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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 capacity 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 capacity as Director of ARIZONA DEPARTMENT OF CHILD SAFETY, Defendants.	No. **CIVIL RIGHTS CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. By honoring the moral imperatives enshrined in our Constitution, this nation has successfully shed much of its history of legally sanctioned discrimination on the basis of race or ethnicity. We have seen in vivid, shameful detail how separate treatment is inherently unequal. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). There can be no law under our Constitution that creates and applies pervasive separate and unequal treatment to individuals based on a quantum of blood tracing to a particular race or ethnicity. This country committed itself to that principle when it ratified the Fourteenth Amendment and overturned *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and when it abandoned *Plessy v. Ferguson*, 163 U.S. 537 (1896).

2. In 1994 and again in 1996, Congress recognized that race and ethnicity should play no role in state-approved adoptions when it enacted the Multiethnic Placement Act, Pub. L. 103-382, §§ 551-553, *codified at* 42 U.S.C. § 5115a (1994), and the Interethnic Placement Act, Pub. L. 104-188, § 1808, *codified at* 42 U.S.C. §§ 671(a), 674(d), 1996b(c) (1996), which forbid discrimination in adoptions and foster care placements.

3. Children with Indian ancestry, however, are still living in the era of *Plessy v. Ferguson*. Alone among American children, their adoption and foster care placements are determined not in accord with their best interests but by their ethnicity, as a result of a well-intentioned but profoundly flawed and unconstitutional federal law, the Indian Child Welfare Act ("ICWA"), *codified at* 25 U.S.C. §§ 1901-1963.

4. This civil rights class action is filed by Plaintiffs baby girl A.D. and baby boy C., by Carol Coghlan Carter, their next friend, and S.H. and J.H., foster/adoptive parents of baby girl A.D., and M.C. and K.C., foster/adoptive parents of baby boy C. They file this action on behalf of themselves and all off-reservation Arizona-resident children with Indian ancestry and all off-reservation Arizona-resident foster, preadoptive, and

prospective adoptive parents in child custody proceedings involving children with Indian ancestry.

5. They seek a declaration by this Court that certain provisions of ICWA, and Guidelines issued by the Bureau of Indian Affairs (BIA), both facially and as applied, violate the United States Constitution. They also seek an injunction from this Court against the application of certain provisions of ICWA and the accompanying BIA Guidelines.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction under 28 U.S.C. § 1331.

7. This Court is authorized to grant declaratory and injunctive relief under 5 U.S.C. §§ 701 through 706, 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. § 1983, Federal Rules of Civil Procedure ("FRCP") 57 and 65, and by the general and equitable powers of the federal judiciary.

8. Venue is proper under 28 U.S.C. § 1391(b), (e).

PARTIES

9. Plaintiff A.D. is a citizen of the United States and the State of Arizona, and domiciled in the State of Arizona. Baby girl A.D. is approximately 10 months old. Baby girl A.D., on information and belief, is eligible for membership in, or is already an enrolled member of, the Gila River Indian Community, a federally-recognized tribe. Parental rights of A.D.'s birth parents have already been terminated by the state court properly having jurisdiction over the matter. Baby girl A.D., on information and belief, has more than 50% non-Indian blood.

10. Plaintiff C. is a citizen of the United States and the State of Arizona, and domiciled in the State of Arizona. Baby boy C. is almost 5 years old. Baby boy C., on information and belief, is eligible for membership in, or is already an enrolled member of, the Navajo Nation, a federally-recognized tribe. Parental rights of C.'s birth parents have already been terminated by the state court properly having jurisdiction over the matter. Baby boy C., on information and belief, has more than 50% Hispanic blood.

11. Carol Coghlan Carter is a citizen of the United States and the State of Arizona, and domiciled in the State of Arizona. She is an attorney licensed to practice in the State of Arizona. She has practiced in the area of family law for several decades. In the course of her legal career, she has represented during all stages of child custody proceedings children, including children with Indian ancestry as their court-appointed guardian-ad-litem; birth parents, including birth parents with Indian ancestry; and foster/adoptive parents, including foster/adoptive parents with Indian ancestry and those in child custody proceedings involving children with Indian ancestry. She is "next friend" to baby girl A.D. and baby boy C. and all off-reservation children with Indian ancestry in the State of Arizona in child custody proceedings. *See* FRCP 17(c).

12. Plaintiffs S.H. and J.H., a married couple, are both citizens of the United States and the State of Arizona, and are residents of and are domiciled in the State of Arizona. Neither S.H. nor J.H. are enrolled members of a tribe or eligible for membership in an Indian tribe. S.H. and J.H. are the only family baby girl A.D. has ever known as she was placed in foster care with them since her birth. Their petition to adopt baby girl A.D. is pending before the state court properly having jurisdiction over the matter.

13. Plaintiffs M.C. and K.C., a married couple, are both citizens of the United States and the State of Arizona, and are residents of and are domiciled in the State of Arizona. Neither M.C. nor K.C. are enrolled members of a tribe or eligible for membership in an Indian tribe. M.C. and K.C. have been foster parents to baby boy C. for approximately four years. M.C. and K.C. want to adopt baby boy C.

14. Defendant Kevin Washburn is the Assistant Secretary of the Bureau of Indian Affairs ("BIA"). He has primary authority to enforce ICWA and the BIA Guidelines at issue. He is sued in his official capacity only.

