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. 2:19cv2034

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

DEFENDANT CHEROKEE NATION'S BRIEF IN SUPPORT OF MOTION TO DISMISS

Plaintiffs' lawsuit should be dismissed because they have not stated a claim for which relief can be granted. Simply put, Plaintiffs lack standing and this Court lacks subject matter jurisdiction over the applicability of the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §1901 et seq., to private actions for termination of parental rights and stepparent adoptions. However, even if the Court finds it has jurisdiction, the Court should abstain pursuant to *Rooker-Feldman* and *Younger*. Accordingly, this case should be dismissed according to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).[1]

[1] As a federally recognized Indian tribe, the Cherokee Nation possesses sovereign immunity from suit. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."). *See also Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*. 523 U.S. 751 (1998). However, the Cherokee Nation consents to defend the immediate action. By defending the present case, the Cherokee Nation does not waive sovereign immunity for any other context or purpose.

INTRODUCTION

Plaintiff Richard Fisher filed an adoption petition in Arkansas state court seeking a step-parent adoption of A.C. The Arkansas state court determined that ICWA would apply to the adoption proceedings because A.C. is a citizen of the Cherokee Nation[2] and Defendant Jason Cook, the biological father of A.C., is also a citizen of the Cherokee Nation.

Because the Arkansas state court ruling was an unsatisfactory ruling on the applicability of ICWA, Plaintiff dismissed the adoption proceeding and filed this case seeking a different result. Plaintiffs state that they intend to eventually refile the Arkansas state adoption case. When Plaintiffs refile the adoption case in Arkansas state court, they will have a full and fair opportunity to assert all claims and seek all the requested remedies in the context of a single case with a full adjudication of all factual and legal issues.

Plaintiffs concede that this Court lacks the authority to terminate the biological father's parental rights. Plaintiffs concede that this Court lacks the authority to grant an adoption, the ultimate remedy Plaintiffs seek.[3] The Arkansas state court is the appropriate and best forum for a full and complete litigation of Plaintiffs claims and this Court should dismiss the present case.

Furthermore, Plaintiffs also seek relief from this Court that would impact an ongoing post-divorce custody modification case between Plaintiff Erin Cook and Defendant Jason Cook in Arkansas family court. Defendant Cherokee Nation informed both the Arkansas state court and this Court in the Cherokee Nation's Opposition to Motion for Temporary Restraining Order ("TRO") that ICWA does not apply to state court divorce and custody modification matters.

[2] The Cherokee Nation confirms that A.C. is a Cherokee Nation citizen and that the application for citizenship was filed with the Cherokee Nation Registration Department on January 4, 2011 by Plaintiff Erin Cook.

[3] The underlying Complaint asserts that Plaintiffs will seek to terminate parental rights in state court and seek an adoption in state court (Doc. 1, ¶ 62), but acknowledges that Plaintiffs do not seek termination of parental rights or adoption remedies in federal court.

This Court denied Plaintiff's request for TRO on April 24, 2019. (Doc. 35). The same reasons for denying the TRO are applicable to the request for permanent injunctive relief.

ARGUMENT

The Court lacks jurisdiction over the matters at issue in Plaintiffs' lawsuit and Plaintiffs lack standing to proceed with their claims. Yet, if the Court finds it does possess jurisdiction, it should abstain from ruling on the case so that the adoption proceedings may be heard in Arkansas state court. To do otherwise will lead to undue delay and inefficient use of judicial resources.

I. The Court lacks subject matter jurisdiction over the applicability of ICWA.

This Court lacks subject matter jurisdiction because ICWA does not provide for a federal cause of action for the Plaintiffs. Plaintiffs assert no legal authority to invoke the power of a federal district courts to adjudicate the claims and provide the remedies they seek. This Court should decline to engage in appellate review of the Arkansas state adoption court ruling that ICWA applies to the adoption of a Cherokee citizen child.

Congress passed ICWA to provide minimum federal standards for state courts exercising jurisdiction over adoption and child welfare proceedings that involve Indian children. ICWA does not provide for a federal cause of action or federal court review of state court rulings. Following the exhaustion of all state court remedies, ICWA challenges are reviewable by the United States Supreme Court, but there is no legal basis for an interim cause of action in a federal district court. This was the procedural avenue in the two ICWA cases reviewed by the U.S. Supreme Court, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), and *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). In both cases, Mississippi and South Carolina courts entertained ICWA challenges and ruled on the applicability of ICWA.

ICWA is one of thousands of federal laws codified in Title 25 of the United States Code entitled "Indians." Title 25 is deeply rooted in a long and complicated history of American Indian affairs involving treaty relationships and modern ongoing government-to-government relationships between, in this case, the United States and the Cherokee Nation. Plaintiffs' argument that ICWA, and by consequence an entire body of Indian law statutes, is unconstitutionally race-based, is inconsistent with a well-settled and extensive body of law that recognizes the authority of Congress to pass laws that uniquely apply to individual Indians and Indian tribes. This power extends to a broad array of subject matter areas including, but not limited to, federal Indian country criminal jurisdiction, education and child welfare, property and probate, trade, and commerce. The United States Supreme Court has repeatedly upheld Congressional authority to pass laws that apply to individual Indians, like A.C. and Defendant Cook, because they are citizens of the Cherokee Nation. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 552 (1974).

