No. 17-15839

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CAROL COUGHLAN CARTER,
NEXT FRIEND OF A.D., C.C., L.G. AND C.R., MINORS, ET AL.,
Plaintiffs-Appellants,

v.

KEVIN WASHBURN,
IN HIS OFFICIAL CAPACITY AS
ASSISTANT SECRETARY OF BUREAU OF INDIAN AFFAIRS, ET AL.,
Defendants-Appellees,

GILA RIVER INDIAN COMMUNITY AND NAVAJO NATION,
Intervenors-Defendants-Appellees.

On Appeal from the U.S. District Court for the District of Arizona,
No. 2:15-cv-1259-NVW

BRIEF OF INTERVENORS-DEFENDANTS-APPELLEES
GILA RIVER INDIAN COMMUNITY AND NAVAJO NATION

Paul Spruhan
Katherine Claire Belzowski
NAVAJO NATION DEPARTMENT OF JUSTICE
P.O. Box 2010
Window Rock, AZ 86515
(928) 871-6937
pspruhan@nndoj.org

Counsel for Navajo Nation

Pratik A. Shah
Donald R. Pongrace
Merrill C. Godfrey
Z.W. Julius Chen
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000
pshah@akingump.com

Counsel for Gila River Indian Community

(Additional counsel listed on inside cover)

Linus Everling
Thomas L. Murphy
GILA RIVER INDIAN COMMUNITY
OFFICE OF GENERAL COUNSEL
P.O. Box 97
Sacaton, AZ 85147

Counsel for Gila River Indian Community

TABLE OF CONTENTS

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUE 1

STATUTORY ADDENDUM 1

INTRODUCTION 1

STATEMENT 3

A. Indian Child Welfare Act 3

B. Factual and Procedural Background 7

SUMMARY OF ARGUMENT 13

ARGUMENT 15

THE DISTRICT COURT CORRECTLY DISMISSED THIS CASE FOR LACK OF ARTICLE III STANDING 15

A. The Arizona Supreme Court Determined That ICWA's Transfer Provision (25 U.S.C. § 1911(b)) Did Not Govern The Community's Transfer Motion In A.D.'s Proceeding 19

B. ICWA's Foster Care/Parental Rights Termination Active Efforts Provision (25 U.S.C. § 1912(d)) By Its Terms Did Not Apply To C.C. 22

C. The Amended Complaint Alleges No Facts That Would Have Triggered ICWA's Parental Rights Termination Evidentiary Provision (25 U.S.C. § 1912(f)) 24

D. Plaintiffs' Assertion That They Were Subject To ICWA's Foster/Preadoptive Care Placement Preferences Provision (25 U.S.C. § 1915(b)) Is Factually And Legally Incorrect 25

E. The Adoption Placement Preferences Provision (25 U.S.C. § 1915(a)) Was Inapplicable To Plaintiffs As A Matter Of Law 29

CONCLUSION 33
STATEMENT OF RELATED CASES 34
CERTIFICATE OF COMPLIANCE 35

TABLE OF AUTHORITIES

CASES:

Adoptive Couple v. Baby Girl,
133 S. Ct. 2552 (2013) 6, 29, 30

Babbitt v. United Farm Workers Nat'l Union,
442 U.S. 289 (1979) 18

Catholic League for Religious & Civil Rights v. City & Cty. of S.F.,
624 F.3d 1043 (9th Cir. 2010) 31

Davis v. FEC,
554 U.S. 724 (2008) 19

Gila River Indian Cmty. v. Department of Child Safety,
379 P.3d 1016 (Ariz. Ct. App. 2016) 26, 28
395 P.3d 286 (Ariz. 2017) 20

Habeas Corpus Res. Ctr. v. United States Dep't of Justice,
816 F.3d 1241 (9th Cir. 2016) 20

Lopez v. Candaele,
630 F.3d 775 (9th Cir. 2010) 18

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 16, 20, 27

Maya v. Centex Corp.,
658 F.3d 1060 (9th Cir. 2011) 16

McCormack v. Herzog,
788 F.3d 1017 (9th Cir. 2015) .... *passim*

Mississippi Band of Choctaw Indians v. Holyfield,
490 U.S. 30 (1989) 3, 4, 6

Native Village of Tununak v. Alaska,
334 P.3d 165 (Alaska 2014) 29

Northeast Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville,
508 U.S. 656 (1993)....................16, 17

S.S. v. Colorado River Indian Tribes, --- S. Ct. ----, 2017 WL 3136930 (Mem) (Oct. 30, 2017)....................32

San Diego Cty. Gun Rights Comm. v. Reno,
98 F.3d 1121 (9th Cir. 1996)....................17

Scott v. Pasadena Unified Sch. Dist.,
306 F.3d 646 (9th Cir. 2002)....................18, 28

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998)....................21

Stoianoff v. Montana,
695 F.2d 1214 (9th Cir. 1983)....................17

Thomas v. Anchorage Equal Rights Comm'n,
220 F.3d 1134 (9th Cir. 2000)....................17

United States v. Hays,
515 U.S. 737 (1995)....................17

Vermont Agency of Nat. Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000)....................21

Villa v. Maricopa Cty.,
865 F.3d 1224 (9th Cir. 2017)....................19

STATUTES:

25 U.S.C.
§ 1901(3) 4
§ 1901(4) 4
§ 1901(5) 4
§ 1902 5
§ 1903(1) 6
§ 1903(4) 5
§ 1911 10
§ 1911(a) 6
§ 1911(b) 13, 19
§ 1912(d) 14, 22
§ 1912(e) 19
§ 1912(f) 14, 24
§ 1915(a) 15, 23, 29
§ 1915(b) 15, 25

OTHER AUTHORITIES:

1-11 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2012) 5, 31

CIR. R. 28-2.2 1

FED. R. CIV. P. 17(c) 10

STATEMENT OF JURISDICTION

Pursuant to Circuit Rule 28-2.2, Intervenors-Defendants-Appellees state that they agree with Plaintiffs-Appellants' statement of jurisdiction.

