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IN THE UNITED STATES DISTRICT COURT

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,

v.

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

Defendants.

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

FEDERAL DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

(Assigned to The Honorable Neil V. Wake)

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INTRODUCTION

The Indian Child Welfare Act ("ICWA") was enacted to protect "Indian children, Indian families, and Indian tribes [from] abusive child welfare practices" that were tearing apart Indian communities and harming Indian children. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Decrying ICWA as racial segregation, Plaintiffs style this case as an effort to rescue Indian children from ICWA's preference for placement with their families and tribes. Such an attempt to "rescue" Indian children from their families and their tribes is precisely what Congress intended to prevent when it enacted ICWA, after it determined that removing Indian children from their families and tribes was likely to cause them harm. *See e.g. id*. at 33 n.1 (attesting to the problems suffered by Indian children adopted into non-Indian society as they struggled to assimilate). While claiming to champion the "best interests" of Indian children, Plaintiffs would invalidate the statute that Congress specifically designed to protect those interests. Because Plaintiffs' agenda is not supported by a concrete case or controversy, and because they have failed to state a claim for relief, their Complaint must be dismissed.

ARGUMENT

I. Plaintiffs lack standing.

Mere Allegation of a Race-Based Classification Does Not Create a Case or Controversy. Plaintiffs assert that they need not show injury from the specific provisions of ICWA they wish to overturn because they bring a class challenge to "the

discriminatory system" which they claim is ICWA, Opp. at 5, and therefore are at liberty to pick and choose which provisions this Court should review and overturn. However, Plaintiffs must demonstrate standing for each claim they press. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Plaintiffs' cited civil rights cases are not to the contrary. Plaintiffs in *Regents of University of California v. Bakke*, for example, had "standing to challenge" the admissions program because "that program operated to exclude [plaintiff] from the school on the basis of race." 438 U.S. 265, 277-78 (1978). And, contrary to Plaintiffs' representation, *Gratz v. Bollinger* did not permit an open-ended challenge to a "broad racial classification policy," Opp. at 4, but instead allowed a challenge to a specific admissions program that was applied to both freshman and transfer admission applicants. 539 U.S. 244, 265 (2003). Plaintiffs must show standing to challenge each ICWA provision they target because "[t]he remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *DaimlerChrysler*, 547 U.S. at 353.[1] Further distinguishing this case from the civil rights cases cited by Plaintiffs is that ICWA is not, as a matter of law, a race-based statute. *See infra* Section II.A. Moreover, the Ninth Circuit has made clear that "system-wide injunctive relief is not available based on alleged injuries to unnamed

[1] Needless to say, equal protection claims are often dismissed for lack of standing. *See, e.g., Braunstein v. Ariz. Dept. of Justice*, 683 F.3d 1177 (9th Cir. 2012) (dismissing challenge to minority business program for lack of evidence that it posed a barrier to plaintiff); *Carroll v. Nakatani*, 342 F.3d 934, 943-44 (9th Cir. 2003) (no standing to challenge minority loan/lease program where grievance is general and not redressable); *Scott v. Pasadena Unif. Sch. Dist.*, 306 F.3d 646 (9th Cir. 2002) (barring challenge to race-based admissions because no imminent threat of enforcement or specific harm).

members of a proposed class." *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999).[2] Thus general statements of what happens to hypothetical Indian children and foster parents in unspecified cases are neither relevant to the standing of named plaintiffs nor descriptive of actual and concrete injury.[3]

Plaintiffs Have Not Otherwise Demonstrated Standing. Plaintiffs desire to "desegregate" a broad class of Arizona children from the protections afforded them by ICWA is not enough in itself to generate a concrete case or controversy. To satisfy Article III and prudential justiciability with respect to each claim, they must identify redressable injury to named Plaintiffs caused by the challenged provisions, and they have failed to do so here.[4]

Plaintiffs attempt to show harm from delay by positing that *Lipscomb By and Through DeFehr v. Simmons*, 962 F.2d 1374 (9th Cir. 1992), in which the Ninth Circuit declined to hear claims by children who remained in their preferred foster-care placements, "is not a standing case," Opp. at 9, a characterization hard to countenance in light of that Court's rejection of the children's "claim of constitutional injury." 962

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[2] In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999), the Court remanded for inappropriate certification under Rule 23(b)(1)(B) and did not consider standing at all.

