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

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs are an adoptive couple, two sets of foster parents, a mother whose child is in Nevada foster care (together, "Individual Plaintiffs"), and three States ("State Plaintiffs"), who sue the Department of the Interior ("Interior") and its officers, challenging the constitutionality of the Indian Child Welfare Act of 1978 ("ICWA") and the 2016 Final Rule issued by the Department of Interior ("Interior"), which incorporates and clarifies various provisions of ICWA. Interior moved to dismiss Plaintiffs' First Amended Complaint on February 13, 2018. ECF Doc. 28. Plaintiffs then attempted to cure deficiencies in their complaint by amending to add another federal agency, the Department of Health and Human Services ("HHS") and its officer, the United States, and a constitutional challenge to two provisions of the Social Security Act relating to federal funding for state child welfare-services. However, adding these new defendants does not cure this Court's lack of subject matter jurisdiction over this action.

ICWA is typically applied by state courts in state court child-welfare proceedings and any challenge to ICWA's application to Plaintiffs can easily be raised in any proceeding that involves them. Instead, Plaintiffs ask this Court to use its equitable powers to issue declaratory and injunctive relief as to the constitutionality of ICWA and the Final Rule. Plaintiffs apparently expect such relief to alter the course of ongoing state-court proceedings, even though the state courts would not be bound to follow this Court's determination. Moreover, federal law dictates that federal courts should refrain from interfering with pending state judicial proceedings. *See Younger v. Harris*, 401 U.S. 37 (1971). This is particularly so where, as here, the state courts—if given the opportunity—may apply federal and state law in a way that obviates Plaintiffs' constitutional challenges.

In any event, Plaintiffs lack standing to have this Court pre-adjudicate how state courts should apply ICWA and the Final Rule in child-welfare proceedings. Individual Plaintiffs base their constitutional challenges on speculative injuries from provisions of ICWA and the Final Rule that may not even apply to their state-court proceedings, or purported injuries that might occur equally under applicable state law. And the relief that Plaintiffs seek against Interior—which does not enforce ICWA in state court—will not affect state-court proceedings, nor will it eliminate the State Plaintiffs' obligation to follow federal law. As to the HHS defendants, Plaintiffs have failed to allege an actual injury or ripe claim relating to HHS's administration of federal funds for child-welfare services.

In addition, Individual Plaintiffs' claims are based on proceedings in Minnesota and Nevada state courts, which involve those States' child welfare agencies and applicable child-welfare laws. Those States have a compelling interest in the adjudication of those Plaintiffs' claims; thus, the States are necessary parties to this action, but cannot be joined due to their sovereign immunity. For these reasons and as elaborated below, Plaintiffs' complaint should be dismissed in its entirety.

A. BACKGROUND

1. Congress' Plenary Authority Over Indian Affairs

The Complaint is replete with assertions that Congress lacked authority to enact ICWA. The Constitution, however, vests Congress with "plenary power . . . . in the field of Indian affairs." *United States v. Lara*, 541 U.S. 193, 200 (2004) (citation omitted). "The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). The Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, expressly provides Congress with the power to

"regulate Commerce with . . . the Indian Tribes," and the Treaty Clause, *id.* art. II, § 2, cl. 2, gives the President the power, by and with the consent of the Senate, "to make Treaties" with Indian Tribes. And through "the exercise of the war and treaty powers . . . the United States assumed the duty of furnishing [] protection [to Indian Tribes], and with it the authority to do all that was required to perform that obligation." *Board of Cty Comm'rs v. Seber*, 318 U.S. 705, 715 (1943). Thus, "long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and the duty of exercising a fostering care and protection over all dependent Indian communities." *United States* v. *Sandoval*, 231 U.S. 28, 45-46 (1913).

2. Indian Child Welfare Act

Pursuant to its broad constitutional authority over Indian affairs, Congress enacted ICWA forty years ago declaring that "it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," 25 U.S.C. § 1902; *see also id.* § 1901(3) (discussing the United States' "direct interest, as trustee"). The catalyst for Congress' in-depth investigation into foster care and adoption of Indian children, and ultimately the passage of ICWA, was Congress' recognition of "'the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.'" *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 642 (2013) (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989)). . In particular, Congress found "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(3); *see also Holyfield*, 490 U.S. at 32 (noting "that 25

to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions"). Congress additionally found that states "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." *Id.* § 1901(5). The testimony before Congress demonstrated both a betrayal of the best interests of Indian children, as well as "the impact on the tribes themselves of the massive removal of their children." *Holyfield*, 490 U.S. at 34.

To address this crisis, Congress established "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. § 1902. ICWA thus directly addresses one of the most critical sovereign interests of tribes—preventing their demise through systematic loss of their children, *Holyfield*, 490 U.S. at 52-53—while also protecting the best interests of the children.

Congress balanced these interests with the interest of the states in child welfare matters occurring within their jurisdictions, noting:

> While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.

H.R. REP. NO. 95-1386, at 19 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7541, 1978 WL 8515. Thus, child-welfare proceedings involving Indian children in state courts continue to be primarily governed by state child-welfare law, with ICWA's protections applying only as necessary and relevant to a particular case. *See e.g.*, *In re J.J.C.*, 302 S.W.3d 896, 899 (Tex. App. 2009) (ICWA preempts state law only where there is a conflict between the two).

ICWA applies solely to "child custody proceedings" (defined as foster-care placements, terminations of parental rights, and preadoptive and adoptive placements) involving an "Indian

child."[1] 25 U.S.C. § 1903(1), (4). Within these state-court child-custody proceedings, ICWA provides important procedural and substantive standards to be followed. The "most important substantive requirement" of ICWA is the placement preferences. *Holyfield*, 490 U.S. at 36-37; *see* 25 U.S.C. § 1915(a)-(b). "In any adoptive placement of an Indian child under State law," ICWA requires that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a) ("adoptive preferences"). These preferences reflect "Federal policy that, where possible, an Indian child should remain in the Indian community." H.R. REP. NO. 95-1386, at 23. ICWA also allows an Indian child's parent or tribe to bring an action to invalidate a foster-care placement or termination-of-parental-rights determination upon a showing that certain provisions of ICWA, §§ 1911-1913, have been violated. 25 U.S.C. § 1914.

3. Final Rule: Indian Child Welfare Act

On June 6, 2016, after notice and comment, Interior issued a Final Rule to "promote[] the uniform application of Federal law designed to protect Indian children, their parents, and Indian Tribes." *Indian Child Welfare Act Proceedings*, Final Rule, 81 Fed. Reg. 38,778-01 (published June 14, 2016).[2] The Final Rule addresses the fact that "implementation and interpretation of the Act has been inconsistent across States and sometimes can vary greatly even

[1] The term "Indian child" is defined as "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] Interior had previously issued regulations addressing tribal reassumption of jurisdiction, notice procedures, and federal grants for child and family programs, 44 Fed. Reg. 45,096 (Jul. 31 1979), which were revised in 1994, 59 Fed. Reg. 2,248-01 (Jan. 13, 1994), as well as guidelines for Indian child-custody proceedings in state courts, 44 Fed. Reg. 67,584 (Nov. 26, 1979), which were revised, 80 Fed. Reg. 10,146-02 (Feb. 25, 2015).

within a State." *Id.* at 38779. The Final Rule promotes consistent application by clarifying things like when the statute applies, 25 C.F.R. § 23.103, when a state court is required to provide notice of a child-custody proceeding to parents and the applicable Indian tribe(s), *id.* § 23.111, how an Indian child's membership in an Indian tribe is determined, *id.* § 23.108, and what constitutes good cause to deviate from the placement preferences, *id.* §§ 23.129-23.132.

4. Related Judicial Proceedings

The allegations in the Complaint reference four state-court child-custody proceedings, occurring in Texas, Minnesota, and Nevada, that concern the Indian children that Individual Plaintiffs either have already adopted or seek to adopt. First, Chad and Jennifer Brackeen have successfully petitioned in Texas family court to adopt A.L.M., an Indian child who the Brackeens were previously fostering. Compl. ¶152. The Brackeens' adoption was finalized nearly three months ago, on January 8, 2018. *See* Crawford Affidavit, attached as Exhibit 1, Appendix at 5. Second, the Complaint alleges ongoing abuse and neglect proceedings in Nevada involving Baby O., an Indian child fostered by Nick and Heather Libretti, in which biological parents Altagracia Soccorro Hernandez and Baby O's birth father, the Nevada Division of Child & Family Services, and the Ysleta del Sur Pueblo may be parties or have interests. *Id.* ¶¶ 157-164. The Complaint further asserts the outcome of that proceeding will likely be "an agreement allowing the Librettis to adopt Baby O." *Id.* ¶ 168. Third, the Complaint includes two ongoing child-custody proceedings, one child-dependency proceeding and one petition to adopt, in Hennepin County, Minnesota, involving Child P., an Indian child who Jason and Danielle Clifford have in the past fostered and who now lives with her maternal grandmother. *Id.* ¶¶ 173-177. Notwithstanding Child P. being reunited with her maternal grandmother, the Cliffords have petitioned to adopt Child P. *Id.* ¶¶ 176-177. Child P.'s maternal grandmother, Hennepin County

Family Services, and the White Earth Band of Ojibwe Tribe may be parties or have interests in these proceedings. In addition, State Plaintiffs also reference an unspecified number of child-custody proceedings involving Indian children within their States.

