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10 *Attorneys for GREGORY McKAY in his Official Capacity as Director of the Arizona*  
 11 *Department of Child Safety*

12 **UNITED STATES DISTRICT COURT**  
 13 **DISTRICT OF ARIZONA**

14 A.D., C.C., L.G. and C.R., by CAROL  
 15 COUGHLIN CARTER and DR. RONALD  
 16 FEDERICI, their next friends; et al.,

17 Plaintiffs,

18 v.

19 KEVIN WASHBURN, in his official capacity as  
 20 Assistant Secretary of BUREAU OF INDIAN  
 21 AFFAIRS; et al.,

22 Defendants.

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

**STATE DEFENDANT’S MOTION  
 TO DISMISS PLAINTIFFS’  
 FIRST AMENDED CIVIL  
 RIGHTS COMPLAINT FOR  
 DECLARATORY, INJUNCTIVE,  
 AND OTHER RELIEF [DOC. 173]**

(Honorable Neil V. Wake)

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1 Pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, State  
2 Defendant GREGORY MCKAY, in his official capacity as the Director of the Arizona  
3 Department of Child Services (“State Defendant”), respectfully requests that Plaintiffs’  
4 *First Amended Civil Rights Class Action Complaint for Declaratory, Injunctive, and*  
5 *Other Relief* [Doc. 173 or “FAC”], be dismissed with prejudice.

6 I

7 **BRIEF INTRODUCTION**

8 The Named Plaintiffs, one of which is not eligible for tribal membership, ask this  
9 Court to take the extraordinary step of entering an injunction to prevent compliance with  
10 a federal law, the Indian Child Welfare Act of 1978 (“ICWA”), which has been binding  
11 legal authority for almost forty years. Among other frailties, their entire FAC is based  
12 on a fatal premise that ICWA is racially discriminatory. *See, e.g.,* FAC, ¶¶ 1, 2 and 3.  
13 Plaintiffs strain, without legal authority or factual support, to equate their claims to  
14 historic racial-discrimination cases such as *Plessy v. Ferguson*, 163 U.S. 537 (1896) and  
15 *Brown v. Board of Educ.*, 347 U.S. 483 (1954). *Id.* But, the entire tenet upon which  
16 Plaintiffs’ FAC is based has been directly repudiated by roughly 40 years of United  
17 States Supreme Court precedent. Regardless of how loudly and frequently Plaintiffs  
18 scream race, *this is not a racial discrimination case.*

19 Further, Plaintiffs, in contravention of the *Younger* abstention doctrine, seek  
20 broad and sweeping intrusion on Arizona juvenile courts despite their fatal inability to  
21 establish constitutional standing, ripeness or harm. Despite the lack of harm, Plaintiffs  
22 ask this Court to invalidate a federal statute that was lawfully enacted to remediate  
23 generations of forced assimilation that weakened or severed Indian children’s ties to their  
24 tribes. The State Defendant asks this Court to decline Plaintiffs’ invitation to insert itself  
25 into the well-established system of state jurisprudence that protects and serves Arizona’s  
26 children and families, including those that fall under the auspices of ICWA.

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1 As shown below, Plaintiffs have failed to articulate a legally cognizable claim  
2 against State Defendant and all claims against State Defendant should be dismissed with  
3 prejudice.

4 **II**

5 **RELEVANT PROCEDURAL HISTORY**

6 This matter began with the filing of a *Civil Rights Class Action Complaint for*  
7 *Declaratory and Injunctive Relief* on July 6, 2015 [Doc. 1]. The Plaintiffs were two  
8 children, Baby Girl A.D. and Baby Boy C., by and through their putative Next Friend,  
9 Carol Coghlan Carter, and the children’s foster parents, S.H. and J.H., and M.C. and  
10 K.C. In response thereto, the Federal Defendants filed a Motion to Dismiss and  
11 Memorandum of Points and Authorities on October 29, 2015 [Doc. 68] (“Federal  
12 Defendants’ MTD”) and the State Defendant filed its *Motion to Abstain and Dismiss*  
13 *Pursuant to Fed.R.Civ.P. 12(b)(1), (6)* on October 29, 2015 [Doc. 70] (“State  
14 Defendant’s MTD”). The Hearing on both Motions to Dismiss was held before this  
15 Court on December 18, 2015 [Doc. 119].

16 While the Court was deliberating the Motions to Dismiss, the parties became  
17 aware that Baby Boy C. had been adopted by Plaintiffs M.C. and K.C. and that the State  
18 Court had denied the Gila River Indian Community’s Motion to Transfer Baby Girl  
19 A.D.’s case to tribal court. [See Doc. 145.] The Court Ordered Plaintiffs to file a status  
20 report. *Id.* On February 29, 2016, Plaintiffs filed the Status Report with the Court  
21 indicating that they intended to file an amended complaint with additional Plaintiffs  
22 [Doc. 149].

