A.D. v. Washburn

Parties:

(1) Appellants (previous Plaintiffs)

- A.D. is an enrolled member of the Gila River Indian Community, and their biological parents' rights have been terminated by the state court. Plaintiffs S.H. and J.H are a married couple, and the foster/pre-adoptive parents of A.D. These plaintiffs have filed their complaint on behalf of themselves and all off-reservation Arizona-resident children with Indian ancestry and all off-reservation Arizona-resident foster, pre-adoptive, and prospective adoptive parents in child custody proceedings involving children with Indian ancestry.
- Plaintiff C.C. is an enrolled member of the Navajo Nation, whose biological parents' rights were terminated, and C.C.'s adoption by M.C. and K.C. was finalized by the state court in November 2015. Neither adoptive parent is enrolled in any tribe.
- Plaintiff C.R. is eligible for membership in and is a child of a member of the Gila River Indian Community. C.R.'s half-sibling L.G. is not eligible for membership in the Pascua Yaqui Tribe of Arizona. Both C.R. and L.G. were taken into protective custody, and both children's cases have been treated as one. The children remained in foster care with Plaintiff foster parents K.R. & P.R., who want to adopt the children.

(2) Appellees (previously Defendants)

- The Federal Defendants are Kevin Washburn in his official capacity as assistant secretary of Indian Affairs, BIA; and Sally Jewell in her official capacity as the secretary of the Interior, U.S. Dept of Interior.
- The State Defendant is Gregory McKay in his official capacity as director of Arizona Department of Child Safety.
- Intervenor Defendants are the Gila River Indian Community and the Navajo Nation, both federally recognized tribes.

Facts:

- All of the minor children had ongoing or concluded child welfare cases before the Arizona state courts.
- *A.D.*
  - The Department of Child Services (DCS) took baby girl A.D. into protective custody at birth due to exposure to her mother's ingestion of controlled substances.
  - A.D. was placed with a married couple, foster parents S.H. and J.H. This couple has an adopted son with Indian ancestry. They sought to adopt A.D.
  - A.D.'s biological mother named two possible birth fathers which were both ruled out by paternity tests. After this, the state court severed the parental rights of the birth mother and absent birth father.
  - The Gila River Indian Community (Community) sought to petition A.D.'s child welfare case to tribal court.
- *C.C.*
  - C.C. is an enrolled member of the Navajo Nation (Nation).
  - DCS took Baby Boy C.C. into protective custody when he was less than one year old after his mother was convicted of a non-drug-related felony.
  - His birth father is unknown.
  - The state court declared him unavailable for adoption because the Navajo Nation had repeatedly proposed alternative ICWA-compliant placements. The tribe has also repeatedly asked for additional opportunities from the state court to find other ICWA-compliant placements.
  - He was placed with a married couple, foster parents M.C. and K.C., who have stated they want to adopt C.C.