15. Defendant Sally Jewell is the Secretary of the Interior, United States Department of the Interior. The Department of the Interior is the cabinet agency of which

BIA is a part and which is assigned enforcement powers under ICWA and Title 25 of United States Code. She is sued in her official capacity only.

16. Defendant Gregory A. McKay is the Director of the Arizona Department of Child Safety ("DCS"). The Director has statutory duty under Ariz. Rev. Stat. ("A.R.S.") § 8-451 *et seq*. to "protect children." The Director is also required to "[e]nsure the department's compliance with the Indian child welfare act of 1978 (P.L. 95-608; 92 Stat. 3069; 25 United States Code §§ 1901 through 1963)." A.R.S. § 8-453(A)(20). He is sued in his official capacity only.

FACTS COMMON TO ALL CLAIMS

I. Baby Girl A.D.

17. DCS took baby girl A.D. into protective custody at birth as she was severely drug-exposed due to her biological mother's ingestion of several controlled substances, and placed her with S.H. and J.H. They have taken care of baby girl A.D. ever since, and although she has some developmental delays due to her exposure to controlled substances, she has shown remarkable recovery from the deleterious effects of second-hand addiction under the loving care of S.H. and J.H.

18. A.D.'s biological mother named two possible birth fathers for baby girl A.D. Paternity tests on both ruled out the possibility that they were A.D.'s birth fathers. Consequently, the state court severed parental rights of the birth mother and the absent birth father.

19. S.H. and J.H., as foster parents, have taken care of baby girl A.D. since birth. S.H. and J.H., along with their adopted son who has Indian ancestry, are the only family that baby girl A.D. has ever known. The tribe has announced it will likely seek in state court a transfer of the case to tribal court. If their case is transferred, it would force A.D., S.H. and J.H., who do not have any contact with the tribal forum, to submit to that forum's jurisdiction over them. Such transfer and the resulting exercise of jurisdiction, if successful, would be solely based on baby girl A.D.'s race.

20. But for ICWA, A.D. would have been very likely cleared for adoption by S.H. and J.H. If they are awarded adoption, they are willing to provide and encourage appropriate visitation and cultural acclimatization opportunities to A.D.

II. <u>Baby Boy C.</u>

21. DCS took baby boy C. into protective custody when he was less than one year old when his biological mother was convicted of a non-drug related felony. His birth father is unknown. The birth mother is on record saying she supports baby boy C.'s adoption by M.C. and K.C.

22. The relevant state court properly having jurisdiction over the matter has not declared baby boy C. as available for adoption because the Navajo Nation repeatedly has proposed alternative ICWA-compliant placements, all of which have turned out to be inappropriate for placement of baby boy C. Baby boy C.'s extended family members have expressly declined to have him placed with them. Other ICWA-compliant placements the tribe has proposed have declined to have baby boy C. placed with them. The tribe has repeatedly asked for additional opportunities from state court to find other ICWA-compliant placements. Consequently, baby boy C. has continuously remained in foster care with M.C. and K.C. for four years. M.C. and K.C. cannot file a petition for adoption until the state court declares that baby boy C. is available for adoption and that there is good cause to deviate from ICWA's adoption placement preferences.

23. Each time the tribe proposes an ICWA-compliant placement, pursuant to a court-supervised and DCS-supported case plan, M.C. and K.C. have to drive each week with baby boy C., sometimes over 100 miles, to visit with the proposed placement to give baby boy C. an opportunity to bond with the proposed placement until that placement becomes unavailable for any reason. Baby boy C. instinctively wants to call M.C. and K.C. "mommy" and "daddy," but he is reminded by some proposed placements that M.C. and K.C. are not his "mommy" and "daddy." This has caused significant emotional and psychological harm to baby boy C. who, through no fault of his own, has to leave the

security of his home and visit with strangers solely because he was born with Indian ancestry.

24. Due to the application of ICWA, baby boy C. has been languishing in foster care for approximately four years. But for ICWA, baby boy C. would have been very likely cleared for adoption by M.C. and K.C. If they are awarded adoption, they are willing to provide and encourage appropriate visitation and cultural acclimatization opportunities to baby boy C.

III. All Plaintiffs

25. But for ICWA, a strong likelihood exists that these families – baby girl A.D, S.H. and J.H., and baby boy C., M.C. and K.C. – would be allowed to become permanent under race-neutral Arizona laws permitting individualized evaluation by state court of what is in baby girl A.D. and baby boy C.'s best interests. But under ICWA, these families are subjected to procedural and substantive provisions that are based solely on the race of the children and the adults involved, which lead to severe disruption in their lives contrary to the children's best interests.

26. In many instances, children subject to ICWA are removed from caring, loving homes and forced into placements, which sometimes leads to abuse, psychological harm, or even physical trauma and death.

27. In many instances, prospective adoptive parents who otherwise would be allowed to adopt children they have raised since infancy and grown to love are deprived of the opportunity to form permanent families as a result of ICWA.

28. In many instances, children are left in abusive or neglectful Indian families where they are subjected to grave physical or psychological harm as a result of ICWA.

29. Subjecting these children and families to ICWA creates delay and uncertainty in the journey to permanent family status, and the prospect and reality of displacement from stable, loving families causes great harm to children and great distress to prospective adoptive parents.

CLASS ALLEGATIONS

30. The named plaintiffs bring this lawsuit on behalf of themselves and a class of all off-reservation Arizona-resident children with Indian ancestry and all off-reservation non-Indian Arizona-resident foster, preadoptive, and prospective adoptive parents in child custody proceedings involving a child with Indian ancestry and who are not members of the child's extended family.

