Steven Miskinis
JoAnn Kintz
Christine Ennis
Ragu-Jara Gregg
U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
Telephone: (202) 305-0262
Email: steven.miskinis@usdoj.gov
Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT

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,

v.

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 the ARIZONA DEPARTMART OF CHILD SAFETY,

Defendants.

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

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

(Assigned to The Honorable Neil V. Wake)

INTRODUCTION

Plaintiffs seek to upend a decades-old federal statute designed to protect sovereign Indian tribes and their children from the abuses of state child welfare systems which were destroying the "the stability and security of Indian tribes and families" by removing their children. 25 U.S.C. § 1902. But their complaint is fatally flawed – among its many defects, the Plaintiffs lacked standing to bring their claims. Plaintiffs declined to address those defects when the Federal Defendants, in accord with this Court's Orders (ECF Nos. 7, 29), informed them of the defects that would form the basis of the now-pending motion to dismiss (ECF No. 68). Now, after Defendants' motions to dismiss are fully briefed and argued, and only with this Court's prompting, Plaintiffs attempt to remedy this defect by seeking leave to amend their complaint to add new plaintiffs, add claims, and fix other flaws. Their motion for leave to amend should be denied. This Circuit's law is clear – a court lacks jurisdiction to permit amendment of a class-action complaint where the original plaintiffs did not have standing to bring the suit. That is exactly the situation here, and the motion for leave to amend should be denied, and the suit dismissed.

Plaintiffs portray the statute in question, the Indian Child Welfare Act ("ICWA"), as a race-based throwback to the Jim Crow era and seek to represent a class of all "off-reservation Arizona-resident children with Indian ancestry," whom they allege are subject to the statute. Compl. (ECF No. 1) at ¶ 30. But ICWA is not a race-based statute and its provisions do not address children of Indian ancestry. Instead the

statute focuses on children's political affiliation with their tribes. ICWA is designed to protect children who are either members of federally recognized Indian tribes or who are eligible for membership and the biological child of a tribal member who were and are being removed from their parents, extended families and communities at alarming rates. These tribes are sovereign political entities with whom the United States has a government-to-government relationship. A child is not subject to ICWA unless that child meets the definition of "Indian child" in ICWA, which turns not on race but on tribal membership as a political relationship which is bilateral and voluntary, and which provides an opportunity for exit: a parent can disenroll their child and themselves.

So the entire premise of Plaintiffs' proposed class is misplaced, resulting in a proposed class that sweeps in children of Indian ancestry who are ineligible for the statute's protections, while at the same time including ICWA eligible children who may want the protections of a statute designed to safeguard their relationship with their Indian community and their own family. Plaintiffs disregard that these relations historically have been threatened, and often severed, by state child welfare processes that all too easily removed children from their families and tribes – and the abuses faced by Indian children, families, and tribes continue today, *see Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp.3d 749 (D.S.D. 2015) (finding state emergency removal hearings violated ICWA and denied due process to the parents of removed Indian children), on the grounds that state authorities know what is best for tribes and individual members. Not only is there no basis for Plaintiffs' proposed class, Plaintiffs' purported class

representatives lack Article III standing, as explained in the motion to dismiss. Relying on general and unfounded allegations of disparate racial treatment, Plaintiffs neglected to establish how their class representatives are concretely injured in any way by ICWA.

Plaintiffs now seek to amend their complaint to add new plaintiffs and allege new injuries which, they hope, will provide some way to anchor their proposed class with Article III standing, a necessary prerequisite if their suit is to go forward. However, the law is clear: where there is no standing, the case must be dismissed outright because, absent standing, this Court lacks jurisdiction to consider any motion to amend to add new plaintiffs that would attempt to cure present standing defects. If Plaintiffs insist on going forward, they must bring a new suit with their new plaintiffs.

