Case No. 17-15839

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A.D. C.C., L.G., and C.R., by
CAROL COGHLAN CARTER, and
DR. RONALD FEDERICI, et al.,

vs.

JOHN TAHSUDA, (in his official capacity as Acting Assistant Secretary of Indian Affairs, BUREAU OF INDIAN AFFAIRS), et al.

APPELLANTS' REPLY BRIEF

Appeal from the United States District Court for the District of Arizona
Case No. 2:15-CV-1259-PHX-NVW, Hon. Neil Wake, presiding

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Introduction[1]

The Appellees' arguments boil down to two points: (1) the case is moot because all Parent Plaintiffs have adopted Children Plaintiffs (Feds.33–37[2]; St.8);[3] (2) Plaintiffs have not shown injury sufficient for Article III standing because the adoptions were successful *despite* ICWA (Feds.37–65; St.8–13; Tribes.22–39). Both arguments miss the mark.

This case presents a situation like that of Homer Plessy's: he got to ride the train, but only in a segregated coach. *Plessy v. Ferguson*, 163 U.S. 537 (1896). The Plaintiffs here also got to ride the train and they reached their destination—but thanks to ICWA, they were required to do so in a separate legal "coach"—that is, under a separate set of rules that caused them injuries. Those injuries are redressable by an award of nominal damages and declaratory relief, which remain a live controversy.

Because of course, the merits arguments are not yet before this Court, the Court should not prejudge whether the separate-and-unequal treatment of Plaintiffs

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[1] Plaintiffs-Appellants file a single reply brief not exceeding 8,400 words under 9th Cir. R. 28-5, 32-2(b).

[2] All page references are to the electronic page numbers generated by the Court's CM/ECF system. Also:

- Feds.xx refers to Dkt. No. 42-1, Resp. Br. of the Federal Appellees;
- St.xx refers to Dkt. No. 40, Appellee Gregory McKay's Answering Br.;
- Tribes.xx refers to Dkt. No. 41, Br. of Intervenors-Defendants-Appellees Gila River Indian Community & Navajo Nation;
- AOB.xx refers to Dkt. No. 20, Appellants' Opening Brief.

[3] The Tribes, Gila River Indian Community (GRIC) and the Navajo Nation (NN), do not argue mootness.

is constitutional. Instead, it should find that Plaintiffs have standing and the case is not moot, and allow the case to proceed to the merits in the District Court.

Argument

I. Plaintiffs have standing.

Appellees' arguments on standing misconstrue how standing works. The Plaintiffs here have standing because they have suffered concrete and particularized injuries as a result of Defendants' enforcement of the challenged provisions of ICWA, and a favorable judicial ruling would remedy their grievances.

A. Injury-in-fact

1. Particularized injury

Federal Defendants mainly argue that Plaintiffs have not shown "particularized injury." Feds.29. The Tribes argue the same. Tribes.17. But "particularized" only "mean[s] that the injury must affect the plaintiff in a personal and individual way," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)—in other words, that the injury is not merely an abstract or generalized grievance. That is all that particularization means and requires. Federal Defendants agree. *See* Feds.38 (same). The Complaint alleges how Plaintiffs were affected "in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. And the Opening Brief further explains those allegations.[4]

[4] AOB.17–43; Am. Compl., ER.028–37, 051–59 ¶¶ 9–17, 21–49, 110–150, A–H (discrimination based on race or national origin, forced association with strangers, and forced separation from *de facto* parents, transfer-of-jurisdiction, no race- or national-origin-neutral child welfare proceeding, imposing a higher evidentiary burden before the child's best interests can be protected, being subject to race-matching preferences, etc.).

Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016), clarified that plaintiffs' injuries must be concrete *and* particularized, and explained in what manner "[c]oncreteness … is … different from particularization." The Court remanded because the Ninth Circuit had "failed to fully appreciate the distinction between concreteness and particularization," which led to an "incomplete" standing analysis. *Id.* at 1550.

Appellees argue that Plaintiffs were personally affected not by operation of the challenged provisions but only by Appellees acting under color of law. *See* Feds.57 (discussing Intergovernmental Agreement Between Arizona and Navajo Nation, which is not part of the trial court record); Feds.58 (referring to Arizona–Navajo Agreement that locks the State into a litigation position without regard to the individual needs or best interests of the child); Feds.44 (quoting *Braunstein v. Arizona Dept. of Transp.*, 683 F.3d 1177, 1185 (9th Cir. 2012), for this proposition); Feds.49–50 (suggesting not that certain allegations are not *particularized* but that they are not *injuries*); Tribes.21 (pointing to Tribe-proposed race-matched placements with the State concurring); St.8 (joining the Federal Defendants' arguments). But that makes no difference.

The civil rights laws prohibit deprivation of civil rights by a government agent acting under color of law, and when a government agent acting under color of law deprives a plaintiff of "the right to equal treatment," *Heckler v. Mathews*, 465 U.S. 728, 739 (1984), in a way that inflicts measurable harm on the plaintiff, then the plaintiff has standing.

That is what Plaintiffs allege has happened here. *See* Am. Compl., ER.032 ¶¶ 23–24 (operation of ICWA in A.D., S.H., and J.H.'s case, and Defendants acting

under its color), ER.032–34 ¶¶ 26–28, 31 (same, with respect to C.C., M.C. and K.C.'s case), ER.035–36 ¶¶ 37–39, 41–43 (same with respect to L.G., C.R., P.R. and K.R.'s case), ER.037, 054–55, 058 ¶¶ 49, 123–130, 149 (State Defendant acting under color of ICWA), ER.039–51 ¶¶ 59–109 ("statute's operation" allegations), ER.056–57 ¶¶ 139–140 (forced association under color of law).

