IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHAD EVERET BRACKEEN, et al. Plaintiffs, v. RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior, et al., Defendants, and CHEROKEE NATION, et al., Defendant-Intervenors.	Civil Action No: 4:17-cv-868-O

REPLY TO STATE PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

The Federal Defendants hereby reply to Individual Plaintiffs' opposition (ECF No. 74) to the United States' Motion to Dismiss.

ARGUMENT

A. State Plaintiffs Have Failed to Allege an Injury-in-Fact

State Plaintiffs' briefing on standing confirms that this case lacks "that concrete adverseness which sharpens the presentation of the issues," as required by Article III. *Baker v. Carr*, 369 U.S. 186, 204 (1962). State Plaintiffs assert that they are entitled to "special solicitude" for purported injuries they have sustained in their "capacities as quasi-sovereigns." ECF No. 74 at 29. But State Plaintiffs have not identified a "quasi-sovereign" interest "apart from the interests of citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) ("It has. . . become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens.").

The cases State Plaintiffs cite are not to the contrary. For instance, in *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007), the Court found that a state's quasi-sovereign interest in protecting its sovereign territory from environmental damage was distinct from the concrete interests of any particular citizen in the environment. *Id*. at 519. And in *United States v. Texas*, 809 F.3d 134 (5th Cir. 2015), the harm to the state's fisc due to the subsidization of driver's licenses for beneficiaries of a federal program differed from the interest of any individual Texan. *Id.* at 155-56. Further, State Plaintiffs' reliance on *New York v. United States*, 505 U.S. 144 (1992), is unavailing because standing must be demonstrated even for an anti-commandeering claim. *See West Virginia v. U.S. Dep't of Health & Human Servs.* 145 F. Supp. 3d 94, 105 (D.D.C. 2015), *aff'd sub nom. West Virginia ex rel. Morrisey v. U.S. Dep't of Health & Human Servs.*, 827 F.3d 81 (D.C. Cir. 2016) (dismissing West Virginia's Tenth Amendment anti-commandeering claim for lack of standing).

State Plaintiffs' reliance on *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007), is misplaced. The *Texas* court found a sufficient injury because Texas had been "subjected to an administrative process involving mediation and secretarial approvals of gaming procedures." *Id.* at 497. But State Plaintiffs have not demonstrated how the Final Rule[1] has been applied to them qua state or subjected them to any administrative process. And as explained in the United States' opening brief, ECF No. 57 at 28, speculative allegations of financial harm are insufficient to establish concrete harm from the Final Rule. State Plaintiffs have alleged no specific instance of their employees "spending time and money" to comply with Indian Child Welfare Act ("ICWA") recordkeeping and notifications costs, let alone alleged any instances in which they have expended fiscal resources on hiring employees and training. ECF No. 74 at 35. And Federal Defendants have not threatened to withhold, let alone actually withheld, federal funding from State Plaintiffs because of ICWA.

Further, all of the duties that State Plaintiffs allege impact them fiscally, such as requiring the testimony of qualified expert witnesses, maintaining records, and sending notice to affected parties, flow from ICWA's mandates (though many may also be otherwise required by state law), and not Interior's promulgation of the Final Rule. *See* 25 U.S.C. § 1912(a) (notice); § 1912(e), (f) (qualified expert witness testimony); § 1951 (record keeping). They have not made any allegation of fiscal injury that the Final Rule imposes over and above the fiscal injuries they allege from ICWA itself, which has been in place for forty years. This case is therefore unlike *United States v. Texas*, in which the court found that the federal government's recent DAPA policy had compelled Texas to incur costs it had never incurred before by issuing and subsidizing drivers' licenses for individuals who had not previously been eligible.

