No. 18-923

In the Supreme Court of the United States

CAROL COGHLAN CARTER, NEXT FRIEND OF A. D., C. C., L. G., AND C. R., ET AL., PETITIONERS

v.

TARA KATUK MAC LEAN SWEENEY, ASSISTANT SECRETARY OF BUREAU OF INDIAN AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners prevented their challenge to the validity of a federal statute from ever becoming moot, simply by amending their complaint to add a claim for nominal damages under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, without any claim of actual damages or any factual allegation that any plaintiff was concretely harmed in the past by the statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 743 Fed. Appx. 823. The order of the district court (Pet. App. 5a-34a) is not published in the Federal Supplement but is available at 2017 WL 1019685.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2018. A petition for rehearing was denied on October 15, 2018 (Pet. App. 36a-38a). The petition for a writ of certiorari was filed on January 14, 2019 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are several individuals who were foster parents (and are now adoptive parents), children, and purported next friends who challenge the constitutionality of the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901 *et seq.* ICWA declares a federal policy "to protect the best interests of Indian children" and "to promote the stability and security of Indian tribes and families" by enacting protections for tribes, their members, and their members' children. 25 U.S.C. 1902. ICWA enacts "minimum Federal standards" that operate as an overlay on otherwise applicable state law in certain child-welfare proceedings involving an "Indian child," defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. 1902, 1903(4); see 25 U.S.C. 1903(1).

Petitioners challenged five provisions of ICWA. Pet. App. 100a-111a. The "transfer provision," 25 U.S.C. 1911(b), establishes a presumption in favor of transfer from state court to tribal court upon timely petition from a child's tribe or parents, but that presumption is rebuttable by the objection of either parent or by the state court's determination that "good cause" exists not to transfer. The "active-efforts" provision, 25 U.S.C. 1912(d), provides that the state court must be satisfied that "active efforts" have been made to reunify the family before terminating a parent's rights. The "burden of proof" provision, 25 U.S.C. 1912(f), provides that termination of parental rights requires evidence beyond a reasonable doubt that the parent's continued custody is likely to result in serious emotional or physical damage to the child. The adoptive and foster-care preference

provisions, 25 U.S.C. 1915(a) and (b), establish an order for foster-care and adoptive placements that gives preferred placement priority (for example, to extended family) to the extent a person seeking such alternative placement comes forward. Here, too, the state court may depart from the preferences for good cause. *Ibid.*

The State of Arizona has enacted statutes implementing ICWA. First, Ariz. Rev. Stat. Ann. § 8-453(A)(20) (2018) provides that the Director of the Arizona Department of Child Safety shall "[e]nsure the department's compliance with the Indian child welfare act of 1978." Second, Ariz. Rev. Stat. Ann. § 8-514(C) (Supp. 2018) adopts ICWA's foster-care preferences. Third, Ariz. Rev. Stat. Ann. § 8-105.01(B) (2018) clarifies that the State's prohibition on denying or delaying an adoptive placement based on the race of the adoptive parent or child "does not apply to the placement * * * of children pursuant to the Indian child welfare act." This provision is also consistent with 42 U.S.C. 1996b, which prohibits race-based discrimination in adoption and explains that such prohibition "shall not be construed to affect the application of the Indian Child Welfare Act," 42 U.S.C. 1996b(3). Like all States, Arizona receives federal funding for the provision of child-welfare services. See Pet. App. 111a.

2. a. In the original complaint, certain petitioners—an individual purporting to be the "next friend" of two minor children, those two children, and four adults who were then their foster parents (and are now their adoptive parents)—sued two officials of the United States Department of the Interior (Interior) and an official of the Arizona Department of Child Safety (Arizona). The complaint asserted that the five ICWA provisions discussed above are unconstitutional. See D. Ct. Doc. 150-2

(Mar. 2, 2016) (blackline of the amended complaint showing changes from the original complaint). It solely sought prospective relief, namely, a declaration to that effect and an injunction preventing Interior and Arizona from applying the challenged provisions to their child-welfare cases. See *id.* ¶ 5. The complaint also sought to certify a class consisting of all Arizona children with Indian ancestry who reside off-reservation, along with all non-Indian foster, preadoptive, and prospective adoptive parents who are (or will be) involved in child custody proceedings relating to such children. See *id.* ¶¶ 4, 50-58; see also D. Ct. Doc. 22 (Aug. 21, 2015).

