No. 17-15839

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAROLYN COGHLAN CARTER AND DR. RONALD FEDERICI ON BEHALF OF MINOR CHILDREN A.D., C.C., L.G., AND C.R.; FOSTER PARENTS S.H., J.H., M.C., K.C., K.R., AND P.R.,

Plaintiffs-Appellants

v.

JOHN TAHSUDA, ACTING ASSISTANT SECRETARY OF INDIAN AFFAIRS; RYAN ZINKE, SECRETARY OF THE INTERIOR; GREGORY A. MCKAY, DIRECTOR OF ARIZONA DEPARTMENT OF CHILD SAFETY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
CASE NO. 15-1259 (HON. NEIL WAKE)

RESPONSE BRIEF FOR THE FEDERAL APPELLEES

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TABLE OF CONTENTS

Table of Contents ii

Table of Authorities v

Introduction 1

Statement of Jurisdiction 1

Statement of the Issues 2

Statutory Addendum 2

Statement of the Case 2

I. Legal Background 2

A. Arizona Child-Welfare Proceedings 3

B. Indian Child Welfare Act 5

C. Interior's ICWA Guidelines 11

II. Factual & Procedural Background 12

A. Descriptions of Plaintiffs 12

1. Minor children 12

2. "Next Friends" to Children 16

3. Foster parents 16

4. Putative class 17

B. Claims 17

C. Dismissal Order 18

Summary of Argument 20

Standard of Review 21

Argument........ 22

I. Plaintiffs' Claims for Relief Are Moot Because Each of the Children Has Been Adopted By His or Her Foster Parents........ 22

A. Injunctive Relief........ 23

B. Declaratory relief........ 24

C. Nominal damages 25

II. Plaintiffs Failed to Establish Standing to Pursue Their Specific ICWA Claims........ 26

A. Standing Requires Particularized Injury, Even When the Injury Asserted Is An Alleged Denial of Equal Treatment........ 26

B. Indian Children Have Not Alleged With Particularity Any Denial of Equal Treatment and Do Not Otherwise Have Standing........ 29

1. A.D. Has Not Plausibly Alleged That Any Provision of ICWA That She Challenges Will Cause Her Concrete and Particularized Injury........ 30

2. C.R. Has Not Plausibly Alleged That Any Provision of ICWA That He Challenges Will Cause Him Particularized Injury........ 39

3. C.C. Has Not Plausibly Alleged That Any Provision of ICWA That He Challenges Will Cause Him Particularized Injury........ 45

C. Non-Indian Child L.G. Is Not Subject to ICWA, and Her Fear of Being Separated from Sibling C.R. Is Unfounded........ 48

D. Children Are Minors Whose Interests Are Not Adequately Represented by Next Friends or Foster Parents........ 49

1. Carter Does Not Qualify as Next Friend to Children. 49

2. Foster Parents Do Not Have Standing to Represent Children, Nor Can Foster Parents Establish Standing in Their Own Right. 50

E. Plaintiffs Cannot Import Standing From Their Proposed Class. 53

Conclusion 55

Statement of Related Cases 56

TABLE OF AUTHORITIES

Cases

Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013)....................................6, 8, 36, 41, 46

Allen v. Wright, 468 U.S. 737 (1984)...23, 27

Already, LLC v. Nike, Inc., 568 U.S. 85 (2013)..22, 23

Alvarez v. Smith, 558 U.S. 87 (2009)...23, 24

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 54

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 26

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 22, 35, 39

Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983) 52

Bates v. United Parcel Service, Inc., 511 F.3d 974 (9th Cir. 2007)....................................... 24

Bras v. California Public Utilities Commission, 59 F.3d 869 (9th Cir. 1995) 29

Braunstein v. Arizona Department of Transportation, 683 F.3d 1177 (9th Cir. 2012).....27, 33

Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036 (9th Cir. 1999) 18

Carey v. Piphus, 435 U.S. 247 (1978) 39

Carroll v. Nakatani, 342 F.3d 934 (9th Cir. 2003) 34

Center for Biological Diversity v. Mattis, 868 F.3d 803 (9th Cir. 2017)................................ 25

Chapman v. Pier 1 Imports (U.S.), Inc., 631 F.3d 939 (9th Cir. 2011) (en banc)..........34, 35

Clapper v. Amnesty International USA, 568 U.S. 398 (2013) 31, 40, 49

Coalition of Clergy v. Bush, 310 F.3d 1153 (9th Cir. 2002).. 50

Comer v. Schriro, 480 F.3d 960 (9th Cir. 2007) 16

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) 22

Davis v. FEC, 554 U.S. 724 (2008) 21

Doe v. Bolton, 410 U.S. 179 (1973) 25

Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004) 51

Friends of the Earth, Inc. v. Bergland, 576 F.2d 1377 (9th Cir. 1999) 23

Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125 (9th Cir. 2005) (en banc) 25

Gibson v. Merced County Department of Human Resources, 799 F.2d 582 (9th Cir. 1986) 52

Gila River Indian Community v. Department of Child Safety, 363 P.3d 148 (Ariz. Ct. App. 2015) 43

Gila River Indian Community v. Department of Child Safety, 395 P.3d 286 (Ariz. 2017) 5, 7, 12, 31, 33

Gila River Indian Community. v. Department of Child Safety, 379 P.3d 1016 (Ariz. Ct. App. 2016) 31

Gratz v. Bollinger, 539 U.S. 244 (2003) 53

Halet v. Wend Investment Co., 672 F.2d 1305 (9th Cir. 1982) 51

Heckler v. Mathews, 465 U.S. 728 (1984) 29

Hewitt v. Helms, 482 U.S. 755 (1987) 25

Jeff O. v. Arizona Department Economic Security, No. 1 CA-JV 11-0019 (Ariz. Ct. App. Aug. 30, 2011) 43

Kent K. v. Bobby M., 110 P.3d 1013 (Ariz. 2005) 4, 10

Lierboe v. State Farm Mutual Automobile Ins. Co., 350 F.3d 1018 (9th Cir. 2003) 53

Lipscomb ex rel. DeFehr v. Simmons, 962 F.2d 1374 (9th Cir. 1992) 29, 39, 44, 48

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 21, 36, 37

Massie ex rel. Kroll v. Woodford, 244 F.3d 1192 (9th Cir. 2001) 49

Matter of Appeal in Maricopa County, 874 P.2d 1006 (Ariz. Ct. App. 1994) 3

Maya v. Centex Corp., 658 F.3d 1060 (9th Cir. 2011) 21

Miller v. Albright, 523 U.S. 420 (1998) 50

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989) 6, 7, 32

Morton v. Mancari, 417 U.S. 535 (1974) 6

Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656 (1993) 29

Pascua Yacqui Tribe v. Arizona Department of Economic Security, No. 1 CA-JV 2007-0079, 2007 WL 5515315 (Ariz. Ct. App. Nov. 27, 2007) 8

Raines v. Byrd, 521 U.S. 811 (1997) 26

Roe v. Wade, 410 U.S. 113 (1973) 25

San Diego County Gun Rights Committee v. Reno, 98 F.3d 1121 (9th Cir. 1996) 42, 46

Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) 28

Singleton v. Wulff, 428 U.S. 106 (1976) 50

Sosna v. Iowa, 419 U.S. 393 (1975) 53

Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) 26, 27

Steffel v. Thompson, 415 U.S. 452 (1974) 25

Summers v. Earth Island Institute, 555 U.S. 488 (2009) 27, 34

Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974) 25

Sze v. INS, 153 F.3d 1005 (9th Cir. 1998).. 24

Thompson v. County of Franklin, 180 F.R.D. 216 (N.D.N.Y. 1998) 32

Turner v. Fouche, 396 U.S. 346 (1970) 29

United States v. Hays, 515 U.S. 737 (1995)... 27

Valerie M. v. Arizona Department of Economic Security, 198 P. 3d 1203 (Ariz. 2009)........... 3

Wooden v. Board of Regents, 247 F.3d 1262 (11th Cir. 2001)... 27

Statutes

<u>Indian Child Welfare Act</u>

25 U.S.C. §§ 1901 et seq. 1
25 U.S.C. § 1901(3) 9
25 U.S.C. § 1901(4) 5
25 U.S.C. § 1901(8) 9
25 U.S.C. § 1902.. 6
25 U.S.C. § 1903(1) 7, 23
25 U.S.C. § 1903(4) 6
25 U.S.C. § 1903(4)(b) 29
25 U.S.C. § 1903(4)(a)... 12
25 U.S.C. § 1903(9) 23
25 U.S.C. § 1911(b).. 7, 11, 15, 18, 31
25 U.S.C. § 1911(c) 7
25 U.S.C. § 1912(d).. 8, 11, 15, 19, 47
25 U.S.C. § 1912(e) 18
25 U.S.C. § 1912(f).. 10, 11, 15, 17, 19
25 U.S.C. § 1915(a) 10, 11, 15, 19
25 U.S.C. § 1915(b).. 8, 9, 11, 15, 19
25 U.S.C. § 1915(b)(i)-(iv) 9
25 U.S.C. § 1921... 11

<u>Civil Rights Act</u>

42 U.S.C. § 2000d.. 17, 25

28 U.S.C. § 1291 1
28 U.S.C. § 1331 1

Arizona Revised Statutes

A.R.S. § 8-103(C) 4, 10
A.R.S. § 8-103(D) 4, 10
A.R.S. § 8-105 46
A.R.S. § 8-105(A) 4
A.R.S. § 8-116 .... 5, 10
A.R.S. § 8-221(I) 3
A.R.S. § 8-451 3
A.R.S. § 8-453(D) 3
A.R.S. § 8-514(B) 3, 8
A.R.S. § 8-522 3
A.R.S. § 8-529(A)(13) 47
A.R.S. § 8-533(B) 4, 10
A.R.S. § 8-537(B) 4, 10
A.R.S. § 8-548 5
A.R.S. § 8-815(B) 11
A.R.S. § 8-841 3
A.R.S. § 8-843(E) 3, 8
A.R.S. § 8-845(A) 4, 8
A.R.S. § 8-861 4
A.R.S. § 8-862(B) 4
A.R.S. § 8-862(B)(2) 8

Regulations

25 C.F.R. pt. 23 (June 14, 2016) 11
25 C.F.R. § 23.131(a)(1) 9
25 C.F.R. § 23.132(c) 9
25 C.F.R. § 23.132(c)(1) 46
25 C.F.R. § 23.132(c)(3) 43
25 C.F.R. § 23.2 8
25 C.F.R. § 25.115(b) 31

Other Authorities

Legislative History

H.R. REP. NO. 95-1386, at 9 (1978) 5, 6
H.R. REP. NO. 95-1386, at 10 6
H.R. REP. NO. 95-1386, at 11 6
H.R. REP. NO. 95-1386, at 19 7

