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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

A.D. and C. by CAROL COGHLAN
CARTER, their next friend;
S.H. and J.H., a married couple;
M.C. and K.C., a married couple;
for themselves and on behalf of a class of
similarly-situated individuals,
Plaintiffs,

vs.

KEVIN WASHBURN, in his official capac-
ity as Assistant Secretary of BUREAU OF
INDIAN AFFAIRS;
SALLY JEWELL, in her official capacity as
Secretary of Interior, U.S. DEPARTMENT
OF THE INTERIOR;
GREGORY A. McKAY, in his official ca-
pacity as Director of ARIZONA DEPART-
MENT OF CHILD SAFETY,
Defendants.

No. CV-15-1259-PHX-NVW

**PLAINTIFFS' CONSOLIDATED
REPLY TO STATE AND
FEDERAL DEFENDANTS'
RESPONSES TO PLAINTIFFS'
MOTION FOR LEAVE TO FILE
FIRST AMENDED COMPLAINT**

I. Introduction. Defendants’ opposition to Plaintiffs’ motion for leave to amend primarily rehashes arguments that they presented in their motions to dismiss on standing and abstention. Fed. Resp. (Doc. 160) (“FR”) 2–8; St. Resp. (Doc. 162) (“SR”) 2–10.¹ Such arguments are out of place here, as this motion only seeks leave to file the amended complaint. A motion for leave to amend should be “‘freely given’ ... ‘with extreme liberality.’” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). The only argument Defendants make that speaks directly to the Plaintiffs’ motion to amend focuses on one factor of the test of *Foman v. Davis*, 371 U.S. 178 (1962): the purported futility of including Baby Girl L.G. as a Plaintiff. FR.8–11; SR.4–8. Plaintiffs address all of these arguments below, and expressly incorporate by reference their already-filed responses to Defendants’ arguments for dismissal (Doc. 80).²

II. Standing. Plaintiffs’ characterization of this case in ¶ 1 of the Complaint is proving prescient. Defendants argue that Plaintiffs lack standing either because of their racial makeup (particularly Baby Girl L.G.), or on the theory that unequal treatment based on race is not a cognizable injury. In fact, it is. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) (“[t]he injury ... is that a ‘discriminatory classification [deprives] the plaintiff [of] ... an equal [legal] footing.’”); *Northeastern Fla. Chapter of Assoc. Gen. Contractors of Amer. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (“The ‘injury in

¹ Plaintiffs cite page numbers of Doc. 162, which does not currently comply with LRCiv 7.1(b)(1)’s type-size and margin requirements. *See also* Doc. 70; Doc. 101. For the Court’s convenience, should these page numbers change after State Defendant formats and refiles Doc. 162, Plaintiffs will refile this consolidated reply incorporating the changed page numbers. *See* ECF # 164 (striking State Defendant’s filing with leave to refile).

² Because Defendants’ responses to the motion for leave to amend simply repeat arguments already presented in their motions to dismiss, Plaintiffs think it is not necessary to have a round of supplemental motion-to-dismiss briefing. But if the Court would like such supplemental briefing, Plaintiffs propose the following briefing schedule: 14 days after the date of the order amending the complaint for Defendants to file an opening supplemental brief (17 pages each); 14 days for Plaintiffs to respond (34 pages); no reply, or alternatively, a reply within 7 days thereafter (11 pages each). *See* LRCiv 7.2(c)–(e). The federal Defendants’ request of 30 days to file their motion (FR.11 n.2) would needlessly delay this action; they will have had more than 30 days to study the proposed amended complaint and prepare a supplemental memorandum by the time the Court rules on this Motion; Plaintiffs are happy to have a less than commensurate timeframe to respond (14 days, as proposed above) in the interest of moving this lawsuit to a speedy resolution.

fact’ in an equal protection case ... is the denial of equal treatment.”); *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (“the right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against. Rather ... the ‘right invoked is that of equal treatment.’”).³

On Defendants’ theory of standing, Rosa Parks would have had no cognizable injury, because she was allowed to ride on the bus and travel so long as she gave up her seat to a white passenger. *See* SR.3 (discussing standing of C.C., M.C., K.C., A.D., S.H., and J.H.). But the law is otherwise: a party denied equal treatment on the basis of race suffers a distinct injury and has Article III standing for that reason. *Mathews*, 465 U.S. at 739.