    - During the period in which the couple sought to adopt C.C., the Navajo Nation looked for but did not find an appropriate ICWA-compliant placement for C.C., and the couple ultimately adopted C.C. with the support of C.C.'s biological mother.
- *C.R.*
    - C.R. is another enrolled member of the Gila River Indian Community
    - The state took C.R. into protective custody at birth due to exposure to controlled substances and placed C.R. and his half-sibling L.G. in the care of foster parents P.R. and K.R.
    - The state eventually terminated the parental rights of C.R.'s biological parents.
    - P.R. and K.R. sought to adopt C.R. The Community had proposed alternative placements for C.R. at the time the amended complaint in 2015 was filed.
- In July 2015, Carol Coughlan Carter (friend of the family for A.D. and C.C.), S.H and J.H, and M.C. and K.C. all brought suit in the Arizona District Court to challenge ICWA's validity, naming certain federal and state officials as defendants, and the Gila River Indian Community and Navajo Nation intervened as defendants.
    - The main claim was a challenge of parts of ICWA as unconstitutional racial discrimination, specifically violating federal civil rights statutes, by requiring state courts to treat Indian children differently than non-Indian children in child custody proceedings.
    - They also challenged Congress' power to enact laws regulating state court proceedings and ousting state laws concerning foster care placement, termination of parental rights, pre-adoptive placement, and placements of some off-reservation children of Indian descent.
- In October 2015, the Federal and State Defendants filed a Motion to Dismiss. Shortly after, the Casey Family Program and 12 other national child welfare programs filed amicus briefs in support of the Defendants' Motions to Dismiss. The National Congress of American Indians, along with the National Indian Child Welfare Association and the Association on American Indian Affairs, also filed amicus briefs in support of the Defendants.
- The Plaintiffs opposed the Interventions by the Community and Nation and responded to the Motions to Dismiss. Soon after, the Citizens Equal Rights Alliance filed an amicus brief in support of a Motion to Certify a Class Action.
- Subsequent motions were filed back and forth for the next year.
- In March 2017, the district court granted the Defendants' Motion for a Dismissal[1] of the case.
    - The court held that the Plaintiffs "do not have standing to have this Court pre-adjudicate for state court judges how to rule on facts that may arise and that may be governed by statutes or guidelines that this Court may think invalid."
    - The Plaintiffs have not named any Plaintiffs with standing to challenge any provisions of ICWA or the 2015 guidelines.
    - Further, "any true injury to any child or interested adult can be addressed in the state court proceeding itself, based on actual facts before the court, not on hypothetical concerns."
- Plaintiffs soon after appealed to the Ninth Circuit Court, alleging that they do have standing to seek a variety of forms of relief.
- *Standing*
    - Requirements for Article III Standing—A plaintiff must show:
        - He or she has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
        - The injury is fairly traceable to the challenged action of the Defendant; and
        - It is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

[1] A motion to dismiss under Federal Rules of Civil Procedure 12(b)(6); all allegations of material fact are assumed to be true and construed in the light most favorable to the non-moving party. To avoid dismissal, a complaint need contain only "enough facts to state a claim for relief that is plausible on its face" (*Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 [2007]).

- The party invoking federal jurisdiction bears the burden of establishing these elements.[2]
- For an equal protection claim, a plaintiff may show an "injury in fact" caused by denial of equal treatment when the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group.

- Class Action Standing[3]
  - The requirements Plaintiffs must show for class action standing are:
    - Numerosity: the class is so numerous that joinder of class members is impracticable.
    - Commonality: there are questions of law or fact common to the class.
    - Typicality: the claims or defenses of the class representatives are typical of those of the class
    - Adequacy of representation: the class representatives will fairly and adequately protect the interests of the class.
  - All four requirements must be met.

Arguments/Claims:

PLAINTIFFS/APPELLANTS

(1) Plaintiffs claim to have standing to seek retrospective relief and declaratory relief, and *the proposed class has standing to seek prospective relief.*

Retrospective Relief Standing Allegations

- "Retrospective[4]" relief is a concept which attempts to correct past wrongs suffered under a law that contradicts other valid provisions of the Constitution.
- The injury-in-fact in a case alleging racial discrimination comes from the Plaintiff being subjected to different rules (ICWA placement preferences) on account of her race, not the consequences that flow from that different treatment.
- The Plaintiffs were forced to "compete on an unequal basis" due to race during their foster placements and adoptions. They were forced to overcome legal presumptions, satisfy different evidentiary standards, submit themselves to active efforts, and undergo other legal proceedings that would not have occurred if the children were any other race.
- Unequal treatment is sufficient to confer standing.[5]
- Plaintiffs apply an Eleventh Circuit test[6] for standing: "whether the Plaintiff's application has actually been treated differently at some stage … on the basis of race."
- Plaintiffs further allege the district court erred in focusing on the outcomes received by the Plaintiffs instead of the unequal treatment, contrary to law. Plaintiffs state they have shown that the system of laws applicable to them is based on their "race, color, or national origin," and therefore they should have standing to seek Title VI[7] damages and declaratory relief.

