

Appeal No. 21-15097

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Stephen C., et al.,

Plaintiffs-Appellants,

v.

Bureau of Indian Education, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
THE HONORABLE STEVEN P. LOGAN, JUDGE
CASE No. 3:17-cv-08004-SPL

BRIEF OF AMICUS CURIAE THE HAVASUPAI TRIBE

DENTEN ROBINSON
MARTINA GAST
DR LAW PLLC
1930 E. Brown Rd., Ste. 103
Mesa, Arizona 85203-5139
Telephone: 480.500.6656
Facsimile: 480.500.6655

Attorneys for Amicus Curiae
The Havasupai Tribe
P.O. Box 10
Supai, AZ 86435

MATT KLINE
SETH FORTIN
DANIELLE FEUER
TYLER HELMS
MARY MANUKYAN
VANESSA GUERRERO
O'MELVENY & MYERS LLP
1999 Avenue of the Stars, 8th Floor
Los Angeles, California 90067
Telephone: 310.553.6700
Facsimile: 310.246.6779

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* is a governmental entity for whom no corporate disclosure is required.

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 Other Authorities	
Alden Woods, <i>A Hidden Tribe, a Disastrous School and Finally, a Cry for Help</i> , THE ARIZONA REPUBLIC (March 15, 2017), http://www.azcentral.com/story/news/local/arizona-best-reads/2017/03/15/havasupai-elementary-grand-canyon-supai/98355588/	13, 14, 17, 24
Algernon Austin, Econ. Pol’y Institute, NATIVE AMERICAN POLICY AND JOBS 5 (Dec. 17, 2013), https://files.epi.org/2013/NATIVE-AMERICANS-AND-JOBS-The-Challenge-and-the-Promise.pdf	18

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Austin Frakt, <i>Does Your Education Level Affect Your Health?</i> , N.Y. TIMES (June 3, 2019), https://www.nytimes.com/2019/06/03/upshot/education-impact-health-longevity.html	16
Caroline Wolf Harlow, <i>Education and Correctional Populations</i> , BUREAU OF JUSTICE STATISTICS (Apr. 15, 2003), https://www.bjs.gov/content/pub/pdf/ecp.pdf	16
Dianna Jennings, <i>USDA Rural Utilities Administrator Visits Supai Tribe in Arizona to Announce a Recovery Act Broadband Project</i> , US DEP'T OF AGRICULTURE (Feb. 21, 2017), https://www.usda.gov/media/blog/2011/03/04/usda-rural-utilities-administrator-visits-supai-tribe-arizona-announce#more-31606%20	6, 15
<i>Education Pays</i> , BUREAU OF LABOR STATISTICS (Apr. 21, 2021), https://www.bls.gov/emp/chart-unemployment-earnings-education.htm	16
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<i>Indian Entities Recognized by and Eligible to Receive Services from the Bureau of Indian Affairs</i> , 86 Fed. Reg. 7554, 7555 (Jan. 29, 2021)	1
James Brooke, <i>Indians Striving to Save Their Languages</i> , N.Y. TIMES (Apr. 9, 1998), https://www.nytimes.com/1998/04/09/us/indians-striving-to-save-their-languages.html	21
Katherine Peralta, <i>Native Americans Left Behind in the Economic Recovery</i> , US NEWS & WORLD REPORT (Nov. 27, 2014), https://www.usnews.com/news/articles/2014/11/27/native-americans-left-behind-in-the-economic-recovery	27
Laurel Morales, <i>Most Isolated Tribe In Continental U.S. Gets Broadband</i> , NPR (Sep. 16, 2019), https://www.npr.org/2019/09/16/759908026/most-isolated-tribe-in-continental-u-s-gets-broadband	6, 17

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Lewis Meriam, <i>THE PROBLEM OF INDIAN ADMINISTRATION</i> , INSTITUTE FOR GOV'T RESEARCH 11 (1928), https://files.eric.ed.gov/fulltext/ED087573.pdf	6
Maggie Severns, <i>How Washington Created Some of the Worst Schools in America</i> , POLITICO (Nov. 25, 2015), http://www.politico.com/story/2015/11/how-washington-created-the-worst-schools-in-america-215774	7
Melinda D. Anderson, <i>The Costs of English-Only Education</i> , THE ATLANTIC (Nov. 2, 2015), https://www.theatlantic.com/education/archive/2015/11/the-costs-of-english-only-education/413494/	20
National Center for Education Statistics, <i>AMERICA'S YOUTH: TRANSITIONS TO ADULthood</i> 96 (Dec. 2011), https://nces.ed.gov/pubs2012/2012026.pdf	16
National Center for Education Statistics, <i>Public High School Graduation Rates</i> , NCES.ED.GOV (May 2021), https://nces.ed.gov/programs/coe/indicator/coi	24
Stephen Hirst, <i>I AM THE GRAND CANYON: THE STORY OF THE HAVASUPAI PEOPLE</i> 1 (2006)	passim
Teresa L. McCarty, <i>THE ROLE OF NATIVE LANGUAGES AND CULTURES IN AMERICAN INDIAN, ALASKA NATIVE, AND NATIVE HAWAIIAN STUDENT ACHIEVEMENT</i> 14 (July 2011), https://static1.squarespace.com/static/52cf1070e4b048ae22d972b2/t/54aac6b3e4b0c309d027948a/1420478131256/McCarty+%282011%29.+Role+and+Impact+of+Native+Languages+and+Cultural+Context.pdf	20
The White House, Executive Office of the President, <i>2014 Native Youth Report</i> (December 2014)	19
U.S. COMMISSION ON CIVIL RIGHTS, <i>BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS</i> at 120 (Dec. 2019), https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf	19, 20