23 On March 2, 2016, Plaintiffs filed a *Motion for Leave to File First Amended*  
24 *Complaint* [Doc 150]. On March 21, 2016, the Federal Defendants and State Defendant  
25 each file an *Opposition to Plaintiffs’ Motion for Leave to File First Amended Complaint*  
26 [Docs. 160 and 162]. Plaintiffs filed their *Reply* thereto on March 31, 2016 [Doc. 169].  
27 On April 4, 2016, this Court issued an Order granting Plaintiffs’ *Motion for Leave to File*  
28 *First Amended Complaint* and denying, as moot, the Motions to Abstain and Dismiss

1 filed by the State Defendant and Federal Defendants [Doc. 172]. On April 5, 2016,  
2 Plaintiffs filed their FAC [Doc. 173].

3 **III**

4 **STANDARD OF REVIEW**

5 **A. Rule 12(b)(1)**

6 Although a defendant is usually the moving party on a Rule 12(b)(1) motion, the  
7 plaintiff is the party who invoked the court's jurisdiction. Accordingly, the plaintiff  
8 bears the burden of establishing federal subject matter jurisdiction. In effect, the Court  
9 presumes lack of jurisdiction until plaintiff proves otherwise. *Kokkonen v. Guardian*  
10 *Life Ins. Co. of America*, 511 U.S. 375, 376-378 (1994); *In re Wilshire Courtyard*, 729  
11 F.3d 1279, 1284 (9<sup>th</sup> Cir. 2013). "[T]he party asserting subject matter jurisdiction has  
12 the burden of proving its existence." *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9<sup>th</sup> Cir.  
13 2015).

14 A Rule 12(b)(1) motion may be made when, as here, the complaint fails to  
15 establish grounds for federal subject matter jurisdiction as required by Rule 8(a)(1).  
16 *Warren v. Fox Family Worldwide, Inc.* 328 F.3d 1136, 1139 (9<sup>th</sup> Cir. 2003). The court  
17 need not accept as true legal conclusions couched as factual allegations or inferences  
18 unsupported by the facts set out in the complaint. *Lacano Inves., LLC v. Balash*, 765  
19 F.3d 1068, 1071-1072(9<sup>th</sup> Cir. 2014) [legal conclusions disregarded even if case has  
20 factual allegations].

21 **B. Rule 12(b)(6)**

22 A Rule 12(b)(6) motion is similar to the common law general demurrer, i.e., it  
23 tests the legal sufficiency of the claims in the complaint. *Strom v. United States*, 641  
24 F.3d 1051, 1067 (9<sup>th</sup> Cir. 2011). In reviewing a motion to dismiss for failure to state a  
25 claim under Rule 12(b)(6), this Court must dismiss the complaint if "it appears beyond a  
26 reasonable doubt that plaintiff cannot prove a set of facts in support of his claim which  
27 would entitle him to relief." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9<sup>th</sup>  
28 Cir. 1998). Dismissal may also "be based on the lack of a cognizable legal theory or the

1 absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v.*  
 2 *Pacifica Police Dept.*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990).

3 Although the “allegations of material fact in the complaint are taken as true and  
 4 construed in the light most favorable to the nonmoving party,” this Court “is *not*  
 5 *required* to accept *legal conclusions* cast in the *form of factual allegations* if those  
 6 conclusions cannot reasonably be drawn from the facts alleged.” *Clegg v. Cult*  
 7 *Awareness Network*, 18 F.3d 752, 754-55 (9<sup>th</sup> Cir. 1994) (italics added). Additionally,  
 8 motions to dismiss may be granted where they involve “questions of law rather than  
 9 fact.” *United States v. Nukida* 8 F.3d 665, 669 (9<sup>th</sup> Cir. 1993).

#### 10 IV

### 11 THE STATUTORY AND REGULATORY BACKGROUND 12 OF ICWA AND BIA GUIDELINES

13 Plaintiffs challenge the constitutionality of ICWA and the non-binding Guidelines  
 14 issued by the Bureau of Indian Affairs (“BIA”). *See, e.g.*, FAC ¶ 5. Therefore, the  
 15 history, purpose, applicability, and enforcement of ICWA and the BIA Guidelines are  
 16 relevant to the determination of this Motion.

