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

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

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

Plaintiffs,

v.

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

Defendants.

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

STATE DEFENDANT'S REPLY TO PLAINTIFFS' COMBINED RESPONSE TO STATE AND FEDERAL DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' FIRST AMENDED CIVIL RIGHTS COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF

(Honorable Neil V. Wake)

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Pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, State Defendant GREGORY MCKAY, in his official capacity as the Director of the Arizona Department of Child Services ("State Defendant"), respectfully submits the following Reply to Plaintiffs' *Combined Response to State and Federal Defendants' Motions to Dismiss* ("Combined Response").

I

BRIEF INTRODUCTION

Plaintiffs' entire Combined Response is based on the unsupported position that the Indian Child Welfare Act of 1978 ("ICWA") is a race-based law. It is not, and as detailed below, and in Docs. 68, 70, 96, 101, 178, and 179, this assertion is directly contradicted by binding Supreme Court and Ninth Circuit Court precedent. Noticeably absent is the citation to any legal authority which holds the ICWA to be a race-based law. Accordingly, Counts 3 and 7, which are based on claims of injury related to unequal treatment and civil rights violations based on race, must be dismissed.

Further, Counts 1 and 2 allege violations of the Fifth Amendment which does not apply to state action. Accordingly those counts must be dismissed as against State Defendant. Lastly, the remaining counts 4, 5, and 6, challenge federal power and must be dismissed as against State Defendant. That is especially true considering that Plaintiffs acknowledge that the State Defendant is compelled to follow the ICWA. FAC, ¶ 133 p. 31:2-3 ("ICWA impermissibly commandeers state courts and state agencies [such as State Defendant] to apply, enforce, and implement … federal law").

In short, Plaintiffs have failed to articulate a single legally cognizable claim against State Defendant; therefore, the entire FAC, as against State Defendant, should be dismissed with prejudice.

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II

LAW AND ARGUMENT

A. ALL PLAINTIFFS LACK STANDING

As has been shown by Defendants in previous briefing, Plaintiffs have failed to establish constitutional standing to pursue this matter.[1] Plaintiffs have yet to suffer any harm under ICWA, their claims are not ripe, the foster parents do not have a protected liberty interest, and Plaintiffs' alleged injuries are speculative at best.

Plaintiffs' entire argument is predicated on the alleged injury of "unequal treatment." Combined Response, p. 1:18-19 ("The injury [the Plaintiffs] assert is *unequal treatment*." (italics in original)). The alleged "unequal treatment" is argued to be "Race-Based Differential Treatment" of the ICWA based on Indian heritage. *See, e.g.*, Combined Response, pp. 2:1-2, 3:2-3, 4:26-27, 5:27, 7:1-2, 7:14-16, 8:19-20, and Section III.

Plaintiffs spend the majority of the Combined Response arguing as if ICWA has been found to be a raced-based law and that they have been treated differently because of their race. Absent, however, is any legal authority supporting Plaintiffs' argument. Plaintiffs merely state it, skip citation to legal support, and then argue as if it is legally established. But, as is shown in the Motions to Dismiss (which cite other briefing), numerous legal precedent holds that the ICWA is not a race-based statute. Accordingly, Plaintiffs have not suffered constitutionally unequal treatment and, therefore, lack standing.

The lack of standing is fatal to Plaintiffs' FAC. The Ninth Circuit and the U.S. Supreme Court have clearly held that when, as here, the named plaintiff(s) in a class action lack(s) standing, the class action cannot go forward with a substitute representative because the court never had jurisdiction. *See, Lierboe v. State Farm Mut.*

[1] *See, e.g.*, Doc. 68 at pp. 6-16, Doc. 70 at pp. 24-27, Doc. 96 at pp. 1-6, Doc. 101 at pp. 3-9, Doc. 178 at pp. 3-14, and Doc. 179 at pp. 6-9.

Auto. Ins. Co., 350 F.3d 1018, 1022-23 (9th Cir. 2003) (citing *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)).

B. THE FAC FAILS TO STATE A CLAIM AGAINST STATE DEFENDANT

1. Counts 1 and 2 Should be Dismissed as Against State Defendant Because the Fifth Amendment Does Not Apply to State Action

Counts 1 and 2 are both brought under the Equal Protection and Due Process clauses of the Fifth Amendment to the U.S. Constitution. [Doc. 173, pp. 26-29, ¶¶ 110-122.]

As shown in State Defendant's Motion to Dismiss FAC, [Doc. 179, Section D(1)(a)], the claims brought by Plaintiffs under the Fifth Amendment do not apply to states and, therefore, cannot support legally cognizable claims against State Defendant. As the Ninth Circuit has held "[t]he Due Process clause of the Fifth Amendment and the Equal Protection component thereof apply only to actions of the federal government — not to those of state or local governments." *See, e.g., Peoples v. Schwarzenegger*, 402 Fed. Appx. 204, 205 (9th Cir. 2010); *see also Bingue v. Prunchak*, 512 F.3d 1169, 1174 (9th Cir. 2008); *Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir. 2001).

