IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHAD EVERET BRACKEEN, et al. Plaintiffs, v. RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior, et al., Defendants, and CHEROKEE NATION, et al., Defendant-Intervenors.	Civil Action No: 4:17-cv-868-O

REPLY TO INDIVIDUAL PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

The Federal Defendants hereby reply to Individual Plaintiffs' opposition (ECF No. 80) to the United States' motion to dismiss.

ARGUMENT

A. Individual Plaintiffs Lack Standing

Individual Plaintiffs seek to invalidate congressional protections for Indian children in all states, yet they have not credibly alleged injury by any Indian Child Welfare Act (ICWA) provision, or shown that granting such sweeping relief would provide them redress.

Foster Parents Are Not the Object of the Statute. Individual Plaintiffs first argue that, as the "object[s] of a regulation, 'there is ordinarily little question that the action . . . has caused [them] injury." ECF No. 80 at 33. But foster or putative adoptive parents are not the intended "object" of ICWA, nor are they are directly "governed" in any way by ICWA.[1] They are not the beneficiaries of statutory rights established by ICWA, nor are they the party that will interpret and apply ICWA in these cases (state courts) or the "target" of the statute. In contrast, cases cited by Plaintiffs involve statutes clearly aimed at the conduct of those plaintiffs.[2]

The Mere Existence of the Statute or Final Rule Does Not Constitute Injury. Individual Plaintiffs' alternative theory is that it is the *existence* of ICWA itself (which they assert is racially discriminatory), untethered from any connection to their case, which causes them injury. ECF No. 80 at 35. ICWA is not racially discriminatory, but even if it were, "exposure to a discriminatory message, without a corresponding denial of equal treatment, is insufficient to

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[1] That ICWA establishes a cause of action in 25 U.S.C. § 1914 for Indian children, their biological parents, or their tribes—but not for foster parents—underscores that foster parents are not within the "zone of interest" of the statute. *See Bennett v. Spear*, 520 U.S. 154, 161-66, 175-77 (1997). *See also Griffith v. Johnston*, 899 F.2d 1427, 1437-38 (5th Cir. 1990) (no fundamental interest in adopting children).

[2] *See Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 264 (5th Cir. 2015) (horse owner had standing to challenge regulation targeted at illegal activity by horse owners); *Duarte ex rel. Duarte v. City of Lewisville, Tex.*, 759 F.3d 514, 515 (2014) (registered child sex offender had standing to challenge ordinance that limited where registered sex offenders could live).

plead injury in an equal protection case." *Barber v. Bryant*, 860 F.3d 345, 356 (5th Cir. 2017) (quoting *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017)).[3] Similarly, Plaintiffs argue that the Final Rule[4] establishes causation because it implements ICWA's standards, ECF No. 80 at 41, and therefore "coerces" state judges. Judges are not "coerced" [5] by the Final Rule but even if they were, Plaintiffs must still show that the "coercion" impacts them, i.e., that the Final Rule is applied to them, which they have failed to do.

B. The Brackeens lack standing

Chad and Jennifer Brackeen tacitly acknowledge that their claims based on injury from 25 U.S.C. § 1915 are moot, since they have already adopted A.L.M. *See* ECF No. 80 at 48. The Brackeens' challenge therefore must rest on 25 U.S.C. § 1913(d) and § 1914, which only provide for the right to petition a court to invalidate an action. Assuming these provisions apply to A.L.M.'s proceeding at all, the Brackeens' claim for standing turns on the attenuated possibility that a series of speculative events will occur: *E.g.*, for Section 1914 to apply, A.L.M., his biological parents, or the Navajo Nation determines that A.L.M.'s foster care placement or the termination of his parents' rights violated sections 1911 or 1912 of ICWA; one of them petitions for review; the reviewing court accepts jurisdiction, agrees with the allegations, and invalidates the underlying foster care or termination of parental rights decision; and the court further concludes that the appropriate remedy (in light of the best interest of the child) is the invalidation of A.L.M.'s adoption by the Brackeens—a remedy not mentioned in Section 1914. Similarly, application of Section 1913(d) would require one of A.L.M.'s parents to decide to petition the court to vacate the adoption decree; the court to apply Section 1913(d); and the court to hold that fraud or duress occurred. Such chains of possible events constitute a mere "fear[] of hypothetical,

