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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. CV-15-1259-PHX-NVW

PLAINTIFFS' CONSOLIDATED REPLY TO STATE AND FEDERAL DEFENDANTS' RESPONSES TO PLAINTIFFS' MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

I. Introduction. Defendants' opposition to Plaintiffs' motion for leave to amend primarily rehashes arguments that they presented in their motions to dismiss on standing and abstention. Fed. Resp. (Doc. 160) ("FR") 2–8; St. Resp. (Doc. 162) ("SR") 2–10.[1] Such arguments are out of place here, as this motion only seeks leave to file the amended complaint. A motion for leave to amend should be "'freely given' … 'with extreme liberality.'" *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). The only argument Defendants make that speaks directly to the Plaintiffs' motion to amend focuses on one factor of the test of *Foman v. Davis*, 371 U.S. 178 (1962): the purported futility of including Baby Girl L.G. as a Plaintiff. FR.8–11; SR.4–8. Plaintiffs address all of these arguments below, and expressly incorporate by reference their already-filed responses to Defendants' arguments for dismissal (Doc. 80).[2]

II. Standing. Plaintiffs' characterization of this case in ¶ 1 of the Complaint is proving prescient. Defendants argue that Plaintiffs lack standing either because of their racial makeup (particularly Baby Girl L.G.), or on the theory that unequal treatment based on race is not a cognizable injury. In fact, it is. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) ("[t]he injury … is that a 'discriminatory classification [deprives] the plaintiff [of] … an equal [legal] footing.'"); *Northeastern Fla. Chapter of Assoc. Gen. Contractors of Amer. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("The 'injury in

[1] Plaintiffs cite page numbers of Doc. 162, which does not currently comply with LRCiv 7.1(b)(1)'s type-size and margin requirements. *See also* Doc. 70; Doc. 101. For the Court's convenience, should these page numbers change after State Defendant formats and refiles Doc. 162, Plaintiffs will refile this consolidated reply incorporating the changed page numbers. *See* ECF # 164 (striking State Defendant's filing with leave to refile).

[2] Because Defendants' responses to the motion for leave to amend simply repeat arguments already presented in their motions to dismiss, Plaintiffs think it is not necessary to have a round of supplemental motion-to-dismiss briefing. But if the Court would like such supplemental briefing, Plaintiffs propose the following briefing schedule: 14 days after the date of the order amending the complaint for Defendants to file an opening supplemental brief (17 pages each); 14 days for Plaintiffs to respond (34 pages); no reply, or alternatively, a reply within 7 days thereafter (11 pages each). *See* LRCiv 7.2(c)–(e). The federal Defendants' request of 30 days to file their motion (FR.11 n.2) would needlessly delay this action; they will have had more than 30 days to study the proposed amended complaint and prepare a supplemental memorandum by the time the Court rules on this Motion; Plaintiffs are happy to have a less than commensurate timeframe to respond (14 days, as proposed above) in the interest of moving this lawsuit to a speedy resolution.

fact' in an equal protection case … is the denial of equal treatment."); *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) ("the right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against. Rather … the 'right invoked is that of equal treatment.'").[3]

On Defendants' theory of standing, Rosa Parks would have had no cognizable injury, because she was allowed to ride on the bus and travel so long as she gave up her seat to a white passenger. *See* SR.3 (discussing standing of C.C., M.C., K.C., A.D., S.H., and J.H.). But the law is otherwise: a party denied equal treatment on the basis of race suffers a distinct injury and has Article III standing for that reason. *Mathews*, 465 U.S. at 739.

Doe v. Piper, __ F. Supp. 3d __, 2016 WL 755619 (D. Minn. Feb. 25, 2016), was decided on the anniversary of the promulgation of the New Guidelines. That case found that the plaintiffs had standing because "unequal treatment" is an Article III injury. *Id.* at *5–*7. Plaintiffs' injury here is likewise that they are relegated to a different, disadvantageous set of laws and procedures exclusively because ICWA imposes those rules on the basis of their racial or ethnic origin. ICWA thus subjects them to separate and unequal treatment that Plaintiffs refer to as the ICWA "penalty box." *See* Doc. 80 at 1, 5, 11.