[3] The allegations that Plaintiffs suggest demonstrate injury by forced association, for example, are couched entirely in terms of hypothetical injuries that may occur to "many children" subject to ICWA, and do not provide a basis for standing. *See* Opp. at 32.

[4] Plaintiffs' claims are not ripe because they present "abstractions," not "concrete legal issues . . . in actual cases" for purposes of Article III. *Colwell v. Dep't of Health and Human Servs.*, 558 F.3d 1112, 1123-24 (9th Cir. 2009). Nor are they fit for prudential review until "the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Id*. at 1124. Nor do Plaintiffs claim any hardship from denying review.

F.2d at 1377; *see also* Br. at 9-10. By suggesting that they would otherwise "be subject to a different set of rules and procedures . . . more favorable to them," Opp. at 9, Plaintiffs only underscore the deficiency in their allegation of injury from the adoptive-placement preferences and transfer provisions: Because *neither provision has been or necessarily will be applied*, we cannot know whether injury will ever be more than a hypothetical possibility, or whether the adoptive-placement or transfer provisions as applied would in fact involve application of different rules or procedures.[5] *See, e.g.*, Br. at 10-13, 17 n.6. Nor is it clear that application of ICWA's "rules and procedures," to the extent they differ from state law, would cause any concrete injury.[6] Finally, Foster Parent Plaintiffs do not claim to have identified a legally protected interest that is injured by delay or that the adoptive-placement preferences, if applied, are likely to

[5] For example, C. is not available for adoption, Compl. ¶ 22, but should his permanency plan change, ICWA will deviate from state law only where there is no extended family available for placement (a criteria that both ICWA and Arizona prioritize); where there are suitable placements both within and external to the tribal community; and where there is no good reason, as determined by the state court, to prefer the latter. The reality is – inconveniently for Plaintiffs – much more complicated than the "two-track system of child custody" that they seek to portray. Opp. at 11; *see also* Opp. at 3, 5, 8.

[6] With respect to transfer, Plaintiffs do not dispute that A.D.'s obvious connection to Gila River means tribal-court jurisdiction would not cause the harm alleged. *See* Br. at 12. Instead, they speculate about possible children having no connection with a tribe somehow being subject to ICWA, without establishing that this is the case for any Plaintiff. Opp. at 10. They further suggest that non-Indian families that "come to love [a] child" and decide to adopt it should not be hindered by the fact that the child is part of an Indian community and thus protected by ICWA. *Id*. None of this creates cognizable present harm for standing purposes because there is no "right" to adopt anyone you "come to love." Finally, Plaintiffs misstate advice from the Guidelines, which recommend that the State help eligible children obtain membership. *See* 80 Fed. Reg. 10153 (§ B.4(d)(iii)). Contrary to Plaintiffs' account, Opp. at 8, 10, the Guidelines say nothing of overriding parental opposition to do so; moreover, at least one of an unenrolled "Indian child's" biological parents is already a member. 25 U.S.C. §1903(4).

harm that interest. Br. at 12-14. Unlike their inchoate desire to adopt, foster parents in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 818 n.1 (1977), satisfied the case and controversy requirements because the State either had s*ought to remove or had actually removed* foster children from their care.[7]

Plaintiffs lack third-party standing. Foster Parent Plaintiffs' belated attempt to recast their claims as derivative of the rights of C. and A.D. should be rejected. Opp. at 12. As described above, they do not have standing to challenge ICWA or the Guidelines directly – a prerequisite for third-party standing. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 n.2 (2004). Nor is the basis for third-party standing or their intent to represent Indian Child Plaintiffs alleged in the Complaint. *See Hong Kong Supermarket v. Kizer*, 830 F.2d 1078, 1082 (9th Cir. 1987) ("Mutual interdependence cannot be established by post hoc editing.").