b. Interior and Arizona moved to dismiss on the ground, among others, that the original plaintiffs lacked Article III standing. See D. Ct. Doc. 68, at 5-16 (Oct. 29, 2015); D. Ct. Doc. 70, at 24-26 (Oct. 29, 2015). They argued that the plaintiffs had not alleged any injury in fact connected to three of the challenged provisions, and that their allegations with respect to the other two provisions were insufficient to support standing. See *ibid.* Respondents Gila River Indian Community (Gila River) and the Navajo Nation—the tribes in which three out of the four eventual child petitioners were members—moved to intervene and filed motions to dismiss. D. Ct. Docs. 47, 47-1 (Oct. 16, 2015); D. Ct. Docs. 81, 82 (Nov. 18, 2015).

By the time the district court heard argument on those motions, two foster-parent petitioners had successfully adopted one of the children. Petitioners' counsel conceded that "[t]heir individual case is moot," but asserted that those petitioners could rely on their class allegations to avoid mootness and also stated that they would move to add additional plaintiffs. 12/18/15 Tr. 7; see Pet. App. 10a.

c. On March 2, 2016, petitioners moved for leave to file an amended complaint. See Pet. App. 62a-113a. The amended complaint sought to add an additional "next friend" who purported to represent two new children, and two foster parents interested in adopting those children. *Id.* at 66a-69a. It also sought to add a new count, Count 7, against Arizona for "nominal damages of $1" to each petitioner under Section 601 of Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (42 U.S.C. 2000d). See Pet. App. 111a. Section 601 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. 2000d. Congress has expressly abrogated Eleventh Amendment immunity for claims under Section 601. See 42 U.S.C. 2000d-7. And this Court has found it to be "beyond dispute that private individuals may sue to enforce § 601." *Alexander* v. *Sandoval*, 532 U.S. 275, 280 (2001); see *Cannon* v. *University of Chi.*, 441 U.S. 677, 694-699 (1979).

Count 7 of petitioner's proposed amended complaint incorporated the allegations of the preceding paragraphs, asserting that Arizona "has subjected and continues to subject [petitioners], and members of the class that [petitioners] seek to represent, to *de jure* discrimination on the ground of the race, color, or national origin of the individuals involved." Pet. App. 111a. Petitioners explained that their "legal theories * * * remain unchanged," and that they "are not seeking compensatory or punitive damages, which would have probably required development of additional facts." D. Ct. Doc. 150, at 3 (Mar. 2, 2016).

d. The district court granted the motion to amend, allowed Gila River and Navajo Nation to intervene, then dismissed the amended complaint for lack of subject-matter jurisdiction. Pet. App. 2a, 11a, 34a. The court determined that petitioners lacked Article III standing because they had not alleged "particularized injury" stemming from the specific provisions of ICWA that they claimed were unconstitutional. *Id.* at 20a, 24a, 26a, 29a-30a. Regarding the transfer provision, only one child alleged that Gila River sought to transfer her child-welfare proceeding from state court to tribal court, but the district court concluded that the transfer petition was not fairly traceable to ICWA because it was filed out of time and was not authorized by the statute. *Id.* at 19a-20a. Regarding the active-efforts provision, two children alleged that the State attempted to reunify them with their parent, but they did not allege that the active-efforts provision had any concrete impact as distinct from other independent legal requirements for reunification. *Id.* at 23a. Regarding the burden of proof and the foster-care preference provision, no child alleged any effect from those provisions on his or her child-welfare proceedings. *Id.* at 26a, 29a-30a. Finally, the district court concluded that petitioners' allegations that their adoptions were delayed by the adoptive-preferences provision failed to "allege facts, rather than mere conclusions, showing that [those] adoption[s] would have been completed more quickly" absent the preferences, or that petitioners suffered any cognizable harm from that provision. *Id.* at 28a; see *id.* at 29a.