5. Summary of Plaintiffs' Claims

Constitutional Claims. All Plaintiffs allege that §§ 1901-1923 and 1951-1952 of ICWA violate the Commerce Clause of Article I of the Constitution (Count Two), *id*. ¶¶ 266-281; that certain provisions of ICWA, the Final Rule, and 42 U.S.C. §§ 622(b)(9) and 677(b)(3)(G) of the Social Security Act violate the Tenth Amendment (Count Three), *id.* ¶¶ 282-323; and that ICWA's adoptive preferences and provisions providing for vacatur in the event of fraud and duress violate the Equal Protection Clause of the Fifth Amendment (Count Four), *id.* ¶¶ 324-338. Individual Plaintiffs allege that ICWA's placement preferences violate their substantive due process rights under the Fifth Amendment to an intimate familial relationship with the Indian children they foster (Count Six). *Id.* ¶¶ 350-367. State Plaintiffs further allege that certain provisions of ICWA and the Final Rule violate the non-delegation doctrine implicit in Article I of the Constitution (Count Seven). *Id.* ¶¶ 368-376.

Administrative Procedure Act Claims. The remainder of the Complaint restates these claims as violations of the Administrative Procedure Act ("APA"). Individual Plaintiffs allege that the Final Rule violates their substantive due process rights under the Fifth Amendment (Count Five), *id.* ¶¶ 339-349, as well as the rights of Indian children not party to this case, *id*. ¶¶ 342-343. All Plaintiffs claim that the Final Rule violates the Equal Protection Clause,[3] Commerce Clause, Tenth Amendment, and non-delegation principles under Article I of the

[3] Individual Plaintiffs again assert the equal-protection rights of non-party Indian children. Compl. ¶¶ 251, 253. State Plaintiffs allege here and in Count Four that ICWA and the Final Rule violate the rights of their state citizens. *Id*. ¶¶ 250; 336.

Constitution. They also claim that the Final Rule is arbitrary and capricious because it differs from the 1979 guidelines, and because its provisions on good cause to deviate from the placement preferences violate ICWA itself (Count One), *id*. ¶¶ 247-265.

STANDARD OF REVIEW

Defendants seek dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. "Federal courts are courts of limited jurisdiction," and "[i]t is to be presumed that a cause lies outside this limited jurisdiction . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) (internal citations omitted). Accordingly, "[s]tanding to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within [their] proper judicial sphere." *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 496-97 (5th Cir. 2007). "Plaintiffs always have the burden to establish standing." *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017).

When challenging subject-matter jurisdiction under Rule 12(b)(1), a party can make a "facial attack" or a "factual attack." *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). If the party files a Rule 12(b)(1) motion without submitting evidence such as affidavits or testimony, it is considered a "facial attack," and the court looks only at the sufficiency of the allegations in the pleadings and assumes them to be true. *Id.*; *Davila v. United States*, 713 F.3d 248, 255 (5th Cir. 2013).[4] If a defendant makes a "factual attack" upon the court's subject matter jurisdiction, "the defendant submits affidavits, testimony, or other evidentiary materials." *Paterson*, 644 F.2d at 523. Nevertheless, the Court need not accept legal conclusions, including

[4]As argued herein, Plaintiffs' claims can be dismissed for lack of standing on the basis of the insufficient allegations in the Complaint alone. If the Court disagrees, however, Defendants plan to seek discovery relating to jurisdiction.

those "couched as a factual allegation," as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted).

ARGUMENT

A. Individual Plaintiffs Lack Standing

For Article III standing to sue, a plaintiff must demonstrate that it has "(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). As an initial matter, the Cliffords have alleged injury only from ICWA's § 1915(a) (the adoptive preferences); the Librettis have alleged injury from Final Rule § 23.132(c)(5) (regarding findings of unavailability of preferred placement);[5] and the Librettis and the Brackeens have alleged injury from § 1914 (invalidation of foster-care or termination-of-parental-rights decisions) and § 1913(d) (vacatur of voluntary adoptions if there is fraud or duress) and implementing provisions of the Final Rule, §§ 23.136 and 23.137. Plaintiffs, therefore, lack standing to challenge any other provision of ICWA or the Final Rule. *See Crane v. Napolitano*, 920 F. Supp. 2d 724, 741-43 (N.D. Tex. 2013) (O'Connor, J.), *aff'd sub nom. Crane v. Johnson*, 783 F.3d 244, 250 (5th Cir. 2015) (dismissing several counts of complaint that challenged statutory provisions unrelated to the injuries alleged for standing).[6] And even where

[5] In their Second Amended Complaint, the Brackeens and the Librettis have added general allegations against §§ 1913-1915(a) based on the abstract possibility that they might someday adopt another Indian child, *see* Compl. ⁋⁋ 259-60, but as discussed *infra* Sections A.2 and A.3, these allegations are too speculative to support standing. They do not therefore, have standing to bring Counts Five and Six.

[6] Individual Plaintiffs thus lack standing to pursue certain claims alleged in Count One, *see* Compl. ¶ 255, and Count Three, *see id*. ¶¶ 296-298; 300-301; 304-306; 308; 313-314. Claims made generally or that encompass multiple provisions similarly must be narrowed to a challenge to one of these three provisions. *See, e.g.*, Compl. ¶¶ 252; 256 (Count One); 274 (Count Two); 307 (Count Three); 331 (Count Four).

Individual Plaintiffs assert injury due to ICWA or the Final Rule—§§ 1915(a), 1914, 1913(d), and §§ 23.132(c)(5), 23.136, and 23.137—they fail to demonstrate an imminent, concrete harm that is fairly traceable to ICWA, or redressable by this Court. All of their claims, therefore, must be dismissed.

1. The Brackeens' claims are moot because the Texas court has finalized their adoption of A.L.M.

Even when they filed their First Amended Complaint, the Brackeens' adoption of A.L.M. was all but inevitable. The lower court's initial unfavorable judgment had been set aside and the case remanded, with no alternative placements suggested by any party, leaving the Brackeens as the only potential placement for A.L.M. Compl. ¶ 151. Indeed, Interior learned that the Brackeens' adoption was finalized not long after the First Amended Complaint was filed and noted as much in the First Motion to Dismiss. *See* Exhibit 1, Appendix at 5 (stating that the adoption was finalized on January 8, 2018). A.L.M.'s adoption by the Brackeens renders their claims moot. Dismissal for mootness is required if "an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point in the litigation." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (internal quotations omitted). Because A.L.M. has been adopted by the Brackeens, neither A.L.M. nor the Brackeens continue to be party to a child-custody proceeding such that the adoptive preferences could apply.

2. The Brackeens have not alleged imminent injury that is fairly traceable to, or redressable by eliminating § 1915(a), § 1914, or § 1913(d)

Injury in Fact. Even if their claims were not moot, the Brackeens have not established standing. The Brackeens no longer allege injury from § 1915(a), noting only that they "intend to provide foster care for, and possibly adopt, additional children." Compl. ¶ 154. Whether ICWA might affect possible future adoptions of unknown children is purely speculative and Plaintiffs

seek to "manufacture standing . . . based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l*, 568 U.S. 398, 415 (2013). Any injury based on the hypothetical future adoption of an unidentified child who "may be an Indian child," *see* Compl. ¶ 154, is too speculative to support standing.[7]

More speculative still are the Brackeens' allegations that § 1913(d), ICWA's provision allowing for vacatur in the event of fraud and duress, and § 1914, a provision which permits certain parties to challenge the state court's foster-care or termination-of-parental-rights decisions for violating ICWA, threaten the Brackeens' adoption of A.L.M. Compl. ¶ 153. The Brackeens provide no basis for believing that any possible invalidation or vacatur is "imminent." Indeed, § 1913(d) only permits vacatur of a voluntary adoption (i.e., from biological parents whose rights were not under threat of termination by the state); and the Complaint does not even allege that the adoption of A.L.M. is voluntary such that § 1913(d) *could* apply, much less that the adoption is likely to be challenged based on fraud or duress.