Moreover, exceptions to the general rule that "one may not claim standing . . . to vindicate the constitutional rights of some third party," *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976), are strictly limited and do not apply here. Not only are Indian Child Plaintiffs party to the litigation and not hindered from participating, *see Miller v. Albright*, 523 U.S. 420, 448 (1998), but Foster Parent Plaintiffs are not appropriate representatives for their interests anyway because their interests are, as a matter of law,

[7] The Supreme Court nonetheless declined to recognize a liberty interest of foster parents in their foster children. *See infra* Section II.B. As such, S.H.'s and J.H.'s decision to adopt A.D. with the knowledge of ICWA's applicability cannot be said to "waive" nor "strip them" of a right they did not possess in the first place. Opp. at 10. Plaintiffs do not attempt to defend M.C.'s and K.C.'s allegations of injury from C.'s visitation, Br. at 14, and we therefore do not discuss them further here.

and on the basis of the pleadings, "not in parallel and, indeed [are] potentially in conflict." *See Elk Grove Unif. Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004).[8] Foster Parent Plaintiffs have alleged their desire to adopt C. and A.D., but there is an obvious conflict between the right they would assert on the children's behalf – the right to have adoptive placement guided by the children's best interests – and their intense wish to *be* that placement, irrespective of what is best for the children. *See AlohaCare v. Haw. Dept. of Human Servs.*, 567 F. Supp. 2d 1238, 1260 (D. Haw. 2008). The same lack of common interest is apparent from the fact that Plaintiffs seek to invalidate a statute designed to protect Indian Child Plaintiffs' rights. *See Hong Kong*, 830 F.2d at 1082 (observing that vendor's "willingness to enjoin the [Special Food Program for Women, Infants, and Children] was probative of a conflict, rather than a congruence of interests" with its customers); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1308 (9th Cir. 1982).[9]

Carter Lacks Standing to Serve as Next Friend. Plaintiffs downplay Carter's lack of a relationship with A.D., C. and all potential child plaintiffs in this action even though the Ninth Circuit places great import on a significant relationship. *See Coal. Of Clergy, Lawyers & Professors v. Bush*, 310 F.3d 1153, 1162 (9th Cir. 2002) (requiring "an objective basis for discerning the 'intruder' or 'uninvited meddler' from the true

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[8] Abrogated on other grounds by *Lexmark Intern, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 n.3 (2014).

[9] Plaintiffs rely on a footnote in *Smith* for the proposition that foster parents have third-party standing even where the child is separately represented by court-appointed counsel, 431 U.S. at 841 n.44, but courts look to state law to determine whether a given party has "sufficient attributes of guardianship." *Id.*; *see also Newdow*, 542 U.S. at 16; *United States v. Bennett*, 147 F.3d 912, 914 (9th Cir. 1988).

'next friend.'"). Nor is this an "extreme case" that necessitates departure from the requirement. *See, e.g.*, *Nichols v. Nichols*, 2011 WL 2470135, *2-6 (D. Or. 2011) (appointing a stranger next friend because circumstances present "an 'extreme case'"). Carter's qualifications as a general family-law attorney who understands "the best interests of . . . children," Opp. at 13, do not make her suitable to represent the *particular* best interests of each and every potential named and un-named child plaintiff in this action and Carter therefore lacks standing to bring this action on their behalf.

II. Plaintiffs' Substantive Claims Must be Dismissed

A. Plaintiffs' Equal Protection Claim is Premised on a Race-Based Classification that is Incorrect As a Matter of Law

Plaintiffs stake their equal protection challenge to ICWA on their belief that the definition of "Indian child" constitutes *de jure*, race-based discrimination. Compl. ¶ 40. However, membership in a federally recognized Indian tribe is legally distinct from racial or ethnic identity. *See Bakke*, 438 U.S. at 304 n.42 (1978) (distinguishing laws promoting the interests of tribal members from laws targeting racial groups). And the Ninth Circuit has already concluded that *Morton v. Mancari*, 417 U.S. 535 (1974), remains untouched by the line of cases applying strict scrutiny to admissions preferences for racial minorities. *Means v. Navajo Nation*, 432 F.3d 924, 932 (9th Cir. 2005) (finding that *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) did not undermine *Mancari*); *see also Morris v. Tanner*, 288 F. Supp. 2d 1133, 1141 (D. Mont. 2003) ("The rhetoric of race relations derived from the history of African–Americans is only partially applicable to the situation of Indians, and to overlook the crucial

differences minimizes the great respect owed to the remaining sovereignty of tribes."). Plaintiffs have not challenged ICWA as a political classification, nor have they pled facts sufficient to overcome the presumption of constitutionality that applies to congressional enactments, *Schwenk v. Hartford*, 204 F.3d 1187, 1204 (9th Cir. 2000),[10] and their claim must be dismissed.