17 In State Defendant’s *Motion to Abstain and Dismiss Pursuant to Fed. R. Civ. P.*  
 18 *12(b)(1), (6)* [Doc. 70] (“State Defendant’s MTD”) and the Federal Defendants’ *Motion*  
 19 *to Dismiss and Memorandum of Points and Authorities* [Doc. 68] (“Federal Defendants’  
 20 MTD”), filed in response to Plaintiffs’ original *Civil Rights Class Action Complaint for*  
 21 *Declaratory and Injunctive Relief* [Doc. 1] (“Original Complaint”), the history, purpose,  
 22 applicability, and enforcement of ICWA and the BIA Guidelines were explained in  
 23 detail. Instead of repeating that discussion, the State Defendant hereby incorporates by  
 24 reference the following portions of State Defendant’s MTD, pp. 4:6-9:6, and Federal  
 25 Defendants’ MTD, pp. 2:22-5:18.<sup>1</sup>

26 \_\_\_\_\_  
 27 <sup>1</sup> Throughout this Motion, the State Defendant will, in accordance with this Court’s  
 28 directive, reference and incorporate portions of previously filed motions which support  
 the particular issue being addressed. In an Order dated April 4, 2016, this Court  
 instructed that if the “Defendants choose to file motions to dismiss the First Amended

## V

**LAW AND ARGUMENT****A. THIS COURT SHOULD ABSTAIN FROM AND DISMISS THE FAC**

As more fully detailed in previously filed Motions<sup>2</sup> this proposed class action impermissibly interferes with the on-going state-court proceedings and functions, contrary to the basic concepts of federalism and separation of powers. *Moore v. Sims*, 442 U.S. 415, 427 (1979) [“The breadth of a challenge to a complex state statutory scheme has traditionally militated in *favor* of abstention, not *against* it.”] (Emphasis in original). The U.S. Supreme Court has articulated “a strong policy against intervention in state court processes in the absence of great and immediate irreparable injury to the federal plaintiff.” *Moore*, 442 U.S. at 423.

This policy hinges on “the constraints of equity jurisdiction and the concern for comity in our federal system,” in addition to the fundamental principle that federal courts “avoid unwarranted determination of federal constitutional questions” if and when a state court can decide a matter on grounds short of constitutional dimension. *Gilbertson v. Albright*, 381 F.3d 965, 970, 973 (9th Cir. 2004) (en banc); *see also Moore*, 442 U.S. at 423 (explaining the “basic concern” as a “threat to our federal system posed by displacement of state courts by those of the National Government.”).

Accordingly, this Court must abstain from and dismiss the FAC under the doctrine of abstention under *Younger v. Harris*, 40 U.S. 37 (1971), if properly raised, considered, and granted upon a Rule 12(b)(1) motion to dismiss. *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1081 (9<sup>th</sup> Cir. 1987) [dismissal is required when court abstains].

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Complaint they may, and should, incorporate herein by reference those portions of their previous motions that remain applicable.” [Doc. 172, pp. 2:27-3:2.]

<sup>2</sup> See, State Defendant’s MTD [Doc. 70], Section I, pp. 10:10-16:23, Federal Defendants’ MTD [Doc. 68], Section III, pp. 18:6-20:6, and State Defendant’s *Reply in Support of Motion to Abstain and Dismiss* [Doc. 101] (“State Defendant’s Reply”), Section I(C).



1 As demonstrated by the recent denial of the Gila River Indian Community's  
 2 motion to transfer jurisdiction of Baby Girl A.D.'s case to its tribal court,<sup>3</sup> the State  
 3 Court is a more than adequate venue for Plaintiffs to raise their constitutional claims and  
 4 the Plaintiffs cannot prove otherwise.<sup>4</sup> A state court forum is "inadequate only when the  
 5 state procedural law *bars* presentation of the federal claims." *Hirsch v. Justices of*  
 6 *Supreme Court of State of California*, 67 F.3d 708, 713 (9<sup>th</sup> Cir. 1995) (italics in original)  
 7 [affirming lower court decision to abstain on *Younger* grounds]. Accordingly, this Court  
 8 should dismiss the FAC with prejudice under the *Younger* abstention doctrine.

9 **B. ALL PLAINTIFFS LACK STANDING**

10 Plaintiffs must demonstrate that they have standing before this Court may  
 11 exercise jurisdiction over their claims. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560  
 12 (1992). The facts to show standing must be clearly apparent on the face of the  
 13 complaint. *Baker v. United States*, 722 F.2d 517, 518 (9<sup>th</sup> Cir. 1983). To carry this  
 14 burden, Plaintiffs must (1) show an "injury in fact" that is "concrete and particularized"  
 15 and "actual or imminent, not 'conjectural' or 'hypothetical'"; (2) "there must be a causal  
 16 connection between the injury and the conduct complained of"; and (3) "it must be  
 17 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a  
 18 favorable decision." *Lujan*, 504 U.S. at 560-561. When "a plaintiff's asserted injury  
 19 arises from the government's allegedly unlawful regulation . . . of *someone else*," the  
 20 plaintiff must show that the actions of the regulated third party will cause and permit  
 21 redressability of injury. *Lujan*, 504 U.S. at 562.

22 1. **Plaintiffs Baby Girl A.D., Baby Boy C.C., their Putative Next Friend,**  
 23 **Carol Coghlan Carter, and the Caregivers, S.H., J.H., M.C., and K.C.**  
 24 **All Lack Standing.**

25 Plaintiffs, Baby Girl A.D., and Baby Boy C.C. (previously known as Baby Boy  
 26 C.), their putative Next Friend, Carol Coghlan Carter, and the children's caregivers, S.H.,

27 <sup>3</sup> See FAC ¶ 23.