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[2] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).
[3] Under the Federal Practice Manual, 7.2 Rule 23, the four preliminary requirements for class certification—numerosity, commonality, typicality and adequacy of representation—must all be met.
[4] Definition comes from https://legal-dictionary.thefreedictionary.com/retrospective and https://www.lexology.com/library/detail.aspx?g=e5717302-65c7-4e33-8ca7-c285d5304b24.
[5] *Heckler v. Mathews*, 465 U.S. 728, 740 n.8 (1984), whereas the Plaintiffs quoted an excerpt from the court's opinion saying that a cognizable injury can be found where persons are personally denied equal treatment solely because of their membership in a disfavored group (*Id.* at 739–40).
[6] *Wooden v. Board of Regents of Univ. Sys. Of Ga.,* 247 F.3d 1262, 1278 (11th Cir. 2001).
[7] Title VI refers to that title within the Civil Rights Act of 1964, 42 U.S.C. 2000(d) et seq. It prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. Policies and practices that have such an effect must be eliminated unless a recipient can show that they were necessary to achieve a legitimate nondiscriminatory objective.

- A brief review of Supreme Court holdings regarding types of relief does not seem to favor retrospective relief where declaratory and injunctive relief is already awarded, and where there is no clear showing of future violations of a repealed law.

Declaratory Relief Standing Allegations

- Plaintiffs maintain that granting declaratory relief will redress the claimed injuries.
- Declaratory relief[8] refers to a judgment of a court which determines the rights of parties without ordering anything to be done or awarding damages. By seeking a declaratory judgment, the party making the request is seeking for an official declaration of the status of a matter in controversy.
- Plaintiffs claim the District Court erred when it rejected Plaintiffs' previous claim for declaratory relief on the grounds that Plaintiffs were asking the court to "pre-adjudicate for state court judges how to rule on facts that may arise."
    - Plaintiffs say they were not trying to tell the judges how they are allowed to rule on the facts, but were simply seeking redress for race-based discrimination by the Defendants acting pursuant to ICWA.
- Plaintiffs further maintain that this case is not moot because they are continuing to seek retrospective relief for the violations of their constitutional rights alleged in the Complaint.
- Plaintiffs want to apply the "inherently transitory" doctrine, which states that a proposed class-action lawsuit seeking redress for injuries that are inherently transitory may not be rendered moot even when the named Plaintiffs' cases have been rendered moot.
    - Plaintiffs rely on a 2013 case where the Supreme Court held that the "inherently transitory" doctrine was necessary because "the fleeting nature of the challenged conduct giving rise to the claim" could "effectively insulate defendants' conduct from review" if a Plaintiff was unable to accomplish "the considerable challenge of preserving his individual claim from mootness."[9]
    - Plaintiffs state that state courts will typically resolve termination, foster care, adoption, etc. cases before a case challenging the racial discrimination underlying the procedure can be heard, and it would be perverse to force foster parents and prospective adoptive parents to seek to delay the resolution of their own cases in order to prevent the mootness of their civil rights claims.

Prospective Relief Standing Allegations

- Plaintiffs allege that members of the proposed class have standing to seek prospective relief because their cases are going to be subject to ICWA just as the named Plaintiffs' cases were. Class members will also be able to show commonality.
- In a proposed class action seeking prospective injunctive relief against the enforcement of racially discriminatory laws, the mootness of the named Plaintiffs' claims does not deprive them of the right to seek prospective relief on behalf of the class.
- If Plaintiffs have standing to seek some form of relief other than prospective injunctive relief, then the district court can decide on remand whether Plaintiffs also have standing to seek declaratory, injunctive, and Title VI relief on behalf of the class.

(2) Overall, Plaintiffs want the judgment to be reversed and the case remanded for further proceedings regarding the class action. Plaintiffs believe they have standing to seek declaratory relief and Title VI damages for injuries they have suffered by being subject to a discriminatory system of national origin-based laws.

Where are we now?

- Oral arguments will be heard on June 11, 2018, at the Ninth Circuit Court of Appeals in San Francisco.

[8] Definition taken from https://definitions.uslegal.com/d/declaratory-relief/.
[9] *Genesis Healthcare Corp. v. Symczyk,* 133 S. Ct. 1523 (2013).