TABLE OF AUTHORITIES

(continued)

Page(s)

U.S. Dep’t of Educ., WHITE HOUSE INITIATIVE ON AMERICAN INDIAN
AND ALASKA NATIVE EDUCATION: SCHOOL ENVIRONMENT
LISTENING SESSIONS 18 (Oct. 2015),
[https://sites.ed.gov/whiaiane/files/2015/10/school-environment-
listening-sessions-final-report.pdf](https://sites.ed.gov/whiaiane/files/2015/10/school-environment-listening-sessions-final-report.pdf)19, 20, 21

UNESCO Atlas of the World’s Languages in Danger, UNESCO,
[http://www.unesco.org/languages-
atlas/index.php?hl=en&page=atlasmap](http://www.unesco.org/languages-atlas/index.php?hl=en&page=atlasmap) (last accessed May 6, 2021)21

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INTEREST OF AMICUS CURIAE

Amicus Curiae, the Havasupai Tribe (“Tribe”), is a federally-recognized Indian tribe, located on a Reservation within the State of Arizona and at the bottom of the Grand Canyon. Bureau of Indian Affairs, *Indian Entities Recognized by and Eligible to Receive Services from the Bureau of Indian Affairs*, 86 Fed. Reg. 7554, 7555 (Jan. 29, 2021). Most of the Tribe’s children are educated, in part, at the Havasupai Elementary School, the Bureau of Indian Education-run school that is the subject of this lawsuit.

Amicus has an interest here because it is seriously affected by the BIE’s failure to provide its children an adequate education. Not only are the children themselves tribal members who have suffered and are suffering the pains and losses described in the complaint, but today’s children are tomorrow’s tribal leaders and doers. The Tribe’s future is inextricably intertwined with the education of its children.

Amicus has authority to file because all parties have consented to the filing of this brief. Federal Rule of Appellate Procedure 29(a)(2).

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the undersigned counsel certifies that no party or counsel for a party authored or contributed monetarily to this brief in any respect, and no other person or entity—

other than Amici and their counsel—contributed monetarily to this brief’s preparation or submission.

INTRODUCTION

Most of this case is rightly focused on the harms the Bureau of Indian Education's ("BIE") neglect has caused the Student Plaintiffs as individuals. But these children do not exist in a vacuum; they are part of a small, tight-knit community, the Havasupai Tribe, that has lived together in and around the Grand Canyon since time immemorial. Today's children are tomorrow's parents, workers, and leaders within that community, which cannot afford for the Reservation's only school to fail them. Because the Tribe's Reservation is so remote, and its material resources are few, if the children fall behind in educational attainment at a young age there are few opportunities to catch up. There is, therefore, a larger context to this case: the federal government's failure to educate these children has had, and continues to have, an outsized destructive effect not only on the children themselves, but on an already vulnerable community.

The unique nature of this community helps explain why the district court's grant of summary judgment against the students' Administrative Procedure Act ("APA") claims was erroneous. As discussed further below, the district court erred in granting summary judgment against Plaintiffs on their APA claims. Plaintiffs do not mount a "systematic challenge" to the BIE, nor do their APA claims "requir[e] a regulation, a series of regulations, or even a whole 'program' to be revised by the agency." Order on Mots. for Summ. J. at 5. Rather, granting relief

on the claims would simply require the agency to act in accordance with regulations that already exist, which mandate both basic instruction and appropriate cultural education. Failing to provide this education harms not only the children themselves, but the Tribe of which they are a crucial part.

Similarly, the district court erred in excluding the possibility of relief for the Tribe's children who no longer attend Havasupai Elementary School ("HES"). Order on Mots. for Summ. J. at 10-11, 1-ER-26-27; *see also* Order on Mot. to Dismiss at 5, 1-ER-34. These students can still benefit from compensatory education, particularly in light of the unique circumstances that face the Tribe and its children: the Reservation has no secondary school, and Havasupai children who graduate from HES must leave the Reservation and attend high school far away from any support or adult guidance, in schools where they have often faced hostility and alienation. These children, uniquely, will benefit from being able to access remedial education—and, as discussed below, so will the Tribe, which cannot afford for even one child to be denied an education.

In short, the unique position of the Tribe and its children gives context and further urgency to Plaintiffs' claims, which are meritorious. The BIE's failure to educate these children is a harsh wound to the Tribe itself, and relief is long overdue.

The Tribe urges the Court to reverse the district court's errors.

ARGUMENT

I. THE HISTORY OF THE HAVASUPAI TRIBE AND FEDERAL SCHOOLING AT SUPAI

The Havasupai Tribe is a small, federally-recognized Indian tribe that has lived in and around the Grand Canyon since time immemorial. Traditionally, the Tribe was self-sufficient in this rugged landscape, relying on a combination of agriculture, pastoralism, hunting, and gathering.¹ While the land immediately around Havasu Creek could be lush during the summer, the Havasupai hunted and pastured their animals on a large range of land on the plateau above the Canyon as well.² The Tribe's ancestral land comprised almost three million acres in what is today northern Arizona.³

In 1882, President Chester Arthur signed an Executive Order revoking a prior grant of land to the Havasupai and limiting the Tribe's lands to just 518 acres (0.81 sq. mi.) around what is now the Village of Supai.⁴ The land the Tribe lost was absorbed into the national park surrounding the Grand Canyon, and the Tribe would not regain even a portion of its ancestral lands for the better part of a

¹ Stephen Hirst, I AM THE GRAND CANYON: THE STORY OF THE HAVASUPAI PEOPLE 1, 7-8, and *passim* (2006).

