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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

A.D. and C. by CAROL COUGHLIN CARTER, their next friend; S.H. and J.H., a married couple; M.C. and K.C., 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 BUREAU OF INDIAN AFFAIRS; SALLY JEWELL, in her official capacity as Secretary of Interior, U.S. DEPARTMENT OF THE INTERIOR; AND GREGORY MCKAY, in his official capacity as Director of the ARIZONA DEPARTMENT OF CHILD SAFETY,

Defendants.

No. 2:15-cv-01259-PHX-NVW

STATE DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

(Honorable Neil V. Wake)

Defendant Gregory McKay, in his official capacity as Director of the Arizona Department of Child Safety, ("State Defendant" or "DCS"), respectfully submits this Opposition to Plaintiffs' *Motion for Leave to file First Amended Complaint* ("Motion").

I

INTRODUCTION

Plaintiffs[1] bring this class action challenging the constitutionality of the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963, as it applies to the placement and adoption of foster children of Indian decent. The current Complaint [Doc. 1], as well as the proposed First Amended Complaint [Doc. 150-1] ("FAC"), seeks broad injunctive and declaratory relief that would supplant and interfere with on-going state dependency proceedings in Arizona juvenile courts.

In the current Complaint, as well as in Plaintiffs' proposed FAC, Plaintiffs' declare that their lawsuit challenges "legally sanctioned discrimination on the basis of race or ethnicity." [Doc. 1 at p. 2:3-4; and Doc. 150-1, at p. 2:3-4]. The six original Plaintiffs – two minors in the Arizona foster care system, and their four adult foster care providers – challenge the Indian Child Welfare Act (hereinafter "ICWA" or "the Act") as an unconstitutional race-based set of laws that purportedly violate the Equal Protection Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution, as well as a number of similar interrelated constitutional claims. Specifically, the Complaint and FAC challenge the Act's jurisdictional provisions, placement preferences, requirements for reunification efforts, and its burdens of proof.

As shown herein, in the Defendants' respective Motions to Dismiss [Docs. 68 and 70], as well as in the various Notices of Supplemental Authority filed by the parties, which are

[1] Currently, the only Plaintiffs are baby girl A.D., and her foster parents, S.H. and J.H. As this District Court has been made aware, the State Court found "good cause" to deviate from the preferential placement standards of ICWA, allowing that adoption to proceed. Accordingly, there is a dispute as to whether they are appropriate Plaintiffs in this class action. Upon information and belief, an Appeal has been filed in that State Court matter, but it is unknown whether a formal stay has been issued. Regardless, if the Appeal is denied or unsuccessful, these Plaintiffs may no longer be appropriate representatives of the class(es) to maintain this class action. As for Plaintiffs, baby boy C., now known as C.C., and his adoptive parents, M.C. and K.C., there is a dispute as to whether they are appropriate Plaintiffs after the successful adoption.

incorporated herein by reference, Plaintiffs' proposed FAC suffers from the same fatal flaws as those found in the original Complaint. These flaws are both jurisdictional as well as substantive; and these flaws cannot be cured through amendment.

In both the State Defendant's and Federal Defendants' respective Motions to Dismiss [Docs. 68 & 70], the Defendants showed that, in addition to other defects, Plaintiffs lacked standing because, among other reasons, none of them had actually suffered from the purportedly discriminatory laws. That is especially true considering that at the time the Complaint was filed none of the foster parents had been prevented by ICWA from adopting the minor children, nor had any of the Plaintiffs been forced to submit to tribal jurisdiction because of the jurisdictional provisions within ICWA. Similarly, the Defendants cited case law prescribing that this Court should abstain from interfering with on-going state court matters under the *Younger* abstention doctrine, because the state courts were the proper courts to hear Plaintiffs' claims and were adequate to the task.