In the Combined Response, Plaintiffs do not address the legal authority cited by State Defendant establishing the inappropriateness of a Fifth Amendment claim against a state. Instead, Plaintiffs appear to argue that there is no distinction between the Fifth and Fourteenth Amendments. *See* Combined Response, p. 18:10-12. Based on Plaintiffs co-mingling of these Amendments, Plaintiffs argue that "State Defendants [sic] are proper defendants [sic] in [this] case . . . ." Combined Response, p. 18:3-4.

As purported support for this claim, Plaintiffs cite the following from *McDonald v. Chicago*, 561 U.S. 742, 765 (2010):

> [the] incorporated Bill of Rights protections 'are all to be enforced against the States under *the Fourteenth Amendment* according to the same standards that protect those personal rights against federal encroachment'. (citation omitted)

S*ee* Combined Response, p. 18:12-15. (italics added).

But, *McDonald* does not support Plaintiffs' assertion that there is no distinction between the Fifth and Fourteenth Amendments. In fact, *McDonald* establishes that the proper amendment under which to bring a claim against a state defendant is the Fourteenth Amendment, not the Fifth Amendment. Specifically, *McDonald* holds that Bill of Rights claims are "enforced against the States under the *Fourteenth Amendment* . . . ." (italics added). *McDonald*, 561 U.S. at p. 765 (citations omitted); *see also, Peoples v. Schwarzenegger*, 402 Fed. Appx. 204, 205 (9th Cir. 2010) ("the Fifth Amendment and the Equal Protection component thereof apply only to actions of the federal government—not to those of [the] state").

Accordingly, Counts 1 and 2 must be dismissed with prejudice as against State Defendant.

2. Counts 4, 5, and 6 Should be Dismissed as Against State Defendant Because They Challenge Federal Power

a. Counts 4 and 6

Count 4 alleges that "ICWA exceeds the federal government's power . . . ." FAC, ¶ 132, p. 30:13. Similarly, Count 6, entitled "Unlawful *Agency* Action," (italics added), challenges federal power. Specifically, Plaintiffs' allege that the "BIA overstepped its authority . . . in the New Guidelines . . . ." FAC, ¶145, p. 32:25. There are no allegations in Count 4 or Count 6 alleging any conduct on behalf of the State Defendant.

Where no allegations have been made in a complaint against a named defendant, the complaint fails to comply with Federal Rule of Civil Procedure 8(a)(2), which requires Plaintiffs to provide "a short and plain statement of the claim showing that the pleader is entitled to relief." In short, Plaintiffs do not plead allegations upon which to support Counts 4 and 6 as against State Defendant.

Further, Plaintiffs do not address State Defendant's request to have Counts 4 and 6 dismissed. Instead, Plaintiffs merely argue that the State Defendant "is working in concert with the Federal Defendants to violate the Constitution." Combined Response, p. 18:18-19. But, Plaintiffs admit that federal law controls. Specifically, Plaintiffs plead

that "ICWA impermissibly commandeers state courts and state agencies [such as State Defendant] to apply, enforce, and implement . . . federal law." FAC, ¶ 133 p. 31:2-3.

Accordingly, Counts 4 and 6 should be dismissed with prejudice as against State Defendant.

b. Count 5

Count 5 alleges a "Violation of Associational Freedoms Under the First Amendment." FAC, ¶¶ 136-141. Plaintiffs do not address State Defendant's motion to dismiss this count as against State Defendant. The entirety of Plaintiffs' argument is addressed to the Federal Defendant. *See* Combined Response, Section IV, pp. 14:4-17:4. That is most probably based on the fact that Count 5 is directed to the Federal Defendant. *See* Combined Response, p. 16:12 ("ICWA . . . compels association."). The State Defendant does not compel association and the allegations in the FAC do not implicate any state infringement on the First Amendment.

Accordingly, this Count should be dismissed with prejudice as against State Defendant.

3. Counts 3 and 7 Should be Dismissed with Prejudice Because the ICWA is Not a Race-Based Statute

Count 3 alleges a "Violation of the Substantive Due Process and Equal Protection Clauses of the Fourteenth Amendment." FAC, ¶¶ 123-130. Count 7 seeks "Damages Under Title VI of the Civil Rights Act (42 U.S.C., §§ 2000d – 2000d-7)." FAC, ¶¶ 147-150. Both Counts are based on the unsupported conclusion that State Defendant's compliance with federal laws subjects the Plaintiffs to racial discrimination.

Plaintiffs provide no legal support for their argument that ICWA is a race-based statute. Instead, Plaintiffs merely argue that race-based laws are violative of the Constitution. Failing to find legal support for this position, Plaintiffs cite to inapposite holdings, it is assumed, in an attempt to distract this Court from the lack of any legal support.