Regarding the putative class, the district court observed that "despite being granted leave to amend, [petitioners] have not named [anyone] with standing to

challenge any provisions of ICWA." Pet. App. 33a. Further opportunity to amend, the court concluded, "likely would be futile." *Ibid.* Ultimately, the court ruled that the "legal questions [petitioners] wish to adjudicate here in advance of injury to themselves will be automatically remediable for anyone actually injured," because "[a]ny true injury to any child or interested adult can be addressed in the state court proceeding itself, based on actual facts * * * not on hypothetical concerns." *Ibid.*

3. Petitioners appealed, and revealed in their opening brief that all child petitioners had been adopted by the respective foster-parent petitioners. See Pet. C.A. Br. 3 & nn.1-3.

The court of appeals vacated the district court's decision dismissing for lack of standing and remanded with instructions to dismiss as moot. Pet. App. 1a-4a. The court observed that petitioners' "original complaint sought only declaratory and injunctive relief relating to ICWA's application to their adoption proceedings," which have now been completed, and that petitioners "have never suggested they suffered any economic damages." *Id.* at 3a. The court thus declined to reach the standing inquiry because the relief that petitioners "sought to redress their alleged injuries is no longer available to them." *Ibid.* The court further observed that petitioners did not allege that they would again be subject to ICWA in the future, and it held that petitioners could not rely on claims of members of a not-yet-certified class because "[a]t least one named [petitioner] must present a justiciable claim unless an exception applies," and "no exception applies here." *Ibid.*

The court of appeals rejected petitioners' "suggestion that their belated addition of a claim for nominal damages saves the case from mootness." Pet. App. 3a.

The court determined that the nominal-damages claim was added only after petitioners "had seen the possibility that all their claims for injunctive and declaratory relief could become moot." *Ibid.*; see *id.* at 3a-4a. The court of appeals quoted this Court's admonition in *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997), that "a claim for nominal damages . . . asserted solely to avoid otherwise certain mootness, b[ears] close inspection." Pet. App. 4a (brackets in original). The court of appeals also distinguished *Bernhardt* v. *County of Los Angeles*, 279 F.3d 862 (9th Cir. 2002), on the ground that the *Bernhardt* plaintiff's "original complaint alleged claims for compensatory and punitive damages," whereas petitioners here "have never alleged actual or punitive damages." Pet. App. 4a. Finally, the court noted that petitioners "cite[d] no case supporting the proposition that a claim for nominal damages, tacked on solely to rescue the case from mootness, renders a case justiciable." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 12) that this suit is not moot notwithstanding that the underlying adoptions at issue have been completed and petitioners concede that the legal issues they raised have no ongoing impact on them (and will have no impact on them in the future). The court of appeals correctly determined that petitioners could not evade Article III's limitations on the judicial power by belatedly adding a demand for $1 in nominal damages, disconnected from any claim of concrete harm. Pet. App. 3a-4a. There may be some disagreement in the circuits as to when exactly a claim for nominal damages remains a live controversy, but it is unclear whether a real circuit conflict exists because the different outcomes of different cases are largely explained by

the different uses of the word "nominal" and the differing underlying facts. In any event, the court of appeals' unpublished decision below does not create or implicate any circuit conflict, because it does not establish circuit precedent and petitioners cannot show that this suit would have been allowed to proceed in any other circuit. This Court recently denied review in a case presenting a similar question, see *Davenport* v. *City of Sandy Springs*, 138 S. Ct. 1326 (2018) (No. 17-869), and further review is unwarranted here as well.

1. The court of appeals correctly held that this action is moot.

a. To invoke a federal court's jurisdiction under Article III of the Constitution, a party must establish "three elements" of standing: (1) an "injury in fact" (2) caused by the defendant's conduct and (3) redressable by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992); see *id.* at 561. In addition, "[i]t is a basic principle of Article III that a justiciable case or controversy must remain 'extant at all stages of review, not merely at the time the complaint is filed.'" *United States* v. *Juvenile Male*, 564 U.S. 932, 936 (2011) (per curiam) (quoting *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997)). That is, throughout the entire case, "[t]he parties must continue to have a 'personal stake in the outcome' of the lawsuit." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472. 478 (1990) (quoting *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983)).

Here, that personal stake is lacking. Even if petitioners had standing to bring this suit, but see Pet. App. 5a-34a (district court opinion), the action is now moot. This suit involved a challenge by several individual children, foster parents, and putative next friends who

were in adoption proceedings when this suit was initiated and while it remained in the district court, and who contended that certain provisions of ICWA applied in those proceedings and were unconstitutional. See *id.* at 2a-3a. Petitioners primarily sought prospective declaratory and injunctive relief against applying ICWA in those proceedings. *Id.* at 3a.