Federal Defendants seem to suggest that Plaintiffs have not personally suffered the unequal treatment, Feds.37–38, but the allegations in the complaint plainly show the contrary: Plaintiffs alleged that they "had been [and] would likely be subject to the challenged practices," *Allen v. Wright*, 468 U.S. 737, 755 (1984), and that their rights and interests were and will be adversely affected thereby.[5] Plaintiffs therefore have standing.

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[5] Am. Compl., ER.027 ¶¶ 2–3 (children's best interests), ER.032 ¶ 23 (only family A.D. has ever known; race-based assertion of jurisdiction), ER.033 ¶ 27 (DCS-supported visitation with race-matched placements caused significant emotional and psychological harm to C.C.), *Id.* ¶ 30 (DCS and NN changed position on consenting to C.C.'s adoption by M.C. and K.C.), ER.034 ¶ 32 (only family C.R. has ever known), ER.035 ¶¶ 37, 39 (GRIC continued to propose race-matched placements between September 2015 and March 2016 leading to DCS-supported visitation), *Id.* ¶ 40 (strong sibling bond between L.G. and C.R.), ER.052–55 ¶¶ 115, 123–130 (Plaintiffs' interest in equal treatment under law, and protection of their substantive due process rights), ER.052 ¶ 119 (Plaintiffs' interest in not being forced to submit to the personal jurisdiction of a forum that has no contacts or ties with them), ER.053 ¶ 121 (Plaintiffs' interest in an individualized, race-neutral determination under uniform standards; right to be free from the use of race in their individualized foster/preadoptive care and adoption placement decisions; right to protection of Plaintiffs' existing family relationships), ER.053–54 ¶ 122 (interest in having the child's best interests considered in proceedings), ER.055–56 ¶¶ 131–135 (Plaintiffs' Tenth Amendment interest to not have state actors commandeered by the federal government), ER.056–57 ¶¶ 138–141 (Plaintiffs' interest to be free from forced association), ER.058 ¶ 150 (Plaintiffs' interest to be free from *de jure* discriminatory treatment).

In *Davis v. Guam*, 785 F.3d 1311, 1315 (9th Cir. 2015), this Court clarified that "equal treatment under law is a judicially cognizable interest that satisfies the case or controversy requirement of Article III, even if it brings no tangible benefit to the party asserting it." *Davis* involved a law that, like the laws at issue here, created a penalty box for a class of persons, who were then denied the benefit of race-neutral law. *Id.* at 1314. The Court had no trouble concluding that such an allegation satisfies the standing requirements because it involves "a type of personal injury" that is "long recognized as judicially cognizable." *Id.*

In the same way, Appellees' arguments doubting the "tangible benefit" Plaintiffs will obtain are irrelevant to the *standing* analysis. The injury in this case is the deprivation of the right to equal treatment, which "is not co-extensive with any substantive rights to the benefits denied the party discriminated against," but is an injury "itself," *Heckler*, 465 U.S. at 739–40, regardless of whether the Plaintiffs managed to obtain the benefits they sought even under the discriminatory process inflicted by the Defendants. *Davis*, 785 F.3d at 1315. Plaintiffs' injury—the denial of equal treatment—is redressable by declaratory relief and exemplary damages.

This Court should reject the Appellees' attempt to transform the *particularized injury* standard into a *pleading with particularity* standard. Those two are very different. The particularized-injury standard for standing is decidedly "less rigid" than pleading fraud or mistake with particularity. *Ashcroft v. Iqbal*, 556 U.S. 662, 686–87 (2009). In *Carroll v. Nakatani*, 342 F.3d 934, 946 (9th Cir. 2003) (discussed at Feds.45), plaintiffs lacked standing because they did not plead a "particularized denial of equal treatment," but pled only that a racial classification existed. Here, by

contrast, Plaintiffs plead facts alleging that they were "affect[ed] … in a personal and individual way," *Lujan*, 504 U.S. at 560 n.1, and that they "had been or would likely be subject to the challenged practices" at the time the complaint was filed. *Allen*, 468 U.S. at 755. *See, e.g.*, Am. Compl., ER.037 ¶ 49 (particularized subject-to and under-color-of allegations); fn. 5, *supra*. That pleading satisfies the particularized-injury prong.

Nor does Federal Defendants' discussion of *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939 (9th Cir. 2011) (en banc), and *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009), support their contention that Plaintiffs lack standing. Feds.45–46. First, *Chapman* was careful to note that it was "examin[ing] the Article III standing doctrine in the context of actions for injunctive relief *under the [Americans with Disabilities Act]*." 631 F.3d at 944 (emphasis added). It does not apply in *this* case because standing analysis under the ADA is different. Also, even if *Chapman* did control, it held that a plaintiff who suffers a particularized injury from a barrier he actually encounters—as the Plaintiffs here did—*may also sue* for un-encountered barriers related to his special circumstances. *Id. Summers*, meanwhile, held that the plaintiff lacked standing because it was "hardly … likel[y]" that he would incur an injury from deforestation if he happens to visit some parcel (out of 190 million acres of Forest Service land) that might be in the process of getting cut down. 555 U.S. at 495. The *Summers* plaintiff's relationship to some conceivable parcel of Forest Service land is very different than the actual injuries suffered here, or the genuine *de facto* (and now, adoptive) parental relationship between Parent and Children Plaintiffs that Defendants threatened to disrupt. *Id.* Here, the Plaintiffs *have* experienced

specific, particularized injuries that are described in the complaint—and that, if they prove at trial, would entitle them to judgment.