² *Id.* at 20-21.

³ *Id.* at 1-2, 65; H.R. REP. NO. 92-1077, at 2 (1972).

⁴ Hirst, *supra* note 1, at 58-64; EXECUTIVE ORDERS RELATING TO INDIAN RESERVES FROM MAY 14, 1855, TO JULY 1, 1902 at 15 (1902), available at <http://lcweb2.loc.gov/service/gdc/scd0001/2012/20120509002ex/20120509002ex.pdf>.

century, and then only after decades of struggle.⁵

Currently, there are 759 enrolled members of the Tribe, most of whom live in the Village of Supai, within the Canyon. The U.S. Department of Agriculture has described it as “the most remote community in the lower 48 states.”⁶

As a general matter, federal schools for tribal children have been considered “grossly inadequate” since at least 1928, when Lewis Meriam submitted his report to the Secretary of the Interior.⁷ Thirty-one years later, a Senate subcommittee report signed by Edward Kennedy called the education of Indian children “a national tragedy and a national disgrace” and, while focused mostly on state public schools, critiqued the federally-run Indian schools in a forty-four page section.⁸

Forty-six years after that, Secretary of Education Arne Duncan told *Politico* that

⁵ Hirst, *supra* note 1, at 157-81, 189-237; *see also* H.R. REP. NO. 92-1077, *supra* note 3, at 3.

⁶ Dianna Jennings, *USDA Rural Utilities Administrator Visits Supai Tribe in Arizona to Announce a Recovery Act Broadband Project*, US DEP’T OF AGRICULTURE (Feb. 21, 2017), <https://www.usda.gov/media/blog/2011/03/04/usda-rural-utilities-administrator-visits-supai-tribe-arizona-announce#more-31606%20>; *see also* Laurel Morales, *Most Isolated Tribe In Continental U.S. Gets Broadband*, NPR (Sep. 16, 2019), <https://www.npr.org/2019/09/16/759908026/most-isolated-tribe-in-continental-u-s-gets-broadband>.

⁷ Lewis Meriam, THE PROBLEM OF INDIAN ADMINISTRATION, INSTITUTE FOR GOV’T RESEARCH 11 (1928), <https://files.eric.ed.gov/fulltext/ED087573.pdf>.

⁸ INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, S. REP. NO. 91-501, at X (1969) [hereinafter KENNEDY REP.].

the BIE school system was “the epitome of broken. Just utterly bankrupt.”⁹

But even in a bad system, the schooling at Supai has long stood out as unusually bad. In the late nineteenth century, the Bureau of Indian Affairs (“BIA”) first opened a school at Supai that offered education for just two grades.¹⁰ In 1955, the school was shut down, and students were forced to leave their homes and travel to distant residential schools to get any formal education at all.¹¹

Sending very young children to under-resourced schools hundreds of miles from home yielded predictably awful results:

[The] children were torn from their families during their most dependent post-infancy years and cast into a boarding school for incorrigibles The tiny Havasupai children had their money and clothing stolen, and they found no one to protect them except the older Havasupai children. They learned to be hard and crafty; few of them had the time or opportunity to learn to be Havasupai. They were constantly in and out of trouble, involved in drinking violations, fighting, and theft. The pressure fell most unrelentingly on boys, and the number of them who graduated from high school during those years

⁹ Maggie Severns, *How Washington Created Some of the Worst Schools in America*, POLITICO (Nov. 25, 2015), available at <http://www.politico.com/story/2015/11/how-washington-created-the-worst-schools-in-america-215774>.

¹⁰ Hirst, *supra* note 1, at 19.

¹¹ *Id.* at 189. While most Havasupai children have attended HES or state schools, and this lawsuit is not about conditions at other federal schools for Native children, Havasupai elders have told stories of being sent to federal boarding schools at Fort Apache, Sherman, and Stewart and of the mistreatment and harsh conditions of those schools.

can literally be counted on one hand.¹²

Eventually, after that exceptionally dark period, the BIA reopened the school at Supai, but it did not serve more than two grades until 1971, and to this day the school does not go beyond grade 8.¹³ HES also remains remarkably dysfunctional and limited, as described in the Plaintiffs' brief and below in Part II.

The Tribe has consistently attempted to improve the situation. In the 1950s, when there was no school,

[t]he Havasupai were desperate and tried approaching all the surrounding communities to see if their children could at least go there instead of to the 350-mile-distant Indian school at Fort Apache. Williams, Ash Fork, and Seligman all replied they could not accept nonresident children, as the Havasupai families provided no tax support to their schools. The tribe approached the school at Grand Canyon Village, which educated primarily the children of National Park Service employees They tried to obtain federal funding to build their own school on the plateau or in some nearby town, but received the reply that no federal funds could be used to build a tribal school on nontribal land. Every avenue seemed blocked¹⁴

It was pressure from the parents that eventually caused the federal government to re-open the school, albeit not for two decades. Even today, all Havasupai children on the reservation are eventually forced to leave their home to pursue secondary education: there is no high school on the Reservation.