"Indian child" is a Political Classification. Contrary to Plaintiffs' account, Opp. at 21, the Supreme Court has indeed created a categorical rule that federal laws applying to Indians, by nature of their relationship to and membership in Indian tribes, are subject to rational basis review under the equal protection clause. *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979) ("It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.") (citing *Mancari*). Since *Mancari*, this rule has been upheld and expanded by Supreme Court and Ninth Circuit decisions that have consistently rejected equal protection challenges to statutes differentiating between persons on the basis of tribal membership. *See* Br. at 21, 21 n. 9 (citing cases). Plaintiffs do not cite a single case holding that a classification based on membership in a federally recognized tribe is racial or violates equal protection.[11] They

[10] *See also United States v. Bolin*, 423 F.2d 834, 838 (9th Cir. 1970) (Plaintiff has the "heavy burden . . .to rebut the presumption").

[11] Plaintiffs point to *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2557 (2013), which held *inter alia* that a non-custodial father could not invoke ICWA's higher standards for removal and active efforts because he never had custody of his daughter. 133 S. Ct. at

fail to provide any basis for this Court to reject "the weight of established law," *Means*, 432 F.3d at 932, and upend hundreds of years of "classifications expressly singling out Indian tribes as the subject of legislation." *United States v. Antelope*, 430 U.S. 641, 645 (1977) (finding support for such classifications in the Constitution and the history of Federal-tribal relations).[12]

The cases Plaintiffs do cite, Opp. at 23-24, further solidify the distinction between the two.[13] In *Rice v. Cayetano*, 528 U.S. 495 (2000), the Court did not hold that a political classification that had some overlap with ancestry was race-based, *see* Opp. at 23-24, but that the state election law impermissibly "define[d] the electorate in a way that [was] not analogous to membership in an Indian tribe." 528 U.S. at 526 (Breyer, J., dissenting); *see also Kahawaiolaa v. Norton*, 386 F.3d 1271, 1278 (9th Cir.

2560-64. The decision was not based on the Constitution, and aside from the fact that it also concerned ICWA, has little bearing on the present matter. Plaintiffs seize upon a hypothetical that the Court offered in dicta, musing that if a mother had decided to give her child up for adoption, and if such adoption was in the child's best interests, it *could* raise equal protection concerns if ICWA permitted a father who had abandoned the child before birth to override that decision at the last minute. *See* 133 S. Ct. at 2565; Opp. at 1, 3 n.2. Because the Court found that the statute was not capable of that interpretation, however, it did not address equal protection, nor have Plaintiffs presented such a fact pattern here. And although Plaintiffs quote selectively from the dissent to create the illusion of a constitutional issue, Opp. at 22, it is plain from the majority and minority opinions that any "hints at lurking constitutional problems are . . . irrelevant to [the Court's] statutory analysis." 133 S. Ct. at 2584 (Sotomayor, J., dissenting).

[12] Such a decision may even call into question the constitutionality of the 1924 Indian Citizenship Act, granting U.S. citizenship to members of Indian tribes. 8 U.S.C. §1401.

[13] Plaintiffs assert that ICWA "sweeps within its 'protection' children who do not have significant ties . . . to a reservation or Indian culture." Opp. at 24-25, 41; Compl. ¶ 116. Under *Mancari*, the question is not whether a child has ties to their Indian culture or resides on a reservation, but rather whether they have a political affiliation with a federally recognized tribe. By definition, every "Indian child" has such a political tie through their own membership, or their parent's membership and their own eligibility.

2004) ("*Rice* explicitly reaffirmed and distinguished the political, rather than racial, treatment of Indian tribes as explained in *Mancari.* The issue did not concern recognition of quasi-sovereign tribes."). ICWA, in contrast, applies only based on membership in a federally recognized Indian tribe. 25 U.S.C. § 1903(8).[14] Contrary to Plaintiffs' assertion that "the government is not permitted to use 'shorthand' [i.e., tribal membership] to separate people into racial categories," Opp. at 21, the above precedents affirm that the special political relationship the United States enjoys with members of federally recognized tribes exists *because of* (not in spite of) their descent from members of sovereign nations that predate the nation's formation and their continued identity as members of "distinct, independent communities." *Worcester v. Georgia*, 31 U.S. 515, 519 (1832); *see Mancari*, 417 U.S. at 554; *Antelope*, 430 U.S. at 646; *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 557 (9th Cir. 1991) ("[T]o achieve present-day recognition as a sovereign[] the modern-day group must demonstrate some relationship with or connection to the historical entity.").[15]

Finally, the distinction that Plaintiffs would draw between on- and off-reservation children is without merit. First, "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States." *United States v. McGowan*, 302 U.S. 535, 539 (1938) (internal

[14] It is the prerogative of each tribe as sovereign to decide how it will determine its membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978).

