No. 18-923

In The Supreme Court of the United States

CAROL COGHLAN CARTER,
next friend of A.D., C.C., L.G., C.R., *et al.*,

Petitioners,

v.

TARA KATUK MAC LEAN SWEENEY, in her official capacity as Assistant Secretary—Indian Affairs, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. The circuits are split on the question of whether claims for nominal damages for past injuries remain alive after the mootness of prospective-relief claims.

Respondents admit that there is "some disagreement in the circuits." BIO.8. Indeed, there is. As explained in the Petition, the Parent and Children Plaintiffs' lawsuit would have remained a live controversy had this case been litigated in the Fifth or Tenth Circuits, for example. However, because it originated in the Ninth, a different mootness rule was applied to them. That division between the circuits requires this Court's attention.

In *Fisher v. University of Texas*, 631 F.3d 213, 217 (5th Cir. 2011), *rev'd on other grounds*, 570 U.S. 297 (2013), a prayer for the nominal amount of $75 kept the case alive even after "forward-looking . . . remedies" were foreclosed—meaning that the backward-looking nominal-damage and declaratory-relief claims were not rendered moot.[1] The Fifth Circuit called the principle that retrospective nominal-damages claims are still viable even after the mootness of forward-looking claims "rote"—i.e., an ordinary application of an unremarkable rule. *Id*. Thus, if this case had been

[1] In fact, this Court proceeded *twice* to rule on the merits in *Fisher*, because these backward-looking claims for relief kept the case alive long after the student plaintiff had graduated from another university (and had no intention of reapplying or transferring to UT Austin). *See* 570 U.S. 297 (2013); 136 S. Ct. 2198 (2016).

litigated in the Fifth Circuit, the case would not have been dismissed.

This case would also not be moot in the Tenth Circuit. That Circuit has long held that "'by definition[,] claims for past damages cannot be deemed moot,'" and any change that forecloses prospective relief does "'not moot plaintiffs' claim for nominal damages.'" *O'Connor v. City & Cnty. of Denver*, 894 F.2d 1210, 1216 (10th Cir. 1990) (quoting *Taxpayers for Animas-La Plata Referendum v. Animas-La Plata Water Conservancy Dist.*, 739 F.2d 1472, 1479 (10th Cir. 1984)). In *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1257 (10th Cir. 2004), the plaintiff sought "nominal damages of one dollar," which kept the case alive despite mootness of prospective relief. Likewise, in *Committee for First Amendment v. Campbell*, 962 F.2d 1517 (10th Cir. 1992), when the defendant university adopted a new policy lifting the restriction on viewing a controversial film, thereby mooting prospective relief, "the nominal damages claim which relates to *past* (not future) conduct" kept the case alive. *Id.* at 1526 (emphasis in original). Thus, this case would not have been dismissed as moot if it had originated in the Tenth Circuit.

Yet because this case was litigated in the Ninth Circuit, a different mootness rule applied, and the court of appeals dismissed the well-pleaded allegations regarding *past* injury, solely because the allegations regarding *future* injury had been mooted by incidents occurring long after the complaint was filed. The Eleventh Circuit, too, has joined the Ninth in straying

from the standing rules that this Court has promulgated. In *Flanigan's Enterprises, Inc. v. City of Sandy Springs*, 868 F.3d 1248, 1264 (11th Cir. 2017) (*en banc*), for instance, the plaintiffs sought nominal but not actual or compensatory damages. The court concluded that the nominal-damages claim did not save the case from mootness even though it acknowledged that "a majority of our sister circuits to reach this question have resolved it differently than we do today." *Id.* at 1265. It collected cases from the Second, Fifth, Eighth, and Tenth Circuits concluding unequivocally that "a claim for nominal damages avoids mootness." *Id.* at 1265 n.17.