31. The Arizona Department of Child Safety's semi-annual Report to the Governor for the period of April 1, 2014 through September 30, 2014, attached as Exhibit 1 to this Complaint, and *available at* https://www.azdes.gov/InternetFiles/Reports/pdf/semi_annual_child_welfare_report_apr_sep_2014.pdf (last visited June 25, 2015), reports that as of September 30, 2014 there were 1,336 American Indian children in out-of-home care in Arizona. *Id.* at 43. The number of foster, preadoptive, and prospective adoptive parents of these children is similarly numerous. Their identities are easily ascertainable through DCS records that are not open for inspection to the public. This putative class is so numerous that joinder of all members is impracticable. *See* FRCP 23(a)(1).

32. There are questions of law or fact common to the class, namely, the facial and as-applied constitutionality of several provisions of ICWA and accompanying Guidelines to the members of the class. *See* FRCP 23(a)(2).

33. The circumstances of baby girl A.D., S.H. and J.H., and baby boy C., M.C. and K.C., are typical of children with Indian ancestry and other foster, preadoptive and prospective adoptive families of children with Indian ancestry. *See* FRCP 23(a)(3).

34. The named plaintiffs will fairly and adequately protect the interests of the class. *See* FRCP 23(a)(4).

35. Plaintiffs' attorneys are experienced in representing litigants before federal courts. Plaintiffs' counsel include nationally recognized constitutional lawyers who have litigated extensively at every level of the federal judiciary. Plaintiffs' attorneys are well qualified to be appointed class counsel by this Court.

36. Separate actions by individual class members would create the risk of inconsistent or incompatible standards of conduct for the defendants, and separate actions by individual class members would substantially impair their ability to protect their interests. *See* FRCP 23(b)(1).

37. Defendants have acted or refused to act on grounds that apply generally to the putative class. Thus, final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. *See* FRCP 23(b)(2).

38. Questions of law or fact common to the members of the class predominate over questions affecting individual class members as individual class members are denied equal protection under the law and deprived of their constitutional rights. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, inasmuch as the individual class members are deprived of the same rights. *See* FRCP 23(b)(3).

STATUTORY FRAMEWORK

I. Definitions

39. ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe" 25 U.S.C. § 1903(4). "Indian tribe" is also statutorily defined at 25 U.S.C. § 1903(8).

40. Most Indian tribes have only blood quantum or lineage requirements as prerequisites for membership. *See* Miss. Band of Choctaw Indians Const. art. III, § 1; Cherokee Nation Const. art. IV, § 1; Choctaw Nation of Okla. Const. art. II, § 1; Muscogee (Creek) Nation Const. art. III, § 2; Gila River Indian Community Const. art. III, § 1; Navajo Nation Code § 701; Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10153, B.3 (February 25, 2015) ("New Guidelines"). Consequently, ICWA's definition of "Indian child" is based solely on the child's race or ancestry.

41. Some of the tribes consider individuals with only a tiny percentage of Indian blood to be Indian, even if they have little or no contact or connection with the tribe. *See, e.g.*, Cherokee Nation Const. art. IV, § 1.

42. Thus, in many instances, children with only a minute quantum of Indian blood and no connection or ties to the tribe are subject to ICWA and relegated to the tribe's exclusive or concurrent jurisdiction. *See, e.g.*, *Nielson v. Ketchum*, 640 F.3d 1117, 1120 (10th Cir. 2011) (quoting Chapter 2, Section 11A of the Cherokee Nation Citizenship Act which automatically admits a child as citizen of the Cherokee Nation at birth "for the specific purpose of protecting the rights of the Cherokee Nation under the [ICWA]" (brackets in original)).

43. The Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10153, B.4(d)(3) (February 25, 2015), state, "In the event the child is eligible for membership in a tribe but is not yet a member of any tribe, the agency should take the steps necessary to obtain membership for the child in the tribe that is designated as the Indian child's tribe."

44. "Agency" is defined in the New Guidelines as "a private State-licensed agency or public agency and their employees, agents or officials involved in and/or seeking to place a child in a child custody proceeding." 80 Fed. Reg. at 10151, A.2.

45. ICWA defines "child custody proceeding" to include "foster care placement," "termination of parental rights," "preadoptive placement," and "adoptive placement." 25 U.S.C. § 1903(1).

46. "Foster care placement" is defined as "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated." 25 U.S.C. § 1903(1)(i).

47. "Termination of parental rights" is defined as "any action resulting in the termination of the parent-child relationship." 25 U.S.C. § 1903(1)(ii).

48. "Preadoptive placement" is defined as "the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement." 25 U.S.C. § 1903(1)(iii).

49. "Adoptive placement" is defined as "the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption." 25 U.S.C. § 1903(1)(iv).

50. "Child custody proceeding," as defined, "shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents." 25 U.S.C. § 1903(1).

II. BIA Guidelines

51. The BIA first issued Guidelines in November of 1979. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (November 26, 1979) ("Old Guidelines" or "1979 Guidelines"). On February 25, 2015, the BIA issued new Guidelines to "supersede and replace" the 1979 Guidelines. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10147 (February 25, 2015) ("New Guidelines" or "2015 Guidelines").