STATEMENT OF THE ISSUE

Whether, as the district court determined, Plaintiffs-Appellants lack Article III standing to challenge certain provisions of the Indian Child Welfare Act.

STATUTORY ADDENDUM

All applicable statutes are contained in the addendum of Plaintiffs-Appellants' opening brief.

INTRODUCTION

This appeal arises out of a wide-ranging and abstract challenge to the Indian Child Welfare Act (ICWA). Congress enacted ICWA to combat the pervasive problem of unwarranted removal of Indian children from their families, and to address a variety of harmful practices by state agencies in child welfare proceedings involving such children. The Gila River Indian Community and Navajo Nation intervened below to defend the validity of ICWA.

Although Plaintiffs attempt to cast ICWA as a form of *de jure* racial discrimination, the sole question presented to this Court is a narrow, threshold one that has nothing to do with ICWA's merits: whether Plaintiffs lack Article III standing when they have not pleaded any facts showing that the particular ICWA provisions they challenge were actually applied in the individual state court child

custody proceedings at issue, let alone in a way that affected them or the course of those proceedings.

As Plaintiffs would have it, the mere fact that the non-Indian parent Plaintiffs sought to foster or adopt the Indian child Plaintiffs is sufficient to confer standing. They argue that because ICWA (instead of Arizona law) was "inexorably" applicable, they must have suffered disparate treatment attributable to ICWA. But the mere fact that ICWA may have been in the picture as a general matter does not mean the provisions at issue were actually applied to any of the Plaintiffs. Even in an equal protection case, Plaintiffs must allege facts demonstrating that the operation or enforcement of a particular ICWA provision caused disparate treatment or other redressable injury to a particular Plaintiff.

Here, the allegations in the Amended Complaint provide no basis for such a finding. Quite the opposite, it is clear as a matter of statutory text, binding precedent, and the facts pleaded that the challenged ICWA provisions had no bearing or effect on the child custody proceedings in which Plaintiffs were involved. Accordingly, the district court's judgment dismissing the Amended Complaint for lack of Article III standing should be affirmed.

STATEMENT

A. Indian Child Welfare Act

1. In the 1970s, Congress studied a "rising concern *** over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). During that period, "25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions." *Id.* The "principal reason for the high rates of removal of Indian children" was the view—"at best ignorant of [Indian] cultural values, and at worst contemptful of the Indian way"—"that removal, usually to a non-Indian household or institution, can only benefit an Indian child." *Id.* at 34-35 (citation and quotation marks omitted).

The consequences of the "wholesale removal of Indian children from their homes" were far-reaching. *Mississippi Band*, 490 U.S. at 32 (citation and quotation marks omitted). In congressional hearings, "[a] number of witnesses *** testified to the serious adjustment problems encountered by such children during adolescence, as well as the impact of the adoptions on Indian parents and the tribes

themselves." *Id.* at 33 (footnote omitted). For instance, the Tribal Chief of the Mississippi Band of Choctaw Indians explained:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.

Id. at 34 (citation and quotation marks omitted).

In ICWA, Congress memorialized and took steps to address those significant concerns of sovereign, federally recognized tribes. Congress found "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3). "[T]he States," by contrast, had "exercis[ed] their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies" in a manner that "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families," *id.* § 1901(5), thereby precipitating the breakup of an "alarmingly high percentage of Indian families" through the "removal *** of their children" and "place[ment] in non-Indian foster and adoptive homes and institutions," *id.* § 1901(4).

In view of those findings, Congress "declare[d] that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. To that end, Congress "establish[ed] *** minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." *Id.*

Since its enactment, ICWA has become widely recognized—including by the leading national child advocacy organizations—as the "gold standard" in child welfare practice for *all* children. *See, e.g.*, Brief of Casey Family Programs et al. as *Amici Curiae* in Support of Respondent Birth Father at 2, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399), 2013 WL 1279468, at *1 ("*Amici* are united in their view that, in the Indian Child Welfare Act, Congress adopted the gold standard for child welfare policies and practices that should be afforded to all children[.]").

2. The various procedural and substantive standards set forth in ICWA are subject to two "[t]hreshold [r]equirements." 1-11 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 11.02 (2012). First, the proceedings at issue must involve an "Indian child," defined as an unmarried minor who is either a member of an Indian tribe or "eligible for membership in an Indian tribe and *** the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). Second, the

proceeding must also be a "child custody proceeding"—a term that encompasses foster care placements, termination of parental rights, preadoptive placements (*i.e.*, placements following termination of parental rights but prior to adoptive placements), and adoptive placements. *Id.* § 1903(1).

A failure to satisfy either threshold requirement removes a proceeding from ICWA's ambit. But even where those threshold requirements are satisfied, not all of ICWA's substantive and procedural provisions apply in every proceeding. Instead, whether an ICWA provision applies depends on the type of child custody proceeding involved and on the language and conditions of that particular provision. *See, e.g.*, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 & n.1 (2013) (noting that ICWA's threshold requirements were met and then finding three ICWA provisions to be inapplicable); *Mississippi Band*, 490 U.S. at 42 (noting satisfaction of threshold requirements before turning to "whether [Indian children] were 'domiciled' on the reservation" within the meaning of 25 U.S.C. § 1911(a)).

Five of ICWA's substantive and procedural safeguards, discussed in detail below, are relevant to this appeal.

