See* FRCP 23(b)(3).

STATUTORY FRAMEWORK

I. Definitions

59. ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe" 25 U.S.C. § 1903(4). "Indian tribe" is also statutorily defined at 25 U.S.C. § 1903(8).

60. Most Indian tribes have only blood quantum or lineage requirements as prerequisites for membership. *See* Miss. Band of Choctaw Indians Const. art. III, § 1; Cherokee Nation Const. art. IV. § 1; Choctaw Nation of Okla. Const. art. II, § 1; Muscogee (Creek) Nation Const. art. III, § 2; Gila River Indian Community Const. art. III, § 1; Navajo Nation Code § 701; Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10153, B.3 (February 25, 2015) ("New Guidelines" or "BIA

Guidelines"). Consequently, ICWA's definition of "Indian child" is based solely on the child's race or ancestry.

61. Some of the tribes consider individuals with only a tiny percentage of Indian blood to be Indian, even if they have little or no contact or connection with the tribe. *See, e.g.*, Cherokee Nation Const. art. IV, § 1.

62. Thus, in many instances, children with only a minute quantum of Indian blood and no connection or ties to the tribe are subject to ICWA and relegated to the tribe's exclusive or concurrent jurisdiction. *See, e.g., Nielson v. Ketchum*, 640 F.3d 1117, 1120 (10th Cir. 2011) (quoting Chapter 2, Section 11A of the Cherokee Nation Citizenship Act which automatically admits a child as citizen of the Cherokee Nation at birth "for the specific purpose of protecting the rights of the Cherokee Nation under the [ICWA]" (brackets in original)).

63. The Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10153, B.4(d)(iii) (February 25, 2015), state, "In the event the child is eligible for membership in a tribe but is not yet a member of any tribe, the agency should take the steps necessary to obtain membership for the child in the tribe that is designated as the Indian child's tribe."

64. "Agency" is defined in the New Guidelines as "a private State-licensed agency or public agency and their employees, agents or officials involved in and/or seeking to place a child in a child custody proceeding." 80 Fed. Reg. at 10151, A.2.

65. ICWA defines "child custody proceeding" to include "foster care placement," "termination of parental rights," "preadoptive placement," and "adoptive placement." 25 U.S.C. § 1903(1).

66. "Foster care placement" is defined as "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated." 25 U.S.C. § 1903(1)(i).

67. "Termination of parental rights" is defined as "any action resulting in the termination of the parent-child relationship." 25 U.S.C. § 1903(1)(ii).

68. "Preadoptive placement" is defined as "the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement." 25 U.S.C. § 1903(1)(iii).

69. "Adoptive placement" is defined as "the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption." 25 U.S.C. § 1903(1)(iv).

70. "Child custody proceeding," as defined, "shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents." 25 U.S.C. § 1903(1).

II. BIA Guidelines

71. The BIA first issued Guidelines in November of 1979. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (November 26, 1979) ("Old Guidelines" or "1979 Guidelines"). On February 25, 2015, the BIA issued new Guidelines to "supersede and replace" the 1979 Guidelines. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10147 (February 25, 2015) ("New Guidelines", "2015 Guidelines", or "BIA Guidelines").

III. The Jurisdiction-Transfer Provision

72. ICWA requires state courts to "transfer" "foster care placement" or "termination of parental rights" "proceeding[s] to the jurisdiction of the tribe" of "an Indian child not domiciled or residing within the reservation of the Indian child's tribe" "in the absence of good cause to the contrary," and "absent objection by either parent," if the "parent or the Indian custodian or the Indian child's tribe" petitions for such transfer and the tribal court does not decline such transfer. 25 U.S.C. § 1911(b) ("jurisdiction-transfer provision"); 80 Fed. Reg. at 10156, C.2. The New Guidelines, however, state, "The right to request a transfer is available at *any stage* of an Indian *child custody proceeding,* including during any period of emergency removal." 80 Fed. Reg. at 10156, C.1(c) (emphasis added).

73. Whereas ICWA' s jurisdiction-transfer provision is available to transfer only foster care placement

and termination of parental rights proceedings to the jurisdiction of the tribe, the BIA, in the New Guidelines, extended the jurisdiction-transfer provision to all child custody proceedings.