[3] Cases cited by Individual Plaintiffs are consistent with *Barber*. *See Ne. Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (plaintiff's members foreclosed from even competing for certain public contracts); *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2002) (statute regulating cable operators actually disadvantaged incumbent operators by grant of statewide licenses to new operators).
[4] *Indian Child Welfare Act Proceedings*, Final Rule, 81 Fed. Reg. 38,778-01 (June 14, 2016).
[5] *See, e.g.*, *K.P. v. LeBlanc*, 729 F.3d 427, 436-37 (5th Cir. 2013) (no standing to challenge statute establishing cause of action because enforced by private parties).

future harm that is not certainly impending," *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 416 (2013), and cannot support standing.

1. The Librettis and Hernandez lack standing

Nick and Heather Libretti do not have standing to challenge the Final Rule. The Final Rule, by its own terms, does not apply to Baby O.'s child-custody proceeding, which Plaintiffs' allege was initiated before the Rule's effective date of December 12, 2016. *See* Second Amended Complaint ("SAC") ⁋ 156 (alleging that Baby O. was put up for adoption in March 2016); 25 C.F.R. § 23.143 (effective date).

Injury. The Librettis and Altagracia Hernandez complain about the Final Rule's diligent search requirement, but it is Nevada policy to conduct a diligent search in *every* child-welfare case for adult relatives within the fifth degree of consanguinity.[6] The source of the Librettis' frustration, therefore, arises because Nevada, like ICWA and the Final Rule, privileges family relations in the context of adoptions. The "threat of separation" is inherent in the role of any foster care provider, which prospective foster parents must attest that they understand.[7] The Librettis also argue that they have standing because of their burden to prove good cause to deviate from the adoptive preferences under Section 1915(a). *See* ECF No. 80 at 39. This allegation is speculative, given that the Librettis have alleged that Baby O.'s child-welfare case may be settled and that Hernandez supports placement with the Librettis. SAC ¶ 162.

Hernandez also alleges she is "directly aggrieved" because of the delay. *Id.* ⁋ 277. This allegation does not support standing for the same reasons that it does not for the Librettis. The Complaint suggests that Hernandez may have neglected or abandoned Baby O., and the State assumed custody. *Id.* at ¶¶ 165, 156. If Baby O. is the subject of a state-initiated child-welfare

[6] *See* Nevada Division of Child and Family Services et al., State Child Welfare Policies and Procedures, Policy 1001 at 1001.5.1(A), *available at* http://dcfs.nv.gov/Policies/CW/1000/ ("due diligence" must be exercised to notify "all adult grandparents and all other adult relatives (within the fifth degree of consanguinity)" within thirty days of child removal).

[7] *See, e.g.*, Nevada Caregiver Application at 10, *available at* http://dcfs.nv.gov/Programs/CWS/Placement/FosterCareForms/ ("If my/our application is approved, I/we are not guaranteed the placement of a child in my/our home.").

proceeding, Hernandez would no longer have a legal right to direct Baby O's placement; if Baby O. is not the subject of such a proceeding, then claims by Hernandez and the Librettis are moot.

Causation. Any injury is not fairly traceable to the diligent search provision in 25 C.F.R. § 23.132(c)(5), or Section 1915(a). First, the state court need not look to Section 23.132(c)(5) at all, since Section 23.132(c)(1) indicates that the wishes of the child's biological parents are an alternative basis for "good cause." *See* 25 C.F.R. § 23.132(c)(1); SAC ¶ 162. Because the state court has discretion to deviate, any decision by that court to prefer another placement over the Librettis is not fairly traceable to ICWA. Moreover, since Nevada's policy is to conduct a diligent search in *every* child-welfare case, delay cannot simply be assigned to the Final Rule. And, even if the state court applied the Final Rule rather than its own state policy, a court following Section 23.132(c)(5) would determine for itself the manner and extent of the search.