B. Factual and Procedural Background[1]

1. This federal court challenge to ICWA concerns three (now-completed) child custody proceedings in Arizona state courts, as described in the Amended Complaint.[2]

a. Baby girl A.D. is an enrolled member of the Gila River Indian Community. ER28, ¶ 9. Due to her biological mother's ingestion of controlled substances during pregnancy and A.D.'s exposure at birth, the State took A.D. into protective custody at birth and placed her with S.H. and J.H. (both non-Indians). A.D.'s father was unknown. ER31-32, ¶ 22. An Arizona court terminated the parental rights of A.D.'s biological parents. ER31-32, ¶¶ 21-23. S.H. and J.H. filed a petition to adopt A.D. ER30, ¶ 15.

After the termination of parental rights, the Community sought to transfer jurisdiction over A.D.'s child custody proceeding from Arizona state court to a tribal court pursuant to section 1911(b). ER32, ¶ 23. The Arizona state court denied the Community's request. *Id.*

b. Baby boy C.C. is an enrolled member of the Navajo Nation. ER28, ¶ 10. The State took C.C. into protective custody following his biological mother's

---

[1] Plaintiffs' non-conclusory allegations in the Amended Complaint are taken as true for purposes of this appeal.

[2] Plaintiffs represent, and it is not disputed, that the proceedings resulted in adoption of each of the four Plaintiff children by their respective Plaintiff foster parents. *See* Pls. Br. 3 & nn.1-3.

criminal conviction. ER32, ¶ 25. C.C. was then placed into foster care with non-Indians M.C. and K.C., who became his preadoptive placement following the termination of parental rights. ER32-33, ¶ 26. During the period in which M.C. and K.C. sought to adopt C.C., the Nation looked for but did not find an appropriate tribal-related placement for C.C. *Id.* M.C. and K.C. ultimately adopted C.C. with the support of C.C.'s biological mother, the State, and the Nation. ER32-33, ¶¶ 25, 30.

c. Baby boy C.R. is either an enrolled member of the Community, or eligible for membership and the child of a Community member. ER29, ¶ 12. The State took C.R. into protective custody at birth due to exposure to controlled substances, and placed C.R. (and his half-sibling L.G.) in the care of foster parents P.R. and K.R. ER34, ¶ 32.[3] The State indicated that it would (and it eventually did) terminate the parental rights of C.R.'s biological parents.

P.R. and K.R. were not party intervenors in C.R.'s child custody proceeding, ER35, ¶ 38, but at the time of the Amended Complaint, wanted to adopt C.R., ER30-31, ¶ 17. The Community had proposed alternative placements for C.R. at the time of the Amended Complaint. ER35, ¶ 39.

2. In July 2015, Carol Coughlan Carter (purporting to act in the capacity of "next friend" for A.D. and C.C.), S.H., J.H., M.C., and K.C. brought suit in the

[3] As alleged in the Amended Complaint, L.G. was neither eligible for membership in nor an enrolled member of an Indian tribe. ER34, ¶ 35.

district court to challenge ICWA's validity on several grounds. ER9. They named certain federal and state officials as defendants, and the Community and the Nation intervened as defendants. ER9-10.

After oral argument on motions to dismiss the original complaint on various jurisdictional grounds (including lack of Article III standing) as well as on the merits, Plaintiffs were granted leave to file the operative Amended Complaint. ER9-10. The Amended Complaint added as Plaintiffs another purported "next friend" (Dr. Ronald Federici), children C.R. and L.G., and foster parents P.R. and K.R. ER10. It also asserted that six ICWA provisions, federal guidelines published by the Bureau of Indian Affairs, and certain Arizona laws violate the Equal Protection Clause, the Due Process Clause, the Fourteenth Amendment, the Indian Commerce Clause, the Tenth Amendment, the First Amendment, the Administrative Procedure Act, and Title VI of the Civil Rights Act. ER51-58, ¶¶ 110-150. Plaintiffs also purported to represent a putative "class of all off-reservation Arizona-resident children with Indian ancestry and all off-reservation non-Indian Arizona-resident foster, preadoptive, and prospective adoptive parents who are or will be in child custody proceedings involving a child with Indian ancestry and who are not members of the child's extended family." ER37, ¶ 50.

3. The district court, without reaching the merits, dismissed the Amended Complaint for lack of Article III standing.[4] The district court explained that "even in the equal protection context, 'a plaintiff must assert a particularized injury, rather than a generalized grievance.'" ER14 (citation omitted). In this case, the district court found that Plaintiffs' challenges were based "on hypothetical concerns," rather than "actual facts before the court." ER24.

a. The district court first held that section 1911(b)'s transfer provision did not apply to A.D. (the only Plaintiff child for whom a transfer was sought). Although the Community invoked section 1911(b) as a basis for transferring jurisdiction over A.D.'s child custody proceeding from Arizona state court to a tribal court, that provision was never "enforce[d]." ER15. That is because "[s]ection 1911(b) provides only for transfer of foster care placement or termination of parental rights proceedings," and by the time the Community had moved to transfer, foster care placement and termination of parental rights proceedings had concluded. *Id.* Because any litigation burden on Plaintiffs arose only from the invocation of section 1911 in a proceeding where it did not apply and not from ICWA itself, the district court reasoned, Plaintiffs did not "suffer[] a

---

[4] Neither purported "next friend" is alleged to have any relationship to any of the child Plaintiffs. Because the district court dismissed all Plaintiffs for lack of standing, it did not separately address challenges to the participation of the "next friends" in the case. *See* FED. R. CIV. P. 17(c).

concrete and particularized injury, actual or imminent, and fairly traceable to § 1911(b)." ER16.