74. "Good cause" to not transfer a foster care placement or termination of parental rights proceeding to tribal court is not defined in ICWA. The New Guidelines, however, state:

> In determining whether good cause exists, the court may not consider whether the case is at an advanced stage or whether transfer would result in a change in the placement of the child because the Act created concurrent, but presumptively, tribal jurisdiction over proceedings involving children not residing or domiciled on the reservation, and seeks to protect, not only the rights of the Indian child as an Indian, but the rights of Indian communities and tribes in retaining Indian children. Thus, whenever a parent or tribe seeks to transfer the case it is presumptively in the best interest of the Indian child, consistent with the Act, to transfer the case to the jurisdiction of the Indian tribe. [¶] In addition, in determining whether there is good cause to deny the transfer, the court may not consider: (1) The Indian child's contacts with the tribe or reservation; (2) Socio-economic conditions or any perceived inadequacy of tribal or Bureau of Indian Affairs social services or

> judicial systems; or (3) the tribal court's prospective placement for the Indian child.

80 Fed. Reg. at 10156, C.3(c)–(d).

75. Under uniform Arizona law, when deciding whether to transfer a foster care placement or termination of parental rights proceeding to some other jurisdiction, an Arizona state court "that has made a child custody determination" has "exclusive, continuing jurisdiction over the determination until" either one of the two options is true:

> 1. A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships.
>
> 2. A court of this state or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this state.

A.R.S. § 25-1032(A).

76. Thus, while Arizona law looks at the litigants' contacts with the forum in deciding whether to transfer a foster care placement or termination of parental rights proceeding to some other jurisdiction, ICWA and the New Guidelines explicitly instruct courts to not take into account the litigants' contacts with the tribal forum.

77. The clear and convincing evidence standard is applied in Arizona to determine whether good cause exists to deviate from ICWA's *foster care placement preferences* of 25 U.S.C. § 1915(b). *Gila River Indian Community v. Department of Child Safety*, 363 P.3d 148 (2015). The state trial court in baby girl A.D.'s case, however, concluded that the same clear and convincing evidence standard must be met in order to establish good cause to deviate from ICWA's *jurisdiction-transfer provision*, 25 U.S.C. § 1911(b). *Contra Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 839 (9th Cir. 1986) (proponent must establish personal jurisdiction or lack thereof by preponderance of the evidence).

IV. The Active Efforts Provision

78. Further, ICWA states that "[a]ny party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d) (emphasis added) ("active efforts provision").

79. The New Guidelines state: "*Active efforts* are intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act (42 U.S.C.

671(a)(15)). . . . 'Active efforts' are separate and distinct from requirements of the Adoption and Safe Families Act (ASFA), 42 U.S.C. 1305. ASFA's exceptions to reunification efforts do not apply to ICWA proceedings." 80 Fed. Reg. at 10150–51, A.2 (emphasis in original). The ASFA exceptions provide that the reasonable efforts provision is *inapplicable* if there are "aggravated circumstances" such as "abandonment, torture, chronic abuse, and sexual abuse." 42 U.S.C. § 671(a)(15)(D). But because these exceptions do not apply under the "active efforts" provision, active efforts are required to be taken to reunify children deemed Indian with their family or members of the tribal community even when the children were abandoned, tortured, chronically abused or sexually abused by those individuals.

80. DCS, under the active efforts provision, is required to "[i]dentify[], notify[], and invit[e] representatives of the Indian child's tribe to participate" in the active efforts to reunite the Indian child with the child's "family" and "tribal community." New Guidelines, 80 Fed. Reg. at 10150, A.2.

81. DCS, under the active efforts provision, is required to "[t]ak[e] into account the Indian child's tribe's prevailing social and cultural conditions and way of life" even in situations where the child or the child's parents have never been exposed to or followed the tribe's prevailing social and cultural conditions or way of life. *Id.* DCS is also required "to assure cultural connections," "[s]upport[] regular visits and trial home visits of the Indian child during any period of removal,"

and "[o]ffer[ ] and employ[ ] all available and culturally appropriate family preservation strategies." *Id.*

82. The New Guidelines provide details on when the requirement for active efforts begins and what actions an agency and State court must take in order to determine whether a child is an Indian child and how to comply with the active efforts requirement. 80 Fed. Reg. at 10152–153, A.3, B.1–B.2, B.4, B.8, D.2. The New Guidelines provide no details on when the requirement for active efforts ends; consequently, the active efforts provision remains applicable until the adoption is finalized. Additionally, the foster placement preferences and adoption placement preferences require DCS to engage in active efforts every time the tribe proposes a new ICWA-compliant placement.

83. The New Guidelines require DCS to "treat the child as an Indian child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe," "[i]f there is any reason to believe the child is an Indian child." 80 Fed. Reg. at 10152, A.3(d).

84. The New Guidelines require DCS to engage in active efforts "from the moment the possibility arises that . . . the Indian child [will] be placed outside the custody of either parent or Indian custodian" and also "while investigating" whether ICWA applies to a particular child. 80 Fed. Reg. at 10152, B.1(a)–(b).