[15] The use of ancestry to determine eligibility for citizenship is not unique to tribes. *See, e.g.*, 8 U.S.C. §§ 1401(c), 1401(g), 1409(a), 1409(c) (providing for U.S. citizenship by descent to children born outside the country); *Najjar v. Ashcroft*, 257 F.3d 1262 (11th Cir. 2001) (Saudi Arabian and United Arab Emirati citizenship is based on ancestry).

citations omitted); *United States v. John*, 437 U.S. 634, 653-54 (1978); *Perrin v. United States*, 232 U.S. 478, 482 (1914). Moreover, membership is the touchstone for qualifying as an "Indian child," and does not stop at the reservation boundary. *See Venetie*, 944 F.2d at 559 n.12 ("[T]ribal sovereignty is not coterminous with Indian country. Rather tribal sovereignty is manifested primarily over the tribe's members.") (internal citations omitted); *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974) (upholding right of tribe to regulate members' off-reservation fishing). Tribes have inherent jurisdiction over members' domestic relations, and "need not wait for an affirmative grant from Congress . . . to exercise dominion." *Venetie*, 944 F.2d at 556; *see also Montana v. United States*, 450 U.S. 544, 564 (1981) ("Indian tribes retain their inherent power to determine tribal membership [and] to regulate domestic relations among members."); *Holyfield*, 490 U.S. at 42 ("Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA."). Through ICWA, Congress has formally affirmed the "concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation." *Holyfield*, 490 U.S. at 36.[16]

ICWA's Provisions Are Rationally Related to a Legitimate Government Objective. On a motion to dismiss for failure to state a claim, it is Plaintiffs' burden to

[16] Plaintiffs' contention that extending the preference to "Indian families" creates a race-based classification lacks merit. Opp. at 24. Tribal jurisdiction over members of other tribes has also been upheld against equal protection challenge. *See United States v. Lara*, 541 U.S. 193, 200-207 (2004) (acknowledging Congress's authority to recognize jurisdiction over non-member Indians); *Means*, 432 F.3d at 931-35 (extending Navajo criminal jurisdiction to resident member of Oglala-Sioux because classification retains political character and satisfies rational basis); *Morris*, 288 F. Supp. 2d at 1141-43.

rebut the presumption of constitutionality afforded Congressional acts and show that legislative facts upon which classification is based could not reasonably be conceived to be true. *See Miller v. United States*, 73 F.3d 878, 881-82 (9th Cir. 1995); *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992) (applying rational basis standard in the context of Fed. R. Civ. P. 12(b)(6)); *Giarrantano v. Johnson*, 521 F.3d 298 (4th Cir. 2008) (same); *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995). Rather than engage on the merits of the applicable provisions of ICWA, Plaintiffs rest on their contention that "Indian child" is a race-based definition. Having failed to carry their burden, Plaintiffs' equal protection claim must be dismissed.

Nonetheless, as Federal Defendants have already demonstrated, Br. at 24-26, ICWA *is* narrowly tailored to "*protect the rights of the Indian child as an Indian* and the rights of the Indian community and tribe in retaining its children in its society." H.R. REP. NO. 95-1386, at 23 (July 24, 1978) (emphasis added). Contrary to Plaintiffs' assertions, Opp. at 24-25, ICWA's threshold "Indian child" definition requires that either the parent or the child be a member and therefore have political ties to the tribe, and its implementing provisions apply *solely* in the context of individualized state-court, child-custody cases.[17] Neither "reaches . . . beyond" the statute's purpose, Opp. at 24;

