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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

A.D. and C. by CAROL COGHLAN 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,

vs.

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;
GREGORY A. McKAY, in his official capacity as Director of ARIZONA DEPARTMENT OF CHILD SAFETY,
Defendants.

No. CV-15-1259-PHX-NVW

PLAINTIFFS' CONSOLIDATED RESPONSE TO FEDERAL DEFENDANTS' MOTION TO DISMISS AND STATE DEFENDANT'S MOTION TO ABSTAIN AND DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1), (6)

(Oral Argument Scheduled Dec. 18, 2015 at 1:30 p.m. in Phoenix, AZ)

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INTRODUCTION

This case is a successor to *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013). It is a proposed class action lawsuit that challenges the constitutionality of provisions of the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. § 1901, *et seq*., which systematically subject certain children of Indian heritage and their non-Indian foster and prospective adoptive parents to separate and unequal treatment in child custody proceedings involving termination of parental rights, foster care placements, and adoptions. In *Baby Girl*, the United States and others pressed an interpretation of ICWA that the Court concluded "would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian," an interpretation that "would raise equal protection concerns." *Id.*, 133 S.Ct. at 2565. Here, plaintiffs challenge ICWA provisions on their face and as applied by defendants that do exactly that.

Throughout their motions to dismiss,[1] both in their procedural and substantive arguments, defendants fail or refuse to recognize the nature of the harm to the named plaintiffs and the proposed class members in this legal challenge. To be sure, the named plaintiffs suffer harms inflicted by specific applications of the law, but the principal harm is more fundamental than that: all of the plaintiffs are harmed by being subjected to a separate and unequal legal regime that deprives them of rights and opportunities enjoyed by all other Americans; what we refer to as the ICWA "penalty box." For those reasons, this case is not a "pattern or practice" or *de facto* discrimination case. It alleges *de jure*

[1] Because many of the arguments made in the Federal Defendants' Motion to Dismiss and Memorandum of Points and Authorities are duplicative of those made in the State Defendant's Motion to Abstain and Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1), (6), Plaintiffs provide a single consolidated reply for the convenience of the Court. Where the arguments are essentially the same, we address them in the reply to the Federal Defendants' Motion, and limit our reply to the State Defendant's Motion to its additional or unique arguments made by the State. To be clear, arguments made in response to the Federal Defendants' motion are incorporated in their entirety as arguments against the State Defendant's motion, and *vice versa*.

segregation by ICWA on its face and as applied by defendants through the BIA Guidelines.

The paradigm example of such a case is *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). There the Court explicitly did not examine "tangible" injuries such as school buildings, curricula, or qualifications and salaries of schoolteachers, but rather "the effect of segregation itself" on educational opportunities *Id.* at 690-91. Here, too, plaintiffs "seek the aid of the courts" in securing important rights and opportunities "on a nonsegregated basis." *Id.* at 487.

In their determination to prevent these important questions from being considered, defendants have put forward a multitude of procedural and substantive objections. Viewed in the context of challenging the separate and unequal legal regime to which they are consigned, there is no doubt that plaintiffs are entitled to proceed with the lawsuit and that they have stated a cause of action under the Constitution.

RESPONSE TO FEDERAL DEFENDANTS' MOTION

Federal defendants raise jurisdictional issues of standing, ripeness, and abstention under Fed. R. Civ. P. 12(b)(1) (Federal Defendants' Motion ("Mot.") Parts I, II, and III) and allege that the Complaint fails to state a claim under Rule 12(b)(6) (Mot. Part IV). Throughout, despite acknowledging that facts in the Complaint must be taken as true (Mot. at 5-6), defendants fail to do so. We address defendants' arguments in turn.

I. RULE 12(B)(1)

As it permeates our response to defendants' jurisdictional contentions, it is important to explain how ICWA works. ICWA applies by its own terms to all child custody proceedings (foster care placements, terminations of parental rights, and preadoptive and adoptive placements) involving an "Indian child," defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). Once ICWA is implicated in a child custody proceeding, state rules and procedures no longer apply in ordinary fashion. Rather, as

defendants explain (Mot. at 3-4), two things happen: Indian tribes are given "numerous prerogatives" that they may exercise in the child custody proceedings, and ICWA imposes "procedural and substantive standards to be followed in state-administered proceedings." (Mot. at 3). Hence, from literally the moment that ICWA is implicated, it places Indian children and families who wish to foster or adopt them on a different legal track than all other American children and families.[2] All of the rules and procedures complained of become operative the moment a child is classified as "Indian": the requirement of continuous "active efforts" to place the child with an Indian family; the detrimental differences in burdens of proof; the jurisdiction-transfer provision; the foster and adoption placement preferences; the subordination of the child's best interests to the interests of a tribe. That does not mean every person subject to ICWA will encounter all of those injuries, but rather that every person subject to ICWA by definition is subject to this separate and unequal system of laws and procedures, which engenders segregation and disparate treatment from beginning to end.

As in *Brown v. Bd. of Educ.*, to the extent that the legal regime to which they are subjected is adverse to those children and families, the harm is inflicted immediately and is ongoing throughout the child custody proceedings. Just as any black children in the Jim Crow South would have had standing to challenge segregated schools, and just as their case would have been ripe for adjudication even if they had adequate schools or teachers within the segregated system, so too do plaintiffs here have standing to challenge the federally mandated legal regime to which they are consigned, the case is ripe for resolution, and this Court should not abstain from deciding it. The Article III injury is not

[2] Indeed, the Supreme Court recognized in *Baby Girl*, 133 S.Ct. at 2565, that the harm could accrue even earlier, observing that "many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA." As is clear from the Complaint, children in the ICWA penalty box are rendered far more difficult to foster or adopt by loving, capable families because of the multiple obstacles placed in the path of non-Indian families who might wish or offer to do so.

limited to the myriad potential harms flowing from the disparate treatment mandated by ICWA, the disparate treatment *itself* is a concrete injury in fact.

A. Standing. As a threshold matter, nowhere do defendants acknowledge that this is a proposed class action lawsuit. "Ordinarily, of course, this or any other Article III court must be sure of its own jurisdiction before getting to the merits." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999). "But the class certification issues are . . . 'logically antecedent' to Article III concerns . . . . Thus the issue about Rule 23 certification should be treated first, 'mindful that [the Rule's] requirements must be interpreted in keeping with Article III constraints'." *Id.* (citations omitted). See also *Payton v. County of Kane*, 308 F.3d 673, 680 (7th Cir. 2002) ("We have begun our analysis with the question of class certification, mindful of the Supreme Court's directive to consider issues of class certification prior to issues of standing").

Here, of course, defendants resisted having class certification decided first. That does not mean, however, that the Court should ignore factual allegations made pertaining to members of the class. In *Gratz v. Bollinger*, 539 U.S. 244 (2003), the government argued that an individual plaintiff lacked standing to challenge racial classifications in university freshman admissions on behalf of absent class members because his own alleged injury emanated from racial classifications in transfer admissions. Because, as here, the named plaintiff was challenging a broad racial classification policy, he had standing to assert the interests of class members whose injuries emanated from different applications of the policy. "In the present case, the University's use of race in undergraduate transfer admissions does not implicate a significantly different set of concerns than does its use of race in undergraduate freshman admissions." *Id.* at 265. Thus, against a challenge to his standing, "we think it clear that [plaintiff's] personal stake, in view of both his past injury *and the potential injury he faced at the time of certification*, demonstrates that he may maintain this class-action challenge to the University's use of race in undergraduate admissions." *Id.* at 268 (emphasis added).

Here, the lawsuit conjoins individual named plaintiffs who have sustained injuries with proposed class members who have alleged similar or related injuries arising from the same set of policies. See, e.g., Complaint ("Comp.") ¶¶ 25-29). Rather than viewing the named plaintiffs' injuries in isolation, the Court should consider the injuries of the entire class, taking as true the Complaint's complete array of factual allegations.

Defendants argue that the individual plaintiffs do not have standing because they have not been directly harmed by each of the specific ICWA provisions that are targeted in the action; that some of the injuries inflicted upon them are in the past and are unlikely to recur; and that ultimately they may have happy outcomes, or those outcomes may be affected by factors other than ICWA, and therefore their claims are conjectural and might not be redressed by invalidating the challenged provisions. The arguments miss the point of the action: every day that the plaintiffs are subjected to ICWA, they are harmed because they are deprived of the otherwise applicable state legal procedures and protections to which they would be entitled absent ICWA.

The plaintiffs here readily meet the standards for standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The injury common to every plaintiff is being relegated to a different and disadvantageous set of laws and procedures solely because of their status under ICWA.[3] Within that framework, the individual and proposed class plaintiffs are subjected to tangible injuries and hardships as set forth in the Complaint. Those injuries are directly traceable to the defendants' actions in enforcing ICWA. Were ICWA's challenged provisions struck down, plaintiffs would be entitled to the same legal protections and procedures as other similarly situated American children and families. As a result, plaintiffs plainly have standing to challenge the discriminatory system. See, e.g.,

[3] Defendants argue (Mot. at 20-26) that the classifications created by ICWA are not based on race; but that goes to the merits, not standing. Indeed, even non-suspect classifications that create legal disabilities can be challenged by those disadvantaged by them. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

Regents of Univ. of Calif. v. Bakke, 438 U.S. 265 (1978) (standing to challenge the "special admissions program" to which only some students were eligible to apply).

Indeed, a case cited by defendants (Mot. at 8) helps explain this point. In *Ryan v. Mesa Unif. Sch. Dist.*, 64 F. Supp.3d 1356, 1360 (D. Ariz. 2014), the court held that plaintiffs lacked standing to challenge the constitutionality of certain religious policies because they failed to allege that the "policy affected them directly in some way," that they had "personal exposure" to the challenged program, or that it "caused them to alter their conduct." Plainly, plaintiffs here all have alleged all three elements: they are directly affected by ICWA, they have personal exposure to it, and their conduct has been altered by it.