¹² *Id.* at 190, 192.

¹³ *Id.* at 19, 89.

¹⁴ *Id.* at 190.

The Tribe continues to advocate for its children. Tribal members have, at times, contacted federal officials almost monthly regarding issues with the school, and parents have written letters to the BIE.¹⁵ Members of the Tribal Council have traveled multiple times to the nation's capital to meet with top BIE and DOI officials.¹⁶ In April 2016, Tribal Council members met with then-Acting Director of the BIE, Ann Marie Bledsoe Downes, in Washington, D.C.¹⁷ Tribal Council Members have also spoken with BIE Director Tony Dearman both before and after his appointment.¹⁸

The Tribe has been operating a Head Start program since the 1970s, which serves the Tribe's children before they enter HES. The Tribe supplements the program's budget with its own limited tribal resources.¹⁹ Tribal council members describe the program as better than the BIE school. But an early childhood education program is not a permanent or comprehensive solution to the BIE's failings.

Parents and other tribal members have also attempted to participate in and

¹⁵ Decl. of Chairman Don Watahomigie in Supp. of Br. of *Amicus Curiae* the Havasupai Tribe ("Watahomigie Decl."), Dist. Ct. Dkt. 84, ¶ 11.

¹⁶ Third Amended Complaint ("TAC") ¶ 227 (*see* Vol. 4 of ER, filed under seal).

¹⁷ *Id.*

¹⁸ Watahomigie Decl. ¶ 11.

¹⁹ *Id.* ¶ 4.

improve the life of the school through the Havasupai Elementary School Board (the “School Board”). But the BIE has effectively immobilized the School Board by demanding that Board Members obtain FBI background checks before they meet.²⁰ This is supposedly for the safety of the children, but the School Board does not meet on school grounds when children are present, and the rule is not enforced against any other individuals who may be present on school grounds.²¹ Consequently, the School Board was unable to meet for almost two years while Board Members awaited background check results.²² Even now that the background checks have finally been completed, the School Board has been limited because of inadequate training and support to address the important issues facing the school.

In addition to the Head Start program, the Tribe has used its own limited funds to construct a new learning center that offers remedial educational services to tribal children. The Tribe intends the center to supplement the limited services offered at HES in order to improve educational outcomes.

Because the Tribe values the perpetuation of its culture, the Tribe has developed its own approaches to teaching Tribal history and promoting the mental

²⁰ *Id.* ¶ 12.

²¹ *Id.*

²² *Id.*

health and wellness of its children. The Tribe is prepared to work with the BIE to incorporate the strategies it has developed, but the BIE has not accepted the Tribe's offer to work cooperatively.

Despite all the Tribe's efforts to support and supplement the children's learning, many Havasupai children arrive at high school (already far from home and alone) with thoroughly inadequate preparation.

II. THE BIE'S FAILURE TO PROVIDE HAVASUPAI CHILDREN A BASIC EDUCATION HARMS THE TRIBE

A. The BIE Has Failed to Provide the Education Required by Its Own Regulations

Under Section 706 of the APA, a reviewing court shall “compel agency action unlawfully withheld or unreasonably delayed” and shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]” 5 U.S.C. § 706(2)(A). “Agency action” is “defined to include ‘the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.’” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004) (citing to 5 U.S.C. § 551(13)). This includes “agency regulations that have the force of law.” *Id.* at 65. Here, Plaintiffs allege discrete, specific instances of the BIE unlawfully withholding or unreasonably delaying that which it is legally required to provide to students at HES, including by its own regulations. Plaintiffs

also allege that, when the BIE has made some effort to provide what is required, it has done so in an arbitrary and capricious way.

Specifically, the BIE has failed to fulfill its mandates under 25 C.F.R. Part 36, which contains comprehensive, binding regulations that set forth the content and minimum standards for the provision of basic education at BIE schools, including HES. Section 36.22 mandates that elementary instruction programs for grades one through six “shall include” language arts, mathematics, social studies, sciences, fine arts, and physical education. Section 36.20 lists requirements that there be multi-culture and multi-ethnic dimensions to educational programming. For example, “[t]he school’s language arts program *shall assess* the English and native language abilities of its students *and provide instruction* that teaches and/or maintains both the English and the primary native language of the school population.” 25 C.F.R. § 36.20(b)(1) (emphases added). “Content shall meet local tribal approval.” 25 C.F.R. § 36.20(b)(2).

The BIE has indisputably failed to act to implement multiple aspects of its own mandatory regulations at HES. Very often it has had an extremely abridged curriculum, no functioning library, insufficient numbers of textbooks for the children enrolled, and no extracurricular activities.²³ Even today, after years of

²³ TAC ¶¶ 185-87, 239.

litigation, HES does not teach fine arts, health, consumer economics, or physical education and lacks a librarian or counselor.²⁴

Even the instruction that is provided is severely inadequate, and many children struggle academically. Plaintiff Stephen C. could barely read or write by the time he was in the eighth grade.²⁵ Plaintiff Levi R. tested at a second-grade reading level when he was in the fifth grade.²⁶ Available BIE data shows that from 2011 to 2013, only about 15% of Havasupai schoolchildren achieved grade-level proficiency in reading, and *none* achieved grade level proficiency in math.²⁷ With this dismal level of preparation, it is no surprise that just 20 percent of Havasupai children graduate from high school.²⁸

Defendants have fared no better with their obligation to ensure that the “school program shall include aspects of the native culture in all curriculum areas.” 25 C.F.R. § 36.20(b)(2). BIE does not assess the native language abilities of HES students,²⁹ and has often failed to provide instruction that “teaches and/or

²⁴ Plaintiffs’ Separate Statement of Material Facts (“SOF”) ¶¶ 5-29.