Even if this Court decides that the present Plaintiffs have standing, Plaintiffs' motion to amend should be denied for the additional reason that it is futile. Plaintiffs' proposed amended complaint would add as a plaintiff a child alleged to have Indian ancestry but whom they allege is not eligible for membership in an Indian tribe. Because such a plaintiff cannot come within ICWA's definition of "Indian child," the proposed plaintiff is not subject to ICWA and thus cannot have standing to challenge the statute or represent a class.[1]

[1] Pursuant to Fed. R. Civ. P. 25(d), Lawrence Roberts should be substituted for Kevin Washburn as Acting Assistant Secretary – Indian Affairs, Department of the Interior. Kevin Washburn was not an Assistant Secretary of the Bureau of Indian Affairs.

ARGUMENT

I. Plaintiffs May Not Amend their Complaint unless the Court finds that one of the Original Plaintiffs has Standing

Plaintiffs' proposed amended complaint attempts to add four new plaintiffs along with a new next friend. ECF No. 150 at 2-3. However, Plaintiffs cannot salvage their complaint by adding new party plaintiffs unless this Court first determines that one of the original named plaintiffs had standing. Otherwise, there is no subject matter jurisdiction to entertain a motion to add new plaintiffs. Jurisdiction is a "threshold matter" and "'[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). As the Ninth Circuit has explained, where the named plaintiffs purporting to represent a class lack standing, there is no opportunity for "other proceedings . . . under which it may be possible that the suit can proceed as a class action with another representative" and therefore the Court "remand[ed] . . . to the district court with instructions to dismiss." *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1023 (9th Cir. 2003). The Ninth Circuit distinguished proceedings where a class plaintiff loses standing during the course of the case due to a claim becoming moot – and allowed that in such circumstances "substitution or intervention might have been possible." *Id.* But where the named plaintiffs lacked standing from the outset, "the court need never reach the class action

issue." *Id.* at 1022. As explained by the leading class action treatise, where there is no standing, "there is no opportunity for a substitute class representative to take the named plaintiff's place because this means that the court never had jurisdiction over the matter." Newberg on Class Actions § 2:8 (5th ed.). *See also Kirola v. City & Cty. Of San Francisco*, 74 F. Supp.3d 1187, 1249 (N.D. Cal. 2014) ("The issue here is not mootness, however, but the lack of standing. As a result, substitution is not an appropriate solution to [plaintiff's] lack of standing."); *Hensley-Maclean v. Safeway, Inc.*, No. 11-CV-01230-RS, 2015 WL 3956099, at *4 (N.D. Cal. June 29, 2015) ("Thus, *Lierboe* stands for the proposition that where the original named plaintiff lacks standing, a new plaintiff with standing cannot step in to save the lawsuit from dismissal."); *Sanford v. Memberworks, Inc.*, No. 02cv0601-LAB (JFS), 2008 WL 4482159, at *5 (S.D. Cal. Sept. 30, 2008).

The Ninth Circuit was guided by a Seventh Circuit decision, *Foster v. Center Tp. Of LaPorte County*, 798 F.2d 237 (7th Cir. 1986). In that case, a plaintiff seeking to represent a class challenging poor relief guidelines was held to lack standing where she had not been harmed by the guidelines. *Id.* at 243-44. It necessarily followed that since plaintiff "lacked standing to bring the claim in question in her own right, she cannot qualify as a representative of a class purporting to raise the same claim." *Id.* at 244. Moreover, because plaintiff "never had standing . . . the question of mootness of the class claims simply does not arise." *Id.* at 245. The Seventh Circuit noted that while "[t]here might have been a number of persons" who suffered the requisite injury to

establish standing for themselves and the class, the "simple fact is that [plaintiff] was not one of them," and accordingly the court remanded with instructions to dismiss. *Id.*

Similarly, in *Walters v. Edgar*, 163 F.3d 430 (7th Cir. 1998), the Seventh Circuit again rejected an argument that lack of standing should not prevent plaintiffs from proffering new class representatives. Once the preliminary question of federal jurisdiction was decided there could be no further proceedings because "these plaintiffs never had standing to bring this suit, and so federal jurisdiction never attached." *Id.* at 432. The court noted that its decision "does not bar the filing of a new case if counsel can locate" suitable plaintiffs, but "[s]ince . . . the district court never acquired jurisdiction over the present suit, all previous rulings in this litigation in the district court should be vacated." *Id.* at 437.