Congress contemplated only two court systems in ICWA: tribal courts and state courts. ICWA expressly provides for exclusive tribal court jurisdiction when an Indian child is domiciled inside the tribe's jurisdictional boundaries. *See* 25 U.S.C. § 1911(a). ICWA expressly provides for concurrent jurisdiction between state courts and tribal courts in all other covered proceedings involving Indian children. *See* 25 U.S.C. § 1911(b) and (c). Federal courts are never mentioned in ICWA and there is nothing in the statute or legislative history to suggest that federal district courts were intended to hear ICWA cases. ICWA's silence as to federal courts is consistent with the long-standing rule that matters of family law and child welfare are matters of local general jurisdiction.

The only provision of ICWA that can arguably be read to confer jurisdiction on this Court is 25 U.S.C. § 1914. Plaintiffs fail to cite § 1914 as the basis of their claim and Plaintiffs fail to state a claim to which they are entitled relief under the plain language of §1914:

> Any child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

Even if this Court found that a federal district court is a "court of competent jurisdiction" under § 1914, the Complaint does not fall within the limited scope of cases that may be brought by Plaintiffs under § 1914. The only plaintiffs authorized to bring invalidation actions under § 1914 are (1) Indian children who are the subject of a foster care or termination of parental rights case, (2) parents who have had a child removed from their custody, or (3) a tribe seeking to invalidate an action. Plaintiffs do not have standing because they do not fall within these three categories contemplated in the statute.

Although A.C. is a Cherokee citizen child, A.C. is not subject to an action for foster care placement or termination of parental rights. A.C. was once subject to an adoption proceeding, but that proceeding was voluntarily dismissed by Plaintiffs before they attempted to try their case on the merits. A nonsuit cannot be converted into an action for termination of parental rights to invoke § 1914. Further, Plaintiffs' intent to refile a future adoption case is too remote and speculative for an action under § 1914.

Based on the Complaint, Plaintiff Erin Fisher has always maintained parental custody of A.C. and is therefore not a parent that has been injured as to initiate an action under § 1914. Plaintiff Richard Fisher lacks standing to file a § 1914 action—he is neither a parent nor an Indian custodian under ICWA.

In addition, all § 1914 cases must allege a violation of ICWA §§ 1911, 1912, or 1913. Plaintiffs' Complaint does not allege a violation of any of these requisite sections. Even if this Court were to find that a federal district court is a "court of competent jurisdiction" to invalidate an action under § 1914, the Complaint does state a claim that falls within the limited scope of actions, and limited scope of parties, that fall under § 1914.

For years, tribes and parents have attempted to vindicate their rights guaranteed by ICWA in federal courts and have generally been denied that right. The circuits are somewhat split on the issue, with the Tenth and Eighth circuits denying a right to federal court review under res judicata and *Younger* abstention, while the Ninth Circuit has found that 25 U.S.C. § 1914 authorizes federal jurisdiction provided there is an actual controversy and injury-in-fact, unlike the present case.

In the Tenth Circuit case of *Kiowa Tribe of Oklahoma v. Lewis*, a father and tribe attempted to enjoin state court adoption proceedings in federal court, were denied, and instead appealed the case to the Kansas Supreme Court. 777 F.2d 587 (10th Cir. 1985). The Kansas state court established the Existing Indian Family exception, *Matter of Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982), but instead of appealing that decision to the United States Supreme Court, the tribe filed a case in federal district court collaterally attacking the Kansas state court decision. *See Kiowa Tribe*, 777 F.2d 587. The Tenth Circuit held that res judicata precluded the litigation of the claim in federal court:

> It is not enough here for the Tribe to predicate a due process violation on the argument that the Kansas courts did not follow the ICWA's procedures such as letting the Tribe intervene. Congress clearly anticipated that state courts might have to determine, in the first instance, whether the ICWA's terms should apply. A state court determination that the ICWA does not apply is binding on us unless (1) it is "so fundamentally flawed as to be denied recognition under § 1738, or (2) unless Congress intended state court judgments concerning the

> ICWA's applicability to be excepted from § 1738's command of full faith and credit.

Id. at 591; *see also Kickapoo Tribe of Oklahoma v. Rader*, 822 F.2d 1493 (1987); *Comanche Indian Tribe of Oklahoma v. Hovis*, 53 F.3d 298 (Tenth Cir. 1995) (holding that collateral estoppel barred the claim in federal court).