Finally, State Plaintiffs cannot assert *parens patriae* standing. The Supreme Court explained "that there is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert

[1] *Indian Child Welfare Act Proceedings*, Final Rule, 81 Fed. Reg. 38,778-01 (June 14, 2016).

its rights under federal law (which it has standing to do)." *Massachusetts*, 549 U.S. at 520 n.17. State Plaintiffs are attempting here to sue the federal government in an effort to "protect" its citizens from the operation of ICWA, which the Supreme Court has made clear they cannot do.

B. All Plaintiffs Lack Standing to Challenge ICWA Because Defendants are not the Cause of their Injury and Relief Targeting Defendants Will Not Provide Redress

Causation. Plaintiffs have not shown that Federal Defendants caused alleged injuries derived from ICWA because ICWA is applied and enforced by state courts, and by the parties to these state child welfare proceedings. *See* ECF No. 57 at 28-30. While State Plaintiffs characterize this argument as "novel," notably they do not point to a single specific instance in which the Federal Defendants have taken any action to impose ICWA's standards upon them. State Plaintiffs speculate that Interior might enforce by notifying a "child, the child's parents, custodian, or tribe" of a suspected ICWA violation, ECF No. 74 at 37, but in fact, this is all but impossible because the federal government is generally not involved in state child-welfare proceedings.[2] As for Secretary Azar and the Department of Health and Human Services ("HHS"), they do not enforce ICWA. Rather, they ensure that states that choose to voluntarily accept federal funding for child welfare programs use those dollars to fund programs that comport with Social Security Act requirements, which includes a requirement that a state describe the measures taken to comply with ICWA.

Redress. No Plaintiff can show their harm is redressable by this Court because a judgment binding the Federal Defendants would not bind the state courts that implement ICWA or third parties who believe their rights under ICWA have been violated. *See Okpalobi v. Foster*, 244 F.3d 405, 427 (5th Cir. 2001). Redressability turns on whether this Court can expect state courts to change their conduct in response to a ruling for Plaintiffs.

[2] Even if one takes seriously the notion of a federal enforcement program focused on notifying third parties of potential legal claims, such notification in itself could never guarantee the third party would decide to bring a claim, much less that it would be successful, making causation attenuated. Moreover, State Plaintiffs identify no instance where Interior, for example, contacted someone about a suspected violation of ICWA.

A decision by this Court would bind the United States as against these Plaintiffs, but would not prevent relitigation by the United States of the constitutionality of ICWA in other courts against other plaintiffs. *See United States v. Mendoza*, 464 U.S. 154, 162-63 (1984) (holding that nonmutual offensive collateral estoppel does not apply to United States, and explaining that the holding "will better allow thorough development of legal doctrine by allowing litigation in multiple forums" of the same issue). And it will not prevent application of ICWA to these Plaintiffs unless the state courts of the five states implicated in this litigation all "amend their conduct" in light of a ruling by this Court. The very case cited by State Plaintiffs to suggest that Texas state courts will do so, *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294 (Tex. 1993), actually argues the opposite. *See* ECF No. 74 at 38-39. There the Supreme Court of Texas noted that "Texas courts may certainly draw upon the precedents of the Fifth Circuit," but explained that Fifth Circuit precedent should not be privileged over precedent from other federal and state courts. *Penrod Drilling Corp.*, 868 S.W.2d at 296. The Texas Supreme Court explained that lower state courts "are *obligated* to follow only higher Texas courts and the United States Supreme Court." *Id.* (emphasis in original).

It is against this backdrop of the independence of state and federal courts that this Court must evaluate whether a judgment binding federal defendants will likely result in relief for Plaintiffs in the various state court proceedings from which their ICWA injuries allegedly arise. State Plaintiffs may still request relief from the Department of Health and Human Services (HHS) and Secretary Azar, seeking a judgment precluding HHS review of whether federally funded state programs comply with Social Security Act requirements related to ICWA compliance, but as discussed below, such claims are also unsupported by standing and are unripe.