These points have proven prophetic. Specifically, subsequent to the briefing on the Motions to Dismiss, M.C. and K.C.'s adoption of baby boy C was granted (despite Plaintiffs' conjecture that it "might" be prevented by ICWA), and a jurisdiction transfer request filed by the Gila River Indian Community in baby girl A.D.'s case was denied by the state juvenile court upon a showing of good cause, making it likely that an adoption of baby girl A.D. by S.H. and J.H will occur in short order. [*See* Doc 150-2 at p. 4, ¶ 10, and p. 7, ¶ 23]

In the proposed FAC, Plaintiffs' seek to add two additional minor children (L.G. and C.R.), and their two adult foster care providers (P.R. and K.R.). Similar to the allegations of the original Plaintiffs, these newly proposed plaintiffs assert that ICWA might eventually prevent P.R. and K.R. from adopting L.G. and C.R. Plaintiffs also seek to add a claim for nominal damages. Further, Plaintiffs' seek to add an additional next friend, Dr. Ronald Federici, despite the fact that the FAC makes clear that he has absolutely no relationship or connection with the children he seeks to represent. [*See* Doc. 150-2 at p. 4, ¶ 14]

II

GRANTING LEAVE TO AMEND WOULD BE FUTILE

The "general rule that parties are allowed to amend their pleadings ... does not extend to cases in which any amendment would be an exercise in futility or where the amended complaint would also be subject to dismissal." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir.1998) (citations omitted). Futility alone can justify a court's refusal to grant leave to amend. *See, e.g., Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir.1995).

A. **The Original Plaintiffs and Proposed Plaintiffs All Lack Standing.**

1. The Original Plaintiffs Lack Standing Depriving This Court of Jurisdiction.

As detailed in the Defendants' respective Motions to Dismiss, the original Plaintiffs lacked standing at the time the original Complaint was filed as far back as July 6, 2015. Their claims were not ripe because, among other reasons stressed in the Motions to Dismiss [Docs. 68 & 70], the harm complained of was speculative, hypothetical, and not certain to ever occur. These are jurisdictional defects that prevent the case from proceeding. In the interests of efficiency and judicial economy, State Defendant will not repeat all of those points here, but instead will incorporate by reference those pertinent portions of the existing record.[2]

2. The Proposed Plaintiffs Lack Standing.

Even if the Court were willing to overlook the jurisdictional deficiency associated with the original Plaintiffs' lack of standing, the proposed class representatives suffer from the same lack of standing and unripe claims. Like the original Plaintiffs, the claims of the proposed Plaintiffs K.R., P.R., L.G. and C.R. are based on speculation and conjecture about what might happen in the future under the auspices of ICWA. For all of the same reasons detailed in the

[2] *See* State Defendant's Motion to Dismiss [Doc. 70] at Sections IV and V, pp. 25-30. *See also* Federal Defendants' Motion to Dismiss [Doc. 68] at Sections I and II, pp. 6-17.

Defendants' respective Motions to Dismiss, these proposed Plaintiffs would similarly lack standing to assert any of the claims in the proposed Amended Complaint.[3]

That is especially true of proposed Plaintiff, L.G., who is described as having "more that 50% non-Indian blood," but "not eligible for membership in the Pasqua Yaqui Tribe of Arizona." [Doc. 150-1, ¶11.] Accordingly, L.G. is not eligible for the protections afforded by ICWA which requires an "Indian child" to, among other things, be "eligible for membership in an Indian tribe …" 25 U.S.C. § 1903(4). By the allegations in the proposed FAC, L.G. is not an appropriate Plaintiff.

3. The Proposed Next Friend Lacks Standing

Similarly, the newly proposed next friend, Dr. Federici, lacks any "substantial relationship" with the minors, which is required in this Circuit to appear as a next friend, and therefore he lacks standing for the same reasons as the original next friend, Carol Coughlin Carter. Both Carol Coughlin Carter and Dr. Federici are ideological advocates with absolutely no connection to the minors they seek to represent. Accordingly, they are both unable to adequately assure this Court that it is in the children's best interests to participate as plaintiffs in this action.

Fed.R.Civ.P. 17(c)(2) provides, in pertinent part, that, "a minor … who does not have a duly appointed representative may sue by a next friend …" The "availability of next friend standing as an avenue into federal court is strictly limited." *Hamdi v. Rumsfeld*, 294 F3d 598, 603 (4th Cir. 2002) *(Hamdi I)*. "'[N]ext friend' standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another." *Whitmore v. Arkansas*, 495 U.S. 149, 163, 110 S.Ct. 1717, 109 L.Ed. 135 (1990).