III. The Jurisdiction-Transfer Provision

52. ICWA requires state courts to "transfer" "foster care placement" or "termination of parental rights" "proceeding[s] to the jurisdiction of the tribe" of "an Indian child not domiciled or residing within the reservation of the Indian child's tribe" "in the absence of good cause to the contrary," and "absent objection by either parent," if the "parent or the Indian custodian or the Indian child's tribe" petitions for such transfer and the tribal court does not decline such transfer. 25 U.S.C. § 1911(b) ("jurisdiction-transfer provision"); 80 Fed. Reg. at 10156, C.2. The New Guidelines, however, state, "The right to request a transfer is available at *any stage* of an Indian *child custody*

proceeding, including during any period of emergency removal." 80 Fed. Reg. at 10156, C.1(c) (emphasis added).

53. Whereas ICWA's jurisdiction-transfer provision is available to transfer only foster care placement and termination of parental rights proceedings to the jurisdiction of the tribe, the BIA, in the New Guidelines, extended the jurisdiction-transfer provision to all child custody proceedings.

54. "Good cause" to not transfer a foster care placement or termination of parental rights proceeding to tribal court is not defined in ICWA. The New Guidelines, however, state:

> In determining whether good cause exists, the court may not consider whether the case is at an advanced stage or whether transfer would result in a change in the placement of the child because the Act created concurrent, but presumptively, tribal jurisdiction over proceedings involving children not residing or domiciled on the reservation, and seeks to protect, not only the rights of the Indian child as an Indian, but the rights of Indian communities and tribes in retaining Indian children. Thus, whenever a parent or tribe seeks to transfer the case it is presumptively in the best interest of the Indian child, consistent with the Act, to transfer the case to the jurisdiction of the Indian tribe. [¶] In addition, in determining whether there is good cause to deny the transfer, the court may not consider: (1) The Indian child's contacts with the tribe or reservation; (2) Socio-economic conditions or any perceived inadequacy of tribal or Bureau of Indian Affairs social services or judicial systems; or (3) the tribal court's prospective placement for the Indian child.

80 Fed. Reg. at 10156, C.3(c)-(d).

55. Under uniform Arizona law, when deciding whether to transfer a foster care placement or termination of parental rights proceeding to some other jurisdiction, an Arizona state court "that has made a child custody determination" has "exclusive, continuing jurisdiction over the determination until" either one of the two options is true:

> 1. A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships.
> 2. A court of this state or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this state.

A.R.S. § 25-1032(A).

56. Thus, while Arizona law looks at the litigants' contacts with the forum in deciding whether to transfer a foster care placement or termination of parental rights proceeding to some other jurisdiction, ICWA and the New Guidelines explicitly instruct courts to not take into account the litigants' contacts with the tribal forum.

IV. The Active Efforts Provision

57. Further, ICWA states that "[a]ny party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d) (emphasis added) ("active efforts provision").

58. The New Guidelines state: "*Active efforts* are intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act (42 U.S.C. 671(a)(15))…. 'Active efforts' are separate and distinct from requirements of the Adoption and Safe Families Act (ASFA), 42 U.S.C. 1305. ASFA's exceptions to reunification efforts do not apply to ICWA proceedings." 80 Fed. Reg. at 10150-51, A.2 (emphasis in original).

59. DCS, under the active efforts provision, is required to "[i]dentify[], notify[], and invit[e] representatives of the Indian child's tribe to participate" in the active efforts

to reunite the Indian child with the child's "family" and "tribal community." New Guidelines, 80 Fed. Reg. at 10150, A.2.

60. DCS, under the active efforts provision, is required to "[t]ak[e] into account the Indian child's tribe's prevailing social and cultural conditions and way of life" even in situations where the child or the child's parents have never been exposed to or followed the tribe's prevailing social and cultural conditions or way of life. *Id.* DCS is also required "to assure cultural connections," "[s]upport[] regular visits and trial home visits of the Indian child during any period of removal," and "[o]ffer[] and employ[] all available and culturally appropriate family preservation strategies." *Id.*

61. The New Guidelines provide details on when the requirement for active efforts begins and what actions an agency and State court must take in order to determine whether a child is an Indian child and how to comply with the active efforts requirement. 80 Fed. Reg. at 10152-153, A.3, B.1-B.2, B.4, B.8, D.2.

62. The New Guidelines require DCS to "treat the child as an Indian child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe," "[i]f there is any reason to believe the child is an Indian child." 80 Fed. Reg. at 10152, A.3(d).

63. The New Guidelines require DCS to engage in active efforts "from the moment the possibility arises that … the Indian child [will] be placed outside the custody of either parent or Indian custodian" and also "while investigating" whether ICWA applies to a particular child. 80 Fed. Reg. at 10152, B.1(a)-(b).

64. If a child is suspected to be an Indian child, DCS may be required to provide "[g]enograms or ancestry charts for both parents, … maternal and paternal grandparents and great grandparents or Indian custodians; birthdates; … tribal affiliation including all known Indian ancestry for individuals listed on the charts[.]" New Guidelines, 80 Fed. Reg. at 10152, B.2(b)(1)(i).

65. "In the event the child is eligible for membership in a tribe but is not yet a member of any tribe," the New Guidelines require DCS to "take the steps necessary to obtain membership for the child in the tribe that is designated as the Indian child's tribe." 80 Fed. Reg. at 10153, B.4(d)(3).

66. In emergency removal situations where DCS "knows or has reason to know" that a child is an Indian child, DCS is required to "[t]reat the child as an Indian child until the court determines that the child is not an Indian child." New Guidelines, 80 Fed. Reg. at 10155, B.8(c)(1).