For Baby Girl A.D. and her foster parents, adoption and formation of a permanent family likely would have happened if they were subject to normal state laws and not ICWA (Comp. ¶ 20). Baby Boy C. has not been made eligible for adoption because of the constant efforts required to find an ICWA-compliant (i.e. Indian) placement, which entails substantial delay, disruption, uncertainty, and emotional trauma—all as a consequence of being subject to ICWA rather than state laws that otherwise would control (¶¶ 22-24). In other circumstances, children subject to ICWA are removed from caring, loving homes and placed into less-stable environments (¶ 26). Prospective adoptive parents who otherwise would be allowed to adopt their foster children are deprived of the opportunity to do so due to ICWA's rigid preference system (¶ 27). Children subject to ICWA are left in abusive and neglectful homes in circumstances that would warrant removal under state laws (¶ 28). Children and families who wish to adopt them are subjected to delay, uncertainty, and distress because of the "active efforts" provisions required by ICWA, that are far more burdensome than those under state law (¶ 29).

Contrary to defendants' suggestion, plaintiffs do not have to demonstrate certain consequences flowing from the application of a policy when the policy on its face subjects them to discriminatory treatment. As the Court held in the context of contract set-asides in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) (citation omitted), "[t]he

injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing'." Hence, the "aggrieved party 'need not allege that he would have obtained the benefit but for the barrier in order to establish standing'." *Id.* (citation omitted). The Court stated the principle clearly in *Northeastern Fla. Chap. of Assoc. Gen. Contractors of Amer. v. City of Jacksonville*, 508 U.S. 656, 666 (1993):

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.[4]

Accord, *Worth v. Jackson*, 451 F.3d 854, 859-60 (D.C. Cir. 2006) (finding standing in similar circumstances).

Here, plaintiff parents have made the requisite allegations that they dearly would love to adopt their foster children, and that the challenged provisions of ICWA on their face—through a more-stringent standard for terminating parental rights, a right for third-party tribes to intervene or assume jurisdiction, required "active efforts" to find ICWA-compliant placements, and adoption preferences—make that far more difficult.[5] For the children, the injuries as alleged in the Complaint are even more direct and palpable.

Defendants make a number of claims asserting that plaintiffs lack standing to challenge specific provisions of ICWA, all of which are unavailing. Citing *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999) (*en banc*), which found that plaintiffs lacked standing to challenge border stops as they had been stopped only once in ten years,

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[4] Note that the Court did not restrict this principle to challenges of racial classifications.

[5] Two recent cases illustrate ICWA's perverse consequences that are far afield from "reunifying" Indian families. In both, *non*-Indian parents invoked ICWA to thwart the adoption of children by the spouse of the *Indian* moms. See *In re Adoption of T.A.W.*, 354 P.3d 46 (Wash. App. 2015); *In the Matter of Adoption of J.R.D.*, No. 113,228, slip op. (Okla. Ct. Civ. App. Apr. 21, 2015) (unpublished) (attached as Ex. B for citation as to facts, not as legal precedent).

defendants oddly assert that injuries sustained by plaintiffs here are likewise "not likely to recur" (Mot. at 8 n.2). To the contrary, once inside the ICWA penalty box, children, foster, and prospective adoptive families are continuously subject to its disabilities. The applicable ICWA standards apply to *every* child custody determination. The threat of tribal intervention is omnipresent. The requirement of "active efforts" to locate an ICWA-compliant placement *always* exists. The placement preferences are *always* operative. Defendants' argument is akin to denying standing to a plaintiff challenging segregated streetcar laws because she was only kicked off once. So long as the laws operate upon her, she has standing to challenge them—indeed, even if on occasion she is allowed to remain on the streetcar.

Defendants argue (Mot. at 8) that neither C. nor A.D. has been forced to enroll in a tribe or that participation by the tribes has harmed them. Of course, ICWA by its terms applies to children who are "eligible" for membership. And as the Complaint alleges (¶ 65), the BIA Guidelines, followed by the State, provide that ICWA-eligible children should be enrolled in tribes even against their parents' wishes. 80 Fed. Reg. 10153, § B.4(d)(iii). This imposition of the law upon non-member children coupled with involuntary tribal enrollment are key elements of plaintiffs' equal protection, due process, federalism, and freedom of association claims. The plaintiffs are harmed by being subjected to a legal regime in which a third-party that otherwise would have no jurisdiction or role in the child custody proceedings is invested with what defendants aptly depict as "numerous prerogatives." Plaintiffs seek to be able to participate, like other Americans, in a legal system that does not provide such prerogatives to Indian tribes that can be exercised in ways adverse to their interests. Indeed, both sets of individual plaintiffs have alleged tangible harm—the prospect of a de facto veto of an adoption placement by the tribe in one instance, and the prolonging of "active efforts" and delay in termination of parental rights and eligibility for adoption in the other.

Defendants (Mot. at 9-10) cite *Lipscomb v. Simmons*, 962 F.2d 1374 (9th Cir. 1992) for the proposition that children suffer no harm when children remain with their preferred

foster-care placements. *Lipscomb* is not a standing case but involved a challenge to the state's decision to subsidize foster placements with non-relatives but not relatives. Although the individual plaintiffs here remain in their foster care placements, by being subjected to ICWA, the families and children endure great uncertainty and delay in forming permanent family relationships. And as alleged in the Complaint (¶¶ 26, 28), many children are removed from good homes or forced to stay in bad environments as a consequence of ICWA.

Defendants cite *San Diego Cnty. Gun Rights Comm'n v. Reno*, 98 F.3d 1121 (9th Cir. 1996), which held that plaintiffs lacked standing to challenge the Crime Control Act absent a showing that it "is actually being enforced" against them (Mot. at 10). Here, by contrast, the Complaint is replete with allegations that the plaintiffs encounter different standards and burdens precisely because they are subject to ICWA. Apart from the tribes, whose presence in child custody proceedings is facilitated by ICWA, there is no third party lurking outside the proceedings that is inflicting upon plaintiffs the injuries that are the subject of this lawsuit.

Defendants attack (Mot. at 11-12) many of plaintiffs' claims as hypothetical and not imminent, citing *Mont. Envtl. Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1189 (9th Cir. 2014), which dismissed on standing grounds a lawsuit challenging "the anticipated approval" of an application. See also *Clapper v. Amnesty Int'l*, 133 S.Ct. 1138, 1150 (2013) ("[I]t is just not possible for a litigant to prove in advance that the . . . system will lead to any particular result in his case"). Again, that is not the basis for this lawsuit. Plaintiffs here are challenging the ongoing application of ICWA standards. The outcomes of the ICWA child custody process in particular cases is not what is at issue; the fact that plaintiffs are subject to ICWA is. Hence, whether suitable adoption placements are found, whether cases are transferred to the tribes, and so on, are not the core source of the constitutional injury—rather, absent ICWA, plaintiffs would be subject to a different set of rules and procedures that they allege are more favorable to them. As in the *Adarand*

line of cases, plaintiffs have standing to challenge policies that on their face subject them to disparate treatment.

Defendants then point to the plaintiff children's natural and foster parents as the cause of their injuries. Were plaintiff A.D. to be made subject to tribal jurisdiction, defendants assert (Mot. at 12), "it would not require that A.D. submit to a forum with which she has *no* contact" (emphasis added). Rather, "her contacts with Gila River are comparable to those she enjoys with the State of Arizona: citizenship by operation of choices made by her biological parents." *Id.* Thus, "A.D. is not injured by ICWA or the transfer provisions." *Id.*

What a remarkable set of assertions. They go, of course, to the substantive due process, equal protection, and federalism causes of action in this case. The citizenship that is relevant here is American citizenship. Membership does not equal citizenship, nor does it confer jurisdiction—except by operation of ICWA. Children who have never set foot on a reservation, nor are related to anyone living on a reservation, can be made subject to ICWA. Nor, as we have explained earlier, must a parent voluntarily assent to a child's enrollment in ICWA. There is no question that but for ICWA, the individual and class plaintiff children would be subject to *state* jurisdiction in their child custody proceedings. It is only through federal fiat in the form of ICWA that tribes can assert jurisdiction over them or have any entitlement to participate in state court proceedings.

Even more remarkable is the assertion (Mot. at 14) that "engagement with the tribal forum is voluntary." After all, the argument goes, the foster parents knew about ICWA and therefore implicitly waive any constitutional objections if they choose to foster a child who might have the requisite quantum of Indian blood—or if they come to love the child and try to adopt. To this proposition, defendants cite no case authority. Even if the foster families fully appreciated the impact of ICWA on certain children (who they may not even know are "Indian"), certainly their decision to bring a child into their home does not strip them (or their foster children) of their constitutional rights.

Unsurprisingly, defendants trivialize the harm suffered by prospective adoptive families, asserting (Mot. at 13) that "their unrealized desire to adopt" their foster children does not constitute an "injury in fact." In fact, the relationship between foster parents and children can be as strong as natural families, and its arbitrary disruption (or delay in culminating an adoption) can inflict grievous injury. "No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship," the Court declared in *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977). "At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family." *Id.* It is that type of relationship that the individual plaintiffs have established with their foster children and that ICWA places at grave risk.

Again, defendants misstate the nature of the cause of action. Plaintiffs object to the two-track system of child custody. In the state court, the foster parents have alleged, they likely would be able to adopt their foster children. Indeed, once parental rights have been terminated (which ICWA renders more difficult), state law establishes a preference for adoption by "a person who has a significant relationship with the child," including a "foster parent." A.R.S. §§ 8-103(B)(3), 8-862(H)(1); *Antonio M. v. Ariz. Dept. of Econ. §*, 214 P.3d 1010 (Ariz. App. 2009). By contrast, even when jurisdiction over a child custody proceeding is not transferred to a tribe, ICWA creates a statutory pecking order in which non-Indian foster parents are placed at the bottom: below relatives, tribal families, and even non-tribal Indian families—even if they are complete strangers. The parent plaintiffs are not seeking to establish a right to adopt—they assert an *equal opportunity* to adopt, consistent with the rules that apply to all non-Indian custody proceedings and would apply to Plaintiffs absent ICWA. Unquestionably that is a cognizable interest that confers standing. See, e.g., *Heckler v. Mathews*, 465 U.S. 728, 729 (1984) (standing to vindicate

"the right to equal treatment," which is not necessarily "coextensive with any substantive rights to the benefits denied the party discriminated against").