2. Concrete injury

"Concreteness … is quite different from particularization." *Spokeo*, 136 S. Ct. at 1548. A concrete injury "must actually exist," but can be "intangible." *Id.* at 1548–49. Plaintiffs have alleged concrete injuries.[6]

On remand, this Court, in *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1110 (9th Cir. 2017), *cert. denied*, 2018 WL 491554 (2018), held that "an alleged violation of a consumer's rights … constitutes a harm sufficiently *concrete* to satisfy the injury-in-fact requirement." Plaintiffs here have pled sufficiently concrete allegations that the legal claims for relief asserted by Plaintiffs—First, Fifth, Tenth, Fourteenth Amendments, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act—all were "established to protect [Plaintiffs'] concrete interests," and that the "violations alleged … actually [did] harm, or present a material risk of harm to, such interests." 867 F.3d at 1113. Am. Compl., ER.028–37, 051–59 ¶¶ 9–17, 21–49, 110–150, A–H.

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[6] Am. Compl., ER.032 ¶ 23 (threat of the case being removed to a forum having no personal jurisdiction over A.D., S.H., J.H.), ER.031–32 ¶¶ 21–22, 24 (delay in adoption, uncertainty of being removed from the "loving care of S.H. and J.H."), ER.033 ¶ 27 (cost and time of visiting with proposed placements, delay in adoption, DCS-supported visitation causing significant emotional and psychological harm to C.C., C.C. having to leave the security of his home and visit with strangers), *Id.* ¶ 30 (DCS and NN withholding adoption consent until after this suit was filed), ER.034–35 ¶¶ 32, 39, 40 (medically fragile C.R. facing the prospect of not being placed with his sister L.G., injury to their strong sibling bond, and their bond to *de facto* and psychological parents, K.R. and P.R.), ER.036–37 ¶¶ 44, 49 (being subjected to different and more onerous procedural and substantive provisions based on race), *Id.* ¶¶ 46, 48 (depriving or delaying these families from becoming permanent because of race).

The State Defendant readily admits he faithfully "compl[ied] with [ICWA]." St.5. The only conceivable argument Federal Defendants make in this regard is that each child's case is unique and there is no factual difference between an ICWA proceeding and a non-ICWA one. Feds.50. That is a (incorrect) merits argument which they may later invoke to show Plaintiffs were not denied equal treatment. It does not show that the injuries, as alleged, are not concrete or factual. Whether Plaintiffs will ultimately be able to show *unequal* injuries is an argument on the merits which is inapposite for the standing inquiry.

Federal Defendants' discussion[7] of L.G.'s standing is similarly unavailing. Her psychological harm, Feds.60, *is* a concrete injury because it is an objective fact that results from the Defendants' enforcement of racially discriminatory laws. *Cf. Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010) ("mere[] disagreement with the government" is not concrete injury, but "psychological consequence[s] [of] exclusion or denigration on a [discriminatory] basis" is); *Smith v. City of Cleveland Heights*, 760 F.2d 720, 723 (6th Cir. 1985) (psychological consequences of "an official government policy that directly discriminated on the basis of race in a discrete community" was concrete and particularized injury).

The injury-in-fact inquiry "is qualitative, not quantitative, in nature." *Association of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 357–58 (5th Cir.

[7] The Federal Defendants' discussion of the legal view of the child–foster parent relationship, Feds.63–64, is simply irrelevant to the question of the concreteness of the injuries alleged.

1999). Thus the quantum of L.G.'s harm can be proved through depositions, expert testimony, etc.—but those are all merits-phase arguments. It suffices that she has alleged a concrete injury sufficient to allow the case to proceed to the merits phase. *Lujan*, 504 U.S. at 561 ("allegations … suffice" at the "motion to dismiss" stage).

3. Actual or imminent injury that is not conjectural or hypothetical

Article III requires plaintiffs to allege "actual or imminent, not conjectural or hypothetical" injuries. *Spokeo*, 136 S. Ct. at 1548. The Tribes mainly doubt that the challenged provisions of ICWA "were actually applied" in Plaintiffs' individual state-court cases. Tribes.8. But, as with all of Plaintiffs' factual allegations at this stage, the Court is required to "assume" the "allegations … as true." *Warth v. Seldin*, 422 U.S. 490, 502 (1975).

Federal Defendants take the same tack: they suggest that Plaintiffs must allege that a challenged law may never get triggered in the proceeding of a particular child. Feds.39. Such an allegation, of course, makes no sense.

In any event, Plaintiffs have sufficiently alleged that triggering of each challenged provision *was* actual or imminent—and the Appellees admit these allegations.[8] Should a merits-phase court at some other point decide that certain provisions

[8] *See, e.g.*, Tribes.14–15 (NN looked for but did not find a race-matched placement for C.C.; GRIC had proposed alternative placements (and therefore, threat of contest under 25 U.S.C. §§ 1915(a) or (b)), for C.R., and by extension, for L.G., because no party wanted to disrupt their sibling bond); Tribes.17 (GRIC invoked 25 U.S.C. § 1911(b) in A.D.'s state-court case); Tribes.22 (Tribes sought potential race-matched placements); Tribes.30 (NN stepped beyond the active-efforts provision in suggesting race-matched placements); Tribes.21 (the active-efforts provision applies

of ICWA are *inapplicable* to Plaintiffs, that would be a favorable outcome—but would have no bearing on whether the Plaintiffs have suffered or are likely to suffer injury due to the Defendants' application, or attempted application of ICWA to their cases. The fact that, for example, the Arizona Supreme Court decided in summer of 2017 that ICWA section 1911(b) was not applicable to some of the Plaintiffs here, *GRIC v. Department of Child Safety*, 395 P.3d 286, 290 ¶ 16 (Ariz. 2017), does not change the fact that for years before that, the Defendants sought to enforce that law in their case, and that Plaintiffs were forced to spend time, money, and emotional strain in taking their case all the way to the state's highest court to obtain a judgment in their favor. That fact alone satisfies the Article III requirements for a federal court to act. Appellees' offer of a possible narrowing construction of ICWA is a merits-phase constitutional-avoidance argument that is irrelevant to the *standing* analysis.

