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. JASON COOK; TARA KATUK MACLEAN 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 OF OKLAHOMA, A FEDERALLY-RECOGNIZED INDIAN TRIBE, Defendants,	Civil Action No. 2:19cv2034

FEDERAL DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendants Tara Sweeney, in her official capacity as Assistant Secretary–Indian Affairs; the Bureau of Indian Affairs ("BIA"); and David Bernhardt, in his official capacity as Secretary of the Interior (collectively, "Federal Defendants"), hereby file this brief in support of their motion to dismiss.

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INTRODUCTION

Forty-one years ago, widespread abusive treatment of children affiliated with Indian tribes spurred Congress to pass the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901, *et seq.* ICWA sets minimum federal standards that apply in state-court child-welfare proceedings involving children with one of two present-day relationships to a federally recognized Indian tribe. Myriad state courts have considered and upheld ICWA's constitutionality. This case challenges the constitutionality of ICWA in *federal* court in hopes of securing declaratory and injunctive remedies that would impede future proceedings in Arkansas *state* court.

Plaintiffs, Erin Fisher, on behalf of herself and as next friend to her son A.C., along with her current husband Richard Fisher, wish to terminate the parental rights of Defendant Jason Cook (father of A.C. and Erin Fisher's ex-husband) and then have Plaintiff Richard Fisher adopt A.C. This Court lacks authority to terminate parental rights, to decree an adoption, or to bind the state court that has jurisdiction over these matters. Because Arkansas state court is the only forum that can provide Plaintiffs meaningful relief, this Court should dismiss this case for lack of subject matter jurisdiction in accord with settled standing principles. The Court also should dismiss on the independent ground that any meaningful relief for Plaintiffs runs afoul of the Anti-Injunction Act or the doctrine of abstention. And to the extent this Court reaches the merits, it should find Plaintiffs' claims against Federal Defendants regarding ICWA's applicability and constitutionality are subject to dismissal for failure to state a claim.

BACKGROUND

I. The Indian Child Welfare Act and the 2016 Rule.

Indian Child Welfare Act. ICWA is Congress's response to widespread "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." *Miss.*

Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989). Senate oversight hearings revealed "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(4); *see also Holyfield*, 490 U.S. at 35. The evidence before Congress showed that up to 35% of all Indian children had been removed from their families of origin. *Id.* at 32 (citing Indian Child Welfare Program, Hr'gs before the Subcmte. on Indian Affairs of the Senate Cmte. on Interior and Insular Affairs, 93d Cong., 2d Sess., at 15 (1974); H.R. Rep. No. 95-1386, at 9 (1978)). This removal adversely impacted Indian children, with many of the children encountering "serious adjustment problems during adolescence." *Holyfield*, 490 U.S. at 33. Also of concern was "the impact on the tribes themselves," whose continued existence as discrete political bodies depends on continued participation of younger generations in tribal life. *Id.* at 34; *see* 25 U.S.C. § 1901(3).

ICWA declares a two-pronged federal policy "to protect the best interests of Indian children" and "to promote the stability and security of Indian tribes and families" by enshrining in federal law certain protections for tribes and their children that apply in state-court proceedings. *Id.* § 1902. Specifically, ICWA enacts "minimum Federal standards" that act as an overlay on otherwise-applicable state law in child-welfare proceedings. *Id.* §§ 1902, 1903(1), (4). ICWA's standards explicitly preempt conflicting state law, except where state law provides a "higher standard of protection to the rights of the parent or Indian custodian of an Indian child." *Id.* § 1921. ICWA applies only in child-custody proceedings—defined to include foster-care placements, terminations of parental rights, and preadoptive and adoptive placements—involving an "Indian child." *Id.* §§ 1902, 1903(1), (4). The term "Indian child" refers to "an unmarried person who is under age 18" that is either a "(a) member of an Indian tribe," or "(b) [] eligible for membership in an Indian tribe *and* [] the biological child of a member." *Id.* § 1903(4) (emphasis added).

One of ICWA's most critical protections is Section 1912, which establishes standards that a state court must find are met before ordering the removal of an Indian child from his or her biological parents or terminating parental rights. *See id.* §§ 1912(d), (e), (f). To terminate parental rights, a party must "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that such efforts have proved unsuccessful." *Id.* § 1912(d). Moreover, termination of parental rights requires a showing "by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses," that continued parental custody "is likely to result in serious emotional or physical damage to the child." *Id.* § 1912(f). Section 1914 allows an Indian child, the child's parent or Indian custodian, or the child's tribe to petition any court to invalidate a child's removal or the termination of a parent's rights upon a showing that procedural protections intended to safeguard the ability of tribes and tribal members to participate in state proceedings were violated. *Id.* § 1914.

ICWA also establishes adoptive preferences, which set "preferences" for adoptive placement of Indian children with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." *See id.* § 1915(a). The statute expressly specifies that state courts may deviate from the ordered preferences based on a finding of "good cause." *Id.* § 1915(a). ICWA defines "extended family member" as an Indian child's "grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent." *Id*. § 1903(2). The preference for placement with family members applies irrespective of whether the family members are affiliated with any Indian tribe. *See id.*

States—including Arkansas—have applied ICWA's protections for decades. *See, e.g., Howell v. Arkansas Dep't of Human Servs.*, 2017 Ark. App. 154, 517 S.W.3d 431 (2017) (applying 25 U.S.C. § 1912(f) in parental rights termination proceeding); *Burks v. Arkansas Dep't of Human*

Servs., 76 Ark. App. 71, 61 S.W.3d 184 (2001) (same); *Day v. Arkansas Dep't of Human Servs.*, 2018 Ark. App. 492, 562 S.W.3d 871 (2018) (applying 25 U.S.C. § 1915 to adoption proceeding); *Cutright v. State*, 97 Ark. App. 70, 244 S.W.3d 702 (2006) (same).