Indeed, contrary to defendants' assertion (Mot. at 12), the foster parents here also have third-party standing to assert the rights of their foster children. As the case cited by defendants establishes, plaintiffs may assert the interests of others where "there is some genuine obstacle" to the assertion of rights by the individuals themselves and where "the closeness of the relationship is patent." *Singleton v. Wulff*, 428 U.S. 106, 116-17 (1976) (holding that a physician may assert a patient's right to an abortion). Indeed, the Court recognized third-party standing of foster parents to assert the rights of their foster children *even where they have independent court-ordered representatives*. "We believe it would be most imprudent to leave entirely to court-appointed counsel the choices that neither the named foster children nor the class they represent are capable of making for themselves, especially in litigation in which all parties have sufficient attributes of guardianship that their views on the rights of the children should at least be heard." *Smith*, 431 U.S. at 841 n.44. Here, of course, the children's interests are represented by next friend Carol Couglan Carter; but were her standing found lacking, the foster parents would have standing to assert them. Indeed, the situation is less complicated than in *Smith* given that no one whose views are adverse to the plaintiffs purports to represent the children's interests in this case.

Defendants assert (Mot. at 14-16) that Carter lacks standing to act as next friend for the child plaintiffs. They cite *Safouane v. Fleck*, 226 Fed. App'x 753, 758 (9th Cir. 2007), which held that minor children lacked standing without "appropriate" next friend representation, begging the question of what constitutes "appropriate."

Under Fed. R. Civ. P. 17(c), a "next friend is one who, without being regularly appointed guardian, represents an infant plaintiff. . . . [T]he next friend of his own initiative commences the action and is under the supervision of the court." *Russick v. Hicks*, 85 F. Supp. 281, 283 (W.D. Mich. 1949) (citing 3 Moore's Fed. Prac., 2d ed., § 17.26). There are two prerequisites: the next friend must (1) provide an adequate explanation of why

the real parties in interest cannot represent themselves, and (2) be truly dedicated to the person's best interests. *Whitmore v. Ark.*, 495 U.S. 149, 163 (1990) (holding that a death row inmate could not be next friend for a capital defendant in the absence of a showing that the real party in interest was unable to represent himself). Citing a district court case, the Court observed "it has been further suggested that a 'next friend' must have some significant relationship with the real party in interest." *Id.* at 163-64.

Here, next friend Carter alleges (Comp. ¶ 11) that she is an attorney who has practiced family law for several decades; and that she has represented children, including children of Indian ancestry, at every stage of child custody proceedings. Certainly the children cannot represent themselves.[6] That Carter is committed to the best interests of the children is evidenced by her positions in this lawsuit on their behalf; most notably, that as a matter of law the best interests of the children should be considered in all child custody proceedings.

Courts have allowed both foster parents and qualified experts like Carter to serve as next friend for infant parties. In *Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 91-92 (1st Cir. 2010), a panel that included retired Supreme Court Justice David Souter ruled that

> because these foster care children lack significant ties with their parents and have been placed under the state's legal custody and guardianship, a significant relationship need not be required as a prerequisite to Next Friend status. Important social interests are advanced by allowing minors access to a judicial forum to vindicate their constitutional rights through a Next Friend that the court finds has a good faith interest in pursuing a federal claim on the minor's behalf. . . .

Accordingly, in addition to allowing the foster parent of one of the child plaintiffs to proceed as next friend, *id.* at 92, a professor of sociology at Brown University with a

[6] The cases do not require children in foster care to be represented by guardians ad litem, who of course in this case are paid by the State defendants. Under Arizona law, they are not general guardians but have specific authority to represent foster children in state child custody proceedings. See, e.g., A.R.S. §§ 8-221, 8-535(F), Ariz. R. P. Juv. Ct. 40.

focus on child maltreatment who had never met the children or relatives was allowed to proceed given that he was "familiar with the circumstances foster care children face while in the state's custody" and was "adequately prepared and willing to actively prosecute the types of claims the children have raised" against the State. *Id.* at 93.

The Ninth Circuit too has held that "the contours of the requisite 'significant relationship' do not remain static, but must necessarily adapt to the circumstances." *Coal. of Clergy, Lawyers & Professors v. Bush*, 310 F.3d 1153, 1162 (9th Cir. 2002); accord, *Nichols v. Nichols*, 2011 WL 2470135 at *2-6 (D. Ore. 2011) (approving a next friend who had no prior relationship with the minor given that his "experience, objectivity, and expertise in this role make him an exceptional candidate for such services").

Nor does the next friend need to be appointed by the Court. In *Ad Hoc Comm. of Concerned Teachers v. Greenburgh #11 Union Free Sch. Dist.*, 873 F.2d 25, 30-31 (2d Cir. 1989)—a case cited by defendants—the court denied a teachers committee standing to challenge racial discrimination in a school system in its own right, but permitted it to represent the students as next friend given its expertise and involvement with the issues, even though it had not been appointed to do so. The court predicated its decision on the children's inability to represent themselves, the committee's good faith in seeking justice for the children, and its commitment and financial ability to prosecute the case. Here, Carter readily meets all of the criteria for next friend status.

Finally, defendants argue (Mot. at 16) that plaintiffs lack standing to challenge the BIA Guidelines as they are "non-binding recommendations" and "state courts have full discretion to reject, consider, or apply [them] if they find them persuasive." We address those arguments more fully in Part II-E, *infra*. Regardless, as plaintiffs have alleged (Comp. ¶¶ 103-106), Arizona has adopted the BIA Guidelines and given them the force of official policy, and the application of the Guidelines exacerbates the injuries to the plaintiffs as spelled out throughout the Complaint. On March 10, 2015, the Attorney General acting through Dawn Williams, the attorney who signed the State's Motion to Dismiss, instructed all State attorneys and caseworkers to implement the 2015 BIA

Guidelines in all ICWA cases (Ex. A). Hence plaintiffs are challenging the Guidelines not only as adopted by the Federal defendants but as adopted and enforced by the State defendants. The Complaint is replete with allegations of the Guidelines' impacts on plaintiffs.

The plaintiffs satisfy standing requirements to prosecute the action in its entirety.

B. Ripeness. Defendants assert (Mot. at 17 & n.6) that the case is not ripe because "the injury alleged is grounded in potential future harms," which will be determined through ongoing state court proceedings. More specifically, the heading for the argument insists that the adjudication requires "factual assumptions about whether and how state courts will apply ICWA and the Guidelines and because plaintiffs will suffer no hardship from the delay" (a reprise of the argument in the standing section). This argument fails for the same reason as the standing arguments fail: the harm is current and ongoing. As plaintiffs have alleged, the State defendants and the courts in the child custody proceedings *are* applying ICWA—a legal regime in which a massive thumb is pressed upon the scale in favor of the tribes' interests and against the plaintiff children and foster families.

Again, the defendants simply reject plaintiffs' factual assertions and trivialize ICWA's impact. For example, they contend (Mot. at 17 n.6) that ICWA and the Guidelines have neither altered Plaintiffs' existing foster-care placements nor had any effect on their prospects for adoption. As alleged in the Complaint, thanks to ICWA, plaintiffs live in a perpetual state of fear and uncertainty. They endure constant disruptions of their lives in the search for ICWA-compliant placements. Their prospects for transforming their *de facto* family relationships into permanent ones are diminished by operation of the ICWA preferences. All when compared to the system in which they would be operating but for the federal intervention triggered by the determination that the children are "Indian"—a status that is alleged in the Complaint. Of course the case is ripe.

This is not a pre-enforcement action, see *Abbott Labs v. Gardner*, 387 U.S. 136 (1967), because enforcement is ongoing. Nor does it depend upon future events but

current ones. For some of the plaintiff families, the ordeal visited upon them by ICWA may culminate in adoption. For others it may not. It is the disparate treatment itself, imposed upon plaintiffs by operation of federal and State law, that is the basis for this lawsuit, and that injury is ripe for judicial remediation.

"The 'injury' in fact in an equal protection case . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Gratz*, 539 U.S. at 262. In *Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2015), citing *Heckler*, *supra*, the Ninth Circuit found that a Guam law limiting participation in a plebiscite concerning the island's future was ripe for challenge on equal protection grounds even though the election was not certain to take place. "We read *Mathews* as holding that equal treatment under law is a judicially cognizable interest that satisfies the case or controversy requirement of Article III, even if it brings no tangible benefit to the party asserting it." *Id.* at 1315. By contrast, in *Tex. v. U.S.*, 523 U.S. 296 (1998), the case was not ripe because several events or actions would have to occur before any injury would occur. Here, the injury already is occurring. See *Davis*, 785 F.3d at 1315 (the alleged denial of equal treatment is a "judicially cognizable injury").

Defendants also misstate (Mot. at 17-18) the holding in *Fern v. Turman*, 736 F.2d 1367 (9th Cir. 1984). There, former husbands sought to invalidate their state-court divorce decrees in federal court. The court held that no federal question was presented and there were ongoing administrative and state court proceedings that would determine harm. No general constitutional challenge to state or federal laws or practices was made. This case fits squarely in the category of *Heckler*, *Gratz*, and *Davis*, in which separate and unequal treatment is alleged, and an action challenging the law requiring such treatment is ripe.[7]

[7] It is cold comfort to learn (Mot. at 18) that the Federal defendants "have not expressed any intent to enforce the statute." Unfortunately, the law (which defendants are aggressively defending) is made applicable to the states, and the State defendants here are enforcing it (along with the BIA Guidelines). Far from a "purely hypothetical situation," the Complaint alleges that the plaintiffs have been made subject to ICWA, and that they suffer its consequences every day.