In *Morrow v. Winslow*, another Tenth Circuit case, a Cherokee citizen father attempted to stop the adoption of his child by non-Indians by first motioning to transfer the case to tribal court, and then filing a federal lawsuit prior to the state court trial date on the adoption. 94 F.3d 1386 (10th Cir. 1996). The Tenth Circuit pointed out that the *Younger* abstention doctrine under *Hoffman v. Pursue Ltd.*, 420 U.S. 592 (1975), requires "that a party must exhaust his state appellate remedies before seeking a federal injunction unless he can bring himself within one of the exceptions in *Younger*." *Morrow*, 94 F.3d at 1392.

Those exceptions are (1) if the state proceeding is motivated by a desire to harass or is conducted in bad faith; (2) if the challenged statute is flagrantly violative of express constitutional prohibitions in every clause and paragraph thereof; or (3) if extraordinary circumstances exist." *Id.* *Morrow* specifically argued that abstention should not apply because the case was between private parties with no state involvement. *Id*. at 1390.

After analyzing 25 U.S.C. § 1914 regarding collateral attacks in a "court of competent jurisdiction" and finding it does not create a federal cause of action, *contra Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 553-4 (9th Cir. 1991), the Tenth Circuit turned to the question of private litigation. It found that "[t]he state, although not a party, obviously has an interest in the orderly conduct of the proceedings in its courts in a manner which protects the interests of the child and the family relationship." *Morrow*, 94 F.3d at 1397.

While the on-going state court proceeding in *Morrow* was an actual controversy, and the present case involves only Plaintiffs' intent to refile an adoption case in the future, given the recent Eighth Circuit holding that *any* on-going state proceeding that might be affected by the case requires an abstention, the concerns remain the same. *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 613 (8th Cir. 2018). Plaintiffs verify in the Complaint that their litigation strategy will include refiling the Arkansas adoption case but wish to do so with the benefit of an order from this Court overturning the Arkansas state court's initial ruling as to ICWA applicability. In addition, Plaintiffs seek a remedy from this Court in the on-going divorce modification proceedings that are currently pending before the Arkansas state family court.

A. Plaintiffs lack standing and have provided no statutory authority for this cause of action.

Plaintiffs cannot invoke the jurisdiction of this Court simply on the grounds that Plaintiffs are displeased with the Arkansas state court ruling. Plaintiffs fail to demonstrate that they have suffered a concrete injury that is traceable to Defendant Cherokee Nation's conduct. Further, the relief sought by Plaintiffs will not redress the alleged harm because Plaintiffs will be required to refile the Arkansas state adoption case and fully try their case on the merits in order to obtain the remedy they ultimately seek. As to the divorce modification proceedings, ICWA does not apply and Cherokee Nation has not, and does not intend, to intervene.

To reach the standing threshold, Plaintiffs must have (1) suffered an "injury in fact" of a legally protected interest that is concrete and actual or imminent; (2) there must be a connection between the injury and the conduct brought before the court; and (3) it must be likely, rather than speculative, that a favorable decision by the court will redress the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs' alleged injury are speculative: Plaintiffs may not be awarded the adoption remedy they seek from an Arkansas state court in a future adoption

case. They presume that in that future case, the Arkansas state court will apply ICWA and allow the Cherokee Nation to intervene and present facts and legal arguments.

In the present case, Plaintiffs lack standing, both under the express requirements of ICWA § 1914 as detailed above, and under the *Lujan* test. ICWA § 1914 does not allow "any person" to obtain judicial review of a state court action or inaction. It provides for a limited class of plaintiffs, and the Complaint fails to place any of the present Plaintiffs in the requisite categories of § 1914.

Plaintiffs fail to allege an injury in fact. Plaintiffs' alleged injury will occur, if at all, at some point in the future *should* they refile the Arkansas state court adoption proceedings and *if* after applying Arkansas adoption law and ICWA, the Arkansas state court fails to grant the remedy they ultimately seek, step-parent adoption of A.C. The alleged injury to the Plaintiffs is hypothetical and is not imminent because it requires a subsequent Arkansas state court proceeding to run its course to completion. Plaintiffs' alleged injury turns on whether an Arkansas state court will award or deny the remedies they intend to seek in a future adoption case. Plaintiffs must satisfy the case-or-controversy requirement by demonstrating they are under a real and immediate threat of injury, but a conjectural or hypothetical possibility of future harm is not sufficient. *See Brazil v. Ark. Dep't of Human Serv.*, 892 F.3d 957, 960 (8th Cir. 2018).

The fact that the Arkansas state court ruled that ICWA applied in the previous case does not give Plaintiffs standing to bring this suit. "The mere fact that injurious activity took place in the past does nothing to convey standing to seek injunctive relief against future constitutional violations." *Harmon v. City of Kansas City, Mo.*, 197 F.3d 321 327 (9th Cir. 1999). The burden

of establishing standing rests on the Plaintiffs, yet they do not allege sufficient facts or law to meet this requisite burden.