67. Pursuant to 42 U.S.C. § 671(a)(15), as amended by ASFA, the "reasonable efforts" standard is pervasive under Arizona Law. *See, e.g.*, A.R.S. §§ 8-513 (foster care placement), 8-522 (dependency actions), 8-825 (preliminary protective hearing), 8-829 (same), 8-843 (initial dependency hearing), 8-845 (dependency determination), 8-846 (same), 8-862 (permanency hearing).

68. Whereas "active efforts" are required not only to "maintain and reunite an Indian child with his or her family" but also with the child's "tribal community," New Guidelines, 80 Fed. Reg. at 10150, A.2, "reasonable efforts" under Arizona law are required only to maintain and reunite the child with the child's family. *See, e.g.*, A.R.S. § 8-522(E)(3).

69. Arizona DCS applies the active efforts provision to children with Indian ancestry, and the "reasonable efforts" provision to all other children. The New Guidelines explicitly state that the active efforts provision is "more than" the reasonable efforts provision. Consequently, children with Indian ancestry are singled out and afforded separate, unequal treatment resulting in delayed resolution of foster care placement and termination of parental rights proceedings of children with Indian ancestry, based solely on their race.

V. Burden of Proof in Foster Care Placement Orders

70. ICWA further requires that "No foster care placement may be ordered in [an involuntary] proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(e).

71. The New Guidelines state: "The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents or Indian custodian is likely to result in serious harm to the child." 80 Fed. Reg. at 10156, D.3(a).

72. Under Arizona law, to take a child into temporary custody, there must be a showing that "reasonable grounds exist to believe that temporary custody is clearly necessary to protect the child from suffering abuse or neglect" and that "probable cause exists to believe" that, inter alia, the child is or will imminently become a victim of abuse or neglect, or is suffering from serious physical or emotional injury. A.R.S. § 8-821(A)-(B); § 8-824(F) ("The petitioner has the burden of presenting evidence as to whether there is probable cause to believe that continued temporary custody is clearly necessary to prevent abuse or neglect pending the hearing on the dependency petition"); A.R.S. § 8-843 ("reasonable efforts" standard in initial dependency hearings); A.R.S. § 8-844 ("preponderance of the evidence" standard in dependency adjudication hearings).

73. Thus, ICWA requires a showing of clear and convincing evidence whereas Arizona law requires a showing of "reasonable grounds," "probable cause," "reasonable efforts," or "preponderance of the evidence" at various stages of proceedings leading to foster care placement of children. Consequently, ICWA's higher burden of proof requires DCS to disregard to a greater extent the safety and security of children with Indian ancestry based solely on the race of these children.

VI. Burden of Proof in Termination of Parental Rights Orders

74. ICWA requires that "No termination of parental rights may be ordered in [an involuntary] proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f).

75. The New Guidelines state: "The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, supported by the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious harm to the child." 80 Fed. Reg. at 10156, D.3(b).

76. Under Arizona law, "Arizona's statutes require that the party seeking termination of parental rights establish only the statutory grounds of section 8-533 by clear and convincing evidence and establish the best interests of the child by a preponderance of the evidence." *Kent K. v. Bobby M.*, 110 P.3d 1013, 1018 (Ariz. 2005) (interpreting A.R.S. §§ 8-533, 8-537).

77. Thus, ICWA requires a showing of beyond a reasonable doubt whereas Arizona law requires use of the clear and convincing evidence standard in termination of parental rights proceedings. Consequently, ICWA's higher burden of proof, which explicitly does not take into account the best interests of the child, places greater burdens on children with Indian ancestry than does Arizona law uniformly applied to all other children. This separate, unequal treatment of children with Indian ancestry is based solely on the child's race.

VII. Foster/Preadoptive Care Placement Preferences

78. Under ICWA:

> In any foster care or preadoptive placement, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with—

> (i) a member of the Indian child's extended family;
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

25 U.S.C. § 1915(b) (emphasis added).

79. The New Guidelines state:

> The agency seeking a preadoptive, adoptive or foster care placement of an Indian child *must always follow* the placement preferences. If the agency determines that any of the preferences cannot be met, the agency must demonstrate through clear and convincing evidence that a diligent search has been conducted to seek out and identify placement options that would satisfy the placement preferences specified in sections F.2 or F.3 of these guidelines, and explain why the preferences could not be met.

80 Fed. Reg. at 10157, F.1(b) (emphasis added).

80. Although "good cause" to not apply the foster care placement preferences is not defined in ICWA, the New Guidelines state:

> (a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for such belief or assertion must be stated on the record or in writing and made available to the parties to the proceeding and the Indian child's tribe.
> (b) The party seeking departure from the preferences bears the burden of proving by clear and convincing evidence the existence of "good cause" to deviate from the placement preferences.
> (c) A determination of good cause to depart from the placement preferences must be based on one or more of the following considerations:
> (1) The request of the parents, if both parents attest that they have reviewed the placement options that comply with the order of preference.

> (2) The request of the child, if the child is able to understand and comprehend the decision that is being made.
>
> (3) The extraordinary physical or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live, as established by testimony of a qualified expert witness; provided that extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with the Act. *The good cause determination does not include an independent consideration of the best interest of the Indian child* because the preferences reflect the best interests of an Indian child in light of the purposes of the Act.
>
> (4) The unavailability of a placement after a showing by the applicable agency in accordance with section F.1, and a determination by the court that active efforts have been made to find placements meeting the preference criteria, but none have been located. For purposes of this analysis, a placement may not be considered unavailable if the placement conforms to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.
>
> (d) The court should consider only whether a placement in accordance with the preferences meets the physical, mental and emotional needs of the child; and may not depart from the preferences based on the socio-economic status of any placement relative to another placement.