b. Turning to the "active efforts" provision, the district court again looked to the statutory text in concluding that Plaintiffs lacked standing. "Section 1912(d) requires reunification attempts only before foster care placement and termination of parental rights, and the Amended Complaint does not allege that any reunification attempts were made before the child Plaintiffs were placed in foster care." ER17. Nor did the Amended Complaint "allege that any attempt was made to reunify C.C.'s family *** before parental rights were terminated." ER18. As such, the district court concluded that section 1912(d) could not have caused any injury.

c. As to section 1912(f)'s evidentiary standard for the termination of parental rights, the district court observed that the Amended Complaint states merely "that the parental rights of the biological parents of A.D. and C.C. have been terminated, and the parental rights of the biological parents of C.R. *** have not been terminated." ER19. Absent from the Amended Complaint are any allegations "that the termination proceedings were affected by the evidentiary standard required by § 1912(f)." *Id.* Thus, there was no basis for finding that "Plaintiffs suffered a concrete and particularized injury, actual or imminent, and fairly traceable to § 1912(f)." *Id.*

d. With respect to section 1915(a)'s placement preferences for adoptions, the district court noted that the Amended Complaint does not contain any allegations that the Community proposed alternative adoption placements for A.D. ER21. Although the Amended Complaint does allege that the Nation proposed alternative placements for C.C. and the Community proposed alternative placements for C.R., the assertions that those adoption proceedings would otherwise have been completed more quickly were "mere conclusions" unsupported by any facts. *Id.* The district court therefore concluded that section 1915(a) itself did not cause any concrete or particularized injury to Plaintiffs.

e. The district court found that Plaintiffs lacked standing to challenge section 1915(b)'s placement preferences for foster/preadoptive care for similar reasons. The Amended Complaint contains no factual allegation showing that section 1915(b) was a factor in the foster care placements of any of the Plaintiff children. ER22.

f. In closing, the district court noted that if the challenged provisions of ICWA caused an Article III injury—in other words, something more than the mere "hypothetical concerns" raised in this case—those injuries would arise in the state courts conducting the underlying child custody proceedings and could (and should) be addressed "based on actual facts before the [state] court." ER24 ("The very allegations of wrongfulness are that *** injuries will arise in state court child

custody proceedings, directly in the court processes or in actions taken by state officers under the control and direction of judges in those proceedings."). The district court therefore refused to bend Article III limits to "pre-adjudicate for state court judges how to rule on facts that may arise and that may be governed by statutes or guidelines that this Court may think invalid." *Id.*

SUMMARY OF ARGUMENT

The district court's judgment that Plaintiffs lack Article III standing should be affirmed. Even for an equal protection claim, a plaintiff must (at a minimum) plead facts demonstrating that the challenged statutory provision actually was applied to him and caused disparate treatment. Despite amending their complaint, Plaintiffs cannot satisfy that basic requirement for any of the five ICWA challenges they seek to resuscitate on appeal.

A. Plaintiffs assert standing to challenge ICWA's transfer provision, 25 U.S.C. § 1911(b), on the ground that the Community sought a transfer of A.D.'s proceeding from state court to tribal court. But the Arizona Supreme Court determined that section 1911(b) did not govern the Community's transfer motion. As a result, section 1911(b) never applied here—and thus could not have caused any injury to Plaintiffs. The time and expense that Plaintiffs spent litigating the applicability of section 1911(b) is not a cognizable injury under settled law.

B. Based solely on allegations relating to C.C., Plaintiffs argue that they have standing to challenge ICWA's "active efforts" provision, 25 U.S.C. § 1912(d). That provision applies only to proceedings involving foster care placements and termination of parental rights. As the district court found, the Amended Complaint nowhere alleges that any "active efforts" were undertaken *before* C.C.'s placement into foster care or the termination of his biological parents' rights. Instead, Plaintiffs underscore the role of ICWA's separate *adoption* placement preferences provision and point to alternative placements (not reunification attempts) that the Nation (not the State) independently suggested for C.C. Those facts do not make out an Article III injury traceable to the operation of section 1912(d).

C. With respect to ICWA's provision relating to the burden for terminating parental rights, 25 U.S.C. § 1912(f), Plaintiffs now assert that they were forced to prove termination by a heightened standard, including through the procurement of expert testimony. But the Amended Complaint contains no such allegations. To the contrary, the Amended Complaint indicates that the parent Plaintiffs were not involved in those termination proceedings. Accordingly, the district court appropriately concluded that section 1912(f) did not cause Plaintiffs any injury that would support standing.

D. Plaintiffs argue that they have standing to challenge ICWA's foster care and preadoptive care placement preferences provision, 25 U.S.C. § 1915(b). But the only foster/preadoptive placements described in the Amended Complaint concern the placement of the child Plaintiffs with the parent Plaintiffs—*i.e.*, placements that took place *before* the Community and the Nation proposed (unsuccessfully) alternative placements. The potential alternative placements, moreover, were sought out independently by the Community and the Nation, not because section 1915(b) required them.

E. Lastly, Plaintiffs assert standing to challenge ICWA's adoptive placement preferences provision, 25 U.S.C. § 1915(a). That assertion fails for the simple reason that the provision never applied to Plaintiffs. That is because no alternative placement ever came forward to invoke the statutory preferences against the parent Plaintiffs.

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED THIS CASE FOR LACK OF ARTICLE III STANDING

The familiar "irreducible constitutional minimum of standing" consists of "three elements":

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly *** trace[able] to

> the challenged action of the defendant, and not *** th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992) (alterations and ellipses in original) (internal citations omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements," which "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561; *see Maya v. Centex Corp.*, 658 F.3d 1060, 1067-1068 (9th Cir. 2011) (discussing principles applicable to review of motion to dismiss for lack of Article III standing).