Doe v. Piper, __ F. Supp. 3d __, 2016 WL 755619 (D. Minn. Feb. 25, 2016), was decided on the anniversary of the promulgation of the New Guidelines. That case found that the plaintiffs had standing because “unequal treatment” is an Article III injury. *Id.* at *5–*7. Plaintiffs’ injury here is likewise that they are relegated to a different, disadvantageous set of laws and procedures exclusively because ICWA imposes those rules on the basis of their racial or ethnic origin. ICWA thus subjects them to separate and unequal treatment that Plaintiffs refer to as the ICWA “penalty box.” *See* Doc. 80 at 1, 5, 11.

Defendants argue (SR.3–4) that Plaintiffs have not suffered enough to have standing because the “harm” is not “concrete[]” (FR.4), but is “speculative ... and not certain to occur.” This misunderstands the nature of their injury.

Plaintiffs are injured by being subject, solely on the basis of race, to a different set of rules—and disadvantageous ones—than apply to other similarly situated people. A long line of Supreme Court cases have held that singling out of individuals and consequent unequal treatment constitutes Article III injury. *Mathews*, 465 U.S. at 738–40 (collecting cases).

³ It is beyond dispute that *de jure* unequal treatment based on racial makeup, national origin, or the use of racial ancestry as a “shorthand” for membership in a political group (Doc. 68 at 23), is a cognizable Article III injury and that strict scrutiny applies in such cases. In *Korematsu v. United States*, 323 U.S. 214, 216 (1944), the plaintiff challenged the federal government’s use of ethnicity as a shorthand for political affiliation, and the Court found that “the most rigid scrutiny” applied.

1 In *Adarand Constructors*, the Court found that a company had standing to “seek[]
 2 declaratory and injunctive relief against any *future* use of” race-based contracting prefer-
 3 ences, 515 U.S. at 210, even without proving that it would have been awarded the contract
 4 in the absence of unequal treatment, because “[t]he injury in cases of this kind is ... ‘dis-
 5 criminatory classification.’” *Id.* at 211. Likewise, in *Parents Involved in Cmty. Sch. v. Se-*
 6 *attle Sch. Dist. No. 1*, 551 U.S. 701, 718–19 (2007), the Court found that the plaintiffs had
 7 standing despite the fact that it was “possible” that they “[would] not be denied admission
 8 to a school based on their race,” because “one form of injury under the Equal Protection
 9 Clause is being forced to compete in a race-based system.” The Court also noted that one
 10 of the children who had ultimately received a school assignment without the race-based
 11 classification applying, nevertheless had standing because “he may again be subject to as-
 12 signment based on his race” in the future. *Id.* at 720. Simply put, a plaintiff who, like the
 13 Plaintiffs here, is subjected to different and unequal treatment on the basis of race, or who
 14 will be so treated in the future, may seek prospective injunctive relief to bar the application
 15 of such race-based classifications.

16 Defendants’ arguments, therefore, that “there have been no transfers to tribal courts”
 17 yet, or any “application of ICWA’s adoptive placement preferences” yet (FR.8), simply do
 18 not defeat Plaintiffs’ standing. This is not a case dealing with unequal *outcomes*; Plaintiffs
 19 seek *equal treatment*. It is certain—indeed, Defendants tout it as ICWA’s feature (FR.2–
 20 3)—that Plaintiffs are currently “subject to” (FR.3) all of the provisions of ICWA and the
 21 New Guidelines, including the provisions challenged here. Defendants thus admit that
 22 Plaintiffs are *intentionally* placed in the ICWA Penalty Box (Ex. 1) if they are classified as
 23 “Indian child[ren]” under 25 U.S.C. § 1903(4).⁴ Class representative plaintiffs in every
 24 conceivable stage of a state “child custody proceeding,” 25 U.S.C. § 1903(1), are not nec-
 25 essary here. The injury common to all—the “glue,” *Wal-Mart Stores Inc. v. Dukes*, 564

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 27 ⁴ It bears repeating that all Indian children are citizens of the United States at birth, 8 U.S.C.
 28 § 1401(b), and are just as entitled to the protections of the Constitution as American citizens
 of any other ethnic background.

1 U.S. 338, 131 S.Ct. 2541, 2552 (2011), that binds them together—is being subject to ICWA
2 and the New Guidelines. *See, e.g., Rodriguez v. Hayes*, 591 F.3d 1105, 1123 (9th Cir. 2009)
3 (finding commonality where “the constitutional issue at the heart of each class member’s
4 claim for relief is common”). The named plaintiffs, nonetheless, provide a representative
5 sampling of proceedings in the pre-termination, post-termination, pre-adoption, and post-
6 adoption stage. *See* Doc. 150-1 ¶ 49.