80 Fed. Reg. at 10158, F.4 (emphasis added).

81. The standard applied to all other children in Arizona is markedly different from the standard applied to children with Indian ancestry. For foster care placements, Arizona courts look at whether there was reasonable evidence to find that placing a child with the foster family instead of an extended family member was in the child's "best interests." *Antonio M. v. Ariz. Dept. of Econ. Sec.*, 214 P.3d 1010, 1012 (Ariz. App. 2009). Courts in such situations also give weight to the fact that "the foster parents wished to adopt [the child]." *Id. See also Antonio P. v. Ariz. Dept. of Econ. Sec.*, 187 P.3d 1115,

1117 (Ariz. App. 2008) (analyzing what is in the child's best interest in foster care placements and giving weight to the fact that the child had an "undeniabl[y]" "longer relationship" with one placement than with the other).

VIII. Adoption Placement Preferences

82. Under ICWA,

> In any adoptive placement of an Indian child under State law, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with
> (1) a member of the child's extended family;
> (2) other members of the Indian child's tribe; or
> (3) other Indian families.

25 U.S.C. § 1915(a).

83. The New Guidelines require state courts to follow ICWA's adoption placement preferences. 80 Fed. Reg. at 10157, F.1(b) ("The agency seeking a[n] … adoptive … placement of an Indian child *must always follow* the placement preferences") (emphasis added).

84. Although "good cause" to not apply the adoption placement preferences is not defined in ICWA, the New Guidelines, as reproduced above, specifically state that the "good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child in light of the purposes of the Act." 80 Fed. Reg. at 10158, F.4.

85. Due to the mandatory language of the New Guidelines, there is an inherent conflict between the duty of DCS, an "agency" within the meaning of the New Guidelines, to "protect children" and its application of ICWA to children with Indian ancestry.

86. The placement preferences, as applied under the New Guidelines, do not look to the interests-of-the-child factors that state courts have traditionally applied in entering foster care placement, preadoption and adoption orders, and thereby deprive

children with Indian ancestry of an individualized race-neutral determination that all other children enjoy under state law.

87. States cannot disregard a child's unique background in making an individualized and race-neutral foster, preadoptive or adoptive assessment, and in terminating parental rights. But the states cannot also turn a blind eye to the child's safety, security and best interests based solely on the child's or the adults' race, for such action is necessarily based on inherently demeaning, stereotypical assumptions about an individual's race or culture. Although the court did not reach constitutional issues, a core premise of the Baby Veronica decision, *Adoptive Couple v. Baby Girl*, __ U.S. __, 133 S. Ct. 2552 (2013), was that ICWA cannot force a child to create a racially-conforming relationship and that a child should not be made to sever existing relationships in order to create new racially-conforming ones.

CLAIMS FOR RELIEF

COUNT 1 – VIOLATION OF THE EQUAL PROTECTION GUARANTEE OF THE FIFTH AMENDMENT

88. Plaintiffs reallege, adopt and incorporate by reference the preceding paragraphs as though fully set forth herein.

89. The jurisdiction-transfer provision, 25 U.S.C. § 1911(b), New Guidelines at §§ C.1, C.2, C.3, is based solely on the race of the child and the adults involved.

90. The active efforts provision, 25 U.S.C. § 1912(d), New Guidelines at §§ A.2, A.3, B.1, B.2, B.4, B.8, D.2, creates a separate set of procedures for children with Indian ancestry and all other children based solely on the child's race.

91. The clear and convincing evidence burden of proof in foster care placement orders under ICWA, 25 U.S.C. § 1912(e), New Guidelines at § D.3, that is applicable to children with Indian ancestry as compared to Arizona's demonstrably lesser burden of proof that is applicable to all other children is a legally required, unequal treatment of

children with Indian ancestry. Government cannot treat the safety and security of children with Indian ancestry less seriously than the safety and security of all other children.

92. The beyond a reasonable doubt burden of proof in termination of parental rights proceedings under ICWA, 25 U.S.C. § 1912(f), New Guidelines at § D.3, that is applicable to children with Indian ancestry as compared to Arizona's demonstrably lesser burden of proof that is applicable to all other children is a legally required separate, unequal treatment of children with Indian ancestry. Government cannot treat the best interests of children with Indian ancestry differently and less seriously than those of all other children.

93. The foster/preadoptive and adoption placement preferences under ICWA, 25 U.S.C. §§ 1915(b), (a), New Guidelines at §§ F.1, F.2, F.3, F.4, single out and treat differently children with Indian ancestry. They also single out and treat differently the non-Indian adults involved in the care and upbringing of children with Indian ancestry.

94. The jurisdiction-transfer provision, active efforts provision, burden of proof in foster care placement orders provision, burden of proof in termination of parental rights orders provision, foster/preadoptive care placement preferences provision, and the adoption placement preferences provision of ICWA, and New Guidelines, all subject Plaintiffs to unequal treatment under the law based solely on the race of the child and the adults involved and are therefore unconstitutional under the equal protection guarantee of the Fifth Amendment.

95. Because the foregoing provisions of ICWA and the New Guidelines do not serve a compelling governmental purpose in a narrowly tailored fashion, they violate the equal protection guarantee of the Fifth Amendment.