According to Plaintiffs, this appeal "boil[s] down to one essential point: 'The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.'" Pls. Br. 1 (quoting *Northeast Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)). Invoking that single quotation from *Northeast Florida*, Plaintiffs assert injury in fact on the ground that, because the proceedings involved Indian children, they were "inexorably" "subject to" or "subjected to" the ICWA provisions at issue. Pls. Br. 11, 17, 21, 25, 28, 32, 36.

Plaintiffs' Article III analysis cannot be squared with basic standing precepts. Neither the equal protection context nor *Northeast Florida* exempts Plaintiffs from the strictures of standing law. *See, e.g.*, *United States v. Hays*, 515 U.S. 737, 743 (1995) ("The rule against generalized grievances applies with as much force in the equal protection context as in any other."). Even if Plaintiffs need not show an "ultimate inability to obtain the benefit," they must show "the imposition of [a] barrier" in their individual cases. *Northeast Fla.*, 508 U.S. at 666. That is, they must allege facts showing that the ICWA provisions they challenge actually caused them harm, *i.e.*, unequal treatment, not merely that the provisions *could or would have* done so on some other hypothetical set of facts.

In that regard, this Court has "repeatedly admonished *** that '[t]he mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III.'" *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (alteration in original) (quoting *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983)); *see, e.g.*, *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc). And it has further rejected *Northeast Florida* as license to ignore that admonishment: "[The plaintiff] has misconstrued th[e] statement [from *Northeast Florida*] to mean that the hypothetical existence of a racial *** barrier is enough, without a plaintiff's showing that she has been, or is

genuinely threatened with the likelihood of being, subjected to such a barrier." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 657 (9th Cir. 2002).

The district court correctly determined that Plaintiffs' Amended Complaint suffers from that same fundamental defect because it fails to allege facts showing any disparate treatment caused by the ICWA provisions they challenge. ER14. Contrary to Plaintiffs' characterization, the district court neither required them to show an inability to obtain the benefits they sought nor otherwise disregarded *Northeast Florida*. Rather, the district court correctly relied on *Northeast Florida* (among other precedent) for the following unexceptional rule: To establish Article III standing, Plaintiffs must show that the five ICWA provisions at issue on appeal were actually applied to them in a manner that caused unequal treatment. *See* ER13-14; *accord McCormack v. Herzog*, 788 F.3d 1017, 1026 (9th Cir. 2015) ("'A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'") (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)); *Lopez v. Candaele*, 630 F.3d 775, 788 (9th Cir. 2010) (collecting cases in which plaintiffs were found to lack standing because the provision at issue "by its terms is not applicable to the plaintiffs").

Plaintiffs have already conceded that they cannot make such a showing with respect to one ICWA provision challenged below (and they have abandoned other

claims). *See* Pls. Br. 4 n.7 ("Plaintiffs concede the dismissal of their challenge to the Foster Care Burden Provision," 25 U.S.C. § 1912(e)); *see also* Pls. Br. 4-5 nn.7-8 (representing that Plaintiffs have abandoned their challenges to regulatory guidelines).[5] Because Plaintiffs likewise cannot satisfy their Article III obligation with respect to the remaining five ICWA provisions, discussed in turn below, this Court should affirm the dismissal of the Amended Complaint.[6]

A. The Arizona Supreme Court Determined That ICWA's Transfer Provision (25 U.S.C. § 1911(b)) Did Not Govern The Community's Transfer Motion In A.D.'s Proceeding

Plaintiffs' first standing argument, which concerns ICWA's transfer provision, 25 U.S.C. § 1911(b), provides a clear-cut example of a statute that did not injure Plaintiffs because it was never applied to them. In Plaintiffs' view (Br. 11-16), section 1911(b) caused harm because it differs from the Uniform Child

[5] Plaintiffs do not advance any independent arguments relating to their due process, Indian Commerce Clause, Tenth Amendment, First Amendment, and federal statutory law claims. ER51-58. Plaintiffs thus have conceded lack of standing for those distinct claims. *See Davis v. FEC*, 554 U.S. 724, 734 (2008) ("[S]tanding is not dispensed in gross. Rather, a plaintiff must demonstrate standing for each claim he seeks to press[.]") (alteration in original) (internal citation and quotation marks omitted).

[6] These Article III defects cut across not only the relief Plaintiffs seek in their individual capacities (Pls. Br. 33-44), but also the relief they seek in their capacities as putative class representatives (Pls. Br. 44-46). *See Villa v. Maricopa Cty.*, 865 F.3d 1224, 1229 (9th Cir. 2017) (noting that "a plaintiff must show standing with respect to each form of relief sought" and that, "[b]ecause [the plaintiff] herself lacks Article III standing to pursue *** relief, she cannot represent a plaintiff class seeking such relief") (citations and internal quotation marks omitted).

Custody Jurisdiction and Enforcement Act adopted into Arizona law, and the Community filed a motion pursuant to section 1911(b) to transfer jurisdiction over A.D.'s child custody proceeding from an Arizona state court to a tribal court. But the juvenile court denied the Community's motion, and Plaintiffs ultimately prevailed in state court on the ground that "§ 1911(b) did not govern the Community's motion to transfer." *Gila River Indian Cmty. v. Department of Child Safety*, 395 P.3d 286, 290 (Ariz. 2017). Plaintiffs' pages-long explication of the (supposed) differences between section 1911(b) and Arizona law therefore does nothing to show an injury *to them*. As the district court explained (ER15-16), the inapplicability of section 1911(b) to A.D.'s case—the only one in which a transfer was sought—precludes a finding that Plaintiffs "sustain[ed] a direct injury as a result of [section 1911(b)'s] operation or enforcement," *McCormack*, 788 F.3d at 1026 (citation and quotation marks omitted).