C. State Plaintiffs' Claims Against HHS Should be Dismissed

Standing. Recognizing that they have not alleged any actual injury against HHS, State Plaintiffs instead manufacture a new legal standard that "potential loss of future funding is a direct injury cognizable by the States." ECF No. 74 at 36. This is at odds with the Supreme

Court's longstanding requirement that an injury in fact must be "concrete and particularized" and "actual or imminent, *not conjectural or hypothetical*." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (emphasis added). And even if such a speculative injury did suffice for the purposes of Article III standing, State Plaintiffs have not alleged any action has been taken by HHS, threatened or actual, that could be fairly seen as creating a potential loss of future funding.

Ripeness. Plaintiffs have no ripe controversy with HHS and Secretary Azar who, if not for the need to shore up standing, would not have been added as Defendants. State Plaintiffs contend the legal issues raised by their controversy with HHS are clear, but then explain only that the Court will decide whether "Defendants [can] impose ICWA on State Plaintiffs." ECF No. 74 at 41-42. ICWA has many provisions and Plaintiffs seek a declaration that most of them are unconstitutional, but for each provision they wish to attack, they must show a ripe case or controversy that puts it at issue. But they do not point to any specific provisions that are at issue between them and HHS.

Such broad, programmatic challenges to an entire statute or regulation are precisely the kinds of challenges the Supreme Court and the Fifth Circuit have held unripe for lack of an actual controversy over a specific legal issue. For example, in *Lujan v. Nat'l Wildlife Fed'n*, the Court faced a complaint alleging that "violation of the law is rampant" in an agency program, but the Court found the case unripe, explaining that "the flaws in the entire 'program' . . . cannot be laid before the courts for wholesale correction under the APA." 497 U.S. 871, 891, 893 (1990). *See also Sierra Club v. Peterson*, 228 F.3d 559, 567 (5th Cir. 2000) (plaintiffs' "sweeping argument that the Forest Service's 'on-the-ground' management of the Texas forests over the last twenty years violates [federal law]" not justiciable and must be focused on a specific agency action). And State Plaintiffs' refusal to specify what amount of funding might be at issue in a potential dispute (a barometer of their hardship) only points up the need to await a real dispute with HHS.

D. Section 702 Only Waives Sovereign Immunity as to Challenges to Final Agency Action

State Plaintiffs' perfunctorily gesture to 5 U.S.C. § 702 as the basis of the United States waiver of sovereign immunity.[3] The Fifth Circuit has "held that sovereign immunity is not waived by § 702 unless there has been 'agency action.'" *Doe v. United States*, 853 F.3d 792, 799 (5th Cir. 2017), *as revised* (Apr. 12, 2017). Accordingly, Plaintiffs cannot rely on this provision for claims not targeting the Final Rule. Plaintiffs' claims that go beyond the scope of their challenge to the Final Rule are unfocussed programmatic challenges not cognizable under the Administrative Procedure Act (APA). In particular, Plaintiffs cannot satisfy this requirement as to HHS or the United States in the context of a claims targeting the Social Security Act.[4] Other than stating the provisions of the Social Security Act and HHS's implementing regulations that they seek to challenge, Plaintiffs have pointed to no concrete action taken by HHS to enforce those provisions against State Plaintiffs. *See* SAC ¶¶ 68-81. Further, the United States has not waived its sovereign immunity under Section 702 for Plaintiffs' constitutional challenges that reach beyond the scope of their challenge to the Final Rule.

E. The Court Should Abstain from Review of Plaintiffs' Claims under *Younger*

State Plaintiffs argue that *Younger* abstention should not apply to them, basing their argument on *Green v. City of Tucson*, 255 F.3d 1086 (9th Cir. 2001), which held that the *Middlesex* factors would only apply when the relief sought in federal court would "directly interfere" with ongoing state judicial proceedings. But in 2004, the Ninth Circuit revisited *Green* and expressly determined that "we shall no longer require 'direct interference' as a condition, or threshold element, of *Younger* abstention." *Gilbertson v. Albright*, 381 F.3d 965, 978 (9th Cir. 2004) (en banc). The court did so because it found no Supreme Court precedent to require such a relationship between the federal and state proceedings. *Id.* And to the extent that State

[3] Plaintiffs alleged in the Complaint that they sued the "United States" under 28 U.S.C. § 1346, SAC ¶ 27, but now argue that Section 702 is their basis for the waiver.

