IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ERIN FISHER; RICHARD FISHER; AND ERIN FISHER,
AS NEXT FRIEND AND NATURAL MOTHER
OF MINOR CHILD A.C. PLAINTIFFS

v. NO. 2:19-CV-02034-PKH

JASON COOK; TARA KATUK MAC LEAN SWEENEY,
IN HER OFFICIAL CAPACITY AS ASSISTANT SECRETARY–
INDIAN AFFAIRS; BUREAU OF INDIAN AFFAIRS;
DAVID BERNHARDT, IN HIS OFFICIAL CAPACITY
AS ACTING SECRETARY OF THE INTERIOR; AND
CHEROKEE NATION OF OKLAHOMA DEFENDANTS

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AGAINST DEFENDANT JASON COOK

Erin Fisher, Richard Fisher, and Erin Fisher, as Next Friend and Natural Mother of Minor Child A.C. (collectively "Plaintiffs" or "the Fishers"), file this reply in support of their motion for Temporary Restraining Order ("TRO") against Defendant Jason Cook. Plaintiffs file this reply pursuant to the Court's order granting Plaintiffs leave to file a reply.

Defendant Cook did not file a response. The Cherokee Nation and the Federal Defendants responded separately.[1] Plaintiffs file this combined reply to address both of these responses.

Much of the Defendants' briefing is based on two faulty premises: (1) there is an ongoing state proceeding,[2] and (2) there is no overlap between visitation and the Indian

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[1] Nation.xx refers to electronic page numbers of the Cherokee Nation's Response. Feds.xx refers to electronic page numbers of the Federal Defendants' Response.

[2] Nation.2–3, 5, 7–9, 11–12; Feds.2, 4, 5, 7–9.

Child Welfare Act ("ICWA").[3] Once one looks past these obvious misstatements, the conclusion that the TRO should issue against Cook becomes plain.

Plaintiffs address these misstatements throughout their reply, address why they have met the standard for granting the TRO, and also address the grab-bag of inapposite arguments Defendants raise: standing, advisory opinions, ripeness, *Younger* abstention, and the Anti-Injunction Act, 28 U.S.C. § 2283 ("AIA"). Notwithstanding these arguments, this Court does have authority to enter a narrow, focused TRO against Cook.

I. Factual, Procedural, and Statutory Background

In this reply, Plaintiffs only supplement the background that they already laid out in the brief in support of the TRO motion, and in their complaint. This explanation should be read in conjunction with those two documents.

Cook filed a motion seeking visitation specifically in retaliation and in response to the Fishers filing this suit. Supplementary Aff. of Erin Fisher ("Fisher Suppl. Aff.") at Ex. 1. Thus, at the time this lawsuit was filed (March 1, 2019), and at the time this Court acquired personal jurisdiction over Cook (March 6, 2019), there was *no pending state-court case or motion*. Cook filed the visitation motion on March 12, 2019 and served it on Plaintiff Erin Fisher on April 18, 2019. The newly-invented visitation motion, therefore, can hardly be said to be part of an ongoing, preexisting, or live state-court proceeding.

Indeed, the visitation motion demonstrates Cook's bad faith and intent to harass the Plaintiffs for filing suit in federal court. Filing the visitation motion close to *three years* after his last visit with A.C. (Fisher Aff. (ECF No. 22-1) ¶ 9), not all of which were years during which Cook was incarcerated, cannot be viewed as anything else. If there is

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[3] Nation.1, 3–6, 8, 12–13, 15–17; Feds.3, 9.

any doubt, one only need peruse the visitation motion Cook filed—he berates the Fishers for filing suit, because Plaintiff Richard Fisher filed a petition to adopt A.C., and uses that to argue that his visits with A.C. should resume and that ICWA should apply across the board to all of his disputes with the Fishers. *See* Fisher Suppl. Aff. Ex. 1.

Cook's visitation motion is not only retaliatory obstruction but also a substantive effort to employ ICWA. Visitation is a required first step under ICWA's active-efforts provision, 25 U.S.C. § 1912(d). *See, e.g.*, *Maisy W. v. State*, 175 P.3d 1263, 1268 (Alaska 2008) ("trial home visit" is a necessary step before it can be proved by clear-and-convincing evidence that active efforts were made but were unsuccessful); *S.S. v. Stephanie H.*, 388 P.3d 569, 575 ¶ 22 (Ariz. App. 2017) (active efforts requires "facilitating visits").

Cook's efforts to restart visitation (regardless of whether such visits are ordered by a court, or informally worked out between the parties) are thus an attempt to apply ICWA against the Fishers. The 2016 Regulations specifically list "regular visits with parents" as a way to accomplish active efforts. In *In re T.A.W.*, 383 P.3d 492, 507 (Wash. 2016) (emphasis added), for example, the birth father's "*attempt*[] to reestablish visitation following his second release from prison" was sufficient to show active efforts might have been successful (and, therefore, that the birth father's parental rights cannot be terminated under ICWA Sections 1912(d), (f)).