C. Abstention. Defendants' abstention assertions are another variation of the arguments already addressed. The Supreme Court's guidance in this context is unequivocal: "In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction. Abstention is not in order simply because a pending state-court proceeding involves the same subject matter." *Sprint Commc'n, Inc. v. Jacobs*, 134 S.Ct. 584, 588 (2013).

Defendants recite (Mot. at 18, citing *L.H. v. Jamieson*, 643 F.2d 1351, 1354-56 (9th Cir. 1981)) the Ninth Circuit criteria for applying abstention under *R.R. Comm'n of Tex. v. Pullman Co.* 312 U.S. 496 (1941): (1) the complaint touches upon a sensitive area of social policy, (2) constitutional adjudication can be avoided if there were a definite ruling on the state issue, and (3) the determinative issue of state law is unclear. Defendants cannot remotely satisfy those criteria, which perhaps is why the State defendants do not even mention *Pullman* abstention.

This case does indeed touch upon a sensitive area of state social policy—child custody proceedings---but it is one that the United States has hijacked through ICWA. See *Baby Girl*, 133 S.Ct. at 2571 (Thomas, J., concurring) ("there is simply no constitutional basis for Congress' assertion of authority over such proceedings"). Defendants focus on subsidiary, case-specific procedural rulings to satisfy the second criterion, such as state court transfers of jurisdiction to tribes. Ultimately such individual determinations do not affect the larger question of ICWA's constitutionality. So long as ICWA applies to the plaintiffs—and by its terms, and the State's enforcement of it, it does—abstention is inappropriate. The relevant determination of State law is not unclear, nor will it be determined in individual child custody decisions: the State (as it must) applies ICWA; and the State (as it has chosen to do) applies the BIA Guidelines. There are no constitutional questions, or questions of statutory interpretation, that Arizona courts need to answer in order for this Court to resolve the constitutional issues; hence *Pullman* abstention is inappropriate.

Defendants also urge the Court to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), which is inapplicable as well. While there are ongoing state proceedings in this case, they involve individualized child custody determinations, and do not meet the abstention criteria set forth in *Younger*. They are not quasi-criminal enforcement actions nor do they involve a state's interest in enforcing orders and judgments of its courts. *Id.* at 46. Nor will this action have the effect, at all, of enjoining the state proceedings. *Id.* Indeed, apart from identifying them, defendants do not address the *Younger* criteria at all.

As the Supreme Court emphasized in *Sprint*, 134 S.Ct. at 588 (citation omitted), "Circumstances fitting within the *Younger* doctrine, we have stressed, are 'exceptional'; they include . . . 'state criminal prosecutions,' 'civil enforcement proceedings,' and 'civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions'." The ongoing state proceedings here, of course, fit into none of those categories. See, e.g., *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604-05 (civil enforcement proceedings are where a successful party in state court seeks enforcement in federal court); *Juidice v. Vail*, 430 U.S. 327, 335-36 (1977) (federal courts cannot reverse state civil contempt orders); *Lebbos v. Judges of Super. Ct.*, 883 F.2d 810, 815 (9th Cir. 1989).

Hence, in *Brian A. ex rel. Brooks v. Sundquist*, 149 F. Supp.2d 941, 957 (M.D. Tenn. 2000), the court refused to abstain on *Younger* grounds from considering a class action brought on behalf of African American children to challenge systemic deficiencies in a state foster care program on due process grounds, characterizing defendants' argument that there were ongoing individual child custody proceedings as "misleading." Because the court's discussion is so instructive we quote it at length:

> It is true that there are ongoing and pending state proceedings concerning individual foster children; *but nothing about this litigation seeks to interfere with or enjoin those proceedings*. Rather, Plaintiffs seek injunctive relief against the Department of Children's Services, not the courts.
>
> Further, the Court finds that the juvenile courts of Tennessee are not more appropriate vehicles for adjudicating the claims raised in this putative class action. Although technically

> Plaintiffs could raise constitutional questions in their individual juvenile proceedings, there is no pending judicial proceeding which could serve "as an adequate forum for the class of children in this case to present its multifaceted request for broad based injunctive relief" based on the Constitution and federal and state law. . . . Instead, Plaintiffs' federal constitutional claims herein represent . . . "the exact sort of disputes over citizens' rights with which the federal courts were created to deal."

Id. (emphasis added) (citations omitted).[8] Accord, *La Shawn v. Kelly*, 990 F.2d 1319, 1322 (D.C. Cir. 1993). Here there is no pendent state claim and the Complaint does not list courts as defendants.

The logical consequence of Defendants' abstention arguments is that the constitutionality of ICWA could *never* be filed in federal court. If no child custody proceedings subject to ICWA were ongoing, defendants would argue that the challenge either would be unripe or moot and plaintiffs lack standing. If the proceedings were ongoing, defendants would, as they do here, argue the Court should abstain. Rule 12(b)(1) is not intended to thwart individuals from vindicating their most precious rights.

In this regard, defendants make a concession (Mot. at 20) that perhaps they did not intend: the relief sought by plaintiffs "would necessarily change the outcome of the state-court proceedings." Actually that may or may not be true; but unquestionably plaintiffs would be freed from the ICWA penalty box and given the same opportunities as other foster families to potentially form permanent families. Nothing this Court has been asked to do would interrupt or displace ongoing proceedings---rather, it is the federal government that has displaced state laws and policies in the context of plaintiffs. That

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[8] In Arizona, as well, state courts are not "more appropriate" forums in which to raise federal constitutional challenges to ICWA. "The juvenile court derives its jurisdiction solely from statute . . . and compliance with the statutory provisions concerning adoption is mandatory." *Matter of Pima Cty. Juv. Action No. B-8736*, 647 P.2d 1181, 1182 (Ariz. App. 1982). "[P]rovisions concerning adoption" include the State's ICWA carve-out, A.R.S. § 8-105.01(B), which is at issue in this litigation. Foster parents are not parties in many proceedings unless granted intervention. *William Z. v. Ariz. Dept. of Econ. Sec.*, 965 P.2d 1224 (Ariz. App. 1998). Adoption proceedings are separate from other child custody proceedings, and they cannot be used to collaterally attack what happened in those proceedings. For all of those reasons, although challenges to ICWA may be raised in state child custody proceedings, they are far less fitting forums in which to raise a broad-based challenge. See also discussion at p. 50, *infra*.

defendants have acknowledged that the different sets of rules could (much less would) result in different outcomes demonstrates why all of the procedural obstacles interposed by defendants---standing, ripeness, and abstention—are red herrings and the Motion should be denied..

II. RULE 12(B)(6)

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. While plaintiffs will present their constitutional arguments in much greater detail in a forthcoming Motion for Summary Judgment, we discuss below why their claims are more than plausible.

Indeed, it is not the constitutional challenge that is remarkable but the law it challenges. In the year 2016 it is astounding that a two-track system of child custody proceedings, based upon a racial classification, making individuals subject to a jurisdiction against their will, and imposed by federal dictate upon a field traditionally devoted to state autonomy, could exist. Merely describing it makes its constitutional infirmities obvious.

A. Equal Protection. We finally get to the sole issue that defendants identified when the Court asked the grounds for the Motion to Dismiss at the status conference. Their basic argument (Mot. at 20) is simple: "ICWA's application does not turn on a child's race or ancestry." For that proposition, the government relies on *Morton v. Mancari*, 417 U.S. 535 (1974) and *U.S. v. Antelope*, 430 U.S. 641 (1977).

In *Mancari*, 417 U.S. at 551, the Court upheld employment preferences for Indians at the BIA pursuant to the "plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes." Emphasizing that the preferences were limited to employment in the BIA, the Court held that they were "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554.

In *Antelope*, the Court upheld the application of federal criminal procedures to enrolled Indians who allegedly murdered a non-Indian within the tribal boundaries, even though non-Indians committing the same crime in the same place would have been subject to more favorable rules under state law. Finding that the law constituted "federal regulation of criminal conduct within Indian country implicating Indian interests," 430 U.S. at 646, the Court held there was no discrimination because the law applied equally to all people subject to federal jurisdiction. *Id.* at 647-649.

Defendants attempt to apply the narrow rule of *Mancari* and *Antelope* far too broadly. They assert correctly (Mot. at 23) that "the political relationship of the United States with Indian tribes is inextricably bound up in the status of those tribes as sovereigns predating the formation of the United States. . . ." From there it takes not a step but a giant leap. "Accordingly, blood descent is typically shorthand for the social, cultural, and communal ties a person has with a sovereign tribal entity" *Id.*

That sentence distills the essence of ICWA's equal protection problem: the government is not permitted to use "shorthand" to separate people into racial categories and subject them to different treatment. ICWA encompasses people who have such ties and people who don't. As applied by the Federal and State defendants, the law presumes that a child whose biological parent is a member of an Indian tribe is socially, culturally, and communally tied to a tribe regardless of the weight of contrary evidence. Indeed, the BIA Guidelines instruct courts to "not consider . . . [t]he Indian child's contacts with the tribe or reservation." 80 Fed. Reg. at 10156, C.3(d). On the basis of that presumption, it confers great discretion upon the tribe—even to the point of forcing the state to cede jurisdiction under specified circumstances—and applies a legal regime that divests children of important rights and opportunities.

Although defendants have attempted to craft a categorical rule that any federal law affecting "Indians" is immune from challenge as a racial classification, the Court created no such rule. Certainly tribes may determine the rules affecting custody of Indian children who live on reservations, and the federal government may regulate such conduct. See

Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989) (tribal courts have jurisdiction over children who are domiciled on reservation); *Fisher v. Dist. Ct.*, 424 U.S. 382 (1976).[9] But the cases do not give either the tribes or the federal government power to deprive non-reservation children of rights and opportunities through a sweeping and race-based definition of eligibility for tribal membership.