It is the putative next friend's burden to present "meaningful evidence" showing (1) "an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why

[3] *See* State Defendant's Motion to Dismiss [Doc. 70] at Sections IV and V, pp. 25-30. *See also* Federal Defendants' Motion to Dismiss [Doc. 68] at Sections I and II, pp. 6-17.

the real party in interest cannot appear on his own behalf to prosecute the action," and (2) dedication "to the best interests of the person on whose behalf he seeks to litigate." *Whitmore*, 495 U.S. at 163. Further, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and have some significant relationship with the real party in interest. *Id*., at 163-164. The burden is on the "next friend" to clearly establish the propriety of his status and thereby justify the jurisdiction of the court. *Id*., at 164.

To establish standing, and of central importance here, "a 'next friend' must have some significant relationship with the real party in interest." *Whitmore,* 495 U.S. at 164; *see also, Coalition of Clergy, Lawyers, and Professors, et al, v. Bush, et al.,* 310 F.3d 1153, 1161-1162, 5 A.L.R. Fed. 2d 723 (2002). The existence of a significant relationship helps ensure that the next friend has a personal stake in the controversy and be fully dedicated to serving the minor's interests. *Coalition of Clergy,* 310 F.3d at 1161-1162; *Hamdi I,* 294 F.3d at 604-606; *Massie ex rel. Kroll v. Woodford,* 244 F.3d 1192, 1194 (9th Cir.2001) (the two-pronged *Whitmore* inquiry requires the next friend to have some significant relationship with, and be truly dedicated to the best interests of, the petitioner).

The requirement of a significant relationship is connected to a value of great constitutional moment, because it prevents a "litigant asserting only a generalized interest in constitutional governance [from] circumvent[ing] the jurisdictional limits of Art. III simply by assuming the mantle of 'next friend.'" *Whitmore,* 495 U.S. at 164. It offends the policy behind the requirement of standing, which is to confine the right to initiate and control federal court litigation to persons who have a concrete stake, rather than merely an ideological interest—passionate and motivating as such interests can be—in the litigation. *Ibid.*

Without such a limitation, not only would the federal courts be flooded by "cause" suits, but people who did have concrete stakes in a litigation would often be thrust aside by the ideologues. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473, 102 S.Ct. 752, 759, 70 L.Ed.2d 700 (1982). Otherwise, "however

worthy and high minded the motives of 'next friends' may be, they inevitably run the risk of making the [real party in interest] a pawn to be manipulated on a chessboard larger than his own case." *Coal. of Clergy*, 310 F.3d at 1161, citing *Lenhard v. Wolff,* 443 U.S. 1306, 1312, 100 S.Ct. 3, 61 L.Ed.2d 885 (1979) (Rehnquist, Circuit Justice).

"The proper rule is that the next friend must be an appropriate alter ego for a plaintiff who is not able to litigate in his own right; that ordinarily the eligibles will be confined to the plaintiff's parents, older siblings (if there are no parents), or a conservator or other guardian, akin to a trustee; *that persons having only an ideological stake in the child's case are never eligible*; but that if a close relative is unavailable and the child has no conflict-free general representative the court may appoint a personal friend of the plaintiff or his family, a professional who has worked with the child, or, in desperate circumstances, a stranger whom the court finds to be especially suitable to represent the child's interests in the litigation." (Italics added). *See T.W. by Enk v. Brophy*, 124 F.3d 893, 897-898 (7th Cir. 1997), citing *In re Cockrum*, 867 F.Supp. 494 (E.D.Tex.1994); *Davis v. Austin*, 492 F.Supp. 273, 275 (N.D.Ga.1980) (cited with approval in the *Whitmore* case, 495 U.S. at 164, 110 S.Ct. at 1727).

As evidenced in both the original Complaint and the proposed FAC, both Carol Coughlin Carter and Dr. Federici lack any relationship with the minor plaintiffs whatsoever, let alone one which could be characterized under any reading of the facts as "significant." Further, they only have "an ideological stake in the child's case," and therefore cannot be eligible. *See T.W. by Enk*, 24 F.3d at 897-898; *Coal. of Clergy*, 310 F.3d at 1161. Accordingly, neither of the named Next Friends has standing to maintain this action on behalf of the minor plaintiffs.