1979 Guidelines

44 Fed. Reg. 67,584, 67,594 at F.3 (Nov. 26, 1979) 9
44 Fed. Reg. at 67,591 at C.3 Commentary 52

2015 Guidelines

80 Fed. Reg. 10,146, 10,156 (Feb. 25, 2015) 31
80 Fed. Reg. at 10,158 at F.2 43
80 Fed. Reg. at 10,158 at F.3 9
80 Fed. Reg. at 10,158 at F.4 9
80 Fed. Reg. at 10,158 at F.4(c)(1) 46

2016 Guidelines

81 Fed. Reg. 96,476 (Dec. 30, 2016) 11
U.S. Department of the Interior, *Guidelines for Implementing the Indian Child Welfare Act* F.2 at 47 (Dec. 2016) 31
U.S. Department of the Interior, *Guidelines for Implementing the Indian Child Welfare Act* H.4 at 62 43

State and Tribal Authorities

Arizona Department of Child Safety, *Policy and Procedure Manual*, Ch. 5, § 7 .... 4, 53
Arizona Department of Child Safety, *Policy and Procedure Manual*, Ch. 5, § 11 .... 5, 47, 52
Arizona Department of Child Safety, *Policy and Procedure Manual*, Ch. 5, § 13 5
Arizona Department of Child Safety, Family Foster Home Care Rates and Fees Schedule (eff. July 1, 2015) 53
Intergovernmental Agreement Between the State and the Nation 2
Intergovernmental Agreement Between the State and the Nation, art. IX, § D (2014) 47

Rules

Fed. R. App. P. 4(a)(1)(B)(iii) 2
Fed. R. App. P. 43(c)(2) 1
Fed. R. Civ. P. 17(c) 16
Fed. R. Civ. P. 23(f) 24
Fed. R. Civ. P. 82 54
Ariz. R. Proc. Juv. Ct. 37(A), (B) 3

Treatises

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 82 (Newton ed. 2005) 5

Constitutional Provisions

U.S. Const. art. III, § 2 22

INTRODUCTION

Plaintiffs are "next friends" who purport to act on behalf of four minor children and the now-adoptive parents of these children. They sued officials of the United States Department of the Interior ("Interior")[1] and the Arizona Department of Child Safety ("State"), seeking a declaration that five provisions of the Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq. ("ICWA"), are unconstitutional, an injunction preventing their application to their child-welfare cases, and nominal damages from the State. The district court entered a final judgment dismissing all claims for lack of Article III standing. The judgment of dismissal should be affirmed because this case is now moot. Alternatively, the judgment should be affirmed because the district court's ruling that Plaintiffs lack Article III standing was correct.

STATEMENT OF JURISDICTION

(a) Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. Plaintiffs' Excerpts of Record ("ER") 28. But as set out in Part II below (pp. 26-54), the district court lacked jurisdiction because Plaintiffs lacked Article III standing.

(b) The district court's judgment is final because it disposed of all claims against all defendants. This Court has jurisdiction under 28 U.S.C. § 1291.

[1] Pursuant to Fed. R. App. P. 43(c)(2), the following automatic substitutions should be made for Federal Appellees: Secretary of the Interior Ryan Zinke for former Secretary Sally Jewell, and Acting Assistant Secretary of Indian Affairs John Tahsuda for former Secretary of Indian Affairs Kevin Washburn.

(c) The district court entered its judgment on March 16, 2017. ER 5. Plaintiffs filed a notice of appeal on April 24, 2017. ER 2. The appeal is timely under Fed. R. App. P. 4(a)(1)(B)(iii).

STATEMENT OF THE ISSUES

1. Whether Plaintiffs' claims are moot because the ICWA provisions in question apply only to child-welfare proceedings, but all such proceedings related to Plaintiffs have concluded.

2. Whether Plaintiffs have standing to challenge the constitutionality of those provisions where Plaintiffs do not plausibly allege that any of the challenged ICWA provisions adversely affected their child-custody proceedings.

STATUTORY ADDENDUM

All applicable statutes are contained in the addendum of Plaintiffs. One source cited herein, the Intergovernmental Agreement Between the State and the Nation, is not available online and is included in the Addendum filed with this brief.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

ICWA sets minimum standards in state child-welfare proceedings for the foster-care, pre-adoptive, and adoptive placement of Indian children and for the termination of their biological parents' parental rights. A child-welfare proceeding concerning an Indian child under ICWA nonetheless remains fundamentally a *state* proceeding. *See*, *e.g.*, *Valerie M. v. Arizona Department of Economic Security*, 198 P. 3d

1203, 1206 (Ariz. 2009). We begin by describing Arizona child-welfare proceedings generally, and then we explain what effect, if any, ICWA may have in those proceedings.

A. Arizona Child-Welfare Proceedings

In Arizona, child-welfare proceedings are the province of state juvenile courts. *See Matter of Appeal in Maricopa County*, 874 P.2d 1006, 1008 (Ariz. Ct. App. 1994). The State investigates allegations of child neglect or abuse and takes responsibility for the care, custody, and control of children as needed for their protection. Arizona Revised Statutes ("A.R.S.") §§ 8-451, 8-453(D). In addition to the State, the primary parties in interest in a child-welfare proceeding are the child and his or her parents. The court may appoint counsel for the parents or child, and may additionally appoint a Guardian ad Litem ("GAL") for the child. *Id.* §§ 8-221(I), 8-522. Foster parents are not parties to a child-welfare proceeding unless they receive court approval to intervene. *See* Ariz. R. Proc. Juv. Ct. 37(A), (B).

A child-welfare proceeding in Arizona is initiated when the State or a private party files a "dependency petition" with the court asserting that a parent is unfit or unable to care for their child. A.R.S. § 8-841. The court must determine if "reasonable efforts" were made to prevent removal from the child's parent. *Id.* § 8-843(E). If the court grants the dependency petition, the child becomes a ward of the court. If the child cannot be returned to the parent's care, the court must determine the "least restrictive type" of foster-care placement, *id.* § 8-514(B),

preferably with the other parent, a grandparent, extended family, or someone who has a "significant relationship" with the child, *id.* § 8-845(A). Even after placement in foster care, Arizona state policy continues to favor the reunification of a child with his or her parents. The child must be returned to his or her parent if, at any point prior to termination of parental rights, the State cannot meet its burden to show that reunification would create a substantial risk of harm to the child. A.R.S. § 8-861. Foster parents are informed that there is no guarantee that parental rights will be terminated or that the child will be freed for adoption. Arizona Department of Child Safety, *Policy and Procedure Manual*, Ch. 5, § 7 ("DCS Manual").

If the court determines that reunification is not possible despite reasonable efforts, it will direct the State to find a permanent option for the child, such as adoption, permanent guardianship, independent living, or long-term foster care. A.R.S. § 8-862(B). To terminate parental rights, the State must prove by clear and convincing evidence that one of eleven grounds for termination is satisfied, and by a preponderance of the evidence that termination is in the best interests of the child. *Id.* §§ 8-537(B), 8-533(B). *See also Kent K. v. Bobby M.*, 110 P.3d 1013 (Ariz. 2005).

If the permanent plan is adoption, the State will consider the "safety, social, emotional, physical, and mental health needs of the child." A.R.S. § 8-103(C). If all relevant factors are equal, the State prioritizes adoptive placement with a married man and woman over a single adult. *Id.* § 8-103(D). Prospective adoptive parents must be certified by the court as "acceptable to adopt children." *Id.* § 8-105(A). The State will

arrange for a visit of the prospective adoptive parents with the child, and will recommend when to file a petition to adopt. DCS Manual, Ch. 5, §§ 11, 13. The State generally must consent to adoption, *id.*, Ch. 5, § 13, and the court must find that the adoption is in the best interests of the child. A.R.S. § 8-116. If the court approves the adoption, the jurisdiction of the juvenile court ends.

At any appropriate time in a child-welfare proceeding, the case may be transferred from Arizona juvenile court to another court of competent jurisdiction. *Id.* § 8-548. This includes a tribal court with concurrent jurisdiction. *See Gila River Indian Community v. Department of Child Safety*, 395 P.3d 286, 291 (Ariz. 2017) ("[T]ribes have inherent authority to hear child custody proceedings involving their own children.").

B. Indian Child Welfare Act

Congress passed ICWA in 1978 after finding "that an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. § 1901(4). Congress found that the "wholesale separation of Indian children from their families"—by state child welfare practices, private adoptions, and the federal boarding school program—was "perhaps the most tragic and destructive aspect of American Indian life today." H.R. REP. NO. 95-1386, at 9 (1978) (House Report); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 82 (Newton ed. 2005). The House Report on ICWA noted that state social workers often removed children

from parents regarded by their tribal communities as "excellent caregivers" based on vague allegations of "social deprivation," and that social workers "frequently discover neglect or abandonment where none exists." House Report at 10. As a result, nearly one-third of all Indian children had been separated from their families. *Id.* at 9; *see also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). The Report also observed that "non-Indian parents continue[d] to furnish almost all the foster and adoptive care for Indian children." House Report at 11. ICWA was enacted to address "the consequences to Indian children, Indian families, and Indian tribes of [these] abusive child welfare practices." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013).

The animating principle of ICWA is "the best interests of Indian children." 25 U.S.C. § 1902. To further this goal, ICWA "establish[es] . . . minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." *Id.* An "Indian child" is "an unmarried person who is under age 18 and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).[2] ICWA's substantive and procedural standards

[2] Tribal membership per se is a political classification, not a racial one. *See Morton v. Mancari*, 417 U.S. 535, 554 n.24 (1974) (concluding that a preference granted to "members of 'federally recognized' tribes" is "political rather than racial in nature").

apply only in "four discrete legal proceedings," House Report at 19, which the statute terms "child-custody proceedings." 25 U.S.C. § 1903(1).[3] These are (1) proceedings for the termination of parental rights, and proceedings for the Indian child's (2) foster-care, (3) pre-adoptive, or (4) adoptive placement. *Ibid.* Once an Indian child has been adopted there is no "child-custody proceeding," and ICWA's standards have no further application.

ICWA recognizes, but does not create, tribal jurisdiction over child-welfare proceedings involving tribal children. *See Holyfield*, 490 U.S. at 42 ("Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA."). It provides Indian tribes the right to intervene in child-custody proceedings at any point prior to termination of parental rights. 25 U.S.C. § 1911(c).

Plaintiffs challenge five of ICWA's protections:

Transfer provision (25 U.S.C. § 1911(b)). Irrespective of ICWA, Arizona courts may transfer custody proceedings involving Indian children to a tribal court. *Gila River*, 395 P.3d at 291. ICWA, however, establishes a presumption in favor of transfer upon timely petition from the tribe or the parents. This "transfer provision" applies only if (1) the tribe or a parent petition the court for transfer; (2) the petition is filed prior to the termination of parental rights; (3) neither parent objects to transfer;

[3] This brief uses the more common term, "child-welfare proceeding," except when referring to the statute-specific definition.

