Case No. 17-15839

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A.D. C.C., L.G., and C.R., by
CAROL COGHLAN CARTER, and
DR. RONALD FEDERICI, et al.,

vs.

KEVIN WASHBURN, (in his official capacity as Assistant Secretary of Indian Affairs, BUREAU OF INDIAN AFFAIRS), et al.

APPELLANTS' OPENING BRIEF

Appeal from the United States District Court for the District of Arizona
Case No. 2:15-CV-1259-PHX-NVW, Hon. Neil Wake, presiding

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Introduction

This lawsuit seeks exemplary damages and equitable relief for *de jure* racial discrimination by state agencies pursuant to the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901, *et seq.*, a federal law that establishes separate and substandard rules for child welfare cases, foster care, and adoption proceedings, that involve children of Native American ethnicity. Six decades after *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), such "inherently unequal" discriminatory treatment has no place in this country, and Plaintiffs brought suit on behalf of themselves and a class of similarly-situated individuals seeking damages for past enforcement, declaratory relief, and an injunction against future enforcement of ICWA. The District Court, however, concluded that the Plaintiffs lack Article III standing for various reasons. Plaintiffs seek reversal.

The standing questions at issue in this case boil down to one essential point: "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." *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The Plaintiffs have been—and the proposed class are going to be—deprived of their right to equal treatment before the law. That is why they have standing. The District Court erroneously concluded that they lacked standing because, one way or the other, they had not been

deprived of benefits as a consequence of ICWA's unequal standards. That was in error, and should be reversed.

Statement of Jurisdiction

The District of Arizona had subject matter jurisdiction under 28 U.S.C. § 1331. The District Court dismissed Plaintiffs-Appellants' first amended complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) on March 16, 2017. *See* Excerpt of Record ("ER") 006. Plaintiffs-Appellants filed a timely notice of appeal on April 24, 2017. *See* Fed. R. App. P. 3(a), 4(a)(1)(B); ER.001. This Court has jurisdiction under 28 U.S.C. § 1291.

Statement of Issues Presented

Do Plaintiffs, who, on behalf of themselves and a class of similarly-situated individuals, allege that they have suffered concrete and particularized injuries from being subjected to a different set of procedural and substantive law based on their race, color or national origin, have standing to sue?

Pertinent Legal Provisions

The pertinent legal provisions, U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause); U.S. CONST. amends. I, V, X, XIV, § 1; 25 U.S.C. §§ 1901, 1902, 1903, 1911, 1912, and 1915; and Ariz. Rev. Stat. ("A.R.S.") §§ 8-453(A)(20), 8-105.01, 8-514(B)–(C), are reproduced in relevant part in the Addendum at pgs. 49–60.

Statement of the Case

The Plaintiffs here are baby girl A.D., baby boy C.C., baby girl L.G., and baby boy C.R., by their next friends Carol Coghlan Carter and Dr. Ronald Federici—as well as S.H. and J.H. (adoptive parents of A.D.),[1] M.C. and K.C. (adoptive parents of C.C.)[2] and P.R. and K.R. (adoptive parents of L.G. and C.R.).[3] Am. Compl. ¶ 4, ER.027–28. They brought this action "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." *Id.* at ¶ 50.[4]

They challenged six provisions of ICWA[5] and relevant Arizona statutes[6] as unconstitutional discrimination based on the race, color, or national origin of the children, parents, and class members.[7] In Count 1, they alleged that the six ICWA

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[1] S.H. and J.H. adopted A.D. in August 2017, i.e. after appeal was taken to this Court.

[2] M.C. and K.C. adopted C.C. in November 2015, i.e. before the first amended complaint was filed.

[3] P.R. and K.R. adopted L.G. and C.R. in November 2016, i.e. after the first amended complaint was filed.

[4] A.D., C.C., L.G., and C.R. are collectively referred to as "children Plaintiffs." S.H., J.H., M.C., K.C., K.R., P.R. are collectively referred to as "parent Plaintiffs."

[5] 25 U.S.C. §§ 1911(b), 1912(d), 1912(e), 1912(f), 1915(a), and 1915(b).

[6] A.R.S. §§ 8-453(A)(20), 8-105.01(B), 8-514(C).

[7] Plaintiffs had also challenged certain provisions of the Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146 (Feb. 25, 2015) ("2015 Guidelines"), namely, §§ A.2, A.3, B.1, B.2, B.4, B.8, C.1,

provisions violate the Fifth Amendment's Equal Protection guaranty. Am. Compl. ¶¶ 110–117, ER.051–52. In Count 2, they alleged that ICWA Section 1911(b) violates the due process guaranty of the Fifth Amendment because it purports to grant tribal courts personal jurisdiction over parties who lack minimum contacts with the forum. Am. Compl. ¶¶ 118–120, ER.52–53. Plaintiffs also alleged in Count 2 that the six ICWA provisions deprive them of liberty without due process of law in violation of the Fifth Amendment. Am. Compl. ¶¶ 121–122, ER.053–54. In Count 3, they alleged that the six provisions of ICWA and the relevant Arizona statutes violate the First Amendment, and Equal Protection and Due Process Clauses of the Fourteenth Amendment. Am. Compl. ¶¶ 123–130, ER.054–55. In Count 4, they alleged that all six ICWA provisions exceed the federal government's power under the Indian Commerce Clause and the Tenth Amendment, and unconstitutionally commandeer state resources to execute federal laws. Am. Compl. ¶¶ 131–135, ER.055–56. In Count 5, Plaintiffs alleged that the six ICWA provisions and relevant state

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C.2, C.3, D.2, D.3, F.1, F.2, F.3, F.4., issued by the Bureau of Indian Affairs ("BIA"). In June 2016, however, the BIA issued new regulations, 81 Fed. Reg. 38,778 (Jun 14, 2016) ("2016 Regulations"), and in December 2016, it issued new Guidelines ("2016 Guidelines"), https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf. Plaintiffs' amended complaint did not challenge the 2016 Regulations or the 2016 Guidelines. Because the 2016 Regulations and 2016 Guidelines replaced the 2015 Guidelines, and Plaintiffs' amended complaint did not challenge the 2016 Regulations or Guidelines, Plaintiffs no longer challenge the 2015 Guidelines. *See also* ER.009. Also, Plaintiffs concede the dismissal of their challenge to the Foster Care Burden Provision, 25 U.S.C. § 1912(e). *See* Am. Compl. ¶¶ 91–95, ER.046.

statutes violate Plaintiffs' associational freedoms under the First Amendment. Am. Compl. ¶¶ 136–141, ER.056–57. Finally, in Count 7,[8] Plaintiffs sought an award of nominal damages under Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000d–2000d-7. Am. Compl. ¶¶ 147–150, ER.058.

Defendants and Intervenor-Defendants moved to dismiss, Docs. 178, 179, 217, 218, and the District Court received several amicus curiae briefs. *See* ER.006–7. The District Court then granted the motions to dismiss on grounds of lack of standing. ER.024–25.[9]

Summary of Argument

Plaintiffs have alleged concrete, particularized injuries: they have suffered by being subject to laws that establish a separate-and-substandard legal regime that treats them differently than others solely on the basis of their race, color, or national origin. The class they seek to represent has suffered and will in the future suffer the same type of injury, unless relief is granted. These injuries are redressable under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, and Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000d–2000d-7. Plaintiffs thus have Article III standing because

[8] Plaintiffs no longer maintain their challenge to Sections C.1, C.2, and C.3 of the 2015 Guidelines, in Count 6 as unlawful agency action, in excess of statutory authority, and not in accordance with law under 5 U.S.C. § 706. Am. Compl. ¶¶ 142–146, ER.057–58.