[4] While it is true that Section 702 allows the United States to be named as a defendant in certain actions, Plaintiffs fail to explain how this broadens the scope of the United States' sovereign immunity waiver beyond a challenge to a concrete and discrete final agency action.

Plaintiffs rely on *Green* to argue that *Younger* does not apply to non-parties in the state court proceedings, they miss the mark.[5] It is precisely because State Plaintiffs *are* parties to all involuntary state-court child-custody proceedings occurring in their respective States that their constitutional challenges are more appropriately made in the context of the specific child-custody cases in which ICWA is implicated, since the state courts are better positioned to analyze the factual circumstances surrounding the particular child-custody proceeding at issue and specific application of ICWA in those cases. For these reasons and as articulated in Federal Defendants' Opening Brief, Plaintiffs' claims fit squarely within *Younger*, and the Court should abstain from hearing this case in favor of resolution of the issues in state court proceedings.

F. State Plaintiffs Waived Their Arguments Challenging the Final Rule by Failing to Raise the Issue to the Agency During the Notice and Comment Period

State Plaintiffs argue that no waiver requirement exists, relying on *City of Seabrook, Tex. v. EPA*, 659 F.2d 1349 (5th Cir. 1981) (ECF No. 74 at 45-46), but in the 37 years since this decision, the Fifth Circuit has distanced itself from *Seabrook* and confirmed that objections must be raised during the rulemaking proceeding or they are waived.[6] *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 829 n.10 (5th Cir. 2003) ("in recent years, the court has stepped back from *Seabrook*'s holding on waiver"); *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 933 n.7 (5th Cir. 1998).

Plaintiffs also wrongly assert that the waiver requirement is confined to evidentiary hearings. For example, in *Texas Oil*, the Fifth Circuit found that challenges to new source performance standards—a rule, not an adjudication—"were waived by Texas Petitioners' failure

[5] State Plaintiffs cite to *Ohio Bureau of Emp't Servs. v. Hodory*, 431 U.S. 471, 480 (1977), which determined that when a state voluntarily submits to a federal court, the district court is not *required* "to refuse Ohio the immediate adjudication it seeks" by invocation of *Younger*. The Court also expressly stated that because it determined that the district court was not compelled to apply *Younger*, "we need not and do not express any view on whether the District Court erred in refusing to abstain on *Younger* grounds." *Id.* at 480 n.10.

[6] State Plaintiffs suggest that such a rule would create an "impossible burden" of monitoring federal rulemakings. ECF No. 74 at 45. Here, however, the State of Texas was not only aware of the rulemaking proceeding, but belatedly *filed supportive comments on the rule*. It is particularly inappropriate to allow an APA challenge by a party that took an entirely different position on the rule during its development.

to raise the objections during the notice and comment period," and reached the same conclusion as to challenges to another aspect of EPA's rulemaking. *Id.* at 933 n.7. The same is true for the rule at issue in *BCCA* where the court concluded that arguments not raised during the rulemaking were waived. 355 F.3d at 829. The court observed that "it is a basic tenet of administrative law" that courts should not consider arguments not presented to the agency, as that would "usurp the agency's function" and deprive the agency of an opportunity to consider the issue and address it.[7] *Id*. at 828-29 (citing *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155 (1946) and *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)). Plaintiffs also argue that exhaustion was statutorily required in that case, but the Fifth Circuit did not appear to think so, and based its decision on general principles of administrative law which are equally applicable here.[8]

Plaintiffs assert that other commenters on the final rule "raised the constitutional issues" in the complaint. ECF No. 74 at 48 (pointing to comments raising "Tenth Amendment" and "equal protection" concerns). But Plaintiffs' APA claim includes numerous allegations that are