Five judges dissented, *id.* at 1271, calling the conclusion that a "request for nominal damages saves this constitutional case from mootness," "far from novel." *Id.* A "rule allowing nominal damages to save constitutional claims from mootness" is "the most workable . . . bright-line rule." *Id.* "[U]nder Supreme Court precedent," the dissent explained, "one can bring a suit solely for nominal damages, which means that nominal damages defy mootness on their own." *Id.* at 1273.

Judge McConnell's and Judge Henry's competing concurring opinions in *Utah Animal Rights* demonstrate that the question presented by this Petition has long percolated, and is one on which courts of appeals are, and have long been, irreconcilably split. Judge McConnell in his concurrence, criticized the rule that "a claim for nominal damages precludes dismissal of the case on mootness grounds," and called upon "either an *en banc* court or the Supreme Court" to address the

issue. 371 F.3d at 1262–63. Even 15 years ago, Judge McConnell acknowledged there existed a split among the circuits. *Id.* at 1268–69 (collecting cases). That split has only sharpened in those years.

Judge Henry, in his concurrence, was of the view that "the [Supreme Court] cases clearly do not say that nominal damages do not provide justiciability." *Id.* at 1272. He explained that "[c]ommon-law courts traditionally have vindicated deprivations of certain 'absolute' rights . . . through the award of a nominal sum of money" and, relevant to this case, that courts have not traditionally required "*proof* of actual injury," but only a validly-pleaded *allegation* of injury. *Id.* (citation omitted, emphasis added). After all, in a case coming to this Court on a granted motion to dismiss, the actual injury is, by definition, not *proven*, but *alleged*—an allegation that is taken to be true.

This Court has emphasized the vital importance of nominal-damage claims in civil rights litigation: "important civil and constitutional rights," it has noted, "cannot be valued solely in monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). Thus, nominal-damage claims for past injuries frequently accompany prospective claims for injunctive relief. All parties agree—especially now that all the adoptions have been finalized—that the Plaintiffs *were*, *in fact*, *actually* subjected to the eight provisions of the Indian Child Welfare Act and Arizona law whose constitutionality they challenge. There is consequently *no* dispute that Plaintiffs "suffered some actual injury that can be redressed by a favorable judicial decision."

Iron Arrow Honor Soc'y v. Heckler, 464 U.S. 67, 70 (1983). They have the "requisite personal interest" that saves this case from becoming moot on account of subsequent events. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)—or would have if this case had originated on the other side of the circuit split.

Respondents conflate the crucial difference between the *purpose* and the *amount* of damage awards. Pleadings seeking damages that are nominal as to *amount* but compensatory as to *purpose* are "rote." *Fisher*, 631 F.3d at 217. Respondents' briefing adds many adjectives to the word "damages," but ignores the difference between *purpose* and *amount*. BIO.5, 7, 8, 13, 20 (nominal, compensatory, punitive, non-punitive, economic, actual, liquidated, presumed, insubstantial). As a result, Respondents fail to explain why a nominal amount cannot be actual or compensatory in *character*, and that is what matters—or would, if this case had originated in the Fifth or Tenth Circuits.

But this Court looks past "mere labels," especially when the government is in the role of an adverse party. *NAACP v. Button*, 371 U.S. 415, 429 (1963). *All* claims for damages—actual, punitive, or nominal in amount—"are retrospective in nature"; "they *compensate* for past harm." *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 622 (3d Cir. 2013) (emphasis added). Thus, the *adjective* appended to the word "damages" has no bearing on the mootness inquiry; "[d]amages should be denied on the merits, not on grounds of mootness." 13A Charles Alan Wright, et al., *Federal Practice & Procedure* § 3533.3 (3d ed. 2017).

In other words, the mootness test only asks whether Plaintiffs have the "requisite personal interest" that continues throughout the existence of the suit. *Geraghty*, 445 U.S. at 397. The test does not have a second prong—one the government urges the Court to adopt—that focuses on the dollar value of the requested damages relief. Such an idea was firmly rejected by this Court in *Memphis Community School District v. Stachura*, 477 U.S. 299, 308–09 (1986), which concluded that cases, where only the "nominal damages" claim survives, are *not* moot and can proceed to the merits.