²⁵ TAC ¶ 60.

²⁶ *Id.* ¶ 127.

²⁷ *Id.* ¶ 218.

²⁸ Alden Woods, *A Hidden Tribe, a Disastrous School and Finally, a Cry for Help*, THE ARIZONA REPUBLIC (March 15, 2017), <http://www.azcentral.com/story/news/local/arizona-best-reads/2017/03/15/havasupai-elementary-grand-canyon-supai/98355588/>.

²⁹ SOF ¶ 5.

maintains . . . the primary native language” of HES students. 25 C.F.R. § 36.20(b)(1). Indeed, Havasupai-English dictionaries and storybooks, rather than being used, have been left outside to rot.³⁰ And the minimal language instruction that has been provided has not been approved by the Havasupai Tribe.³¹

Although HES has employed a native culture instructor since November 2018, that individual has not consistently offered culture instruction, because his culture classes are frequently canceled so that he can “cover” general education classrooms in the absence of a full-time, credentialed teacher.³² When culture instruction is provided at all, it is provided exclusively by the school’s native culture instructor and is not incorporated into other areas of the curriculum.³³

Additionally, the BIE has failed to provide consistent counseling services for children at HES as required by 25 C.F.R. § 36.42. Section 36.42(b)(1) provides that a BIE school with fewer than 200 students “shall make provisions for a part-time professional counselor.” HES has frequently failed to employ a part-time professional counselor, and the counselor HES employed for part of the 2018-2019 school year quit.³⁴ Even when HES has had a certified counselor on staff, that

³⁰ See Woods, *supra* note 28.

³¹ SOF ¶ 9.

³² SOF ¶¶ 6-8.

³³ SOF ¶ 10.

³⁴ SOF ¶ 28.

counselor was often unable to provide counseling services because she was called upon to teach general education.³⁵

By statute, the BIE is charged with providing Native American children “with educational opportunities that *equal or exceed those for all other students in the United States.*” 25 U.S.C. § 2001(a)(1) (emphasis added). Its regulations establish what is required. But, in contravention of those regulations, the curriculum and resources at HES do not provide even the bare minimum of a basic education.

B. The Tribe Suffers When Its Children Cannot Obtain Basic Education

The BIE’s arbitrary and capricious failures to meet regulatory and statutory requirements impact the entire tribal community. Failing schools can be devastating for any community, but the stakes are uniquely high in the remote Village of Supai: it is no exaggeration to say that the Tribe’s future rests on the children who attend HES. Unlike in most communities, HES is Supai’s *only* school. And Supai “has the distinction of being the most remote community in the lower 48 states.”³⁶ Its numbers are small, its members are constant, and each Supai child will have an integral role to play in the Tribe’s future. The dismal state of

³⁵ SOF ¶ 29.

³⁶ Jennings, *supra* note 6.

HES thus reverberates through the entire community.

1. Education Is Crucial for the Tribe's Economy and Prosperity

It is axiomatic that education is the key to opportunity. Higher educational attainment is associated with higher incomes,³⁷ lower unemployment rates,³⁸ and lower rates of poverty.³⁹ It opens the door to various career paths foreclosed to those without degrees, whether high school, college, or postgraduate. It is linked to non-economic benefits too, including greater longevity,⁴⁰ better health outcomes,⁴¹ and lower incarceration rates.⁴² A good education carries with it a cascade of positive effects for an individual child, the child's family, and the child's community.

Education is all the more important in Supai, given local conditions. The Tribe survives on tourism revenues, and the higher-paying tourism jobs require a

³⁷ *Education Pays*, BUREAU OF LABOR STATISTICS (Apr. 21, 2021), <https://www.bls.gov/emp/chart-unemployment-earnings-education.htm>.

³⁸ *Id.*

³⁹ National Center for Education Statistics, *AMERICA'S YOUTH: TRANSITIONS TO ADULTHOOD* 96 (Dec. 2011), <https://nces.ed.gov/pubs2012/2012026.pdf>.

⁴⁰ Austin Frakt, *Does Your Education Level Affect Your Health?*, N.Y. TIMES (June 3, 2019), <https://www.nytimes.com/2019/06/03/upshot/education-impact-health-longevity.html>.

⁴¹ *Id.*

⁴² Caroline Wolf Harlow, *Education and Correctional Populations*, BUREAU OF JUSTICE STATISTICS (Apr. 15, 2003), <https://www.bjs.gov/content/pub/pdf/ecp.pdf>.

high school diploma or GED.⁴³ Yet HES so utterly fails to prepare its students that just twenty percent of HES alumni graduate from high school.⁴⁴ These children are thus boxed out of the most robust job market available to them. And for members of the “most isolated tribe in [the] continental U.S.,”⁴⁵ other good job prospects are hard to come by.

The basic schooling in Supai is so dismal that higher education is often out of the picture altogether. HES students are left unprepared for high school, let alone college. That bleak reality closes doors to many career paths that require higher education as a point of entry. For example, there is not a single doctor or lawyer within the Tribe.⁴⁶ This is a loss for the children of Supai and for the Tribe as a whole, which must operate with a heightened degree of self-reliance given its remoteness.