Nor have the Brackeens provided any basis for believing that any petition to invalidate decisions relating to A.L.M.'s foster-care placement or the termination of his parents' rights under § 1914 is imminent, much less that any reviewing court would then exercise its discretion to invalidate A.L.M.'s adoption. For the Brackeens to suffer the injury on which their § 1914 claims are based, the following would have to occur:

(1) A.L.M., A.L.M.'s biological parents, or the Navajo Nation (who entered into a binding settlement agreement with the Brackeens) would have to determine, against their apparent interests, that the state court violated provisions of ICWA relating to A.L.M.'s foster-

[7] If the Brackeens had alleged injury from § 1915(a), their claim would not be ripe for many of the same reasons. *See Contender Farms, L.L.P. v. U.S. Dep't of Agriculture*, 779 F.3d 258, 267 (5th Cir. 2015) ("The ripeness and standing analyses are closely related . . .").

care or the termination of parental rights proceedings (specifically, that the state court violated Section 1911, 1912, or 1913) and would have to petition another court to review the alleged violations;

(2) The reviewing court would have to accept jurisdiction,[8] agree with petitioners, and further determine that it is appropriate to invalidate the state-court foster-care or termination-of-parental-rights action, *see* 25 C.F.R. § 23.137(b) (noting the reviewing court's discretion to determine if relief for a violation of ICWA warrants invalidation of the action); and

(3) Some court—the reviewing court or another court with jurisdiction—would need to conclude that the invalidation of the foster-care or termination-of-parental-rights action necessitates invalidating A.L.M.'s adoption by the Brackeens, since invalidation of an adoption is not expressly provided for by § 1914. *See* 25 U.S.C. § 1914 (allowing challenges to "foster care placement or termination of parental rights under State law").

The Brackeens have alleged nothing that suggests that any of these steps represent more than a "fear[] of hypothetical, future harm that is not certainly impending." *Clapper*, 568 U.S. at 416.

Causation. The Brackeens do not allege injury from ICWA's adoptive preferences or the elaboration of those preferences in the Final Rule. Even if the Brackeens were to adopt another child and that child were an Indian child, it does not follow that ICWA's adoptive preferences would apply. For the adoptive preferences to have an effect on the future adoption by the Brackeens of an unspecified Indian child, another prospective adoptive parent would have to formally indicate a desire to adopt the same child in order to trigger the order of priority set forth

[8] A reviewing court may well conclude, as the Tenth Circuit did in *Morrow v. Winslow*, 94 F.3d 1386, 1393-95 (10th Cir. 1996), that the appropriate response to a § 1914 petition is abstention.

in Section 1915(a). *See Adoptive Couple*, 570 U.S. at 654 (noting that the adoptive preferences "are inapplicable in cases where no alternative party has formally sought to adopt the child"). Second, even if another prospective parent were to materialize, both the statute and the Final Rule provide that state courts can deviate from the placement preferences for good cause, including based on the views of an Indian child's biological parents. *See* 25 C.F.R. § 23.132(c)(1); Compl. ¶ 141 (alleging that "A.L.M.'s biological parents . . . each testified that they . . . preferred A.L.M.'s adoption by the Brackeens").

The Brackeens have also failed to allege why any threat of vacatur in the event of fraud or duress is caused by § 1913(d) of ICWA when the proximate cause would be the purported fraud or duress, not the statute. In any event, existing Texas law, like ICWA, also would allow collateral attack on an adoption obtained by fraud or duress. *See In re E.R.*, 385 S.W.3d 552, 562 n.21 (Tex. 2012) (concluding that there was no statute of limitations to unwind an adoption for due process violations and citing cases with claims of fraud or duress).

Nor is the alleged threat of invalidation upon the filing of a § 1914 petition "fairly traceable" to Section 1914. As explained above, a would-be petitioner under § 1914 would have to show that the state court or the parties to the underlying action violated Section 1911, 1912, or 1913 of ICWA; it would be that party's substantive violation, not the procedural right of review, that would be the cause of any harm to the Brackeens. Furthermore, the intervening exercise of the reviewing court's discretion on several points of law—whether the court should consider the petition, whether the underlying action should be invalidated, whether there are further consequences with respect to any related adoption—means that any injury to the Brackeens "results from the independent action of some third party not before the court," not from § 1914. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976).

Redressability. The crux of the Brackeens' complaint appears to be that Texas supported A.L.M.'s placement with a Navajo family, and that the state court adjudicating the Brackeens' adoption petition agreed with Texas' position that the Brackeens had failed to demonstrate good cause to deviate from the adoptive preferences. *Id*. ¶¶ 142-143. This alleged past injury, by one of the State Plaintiffs, is not redressable by the injunctive and declaratory relief the Brackeens seek. *See In re Stewart*, 647 F.3d 553, 557 (5th Cir. 2011) ("Absent [] a showing [of real and immediate threat that injury will occur again in the future], there is no case or controversy regarding prospective relief, and thus no basis in Article III for the court's power to issue an injunction").

As noted above, the Brackeens are subject to a threat of vacatur in the event of fraud or duress pursuant to Texas law anyway, such that declaring § 1913(d) unconstitutional would not prevent the biological parents from seeking similar relief in the event of fraud or duress. And the court cannot redress any injury alleged from § 1914 that is not fairly traceable to the challenged action of the defendant, as opposed to the discretion of any reviewing court. *See Simon*, 426 U.S. at 42. As a result, the Brackeens fail to establish that they have suffered an imminent harm that results from §§ 1913(d), 1914, and 1915(a), or that the relief the Brackeens seek would redress any purported injury.

3. The Librettis have not alleged an injury in fact that is fairly traceable to, or redressable by eliminating 25 C.F.R. § 23.132(c)(5)

The Librettis claim that the Final Rule's guidance that good cause to depart from the placement preferences should be found only after a diligent search for placements that satisfy the

adoptive preferences, 25 C.F.R. § 23.132(c)(5), delays their possible future adoption of Baby O.[9] Compl. ¶ 166. The Complaint fails to allege that the Librettis have been denied the ability to adopt Baby O. or that Baby O. has been removed from their care. Indeed, the Librettis note in the Second Amended Complaint that, although alternative placements for Baby O. were proposed, "many . . . withdrew before completing home studies" and "[n]one . . . seeks to adopt." *Id*. As the Librettis acknowledge, "negotiations . . . may result in an agreement allowing [them] to adopt Baby O." *Id*. ¶ 168.[10] Thus the Librettis allege nothing more than a speculative harm from a purported delay, but they make no showing that they have served as foster parents for Baby O. for an unusually long time. Based on the facts alleged in the Complaint, the Librettis have lived with Baby O. for at most twenty-three months. Publicly available data, however, suggests that most adoptions in Nevada take longer.[11]

Moreover, under the circumstances, any injury to the Librettis from delay would not be fairly traceable to ICWA. As discussed above, the state court may find that good cause to

[9] In their Second Amended Complaint, Plaintiffs added a generic allegation of injury "by Section 1915's placement preferences and the provisions of the Final Rule purporting to implement those preferences" to each claim. *See, e.g.*, Compl. ¶¶ 260, 262 (Count 1), 276-278 (Count 2), 318-320 (Count 3), 333-335 (Count 4), 345-347 (Count 5), 361 (Count 6). Conclusory allegations like these do not support standing where they have alleged no factual basis for injury. *See Jebaco, Inc. v. Harrah's Operating Co., Inc.*, 587 F.3d 314, 318 (5th Cir. 2009) ("[T]he complaint must allege 'more than labels and conclusions.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

[10] In the event that the Librettis do settle, their case would also be moot. *See supra* Section A.1. Given that they have not yet adopted Baby O., the Librettis' alleged concern for possible collateral attack, Compl. ¶ 168, is even more speculative than the Brackeens' and fails to support standing for the same reasons. *See supra* Section A.2.

[11] In 2014, only 1.4% of adoptive children in Nevada had been in care for less than 12 months; nearly a third (30.2%) were in care for up to 2 years. *See* U.S. Dept. of Health and Human Services, Child Welfare Outcomes 2010-2014: Report to Congress at 48-49 (July 2015), *available at* https://www.acf.hhs.gov/cb/resource/cwo-10-14 (last visited April 5, 2018).

deviate from ICWA's adoptive preferences exists, and may consider the request of Baby O.'s biological parents, Hernandez and E.R.G.[12] *See* Compl. ¶ 162-63; 25 C.F.R. § 23.132(c)(1). Even if the state court declines to find that consent of Baby O.'s parents constitutes good cause, the court controls the manner and extent of the search for a preferred placement: ICWA does not require that Nevada investigate every possible alternative or mandate any particular search.[13] Finally, nothing in ICWA or Nevada state statutes prevents the Librettis from petitioning to adopt as long as they have fulfilled State requirements. *See, e.g.*, Nev. Rev. Stat. § 127.110. Final Rule § 23.132(c)(5), therefore, has no effect on the Librettis.[14]

4. Child P.'s placement with her grandmother is supported by state law and any injury the Cliffords have suffered would not be redressed by enjoining ICWA

The Second Amended Complaint reflects that Child P. has been placed with her grandmother, which accords with Minnesota law. Minnesota law establishes a preference for placements with relatives, like Child P.'s maternal grandmother, independent of ICWA. *See* Minn. Stat. § 259.57(2)(c). Moreover, Minnesota law independently defines what constitutes "good cause" to deviate from ICWA's placement preferences. *See id.* § 260.771(7)(b). Thus,

[12] Hernandez and E.R.G., who put Baby O. up for adoption at birth, Compl. ¶ 156, would not have standing for the same reason: Nothing in ICWA or the Final Rule prevents the state court from finding "good cause" to deviate from the adoptive preferences.