2. The Cliffords lack standing

Injury. Jason and Danielle Clifford are the only Individual Plaintiffs whose claims are not alleged to be subject to a settlement. Two Minnesota courts found their their claims unripe. ECF No. 81 at 43 (Minnesota District Court) ("[T]he § 1915(a) placement preferences only apply to the *adoptive* placement of an Indian child, and this child has not yet been placed for adoption."); *id*. at 53 (Minnesota Court of Appeals) ("Foster parents' focus on the *adoptive* placement preferences of section 1915(a) is misplaced because, absent an adoptive placement, it is premature to address foster parents' arguments."). Regardless, the Cliffords press this Court to effectually review a Minnesota appellate court's order, while simultaneously arguing that Minnesota is not a necessary party. But it is Minnesota, not the Cliffords, that is charged with ensuring Child P.'s safety and welfare, and nearly every state prioritizes keeping children with their families where possible. *See* Department of Health and Human Services, Placement of Children With Relatives 2, *available at* www.childwelfare.gov/pubPDFs/placement.pdf.

Causation. According to the Minnesota District Court, Child P.'s placement change was made possible because her grandmother addressed barriers that previously had made her

unsuitable to care for Child P., including completion of a home study.[8] Minnesota law not only prioritizes Child P.'s placement with her grandmother, *see* Minn. Stat. § 259.57(2)(c), it requires child-placing agencies to "make special efforts to recruit" an adoptive placement from among Child P.'s family. *Id*. § 259.77; *see also id*. §§ 259.22, 259.41. Here, the State actually "conducted a diligent search for relatives" even before Baby O. was determined to be an Indian child. ECF No. 81 at 19. The Cliffords have failed to show that any injury is caused by the challenged ICWA and Final Rule provisions rather than by Minnesota law.[9]

Redressability. If the Cliffords have any legally cognizable prospective injury, it is not redressable here. A determination by this Court as to the constitutionality of ICWA's preference for relative placement will not affect the longstanding practice of Minnesota and other states of prioritizing keeping children with their families, as they have done for Child P. Moreover, any change in Child P.'s placement should be because the state court presiding over Child P.'s case determines that it is no longer in her best interests to remain with her grandmother, not because of litigation that includes *none* of the parties to the underlying state case.

C. This Court Cannot Redress Plaintiffs' Alleged Harms from ICWA through Injunctive or Declaratory Relief Targeting Defendants

No Plaintiff can show their harm is redressable by this Court because a judgment binding the Federal Defendants would not bind the state courts that implement ICWA or third parties who believe their rights under ICWA have been violated. *See Okpalobi v. Foster*, 244

[8] The Cliffords intimate that because Child P.'s grandmother was once declined as a placement for her granddaughter she continues to be "unfit." SAC ¶ 176. The unsuitability of a particular placement, however, may be based on temporary or resolvable problems (as appears to be the case here). *See* Minnesota District Court Order, ECF No. 81, at ⁋⁋ 5, 14. ("[t]he record is clear that [Child P.'s grandmother] has an approved adoption home study," and "there are no legal barriers to the child's placement with [her]").

[9] The Cliffords rely on citations to Section 1915(a) in the Minnesota District Court Order for the proposition that their injuries "were caused by federal, not state, law," ECF No. 80 at 34, but the court explicitly applied both federal and state law. *See id*. Minnesota District Court Order, ECF No. 81 at 45 (holding that the Cliffords "have not established good cause . . . under either the federal or the Minnesota law"). Further, to the extent the Cliffords are challenging the application of the Final Rule to Child P.'s proceeding, it appears that proceeding commenced before the effective date of the Final Rule and it thus does not apply.

F.3d 405, 427 (5th Cir. 2001). Individual Plaintiffs' gesture towards likely Supreme Court review, ECF No. 80 at 45-46, but Plaintiffs cannot postpone the standing inquiry to a later stage. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.5 (1992) (rejecting notion that standing may be premised upon expectation of eventually binding Supreme Court precedent).

Individual Plaintiffs rely on *Allstate Insurance Co. v. Abbott* to argue that *Okpalobi* does not apply where the state (here the United States) is a party to a suit. *See* 495 F.3d 151, 159 (5th Cir. 2007). *Allstate* relied on *Franklin v. Massachusetts*, 505 U.S. 788, 790-91 (1992), for the principle that redressability can be found where "actors who were not parties to the lawsuit could be expected to amend their conduct in response to a court's declaration." 495 F.3d at 159 n.19.