85. If a child is suspected to be an Indian child, DCS may be required to provide "[g]enograms or ancestry charts for both parents, . . . maternal and

paternal grandparents and great grandparents or Indian custodians; birthdates; . . . tribal affiliation including all known Indian ancestry for individuals listed on the charts[.]" New Guidelines, 80 Fed. Reg. at 10152, B.2(b)(1)(i).

86. "In the event the child is eligible for membership in a tribe but is not yet a member of any tribe," the New Guidelines require DCS to "take the steps necessary to obtain membership for the child in the tribe that is designated as the Indian child's tribe." 80 Fed. Reg. at 10153, B.4(d)(iii).

87. In emergency removal situations where DCS "knows or has reason to know" that a child is an Indian child, DCS is required to "[t]reat the child as an Indian child until the court determines that the child is not an Indian child." New Guidelines, 80 Fed. Reg. at 10155, B.8(c)(1).

88. Pursuant to 42 U.S.C. § 671(a)(15), as amended by ASFA, the "reasonable efforts" standard is pervasive under Arizona Law. *See, e.g.*, A.R.S. §§ 8-513 (foster care placement), 8-522 (dependency actions), 8-825 (preliminary protective hearing), 8-829 (same), 8-843 (initial dependency hearing), 8-845 (dependency determination), 8-846 (same), 8-862 (permanency hearing).

89. Whereas "active efforts" are required not only to "maintain and reunite an Indian child with his or her family" but also with the child's "tribal community," New Guidelines, 80 Fed. Reg. at 10150, A.2, "reasonable efforts" under Arizona law are required only to

maintain and reunite the child with the child's family. *See, e.g.*, A.R.S. § 8-522(E)(3).

90. Arizona DCS applies the active efforts provision to children with Indian ancestry, and the "reasonable efforts" provision to all other children. The New Guidelines explicitly state that the active efforts provision is "more than" the reasonable efforts provision. Consequently, children with Indian ancestry are singled out and afforded separate, unequal treatment resulting in delayed resolution of child custody proceedings of children with Indian ancestry, based solely on their race.

V. Burden of Proof in Foster Care Placement Orders

91. ICWA further requires that "No foster care placement may be ordered in [an involuntary] proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(e).

92. The New Guidelines state: "The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents or Indian

custodian is likely to result in serious harm to the child." 80 Fed. Reg. at 10156, D.3(a).

93. The clear and convincing evidence standard is applied in Arizona to determine whether good cause exists to deviate from ICWA's foster care placement preferences. *Gila River Indian Community v. Department of Child Safety*, 363 P.3d 148 (2015).

94. Under Arizona law, to take a child into temporary custody, there must be a showing that "reasonable grounds exist to believe that temporary custody is clearly necessary to protect the child from suffering abuse or neglect" and that "probable cause exists to believe" that, inter alia, the child is or will imminently become a victim of abuse or neglect, or is suffering from serious physical or emotional injury. A.R.S. § 8-821(A)–(B); § 8-824(F) ("The petitioner has the burden of presenting evidence as to whether there is probable cause to believe that continued temporary custody is clearly necessary to prevent abuse or neglect pending the hearing on the dependency petition"); A.R.S. § 8-843 ("reasonable efforts" standard in initial dependency hearings); A.R.S. § 8-844 ("preponderance of the evidence" standard in dependency adjudication hearings).

95. Thus, ICWA requires a showing of clear and convincing evidence whereas Arizona law requires a showing of "reasonable grounds," "probable cause," "reasonable efforts," or "preponderance of the evidence" at various stages of proceedings leading to foster care placement of children. Consequently, ICWA's higher burden of proof requires DCS to disregard to a

greater extent the safety and security of children with Indian ancestry based solely on the race of these children.

VI. Burden of Proof in Termination of Parental Rights Orders

96. ICWA requires that "No termination of parental rights may be ordered in [an involuntary] proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f).

97. The New Guidelines state: "The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, supported by the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious harm to the child." 80 Fed. Reg. at 10156, D.3(b).

98. Under Arizona law, "Arizona's statutes require that the party seeking termination of parental rights establish only the statutory grounds of section 8-533 by clear and convincing evidence and establish the best interests of the child by a preponderance of the evidence." *Kent K v. Bobby M*, 110 P.3d 1013, 1018 (Ariz. 2005) (interpreting A.R.S. §§ 8-533, 8-537).

99. Thus, ICWA requires a showing of beyond a reasonable doubt whereas Arizona law requires use of the clear and convincing evidence standard in termination of parental rights proceedings. Consequently, ICWA's higher burden of proof, which explicitly does not take into account the best interests of the child, places greater burdens on children with Indian ancestry than does Arizona law uniformly applied to all other children. This separate, unequal treatment of children with Indian ancestry is based solely on the child's race.

