No. 17-15839

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAROL COGHLAN CARTER and RONALD FEDERICI, next friends of minors A.D., C.C., L.G., and C.R.; and S.H., K.C., M.C., P.R., and K.R., married couples, for themselves and on behalf of a class of similarly situated individuals,

Plaintiffs-Appellants,

v.

JOHN TAHSUDA, in his official capacity as Acting Assistant Secretary of Indian Affairs; RYAN ZINKE, in his official capacity as Secretary of the Interior; and GREGORY MCKAY, in his official capacity as Director of Arizona Department of Child Safety,

Defendants-Appellees.

On Appeal from the
United States District Court
for the District of Arizona
No. 2:15-CV-1259-PHX-NVW

APPELLEE GREGORY MCKAY'S ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

INTRODUCTION

Plaintiffs-Appellants ask this Court to enjoin Defendants-Appellees from complying with the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 to 1963, and Arizona statutes that ensure compliance with ICWA. Congress enacted ICWA to ensure that minimum standards are applied to child welfare proceedings concerning Indian children. Plaintiffs allege that certain provisions of ICWA harm them. But the district court correctly held that Plaintiffs did not allege facts showing that they suffered concrete and particularized injury that is fairly traceable to the ICWA provisions they challenge.

On appeal, Plaintiffs acknowledge that the named Children Plaintiffs have been adopted by the named Parent Plaintiffs. Plaintiffs' Opening Brief ("Br.") at 3 nn. 1-3. The district court denied Plaintiffs' motion for class certification as premature (ECF No. 39) and then dismissed their case in its entirety, finding that they lack standing (ER 25). Because the child welfare proceedings concerning Plaintiffs are now complete and they have not alleged that ICWA is likely to harm them in the future, their claims for declaratory and injunctive relief are moot.

Plaintiffs sought nominal damages from Defendant McKay, the Director of the Arizona Department of Child Safety, under 42 U.S.C. §§ 2000d to 2000d-7. The district court correctly held that Plaintiffs lacked standing to bring their nominal damage claim because they failed to allege facts that demonstrate that

they have suffered concrete and particularized harm as result of the application of ICWA. There is another reason Plaintiffs lack standing to bring their nominal damage claim. Now that it is undisputed that the ICWA procedures did not affect the result in Plaintiffs' state court proceedings—that is, Plaintiffs' sought-after adoptions are final—they cannot demonstrate the harm necessary for a damages claim. This Court should therefore affirm the district court's decision.

JURISDICTIONAL STATEMENT

Defendant-Appellant Gregory McKay, Director of the Arizona Department of Child Safety ("State Defendant") adopts the Federal Appellees' statement of jurisdiction.

ISSUES PRESENTED FOR REVIEW

The State Defendant adopts the Federal Appellees' statement of the issues and adds the following issue:

Do Plaintiffs lack standing to pursue nominal damages because it is undisputed that the State would have made the same decisions—that is, placing the Children Plaintiffs with and authorizing their adoption by the Parent Plaintiffs—despite ICWA's allegedly impermissible criteria?

STATUTORY AUTHORITIES

All relevant statutory authorities appear in the Addendum to this brief.

STATEMENT OF THE CASE

The State Defendant adopts the Federal Appellees' statement of the case.

SUMMARY OF THE ARGUMENT

The State Defendant adopts the Federal Appellees' arguments in Sections I and II of their Response Brief. This Court should affirm the district court's dismissal of all claims for all the reasons stated in the Federal Appellees' Response Brief.

There is another reason to affirm the dismissal of Plaintiffs' nominal damage claim. Parent Plaintiffs have adopted the Children Plaintiffs. Br. at 3 nn.1-3. They argue that they "nevertheless have standing to seek nominal damages for having been subjected to *de jure* racial discrimination by Defendants acting in compliance with ICWA." *Id.* at 22. Even if Plaintiffs' argument were valid for a certified class seeking prospective relief, this showing would not be enough to obtain damages. "[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief . . . ." *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (per curiam). Here, the State made the same decisions—authorizing the Parent Plaintiffs to be foster parents of and then adopt the Children Plaintiffs—and

ICWA's criteria did not change those decisions. This Court should therefore affirm the dismissal of Plaintiffs' nominal damage claim.

ARGUMENT

I. Plaintiffs Lack Standing to Pursue All of Their Claims and Their Claims Are Moot.

The State Defendant adopts the Federal Appellees' arguments in Sections I and II of their Response Brief.

II. Plaintiffs Lack Standing to Sue for Damages.

A. Standard of Review.

This Court reviews the district court's determination whether a party has standing de novo. *San Luis & Delta-Mendoza Water Auth. v. United States*, 672 F.3d 676, 699 (9th Cir. 2012).

B. Because Plaintiffs Cannot Show that the ICWA Provisions Affected the Outcome of Their Child Welfare Proceedings, They Lack Standing to Pursue Their Nominal Damages Claims.