Thus, while ICWA does not apply to determine whether Cook obtains visitation, anything Cook does in that direction—anything that can be construed as an "attempt to reestablish visitation"—can later be used under ICWA to defeat the Fishers' argument that they attempted active efforts but that such efforts were unsuccessful. The bottom line, therefore, is that Defendant Cook is using the visitation motion to demonstrate that

the Fishers have not made "active efforts," and thereby block the Fisher family from completing the adoption they seek.

The Federal Defendants admit that ICWA, including the active-efforts requirement and the resultant visits, is an "*overlay* on … state law," Feds.3 (emphasis added), meaning that ICWA's dictates are *additional requirements*, over and above those required by state law, that the Fishers must follow in order to terminate Cook's rights and secure A.C.'s adoption by Richard Fisher. These additional requirements would not be necessary if not for ICWA and A.C.'s status as an "Indian child."

A.C. is terrified of meeting Cook. He cries and is visibly upset merely thinking about that prospect. *See* Fisher Aff. ¶ 24; Fisher Supp. Aff. ¶ 4. Contrary to the Federal Defendants' unsubstantiated assertion (Feds.4), the narrow TRO the Fishers seek here *will* redress the Fishers' specific injuries flowing from such attempted or secured visits.

Consequently, both of the responding Defendants' premises—there is an ongoing state proceeding, and there is no overlap between visitation and ICWA—are simply untrue.

Furthermore, pleadings are closed as to Defendant Cook, whose responsive pleading was due on March 27, 2019, but he answered the complaint on April 4, 2019. Cook has not filed a Rule 12(b) motion, nor can he assert any Rule 12(b) defenses now, because such "defenses must be made before pleading if a responsive pleading is allowed." Fed. R. Civ. P. 12(b).

Plaintiffs request a TRO that will restrain only Defendant Cook from exercising visitation until such time as this Court can decide the merits of Plaintiffs' claims. The requested relief will not restrain any other Defendants. Yet, the other Defendants strenuously object while Defendant Cook has expressed no interest in objecting to the

Plaintiffs' motion for TRO. The requested TRO has a narrow, tailored focus: preventing Cook from interfering with these proceedings by exercising visitation with A.C. Arkansas law specifically provides that a separate no-contact restraining-order "petition may be filed regardless of whether there is any pending litigation between the parties." Ark. Code Ann. § 9-15-201(f). TROs, like the one requested here, can issue regardless of what the state court does with the visitation motion because those are two distinct cases. The state views the visitation and no-contact restraining orders as separate matters. This Court should do the same. Any TRO running to Cook is within the sound authority of this Court to issue.[4]

II. The AIA

The Nation's AIA argument stems from its premise that the TRO will "stay proceedings in a State court … ongoing child custody proceedings." Nation.2. The Federal Defendants argue the same. Feds.5.

However, the requested TRO does not stay any proceedings in state court at all. If granted, it will only restrain Defendant Cook from *exercising visitation*. There is no requirement that Defendant Cook seek visitation by going to court—he could write to or call the Fishers to request visits with A.C., or show up at their doorstep. The Fishers worry about Cook harassing them in this manner. Fisher Supp. Aff. ¶ 4. That is what the TRO, if granted, will restrain.

This much is blackletter law: "[W]here a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in

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[4] The Federal Defendants readily acknowledge that this is so. They state, "the Anti-Injunction Act may not strictly apply to an order tailored precisely to Cook's conduct in state court." Feds.6.

a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court." *Kline v. Burke Const. Co.*, 260 U.S. 226, 229 (1922). Thus, "if a federal court first acquires such jurisdiction"—as is the case here—"the state court has no right to interfere therewith, and it has the right to enjoin such interference." *C.T.C. Inv. Co. v. Daniel Boone Coal Corp.*, 58 F.2d 305, 319 (E.D. Ky. 1931).

Defendant Cook was served with this federal suit on March 6, 2019, and his answer or responsive pleading was due on March 27, 2019 (ECF No. 14). But rather than do so, he filed his visitation motion on March 12, 2019, in the state court case that had been closed for *eight* years, and then answered the complaint on April 4, 2019 (ECF No. 21), and served his purported state-court visitation motion on Plaintiff Erin Fisher on April 18, 2019, i.e. five weeks after filing it. Fisher Supp. Aff. ¶ 2.

The state-court divorce case in which Cook purported to file his visitation motion has been closed since 2011. Cook's sole motive for filing that motion was to cause confusion about this Court's jurisdiction over this matter. That bad faith act must weigh in favor of the TRO. Like the defendant in *Town of Lockport v. Citizens for Community Action at Local Level, Inc*., 430 U.S. 259, 264 n.8. (1977), Defendant Cook is trying to revive the long-closed state-court case in an effort to use the state court's purported jurisdiction to interfere with this Court's jurisdiction.

Had Cook filed a *new* suit in state court after being served with the complaint in this case, such an attempt to use state court jurisdiction to usurp this Court's authority would obviously have been forbidden. *Id.*. The fact that Cook is doing the same through the clever but transparent device of seeking in bad faith to revive a dormant state-court case instead of filing a new one should make no difference. Cook's attempt "to defeat or

impair the jurisdiction of the federal court" should not stop this Court from exercising its clear authority to restrain Cook from seeking visitation until the merits issue is finally resolved. *Kline*, 260 U.S. at 229. This Court has authority under the All Writs Act, 28 U.S.C. § 1651, to enter a TRO against Cook; neither the AIA nor *Younger* abstention (as discussed elsewhere in this reply) apply.