VII. Foster/Preadoptive Care Placement Preferences

100. Under ICWA:

> In any foster care or preadoptive placement, a preference shall be given, *in the absence of good cause to the contrary,* to a placement with—
>
> (i) a member of the Indian child's extended family;
>
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
>
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
>
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has

> a program suitable to meet the Indian child's needs.

25 U.S.C. § 1915(b) (emphasis added).

101. The New Guidelines state:

> The agency seeking a preadoptive, adoptive or foster care placement of an Indian child *must always follow* the placement preferences. If the agency determines that any of the preferences cannot be met, the agency must demonstrate through clear and convincing evidence that a diligent search has been conducted to seek out and identify placement options that would satisfy the placement preferences specified in sections F.2 or F.3 of these guidelines, and explain why the preferences could not be met.

80 Fed. Reg. at 10157, F.1(b) (emphasis added).

102. Although "good cause" to not apply the foster care placement preferences is not defined in ICWA, the New Guidelines state:

> (a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for such belief or assertion must be stated on the record or in writing and made available to the parties to the proceeding and the Indian child's tribe.

(b) The party seeking departure from the preferences bears the burden of proving by clear and convincing evidence the existence of "good cause" to deviate from the placement preferences.

(c) A determination of good cause to depart from the placement preferences must be based on one or more of the following considerations:

(1) The request of the parents, if both parents attest that they have reviewed the placement options that comply with the order of preference.

(2) The request of the child, if the child is able to understand and comprehend the decision that is being made.

(3) The extraordinary physical or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live, as established by testimony of a qualified expert witness; provided that extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with

the Act. *The good cause determination does not include an independent consideration of the best interest of the Indian child* because the preferences reflect the best interests of an Indian child in light of the purposes of the Act.

(4) The unavailability of a placement after a showing by the applicable agency in accordance with section F.1, and a determination by the court that active efforts have been made to find placements meeting the preference criteria, but none have been located. For purposes of this analysis, a placement may not be considered unavailable if the placement conforms to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

(d) The court should consider only whether a placement in accordance with the preferences meets the physical, mental and emotional needs of the child; and may not depart from

> the preferences based on the socio-economic status of any placement relative to another placement.

80 Fed. Reg. at 10158, F.4 (emphasis added).

103. The standard applied to all other children in Arizona is markedly different from the standard applied to children with Indian ancestry. For foster care placements, Arizona courts look at whether there was reasonable evidence to find that placing a child with the foster family instead of an extended family member was in the child's "best interests." *Antonio M v. Ariz. Dept. of Econ. Sec.*, 214 P.3d 1010, 1012 (Ariz. App. 2009). Courts in such situations also give weight to the fact that "the foster parents wished to adopt [the child]." *Id. See also Antonio P. v. Ariz. Dept. of Econ. Sec.*, 187 P.3d 1115, 1117 (Ariz. App. 2008) (analyzing what is in the child's best interest in foster care placements and giving weight to the fact that the child had an "undeniabl[y]" "longer relationship" with one placement than with the other).

VIII. Adoption Placement Preferences

104. Under ICWA,

> In any adoptive placement of an Indian child under State law, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with
>
> (1) a member of the child's extended family;

> (2) other members of the Indian child's tribe; or
>
> (3) other Indian families.

25 U.S.C. § 1915(a). (emphasis added).

105. The New Guidelines require state courts to follow ICWA' s adoption placement preferences. 80 Fed. Reg. at 10157, F.1(b) ("The agency seeking a[n] . . . adoptive . . . placement of an Indian child *must always follow* the placement preferences") (emphasis added).

106. Although "good cause" to not apply the adoption placement preferences is not defined in ICWA, the New Guidelines, as reproduced above, specifically state that the "good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child in light of the purposes of the Act." 80 Fed. Reg. at 10158, F.4.

107. Due to the mandatory language of the New Guidelines, there is an inherent conflict between the duty of DCS, an "agency" within the meaning of the New Guidelines, to "protect children" and its application of ICWA to children with Indian ancestry.

108. The placement preferences, as applied under the New Guidelines, do not look to the interests-of-the-child factors that state courts have traditionally applied in entering foster care placement, preadoption and adoption orders, and thereby deprive children with Indian ancestry of an individualized race-neutral

determination that all other children enjoy under state law.