The 2016 Rule. In 2016, the Department of the Interior, pursuant to its rulemaking authority under 25 U.S.C. § 1952, promulgated a final rule incorporating the standards of ICWA and interpreting various provisions of ICWA as necessary to ensure uniform application by courts and others. 81 Fed. Reg. 38,778, 38,782 (June 14, 2016) ("2016 Rule"). The 2016 Rule incorporates ICWA's standards for active efforts, termination of parental rights, and adoptive placement preferences. *Compare* 25 U.S.C. § 1912 *with* 25 C.F.R. §§ 23.120-122; 25 U.S.C. § 1915(a) *with* 25 C.F.R. § 23.130(a). And the 2016 Rule provides that "active efforts" under ICWA, 25 U.S.C. § 1912(d), are "to be tailored to the facts and circumstances of the case" and provides examples, 25 C.F.R. § 23.2. With respect to adoptive placement preferences, the Preamble to the 2016 Rule elaborates that adoptive placement with a stepparent would meet the preferences "because the first placement preference is a member of the child's extended family and stepparents are included in the definition of 'extended family member.'" *See* 81 Fed. Reg. at 38,835 (citations omitted).

II. Procedural Background

Plaintiffs' Complaint states two counts challenging Sections 1912(d) and (f), 1914, and 1915(a) of ICWA, along with 2016 Rule. The first count alleges that ICWA and the 2016 Rule do not apply to proceedings to terminate parental rights or adopt a child where there is no removal of a child by a state agency. ECF No. 1 at ¶ 93. And, to the extent the Court finds otherwise, the first count alleges that application of ICWA and the 2016 Rule to Plaintiffs would be in violation of Plaintiffs' rights to equal protection under the Fifth and Fourteenth Amendments of the Constitution. *Id.* at ¶¶ 94-95. The second count alleges that application of ICWA and the 2016 Rule to Plaintiffs would infringe substantive rights protected by the Due Process Clauses of the

Fifth and Fourteenth Amendments and violate the privileges and immunities clause of the Fourteenth Amendment. *Id.* at ¶ 103. Plaintiffs seek declaratory relief holding ICWA and the 2016 Rule either do not apply to Plaintiffs or, if they do, they are unconstitutional. *Id.* at Wherefore Clause ¶ A. They also seek injunctive relief prohibiting Cook and the Cherokee Nation from invoking ICWA and the 2016 Rule in future state court proceedings. *Id.* at Wherefore Clause ¶¶ B, D. Lastly, they seek injunctive relief requiring the Federal Defendants to "constrain" the Cherokee Nation from asserting its rights under ICWA. *Id.* at Wherefore Clause ¶ C.[1]

STANDARD OF REVIEW

On a motion to dismiss, the Court takes the complaint's factual allegations "as true," but "[t]his tenet does not apply . . . to legal conclusions." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). Under Fed. R. Civ. P. 12(b)(1), a complaint must be dismissed where it fails to allege a basis for subject matter jurisdiction. *Bowe v. Nw. Airlines, Inc.*, 974 F.2d 101, 103 (8th Cir. 1992). Under Fed. R. Civ. P. 12(b)(6), a complaint must be dismissed that fails to state a claim on which relief can be granted. *Carton v. Gen. Motor Acceptance Corp.*, 611 F.3d 451, 454 (8th Cir. 2010).

[1] Plaintiffs bring claims against Federal Defendants "in their official capacity" under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Unnamed Federal Narcotics Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). ECF No. 1 at ¶ 89. Section 1983 applies only to *state* officials, not *federal*. *West v. Atkins*, 487 U.S. 42, 48-49 (1988) (Section 1983 requires showing of deprivation under color of state law of a state right or privilege). Plaintiffs also assert a *Bivens* claim. Because it is "well settled that a *Bivens action* cannot be prosecuted against the United States and its agencies because of sovereign immunity," *Buford v. Runyon*, 160 F.3d 1199, 1203 (8th Cir. 1998), Plaintiffs have no cognizable claim against the BIA and Department of the Interior under their causes of action. Similarly, a *Bivens* claim may not be brought against federal officers named in their official capacity. *Id.* at 1203 n.6.

ARGUMENT

I. Plaintiffs lack standing to bring their claims.

To bring a claim in federal court, the "irreducible constitutional minimum of standing" requires a plaintiff to demonstrate that he or she suffered an "injury in fact" which is "fairly . . . trace[able]" to the challenged conduct and which is "likely" to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Where, as here, plaintiffs challenge a statute or regulation, they must demonstrate injury from each individual provision that they wish to see invalidated and must establish entitlement to each form of relief they request. *See, e.g.*, *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008).

Injury. Plaintiffs seek relief in this Court from future harms they expect to result from application of ICWA's Section 1912 in Arkansas state court where Plaintiffs intend to renew their termination-of-parental-rights claim. ECF No. 1 at ¶ 84. Plaintiffs allege, however, that, in any such future proceedings, *id.* at ¶¶ 92-93, ICWA will *not* apply, because in their view, the law does not apply in a private, intra-family, action to terminate parental rights. In briefing their temporary restraining order request, Plaintiffs cited state court cases where ICWA was not applied in those circumstances. ECF No. 23 at 12-15. The Arkansas state courts do not appear to have addressed this question.[2]

Thus, before Plaintiffs could be injured, even under their own theory, at least three things must happen: (1) Plaintiffs must bring a state court parental rights termination action; (2) the state court must reject Plaintiffs' assertion that ICWA does not apply; and (3) the state court must apply

[2] Plaintiffs allege they dismissed their prior state court action because they could discern no legal avenue to raise ICWA's applicability. ECF No. 1 at ¶ 83. But the Arkansas Rules of Civil Procedure contemplate motion practice. *See* Ark. R. of Civ. P. 7. Plaintiffs could also raise the issue by letter, as the Cherokee Nation did when addressing Cook's petition to resume visitation. ECF No. 27.