Appellees also try to defeat standing by suggesting that they voluntarily consented or ceased to take certain actions under color of law. *See, e.g.*, Tribes.24–25. But voluntary cessation does not moot a case—see below, Section II.A—and it does not suggest that the Plaintiffs' alleged injuries were not actual or imminent when the complaint was filed.

For this reason, the Tribes' dependence on *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121 (9th Cir. 1996), is misplaced. Tribes.24.[9] *Reno* involved a statute "which may or may not ever be applied to plaintiffs." *Id.* at 1126.

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to portions of Plaintiffs' state-court proceedings); Tribes.19 (these are actual or imminent injuries, but they should be addressed in state court).

[9] *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (en banc) is a ripeness case and inapposite here. *See* Tribes.24 (citing *Thomas*).

Here, by contrast, ICWA certainly was, and certainly would have been applied. Am. Compl., ER.037 ¶ 49. If the Tribes' and State Defendants' actions had borne fruit, the *only* statutes which would ever be applied to Plaintiffs were the challenged provisions—not race-neutral Arizona law. The type of uncertainty that defeated standing in *San Diego* is simply absent here. Plaintiffs sufficiently allege that they were subjected to ICWA, Am. Compl., ER.028–31, 051–59 ¶¶ 9–17, 21–49, 110–150, A–H, and, at the time of the complaint, faced a "genuine threat" of imminent application of ICWA, *id.*—in other words, that they were "threatened" by the Appellees "with the likelihood of being" "subjected to" a "racial … barrier." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 657 (9th Cir. 2002); Tribes.35 (discussing *Scott*).

Quoting *McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015), the Tribes argue that a plaintiff must "demonstrate" a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. Tribes.24–25. At the motion-to-dismiss stage, however, it suffices that Plaintiffs have made a plausible *allegation*. *See Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" (citation omitted)); *Spokeo*, 136 S. Ct. at 1547 ("at the pleading stage, the plaintiff must … allege facts"). Factual proof or legal conclusions—*i.e.*, "showings" and "demonstrations"—are a merits-phase matter.

To satisfy the actual-or-imminent prong at the pleading stage, a plaintiff must allege that she "has sustained or is immediately in danger of sustaining some direct injury" as a direct "result of the challenged official conduct and the injury or threat

of injury must be both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) (citations and quotation marks omitted). Plaintiffs allege several injuries, both past and future, such as actual (or threat of) separation from the only family the Children have ever known, Am. Compl., ER.032–37, 039–58 ¶¶ 23, 26–27, 32, 39–40, 44–46, 49, 59–150, being forcibly haled into a foreign forum, ER.032, 041–43, 051–53, 055–58 ¶¶ 23, 72–77, 111, 116, 119–120, 131–141, 147–150, having to prove certain elements beyond a reasonable doubt, ER.031–32, 035, 037, 043–48, 051–58 ¶¶ 22, 37, 47, 78–90, 96–99, 112, 114, 116, 121–122, 125, 127, 129–141, 147–150, and having to undergo race- or national-origin-matching by operation of law or Defendants acting under color of law, ER.028–37, 039–58 ¶¶ 9–49, 59–150. Tribes have freely admitted that Plaintiffs were under a *threat* of suffering all of these injuries—by the conduct of one or the other Defendant, including the Tribes.

However complicated this case might be, this part is simple: this is an ordinary civil rights case challenging the constitutionality of a federal law that Plaintiffs contend is racially discriminatory. The proper defendants are the government entities that enforce that law. It is not reasonably disputable that Defendants do, in fact, enforce that law—that they did so in cases involving the Plaintiffs, and that they will continue to enforce the Indian Child Welfare Act in cases nationwide. Neither the Tribes nor the State Defendant can whitewash the fact that they actively sought compliance with and enforcement of the challenged provisions of ICWA against Plaintiffs.

B. Fair traceability

Standing requires that the injury-in-fact be "fairly traceable to the challenged conduct of the defendant," *Spokeo*, 136 S. Ct. at 1547, meaning, in a case like this, fairly traceable to Defendants' enforcement of ICWA. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013). Plaintiffs' allegations meet the fair-traceability requirement.

Defendants blame each other for Plaintiffs' injuries. The court can reserve for now the question of which Defendant did exactly what, but Defendants' briefing plainly supports Plaintiffs' contention because it shows that the injuries Plaintiffs have alleged *are* fairly traceable to Defendants' conduct in enforcing the challenged provisions of ICWA. *See, e.g.*, Feds.58 (pointing to the Arizona–Navajo Agreement as the culprit); Feds.22 (pointing to State Defendant's and Tribes' conduct in Plaintiffs' state-court proceedings); Feds.29–30 (A.D.'s injury fairly traceable, not to 25 U.S.C. § 1911(b), but to Defendants acting under its color); Feds.34–35 (offering a saving construction of 25 U.S.C. § 1915(b), which is a merits-phase argument, but not disputing that one of the Defendants actively sought to apply that provision to Plaintiffs); Feds.43 (Tribes acted under color of a statute that they "misunderstood"); Feds.43 (implying that because A.D., an infant, "volunt[eered]" to be a tribal member, the injuries are fairly traceable either to A.D.'s conduct or the Tribes'); Feds.49 (suggesting that State Defendant's attempt to comply with ICWA caused injuries); Feds.55 (not disputing that delay in adoption was caused by Defendants' actions

taken under color of the challenged provisions);[10] Tribes.34 (suggesting that 25 U.S.C. § 1915(b) was an impetus for the Tribes to suggest race-matched placements, which in turn resulted in the alleged harm).