[13] The Final Rule does not mandate criteria to support a deviation from the placement preferences, but rather indicates that the court's determination "*should* be based on one or more of the following considerations." 25 C.F.R. § 23.132(c) (emphasis added). Further, in the absence of other grounds to deviate, the regulations indicate only that a diligent search should be conducted. *Id.* § 23.132(c)(5). The state court determines what constitutes a "diligent search." The Complaint acknowledges that Nevada would conduct its own "normal" review of alternative placements before making an adoption recommendation to the court. Compl. ¶ 165.

[14] The Librettis also claim that they "intend to provide foster care for, and possibly adopt, additional children." Compl. ¶ 170. The Librettis' claim fails to support standing for the same reasons that the Brackeens' claim did not. *See supra* Section A.2.

whether or not the state court applied federal law in determining that Child P. belonged with her grandmother, the same result would have obtained under state law. Any injury that the Cliffords suffered, therefore, by Child P.'s placement with her family, is not redressable by enjoining § 1915(a).

The Cliffords also claim that "because ICWA contains no . . . provision" for an evidentiary hearing on a motion to adopt, the court "declined to allow [them] an evidentiary hearing on their motion, which would otherwise be guaranteed . . . under state law." *See* Compl. ¶ 176. They do not allege any prejudice from the denial of an evidentiary hearing. In addition, Section 1915(a) is a federal overlay on state proceedings, but does not supplant all state procedures. Section 1915 does not address an evidentiary hearing, and therefore state law governs on that point. The state court's determination that the Cliffords were not entitled to an evidentiary hearing, therefore, was not traceable to ICWA.

5. Individual Plaintiffs lack standing to assert the rights of Indian Children

Individual Plaintiffs do not allege injury to A.L.M., Baby O., or Child P., though they purport to bring claims on their behalf in Counts One and Five. *See* Compl. ¶¶ 251, 253; 342-343. Even if they had alleged injury to Baby O. and Child P., moreover, as foster parents, the Librettis and the Cliffords lack standing to bring claims to enforce the *children's* respective rights. 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 quotations omitted). As foster parents, the Librettis and the Cliffords do not speak for the Indian children in this case.[15] And the interests of foster parents are "not in parallel and, indeed, are potentially in conflict"

[15] This is not to say that no one could speak for Baby O. and Child P. They were or could have been separately represented in the state courts by guardians ad litem. Compl. ¶ 177 (Child P.); s*ee* Nev. Rev. Stat. § 159.0455 (state court may appoint guardian ad litem by petition).

with the interests of the foster children. *See Elk Grove Unif. Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (holding that non-custodial parent could not pursue claim on behalf of daughter where she disagreed that she was injured). The Indian children's interest in having a permanent placement based on their best interests conflicts with the Librettis' and the Cliffords' intense wish to be that placement, irrespective of what is best for the children.

B. State Plaintiffs Lack Standing to Bring Their Claims

State Plaintiffs lack standing based on parens patriae to assert the interests of their citizens against the federal government. State Plaintiffs allege that they "represent the interests of many children within their custody and care" and "represent the interests of their resident parents who are thinking about fostering and/or adopting a child." Compl. ¶ 26. "A State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 610 n.16 (1982) (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923) and *Missouri v. Illinois*, 180 U.S. 208, 241 (1901)).[16] The Supreme Court has made clear that "it is no part of [a state's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government." *Mellon*, 262 U.S. at 485-86. In this regard, the Court emphasized, "it is the United States, and not the state, which represents [its citizens] as *parens patriae*."[17] *Id.* at 486. Thus, State Plaintiffs' efforts to represent the interests of their citizens as a basis for standing in this case must be rejected.

[16] Some federal courts have recognized a state's ability to maintain a *parens patriae* suit against the federal government in order to *enforce* rights guaranteed by a federal statute. *See Texas v. United States*, 86 F. Supp. 3d 591, 626 (S.D. Tex. 2015), *aff'd on other grounds*, 809 F.3d 134 (5th Cir. 2015), *as revise*d (Nov. 25, 2015). But *Mellon* makes clear that suits brought by a state to protect its citizens from the *application* of a federal statute are barred, 262 U.S. at 486.

[17] This is particularly true in the context of Indian affairs, where the Constitution expressly provides for congressional authority. Here, Congress investigated the issue and opted to exercise its authority to protect Indian children, as well as the continued existence of Indian tribes, from

State Plaintiffs have failed to allege fiscal injury. Although State Plaintiffs allege in a conclusory manner that their States' compliance with ICWA and the Final Rule imposes costs on the States, Compl. ¶¶ 23-25; 53; 263, the purported costs are "purely speculative, and at most only remote and indirect." *See Florida v. Mellon*, 273 U.S. 12, 18 (1927). The Complaint provides no specificity of the fiscal burden, if any, that is directly caused by the challenged provisions of ICWA or the Final Rule. Despite State Plaintiffs listing of an approximate amount of federal funding they have received in a certain fiscal years under Title IV-B and Title IV-E programs, Compl. ¶¶ 76-78, Plaintiffs have not alleged any concrete fiscal impact to State funds, or that Federal Defendants either have withheld, or threatened to withhold. Although "expenditure of state funds may qualify as an invasion of a legally protected interest sufficient to establish standing under the proper circumstances," *Crane v. Napolitano*, 920 F. Supp. 2d at 743, State Plaintiffs must provide concrete allegations of costs. *See id*. at 745-46 (finding "that Mississippi's asserted fiscal injury is purely speculative because there is no concrete evidence that the costs [to the State] . . . increased or will increase as a result of" the federal action).

C. All Plaintiffs Lack Standing to Challenge ICWA Because Defendants Are Not the Cause of Any Alleged Injuries and Relief Targeting Defendants Will Not Provide Redress

1. Defendants are not the cause of Plaintiffs' alleged injuries from ICWA

All Plaintiffs lack standing to bring this suit because named Defendants are not the cause of any injury from ICWA's application to Plaintiffs. Plaintiffs' claimed injuries of delay and expense, if valid, flow from the implementation of ICWA by state courts, not from any actions by Defendants. ICWA specifies no enforcement role for Defendants, and neither Interior or

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what it deemed unwarranted and improper removal of Indian children from their extended family. *See* H.R. REP. NO. 95-1386, at 27.

HHS or any of their respective officers have enforced or are threatening to enforce ICWA against any Plaintiff, State or individual. Instead, ICWA is typically "enforced" by state courts, which interpret and apply ICWA in conjunction with state law in child-custody proceedings involving Indian children. The parties to such proceedings, who are best positioned to contest violations of the statute, also argue for the application of ICWA's standards. Thus, even if Plaintiffs could establish injury due to ICWA, this suit fails to meet the causation and redressability prongs of the standing inquiry. *See Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc) (plaintiffs lack standing to bring suit against government defendant "who is without any power to enforce the complained-of statute").

ICWA's only enforcement-related provision is § 1914, which provides that "[a]ny Indian child," his or her "parent or Indian custodian," or the "Indian child's tribe" may "petition any court of competent jurisdiction" to challenge the termination of parental rights or foster care placements made in violation of the statute. 25 U.S.C. § 1914. Section 1914 challenges are typically brought in state court. *See In Interest of J.J.T.*, No. 08-17-00162-CV, 2017 WL 6506405, at *2 (Tex. App. Dec. 20, 2017) (Navajo Nation has standing to bring § 1914 claim).[18] And the existence of § 1914, along with the ability of parties to appeal adverse state-court child-welfare proceedings pursuant to state law, spurs state courts to ensure ICWA's requirements are met. *See, e.g., In Interest of C.C.*, No. 12-17-00114-CV, 2017 WL 2822518, at *2 (Tex. App. June 30, 2017); *Matter of Custody of S.E.G.*, 521 N.W.2d 357 (Minn. 1994) (reversing adoptive placement decision for failure to demonstrate good cause); *Matter of Adoption of T.R.M.*, 525

[18] Although § 1914 grants any "court of competent jurisdiction," including a federal court, authority to consider a challenge, § 1914 has not been construed to authorize "federal court supervision into ongoing state adoption proceedings." *Morrow*, 94 F.3d at 1396.