Defendants argue (SR.3–4) that Plaintiffs have not suffered enough to have standing because the "harm" is not "concrete[]" (FR.4), but is "speculative … and not certain to occur." This misunderstands the nature of their injury.

Plaintiffs are injured by being subject, solely on the basis of race, to a different set of rules—and disadvantageous ones—than apply to other similarly situated people. A long line of Supreme Court cases have held that singling out of individuals and consequent unequal treatment constitutes Article III injury. *Mathews*, 465 U.S. at 738–40 (collecting cases).

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[3] It is beyond dispute that *de jure* unequal treatment based on racial makeup, national origin, or the use of racial ancestry as a "shorthand" for membership in a political group (Doc. 68 at 23), is a cognizable Article III injury and that strict scrutiny applies in such cases. In *Korematsu v. United States*, 323 U.S. 214, 216 (1944), the plaintiff challenged the federal government's use of ethnicity as a shorthand for political affiliation, and the Court found that "the most rigid scrutiny" applied.

In *Adarand Constructors*, the Court found that a company had standing to "seek[] declaratory and injunctive relief against any *future* use of" race-based contracting preferences, 515 U.S. at 210, even without proving that it would have been awarded the contract in the absence of unequal treatment, because "[t]he injury in cases of this kind is … 'discriminatory classification.'" *Id.* at 211. Likewise, in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718–19 (2007), the Court found that the plaintiffs had standing despite the fact that it was "possible" that they "[would] not be denied admission to a school based on their race," because "one form of injury under the Equal Protection Clause is being forced to compete in a race-based system." The Court also noted that one of the children who had ultimately received a school assignment without the race-based classification applying, nevertheless had standing because "he may again be subject to assignment based on his race" in the future. *Id.* at 720. Simply put, a plaintiff who, like the Plaintiffs here, is subjected to different and unequal treatment on the basis of race, or who will be so treated in the future, may seek prospective injunctive relief to bar the application of such race-based classifications.

Defendants' arguments, therefore, that "there have been no transfers to tribal courts" yet, or any "application of ICWA's adoptive placement preferences" yet (FR.8), simply do not defeat Plaintiffs' standing. This is not a case dealing with unequal *outcomes*; Plaintiffs seek *equal treatment*. It is certain—indeed, Defendants tout it as ICWA's feature (FR.2–3)—that Plaintiffs are currently "subject to" (FR.3) all of the provisions of ICWA and the New Guidelines, including the provisions challenged here. Defendants thus admit that Plaintiffs are *intentionally* placed in the ICWA Penalty Box (Ex. 1) if they are classified as "Indian child[ren]" under 25 U.S.C. § 1903(4).[4] Class representative plaintiffs in every conceivable stage of a state "child custody proceeding," 25 U.S.C. § 1903(1), are not necessary here. The injury common to all—the "glue," *Wal-Mart Stores Inc. v. Dukes*, 564

[4] It bears repeating that all Indian children are citizens of the United States at birth, 8 U.S.C. § 1401(b), and are just as entitled to the protections of the Constitution as American citizens of any other ethnic background.

U.S. 338, 131 S.Ct. 2541, 2552 (2011), that binds them together—is being subject to ICWA and the New Guidelines. *See, e.g., Rodriguez v. Hayes*, 591 F.3d 1105, 1123 (9th Cir. 2009) (finding commonality where "the constitutional issue at the heart of each class member's claim for relief is common").The named plaintiffs, nonetheless, provide a representative sampling of proceedings in the pre-termination, post-termination, pre-adoption, and post-adoption stage. *See* Doc. 150-1 ¶ 49.