While the appeal was pending, however, the "adoptions all became final." Pet. App. 3a. The prospective relief petitioners sought thus "is no longer available to them." *Ibid.* Indeed, petitioners now concede (Pet. 1) that their requests for prospective relief are moot. And petitioners "never suggested they suffered any economic damages" and "never alleged actual or punitive damages." Pet. App. 3a-4a; see also *id.* at 18a-33a. Moreover, petitioners identify no case allowing a plaintiff to obtain money damages (actual or nominal) under Title VI on the ground that a state officer complied with another federal statute (here, ICWA).

Petitioners nonetheless contend (Pet. 10) that this is a live case or controversy because, after it became apparent that this suit would likely become moot, they amended their complaint to add a demand for $1 in nominal damages. But the court of appeals correctly rejected that argument and concluded that petitioners' bare demand for nominal damages, without more and "tacked on solely to rescue the case from mootness," did not "save[] the case from mootness." Pet. App. 3a-4a. Nominal damages are called "nominal" damages because they are "damages in name only, trivial sums such as six cents or $1." 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 3.3(2), at 294 (2d ed. 1993). "They are symbolic only." *Utah Animal Rights Coal.* v. *Salt Lake City Corp.*, 371 F.3d 1248, 1264 (10th Cir. 2004) (McConnell,

J., concurring). This Court in turn has admonished that "a claim for nominal damages * * * asserted solely to avoid otherwise certain mootness, b[ears] close inspection." *Arizonans for Official English*, 520 U.S. at 71. And the claim here "does not survive such inspection." Pet. App. 4a. As the court of appeals correctly determined, petitioners "have never alleged actual or punitive damages"—that is, they did not allege facts showing that ICWA caused them any concrete harm in the past—and they admit that ICWA has no present or future impact on them either. *Ibid.* As a result, this suit is moot.

Indeed, petitioner's sweeping position would effectively eliminate Article III's prohibition against adjudicating moot disputes, because litigants could evade that limitation simply by adding a demand for nominal damages, without any claim of actual past, present or future concrete harm. "It is hard to conceive of a case in which a plaintiff would be unable to append a claim for nominal damages, and thus insulate the case from the possibility of mootness." *Utah Animal Rights Coal.*, 371 F.3d at 1266 (McConnell, J., concurring). Petitioners even go so far as to contend (Pet. 22) that their case is not moot because, they claim, they have demanded "retrospective declaratory relief"—that is, an abstract declaration that their rights were violated in the past, without even the fig leaf of a $1 nominal damages claim to cover over their request for an advisory opinion.

Petitioners also assert (Pet. 7) that their amended complaint alleged that they were "forced to expend extra time, effort, and cost as part of their child-custody proceedings." But the court of appeals correctly determined that petitioners included no such demand for actual damages in their amended complaint. See Pet.

App. 3a-4a. The claim at issue here (Count 7 of the amended complaint) seeks "nominal damages of $1 each to each of the named Plaintiffs" and class members, without any factual allegation that they spent more money or that any plaintiff was otherwise concretely harmed because of the allegedly unlawful conduct. *Id.* at 111a; see also *id.* at 18a-33a. The only reference to "expenses" or "costs" in the amended complaint is in petitioners' request for "litigation expenses and costs" incurred in the instant action challenging ICWA, not the underlying adoption proceedings. *Id.* at 112a. But it is well-settled that a demand for litigation expenses is insufficient to keep alive an otherwise moot claim on the merits. See *Lewis*, 494 U.S. at 480. In any event, petitioners do not present any question about exactly what allegations their complaint included or whether any particular factual allegations were adequately pleaded. See Pet. i. Regardless, such a case-specific contention would not warrant review.

b. Contrary to petitioner's contention (Pet. 11), the court of appeals' decision does not conflict with any decision of this Court. This Court has never held that a plaintiff can unilaterally prevent an otherwise purely prospective challenge to a federal statute from becoming moot simply by amending the complaint to add a claim for nominal damages, without any factual allegations showing that a plaintiff had actually suffered a concrete injury because of the statute that could be redressed by a judgment in the plaintiff's favor. Petitioners rely (Pet. 15-22) on *Memphis Community School District* v. *Stachura*, 477 U.S. 299 (1986), and *Carey* v. *Piphus*, 435 U.S. 247 (1978). But those decisions are inapposite, and indeed neither even mentions mootness or Article III. Those cases instead involved situations in

which plaintiffs sued for actual damages and proved liability, but were unable to prove the extent of damages on the merits. Those cases thus involved live controversies for their entire duration and raised no question of mootness: The award of nominal damages to reflect the conclusion of such a suit—liability but no actual damages—does not make a case "moot," any more than a verdict for the defendant makes a case moot.