28 <sup>4</sup> To avoid abstention, the Plaintiffs must prove that state juvenile courts do not afford  
 an adequate opportunity to raise federal constitutional claims. *Penzoil Co. v. Texaco,*  
*Inc.*, 481 U.S. 1, 14 (1987).

1 J.H., M.C., and K.C., were Plaintiffs in the Original Complaint. As detailed in  
2 previously filed Motions, all of these Plaintiffs lacked standing at the time the Original  
3 Complaint was filed as far back as July 6, 2015.<sup>5</sup> Their claims were not ripe then  
4 because, among other reasons outlined in previously filed Motions, the harm complained  
5 of was speculative, hypothetical, and not certain to ever occur.

6 The lack of ripeness is especially shown by the State Juvenile Court's denial to  
7 transfer Baby Girl A.D.'s case to the Gila River Indian Community tribal court, based  
8 upon a showing of good cause to deviate from the ICWA placement preferences, making  
9 it likely that an adoption of Baby Girl A.D., by Plaintiffs S.H. and J.H., will occur  
10 shortly. See FAC, ¶ 23, p. 6-7.<sup>6</sup> Also, Baby Boy C.C. has already been adopted by  
11 Plaintiffs M.C. and K.C., despite ICWA. See FAC, ¶ 10, pp. 3:27-4:1. Accordingly, no  
12 harm has been suffered by these Plaintiffs.

13 Not only do the foster parents lack standing based on lack of harm, but they also  
14 lack a constitutionally protected interest in maintaining the foster or adoptive family,  
15 particularly when relatives or other family members are involved. Instead, "the source  
16 of the foster family relationship is contractual in nature and is carefully circumscribed by  
17 the state in the foster care agreement." *Gibson v. Merced Cnty. Dept. of Human Res.*,  
18 799 F.2d 582, 586 (9th Cir. 1986) (citing *Smith v. Org. of Foster Families*, 431 U.S. 816,  
19 845, 97 S. Ct. 2094, 2110 (1977)). Thus, "it is appropriate to ascertain from state law the  
20 expectations and entitlements of the parties." *Id.*

21 The holding in *Smith* recognizes that the foster-family relationship "has its source  
22 in state law and contractual arrangements" and thus is entitled to only "the most limited  
23 constitutional 'liberty'" interest. *Smith*, 431 U.S. at 845-846, 97 S. Ct. at 2110.  
24 Therefore, "[w]hatever liberty interest might otherwise exist in the foster family as an  
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26 <sup>5</sup> See State Defendant's MTD [Doc. 70] at Sections IV(1) and (2), pp. 24:5-26:2; See  
27 also Federal Defendants' MTD [Doc. 68] at Section I, pp. 6:7- 16:17; See also State  
28 Defendant's Reply [Doc. 101], Section I(A)(1)-(9).

<sup>6</sup> Upon information and belief, that matter is currently on appeal.

1 institution . . . must be substantially attenuated where the proposed removal from the  
2 foster family is to return the child to his natural parents” in light of the “constitutionally  
3 recognized liberty interest that derives from blood relationship, state-law sanction, and  
4 basic human right.” *Id.* at 846-74, 97 S. Ct. at 2111. Placing the child with extended  
5 relatives, including tribal members who may share a blood relationship with the child,  
6 thus comports with basic notions of due process for fundamentally protected family  
7 relationships.

8 Here, the State law reflects such a preference for maintaining family connections,  
9 a preference also present in ICWA. For example, A.R.S. § 8-103(B)(3) evinces a  
10 preference for “placement with a grandparent or another member of the child’s extended  
11 family including a person or foster parent who has a significant relationship with the  
12 child.”

13 Therefore, these Plaintiffs do not have legal standing to pursue this matter.

14 **2. The Fatal Defects to Standing Cannot Be Remedied.**

15 The U.S. Supreme Court and the Ninth Circuit have made clear that when, as  
16 here, the named plaintiff(s) in a class action lack(s) standing, the class action cannot go  
17 forward with a substitute representative because the court never had jurisdiction. *See,*  
18 *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022-23 (9th Cir. 2003)  
19 (citing *O’Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)).

20 As this Court is aware, Baby Boy C.C.’s adoption by M.C. and K.C. has been  
21 approved and the state juvenile court has rejected a motion to transfer to tribal court in  
22 Baby Girl A.D.’s case, indicating her adoption by S.H. and J.H. seems likely to occur  
23 soon. Accordingly, Plaintiffs’ attorneys are left without a proper class representative.  
24 Because standing is a jurisdictional issue, which cannot be remedied by amendment, this  
25 case cannot proceed even if Plaintiffs’ attorneys were to finally identify a proper class  
26 representative with genuinely ripe claims.