B. Plaintiffs are requesting this Court issue an advisory opinion such that they have not stated a cause of action upon which relief can be granted.

Plaintiffs seek declaratory relief that ICWA does not apply to termination of parental rights in a private action and stepparent adoptions generally, and additionally that ICWA is unconstitutional. There is no pending adoption proceeding to which this Court's declaratory relief would apply. The only action before the Court is Plaintiffs' stated intent to file a future adoption case. Any such declaratory order would be advisory.

The Complaint cites the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201-2202, as authorization for this Court to grant relief. The DJA, however, is discretionary and was never intended as an avenue to seek advisory opinions. Plaintiffs must demonstrate standing and an actual controversy. 28 U.S.C. § 2201(a). Like any other plaintiff in federal court, a claimant under the DJA must also satisfy the requirements for constitutional standing as discussed above. *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 127 (2007).

Plaintiffs also seek injunctive relief against Cherokee Nation. Plaintiffs seek an injunction to stop Defendant Cherokee Nation from seeking the application of ICWA in a future state court proceeding, as well as damages for Defendants subjecting them to ICWA that allegedly discriminates against them on the basis of race. Even if Plaintiffs prevail on jurisdictional challenges, the injunctive relief sought is foreclosed by the Anti-Injunction Act ("AIA"), 28 U.S.C. § 2283 and Plaintiffs have not alleged an exception to AIA. Congress has not provided federal courts authority to grant an injunction to interfere with proceedings in a state court. In the present case, the adoption proceeding was filed and then dismissed by Plaintiff with the intent to immediately refile.

Plaintiffs seek injunctive relief to permanently enjoin and mandate Defendant Cherokee Nation from asserting its statutorily guaranteed ICWA rights in an Arkansas state court case Plaintiffs plan to file in the future. In essence, the Plaintiffs seek to interfere with the Arkansas state court's ability to hear Defendant Cherokee Nation's arguments to enforce the statutorily guaranteed rights under ICWA. The AIA prohibits the issuance of injunctive relief in this matter, and Plaintiffs have not asserted an exception to the AIA.

This Court's reasons for denying Plaintiff's Temporary Restraining Order should apply to the longer-term injunctive relief Plaintiffs seek. Just as the Court will not enjoin Defendant Cook from presenting arguments to the Arkansas state court in the form of his motion to modify his visitation rights with A.C. because doing so impermissibly enlarge the exceptions to the AIA, neither should the Court enter more permanent injunctive relief to stop Defendant Cherokee Nation from asking the Arkansas state court to apply ICWA.

"Article III limits the federal courts to deciding 'Cases' and 'Controversies" and this prohibits [federal courts] from issuing advisory opinions." *KCCP Tr. V. City of N. Kansas City*, 432 F.3d 897, 899 (8th Cir. 2005). "One kind of advisory opinion is an opinion advising what the law would be upon a hypothetical state of facts." *Pub. Water Supply Dist. No. 8 of Clay Cty., Mo. v. City of Kearney, Mo.*, 401 F.3d 930, 932 (8th Cir. 2005)(internal quotations and citations omitted). "As for policy, courts avoid resolving disputes based on hypothetical facts because to do so would be a poor use of scarce judicial resources." *Id.* "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (unanimous decision) (internal quotations and citations omitted).

Plaintiff are relying on the past injury of the Arkansas state court ruling that ICWA applied to the adoption proceeding and do not allege an ongoing injury by Defendant Cherokee Nation. "In cases of this sort, where the plaintiffs seek declaratory and injunctive relief, past injuries alone are insufficient to establish standing. Rather, [the plaintiff] must show he is suffering an ongoing injury or faces an immediate threat of injury." *Dearth v. Holder*, 641 F.3d 499, 501 (D.C. Cir. 2011). There is no ongoing injury or immediate threat of injury in the adoption case. There is no ongoing adoption proceeding. Plaintiffs are asking this Court to issue an advisory opinion that would apply to the parties *if and when* Plaintiffs refile an adoption proceeding in Arkansas state court on the presumption that the Arkansas state court will rule against them. This amounts to a request for an advisory opinion from the Court.

Furthermore, Plaintiffs' request for relief from this Court is clearly advisory in that they did not even *attempt* to obtain the ultimate relief of adoption in the state court. Absent that attempt, it is impossible to state that the provisions of ICWA prevented the adoption from occurring. When confronted with the reasonable requirements of ICWA, Plaintiff Richard Fisher simply chose a voluntary dismissal rather than put on the requisite proof. This suggests that the instant litigation is not about A. C. at all, but rather a pretext to lure the Court into a non-existent case for other purposes.