The Defendants' whole premise that somehow the divorce proceeding is "pending" is not only contrived, it also shows why their AIA argument does not work. Visitation is not even a judicial proceeding for purposes of the AIA. *See, e.g.*, *Roudebush v. Hartke*, 405 U.S. 15, 20 (1972) (election recount is not a judicial proceeding within the meaning of the AIA); *Six Clinics Holding Co., II v. CAFOMP Sys., Inc.*, 119 F.3d 393, 398 (6th Cir. 1997) (arbitration proceedings are not state court proceedings for purposes of the AIA). *See also* Ark. Code Ann. § 9-15-201(f) (treating visitation and no-contact restraining orders as separate matters).

Applying *Roudebush*, the court in *Big Apple Cookie Co. v. Springwater Cookie Co.*, 517 F. Supp. 367, 370 (S.D. Ohio 1981) (cleaned up), explained:

> not every state court function involves litigation or legal controversies. … Thus, the exercise of a state court's authority, or the conduct of extrajudicial proceedings thereby initiated under the auspices of the state court, might not always be said to constitute 'proceedings in a State court.'

Big Apple involved an Ohio state court's "duties in connection with the enforcement of private arbitration agreements." *Id.* at 371. Plaintiff filed federal suit alleging that defendant's conduct violates federal law. Defendant filed suit in state court alleging plaintiff breached its agreement with the defendant. The state court ordered the state claims to arbitration. Before arbitration proceedings commenced, plaintiffs requested

them stayed by the federal court. *Id.* at 368. Defendant argued that the TRO should not issue because of the AIA. *Id.* at 370.

The federal court concluded that "arbitration proceedings … are not 'proceedings in a State court.'" *Id.* (quoting the AIA). State-court-ordered arbitration (like state-court-ordered visitation), *Big Apple* reasoned, is nothing more than a court-ordered private meeting between parties "which predominantly occurs outside, and in lieu of court proceedings." *Id.* Even though the state provides a procedure "to enforce arbitration agreements where one of the parties … refuses to submit to arbitration," the arbitration itself does not become "a part of 'proceedings in a State court,' for purposes of 28 U.S.C. § 2283, simply because the state court has ordered the parties to [arbitrate]." *Id.*

Here, even though there are state procedures to enforce visitation, the *visitation itself* does not become a state-court proceeding for purposes of the AIA. The AIA, thus does not stop the federal court from restraining *the visitation*. Arkansas law treats visitation and no-contact orders as separate matters. Even under Arkansas law, the requested TRO can issue regardless of whether there is a pending visitation motion before a different judge or a different court. Therefore, as in *Big Apple*, the AIA was not a bar to the federal court's issuance of an injunction.[5]

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[5] Likewise, in *Roudebush v. Hartke*, Roudebush lost a federal election to Hartke. The next day, Roudebush filed vote-recount petitions in 11 different state trial courts. 405 U.S. at 16–17. Hartke filed suit in federal court to stop the recount. A three-judge district court enjoined the recount. *Id.* at 18. Roudebush appealed to the Supreme Court (per settled procedure). *Id.* State law gave every candidate a right to seek recount—like Cook presently has a right to seek visitation. *Id.* at 21. Once the state court grants the recount, the "court has no other responsibilities or powers." *Id.* "The exercise of these limited responsibilities," the Supreme Court concluded, "does not constitute a court proceeding under § 2283" and therefore that the district court had authority to enjoin the recount. *Id.* at 21–22. Similarly, once an Arkansas court grants visitation, it has no other "responsibilities or powers." *Id.* at 21. Like in *Roudebush*, Plaintiffs here do not ask the

So too here. On October 11, 2017, the state court entered an order stating that "[Cook's] visitation with [A.C.] … is hereby suspended." Fisher Supp. Aff., Ex. 2 at ¶ 2. That order gave Cook the following option: "[Cook] can develop a written plan for resumption of visitation and send it to [Erin Fisher]; [Erin Fisher] can approve or disapprove the plan. If [Erin Fisher] does not approve the plan, [Cook] can petition the Court to resume visitation upon his release from custody." *Id.* ¶ 3. When Cook was released from prison, he did not send a plan for resuming visitation to the Fishers or address the subject of visitation in any way for more than five months. Fish. Aff. ¶ 13. Cook made no efforts whatsoever to regain visitation until after this case was filed, when he chose to file a motion to resume visitation in the previous divorce case, *after* this Court acquired jurisdiction over him, expressly to create confusion as to whether Cook can be restrained from seeking visitation.