For Native American communities—and the Tribe in particular—education can play a transformative role in the economy. Studies reinforce the commonsense conclusion that high-quality schooling ripples throughout the community and

⁴³ Woods, *supra* note 28; Watahomigie Decl., ¶ 10.

⁴⁴ *Id.*

⁴⁵ Laurel Morales, *Most Isolated Tribe In Continental U.S. Gets Broadband*, NPR (Sep. 16, 2019), <https://www.npr.org/2019/09/16/759908026/most-isolated-tribe-in-continental-u-s-gets-broadband>.

⁴⁶ Watahomigie Decl. ¶ 10.

continues to produce returns long after graduation. The low employment rate among Native Americans is a principal driver of poverty,⁴⁷ but it is not intractable: “increas[ing] Native American educational attainment” has the “strong potential for improving the employment rates of American Indians”—yielding the “largest positive effect on the odds of employment” of all other variables.⁴⁸

So too, HES is failing to prepare the future leaders of the Tribe for the critical roles they will hold in the years to come. HES is the only local school serving the Tribe, and the Tribe draws its leaders from within. HES is thus responsible for cultivating the next generation of the Tribe’s leaders, yet it has proven unfit for that weighty task. HES has not prepared its students to become the savvy, critical thinkers, steeped in the culture of the Tribe, who will be ready to lead their community when the time comes. As the government has long recognized, when BIE schools like HES fail their students, that failure “in turn hinder[s] the opportunities for tribal nations to develop leaders who can build stronger tribal economies and contribute to the overall rebuilding of Native nations.”⁴⁹

⁴⁷ Algernon Austin, Econ. Pol’y Institute, NATIVE AMERICAN POLICY AND JOBS 5 (Dec. 17, 2013), <https://files.epi.org/2013/NATIVE-AMERICANS-AND-JOBS-The-Challenge-and-the-Promise.pdf>.

⁴⁸ *Id.* at 24.

⁴⁹ U.S. COMMISSION ON CIVIL RIGHTS, BROKEN PROMISES: CONTINUING FEDERAL

HES thus stands in the way of the Tribe's prosperity. The Tribe reaps benefits from its members' success—both for the financial welfare of the community and the strength of its social fabric. And the Tribe's numbers are so small that the fate of each member is a matter of great concern for the entire community.

2. A Culturally-Attuned Education Is Key to Survival of the Tribe's Traditions, Values, and Language

Flouting regulatory requirements, HES has frequently failed to incorporate tribal traditions, culture, or language into its curriculum. But this mandate serves an important purpose: “excluding Native cultures and history from classrooms harms the identities of [Native] students,” whereas “[i]ncluding Native languages and cultures in curricula is healing for students and can begin to address a history of exclusion that began with mission and boarding schools and continues today.”⁵⁰ Native language and cultural programs in schools also have a positive effect on the broader academic achievement of Native American students, while fostering

FUNDING SHORTFALL FOR NATIVE AMERICANS at 120 (Dec. 2019), *available at* <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf> (quoting The White House, Executive Office of the President, *2014 Native Youth Report* (December 2014)) (internal quotation marks omitted).

⁵⁰ U.S. Dep't of Educ., WHITE HOUSE INITIATIVE ON AMERICAN INDIAN AND ALASKA NATIVE EDUCATION: SCHOOL ENVIRONMENT LISTENING SESSIONS 18 (Oct. 2015), <https://sites.ed.gov/whiaiane/files/2015/10/school-environment-listening-sessions-final-report.pdf> [hereinafter LISTENING SESSIONS].

linguistic and cultural revitalization.⁵¹ And academic programming infused with Native language and cultural instruction is proven not only to generate “significant gains in achievement . . . for a population of students with dismal education outcomes,” but also to bolster family involvement and community pride.⁵²

HES’s failure to fulfill this mandate chips away at children’s tribal identity in their critical early years,⁵³ harkening back (if unintentionally) to the country’s dark history of using government-sponsored education of Native Americans as a vehicle for cultural eradication.⁵⁴ The Havasupai suffered decades of attempted assimilation and erasure,⁵⁵ and the detachment of HES’s curriculum from Havasupai culture and traditions stands out as a missed opportunity to “renew[] . . .

⁵¹ Teresa L. McCarty, THE ROLE OF NATIVE LANGUAGES AND CULTURES IN AMERICAN INDIAN, ALASKA NATIVE, AND NATIVE HAWAIIAN STUDENT ACHIEVEMENT 14 (July 2011), <https://static1.squarespace.com/static/52cf1070e4b048ae22d972b2/t/54aac6b3e4b0c309d027948a/1420478131256/McCarty+%282011%29.+Role+and+Impact+of+Native+Languages+and+Cultural+Context.pdf>.

⁵² Melinda D. Anderson, *The Costs of English-Only Education*, THE ATLANTIC (Nov. 2, 2015), <https://www.theatlantic.com/education/archive/2015/11/the-costs-of-english-only-education/413494/>.

⁵³ LISTENING SESSIONS, *supra* note 50, at 18; Watahomigie Decl. ¶ 6.

⁵⁴ BROKEN PROMISES, *supra* note 49, at 95-98.