II. Even if the Court finds it has jurisdiction, it should abstain pursuant to the *Rooker-Feldman* doctrine.

The *Rooker-Feldman* doctrine, codified at 28 U.S.C. § 1257, specifically protects against federal courts becoming de facto appellate courts for state-court losers. The doctrine applies to "cases brought by state-court losers complaining of injuries cause by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280,

284 (2005). Only when a complaint alleges blatant violations of federal laws will federal courts refuse to find that *Rooker-Feldman* bars jurisdiction. Plaintiffs have alleged no such violation in the Complaint. Plaintiffs argue that ICWA does not apply to a private step-parent adoption proceeding despite the fact that ICWA expressly applies to adoptions proceedings in state courts where a tribal citizen child is the subject. Plaintiffs allege no action under § 1914 or any other substantive federal statute.

Like *Younger*, *Rooker-Feldman* provides an avenue for federal courts to decline to interfere in state court proceedings. The *Rooker-Feldman* abstention doctrine precludes a federal district court from reviewing cases brought by state-court losers because "federal jurisdiction to review most state court judgments is vested exclusively in the United States Supreme Court." *Simes v. Huckabee*, 354 F.3d 823, 827 (8th Cir. 2004) (quoting *Lemonds v. St. Louis Cnty.*, 222 F.3d 488, 492 (8th Cir. 2000)).

In *Hageman v. Barton*, the Eighth Circuit declined to find a *Rooker-Feldman* jurisdictional bar but the following standard was articulated: "If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, *Rooker-Feldman* bars … jurisdiction …. If, on the other hand, a … plaintiff … asserts an alleged illegal act or omission by and adverse party, *Rooker-Feldman* does not bar jurisdiction." 817 F.3d 611, 614 (8th Cir. 2016) (quoting *See Riehm v. Engelking*, 538 F.3d 952, 965 (8th Cir.2008)).

Section § 1914 of ICWA is not an exception to *Rooker-Feldman*. Although the Ninth Circuit has ruled that §1914 provides federal courts with authority to invalidate a state court foster care placement or termination of parental rights if it is in violation of §§ 1911, 1912 or 1913, no other circuit court has determined that a federal court is a "court of competent

jurisdiction" over family law and child welfare matters within the meaning of ICWA. *See Doe v. Mann*, 415 F.3d 1038, 1047 (9th Cir. 2005). The Tenth Circuit has declined to adopt the *Doe v. Mann* analysis and instead has applied federal court abstention principles and res judicata to ICWA cases. *See Morrow*, 94 F.3d at 1393-96, *Hovis*, 52 F.3d at 201-04.

In the current case, there is no § 1914 action from which Plaintiffs can argue federal court jurisdiction and the complaint alleges no violation of sections 1911,1912 or 1913 and no actual injury from violations of the sections. Plaintiff Richard Fisher filed an adoption petition and the state court made one ruling: that ICWA would apply to the state adoption proceeding because A.C. is a Cherokee Nation citizen. Plaintiffs' federal case challenges the Arkansas ruling on precisely that point, arguing that the federal court should overrule the state court's ruling and hold that ICWA does not apply, or, in the alternative, that ICWA is unconstitutional. The fact that Plaintiff Richard Fisher dismissed his state court petition so that he could file the present case in federal court, rather than appealing the decision in Arkansas courts, does not escape *Rooker-Feldman* application. This is precisely the type of litigant conduct *Rooker-Feldman* seeks to stop.

III. The *Younger* abstention doctrine provides an additional basis for the Court to abstain from ruling even if it has jurisdiction to do so.

Should this Court find that it has subject matter jurisdiction, it should abstain from hearing Plaintiffs' case out of consideration for role of the state courts in adoption and custody proceedings, where these questions are routinely and best resolved.

Arkansas state court is the appropriate forum for both adoption and custody modification proceedings. Plaintiffs acknowledge that federal courts typically do not consider domestic and child welfare cases. (Doc. 22, p. 6). As has been repeatedly recognized by federal courts, "[f]amily relations are a traditional area of state concern." *Moore v. Sims*, 442 U.S. 415, 435

(1979); *see also State of Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930) ("It has been understood that, 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States.'").

The Eighth Circuit has stated:

> Reexamination of custody arrangements is a matter which belongs exclusively in state court; domestic relations disputes have been traditionally subject to exclusive state jurisdiction. Where a constitutional issue arises out of a custody dispute, and the initial determination involves a reexamination of the custody arrangement, the proper course is to dismiss the case and remand to the state court.

Bergstrom v. Bergstrom, 623 F.2d 517, 520 (8th Cir. 1980). Plaintiffs have sought to distinguish *Bergstrom* by arguing that the facts of this case do not involve a reexamination of who should have custody of the minor. Yet, "when a cause of action closely relates to but does not precisely fit into the contours of an action for divorce, alimony or child custody, federal courts generally will abstain from exercising jurisdiction." *Kahn v. Kahn*, 21 F.3d 859, 861 (8th Cir. 1994). Furthermore, Ark. Code Ann. § 9-2-102(2) includes visitation decrees and orders within the definition of "child-custody determination." *See also Robbins v. Robbins*, 328 S.W.2d 498, 500 (Ark. 1959) ("As in all child custody cases, the trial court retains jurisdiction to make any change in visitation rights which future circumstances might dictate."). Adoption proceedings are consistently within the exclusive jurisdiction of Arkansas state courts. Under ICWA, Arkansas exercises concurrent jurisdiction in this case with the Cherokee Nation, and not with federal district courts. 25 U.S.C. § 1911 and § 1912.