Apparently Justice Sotomayor agrees with the categorical rule advanced by defendants, contending that *Mancari* and *Antelope* "squarely hold that classifications based on Indian tribal membership are not impermissible racial classifications." *Baby Girl*, 133 S. Ct. at 2584 (Sotomayor, J., dissenting). However, she then goes on to identify the central flaw in her conclusion, acknowledging that "the Federal government requires Indian tribes, as a prerequisite for official recognition, to make 'descen[t] from a historical Indian tribe' a condition of membership." *Id.* at 2585 (citing 25 C.F.R. § 83.7(e) (2012)).[10]

Regardless, the majority disagreed. The Court recognized repeatedly that Baby Girl and her adoptive parents were placed in a bind because of her race as defined by the tribe and made determinative by ICWA. The Court noted that a construction of ICWA that gave preference to an absent birth parent who had attempted to relinquish his rights over an adoptive couple with whom the child had bonded "would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Baby Girl*, 133 S. Ct. at 2565 (majority). That consequence "would raise equal

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[9] Likewise, all of the cases cited in Mot. at 21-22 n.9 deal with on-reservation Indians or conduct, whereas this case deals with extending the federal government's and tribes' reach over individuals who are not domiciled on reservations and off-reservation conduct. Of special note is *U.S. v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015), dealing with the Indian Major Crimes Act (IMCA), whose elements include proof of some quantum of Indian blood *and* membership in a tribe. By contrast, ICWA sweeps in children who are merely "eligible" for membership. 25 U.S.C. § 1903(4). Moreover, IMCA applies only to crimes committed in Indian country, *Zepeda*, 792 F.3d at 1106, whereas ICWA encompasses children even if their tribal connections are nonexistent. Both of those factors remove this case from the *Mancari* ambit. Ultimately, as Judge Kozinski emphasized in *Zepeda*, 792 F.3d 1119 (Kozinski, J., concurring), "[w]hatever complexities may be inherent in the federal regulation of Indian tribes, the equal protection clause permits no exceptions. Racial classifications must survive the strictest scrutiny. Those that cannot have no place in our law."

[10] Indeed, plaintiffs have alleged as a factual matter that most tribes require a specified blood quantum for eligibility for membership (Comp. ¶ 40).

protection concerns." *Id.* Though defendants somehow fail to discuss *Baby Girl*, that decision establishes unequivocally that an equal protection challenge is very much in play.

Indeed, in *Rice v. Cayetano*, 528 U.S. 495 (2000), the Court struck down a Hawaii scheme that restricted voting for certain public offices to people of Hawaiian ancestry. The restriction was justified on the basis of a trust relationship. The defendants argued that the classification was not racial, but the Court disagreed. "Ancestry can be a proxy for race." *Id.* at 514. The Court elaborated:

> One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. . . . Ancestral tracing of this sort achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name.

Id. at 517. The Court thus condemned precisely the type of ancestral "shorthand" that undermines equal protection.

The premise underlying ICWA—that the interests of non-reservation children deemed to be Indian based on blood quantum are the same as interests of tribes—is antithetical to the guarantee of equal protection. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943). That principle has been applied to government-imposed racial classifications in family relationships. See, e.g., *Loving v. Va.*, 388 U.S. 1 (1967); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (invalidating child custody decision that had a different outcome based on the race of the man the child's mother married and holding that the "goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause").

Defendants switch gears to argue (Mot. at 22) that because individuals who do not meet blood quantum requirements are excluded from membership and thus unscathed by ICWA, the classification is political rather than racial. "Simply because a class defined by ancestry does not include all members of the race does not suffice to make the

classification race neutral." *Rice*, 528 U.S. at 516-17. Indeed, many Jim Crow laws were based on blood quantum. See, e.g., Fla. Laws, 14th Gen. Ass., 1865-66, Ch. 1, 468 § 1-3 (defining a person with at least one-eighth African ancestry as black). The fact that not all persons of a certain ancestry are affected does not defeat equal protection scrutiny; rather, affixing a racial classification and assigning benefits or burdens on that basis triggers such scrutiny.

Defendants' contention that ICWA's disparate treatment of Indian children is based on a political rather than racial classification is further belied by the fact that ICWA gives a preference to "Indian foster home[s]" and "Indian families" that do not come from the tribe with which the child is associated. 25 U.S.C. § 1915(a)(3), (b)(iii). Thus, for example, in a Navajo child's adoption proceedings, prospective adoptive parents who are Cherokee receive a preference over prospective adoptive parents who are African American. Plainly the function of this preference is to lump all Indian children together according to race, not to acknowledge their political affiliation with a particular tribe.

Finally, defendants argue (Mot. at 24-26) that ICWA's contested provisions are "narrowly tailored" to its objectives. Plainly they are not. The Supreme Court in *Adarand*, 515 U.S. at 227 (emphasis in original), recognized the "basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*," and held that unequal treatment on the basis of race "should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Id.* In *Gratz*, 539 U.S. at 271, the Court held that a racial preference in university admissions was not narrowly tailored because it lacked "individualized consideration." See also *id.* at 276 (O'Connor, J., concurring) (admissions procedures "do not provide for a meaningful individualized review of applicants").

ICWA suffers the same infirmity but on a much grander scale. In *Holyfield*, 490 U.S. at 37 (emphasis added), the Court observed that ICWA's modest purpose was to protect the "rights of the Indian community and tribe in *retaining* its children in its society." But it reaches far beyond that. The law sweeps within its "protection" children

who do not have significant ties—indeed, in many cases children who have no ties whatsoever—to a reservation or Indian culture, or whose primary ties (including jurisdiction) are outside of the tribe. It conflates the best interest of the child with that of the tribe, precluding precisely the type of individualized determinations that the equal protection clause requires.

The Complaint extensively documents six sets of provisions in ICWA and the BIA Guidelines that prejudice plaintiff children and families: transfer of jurisdiction, active efforts, burden of proof in foster care placement orders, burden of proof in termination of parental rights, foster and preadoptive care placement preferences, and adoption placement preferences. Ultimately, defendants must demonstrate not only that those rules are narrowly tailored to a compelling governmental interest, but that there are no less-restrictive alternatives.*Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (plurality opinion). At the Motion to Dismiss stage, it is enough that plaintiffs have alleged that they are subjected because of race to a separate and unequal legal regime, and that defendants have confessed that the disparate treatment may lead to different outcomes in their child custody proceedings.

B. Due Process. Defendants correctly identify (Mot. at 26-27) three discrete due process claims in the Complaint: the jurisdiction-transfer provision, the children's and families' liberty interest in individualized determinations under uniform standards, and the failure of ICWA and BIA Guidelines to adequately consider the individual children's best interests. Each states a due process cause of action. We address each in turn.

1. *Jurisdiction-transfer provision.* It is conceptually important to differentiate ICWA's exclusive jurisdiction provision, 25 U.S.C. § 1911(a), which was at issue in *Holyfield*, from § 1911(b), which assumes a tribal forum has *in personam* jurisdiction over litigants brought before it. The latter is at issue here and presents a classic example of an impermissible "long-arm" statute.

It is extremely well-established that a forum may not establish *in personam* jurisdiction absent minimum contacts. See, e.g., *World-wide Volkswagen Corp. v.*

Woodson, 444 U.S. 286 (1980); *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). The contacts must be "continuous and systematic" and the litigation must be related to or arise from the contacts. *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984). Moreover, the minimum contacts must be "purposefully directed at the forum" by the person who is being hailed into the forum. *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 110 (1987).

Under ICWA, state courts are required to transfer certain child custody proceedings involving Indian children not residing on a reservation to a tribe's jurisdiction "in the absence of good cause to the contrary" and "absent objection by either parent" if a parent, Indian custodian, or the tribe petitions for it. 25 U.S.C. § 1911(b). The BIA Guidelines, adopted by Arizona, extend the provision to all child custody proceedings. 80 Fed. Reg. at 10156, C.1(c).

The "contacts" required by ICWA to trigger transfer of child custody proceedings to a tribal court on their face do not remotely meet the requirements for *in personam* jurisdiction. Indeed, the required contacts may be nonexistent (i.e., mere "eligibility" for membership in a tribe). Even volitional membership, which of course is impossible for minors, is not the same as "continuous and systematic" contacts. Certainly the foster families have not engaged in actions "purposefully directed at the forum," and the child custody proceedings may well not arise from the forum. Yet this is exactly where the "shorthand" that defendants refer to comes in: ICWA's core assumption that any child with the requisite ancestry who is eligible for membership in a tribe necessarily should be made subject to a tribe's jurisdiction. That is a clear and profound due process violation, compounded by imposing the burden of proof on the party contesting it rather than the entity seeking it. Indeed, defendants do not even suggest it does not state a claim (Mot. at 26).

2. *Individualized determination*. Contrary to defendants' cursory assertion (Mot. at 26-27) that this claim simply restates their equal protection claim, foster parents and children do have a recognized interest in protecting their bonds against the type of

arbitrary disruption so often inflicted by ICWA. Foster parents who are the psychological parents of a child have a liberty interest that cannot be deprived without due process. As the Court recognized in *Smith*, 431 U.S. at 844, "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association." No less than biological families, foster families—while not possessing a "property" interest or entitlement—nonetheless possess due process rights that may not lightly be discarded.

3. *Children's best interests*. It is beyond ironic that a law entitled Indian Child Welfare Act does not make paramount the best interests of the children who are subject to it. To the contrary, in establishing foster/preadoptive placements, ICWA establishes preferences to be effectuated, "in the absence of good cause to the contrary," for members of the child's extended family, Indian foster homes, and Indian-approved or Indian-operated institutions. 25 U.S.C. § 1915(b). For adoption placements, ICWA establishes preferences, "in the absence of good cause to the contrary," for placements with the child's extended family, other members of the tribe, or other Indian families. 25 U.S.C. § 1915(a).