N.E.2d 298, 311-12, (Ind. 1988) (reviewing and affirming good cause departure from § 1915 preferences).

These "enforcement" mechanisms are in accord with the statutory scheme crafted by Congress, which does not "oust the States of their traditional jurisdiction over Indian children falling within their geographic limits." H.R. REP. NO. 95-1386, at 19. State courts apply ICWA, when relevant, in state proceedings otherwise governed by state law. *In re J.J.C.*, 302 S.W.3d 896, 899 (Tex. App. 2009). And, as a practical matter, state courts regularly interpret ICWA and determine how it best applies case-by-case in state court proceedings. *See, e.g. Matter of Adoption of T.R.M.*, 525 N.E.2d at 311 ("Primary responsibility for interpreting the language of [ICWA] rests with the courts deciding the custody proceedings of Indian children."). In doing so, state courts should take into account the relevant Interior guidelines and regulations, but in the end the state courts both apply ICWA and determine whether its requirements have been met without direct federal involvement in child-welfare proceedings. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (injury resulting from "independent action of [a] third party not before the court" does not meet the causation requirement for standing) (internal quotations omitted).

There are no allegations that any Defendants are either currently enforcing, threatening imminent enforcement, or have ever enforced ICWA's requirements against Plaintiffs. *See Younger*, 401 U.S. at 42 ("[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs" in federal lawsuits.); *Crane v. Johnson*, 783 F.3d at 254-55 (no standing where there was "no evidence" of any threat of sanctions); *Okpalobi*, 244 F.3d at 426. Absent such allegations, Plaintiffs cannot trace their alleged injuries to Defendants.

2. This Court cannot redress Plaintiffs' alleged harms from ICWA through injunctive or declaratory relief targeting Defendants

Injunctive or declaratory relief from this Court against Defendants cannot redress Plaintiffs' alleged injuries. A court's remedial power is limited to the parties before it, those under the parties' control, and those in concert with them. Fed. R. Civ. P 65(d)(2); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 108-12 (1969). A judgment by this Court would bind Defendants but would leave third parties free to invoke their rights under ICWA. *See Okpalobi*, 244 F.3d at 427 ("[T]hese defendants cannot prevent purely private litigants from filing and prosecuting a cause of action under [the statute]").

And a declaratory judgment addressing the constitutionality of ICWA would not bind state courts that are applying ICWA in the cases before them. *See Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."); *Omniphone, Inc. v. Sw. Bell Telephone Co.*, 742 S.W.2d 523, 526 n.3 (Tex. App. 1987) ("While a decision of a federal court, other than the Supreme Court, may be persuasive in a state court on a federal matter, it is, nevertheless, not binding, *since the state court owes obedience to only one federal court, namely, the Supreme Court*.") (emphasis in original); *Ind. Dep't. of Public Welfare v. Payne*, 622 N.E.2d 461, 468 (Ind. 1993) (same); *Kornman v. Blue Cross/Blue Shield of La*, 94-306, p. 4 (La. App. 5 Cir. 9/26/95); 662 So.2d 498, 500 (same). This means that because State Plaintiffs have opted to challenge ICWA in Texas federal court rather than in their own state courts, their own courts may well continue to treat ICWA as constitutional, regardless of the outcome of this case. And for Individual Plaintiffs involved in proceedings in Nevada and Minnesota, the possibility of

relief is even more remote, since those States and state courts are not a party to this suit. That lack of redressability is fatal for the standing of all Plaintiffs.

None of this suggests Plaintiffs lack recourse for their alleged grievances. Nothing prevents Individual Plaintiffs from challenging the constitutionality of ICWA in the context of state-court proceedings in which they seek to adopt children.[19] And State Plaintiffs can raise (or should have raised) their grievances in their own state courts.[20] In contrast, this Court would be offering an advisory opinion, and whether that will provide redress is purely speculative.[21]

3. Plaintiffs cannot challenge the Final Rule as an indirect attack on ICWA because they do not have standing to challenge ICWA directly

Plaintiffs also seek to invalidate the Final Rule as unconstitutional on comparable grounds under the APA. The APA does not relieve them of the obligation to show standing, however. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 162-63 (1997). The Final Rule does two things: It incorporates standards found in ICWA itself and in places "clarifies" those standards by elaborating procedural and substantive requirements that constitute best practices in implementing ICWA. 81 Fed. Reg. at 38,779-80. Where Plaintiffs challenge requirements that

[19] State courts have routinely considered questions related to the constitutionality of ICWA's provisions. *See, e.g., Matter of Appeal in Pima Cty. Juvenile Action No. S-903*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981) (equal protection challenge to ICWA); *In Interest of Armell*, 550 N.E.2d 1060, 1067-68 (Ill. App. Ct. 1990) (equal protection and due process challenge); *Matter of Guardianship of D.L.L.*, 291 N.W.2d 278, 280-81 (S.D. 1980) (equal protection and Tenth Amendment challenge).

[20] To the best of Defendants' knowledge, State Plaintiffs have applied ICWA in their respective state courts for multiple decades without asserting that the statute suffers from constitutional infirmities.

[21] The Complaint attempts to avoid this argument by adding HHS and Secretary Azar as Defendants and by challenging the constitutionality of provisions of the SSA that award grant money in exchange for state implementation of federal child welfare policy objectives. However, as discussed below, the HHS Defendants do not enforce ICWA either.

merely repeat statutory requirements, there is no redress because even in the absence of the regulatory requirement, ICWA's requirements still apply.[22]

Plaintiffs' constitutional challenges to regulatory provisions that elaborate on the statutory requirements also fail for lack of standing. For example, Plaintiffs' equal protection challenge to 25 C.F.R. § 23.132(b) (addressing "good cause" under the adoptive placement preferences) appears to turn not on the particular requirements of the Final Rule but on the fact that the provision applies, like ICWA, to cases involving children who meet the definition of "Indian child" in the statute itself. Thus, invalidation of § 23.132(b) would not provide redress because Plaintiffs' alleged harm actually flows from ICWA itself, not the Final Rule's elaboration of good cause requirements. The same is true for Plaintiffs' equal protection challenge to 25 C.F.R. §§ 23.136-37, Compl. ¶ 253, because those provisions just reiterate requirements found in ICWA. *Compare* 25 C.F.R. § 23.136(a) *with* 25 U.S.C. § 1913(d); 25 C.F.R. § 23.137 *with* 25 U.S.C. § 1914. It is also true for Plaintiffs' Tenth Amendment, non-delegation, and substantive due process claims challenging the Final Rule's reiteration of ICWA's placement preferences. Compl. ¶¶ 254-255; 298; 342; 372.[23]

[22] This is true, for example, of Plaintiffs' challenge to the Final Rule's restatement of the adoptive preferences, *compare* 25 C.F.R. § 23.130 *with* 25 U.S.C. § 1915(a); their challenge to the definition of "Indian child," *compare* 25 C.F.R. § 23.2 *with* 25 U.S.C. § 1903(4); and their challenge to the two year statute of limitations for vacatur in the event of fraud or duress, *compare* 25 C.F.R. § 23.136(a) *with* 25 U.S.C. § 1913(d). *See* Compl. ¶¶ 250; 254-255; 342-343 (challenge to adoptive preferences in Final Rule); *id*. ¶ 250 (challenge to "Indian child" definition in Final Rule); *id*. ¶¶ 253; 344 (challenge to vacatur for fraud and duress in Final Rule).

[23] This rationale does not extend to instances in which Plaintiffs allege that the Final Rule violates ICWA itself by going beyond ICWA's requirements or that aspects of the Final Rule are arbitrary and capricious. For example, it does not apply to Plaintiffs' APA claim that the Final Rule constitutes an unexplained departure from the Department's prior policy. Compl. ¶ 256.

D. Plaintiffs Lack Standing to Bring Claims against HHS and Their Claims are Not Ripe

Plaintiffs add three new defendants: the Department of Health and Human Services (HHS), the Secretary of HHS, Alex Azar ("the HHS Defendants"), as well as the United States to their Second Amended Complaint, and a challenge to two provisions of the Social Security Act—42 U.S.C. § 622(b)(9), regarding the Title IV-B Subpart 1 Stephanie Tubbs Jones Child Welfare Services Program, and § 677(b)(3)(G), regarding the Title IV-E Chafee Foster Care Program for Successful Transition to Adulthood ("Chaffee Program") federal funding to states. Compl. ¶¶ 68-81.