ICWA and the 2016 Rule in a way that injures Plaintiffs. *See Los Angeles v. Lyons*, 461 U.S. 95, 97-98 (1983) (for injunctive relief to remedy future injury plaintiff must show both that he will be subject to a traffic stop and treated unconstitutionally in that stop); *Park v. Forest Serv. of U.S.*, 205 F.3d 1034, 1038 (8th Cir. 2000) ("The key inquiry in the issue of standing in our case, however, focuses on . . . the probability that the Forest Service will use an unconstitutional checkpoint at the next annual gathering."). Assuming Plaintiffs bring a parental rights termination action in state court, Plaintiffs' own statements show that it is not "certain" that the state court will apply ICWA, given their assertion that there is a fair argument that ICWA does not apply to such proceedings absent involvement by a public or private agency. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409-10 (2013) (threatened injury must be "certainly impending"). And, even if a court were to apply ICWA, it is far from clear that ICWA would require a different outcome in this unique context.[3] Accordingly, there is no imminent injury from application of Section 1912 of ICWA or the 2016 Rule to Plaintiffs.[4]

Plaintiffs also allege harm from Section 1914, which allows an action to be brought in any court of competent jurisdiction for violations of Sections 1911-1913 of ICWA. This purported

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[3] Moreover, even if the state court determines ICWA applies, it is not clear that Plaintiffs will be burdened by Section 1912(d), the provision requiring active efforts to prevent the breakup of the Indian family before terminating parental rights. The 2016 Rule clarifies that "[a]ctive efforts are to be tailored to the facts and circumstances of the case," and state courts have done this in the context of actions brought by private individuals rather than state agencies. 25 C.F.R. § 23.2. *See S.S. v. Stephanie H.*, 388 P.3d 569, 425 (Ariz. Ct. App. 2017) (active efforts in private proceeding need not "implicate formal public services" but rather "informal private initiatives aimed at promoting contact by a parent with the child"). Plaintiffs here allege past visitation between A.C. and his father and the state court will have to determine, based on "the facts and circumstances of the case," whether and what more is required to satisfy Section 1912(f).

[4] Plaintiffs allege harm from expenses incurred in filing, and then dismissing, a prior state court proceeding when they decided upon their present litigation strategy. ECF No. 1 at ¶ 85. However, self-inflicted injuries do not provide a basis for standing. *Auer v. Trans Union, LLC*, 902 F.3d 873, 878 (8th Cir. 2018).

injury is even more remote than the alleged injury from application of Section 1912. An action pursuant to Section 1914 would only be ripe after the termination of parental rights has occurred. Further, Plaintiffs identify no third party currently threatening to bring an action pursuant to Section 1914 and the basis of such action at this juncture would be purely speculative.

Finally, with regard to Plaintiffs' allegation that application of Section 1915(a) will harm them in a future adoption proceeding, Plaintiffs are simply incorrect. Section 1915(a) establishes preferences for adoptive placements to which a court must adhere unless it finds good cause to depart from them. 25 U.S.C. § 1915(a). The first preference is for "a member of the child's extended family." *Id.* ICWA defines extended family to include a child's stepparent, regardless of whether the stepparent is affiliated with any Indian tribe. *Id.* § 1903(2). Accordingly, adoption by A.C.'s stepfather would be a preferred placement under ICWA. Plaintiffs therefore would not have to show good cause for any departure from the preference. ICWA's application thus would plainly not hinder his attempts to adopt A.C.

Causation. Plaintiffs also fail to demonstrate that the named defendants have caused any of Plaintiffs' alleged injuries. Where the connection between an injury and a defendant is mediated by the independent action of a third party not before the court, there is no standing. *Lujan*, 504 U.S. at 560; *Balogh v. Lombardi*, 816 F.3d 536, 543 (8th Cir. 2016) (quoting *Lujan*, 504 U.S. at 560); *Wieland v. U.S. Dep't of Health & Human Servs.*, 793 F.3d 949, 954–55 (8th Cir. 2015).

As noted above, Plaintiffs argue that ICWA does not apply to their future state court termination of parental rights action, and claim—incorrectly—that they will be injured if it is applied to their future state-court proceedings. But the state court, not any party appearing before this Court, will decide whether and how to apply the statute to those proceedings. Because the unfettered choice of a third party breaks any arguable chain of causation between Defendants and

Plaintiffs' alleged injury—here the state court's interpretation of the applicability of Section 1912—Plaintiffs lack standing.[5] *See E.L. by White v. Voluntary Interdistrict Choice Corp.*, 864 F.3d 932, 937 (8th Cir. 2017) (equal protection injury caused not by defendant's transfer policy but by entity deciding to apply it to plaintiff).

Redressability. Plaintiffs fail to make the required showing that a judgment from this Court would redress any alleged injury. The Court has already noted that declaratory relief will be purely advisory. ECF No. 35 at 2. The state court will not be bound by any opinion of this Court regarding whether and when ICWA applies or whether ICWA is constitutional. *See Dickinson v. SunTrust Nat'l Mortg. Inc.*, 2014 Ark. 513, 7, 451 S.W.3d 576, 581 (2014) (federal court decisions are persuasive, not binding, authority in Arkansas state courts). Therefore, redress to Plaintiffs for harms suffered in state court would only come from relief that enjoins the state court, which is inappropriate for the reasons discussed in the next section.