⁵⁵ KENNEDY REP., *supra* note 8, at 9; Hirst, *supra* note 1, at 93-95 (describing 1914 murder and mutilation of Havasupai man by local cattlemen); *id.* at 157-187, 191 (Havasupai pushed out of their traditional land over the course of decades in the first half of the twentieth century); *id.* at 190 (Bureau of Indian Affairs adopted formal policy, in 1956, of encouraging Havasupai to move to other reservations or to urban centers).

the language and cultural base” of the Tribe.⁵⁶ Having assumed control of the education of Havasupai children, the BIE must take seriously its responsibility to provide a specifically Havasupai education.

In addition to cultural erosion, “Native languages across the United States are dying.”⁵⁷ The Havasupai language is one of them—classified by UNESCO as endangered⁵⁸—making HES’s failure to introduce the Havasupai language into the curriculum all the more perilous for the Tribe. When Native languages disappear, the community suffers a broader cultural loss than linguistics alone: losing a tribal language is tantamount “to los[ing] [an] identity.”⁵⁹ Indeed, “the worldviews embedded within them perish along with the languages.”⁶⁰ As the primary educational institution for Havasupai children, HES has the potential to play a key role in preserving and revitalizing the Havasupai language before it is too late. Yet that potential is squandered—with HES, if anything, hastening the loss of an already-endangered language.

⁵⁶ KENNEDY REP., *supra* note 8, at IV.

⁵⁷ LISTENING SESSIONS, *supra* note 50, at 18.

⁵⁸ *UNESCO Atlas of the World’s Languages in Danger*, UNESCO, <http://www.unesco.org/languages-atlas/index.php?hl=en&page=atlasmap> (last accessed May 6, 2021).

⁵⁹ James Brooke, *Indians Striving to Save Their Languages*, N.Y. TIMES (Apr. 9, 1998), <https://www.nytimes.com/1998/04/09/us/indians-striving-to-save-their-languages.html>.

⁶⁰ LISTENING SESSIONS, *supra* note 50, at 18.

The failures of HES thus transcend any one student: the Tribe's material prosperity and cultural legacy are both at stake.

III. COMPENSATORY EDUCATION IS UNIQUELY IMPORTANT HERE GIVEN THE RESERVATION'S REMOTE LOCATION AND THE NEED TO LEAVE HOME FOR ADVANCED SCHOOLING

A. Havasupai Children Who Have Already Been Harmed Are in Need of Compensatory Education

Compensatory education is an equitable remedy designed to make up for educational services children were entitled to, but did not receive. *See R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011). The aim of compensatory education is to place the children in the same position they would have been in but for the violations. *Id.* Plaintiffs sought compensatory and remedial education in their complaint,⁶¹ but the district court's summary judgment order overlooked this request entirely.⁶² The court thus deemed moot the claims of former HES students, finding them no longer capable of relief—notwithstanding that compensatory education is not contingent on students' current enrollment status.⁶³ This was an error, and one with far-reaching consequences for the affected children and the community at large.

Because HES only accommodates students through the eighth grade,

⁶¹ TAC at 70.

⁶² *See generally* Order on Mots. for Summ. J. at 10-11, 1-ER-26-27.

⁶³ *Id.*

Havasupai students must leave the Reservation to pursue further education.

Families have two options: (i) send their children to BIE boarding schools, putting considerable emotional and financial strain on the students and their families, or (ii) move out of the Canyon to attend public schools, leaving their ancestral homes and ripping up generations of roots in the process.

Even if families are willing and financially able to take one of these options, the students are thrust into a strange new world, finding themselves far from home and everyone they have ever known. Even if they are lucky enough to have their family with them on their educational journey, students are met by classmates and teachers that may know little to nothing about their culture.

On top of the jarring culture shock, students find themselves far behind their peers in terms of educational attainment—forced to sink or swim with the educational equivalent of a cannonball strapped to their ankle. When these students are taught subjects like fine arts, health, and consumer economics at their new school, they may be seeing these subjects in a formal setting for the first time. Their classmates, on the other hand, may have been studying these subjects for years. And even in the subjects that were taught at HES, like English and math, the Havasupai students are often badly underprepared. Carletta Tilousi, a bright student who later became a member of the tribal council, recalls spending “the first day of ninth grade trying to learn what fractions were. The teacher called her to

the board, and Tilousi could do nothing but stare at the numbers.”⁶⁴

These pressures and challenges can be crushing when placed on the shoulders of a child. This is borne out in the data, which show that only 20 percent of Havasupai students go on to graduate from high school⁶⁵—compared to a national average well above 80 percent.⁶⁶

These students are in desperate need of a life preserver to help them stay afloat in their post-elementary education. Compensatory education can provide that boost. Giving these students the academic foundation that they need for their post-elementary education will not remove the other significant difficulties they must face in pursuit of their goals. They will still be far from home and away from their community. But at least they will have the opportunity to catch up to their peers, so that they can meaningfully engage with more advanced material in high school and beyond. Compensatory education sets these students up to succeed.

B. The Havasupai Children in Need of Compensatory Education Have Standing, and Their Claims Are Not Mooted on Graduation or Transfer from HES

The claims of the Student Plaintiffs of HES, present and past alike, arise from the failures of their schooling—failures that hamper their performance in high

⁶⁴ Woods, *supra* note 28.

⁶⁵ *Id.*

⁶⁶ National Center for Education Statistics, *Public High School Graduation Rates*, NCES.ED.GOV (May 2021), <https://nces.ed.gov/programs/coe/indicator/coi>.

school, deprive them of cultural and linguistic grounding, impede their job prospects, and, in a tight-knit community like the Havasupai, disadvantage the entire Tribe. Because these students carry the burden of their educational gaps long after graduating and compensatory education could help close those gaps, graduation or school transfer does not render their injuries any less redressable. The district court erred in concluding otherwise.