[9] The complaint was dismissed before certifying the class under Fed. R. Civ. P. 23.

their injuries are not hypothetical or conjectural; they are fairly traceable to the challenged statutes and the actions of Defendants and Intervenor-Defendants, and can be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Argument

I. Standard of Review.

This Court reviews *de novo* a district court's decision to grant a motion to dismiss. *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 955 (9th Cir. 2011). This Court "accept[s] all factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). This Court must reverse unless the plaintiffs' complaint fails to "'state a claim to relief that is plausible on its face.'" *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

II. Statutory Framework and Plaintiffs' Injuries.

A. Structure of this Brief

To understand the nature of the claims and the Plaintiffs' injuries, it is important to understand the statutory framework that Plaintiffs challenge. This section will therefore describe each challenged provision of ICWA and associated statutes, and explain how the Plaintiffs have been injured by each one, before proceeding in

Part III with an explanation of why Plaintiffs have standing to seek retrospective relief and declaratory relief, why the claims are not moot, and why the standing inquiry with regard to the purported class's injunctive relief claims should be postponed until after further findings are made on remand.

B. "Indian Children"

Once a child is classified as an "Indian child" under 25 U.S.C. § 1903(4), that child's "child custody proceeding," *id*. § 1903(1), is *subject to* ICWA. That is to say, ICWA's mandates—which include evidentiary standards for deciding certain types of actions, placement preferences that dictate what foster or adoptive homes children are placed in, jurisdictional provisions that give tribal governments special privileges in legal proceedings involving Indian children, and more—all supersede the ordinary state law that would govern the matter if the case involved a child of any other ethnicity.

ICWA defines an "Indian child" as a child who is either a tribal member or *eligible* for membership in a tribe and who has a tribal member parent. Eligibility, in turn, is defined by tribal law—and virtually all tribes, including the Gila River Indian Community ("GRIC") and Navajo Nation, intervenors here, define membership by *genetics*.[10] Political, cultural, social, or religious affiliation play *no role* in

[10] The California Supreme Court has rightly emphasized the difference between "[tribal] membership, which is a tribe's determination based on tribal law, [and] a child's status as an Indian child, which is a conclusion of federal and state law based

the definition of "Indian child." Nor does residency or domicile on a reservation. DNA is *all* that matters. No degree of political or cultural affiliation will make a child eligible for membership if she lacks the required genes, and a child who has the requisite genes is not made *ineligible* due to lack of political or cultural affiliation. Not even legal adoption can qualify a child as "Indian" under ICWA, if the child lacks the proper DNA, because ICWA requires that the child be the "*biological* child" of a tribal member. 25 U.S.C. § 1903(4) (emphasis added).

What matters is *genetics*. Political affiliation does not count. The Navajo Nation Code § 701, for example, requires members to have "at least one-fourth degree Navajo blood."[11] Nor are tribal relationships determinative. The GRIC Constitution, art. III, § 1(b), for example, defines the qualifications for membership: children of members are eligible "if they are of at least one-fourth Indian blood."[12] Note: not GRIC blood, but "Indian" blood. What counts is not tribal descent, but generic "Indian" ancestry. Other tribal constitutions, like that of the Cherokee Nation, limit membership to direct biological descendants of signers of the Dawes Rolls. Cherokee Nation Const. art. IV, § 1.[13] No political, cultural, social, or religious affiliation

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on the tribe's determination," and which must satisfy constitutional standards. *In re Abbigail A.*, 1 Cal. Rptr. 3d 760, 768 (2016) (citations omitted). This case involves the latter.

[11] http://www.navajonationcouncil.org/Navajo%20Nation%20Codes/V0010.pdf.

[12] http://thorpe.ou.edu/IRA/gilacons.html.

[13] http://www.cherokee.org/Portals/0/Documents/2011/4/308011999-2003-CN-CONSTITUTION.pdf

is required to make a child eligible for membership in these tribes, thus subjecting them to ICWA.[14]

Thus, s*olely as a result* of their racial profile, the children Plaintiffs—who are, after all, citizens of the United States, entitled to "the protection of equal laws," *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)—are subjected to different rules, both procedural and substantive, than would apply to their white, black, Hispanic, or Asian peers—rules that put them "at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013). If separate is "inherently unequal," *Brown*, 347 U.S. at 495, that discriminatory treatment cannot be tolerated.

Because ICWA is triggered by biological ancestry, such classification is by definition "directed towards a 'racial' group consisting of 'Indians,'" *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974), and does not qualify as a "political" classification. *Cf. Malabed v. North Slope Borough*, 335 F.3d 864, 868 n.5 (9th Cir. 2003) (*Mancari* does not save provisions whose underlying purpose is racial); *see also Rice v. Cayetano*, 528 U.S. 495, 515 (2000) ("singl[ing] out 'identifiable classes of persons … solely because of their ancestry or ethnic characteristics'" is the definition of a race-based category that is strictly scrutinized) (citation omitted). But

[14] Federal law requires that tribes use "descen[t] from a historical Indian tribe" as a condition of membership. 25 C.F.R. § 83.11(e).

even if tribal membership were the determinative factor in this differential treatment, that would still qualify as a *national-origin*-based classification, *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1120 (9th Cir. 1998), which is just as "suspect," and as strictly scrutinized, as racial classifications. *Jana-Rock Constr., Inc. v. New York State Dep't of Econ. Dev.*, 438 F.3d 195, 204–05 (2d Cir. 2006).

The parent Plaintiffs are likewise treated differently on the basis of race, because of ICWA. Because they are the foster, preadoptive, or adoptive parents of children classified as Indian children, they are placed in the same ICWA penalty box. Obviously, the same provisions of ICWA challenged here are applicable in the child custody proceedings involving these children and parents. Additionally, parent Plaintiffs are uniquely injured under the placement preferences provisions, because those provisions expressly exclude non-Indian, *i.e.*, non-racially-matched, individuals from being considered as placements for Indian children. 25 U.S.C. §§ 1915(a), (b); A.R.S. § 8-514(C).

Let us look at the challenged ICWA provisions and relevant state statutes in turn, and how the Plaintiffs have been injured.

C. The Jurisdiction-Transfer Provision, 25 U.S.C. § 1911(b)

A.D., S.H., and J.H. were subjected to the jurisdiction-transfer provision in a case in Arizona state court, Am. Compl. ¶ 23, ER.032, and ultimately won that case in the state Supreme Court. *GRIC v. Department of Child Safety*, 395 P.3d 286 (Ariz. 2017). But that result is not the gravamen of their complaint. Instead, their grievance is threefold:

(1) there is a *separate* jurisdiction-transfer provision that applied to them *based on their race or national origin*, which differs from the race- and national-origin-neutral jurisdiction-transfer provision that already exists in the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") adopted by Arizona (A.R.S. §§ 25-1032, 25-1037). Plaintiffs were subjected not to the UCCJEA but to ICWA, based solely on race;

(2) ICWA's jurisdiction-transfer provision allocated personal jurisdiction over A.D., S.H., and J.H., based not on the "minimum contacts" element that due process requires, but solely on the basis of their race or national origin. That is, ICWA includes provisions that enable tribal courts to exercise personal jurisdiction over parties who have *no contacts whatsoever* with the tribe except the DNA in their blood; and

(3) such unequal treatment violates the First, Fifth, Tenth, and Fourteenth Amendments to the U.S. Constitution, and Title VI of the Civil Rights Act. Am. Compl. ¶¶ 72–77, 110–141, 147–150, ER.041–43, 051–58.

The difference between the UCCJEA and ICWA's jurisdiction-transfer provision is significant. Under the UCCJEA, Arizona courts have "exclusive, continuing jurisdiction" as long as either of the following is true: (1) "significant connection" with Arizona and "substantial evidence is … available" in Arizona, or (2) the child, the child's parents or any other person acting as a parent (like the foster or preadoptive parents here) "presently reside" in Arizona. A.R.S. § 25-1032(A).