Defendants misunderstand the nature of L.G.'s injury. Plaintiffs allege that she has known her brother C.R. since birth, shares a sibling bond with him, and that both consider K.R. and P.R. to be their parents. Doc. 150-1 ¶ 40. Both call K.R. and P.R. "mommy" and "daddy." *Id.* Arizona state policy, mandated by state law, is to place well-bonded siblings with the same foster and adoptive parents. *See, e.g.*, A.R.S. § 8-513(D). Were it not for ICWA, L.G. and C.R. would be placed together. Doc. 150-1 ¶¶ 40–41. But because ICWA imposes different rules, based on C.R.'s race, the ordinary Arizona laws do not apply. This harms L.G., who loves him as her brother. Moreover, by operation of ICWA, her fate is inextricably intertwined with C.R.'s. Both are subject to unequal treatment because of ICWA's race-based rules. L.G.'s state-court child custody proceeding is consolidated with that of her brother, C.R. Doc. 150-1 ¶ 39. That proceeding, including her adoption by K.R. and P.R., is consequently delayed in order to keep it in sync with C.R.'s. Doc. 150-1 ¶¶ 39, 42–43. This delay, which injures L.G. is attributable to the operation of ICWA. She is therefore injured for Article III purposes, regardless of her not being *herself* subject to ICWA's separate and unequal treatment.

The Federal Defendants claim that children's relations with their Indian communities and their families "historically have been threatened, and often severed, by state child welfare processes … on the grounds that state authorities know what is best for tribes and individual members." FR.3. But an "Act [that] imposes current burdens … must be justified

by current needs." *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2615 (2013).[5] However that may be, it is clear that the government-imposed severing of sibling bonds, bonds of affection and familial relation—the very breaking up of families that the federal Defendants claim ICWA prevents—are legally cognizable injuries.

All of these arguments either pertain to Fed. R. Civ. P. 12(b)(1) or 12(b)(6). The Defendants provide little, if any, in support of their opposition to amend the complaint under Fed. R. Civ. P. 15. Their contention that the Court must deny the motion to amend if it finds that the plaintiffs in the original complaint lacked standing is incorrect. The Supreme Court has held that "class certification issues are … 'logically antecedent' to Article III concerns," and that it is proper for a court to resolve a class certification motion before addressing standing. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999). *Lierboe v. State Farm Mut. Auto Ins. Co.*, 350 F.3d 1018, 1023 n.6 (9th Cir. 2003), on which they rely, involved a different question, one the court found "unusual." *Hensley-Maclean v. Safeway*,

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[5] Ironically, it was in fact the Federal government, not the states, that was most responsible for the historical abuses the federal government refers to in its brief. The NCAI amicus brief (Doc. 59), *which supports the Defendants*, offers the following evidence:

- "*federal* Indian policy favored the removal of Indian children from their homes" (Doc. 59 at 2) (emphasis added).
- "*federal* boarding schools" (*Id.* at 3 n.2) (emphasis added).
- "mass removals had their genesis in early federal Indian policy" (*Id.* at 4).
- "established practice of the federal government was to remove Indian children from their homes" (*Id.*).
- "The *federal boarding school and dormitory programs* also contribut[ed] to the destruction of Indian family and community life." (*Id.* (citing H.R. Rep. No. 95-1386 at 9 (1978) (emphasis added))).
- Federal "assimilat[ion]" policy (Doc. 59 at 4 (citing Cohen's *Handbook of Federal Indian Law*, § 22.03(1)(a) at 1397 (2012) ("In 1969, the federal government acknowledged that its educational policy was 'a failure of major proportions.'")).
- "*federal* Indian Adoption Project supported adopting Indian children to non-Indian households" (Doc. 59 at 5) (emphasis added). The Indian Adoption Project was formed by the BIA (Doc. 59 at 5), and the "federal policy of 'Indian extraction'" was implemented by "IAP-approved state agencies". *Id.*
- "With the IAP, *the federal government* looked to the 'private sector'" (*Id.* at 6) (emphasis added).

There is no legislative historical evidence of *state* social workers entering Indian land and removing Indian children from Indian homes. NCAI, supporting Defendants, admits that evidence shows that state and private social workers removed Indian children only because of *federal* directives. In any event, this sad history does not justify imposing ICWA and the New Guidelines *in the present* on the State Defendants or the named and putative class member plaintiffs.

Inc., No. 11-CV-01230-RS, 2015 WL 3956099 (N.D. Cal. June 29, 2015), which Defendants cite (FR.6), actually cuts against Defendants because after "[d]iscovery … established … that the products the named plaintiffs allegedly purchased were not in fact subject to any recalls," the court dismissed their claims for lack of standing, but gave the plaintiffs leave to amend to substitute other members of the putative class as new named plaintiffs. *Id.* at *1. This comports with Fed. R. Civ. P. 15(a)(2), which instructs courts to "freely give leave" to amend the complaint "for virtually any purpose, including to add claims, alter legal theories or request different or additional relief." *In re Private Capital Partners, Inc.*, 139 B.R. 120, 125 (S.D.N.Y. 1992).

