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13 **IN THE UNITED STATES DISTRICT COURT**
14 **DISTRICT OF ARIZONA**

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

21 Plaintiffs,

22 v.

23 KEVIN WASHBURN, in his official
24 capacity as Assistant Secretary of BUREAU
25 OF INDIAN AFFAIRS; SALLY JEWELL,
26 in her official capacity as Secretary of
27 Interior, U.S. DEPARTMENT OF THE
28 INTERIOR; GREGORY A. McKAY,
in his official capacity as Director of the
ARIZONA DEPARTMENT OF CHILD
SAFETY,

Defendants.

No. 2:15-CV-01259- PHX-NVW

**FEDERAL DEFENDANTS’
SECOND NOTICE OF
SUPPLEMENTAL AUTHORITY**

(Assigned to The Honorable Neil V.
Wake)

1 Federal Defendants respectfully submit this Second Notice of Supplemental
2 Authority to bring to the Court’s attention the January 5, 2016 decision of the U.S.
3 Court of Appeals for the Sixth Circuit in *Kelsey v. Pope*, No. 14-1537, slip op. (6th Cir.
4 Jan. 5, 2016) (attached as Exhibit 1). In an opinion that addressed several issues of
5 relevance to the present case, the Sixth Circuit concluded, *inter alia*, that a tribe has
6 inherent authority to exercise extra-territorial criminal jurisdiction over its members.
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9 The tribal-court defendant had argued that the tribe’s criminal authority was
10 either greatly diminished or altogether absent because his purported crime took place
11 outside of Indian country. *Id.* at 7. Examining the scope of retained tribal sovereignty,
12 the Sixth Circuit noted that, because of tribes’ “dependent relationship with the United
13 States, Congress wields power ‘consistently described as plenary and exclusive to
14 legislate [with] respect to Indian tribes.’ However, ‘unless and until Congress acts, the
15 tribes retain their historic sovereign authority.’” *Id.* at 6 (citing *Michigan v. Bay Mills*
16 *Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014)). But whereas Congress affirmed in the
17 Indian Child Welfare Act that tribes retain sovereignty over child-custody proceedings,¹
18 in *Kelsey*, the Sixth Circuit grappled with the more difficult question of whether tribes
19 retain sovereignty over criminal matters. Specifically, the question presented to the
20 Sixth Circuit was whether Congress had “divested [the Tribe] of its inherent sovereign
21 authority to prosecute members when necessary to protect tribal self-government or
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26 ¹ See 25 U.S.C. § 1911; *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 58
27 (1989) (Rehnquist, C.J., Stevens & Kennedy, JJ., dissenting) (highlighting the
28 “jurisdictional provision [] designed primarily to preserve tribal sovereignty over
domestic relations”).

1 control internal relations.” *Kelsey*, slip op. at 2.

2 Drawing on Supreme Court and Ninth Circuit precedent, the Sixth Circuit first
3 recognized that tribal jurisdiction derives from membership and extends off reservation.
4 *Id.* at 7-10 (citing *United States v. Wheeler*, 435 U.S. 313 (1978); *Duro v. Reina*, 495
5 U.S. 676 (1990); *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th
6 Cir. 1991); and *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974)). In particular, the Sixth
7 Circuit was persuaded by the Supreme Court’s reasoning in *Duro* “that a tribe’s
8 authority to prosecute its members is ‘justified by the *voluntary character of tribal*
9 *membership* and the concomitant right of participation in a tribal government.’” *Id.* at
10 12 (quoting *Duro*, 495 U.S. at 677-78) (emphasis in Sixth Circuit opinion). Because the
11 off-reservation offense involved tribal leaders and therefore affected tribal self-
12 government or control of internal relations, the Sixth Circuit further concluded that the
13 tribe had not been divested of such authority.
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18 RESPECTFULLY SUBMITTED this 19th day of January, 2016.

19 JOHN C. CRUDEN
20 Assistant Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2016, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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