Under that standard, Arizona courts would unquestionably have had jurisdiction over all child custody proceedings concerning A.D. if she were not racially to be classified as Indian. She was born in Arizona and has continuously resided there (not on a reservation); S.H. and J.H. are Arizona citizens; the Arizona Department of Child Safety had legal custody of A.D. Am. Compl. ¶ 23, ER.032; *GRIC*, 395 P.3d at 288. All individuals involved have a significant connection to Arizona, and all evidence regarding the care, protection, training and personal relationships is available in Arizona.

But because A.D. is an "Indian child," Section 1911(b) of ICWA's different standards applied. That section provides that in a "foster care placement" or "termination of parental rights" proceeding involving an "Indian child not domiciled or

residing within the reservation," the state court "*shall* transfer" the proceeding to tribal court if: (1) no parent objects, (2) if either parent or the tribe petitions for transfer, (3) the tribal court accepts the case, and (4) there is no "good cause" to deny transfer.

Thus the two rules are different—and the difference is racial. Arizona's UCCJEA provision (A.R.S. § 25-1032) is race- and national-origin-neutral. It involves such factors as significant connection, availability of evidence, in-state residence or domicil, all of which are consistent with the "minimum contacts" requirement of due process. *See International Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 319 (1945). Due Process "does not contemplate" that any court "may make binding a judgment *in personam* against an individual or corporate defendant with which the [sovereign] has no contacts, ties, or relations." *Id.* at 319.[15] Arizona courts could not exercise jurisdiction over, say, a personal injury case resulting from a Nevada car accident between two California residents, just because one of them happens to have a grandparent who lived in Arizona. Nor could Arizona seek to transfer such a case into its courts based solely on the genetic ancestry of the parties.

[15] The minimum contacts rule also applies to tribal courts. *See Red Fox v. Hettich*, 494 N.W.2d 638, 645 (S.D. 1993).

Yet that is just what ICWA Section 1911(b) does. Neither A.D., S.H., nor J.H. have ever been domiciled on, or residents of, GRIC's reservation, nor have they directed contacts to the tribal forum sufficient to entitle the GRIC courts to render any binding judgment regarding them. The *sole* basis for GRIC's assertion of jurisdiction and its invocation of § 1911(b) was A.D.'s biological ethnicity—her eligibility for membership based on her having at least 25 percent "Indian blood." GRIC Const. art. III, § 1(b). On that ground, GRIC sought to use ICWA Section 1911(b), which purports to give its courts *worldwide* personal jurisdiction over cases involving children who satisfy its genetic requirements. In short, ICWA Section 1911(b) uses racial ancestry as the basis for "general or all-purpose jurisdiction" over A.D., or specific personal jurisdiction over S.H. and J.H., which is unconstitutional. *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014).

"[O]n so unsupportable a basis as … racial classifications," *Loving v. Virginia*, 388 U.S. 1, 12 (1967), and "an immutable characteristic determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), GRIC sought to send A.D.'s case to a tribal court where she would be deprived of the structural and substantive protections of the United States and Arizona Constitutions—and ICWA was the basis for that effort.

This is not a minor matter of the location of a court. Tribal courts are not bound by the Constitution. *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016);

Duro v. Reina, 495 U.S. 676, 693 (1990). Nor is there any way for civil litigants to obtain federal redress for violations of the Indian Civil Rights Act ("ICRA"), or other federal rights because there is no direct review of tribal court decisions in federal court. *United States v. Lara*, 541 U.S. 193, 208–09 (2004) (ICRA places fewer restrictions on tribal courts than the Due Process Clause imposes on state and federal courts); *Alvarez v. Tracy*, 773 F.3d 1011, 1022 (9th Cir. 2014) (same). There is no private right of action to enforce ICRA against a tribe. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 52 (1978). Federal habeas review of tribal court judgments is extremely limited, 25 U.S.C. § 1303, and is not available to challenge a tribal court order in a child custody matter such as this one. *Weatherwax ex rel. Carlson v. Fairbanks*, 619 F. Supp. 294, 296 (D. Mont. 1985). Nor does the federal removal statute, 28 U.S.C. § 1441, permit removing tribal court cases to federal court. To top it all, ICWA is not even applicable in tribal courts. 25 C.F.R. § 23.103(b)(1). In short, *none* of the substantive and procedural protections of the state and federal constitutions available to litigants in state or federal court would be available in tribal court.

The jurisdiction transfer GRIC sought under ICWA Section 1911(b) would therefore have deprived A.D., S.H., and J.H. of critical constitutional and statutory protections. But Congress has no authority to force U.S. citizens like A.D., S.H., and J.H., to undergo legal proceedings in a foreign jurisdiction that lacks such protections. *Reid v. Covert*, 354 U.S. 1, 5–6, 16 (1957). Subjecting them "to a sovereignty

outside the basic structure" of our Constitution "is a serious step" that the Supreme Court has never allowed in the off-reservation context. *Lara*, 541 U.S. at 212 (Kennedy, J., concurring).

A.D., S.H., and J.H. were forced to undergo expensive and time-consuming legal proceedings to prevent the case from being transferred to tribal court pursuant to ICWA. Thus, they suffered a cognizable legal injury.

Yet the District Court found that they lacked standing on the grounds that they were not injured by Section 1911(b), but instead by GRIC's actions. ER.015–16. It concluded that GRIC "did not seek to enforce § 1911(b), but rather it sought a transfer of jurisdiction not authorized by § 1911(b)," and consequently that the injury stated in the Amended Complaint was not fairly traceable to ICWA. ER.015. But GRIC plainly invoked Section 1911(b) as its basis for taking the actions that injured A.D., S.H., and J.H., and forcing them to go all the way to the Arizona Supreme Court to defend their rights. *See GRIC*, 395 P.3d 286. Only in retrospect—after the rulings by the state's highest court—could it be definitively stated that GRIC's actions were legally incorrect. That A.D., S.H., and J.H. finally prevailed in state court is immaterial, because the injury they complain of is *that they were forced by Defendants, acting pursuant to ICWA, to go through those lengthy and expensive proceedings*.

D. The Active-Efforts Provision, 25 U.S.C. § 1912(d)

C.C., M.C., and K.C. were subjected to ICWA's active-efforts provision, Am. Compl. ¶¶ 26–27, ER.032–33, before the adoption of C.C. could be finalized. Ultimately, C.C., M.C., and K.C. were able to obtain legal recognition for their family by adoption, and for that reason, the District Court found that CC., M.C., and K.C. lacked standing. But to understand why that was in error, it is important to understand ICWA's "active efforts" provision, and how it differs from the "reasonable efforts" requirement that applies to non-Indian children.

1. Arizona law, like the laws in most states, and like the federal Adoption and Safe Families Act ("ASFA"), requires state child protection officers to undertake "reasonable efforts" to "preserve and reunify families" before seeking to terminate parental rights. 42 U.S.C. § 671(a)(15); A.R.S. § 8-522(E)(3). These "reasonable efforts" are *not* required, though, when "aggravated circumstances" are present. 42 U.S.C. § 671(a)(15)(D).

ICWA, by contrast, requires "*active* efforts," and although it does not define that term, most courts have held that it means something *more* than reasonable efforts. *See, e.g.*, *In re J.S.*, 177 P.3d 590, 593 ¶ 14 (Okla. App. 2008); *In re K.C.J.*, 207 P.3d 423, 425 (Or. App. 2009); *In re C.D.*, 200 P.3d 194, 205 ¶ 29 (Utah App.

2008). Furthermore, ICWA's "active efforts" requirement is *not* excused—as "reasonable efforts" is—in cases of aggravated circumstances. *See In re J.S.B., Jr.*, 691 N.W.2d 611, 618 ¶ 20 (S.D. 2005).

2. In Arizona, efforts to reunify a *parent* with a *child* before terminating parental rights are *not* required "in the absence of an existing parent–child relationship." *Toni W. v. Arizona Dep't of Econ. Sec.*, 993 P.2d 462, 467 ¶ 15 (Ariz. App. 1999). But ICWA's active-efforts provision does not follow this rule. On the contrary, acting in obedience to ICWA, state officials essentially sought to force C.C. to create a relationship, not with his *parents*, but with strangers whom the Navajo Nation proposed as race-matched placements for him. Am. Compl. ¶ 26–27, ER.032–33.