Exercising visitation is not a judicial proceeding within the meaning of the AIA. It remains a nonjudicial matter that can be informally worked out between the Fishers and Cook—with no involvement whatsoever of the other Defendants or of the state court. Even if this were not the case, seeking visitation by motion in state court is closer to the election recount or arbitration proceeding, like in *Roudebush*, *Six Clinics*, or *Big Apple*, to which the AIA does not apply, than it is to a judicial proceeding to which the AIA presumably does apply. Arkansas modifications are precisely the kind of "ministerial" or "administrative" actions of the state court to which the AIA does not apply. *Big Apple*, 517 F. Supp. At 371.

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federal district court "to restrain the action of the [state] court"; rather they want to enjoin *the visitation* when and if the state-court grants Cook's visitation motion. *Id.* at 22.

The Nation tries to cover up a gaping hole in its argument by assuming that seeking visitation is a "state court[proceeding that] will vindicate constitutional claims as fairly and efficiently as federal courts." Nation.9 (quoting *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 556 (1972)). Seeking visitation is nothing of the sort. The Nation points to *Morrow v. Winslow*, 94 F.3d 1386 (10th Cir. 1996), Nation.10, but that case involved a pending "state adoption case" in which trial was set for "May 17, 1995." 94 F.3d at 1389. However, the *Morrow* plaintiff filed suit in federal court on "May 11, 1995" *Id.* In other words, in *Morrow* there was a pending state matter *at the time* the federal suit was filed (a matter in which the constitutional claims can be raised and resolved); here, Cook's visitation motion was filed *after* the federal suit was filed. *Morrow*, therefore, does not speak to the situation here.[6]

In ordinary *in personam* actions, federal injunctions may issue where, as here, the "state court action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation." *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1996). Cook's state-court visitation motion is calculated to "disrupt the orderly resolution of the federal litigation." *Id.* He seeks visitation in state court precisely because it is in furtherance of his argument that active efforts are ongoing under 25 U.S.C. § 1912(d), the applicability of which is a question pending in *this* Court, not in any state-court action. To underscore this point, all parties agree that the state court *will not* and *cannot* resolve ICWA questions in the divorce proceeding. And no other state-court action involving the Fishers and Cook exists in which the ICWA questions are at issue.

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[6] As discussed elsewhere, the divorce proceeding gives no occasion to the Fishers to adjudicate the question of the applicability or constitutionality of ICWA in private-severance and stepparent-adoption matters—which are completely distinct state-court cases.

For these reasons, this Court unquestionably has the authority to issue a TRO to Cook. The responding Defendants' AIA arguments lack merit.

III. *Younger* Abstention

Apart from identifying them, the responding Defendants do not address the *Younger* criteria at all. The Nation contends that this Court should abstain under the *Younger* abstention doctrine because "adequate and complete remedy is otherwise available in Arkansas state court," Nation.10, when the Nation, contradicting itself, openly admits that the question of the applicability or constitutionality of ICWA and the 2016 Regulations cannot be addressed in the divorce case because ICWA does not apply to determining visitation. Nation.4. Furthermore, Plaintiffs A.C. and Richard Fisher are not parties to the divorce proceeding. The Arkansas state-court divorce case is neither an adequate nor a complete venue to provide them any effective relief. Nor is the state-court avenue open for Plaintiff Erin Fisher, because, by the Nation's own repeated reminders to this Court, the state court in the divorce proceeding will not, should not, and cannot, rule upon the questions of the applicability or constitutionality of ICWA Sections 1912(d), (f), 1914, 1915(a), or the 2016 Regulations. No other state-court proceedings exist where the issue of the applicability or constitutionality of the challenged provisions can be raised.[7]

A federal court's obligation to hear and decide cases within its jurisdiction "is 'virtually unflagging.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (citing *Sprint Commc'ns., Inc. v. Jacobs*, 571 U.S. 69, 77 (2013)

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[7] *Compare* Nation.2 (Nation claiming there are "ongoing child custody proceedings" in state court), *with* Nation.4 (Nation claiming "a divorce proceeding is not a child custody proceeding as defined in and subject to ICWA") (emphasis borrowed). *Id.* ("Arkansas state divorce proceedings and modifications thereto have been, and will continue to be, outside the scope and reach of ICWA.").

("Federal courts, it was early and famously said, have no … right to decline the exercise of jurisdiction which is given." (citation omitted))). In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court recognized a "'far-from-novel' exception to this general rule" holding that federal courts should decline to enjoin a pending state *criminal* prosecution absent a showing—a showing that is abundantly provided here—that the charges had been brought in bad faith or with an intent to harass. *Sprint*, 571 U.S. at 77. That holding was later extended to bar interference with certain state civil proceedings. *Id.* at 77–78 (collecting cases).

Sprint clarified that *Younger* abstention applies only to "three 'exceptional'" categories of state proceedings: "criminal prosecutions," "certain 'civil enforcement proceedings'" "akin to criminal prosecutions," and "'civil proceedings involving certain orders … uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Sprint*, 571 U.S. at 72, 78 (citations omitted). The Supreme Court "ha[s] not applied *Younger* outside these three 'exceptional' categories," and has expressly held "that they define *Younger*'s scope." *Id.* at 78. None of these apply here.