[17] Far from precluding individualized consideration, Opp. at 24, Congress amended the draft bill to "make[] clear that the underlying principle . . . is in the best interest of the Indian child." H.R. REP. NO. 95-1386, at 19. ICWA does not "conflate" the interests of the Indian child with the tribe, Opp. at 25, but rather creates a presumption that the standards set forth in the Act (which may or may not align with the interests of the tribe) *are* in the child's best interests. Concerns Plaintiffs raise regarding the possibility that an Indian child may be better served outside the tribal community, Opp. at 21, 25, are

rather, Plaintiffs artificially restrict that purpose by quoting only part of the relevant sentence from the legislative history. *See id*. (excluding reference to ICWA's purpose of protecting the rights of the Indian child); *Holyfield*, 490 U.S. at 37 (providing complete quotation).[18]

B. Plaintiffs Fail to Identify Any Due Process Right Violated by ICWA

Plaintiffs have also failed to meet the "heavy burden" to sustain their facial substantive due process claim because they have not identified any fundamental right affected, let alone harmed, by the challenged ICWA provisions. *See Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1994).

Transfer Provision. Plaintiffs do not dispute that they have never been required to appear in a tribal forum. *See* Br. at 26. Their facial challenge to Section 1911(b) must therefore establish that "no set of circumstances exists under which the [statute] would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), and they do not satisfy this standard. *See also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008).

First, Plaintiffs' claim is based on an erroneous application of generic personal jurisdiction principles to child-welfare proceedings. State juvenile courts routinely

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therefore accounted for by the discretion given the state court to decide if there is "good cause" not to transfer to tribal jurisdiction or to deviate from ICWA's placement preferences. *See* 25 U.S.C. §§ 1911(b), 1915(a).

[18] Moreover, the legislative history is replete with less-restrictive alternatives that Congress considered, including a definition of Indian child that would have limited ICWA's application where member parents did not have custody. *See* H.R. REP. NO. 95-1386, at 20, 39 (rejecting proposal because the biological, not the custodial relationship with parents was the touchstone of child's right to tribal affiliation).

exercise jurisdiction over a nonresident parent. *See, e.g.* Uniform Child Custody Jurisdiction and Enforcement Act § 201(c) (1997) ("[P]hysical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.") [hereinafter UCCJEA]; Ariz. Stat. § 8-532 (granting juvenile courts jurisdiction when the child involved is present in Arizona). Child-welfare proceedings would otherwise grind to a halt whenever there is no sovereign with personal jurisdiction over all possible parties to the action. The same principles apply to tribal-court jurisdiction over Indian children.

Second, Plaintiffs assume – but cite no relevant authority – that child-welfare courts must be able to exercise personal jurisdiction over *foster parents* in child-welfare proceedings. Foster parents do not automatically have party-status in these proceedings, and certainly cannot divest a court of jurisdiction because of an alleged lack of personal jurisdiction over them. If Foster Parent Plaintiffs' broad assertion was accepted, foster parents could defeat otherwise-lawful transfers of child-welfare proceedings between states, notwithstanding that such a transfer is otherwise in the interests of justice. *See, e.g.*, UCCJEA § 207.

Third, Plaintiffs cannot succeed in a facial challenge because Section 1911(b) permits state courts to deny a petition to transfer to tribal court either if there is "good cause" or if there is an "objection by either parent." *See, e.g.*, *Matter of Appeal in Maricopa Cnty. Juv. Action No. JD-6982*, 922 P.2d 319 (Ariz. Ct. App. 1996) (upholding denial of transfer due to mother's objection); *Matter of Maricopa Cnty. Juv.*

Action No. JS-8287, 828 P.2d 1245 (Ariz. Ct. App. 1991) (finding good cause to deny transfer due to advanced stage of state-court proceeding and because transfer was not in the child's best interests). Particularly in light of the discretion built into the statute, Plaintiffs cannot establish that Section 1911(b) violates the due process rights of children or foster parents in *any* circumstance, much less *all* circumstances. *See Roulette v. City of Seattle*, 97 F.3d 300, 306 (9th Cir. 1996) (rejecting facial substantive due process challenge where statute would be constitutional as applied in a large fraction of cases).

Individualized Determination. Plaintiffs do not point to a single court that has recognized a fundamental right of foster parents to maintain their relationship with the children placed in their care. Although they imply that *Smith* supports their cause, the Supreme Court in fact recited numerous reasons that there is only "the most limited constitutional 'liberty' in the foster family." 431 U.S. at 846. *Accord Gibson v. Merced Cnty. Dep't of Human Res.*, 799 F.2d 582 (9th Cir. 1986); *Matter of Appeal in Maricopa Cnty. Juv. Action No. J-57445*, 691 P.2d 1116 (Ariz. Ct. App. 1984). Because Plaintiffs can point to the violation of no fundamental right, nor show that the burden-of-proof and placement preference provisions are unreasonable, this claim should be dismissed.