3. For non-Indian children, ASFA's "reasonable efforts" requirement applies "prior to the placement of a child in foster care," 42 U.S.C. § 671(a)(15)(B)(i), but also thereafter. *See, e.g., Cabinet for Health & Family v. J.M.G.*, 475 S.W.3d 600, 604 (Ky. 2015). And Arizona's requirement goes beyond efforts taken prior to a child's placement in foster care; efforts must be undertaken to reunify the child with the parent "prior to seeking termination"; they end after that in most situations. *See, e.g., James H. v. Arizona Dep't of Econ. Sec.*, 106 P.3d 327, 328 ¶ 8 (Ariz. App.

2005); Am. Compl. ¶ 88, ER.045.[16] Notably, under AFSA and Arizona state law, there is "no duty to offer reunification services when the termination of parental rights is based on length of [a parent's prison] sentence." *James H.*, 106 P.3d at 327 ¶ 1. C.C.'s biological mother was convicted of a felony and was incarcerated for a prolonged period of time; C.C. was less than a year old at the time. Am. Compl. ¶ 25, ER.032. Had AFSA or race-neutral state law applied, that would have been the end of it. But, acting pursuant to ICWA, DCS and the Navajo Nation directed efforts not just to make C.C. *maintain* a relationship with his biological mother, but instead to make C.C. *create* a relationship with *strangers* where none existed before. All this was done for the purpose of seeking a race-matched placement for C.C. Am. Compl. ¶ 26–27, ER.032–33. If C.C. were not subject to ICWA, the *James H.* rule would have applied to him and none of that would have happened.

But ICWA's *active*-efforts provision applied—based solely on C.C.'s genetics—as did ICWA's placement-preferences provisions. 25 U.S.C. § 1915(a)–(b). Accordingly, the state defendants sought to force him to *create* relationships with race-matched strangers. State defendants were then required by ICWA to prove that

[16] A.R.S. § 8-513(D) requires DCS to undertake "reasonable efforts to place [a] child with the child's siblings" *after* the child has been moved and already "placed in out-of-home placement, guardianship or adoptive placement." A.R.S. §§ 8-825(D)(1) and 8-843(E)(1) require "reasonable efforts to provide services to the child and parent to facilitate the reunification"; *reunification* is obviously a matter pertaining to what happens after removal and placement in foster care.

efforts to create such relationships were *unsuccessful* before C.C. could be "cleared for adoption," *i.e.*, even *after* parental rights were terminated. 25 U.S.C § 1912(d); Am. Compl. ¶ 28, ER.033.

The bottom line is: CC., M.C., and K.C.'s grievance is twofold: (1) instead of race-neutral state law or AFSA, which apply to children of non-Indian descent, ICWA's *separate* active-efforts provision was made applicable to them—and consequently cost them time, money, and emotional stress—based exclusively on their race or national origin, and (2) ICWA's active efforts provision discriminates against them and thereby violates the Constitution and the Civil Rights Act. Am. Compl. ¶¶ 78–90, 110–141, 147–150, ER.043–46, 051–58.

The District Court, however, concluded that AFSA's reasonable efforts provision "applies only to foster care placement, and the Amended Complaint does not allege that any reunification attempts were made before foster care placement for [C.C.]. 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[ly] abused them." ER.017. This misconstrues C.C.'s injuries. C.C. was injured because he was subjected to differential treatment based on race, and consequently compelled to form associational attachments with race-matched strangers chosen by DCS and Navajo Nation. M.C. and K.C. were injured by also being subjected to ICWA, and consequently having to participate in these efforts,

including driving C.C.—sometimes over 100 miles—to visit with proposed placements. Am. Compl. ¶ 27, ER.033. This caused significant emotional and psychological harm to C.C., who through solely because he was born with Indian ancestry, had to leave the security of his home to visit with strangers solely because he was born with Indian genes. *Id.* And while he languished in foster care for *four years*, his "mommy" and "daddy"—M.C. and K.C.—could do nothing to change the circumstances of his life by making their family permanent in the eyes of the law. *Id.* at ¶¶ 27–28, ER.033.

E. The Termination Burden Provision, 25 U.S.C. § 1912(f)

A.D., S.H., and J.H., and C.C., M.C., and K.C.,[17] were subjected to ICWA's termination-burden provision. Am. Compl. ¶¶ 22, 30, ER.031–33. When the Amended Complaint was filed, the parental rights of L.G. and C.R.'s birth parents had not been terminated. Am. Compl. ¶ 37, ER.035. Thus, at that time, L.G., C.R., K.R., and P.R.'s injuries from being subject to the termination-burden provision were imminent. Although they are no longer imminent—because the process is now

[17] The complaint alleges, "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." Am. Compl. ¶ 30, ER.033. While the complaint does not explicitly allege whether the rights of his birth parents were terminated, it is implied in the allegations. A child can be cleared for adoption by DCS only after the parental rights of the birth parents are terminated. A.R.S. § 8-106(A).

completed and parental rights in each case have been terminated—the parties nevertheless have standing to seek nominal damages for having been subjected to *de jure* racial discrimination by Defendants acting in compliance with ICWA.

The Plaintiffs' challenge to the termination-burden provision is the same as their challenge to the other provisions: due to enforcement of ICWA, Defendants subjected them, on the basis of race or national origin, to different, less protective standards than would have applied under race- and national-origin-neutral state law, and such discrimination violates the First, Fifth, Tenth, and Fourteenth Amendments to the U.S. Constitution, and Title VI of the Civil Rights Act. Am. Compl. ¶¶ 96–99, 110–141, 147–150, ER.047–48, 051–58.

The difference between ICWA and state law is again significant. For a child who is white, black, Hispanic, Asian, or a member of any other race or national origin, Arizona provides that a party seeking termination of parental rights must establish one of the "statutory grounds" for termination (set forth in A.R.S. § 8-533) by *clear and convincing evidence*, and must also establish, *by a preponderance of the evidence*, that termination is in the child's best interests. *Kent K. v. Bobby M.*, 110 P.3d 1013, 1018 ¶ 22 (Ariz. 2005).

But ICWA requires a petitioner to establish, "*in addition to state law requirements*," *Valerie M. v. Arizona Dep't of Econ. Sec.*, 198 P.3d 1203, 1207 ¶ 16 (Ariz. 2009) (emphasis added), the following:

- by "clear and convincing evidence," *Yvonne L. v. Arizona Dep't of Econ. Sec.*, 258 P.3d 233, 242 ¶ 39 (Ariz. App. 2011), 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); and
- "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." *Id.* § 1912(f).

The law therefore treats termination-of-parental-rights cases differently depending on whether the child qualifies as "Indian" under ICWA. And A.D., S.H., and J.H., and C.C., M.C., and K.C., were all forced to undergo the separate and different procedures mandated by ICWA. Am. Compl. ¶¶ 9–12, ER.028–29.

These differences are profound—and detrimental to children. In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Supreme Court refused to impose a "beyond a reasonable doubt" standard on termination-of-parental-rights cases in light of the need to balance the rights of children with those of parents. Too high a burden of proof endangers children, because it can "erect an unreasonable barrier to state efforts to free permanently neglected children for adoption," *id.* at 769, and because proof of "emotional … damage," 25 U.S.C. § 1912(f), is "*rarely* susceptible to proof

beyond a reasonable doubt." *Santosky*, 455 U.S. at 769 (emphasis added). *See also Addington v. Texas*, 441 U.S. 418, 432 (1979) (beyond-reasonable-doubt standard is "inappropriate … because, given the uncertainties of psychiatric diagnosis, it may impose a burden the [party] cannot meet and thereby erect an unreasonable barrier to [relief].") But that is the rule that applies to Indian, and only Indian, children.