The Respondents acknowledge this disagreement between the circuits—thereby strengthening the Petitioners' point that the court below decided an important federal question of Title VI remedies and mootness that has not been, but should be, settled by this Court.

II. The retrospective declaratory relief question is preserved, was passed upon below, and is one on which lower courts remain divided.

First, contrary to the government's contention, the retrospective declaratory relief question was pressed and passed upon below. BIO.21. Petitioners

did raise it in the trial court[2] and press it in the Ninth Circuit.[3]

Second, assuming the government is correct that this precise argument was not pressed below, courts look to the *claim*, not the *argument* made below. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (parties are "not limited to the precise arguments they made below" if a party has "properly presented" a claim in the lower courts). The claim Petitioners have consistently maintained is that they were harmed in the past, and are entitled to damages that are nominal in amount, and retrospective declaratory relief—and each or both *claims* would redress their injuries. That provides the redressability needed to establish standing and prevent the case from becoming moot when their *other* claims—for forward-looking relief—were rendered moot.

Third, this Court may review *any* claim or issue, regardless of whether the parties raised it below, "so long as it has been passed upon" by the court below. *Citizens United v. FEC*, 558 U.S. 310, 330 (2010). Both

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[2] App.65a ¶ 7 (separately pleading prospective and retrospective declaratory relief); App.111a ¶ 149 ("Defendant McKay *has subjected* . . . Plaintiffs . . . to *de jure* discrimination on the ground of . . . race, color, or national origin.") (emphasis added).

[3] Op. Br., 2017 WL 3842983, at *33 (seeking "declaratory relief for past injuries"); Reply Br., 2018 WL 841918, at *1 (briefing that past injuries "are redressable by an award of nominal damages and declaratory relief"); *id.* at *15 ("Nominal damages and declaratory relief provide relief for past violations of individual rights" (citation omitted)); *id.* at *20 ("backward-looking declaratory relief . . . goes hand-in-hand with nominal damages").

the district court and the Ninth Circuit passed upon the question. App.6a, 10a, 11a (district court); App.3a (court of appeals).

Fourth, it is difficult in this case to separate the request for nominal damages from the request for declaratory relief; each is the "predicate" of the other. Pet.22–25. Respondents do not explain why that is not so. BIO.21. They also fail to explain why certiorari should not be granted given the fact that the predicate theory is *this* Court's formulation in the context of 42 U.S.C. § 1983 that can and should be extended to Title VI cases. Certiorari on Petitioners' question presented, which encompasses this issue, is therefore warranted.

III. The government's lingering doubts about "particularized injury" do not reduce the certworthiness of the question presented.

1. In *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), this Court had "grave doubts" about the plaintiffs' "standing under Article III to pursue appellate review." *Id*. at 66. The Court "did not definitively resolve the issue" but instead "assume[d]" the plaintiffs "had standing to place th[e] case before an appellate tribunal . . . in order to analyze [the] mootness issue." *Id.* Resolving the mootness question first before resolving the standing question is permissible, the Court explained, because both questions "go[ ] to the Article III jurisdiction of this Court and the courts below, not to the merits of the case." *Id.* at 67.

Deciding the mootness question before deciding the standing question makes sense. If an appellate court decides that the plaintiff lacks standing, it "vacates the decision, and remands with directions to dismiss." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21 (1994). *See also Burke v. Barnes*, 479 U.S. 361, 363 (1987) (concluding case was moot and therefore did not reach the question of Article III standing).

However, if an appellate court determines that a case has "become moot while awaiting review," there is no live case or controversy to begin with, and the Court does *not* have jurisdiction to address the standing question in *that* scenario. *U.S. Bancorp Mortg. Co.*, 513 U.S. at 21. That is what happened here, and that is precisely the path followed by the Ninth Circuit, which concluded that the case was moot without determining the question of standing. App.1a–4a. In the government's own words: the Ninth Circuit "declined to reach the standing inquiry." BIO.7. That is the posture of this case. Thus, the Respondents' arguments about Petitioners' standing have no bearing on the certworthiness of the question presented.