The Nation does not even explain which of these three categories apply here. *See* Nation.10–13. Nor can it. Instead, the Nation talks about some generic and inchoate state interests present in state-initiated proceedings—interests that are absent here because there is no state-initiated proceeding. *Id.*[8] An examination of the three *Younger* categories will provide further assurance on this point.

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[8] The Federal Defendants, on the other hand, rely on cases predating the U.S. Supreme Court's *Sprint* (2013) decision. Feds.7–8 (quoting from *Alleghany Corp. v. Pomeroy*, 898 F.2d 1314, 1316 (8th Cir. 1990); *Plouffe v. Ligon*, 606 F.3d 890, 892 (8th Cir. 2010)). Those old cases have no continued validity.

Cook's visitation motion is obviously not a criminal prosecution.[9] Nor is it a civil enforcement proceeding akin to a criminal prosecution, because it is not "initiated to sanction the federal plaintiff … for some wrongful act." *Sprint*, 571 U.S. at 79.

Post-*Sprint*, federal courts have routinely rejected attempts to invoke *Younger* in what the Nation characterizes as "[f]amily relations" cases. Nation.12. In *Doe v. Piper*, 165 F. Supp. 3d 789, 806 (D. Minn. 2016), for example, the court held that "Baby Doe's state court adoption proceeding was undeniably not a criminal prosecution, civil enforcement proceeding 'akin to a criminal prosecution,' nor a civil proceeding involving the enforcement of a state court judgment." Likewise, in *Tinsley v. McKay*, 156 F. Supp. 3d 1024, 1034 (D. Ariz. 2015), the court held that ongoing state juvenile-court proceedings[10] "do not qualify as quasi-criminal [enforcement actions] for purposes of *Younger*." Indeed, "federal courts cannot ignore *Sprint*'s strict limitations on *Younger* abstention simply because states have an undeniable interest in family law." *Cook v. Harding*, 879 F.3d 1035, 1040 (9th Cir. 2018). The "law of domestic relations often has constitutional dimensions properly resolved by federal courts." *Id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

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[9] *Bergstrom v. Bergstrom*, 623 F.2d 517 (8th Cir. 1980), that the Nation cites (Nation.12) involved a clear matter of which parent gets *custody*—a term used to denote which parent has legal control or responsibility for the child. Plaintiff Erin Fisher has full custody here. While Cook retained a residual visitation right, that right was suspended due to his chronic disinterest in visiting A.C. *See* Fisher Supp. Aff. ¶ 3. *Bergstrom*, therefore, is not on all fours. No custody arrangement will be reexamined here by the state court or by this court. Nor are Plaintiffs asking this Court to do so.

[10] *Tinsley* involved juvenile-court proceedings relating to "children's placements, visitation, and health care services, as well as [the state court's] power to enforce its own orders through contempt proceedings." 156 F. Supp. 3d at 1034.

The responding Defendants rely on *Moore v. Sims*, 442 U.S. 415 (1979), as an example of a quasi-criminal civil enforcement action. Nation.11; Feds.7–8. But as *Sprint* explained, *Moore* involved a "state-initiated proceeding to gain custody of children allegedly abused by their parents." 571 U.S. at 79.[11] Because the proceeding in *Moore* was "in aid of and closely related to criminal statutes," 442 U.S. at 423, they were considered quasi-criminal for purposes of *Younger*. As such, *Younger*'s second category does not apply here.

The third *Younger* category—civil proceedings involving orders uniquely in furtherance of the state courts' ability to perform their judicial functions—is similarly inapplicable. The responding Defendants compare (Nation.11–12; Feds.7) this purely private dispute between the Fishers and Cook to *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603 (8th Cir. 2018). There, Native American tribes sued state officials to stop them from using the state's established court procedures in state-initiated child-custody proceedings. An injunction in *Fleming*, if granted, would have interfered with the "state court's ability to perform [its] judicial functions," *Sprint*, 571 U.S. at 79, making abstention unremarkable under those circumstances. But because such interference would not exist here, there is no reason to abstain.[12]

The Federal defendants insinuate that the Fishers *could* raise the issue of the applicability or constitutionality of the challenged ICWA and 2016 Regulations

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[11] The Nation also admits this, as it must: "*Moore* involved matters of child abuse initiated by state actors rather [than] private parties." Nation.11.

[12] The other cases the responding Defendants cite (Nation.12; Feds.8) also deal with suits against state officials to stop them from initiating removal of children from the custody of the federal plaintiff parent. *See Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245 (8th Cir. 2012); *Machetta v. Moren*, 726 Fed. App'x 219 (5th Cir. 2018) (birth parent sued state-court judge in federal court).

provisions in state court. Feds.8. But it is abundantly clear—indeed, the Nation makes this point forcefully—that these issues *cannot* be resolved in the divorce case. Nation.16–17. And no other state-court proceeding between the Fishers and Cook exists. *See* Nation.2 (arguing that a divorce proceeding is distinct from an adoption proceeding). In effect, the Federal Defendants are dissatisfied with the Plaintiffs' choice of the federal forum—or want to somehow remove a federal case to the state court. But "a plaintiff's choice of forum should rarely be disturbed," *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981), and there is no such thing as a reverse-removal statute under which federal cases can be removed to state court. Although state trial courts may be as competent as federal courts to decide federal constitutional or statutory questions, *see* Feds.5 (making this point), that is hardly an argument counseling in favor of federal-court abstention.