The Sixth Circuit has followed suit, holding that where plaintiff "had no standing to bring this action," it also had "no standing to make a motion to substitute the real party in interest." *Zurich Ins. v. Logitrans, Inc.*, 297 F.3d 528, 531 (6th Cir. 2002). *See also Zangara v. Travelers Indem. Co. of America*, 2006 WL 825231, at *3 (N.D. Ohio Mar. 30, 2006) (plaintiffs "lack of standing precludes him from amending the complaint to substitute new plaintiffs . . . . More precisely, his lack of standing divests this Court of subject matter jurisdiction necessary to even consider such a motion."). Similarly, the Third Circuit, in a case where it could not determine if the lead plaintiff representing a class had standing, remanded to the district court to decide if the lead plaintiff "falls within the amended class definition and sustained an injury," and further explained that

in the absence of a standing-conferring injury "the case must be dismissed." *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 361 (3d Cir. 2013). The court went on to cite the Newberg treatise for the proposition that substitution of the lead plaintiff could not occur in the absence of standing. *Id.* at 361 n.12.

Accordingly, the law is clear: unless Plaintiffs presently can demonstrate standing, they may not move to amend their complaint and add new plaintiffs. As explained in the motion to dismiss, Plaintiffs have not shown any concrete harm from ICWA. No ICWA requirement has altered their child welfare proceedings: there have been no transfers to tribal courts and there have been no application of ICWA's adoptive placement preferences to any of the present plaintiffs. Plaintiffs' lack of standing only leaves one course of action: dismissal of this lawsuit.

II. Plaintiffs' attempt to add L.G. is futile because they allege she is not an "Indian child" within the meaning of ICWA.

Where a court has subject matter jurisdiction, it "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). A court considers five factors: "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014) (quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990); *see also Lorona v. Arizona Summit Law School, LLC*, --- F. Supp.3d ---, 2015 WL 9009794 at *14 (D. Ariz. 2015) (same). "Futility alone can justify the denial of a motion to amend." *Johnson v.*

Buckley, 356 F.3d 1067, 1077 (9th Cir. 2004) (internal quotations omitted). Thus denial of a motion to amend is warranted where "the proffered amendments would be nothing more than an exercise in futility." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). *See Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 614 (9th Cir. 1993) (affirming denial of motion to amend complaint where new claim was not colorable).

Plaintiffs' proposed amended complaint would add L.G. as a plaintiff. L.G. is described as "not eligible for membership in the Pascua Yaqui Tribe of Arizona, a federally-recognized tribe" and as having "on information and belief . . . more than 50% non-Indian blood." ECF No. 150-1 at ¶ 11. Thus, while L.G. apparently has Indian ancestry, she has no connection to a federally recognized tribe sufficient to make her eligible for the protections offered by ICWA. ICWA does not apply based on race, but rather depends on a child having ties to a sovereign tribal entity recognized by the United States. Specifically, to be eligible for ICWA's protections, one must be an "Indian child" which is defined 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 defined by ICWA as

> any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians . . . .

25 U.S.C. § 1903(8). As courts have recognized, eligibility for ICWA does not depend on a child's race. *See In re L.S.*, 2012 S.D. 22, ¶ 14, 812 N.W.2d 505, 508 (S.D. 2012)

("Thus, the term 'Indian child' as defined by the ICWA means 'something more specific than merely having Native American ancestors.'") (quoting *In re Arianna R.G.*, 259 Wis. 2d 563, 657 N.W.2d 363, 368 (2003); *In re A.B.*, 2003 ND 98, ¶ 36, 663 N.W.2d 625, 636 (N.D. 2003) ("The different treatment of Indians and non-Indians under ICWA is based on the political status of the parents and children and the quasi-sovereign nature of the tribe.").