109. States cannot disregard a child's unique background in making an individualized and race-neutral foster, preadoptive or adoptive assessment, and in terminating parental rights. But the states cannot also turn a blind eye to the child's safety, security and best interests based solely on the child's or the adults' race, for such action is necessarily based on inherently demeaning, stereotypical assumptions about an individual's race or culture. Although the court did not reach constitutional issues, a core premise of the Baby Veronica decision, *Adoptive Couple v. Baby Girl*, ___ U.S. ___, 133 S. Ct. 2552 (2013), was that ICWA cannot force a child to create a racially-conforming relationship and that a child should not be made to sever existing relationships in order to create new racially-conforming ones.

CLAIMS FOR RELIEF

COUNT 1—VIOLATION OF THE EQUAL PROTECTION GUARANTEE OF THE FIFTH AMENDMENT

110. Plaintiffs reallege, adopt and incorporate by reference the preceding paragraphs as though fully set forth herein.

111. The jurisdiction-transfer provision, 25 U.S.C. § 1911(b), New Guidelines at §§ C.1, C.2, C.3, is

based solely on the race of the child and the adults involved.

112. The active efforts provision, 25 U.S.C. § 1912(d), New Guidelines at §§ A.2, A.3, B.1, B.2, B.4, B.8, D.2, creates a separate set of procedures for children with Indian ancestry and all other children based solely on the child's race.

113. The clear and convincing evidence burden of proof in foster care placement orders under ICWA, 25 U.S.C. § 1912(e), New Guidelines at § D.3, that is applicable to children with Indian ancestry as compared to Arizona's demonstrably lesser burden of proof that is applicable to all other children is a legally required, unequal treatment of children with Indian ancestry. Government cannot treat the safety and security of children with Indian ancestry less seriously than the safety and security of all other children.

114. The beyond a reasonable doubt burden of proof in termination of parental rights proceedings under ICWA, 25 U.S.C. § 1912(f), New Guidelines at § D.3, that is applicable to children with Indian ancestry as compared to Arizona's demonstrably lesser burden of proof that is applicable to all other children is a legally required separate, unequal treatment of children with Indian ancestry. Government cannot treat the best interests of children with Indian ancestry differently and less seriously than those of all other children.

115. The foster/preadoptive and adoption placement preferences under ICWA, 25 U.S.C.

§§ 1915(b), (a), New Guidelines at §§ F.1, F.2, F.3, F.4, single out and treat differently children with Indian ancestry. They also single out and treat differently the non-Indian adults involved in the care and upbringing of children with Indian ancestry.

116. The jurisdiction-transfer provision, active efforts provision, burden of proof in foster care placement orders provision, burden of proof in termination of parental rights orders provision, foster/preadoptive care placement preferences provision, and the adoption placement preferences provision of ICWA, and New Guidelines, all subject Plaintiffs to unequal treatment under the law based solely on the race of the child and the adults involved and are therefore unconstitutional under the equal protection guarantee of the Fifth Amendment.

117. Because the foregoing provisions of ICWA and the New Guidelines do not serve a compelling governmental purpose in a narrowly tailored fashion, they violate the equal protection guarantee of the Fifth Amendment.

COUNT 2—VIOLATION OF THE DUE PROCESS GUARANTEE OF THE FIFTH AMENDMENT

118. Plaintiffs reallege, adopt and incorporate by reference the preceding paragraphs as though fully set forth herein.

119. The jurisdiction-transfer provision forces Plaintiffs to submit to the personal jurisdiction of a forum with which they have no contacts or ties.

120. The jurisdiction-transfer provision, 25 U.S.C. § 1911(b), New Guidelines at §§ C.1, C.2, C.3, disregards well-established Supreme Court pronouncements which require minimum contacts between the forum and the litigant for the forum to constitutionally exercise specific or general personal jurisdiction over the litigant, and are therefore, unconstitutional under the due process guarantee of the Fifth Amendment. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980); *Helicoptores Nationales de Colombia v. Hall*, 466 U.S. 408 (1984); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

121. Every child and adult deserves an individualized, race-neutral determination under uniform standards when courts make foster/preadoptive care and adoption placement decisions. Every child and adult has a right to be free from the use of race in their individualized foster/preadoptive care and adoption placement decisions. ICWA's jurisdiction-transfer provision, 25 U.S.C. § 1911(b), active efforts provision, 25 U.S.C. § 1912(d), foster care burden of proof, 25 U.S.C. § 1912(e), termination of parental rights burden of proof, 25 U.S.C. § 1912(f), foster/preadoptive care placement preferences provision, 25 U.S.C. § 1915(b), the adoption placement preferences provision, 25 U.S.C. § 1915(a), and New Guidelines at §§ A.2, A.3, B.1, B.2, B.4, B.8, C.1, C.2, C.3, D.2, D.3, F.1, F.2, F.3,

F.4, violate the substantive due process rights of children with Indian ancestry, and those of adults involved in their care and upbringing who have an existing family-like relationship with the child. *See Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984); *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977); *In re Santos Y*, 92 Cal. App. 4th 1274, 1314–1317 (Cal. App. 2001); *In re Bridget R.*, 41 Cal. App. 4th 1483, 1503–1504 (Cal. App. 1996); *In re Jasmon O.*, 878 P.2d 1297, 1307 (Cal. 1994).