2. If resolving the standing question *is* important, this Court should take one of two options. It should either:

(a) Grant certiorari and ask the parties to brief an additional question of Article III standing—as it did in *Department of Commerce v. New York*, No. 18-966, 2019 WL 1216251 (Mar. 15, 2019), and *United States v.*

Windsor, 568 U.S. 1066 (2012) (order granting certiorari); or

(b) Grant, vacate, and remand so that the Ninth Circuit can analyze the standing question, as it did in *Frank v. Gaos*, 139 S. Ct. 1041, 1043–44 (2019). These options are available—although, as Petitioners have shown, they are unnecessary to resolve this case, as the Petitioners plainly have standing on account of their still-unredressed past injuries.

3. The government argues that Plaintiffs have not alleged "particularized injury." BIO.6, 23. That is belied by the allegations in the complaint, which plainly show that the injury "affect[ed] the plaintiff[s] in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992).[4] Specifically: being forced to visit with strangers, the children being driven over 100 miles, the parties being exposed to emotional and psychological anguish—all of this and more on account of the Petitioners' race, color, or national origin—these are all actual, *physical*, particularized injuries. App.72a–73a.

Respondents fall back to the district court's mistaken premise that "'[a]ny true injury to any child or interested adult can be addressed in the state court proceeding itself.'" BIO.7 (quoting App.33a). This completely false statement stems from the government's unfamiliarity with Arizona state-court child-custody proceedings. Foster parents are not parties to the suit until the very final stages. They are not parties in the

[4] App.65a–79a, 100a–113a ¶¶ 9–17, 21–49, 110–150, A–H.

foster-care-placement, termination-of-parental-rights, or preadoptive-placement proceedings where the vast majority of the cases get decided—and where most of the injuries of the type complained of here occur. Foster parents are only parties in an adoption-placement proceeding if they file a petition to adopt their foster child, or if they seek intervention, which is rarely, if ever, granted until the child is cleared for adoption *after* the biological parents' rights are terminated. *See* Ariz. R. Proc. Juv. Ct. 37(A)–(B), 68(A)(2) (defining "parties" and "participants"). That is, until *after* the unconstitutional provisions of the Indian Child Welfare Act have been applied. Retrospective relief is the *only* practicable avenue for these people.

With the possible exception of the race-, color-, or national-origin-based adoptive-placement preferences in 25 U.S.C. § 1915(a), the Indian Child Welfare Act is thereby rendered, for all practical purposes, immune to legal challenge. No state-court route exists whereby parents and children can challenge the other seven provisions challenged here (25 U.S.C. §§ 1911(b), 1912(d), 1912(f), 1915(b); Ariz. Rev. Stat. §§ 8-105.01(B), 8-453(A)(20), 8-514(C)) that injure them. And even if foster parents could challenge Section 1915(a) in state court, they would still need to *comply with* that section *in order to* challenge it. The injury they allege here—that they were *subjected to* this and the other challenged provisions that treated them differently based on their race, color, or national origin—is not redressable in state court. *Cf. Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (holding major portions of the Indian Child Welfare Act

unconstitutional, including the provisions challenged here). Thus, even if parties were tasked with addressing standing, Petitioners will easily pass the inquiry.

In sum, there are *three* clear ways to address the Article III standing question, all of which lead to granting certiorari. The dominant approach is the one given in *Arizonans for Official English*: The Court assumes standing so it could decide another jurisdictional issue like mootness. Thus, the government's briefing on the standing issue fails to show why the Court should deny certiorari or why this case is not an excellent vehicle to address the question presented.

CONCLUSION

The writ should issue.

Respectfully submitted, in May 2019.

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