For example, *Carey* involved Chicago public school students who sought actual and punitive damages under 42 U.S.C. 1983 on the ground that they were suspended from school without due process. See 435 U.S. at 248-252. The district court found that their rights had been violated, but determined that their "claims for damages * * * fail[ed] for complete lack of proof." *Id.* at 252 (citation omitted). On appeal, the court of appeals held that the students were nonetheless entitled under Section 1983 to recover "substantial" non-punitive damages (essentially liquidated damages) for the denial of due process, even absent proof of actual harm. *Ibid.*; see *id.* at 252-253. This Court reversed, holding that such presumed damages were unavailable. See *id.* at 264. Instead, relying on the traditional practice of awarding nominal damages when rights had been violated but the plaintiff failed to prove the extent of actual damages, the Court concluded that the students could recover "nominal damages not to exceed one dollar" if they were unable to prove actual damages. See *id.* at 267. But during the entire lawsuit—at trial, on appeal, and back on remand—the plaintiffs always were pressing a live claim for actual damages. *Carey* thus was not moot, and the Court did not mention mootness.

Similarly, in *Stachura*, a public school teacher sued under Section 1983 when he was suspended without pay

for his teaching of sex education. The teacher sought compensatory damages (including loss of pay), punitive damages, and damages for "the value or importance of a substantive constitutional right." 477 U.S. at 300; see *id.* at 300-302. Relying on *Carey*, this Court held that such presumed or liquidated damages were not available. See *id.* at 309-310. The Court further noted that nominal damages may be awarded in the absence of proof of an "actual, provable injury." *Id.* at 308 n.11. But that simply reiterated what the Court had stated in *Carey*, namely, that courts may award nominal damages if the plaintiff proves liability but ultimately fails to prove actual damages.

Carey and *Stachura* thus involved live controversies, namely, whether the students in *Carey* were harmed by suspensions in violation of due process, and whether the teacher in *Stachura* was harmed by his suspension without pay in violation of the First Amendment. Here, by contrast, petitioners' entire suit was a prospective challenge to a federal statute; they now admit (Pet. 1) that their demands for prospective relief are moot; and although they added a demand for nominal damages, they made no other relevant changes to their complaint or to their underlying legal theories and have "never suggested they suffered any economic damages" and "never alleged actual or punitive damages," Pet. App. 3a-4a. This suit accordingly is moot, and nothing in *Carey* or *Stachura* is to the contrary.

Petitioners also assert (Pet. 4) that this Court in *Texas* v. *Lesage*, 528 U.S. 18 (1999) (per curiam), "left unresolved" the question here about using a nominal damages claim to save a case from mootness. But a court of appeals decision cannot conflict with a decision of this Court on an issue that was left unresolved. In

any event, the plaintiff in *Lesage* plainly alleged concrete harm—that he was denied admission to a graduate school because of his race—but his claim failed on the merits when the factfinder determined that he would have been denied admission regardless. *Id.* at 20-21 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977)). The Court in turn remanded to the court of appeals to resolve plaintiffs' separate claims under Title VI and 42 U.S.C. 1981, without addressing any question of mootness or saying anything about nominal damages. See *Lesage*, 528 U.S. at 22.