7 Defendants misunderstand the nature of L.G.’s injury. Plaintiffs allege that she has
8 known her brother C.R. since birth, shares a sibling bond with him, and that both consider
9 K.R. and P.R. to be their parents. Doc. 150-1 ¶ 40. Both call K.R. and P.R. “mommy” and
10 “daddy.” *Id.* Arizona state policy, mandated by state law, is to place well-bonded siblings
11 with the same foster and adoptive parents. *See, e.g.,* A.R.S. § 8-513(D). Were it not for
12 ICWA, L.G. and C.R. would be placed together. Doc. 150-1 ¶¶ 40–41. But because ICWA
13 imposes different rules, based on C.R.’s race, the ordinary Arizona laws do not apply. This
14 harms L.G., who loves him as her brother. Moreover, by operation of ICWA, her fate is
15 inextricably intertwined with C.R.’s. Both are subject to unequal treatment because of
16 ICWA’s race-based rules. L.G.’s state-court child custody proceeding is consolidated with
17 that of her brother, C.R. Doc. 150-1 ¶ 39. That proceeding, including her adoption by K.R.
18 and P.R., is consequently delayed in order to keep it in sync with C.R.’s. Doc. 150-1 ¶¶ 39,
19 42–43. This delay, which injures L.G. is attributable to the operation of ICWA. She is
20 therefore injured for Article III purposes, regardless of her not being *herself* subject to
21 ICWA’s separate and unequal treatment.

22 The Federal Defendants claim that children’s relations with their Indian communi-
23 ties and their families “historically have been threatened, and often severed, by state child
24 welfare processes ... on the grounds that state authorities know what is best for tribes and
25 individual members.” FR.3. But an “Act [that] imposes current burdens ... must be justified
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by current needs.” *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2615 (2013).⁵ However that may be, it is clear that the government-imposed severing of sibling bonds, bonds of affection and familial relation—the very breaking up of families that the federal Defendants claim ICWA prevents—are legally cognizable injuries.

All of these arguments either pertain to Fed. R. Civ. P. 12(b)(1) or 12(b)(6). The Defendants provide little, if any, in support of their opposition to amend the complaint under Fed. R. Civ. P. 15. Their contention that the Court must deny the motion to amend if it finds that the plaintiffs in the original complaint lacked standing is incorrect. The Supreme Court has held that “class certification issues are ... ‘logically antecedent’ to Article III concerns,” and that it is proper for a court to resolve a class certification motion before addressing standing. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999). *Lierboe v. State Farm Mut. Auto Ins. Co.*, 350 F.3d 1018, 1023 n.6 (9th Cir. 2003), on which they rely, involved a different question, one the court found “unusual.” *Hensley-Maclean v. Safeway*,

⁵ Ironically, it was in fact the Federal government, not the states, that was most responsible for the historical abuses the federal government refers to in its brief. The NCAI amicus brief (Doc. 59), *which supports the Defendants*, offers the following evidence:

- “*federal* Indian policy favored the removal of Indian children from their homes” (Doc. 59 at 2) (emphasis added).
- “*federal* boarding schools” (*Id.* at 3 n.2) (emphasis added).
- “mass removals had their genesis in early federal Indian policy” (*Id.* at 4).
- “established practice of the federal government was to remove Indian children from their homes” (*Id.*).
- “The *federal boarding school and dormitory programs* also contribut[ed] to the destruction of Indian family and community life.” (*Id.* (citing H.R. Rep. No. 95-1386 at 9 (1978) (emphasis added))).
- Federal “assimilat[ion]” policy (Doc. 59 at 4 (citing Cohen’s *Handbook of Federal Indian Law*, § 22.03(1)(a) at 1397 (2012) (“In 1969, the federal government acknowledged that its educational policy was ‘a failure of major proportions.’”))).
- “*federal* Indian Adoption Project supported adopting Indian children to non-Indian households” (Doc. 59 at 5) (emphasis added). The Indian Adoption Project was formed by the BIA (Doc. 59 at 5), and the “federal policy of ‘Indian extraction’” was implemented by “IAP-approved state agencies”. *Id.*
- “With the IAP, the *federal government* looked to the ‘private sector’” (*Id.* at 6) (emphasis added).