Though ICWA does not define good cause, the BIA Guidelines, adopted by the State, provide that in all of these instances, the agency "must always follow the placement preferences" unless it can prove through "clear and convincing evidence" why they could not be met. 80 Fed. Reg. at 10157, F.1(b). Moreover, the Guidelines state, "The good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child in light of the purposes of the Act." 80 Fed. Reg. at 10158, F.4(c)(3). Nor may "good cause" include "ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with the Act." *Id.*

Consider the implications of those words. They are breathtaking. A child with the most attenuated blood, cultural, or physical connection to a tribe *should* be removed from

a foster home in which he or she has resided since birth and in which the child has formed a psychological family, in favor of an extended family or unrelated tribal member, an institution, or even an Indian member of another tribe in a distant state. Those preferences are *mandatory* unless someone stands up for the child and demonstrates good cause, which comprises a limited set of conditions under the BIA Guidelines and does not include psychological and physical bonding. The child's best interests are presumed to be the same as a tribe that the child may never even have encountered and, indeed, of which the child may not even be eligible for membership. If those laws and policies do not state a due process violation, nothing does.

Defendants seek to shut down this cause of action by misstating it. Plaintiffs do not assert that a child's best interests should be the sole consideration in child custody proceedings. State custody laws and procedures recognize a variety of interests in such proceedings. But there is no state in the country that does not consider the child's best interests in child custody proceedings. There is no state in the country that elevates the placement preference of a complete stranger in a distant state over a loving foster family that has attached to a child since birth. It goes without saying that these decisions are the most important that will ever be made on behalf of the child. Why would a court require the appointment of a guardian ad litem in child custody cases if not to advocate for the child's best interests? But ICWA and the BIA Guidelines impose a straitjacket on what state courts and children's appointed representatives can do.

"Certain basic principles are agreed upon," the Ninth Circuit declared in *Lipscomb*, 962 F.2d at 1379. "Once the state assumes wardship of a child, the state owes the child, as part of that person's protected liberty interest, reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child." *Id.* The default rule that would apply in Arizona, absent ICWA's intervention, was set forth in *Clifford v. Woodford*, 320 P.2d 452, 455 (Ariz. 1957) (citation omitted): "'[T]here can be no question under all the authorities but that in answering the query, Who should have the custody of the children? the pole star by which it is led to a decision is their best interest'." See also

Kent K. v. Bobby M., 110 P.3d 1013, 1020 (Ariz. 2005) (child "has an interest in a 'normal family home'" (citing *Santosky v. Kramer*, 455 U.S. 745, 759 (1982)); *Kent K.*, 110 P.3d at 1021) (child has an "interest in obtaining a loving, stable home").

A child's best interests, based on an individualized determination, cannot be excluded from child custody decisions without violating that child's due process rights. Through ICWA's displacement of state policies that protect children's best interests, and the State's adoption of the BIA Guidelines that exclude such considerations, plaintiff children have a due process cause of action.

C. Federalism. We begin with two basic propositions that appear to be undisputed. First, plaintiffs have standing to challenge a violation of the Tenth Amendment when the State declines to do so and the violation directly affects their interests. In so holding, the Court observed in *Bond v. U.S.*, 131 S.Ct. 2355, 2364 (2011), "Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." In this case, the people of Arizona did exactly that in crafting their child custody laws, whose protection plaintiffs would enjoy were they not displaced by ICWA.

Second, it is undisputed that "domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). Indeed, the "whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890).

Had ICWA merely been extended to the tribes as quasi-sovereign entities acting within their jurisdiction, this lawsuit would not be necessary. However, the federal government went much further, doing great violence to principles of federalism in three distinct ways: replacing otherwise applicable state child custody rules and procedures with

federal dictates, commandeering state resources to effectuate those dictates, and displacing state jurisdiction over certain child custody proceedings.

Defendants' answer (Mot. at 28-29) that the Indian Commerce Clause confers "plenary and exclusive" authority to legislate in the field of Indian affairs. But such power, no matter how extensive, should by definition not place federal regulation on a collision course with state prerogatives. As Justice Thomas put it, the "threshold question, then, is whether the Constitution grants Congress power to override state custody law whenever an Indian is involved." *Baby Girl*, 133 S. Ct. at 2566 (Thomas, J., concurring).

Justice Thomas' concurrence in *Baby Girl* is reminiscent of his earlier separate decision in *N.W. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 212-229 (2009) (Thomas, J., concurring and dissenting), when he urged that portions of the Voting Rights Act were unconstitutional, even as his colleagues found a way to interpret the law to avoid the constitutional question. Four years later, the Court resolved the constitutional question, invalidating the provision on federalism grounds. *Shelby Cnty. v. Holder*, 133 S.Ct. 2612 (2013). Plaintiffs hope that Justice Thomas' opinion in *Baby Girl* will demonstrate his prescience again; certainly his analysis underscores the plausibility of plaintiffs' federalism claims.

To begin with, the Indian Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, by its terms provides authority to regulate commerce "with the Indian tribes."[11] As Justice Thomas explains, "neither the text nor the original understanding of the Clause supports Congress' claim to . . . 'plenary' power." *Baby Girl*, 133 S. Ct. at 2567 (Thomas, J., concurring). Commerce is not an open-ended term; it does not encompass child custody proceedings. Moreover, the contested portions of ICWA "do not regulate Indian tribes as tribes." *Id.* at 2570. Indeed, the tribes often are not even involved in the proceedings.

[11] Defendants also cite the Indian treaty power as a source of authority for ICWA, but it cites no treaties that require the federal government to displace child custody proceedings over which states have authority, nor could they bargain away the constitutional powers of states or individual constitutional rights. *Bond v. United States*, 134 S. Ct. 2077 (2014) (*Bond II*).

The children often were never domiciled on Indian reservations and the tribes had no jurisdiction over them. *Id.* As a result, "there is simply no constitutional basis for Congress' assertion of authority over such proceedings." *Id.* at 2571.

Additionally, the Tenth Amendment prohibits the federal government from "commandeering" state resources. *N.Y. v. U.S.*, 505 U.S. 144 (1992). In *Printz v. U.S.*, 521 U.S. 898 (1997), the Court struck down a federal law obligating state officials to conduct background checks on prospective handgun purchases. Among other things, and far more odious, if a child is suspected to be Indian, the State defendants may be required to provide "genograms or ancestry charts for both parents, . . . maternal and paternal grandparents and great grandparents or Indian custodians; birthdates . . . [and] tribal affiliation including all known Indian ancestry for individuals listed on the charts[.]" 80 Fed. Reg. at 10152, B.2(b)(1)(i). Also, state officials are required to enroll children with the tribes. 80 Fed. Reg. at 10153, B.4(d)(iii).

Finally, deep federal incursions into state prerogatives to alleviate specific conditions, even if constitutionally authorized, have a limited shelf-life. Observing that "'current burdens' must be justified by 'current needs,'" the Court in *Shelby Cty.*, 113 S. Ct. at 2627, found that certain provisions of the Voting Rights Act were "based on decades-old data and eradicated practices." *Id.* Because current impositions on the states were "based on 40-year old facts having no logical relation to the present day," *id.* at 2629, the provisions exceeded the bounds of appropriate federal remedial power.

ICWA, coincidentally, will soon turn 40. Its sweeping displacement of state authority over child custody proceedings that otherwise would be subject to state jurisdiction cannot be justified based on conditions that existed when most current Americans were not yet born. As Justice Thomas has observed, ICWA's reach exceeded congressional authority in the first place. Plaintiffs have stated a cause of action under the Tenth Amendment.

D. Freedom of Association. Defendants assert (Mot. at 32) that "ICWA does not require association, but rather protects associations that already exist." Except, of course,

when it doesn't, and instead compels individuals to associate with tribes. Complaint ¶ 116, which must be taken as true as defendants have chosen to contest the claim in a Motion to Dismiss, states as follows:

> Many children who are subject to ICWA have few, if any, ties to the tribe upon which ICWA confers jurisdiction over them. Some but not all are members of the tribes but do not thereby consent to surrender their constitutional rights. Some are enrolled in the tribes as a result of the mandates of ICWA and the [BIA] Guidelines. Others are not members and have virtually no connection to the tribes other than a prescribed blood quantum.

The jurisdiction-shifting provisions of ICWA require individuals who have few contacts with a tribe to submit to its jurisdiction. The array of preferences ICWA establishes for foster and adoption placements is calculated to lead to *creation* of a tie to tribes even if one did not previously exist. That is what *Baby Girl* was all about. Moreover, under the BIA Guidelines, the State is obligated to "take the steps necessary to obtain membership for the child in the tribe" if the child is not enrolled. 80 Fed. Reg. at 10153, B.4(d)((iii).

The government goes on to say (Mot. at 32 n.16) that "the tribe also has closer ties to the children than the proposed 'next friend' because the children are members of *or the offspring of* members politically affiliated with the sovereign tribe." Really? A parent's *political affiliation*, as defendants describe it, is more important than someone who is advocating that the child's best interests should be paramount? If Congress passed a law and federal guidelines decreed that infants born to Republican parents must be enrolled in the Grand Old Party, and should be adopted by Republican families, would the Department defend it so tenaciously?

Whatever ICWA's intent, Congress did not write it merely to reunite Indian families. It encompasses individuals who merely are "members," regardless of how close or remote their attachment to the tribe, or who are eligible for membership. Once that status is established, free will and an individual's best interests are made subordinate to the federal government's goal of compelling association. That far it cannot go.

Freedom of association also protects the freedom not to associate. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). To compromise that freedom, the government must establish "compelling state interests" that "cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); see also *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2289 (2012). Plaintiffs have stated a freedom of association cause of action.

E. BIA Guidelines. There is no doubt the revised BIA Guidelines reflect defendants' application of ICWA and have the force of law through the State's adoption of them. Hence, they broaden and intensify the violations of plaintiffs' constitutional rights as alleged throughout the Complaint. The only question raised by defendants' motion to dismiss Count 6 of the Complaint is whether it is plausible to argue that the Guidelines themselves have the force of law and exceed agency authority. It is.

The Guidelines constitute final agency action and defendants fail at this preliminary stage to overcome the presumption of reviewability under 5 U.S.C. § 704. In drafting the Administrative Procedure Act (APA), it was the intent of Congress to provide for the review of "a broad spectrum of administrative actions." *Abbott Labs*, 387 U.S. at 140. For that reason, the APA's "'generous review provisions' must be given a 'hospitable' interpretation." *Id.* at 140-41 (citation omitted). Courts should give access to judicial review unless defendants make a showing of contrary intent by "clear and convincing evidence." *Id.* at 141.