2. Petitioners contend that "the vast majority of circuits that have addressed the issue" have decided that "a sole claim for damages, however labeled, keeps the case alive," and that only the Seventh, Ninth, and Eleventh Circuits have reached contrary decisions. Pet. 13 (emphasis omitted); see Pet. 13-22. But that contention is overstated, as the courts of appeals have not resolved questions of Article III jurisdiction at such a high level of generality. While there may be some disagreement in the lower courts over the exact circumstances in which claims for nominal damages can survive as the sole form of relief, the extent of that disagreement is far from clear, as many of the different decisions can be explained by varying uses of the word "nominal" and the different facts and postures of the different cases and the different underlying claims at issue. In particular, petitioners cannot establish that any circuit would have allowed this suit to proceed. This case accordingly does not implicate any conflict warranting this Court's review.

a. At the outset, the court of appeals' decision here is unpublished and therefore "is not precedent" on any

issue. Pet. App. 1a n.*. To the extent petitioners contend that the decision here creates or deepens a circuit conflict, that claim lacks merit.

b. Petitioners also assert (Pet. 13-15) that the court of appeals' decision conflicts with numerous decisions of the courts of appeals indicating that a claim for actual or punitive damages does not become moot as a result of events that would render moot a claim for prospective relief. *E.g.*, *CMR D.N. Corp.* v. *City of Philadelphia*, 703 F.3d 612, 622 (3d Cir. 2013) ("Claims for damages are retrospective in nature—they compensate for past harm."). But the difference between such a case and this one is obvious: Unlike a case where the plaintiff is seeking actual or punitive damages, petitioners have never alleged an actual, concrete harm for which they demand compensation. Instead, they seek a $1 nominal award not to obtain any kind of compensation or to provide any kind of concrete relief, but instead simply to obtain an abstract declaration that the law was broken.

c. To the extent petitioners focus on nominal damages specifically, many of the cases they cite are readily distinguishable—and none adopts their proposed blanket rule that any plaintiff can always save a suit from mootness simply by adding a demand for nominal damages.

First, as discussed above, see pp. 12-14, *supra*, courts have traditionally awarded nominal damages in situations where the plaintiff sought actual damages and proved liability, but ultimately failed to prove those actual damages. But such cases are not moot, because the plaintiff in such a case claims a concrete injury in fact during the entire proceeding. Indeed, petitioners appear to recognize the point, noting (Pet. 15) that "once a constitutional violation is established, insufficient evidence to establish actual injury (or sufficient

evidence establishing great difficulty in proving damages) will result in an award of only nominal or presumed damages," whereas "if the trier of fact is given sufficient evidence of actual harm, then compensatory or actual damages are recoverable." See Pet. 15 n.2 (collecting cases). Here, by contrast, petitioners never included any claim of actual damages and never alleged facts showing that they had suffered a concrete injury in the past, such as increased costs. Indeed, a claim of actual damages would likely have been incompatible with petitioners' effort to certify a damages class action under Federal Rule of Civil Procedure 23(b)(3). Even if petitioners had alleged that expenses had increased in a specific adoption, for example, whether in fact any such injury had occurred (and the extent of any such injury) would have been highly individualized and thus likely could not have been resolved on a class-wide basis.

Second, in some cases, courts entertain claims for nominal damages essentially as a procedural device to enable the court to adjudicate a related live controversy. See *Flanigan's Enters.* v. *City of Sandy Springs*, 868 F.3d 1248, 1263 n.12 (11th Cir. 2017) (en banc), cert. denied, 138 S. Ct. 1326 (2018). "When neighboring landowners wish to obtain a legal determination of a disputed boundary, for example, one might sue the other for nominal damages for trespass." *Utah Animal Rights Coal.*, 371 F.3d at 1264 (McConnell, J., concurring); see *Flanigan's*, 868 F.3d at 1263 n.12 (same). But in such a case, the live controversy is not the dispute over who gets to keep $1. Rather, the live controversy is *the ongoing boundary dispute* between the neighbors, and the demand for nominal damages is simply a means for asking a court to resolve that controversy, akin to a demand for a declaratory judgment. Here, by contrast, the

court of appeals determined that there is no longer any concrete controversy at all.

In still other cases, federal courts have allowed claims for nominal damages to proceed where the court determined that the plaintiff suffered a concrete injury in fact in the past, but the economic value of the impact was unclear or small. For example, in *Brinsdon* v. *McAllen Independent School District*, 863 F.3d 338 (5th Cir. 2017), the plaintiff was a high school student who was forced to recite the Mexican pledge of allegiance over her objection, and was later removed from the class. Although the student perhaps could have tried to seek damages for emotional distress for being compelled to speak and being removed from class, she instead requested nominal damages, and the Fifth Circuit concluded that her demand for nominal damages survived her later graduation. *Id.* at 345-346.