[7] Plaintiffs also cite *Sims v. Apfel*, 530 U.S. 103, 109 (2000), in support of their narrow reading of the exhaustion requirement, but that case has been limited to its facts. In *Sims*, a closely divided Supreme Court declined to apply the issue exhaustion requirement to a Social Security Act adjudication. Justice O'Connor supplied the fifth vote by emphasizing the unique circumstances of that case. *Id.* at 113 (O'Connor, J., concurring in part and concurring in the judgment). Several Courts of Appeal have continued to apply the waiver rule post-*Sims*, including the Fifth Circuit. *See BCCA*, 355 F.3d at 828-29; *see also Advocates for Highway and Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1149 (D.C. Cir. 2005) (finding that waiver requirement applies post-*Sims*); *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1020 (9th Cir. 2004) (requiring issue exhaustion for rule challenge, and observing that the "Court's decision [in *Sims*] turned on the unique nature of Social Security benefit proceedings and offers no guidance relevant to the rulemaking.").

[8] Plaintiffs suggest that the waiver rule does not apply to constitutional challenges, but the United States only seeks dismissal of Plaintiffs' APA claim on this basis, not their constitutional claims. ECF No. 57 at 47. And courts, including this one, have found that even constitutional arguments may be waived if not raised before the agency. *See Chamber of Comm. of the U.S. v. Hugler*, 231 F. Supp. 3d 152, 202 (N.D. Tex. 2017), *rev'd on other grounds, Chamber of Comm. of the U.S. v. U.S. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018) ("constitutional challenges have been deemed waived when the objection was not made to the agency"); *Nat'l Multi Hous. Council v. EPA*, 292 F.3d 232, 233 n.2 (D.C. Cir. 2002) (declining to address equal protection argument not raised during rulemaking).

not based on the Tenth Amendment or equal protection principles. *See, e.g.*, SAC ¶¶ 255, 256, 257, 258. Plaintiffs have made no showing that these concerns were raised during the rulemaking process. Even as to those allegations that do allude to Tenth Amendment or equal protection principles, Plaintiffs have not shown that the cited comments raise the same concern. It is not sufficient that other commenters had generalized constitutional concerns, or constitutional concerns about other provisions. "Generalized objections to agency action . . . will not do"; rather, concerns must be raised with "sufficient specificity reasonably to alert the agency" of the actual allegations that form the basis of Plaintiffs' claim. *Appalachian Power Co v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001) (citation omitted). Here, Plaintiffs challenge specific provisions of the Final Rule—those implementing the placement preferences in 25 U.S.C. § 1915 (SAC ¶ 250-52) and the "collateral attack" provision in 25 U.S.C. § 1913(d) (SAC ¶ 253)—but have pointed to no commenter that raised similar constitutional concerns about those provisions.

Having failed to meet the required legal standards to bring their APA claim, Plaintiffs seek to salvage it based on unsupported hyperbole[9] and irrelevant case law.[10] Because neither State Plaintiffs nor any other commenter presented the concerns raised in Count One during the rulemaking process, the Court should not consider these arguments for the first time in this case.

CONCLUSION

For the foregoing reasons, the Court should dismiss State Plaintiffs' claims.

[9] For example, Plaintiffs' unsupported assertion that Texas DFPS would jeopardize their funding through HHS if it commented negatively on a BIA rule has no basis in law or fact. Indeed, the Texas DFPS did express concerns about certain aspects of the Final Rule—but not the provisions challenged by Plaintiffs. ECF 57-1 at 8-12.

[10] *New York*, 505 U.S. 144 (1992), did not involve a rulemaking or an APA claim, and is inapposite.

Dated: May 25, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th of May, 2018 a true and correct copy of the foregoing was submitted to the Clerk of the Court for the U.S. District Court, Northern District of Texas, along with Plaintiffs' counsel, using the ECF system of the court.

/s/ Steven Miskinis
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