Plaintiffs seek to avoid directly enjoining the state court by tailoring their requested relief to control the conduct of Defendants Cook and the Cherokee Nation in future state court proceedings. ECF No. 1 at Wherefore Clause ¶¶ B, D. But unless Plaintiffs plan to misrepresent A.C.'s status as an Indian child in future court proceedings, the state court will have to determine whether and how ICWA and the 2016 Rule apply to Plaintiffs. That will occur regardless of whether Plaintiffs succeed in gaining an order gagging Defendants Cook and the Cherokee Nation in the state court. Therefore, injunctive relief targeting Defendants Cook and the Cherokee Nation will not redress Plaintiffs' alleged injuries.

[5] Federal Defendants are not parties to state-court child welfare proceedings at issue here, and are not seeking any particular application of the ICWA or the 2016 Rule to Plaintiffs' particular case. The chain of causation to Federal Defendants' actions is thus even more attenuated.

With regard to Federal Defendants, Plaintiffs ask this Court to require them to "constrain" the Cherokee Nation from invoking ICWA and the 2016 Rule in proceedings involving Plaintiffs. *Id*. at Wherefore Clause ¶ C. But Plaintiffs have pointed to no authority granted to Interior or the BIA to take such action. In any event, such relief would be extraordinary and would similarly fail to redress Plaintiffs' injuries because the state court would have an independent obligation to determine ICWA's applicability, regardless of whether the Cherokee Nation invokes the statute.

Accordingly, the Complaint should be dismissed for lack of subject matter jurisdiction.

II. The Court should abstain from interfering with state-court proceedings.

A. Issuing the injunctive relief Plaintiffs seek is inconsistent with the policies of the Anti-Injunction Act.

For the reasons above, to provide meaningful relief to Plaintiffs, this Court would need to expressly prohibit Arkansas state court from applying ICWA. Plaintiffs alternatively request an injunction prohibiting Cook and the Cherokee Nation from raising ICWA in state court. Either of these orders would have the effect of stripping the state court of its jurisdiction. Injunctive relief directly targeting the state court would likely violate the Anti-Injunction Act, 28 U.S.C. § 2283. Injunctive relief preventing Cook or the Cherokee Nation from raising arguments in those state court proceedings would violate the principles underlying the Act.

The Anti-Injunction Act is "an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions." *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286 (1970). Those exceptions are (1) where "expressly authorized by statute"; (2) where "necessary in aid of the court's jurisdiction"; and (3) where "necessary to protect or effectuate the court's judgment." *Chick Kam Choo v. Exxon Corp*., 486 U.S. 140, 146 (1988). Plaintiffs can satisfy none of these exceptions. First, no applicable act of Congress authorizes an injunction here. Second, restraining

a future state court proceeding is not "necessary" to preserve jurisdiction. *In re Federal Skywalk Cases*, 680 F.2d 1175, 1183 (8th Cir. 1982). Third, there is no judgment from this Court to protect or effectuate. *See Atlantic Coast Line R.R.*, 398 U.S. at 297.

And while the Anti-Injunction Act may not strictly apply to an order tailored precisely to Cook's or the Cherokee Nation's conduct in state court, such an end run around the Act should not be countenanced. Such an order would be at odds with the Act's purpose, which is to "balance the tensions inherent" in "a dual system of federal and state courts" and discourage forum shopping. *Chick Kam Choo*, 486 U.S. at 146. *See also Overman v. U.S.*, 563 F.2d 1287, 1292 (8th Cir. 1977) ("There is, and ought to be, a continuing federal policy to avoid handling domestic relations cases in federal court in the absence of important concerns of a constitutional nature."). The United States Supreme Court has urged federal courts to exercise caution in issuing injunctions and to favor permitting state court proceedings. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977). Plaintiffs, therefore, cannot demonstrate entitlement to any meaningful relief.

B. The Court should abstain under *Younger*.

Alternatively, this Court should abstain from exercising jurisdiction under *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. The abstention doctrine set forth in *Younger* recognizes the principles of "equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum v. Foster*, 407 U.S. 225, 243 (1972). Under *Younger*, federal courts may not grant relief against an ongoing judicial proceeding when a State's interests "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); *Alleghany Corp. v. Pomeroy*, 898 F.2d 1314, 1316 (8th Cir. 1990). *Younger* abstention "reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff." *Oglala Sioux Tribe v. Fleming*, 904

F.3d 603, 610 (8th Cir. 2018), *petition for cert. filed*, No. 18-1245 (Mar. 4, 2019) (quoting *Moore v. Sims*, 442 U.S. 415, 423 (1979)).

Younger instructs a federal court to abstain from interfering in the state proceedings, 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. *Plouffe v. Ligon*, 606 F.3d 890, 892 (8th Cir. 2010). All three of these factors are met here and favor dismissal of the Complaint in its entirety, appropriately allowing the Arkansas state court the opportunity to adequately hear Plaintiffs' claims.

1. *Notwithstanding Plaintiffs' voluntary dismissal of their state court action, the ongoing state judicial proceeding factor is satisfied.*

With regard to the first condition, Plaintiffs allege past and prospective harm from application of ICWA and the 2016 Rule in Arkansas state court, but they also allege that they voluntarily "dismissed their termination and adoption petitions without prejudice in order to seek declaratory, injunctive, and monetary relief in federal court." ECF No. 1 at ¶ 83. Plaintiffs cannot avoid *Younger* abstention through the tactic of foregoing or abandoning a state court proceeding. *See Pennzoil Co.*, 481 U.S. at 16 n.16 (holding that party "cannot escape *Younger* abstention by failing to assert its state remedies in a timely manner"); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 369 (1989) (must exhaust state court procedures); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975) (same). *See also Anthony v. Council*, 316 F.3d 412, 420-21 (3d Cir. 2003) (internal quotations and citations omitted) (rejecting a party's attempt to "bypass the state system and to seek relief in federal court," stating that: "Once a party has appeared in state court and has had an *opportunity* to present [its] federal claims in the state proceedings, a federal court normally should refrain from hearing the claims.").