Plaintiffs mislead this Court by stating that "ICWA's 'explicit tie to race,' . . . cannot be overcome . . . ." Combined Response, p. 11:4-5 (citing *Rice v. Cayetano*, 528 U.S. 495 (2000)). But, *Rice* does not concern ICWA, let alone hold that it is tied to race. Instead *Rice* concerns a Hawaiian law limiting the right to vote only to those persons who are considered Native Hawaiians. Therefore, the issues and holding in *Rice* are not relevant to the issues in this case.

The same is true for Plaintiffs' citation to *Kahawaiolaa v. Norton*, 386 F. 3d 1271, 1279 (9th Cir. 2004). Combined Response, p. 13:28. *Kahawaiolaa* does not concern ICWA and supports State Defendant's position. The Ninth Circuit holding in *Kahawaiolaa*, as well as the Supreme Court holding in *Rice*, support the fact that the legal designation of Indian is a political designation rather than racial designation. Specifically, *Kahawaiolaa* holds that "[i]n fact, *Rice* explicitly reaffirmed and distinguished the political, rather than racial, treatment of Indian tribes as explained in *Mancari*[2]." *Kahawaiolaa*, 386 F. 3d at 1279.

In a futile attempt to distinguish this case from the holding in *Mancari*, Plaintiffs boldly claim that "*Mancari* and its progeny are inapplicable here." Combined Response, Section III(B). In an effort to support this claim, Plaintiffs creatively argue the holdings of inapposite cases and quotes from dicta. Regardless, none of the cited legal authority supports Plaintiffs' assertion that the ICWA is "race-based."

Although unclear, Plaintiffs appear to argue that "[t]he Ninth Circuit has expressly rejected [*Mancari*]," citing *Malabed v. North Slope Borough*, 335 F.3d 864, 868 n.5 (9th Cir. 2003) as support. Combined Response, p. 13:19-20. If so, *Malabed* does no such thing. In fact, *Malabed* reinforces *Mancari*'s holding that Congress is empowered by the Constitution to pass laws like the ICWA. Specifically, *Malabed* finds that "*Mancari* held only that when Congress acts to fulfill its unique trust responsibilities toward Indian tribes, *such legislation is not based on a suspect*

[2] Referring to *Morton v. Mancari*, 417 U.S. 535 (1974).

classification." *Malabed*, 335 F.3d at 868 n. 5 (emphasis added). Accordingly, *Malabed* is unsupportive of Plaintiffs' position.

Plaintiffs further argue that "[w]ere *Mancari* that broad, the Supreme Court would not have said . . . that using ICWA 'to override . . . the child's best interests . . . solely because an ancestor – even a remote one – was an Indian' 'would raise equal protection concerns.'" Combined Response, p. 13:21-24, citing *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013). Noticeably absent is any citation to an actual holding of the Court. Instead, Plaintiffs use slight of hand to imply that the referenced dicta constitutes the legal holding.

Regardless, Plaintiffs' argument and selective citation do not support their position. As explained in previous motions[3], the *Adoptive Couple* decision was not based on the Constitution and, aside from the fact that it also concerned ICWA, it has little bearing on the present matter. Plaintiffs attempt to seize upon a hypothetical that the Court in *Adoptive Couple* offered in dicta, musing that under some hypothetical situation, ICWA might raise equal protection concerns if ICWA permitted a father who had abandoned the child before birth to override that decision at the last minute – circumstances that do not exist in this matter. *See Adoptive Couple*, 133 S. Ct. at 2565. The Supreme Court could have ruled ICWA unconstitutional in *Adoptive Couple*. It chose not to do so.

Accordingly, Counts 3 and 7 should be dismissed with prejudice as against the State Defendant.

C. THE COURT SHOULD ABSTAIN FROM AND DISMISS THE FAC

Plaintiffs argue that "[a]bstention is inapplicable." Combined Response, p. 17:7. As shown in State Defendant's Motion to Dismiss (and previously filed motions)[4], abstention is appropriate where, as here, "[t]he breadth of a challenge to a complex state

[3] *See, e.g.,* Doc. 106, at pp. 8-9, n. 11.

[4] *See* State Defendant's Motion to Dismiss FAC, Section V(A), and the citations referenced therein.

statutory scheme has traditionally militated in favor of abstention, not against it." *Moore v. Sims*, 442 U.S. 415, 427 (1979).

Here, Plaintiffs seek injunctive relief which would, if granted, substantially interfere in state juvenile court proceedings. Further, those state court proceedings concern a critical interest of the State of Arizona, i.e., child dependency maters. Therefore, pursuant to *Younger v. Harris*, 40 U.S. 37 (1971), the Court should abstain from and dismiss the FAC.

III

CONCLUSION

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

RESPECTFULLY SUBMITTED this 20th day of May, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 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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