(4) the state court does not find "good cause" to deny the petition; and (5) the tribal court does not decline jurisdiction.

Active-efforts provision (25 U.S.C. § 1912(d)). Under Arizona law, juvenile courts must find that "reasonable efforts" to reunify the family were made before a child's removal and before terminating parental rights. A.R.S. §§ 8-843(E), 8-862(B)(2). Under ICWA, the court must be satisfied that "active efforts" have been made. 25 U.S.C. § 1912(d); *see also* 25 C.F.R. § 23.2 (defining "active efforts"); *Adoptive Couple*, 133 S. Ct. at 2563 ("Section 1912(d) is a sensible requirement when applied to state social workers who might otherwise be too quick to remove Indian children from their Indian families."). Arizona courts have yet to conclusively resolve whether "active efforts" means something more than "reasonable efforts," but at least one Arizona court has found that the two standards are "indistinguishable." *Pascua Yacqui Tribe v. Arizona Department of Economic Security*, No. 1 CA-JV 2007-0079, 2007 WL 5515315 at *7 (Ariz. Ct. App. Nov. 27, 2007) (citing *In re S.B.*, 130 Cal. App. 4th 1148, 1165 (2005)).

Foster-care preferences (25 U.S.C. § 1915(b)). Arizona courts may award a dependent child to the "least restrictive" placement available, preferring parents, grandparents, and extended-family members or persons with a significant relationship to the child, over other foster-care families, homes, or facilities. A.R.S. §§ 8-514(B), 8-845(A). ICWA requires placement in the "least restrictive setting which most approximates a family and in which [the Indian child's] special needs . . . may be met,"

including placing the child in reasonable proximity to his or her home, 25 U.S.C. § 1915(b), and accommodating sibling attachments, 25 C.F.R. § 23.131(a)(1).[4] Within these parameters, ICWA prefers placements with an Indian child's extended family, followed by a foster home licensed or specified by the child's tribe, an Indian foster home licensed by non-Indian licensing authority, or a suitable institution approved by an Indian tribe or operated by an Indian organization, in declining order of preference. 25 U.S.C. § 1915(b)(i)-(iv).[5]

The state court may deviate from these preferences for "good cause," *id.* § 1915(b), including the request of the parents or the child (if of sufficient age), or the child's extraordinary physical, mental, or emotional needs, 25 C.F.R. § 23.132(c); *see also* 80 Fed. Reg. 10,146, 10,158 at F.4 (Feb. 25, 2015); 44 Fed. Reg. 67,584, 67,594 at F.3 (Nov. 26, 1979). Thus, State and ICWA foster-care preferences align unless (1) placement with extended family is not available; (2) two or more foster-care placements exist that are "least restrictive" and are otherwise suitable and willing to serve as foster parents, and one is preferred under ICWA but not under state law; and (3) the state court does not find good cause to deviate from ICWA's preferences.

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[4] The Interior guidelines in place for much of the children's child-welfare proceedings also accounted for sibling attachment. *See* 80 Fed. Reg. 10,146, 10,158 at F.3 (Feb. 25, 2015) (recommending placement in reasonable proximity to siblings).

[5] "Indian" as used in the foster-care and adoptive preferences refers to persons who are members of federally recognized Indian tribes. 25 U.S.C. §§ 1901(3), (8).

Burden of Proof for Termination (25 U.S.C. § 1912(f)). The State must prove statutory grounds to terminate parental rights by "clear and convincing evidence," A.R.S. § 8-537(B), and that termination is in the child's best interests by preponderance of the evidence, *id.* § 8-533(B); *see also Kent K.*, 110 P.3d at 1013. ICWA additionally requires "evidence beyond a reasonable doubt, including testimony of a qualified expert witness, that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f).

Adoptive preferences (25 U.S.C. § 1915(a)). The State prioritizes adoptive placement with a "married man or woman," so long as it meets the "safety, social, emotional, physical, and mental health needs of the child." A.R.S. § 8-103(C), (D). Moreover, the court must find that the adoption is in the best interests of the child. *Id.* § 8-116. ICWA prioritizes, in the absence of good cause to the contrary, adoptive placements with an Indian child's extended family, a member of the same tribe, or a member of another tribe, in declining order of preference. 25 U.S.C. § 1915(a). Thus, ICWA's adoptive preferences depart from state priorities only where (1) two or more adoptive placements exist that are fit and willing to serve as adoptive parents, and one is preferred under ICWA but not under state law; (2) both placements indicate formally their intent to adopt the child; and (3) the state court does not find good cause to deviate from ICWA's preferences.

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The five provisions of ICWA described above are directed at state courts. *See* 25 U.S.C. § 1911(b) (requiring the state court to transfer absent good cause); *id.* § 1912(d) (requiring the state court to be satisfied before removal and termination that active efforts were made to prevent both); *id.* § 1912(f) (requiring the state court to determine that the burden of proof has been met before terminating parental rights); *id.* § 1915(a), (b) (requiring that the court prefer certain placements absent good cause). Implementation varies from state to state, and ICWA provides that state law should take precedence when it is more protective of parental rights. 25 U.S.C. § 1921. In Arizona, ICWA's provisions act as a backstop should comparably protective state law be absent. *See, e.g.*, A.R.S. § 8-815(B) (the court and parties shall meet all the requirements of ICWA that are not otherwise prescribed by state law). Whether those provisions actually affect a particular child-custody proceeding depends on a myriad of factors, including the actions of the parties (including the tribe), the decisions of the state courts, and the particular facts of each child's case.

C. Interior's ICWA Guidelines

Interior's Bureau of Indian Affairs employs expert social workers and child-welfare experts across the country to provide services to Indian tribes. Interior also has promulgated guidelines and regulations to aid States in interpreting ICWA. *See* 25 C.F.R. pt. 23 (June 14, 2016); 81 Fed. Reg. 96,476 (Dec. 30, 2016) (announcing new guidelines). Plaintiffs initially challenged an earlier version of Interior's guidelines, ER 57-58, but they do not press that claim on appeal, *see* Plaintiffs' Brief ("Br.") at 3 n.7.

II. FACTUAL & PROCEDURAL BACKGROUND

A. Descriptions of Plaintiffs

1. *Minor children*

The operative complaint ("Complaint") presented claims by and on behalf of four minor children ("Children," or individually, "Child") who had ongoing or concluded child-welfare cases before the Arizona state courts. One of the Children already had been adopted at the time the Complaint was filed. Br. 3 n.2. The others were adopted during the pendency of this litigation. Br. 3 nn.1 & 3.

A.D. is an Indian child as defined by 25 U.S.C. § 1903(4)(a) because she is an enrolled member of the Gila River Indian Community ("Community"). The Complaint alleges that the Community had petitioned to transfer her child-welfare case to tribal court. ER 32. A.D. asserted that she was injured by the mere possibility of being subject to tribal jurisdiction, *id.*, which never came to pass because the juvenile court denied the transfer petition, *see Gila River*, 395 P.3d at 289. After Plaintiffs filed this appeal, the Arizona Supreme Court affirmed the decision of the juvenile court and held that ICWA's transfer provision "did not govern the Community's motion to transfer" A.D.'s case because the motion postdated termination of parental rights. *Id.* at 290. The Complaint also alleges that, but for ICWA, A.D. likely would have been available to be adopted. ER 32. A.D. was adopted by her foster parents in August 2017.

C.R. is another Indian child and enrolled member of the Community. The Complaint generally alleges that the Community "has and will continue to propose alternative . . . [placements] for C.R." ER 35. It further alleges that C.R. was harmed by the length of time he spent in foster care (1.5 years) with the family that ultimately adopted him in November 2016. ER 36; *see* Br. 3 n.3. C.R. and his half-sister, **L.G.**, were fostered and adopted by the same family. L.G. is not an Indian child, but the Complaint alleges that she suffered injuries identical to those alleged by C.R. ER 35-36. The Complaint also alleges that, but for ICWA, C.R. and L.G. likely would have been available to be adopted at an earlier date.

C.C. is an Indian child and an enrolled citizen of the Navajo Nation ("Nation") who had been adopted by his foster parents at the time of the Complaint. ER 33. The Complaint alleges that C.C. had been harmed by the duration of his time he spent in their care (four years) prior to his adoption. *Id.* The Complaint further alleges that the Nation proposed alternative placements for C.C., none of which was willing or had appropriate homes for him, and that the state court found good cause to deviate from ICWA's adoptive preferences. ER 32-33. It also states that C.C. suffered harm from being forced to visit other prospective placements, some of whom reminded him that his foster parents were not "mommy" and "daddy." ER 33. Once again, the Complaint alleges that, but for ICWA, C.C. likely would have been available to be adopted at an earlier date. *Id.*

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Except as noted above, none of the Children alleged that the challenged provisions of ICWA had been or would be applied to their cases, beyond a blanket statement that "[a]ll named children and parent plaintiffs . . . have in the past been, are currently, or . . . will surely be, subject to the . . . provisions of ICWA and [Interior's] Guidelines challenged here." ER 37. The chart below summarizes the Complaint's allegations with respect to the Children.

Table 1: *Allegations in Complaint Related to Children*

Challenged Provisions	A.D.	C.C.	C.R.	L.G.
Did the Complaint specifically allege that the **transfer provision** in § 1911(b) impacted the Child's proceedings?	Yes. State court had denied petition to transfer prior to Complaint. ER 32.	No.	No.	N/A (Not an Indian child.)
Did the Complaint specifically allege that the **active-efforts provision** in § 1912(d) impacted the Child's foster-care placement or the termination of their parents' rights?	No.	No.	No.	N/A
Did the Complaint specifically allege that the **burden of proof for termination** in § 1912(f) impacted termination of parental rights?	No.	No.	No.	N/A
Did the Complaint specifically allege that the **adoptive preferences** in § 1915(a) impacted the Child's adoptive placement?	No.	Yes. State court found good cause to deviate from adoptive preferences. ER 33.	No.	N/A
Did the Complaint specifically allege that the **foster-care preferences** in § 1915(b) impacted the Child's foster-care placement?	No.	No.	No.	N/A

2. "Next Friends" to Children

Because Children are minors, they do not speak for themselves in federal litigation. A minor may not appear without a duly appointed representative, a next friend, or a GAL. Fed. R. Civ. P. 17(c). Carol Coghlan Carter and Dr. Ronald Federici (collectively, "Carter"), neither of whom alleges any contact or familiarity with Children, purport to give A.D., C.C., and C.R. voice by acting as "next friends." ER 29-30. A "next friend" is "one who appears on behalf of a party unable, usually because of mental incompetence or inaccessibility, to seek relief himself." *Comer v. Schriro*, 480 F.3d 960, 978 (9th Cir. 2007) (internal formatting, quotation marks, and citation omitted).

