

1 **Scharf-Norton Center for Constitutional Litigation at the**
2 **GOLDWATER INSTITUTE**

3 Aditya Dynar (031583)
4 500 E. Coronado Rd.
5 Phoenix, Arizona 85004
6 (602) 462-5000
7 litigation@goldwaterinstitute.org

8 **COOPER & KIRK, PLLC**

9 Michael W. Kirk (admitted *pro hac vice*)
10 Brian W. Barnes (admitted *pro hac vice*)
11 Harold S. Reeves (admitted *pro hac vice*)
12 1523 New Hampshire Ave., N.W.
13 Washington, D.C. 20036
14 (202) 220-9600
15 (202) 220-9601 (fax)
16 *Attorneys for Plaintiffs*

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

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

26 vs.

27 KEVIN WASHBURN, in his official
28 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. CV-15-1259-PHX-NVW

**PLAINTIFFS' RESPONSE TO
FEDERAL DEFENDANTS'
SECOND NOTICE OF
SUPPLEMENTAL AUTHORITY**

1 Federal Defendants brought to the Court's attention *Kelsey v. Pope*, No. 14-
2 1537, ___ F.3d ___, 2016 WL 51243 (6th Cir., Jan. 5, 2016), and identified one issue
3 addressed by *Kelsey* that is in their view relevant to the present case. Second Notice p. 2.
4 Plaintiffs' response follows.

5 In *Kelsey*, Kelsey, an elected member of the tribe's nine-member Tribal Council,
6 "made inappropriate physical contact of a sexual nature with Foster," an employee of the
7 tribe in the tribe-owned off-reservation Community Center that was "located just across
8 the street from the [tribe's] reservation." 2016 WL 51243 at *2. The question before the
9 Sixth Circuit was "whether the [tribe] properly asserted extraterritorial criminal
10 jurisdiction over Kelsey." *Id.* at *3. The court concluded that it did. *Id.* at *11.

11 *Kelsey*, which involved the application of a tribe's criminal statute, is inapposite to
12 the question at issue in this case: whether 25 U.S.C. § 1911(b), a federal statute requiring
13 transfer of some state child custody proceedings to a tribal forum based solely on the
14 child's race, is constitutional. *Kelsey* does not overcome the plausibility of Plaintiffs'
15 constitutional challenge to 25 U.S.C. § 1911(b), especially where the child deemed subject
16 to ICWA has no minimum contacts, much less systematic and continuous contacts, with
17 the tribal forum, and where tribal membership of the child is anything but voluntary. *See*
18 *also* 25 U.S.C. § 1903(4) (a child's eligibility for membership makes the child subject to
19 ICWA). *Kelsey*, of course, does not address such a situation because it involved an elected
20 member of the tribe's governing body who had systematic and continuous contacts with
21 the tribal forum.

22 Moreover, the *Kelsey* court itself was careful in limiting membership-based
23 criminal jurisdiction of tribes to cover situations where it is "*necessary to protect tribal*
24 *self-government or to control internal relations.*" 2016 WL 51243 at *8 (emphasis in
25 original). Federal Defendants ignore the Sixth Circuit's carefully-crafted language which
26 limited its holding to the unique facts in that case. *Id.* at *9. Section 1911(b), a federal
27 civil jurisdiction statute, which requires transfer of some child custody proceedings to
28

1 tribal court based on nothing but the child’s blood quantum is neither “necessary to protect
2 tribal self-government” nor “to control internal relations.”

3 The Federal Defendants admit (Second Notice p. 3), because they must, that
4 *Kelsey*’s holding is narrow. But the constraints of logic do not prevent them from making
5 a sweeping assertion that “tribal jurisdiction derives from membership and extends off
6 reservation.” Second Notice p. 3. None of the cases the Federal Defendants cite come
7 remotely close to substantiating that assertion nor overcome the inherent infirmity in
8 asserting worldwide race-based long-arm jurisdiction that disregards the constitutional
9 rights of American citizens.

10 *Kelsey* is not relevant to the jurisdiction-transfer issue in this case.

11 **RESPECTFULLY SUBMITTED** this 20th day of January, 2016 by:

12
13 /s/ Aditya Dynar

Aditya Dynar (031583)

14 **Scharf-Norton Center for Constitutional Litigation**
15 **at the GOLDWATER INSTITUTE**

16 Michael W. Kirk (admitted *pro hac vice*)

17 Brian W. Barnes (admitted *pro hac vice*)

18 Harold S. Reeves (admitted *pro hac vice*)

COOPER & KIRK, PLLC

19 *Attorneys for Plaintiffs*
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Document Electronically Filed and Served by ECF this 20th day of January,
2016.

MARK BRNOVICH
ATTORNEY GENERAL
John S. Johnson
Dawn R. Williams
Gary N. Lento
Melanie G. McBride
Joshua R. Zimmerman
1275 West Washington Street
Phoenix, Arizona 85007
John.Johnson@azag.gov
Dawn.Williams@azag.gov
Gary.Lento@azag.gov
Melanie.McBride@azag.gov
Joshua.Zimmerman@azag.gov

Steven M. Miskinis
Ragu-Jara Gregg
U.S. Department of Justice
ENRD/ Indian Resources Section
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
Steven.miskinis@usdoj.gov
RGregg@ENRD.USDOJ.GOV

Courtesy Copy Mailed this 20th day of January, 2016 to:

Honorable Neil V. Wake
United States District Court
Sandra Day O'Connor U.S. Courthouse, Ste. 524
401 W. Washington St., SPC 52
Phoenix, AZ 85003-2154

/s/ Kris Schlott
Kris Schlott