The Fishers are *not* asking for a ruling on any state law or seeking an injunction against any state official. Nor are there any pending civil enforcement actions against any of the Plaintiffs. Under controlling Supreme Court precedent, therefore, there is no basis for this Court to abstain from issuing a TRO against Cook.

IV. The Four TRO Factors

The Federal Defendants present no argument on whether Plaintiffs meet the four TRO factors. The Nation does. Nation.13–17. Plaintiffs will not repeat arguments already made in their motion and memo for TRO because those arguments almost fully respond to the Nation's arguments on the four TRO factors. Here, Plaintiffs address only those points to the extent they are not already covered.

A. Likelihood of success on the merits

The Nation provides a list of cases supposedly upholding the constitutionality of ICWA. Nation.14. But *none* of those cases dealt with the private-severance and

stepparent-adoption issues presented here. Those cases involved *state-initiated* proceedings involving state child welfare agencies or officials, not purely private parties like the Fishers and Defendant Cook.[13] Of course, ICWA was enacted to curb abuses "by nontribal public and private agencies," 25 U.S.C. § 1901(4), not to regulate purely private disputes. Thus, none of those cases involving child welfare agencies govern this as-applied challenge to ICWA's application in a private dispute.

The only case that is similar to the private-severance and stepparent-adoption scenario presented here[14] only underscores the Fishers' injuries, shows exactly how state courts, including Arkansas courts, deprive parents like Richard and Erin Fisher of their constitutional rights and lead to absurd results.[15] Instead of operating to protect Indian children, the application of ICWA in this scenario *hurts* Indian children, a matter that is proven both factually in this case, and also by comparing the substantive legal standards applied to Indian versus non-Indian children.

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[13] The Federal Defendants, likewise, provide a list of Arkansas cases applying ICWA provisions. Feds.3 n.1. *All* of those cases involved state-initiated proceedings. Currently, it is unclear whether Arkansas will apply these provisions in private-severance and stepparent-adoption situations. This is another reason why eventually, when this Court reaches the question of declaratory relief on whether ICWA applies, that declaration will have a real, immediate, and prospective impact on the Fishers and such other Arkansas cases that may be filed by others in the future.

[14] *Adoption of Hannah S.*, 48 Cal. Rptr. 3d 605 (Cal. App. 2006).

[15] Other cases the Nation cites, Nation.14, in this string cite, apparently copy-pasted from somewhere, without reviewing those cases for relevance, are off-point. *See, e.g.*, *In re Marcus S.*, 638 A.2d 1158 (Me. 1994) (involving constitutionality, not of ICWA, but of the Maine Child Protection Act, 22 Me. Rev. Stat. Ann. tit. 22, § 4055(1)(B)(2)); *In re Miller*, 451 N.W.2d 576 (Mich. App. 1990) (involving constitutionality, not of ICWA, but of Mich. Cr. R. 5.980); *In re Angus*, 655 P.2d 208 (Or. App. 1982) (involving, not stepparent adoptions, but third-party adoptions by a couple neither of whom is the biological parent of the child to be adopted).

The Nation vaguely talks about "a political tie." Nation.14. While there may be a "government-to-government relationship," Nation.15, between federally-recognized Indian tribes and the federal departments having hegemony over them, a political tie, if any, between an individual and the tribe, between the individual and the federal government, or between two individuals are different matters altogether.

In other words, the only "tie" that binds the Fishers to the Nation here is based on A.C.'s race and/or national origin. ICWA does not impose a "political classification" as in *Morton v. Mancari*, 417 U.S. 535 (1974), because it applies based on *membership* and *eligibility* for membership, 25 U.S.C. § 1903(4), which is based solely on genetic considerations, without reference to political, cultural, or religious factors. Thus, a child who is fully acculturated to a tribe is *not* subject to ICWA if she lacks the genetic qualifications, and a person who *has* the genetic qualifications *is* subject to ICWA *without* regard to political, social, or cultural considerations. The Cherokee Constitution imposes no political, social, or cultural criterion for tribal membership—one need merely be a direct biological descendant of a signer of the 1906 Dawes Rolls. CHEROKEE CONST. art. IV, § 1. Someone like the Texas hero Sam Houston—who was adopted at the age of 16 by a member of the Cherokee tribe, MARQUIS JAMES, THE RAVEN: A BIOGRAPHY OF SAM HOUSTON 20 (Austin: Univ. of Texas Press, 2004) (1929), spoke Cherokee and even served as Cherokee ambassador to the U.S. government, *id.* at 128, would therefore *not* qualify as an "Indian child" under ICWA—because he lacked the *genetic* requirement.

Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018), declared major portions of ICWA (including the provisions at issue here) and the entirety of the 2016 Regulations as unconstitutional race-based classifications. Even if one were to ignore *Brackeen* and the genetic basis for membership, such membership (or citizenship) in a "domestic

dependent nation[],” *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 13 (1831), is a classification based on national origin that is strictly scrutinized like any classification based on race.