There is no legislative historical evidence of *state* social workers entering Indian land and removing Indian children from Indian homes. NCAI, supporting Defendants, admits that evidence shows that state and private social workers removed Indian children only because of *federal* directives. In any event, this sad history does not justify imposing ICWA and the New Guidelines *in the present* on the State Defendants or the named and putative class member plaintiffs.

1 *Inc.*, No. 11-CV-01230-RS, 2015 WL 3956099 (N.D. Cal. June 29, 2015), which Defend-
2 ants cite (FR.6), actually cuts against Defendants because after “[d]iscovery ... established
3 ... that the products the named plaintiffs allegedly purchased were not in fact subject to
4 any recalls,” the court dismissed their claims for lack of standing, but gave the plaintiffs
5 leave to amend to substitute other members of the putative class as new named plaintiffs.
6 *Id.* at *1. This comports with Fed. R. Civ. P. 15(a)(2), which instructs courts to “freely give
7 leave” to amend the complaint “for virtually any purpose, including to add claims, alter
8 legal theories or request different or additional relief.” *In re Private Capital Partners, Inc.*,
9 139 B.R. 120, 125 (S.D.N.Y. 1992).

10 Finally, citing *Foster v. Center Twp. of LaPorte Cnty.*, 798 F.2d 237 (7th Cir. 1986),
11 and *Walters v. Edgar*, 163 F.3d 430 (7th Cir. 1998), Defendants take issue with this Court’s
12 decision (Doc. 151) to not rule on the pending motions to dismiss before deciding whether
13 leave to amend the complaint should be granted. (FR.6–7). By so arguing, they urge this
14 Court to change its mind and decide the pending motions to dismiss first. But that is not an
15 argument *against* granting leave to amend the complaint. And a party asking the Court to
16 change its mind should do so in a motion for relief under Fed. R. Civ. P. 60, not in this
17 proceeding.

18 **III. Next Friends.** Defendants rehash (SR.5–7) their argument against Carol
19 Coughlan Carter’s (and now Dr. Ronald Federici’s) next-friend status. But the path sug-
20 gested by the Court during the December 18, 2015, oral argument is the correct one to take:
21 the best way to ensure that the children plaintiffs’ claims are heard in court is through the
22 adversarial process in which the next-friend plaintiffs and Defendants diligently address
23 the contentions in the complaint and the parties’ legal arguments. As the Supreme Court
24 has explained, “the ‘gist of the question of standing’” is “to assure that concrete adverse-
25 ness which sharpens the presentation of issues upon which the court so largely depends for
26 illumination of difficult ... questions.” *Association of Data Processing Serv. Orgs., Inc.*
27 *v. Camp*, 397 U.S. 159, 170 (1970). Carter’s and Federici’s participation will ensure that.

1 A next-friend must be “truly dedicated to the children’s best interests.” *Sam M. v.*
 2 *Carcieri*, 608 F.3d 77, 83 (1st Cir. 2010). A close relationship between the child and the
 3 next friend is not required—indeed, in *Coalition of Clergy, Lawyers, & Professors v. Bush*,
 4 310 F.3d 1153, 1161–62 (9th Cir. 2002), the Ninth Circuit rejected a categorical rule re-
 5 quiring a close relationship between the party and the next-friend, holding that it was “no
 6 more than an additional consideration in determining whether a petitioner is a suitable next
 7 friend,” *id.* at 1161, and applying instead a sliding scale so as to exclude “the ‘intruder’ or
 8 ‘uninvited meddler.’” *Id.* at 1162. There is no question that Carter and Federici are truly
 9 dedicated to the children’s best interests—so dedicated, in fact, that Defendants call them
 10 “ideological advocates.” SR.5. In fact, like the sociology professor who was allowed to
 11 appear as next-friend in *Sam M.*, next friend plaintiffs such as Ms. Carter and Dr. Federici
 12 who are “truly dedicated to the children’s best interests,” 608 F.3d at 83, are proper next
 13 friends. Dr. Federici is an experienced, highly-respected clinical neuropsychologist and
 14 psychopharmacologist, a professional consultant to doctors, schools, and clinics, who has
 15 served as an expert witness in child custody proceedings throughout the United States and
 16 abroad, and is President of a humanitarian aid organization, Care for Children International,
 17 Inc., that focuses on aid to children in government protective care. Ms. Carter is an expe-
 18 rienced and highly respected family law attorney who has represented countless parents
 19 and children in Arizona custody proceedings, including many cases involving children of
 20 Indian ancestry, as guardian-ad-litem. Neither Dr. Federici nor Ms. Carter are the “feared
 21 ideologue that pursues an action for purely political or ideological reasons.” *Id.* at 93. Un-
 22 der Fed. R. Civ. P. 17(c),⁶ their participation as next friends of the named and putative class
 23 member children is beyond reproach.