With respect to Title IV-E funding, Plaintiffs challenge a provision of 42 U.S.C. § 677, through which federal funding is provided to States to support programs that assist "youth who have experienced foster care at age 14 or older" in their transition to adulthood. 42 U.S.C. § 677(a)(1). The Chaffee Program is intended to provide funding to states to prepare teenagers and young adults in foster care, as well as former foster care recipients, to achieve self-sufficiency. *Id*. § 677(a).[24] Such funding is contingent upon submission of a state plan which meets specified federal criteria and includes certifications by the state chief executive officer regarding how such funding will be used. *Id.* §§ 677(b)(2)-(3). Plaintiffs seek relief with regard to Section 677(b)(3)(G), which requires a certification that the state chief executive officer consult with Indian tribes in the state about the Chafee plan programs, that such programs will assist Indian children as well as non-Indian children and that the State will negotiate in good

[24] *See* John H. Chafee Foster Care Independence Program, https://www.acf.hhs.gov/cb/resource/chafee-foster-care-program (last visited April 5, 2018). The Chafee Program is separate from federal funding provided to states for foster care maintenance payment programs, which have their own eligibility requirements. *See* 42 U.S.C. § 672.

faith with Tribes that wish to administer such programs for Indian children under their authority. *Id.* § 677(b)(3)(G). This provision does not expressly require ICWA compliance, although Plaintiffs apparently believe otherwise. Compl. ¶ 309.

The second provision Plaintiffs target concerns Title IV-B funding to support state programs providing child and family services in accord with federal policy goals. 42 U.S.C. § 621. To qualify for such funding States must jointly develop a plan with HHS that comports with certain federal requirements, one of which is that a plan describe "the specific measures taken by the State to comply with the Indian Child Welfare Act." *Id.* § 622(b)(9). Plaintiffs challenge this provision and allege injury in that if they do not agree to comply with this requirement, a portion of their Title IV-B federal funding may be withheld. Compl. ¶ 17. Plaintiffs also allege injury from the fact that HHS reviews state programs funded pursuant to Title IV-E and IV-B to determine if they comply with 42 U.S.C. § 622(b)(9). 45 C.F.R. § 1355.34(b)(2)(ii)(E); Compl. ¶¶ 74-75.

1. Plaintiffs have not alleged an actual injury with regard to Title IV-B and IV-E funding

Plaintiffs' allegations against HHS and Secretary Azar boil down to the bare proposition that because HHS possesses the authority to withhold Title IV-E or IV-B funding based on non-compliance with certain federal requirements, then HHS "*will* reduce or deny funding to States that do not comply with ICWA." Compl. § 81 (emphasis added). Beyond this conclusory and speculative allegation, Plaintiffs allege no facts indicating that HHS has, intends to, or has threatened to withhold federal funding or taken any other action against State Plaintiffs because of ICWA. Plaintiffs do not allege that any State Plaintiffs' Title IV-E or IV-B plan has not received HHS approval or that HHS has found any program funded through Title IV-E or IV-B funds to be non-compliant with federal law. Plaintiffs do not even allege that they intend to

refuse to comply with any Title IV-E or IV-B funding requirements. Put simply, Plaintiffs have not alleged an actual injury relating to HHS or the two provisions they seek to challenge—§§ 622(b)(9) and 677(b)(3)(G).

With respect to the § 677(b)(3)(G) certification requirement, which only applies to the Chafee Program (and not all Title IV-E funding), Plaintiffs have not alleged that they have applied for the Program, let alone that they have been denied federal funding for failure to comply with the application requirements. Nor have they alleged any adverse action on the part of HHS, or any Defendant for that matter, taken against any Plaintiff relating to funding derived from the Chafee Program.

Plaintiffs' challenge to the § 622(b)(9) state plan requirement for Title IV-B funding fails for the same reason. In order for a state to receive Title IV-B Subpart 1 funding, it must jointly develop a plan with HHS that meets nineteen different criteria relating to state child-welfare services, one of which is to provide a description of a state's efforts to comply with ICWA. 42 U.S.C. § 622(b). The HHS regulation sets out the timing and process for HHS's review of a state's conformity with plan requirements, 45 C.F.R. § 1355.32-33. The regulation also states that the Administration for Child and Families (ACF) will determine whether a state agency is in substantial conformity with Title IV-B and Title IV-E plan requirements, *id.* § 1355.34(a), that if a State is not found to be in substantial conformity with the requirements, then the State will be required to develop a program improvement plan, *id.* § 1355.35(a), and that a State "will have the opportunity to develop and complete a program improvement plan prior to any withholding of funds," *id.* § 1355.36(b)(1). The HHS regulation further provides for administrative appeals and judicial review should funding be withheld from a State. *Id.* § 1355.39. Plaintiffs have not alleged any of these steps have occurred or are impending due to nonconformity with §

622(b)(9). At best, Plaintiffs are alleging a speculative future injury that may occur only if the following takes place: HHS conducts a review of a State's plan as part of the full Child and Family Services Review or as a partial review triggered by a State submitting an inadequate Title IV-B Subpart 1 state plan that could not be resolved through informal negotiation, HHS determines the State is not in substantial conformity with plan requirements, efforts to resolve the matter through a program improvement plan fail, and HHS ultimately makes a determination to withhold funds. This is exactly the type of "speculative chain of possibilities" based on potential future harms that the Supreme Court has determined does not establish injury. *Clapper*, 568 U.S. at 414.[25] Given Plaintiffs have made no allegations that they have been injured by §§ 622(b)(9) and 677(b)(3)(G), their challenge to those provisions, as well as defendants HHS and Secretary Azar, should be dismissed.

2. Plaintiffs' claims against the HHS Defendants are not ripe and HHS, Secretary Azar, and the United States should be dismissed as defendants.

Like standing, ripeness is "a constitutional prerequisite for the exercise of jurisdiction." *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002); *see also Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 (5th Cir. 2008). For the same reasons that Plaintiffs lack standing to bring claims against the HHS Defendants, Plaintiffs' claims against the HHS Defendants are not ripe. *See Contender Farms*, 779 F.3d at 267. Plaintiffs seek declaratory relief in anticipation of a future controversy and such a declaratory action "by its very structure, pushes against our insistence upon mature disputes." *Shields*, 289 F.3d at 835. This Court should "look to the

[25] The "speculative chain of possibilities" here is at least as tenuous as in *Clapper*, which involved a challenge to Foreign Intelligence Surveillance Act ("FISA"). The Court concluded that for injury in fact all of the following would have to occur: (1) targeting of individuals that communicate with the plaintiffs; (2) government invocation of the FISA, rather than some other means of surveillance; (3) approval by the FISA court; and (4) actual interception of communications involving the plaintiffs. *Clapper*, 568 U.S. at 410.

practical likelihood that a controversy will become real." *Id.* As noted above, there is presently no case or controversy between the HHS Defendants and Plaintiffs.

Ripeness also has a prudential component designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 286 (5th Cir. 2012) (internal quotation marks omitted); *see also Roman Catholic Diocese of Dallas v. Sebelius*, 927 F. Supp. 2d 406, 424 (N.D. Tex. 2013) (prudential ripeness "means that the case will be better decided later") (internal quotation marks omitted). The court looks to "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Opulent Life*, 697 F.3d at 286 (internal quotation marks omitted).

Here the issues are not fit for judicial resolution. There is no dispute between HHS and a state agency regarding the development of a "plan for child welfare services" that could be funded by federal dollars, 42 U.S.C. § 622(a), nor are there allegations that HHS has reviewed a state agency's conformance with "title IV-B and IV-E plan requirements" and found non-conformity. 45 C.F.R. § 1355.34. Thus, this is not a case where State Plaintiffs are already engaged in an administrative process and allege harm from it. *Compare Texas v. U.S.*, 497 F.3d 491, 499 (5th Cir. 2007). Nor is this a case where HHS has issued some new guidance or regulation that places State Plaintiffs in a situation of non-conformity, with enforcement likely to follow. *Texas v. U.S.*, 201 F. Supp. 3d 810, 823-24 (N.D. Tex. 2016). In fact, there is no dispute with the HHS Defendants at all.

Furthermore, Plaintiffs' challenge to provisions of the Social Security Act does not make ICWA ripe for judicial review. Plaintiffs have not identified any specific provisions of ICWA that are at issue in any failure to jointly develop a Title IV-B funding plan. Nor could they since

there is no such dispute with HHS. Similarly, Plaintiffs have not alleged that any specific ICWA provisions prevent compliance in the context of HHS's review of federally-funded state programs. Judicial review now requires pure speculation about which ICWA provisions would be at issue in a future dispute between the HHS Defendants and Plaintiffs.

The second prong of the prudential ripeness inquiry also warrants dismissal of the newly joined defendants, as well as Plaintiffs' challenge to the Social Security Act. The typical kinds of hardship warranting review include "the harmful creation of legal rights or obligations; practical harms on the interests advanced by the party seeking relief; and the harm of being forced to modify one's behavior in order to avoid future adverse consequences." *Texas*, 497 F.3d at 499 (internal quotation marks omitted). ICWA was enacted in 1978 and for the last forty years State Plaintiffs have implemented it without objection. Accordingly there can be no argument that absent immediate relief, State Plaintiffs will have to modify their behavior or be forced to accommodate newly created legal rights or obligations. If State Plaintiffs have waited forty years to object to ICWA, they can wait longer for an appropriate case or controversy to mature between them and the HHS Defendants.