Finally, citing *Foster v. Center Twp. of LaPorte Cnty.*, 798 F.2d 237 (7th Cir. 1986), and *Walters v. Edgar*, 163 F.3d 430 (7th Cir. 1998), Defendants take issue with this Court's decision (Doc. 151) to not rule on the pending motions to dismiss before deciding whether leave to amend the complaint should be granted. (FR.6–7). By so arguing, they urge this Court to change its mind and decide the pending motions to dismiss first. But that is not an argument *against* granting leave to amend the complaint. And a party asking the Court to change its mind should do so in a motion for relief under Fed. R. Civ. P. 60, not in this proceeding.

III. Next Friends. Defendants rehash (SR.5–7) their argument against Carol Coughlan Carter's (and now Dr. Ronald Federici's) next-friend status. But the path suggested by the Court during the December 18, 2015, oral argument is the correct one to take: the best way to ensure that the children plaintiffs' claims are heard in court is through the adversarial process in which the next-friend plaintiffs and Defendants diligently address the contentions in the complaint and the parties' legal arguments. As the Supreme Court has explained, "the 'gist of the question of standing'" is "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult … questions.'" *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 159, 170 (1970). Carter's and Frederici's participation will ensure that.

A next-friend must be "truly dedicated to the children's best interests." *Sam M. v. Carcieri*, 608 F.3d 77, 83 (1st Cir. 2010). A close relationship between the child and the next friend is not required—indeed, in *Coalition of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153, 1161–62 (9th Cir. 2002), the Ninth Circuit rejected a categorical rule requiring a close relationship between the party and the next-friend, holding that it was "no more than an additional consideration in determining whether a petitioner is a suitable next friend," *id*. at 1161, and applying instead a sliding scale so as to exclude "the 'intruder' or 'uninvited meddler.'" *Id.* at 1162. There is no question that Carter and Federici are truly dedicated to the children's best interests—so dedicated, in fact, that Defendants call them "ideological advocates." SR.5. In fact, like the sociology professor who was allowed to appear as next-friend in *Sam M.*, next friend plaintiffs such as Ms. Carter and Dr. Federici who are "truly dedicated to the children's best interests," 608 F.3d at 83, are proper next friends. Dr. Frederici is an experienced, highly-respected clinical neuropsychologist and psychopharmacologist, a professional consultant to doctors, schools, and clinics, who has served as an expert witness in child custody proceedings throughout the United States and abroad, and is President of a humanitarian aid organization, Care for Children International, Inc., that focuses on aid to children in government protective care. Ms. Carter is an experienced and highly respected family law attorney who has represented countless parents and children in Arizona custody proceedings, including many cases involving children of Indian ancestry, as guardian-ad-litem. Neither Dr. Frederici nor Ms. Carter are the "feared ideologue that pursues an action for purely political or ideological reasons." *Id.* at 93. Under Fed. R. Civ. P. 17(c),[6] their participation as next friends of the named and putative class member children is beyond reproach.

[6] The state court-appointed guardians-ad-litem of named children are unable or unwilling to "advocate" (SR.5) for the children's cause in this court. Director McKay and DCS, who have legal custody of these children are at best neutral, or at worst, actively advocating against these children's best interests. Their natural parents, by definition, are unavailable. Defendants resisted the named foster/preadoptive parents as being named next friend to children in their care. While it is questionable that any of these can ever be "general guardians" of these children, what is unquestionable is that M.C. and K.C. as legal parents of baby boy C.C. can be next friend plaintiffs to baby boy C.C. in addition to Ms.