Appellees also seem to point to independent actions of third parties not before the court. Tribes.23. It is well-settled, however, that the fair-traceability requirement is satisfied if an injury is "produced by determinative or coercive effect upon the action of someone else." *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (refusing to impose a proximate-causation analysis). Therefore, the Tribes do not dispute that each Defendants' actions produced *some* determinative or coercive effect on each other Defendant. For example, the Tribe proposed alternative placements or reunification attempts, which the State (because it had legal custody of Children Plaintiffs) rubber-stamped, and vice-versa. Tribes.21. This "powerful coercive effect" exerted by Defendants on each other proves fair traceability. *Bennett*, 520 U.S. at 169. The *Bennett* Court found such a "causal connection between the injury and the conduct complained of" sufficient to satisfy Article III standing. *Id.* at 167. In the same way, Plaintiffs have met the fair-traceability requirement.

[10] An argument could be made that, after Plaintiffs conceded the dismissal of their challenge to the ICWA Guidelines, AOB.14 n.7, no claim for relief lies as against the Federal Defendants. As such, Federal Defendants could then be dismissed

C. Redressability

It suffices that Plaintiffs' injuries are "likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. Granting a declaratory judgment or nominal damages will do that here.

Appellees' arguments on this point are somewhat confusing. Federal Defendants conflate this prong of Article III standing with mootness. Feds.33–37. The Tribes do not address this question. The State Defendant principally seems to argue, not that nominal damages are unlikely to redress Plaintiffs' injuries, but that because ICWA provisions did not "affect[] the outcome of [Plaintiffs'] child welfare proceedings, they lack standing to pursue their nominal damages claim." St.8 (capitalization removed). But that is not a redressability argument. In any event, Plaintiffs' injuries are redressable through the requested relief, so this case should proceed.

1. Nominal damages and declaratory relief

Nominal damages and declaratory relief provide relief for past violations of individual rights. *See Summum v. Duchesne City*, 319 Fed. Appx. 753, 753 (10th Cir. 2009). Appellees ignore a central difference between forward-looking and backward-looking relief: as discussed below, *retro*spective relief is unaffected by the mootness of claims for *pro*spective relief. Also, a court's power to decide such a claim is unaffected by "a defendant's change in conduct." *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 608–09 (2001); *see also* 13C Charles Alan Wright et al., *Federal Practice & Procedure* § 3533.3 (3d ed. 2017).

When, for instance, a police department engages in a policy of unconstitutional searches, an individual *subject to* such a search has a claim for nominal damages even if he is never prosecuted. *Cf. Hudson v. Michigan*, 547 U.S. 586, 598 (2006); *id.* at 610 (Breyer, J., dissenting) (acknowledging reported decisions awarding nominal damages for violations of the Fourth Amendment's "knock and announce" rule). This is true even if the policy is later ended; there is nothing hypothetical about the violation the individual suffered while the policy was in place. Likewise here, there is nothing hypothetical about deciding whether Appellees deprived Plaintiffs of their rights under color of law during their child-custody proceedings conducted under ICWA, regardless of whether Defendants later changed their ways.

The reason nominal-damages claims are available is because they vindicate "absolute" rights—"the right of personal security, the right of personal liberty, and the right of private property," *see* 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *124, *129; *see also Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring) (courts have historically decided cases involving violations of individual rights "even when plaintiffs alleged only the violation of those rights and nothing more").

The difference between redressability afforded by prospective and retrospective relief can be readily clarified by looking at *Hall v. Beals*, 396 U.S. 45 (1969) and *Nixon v. Herndon*, 273 U.S. 536 (1927). In *Hall*, plaintiffs did not seek retrospective relief. Thus, because the election in which the *Hall* plaintiffs had sought to

vote passed, and the challenged law was amended before the case reached the Supreme Court, their claim for injunctive relief was moot.[11] 396 U.S. at 48. But in *Nixon*, where plaintiffs *did* seek retrospective relief, the Supreme Court had no trouble awarding damages for unconstitutional deprivation of the right to vote after the election had passed. Here, unlike in *Hall*, Plaintiffs have requested *retrospective* relief. The Appellees' change in litigation position in the Plaintiffs' state-court child-custody proceedings is insufficient to overcome the blackletter law pointing in favor of the Plaintiffs' arguments.

In *Carey v. Piphus*, 435 U.S. 247, 248–51 (1978), two students alleged that their school suspended them without due process of law. The Court held that they would be "entitled to recover nominal damages" based on the violation of their due process rights, *even if* they would have been suspended had proper procedures been followed. *Id.* at 266–67. Indeed, it is "enough to invoke" the rights and "safeguards" of the Constitution, "whatever the ultimate outcome of a hearing." *Id.* at 266.

In *Memphis Cmty. Sch. Dist. v. Stachura*, the Court ruled that the same rule governs Section 1983 claims alleging the deprivation of *any* constitutional right. 477 U.S. 299, 308 n.11 (1986). Nominal damages are "the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Id.* Cases where a plaintiff alleges a violation of her rights—with or without further harm—are "traditionally amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). That is the case here.

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[11] Whether Plaintiffs can seek injunctive relief for class members is a question left for another day, after the class is certified.

Federal Defendants argue that Plaintiffs "cannot be awarded any effective relief" because the Children Plaintiffs have been adopted by the Parent Plaintiffs. Feds.33–35. That conflates the Article III standing inquiry with a remedies-phase inquiry. Even if a claim for *prospective* injunctive relief becomes moot, a claim for exemplary damages as *retrospective* relief does not thereby become moot.