State Plaintiffs will argue that because large sums of federal money (that they are free to reject) are at issue, they are entitled to challenge ICWA now. That argument, if accepted, means that at any time of their choosing, State recipients of federal grant money can challenge any federal statutory or policy goal enabled through such cooperative federalism.[26]

[26] Even where HHS has found that a program fails to fully comply with statutory and regulatory requirements, withholding of funds is incremental depending upon how many of seven outcomes a state program fails to meet, with penalties increasing each year the nonconformity is not addressed. 45 C.F.R. § 1355.36. Thus, absent further factual development, it is impossible to ascertain how many federal dollars would actually be at issue.

Finally, as noted above, State Plaintiffs do not lack a means to challenge ICWA. They can bring such challenges in their own state courts and if those courts determine that provisions of ICWA are not enforceable on constitutional or other grounds, Plaintiffs can then raise that with HHS, without endangering their receipt of federal dollars in the interim. And if the state courts reject State Plaintiffs' arguments, ICWA will continue to be applied by those courts regardless of whether the State Plaintiffs choose to accept or reject federal dollars to support child welfare programs. For all these reasons, Plaintiffs' challenge to Title IV-B and IV-E is not ripe and the HHS Defendants should be dismissed.

3. Plaintiffs fail to identify any waiver of sovereign immunity by the HHS Defendants or the United States

Plaintiffs cannot join the HHS Defendants or the United States absent showing a waiver of federal sovereign immunity. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980) ("It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued ..., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'") (citation omitted). Given the lack of any concrete agency action by the HHS Defendants for Plaintiffs to challenge, the Administrative Procedures Act does not provide such a waiver. *Doe v. United States*, 853 F.3d 792, 799 (5th Cir. 2017), *as revised* (Apr. 12, 2017) ("[S]overeign immunity is not waived by § 702 unless there has been 'agency action,' as that term is defined in [5 U.S.C.] § 551(13)."). Plaintiffs also cannot demonstrate a waiver of the sovereign immunity of the United States or the HHS defendants on other grounds.[27]

[27]Plaintiffs cite the Tucker Act, 28 U.S.C. § 1346, as a basis to name the United States as a defendant, but that provision is not implicated when there is not a monetary claim against the United States. *Van Drasek v. Lehman*, 762 F.2d 1065, 1068 (D.C. Cir. 1985) ("Although consent to suit is necessary for monetary and non-monetary claims alike, the Tucker Act is not implicated when the plaintiff seeks only declaratory and injunctive relief.")

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

Even if the Court determines that it has subject-matter jurisdiction to hear Plaintiffs' claims, it should abstain from exercising such jurisdiction under *Younger*, 401 U.S. 37, and its progeny. Plaintiffs here seek declaratory and injunctive relief to preclude application of ICWA and the Final Rule in ongoing state-court child-custody proceedings. As Plaintiffs acknowledge, these state-court child-custody proceedings involve important state interests. *See e.g.*, Compl. ¶¶ 37-43 (highlighting State Plaintiffs' interests in domestic relations and child-welfare matters).

The *Younger* abstention doctrine provides that federal courts should abstain whenever a State's interests in an ongoing judicial proceeding "are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987). While *Younger* initially addressed abstention in the context of ongoing state criminal proceedings, the Supreme Court has recognized the applicability of *Younger* in state civil proceedings that are enforcement proceedings akin to criminal prosecutions. *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013).

Here, Plaintiffs' alleged injuries are based on the application of ICWA to state-court child-custody proceedings which qualify as civil enforcement actions under *Younger*. *See Moore v. Sims*, 442 U.S. 415, 423 (1979) (citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)); *see also DeSpain v. Johnston*, 731 F.2d 1171, 1178 (5th Cir. 1984) (*Younger* abstention applies to a challenge to a state abuse and neglect investigation). This Court has also applied *Younger* in the context of constitutional challenges to pending state-court proceedings involving child custody and child support matters. *Stewart v. Nevarez*, No. 4:17-CV-00501-O-BP, 2018 WL

507153, at *2 (N.D. Tex. Jan. 23, 2018). And the Tenth Circuit has applied it to preclude federal interference with state court ICWA proceedings. *Morrow*, 94 F.3d at 1397-98.

As such, *Younger* instructs a federal court to abstain from interfering in the state proceedings involved in this case, if three factors are present:

> (1) there are ongoing state judicial proceedings;
> (2) the proceedings implicate important state interests; and
> (3) there is an adequate opportunity to raise federal claims in the state proceedings

Google, Inc. v. Hood, 822 F.3d 212, 222–23 (5th Cir. 2016); *see also Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). All three of these factors, termed "*Middlesex*" factors, are met here and favor a dismissal of the Complaint in its entirety, which would appropriately allow the State courts implicated in the Complaint the opportunity to adequately hear any constitutional challenges to the child-custody proceedings referenced.

Ongoing state judicial proceedings. With regard to the first condition, Plaintiffs allege harm from application of ICWA and the Final Rule to ongoing state-court child custody proceedings. The Brackeens no longer have a state-court case, but the Librettis and Hernandez challenge the application of ICWA and the Final Rule to ongoing Nevada child-custody proceedings involving Baby O. *Id*. ¶¶ 156-170. And the Cliffords' challenge involves ongoing child-custody proceedings in Minnesota for Child P. *Id*. ¶¶ 171-177.

Additionally, State Plaintiffs' allegations rest on the existence of both ongoing and future state-court child-custody proceedings in their respective States in which state agencies are a party and ICWA applies. *Younger* abstention applies with equal vigor when the relief sought by a plaintiff "would indirectly accomplish the kind of interference that *Younger v. Harris* and related cases sought to prevent." *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974) (internal citation omitted). As in *O'Shea*, State Plaintiffs seek relief "aimed at controlling or preventing the

occurrence of specific events that might take place in the course of future state . . . trials." *Id.* The Court in that case determined that *Younger* applied "because an injunction against acts which might occur in the course of future criminal proceedings would necessarily impose continuing obligations of compliance"; thus, "the question arises of how compliance might be enforced if the beneficiaries of the injunction were to charge that it had been disobeyed." *Id.* at 501; *see also Williams v. Rubiera,* 539 F.2d 470, 473 (5th Cir. 1976) (abstention required because relief "would have the effect of a federal court telling a state court how to run an ongoing criminal prosecution").

The proceedings implicate important state interests. With respect to the second condition, Plaintiffs' Complaint rests on the premise that the state proceedings that are the subject of the Complaint involve important state interests, given the central role that states maintain in regulation of domestic relations within their borders. "It cannot be gainsaid that adoption and child custody proceedings are an especially delicate subject of state policy, the [Supreme] Court stating that '[f]amily relations are a traditional area of state concern.'" *Morrow*, 94 F.3d at 1393 (citing *Moore*, 442 U.S. at 435); *see also DeSpain*, 731 F.2d at 1179 ("Child welfare has long been a recognized area of state concern."). In addition to states' interest in the development of child welfare law (including the overlay of ICWA on their own state child-welfare law), state courts have an equally important interest in "continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies." *Huffman*, 420 U.S. at 604.

There is adequate opportunity to raise federal claims in the state proceedings. The Supreme Court has made clear that so long as "constitutional claims [] can be determined in the state proceedings and so long as there is no showing of bad faith, harassment, or some other

extraordinary circumstance that would make abstention inappropriate, the federal courts should abstain." *Middlesex,* 457 U.S. at 435. Thus, federal courts "should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Pennzoil*, 481 U.S at 15. Here, Plaintiffs have alleged no barrier to their ability to raise constitutional challenges to ICWA and the Final Rule in state-court proceedings; indeed, constitutional challenges to ICWA have been considered by many state courts.[28] *See supra* n.16. In fact, Plaintiffs allege that constitutional challenges were made in the context of Brackeens' petition to adopt A.L.M.[29] *See* Compl. ¶ 128.

Further, state courts are in a better position to evaluate the particular circumstances of a concrete case, and if Plaintiffs are dissatisfied with the outcome, they have the opportunity to appeal that decision in state court. "[T]ypically a judicial system's appellate courts [] are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions. . . . we do not believe that a State's judicial system would be fairly accorded the opportunity to

[28] State Plaintiffs cannot rely on their inability to challenge the Final Rule under the APA in the state-court proceedings as a basis to circumvent *Younger* abstention because they have waived their ability to challenge the Final Rule in federal court by failing to comment during the notice and comment period. *See* infra Section III.G. Neither can they rely on the claims they seek to bring against HHS because they lack standing to bring these claims and the claims are not ripe. *See* supra III.D. So all that remain are their constitutional challenges to ICWA and the Final Rule, which can be raised in the context of the state-court proceedings referenced in the Complaint.