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1           **3. Newly Added Plaintiffs Baby Girl L.G., Baby Boy C.R., the Caregivers**  
 2           **K.R. and P.R., and Newly Added Putative Next Friend, Dr. Ronald**  
 3           **Federici All Lack Standing.**

4           As shown in State Defendant’s *Opposition to Plaintiffs’ Motion for Leave to file a*  
 5           *First Amended Complaint* [Doc. 162], none of the newly added Plaintiffs, including the  
 6           newly added Next Friend, Dr. Ronald Federici, have standing and their claims suffer the  
 7           same fatal flaws as the original Plaintiffs. Like the original Plaintiffs, the claims of  
 8           Plaintiffs K.R., P.R., L.G., and C.R. are based on speculation and conjecture about what  
 9           *might* happen in the future under the auspices of ICWA. State Defendant incorporates by  
 10          reference the relevant portions of Doc. 162.<sup>7</sup> Accordingly, these new Plaintiffs do not  
 11          have standing.

12          That is especially true of new Plaintiff, Baby Girl L.G., who, by Plaintiffs own  
 13          admission, is “*not eligible* for membership in the Pascua Yaqui Tribe of Arizona,” and  
 14          “has more than 50% *non-Indian* blood.” FAC, ¶ 11 (*italics added*). Therefore, Baby Girl  
 15          L.G. is not eligible for the protections afforded by ICWA which requires an “Indian  
 16          child” to, among other things, be “eligible for membership in an Indian tribe ...” 25  
 17          U.S.C. § 1903(4).<sup>8</sup> Under no circumstances can Baby Girl L.G. have standing to  
 18          challenge ICWA and she should be dismissed from this lawsuit.

19          **C. PLAINTIFFS’ CLAIMS ARE NOT RIPE**

20          Plaintiffs’ FAC seeks severe, intrusive, and extraordinary relief despite the fact  
 21          that none of them have been legally injured by ICWA. Accordingly, their claims are not  
 22          ripe for review.

23          The “ripeness doctrine” protects courts from premature adjudication likely to  
 24          “entangle[e] them[] in abstract disagreements. *Abbott Labs v. Gardner*, 387 U.S. 136,  
 25          148 (1967). “The ripeness doctrine is ‘drawn both from Article III imitations on judicial  
 26          power and from prudential reasons for refusing to exercise jurisdiction.’” *Nat’l Park*

27          <sup>7</sup> See State Defendant’s *Opposition to Plaintiffs’ Motion for Leave to File First Amended*  
 28          *Complaint* [Doc. 162] at Sections II(A)(2) and (3), pp. 4:17-7:21.

28          <sup>8</sup> See Federal Defendants’ *Opposition to Plaintiffs’ Motion for Leave to File First*  
 28          *Amended Complaint* [Doc. 160], Section II.

1 *Hospitality Ass’n v. DOI*, 538 U.S. 803, 808 (2003) (quoting *Reno v. Catholic Soc.*  
 2 *Servs., Inc.*, 509 U.S. 43, 57, n. 18 (1993)). It is a “justiciability doctrine designed ‘to  
 3 prevent the courts, through avoidance of premature adjudication, from entangling  
 4 themselves in abstract disagreements over administrative policies and also to protect the  
 5 agencies from judicial interference until an administrative decision has been formalized  
 6 and its effects felt in a concrete way by the challenging parties.’” *Nat’l Park Hospitality*  
 7 *Ass’n*, 538 U.S. at 807-08 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49  
 8 (1967)).

9 As a result, “[e]ven where jurisdiction is present in the Article III sense, courts are  
 10 obliged to dismiss a case when considerations of prudential ripeness are not satisfied.”  
 11 *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1211  
 12 (9th Cir. 2006) (citing *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972)  
 13 (“Problems of prematurity and abstractness may well present ‘insuperable obstacles’ to  
 14 the exercise of the Court’s jurisdiction, even though that jurisdiction is technically  
 15 present.”)).

16 For the same reasons that the claims made in the Original Complaint are not ripe  
 17 for review, the claims made in this FAC are also unripe.<sup>9</sup>

18 **D. THE FAC FAILS TO STATE A COGNIZABLE CLAIM AGAINST**  
 19 **STATE DEFENDANT**

20 **1. Counts One, Two, Four, Five, and Six Should Be Dismissed if**  
 21 **Addressed to State Defendant.**

22 Plaintiffs assert seven causes of action against the three named defendants [Doc.  
 23 173, ¶¶ 110-150]. Plaintiffs do not, however, identify which Count is alleged against  
 24 which defendant, nor which class representative(s) are bringing which count(s).  
 25 Accordingly, State Defendant, and this Court, are both required to guess as to this  
 26

27 \_\_\_\_\_  
 28 <sup>9</sup> See State Defendant’s MTD [Doc. 70] at Sections IV, pp. 26:3-29:5; See also Federal  
 Defendants’ MTD [Doc. 68] at Section II, pp. 16:18-18:5; See also, State Defendant’s  
 Reply [Doc. 101], Section I(B).