Best Interests of the Child. Plaintiffs' hyperbole about the best interests of the child fails to address the legal requirements to maintain their claim. They do not point to a single case that holds that there is a fundamental right to a "best interests" analysis in all decisions affecting a child's care and custody. Indeed, as plaintiffs must

acknowledge, the Ninth Circuit has articulated a significantly more limited liberty interest – "reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child" – a standard far exceeded by ICWA. *Lipscomb*, 962 F.2d at 1379. Yet again, Plaintiffs do not point to a single circumstance in which the application of ICWA has denied a child the right to a placement based on their best interests, much less demonstrate that it denies this right in all cases.

Nor could they, as ICWA's provisions are designed to *protect* an Indian child's best interests, including their interest in remaining with their parents, or if this is not possible, with their extended family (whether a tribal member or not), or with their tribal community. *See supra* note 17. Plaintiffs clearly believe that the interests of foster parents outweigh these interests, *see* Opp. at 28 (asserting that children should remain with foster families even where an extended family member is available for placement). But Congress reasonably prioritized the interests of Indian children in remaining with their families, when possible, over the interests of foster parents.[19] Under any circumstances, Plaintiffs cannot demonstrate that any rights are actually being violated, as Arizona state courts continue to apply a "best interests" standard in ICWA cases, including in making placement decisions.[20]

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[19] As articulated by *amicus* brief filed by Casey Family Programs and many other national child-welfare organizations, ICWA represents the "gold standard for child welfare policies and practices that should be afforded to all children." Casey Br. at 2.

[20] *See, e.g., Valerie M. v. Ariz. Dep't of Econ. Sec.*, 198 P.3d 1203 (Ariz. S. Ct. 2009); *Navajo Nation v. Ariz. Dep't of Econ. Sec.*, 284 P.3d 29, 35 (Ariz. Ct. App. 2012) ("[W]e have held that Congress intended that the child's best interests be considered in placement along with the child's ties to the tribe"). The rest of Plaintiffs' argument is

C. Plaintiffs Cite No Authority for the Limits They Would Impose on the Indian Commerce Clause

Plaintiffs argue that the Indian Commerce Clause ("ICC") "should by definition not place federal regulation on a collision course with state prerogatives." Opp. at 32. However, ICWA was undoubtedly a permissible exercise of Congress's plenary authority over Indian affairs pursuant to the ICC and other sources of federal authority, such as the Treaty Clause and Congress' authority as trustee, 25 U.S.C. § 1901(2), (3), which Plaintiffs do not challenge here. The Supreme Court has consistently endorsed such broad federal power over Indian affairs, concluding that it does not impinge upon any reserved state right or violate principles of federalism. *Mancari*, 417 U.S. at 552-53; *Lara*, 541 U.S. at 200; *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014); *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1153 (9th Cir. 2013), *as amended* (July 9, 2013) (holding that, where Congress acts within its powers under the ICC, "the Tenth Amendment is not implicated, and the constitutional challenge fails") (internal citation omitted).[21]

The only support for Plaintiffs' position that the ICC is limited to "commerce" and "does not encompass child custody proceedings," Opp. at 30, is Justice Thomas' concurrence in *Adoptive Couple*. *See* 133 S. Ct. at 2566. There Justice Thomas

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devoted to their complaints about the Guidelines, which do not have the force of law, *see infra* Section II.E, and cannot form the basis of a substantive due process challenge.

[21] Moreover, in the event of a "collision" between a constitutionally permissible federal law like ICWA and a state prerogative, the Supremacy Clause requires that the federal law prevail. U.S CONST., art. VI.

promoted an approach to the ICC that would narrow its application radically to "commerce" as that word is understood in the context of the Interstate Commerce Clause.[22] *Id*. No other Supreme Court Justice joined in his opinion and four rejected his view. *See* 133 S. Ct. at 2584 n. 16 (Sotomayor, Ginsburg, Kagan, and Scalia, J., dissenting) (dismissing Justice Thomas' argument as "inconsistent with this Court's precedents" concerning the reach of the ICC).[23]

Finally, Plaintiffs inaptly analogize ICWA to provisions of the Voting Rights Act held unconstitutional in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). The provisions at issue in *Shelby County* "were intended to be temporary[,]" and required continual reauthorization by Congress. 133 S. Ct. at 2620, 2619. ICWA, in contrast, furthers an on-going national policy to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. ICWA does not displace "state authority over child custody proceedings," Opp. at 31, but merely provides for "minimum Federal standards" where state authority is exercised over Indian children. Plaintiffs' Fourth Count fails to state a claim.