As to Levi R. and Leo R., the district court concluded that they lacked standing to bring their claims.⁶⁷ To have standing, a plaintiff must have “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). All the Student Plaintiffs, even those that no longer attend Havasupai Elementary School, meet these requirements. These students were harmed by the Defendants’ failure to provide sufficient education, either because they attended the school or because they were eligible for attendance but were forced to seek education elsewhere due to the dire state of education in Supai. As for redressability, compensatory education is a suitable remedy that can provide immediate benefits even for students that no longer attend or are no longer eligible to attend Havasupai

⁶⁷ Order on Motion to Dismiss at 4-5, 1-ER-33-34.

Elementary School.

The doctrine of mootness, on which the district court relied in dismissing the claims of Durell P. and Stephen C.,⁶⁸ addresses whether the court remains able to “provide a plaintiff with any effectual relief” throughout the proceedings.

Uzuegbunam v. Preczewski, 141 S. Ct. 792, 796 (2021). Courts routinely find that student plaintiffs’ requests for compensatory education preclude a finding of mootness upon graduation, school transfer, or similar events. Appellants have addressed both these issues thoroughly in their opening brief. Appellants’ Br. at 15-16, 42-57.⁶⁹ Former HES students’ claims, therefore, cannot be dispensed as moot where a viable remedy in compensatory education remains.

Indeed, where a plaintiff seeks compensatory education as an equitable remedy, it is perverse to deny the claim as moot because he has graduated from the school: the graduation to more advanced coursework without adequate preparation is itself part of the harm that the school inflicts. Such a use of the mootness doctrine would render compensatory education unavailable to the students who

⁶⁸ Order on Mots. for Summ. J. at 11, 1-ER-27.

⁶⁹ See also *Maine Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 20 (1st Cir. 2003) (reversing district court’s finding of mootness in light of compensatory education claim); *Lillbask ex rel. Mauclaire v. State of Conn. Dep’t of Educ.*, 397 F.3d 77, 89 (2d Cir. 2005) (“[S]everal of our sister circuits have concluded that a claim for compensatory education or reimbursement can defeat a mootness challenge in an IEP placement dispute.”); *Z.G. by & through C.G. v. Pamlico Cty. Pub. Sch. Bd. of Educ.*, 744 F. App’x 769, 778 (4th Cir. 2018) (similar).

need it most and would unfairly punish those students for the pace of litigation beyond their control. Given the realities of litigation, this restrictive approach would make it nearly impossible for a student in the upper grades to ever see an education-based claim through to completion. Students are thus put in an impossible position. In the early grades, the cumulative effects of bad schooling might not yet be visible. But a child who brings a claim in the later grades would almost always age out before litigation could reach its conclusion.

Nor does the harm caused by poor education spontaneously abate after a student's graduation from HES. On the contrary, it is well-established that the limited educational opportunities offered to Native American students hinder tribal members in developing marketable skills necessary to secure gainful employment. Native Americans face nearly double the unemployment rate of the country as a whole, due in no small part to a lack of higher education.⁷⁰ For the Havasupai Tribe, these effects are magnified by the particularly dreadful state of HES. Nearly 40 percent of the Tribe lives in poverty. Since many of the few tourism jobs that are available to members of the Tribe require a high school diploma or GED, an overwhelming majority of tribal members are ineligible. This is to say nothing of

⁷⁰ Katherine Peralta, *Native Americans Left Behind in the Economic Recovery*, US NEWS & WORLD REPORT (Nov. 27, 2014), <https://www.usnews.com/news/articles/2014/11/27/native-americans-left-behind-in-the-economic-recovery>.

jobs that require postsecondary education, which is even further out of reach.

Havasupai children who are no longer eligible to attend HES have been deprived of years of education, but an award of compensatory education will better equip them to access the educational opportunities that may be available to them now. It is not too late to help lift these students up from the hole that Defendants' conduct has dug for them.

Accordingly, the district court's decisions dismissing the claims of former HES students should be reversed.

CONCLUSION

For the reasons stated above, the Havasupai Tribe respectfully requests that the Court reverse the district court's order granting summary judgment against Plaintiffs on their APA claims and the district court's dismissals of the claims of students who no longer attend Havasupai Elementary School.

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/s/ Matt Kline

MATT KLINE
SETH FORTIN
DANIELLE FEUER
TYLER HELMS
MARY MANUKYAN
VANESSA GUERRERO
O'MELVENY & MYERS LLP
1999 Avenue of the Stars, 8th Floor
Los Angeles, California 90067
Telephone: 310.553.6700

Facsimile: 310.246.6779

DENTEN ROBINSON

MARTINA GAST

DR LAW PLLC

1930 E. Brown Rd., Ste. 103

Mesa, Arizona 85203-5139

Telephone: 480.500.6656

Facsimile: 480.500.6655

Attorneys for *Amicus Curiae*

The Havasupai Tribe

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(a)(5) & 32(a)(7)(B) and Circuit Rule 32-1 because it contains 5,993 words, exclusive of the portions of the brief that are exempted by Federal Rule of Appellate Procedure 32(f). I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

Dated: July 2, 2021

/s/ Matt Kline

Matt Kline

O'MELVENY & MYERS LLP
Attorney for *Amicus Curiae*
County of Los Angeles, California