1 essential information, making a response difficult. Regardless, it is clear that Counts 1,  
2 2, 4, 5, and 6 cannot be leveled against State Defendant.

3 **a). Counts 1 and 2 Should Be Dismissed as Against State Defendant**  
4 **Because the Fifth Amendment Does Not Apply to the State**  
5 **Action.**

6 Count 1 alleges a “Violation of the Equal Protection Guarantee of the *Fifth*  
7 *Amendment.*” (Italics added.) FAC, ¶¶ 110-117. Count 2 alleges a “Violation of the  
8 Due Process Guarantee of the *Fifth Amendment.*” (Italics added.) FAC, ¶¶ 118-122.

9 The Fifth Amendment does not apply to state action. *See, Lee v. City of Los*  
10 *Angeles*, 250 F.3d 668, 687 (9th Cir. 2001) [“The Due Process clause of the Fifth  
11 Amendment and the equal protection component thereof apply only to actions of the  
12 federal government—not to those of state or local governments.”]; *See also*, e.g.,  
13 *Peoples v. Schwarzenegger*, 402 Fed. Appx. 204, 205 (9<sup>th</sup> Cir. 2010) [affirming the  
14 district court’s dismissal of plaintiff’s Fifth Amendment claim “because the Fifth  
15 Amendment’s Due Process and Equal Protection Clauses apply only to the federal  
16 government, not to state actors]; *Bingue v. Prunchak*, 512 F.3d 1169, 1174 (9th Cir.  
17 2008) [“Fifth Amendment’s due process clause only applies to the federal  
18 government.”].

19 Accordingly, Counts 1 and 2 do not apply to State Defendant and they should be  
20 dismissed with prejudice as against State Defendant for failure to state a claim.

21 **b). Count 4 Should Be Dismissed as Against State Defendant**  
22 **Because It Challenges Federal Power.**

23 Count 4 alleges that “[ICWA] Exceeds the *Federal Government’s Power* under  
24 the Indian Commerce Clause and the Tenth Amendment.” (Italics added.) FAC, ¶¶ 131-  
25 135. Count 4 is founded on the Tenth Amendment<sup>10</sup> which is part of the Bill of Rights.

26 \_\_\_\_\_  
27 <sup>10</sup> The full text of the Tenth Amendment reads as follows: “The powers not delegated to  
28 the United State by the Constitution, nor prohibited by it to the states, are reserved to the  
states respectively, or to the people.”

1 It expresses the principle of federalism and makes explicit the idea that the federal  
2 government is limited to the powers granted in the Constitution. *See, United States v.*  
3 *Darby Lumber*, 312 U.S. 100, 124 (1941).

4 Here, the allegations in Count 4 are clearly directed at the Federal Defendants, not  
5 the State Defendant. The FAC alleges that “Congress” has exceeded its powers,  
6 commandeered state resources, and that ICWA displaces inherent state jurisdiction. *See,*  
7 FAC, ¶¶ 132, 133, and 135. The FAC does not, and cannot, allege that the State  
8 Defendant played a role in the alleged over-reach by Congress. Accordingly, this Count  
9 should be dismissed with prejudice as against State Defendant.

10 c). **Count 5 Should Be Dismissed as Against State Defendant**  
11 **Because It Challenges Federal Power.**

12 Count 5 alleges a “Violation of Associational Freedoms Under the First  
13 Amendment.” FAC, ¶¶ 136-141.

14 Here, the allegations in the FAC do not implicate any state infringement on the  
15 First Amendment or that the State Defendant is compelling an association with a tribe.<sup>11</sup>  
16 Instead, the FAC merely alleges that State Defendant follows ICWA and a newly  
17 proposed Federal Regulation, FAC, ¶ 140, which is not binding. *See Oglala Sioux Tribe*  
18 *v. Van Hunnik*, No. CIV. 13-5020-JLV, 2015 WL 1466067, at \*14 (D.S.D. Mar. 30,  
19 2015) (“The DOI Guidelines are not binding on the court but are an administrative  
20 interpretation of ICWA entitled to great weight”).

21 Further, the new Federal Regulations, even if binding, would only come into play  
22 if ICWA has been invoked. The State Defendant did not play a role in the enactment of  
23 ICWA nor the proposed Federal Regulations associated therewith. It should also be  
24 noted that there is no allegation in the FAC regarding whether the Named Plaintiff  
25 children’s association with the tribes—via their enrollment or membership therein—  
26 predated the State’s involvement through the ICWA dependency process. Consequently,  
27

28 \_\_\_\_\_  
<sup>11</sup> *See, State Defendant’s MTD* [Doc. 70], Section III, pp. 22:23-24:4.

1 they have failed to state a cognizable claim that the State Defendant is enforcing an  
2 unwanted association.