The District Court misconstrued the nature of the injury when it concluded that the complaint "does not allege that the termination proceedings were affected by the evidentiary standard required by § 1912(f) in any way." ER.019. The injury alleged in the Amended Complaint is being *subject to* § 1912(f) in the first place. Am. Compl. ¶ 49, ER.037. Thanks to ICWA, the termination-of-parental-rights cases for A.D., C.C., L.G., and C.R., were treated differently than would otherwise have happened had they not been subjected—on a racial basis—to ICWA. And the differences were significant. The parties were forced to prove ICWA's separate and additional elements for termination "beyond a reasonable doubt," even after they had already proved that termination would be in the best interest of the child—and to satisfy that requirement were forced to procure "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) (emphasis added). Am. Compl. ¶¶ 9–12, ER.028–29.

The District Court therefore erred in holding that the parties were not injured by ICWA's termination-of-parental-rights provision. Although those injuries are no longer imminent, they can be redressed by nominal damages and equitable relief pursuant to Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000d, *et seq.*

F. The Foster/Preadoptive Care Placement Preferences, 25 U.S.C. § 1915(b)

ICWA imposes "preferences" for placement of an Indian child in foster care. Specifically, an Indian child must be placed in foster care with either a member of the child's extended family, 25 U.S.C. § 1915(b)(i), or, failing that, with a foster home licensed or approved by the child's tribe, *id.* § 1915(b)(ii), or, failing that, with "*an* Indian foster home," regardless of tribe, *id.* § 1915(b)(iii) (emphasis added), or, failing that, with an institution "approved by *an* Indian tribe." *Id.* § 1915(b)(iv) (emphasis added); *see also* A.R.S. § 8-514(C). There are, of course, no state analogues to these race-based provisions, which apply exclusively to children deemed "Indian." *See, e.g.*, 42 U.S.C. § 1996b; A.R.S. § 8-105.01(A).

All Plaintiffs were subject to these provisions. A.D.'s foster placement with S.H. and J.H., as well as C.C.'s with M.C. and K.C., and L.G.'s and C.R.'s placement with K.R. and P.R., were non-racially-matched placements. As a consequence, tribal officials repeatedly proposed race-matched foster care placements. In A.D.'s case, GRIC sought several such placements over the course of several months, and all of them "fell through." *GRIC v. Department of Child Safety*, 379 P.3d 1016, 1019 n.8

& n.9 (Ariz. App. 2016). Likewise, in C.C.'s case, Navajo Nation repeatedly proposed race-matched placements, all of which turned out—after protracted "active efforts" were taken—to be inappropriate. Am. Compl. ¶ 26–27, ER.032–33. In L.G. and C.R.'s case, GRIC similarly proposed alternative, race-matched foster care placements, *Id.* ¶ 39, ER.035, which ultimately did not work out for L.G. and C.R.

Arizona's race-neutral law that applies to all *other* children provides that in a foster care placement (or *re*-placement[18]), the legal standard is best interests of the child. *Antonio M. v. Arizona Dep't of Econ. Sec.*, 214 P.3d 1010, 1012 ¶ 5 (Ariz. App. 2009); *Antonio P. v. Arizona Dep't of Econ. Sec.*, 187 P.3d 1115, 1117 ¶ 8 (Ariz. App. 2008). But in an Indian child's case, that standard is displaced by ICWA's race-conscious preference provisions. Furthermore, in making placement determinations for Indian children, courts "start with the *presumption*" that ICWA's race-matching "[placement] preferences are in the child's best interest." *Navajo Nation v. Arizona Dep't of Econ. Sec.*, 284 P.3d 29, 35 ¶ 21 (Ariz. App. 2012) (emphasis added). No such presumption exists in making placement determinations for non-

[18] In ICWA, there is no difference between foster care *placements* and foster care *re*-placements; the same 25 U.S.C. § 1915(b) preferences are applicable. *See* 25 U.S.C. § 1916(b) ("Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter[.]"). Furthermore, the same Section 1915(b) is applicable to foster care placements and *pre-adoptive* placements, *i.e.*, placement *after* parental rights are terminated. *See* 25 U.S.C. § 1903(1)(iii).

Indian children. Instead, the best interests of the child are paramount.[19] *Antonio M.*, *supra*; *Antonio P.*, *supra*.

In seeking to satisfy ICWA's race-conscious provisions, Defendants sought race-matched foster care placements for the children Plaintiffs, and forced them and the parent Plaintiffs to spend time and money seeking either to maintain custody of their children, or to place the children in the proposed ICWA-compliant foster placements, or to otherwise undergo the cost and delay of legal proceedings. These costs, which measured in the five-digits, and the delay in permanency and stability caused significant emotional and psychological harm, Am. Compl. ¶ 27—harms Plaintiffs can easily prove through routine discovery.

Such *de jure* discrimination violates the First, Fifth, Tenth, and Fourteenth Amendments to the U.S. Constitution, and Title VI of the Civil Rights Act. Am. Compl. ¶¶ 100–103, 110–141, 147–150, ER.048–58.

The District Court, instead, concluded that the complaint "does not allege any delay in, or effect on, the foster care placements of the child Plaintiffs caused by §

[19] The discriminatory treatment imposed on Indian children under ICWA was made unusually clear by a recent California Court of Appeal decision, which held that while the best interests of the child is the "paramount" consideration for children of white, black, Asian, Hispanic, or other ethnicity, *In re Nia A.*, 201 Cal. Rptr. 3d 424, 430 (Cal. App. 2016), best interests is only "one of *the constellation of factors*" that a court should take "into account" in an Indian child's case. *In re Alexandria P.*, 204 Cal. Rptr. 3d 617, 634 (Cal. App. 2016), *cert. denied sub nom. R.P. v. Los Angeles Cnty. Dep't of Children & Family Servs.,* 137 S. Ct. 713 (2017) (emphasis added).

1915(b).” ER.022. To the contrary, Plaintiffs *do* allege such delay, Am. Compl. ¶ 48, ER.037, and injuries flowing from being *subject to* such a race-matching placement preference provision, *id.* ¶ 49. The District Court was therefore in error.

G. Adoption Placement Preferences Provision, 25 U.S.C. § 1915(a)

Unlike the race-neutral procedures for adoption provided by Arizona law—which prioritize the best interests of the child—ICWA Section 1915(a) requires race-matching when Indian children are adopted. All Plaintiffs were subject to ICWA’s adoption placement preferences provision. *Id.* ¶¶ 24, 30–31, 39, 42, ER.032–33, 035–36. That is the crux of their injury. Such *de jure* discrimination, Plaintiffs claim, violates the Constitution and the Civil Rights Act. *Id.* ¶¶ 104–141, 147–150, ER.050–58.

ICWA Section 1915(a) requires that an Indian child be placed with “members of the Indian child’s tribe” or “other Indian families,” *regardless* of tribe, before she can be adopted into a non-Indian home. ICWA thus creates a hurdle that the Plaintiff families—A.D. and her adoptive parents, S.H. and J.H.; C.C., and his adoptive parents, M.C. and K.C.; and L.G. and C.R., and their adoptive parents, P.R. and K.R.—were forced to clear when they sought “the basic dignity” of “recognition, stability, and predictability” for their families. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600, 2606 (2015). In their adoptions, they were forced by Defendants, acting pursuant to

ICWA, to overcome race and national-origin factors—factors which are "in no respect 'appropriate'" "[i]n a child custody case." *In re Temos*, 450 A.2d 111, 120 (Pa. Super. 1982); *accord*, *Palmore v. Sidoti*, 466 U.S. 429 (1984).