Federal abstention doctrine can prohibit a federal court, even in an effort to protect federal constitutional rights, from enjoining pending state court proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). "The *Younger* doctrine, which counsels federal-court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial

processes in the absence of great and immediate irreparable injury to the federal plaintiff." *Moore*, 442 U.S. at 415. Although *Younger* involved an injunction that enjoined a state criminal proceeding, the same logic now applies to civil cases.

The U.S. Supreme Court "has extended *Younger* abstention to particular state civil proceedings that are akin to criminal prosecutions, or that implicate a State's interest in enforcing the orders and judgments of its courts…" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69 (2013). As the Court noted in *Sprint*, there are "certain instances in which the prospect of undue interference with state proceedings counsels against federal relief." *Id*. (citing *New Orleans Public Service, Ind. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989)).

Plaintiffs contend that the immediate case does not present either a civil proceeding akin to criminal prosecution or one that implicates the State of Arkansas's interest in enforcing the orders and judgments of its courts.[4] To the contrary, this case involves both types of civil enforcement proceedings to which *Younger* applies. Plaintiffs argue that only those cases that are initiated by the state are subject to abstention. Yet, *Moore* simply noted that the state was a party to the state court proceedings, without making particular note of the state initiating those proceedings. 442 U.S. at 416. *Younger* abstention does not require that civil enforcement proceedings first be initiated by the state, and abstention may be found when civil proceedings are akin to criminal prosecutions or in civil proceedings that implicate a state's interests in enforcing the orders of its courts.

In the state court proceeding at issue herein, the State of Arkansas intervened to argue against Mr. Cook, child custody and support obligations were found against him, the court

[4] In support, Plaintiffs cite *Doe v. Piper*, 165 F. Supp. 3d 789, 806 (D. Minn. 2016), a case involving a state court adoption proceeding that was ultimately dismissed as moot, and *Tinsley v. McKay*, 156 F. Supp. 3d 1024, 1034 (D. Ariz. 2015), where Arizona juvenile court proceedings "responsible for approving motions for psychiatric assessments and residential treatment services," did not qualify as quasi-criminal enforcement proceedings.

entered contempt orders against him, and his visitation rights were restricted. This, combined with the "massive importance of the state's interest in child custody and support proceedings" have been found to be sufficient grounds for determining a civil enforcement proceeding is akin to a criminal prosecution. *Alexander v. Morgan*, 353 F. Supp. 3d 622, 627 (W.D. Ky. 2018) (Kentucky child custody and child support proceeding was a civil enforcement proceeding akin to criminal prosecution appropriate for *Younger* abstention where unmarried father's federal lawsuit against mother arose out of the state court proceeding, state intervened against father, father was ordered to pay money to mother, and state had an important interest in the proceedings).

In addition, this case implicates the State of Arkansas's interest in enforcing its orders and judgment in the domestic relations and adoption cases over which it has the exclusive and continuing jurisdiction. *See* Ark. Code Ann. § 9-19-202(a) ("Except as otherwise provided in § 9-19-204, a court of this state which has made a child-custody determination … has exclusive, continuing jurisdiction over the determination…"). The Sebastian County Circuit Court retains jurisdiction to enter any further orders and ensure compliance with those currently in effect in *Fisher v. Cook*, Case No. DR-2011-446, in accordance with the exclusive jurisdiction of the State of Arkansas over domestic relations matters. *See Machetta v. Moren*, 2017 WL 2805192, at *5 (S.D. Tex. Apr. 13, 2017), *report and recommendation adopted*, 2017 WL 2805002 (S.D. Tex. June 28, 2017), *aff'd*, 726 F. App'x 219 (5th Cir. 2018) ("Plaintiff's complaints in this Court are inextricably connected to an ongoing child custody proceeding in Texas state court. Thus, this case fits into the third exceptional category of *Younger* abstention."); *Karl v. Cifuentes*, 2015 WL 4940613, at *4 (E.D. Pa. Aug. 13, 2015) ("Custody cases are particularly appropriate for *Younger* abstention."); *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S.

423, 432 (1982) ("The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved."). Plaintiffs' claims in this immediate matter are inextricably connected with the ongoing post-divorce custody modification proceedings over which the Sebastian County Circuit Court has and will maintain jurisdiction. As to the adoption proceedings, the Arkansas and Cherokee Nation exercise concurrent jurisdiction as recognized by ICWA § 1911 and § 1912.