Courts disfavor the gamesmanship engaged in by Plaintiffs, finding that state proceedings are considered "ongoing" for *Younger* purposes even when they have been withdrawn. *See Local 54 Patrolman's Benevolent Ass'n v. Fontoura*, No. Civ. A. 06-6278, 2007 WL 4165158 at *4 (D.N.J. Nov. 19, 2007) (concluding that "[t]o permit such judicial manipulation would be tantamount to forum shopping and in direct contravention of state and administrative efficiency"). Here, Plaintiffs "knowingly, voluntarily, and intentionally chose not to pursue the instant claims at the state" level and therefore are "barred from presenting them to this Court under *Younger*." *Id.* at *6 (citations omitted). And state proceedings are similarly considered "ongoing" for *Younger* purposes when they were available, including on appeal, but not pursued in an effort to escape *Younger* abstention. *Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J.*, 973 F.2d 169, 173 n.2 (3d Cir. 1992) (even if plaintiffs "had not filed an appeal within the state court system, *Younger* abstention would nevertheless have been appropriate because [plaintiffs] had the ability to file such an appeal").

Further, *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*, 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 there 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 Oglala Sioux Tribe*, 904 F.3d at 612

(applying *Younger* abstention where Plaintiffs sought prospective relief).[6] For these reasons, Plaintiffs' reliance on past and prospective state court proceedings support applying *Younger* here.

2. The proceeding at issue here implicates important state interests.

With respect to the second condition, the state court proceeding that is the subject of Plaintiffs' Complaint involves important state interests, given the important role of states in regulation of domestic relations within their borders. *See Oglala Sioux Tribe*, 904 F.3d at 614 (noting that family relations are a traditional area of state concern); *see also Morrow v. Winslow*, 94 F.3d 1386, 1393 (10th Cir. 1996) (citing *Moore*, 442 U.S. at 435). In addition to Arkansas' interest in the development of child welfare law (including the overlay of ICWA on their own state child-welfare law), Arkansas 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.

The Supreme Court has recently explained that, in addition to state criminal proceedings, "certain civil enforcement proceedings," and "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions" are also the type of state proceedings which trigger *Younger* abstention. *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013). The civil proceedings that the Plaintiffs envision, which would involve the state determining whether Cook has any ongoing parental rights with regard to his biological child, fit the bill. *See Moore*, 442 U.S. at 423 (citing *Huffman*, 420 U.S. at 604) (action

[6] Additionally, the Eighth Circuit in *Oglala Sioux Tribe* also cited with approval *Parker v. Turner*, 626 F.2d 1 (6th Cir. 1980), where the court applied *Younger* to abstain from hearing a federal action for prospective declaratory and injunctive relief brought by indigent fathers who were behind on their child support and alimony payments and alleged due process violations by a state court. *Id*. at 2; *Oglala Sioux Tribe*, 904 F.3d at 612. The Sixth Circuit recognized that "federal interference with the state proceedings would be as serious here as it was feared to be in *O'Shea*." *Parker*, 626 F.2d at 8.

to remove children from home). Both the Eighth and Tenth Circuits have applied *Younger* to preclude federal interference with state court ICWA proceedings. *Oglala Sioux Tribe*, 904 F.3d at 610 (class action by Indian tribes and tribal members alleging violations of ICWA and due process relating to State's temporary custody hearings over Indian children); *Morrow*, 94 F.3d at 1386 (action alleging violations of ICWA in a private state-court termination of father's parental rights and petition to adopt an Indian child).

3. There is adequate opportunity to raise federal claims in the state proceedings.

Arkansas state courts provide Plaintiffs with an adequate opportunity to raise their federal claims in state court. *Oglala Sioux Tribe*, 904 F.3d at 613 ("State courts are competent to adjudicate federal constitutional claims."). 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 Cnty. Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 435 (1982). 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. The case for abstention is particularly strong given that "'[f]amily relations are a traditional area of state concern,' and federal courts should be 'unwilling to conclude that state processes are unequal to the task of accommodating the various interests and deciding the constitutional questions that may arise in child-welfare litigation.'" *Oglala Sioux Tribe*, 904 F.3d at 614 (quoting *Moore*, 442 U.S. at 435).

Because Plaintiffs did not give the Arkansas state courts an opportunity to adjudicate their constitutional claims, and they cannot demonstrate that those courts were not open to adjudicating them, *Younger* abstention is required. *Pennzoil*, 481 U.S. at 18. Further, the 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. The Court should refrain, based on abstention, from providing any declaratory or injunctive relief.

III. ICWA does not offend the Fifth or Fourteenth Amendments.

A. Applicability of ICWA to private proceedings.

Plaintiffs seek a declaration that Sections 1912, 1914 and 1915(a) do not apply to actions to terminate parental rights or adopt a child where a public or private agency is not involved. The plain language of ICWA does not support such a holding. ICWA applies to any "action resulting in the termination of the parent-child relationship" where an "Indian child" is involved. 25 U.S.C. § 1903(1)(ii). ICWA therefore encompasses all actions to terminate parental rights to an Indian child, without regard to whether the action is brought by an agency or a private individual. Similarly, Section 1912 tasks "any party" seeking to terminate parental rights, not just agencies, with the obligation of making active efforts to "prevent the breakup of the Indian family." *Id.* § 1912(d). Finally, Congress did except divorce proceedings awarding custody of a child to one of the parents from application of ICWA along with certain delinquency proceedings. *Id.* § 1903(1). Those are the only two exceptions to ICWA's application to child-custody proceedings involving Indian children. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).[7]