For all other Arizona children, an adoption is finalized if the court determines that the adoptive home "best meets the safety, social, emotional, physical and mental health needs of the child." ER.020 (quoting A.R.S. § 8-103(C)). But ICWA imposes a separate rule of law: it requires that children be placed with adults who fit within the racial profile of "Indian." As a result, Plaintiffs must prove either that they are race-matched, or that there is "good cause" to deviate from the race-matching rules. 25 U.S.C. § 1915(a). Either way, *race* must be front and center in the determination—and it takes priority over the child's best interests. *See Navajo Nation*, 284 P.3d at 35 ¶¶ 18, 21 ("the presumption is that placement of the child in accordance with ICWA preferences *is* in the best interest of the child"; consequently, for an Indian child, the child's best interests are not the paramount consideration, but only one of many factors that "*may override*" ICWA's placement preferences) (emphasis in original); *In re C.H.*, 997 P.2d 776, 782 ¶ 22 (Mont. 2000) ("[W]hile the best interests of the child is an appropriate and significant factor in custody cases under state law, it is improper to apply a best interests standard when determining whether good cause exists to avoid the ICWA placement preferences.").

The burden in overcoming the nebulous, undefined, and race-triggered good-cause provision of ICWA was on the *Plaintiffs*—and *that* is their injury. *See GRIC v. Department of Child Safety*, 363 P.3d 148, 152 ¶ 17 (Ariz. App. 2015) (the party seeking a deviation from ICWA's race-matching placement preferences bears the burden of proving good cause).

More importantly, all of these families were forced to undergo legal proceedings governed by separate and different rules, exclusively as a result of their race. As the Supreme Court has made clear, **"[t]he '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."** *Northeastern Fla.*, 508 U.S. at 666. The fact that today the adoptions have been finalized does not mean the Plaintiffs were not injured by being subjected to different treatment based on their race.

The District Court disregarded all of this. It found that Plaintiffs lacked standing because they failed to allege that their "adoption[s] would have been completed more quickly" absent ICWA. ER.021. That was error. The child Plaintiffs were injured by ICWA because they were subjected to the race-conscious presumptions in Section 1915(a) and were forced to *overcome* those presumptions before they could obtain legal recognition for their families. Their injury is the differential treatment, not their ultimate ability or inability to obtain the benefit.

H. Challenged State Statutes, A.R.S. §§ 8-453(A)(20), 8-105.01(B), 8-514(C)

The state-law provisions challenged here require Director McKay to perpetuate this *de jure* discrimination against Plaintiffs. For example, A.R.S. § 8-453(A)(20) imposes a statutory duty on Director McKay to ensure "compliance with" ICWA. Section 8-105.01 is even more explicit. Subsection (A) says Director McKay cannot "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," *id.*, but subsection (B) specifically excludes from this protection children deemed "Indian" under ICWA.

A.R.S. § 8-514(C) is, if possible, still more overtly discriminatory. First, it applies to a "native American" child, not an "Indian child" as defined in ICWA. *Compare* A.R.S. § 8-514(C) *with* 25 U.S.C. § 1903(4). "Native American" is not defined in Title 8 of the Arizona statute, and Arizona law specifically identifies "Black, Hispanic, Native American, Asian or other heritage" as "[r]acial or ethnic factors." A.R.S. § 8-141(A)(12). Therefore, A.R.S. § 8-514(C) is *expressly* race-based.

Second, A.R.S. § 8-514(C) has no "good cause" exception as ICWA does. *Compare* A.R.S. § 8-514(C) *with* 25 U.S.C. § 1915(b). Thus there are no exceptions: a "native American" child that DCS takes into protective custody *must* be placed, first, with the child's extended family, A.R.S. § 8-514(C)(1); failing that, in "a licensed family foster home approved or specified by the child's tribe," *id.* § 8-

514(C)(2); failing that, in "*an* Indian foster home," *id.* § 8-514(C)(3) (emphasis added); and failing that, a "suitable" "institution approved by the Indian tribe or operated by *an* Indian organization." *Id.* § 8-514(C)(4) (emphasis added). Of course, A.D., C.C., L.G. and C.R. were placed in non-race-matched homes. But that only highlights just how expansive Section 8-514(C) is: the only way for Director McKay to fulfill his statutory obligation to "protect children," A.R.S. § 8-451, is by *violating* A.R.S. § 8-514(C)—and that is what he has been doing.[20]

All Plaintiffs, who, as described above, were subjected to ICWA Section 1915(b) were doubly injured because they were also subjected to Arizona's own explicitly race-based law. Am. Compl. ¶ 128–129, ER.054. This *de jure* race- or national-origin based treatment under A.R.S. §§ 8-453(A)(20), 8-105.01(B), and 8-514(C), violates the Constitution and the Civil Rights Act. Am. Compl. ¶¶ 123–130, 136–141, 147–150, ER.054–58.

The District Court opinion is simply silent as to this aspect of Plaintiffs' case. It makes no effort to explain why their challenge to Arizona statutes should be dismissed. Instead, the court dismissed the entire complaint for lack of standing. That was error.

[20] DCS is committed to placing children in "the most family-like setting possible," Am. Compl. ¶ 51, ER.037–38 & Ex. 1 at 5, ER.063. Pursuant to this policy, Indian children are placed in non-race-matched foster homes before they are placed in a group home under A.R.S. § 8-514(C)(4).

III. All Plaintiffs have standing to seek retrospective relief and declaratory relief, and the proposed class has standing to seek prospective relief.

Plaintiffs filed suit seeking both "backward-looking" and "forward-looking relief" for the *de jure* discriminatory treatment inflicted upon them and members of the proposed class. *Worth v. Jackson*, 451 F.3d 854, 858 (D.C. Cir. 2006). They sought declaratory and injunctive relief and damages under Title VI of the Civil Rights Act.

"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) (emphasis added). Plaintiffs satisfy the standing requirements here both for exemplary damages and for declaratory relief for past injuries.

A. Plaintiffs have subject-to standing to seek retrospective relief

The injury-in-fact in a case alleging racial discrimination comes from the plaintiff being subjected to different rules on account of her race, *not* the consequences that flow from that different treatment. *Northeastern Fla.*, 508 U.S. at 666. Even if a person who is discriminated against manages to obtain the benefit at the end of the discriminatory process, she has still been treated differently on account of race, and that is a distinct constitutional injury. In *Bras v. California Pub. Utilities Comm'n*, 59 F.3d 869 (9th Cir. 1995), this Court held that a contractor had standing to challenge a race-based contracting program even though he had not shown any

loss of business as a consequence of that program. *Id.* at 873–74. Rather than showing that it had suffered monetarily, this Court held that the contractor "need only show that [it is] forced to compete on an unequal basis" due to race. *Id*. at 873.

Precisely the same is true here. While the foster placements, adoptions, etc., of the named Plaintiffs in this case may have been finalized at this point, there is no dispute that they were forced to obtain these things on an unequal basis, due to their race. As explained in Part II, *supra*, they were forced to overcome legal presumptions, to satisfy different evidentiary standards, to submit themselves to "active efforts," and to undergo other legal proceedings that would not have occurred if the children had been white, black, or members of any other racial group. This unequal treatment is sufficient to confer standing. *Heckler v. Mathews*, 465 U.S. 728, 740 n.8 (1984) (plaintiff's injury in equal protection case is the "denial of equal treatment"); *Bras*, 59 F.3d at 873.

In *Heckler*, a retired federal employee brought a class action lawsuit challenging the spousal-benefits provision of the Social Security Act as unconstitutional gender-based discrimination. 465 U.S. at 734–35. He alleged that "the pension offset exception subjects him to unequal treatment … solely because of his gender; specifically, as a nondependent man, he receives fewer benefits than he would if he were a similarly situated woman." *Id*. at 738. The Court found that this was a judicially cognizable injury. *Id*. "[D]iscrimination itself," it emphasized, "can cause serious

non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Id*. at 739–40. Such denial of equal treatment can be "remed[ied]" by "a mandate of equal treatment," which "can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Id*. at 740.

Here, the Plaintiffs, in the same manner, allege their injury as denial of equal treatment under the challenged provisions of ICWA, provisions that subjected them—and, if not enjoined, will continue to subject the class—to discrimination on the basis of race or national origin.[21] They allege that they are deprived of the benefits of the race- and national-origin-neutral state laws that are applicable to others.