Next, federal courts should abstain from exercising their jurisdiction pursuant to *Younger* if (1) there is an ongoing state proceeding, (2) that implicates important state interests, and (3) that provides an adequate opportunity to raise any relevant federal questions. *Plouffe v. Ligon*, 606 F.3d 890, 894-95 (8th Cir.2010) (citing *Middlesex*, 457 U.S. at 432).

First, as this Court previously noted, "[c]ontrary to Plaintiffs' argument that there are no ongoing state judicial proceedings, an Arkansas State court has entered a visitation order (Doc. 22-3) explicitly retaining jurisdiction to enter further orders, following the current laws of the State of Arkansas and its longstanding practice." (Doc. 35, p. 2). As to the adoption case, Plaintiffs dismissed the Arkansas state court case but they plan to refile, as the Arkansas state court will be the court that can award them the concrete relief they ultimately seek, the step-parent adoption of A.C.

"Regarding the second component for *Younger* abstention, there is no doubt that state-court proceedings regarding the welfare of children reflect an important state interest that is plainly within the scope of the doctrine." *Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245, 1249 (8th Cir. 2012). Finally, "[s]tate courts are competent to adjudicate federal constitutional claims, and when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an

adequate remedy, in the absence of unambiguous authority to the contrary." *Oglala Sioux*, 904 F.3d at 613 (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987)) (internal citation omitted). Each of the *Younger* criteria strongly weighs in favor of abstention and recognizes that familial matters belong in state court.

The recent case of *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 608 (8th Cir. 2018) is particularly enlightening on the applicability of *Younger* abstention to the current matter. In essence, the class members in *Oglala Sioux* were not attempting to make changes to their own case, but rather "'seeking to expose and challenge systemic policies, practices, and customs of the Defendants that violate federal law.'" 904 F.3d at 608. The plaintiffs argued the state practice around the 48-hour, or the first hearing after the removal of the children, violated both ICWA and the due process clause. *Id*. Like the Plaintiffs in this case, the plaintiffs in *Oglala Sioux* argued that since there were no on-going state proceedings, the *Younger* exception did not apply. *Id*. at 610. However, the Eighth Circuit found that the fact 48-hour hearings in general were on-going during the pendency of the case meant that the federal court must abstain from hearing the case. *Id*. at 611. The same must hold true for the current plaintiffs. Even accepting, *arguendo,* they do not have a case pending, there are certainly pending and ongoing ICWA cases in Arkansas state court, likely including those involving stepparent adoptions.

Sebastian County Circuit Courts hear a very high volume ICWA cases because of Sebastian County's geographic proximity as a border county to the territorial boundaries of the Cherokee Nation. Currently, there are ICWA cases in Sebastian County involving 68 Cherokee citizen children, including adoption cases. *See* Affidavit of Renee Gann, attached hereto as Exhibit "A." Those cases are best resolved in the local courts by court staff and social workers that are accustomed to working together in a high volume of cases.

In recognition of the long-held position that matters of adoption and child custody belong in state court, this Court should abstain pursuant to *Younger* if jurisdiction to hear the matter is found.

IV. Plaintiffs' equal protection claims fail because ICWA applies to a child and parent's political affiliations as citizens of the Cherokee Nation and not because of race.

Over and over again, state courts have found the arguments the Plaintiffs put forward to be unavailable. ICWA applies when there are two prerequisites—an Indian child, and a child custody proceeding. Both of these are defined clearly in the law. An Indian child is a child who is a citizen or member of a federally recognized Indian tribe. 25 U.S.C. § 1903(4). A child custody proceeding is either a foster care placement, any termination of parental rights, a pre-adoptive placement, or adoptive placement. 25 U.S. C. § 1903(1)(i-iv).

A review of published judicial opinions produces no instance of a state court finding that ICWA violates equal protection. In cases with facts substantially similar to the present case—a stepparent adoption—state courts have specifically held that equal protection concerns are simply not applicable. *In re N.B.*, 199 P.3d 16, 22-23 (Colo. Ct. App. 2007) (rejecting the equal protection argument in a case applying ICWA to a step parent adoption); *In re T.A.W.*, 383 P.3d 492, n20 (Wash. 2016) (in a case applying ICWA and Washington state law to a stepparent adoption, the court noted while the argument was only raised on the petition for review, several states have rejected those arguments); *S.S. v. Stephanie H.*, 388 P.3d 569, 576 (Ariz. Ct. App. 2017), *cert denied* 138 S.Ct. 380 (2017) (flatly rejecting equal protection arguments when applying ICWA to a stepparent adoption).

In their claim that ICWA unduly burdens them, Plaintiffs also misread ICWA. Plaintiffs claim their eventual adoption would be reviewable for up to two years under the federal law

rather than the usual length of time an adoption is reviewable in Arkansas. The two-year review time period is for cases of voluntary adoption, and only then when there is demonstrable evidence of fraud or duress. 25 U.S.C. § 1913. Plaintiffs are adopting a child under 25 U.S.C. § 1912, an involuntary proceeding as to the father. As noted earlier, the only way to attach an adoption under § 1912 is through § 1914 where state courts have generally adopted the *state* statute of limitations. *See In re Adoption Erin G.*, 140 P.3d 886 (Alaska 2006).