122. Any determination regarding removal of a child from home, active efforts, termination of parental rights, foster care placement, or adoption placement must take into account the child's best interests. The failure of ICWA as applied by the BIA Guidelines to adequately consider the child's best interests deprives the class of plaintiff children of liberty without due process of law in violation of the Fifth Amendment.

COUNT 3—VIOLATION OF THE SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

123. Plaintiffs reallege, adopt and incorporate by reference the preceding paragraphs as though fully set forth herein.

124. Defendant McKay, pursuant to his statutory duty to "[e]nsure the department's compliance

with the Indian child welfare act," A.R.S. § 8-453(A)(20), complies with and enforces provisions of the Indian Child Welfare Act in Arizona.

125. Defendant McKay complies with and enforces the active efforts provision, 25 U.S.C. § 1912(d), New Guidelines at §§ A.2, A.3, B.1, B.2, B.4, B.8, D.2, in Arizona.

126. Defendant McKay complies with and enforces the clear and convincing evidence burden of proof in foster care placements under ICWA, 25 U.S.C. § 1912(e), New Guidelines at § D.3, in Arizona.

127. Defendant McKay complies with and enforces the beyond a reasonable doubt burden of proof in termination of parental rights proceedings under ICWA, 25 U.S.C. § 1912(f), New Guidelines at § D.3, in Arizona.

128. Defendant McKay complies with and enforces the foster/preadoptive and adoptive placement preferences under ICWA, 25 U.S.C. § 1915(b), (a), New Guidelines at §§ F.1, F.2, F.3, F.4, A.R.S. §§ 8-105.01(B), 8-514(C), in Arizona.

129. Defendant McKay's compliance with and enforcement of these provisions subjects Plaintiffs to unequal treatment under color of state and federal law based solely on the race of the child and the adults involved and therefore deprives Plaintiffs of equal protection of the law under the Equal Protection Clause of the Fourteenth Amendment. *See* 42 U.S.C. § 1983.

130. Defendant McKay's compliance with and enforcement of the jurisdiction-transfer provision, active efforts provision, burden of proof in foster care placements provision, burden of proof in termination of parental rights proceedings provision, foster/preadoptive and adoptive placement preferences provisions under state law, ICWA, and New Guidelines, violate the substantive due process rights to be free from the use of race in child custody proceedings and to an individualized race-neutral determination in child custody proceedings of children with Indian ancestry, and those of adults involved in their care and upbringing who have an existing family-like relationship with the child. Defendant McKay's failure to adequately consider the child's best interests deprives the class of plaintiff children of liberty without due process of law in violation of the Fourteenth Amendment. *See* 42 U.S.C. § 1983.

COUNT 4—THE INDIAN CHILD WELFARE ACT EXCEEDS THE FEDERAL GOVERNMENT'S POWER UNDER THE INDIAN COMMERCE CLAUSE AND THE TENTH AMENDMENT.

131. Plaintiffs reallege, adopt and incorporate by reference the preceding paragraphs as though fully set forth herein.

132. ICWA exceeds the federal government's power under the Indian Commerce Clause and the Tenth Amendment. A child with Indian ancestry is not

an item of commerce, nor an instrumentality of commerce, nor tangible personal property the possession of which by federally-recognized Indian tribes promotes "Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). Nor is a federal law dealing with child custody proceedings "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id.*; *Rice v. Cayetano*, 528 U.S. 495 (2000). Indeed, the BIA and the Department of the Interior's position is that "ICWA and these regulations or any associated Federal guidelines do not apply to . . . [t]ribal court proceedings[.]" Notice of Proposed Rulemaking, Regulations for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 14880, 14887, § 23.103(e) (March 20, 2015); New Guidelines, 80 Fed. Reg. at A.3(e) (same). *See Adoptive Couple v. Baby Girl*, __ U.S. __, 133 S. Ct. 2552, 2566–2570 (2013) (Thomas, J., concurring).

133. Congress cannot commandeer state resources to achieve federal policy objectives or commandeer state officers to execute federal laws. *Printz v. United States*, 521 U.S. 898 (1997). ICWA impermissibly commandeers state courts and state agencies to act as investigative and adjudicatory arms of the federal government or Indian tribes. ICWA impermissibly commandeers state courts and state agencies to apply, enforce, and implement an unconstitutional federal law. *Dodds v. Richardson*, 614 F.3d 1185, 1195–1196 & n.3 (10th Cir. 2010); Ariz. Const. art. II, § 3.