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[22] The Supreme Court has otherwise recognized that "while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation," "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192-93 (1989). Unlike the Interstate Commerce Clause, the only limitation ever imposed on the ICC is that it does not grant Congress authority to abrogate state sovereign immunity under the Eleventh Amendment. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996).

[23] Plaintiffs' claim that the Federal Government is commandeering state resources is limited to the Guidelines, which as stated *infra* Section II.E, are a non-binding, advisory document meant to serve as guidance and a resource for best practices resource to state courts and child-welfare agencies.

D. Plaintiffs' First Amendment Claim Fails Because They Cannot Demonstrate Forced Association

Plaintiffs attempt to deflect from the lack of standing to support a forced association claim by passing their outrage and misdirection off as law, but their new arguments in opposition fail for three reasons.[24] First, *Adoptive Couple* does not support a finding that the transfer and adoptive-placement preference provisions create ties cognizable under the First Amendment where none existed before. In fact, that case did not concern transfer and the Court's only pronouncement regarding placement preferences was that they would not apply where no alternative candidate had formally sought to adopt. *See* 133 S. Ct. at 2564. Second, although they offer an absurd comparison between membership in a federally recognized tribe and participation in political parties, the latter are not "distinct, independent political communities" by virtue of their sovereign status that predates the Constitution. *See Worcester*, 31 U.S. at 559; *United States v. Wheeler*, 435 U.S. 313, 323-24 (1978). Finally, tribal membership does not suborn "free will" or an "individual's best interest." Membership in an Indian Tribe can be relinquished, *see Thompson v. Cnty. of Franklin*, 180 F.R.D. 216, 225 (N.D.N.Y. 1998), and, as described above, Indian children receive individualized consideration in child-custody proceedings under ICWA. *See supra* Section II.B.

[24] Rather than counter the obvious proposition that ICWA, by definition, applies only to children who are already associated with their Tribe via membership, Plaintiffs' respond only that "when it doesn't, it compels individuals to associate with tribes." Opp. at 32. By their own terms, however, Plaintiffs challenge ICWA as written, and have never alleged that forced association is due to a misapplication of the "Indian child" definition.

Plaintiffs have failed to state a claim under the First Amendment.

E. The Guidelines Are Not Final Agency Action

The Guidelines are an advisory legal document that imposes no binding obligations on any party, and state and federal courts considering them have concluded as much. *See* Br. at 34 (citing cases).[25] Plaintiffs suggest falsely that the Federal Defendants rely "primarily on precedents that pre-date the current Guidelines," Opp. at 34, ignoring altogether a recent federal-court decision that is squarely on point. Mem. Op. and Order, *Nat'l Council for Adoption v. Jewell*, No. 1:15cv675 (E.D. Va. Oct. 20, 2015) *available at* https://turtletalk.wordpress.com/fort/icwa/national-council-for-adoption-v-washburn/ (ECF No. 66) (case cited in Br. at 34). Plaintiffs note that Tribes may invoke the Guidelines to support their intervention in state-court proceedings, but their use in advocacy does not mean that the state court will be bound to follow that authority. Because the Guidelines cannot control the results of these proceedings, they do not constitute reviewable final agency action.

CONCLUSION

For the forgoing reasons, the Court should dismiss or abstain from hearing Plaintiffs' claims.

[25] Citing D.C. Circuit authority, Plaintiffs observe that the word "must" appears 101 times in the Guidelines, and ask, "Mere suggestions or marching orders?" Opp. at 34. Unfortunately for Plaintiffs, in the context of determining whether an agency document creates legal obligations, the D.C. Circuit has also noted that tabulating the frequency of the imperative mood in a document is of little value. *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993) ("Nor is there much explanatory power in any distinction that looks to the use of mandatory as opposed to permissive language.").

RESPECTFULLY SUBMITTED this 4th day of December, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2015, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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