Likewise, deprivations of constitutional rights are actionable for nominal damages under Section 1983 regardless of whether the violation caused the plaintiff any financial harm. *Carey*, 435 U.S. at 266–67; *see also Stachura*, 477 U.S. at 308–09 (nominal damages redress violation of constitutional rights, procedural as well as substantive). In the four decades since *Carey*, federal courts of appeals have uniformly concluded that the absence of a live claim for *pro*spective relief is irrelevant to courts' power to decide a nominal-damages claim for *retro*spective relief. Indeed, "the denial of" an asserted protected right is "actionable for nominal damages *without proof of actual injury*." *Carey*, 435 U.S. at 266 (emphasis added).

Appellees argue that when prospective relief becomes unavailable, a federal court loses power to decide a proper, pending claim for nominal damages unless it is accompanied by some other claim. Feds.33–37; St.8–13. That misconstrues settled law. Article III jurisdiction is determined claim by claim,[12] not "in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). This means that a mooted claim for prospective

[12] A claim for relief (injunction, declaration, damages) is different from the legal theories (as here, First, Fifth, Tenth, Fourteenth Amendments, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act) under which such relief is available. Standing must be established for each *claim for relief*. The Tribes' own case, Tribes.26 n.5, *Davis v. FEC*, 554 U.S. 724 (2008), supports this settled proposition.

relief does not affect a live claim for retrospective relief. Am. Compl., ER.058–59 ¶¶ A–H (giving claims for relief).

In *Lyons*, 461 U.S. at 109, for example, the Court held that the plaintiff's lack of standing to pursue injunctive relief did not mean that a "claim for damages" could not "meet all Article III requirements." And in *Powell v. McCormack*, 395 U.S. 486, 497 (1969), the Court held that "[w]here one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." In other words, federal courts' power to adjudicate claims for nominal damages is unaffected by the mootness of claims for prospective relief. *See also Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002). This rule has been applied in cases involving a wide spectrum of underlying claims. *See, e.g.*, *Green v. McKaskle*, 788 F.2d 1116 (5th Cir. 1986) (prison conditions); *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740 (5th Cir. 2009) (religious speech). And courts have held that the same rule applies regardless of the reason the claim for injunctive relief became moot. *See, e.g.*, *Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 345–46 (5th Cir. 2017) (nominal damages claim was live despite student's graduation); *Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006) (nominal damages claim was live despite city's amendment of the challenged ordinance).[13]

[13] State Defendant argues that ICWA provisions did not "affect[] the outcome of" Plaintiffs' child-custody proceedings, and therefore they lack standing to sue for nominal damages. St.8. That argument also goes against settled law. Nominal damages are available when plaintiffs allege constitutional violations even where the outcome is ultimately not affected by the alleged violations. *Miller v. Indiana Dept. of Corr.*, 75 F.3d 330, 331 (7th Cir. 1996); *Oliver v. Keller*, 289 F.3d 623, 630 (9th

The same is true of backward-looking declaratory relief, which goes hand-in-hand with nominal damages and, for Article III purposes, redresses Plaintiffs' injuries. Indeed, Title VI of the Civil Rights Act does not bar an award of retrospective declaratory relief against the State Defendant. *See* 42 U.S.C. § 2000d-7. A declaratory judgment saying the challenged provisions were *either unconstitutional or inapplicable* to Plaintiffs will redress their injuries. In enacting the Declaratory Judgments Act, Congress authorized federal courts to award such relief because it "is consonant with the exercise of the judicial function." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937); *see also* 42 U.S.C. § 2000d-7(a)(2) (making *all* legal and equitable remedies available "to the same extent" as are available "against any public or private entity other than a State"). Plaintiffs therefore have standing to assert constitutional and statutory rights and seek remedies for past wrongs.

For purposes of the standing analysis, it is sufficient that an award of nominal damages and/or declaratory relief redresses Plaintiffs' past injuries. Drawing "all reasonable inferences" from Plaintiffs' allegations "in plaintiffs' favor," as this Court is obligated to do, the Court should conclude that Plaintiffs have met their burden to establish standing. *LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011).[14]

Cir. 2002) (plaintiff is entitled to nominal damages premised simply on violations of constitutional rights).

[14] Federal Defendants discuss conclusory allegations. Feds.48. Whether particular provisions of ICWA are actually inapplicable to Plaintiffs is a determination on the merits and is irrelevant to decide whether an actual or imminent application of those provisions to Plaintiffs counts as Article III injury. *Cf. Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (deciding on the merits that 25 U.S.C. §§ 1912(d), (f), 1915(a) are inapplicable in certain situations); *Mississippi Band of Choctaw Indians*

2. Prospective injunctive relief

The availability of class-wide prospective injunctive relief is not a question before the Court; it is premature. It might come up in the context of Plaintiffs seeking injunctive relief on behalf of the class, but that is the proper context in which the question will arise. Appellees will get a chance to fully brief the question during either the class-certification stage or the remedies stage of this suit. *See Grutter v. Bollinger*, 539 U.S. 306, 317 (2003) (noting that the rights phase is distinct from the remedies phase); *Gratz v. Bollinger*, 539 U.S. 244, 253 (2003) (discussing bifurcation of a case into a "liability" (*i.e.*, merits) and "damages" (*i.e.*, remedies) phases); *Brown v. Board of Educ.*, 349 U.S. 294 (1955) ("*Brown II*") (decision on remedies coming after a decision on the merits).