134. Child custody proceedings and domestic relations matters are a "virtually exclusive province of

the States" under the Tenth Amendment upon which the federal government cannot intrude. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

135. ICWA displaces inherent state jurisdiction over specified child welfare, custody, and adoption proceedings and therefore violates the Tenth Amendment. *Adoptive Couple v. Baby Girl*, 133 S. Ct. at 2566 (Thomas, J., concurring).

COUNT 5—VIOLATION OF ASSOCIATIONAL FREEDOMS UNDER THE FIRST AMENDMENT

136. Plaintiffs reallege, adopt and incorporate by reference the preceding paragraphs as though fully set forth herein.

137. By virtue of ICWA, the tribes make the primary determination whether children with a specified blood quantum will be brought within their jurisdiction, custody, and control.

138. Many children who are subject to ICWA have few, if any, ties to the tribe upon which ICWA confers jurisdiction over them. Some but not all are members of the tribes but do not thereby consent to surrender their constitutional rights. Some are enrolled in the tribes as a result of the mandates of ICWA and the New Guidelines. Others are not members and have virtually no connection to the tribes other than a prescribed blood quantum. *See* New Guidelines, 80 Fed. Reg. at 10153, B.4(d)(3).

139. By operation of the provisions of ICWA and the New Guidelines challenged here, Plaintiff children like baby girl A.D. and baby boy C.R. are forced to associate with tribes and tribal communities and be subject to tribal jurisdiction often against their will and/or contrary to their best interests. *See id.* at 10150, A.2 (active efforts required to reunify an Indian child not only with the child's family but also with the child's tribe).

140. Under the active efforts provision, DCS is required to "take steps necessary to obtain membership for the child in the tribe that is designated as the Indian child's tribe." 80 Fed. Reg. at 10153, B.4(d)(iii). DCS, thus, forces children deemed Indian to associate with and become members of federally-recognized Indian tribes.

141. This forced association violates Plaintiffs' freedom of association, which encompasses the freedom not to associate under the First Amendment. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Knox v. Service Employees Int'l Union, Local 1000*, ___ U.S. ___, 132 S. Ct. 2277 (2012).

COUNT 6—UNLAWFUL AGENCY ACTION

142. Plaintiffs reallege, adopt and incorporate by reference the preceding paragraphs as though fully set forth herein.

143. Whereas ICWA's jurisdiction-transfer provision is available to transfer only foster care

placement and termination of parental rights proceedings to the jurisdiction of the tribe, 25 U.S.C. § 1911(b), the New Guidelines state, "The right to request a transfer is available at *any stage* of an Indian *child custody proceeding*, including during any period of emergency removal." 80 Fed. Reg. at 10156, C.1(c) (emphasis added). Further, the New Guidelines instruct state courts that they "must transfer" all child custody proceedings if the parent does not object to the transfer, the tribal court does not decline, and there is no good cause to deny transfer. New Guidelines, 80 Fed. Reg. 10156, C.2, C.3.

144. BIA's enlargement of the jurisdiction-transfer provision, 25 U.S.C. § 1911(b), New Guidelines at C.1, C.2, C.3, making the provision available during preadoptive placement and adoptive placement proceedings, clearly contradicts the statutory provision. *See* 25 U.S.C. § 1903(1) (definitions).

145. BIA overstepped its authority by extending, in the New Guidelines, the jurisdiction-transfer provision to all child custody proceedings. Such extension, which directly contradicts a Congress-enacted provision, harms children in cases where parental rights have been terminated. It gives tribes the "right to request a transfer," 80 Fed. Reg. at 10156, C.1(c), in cases where Congress expressly did not give tribes a right to request transfer.

146. Such agency action is unlawful, in excess of statutory authority, and not in accordance with law. 5 U.S.C. § 706; *see American Federation of Govt.*

Employees, AFL-CIO, Local 3669 v. Shinseki, 821 F. Supp. 2d 337 (D.D.C. 2011), *affirmed by*, 709 F.3d 29 (D.C. Cir. 2012).

COUNT 7—DAMAGES UNDER TITLE VI OF THE CIVIL RIGHTS ACT (42 U.S.C. §§ 2000d–2000d-7)

147. Plaintiffs reallege, adopt and incorporate by reference the preceding paragraphs as though fully set forth herein.

148. DCS is a state agency, of which Defendant McKay is Director. DCS receives federal financial assistance.

149. Defendant McKay has subjected and continues to subject Plaintiffs, and members of the class that Plaintiffs seek to represent, to *de jure* discrimination on the ground of the race, color, or national origin of the individuals involved.