Plaintiffs acknowledge as much in asserting that "[t]he jurisdiction transfer [the Community] sought under ICWA Section 1911(b) *would* therefore have deprived A.D., S.H., and J.H." of certain protections. Br. 15 (emphasis added). A statutory provision that "would *** have" harmed Plaintiffs *if it had applied to them* is not one that caused an injury in fact. It is hornbook law that such a "hypothetical" injury is insufficient to support Article III standing. *Lujan*, 504 U.S. at 560 (citation and quotation marks omitted); *see Habeas Corpus Res. Ctr. v.*

United States Dep't of Justice, 816 F.3d 1241, 1247 (9th Cir. 2016) ("The case-or-controversy requirement ensures that "[f]ederal courts [do] not decide questions that cannot affect the rights of litigants in the case before them or give opinion[s] advising what the law would be upon a hypothetical state of facts.") (alterations in original) (citation and internal quotation marks omitted).

Faced with the reality that A.D. was never subjected to section 1911(b), Plaintiffs resort to arguing (Br. 16) that the time and expense of defeating the Community's transfer motion gives rise to standing to challenge section 1911(b) here. That argument fails: "a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). More generally, "[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing," *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000), and here any litigation-related injury would be caused by the Community's invocation of section 1911(b) in A.D.'s state court proceeding, not section 1911(b) itself, *see* ER15-16; Pls. Br. 16 (stating that their litigation injury was brought about "*by Defendants*").

B. ICWA's Foster Care/Parental Rights Termination Active Efforts Provision (25 U.S.C. § 1912(d)) By Its Terms Did Not Apply To C.C.

Relying on the facts alleged in the Amended Complaint only as to C.C. (and his adoptive parents, M.C. and K.C.), and ignoring the district court's holding with respect to the remaining Plaintiffs, Plaintiffs argue they have standing to challenge ICWA's so-called "active efforts" provision, 25 U.S.C. § 1912(d). That argument does not withstand scrutiny.

Section 1912(d) could not have injured C.C. because the provision did not apply in C.C.'s situation. *See McCormack*, 788 F.3d at 1026. It states:

> Any party seeking to effect a *foster care placement of*, or *termination of parental rights to*, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

25 U.S.C. § 1912(d) (emphasis added). Section 1912(d) by its terms "requires reunification attempts only *before* foster care placement and termination of parental rights." ER17 (emphasis added).

In this case, as the district court explained, "the Amended Complaint does not allege that any reunification attempts were made before [C.C.] w[as] placed in foster care." ER17. Nor does the Amended Complaint "allege that any attempt was made to reunify C.C.'s family *** before parental rights were terminated." ER18. It follows that "the Amended Complaint does not allege facts showing that

[C.C.] suffered a concrete and particularized injury, actual or imminent, and fairly traceable to § 1912(d)." *Id.*

On appeal, Plaintiffs do not dispute the factual predicate for the district court's conclusion or identify any allegations in the Amended Complaint establishing that active efforts were undertaken prior to either C.C. being placed in foster care or the termination of his biological parents' rights. Instead, Plaintiffs maintain that the (ultimately unsuccessful) alternative placements the Nation sought out for C.C. give rise to standing to challenge section 1912(d). *See* Pls. Br. 19-21 (citing ER32-33, ¶¶ 26-28). But Plaintiffs conflate "active efforts" to *reunify* C.C.'s family (covered by section 1912(d)) with attempts to seek an *alternative* placement for C.C. (covered by sections 1915(a)-(b), *see* pp. 25-30, *infra*). In any event, the Nation's suggestions of alternative placements were independent of any "active efforts" obligation that ICWA imposes on the State.

Plaintiffs' own argument, moreover, undercuts any tie between section 1912(d) and the alleged placement-related injury. Plaintiffs complain that ICWA required the State to prove that the alternative placement attempts were unsuccessful "before C.C. could be 'cleared for adoption,' *i.e.*, even *after* parental rights were terminated." Pls. Br. 20; *see also* Pls. Br. 28 (linking efforts to "ICWA's adoption placement preferences provision," 25 U.S.C. § 1915(a)). Plaintiffs' explicit reliance on ICWA's separate *adoption* placement provision

underscores that the crux of the alleged injury, as set forth in the Amended Complaint and echoed in Plaintiffs' brief, is that "M.C. and K.C. were not able to file a petition for *adoption*" pending the attempted alternative placements. ER32-33, ¶ 26 (emphasis added). Section 1912(d), however, has nothing to do with adoptions—a point that Plaintiffs nowhere dispute. Thus, even if any alternative placement attempts were motivated by a desire to have C.C. adopted by a Navajo Nation family, they were *not* caused by operation of section 1912(d).

C. The Amended Complaint Alleges No Facts That Would Have Triggered ICWA's Parental Rights Termination Evidentiary Provision (25 U.S.C. § 1912(f))

Plaintiffs next take aim at the district court's conclusion that they lack standing to challenge 25 U.S.C. § 1912(f), which states:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. §1912(f). The district court committed no error.

The record lacks any support for Plaintiffs' representation that section 1912(f) "forced [them] to prove ICWA's separate and additional elements for termination beyond a reasonable doubt" by "procur[ing] testimony of qualified expert witnesses." Br. 24 (citation and internal quotation marks omitted). The cited paragraphs of the Amended Complaint are devoid of such allegations; they

state merely that the parental rights of A.D.'s and C.C.'s respective birth parents have been terminated and that the parental rights of C.R.'s birth parents have not yet been terminated. ER28-29, ¶¶ 9-12.