COUNT 2 – VIOLATION OF THE DUE PROCESS GUARANTEE OF THE FIFTH AMENDMENT

96. Plaintiffs reallege, adopt and incorporate by reference the preceding paragraphs as though fully set forth herein.

97. The jurisdiction-transfer provision forces Plaintiffs to submit to the personal jurisdiction of a forum with which they have no contacts or ties.

98. The jurisdiction-transfer provision, 25 U.S.C. § 1911(b), New Guidelines at §§ C.1, C.2, C.3, disregards well-established Supreme Court pronouncements which require minimum contacts between the forum and the litigant for the forum to constitutionally exercise specific or general personal jurisdiction over the litigant, and are therefore, unconstitutional under the due process guarantee of the Fifth Amendment. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Helicoptores Nationales de Colombia v. Hall*, 466 U.S. 408 (1984); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

99. Every child and adult deserves an individualized, race-neutral determination under uniform standards when courts make foster/preadoptive care and adoption placement decisions. ICWA's foster/preadoptive care placement preferences provision, 25 U.S.C. § 1915(b), the adoption placement preferences provision, 25 U.S.C. § 1915(a), and New Guidelines at §§ F.1, F.2, F.3, F.4, violate the substantive due process rights of children with Indian ancestry, and those of adults involved in their care and upbringing who have an existing family-like relationship with the child. *See Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984); *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977); *In re Santos Y.*, 92 Cal. App. 4th 1274, 1314-1317 (Cal. App. 2001); *In re Bridget R.*, 41 Cal. App. 4th 1483, 1503-1504 (Cal. App. 1996); *In re Jasmon O.*, 878 P.2d 1297, 1307 (Cal. 1994).

100. Any determination regarding removal of a child from home, termination of parental rights, foster care placement, or adoption placement must take into account the child's best interests. The failure of ICWA as applied by the BIA Guidelines to adequately consider the child's best interests deprives the class of plaintiff children of liberty without due process of law in violation of the Fifth Amendment.

COUNT 3 - VIOLATION OF THE SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

101. Plaintiffs reallege, adopt and incorporate by reference the preceding paragraphs as though fully set forth herein.

102. Defendant McKay, pursuant to his statutory duty to "[e]nsure the department's compliance with the Indian child welfare act," A.R.S. § 8-453(A)(20), complies with and enforces provisions of the Indian Child Welfare Act in Arizona.

103. Defendant McKay complies with and enforces the active efforts provision, 25 U.S.C. § 1912(d), New Guidelines at §§ A.2, A.3, B.1, B.2, B.4, B.8, D.2, in Arizona.

104. Defendant McKay complies with and enforces the clear and convincing evidence burden of proof in foster care placements under ICWA, 25 U.S.C. § 1912(e), New Guidelines at § D.3, in Arizona.

105. Defendant McKay complies with and enforces the beyond a reasonable doubt burden of proof in termination of parental rights proceedings under ICWA, 25 U.S.C. § 1912(f), New Guidelines at § D.3, in Arizona.

106. Defendant McKay complies with and enforces the foster/preadoptive and adoptive placement preferences under ICWA, 25 U.S.C. § 1915(b), (a), New Guidelines at §§ F.1, F.2, F.3, F.4, A.R.S. §§ 8-105.01(B), 8-514(C), in Arizona.

107. Defendant McKay's compliance with and enforcement of these provisions subjects Plaintiffs to unequal treatment under color of state and federal law based solely on the race of the child and the adults involved and therefore deprives Plaintiffs of equal protection of the law under the Equal Protection Clause of the Fourteenth Amendment. *See* 42 U.S.C. § 1983.

108. Defendant McKay's compliance with and enforcement of the foster/preadoptive and adoptive placement preferences under state law and ICWA, 25 U.S.C. § 1915(b), (a), New Guidelines at §§ F.1, F.2, F.3, F.4, violate the substantive due process rights of children with Indian ancestry, and those of adults involved in their care

and upbringing who have an existing family-like relationship with the child. Defendant McKay's failure to adequately consider the child's best interests deprives the class of plaintiff children of liberty without due process of law in violation of the Fourteenth Amendment. *See* 42 U.S.C. § 1983.

COUNT 4 – THE INDIAN CHILD WELFARE ACT EXCEEDS THE FEDERAL GOVERNMENT'S POWER UNDER THE INDIAN COMMERCE CLAUSE AND THE TENTH AMENDMENT.

109. Plaintiffs reallege, adopt and incorporate by reference the preceding paragraphs as though fully set forth herein.

110. A child with Indian ancestry is not an item of commerce, nor an instrumentality of commerce, nor tangible personal property the possession of which by federally-recognized Indian tribes promotes "Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). Nor is a federal law dealing with child custody proceedings "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id.*; *Rice v. Cayetano*, 528 U.S. 495 (2000). Indeed, the BIA and the Department of the Interior's position is that "ICWA and these regulations or any associated Federal guidelines do not apply to … [t]ribal court proceedings[.]" Notice of Proposed Rulemaking, Regulations for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 14880, 14887, § 23.103(e) (March 20, 2015); New Guidelines, 80 Fed. Reg. at A.3(e) (same). *See Adoptive Couple v. Baby Girl*, __ U.S. __, 133 S. Ct. 2552, 2566-2570 (2013) (Thomas, J., concurring).