Two criteria must be satisfied for an agency action to be final. "First, the action must mark the 'consummation' of the agency's decisionmaking process. . . . And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow'." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted).

The first criterion is satisfied and defendants do not argue otherwise. See 80 Fed. Reg. at 10147 ("Effective immediately, these guidelines supersede and replace the guidelines published in 1979"). As to the second criterion, it "can be met through different

kinds of agency actions, not only one that alters an agency's legal regime." *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 987 (9th Cir. 2006).

It is not what an agency action purports to be, but rather what it is, that determines its status as a final action. In *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000), the court found that self-styled "Guidance," which by its terms recited it was guidance only and not a final agency action, was in fact final agency action. The court looked at the actual effect, finding that although some states had not adopted it, "[t]hrough the Guidance, EPA has given the States their 'marching orders' and EPA expects the States to fall in line." *Id.* The Ninth Circuit has cited *Appalachian Power* favorably. *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1095 (9th Cir. 2014).

Defendants rely primarily on precedents that pre-date the current Guidelines, which have become significantly more coercive, using the word "must" 101 times in their instructions to state courts and agencies. The Guidelines' stated purpose is to "clarify the *minimum* Federal standards, and best practices, governing implementation of the [Act] to *ensure that ICWA is applied in all States* consistent with the Act's express language, Congress' intent in enacting the statute, and the canon of construction that statutes enacted for the benefit of Indians are to be liberally construed to their benefit." 80 Fed. Reg. 10150 A.1 (emphasis added). As the Guidelines state, "These guidelines provide *minimum* Federal standards and best practices to ensure compliance with ICWA and *should be applied in all child custody proceedings in which the Act applies*." 80 Fed. Reg. at 10152 A.5(a) (emphasis added). Mere suggestions or marching orders? It surely seems more than plausible that their intended effect is the latter.

Unlike cases cited by defendants (see, e.g., *BBK Tobacco & Foods, LLP v. U.S. Food & Drug Admin.*, 672 F. Supp.2d 969, 975 (D. Ariz. 2009) (no final agency action where guidance does not provide legal basis on which to institute legal proceedings)), here tribes can invoke the Guidelines to intervene in child custody proceedings at all stages, whereas ICWA by its own terms gives them a legal basis to do so only in foster care

placement and termination of parental rights proceedings, but not in preadoption or adoption proceedings. *Compare* 25 U.S.C. § 1911(b), *with* 80 Fed. Reg. at 10156, C.1(c).

It is unsurprising that defendants would seek to shield the Guidelines from judicial review, for they greatly exceed statutory authority and expand ICWA's impact. ICWA is unique in many ways, among them that it reflects a direct mandate to state courts and child services officials to set aside state laws and procedures and substitute federal laws and procedures. When the federal enforcement agency issues "guidelines" that reflect "minimum federal standards" that "should be" enforced in all proceedings, a state court or agency can be excused for considering them mandatory. Whatever benign label defendants might ascribe to them, the Guidelines operate directly upon plaintiffs to their detriment. They have stated a cause of action that the Guidelines represent final agency action that exceeds agency authority.

RESPONSE TO STATE DEFENDANT'S MOTION

Most of the State defendant's arguments parallel those made by the Federal defendants, so we will address here only the different or additional arguments made by the State. Echoing the Federal defendants, the State mischaracterizes the claims, suggesting that they reflect a series of individual disputes. Rather, all of the claims are aimed at a common injury: being segregated into a separate and unequal legal regime.

I. RULE 12(B)(1)

A. Abstention. The State (Mot. at 10) cites *Moore v. Sims*, 442 U.S. 415 (1979) for the proposition that a challenge to a complex state statutory scheme traditionally has militated in favor of abstention. Plaintiffs do not challenge a *state* statutory scheme. They challenge a *federal* scheme that operates as an overlay on the state statutory scheme for child custody proceedings. As the State itself repeatedly points out, the primary source of harm here emanates from the federal statute. The relief sought by plaintiffs would restore the State to hegemony over child custody proceedings, with a single, unitary system applying to all of the children within its jurisdiction. All that would be altered is the State's compelled adoption of ICWA and its embrace of the BIA Guidelines.

Moore also differs in that the federal court in that case barred further state proceedings. Here, the impact of the federal lawsuit on ongoing state child custody proceedings is exactly none.[12] All relief sought is prospective. Oddly, in light of its professed concern for ongoing state child custody proceedings, the State seems to think that the proper course for plaintiffs is to raise constitutional objections in all such state juvenile court proceedings implicating the individual plaintiffs and class members. Quite to the contrary, the proper place for a class action constitutional challenge to a federal statutory scheme is federal court.

Much more helpful is the State's citation (Mot. at 10-11 n.4) of Judge Silver's recent opinion in *Tinsley v. McKay*, slip op., No. CV-15-00185-PHX-ROS (Sept. 29, 2015) (attached as Ex. C). The lawsuit is a broad-based challenge to "widespread systemic failures in state child welfare agencies."[13] *Id*. at 1. Judge Silver held that after the four criteria to invoke the "exceptional" abstention under *Younger* are satisfied, a fifth factor must be considered: "whether '[t]he requested relief [] seek[s] to enjoin—or ha[s] the practical effect of enjoining—ongoing state proceedings." *Id.* at 11-12 (citing *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014)). Although the relief sought in *Tinsley* was far more intrusive than the injunctive relief sought here, Judge Silver concluded that the court should not abstain given that the case did not involve quasi-criminal proceedings, enforcement of state orders, or an injunction against ongoing juvenile court cases. *Tinsley*, slip op. at 12-25. "[P]rinciples of federalism and comity warrant restraint and respect when the target of a federal court injunction is a state agency.

[12] It is thus not a case where a plaintiff seeks to "remove an open, active and ongoing State of Arizona juvenile dependency proceeding" to federal court, see *Dema v. Ariz.*, 2008 WL 2437939 at *1 (D. Ariz. 2008); or a case that would place "decisions that are now in the hands of the state courts under the direction of the federal district court," see *31 Foster Children v. Bush*, 329 F.3d 1255, 1278 (11th Cir. 2003); nor one in which the "federal court would, in effect, assume an oversight role over the entire state program," see *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1291-92 (10th Cir. 1999).

[13] Here as in *Tinsley*, slip op. at 18, "the complaint includes anecdotal evidence from individual children's cases, [which are] examples of the alleged broader phenomena the complaint describes and for which [federal] relief is requested."

But this Court . . . is fully capable of practicing such restraint and hewing to the direction provided by the Supreme Court . . . for managing the competing requirements of federal jurisdiction and state sovereignty." *Id*. at 29.

The court also rejected the notion that plaintiffs could viably pursue their challenges in juvenile court. *Id.* at 24-25. Everything about the state court proceedings, the court observed, "is tailored to the specific facts and circumstances of a particular child's life. Nothing in the statutes governing the authority or procedures of the juvenile court envisions or authorizes the court's adjudication of class action cases." *Id.* at 25 n.18. Regardless, the existence of such state forums does not mandate abstention. "Jurisdiction existing, this Court has cautioned, a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.' . . . Parallel state-court proceedings do not detract from that obligation." *Sprint*, 134 S. Ct. at 591 (citation omitted).

Here, of course, the ongoing state cases likewise are not "quasi-criminal enforcement actions or involve a state's interest in enforcing the orders and judgments of its courts." *ReadyLink* , 754 F.3d at 759. As in *Tinsley*, slip op. at 19 (emphasis in original), "each aspect of Plaintiffs' requested relief . . . concerns *systemic* problems not individual cases." The lawsuit seeks prospective relief only. See *Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 2d 1017, 1024 (D.S.D. 2014) (where relief sought is prospective and does not interfere with ongoing state proceedings, abstention is inappropriate). Nor does the case enjoin or have the effect of enjoining ongoing state proceedings. Applying *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) (*NOPSI*), courts repeatedly have held that federal complaints seeking systemic relief against problems in state child welfare agencies "aid the ongoing state proceedings" and do "not interfere with them." *M.D. v. Perry*, 799 F. Supp.2d 712, 720 (S.D. Tex. 2011); accord, *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 286 (N.D. Ga. 2003); *Dwayne B. v. Granholm*, 2007 WL 114920 at *6 (E.D. Mich. 2007).

For all of those reasons, the Court should not abstain.

B. Standing. Defendants make no new or additional arguments regarding standing, hence plaintiffs rely on their arguments in Part I-A, *supra*. Like the Federal defendants, the State argues that no one has suffered an injury. But the Complaint identifies specific harms to both the individual and class plaintiffs by virtue of being directed to a system that imposes greater burdens and provides fewer protections to children and foster families alike.

Defendants assert (Mot. at 25) that as to all of the individual plaintiffs, no motion to transfer jurisdiction to a tribe has been made and active efforts were "completed" prior to the lawsuit. To the contrary, since the lawsuit was filed, the tribe has made a motion to transfer jurisdiction as to Baby Girl A.D. and her foster family; and active efforts to identify an ICWA-compliant placement persist. Defendants' factual error underscores the dynamic circumstances of child custody proceedings subject to ICWA: a number of adverse and injurious actions are possible *only because* the child has been made subject to the law. Different individual plaintiffs and prospective class members will experience different injuries and different outcomes; but for all of them, the system imposes disparate treatment from start to finish.

Consider this hypothetical. Both blacks and whites are allowed to travel on the state highway system. (To indulge defendants' insistence that this is about political affiliation rather than race, the hypothetical can be changed to Republicans and Democrats to the same effect.) Once a person's status is confirmed based on blood quantum (or parents' political affiliation), different sets of rules apply. The first class of drivers is given full constitutional protections for traffic infractions, while the second receives substantially less. For good measure, at the instigation of a different state, the second set of drivers can be hailed into court in a different jurisdiction even if they have never driven there. Does a driver in the second class have to wait to get a ticket, or go through the court system, before he can challenge the law? Does his decision to drive waive his rights because he doesn't have a "right" to drive and his action is "voluntary"? Of course not: being subjected to a separate and unequal system itself is a cognizable injury. Magnify

the hypothetical by making it about the lives, futures, and well-being of vulnerable children and the injury is even more palpable.