Beyond the silence as to any specifics (such as procuring expert testimony), the Amended Complaint affirmatively alleges that the parent Plaintiffs were not involved in the children Plaintiffs' termination proceedings. *See* ER33, ¶ 29 ("M.C. and K.C. were not granted intervention in the dependency matter of C.C."); ER35, ¶ 38 ("P.R. and K.R. are not party intervenors in the state child custody proceedings of *** C.R."). Accordingly, as the district court concluded, the Amended Complaint "does not allege that the termination proceedings were affected by the evidentiary standard required by § 1912(f) in any way," and "does not allege facts showing that any of the Plaintiffs suffered a concrete and particularized injury, actual or imminent, and fairly traceable to § 1912(f)." ER19.

D. Plaintiffs' Assertion That They Were Subject To ICWA's Foster/Preadoptive Care Placement Preferences Provision (25 U.S.C. § 1915(b)) Is Factually And Legally Incorrect

Plaintiffs take issue with the district court's holding that they lack standing to challenge ICWA's foster/preadoptive care placement preferences provision. 25 U.S.C. § 1915(b) (providing that "[i]n any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with" various tribal affiliations). According to Plaintiffs (Br. 25-27),

section 1915(b) caused harm because the Community and the Nation explored (unsuccessfully) the possibility of alternative placements. That argument is unavailing as both a factual and legal matter.

The only foster/preadoptive care placements described in the Amended Complaint concern the placement of the child Plaintiffs with their respective parent Plaintiffs at birth or as infants. *See* ER30-34, ¶¶ 15-17, 21, 32. Each of those placements occurred *before* the Community and the Nation unsuccessfully explored supposedly injurious potential alternative placements. *See* pp. 22-23, *supra* (discussing lack of "active efforts" before foster placements).

For A.D., Plaintiffs cite an Arizona intermediate appellate court decision—presumably because there are no allegations concerning alternative placements for A.D. in the Amended Complaint, *see* ER21—that makes this timing clear: "The Community requested A.D. *remain* in her *current* placement" with S.H. and J.H. while "the Community made further unsuccessful efforts to identify a placement." *Gila River Indian Cmty. v. Department of Child Safety*, 379 P.3d 1016, 1019 n.8 (Ariz. Ct. App. 2016) (emphasis added). C.C.'s and C.R.'s circumstances were no different. *See* ER32-33, ¶ 26 (alleging that "C.C. continuously remained in foster care with M.C. and K.C." while Nation investigated other placements); ER30-31, ¶ 17 (noting that C.R. was "placed in foster care with [K.R. and P.R.] since birth"). In all three cases, moreover, the child Plaintiffs remained in the same foster

placements—made at the *outset* of state court proceedings—until those placements became permanent through adoption. Accordingly, the district court was right to hold that "[t]he Amended Complaint does not allege any delay in, or effect on, the foster care placements of the child Plaintiffs caused by § 1915(b)." ER22.

Plaintiffs counter (Br. 28) that they did allege delay. But the cited paragraphs of the Amended Complaint contain generalized allegations that "ICWA" as a whole "creates delay and uncertainty." ER37, ¶¶ 48-49. Even if such conclusory allegations could be considered in assessing Article III standing, *see* ER21 (explaining that allegations of delay were conclusory), they would not explain why any specific delay here was "caused by § 1915(b)" in particular, ER22.

Nor is it enough for Plaintiffs to argue that section 1915(b) was the impetus for the Community and the Nation to suggest placements, which in turn resulted in the alleged harm. ICWA's text and Supreme Court precedent foreclose reliance on that type of indirect causal chain to establish standing to challenge a statute. Plaintiffs must show that they were actually injured by operation of the statute, rather than allege harms caused by third parties. *See Lujan*, 504 U.S. at 560-561 (injury in fact cannot be "th[e] result [of] the independent action of some third party") (alterations in original) (citation and quotation marks omitted). Section 1915(b) addresses only the preferences that a *court* must apply when there are

competing placements; it does not require any search for such placements, by tribes or anyone else. Therefore, in complaining of the search for alternative placements, Plaintiffs allege no "*direct* injury *** result[ing] [from] the statute's operation or enforcement." *McCormack*, 788 F.3d at 1026 (emphasis added) (citation and quotation marks omitted).

The Amended Complaint alleges no facts that would have triggered section 1915(b) in any of the child Plaintiffs' child custody proceedings. To the contrary, it is beyond dispute that none of the Community's or the Nation's proposed foster/preadoptive placements came before a court to invoke the preferences. *See Gila River Indian Cmty.*, 379 P.3d at 1019 & n.8 (stating that, due to "unsuccessful efforts," the Community did "not provide[] an alternative" for A.D.); ER31-32, ¶ 26 (alleging that "all of *** [the Nation's proposed placements for C.C.] turned out to be inappropriate for placement" because "C.C.'s extended family members expressly declined to have him placed with them" and the other potential placements "also declined"); ER35, ¶ 39 (noting only that Community "propos[ed]" placements for C.R.). Standing cannot be found on those facts. *See Scott*, 306 F.3d at 657 (rejecting notion that "hypothetical existence of a racial *** barrier is enough, without a plaintiff's showing that she has been, or is genuinely threatened with the likelihood of being, subjected to such a barrier").