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 25 ⁶ The state court-appointed guardians-ad-litem of named children are unable or un-
 26 willing to “advocate” (SR.5) for the children’s cause in this court. Director McKay and
 27 DCS, who have legal custody of these children are at best neutral, or at worst, actively
 28 advocating against these children’s best interests. Their natural parents, by definition, are
 unavailable. Defendants resisted the named foster/preadoptive parents as being named next
 friend to children in their care. While it is questionable that any of these can ever be “gen-
 eral guardians” of these children, what is unquestionable is that M.C. and K.C. as legal
 parents of baby boy C.C. can be next friend plaintiffs to baby boy C.C. in addition to Ms.

1 In *Sam M.*, the court allowed a sociologist who had never met the children or rela-
 2 tives at issue, to appear as a next-friend plaintiff in a case involving foster-care, because he
 3 was “familiar with the circumstances foster care children face while in the state’s custody,”
 4 had studied the children’s situation and familiarized himself with the documents involved,
 5 and concluded that pursuing the case was in the children’s best interests. 608 F.3d at 93.
 6 See also *Nichols v. Nichols*, 2011 WL 2470135 at *2–*6 (D. Or. 2011) (approving a next
 7 friend who had no prior relationship with the minor given that his “experience, objectivity,
 8 and expertise in this role make him an exceptional candidate for such services”). Dr. Fre-
 9 derici and Ms. Carter are experts in the subject matter of this case, are dedicated to the
 10 children’s best interests, and are well situated to ensure the “concrete adverseness” and
 11 sharp presentation of issues this litigation needs. *Camp*, 397 U.S. at 170. Their interest in
 12 the welfare of children, and in foster and custody proceedings, is hardly “ideological.”

13 The cases relied upon by Defendants involved next friend plaintiffs seeking to rep-
 14 resent interests of *adult* real parties-in-interest where a showing of mental incompetence is
 15 a prerequisite. Children, of course, are considered legally incompetent, for which reason
 16 Fed. R. Civ. P. 17(c) provides a mechanism for a next friend to sue on their behalf.⁷ Thus
 17 cases like *Massie v. Woodford*, 244 F.3d 1192 (9th Cir. 2001), *Hamdi v. Rumsfeld*, 294
 18 F.3d 598 (4th Cir. 2002), and *Whitmore v. Arkansas*, 495 U.S. 149 (1990), are inapposite.

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 22 Carter and Dr. Federici. See *J.W. v. Superior Court*, 17 Cal. App. 4th 958, 964–65 (1993)
 23 (“The essential difference between a general guardian and a [state court] guardian ad litem
 24 is that the former is usually appointed to ‘take care of the person or property of a minor,
 25 not for the purpose of prosecuting a lawsuit,’ ... while a [state court] guardian ad litem is
 appointed specifically to ‘prosecute or defend’ a suit, and may be appointed even though
 there is a general guardian.”). Given the expansive allowance in Fed. R. Civ. P. 17(c) of
 individuals who can be next friend to minors, there is no serious doubt about the status of
 Carter and Federici as next friends.

26 ⁷ Any perceived lack of significant relationship can easily be cured by this Court or-
 27 dering Ms. Carter or Dr. Federici or both to visit with the plaintiff children. However, that
 28 is not required by the rules. In *Sam M.*, and *M.D. v. Perry*, 294 F.R.D. 7 (5th Cir. 2013),
 courts permitted class action lawsuits to proceed in which large classes of children were
 represented by next friends, and did not require them to have a significant relationship with
 every child in the class, which would have been impracticable.

1 To reiterate, these arguments are all pertinent to a motion to dismiss, not to a motion
 2 for leave to amend, which should be given ““with extreme liberality.”” *Aspeon*, 316 F.3d
 3 at 1051.