In *Sam M.*, the court allowed a sociologist who had never met the children or relatives at issue, to appear as a next-friend plaintiff in a case involving foster-care, because he was "familiar with the circumstances foster care children face while in the state's custody," had studied the children's situation and familiarized himself with the documents involved, and concluded that pursuing the case was in the children's best interests. 608 F.3d at 93. *See also Nichols v. Nichols*, 2011 WL 2470135 at *2–*6 (D. Or. 2011) (approving a next friend who had no prior relationship with the minor given that his "experience, objectivity, and expertise in this role make him an exceptional candidate for such services"). Dr. Frederici and Ms. Carter are experts in the subject matter of this case, are dedicated to the children's best interests, and are well situated to ensure the "concrete adverseness" and sharp presentation of issues this litigation needs. *Camp*, 397 U.S. at 170. Their interest in the welfare of children, and in foster and custody proceedings, is hardly "ideological."

The cases relied upon by Defendants involved next friend plaintiffs seeking to represent interests of *adult* real parties-in-interest where a showing of mental incompetence is a prerequisite. Children, of course, are considered legally incompetent, for which reason Fed. R. Civ. P. 17(c) provides a mechanism for a next friend to sue on their behalf.[7] Thus cases like *Massie v. Woodford*, 244 F.3d 1192 (9th Cir. 2001), *Hamdi v. Rumsfeld*, 294 F.3d 598 (4th Cir. 2002), and *Whitmore v. Arkansas*, 495 U.S. 149 (1990), are inapposite.

Carter and Dr. Federici. *See J.W. v. Superior Court*, 17 Cal. App. 4th 958, 964–65 (1993) ("The essential difference between a general guardian and a [state court] guardian ad litem is that the former is usually appointed to 'take care of the person or property of a minor, not for the purpose of prosecuting a lawsuit,' … while a [state court] guardian ad litem is appointed specifically to 'prosecute or defend' a suit, and may be appointed even though there is a general guardian."). Given the expansive allowance in Fed. R. Civ. P. 17(c) of individuals who can be next friend to minors, there is no serious doubt about the status of Carter and Federici as next friends.

[7] Any perceived lack of significant relationship can easily be cured by this Court ordering Ms. Carter or Dr. Federici or both to visit with the plaintiff children. However, that is not required by the rules. In *Sam M.*, and *M.D. v. Perry*, 294 F.R.D. 7 (5th Cir. 2013), courts permitted class action lawsuits to proceed in which large classes of children were represented by next friends, and did not require them to have a significant relationship with every child in the class, which would have been impracticable.

To reiterate, these arguments are all pertinent to a motion to dismiss, not to a motion for leave to amend, which should be given "'with extreme liberality.'" *Aspeon,* 316 F.3d at 1051.

IV. Class Certification. State Defendant repeatedly uses the term "appropriate plaintiff." SR.2 n.1; SR.5; SR.7. It is unclear what this means. Article III requires an *injured* plaintiff, not an *appropriate* plaintiff. "Propriety" is a consideration for class certification under Fed. R. Civ. P. 23, and it is therefore not appropriate to address here. Here, the only question is whether the motion for leave to file is filed in bad faith, whether it would be futile for Plaintiffs to amend, or whether the amendment would cause undue prejudice to Defendants. *Wizards of the Coast LLC v. Cryptozoic Entm't LLC,* 309 F.R.D. 645, 649 (W.D. Wash. 2015). Because none of those factors is present here, the Court should grant the leave to amend, and reserve arguments over class certification for the proper time.

V. *Younger* Abstention. Defendants repeat their *Younger* abstention arguments. SR.2; SR.9. Plaintiffs have sufficiently dealt in their opposition to the dismissal motion, and rely on that opposition here, except to add that *Piper, supra,* held that "*Younger* abstention does not apply" in the context of a federal constitutional challenge during which an underlying state child custody proceeding involving an "Indian child" as defined in ICWA was proceeding. 2016 WL 755619, at *12. This Court should do likewise. *Younger* abstention applies only where the ongoing state proceedings are "akin to criminal prosecutions," or that implicate a State's interest in enforcing its court judgments. *Sprint Commc'ns v. Jacobs*, 134 S. Ct. 584, 588 (2013). Neither factor is present here (on the contrary, Plaintiffs seek relief so that the challenged provisions of the federal law will *not* supplant and interfere with Arizona state court procedures).