The "critical inquiry for standing purposes" is "whether the plaintiff's application has actually been treated differently at some stage … on the basis of race." *Wooden v. Board of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1278 (11th Cir. 2001). Here, Plaintiffs have alleged that their child custody proceedings have "actually been treated differently," and those of the proposed class members will inexorably be treated differently, based on race or national origin at each of the four stages of the child custody proceedings itemized in 25 U.S.C. § 1903(1)(i)–(iv), because

[21] Defendants never disputed that the challenged provisions provide disparate treatment in state court to Indian children; in fact, they argued that this is a feature of ICWA.

the children Plaintiffs are classified as Indian children while the Parent Plaintiffs have no Native American ancestry.

Parental rights with respect to A.D. and C.C. were terminated under ICWA § 1912(d) and (f)—thus they were *actually* subject to those two provisions, instead of the state law that would have governed had A.D. and C.C. not been classified as "Indian children." This Court has said that the existence of a racial barrier is not enough to establish standing "without a plaintiff's showing that she has been…subjected to such a barrier." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 657 (9th Cir. 2002). But here it is undeniable that A.D., C.C., L.G., and C.R. were subjected to such a barrier.

When the complaint was filed, S.H. and J.H.'s petition to adopt A.D. was pending in state court. Am. Compl. ¶ 15, ER.030. They were not *likely to be*, but *certainly* and *inexorably were* subject to ICWA's adoption placement preferences provision (25 U.S.C. § 1915(a)). When M.C. and K.C. adopted C.C., Am. Compl. ¶ 16, ER.030, their adoption was *in fact* subject to this provision, and was finalized under that provision—not under race-neutral Arizona law. K.R. and P.R. similarly "want[ed] to adopt L.G. and C.R." at the time of the complaint. *Id*. ¶ 17, ER.030. Their adoption proceeding was not *likely* but *certainly*, going to be subject to ICWA Section 1915(a), and in fact it ultimately was. *Id*. ¶ 49, ER.037.

At the time of the complaint, S.H., J.H., and A.D. were litigating the jurisdiction-transfer question under ICWA § 1911(b). *Id.* ¶ 23, ER.032. They were *actually* being subjected to that section. That case has now been completed, but that does not mean they were not harmed by the application of ICWA, as the District Court concluded—it just means their injury has now been finalized. E.R.016.

Every time the tribes proposed race-matched foster or preadoptive placements for A.D., C.C., L.G. and C.R., and threatened to remove them from the homes of the parent Plaintiffs, the parties were *in fact* subjected to ICWA Section 1915(b) and A.R.S. § 8-514(C). Throughout their child custody proceedings, they were subjected to A.R.S. §§ 8-453(A)(20), and 8-105.01(B). These are all concrete, particularized, actual injuries that are not conjectural or hypothetical, *Lujan*, 504 U.S. at 560, and those injuries can be "redressed by" the federal courts, *id.* at 560–61, through the nominal damages they seek under the Civil Rights Act. Am. Compl. ¶¶ 147–150, ER.058.[22]

The District Court erred in focusing not on the unequal treatment, but on the outcomes received by the named plaintiffs—an analysis that is contrary to law. What matters for standing purposes is not the outcome of discriminatory treatment, but the

[22] If a plaintiff has standing to bring a challenge under the Equal Protection Clause of the Fourteenth Amendment against an institution that accepts federal funds, the plaintiff also has standing to seek Title VI damages. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003).

discriminatory treatment itself. Thus, in *Clements v. Fashing*, 457 U.S. 957, 959–60 (1982), the Supreme Court held that plaintiff officeholders had standing because they alleged that they would have announced their candidacy for other offices were it not for the "automatic resignation" provision they were challenging. Here, as in *Clemens*, Plaintiffs alleged that a separate set of rules applied to their child custody proceedings based on race or national origin, and that "but for" such rules, the course of conduct in those proceedings would have been different. In *Turner v. Fouche*, 396 U.S. 346, 361–62 (1970), the Court held that the plaintiff who did not own property had standing to challenge the property ownership requirement for membership on a school board, even though there was no evidence that he had applied and been rejected. Likewise here, what matters is not whether or not the foster and adoption proceedings ended in the Plaintiffs' favor—but the fact that, contrary to the Constitution, those proceedings treated the parties differently based on race.

The District Court held that, for example, S.H. and J.H. lacked standing because they applied for and received the desired outcome, ER.016, and because they did "not allege that the termination proceedings were affected by the evidentiary standard required by § 1912(f) in any way." ER.019. That was an error. The "injury in fact" here "is the denial of equal treatment resulting from the imposition of [a legal] barrier, not the ultimate inability to obtain" the result. *Northeastern Fla.*, 508

U.S. at 666. A plaintiff "need only demonstrate … that a discriminatory policy prevents [the plaintiff] from" pursuing a desired end "on an equal basis." *Id*.

The District Court seems to have based its decision on *Braunstein v. Arizona Dep't of Transp.*, 683 F.3d 1177, 1184 (9th Cir. 2012). But the plaintiff in *Braunstein*, lacked standing because he "'ha[d] done essentially nothing to demonstrate that he [was] in a position to compete equally' with the other subcontractors." *Id*. at 1186 (citation omitted). Here, by contrast, the Parent Plaintiffs *did* allege they were willing and able to adopt the Child Plaintiffs—and, in fact, did so—and that such adoption would have been a routine matter under Arizona's race- and national-origin-neutral law, were it not for ICWA and the Arizona statutes requiring Director McKay to enforce ICWA. Am. Compl. ¶¶ 24, 28, 41, 43–44, ER.032–33, 035–36. Further, they allege that as a consequence of those statutes, they were forced to go further and do more, and experience greater burdens and undergo more hardship, due solely to their race. *Id.* ¶¶ 21–49, 59–109, ER.031–37, 039–51. These are specific cognizable injuries which can be redressed by recovering damages and by declaratory relief. They therefore have standing.

In *Carey v. Piphus*, 435 U.S. 247, 266 (1978), the Court held that nominal damages are appropriate when a plaintiff's constitutional rights have been infringed but he cannot show further injury. In the same manner, Plaintiffs here have "plau-

sibl[y]" alleged a violation of their constitutional rights giving rise to nominal damages. *Twombly*, 550 U.S. at 570. They have plausibly shown that the system of laws applicable to them is based on their "race, color, or national origin." 42 U.S.C. § 2000d. Plaintiffs thus have standing to seek Title VI damages and declaratory relief.

B. Plaintiffs have standing to seek declaratory relief, and those claims are not moot

Declaratory relief and injunctive relief are separate issues and cannot be treated as "a single issue." *Steffel v. Thompson*, 415 U.S. 452, 463 (1974). In fact, declaratory relief is available where injunctive relief is not. *Id.* at 466. In *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the Court affirmed the issuance of declaratory judgments of unconstitutionality when no future enforcement of the challenged laws was pending. *See Steffel*, 415 U.S. at 469 (discussing *Roe* and *Doe*).

Steffel answered the question of whether forward-looking declaratory relief is available when no state court action is pending, and it gave an affirmative answer. *See id.* at 469–70; *see also Center for Biological Diversity v. Mattis*, No. 15-15695, 2017 WL 3585638, at *18 (9th Cir. Aug. 21, 2017) (even where an injunction is inappropriate—because no future injury is impending, for instance—declaratory relief may be). The real question is one of redressability. That is, whether granting declaratory relief will redress the claimed injuries. Here, it would. That is sufficient.

The District Court erred when it rejected Plaintiffs' claim for declaratory relief on the grounds that Plaintiffs were asking the court to "pre-adjudicate for state court judges how to rule on facts that may arise." ER.024. Plaintiffs were doing nothing of the sort. They simply seek redress for race-based discrimination by the Defendants acting pursuant to ICWA. Even if the District Court were correct, however, the fact that the Plaintiffs' individual cases are now completed militates in favor of *reversal*, because it shows that there is no risk of "pre-adjudicating" anything.