D. Next-friend standing

There is no issue with Ms. Carter and Dr. Federici serving as next friends to Children Plaintiffs. And there is now no impediment to Parent Plaintiffs themselves acting as next friends of Children Plaintiffs. *Brown v. Board of Educ.*, 347 U.S. 483, 487 (1954) ("*Brown I*") (parents suing as next friends of their children). Federal Defendants argue against both options. Feds.60–62.[15]

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v. Holyfield, 490 U.S. 30 (1989) (deciding on the merits that the Indian child takes the mother's domicile, and therefore 25 U.S.C. § 1911(a) was applicable because the mother was domiciled on a tribal reservation). Furthermore, whether a particular provision was ultimately not applied to Plaintiffs is based, in part, on a voluntary change in one of the Defendants' conduct. As discussed in the arguments addressing mootness, such voluntary cessation does not moot any aspect of the case. Nor does it render an allegation conclusory for purposes of evaluating Article III standing.

[15] Federal Defendants conflate next-friend standing and third-party standing. *See, e.g.*, Feds.27. Next-friend standing is specifically governed by Fed. R. Civ. P.

Under Fed. R. Civ. P. 17(c), a "next friend is one who, without being regularly appointed guardian, represents an infant plaintiff … [and] of his own initiative commences the action and is under the supervision of the court." *Russick v. Hicks*, 85 F. Supp. 281, 283 (W.D. Mich. 1949). A next friend must (1) provide an adequate explanation of why the real parties in interest (Children Plaintiffs) cannot represent themselves, and (2) be truly dedicated to the person's best interests. *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (holding that a death row inmate could not be next friend of a capital defendant in the absence of a showing that the capital defendant (real party in interest) was unable to represent himself). Cases following *Whitmore* have developed into two distinct branches, one addressing next friends of adults and the other addressing next friends of minors.

Here, Carter alleges, Am. Compl., ER.029 ¶ 13, that she is an attorney who has practiced family law for several decades; and that she has represented children, including children of Indian ancestry, at every stage of child custody proceedings. Federici alleges, Am. Compl., ER.029–30 ¶ 14, that he has extensive experience evaluating children in foster care across the world, and has acted as expert witness in child-custody proceedings throughout the United States and abroad. Certainly the children cannot represent themselves. That Carter and Federici are committed to the best interests of the children is evidenced by their positions in this lawsuit on their behalf.

17(c)(2). State Defendant and Tribes do not present any arguments on next-friend standing. The Tribes only note in passing that the district court did not separately address the next-friend standing issue. Tribes.17 n.4.

Sam M. ex rel. *Elliott v. Carcieri*, 608 F.3d 77 (1st Cir. 2010), held that "a significant relationship need not be required as a prerequisite to Next Friend status" of "foster care children." *Id.* at 91–92. Only a "good faith interest in pursuing a federal claim on the minor's behalf" is required in such situations because it serves the "[i]mportant social interest[]" of "allowing minors access to a judicial forum to vindicate their constitutional rights." *Id.* Accordingly, the *Sam M.* court allowed a foster parent of one of the child plaintiffs to proceed as next friend, *id.* at 92, and a professor of sociology with a focus on child maltreatment *who had never met the children or relatives* was allowed to proceed, given that he was "familiar with the circumstances foster care children face while in the state's custody" and was "adequately prepared and willing to actively prosecute the types of claims the children have raised against the state." *Id.* at 93.

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

Federal Defendants rely on *Massie* ex rel. *Kroll v. Woodford*, 244 F.3d 1192 (9th Cir. 2001), which presented an *adult's* next-friend scenario as in *Whitmore*. Feds.60. But *Sam M.*, *Coalition of Clergy*, and *Nichols* are the apposite cases here in the *minor child* next-friend scenario. Even assuming *Massie* is relevant, Feds.60–

61, and a showing of some "significant relationship" and "tru[e] dedicat[ion] to the best interests of" Children Plaintiffs were required, 244 F.3d at 1194, Parent Plaintiffs readily fit those criteria—they are now the Children Plaintiffs' natural guardians for all purposes—a point Plaintiffs made in the district court and that is preserved in this Court. *See* Dkt. No. 169 p. 8–9 n.6. Therefore, either Ms. Carter and Dr. Federici, *or* the Parent Plaintiffs, can serve as next friends of Children Plaintiffs.

E. Prematurity of class-certification questions

Plaintiffs' standing to bring claims on behalf of the class are simply premature at this juncture. And, as discussed below, the mootness, in whole or in part, of Plaintiffs' own claims would not necessarily moot the claims brought by them on behalf of the class. These issues will be addressed during the class-certification or remedies phase of the suit, and should not be addressed here. Certainly, any discussion of Plaintiffs' standing here is necessarily restricted to Plaintiffs' *own* standing. The standing of the proposed class to seek prospective relief is preserved for this purpose. *See* AOB.33–46.

II. This case is not moot in whole or in part.

Federal Defendants and State Defendant argue that the case is moot because all Parent Plaintiffs have adopted Children Plaintiffs (Feds.33–37; St.8). Their mootness argument misses the mark under two well-settled doctrines: (1) the voluntary cessation doctrine, and (2) the inherently transitory doctrine.

A. The voluntary cessation doctrine

It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the

practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). This is so because otherwise the defendant would be "free to return to his old ways." *Id.* at 289 n.10. The Supreme Court has, thus, announced a "stringent" standard to determine "whether a case has been mooted by the defendant's voluntary conduct." *Friends of the Earth, Inc. v. Laidlaw Envtl. Svcs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). "A case might become moot if subsequent events make it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (emphasis added). The Court described this "absolutely clear" test as a "heavy," "formidable burden," which "lies with the party asserting mootness." *Id.* at 189–90.