4. The Fatal Defects to Standing Cannot Be Remedied.

Even if Plaintiffs' attorneys were able to identify new class representatives who had more than just hypothetical claims – which they have still failed to do in their proposed FAC – binding precedent makes clear that this case must be dismissed because of this jurisdictional flaw, and cannot be cured with replacement class representatives.

The U.S. Supreme Court and the Ninth Circuit have made clear that when the named plaintiff in a class action lacks standing, the class action cannot go forward with a substitute representative because the court never had jurisdiction. *See Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022-23 (9th Cir. 2003) (citing *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)).

As mentioned above, baby boy C's adoption by M.C. and K.C. has been approved, and the state juvenile court has rejected a motion to transfer to tribal court in baby girl A.D.'s case, indicating her adoption by S.H. and J.H. seems likely to occur soon. Accordingly, Plaintiffs' attorneys are left without a proper class representative.

Because standing is a jurisdictional issue, which cannot be remedied by amendment, this case cannot proceed even if Plaintiffs' attorneys were to finally identify a proper class representative with genuinely ripe claims.

5. The Claims in the Proposed FAC are Fatally Based on an Erroneous and Unsupportable Assertion.

Plaintiffs' Equal Protection claims, in both the original Complaint and the proposed FAC, rest on the assertion that ICWA discriminates based on race. But over the past half century, numerous cases and countless courts – including this district, the Ninth Circuit, and the United States Supreme Court – have held exactly the opposite. State Defendant incorporates by reference the pertinent portions of the existing record on these issues.[4]

Because ICWA's distinctions are based on political affiliation, not race, Plaintiffs' Equal Protection claims fail, and their attempts to draw a parallel with racial discrimination jurisprudence is misplaced and misleading. Similarly, Plaintiffs other constitutional claims suffer from similar fatal flaws, as fully detailed in the Motions to Dismiss.[5] The proposed FAC

[4] *See* Federal Defendants' Motion to Dismiss (Doc. 68) at Section IV, pp. 20-26. *See also* State Defendant's Motion to Dismiss (Doc. 70) at Section II.A., pp. 17-21.

[5] *See* State Defendant's Motion to Dismiss (Doc. 70) at Section III, pp. 22-24. *See also* Federal Defendants' Motion to Dismiss (Doc. 68) at Sections IV and V, pp. 20-34.

does nothing to address these flaws. In fact, Plaintiffs have simply copied and pasted these flaws verbatim from the original Complaint into the FAC, and have done nothing more than add a claim for nominal damages. Accordingly, because amendment does nothing to remedy these issues – which can and should be decided at the motion to dismiss phase as pure questions of law – amendment would be futile.

III

AMENDMENT SHOULD BE DENIED BASED ON *YOUNGER* ABSTENTION

As with the original Complaint, Plaintiffs' proposed FAC suffers from the same frailties which support dismissal pursuant to the *Younger* abstention doctrine, and for the same reasons, this Court should refuse to grant Plaintiffs leave to amend or to continue this suit any longer. State Defendant incorporates by reference the pertinent portions of the existing record on these issues.[6]

As thoroughly detailed in the Defendants' respective Motions to Dismiss, Plaintiffs lawsuit requests that this federal court intervene in on-going state court matters. Doing so would be inappropriate and a violation of the principles of federalism. As demonstrated by the recent denial of the motion to transfer venue in baby girl A.D.'s case, the state court is a more than adequate venue for Plaintiffs to pursue their claims. Accordingly, this Court should deny Plaintiffs' request for leave to amend, and should deny any further attempts to continue this case any longer.

VI

CONCLUSION

For the foregoing reasons, and for the reasons stated in the State Defendant's Motion to Dismiss, as well as the reasons stated in the Federal Defendants' Motion to Dismiss, the State

[6] *See* State Defendant's Motion to Dismiss [Doc. 70] at Section I, pp. 10-16. *See also* Federal Defendants' Motion to Dismiss [Doc. 68] at Section III, pp. 18-19.

Defendant respectfully requests that Plaintiffs' Motion for Leave to File First Amended Complaint [Doc. 150] be denied.

RESPECTFULLY SUBMITTED this 21st day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2016, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of an Electronic Filing to the following CM/ECF registrants:

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