This lawsuit is a classic civil rights disparate treatment challenge to a system of *de jure* segregation. For the reasons set forth in Part I-A, plaintiffs have standing to pursue it.

C. Ripeness. Defendants acknowledge (Mot. at 27) that ripeness depends on the state of the factual record and that straightforward legal questions tend to be ripe. The legal questions presented here are straightforward and require little if any factual development. The law on its face divides individuals into categories of "Indian" and non-Indian, then assigns different rights and opportunities to different entities and individuals based on that classification. The plaintiffs fall into the disadvantaged category and are subject to separate and unequal policies and opportunities. There are no contingencies regarding whether that has occurred. Their case is ripe for resolution.[14] As set forth in Part I-B, *supra*, no resolution of state proceedings is a necessary antecedent to this lawsuit because plaintiffs already are subject to ICWA.

As to the applicability of the Guidelines, defendants already have established that they are binding upon the State defendants (Ex. A). As a consequence, DCS will apply them in all of their actions (for instance, "active efforts" to reunify the family, and foster, preadoptive, and adoptive placement preferences), regardless of whether state courts render decisions based on them. State courts often have relied on BIA Guidelines in enforcing ICWA. See, e.g., *Matter of Maricopa Cnty. Juv. Action No. JS-8287*, 828 P.2d 1245 (Ariz. App. 1991) (relying on Guidelines to interpret ICWA's transfer of jurisdiction provision); *Matter of Appeal in Pima Cnty. Juv. Act. No. S-903*. 635 P.2d 187 (Ariz. App. 1981) (same); *Matter of Appeal in Maricopa Cnty. Juv. Act. No. A-25525*, 667 P.2d 228

[14] Any "confusion" relating to the proposed class definition owes to the decision of the defendants to proceed with a Motion to Dismiss before class certification. The class clearly is intended to consist only of off-reservation children deemed to be Indian, and their non-Indian foster, preadoptive, and prospective adoptive parents.

(Ariz. App. 1983) (definition of Indian child).[15] What state courts ultimately decide is less significant than the fact that DCS, which has legal *custody* over the children and makes day-to-day decisions on their behalf, considers the Guidelines binding. The Complaint alleges significant harm flowing directly from the Guidelines as well as defendants' enforcement of them.

As the harms flowing from the State's enforcement of ICWA and the Guidelines are actual, ongoing, and continuous, the case is ripe for resolution.

II. RULE 12(B)(6)

As with the Federal defendants, the State argues the merits of plaintiffs' constitutional claims without seriously arguing that they fail to meet the standard of plausibility required for a Motion to Dismiss.

A. Equal protection. Defendants recite (Mot. at 18-19) the *Morton v. Mancari* catechism to which plaintiffs have replied in Part II-A, *supra*.[16] They acknowledge (*id.* at 20) that if the classification is racial, strict scrutiny applies and the government bears the burden of proving that no less drastic means exist to achieve the legislation's goals. As discussed previously, for purposes of defining "Indian" children, ancestral lineage is a prerequisite under the law and blood quantum is used by most tribes to determine membership. Only children of Indian heritage are made subject to ICWA.

[15] One of the cases cited by defendants, *Ariz. Dep't of Econ. Sec. v. Bernini*, 48 P.3d 512, 515 (Ariz. App. 2002), actually did apply certain of the Guidelines. Of note, DCS's predecessor agency strongly protested the trial court's order requiring it "to establish by clear and convincing evidence rather than a preponderance that the continued removal of Noah J. from the custody of his parents . . . was 'clearly necessary to protect the child from suffering abuse or neglect'." *Id.* at 512. Here we have a clear acknowledgment by the State that subjecting children to the less-protective ICWA standards exposes them to greater risk of harm and abuse.

[16] A dispute over the applicable standard of review is not a basis for dismissing a complaint. In fact it is not even necessary to plead the applicable level of scrutiny. See, e.g., *Dadian v. Village of Wilmette*, 1999 WL 299887 (N.D. Ill. 1999). The appropriate level of scrutiny often is heavily disputed and goes to the merits. See, e.g., *Cornwell v. Hamilton*, 80 F. Supp.2d 1101 (S.D. Cal. 1999).

Given the relatively modest goals attributed by State defendants to Congress—responding to "the insensitivity of 'many social workers [to] . . . Indian cultural values and social norms' which led to misevaluation of parenting skills and to unequal application of considerations such as parent alcohol abuse" (Mot. at 4 (citation omitted))—one wonders why Congress employed a sledgehammer approach to the perceived problems. The BIA Guidelines have only broadened ICWA's scope and impact. Are the problems today as acute as they were nearly four decades ago? Is DCS saying that, left to its own devices, it would raid Indian tribes and place children with non-native families based on stereotypes and insensitivity?

Why does ICWA sweep so broadly to encompass children with few if any ties to tribes? Instead of using "shorthand," why can't courts employ *Holyfield*-style evaluations to determine whether jurisdiction over a particular child lies appropriately with the State or the tribe? If the object is family reunification, why do the placement preferences extend far past the point of termination of parental rights and encompass non-relatives and even Indians outside of the tribe, to the exclusion of non-native foster families? (Indeed, ICWA's racial classifications go not only to defining who is *included* in the law but to who is *excluded* from placement preferences.) If the purpose is to protect Indian children, why are their individual best interests not considered as a matter of course, and why are their opportunities to be free of abusive homes and to form permanent loving families restricted in ways that similar opportunities for other American children are not? In all of these respects, it will be difficult for the government to demonstrate narrow tailoring.

Plaintiffs do not independently challenge the State statutes that implement ICWA (see Mot. at 20-21), but merely use them to illustrate that the State has adopted ICWA and is jointly liable with the Federal defendants for the constitutional violations flowing from those actions. The State (*id.*) depicts the relationship as when "a state merely follows a federal statute," which highlights the subordinate position into which ICWA relegates the states in an area traditionally reserved to state autonomy.

"Indians like other citizens are embraced within our Nation's 'great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty'." *Duro v. Reina*, 495 U.S. 676, 692 (1990). They do not shed their constitutional rights by virtue of "political affiliation." If they wish to be bound by tribal jurisdiction they have complete freedom to do so. But the converse is, or should be, true as well. By extending the law to encompass individuals who have not chosen to be so bound through a classification based on ancestry, the federal government (and by affirmative extension of the law, the State as well) have transgressed the boundaries of equal protection.

B. Due process. The State asserts (Mot. at 18) that ICWA applies "only [to] those children who can demonstrate the requisite political affiliation to a federally recognized Indian tribe." That assertion is wrong on dual levels. As discussed earlier, it is not the child who is doing the "demonstrating" but, in many instances, DCS officials following federal instructions to register children who are eligible for membership. Nor is the political affiliation "requisite" for due process purposes. As set forth in Part II-B, *supra*, mere "membership" in a tribe is insufficient to deprive individuals of rights and opportunities available to other citizens nor to confer power and jurisdiction upon third parties to influence or determine their futures.

Defendants' argument (Mot. at 21-22) regarding its abandonment of the otherwise-sacrosanct "best interests" standard in child custody proceedings is a model of circular reasoning. ICWA's explicit purpose is to protect the best interests of Indian children, defendants assert; therefore, "by complying with ICWA's mandates with respect to Indian children in its care, the State is considering and acting upon those children's best interests." Put aside that, left to its own devices, Arizona has decreed that for all children within its jurisdiction, a child's individual best interests must be taken into account in all custody proceedings. In the ICWA context, that standard is subordinated to another entity's interests and desires; yet by complying with ICWA, the State is still serving the child's best interests.

The children beg to differ. And in so doing, they assert an actionable due process claim.

C. Freedom of association. It is either a racial classification or a forced political affiliation (or both). Either triggers judicial scrutiny.

The State contends (Mot. at 23) that plaintiffs have not alleged that the State is compelling association with a tribe. To the contrary, Complaint ¶¶ 43, 57-69, 114-118 alleges exactly that. Further, as set forth in the Complaint, ICWA's forum-transfer provisions force individuals to submit to the jurisdiction of a different governmental entity.

Ironically, defendants cite (Mot. at 24) *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71-72 (1978) for the proposition that the Court is "'restrained' in any attempt to 'adjust[] relations between and among tribes and their members' because to do so 'may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity'." *Id.* at 23-24. If this Court orders the requested relief, it will not be "adjusting" relations between tribes and their members.[17] Rather, it will put an end to the federal government's latest efforts—reminiscent of some of the ugliest episodes of American history—to force people to associate with others against their will. Such a practice offends constitutional principles set forth in cases such as *Roberts* and *Knox*, *supra*.

None of the arguments presented by the State defendants divest this Court of the authority to proceed nor defeat the causes of action alleged by plaintiffs.

[17] Tribes will continue to be notified about pending foster care placement and termination proceedings in state court as well as any time an Indian child enters the DCS system under ICWA's notice provisions, which are not challenged here. 25 U.S.C. § 1912(a), (b). Their ability to intervene under state rules of civil procedure is similarly not challenged here. See Ariz. R. Civ. P. 24; *William Z., supra.* Nor do Plaintiffs challenge ICWA's expert witness requirement, 25 U.S.C. § 1912(e), thus not preventing a state court from making an individualized best interest determination in all child custody proceedings involving Indian children that is not skewed by discriminatory provisions of ICWA that are challenged here.

CONCLUSION

Plaintiffs express to the Court their gratitude for its alacrity in considering and resolving the Motions to Dismiss. The claims presented in this lawsuit are serious and important and affect thousands of people, including some of the most vulnerable American children, who deserve the chance to form permanent, loving families. The obstacles interposed by the Motions to Dismiss should not deprive them of their chance to proceed.

RESPECTFULLY SUBMITTED this 13th day of November, 2015 by:

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