4 **IV. Class Certification.** State Defendant repeatedly uses the term “appropriate
 5 plaintiff.” SR.2 n.1; SR.5; SR.7. It is unclear what this means. Article III requires an *injured*
 6 plaintiff, not an *appropriate* plaintiff. “Propriety” is a consideration for class certification
 7 under Fed. R. Civ. P. 23, and it is therefore not appropriate to address here. Here, the only
 8 question is whether the motion for leave to file is filed in bad faith, whether it would be
 9 futile for Plaintiffs to amend, or whether the amendment would cause undue prejudice to
 10 Defendants. *Wizards of the Coast LLC v. Cryptozoic Entm’t LLC*, 309 F.R.D. 645, 649
 11 (W.D. Wash. 2015). Because none of those factors is present here, the Court should grant
 12 the leave to amend, and reserve arguments over class certification for the proper time.

13 **V. Younger Abstention.** Defendants repeat their *Younger* abstention arguments.
 14 SR.2; SR.9. Plaintiffs have sufficiently dealt in their opposition to the dismissal motion,
 15 and rely on that opposition here, except to add that *Piper, supra*, held that “*Younger* ab-
 16 stention does not apply” in the context of a federal constitutional challenge during which
 17 an underlying state child custody proceeding involving an “Indian child” as defined in
 18 ICWA was proceeding. 2016 WL 755619, at *12. This Court should do likewise. *Younger*
 19 abstention applies only where the ongoing state proceedings are “akin to criminal prosecu-
 20 tions,” or that implicate a State’s interest in enforcing its court judgments. *Sprint Commc’ns*
 21 *v. Jacobs*, 134 S. Ct. 584, 588 (2013). Neither factor is present here (on the contrary, Plain-
 22 tiffs seek relief so that the challenged provisions of the federal law will *not* supplant and
 23 interfere with Arizona state court procedures).

24 **VI. Futility of Amendment.** Finally, Defendants argue that amending the com-
 25 plaint would be futile. SR.4; FR.8–11. But their arguments to this effect largely beg the
 26 question, because they address issues of standing, etc., which are already fully briefed and
 27 argued in the pending motion to dismiss. The purported “defect” in Plaintiffs’ complaint,
 28 FR.2, consists of justiciability and merits issues that are not proper arguments against a

1 motion to amend. There is consequently nothing “futile” about granting this motion to
2 amend. Leave to amend should be granted “with extreme liberality,” *Aspeon, Inc.*, 316 F.3d
3 at 1051, and given the inherently transitory and dynamic nature of the state court child
4 custody proceedings of the named plaintiffs and putative class members, that policy is es-
5 pecially important here.

6 With regard to the Plaintiffs’ injuries, the pre-termination phase plaintiffs (K.R.,
7 P.R., L.G., and C.R.), the post-termination and pre-adoption phase plaintiffs (S.H., J.H.,
8 and A.D.), and the post-adoption phase plaintiffs (M.C., K.C., and C.C.) were, currently
9 are, or surely will be subject to all six of the ICWA and New Guidelines provisions chal-
10 lenged here. *See* Doc. 150-1 ¶ 49. While injunctive and declaratory relief will be prospec-
11 tive, damages are available under Title VI of the Civil Rights Act for past violations.

12 Although the Defendants’ arguments as to the sufficiency of the cause of action are
13 out of place here, and are more properly addressed in the pending motion to dismiss (*see*,
14 *e.g.*, FR.11 (“ICWA does not apply based on a child’s racial ancestry.”)), Plaintiffs offer a
15 few words. Defendants maintain that ICWA applies based on a child having *ties* (plural) to
16 a tribal entity. FR.9. But ICWA places a child in the ICWA penalty box even if his or her
17 blood is the *only* tie to the tribe. The statute applies to children who are “eligible for mem-
18 bership in an Indian tribe,” 25 U.S.C. §1903(4), and eligibility for membership is deter-
19 mined, by the tribes themselves, on the basis of biological ancestry. *See, e.g.*, Miss. Band
20 of Choctaw Indians Const. art. III, § 1; Cherokee Nation Const. art. IV, § 1; Choctaw Na-
21 tion of Okla. Const. art. II, § 1; Muscogee (Creek) Nation Const. art. III, § 2; Gila River
22 Indian Community Const. art. III, § 1; Navajo Nation Code tit. 1 § 701. It follows syllogis-
23 tically that ICWA *does* apply based on a child’s biological ancestry. Courts have rightly
24 held that “an Indian child’s cultural tie to a tribe *is irrelevant* as to whether ICWA applies.”
25 *In re T.A.W.*, 354 P.3d 46, 48–49 (Wash. App. 2015), *rev. granted*, No. 92127-0 (Wash.
26 2016) (pending) (emphasis added). *See also* New Guidelines, 80 Fed. Reg. 10146, 10151,
27 § A.3(b) (“existing” ties including “social, cultural, or political” ties “should not be con-
28 sidered in determining whether ICWA is applicable”). Arizona courts have held that ICWA