E. The Adoption Placement Preferences Provision (25 U.S.C. § 1915(a)) Was Inapplicable To Plaintiffs As A Matter Of Law

Plaintiffs' attempt to demonstrate standing to challenge ICWA's adoption placement preferences provision, 25 U.S.C. § 1915(a), also comes up short because that provision was not triggered in the first place. Plaintiffs contend that they were injured because they bore the "burden" of "overcoming" and "seeking a deviation" from the preferences. Br. 30 (citation omitted). But no "deviation" was necessary given that, in the absence of any allegation that a "specific Indian family was willing to adopt [the child Plaintiffs]," section 1915(a) never applied: "there simply is no 'preference' to apply if no alternative party that is eligible to be preferred under § 1915(a) has come forward." *Adoptive Couple*, 133 S. Ct. at 2564-2565 & n.12 (finding insufficient "that there are approximately 100 [Cherokee-Nation-certified] families 'that are ready to take children that want to be adopted'") (citation omitted); *see Native Village of Tununak v. Alaska*, 334 P.3d 165, 176 (Alaska 2014) ("Because the Smiths were the only family that, in the words of the Supreme Court, 'formally sought to adopt' Dawn, § 1915(a)'s 'rebuttable adoption preferences [do not] apply [because] no alternative party has formally sought to adopt [this] child.'") (alterations in original). Plaintiffs could not have been harmed by section 1915(b) when they were never required to confront (much less overcome) it. *See McCormack*, 788 F.3d at 1026 (holding that statute's "operation or enforcement" must directly cause the injury).

Plaintiffs suggest (Br. 30) that the adoptions would have been completed more quickly absent section 1915(a). But Plaintiffs do not contest the district court's conclusion that any allegations of delay in the Amended Complaint were either conclusory or missing altogether. *See* ER22. Instead, Plaintiffs now assert that delay is immaterial to their Article III standing because their injury is differential treatment. As section 1915(a) was "inapplicable" in this case, *Adoptive Couple*, 133 S. Ct. at 2564, however, Plaintiffs could not have been subject to differential treatment based on that provision.[7]

* * *

In sum, despite Plaintiffs' insistence (repeated no fewer than 30 times) that they were subject to the provisions of ICWA they challenge, there is no factual or legal basis for those statements. As the district court observed, "Plaintiffs initiated this action [more than 20 months ago], alleging a putative class so numerous that joinder of all members is impracticable, but despite being granted leave to amend, they have not named any plaintiffs with standing to challenge any provisions of

[7] Plaintiffs' cursory argument (Br. 31-32) relating to Arizona law fares no better. Plaintiffs argue that (in their view) Arizona law without "exception" requires an Indian child to be placed according to certain Indian-related preferences. But as Plaintiffs admit, A.D., C.C., and C.R. were placed in homes that do not qualify for any preferences (*i.e.*, homes which, in line with their erroneous view of these preferences as being race-based, they call "non-race-matched homes"). Br. 32. Those non-preferential placements refute any suggestion that an Arizona law (supposedly) requiring an Indian-related placement, subject to no exception, actually applied to or harmed Plaintiffs.

ICWA." ER24. The district court therefore had no choice but to dismiss the Amended Complaint and leave the merits of Plaintiffs' (unfounded) attacks on the constitutionality of ICWA for another case. *See* Pls. Br. 7-10; *see also Catholic League for Religious & Civil Rights v. City & Cty. of S.F.*, 624 F.3d 1043, 1049 (9th Cir. 2010) (en banc) ("Nor can standing analysis, which prevents a claim from being adjudicated for lack of jurisdiction, be used to disguise merits analysis, which determines whether a claim is one for which relief can be granted if factually true."); 1-11 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 11.06 ("The Act has also survived several constitutional challenges invoking the federal equal protection guarantee.").

This Court should likewise refrain from "pre-adjudicat[ing] for state court judges how to rule on facts that may arise and that may be governed by statutes or guidelines that this Court may think invalid." ER24. Federal courts lack Article III authority to hear anticipatory disputes about what *might* happen in future state court proceedings, where federal law *might* apply. State courts can and do address such issues as they arise—including in cases in which Plaintiffs' counsel are involved. *See* Petition for Writ of Certiorari at 6, *S.S. v. Colorado River Indian Tribes*, No. 17-95 (U.S. July 17, 2017) (recounting that, on appeal from Arizona Superior Court's dismissal of petition to terminate birth mother's parental rights, the Arizona Court of Appeals held that section 1912(d) and (f) "do

not violate the Constitution's Equal Protection guaranty"), *cert. denied*, --- S. Ct. ----, 2017 WL 3136930 (Mem) (Oct. 30, 2017). Those courts are the natural and constitutionally sound forum for disputes that have not yet and may never become concrete. "Any true injury to any child or interested adult [caused by an ICWA provision] can be addressed in the state court proceeding itself, based on actual facts before the court, not on hypothetical concerns." ER24.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment of dismissal for lack of Article III standing.

Respectfully submitted,

/s/Pratik A. Shah

Pratik A. Shah
Donald R. Pongrace
Merrill C. Godfrey
Z.W. Julius Chen
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, D.C. 20036
(202) 887-4000
pshah@akingump.com

Linus Everling
Thomas L. Murphy
GILA RIVER INDIAN COMMUNITY
OFFICE OF GENERAL COUNSEL
P.O. Box 97
Sacaton, AZ 85147

Counsel for Gila River Indian Community

Paul Spruhan
Katherine Claire Belzowski
NAVAJO NATION DEPARTMENT OF JUSTICE
P.O. Box 2010
Window Rock, AZ 86515
(928) 871-6937
pspruhan@nndoj.org

Counsel for Navajo Nation

Pursuant to Circuit Rule 25-5(e), I attest that the Navajo Nation concurs in the content of this filing.

December 15, 2017

STATEMENT OF RELATED CASES

Intervenors-Defendants-Appellees are not aware of any pending related cases within the meaning of Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Circuit Rule 32-1 and Circuit Rule 32-2(b) because this brief contains 7,269 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 with 14-point Times New Roman font.

/s/Pratik A. Shah
Pratik A. Shah

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2017, I electronically filed the foregoing Brief with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served via the CM/ECF system.

/s/Pratik A. Shah
Pratik A. Shah