VI. Futility of Amendment. Finally, Defendants argue that amending the complaint would be futile. SR.4; FR.8–11. But their arguments to this effect largely beg the question, because they address issues of standing, etc., which are already fully briefed and argued in the pending motion to dismiss. The purported "defect" in Plaintiffs' complaint, FR.2, consists of justiciability and merits issues that are not proper arguments against a

motion to amend. There is consequently nothing "futile" about granting this motion to amend. Leave to amend should be granted "with extreme liberality," *Aspeon, Inc.*, 316 F.3d at 1051, and given the inherently transitory and dynamic nature of the state court child custody proceedings of the named plaintiffs and putative class members, that policy is especially important here.

With regard to the Plaintiffs' injuries, the pre-termination phase plaintiffs (K.R., P.R., L.G., and C.R.), the post-termination and pre-adoption phase plaintiffs (S.H., J.H., and A.D.), and the post-adoption phase plaintiffs (M.C., K.C., and C.C.) were, currently are, or surely will be subject to all six of the ICWA and New Guidelines provisions challenged here. *See* Doc. 150-1 ¶ 49. While injunctive and declaratory relief will be prospective, damages are available under Title VI of the Civil Rights Act for past violations.

Although the Defendants' arguments as to the sufficiency of the cause of action are out of place here, and are more properly addressed in the pending motion to dismiss (*see, e.g.*, FR.11 ("ICWA does not apply based on a child's racial ancestry.")), Plaintiffs offer a few words. Defendants maintain that ICWA applies based on a child having *ties* (plural) to a tribal entity. FR.9. But ICWA places a child in the ICWA penalty box even if his or her blood is the *only* tie to the tribe. The statute applies to children who are "eligible for membership in an Indian tribe," 25 U.S.C. §1903(4), and eligibility for membership is determined, by the tribes themselves, on the basis of biological ancestry. *See, e.g.*, 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 tit. 1 § 701. It follows syllogistically that ICWA *does* apply based on a child's biological ancestry. Courts have rightly held that "an Indian child's cultural tie to a tribe *is irrelevant* as to whether ICWA applies." *In re T.A.W.*, 354 P.3d 46, 48–49 (Wash. App. 2015), *rev. granted*, No. 92127-0 (Wash. 2016) (pending) (emphasis added). *See also* New Guidelines, 80 Fed. Reg. 10146, 10151, § A.3(b) ("existing" ties including "social, cultural, or political" ties "should not be considered in determining whether ICWA is applicable"). Arizona courts have held that ICWA

"contains no … requirement" that children have a "significant connection to the Indian community," before ICWA applies to them. *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 963 (Ariz. App. 2000). Other courts have likewise found that no cultural or familial ties are necessary for ICWA to apply: a child's biological ancestry is sufficient. *See, e.g.*, *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1344 (2014). Defendants' assertion that "blood descent" is "shorthand for the social, cultural, and communal ties a person has with a sovereign tribal entity" (Doc. 68 at 23) therefore highlights exactly why this case *should* go forward. Using a person's ethnic heritage as a "shorthand" (Doc. 68 at 23) for their "social" and "cultural" background "raise[s] equal protection concerns." *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2565 (2013), and triggers strict scrutiny. *Korematsu*, 323 U.S. at 216.

Even if Defendants were correct, however, that ICWA applies based on the "political status of the parents" only (FR.10), Plaintiffs have stated a cause of action. Defendants contend that tribal membership "requires the consent … of the individual," FR.11, but children, particularly newborns, are legally incapable of consenting. The New Guidelines require the State Defendant and state agencies to "take the steps necessary to obtain membership for [a] child in the tribe" if that child is biologically eligible for membership. 80 Fed. Reg. at 10153, B.4(d)(iii). To place children who are too young to consent in a purportedly "consensual" political group is to violate their First Amendment rights of association. *Besig v. Dolphin Boating and Swimming Club*, 683 F.2d 1271, 1275 (9th Cir.1981) ("among the rights protected by the first amendment is that to freedom of association, and its corollary, the freedom from coerced association with groups holding views with which the nonmembers disagree.") (internal citation omitted). This is sufficient to state a cause of action, and therefore the Defendant's arguments for dismissal should be rejected.

VII. Conclusion. Plaintiffs request that this Court grant the motion for leave to file the amended complaint.

RESPECTFULLY SUBMITTED this 31st day of March, 2016 by:

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CERTIFICATE OF SERVICE

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