Redressability then turns on whether or not this Court can expect state courts to "amend their conduct" in response to a ruling for Plaintiffs. *See Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816, 831 (S.D. Tex. 2012), *rev'd on other grounds and remanded sub nom. Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013) (explaining that *Abbott* "clarifies that redressability will exist if a declaration against a governmental defendant without enforcement power is reasonably likely to cause nonparties with enforcement power to obey the court's order."). In *Franklin*, redress depended upon the likelihood of Executive Branch officers, including the President, choosing to "abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such determination." 505 U.S. at 803. Because the Secretary of Commerce would be bound and "the Solicitor General has not contended to the contrary" regarding expectations that the President and others would also accept the court's interpretation, the Court concluded there would be redress and therefore standing. *Id.* In other cases, however, the Court has been more wary of concluding third parties will embrace a district court's decision. *See Lujan*, 504 U.S. at 569-71 (redress speculative where district court decision not binding on federal agencies and "there is no reason they should be obliged to honor an incidental legal determination the suit produced").

A decision by this Court would bind the United States as against these Plaintiffs, but would not prevent relitigation by the United States of the constitutionality of ICWA in other courts against other plaintiffs. *See United States v. Mendoza*, 464 U.S. 154, 162-63 (1984) (holding that nonmutual offensive collateral estoppel does not apply to United States, and explaining that the holding "will better allow thorough development of legal doctrine by allowing litigation in multiple forums" of the same issue). And it will not prevent application of ICWA to Individual Plaintiffs unless the state courts hearing their cases "amend their conduct" in light of a ruling by this Court. If this Court concludes that these state courts cannot be expected to uniformly defer to a determination that ICWA is unconstitutional, then the Individual Plaintiffs cannot show standing and should be dismissed.[10]

D. Section 702 Only Waives Sovereign Immunity as to Challenges to Final Agency Action

Relying on case law that is contrary to Fifth Circuit precedent, Plaintiffs argue that the United States has waived its sovereign immunity under 5 U.S.C. § 702.[11] But the Fifth Circuit has grappled with this issue and reached a different conclusion than the D.C. Circuit, holding that "sovereign immunity is not waived by § 702 unless there has been 'agency action.'" *Doe v. United States*, 853 F.3d 792, 799 (5th Cir. 2017), *as revised* (Apr. 12, 2017). Since the only reviewable "final agency action" that Plaintiffs have pointed to is the Final Rule, they cannot rely on this provision for claims not targeting the Final Rule.[12] Plaintiffs' reliance on *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689–91 (1949), is similarly misplaced,

[10] Individual Plaintiffs complaint that ICWA should be challengeable in federal court rings hollow given that their statutory claims could be raised in any state court proceeding. State court cases, like federal court cases, can achieve Supreme Court review and become binding in the sense Plaintiffs want. *See, e.g.*, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). Plaintiffs' problem is that the present case, contrived as a vehicle to secure Supreme Court precedent, is not grounded on redressable injuries as it must be in the first instance.

[11] Plaintiffs alleged in the Complaint that they sued the "United States" under 28 U.S.C. § 1346, SAC ¶ 27, but now argue that Section 702 is their basis for the waiver.

[12] Further, other than a footnote claiming in a conclusory fashion that Individual Plaintiffs have live justiciable claims against the Department of Health and Human Services and Secretary Azar, Individual Plaintiffs put forth no arguments in support of this assertion, and effectively concede the point. ECF No. 80 at 49.

because they seek declaratory and injunctive relief not just against federal officials, but federal agencies and the United States, and cannot be fairly considered as seeking relief against federal officials outside of their capacity as representative of the sovereign interests of the United States.

E. The Court Should Abstain from Review of Plaintiffs' Claims under *Younger*

Individual Plaintiffs attempt to avoid *Younger* abstention by arguing that Defendants ignore *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013). But *Sprint* recognized "certain instances in which the prospect of undue interference with state proceedings counsels against federal relief." *Id.* at 72. One such instance is if the federal action interferes with civil proceedings akin to criminal prosecutions, including abuse and neglect proceedings. *Id*. at 78 (citing *Moore v. Sims*, 442 U.S. 415, 419–420 (1979)). In *Moore*, the Supreme Court held that the temporary removal of a child in the child-abuse context was an appropriate matter for abstention under *Younger*.[13] *Id.*