Whatever the merit of *Brinsdon* and cases like it, this suit is different because petitioners did not plead any facts identifying any concrete injury in fact that any particular plaintiff had suffered in the past because of the challenged statute and for which they demanded redress. The amended complaint merely asserts in abstract and general terms that one defendant "subjected" petitioners "to *de jure* discrimination on the ground of the race, color, or national origin of the individuals involved." Pet. App. 111a. Moreover, petitioners explained that their "legal theories * * * remain unchanged," and that they were "not seeking compensatory or punitive damages, which would have probably required development of additional facts." D. Ct. Doc. 150, at 3. And the court of appeals further determined that petitioners amended their complaint to add the nominal-damages claim solely in an attempt to avoid

mootness. Pet. App. 4a. Petitioners identify no decision from any other court of appeals allowing a case to proceed in a comparable posture.

Petitioners rely (Pet. 17) on *Utah Animal Rights Coalition*, in which the Tenth Circuit allowed a nominal damages claim to proceed. See 371 F.3d at 1256-1258. But *Utah Animal Rights Coalition* is similarly distinguishable. The plaintiff group in that case sought a permit from Salt Lake City to conduct a demonstration. The City delayed its response, depriving the group of "more time to organize its demonstration (if the permit were granted) or to pursue appeals or modified applications (if it were denied)." *Id.* at 1256. The group sued, seeking declaratory and injunctive relief as well as retrospective damages; the City then amended its permitting ordinance, mooting the claims for prospective relief. *Ibid.* The court of appeals concluded that the group had suffered a cognizable injury in fact—the concrete consequences of delay—but found that the injury was too small "to support a claim for compensatory damages." *Ibid.* The court went on to determine that a claim for nominal damages was still live, and resolved the underlying legal challenge on the merits. See *id.* at 1256-1258. Again, whatever the merits of *Utah Animal Rights Coalition*, this suit is different because, among other things, (1) petitioners here never raised any claim for actual damages; (2) petitioners never included any factual allegations that they had, in fact, been concretely injured in a tangible way in the past; (3) instead, petitioners amended their complaint to add a nominal damages claim to an otherwise purely prospective challenge; and (4) the court of appeals determined that they did so solely to avoid the mootness of those demands for

prospective relief, yet without changing their underlying legal theories.

d. Conversely, the cases that petitioner asserts are on the other side of the purported circuit split do not adopt a categorical rule that a request for nominal damages always becomes moot when prospective relief becomes unavailable. See Pet. 13-15. In *Flanigan's*, the Eleventh Circuit stated flatly that it did not articulate a bright-line rule that "a case in which nominal damages is the only available remedy is always or necessarily moot." 868 F.3d at 1270 n.23. Similarly, in *Sanchez* v. *Edgar*, 710 F.2d 1292 (1983), the Seventh Circuit observed merely that "a viable claim for monetary relief * * * preserves the saliency of an action," "with the *possible exception* of a claim for only nominal or insubstantial damages." *Id.* at 1295-1296 (emphasis added). And the Ninth Circuit in *Bernhardt* v. *County of Los Angeles*, 279 F.3d 862 (2002), did not adopt a categorical rule one way or the other. That decision allowed a nominal-damages claim to proceed, whereas the Ninth Circuit in its unpublished decision below distinguished *Bernhardt* and instead held that a nominal-damages claim was moot. See Pet. App. 4a.[*] It is thus unclear to what extent a circuit conflict exists regarding mootness and

[*] The plaintiff in *Bernhardt* brought a Section 1983 action alleging that she was unable to obtain counsel in a separate suit, because of Los Angeles' policy of settling claims only for a lump sum including attorney's fees, which she asserted deprived her of her right to statutory attorney's fees under 42 U.S.C. 1988. The plaintiff sought declaratory and injunctive relief, and compensatory and punitive damages. 279 F.3d at 866. After the other suit was dismissed, the Ninth Circuit concluded that her claims for prospective relief were moot, but held that there was nonetheless a continuing live controversy because of her claims for damages. *Id.* at 871-872. The court expressed doubt whether the plaintiff could ultimately prevail on her

nominal damages, and petitioners in any event cannot show that any circuit would have allowed their nominal-damage claim to proceed.