The plain language of ICWA has also led various state courts to decline to create a private party exception to ICWA. *See A.B.M. v. M.H.*, 651 P.2d 1170, 1173 (Alaska 1982) ("The language

[7] For the same reasons the Department, when promulgating the 2016 Rule, declined a commenter's request that the Rule specify that ICWA does not apply to intra-family disputes. *See* 81 Fed. Reg. at 38,800.

of the Act makes no reference to exceptions for custody disputes within the extended family."); *S.S. v. Stephanie H.*, 388 P.3d 569, 573-74 (Ariz. Ct. App. 2017); *In re Q.G.M.*, 808 P.2d 684, 688 (Okla.1991); *In re Custody of A.K.H.*, 502 N.W.2d 790, 795 (Minn. Ct. App. 1993); *State in Interest of D.A.C.*, 933 P.2d at 1001 (Utah Ct. App. 1997); *In re N.B.*, 199 P.3d 16, 19 (Colo. App. 2007). By contrast, Plaintiffs' prior briefing, along with the cases they proffer, depart from ICWA's text and emphasize ICWA's purpose of preventing abuses by public and private agencies in breaking up Indian families. ECF No. 23 at 11-14. But embracing this reasoning would lead to "an inappropriate judicially-created exception to ICWA." *State in Interest of D.A.C.*, 933 P.2d at 1000. Further, ICWA implements a congressional policy "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" by establishing protective standards like those applying in actions to terminate parental rights of an Indian child's parents. Severing that parental relation breaks up the Indian family regardless of the party seeking termination of parental rights. *See In re Crystal K.*, 226 Cal. App. 3d 655, 666, 276 Cal. Rptr. 619, 625 (Ct. App. 1990). Moreover, ICWA seeks to combat abuses not only of state and private agencies, but also of state *courts*. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 649 (2013).

Plaintiffs argue in this case there is no Indian family to break up, ECF No. 23 at 11, but the fact that they seek to terminate Cook's parental rights belies that. It also distinguishes this case from *Adoptive Couple* where the Court held Section 1912(f) did not apply because the father had no custodial rights over the child—neither physical nor legal. *Adoptive Couple*, 570 U.S. at 650. Applying ICWA here effectuates Congress's purpose of protecting the relationship between an Indian child and his or her parents in state court. Accordingly, this Court should adhere to the plain language of ICWA and decline to create a new exception to ICWA's application.

B. ICWA is not based on race or any other protected category triggering strict scrutiny for an Equal Protection claim.

The Supreme Court has held time and again that federal statutes providing special treatment based on an individual's affiliation with a federally recognized Indian tribe do not rest on suspect racial classification. *Morton v. Mancari*, 417 U.S. 535, 555 (1974); *see also, e.g., United States v. Antelope*, 430 U.S. 641, 643-47 (1977); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 479-80 (1976); *Fisher v. Dist. Ct. of Sixteenth Judicial Dist. of Montana*, 424 U.S. 382, 390-91 (1976). Such provisions instead draw *political* classifications, which are upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555.

The touchstone case on the level of review applied to statutes singling out persons affiliated with Indian tribes is *Mancari*, which involved a BIA hiring preference for members of federally recognized tribes. 417 U.S. at 551 n.24. Non-Indians contended the preference constituted "invidious racial discrimination." *Id.* at 551. A unanimous Supreme Court disagreed. *Id.* at 551–55. *Mancari* explained that the preference for members of federally recognized tribes "does not constitute 'racial discrimination'" because it targets individuals for special treatment based on their affiliation with "quasi-sovereign tribal entities whose lives and activities are governed by" the agency offering the preference. *Id.* at 553–54. That preference was permissible because it was "reasonably and directly related" to the "legitimate, nonracially based goal" of making the BIA more responsive to tribal needs. *Id.* at 554.

Since *Mancari*, the Supreme Court has repeatedly rejected arguments that other federal laws singling out tribes and tribal members draw suspect racial classifications. *E.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (upholding federal treaty provision securing off-reservation fishing rights); *Antelope*, 430 U.S. at

643–47 (upholding statute submitting individual Indians that commit crimes on Indian lands to federal court jurisdiction); *Moe*, 425 U.S. at 479-80 (upholding exemption from state sales and personal-property tax for on-reservation Indians); *Fisher*, 424 U.S. at 390–91 (upholding law requiring individuals to bring adoption proceedings in tribal court). The Eighth Circuit has done the same. *See U.S. v. Eagleboy*, 200 F.3d 1137, 1139 (8th Cir. 1999); *U.S. v. Aanerud*, 893 F.2d 956, 962 (8th Cir. 1990).

ICWA falls within the ambit of *Mancari* and its progeny. ICWA's defines Indian child as a child who is a member him or herself, or is eligible for membership *and* the biological child of a member. 25 U.S.C. § 1903(4). The first definition is plainly based on a child's status as a member of an Indian child, just like the provisions at issue in *Mancari* and its progeny. See, *e.g.*, *Mancari*, 417 U.S. at 551-55; *Eagleboy*, 200 F.3d at 1138-39. In the case at hand, A.C. is a member of the Cherokee Nation of Oklahoma, ECF No. 1 at ¶ 14. Therefore ICWA applies to him, as an Indian child, because of his affiliation with a federally recognized tribe.

The second definition is also based on a child's affiliation with a tribe—and thus political in nature—even though it is not strictly based on current membership in a tribe. Since membership in an Indian tribe is generally not conferred automatically upon birth and an eligible child (or, under many tribes' rules, the child's parents) must instead take affirmative steps to enroll the child, Congress recognized that if ICWA applied only to children who are already tribal members, the Act's protections would be illusory, providing little protection against improper removal of children from their tribal communities during the earliest years of life. H.R. Rep. No. 95-1386 at 17. In this context, the second definition's requirements—eligibility for membership plus a member parent, 25 U.S.C. § 1903(4)—are plainly proxies for the child's not-yet-formalized tribal affiliation, rather than proxies for race. Indeed, imputing a biological parent's membership in a

tribe to a child is familiar from federal statutes that extend United States citizenship to children who are born abroad to United States citizens. *See, e.g.*, 8 U.S.C. § 1433.