Plaintiffs argue that the injury-in-fact in a racial discrimination case "comes from the plaintiff being subjected to different rules on account of her race, *not* the consequences that flow from the treatment." Br. at 33. Plaintiffs are wrong because they rely on cases that address declaratory and injunctive relief. Because Plaintiffs' nominal damage claim seeks retrospective relief and they cannot show

that ICWA affected the outcome of their child welfare proceedings, they lack standing.[1]

Plaintiffs rely primarily on *Northeastern Florida Chapter of Associated Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), and *Bras v. California Public Utilities Commission*, 59 F.3d 869 (9th Cir. 1995). Br. at 33. Both of these cases involved claims for declaratory and injunctive relief and not for damages. *Northeastern*, 508 U.S. at 659 (stating that "petitioner sought declaratory and injunctive relief"); *Bras*, 59 F.3d at 872 (stating that Bras's "only remaining claims are for declaratory and injunctive relief"). But the standing necessary to seek declaratory and injunctive relief from an ongoing race-conscious program is different from the standing necessary to bring a damages claim.

In *Lesage*, the Supreme Court reversed the court of appeals' holding "that summary judgment was inappropriate on Lesage's § 1983 action seeking damages for the school's rejection of his application for the 1996-97 academic year even if petitioners conclusively established that Lesage would have been rejected under a race-neutral policy." 528 U.S. at 20. The Court held that the lower court's decision was inconsistent with its "well-established framework for analyzing such

[1] Although the parties did not argue—and the district court did not find—that Plaintiffs lacked standing to bring their claim for nominal damages because the adoptions had taken place, this Court must consider this argument on appeal. *Ariz. for Official English v. Arizona*, 520 U.S. 43, 73 (1997) (noting that every federal appellate court has a duty to satisfy itself of its own jurisdiction as well as the jurisdiction of the lower courts even if the parties concede jurisdiction).

claims." *Id.* Under that framework, the government can defeat liability for considering impermissible criteria in making a decision if it can demonstrate "that it would have made the same decision absent the forbidden consideration." *Id.* at 20-21 (citing *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).[2] The Court distinguished *Northeastern*, concluding that "where there is no allegation of an ongoing or imminent constitutional violation to support a claim for forward-looking relief, the government's conclusive demonstration that it would have made the same decision absent the alleged discrimination precludes any finding of liability." *Id.*

Following *Lesage*, this Court held that the plaintiff lacked standing to bring a damages claim based on Arizona's use of an affirmative action program ("DBE") in awarding a transportation engineering contract. *Braunstein v. Ariz. Dep't of Trans.*, 683 F.3d 1177, 1181 (9th Cir. 2012). Braunstein argued that "under *Northeastern* and *Bras*, he need only establish that he was 'able and ready' to seek subcontracting work under the contract." *Id.* at 1186. This Court readily distinguished those cases because the plaintiffs in *Northeastern* and *Bras* sought

[2] The Court noted that its previous decisions have "involved retaliation for protected First Amendment activity rather than racial discrimination" but found that the "underlying principle is the same: The government can avoid liability by proving that it would have made the same decision without the impermissible motive." *Id.* at 21.

only prospective relief whereas Braunstein sought damages. *Id.*[3] Relying on *Lesage*, 528 U.S. at 19-22, the Court held that Braunstein lacked standing because he sought "only damages and the evidence establishe[d] that he would not have received utility location work under the 2005 contract regardless of the DBE program." *Braunstein*, 683 F.3d at 1186.

Here, it is undisputed that Parent Plaintiffs S.H. and J.H. adopted Child Plaintiff A.D., Parent Plaintiffs M.C. and K.C. adopted Child Plaintiff C.C., and Parent Plaintiffs P.R and K.R. adopted Children Plaintiffs L.G. and C.R. Br. at 3 nn.1-3. There are no other named Plaintiffs, and the district court denied Plaintiffs' class certification motion. (ECF No. 39.) Because ICWA did not affect the outcome of Plaintiffs' child welfare proceedings—that is, the State's decision would have been the same regardless of ICWA's criteria—they lack standing under *Lesage* and *Braunstein*. The case is even stronger here—where the Plaintiffs achieved the desired outcome—than in *Lesage* and *Braunstein*, where the government denied the plaintiffs the outcome they sought: admission to the university in *Lesage*, 528 U.S. at 21, and work as a subcontractor in *Braunstein*, 683 F.3d at 1186.

[3] *Braunstein* addressed damage claims against Arizona and the Arizona Department of Transportation under 42 U.S.C. § 2000d and against the named defendants in their individual capacities under §§ 1981 and 1983. *Id.* at 1183.