3. Petitioners also contend (Pet. 22-25) that a circuit conflict exists on the question whether a claim seeking "retrospective declaratory relief" keeps a case alive when prospective relief is no longer available. That contention does not warrant review.

First, this issue was not pressed or passed upon below. Indeed, petitioners' recognize (Pet. 22) that the court of appeals "did not separately consider availability of retrospective declaratory relief," and instead "assumed" that the "declaratory-relief claim [wa]s a predicate of the injunctive-relief claim, which is 'now moot.'" Pet. 23 (quoting Pet. App. 3a).

Second, no conflict exists among the circuits as to whether a demand for retrospective declaratory relief, standing alone, prevents mootness. Indeed, such a result would be extraordinary, as a claim for "retrospective declaratory relief"—without more—is simply another word for an advisory opinion. Petitioners discuss (Pet. 23) *Lippoldt* v. *Cole*, 468 F.3d 1204 (10th Cir. 2006), but that case is inapposite because the declaratory relief there accompanied a live claim for actual damages. The plaintiffs challenged the denial of parade permits and sought declaratory and injunctive relief, as well as compensatory damages. The parades were held following the district court's order, thus mooting the

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claim for actual damages, but it noted that even if she ultimately failed on the merits she could still obtain nominal damages. See *id.* at 872. The precise scope of *Bernhardt* is thus unclear, but it can be understood to fit the traditional fact pattern of *Carey*, where nominal damages can be awarded if a plaintiff who demands actual damages for concrete injury proves liability but not damages.

claims for prospective relief. But the plaintiffs had also raised a demand for compensatory damages, which "[wa]s not moot," and the court of appeals held that the demand for declaratory relief was not moot either because it was "'intertwined'" with the live claim for actual damages. *Id.* at 1217 (quoting *PeTA, People for the Ethical Treatment of Animals* v. *Rasmussen*, 298 F.3d 1198, 1202-1203 n.2 (10th Cir. 2002)); see also *Crue* v. *Aiken*, 370 F.3d 668, 677 (7th Cir. 2004) (declaratory relief may survive "as a predicate" to an award of actual damages). Here, by contrast, the request for declaratory relief (even if retrospective) is not "intertwined" with any claim for actual damages, nor is it a "predicate" to an award of actual damages, because petitioners have never sought actual damages.

4. Even if the decision below implicated any conflict among the circuits, it would be a poor vehicle for this Court to address any question about mootness. First, even if this suit were not moot in an Article III sense, it would still be true that the court of appeals has dismissed the suit, conclusively bringing it to a close, and that the only thing that could possibly remain at issue between the parties would be a bare claim for $1 in nominal damages disconnected from any specific allegation that any particular plaintiff was concretely harmed in the past. This Court should not devote its limited resources to considering whether the district court should restart an abstract debate about the constitutionality of a federal statute that has such little bearing on the plaintiffs, and where a district court judgment awarding $1 in damages would do little or nothing to redress any tangible harm to the plaintiffs.

Second, even if this suit were not moot, it would still not be a "case" or "controversy" within the meaning of

Article III, because petitioners have never had standing. Specifically, the district court determined that petitioners had failed to allege "particularized injury" stemming from the specific provisions of ICWA that they claimed were unconstitutional, Pet. App. 20a, 24a, 26a, 29a-30a, and petitioners make no effort in the petition to show that the district court's decision was incorrect. It was not.

Regarding the transfer provision, the only relevant allegation was that Gila River sought to transfer one child's proceeding from state court to tribal court—but the district court concluded that the transfer request was not fairly traceable to ICWA because it was out of time and not authorized by the statute. Pet. App. 20a. Regarding the active-efforts provision, two children alleged that the State attempted to reunify them with their parent, but they did not allege that the active-efforts provision had any impact on the reunification efforts as distinct from other existing requirements for reunification. *Id.* at 23a. No child alleged any effect from the burden of proof and the foster-care preference provisions. *Id.* at 26a, 30a. And the court concluded that petitioners failed to adequately plead facts plausibly suggesting that their adoptions were delayed by the adoptive-preferences provisions (or that any petitioner suffered any cognizable harm from that provision). *Id.* at 28a-29a. The district court thus properly dismissed for lack of standing, and petitioners thus could not invoke the Article III power regardless of any question about mootness. This accordingly would be a poor vehicle for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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