3. Foster parents

The remaining named Plaintiffs are the former foster parents and current adoptive parents of the Children ("Foster Parents"). Foster Parents do not claim membership in an Indian tribe. Although the Foster Parents' alleged injuries appear to be derivative of those of the Children, they do not (and could not) purport to have third-party standing or act as next friends to Children.

S.H. and J.H. were foster parents to A.D. at the time the Complaint was filed. They alleged that they would be injured if A.D.'s case had been transferred to tribal court because they would be "force[d]" to submit to the jurisdiction of the tribal court. ER 32. As noted earlier, the tribal court never took jurisdiction over A.D.'s case. **P.R. and K.R.** were foster parents to C.R. and L.G. at the time the Complaint

was filed. P.R. and K.R. do not describe any injury apart from their alleged inability to adopt C.R. and L.G., both of whom they have since adopted. **M.C. and K.C.** were the adoptive parents of C.C. at the time the Complaint was filed. They alleged that they had to drive C.C. long distances to meet with unspecified and unsuccessful placements proposed by the Nation.

4. *Putative class*

Although ICWA does not apply to children who claim no more than "Indian ancestry," Plaintiffs sought to represent a class of such children who are in child-custody proceedings and their non-Indian foster parents. The district court denied Plaintiffs' motion for class certification as premature, ER 86 (ECF No. 39), and Plaintiffs did not appeal that decision.

B. Claims

Plaintiffs allege that the five provisions of ICWA highlighted earlier violate the Equal Protection Clause, the Due Process Clause, the First Amendment, the Indian Commerce Clause, and the Tenth Amendment. ER 51-57. Plaintiffs request declaratory relief and nominal damages against the State under Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000d *et seq*. ER 58. They no longer contend that any named Plaintiffs have standing to seek injunctive relief. Br. 44-46. They expressly disavow claims for injunctive relief from the burden of proof for termination, 25 U.S.C. § 1912(f). Br. 21-22.

Plaintiffs narrow their challenge on appeal in three other ways as well. First, they limit their equal protection challenge to ICWA as it pertains to Indian children who are *not* enrolled members of a tribe. *See id.* at 7 n.10 (distinguishing between "membership" and federal "Indian child" status, and explaining that "[t]his case involves the latter"). Second, they concede dismissal of their challenge to ICWA's burden of proof for removal, 25 U.S.C. § 1912(e). Br. 4 n.7. Third, by failing to raise them in their opening brief, Plaintiffs abandon any arguments to support their standing to pursue claims under the Due Process Clause, the First Amendment, the Indian Commerce Clause, and the Tenth Amendment. *See Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1046 n.7 (9th Cir. 1999).

C. Dismissal Order

The district court granted the joint motion of Interior and the State to dismiss the Complaint for want of subject-matter jurisdiction.[6] ER 5. The court reasoned that Plaintiffs lacked Article III standing because they had not alleged "particularized injury" stemming from the specific provisions of ICWA they claimed were unconstitutional. ER 14.

The district court first considered ICWA's transfer provision, Section 1911(b). The court observed that only A.D. had alleged that transfer of jurisdiction to tribal court had been sought, and that petition for transfer had been properly denied.

[6] Interior also argued that the district court should abstain from review, and that Plaintiffs failed to state claims under the constitutional provisions.

ER 14-16. Because the petition was "not authorize[d]" by ICWA, any injury that the petition visited upon A.D. or his foster parents was not "fairly traceable to § 1911(b)" and thus not a cognizable Article III injury. ER 16.

The court then turned to ICWA's active-efforts provision, Section 1912(d). The court explained that this provision "requires reunification attempts only before foster care placement and termination of parental rights." ER 17. Plaintiffs had not alleged that any reunification attempts had been made before any of the Children were placed in foster care. *Id.* The Complaint did allege that reunification attempts were made for Plaintiffs C.R. and L.G. before termination of parental rights, but the Complaint did not allege that the "active efforts" required by ICWA affected the number of reunification attempts or delayed termination of parental rights for those Children as compared to the "reasonable efforts" that Arizona law already required. ER 18. The Complaint did not mention any reunification attempts for the other Children. *Id.*

With respect to ICWA's burden of proof for termination, Section 1912(f), the court likewise found that no child had alleged that their termination proceedings were affected by the higher evidentiary standard. ER 19.

The district court similarly found the allegations in the Complaint lacking with regard to the placement preferences listed in Section 1915(a) and (b). The Complaint did not "allege any delay in, or effect on, the foster care placements of the child Plaintiffs caused by § 1915(b)." ER 22. As for adoptive placements, the court acknowledged allegations that three Children's adoptions had been delayed by tribes'

efforts to find preferred placements. ER 21. However, the court determined that the Complaint "does not allege facts, rather than mere conclusions, showing that [these] adoption[s] would have been completed more quickly" absent Section 1915(a), or that any of the Children suffered cognizable harm from this provision of ICWA. *Id.*

As regarded the putative class, the district court stated that "despite being granted leave to amend, [Plaintiffs] have not named [anyone] with standing to challenge any provisions of ICWA." ER 19. Further opportunity to amend, the district court concluded, "likely would be futile." *Id.* Ultimately, the district court ruled that the "legal questions Plaintiffs wish to adjudicate here in advance of injury to themselves will be automatically remediable for anyone actually injured" because "[a]ny true injury to any child or interested adult can be addressed in the state court proceeding itself, based on actual facts . . . , not on hypothetical concerns." *Id.*

SUMMARY OF ARGUMENT

This action is moot and should be dismissed because Plaintiff Children now have been adopted by Plaintiff Foster Parents. There is no longer any "child custody proceeding" through which ICWA might apply to these Plaintiffs, nor is there likely to be such a proceeding in the future. Plaintiffs cannot receive effective relief in the form of an injunction, a declaration, or nominal damages against the State. This Court therefore lacks jurisdiction to entertain Plaintiffs' challenges to ICWA's constitutionality.

In any event, the district court properly dismissed Plaintiffs' claims for lack of Article III standing. The basic flaw in Plaintiffs' standing allegations—even with respect to their equal protection claim—is a failure to show injury from the challenged ICWA provisions that is *particularized* to them. As the district court explained, the only references in the Complaint to Plaintiffs' own experience with ICWA are vague, narrow, or incorrect as a matter of law. ER 8, 16. Moreover, neither Carter (who does not know Children), nor Foster Parents (whose own interests conflict with Children's) can adequately represent Children. Lastly, a proposed (and rejected) class cannot supply jurisdiction where no named Plaintiffs have standing.

STANDARD OF REVIEW

This Court reviews a district court's dismissal for lack of standing de novo. *Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011). A "plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (internal quotation marks omitted). "[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (*Lujan*). Jurisdiction "depends on the facts as they exist when the complaint is filed." *Id.* at 569 n.4. Thus, to survive a motion to dismiss for lack of standing, Plaintiffs must "plead[] factual content that allows the court to draw the reasonable inference" that they have standing to press their claims. *Ashcroft v. Iqbal*,

556 U.S. 662, 678 (2009). A Court need not accept as true conclusory factual allegations or legal conclusions. *Id.*

ARGUMENT

Article III limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. The doctrines of mootness and standing "originate" from that limitation and help to ensure that federal litigation remains within its constitutionally prescribed boundaries. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). "No matter how vehemently the parties continue to dispute the lawfulness of [the defendants'] conduct," their case must be dismissed as moot if, at any point, "the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quotation marks and citation omitted). Here, Plaintiffs challenge ICWA, a statute that applies to children in child-custody proceedings. But Plaintiffs' claims are moot, because all of the relevant child-custody proceedings have ended. And even if their claims are not moot, Plaintiffs lack Article III standing because they failed to plead a particularized injury-in-fact.

I. PLAINTIFFS' CLAIMS FOR RELIEF ARE MOOT BECAUSE EACH OF THE CHILDREN HAS BEEN ADOPTED BY HIS OR HER FOSTER PARENTS.

This case is moot. The challenged provisions of ICWA apply only in child-custody proceedings, and none of the Plaintiffs is a party to any such proceeding because Children have been adopted by their Foster Parents. Plaintiffs do not allege

that they will be subject to similar proceedings again. Nor could they, because ICWA will not apply to future efforts by the State to remove Children or to terminate Foster Parents' rights. Foster Parents are not "parents" under ICWA, so the statute does not apply to child-custody proceedings affecting *their* parental rights. *See* 25 U.S.C. §§ 1903(1), (9). Plaintiffs thus cannot be awarded any effective relief.

A. Injunctive Relief

Plaintiffs sought an injunction to prevent enforcement of the challenged provisions of ICWA, a declaration that the challenged provisions are unconstitutional both facially and as applied to Children, and nominal damages from the State. ER 58-59. In order for federal courts to retain jurisdiction, a "personal injury," *Allen v. Wright*, 468 U.S. 737, 751 (1984), "must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation." *Already, LLC*, 568 U.S. at 90-91 (quoting *Alvarez v. Smith*, 558 U.S. 87, 92 (2009)). But "[w]here the activities sought to be enjoined have already occurred, and the appellate courts cannot undo what has already been done, the action is moot." *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1379 (9th Cir. 1999).

No injunction regarding the active-efforts or transfer provisions, the burden of proof for termination, or the foster-care or adoptive preferences will affect Plaintiffs. Plaintiffs have dropped their claim for injunctive relief as to the burden of proof for termination, Br. 4 n.7, and they tacitly abandon any claim to injunctive relief under other ICWA provisions. *See id.* at 40 ("Plaintiffs thus have standing to seek Title VI

damages and declaratory relief."). Plaintiffs argue that injunctive relief may yet redress unspecified injuries of unnamed members of their putative class, Br. 44-45, but those members could only obtain such relief "once a class action has been certified." *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 987 (9th Cir. 2007). Plaintiffs' motion for class certification was denied, and they did not file an appeal from that denial. *See* Fed. R. Civ. P. 23(f) (authorizing permissive interlocutory appeal). Thus, "the only disputes relevant here" are those that involved the named Plaintiffs, "and those disputes are now over." *Alvarez*, 558 U.S. at 93.[7]

B. Declaratory relief

Plaintiffs also can receive no meaningful relief through a declaration that the challenged provisions of ICWA are unconstitutional. In testing for mootness as applied to a claim for declaratory relief, "the central question . . . is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129

[7] Plaintiffs miss the mark by invoking (Br. 41-44) the "inherently transitory" exception to mootness, which is just an application of the "capable of repetition, yet evading review" exception in the class-action context. "An inherently transitory claim is one . . . where the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Sze v. INS*, 153 F.3d 1005, 1010 (9th Cir. 1998) (internal quotation marks omitted). Here, the district court *did* rule on Plaintiffs' motion for class certification before all the Children were adopted, and it had ample time to do so. *See* Br. 3 n.1 (stating that A.D. was adopted "in August 2017," 17 months after the Complaint was filed). In any event, there is no danger that the claims at issue on appeal will evade review because they may be raised directly in any state child-welfare proceeding concerning an Indian child.