3 **d). Count 6 Should Be Dismissed as Against State Defendant**  
4 **Because It Challenges Federal Power.**

5 Count 6 attacks “Unlawful Agency Action.” FAC, ¶¶ 142-122. Specifically,  
6 Count 6 alleges that the “the BIA overstepped its authority...” FAC, ¶ 145, p. 33:5.  
7 Count 6 challenges federal agency action related to the development and establishment  
8 of the BIA Guidelines, not any action of the State Defendant. Accordingly, this Count is  
9 not alleged against State Defendant and should be dismissed with prejudice.

10 **2. Counts 3 and 7 Should be Dismissed.**

11 **a). ICWA is Not a Race-Based Statute.**

12 Count 3 alleges a “Violation of the Substantive Due Process and Equal Protection  
13 Clauses of the Fourteenth Amendment.” FAC, ¶¶ 123-130. This entire Count is  
14 premised on the allegations that State Defendant “complies with and enforces” ICWA  
15 and the “New [BIA] Guidelines” FAC, ¶¶ 124 and 125. Plaintiffs further allege that  
16 “these provisions subject[] Plaintiffs to unequal treatment under ... law based solely on  
17 the race of the child and the adults involved....” FAC, ¶ 129, pp. 29:27-30:1.

18 Count 7 seeks “Damages Under Title VI of the Civil Rights Act (42 U.S.C., §§  
19 2000d – 2000d-7.” FAC, ¶¶ 147-150. In support thereof, Plaintiffs argue that State  
20 Defendant subjects Plaintiffs to “*de jure* discrimination on the ground of the race, color  
21 or national origin.” FAC, ¶ 149.

22 Accordingly, both Counts are based on the unsupported conclusion that State  
23 Defendant’s compliance with federal law subjects Plaintiffs to racial discrimination. As  
24 shown herein, and in State Defendant’s MTD and the Federal Defendants’ MTD, the  
25 relevant portions of which are incorporated herein by reference,<sup>12</sup> Plaintiffs are wrong as  
26 a matter of law and this Court should dismiss these Counts with prejudice.

27 \_\_\_\_\_  
28 <sup>12</sup> See, State Defendant’s MTD [Doc. 70], Section II, pp. 17:1-22:22; See also, Federal  
Defendants’ MTD [Doc. 68], Section IV(A), pp. 20:7-26:12.



1           It should be stressed that the FAC does not contain any citations or references to  
2 any legal authority supporting the allegations that ICWA and/or the BIA Guidelines are  
3 race based. That is the case even though the FAC is strewn with what Plaintiffs believe  
4 is supportive legal authority for their other Counts. The lack of such citation is based on  
5 the fact that there is no such supportive legal authority.

6           In no uncertain terms, ICWA is not race based and merely applies to a limited and  
7 specific subset of children with “Indian ancestry,” that is, “any unmarried person who is  
8 under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for  
9 membership in an Indian tribe and is the biological child of a member of an Indian  
10 tribe.” 25 U.S.C. § 1903(4). Thus ICWA excludes even children who are eligible for  
11 membership in an Indian tribe—that is, a tribe recognized by the Federal government as  
12 eligible for receipt of services because of their status as Indians, 25 U.S.C. § 1903(8)—if  
13 the child’s parent is not also already a member of the tribe. This serves to limit ICWA’s  
14 applicability to only those children who can demonstrate the requisite political affiliation  
15 to a federally recognized Indian tribe.

16           The United States Supreme Court has explicitly held that federal legislation  
17 concerning Indian Tribes and tribal members is a matter of *political* association, not  
18 *race*. *Morton v. Mancari*, 417 U.S. 535, 551-555 (1974). The *Mancari* Court addressed  
19 the issue of whether exposing Indians to separate treatment was racially based and has  
20 held these laws are not racially discriminatory. Specifically, *Mancari* holds that:

21                   Literally every piece of legislation dealing with Indian tribes  
22 and reservations, and certainly all legislation dealing with the  
23 BIA, single out for special treatment a constituency of tribal  
24 Indians living on or near reservations. *If these laws, derived*  
25 *from historical relationships and explicitly designed to help*  
26 *only Indians, were deemed invidious racial discrimination,*  
27 *an entire Title of the United States Code ... would be*  
28 *effectively erased and the solemn commitment of the*  
*Government toward the Indians would be jeopardized.*  
(Citation omitted). It is in this historical context that the  
constitutional validity of the Indian preference is to be  
determined. (Italics added.)