Plaintiffs argue that ICWA's "Indian child" definition is actually based on race or national origin. ECF No. 32 at 17. But their argument is premised on the actual membership requirements put in place by individual tribes. That does not constitute federal action. ICWA requires that an Indian child either be a member or the membership-eligible child of a member of a federally recognized tribe. But ICWA does not dictate to tribes the criteria for establishing their own membership. Rather, it is the prerogative of each tribe, as a self-governing quasi-sovereign entity, to determine its membership criteria. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). ICWA's applicability does not turn on a specific tribe's membership criteria but rather on the existence of the political, government-to-government relationship between the United States and federally recognized tribes and their members.

The cases cited by Plaintiffs in prior briefing to bolster the claim that ICWA applies a racial classification do not help them. *See* ECF No. 23 at 19-20. Plaintiffs rely on *Rice v. Cayetano*, 528 U.S. 495 (2000), which involved a state statute that limited eligibility to vote in certain statewide elections based on whether a person's distant ancestors lived in Hawaii. *Id*. at 519. *Rice* cited *Mancari* with evident approval, but recognized that the Hawaii statute was fundamentally different than the BIA hiring preference at issue in *Mancari*, in that it did not involve a federally recognized tribe and drew distinctions on ancestry alone, rather than any current-day affiliation with a sovereign political entity. *Id.* at 519-20. *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004), noted that it may be possible for "an 'Indian tribe' [to] be classified as a 'racial group' in certain instances," but then reaffirmed that *Mancari*'s holding that laws applying to "'members of "federally recognized tribes" [are] political rather than racial in nature.'" *Id.* at 1279. And *Malabed*

v. North Slope Borough, 335 F.3d 864 (9th Cir. 2003), involved an Alaska law providing a hiring preference to Native Americans that was struck down for offending the state constitution; it did not touch on, or purport to limit, the holding of *Mancari*.

Plaintiffs also cite *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018), *appeal docketed*, *Brackeen v. Bernhardt*, No. 18-11479 (5th Cir. argued March 13, 2019), a recent district court decision currently on appeal in the Fifth Circuit. ECF No. 32 at 17. *Brackeen*'s holding that ICWA is a race-based statute is unsupported by precedent. The Texas district court so held on the basis that ICWA reaches not just tribal members but children who are membership-eligible. 338 F. Supp. 3d at 533-34. The district court's approach proves too much. If membership eligibility criteria are an impermissible proxy for racial ancestry, then membership itself—which is, of course, based on those same criteria—would *also* be an impermissible proxy for ancestry. Yet the Supreme Court has conclusively held that membership classifications are political, regardless of whether membership itself is based in part on ancestry. *Mancari*, 417 U.S. at 551-55.[8]

In support of an alternative argument that ICWA discriminates based on national origin, Plaintiffs cite *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117 (9th Cir. 1998). *See* ECF No. 23 at 20. There the Ninth Circuit held that a tribal employment preference for its own members but not members of other tribes can give rise to

[8] State courts—the bodies that actually apply ICWA's substantive standards in individual cases—have routinely upheld the statute's constitutionality throughout its 41-year history. *See, e.g.*, *Ruby A. v. State*, Nos. S-10921, 10933, 2003 WL 23018276 (Alaska 2003); *In re Appeal in Pima Cnty. Juvenile Action No. S-903*, 635 P.2d 187 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); *In re Armell*, 550 N.E. 2d 1060, 1067 (Ill. App. Ct. 1990), *appeal denied*, 555 N.E.2d 374 (Ill.), *cert. denied*, 111 S. Ct. 345 (1990); *In re Marcus S.*, 638 A.2d 1158 (Me. 1994); *In re Interest of Phoenix L.*, 708 N.W.2d 786 (Neb. 2006);); *In re Baby Boy C.*, 27 A.D.3d 34 (N.Y. 2005); *In re A.B.*, 663 N.W.2d 625 (N.D. 2003); *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004); *Angus v. Joseph*, 655 P.2d 208 (Or. Ct. App. 1982), *review denied*, 660 P. 2d 683 (Or.), *cert. denied*, 464 U.S. 830 (1983); *Matter of Guardianship of D.L.L.*, 291 N.W.2d 278 (S.D. 1980); *In re K.M.O.*, 280 P.3d 1203 (Wyo. 2012).

discrimination on the basis of national origin for purposes of Title VII of the Civil Rights Act. *Id.* at 1120. But the Ninth Circuit has since clarified that "*Mancari*'s logic applies with equal force where a classification addresses differential treatment between or among particular tribes or groups of Indians" and "that Title VII does not prohibit differential treatment based on tribal affiliation." *E.E.O.C. v. Peabody W. Coal Co.*, 773 F.3d 977, 987-88 (9th Cir. 2014). In any event, ICWA does not discriminate between tribes on the basis of a *specific* tribal affiliation: membership or membership-eligibility (with a parent member) in any federally recognized tribe can qualify one as an "Indian child." And, as discussed immediately below, ICWA has a legitimate non-racial purpose.

C. ICWA furthers the United States' unique obligations to tribes by protecting Indian children and promoting the continued existence and integrity of Indian tribes.

Mancari held that federal laws singling out tribes and members are not race based and will be upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." 417 U.S. at 555. Each of the provisions challenged here plainly survives the test by directly furthering ICWA's twin goals of protecting Indian children and promoting the "continued existence and integrity of Indian tribes"—goals that, like the BIA hiring preference at issue in *Mancari*, are intimately related to the tribes' ability to sustain their autonomy. 25 U.S.C. § 1901(3); *see Mancari*, 417 U.S. at 555.