[29] Additionally, the Supreme Court has determined that "Texas law [i.e., the Texas Family Code] is apparently as accommodating as the federal forum . . . . [A]bstention is appropriate unless state law clearly bars the interposition of the constitutional claims." *Moore*, 442 U.S. at 425–26; *see also Rangel v. Reynolds*, No. 4:07-CV-20 AS, 2007 WL 1189356, at *2 (N.D. Ind. Apr. 18, 2007) (applying *Younger* abstention to a federal court constitutional challenge to Indiana child custody proceedings); *Henry A. v. Willden*, No. 2:10-CV-00528-RCJ, 2010 WL 4362809, at *17 (D. Nev. Oct. 26, 2010), *aff'd in part, rev'd in part on other grounds*, 678 F.3d 991 (9th Cir. 2012) (Nevada state courts adequately provide opportunity for challenge to constitutionality of Nevada's appointment of guardians ad litem in child welfare cases); *P.G. v. Ramsey Cty.*, 141 F. Supp. 2d 1220, 1229 (D. Minn. 2001) ("[J]uvenile courts in Minnesota may decide issues of federal constitutional law.").

resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts." *Huffman,* 420 U.S. at 609. The Court should refrain, based on abstention, from providing any declaratory or injunctive relief.

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

Plaintiffs Hernandez and the Librettis are involved in child-custody proceedings in Nevada and seek to prevent Nevada state courts from applying either ICWA or the Final Rule to those proceedings. The Cliffords are foster parents in Minnesota and seek to prevent Minnesota state courts from applying ICWA or the Final Rule to child-custody proceedings. For these Plaintiffs to secure this relief, this Court's decision would have to bind Nevada and Minnesota state courts and their executive agencies. Accordingly, at a minimum, Nevada and Minnesota are necessary parties that must either be joined or the Librettis' and Cliffords' claims should be dismissed.[30]

Federal Rule of Civil Procedure 19 requires joinder of an absent "person" where "in that person's absence, the court cannot accord complete relief among existing parties." Fed. R. Civ. P. 19(1)(A). If that party is a state possessing sovereign immunity and cannot be joined, then "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." *Id.* at 19(b). The Court must consider four factors:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; and (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

[30] Even if the States of Nevada and Minnesota were parties, it is not clear that Nevada or Minnesota courts would be bound by a judgment of this Court.

Id.

All four factors support dismissal. First, a judgment regarding the applicability of ICWA in Nevada and Minnesota prejudices those States' interest in the welfare of children. As Plaintiffs themselves assert, States have "authority over domestic relations in every child custody proceeding," and a judgment that dictates how that authority will be exercised in their absence would "intrude" upon that interest. Compl. ¶ 17. Minnesota has enacted its own statute to further prevent the breakup of Indian families: the Minnesota Indian Family Preservation Act ("MIFPA"), Minn. Stat. §§ 260.751-260.835, which has been characterized as "broader than its federal counterpart." *Doe v. Piper*, No. CV 15-2639 (JRT/DTS), 2017 WL 3381820, at *1 (D. Minn. Aug. 4, 2017). Any decision by this Court determining the applicability of ICWA in absent States "would be enormously prejudicial to [that State's] interest." *Hood ex rel. Miss. v. City of Memphis, Tenn.*, 570 F.3d 625, 633 (5th Cir. 2009). That is particularly true of Minnesota, since a decision on the constitutionality of ICWA could have ramifications for the MIFPA as well.

Second, no protective measures or shaping of the relief can mitigate prejudice here. Third, a judgment rendered in the absence of Nevada and Minnesota would not be adequate because if neither Nevada and Minnesota courts nor their executive agencies are bound, then no relief is available to the Librettis or Cliffords. Fourth, Plaintiffs have an adequate remedy if this case is dismissed for nonjoinder. Plaintiffs are three States and a set of individual Plaintiffs with an interest in child-welfare proceedings in two more States. Each of these five States has its own state-court systems that routinely handle child-welfare proceedings and apply the relevant laws, including ICWA. Plaintiffs can raise their constitutional challenges to both ICWA and the Final Rule when and if the provisions of the statute and regulation are applied to them.

G. State Plaintiffs Waived Their Arguments Challenging the Final Rule by Failing to Raise the Issue to the Agency During the Notice and Comment Period

State Plaintiffs waived their APA arguments challenging the Final Rule in Count One by not presenting their objections to the BIA during the notice and comment period, which extended from March 20, 2015 through May 19, 2015. *See* 80 Fed. Reg. 14,880 (Mar. 20, 2015). "It is black-letter administrative law that absent special circumstances, a party must ordinarily present its comments to the agency during the rulemaking in order for the court to consider the issue." *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001) (internal quotations omitted); *BCCA Appeal Grp. v. E.P.A.*, 355 F.3d 817, 828 (5th Cir. 2003) (courts "will not consider questions of law which were neither presented to nor passed on by the agency"). This rule ensures that courts do not "usurp the agency's function" and "deprive the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *BCCA Appeal Grp.*, 355 F.3d at 829 (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 35-37 (1952)). This rule applies to questions of law, including constitutional objections to agency action. *See Chamber of Commerce of the United States of Am. v. Hugler*, 231 F. Supp. 3d 152, 202-03 (N.D. Tex. 2017) *rev'd on other grounds by Chamber of Commerce v. U.S. Dept. of Labor*, 885 F.3d 360 (5th Cir. 2018). "Generalized objections . . . or objections raised at the wrong time" will not suffice; rather, "an objection must be made with sufficient specificity reasonably to alert the agency." *Appalachian Power Co.*, 251 F.3d at 1036 (citation omitted).

None of the State Plaintiffs submitted comments to the BIA during the comment period. Texas DFPS submitted an untimely comment, stating that it "fully supports the Indian Child Welfare Act," noting that it worked collaboratively with tribes and community stakeholders to "develop best practices that will inure to the benefit of tribal children and families." Texas DFPS Comment to Proposed Rule, attached as Exhibit 2, Appendix at 8. Texas DFPS also stated

that "our commitment to both the letter and spirit of the ICWA is clear." *Id*. In the Complaint, Texas completely and inexplicably reverses its views on both the statute and Final Rule, but it should not be permitted to sandbag the agency with complaints that it did not raise in the rulemaking proceeding.

Nor did any other commenter adequately raise most of the objections in Count One of the Complaint.[31] For example, Plaintiffs' Complaint does not identify, and Interior has not located, any comment on the Rule concerning the allegation that the Rule's preference for "Indian families" as an adoptive placement is based on race and violates the guarantee of equal protection. Compl. ¶ 250. Nor have Plaintiffs (or Interior) identified any comment that argues that the Rule's provisions regarding foster-care and adoptive placements is not authorized by the Indian Commerce Clause, *id.* ¶ 252, or that raises an equal protection objection to the Rule's reiteration of ICWA's two-year period to invalidate a voluntary adoption, *id.* ¶ 253, or opining that the Rule violates the non-delegation doctrine, *id.* ¶ 255.

In their Second Amended Complaint, Plaintiffs seek to take advantage of having seen an earlier version of this Motion, alleging that other commenters raised objections to the rule "on the grounds that it violated federalism, the Tenth Amendment, and equal protection principles." *Id.* ¶ 126. But "[g]eneralized objections to agency action . . . will not do"; rather, objections must be specific enough to alert the agency to the particular concern. *Appalachian Power Co.*, 251 F.3d at 1036. That standard is not met here. Because neither State Plaintiffs nor any other

[31] Comments are available online. Indian Child Welfare Act (ICWA) Proceedings Regulation Comments, *available at* https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=BIA-2015-0001 (last visited April 5, 2018).

commenter clearly presented the concerns raised in Count One during the rulemaking process, the Court should not consider these arguments for the first time in this case.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), or alternatively, abstain from hearing this case in favor of resolution of these challenges in the applicable state-court proceedings.

Dated: April 5, 2018

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment and Natural Resources Division

/s/ *JoAnn Kintz*
JoAnn Kintz (CO Bar No. 47870)
Steve Miskinis
Christine Ennis
U.S. Department of Justice
Environment & Natural Resources Division
Indian Resources Section
P.O. Box 7611
Washington, DC 20044
Telephone: (202) 305-0424
Facsimile: (202) 305-0275
joann.kintz@usdoj.gov
Counsel for Defendants

Of Counsel:

Sam Ennis
Solicitor's Office, Division of Indian Affairs
United States Department of the Interior

CERTIFICATE OF SERVICE

I hereby certify that on this 5th of April, 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/ JoAnn Kintz
JoAnn Kintz
Trial Attorney
U.S. Department of Justice