1 “contains no ... requirement” that children have a “significant connection to the Indian
2 community,” before ICWA applies to them. *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960,
3 963 (Ariz. App. 2000). Other courts have likewise found that no cultural or familial ties
4 are necessary for ICWA to apply: a child’s biological ancestry is sufficient. *See, e.g., In re*
5 *Alexandria P.*, 228 Cal. App. 4th 1322, 1344 (2014). Defendants’ assertion that “blood
6 descent” is “shorthand for the social, cultural, and communal ties a person has with a sov-
7 ereign tribal entity” (Doc. 68 at 23) therefore highlights exactly why this case *should* go
8 forward. Using a person’s ethnic heritage as a “shorthand” (Doc. 68 at 23) for their “social”
9 and “cultural” background “raise[s] equal protection concerns.” *Adoptive Couple v. Baby*
10 *Girl*, 133 S.Ct. 2552, 2565 (2013), and triggers strict scrutiny. *Korematsu*, 323 U.S. at 216.

11 Even if Defendants were correct, however, that ICWA applies based on the “politi-
12 cal status of the parents” only (FR.10), Plaintiffs have stated a cause of action. Defendants
13 contend that tribal membership “requires the consent ... of the individual,” FR.11, but chil-
14 dren, particularly newborns, are legally incapable of consenting. The New Guidelines re-
15 quire the State Defendant and state agencies to “take the steps necessary to obtain mem-
16 bership for [a] child in the tribe” if that child is biologically eligible for membership. 80
17 Fed. Reg. at 10153, B.4(d)(iii). To place children who are too young to consent in a pur-
18 portedly “consensual” political group is to violate their First Amendment rights of associ-
19 ation. *Besig v. Dolphin Boating and Swimming Club*, 683 F.2d 1271, 1275 (9th Cir.1981)
20 (“among the rights protected by the first amendment is that to freedom of association, and
21 its corollary, the freedom from coerced association with groups holding views with which
22 the nonmembers disagree.”) (internal citation omitted). This is sufficient to state a cause of
23 action, and therefore the Defendant’s arguments for dismissal should be rejected.

24 **VII. Conclusion.** Plaintiffs request that this Court grant the motion for leave to file
25 the amended complaint.
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1 **RESPECTFULLY SUBMITTED** this 31st day of March, 2016 by:

2
3 /s/ Aditya Dynar

4 Aditya Dynar (031583)

5 **Scharf-Norton Center for Constitutional Litigation**
6 **at the GOLDWATER INSTITUTE**

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CERTIFICATE OF SERVICE

Document Electronically Filed and Served by ECF this 31st day of March, 2016.

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Courtesy Copy Mailed this 31st day of March, 2016 to:

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United States District Court
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401 W. Washington St., SPC 52
Phoenix, AZ 85003-2154

/s/ Kris Schlott
Kris Schlott

Exhibit 1

ICWA PENALTY BOX

	ARIZONA LAW	ICWA
Jurisdiction	State Court	Transfer to tribe, absent good cause (25 U.S.C. § 1911 (b))
Foster care / Termination of parental rights – Efforts to reunify	Reasonable efforts to reunify	Active efforts to reunify (25 U.S.C. § 1912 (d))
Foster care burden of proof	Reasonable grounds / Probable cause / Preponderance of the evidence	Clear and convincing evidence (25 U.S.C. §1912 (e))
Termination of parental rights burden of proof	Clear and convincing evidence / Best interest by preponderance	Beyond a reasonable doubt (25 U.S.C. § 1912 (f))
Foster / Preadoptive placement preferences	Reasonable evidence / Best interests of the child	Clear and convincing evidence / Extended family, tribe, any Indian family, unless good cause (25 U.S.C. §1915 (b))
Adoption placement preferences	Reasonable evidence / Significant relationship / Best interests of the child	Clear and convincing evidence / Extended family, tribe, any Indian family, unless good cause (25 U.S.C. § 1915 (a))