111. Congress cannot commandeer state resources to achieve federal policy objectives or commandeer state officers to execute federal laws. *Printz v. United States*, 521 U.S. 898 (1997). ICWA impermissibly commandeers state courts and state agencies to act as investigative and adjudicatory arms of the federal government or Indian tribes. ICWA impermissibly commandeers state courts and state agencies to apply, enforce, and

implement an unconstitutional federal law. *Dodds v. Richardson*, 614 F.3d 1185, 1195-1196 & n.3 (10th Cir. 2010); Ariz. Const. art. II, § 3.

112. Child custody proceedings and domestic relations matters are a "virtually exclusive province of the States" under the Tenth Amendment upon which the federal government cannot intrude. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

113. ICWA displaces inherent state jurisdiction over specified child welfare, custody, and adoption proceedings and therefore violates the Tenth Amendment. *Adoptive Couple v. Baby Girl*, 133 S. Ct. at 2566 (Thomas, J., concurring).

COUNT 5 – VIOLATION OF ASSOCIATIONAL FREEDOMS UNDER THE FIRST AMENDMENT

114. Plaintiffs reallege, adopt and incorporate by reference the preceding paragraphs as though fully set forth herein.

115. By virtue of ICWA, the tribes make the primary determination whether children with a specified blood quantum will be brought within their jurisdiction and control.

116. Many children who are subject to ICWA have few, if any, ties to the tribe upon which ICWA confers jurisdiction over them. Some but not all are members of the tribes but do not thereby consent to surrender their constitutional rights. Some are enrolled in the tribes as a result of the mandates of ICWA and the New Guidelines. Others are not members and have virtually no connection to the tribes other than a prescribed blood quantum. *See* New Guidelines, 80 Fed. Reg. at 10153, B.4(d)(3).

117. By operation of ICWA, Plaintiff children like baby girl A.D. and baby boy C. are forced to associate with tribes and tribal communities and be subject to tribal jurisdiction often against their will and/or contrary to their best interests. *See id.* at 10150, A.2 (active efforts required to reunify an Indian child not only with the child's family but also with the child's tribe).

118. This forced association violates Plaintiffs' freedom of association, which encompasses the freedom not to associate under the First Amendment. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Knox v. Service Employees Int'l Union, Local 1000*, __ U.S. __, 132 S. Ct. 2277 (2012).

COUNT 6 – UNLAWFUL AGENCY ACTION

119. Plaintiffs reallege, adopt and incorporate by reference the preceding paragraphs as though fully set forth herein.

120. Whereas ICWA's jurisdiction-transfer provision is available to transfer only foster care placement and termination of parental rights proceedings to the jurisdiction of the tribe, 25 U.S.C. § 1911(b), the New Guidelines state, "The right to request a transfer is available at *any stage* of an Indian *child custody proceeding*, including during any period of emergency removal." 80 Fed. Reg. at 10156, C.1(c) (emphasis added). Further, the New Guidelines instruct state courts that they "must transfer" all child custody proceedings if the parent does not object to the transfer, the tribal court does not decline, and there is no good cause to deny transfer. New Guidelines, 80 Fed. Reg. 10156, C.2, C.3.

121. BIA's enlargement of the jurisdiction-transfer provision, 25 U.S.C. § 1911(b), New Guidelines at C.1, C.2, C.3, making the provision available during preadoptive placement and adoptive placement proceedings, clearly contradicts the statutory provision. *See* 25 U.S.C. § 1903(1) (definitions).

122. BIA overstepped its authority by extending, in the New Guidelines, the jurisdiction-transfer provision to all child custody proceedings. Such extension, which directly contradicts a Congress-enacted provision, harms children in cases where parental rights have been terminated. It gives tribes the "right to request a transfer," 80 Fed. Reg. at 10156, C.1(c), in cases where Congress expressly did not give tribes a right to request transfer.

123. Such agency action is unlawful, in excess of statutory authority, and not in accordance with law. 5 U.S.C. § 706; *see American Federation of Govt. Employees, AFL-CIO, Local 3669 v. Shinseki*, 821 F. Supp. 2d 337 (D.D.C. 2011), *affirmed by*, 709 F.3d 29 (D.C. Cir. 2012).

REQUEST FOR RELIEF

Consequently, Plaintiffs respectfully request that the Court:

A. Certify the Plaintiff class as defined.

B. Declare that provisions of the Indian Child Welfare Act, specifically, 25 U.S.C. §§ 1911(b), 1912(d), 1912(e), 1912(f), 1915(a), 1915(b), and the New Guidelines, §§ A.2, A.3, B.1, B.2, B.4, B.8, C.1, C.2, C.3, D.2, D.3, F.1, F.2, F.3, F.4, violate the United States Constitution both facially and as applied to Plaintiffs and others similarly situated.

C. Permanently enjoin Defendant Washburn and Defendant Jewell from enforcing these provisions of the Indian Child Welfare Act and the New Guidelines.

D. Permanently enjoin Defendant McKay from complying with and enforcing these unconstitutional provisions of the Indian Child Welfare Act, the New Guidelines, and state law.

E. Hold unlawful and set aside New Guidelines, §§ C.1, C.2, C.3 under 5 U.S.C. § 706.

F. Award Plaintiffs their reasonable attorneys' fees, litigation expenses and costs, pursuant to 28 U.S.C. § 2412 (Equal Access to Justice Act) and 42 U.S.C. § 1988 (Civil Rights Act), and other applicable law.

G. Grant such other relief as the Court may deem just and proper.

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RESPECTFULLY SUBMITTED this 6th day of July, 2015 by:

/s/ Clint Bolick
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