

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

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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' MOTION FOR
LEAVE TO FILE FIRST
AMENDED COMPLAINT**

1 Plaintiffs respectfully request that the Court grant leave to file and serve the First
2 Amended Civil Rights Class Action Complaint for Declaratory, Injunctive, and Other
3 Relief pursuant to Fed. R. Civ. P. (“FRCP”) 15 and LRCiv 15.1.

4 **Procedural Posture**

5 Plaintiffs filed suit on July 6, 2015. Defendants filed motions to dismiss on which
6 oral argument was held on December 18, 2015. Parties are awaiting the Court’s decision
7 on the Defendants’ motions to dismiss.

8 On February 22, 2016, the Court ordered Plaintiffs to file a status report to inform
9 the Court whether and when they planned to amend their Complaint and add additional
10 plaintiffs. In Plaintiffs’ Status Report filed with the Court on February 29, 2016, Plaintiffs
11 informed the Court that they are prepared to file the first amended complaint on or before
12 March 4. This motion for leave to file the first amended complaint follows.

13 **Memorandum of Points and Authorities**

14 Plaintiffs add additional parties as plaintiffs. Plaintiffs also add “Count 7 –
15 Damages Under Title VI of the Civil Rights Act (42 U.S.C. §§ 2000d–2000d-7)” to the
16 first amended complaint.

17 Under FRCP 15(a)(2), courts “freely give leave” to amend the complaint “when
18 justice so requires.” Courts “permit amendment of pleadings for virtually any purpose,
19 including to add claims, alter legal theories or request different or additional relief.” *In re*
20 *Private Capital Partners, Inc.*, 139 B.R. 120, 125 (S.D.N.Y. 1992) (citing *Foman v. Davis*,
21 371 U.S. 178, 182 (1962)). The Supreme Court in *Foman* explained that “if the underlying
22 facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought
23 to be afforded an opportunity to test his claim on the merits.” 371 U.S. at 182.

24 Plaintiffs add four new plaintiffs, K.R. and P.R., who are foster/preadoptive parents
25 of two children in their care, baby girl L.G. and baby boy C.R., who are half-siblings with
26 different birth fathers. Plaintiffs also add Dr. Ronald Federici as a next friend to named
27 and putative class member children in addition to Ms. Carol Carter who will continue to
28 be the next friend to the named and putative class member children.

1 Baby girl A.D., S.H., and J.H. remain as plaintiffs in the amended complaint. The
2 factual allegations pertaining to A.D., S.H., and J.H. are changed to reflect the
3 developments in their underlying state court child custody proceeding that have occurred
4 since the filing of the original complaint.

5 Plaintiffs M.C., K.C., and baby boy C. (baby boy C.C. after adoption), continue as
6 named plaintiffs in the amended complaint. The factual allegations pertaining to C.C.,
7 M.C., and K.C. are changed to reflect the developments in their state court child custody
8 proceeding that have occurred since the filing of the original complaint.

9 The legal theories under which the original complaint challenged certain provisions
10 of the Indian Child Welfare Act and the BIA Guidelines remain unchanged. Count 7
11 pertaining to nominal damages under Title VI of the Civil Rights Act is added to redress
12 the impermissible use of race in the child custody proceedings of all named plaintiffs and
13 putative class members.

14 None of the *Foman* factors counselling against granting leave to amend are present
15 here. There is no “undue delay” here; the original pleadings are not closed. *Foman*, 371
16 U.S. at 182. There is no “bad faith or dilatory motive on the part of the movant” here. *Id.*
17 The legal theories which would give rise to a nominal damages award under Title VI are
18 the same as those contained in the original complaint; the Title VI claim is merely an
19 additional claim for relief. The Title VI claim allows plaintiffs to more thoroughly frame
20 the relevant constitutional issues before this Court. This is Plaintiffs’ first request to amend
21 the complaint; consequently, there is no “repeated failure to cure deficiencies by
22 amendments previously allowed.” *Id.* There is also no “undue prejudice to the opposing
23 party by virtue of allowance of the amendment.” *Id.* The pleadings in this lawsuit are not
24 closed; class certification discovery is underway. Plaintiffs are not seeking compensatory
25 or punitive damages, which would have probably required development of additional
26 facts.¹ Indeed, Defendants are not being “unfairly disadvantaged or deprived of the

27 ¹ Even if Plaintiffs had sought compensatory or punitive damages, such an addition
28 would have provided no reason to deny leave to amend the complaint. It is within the

1 opportunity to present facts or evidence,” such that this amendment would unduly
2 prejudice them. *Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989). Plaintiffs merely
3 “clarify legal theories or make technical corrections” in the first amended complaint.
4 *Harrison v. Rubin*, 174 F.3d 249, 253 (D.C. Cir. 1999). Furthermore, the “amendment[s]”
5 made are far from “futil[e].” *Foman*, 371 U.S. at 182. The state court child custody
6 proceedings of named plaintiffs and putative class members are dynamic and inherently
7 transitory, which necessitates rather than counsels against freely granting leave to amend
8 the complaint.

9 **Conclusion**

10 Plaintiffs request that the Court grant leave to file and serve the first amended
11 complaint (Exhibit 1). Pursuant to LRCiv 15.1, a redlined version of the complaint is
12 attached as Exhibit 2.

13 **RESPECTFULLY SUBMITTED** this 2nd day of March, 2016 by:

14
15 /s/ Aditya Dynar

Aditya Dynar (031583)

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23
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27 _____
28 sound discretion of the Court to bifurcate the lawsuit into a liability and damages phase.
See Gratz v. Bollinger, 539 U.S. 244, 253 (2003).

CERTIFICATE OF SERVICE

Document Electronically Filed and Served by ECF this 2nd day of March, 2016.

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Courtesy Copy Mailed this 2nd day of March, 2016 to:

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/s/ Kris Schlott

Kris Schlott