Plaintiffs attempt to distinguish *Braunstein* by arguing that the Parent Plaintiffs were "willing and able" to adopt the Children Plaintiffs. Br. at 39. But that is not enough—they must refute the State Defendant's showing that the State authorized the adoptions even though ICWA applied. They cannot do this. Plaintiffs also argue that they experienced a greater burden and underwent more hardship as a consequence of ICWA. *Id.* But the district court held that Plaintiffs' First Amended Complaint did not allege facts showing that any of the Plaintiffs suffered a concrete and particularized actual injury or imminent injury fairly traceable to ICWA. ER 14-21. Plaintiffs' Brief does not point to specific alleged facts that the district court ignored; instead it relies on cases discussing the harm necessary to show standing to pursue prospective, class-action relief. Br. 33-40. This is not enough.

Plaintiffs also rely on Supreme Court cases (Br. at 34, 38) that pre-date *Lesage*, involve prospective relief, and allege actual or imminent harm. *See Heckler v. Matthews*, 465 U.S. 728, 735 (1984) (class action challenging the spousal benefit provisions of the Social Security Act and alleging that men received less benefits than they would if they were women); *Clements v. Fashing*, 457 U.S. 957, 962 (1982) (officeholders and voters challenged the constitutionality of Texas's resign-to-run law that precluded officeholders from running for another office); *Turner v. Fouche*, 396 U.S. 346, 349 (1970) (class action seeking

prospective relief from state constitutional and statutory provisions that prevented them from serving on the school board). And *Carey v. Piphus*, 435 U.S. 247 (1978), does not support Plaintiffs' argument because they have not alleged that they were denied due process. *Id.* at 266-67 (holding that plaintiffs were entitled to seek nominal damages because procedural due process is absolute and does not depend on the merits of the claim).

Plaintiffs also rely on language from *Wooden v. Board of Regents of University System*, 247 F.3d 1262, 1278 (11th Cir. 2001). Br. at 35. But that language addresses the standard for prospective relief, not for a damages claim.

Because Plaintiffs lack standing to pursue their nominal damage claim, this Court should affirm the dismissal of the claim.

CONCLUSION

This Court should affirm the dismissal of Plaintiffs' First Amended Complaint.

Respectfully submitted this 15th day of December, 2017.

Mark Brnovich
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Dawn R. Williams
Assistant Attorney General

Attorneys for Defendant-Appellant Gregory McKay, in his official capacity as Director of the Arizona Department of Child Safety

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Appellee states that it is not aware of any related cases pending in the Ninth Circuit.

Date: December 15, 2017

Mark Brnovich
Arizona Attorney General

/s/ Dawn R. Williams
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,055 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

Dated this 15th day of December, 2017.

Mark Brnovich
Arizona Attorney General

/s/ Dawn R. Williams
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Attorneys for Defendant-Appellant Gregory McKay, in his official capacity as Director of Arizona Department of Child Safety

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: December 15, 2017

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HDM#6676396

ADDENDUM

TABLE OF CONTENTS

42 U.S.C. § 2000d:

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

42 U.S.C. § 2000d-1:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report

42 U.S.C. § 2000d-2:

Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for

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

42 U.S.C. § 2000d-3:

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

42 U.S.C. § 2000d-4:

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

42 U.S.C. § 2000d-4a:

For the purposes of this subchapter, the term “program or activity” and the term “program” mean all of the operations of--

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system;

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

> (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
>
> (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

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

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

any part of which is extended Federal financial assistance.

42 U.S.C. § 2000d-5:

The Secretary of Education shall not defer action or order action deferred on any application by a local educational agency for funds authorized to be appropriated by this Act, by the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 6301 et seq.], by the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), or by the Cooperative Research Act [20 U.S.C.A. § 331 et seq.], on the basis of alleged noncompliance with the provisions of this subchapter for more than sixty days after notice is given to such local agency of such deferral unless such local agency is given the opportunity for a hearing as provided in section 2000d-1 of this title, such hearing to be held within sixty days of such notice, unless the time for such hearing is extended by mutual consent of such local agency and the Secretary, and such deferral shall not continue for more than thirty days after the close of any such hearing unless there has been an express finding on the record of such hearing that such local educational agency has failed to comply with the provisions of this subchapter: Provided, That, for the purpose of determining whether a local educational agency is in compliance with this subchapter, compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with this subchapter, insofar as the matters covered in the order or judgment are concerned.

42 U.S.C. § 2000d-6:

(a) Declaration of uniform policy

It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.] and section 182 of the Elementary and Secondary Education Amendments of 1966 [42 U.S.C.A. § 2000d-5] dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation.

(b) Nature of uniformity

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

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

Nothing in this section shall be construed to diminish the obligation of responsible officials to enforce or comply with such guidelines and criteria in order to eliminate discrimination in federally assisted programs and activities as required by title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.].

(d) Additional funds

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

42 U.S.C. § 2000d-7:

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the

Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

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

(b) Effective date

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