In addition, Plaintiffs focus on their own constitutional rights to the care, custody, and control of the child. (Doc. 1, ¶¶ 98, 99). Defendant Cook also has those same constitutionally protected rights until his rights are either terminated or the State of Arkansas files a petition against him. The Plaintiffs refer to Defendant Cook as an "unfit parent." (Doc. 1, ¶¶ 98, 100). If Defendant Cook is in fact an unfit parent, then the Arkansas Department of Human Services should file a petition against him and prove up the case to terminate his parental rights as an unfit parent. If that were to occur, ICWA would apply to the case, as it does to any adoption case Plaintiffs intend to refile. A parent cannot terminate the constitutionally protected rights of another parent simply by calling them "unfit." The road to a final judgment in an adoption case will be a long process including the application of ICWA, the application of Arkansas adoption laws, and the application of the best interest standards.

V. The public interest will not be served if Plaintiffs' claims are found to be meritorious.

The public interest will not be served by this Court granting Plaintiff's remedies as to an ongoing pending state court matter, the Arkansas state court post-divorce custody modification proceeding. Likewise, the public interest is not served by this Court providing appellate review of a state court ruling on the applicability of ICWA in an adoption case, particularly since

Plaintiff dismissed the case to seek federal review with the intent to refile the same adoption case in Arkansas state court.

Giving credence to Plaintiffs' methodology will invite multiple future litigants in ICW and non-ICW child custody proceedings to unduly burden the federal dockets with attempts to interfere with state judicial process by seeking injunctive and declaratory orders that prevent the cases from reaching the merits. These matters belong in state court.

CONCLUSION

Because Plaintiffs lack standing and this Court lacks subject matter jurisdiction, this lawsuit should be dismissed according to Fed. R. Civ. P. 12(b)(1) and (b)(6). However, if the Court finds it has jurisdiction, it should nonetheless abstain pursuant to *Rooker-Feldman* and *Younger* abstention principles.

CHEROKEE NATION, Defendant

Stacy Leeds (Oklahoma Bar No. 17663)
Special Attorney
Cherokee Nation Office of Attorney General
PO Box 948
Tahlequah, OK 74465
Phone: 918-453-5626
Fax: 918-458-6142

By: /s/ Stacy L. Leeds
Stacy L. Leeds

J. Dalton Person (Ark. Bar No. 2016205)
JONES, JACKSON, MOLL,
McGINNIS & STOCKS, PLC
401 N. 7th Street
P. O. Box 2023
Fort Smith, AR 72902-2023
Phone: 479-782-7203
Fax: 479-782-9460

-and-

David R. Matthews (Ark. Bar No. 76072)
Ryan P. Blue (Ark. Bar No. 98125)
Matthews, Campbell, Rhoads,
McClure & Thompson, P.A.
119 South Second Street
Rogers, AR 72756
Phone: 479-636-0875
Fax: 479-636-8150

CERTIFICATE OF SERVICE

I, Danita R. Cox, hereby certify that on May 6th, 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:

Chad W. Pekron
Brittany S. Ford
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
Attorneys for Plaintiffs

Keith Morrison
WILSON & ASSOCIATES
One East Center Street, Suite 310
Fayetteville, Arkansas 72701
Telephone: (479) 521-5820
Facsimile: (479) 521-5543
kmorrison@TheWilsonLawFirm.com
Attorneys for Plaintiffs

Aditya Dynar
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
Attorneys for Plaintiffs

Mark W. Webb

Assistant U. S. Attorney
414 Parker Avenue
Ft. Smith, AR 72901
Phone: (479) 494-4060
Fax: (479) 441-0569
Email: mark.webb@usdoj.gov

I further certify that on May 6th, 2019, I mailed the foregoing pleading by U.S. Postal Serving to non-CM/ECF participant at:

Jason Cook
3710 Park Avenue
Fort Smith, Arkansas 72903

Tara Katuk Mac Lean Sweeney
Acting Assistant Secretary – Indian Affairs c/o Duane Kees, Esq.
U.S. Attorney's Office
Western District of Arkansas
414 Parker Avenue
Fort Smith, Arkansas 72901

Bureau of Indian Affairs
c/o Duane Kees, Esq.
U.S. Attorney's Office
Western District of Arkansas
414 Parker Avenue
Fort Smith, Arkansas 72901

David Bernhardt, Acting Secretary U.S. Department of Interior
c/o Duane Kees, Esq.
U.S. Attorney's Office
Western District of Arkansas
414 Parker Avenue
Fort Smith, Arkansas 72901

/s/ Danita R. Cox
Danita R. Cox