(9th Cir. 2005) (en banc) (quotation marks and citation omitted). Plaintiffs must demonstrate that the declaratory action would settle "some dispute which affects the behavior of the defendant towards the plaintiff." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (emphasis deleted). But Plaintiffs provide no basis upon which to conclude that declaratory relief might affect the behavior of Interior or the State toward Plaintiffs. Even where proposed declaratory relief addresses an ongoing policy like the implementation of ICWA, that policy must "continue to affect a present interest" in order to avoid mootness. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125-26 (1974). Plaintiffs do not proffer any legally cognizable interest in Interior's or the State's implementation of ICWA, making their claim for declaratory relief moot.[8]

C. Nominal damages

Finally, although the thrust of Plaintiffs' claims for relief is forward-looking, they also pray for nominal damages of $1 each against the State under Title VI of the Civil Rights Act, 42 U.S.C. § 2000d. That prayer obviously cannot save Plaintiffs' other claims against the State, or any of their claims against Interior, from mootness.

[8] Plaintiffs cite several cases for the principle that declaratory relief continues to be viable after the conclusion of the underlying child-welfare proceedings (Br. 40), but all involved live controversies and are inapposite here. *See Center for Biological Diversity v. Mattis*, 868 F.3d 803, 820 (9th Cir. 2017) (holding that declaratory relief could still provide redress because the construction project was not complete); *Roe v. Wade*, 410 U.S. 113 (1973) (declaring unconstitutional statutes criminalizing abortion pursuant to which plaintiff risked being prosecuted); *Doe v. Bolton*, 410 U.S. 179 (1973) (same); *Steffel v. Thompson*, 415 U.S. 452 (1974) (allowing declaratory action because plaintiff, who had been dissuaded from protesting by threats of arrest and the arrest of his companion, amply demonstrated a threat of prosecution under state trespass law).

Even with respect to the Title VI claim against the State, Plaintiffs' "late in the day" request for nominal damages bears "close inspection." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997). Plaintiffs added their nominal-damages claim only after C.C.'s child-welfare proceeding concluded, presumably "to avoid otherwise certain mootness." *Id.* And Plaintiffs' demand for only exemplary damages underscores that no one suffered any actual harm. Indeed, as discussed below, Plaintiffs also did not adequately plead the elements of standing required to seek damages. That claim for relief must be dismissed as well.

For these reasons, Plaintiffs' action should be dismissed as moot.

II. PLAINTIFFS FAILED TO ESTABLISH STANDING TO PURSUE THEIR SPECIFIC ICWA CLAIMS.

A. Standing Requires Particularized Injury, Even When the Injury Asserted Is An Alleged Denial of Equal Treatment.

To establish Article III standing at the time of filing, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). These requirements are "especially rigorous when reaching the merits of a dispute would force [a court] to decide whether an action taken by one or the other two branches of Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).

The "[f]irst and foremost" requirement of standing, injury-in-fact, *Spokeo*, 136 S. Ct. at 1548, is "a hard floor of Article III jurisdiction" that applies to any claim

pleaded in federal court, *Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009). "Injury-in-fact must be both concrete *and* particularized." *Spokeo*, 136 S. Ct. at 1548. A "concrete" injury need not be "tangible," but it must be "'real,' and not 'abstract.'" *Id.* at 1548-49 (internal quotation marks omitted). To be "particularized," an injury "must affect the plaintiff in a personal and individual way." *Id.* at 1548 (same). Lastly, to give rise to a case or controversy, this concrete and particularized injury must be "actual or imminent, not conjectural or hypothetical." *Id.* (same).

These requirements apply equally to a claim under the Equal Protection Clause. In that context, we agree with Plaintiffs that the "'critical injury for standing purposes' is 'whether the plaintiff[] . . . has actually been treated differently at some stage . . . on the basis of race.'" Br. 35 (quoting *Wooden v. Board of Regents*, 247 F.3d 1262, 1278 (11th Cir. 2001)). Unequal treatment, by itself, may be considered a *concrete* injury, but, to support standing, it must be *particularized* to the party invoking federal jurisdiction. *See 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."). Race-based discrimination "accords a basis for standing only to 'those persons who are personally denied equal treatment by the challenged discriminatory conduct.'" *Id.* at 743-44 (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)); *accord Braunstein v. Arizona Department of Transportation*, 683 F.3d 1177, 1185 (9th Cir. 2012).

Plaintiffs contend (Br. 33-40) that an Indian child and his or her representative can establish injury-in-fact from the mere existence of a "system of laws" (i.e.,

ICWA), that might apply at various stages of a child-custody proceeding, even if the laws were never triggered in the proceeding of the particular child. The logical implication of that view is that any person who identifies as a certain race (or sex, nationality, etc.) has standing to contest a discriminatory law that applies to any other person of the same race. Shared racial identity, however, is not the sort of "close relationship" needed to sustain third-party standing, nor is there any "hindrance" to a claim brought by the person who allegedly suffered the discriminatory treatment. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (citation omitted). Despite being granted leave to amend their Complaint, Plaintiffs were unable to identify any such persons.[9]

Plaintiffs cite no authority recognizing standing of uninjured members of a protected class to represent the interests of injured members. Claimants in the cases relied on by Plaintiffs actually were denied the benefits they sought. *See Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S.

[9] Because Plaintiffs did not specifically allege that the provisions they challenged applied to their cases, the district court looked for any indication in the Complaint that the provisions had, in fact, applied. What Plaintiffs now characterize as an improper reliance on outcome, *see*, *e.g.*, Br. 1-2, was the district court's attempt to give meaning to their other allegations of injury. *See* ER 15 (transfer not alleged to have applied to anyone but A.D.), 17-18 (active efforts not alleged to have applied to anyone; C.R. visits not alleged to have had any impact), 19 (same for burden of proof for termination; no other injury alleged from that provision), 21 (no other adoptive placement proposed for A.D.; visits by C.C. were not caused by adoptive preferences, and no allegation that any delay for C.C. or C.R. was either), 22 (Complaint alleged neither the application of the foster-care preferences nor any effect from it).

656, 666 (1993) (plaintiff's members could not have won public contracts set aside for minority-owned businesses because, as non-minority owned businesses, they were foreclosed from even competing); *Bras v. California Public Utilities Commission*, 59 F.3d 869, 873 (9th Cir. 1995) (plaintiff's firm would have been one of the three considered for work except for affirmative-action program); *Heckler v. Mathews*, 465 U.S. 728, 738 (1984) (plaintiff received less in Social Security benefits than he would have received if he were a woman); *Turner v. Fouche*, 396 U.S. 346, 361 n.23 (1970) (plaintiff was not eligible to serve on school board because he did not own property). In contrast, this Court has been skeptical of constitutional claims filed by plaintiffs who could not have directly suffered injury by virtue of their individual circumstances. *See Lipscomb ex rel. DeFehr v. Simmons*, 962 F.2d 1374, 1376-77 (9th Cir. 1992) (finding it "difficult to comprehend" a "claim of constitutional injury" suffered by children whose custody proceedings were unaffected by a challenged policy).

B. Indian Children Have Not Alleged With Particularity Any Denial of Equal Treatment and Do Not Otherwise Have Standing.

Plaintiffs do not allege that they have been injured by *any* particular provision of ICWA that they challenge. Below we discuss why each Child lacks standing to seek relief from ICWA's transfer provision, adoptive preferences, active-efforts provision, burden of proof for termination, or foster-care preferences.[10]

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[10] All Children are members of their respective tribes, so none are "Indian children" by operation of the provision (Section 1903(4)(b)) that Plaintiffs allege violates the

1. *A.D. Has Not Plausibly Alleged That Any Provision of ICWA That She Challenges Will Cause Her Concrete and Particularized Injury.*

a. The Alleged Risk of Tribal Jurisdiction Was Neither Injurious to A.D. Nor Fairly Traceable to § 1911(b), the Transfer Provision.

Plaintiffs challenge five provisions of ICWA as violating the Equal Protection Clause, the Due Process Clause, the First and Tenth Amendments, and Title VI. A.D. specifically alleges injury only from the transfer provision. First, in support of her equal protection claim, A.D. has alleged that she was injured from a purported denial of equal treatment when the Community petitioned to transfer her case after the termination of parental rights, even though the state court ultimately denied that petition. ER 32.[11] Second, to support standing to bring her other claims against the transfer provision, A.D. alleged that, were the state appellate court to reverse and transfer to tribal court, it would force A.D., S.H., and J.H. "to submit to that forum's jurisdiction over them." *Id.*

Equal Protection Clause. *See* Br. 7 n.10. Given that no Children are subject to this allegedly racial classification, Plaintiffs do not have standing to challenge its effect, and their equal protection claim must be dismissed for this reason alone.

[11] Contrary to Plaintiffs' argument that the final outcome is irrelevant to standing because "the injury they complain of is that they were forced . . . to go through . . . lengthy and expensive proceedings," Br. 16, S.H., J.H., and A.D. did not allege the cost or difficulty of opposing the Community's petition to transfer as injuries in their Complaint. *See* ER 32.

To articulate grounds for Article III standing based on these injuries, A.D. must allege that the alleged injuries are not only concrete, particularized, and actual or imminent, but also "fairly traceable to the challenged action[] and redressable by a favorable ruling." *Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013). Although the Community invoked the transfer provision in 25 U.S.C. § 1911(b), it did so outside the bounds of statutory authority and outside the bounds of how Interior interprets that provision. Section 1911(b) authorizes the parties to petition for transfer in any "proceeding for the foster care placement of, or termination of parental rights to, an Indian child." *See also* 25 C.F.R. § 25.115(b).[12] As multiple state courts have held, now joined by the Arizona courts, "ICWA provides only for transfer of state juvenile court proceedings *before* termination of parental rights." *Gila River Indian Community. v. Department of Child Safety*, 379 P.3d 1016, 1021 (Ariz. Ct. App. 2016) (emphasis added), *aff'd on this point*, 395 P.3d 286, 290 (Ariz. 2017).[13] Because the rights of A.D.'s parents had already been terminated, Section 1911(b) did not authorize the Community's petition. Thus A.D. never was subject to unequal

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[12] The Interior guidelines in place for much of A.D.'s child-welfare proceeding did not address statutory language restricting transfer under § 1911(b) to proceedings for foster-care placement or termination of parental rights. *See* 80 Fed. Reg. at 10,156.