150. For this *de jure* discriminatory treatment, Plaintiffs request that the court award nominal damages of $1 each to each of the named Plaintiffs and to each of the members of the class they seek to represent under Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000d–2000d-7.

REQUEST FOR RELIEF

Consequently, Plaintiffs respectfully request that the Court:

A. Certify the Plaintiff class as defined.

B. Declare that provisions of the Indian Child Welfare Act, specifically, 25 U.S.C. §§ 1911(b), 1912(d), 1912(e), 1912(f), 1915(a), 1915(b), and the New Guidelines, §§ A.2, A.3, B.1, B.2, B.4, B.8, C.1, C.2, C.3, D.2, D.3, F.1, F.2, F.3, F.4, violate the United States Constitution both facially and as applied to Plaintiffs and others similarly situated, violate federal civil rights statutes, 42 U.S.C. §§ 1981, 1983, and violate Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000d *et seq*.

C. Permanently enjoin Defendant Washburn and Defendant Jewell from enforcing these provisions of the Indian Child Welfare Act and the New Guidelines.

D. Permanently enjoin Defendant McKay from complying with and enforcing these unconstitutional provisions of the Indian Child Welfare Act, the New Guidelines, and state law.

E. Hold unlawful and set aside New Guidelines, §§ C.1, C.2, C.3 under 5 U.S.C. § 706.

F. Award nominal damages of $1 each to each of the named Plaintiffs and to each of the members of the class that they represent under 42 U.S.C. §§ 2000d–2000d-7.

G. Award Plaintiffs their reasonable attorneys' fees, litigation expenses and costs, pursuant to 28 U.S.C. § 2412 (Equal Access to Justice Act) and 42 U.S.C. § 1988 (Civil Rights Act), and other applicable law.

H. Grant such other relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED this 2nd day of *March,* 2016 by:

/s/ Aditya Dynar

Aditya Dynar (031583)
Scharf–Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE

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CERTIFICATE OF SERVICE

Document Electronically Filed and Served by ECF this *2nd* day of *March*, 2016.

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Courtesy Copy Mailed this *2nd* day of *March*, 2016 to:

Honorable Neil V. Wake
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Phoenix, AZ 85003-2154

/s/ Kris Schlott
Kris Schlott

Exhibit 1

CHILD WELFARE REPORTING REQUIREMENTS SEMI-ANNUAL REPORT

FOR THE PERIOD OF APRIL 1, 2015 THROUGH SEPTEMBER 30, 2015

ARIZONA REVISED STATUTES

[LAWS 2011, CHAPTER 147]

ARIZONA DEPARTMENT OF CHILD SAFETY

* * *

Children in Out-of-Home Care

The Department remains committed to working with the community to keep children safe and prevent the need for children to be removed from their homes. Notwithstanding this commitment, the number of children

in out-of-home care increased from 17,592 in the prior reporting period to 18,657 in September 2015.

The Department continues to make efforts to place children who have been removed from their home in the most family-like setting possible. In September 2015, 14,863 children—or approximately 80 percent of all children in out-of-home care—were placed with relatives, licensed foster parents, or trial home visit with a parent. Efforts to increase the number of licensed foster parents who are able to meet the needs of children requiring out-of-home placement resulted in 774 new homes being licensed during the reporting period.

As part of the strategic plan, the Department is striving to improve capacity to place children in family environments and fully meet the needs of children in care and their families. During this reporting period DCS was able to accomplish the following:

- Increased use of Placement Coordinators to identify available kinship placements upon removal;
- Expanded the use of software tools, e.g. Lexis Nexis, to find potential kinship placements;
- Established Fostering Inclusion Respect Support Trust Advisory (FIRST) Commission; and
- Established the Building Resilient Families program to deliver in-home prevention services in Maricopa County for low risk families who have been the subject of a DCS investigation.

The state requires monthly face-to-face visitation with children in foster care. The current report shows that 84.4 percent of the children in foster care received their visitation during the last month of the reporting period. There is a strong correlation between caseworker visits with children and positive outcomes for these children, such as achieving permanency and other indicators of child well-being. The Department continues to make efforts to improve our rate of visitation.

Permanency for Children

Arizona is a national leader in the number of finalized adoptions. The Department remains committed to work toward achieving permanency for children placed in out-of-home care as demonstrated by increasing the total number of children achieving permanency through adoption. This number increased by two percent, from 1,576 during this reporting period compared to 1,552 during the same reporting period last year.

The Department demonstrated a significant increase in the number of children safely reunified with their families. 3,102 children exited DCS custody to reunify with their parents or primary caretakers this reporting period compared to 2,636 during the last reporting period, which is an 18% increase.

* * *