Nor is this case moot. As discussed above, Plaintiffs continue to seek retrospective relief for the violations of their constitutional rights alleged in the Complaint. And although the named Plaintiffs' cases have now been finalized, the proposed class consists of people whose claims will be reviewed in the same racially-discriminatory manner, if not for action by the courts. Federal courts have long recognized that in proposed class action cases, the mootness of the named plaintiffs' disputes will not necessarily render the whole case moot. *See, e.g.*, *Blankenship v. Secretary of HEW*, 587 F.2d 329, 333 (6th Cir. 1978) ("[R]efusal to consider a class-wide remedy merely because individual class members no longer need relief would mean that no remedy could ever be provided for continuing abuses.").

Under the "inherently transitory" doctrine, a proposed class action lawsuit seeking redress for injuries that are inherently transitory may not be rendered moot even when the named plaintiffs' cases have been rendered moot. Thus in *County of*

Riverside v. McLaughlin, 500 U.S. 44 (1991), the plaintiffs challenged a county's policy of failing to provide prompt judicial determinations of probable cause to suspects who were arrested without a warrant. By the time the case was decided, the named plaintiffs' cases had been rendered moot because they had either received probable cause determinations, or had been released. *Id.* at 51. Nevertheless, the Court found that the fact "[t]hat the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction," because "[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Id.* at 52 (citation omitted).

In *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), the Court explained that the "inherently transitory" doctrine was necessary because "the fleeting nature of the challenged conduct giving rise to the claim" could "effectively insulate defendants' conduct from review" if a plaintiff was unable to accomplish "the considerable challenge of preserving his individual claim from mootness." *Id*. at 1531. *See also Wilson v. Gordon*, 822 F.3d 934, 945–47 (6th Cir. 2016) (explaining "inherently transitory" doctrine).

That is precisely the situation here. The Plaintiffs object to judicial procedures—just as the *McLaughlin* plaintiffs did—and those procedures make member-

ship in the class "inherently transitory." State courts will typically resolve termination, foster care, adoption, etc., cases before a case challenging the racial discrimination underlying the procedure can be heard. And it would be perverse to force foster parents and prospective adoptive parents to seek to delay the resolution of their own cases in order to prevent the mootness of their civil rights claims.

The proposed class's claims are certainly not moot or speculative. There is not just a genuine *threat* of enforcement, but absolute *certainty* that ICWA and corresponding state law provisions challenged here *will* be enforced in the future against members of the class. Defendants and Intervenor-Defendants have made it clear that they will continue to zealously enforce those provisions. *See* Docs. 178, 179, 217, 218; Am. Compl. ¶¶ 18–20, 31, 124–130, 133, ER.031, 033–34, 054–56.

This case therefore involves a live controversy over the constitutionality of the law—a law by which the entire class of plaintiffs are injured by the "denial of equal treatment." *Heckler*, 465 U.S. at 740 n.8. The fact that the named Plaintiffs' individual cases have now been resolved does not, therefore, render the class claims moot.[23] Given the inherently transitory nature of child welfare proceedings such as involved here, "the duration of any [individual] plaintiff's claim is uncertain," and the resolution of the named plaintiffs' injuries—which, again, is the denial of equal

[23] And, to reiterate, it does not matter that this occurred before class certification. *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1147 (9th Cir. 2016).

treatment in judicial proceedings—cannot moot the case. *Wilson*, 822 F.3d at 945. The class claims for prospective relief should therefore be allowed to proceed.

C. The question of Plaintiffs' standing to seek prospective injunctive relief is either premature, or Plaintiffs have standing to assert limited prospective injunctive relief

It was premature for the District Court to address named Plaintiffs' standing for seeking prospective injunctive relief on behalf of the proposed class members because doing so necessarily depends on whether the class is certified. *See Allee v. Medrano*, 416 U.S. 802, 832 (1974) (Burger, C.J., concurring in part and dissenting in part) (since the issue of prospective injunctive relief "may well not arise on remand it would be premature now to attempt to resolve it"). For this reason alone, the judgment must be reversed, so that the named Plaintiffs can seek prospective relief on behalf of the proposed class.

In a proposed class action seeking prospective injunctive relief against the enforcement of racially discriminatory laws, the mootness of the named Plaintiffs' claims does not deprive them of the right to seek prospective relief on behalf of the class. Thus in *Gratz*, 539 U.S. at 251 & n.1, 260–61, the plaintiffs had graduated from another university by the time the Court addressed their case, but they still had standing to seek declaratory and injunctive relief for class members that they were certified to represent.

In *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 831 (1999), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612 (1997), the Court explained the standing rule as it applies in proposed class actions. If class certification issues are "logically antecedent" to standing concerns, it held, then those concerns may be treated *before* questions of standing are resolved. In other words, "when resolution of class certification obviates the need to decide issues of Article III standing," *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 65 (2d Cir. 2012), the court should postpone evaluation of the standing question until after the class is certified. *Accord Potter v. Hughes*, 546 F.3d 1051, 1055 (9th Cir. 2008).

Here, the potential standing problems with regard to the named Plaintiffs do not apply to members of the proposed class. Thus standing with regard to the class can be resolved on remand. Members of the proposed class have standing to seek prospective relief because their cases are going to be subject to ICWA just as the named Plaintiffs' cases were, and the class members' claims have obviously not been rendered moot. Class members will also be able to show commonality, Am. Compl. ¶ 52, ER.038, typicality, *id*. ¶ 53, adequacy of representation, i*d*. ¶ 54, and numerosity, *id*. ¶ 51, as well as other Rule 23 factors, *id*. ¶¶ 55–58, ER.038–39.

If Plaintiffs have standing to seek *some* form of relief other than prospective injunctive relief, then the District Court can decide on remand whether Plaintiffs also have standing to seek declaratory, injunctive and Title VI relief on behalf of the

class—a question upon which the District Court has not ruled.[24] Thus the judgment should be reversed and the case remanded for further proceedings regarding the class action.

Conclusion

This Court should reverse the District Court's decision holding that Plaintiffs lacked standing to challenge 25 U.S.C. §§ 1911(b), 1912(d), 1912(f), 1915(b), 1915(a), and A.R.S. §§ 8-453(A)(20), 8-105.01(B), 8-514(C). Plaintiffs have standing to seek declaratory relief and Title VI damages for injuries they suffered by being subject to these provisions that establish a discriminatory system of *de jure* race- or national-origin-based laws.

RESPECTFULLY SUBMITTED this ___ day of _____, 2017 by:

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[24] The Plaintiffs did move for class certification. The District Court denied that motion "without prejudice as premature." Doc. 39.

Certificate of Compliance

Pursuant to FED. R. APP. P. 32(g)(1) and Ninth Circuit Local Rules 28-1, I certify that Plaintiff-Appellant's brief:

(a) was prepared using 14-point Times New Roman font;

(b) is proportionately spaced; and

(c) contains 11,128 words.

Submitted this 1st day of September, 2017,

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Certificate of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on this 1st day of September, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will by accomplished by the appellate CM/ECF system.

/s/ Kris Schlott
Kris Schlott

Statement of Related Cases

There is no other case in this Court that can be deemed related to this case.

Submitted this 1st day of September, 2017,

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Case No. 17-15839

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A.D. C.C., L.G., and C.R., by
CAROL COGHLAN CARTER, and
DR. RONALD FEDERICI, et al.,

vs.

KEVIN WASHBURN, (in his official capacity as Assistant Secretary of Indian Affairs, BUREAU OF INDIAN AFFAIRS), et al.

APPELLANTS' ADDENDUM

Appeal from the United States District Court for the District of Arizona
Case No. 2:15-CV-1259-PHX-NVW, Hon. Neil Wake, presiding

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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.

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.

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.

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.

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.

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.