In short, while L.G. may have Indian ancestry, that is not sufficient, nor even necessarily relevant, to the question of whether she is an Indian child within the meaning of ICWA. "Indian child" defines a class of persons (children members or eligible children with biological parent members) in a bilateral, consensual relationship with a sovereign tribe. As the Supreme Court has made clear, membership is voluntary and tribal authority exists only "over Indians who consent to be tribal members." *Duro v. Reina*, 495 U.S. 676, 693 (1990), *superseded on other grounds as recognized by United States v. Enas*, 255 F.3d 662, 670 (9th Cir. 2001) ("Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe's additional authority comes from the consent of its members . . . ."). Accordingly, membership can be renounced by persons wishing to dissociate themselves from a tribal community and the laws, like ICWA, designed to preserve the integrity of such communities. *See Means v. Navajo Nation*, 432 F.3d 924, 934 n. 68 (9th Cir. 2005) ("The authorities suggest that members of Indian tribes can renounce their membership."); *Thompson v. County. of Franklin*, 180 F.R.D. 216, 225 (N.D.N.Y. 1998) (giving effect to individual's

unequivocal renunciation of tribal membership). And by the same token, the Supreme Court has been clear that "a tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978). Thus tribal membership requires the consent of both the tribe and the individual and where a tribe does not consent, there is no membership and ICWA does not apply. *See In re K.P.*, 242 Cal. App. 4th 1063, 195 Cal. Rptr.3d 551 (2015), *as modified*, (Nov. 20, 2015) (declining to afford children in state child welfare proceedings the protections of ICWA where tribe determined the children were neither members nor eligible for membership).

In short, ICWA does not apply based on a child's racial ancestry, and Plaintiffs' effort to proffer children as new plaintiffs on that basis alone must fail as futile. For the same reason, Plaintiffs' effort to certify a class based on racial ancestry is doomed because ICWA does not apply based on a showing of racial ancestry. ICWA applies to protect an already existing consensual association between either a child or his or her biological parent and a tribal community. Accordingly, Plaintiffs' attempt to amend their complaint is futile, and the present complaint should be dismissed for lack of jurisdiction. [2]

[2] Should the Court allow Plaintiffs to amend their Complaint, the Federal Defendants request that such Order further provide a thirty-day period from the date of the Order allowing for Defendants to file supplemental briefing in accord with this Court's Order permitting such briefing should it permit amendment. *See* ECF No. 151.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for leave to file a first amended complaint should be denied.

RESPECTFULLY SUBMITTED this 21st day of March, 2016.

JOHN C. CRUDEN
Assistant Attorney General

s/_____
Steve Miskinis
JoAnn Kintz
Indian Resources Section
Christine Ennis
Ragu-Jara Gregg
Law and Policy Section
U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
Telephone: (202) 305-0262
Email: steven.miskinis@usdoj.gov
Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 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:

MARK BRNOVICH
ATTORNEY GENERAL
Firm Bar No. 14000
John S. Johnson (016575)
Division Chief Counsel
1275 West Washington Street
Phoenix, Arizona 85007
Telephone: (602) 542-9948
e-mail: John.Johnson@azag.gov
Attorney for Defendant Gregory A. McKay

Clint Bolick (021684)
Aditya Dynar (031583)
Courtney Van Cott (031507)
Scharf-Norton Center for Constitutional Litigation at the
Goldwater Institute
500 East Coronado Road
Phoenix, Arizona 85004
(602) 462-5000
e-mail: litigation@goldwaterinstitute.org

Michael W. Kirk *(admitted pro hac vice)*
Brian W. Barnes (*admitted pro hac vice)*
Harold S. Reeves *(admitted pro hac vice)*
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D. C. 20036
(202) 220-9600
(202) 220-9601 (fax)
Attorneys for Plaintiffs

s/_____
Steven Miskinis
U.S. Department of Justice
ENRD/Indian Resources Section/
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
Telephone: (202) 305-0262
Email: steven.miskinis@usdoj.gov
Attorneys for Federal Defendants