[13] *Accord* U.S. Department of the Interior, *Guidelines for Implementing the Indian Child Welfare Act* F.2 at 47 (Dec. 2016) (2016 Guidelines) ("Parties may request transfer of preadoptive and adoptive placement proceedings but the standards for addressing such motions are not dictated by ICWA or the regulations.") *available at* https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf.

treatment by the *statute*, and such injury never was imminent. As the district court held, any injury "is fairly traceable to the [Community's] groundless intrusion into their pre-adoptive and adoptive proceeding beyond the scope of § 1911(b), but not to § 1911(b) itself." ER 16. Plaintiffs cannot premise their standing to challenge the constitutionality of a federal statute on the mere fact that another litigant misunderstood that statute.

Nor can the alleged risk of having A.D.'s case decided in tribal court supply standing to challenge the transfer provision. A.D. is a member of the Community and, contrary to the allegations in the Complaint, by definition has "contact with the tribal forum." *See* ER 32. Membership in an Indian tribe is voluntary and may be relinquished. *See Thompson v. County of Franklin*, 180 F.R.D. 216, 225 (N.D.N.Y. 1998). Tribal members are subject to the inherent jurisdiction of their Tribe over child custody proceedings of their own children. *See Holyfield*, 490 U.S. at 42 ("Tribal jurisdiction over Indian child custody proceedings is not a novelty of ICWA."). A.D.'s membership represents a voluntary decision by her biological parents to consent to tribal jurisdiction in child-custody proceedings, and she has alleged no reason to think such jurisdiction would be injurious.

Finally, enjoining the application of the transfer provision in A.D.'s case would not prevent the Community from making the same request in the future, and thus A.D.'s alleged injury is not redressable. As the Arizona Supreme Court recently held, although ICWA does not govern the transfer of child-welfare proceedings after

parental rights have been terminated, "state courts may nonetheless transfer such cases involving Indian children to tribal courts" based on their inherent authority over child-custody proceedings. *Gila River*, 395 P.3d at 291.

b. A.D. Has Not Plausibly Alleged that § 1915(a), the Adoptive Preferences, Will Cause Her Concrete and Particularized Injury, or that Any Injury Would Be Imminent.

A.D. seeks relief from ICWA's adoptive preferences, but—as is true for Plaintiffs with respect to nearly all of the challenged provisions—she does not allege that the adoptive preferences have been or will be applied to her case, or assert any personal experience of unequal treatment from their application to support her equal protection claim. Even if A.D. had pled that she would be affected personally by unequal treatment through the future application of the adoptive preferences to her child-welfare case, she would not have standing to bring her equal protection claim because she failed to demonstrate that the application of the adoptive preferences was imminent. A.D. thus does not allege any injury from the adoptive preferences that might support her other constitutional claims.[14]

"Even if the government has discriminated on the basis of race, only those who are 'personally denied' equal treatment have a cognizable injury under Article III." *Braunstein*, 683 F.3d at 1185. A party wishing to challenge a racial classification

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[14] Though they do so now in their brief (Br. 25), Plaintiffs made no allegation in the Complaint that alternative placements were proposed for A.D. Regardless, there is no injury from a proposed placement that "fell through." *See infra* p. 41.

must "establish standing through showing a particularized denial of equal treatment." *Carroll v. Nakatani*, 342 F.3d 934, 946 (9th Cir. 2003). Despite having alleged a particular application of the transfer provision, A.D. did not similarly allege with particularity that the adoptive preferences have been or will be applied in her child-welfare case. *See* ER 28, 31-32; *supra* p.15 (Table 1). Although well-pled jurisdictional allegations in the Complaint are accepted as true, Plaintiffs may not leave the Court to "guess which, if any, of the alleged violations deprived [them] of the same full and equal access" that a child who is not a member of an Indian tribe would enjoy. *Chapman v. Pier 1 Imports (U.S.), Inc.*, 631 F.3d 939, 955 (9th Cir. 2011) (en banc).

A.D.'s failure to identify the specific application of the adoptive and foster-care preferences, the active-efforts provision, or the burden of proof for termination to her interests is not a mere technicality; it is a failure to allege that *any* of these provisions will cause her specific and concrete injury. *See Summers*, 555 U.S. at 495 (emphasizing that injuries alleged in support of standing must be specifically tied to the application of the challenged law). The requirement for particularity is even more important where, as here, A.D. otherwise wholly relies on the abstract existence of an alleged racial classification to supply injury-in-fact. *See Carroll*, 342 F.3d at 946 ("Being subjected to a racial classification differs materially from having personally been denied equal treatment.").

A.D. and other Plaintiffs may not substitute generalizations for the particularity required in the complaint. Rather than take advantage of the opportunity to amend

by adding to the Complaint specific allegations that the adoptive preferences or other provisions applied or would imminently apply in their respective cases, Plaintiffs inserted a catch-all paragraph of the type that this Court rejected in *Chapman*:

> All named children and parent plaintiffs, and the members of the class they seek to represent, have in the past been, are currently, or in the course of the constantly evolving state court child custody proceedings will surely be, subject to the separate, unequal and substandard treatment under provisions of ICWA . . . challenged here: 25 U.S.C. §§ 1911(b), 1912(d), 1912(e), 1912(f), 1915(b), 1915(a).

ER 37. These allegations are demonstrably false: no Child besides A.D. has alleged any reason to believe that he or she was affected by the transfer provision, for example, and the allegations do nothing to illustrate the personal application of unequal treatment. Like the survey in *Chapman*, the list of barriers to which Plaintiffs are allegedly subject "cannot substitute for the factual allegations required in the complaint to satisfy Article III's requirement of an injury-in-fact." 631 F.3d at 955.

Nor must the Court accept A.D.'s and other Plaintiffs' conclusory reasoning that, once a child is considered an "Indian Child" pursuant to ICWA, "all of the provisions of ICWA . . . challenged here inexorably become applicable to that child's child custody proceeding." ER 37. *See Iqbal*, 556 U.S. at 678. Plaintiffs envision a child-welfare case as an assembly line through which a stream of children with identical legal issues follow the same path without deviation, with the parties providing the same inputs and marching inevitably toward the same outcome. This analogy is false as a matter of law. In fact, child-welfare cases are adjudicated by state-

court judges according to the individual needs of each child, based on input received from multiple parties, with no predetermined objective other than to identify the child's path to "permanency." Even where ICWA may apply, no two cases will chart the same course—ICWA's transfer provision, for example, will apply only if the tribe or the parents petition for transfer and the court does not find good cause to deny the petition—and several outcomes are possible (including the return of the child to his or her parents at any point prior to termination). A.D. cannot substitute conclusory and self-serving generalizations regarding the adoptive preferences for allegations of particularized harm. Because her Complaint makes no allegations of particularized harm, A.D.'s claims with respect to the adoptive preferences must be dismissed.

Significantly, the adoptive preferences that A.D. might plausibly have alleged would have some future application in her case would require the independent action of a third party to trigger their application. Thus, even assuming that adoption was the permanent plan for A.D. (as opposed to guardianship or permanent foster-care), A.D. has not alleged that anyone but Foster Parents sought to adopt her. As the Supreme Court held in *Adoptive Couple*, 133 S. Ct. at 2564, the adoptive preferences "are inapplicable in cases where no alternative party has formally sought to adopt the child . . . because there simply is no 'preference' to apply."

A.D. may not establish standing by relying on speculation about "the unfettered choices made by independent actors not before the court." *Lujan*, 504 U.S. at 562. Because it is highly speculative whether the adoptive preferences ever would

apply in A.D.'s child-welfare case, any potential injury from the future application of those preferences was not "imminent." *Id.* at 564. Having failed to allege facts that would support any inference about the behavior of third parties who might have sought to adopt her, A.D. lacks standing to challenge the adoptive preferences.

c. A.D. Has Not Plausibly Alleged that § 1912(d), the Active-Efforts Provision, § 1915(b), the Foster-Care Preferences, or § 1912(f), the Burden of Proof for Termination Caused Her Concrete and Particularized Injury, or That the Court Could Provide Redress.

A.D. also lacks standing to pursue her claims against the active-efforts provision, the foster-care preferences, or the burden of proof for termination. A.D. makes no allegation of injury from these provisions that might support her constitutional claims generally. Nor has she plausibly alleged a personalized denial of equal treatment to support standing for her equal-protection claim, relying instead on the general and conclusory allegations that all of the challenged provisions applied to all plaintiffs. *See* ER 28, 31-32, 37. *See supra* Table 1 (noting that A.D. only alleged injury from the transfer provision of ICWA).

There is no reason to believe that these provisions would have any adverse effect on her child-welfare proceeding even if they had applied. Arizona courts have not clearly established whether ICWA's requirement for active efforts requires more than the state requirement for reasonable efforts. *See supra* p. 8. Absent any allegation that the State made a greater effort to reunify A.D. with her parents as a result of the active-efforts provision than it otherwise would have, or that the facts did not clearly

support termination under either standard (much less that A.D. was actually injured by efforts to maintain her biological family), there is no reason to think that the active-efforts provision or the burden of proof for termination would have caused A.D. to suffer unequal treatment. The foster-care preferences would come into effect in A.D.'s case only if (1) there was a preferred foster-care placement available that was suitable, willing to serve as a foster parent, and could provide the least-restrictive setting that most approximated a family, considering A.D.'s attachment to her siblings (if any), her special needs, and proximity to her home or family. Even then, the foster-care preferences would depart from state law only to the extent that (2) the alternative placement was with someone other than A.D.'s extended family and (3) the court did not find good cause to deviate from the foster-care preferences. *See supra* pp. 8-9. A.D. provides no reason to believe that any of these conditions were met, and therefore no basis for concluding that the foster-care preferences would have caused her to suffer unequal treatment.

d. A.D. and Other Plaintiffs' Allegations That Children Would Have Been Available for Adoption But For ICWA Are Conclusory and Do Not Describe an Injury.

A.D. and other Plaintiffs claim, without support, that "[b]ut for ICWA, [they] would likely have been cleared for adoption." ER 32 (A.D.), 33 (C.C.), 36 (C.R. and L.G.). That A.D. and other Plaintiffs were not adopted or had not been able to adopt by the time they decided to file suit does not, without more, describe an injury. Indeed, A.D. has made no allegation of harm from the length of time she spent in

foster care, when she was living in the arrangement that she allegedly wanted to make permanent. ER 32. The time A.D. spent with Foster Parents, then, cannot in and of itself have been harmful to her. *See Lipscomb*, 962 F.2d at 1377 (considering only challenges brought by children who had been *denied* the placement they desired as a result of the policy). That Plaintiffs cannot prove actual harm is further borne out by the fact that they seek only nominal damages. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978) (describing nominal damages as an alternative to actual damages).