Further, Individual Plaintiffs' so-called "post-*Sprint*" precedent does not foreclose application of *Younger* here. *Doe v. Piper*, 165 F. Supp. 3d 789 (D. Minn. 2016), conflicts with this Court's decision to apply *Younger* in a federal action seeking to challenge child custody and child support orders from a state court. *Stewart v. Nevarez*, No. 4:17-CV-00501-O-BP, 2018 WL 507153, at *2 (N.D. Tex. Jan. 23, 2018). *Tinsley v. McKay*, 156 F. Supp. 3d 1024 (D. Ariz. 2015), a class action case brought by minors alleging systemic failures in state child welfare agencies, did not qualify as an interference with quasi-criminal proceedings (civil enforcement) for the purposes of *Younger*. But here, the very essence of Individual Plaintiffs' challenge is based on the ultimate decisions by the state courts as to where the Indian children should be placed. And in *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749 (D.S.D. 2015), the court reasoned that abstention was inappropriate where plaintiffs only seek prospective relief that would not impact on ongoing state-court proceedings. That is not the case here.

[13] Here, the alleged injuries asserted by the Librettis involve efforts by Nevada to find a suitable placement for Baby O. in the context of ongoing abuse and neglect proceedings.

F. Claims by the Cliffords and Librettis Should Be Dismissed Under Rule 19 for Failure to Join a Necessary and Indispensable Party

Individual Plaintiffs assert that Nevada and Minnesota, far from being necessary and indispensable, are actually irrelevant. This is so in spite of the fact that Hernandez and the Librettis suffer their alleged concrete harms in ongoing Nevada state court proceedings, the Cliffords suffer their alleged concrete harms in Minnesota state court proceedings, and state agencies are parties to each of their cases. Individual Plaintiffs, however, disclaim that they "are asking this Court to 'prevent' [Nevada and Minnesota] 'courts from applying either ICWA or the Final Rule to' particular proceedings through an order from this Court that would 'bind' those States." ECF No. 80 at 54. If true, then there is no Rule 19 problem. But then there is also no standing for those Individual Plaintiffs because they are simply requesting an advisory opinion from this Court and "federal courts . . . do not render advisory opinions." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (citation omitted).

Plaintiffs offer two cases for the proposition that states are not necessary and indispensable where a challenge only targets federal statutes and regulations. But neither of stands for such a broad proposition. *Romero v. United States* involved a challenge to a federal statute that withheld a taxpayer's refund where the taxpayer owed child support under state law. 784 F.2d 1322, 1323-24 (5th Cir. 1986). Plaintiff challenged whether the federal statute afforded due process before withholding his refund, not the state child support law. But here, a federal statute protecting rights in state child welfare proceedings is inextricable from and meaningless outside those state proceedings. And *Bermudez v. U.S. Dep't of Agriculture*, 490 F.2d 718 (D.C. Cir. 1973), found that since only the United States was liable for the retroactive food stamp benefits plaintiffs had been denied, relief could be fashioned that would not implicate state interests. *Id.* at 724. But here, assuming a decision by this Court will affect the proceedings in which Individual Plaintiffs allege injury, it will also affect how Nevada and Minnesota state courts and executive agencies implement ICWA.

Individual Plaintiffs argue that if Nevada and Minnesota are indispensable parties, all states would be indispensable and would have to be joined. ECF No. 80 at 55. That does not follow. Only Nevada and Minnesota's interests are directly implicated by Individual Plaintiffs' claims. If Plaintiffs were serious about seeking to redress injuries, they would have to admit that they seek to impact those state court proceedings and, therefore, those states may be prejudiced by a judgment of this court in their absence. *See* Fed. R. Civ. P. 19(b)(2). Further, without joining Nevada and Minnesota this Court cannot render a judgment that provides "adequate" relief to Hernandez, the Librettis, and the Cliffords. *Id.* 19(b)(3).

CONCLUSION

For the foregoing reasons, the Court should dismiss Individual Plaintiffs' Claims.

Dated: May 25, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th of May, 2018 a true and correct copy of the foregoing was submitted to the Clerk of the Court for the U.S. District Court, Northern District of Texas, along with Plaintiffs' counsel, using the ECF system of the court.

/s/ Steven Miskinis
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