Section 1912 is rationally related to both Congress's finding that public and private agencies were breaking up Indian families by removing their children, often without basis, 25 U.S.C. § 1901(4), and that state agencies and *courts* "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). Similarly, Section 1914 provides a recourse for Indian tribes and members not accorded the procedural protections enacted to end the exclusion or

marginalization of tribal voices in state child-custody proceedings. *See* 25 U.S.C. § 1914; *id.* §§ 1911–13. With regard to Section 1915's adoptive placement preferences, the primary preference is for members of a child's extended family. *Id.* § 1915(a)(1). In light of the copious literature showing that extended-family placements are frequently in children's best interests, those preferences rationally further ICWA's stated goal of protecting the best interests of Indian children. *E.g.*, HHS, Placement of Children with Relatives, *available at* https://www.childwelfare.gov/pubPDFs/-placement.pdf (last visited May 22, 2018). And if on the particular facts of any given case, placement with extended family is *not* in a child's best interest, Section 1915 provides state-court judges sufficient flexibility to deviate. 25 U.S.C. § 1915(a).

For the reasons stated above, the Department's 2016 Rule implementing ICWA also is not race-based and is rationally related to the purposes of ICWA. Because ICWA is not a race-based statute and because the challenged provisions are rationally related to Congress's purpose of protecting Indian tribes, children, and their families, Count I fails to state a claim.

D. Plaintiffs' Due Process challenge fails because Plaintiffs have not asserted fundamental rights protected by the Fifth and Fourteenth Amendments.

Plaintiffs allege in Count II that Sections 1912(d), 1912(f), 1914, and 1915(a) of ICWA and the 2016 Rule infringe upon Erin Fisher's fundamental right, as A.C.'s "biological and custodial parent," and Richard Fisher's fundamental right, as a *de facto* parent, to direct A.C.'s upbringing, ECF No. 1 at ¶¶ 98-99, as well as all Plaintiffs' fundamental rights to "establish family associations and maintain existing family associations," *id*. at ¶ 101. They also classify their rights as a "right to family integrity, family autonomy, and dignity." *Id.* at ¶ 100. Plaintiffs ask this Court to create or expand substantive due process rights for biological parents, stepparents, and children, a request this Court should reject. Substantive due process analysis "must begin with a careful description of the asserted right," the Supreme Court has counseled, "for '[t]he doctrine of judicial

self-restraint requires [courts] to exercise the utmost care whenever [courts] are asked to break new ground in this field.'" *Reno v. Flores*, 507 U.S. 292, 302 (1993) (internal citations omitted). *See also Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

While biological and legal parents have a "fundamental liberty interest . . . in the care, custody, and management of their children," *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), the "rights of parenthood are [not] beyond limitation." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Manzano v. S.D. Dep't of Soc. Servs.*, 60 F.3d 505, 510 (8th Cir. 1995). Erin Fisher, as the natural mother and custodial parent to A.C., seeks an unfettered right to terminate Cook's parental rights to A.C. and direct the adoption of him by Richard Fisher. But custodial parents' rights to parent has never been extended to give them complete control over the legal relationship between children and their noncustodial parents. Further, the scope of Erin Fisher's alleged right must be considered against Cook's fundamental interest as a natural parent to A.C. *See Santosky*, 455 U.S. at 754 ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."). Until the Plaintiffs "prove[] parental unfitness," A.C. and Cook "share a vital interest in preventing erroneous termination of their natural relationship." *Id.* at 760; *see also J.T. v. Arkansas Dep't of Human Servs.*, 329 Ark. 243, 248, 947 S.W.2d 761, 763 (1997) ("Termination of parental rights is an extreme remedy and is in derogation of the natural rights of the parents.").

Next, Richard Fisher asserts a fundamental right to direct A.C.'s upbringing as a *de facto* parent. ECF No. 1 at ¶ 99. While he may have an interest as stepparent to A.C. and husband to Erin Fisher in A.C.'s rearing, this does not give rise to a fundamental right paramount to Cook's parental rights to A.C. or a fundamental right to adopt A.C.. Plaintiffs again seek to protect a right

not previously recognized as a liberty interest by the courts. Further, recognition of such a right would necessarily erode any rights Cook has to A.C. *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 846-47 (1977) (declining to recognize foster parents' constitutionally protected interests, rejecting the notion that "one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right.").

Finally Plaintiffs assert a fundamental right to establish family associations and maintain existing family associations that they claim ICWA infringes. ECF No. 1 at ¶ 101. While a right to familial association may be recognized as a substantive due process right, *Reasonover v. St. Louis Cnty.*, Mo., 447 F.3d 569, 585 (8th Cir. 2006), there is no basis to assert that ICWA violates Plaintiffs' right to family associations. "A defendant can be held liable for violating a right of intimate association only if the plaintiff shows an intent to interfere with the relationship." *Id*. Plaintiffs present no allegations that Federal Defendants have an intent to interfere with the existing relationship between Erin Fisher, Richard Fisher, and A.C. And ICWA is designed to protect family associations that already exist. ICWA's enactment reverses the "wholesale separation of Indian children from their families," H.R. Rep. No. 95-1386, at 9, and protects intimate association as well as the existing communal and political association between the children and the tribe.

Accordingly, Sections 1912(d), 1912(f), 1914, and 1915(a) do not impermissibly violate the Individual Plaintiffs' due process rights. Therefore, Count II should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint.

Dated this May 10, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 10, 2019, I filed the foregoing electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means except as to Defendant Jason Cook who was mailed a copy at this address:

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Dated: May 10, 2019

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