Nonetheless, the suggestion implicit in Plaintiffs' allegation is that, because of an unspecified provision or provisions of ICWA, they were delayed in converting their foster-care placement to an adoptive placement. Even if a purported delay in being adopted could describe injury despite portending no change in placement, the allegations in the Complaint offer no factual basis for believing that any such delay was caused by ICWA. The Court need not accept as true conclusory factual allegations or legal conclusions. *Iqbal*, 556 U.S. at 678. Because this injury does not distinguish Plaintiffs from any other children in the child-welfare system, it does not create standing to challenge the transfer or the active-efforts provisions, the foster-care or adoptive preferences, or ICWA's burden of proof for termination.

2. C.R. Has Not Plausibly Alleged That Any Provision of ICWA That He Challenges Will Cause Him Particularized Injury.

While A.D. identified at least one provision that applied in her child-welfare case to support her equal protection claim with respect to that provision, C.R. has not

alleged any personal experience with the application of *any* of the challenged provisions of ICWA. *See* ER 29, 34-36. *See supra* p.15 (Table 1). Thus, C.R. has not alleged injury-in-fact from a denial of equal treatment under these provisions. Any injury C.R. might have alleged from the burden of proof for termination, moreover, is not redressable. Finally, the separate harms that C.R. alleges—that the Community might propose alternative placement and that he fears being separated from his sister—do not describe imminent injury and are not fairly traceable to ICWA.

This Court cannot provide C.R. relief from the burden of proof for termination because he has abandoned his claim for injunctive relief from this provision, Br. at 25, and he may not seek nominal damages because the rights of his parents had not been terminated at the time of the Complaint.[15] C.R. also has failed to allege imminent injury fairly traceable to the transfer provision or adoptive preferences to support any of his constitutional claims. Having not alleged that the Community had petitioned to transfer his case to tribal court, or that it was considering such a move, C.R. has failed to describe imminent injury from the transfer provision. *Clapper*, 133 S. Ct. at 1149-50 (declining to engage in "guesswork as to how independent decisionmakers will exercise their judgment").

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[15] Plaintiffs elide this distinction by lumping C.R. in with A.D. and C.C., whose parental rights had been terminated. Br. 22. No Child alleged that the burden of proof for termination applied to their proceedings or that such burden had any effect on him or her.

With respect to the adoptive preferences, C.R.'s allegation that the Community "has and will continue to propose alternative ICWA-compliant homes," ER 35, does not make application of the adoptive preferences imminent.[16] Accepting, as the Complaint alleges, that C.R. desired to be adopted by Foster Parents, ER 36, then even *if* (1) the Community proposed another adoptive placement, it still would not jeopardize C.R.'s prospects of remaining with Foster Parents unless that placement was found to be suitable and willing—criteria that proposed placements often do not satisfy. *See*, *e.g.*, ER 33 (explaining that placements proposed for C.C. were not suitable or willing). Moreover, until (2) that placement formally indicated its intent to adopt C.R., the adoptive preferences would be "inapplicable . . . [because] there simply is no 'preference' to apply." *Adoptive Couple*, 133 S. Ct. at 2564. Even then, the adoptive preferences would apply only if (3) the state court does not find that there is good cause to deviate from the adoptive preferences. Here, as discussed below, the need to keep siblings like C.R. and L.G. together *is* good cause to deviate from the preferences. Because C.R.'s alleged injury is based on the ability of uncertain future parties to satisfy the rigorous criteria for adoption and on speculation about the actions of the state court, it cannot be considered imminent.

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[16] C.R. did not identify which, if any, of the challenged provisions relate to the fact that the Community may propose placements. Because he was in foster care at the time of the Complaint and his interest purportedly lay in being adopted by his foster family, we infer that he intended thereby to implicate the adoptive preferences.

The mere possibility that the Community might propose placements for C.R. has not caused him injury, is not fairly traceable to the adoptive preferences, and would not be redressed by enjoining the adoptive preferences. No harm is caused a dependent child merely by proposing a prospective placement; indeed, more options will ordinarily be to the child's benefit. That the Community might propose placements, furthermore, does not make application of the adoptive preferences imminent and is not fairly traceable to that provision. As described above, a "proposed" placement is several steps removed from a "preferred" placement. The adoptive preferences do not require parties to the case to propose placements, only that the court prioritize any preferred placements that have formally sought to adopt. *See, e.g.*, *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996) (concluding that plaintiff lacked standing to challenge legislation because increased cost of weapons was attributable to the independent decision of dealers, not to legislation restricting supply). And enjoining the application of the adoptive preferences in C.R.'s proceeding would not prevent the Community—which would remain party to the proceeding under a separate provision of ICWA—from proposing placements.

Nor does C.R.'s alleged fear of being separated from his sibling L.G., ER 35, describe injury sufficient to support standing. C.R. and L.G. alleged a "strong sibling bond" and suggested that the adoptive preferences would undermine an Arizona policy of placing well-bonded siblings with the same foster and adoptive parents. ER

35. This concern is based on a misunderstanding of the adoptive preferences, which, contrary to C.R.'s and L.G.'s fear, would not prevent the state court from applying existing Arizona policy. *See Gila River Indian Community v. Department of Child Safety*, 363 P.3d 148, 153 (Ariz. Ct. App. 2015) (finding state court had discretion to determine what is "good cause"). The adoptive preferences prioritize the "presence of a sibling attachment that can be maintained only through a particular placement." 25 C.F.R. § 23.132(c)(3); *see also* 2016 Guidelines H.4 at 62 (noting that this allows biological siblings to remain together, even if only one is an "Indian child").[17] Thus, even if the adoptive preferences were triggered by a competing request to adopt C.R., the court would have good cause to allow P.R. and K.R. to adopt in the interest of maintaining his "strong sibling bond" with L.G. Because C.R. and L.G. do not face a threat of certainly impending separation, and because any fear of separation they have is not fairly traceable to the adoptive preferences, they do not have standing on this basis to challenge § 1915(a).

Even if (contrary to fact) C.R. had pled that he had been personally affected by unequal treatment through the application of the active-efforts provision or the foster-care preferences to his child-welfare case, he would not have standing to pursue

[17] Before 2016, the Interior guidelines were silent as to how sibling attachment should factor into adoptive placements, *see*, *e.g.*, 80 Fed. Reg. at 10,158 at F.2, but Arizona courts considered maintaining a sibling relationship to be good cause to deviate from the adoptive preferences. *See, e.g.*, *Jeff O. v. Arizona Department Economic Security*, No. 1 CA-JV 11-0019, ¶ 28 (Ariz. Ct. App. Aug. 30, 2011).

relief from those provisions. As with A.D., there is no reason to believe that these provisions would have denied him equal treatment even if they had applied to C.R.'s child-welfare proceeding: C.R. has not alleged that the State made greater efforts to reunify him with his parents than it otherwise would have, and Arizona courts had not concluded that greater effort would be required as a matter of law. He also has not alleged any reason to believe that any of the conditions precedent to the application of the foster-care preferences were met, and therefore he has alleged no reason to think that the foster-care preferences either applied or displaced state law.[18] *See supra* Section II.B.1.c.

Like A.D., C.R. claims without support that "[b]ut for ICWA, [L.G. and C.R.] would likely have been cleared for adoption." ER 36. That C.R. was not adopted by the time he decided to file suit does not, without more, describe an injury. C.R. was in the placement that the Complaint alleges he wanted to see made permanent, so the length of time he spent in foster care with P.R., K.R., and his sister L.G is not in and of itself harmful to him. ER 36 (1.5 years total). *See DeFehr*, 962 F.3d at 1376-77. What remains of this conclusory allegation, therefore, is the implication that the statute generally delayed C.R.'s adoption relative to other children, with no factual allegations to support the notion that delay was caused by ICWA. Because the

[18] C.R. would not be entitled to injunctive or declaratory relief from these provisions either because, like A.D., the State already had concluded that efforts to reunite his family would not be successful, and because C.R. already was in foster care.

allegation that C.R. would have been cleared for adoption but for ICWA does not describe a concrete injury, or one that is attributable to the challenged provisions of ICWA, it does not support Article III standing.

3. C.C. Has Not Plausibly Alleged That Any Provision of ICWA That He Challenges Will Cause Him Particularized Injury.

C.C. has not alleged any personal experience with the application of any of the challenged provisions of ICWA except as it pertains to the adoptive preferences. *See* ER 28-29, 32-34. *See supra* p.15 (Table 1). For this reason alone, C.C. lacks standing to challenge the active-efforts and transfer provisions, the burden of proof for termination, and the foster-care preferences on equal-protection grounds. C.C.'s other allegations of harm—that the Nation proposed placements, that some placements reminded him during visits that he was in foster care, or that he would have been adopted but for ICWA—do not independently support standing.

Making all inferences in C.C.'s favor, he has alleged that the good-cause exception to the adoptive preferences was invoked in his case, enough to describe personal experience with that provision. *See* ER 33 ("[T]he state court declared . . . that there was good cause to deviate from ICWA's adoption placement preferences."). But equally clear from the Complaint is the fact that the adoptive preferences were never triggered—i.e., the court did not have to weigh competing requests for adoption—because none of the Nation's placements was suitable or willing to adopt C.C. Although the Nation proposed placements, some were extended family who

also would have been preferred under state law, and all "turned out to be inappropriate" or "expressly declined to have him placed with them." *Id.* It can reasonably be inferred that because no proposed placements were willing or suitable, none of them formally sought to adopt C.C. *See* A.R.S. § 8-105; *Adoptive Couple*, 133 S. Ct. at 2564. In the absence of competing parties who had formally sought to adopt, the adoptive preferences never would have come into play. That C.C.'s birth mother supported adoption by M.C. and K.C., ER 32, would have supplied good cause for deviating from those preferences in any event. *See* 25 C.F.R. § 23.132(c)(1).[19] C.C. was not subjected to unequal treatment from the adoptive preferences, and for the same reasons discussed above with respect to C.R., he otherwise was not injured by the Nation's proposed placements. *See infra* Section II.C.2. (discussing why proposing placements is not in itself injurious).

The Nation's proposed placements are also not fairly traceable to the adoptive preferences, which are directed at state courts and require only that extended family and tribal placements be considered after those placements have sought to adopt the child. They do not require parties to the case to propose placements, *see San Diego County*, 98 F.3d at 1130, and enjoining them would not prevent the Nation—whose relationship with the State is governed by a separate legal agreement—from doing so.

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[19] The Interior guidelines in place at the time of C.C.'s child-welfare proceeding also included the parents' preference as grounds for good cause to deviate from the adoptive preferences. 80 Fed. Reg. at 10,158 at F.4(c)(1).

See Intergovernmental Agreement Between the State and the Nation, art. IX, § D (2014) (codifying the agreement between the State and the Nation to "actively assist one another identifying a placement that complies with the placement preferences").