1 *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

2 Fatal to Plaintiffs' claims is the fact that the holding of *Mancari* has been  
3 reaffirmed by the United States Supreme Court, the Ninth Circuit, and the United States  
4 District Court for the District of Arizona, multiple times. See *Washington v. Wash. State*  
5 *Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673, fn. 20 (1979); *United*  
6 *States v. Antelope*, 420 U.S. 641 (1977) [holding there is "no doubt that federal  
7 legislation with respect to Indian tribes ... is not based upon impermissible racial  
8 classifications. Quite the contrary, classifications expressly singling out Indian tribes as  
9 subjects of legislation are expressly provided for in the Constitution ..."] (Italics added);  
10 *Duro v. Reina*, 495 U.S. 676 (1990), superseded by statute as recognized in *United States*  
11 *v. Lara*, 541 U.S. 193, 197-198 (2004); *Means v. Navajo Nation*, 432 F.3d 924, 932-933  
12 (9<sup>th</sup> Cir. 2005) [holding that the Court was bound to follow Supreme Court precedent that  
13 "legislation that singles out Indians for particular and special treatment" is "not even a  
14 'racial' preference."]; *EEOC v. Peabody W. Coal Co.*, 2012 WL 5034276 \*7 (D. Ariz.  
15 Oct. 18, 2012) [granting dispositive motions to defendants and holding that legislation  
16 singling out Indians was not unconstitutional racial discrimination].

17 Plaintiffs choose to ignore this clear and vast precedent and attempt to misdirect  
18 this Court by equating ICWA with the abhorrent history of slavery. See, FAC, ¶¶ 1, 2  
19 and 3. But Plaintiffs' unsupported statements cannot wash away approximately 40 years  
20 of binding precedent. ICWA is not race based.

21 During the briefing on the Defendant's respective Motions to Dismiss to the  
22 Original Complaint, Plaintiffs repeatedly argued that a motion to dismiss should not be  
23 granted on this issue because it goes to the "merits" of the claims. That is not true  
24 because this is merely a legal issue. As noted above, motions to dismiss can be granted  
25 on pure questions of law. *U.S. v. Nukida* 8 F.3d 665, 669 (9<sup>th</sup> Cir. 1993).

26 Considering that the only Counts that can be alleged against the State Defendant,  
27 Count 3 and Count 7, are entirely premised on an erroneous legal conclusion, i.e., that

28 ///

1 ICWA is race based, this Court should dismiss Plaintiffs' FAC in its entirety and with  
2 prejudice.

3 **b). Arizona's Implementing Statutes Do Not Expand ICWA.**

4 It is unclear whether Plaintiffs allege that the Arizona law(s) implementing ICWA  
5 is unconstitutional. *See*, FAC, Count 3, ¶¶ 124 and 128 [citing three Arizona Statutes,  
6 A.R.S. §§ 8-453(A)(20), 8-105.01(B), and 8-514(C)]. To the extent that such a claim is  
7 made, it must fail as a matter of law.

8 Courts have generally refused to extend *Mancari* to instances in which an entity  
9 other than Congress legislates toward Indian tribes because only Congress possesses the  
10 requisite unique and constitutional obligations to justify such legislation. *See Tafoya v.*  
11 *City of Albuquerque*, 751 F. Supp. 1527, 1530 (D. N.M. 1990) ["The City of  
12 Albuquerque does not have comparable power to treat members of federally recognized  
13 Indian tribes . . . differently than other groups of Indians or non-Indians"].

14 Courts have also recognized that if, as here, a state merely follows a federal  
15 statute and adopts a state law regarding rights of Indian tribes or their members  
16 consistent with existing Congressional action, the state law will also satisfy equal  
17 protection as long as it has a rational basis. *See Yakima Indian Nation*, 439 U.S. at 501–  
18 02; *New York Ass'n of Convenience Stores v. Urbach*, 92 N.E.2d 204, 213, 699 N.E.2d  
19 904, 908 (N.Y. App. 1998) [citing *Yakima* to support that states "may adopt laws and  
20 policies to reflect or effectuate Federal laws designed 'to readjust the allocation of  
21 jurisdiction over Indians' without opening themselves to the charge that they have  
22 engaged in race-based discrimination"].

23 Here, the three challenged Arizona statutes do not expand ICWA and are merely  
24 consistent with Congress's action. *See* A.R.S. § 8-105.01(B) [anti-discrimination statute  
25 does not impact the duties set forth in ICWA]; A.R.S. § 8-453(A)(20) [the Director shall  
26 "[e]nsure the department's compliance with the Indian child welfare act"]; A.R.S. § 8-  
27 514(C) [setting an order of placement preferences consistent with ICWA]. Plaintiffs  
28 have not pleaded any manner in which those statutes expand on Congress's actions via

1 ICWA. Accordingly, the FAC does not state a cognizable legal claim that the Arizona  
2 implementing statutes are unconstitutional.

3 **VI**

4 **CONCLUSION**

5 For the reasons shown above, as well as in the previously filed Motions as cited  
6 herein, this Court should abstain and dismiss Plaintiffs' First Amended Complaint in its  
7 entirety and with prejudice as against Defendant, Gregory McKay, in his Official  
8 Capacity as Director of the Arizona Department of Child Safety.

9 **RESPECTFULLY SUBMITTED** this 22<sup>nd</sup> day of April, 2016.

10 **MARK BRNOVICH**  
11 **Arizona Attorney General**

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 22, 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 an Electronic Filing to the following CM/ECF registrants:

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