Voluntary cessation moots litigation only if two conditions are satisfied: "(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, … *and* (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal punctuation and citations omitted); *see also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 93 (2013) (case moot because the covenant the parties had entered after suit was instituted was "unconditional and irrevocable").

Appellees have not met this burden. They have given *no* assurance such as *Davis* requires. Instead they say the opposite: that they will *continue* to comply with the challenged provisions of ICWA. St.5. Nor have the interceding events completely and irrevocably eradicated the effects of the alleged violations—effects that an award of exemplary damages will redress.

Much of their discussion of mootness occurs in the context of injunctive relief. *See, e.g.*, Feds.34 (arguing that because activities sought to be enjoined have already

occurred, and appellate courts cannot undo what has already been done, the action is moot). As discussed above, the unavailability of *pro*spective injunctive relief does not moot Plaintiffs' claims for *retro*spective relief. Plaintiffs have obtained their ultimate outcome—adoption of Children Plaintiffs by Parent Plaintiffs. Appellees concede in several places that their *voluntary* change in position led to Plaintiffs obtaining that relief.[16] But the injuries Plaintiffs sustained along the way remain to be redressed. Thus, the issues presented are "live" and Plaintiffs have "a legally cognizable interest in the outcome." *Already, LLC*, 568 U.S. at 91 (citation omitted).

State Defendant couches this as a standing inquiry, stating that Plaintiffs lack standing to pursue nominal damages because the state could have made the same decisions despite ICWA's allegedly impermissible criteria. St.6. Citing *Texas v. Lesage*, 528 U.S. 18 (1999) (per curiam), State Defendant says that he can avoid liability by proving he would have made the same decision absent the forbidden race-based considerations. St.9–10 & 10 n.2. But, as already discussed, that is a remedies-phase question, not a standing or mootness question. Indeed, *Lesage* itself decided this as a remedies-phase question, not once mentioning standing *or* mootness. *Id.* at 19 (noting case decided on the merits on a motion for summary judgment). In

[16] *E.g.*, Feds.54 n.17 (noting BIA's retraction, as codified in the 2016 Regulations, from its previous position taken in 2015 Guidelines, 80 Fed. Reg. 10,146, § F.2 (Feb. 25, 2015) (silent on sibling attachment, and child's best interests *not* to be considered)), Tribes.36 (Tribes voluntarily not formally proposing any race-matched placement); BIA's retraction from its position taken in 2015 Guidelines, §§ C.1, C.2, C.3, that jurisdiction-transfer under 25 U.S.C. § 1911(b) is available at *any* stage of a *child-custody proceeding*. 2016 Regulations, 81 Fed. Reg. 38,778 (Jun 14, 2016) (codified in relevant part at 25 C.F.R. § 23.115(a)).

any event, as noted in footnote 16 above, Appellees' changes in positions are quintessential examples of voluntary cessation of defendants' conduct, which cannot moot a case. Under the voluntary cessation doctrine, this case is not moot in whole or in part.

B. The inherently transitory doctrine

The inherently transitory doctrine prevents dismissal on mootness grounds when "(1) it is uncertain that a claim will remain live for any individual who could be named as a plaintiff long enough for a court to certify the class; and (2) there will be a constant class of persons suffering the deprivation complained of in the complaint." *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010) (citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)). The doctrine is applicable in the context of class actions to prevent mootness prior to class certification. *Id.*; *Wilson v. Gordon*, 822 F.3d 934 (6th Cir. 2016); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090 (9th Cir. 2011) ("[E]ven if the district court has not yet addressed the class certification issue, mooting the putative class representative's claims will not necessarily moot the class action.").[17]

[17] To be sure, this issue is not yet before the Court, as the district court denied Plaintiffs' class-certification motion *without prejudice* as premature, Dist. Ct. Dkt. No. 39, ER.086. Plaintiffs will re-file it at an appropriate time. Plaintiffs wish merely to highlight the path ahead because Appellees argue this point, Feds.35 n.7, and this issue is bound to come up in the context of class certification—in the district court in the first instance, and conceivably before this Court at a later time. Such a class-certification motion will relate back to the filing of the complaint. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 n.2 (2013) ("[W]here a named plaintiff's claim is 'inherently transitory,' and becomes moot prior to certification, a motion for certification may 'relate back' to the filing of the complaint.").

The crux of the inherently-transitory doctrine is the uncertainty about the length of time a claim remains alive. *Unan v. Lyon*, 853 F.3d 279 (6th Cir. 2017); *Wilson*, 822 F.3d at 945; *Olson*, 594 F.3d at 579, 583. Appellees' briefing has only bolstered this uncertainty: for example, every time State Defendant forced Plaintiff Children to visit with a race-matched stranger nominated by a Tribe—and every time the State Defendant required the Parent Plaintiffs to engage in that exercise—was in furtherance of the State Defendant's policy to apply and prepare a record for a trial on ICWA's race-matching preferences, or a trial to terminate parental rights. *E.g.*, Feds.16, Feds.24, Feds.58. Those mandated visits—which were part of Defendants' policy and practice of enforcing ICWA—constitute an injury to the Plaintiffs, but such injuries are fleeting because "pretrial custody" situations come and go so quickly. That renders such claims inherently transitory. *Symczyk*, 569 U.S. at 76.

Conclusion

The Court should reverse the decision below and hold that Plaintiffs have standing and this case is not moot in whole or in part.

Respectfully submitted this 5th day of February, 2018 by:

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This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).

The brief is 7,982 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by a party filing a single brief in response to multiple briefs. The brief's type size is a 14 pt. roman font and complies with Fed. R. app. P. 32(a)(5) and (6).

Submitted this day of 5th day of February, 2018,

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