Thus, as already briefed, the application of ICWA in such private disputes is better covered by *Rice v. Cayetano*, 528 U.S. 495 (2000), which requires strict scrutiny, than by *Morton v. Mancari*, 417 U.S. 535, which requires only a rational relationship. Under either level of scrutiny, however, Plaintiffs are likely to succeed on the merits.

B. Irreparable harm to the Fishers, and balancing of the interests

The Fishers’ point could not be plainer. Cook seeks visitation with A.C. after an almost three-year absence. A.C. is terrified of visiting with Cook. A.C. has few, if any, good memories of Cook, and does not want to see Cook. A ten-year-old boy who so forcefully expresses his desire, gets visibly upset and cries even thinking of that prospect, *is* irreparably injured. *See* Fisher Aff. ¶¶ 10–12, 24; Fisher Supp. Aff. ¶¶ 4–6. The responding Defendants are in *no position* to explain this away by playing blind to the Fishers’ injuries.[16] The emotional anguish, the financial resources needed to address Cook’s filings, and if Cook obtains visits with A.C., having to remain available for visits, reschedule their school, church, and cultural activities, and putting their life as a family on hold, for Cook (like he consistently did in the past) to cancel visits at the last minute, are all palpable, demonstrable, specific, and irreparable injuries. *See* Fisher Aff. ¶¶ 7, 9; Fisher Supp. Aff. ¶ 5. Irreparable harm to the Fishers under this TRO factor is obvious.

The Nation makes a perplexing claim: that there “will be no irreparable harm if Plaintiffs’ [TRO] Motion is denied *because* the matter at issue is well-recognized to be

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[16] The Defendants’ indifference to A.C. is yet another reason why they should not be allowed to interfere in the Fishers’ family life.

best resolved in state court proceedings." Nation.15 (emphasis added). That argument completely ignores the TRO factor that this Court must evaluate: "whether the moving party will suffer irreparable injury absent the injunction." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 112 (8th Cir. 1981).

Having nothing consequential to say, the Nation instead asks this Court to speculate about "a future adoption case." Nation.15. Obviously, that's not the scope of the requested TRO. The TRO is narrowly tailored to the irreparable injuries flowing from Cook exercising visitation. The Nation discusses *Rogers v. Scurr*, 676 F.2d 1211 (8th Cir. 1982). Nation.16–17. The *Rogers* plaintiffs sought a broad injunction covering all sorts of injuries, real and hypothetical. Here, Plaintiffs have specified concrete actual injuries and seek a TRO with a narrow focus.

In contrast, the responding Defendants have identified *no harm* to Cook, to the Cherokee Nation, or to the Federal Defendants if Cook is restrained from seeking visits or visiting with A.C. They needed to explain such harm to argue that the third TRO factor goes in their favor. *Dataphase*, 640 F.2d at 112 (the third factor is: "the harm to other interested parties if the relief is granted"). Cook has not done so; he has filed no response. The Nation has identified no harm to the Federal Defendants, to the Nation or to Cook. The Federal Defendants have identified no harm to themselves, the Nation, or to Cook. On balance, comparing the Plaintiffs' well-articulated harms to Defendants' nonexistent ones favors the granting of the requested TRO

C. Public interest

The Nation presents (Nation.17) the Fishers a Hobson's Choice:

- If they object to visitation now, the Nation will claim they didn't give active efforts a chance. Recall that the Nation claims "adoption proceedings and

proceedings for the termination of parental rights *are subject* to ICWA." Nation.8 (emphasis added). And, in those proceedings, when filed, the Nation will likely claim that the Fishers failed to meet the active-efforts and termination-burden provisions of ICWA. 25 U.S.C. §§ 1912(d), (f).

- If the Fishers do not object to visitation now, that they should go through the mental and emotional anguish, drain their time and finances, rearrange their entire life around Cook's cancellations and rescheduling of visits. And the Nation will still claim that the Fishers failed to prove that active efforts were unsuccessful by clear and convincing evidence. *Id.* In other words, that the Fishers should have tried harder to meet Cook's demands. No such standard exists in non-ICWA cases.

No public interest is served by forcing the Fishers and Cook to patch things up when there is nothing to patch up. Federal or state law cannot compel people to enter, maintain, or rekindle familial association. That goes against every fiber of the dignity and family integrity of the Fisher family—a realm of private association that is off limits for all government regulation. *Cf. Loving*, 388 U.S. 1.

V. Standing

The Nation presents no argument that Plaintiffs lack Article III standing; instead, it argues that the TRO, if entered, amounts to an advisory opinion, and somewhat confusingly, is not ripe. Nation.8–9. The Nation provides no supporting authority for this entire section of their brief. The Federal Defendants do not argue standing but apparently reserve the question for an "appropriate time." Feds.9 n.2.