C.C.'s other allegations of harm are also not fairly traceable to the adoptive preferences or redressable even by nominal damages. C.C. alleged that he visited some proposed placements, and that some persons he met in these visits reminded him that M.C. and K.C. were not his biological parents. ER 32-33. C.C.'s visits, however, were in furtherance of Arizona state policy that dependent children should visit a prospective placement, DCS Manual, Ch. 5, § 11; they were not a requirement of ICWA.[20] Children in foster care have the right under Arizona law to compliance with their visitation plan, which C.C. does not challenge here. A.R.S. § 8-529(A)(13). Relief in the form of nominal damages also would not have any impact on the people who reminded C.C. that M.C. and K.C. were not his biological parents. These harms are indistinguishable from the experience of other children in foster care. Because they are not fairly traceable to the provisions he challenges nor redressable by the relief he seeks, the Nation's proposed placements and C.C.'s visits with them do not provide a basis for standing.

[20] Plaintiffs' brief suggests that these visits were driven by the active-efforts provision, Br. 18, but the statute only requires that active efforts be provided before termination. 25 U.S.C. § 1912(d).

Finally, C.C.'s claims that he would have been cleared for adoption but for ICWA, ER 33, ring hollow given that he had been adopted by the time he made the allegation. Like C.R., the length of time C.C. spent in foster care with M.C. and K.C. is not in and of itself harmful to him because it was the placement that the Complaint alleges C.C. wanted to see made permanent. *Id.* (4 years total). *See DeFehr*, 962 F.3d at 1376-77. Like C.R. and A.D. and the other Plaintiffs, there is also no factual allegation to support the implication that any delay in C.C.'s adoption was caused by ICWA. Because the allegation that C.C. would have been cleared for adoption but for ICWA does not describe a concrete injury, or one that is attributable to the challenged provisions of ICWA, it does not support Article III standing.

C. Non-Indian Child L.G. Is Not Subject to ICWA, and Her Fear of Being Separated from Sibling C.R. Is Unfounded.

L.G. does not have the requisite political affiliation with a federally recognized Indian tribe to qualify as an "Indian Child" under ICWA. Because L.G. is not a member of the group whose child-welfare proceedings could be subject to ICWA, and because she has not and could not allege that ICWA applied or will apply to her child-welfare case, she does not have standing to bring an equal protection challenge against the statute. *See supra* Section II.B.2.

The only other allegation of harm made by L.G. is her fear of being separated from her half-sibling C.R., but this fear has no basis in the challenged provisions, which prioritize keeping siblings together. *See supra* Section II.B.2. A subjective fear

without factual basis cannot support standing. *See Clapper*, 133 S. Ct. at 1152 (explaining that where plaintiffs face no threat of impending injury, their fear alone is insufficient to create standing). Because L.G. has not and will not be harmed by the challenged provisions of ICWA, her claims must be dismissed.

D. Children Are Minors Whose Interests Are Not Adequately Represented by Next Friends or Foster Parents.

Neither Carter nor Foster Parents are appropriate representatives for Children. Because the allegations made on behalf of Children are facially insufficient to supply Article III standing, the claims of these other Plaintiffs likewise should be dismissed.

1. Carter Does Not Qualify as Next Friend to Children.

Carter does not meet the standard for a next friend. This Court recognizes that a next friend must demonstrate that he or she has "some significant relationship with, and is truly dedicated to the best interests of the [real party in interest]." *Massie ex rel. Kroll v. Woodford*, 244 F.3d 1192, 1194 (9th Cir. 2001). Far from having a "significant relationship" with Children, Carolyn Carter and Dr. Federici do not allege that they have ever met Children, or even that they have any experience with ICWA.[21] Without any connection to Children, Carter lacks standing to represent them, even in the extreme case that there is no one else available to do so. *See id.* (requiring "'some'

[21] That Carter and Dr. Federici also claim to be next friends to a proposed class of "all off-reservation children with Indian ancestry in the State of Arizona in child custody proceedings," ER 29, underscores the superficiality of their connection to this case.

relationship conveying some modicum of authority or consent, 'significant' in comparison to the [child's] other relationships," even in the absence of any alternatives to the proposed next friend); *accord Coalition of Clergy v. Bush*, 310 F.3d 1153, 1162 (9th Cir. 2002) ("Certainly the absence of any connection or association by the Coalition with any detainee is insufficient even under an elastic construction of the significant relationship requirement to confer standing.").[22]

2. Foster Parents Do Not Have Standing to Represent Children, Nor Can Foster Parents Establish Standing in Their Own Right.

Foster Parents do not have third-party standing to represent the claims of their foster children. In general, "one may not claim standing . . . to vindicate the constitutional rights of some third party." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976) (internal quotation marks omitted). A limited exception may be made where there is a genuine obstacle to the assertion of the right such that the third party is the best available proponent, *id.* at 116, but such exception does not apply where, as here, the Children whose rights are at issue are also parties to the case. *See*, *e.g.*, *Miller v. Albright*, 523 U.S. 420, 448 (1998) (rejecting third-party standing where party in interest could

[22] The Complaint offers no explanation as to why Children cannot be represented by a GAL, either those who guided them through their state-court proceedings or those newly appointed in federal court. And Plaintiffs did not take advantage of their opportunity to amend by finding a recognized guardian, despite the district court's evident concern that the absence of a GAL called into question the "fairness of the whole proceeding." Federal Appellees' Supplemental Excerpt of Record ("SER") 3 (Hearing Transcript 66:13 (Dec. 18, 2015)); *see also* SER 3-4 at 66:10-67:21.

have but did not choose to participate). Foster Parents have not alleged in the Complaint an intent to represent the interests of Children, nor any basis for doing so.

Foster Parents do not (and cannot) claim to be next friends of the Children. As a matter of law, and on the basis of the pleadings, the interests of Foster Parents and Children are "not parallel and, indeed, are potentially in conflict." *See Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 15 (2004) (holding that non-custodial parent could not pursue claim on behalf of daughter where she did not agree that she was injured). There is a conflict between the right that Foster Parents would assert on Children's behalf—the right to have a permanent placement based on the Children's best interests—and Foster Parents' intense wish to *be* that placement, irrespective of what is best for the Children. *See Halet v. Wend Investment Co.*, 672 F.2d 1305, 1308 (9th Cir. 1982).

Nor do Foster Parents have standing in their own right to challenge ICWA's active-efforts or transfer provisions, the foster-care or adoptive preferences, or the burden of proof for termination. A.D.'s Foster Parents (S.H. and J.H.) alleged that they are harmed by the risk of tribal court jurisdiction, should A.D.'s child-welfare proceeding be transferred. But as described above, any injury from the Community's petition to transfer A.D.'s case is not attributable to ICWA, which does not authorize petitions to transfer after the parental rights of a child have been terminated. 25 U.S.C. § 1911(b). Nor would having A.D.'s case heard in tribal court threaten a legally cognizable interest of S.H. and J.H., who voluntarily have affiliated themselves with

A.D. *See Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 594 (9th Cir. 1983) (rejecting argument that non-Indian company did not consent to tribal jurisdiction because it only conducted business with individual Indians, not the tribe). Because no law compels S.H. and J.H. to submit to tribal court jurisdiction, to the extent they seek to adopt A.D., they would be coming to the forum of their own accord based on their significant contacts with A.D. as a ward of the court. Moreover, any objection that S.H. and J.H. have that tribal court jurisdiction will interfere with the efficient processing of A.D.'s case could be raised before the juvenile court. *See* 44 Fed. Reg. at 67,591 at C.3 Commentary (indicating that the state court should consider *forum non conveniens* factors where appropriate).

C.C.'s Foster Parents (M.C. and K.C.) allege that they were burdened by the need to drive C.C. long distances to meet with proposed placements. But having children visit with prospective placements is a requirement of state law, not of ICWA. DCS Manual, Ch. 5, § 11. Finally, C.R.'s and L.G.'s Foster Parents (P.R. and K.R.) make no specific allegations of injury from ICWA.

Foster Parents' alleged inability to adopt Children does not describe harm to a legally cognizable interest. Accepting a foster child is a generous act, but the legal relationship of Foster Parents to Children is nonetheless contractual, as it must be to protect the interests of Children in being returned to their families. *See Gibson v. Merced County Department of Human Resources*, 799 F.2d 582, 587-88 (9th Cir. 1986) (suggesting that the temporary nature of foster care strongly weighs against finding a

liberty interest of foster parents in foster children). Foster parents are told, for example, that they will not necessarily be able to adopt the child they foster, DCS Manual, Ch. 5, § 7, and they are reimbursed for expenditures they make on behalf of foster children. *See* Arizona Department of Child Safety, Family Foster Home Care Rates and Fees Schedule (eff. July 1, 2015) *available at* https://dcs.az.gov/sites/default/files/CSO-1109A-updated.pdf. Because there is no right of Foster Parents to adopt Children, much less to have their adoption completed within a certain timeframe, and because the costs of fostering a child are reimbursable, Foster Parents have no standing to support their claims.

E. Plaintiffs Cannot Import Standing From Their Proposed Class.

Plaintiffs further argue that they should be able to borrow injury from their proposed class. Br. 44-45. It is true that a class, once certified, has an independent interest in the claims alleged and can maintain a suit in the event that the named plaintiff's case becomes moot. *Sosna v. Iowa*, 419 U.S. 393, 399 (1975).[23] But the class cannot be certified in the first place in the absence of standing on the part of named plaintiffs. *Lierboe v. State Farm Mutual Automobile Ins. Co.*, 350 F.3d 1018, 1023 (9th Cir. 2003) (dismissing because, where named plaintiffs lack standing, there are no "other

[23] Such was the case in *Gratz v. Bollinger*, 539 U.S. 244, 251 & n.1, 260-61 (2003), on which Plaintiffs rely (Br. 44). There, a class representative who once had standing was permitted to seek declaratory and injunctive relief on behalf of class members.

proceedings . . . under which it may be possible [to] proceed as a class action with another representative."). The rules establishing class actions, cannot "extend . . . the [subject matter] jurisdiction of the United States district courts." Fed. R. Civ. P. 82. *See*, *e.g.*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997).[24] Because that is exactly what Plaintiffs propose here—to use class certification to salvage a case in which plaintiffs do not have standing—their case (and their putative class) must be dismissed.

[24] Plaintiffs miss the import of *Amchem*'s holding that courts may consider "logically antecedent" non-constitutional issues pertaining to jurisdiction (such as class certification) before considering constitutional jurisdictional issues (like Article III standing). *See* Br. 45. Prioritizing non-constitutional issues in that fashion merely allowed the Supreme Court to *dismiss the case* without ever having to reach the constitutional issues. In any event, Plaintiffs have not appealed the denial of their class certification motion.

CONCLUSION

For the foregoing reasons, this case should be dismissed as moot, or the district court's dismissal for lack of standing should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases as defined in Circuit Rule 28-2.6.

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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 appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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