The Nation's argument that this Court lacks jurisdiction, Nation.8, lacks merit. This Court has both personal jurisdiction over Defendant Cook (the Plaintiffs filed their

motion for TRO after Cook answered the Complaint), and subject-matter jurisdiction over federal questions and questions of federal constitutional law. In order to characterize the TRO as an advisory opinion, the Nation characterizes this suit variously as an "adoption case" and an "ongoing divorce modification" proceeding in the same sentence, and also throughout its response. Nation.2, 8–9, 12. The Article III standing doctrine is not a doctrine that prevents federal courts from adjudicating cases to give "state court[s] the opportunity to make factual findings and conclusions of law." Nation.8. Instead, it asks only whether there is a concrete, particularized, actual or imminent injury that is not conjectural or hypothetical, that is fairly traceable to defendant's conduct and redressable by awarding the requested relief. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016). This standard is easily satisfied by the Fishers.

The TRO motion does not ask this Court to decide the merits of whether the challenged provisions of ICWA govern the Fishers' private-severance and stepparent-adoption proceedings, and if they do, whether such application is unconstitutional. The requested TRO only asks for narrow, focused relief against Defendant Cook to prevent a specific irreparable harm identified in the TRO motion: visitation. *See also* Fisher Aff. ¶¶ 9–12; Fisher Supp. Aff. ¶ 5.

Nor can the Nation's argument that the TRO would be an advisory opinion be squared with logic. Nation.8. For example, TROs advise parties not to stalk, make phone calls, seek visits with, or be in the physical vicinity of specified persons all the time. Courts routinely enter such TROs even when the same parties are disputing some other claims in different courts. This TRO, if granted, is no different. If Cook chooses to ignore the TRO, he will be in contempt of court. There is nothing hypothetical or advisory about that.

Abandoning its one-paragraph advisory-opinion argument, the Nation confusingly discusses whether the TRO would be ripe. Nation.8–9. There is no question that Cook wants to commence visits with A.C. after almost three years of no contact. There is no question that A.C. is mortified by that prospect. *See* Fisher Aff. ¶ 24; Fisher Supp. Aff. ¶ 4. The subject matter of the TRO is as ripe as it gets.

The standing arguments can be discarded forthwith.

CONCLUSION

The requested TRO stopping Cook from exercising visitation with A.C. should issue.

Respectfully submitted, this 19th day of April, 2019, by:

QUATTLEBAUM, GROOMS & TULL PLLC
111 Center Street, Suite 1900
Little Rock, Arkansas 72201
Telephone: (501) 379-1700
Facsimile: (501) 379-1701
cpekron@qgtlaw.com
bford@qgtlaw.com

By: /s/ Chad W. Pekron
Chad W. Pekron (Ark. Bar No. 2008144)
Brittany S. Ford (Ark. Bar No. 2018102)

Keith Morrison (Ark. Bar No. 84210)
WILSON & ASSOCIATES
One East Center Street, Suite 310
Fayetteville, Arkansas 72701
Telephone: (479) 521-5820
Facsimile: (479) 521-5543
kmorrison@TheWilsonLawFirm.com

-and-

/s/ Aditya Dynar
Aditya Dynar (Admitted *Pro Hac Vice)*
Arizona Bar No. 031583

Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, Arizona 85004
Telephone: (602) 462-5000
Facsimile: (602) 256-7045
adynar@goldwaterinstitute.org
litigation@goldwaterinstitute.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Aditya Dynar, hereby certify that on April 19, 2019, I electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system which shall send notification of such filing to the following counsel of record for Defendants:

Steven Miskinis
DOJ-ENRD
Indian Resources Section
Poc Kidwell, Dreama
601 D. street, NW
Room 2731, Ste 3008
Washington, DC 20044-7754
202-305-0262
Fax: 202-305-0275
Email: steven.miskinis@usdoj.gov
Attorney for Tara Katuk Mac Lean Sweeney, in her official capacity as Assistant Secretary-Indian Affairs; Bureau of Indian Affairs; David Bernhardt, in his official capacity as Acting Secretary of the Interior

J. Dalton Person
Jones, Jackson, Moll, PLC
401 North 7th Street
Fort Smith, AR 72902
(479) 782-7203
Email: dperson@jjmlaw.com
Attorney for Cherokee Nation of Oklahoma, a federally-recognized Indian tribe

Stacy Leeds
Cherokee Nation Office of Attorney General
Attorney General
P.O. Box. 948
Tahlequah, OK 74465
918-931-0211
Fax: 918-458-6142
Email: leeds@me.com
Attorney for Cherokee Nation of Oklahoma, a federally-recognized Indian tribe

David R. Matthews
Matthews, Campbell, Rhoads, McClure, Thompson & Fryauf, P.A.
119 South Second Street
Rogers, AR 72756
(479) 636-0875
Fax: (479) 636-8150
Email: drm@mcrmt.com
Attorney for Cherokee Nation of Oklahoma, a federally-recognized Indian tribe

I further certify that I have served a true and correct copy of the foregoing, *via* Certified Mail, Return Receipt Requested, on the following:

Jason Cook
3710 Park Ave.
Fort Smith, AR 72903
Defendant, pro se

/s/ Aditya Dynar
Aditya Dynar