

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

3 Clint Bolick (021684)  
4 Aditya Dynar (031583)  
5 Courtney Van Cott (031507)  
6 500 E. Coronado Rd.  
7 Phoenix, Arizona 85004  
8 (602) 462-5000  
9 [litigation@goldwaterinstitute.org](mailto:litigation@goldwaterinstitute.org)

7 **COOPER & KIRK, PLLC**

8 Michael W. Kirk (admitted *pro hac vice*)  
9 Brian W. Barnes (admitted *pro hac vice*)  
10 Harold S. Reeves (admitted *pro hac vice*)  
11 1523 New Hampshire Ave., N.W.  
12 Washington, D.C. 20036  
13 (202) 220-9600  
14 (202) 220-9601 (fax)  
15 *Attorneys for Plaintiffs*

14 **IN THE UNITED STATES DISTRICT COURT**  
15 **FOR THE DISTRICT OF ARIZONA**

15 A.D. and C. by CAROL COGHLAN  
16 CARTER, their next friend;  
17 S.H. and J.H., a married couple;  
18 M.C. and K.C., a married couple;  
19 for themselves and on behalf of a class of  
20 similarly-situated individuals,  
21 Plaintiffs,

22 vs.

23 KEVIN WASHBURN, in his official  
24 capacity as Assistant Secretary of BUREAU  
25 OF INDIAN AFFAIRS;  
26 SALLY JEWELL, in her official capacity as  
27 Secretary of Interior, U.S. DEPARTMENT  
28 OF THE INTERIOR;  
29 GREGORY A. McKAY, in his official  
30 capacity as Director of ARIZONA  
31 DEPARTMENT OF CHILD SAFETY,  
32 Defendants.

No. CV-15-1259-PHX-NVW

**PLAINTIFFS' MOTION FOR CLASS  
CERTIFICATION**

**ORAL ARGUMENT REQUESTED**

1 Plaintiffs, a group of Arizona Indian children<sup>1</sup> and Arizona foster parents, seek to  
2 put an end to the racial discrimination that Arizona’s Indian children and the parents  
3 seeking to care for and adopt them now suffer. The defendants’ implementation of the  
4 Indian Child Welfare Act (“ICWA”), codified at 25 U.S.C. §§ 1901–1963, has given rise  
5 to a separate and unequal child custody and welfare system, a system in which Indian  
6 children are treated as second class citizens. The Constitution does not tolerate a system  
7 that separates children based on race and subjects them to separate and unequal  
8 treatment. ICWA is such a law.

9 The children and parents before the Court now move, pursuant to Rule 23 of the  
10 Federal Rules of Civil Procedure (“FRCP” or “Rule”), to certify this plaintiff class. They  
11 seek to represent all Arizona Indian children and all of the Arizona foster parents who  
12 are seeking to care for and to adopt those children. The proposed class satisfies the four  
13 threshold requirements of Rule 23(a), as well as the requirements of Rule 23(b).

#### 14 **CLASS DEFINITION**

15 All off-reservation Arizona-resident children with Indian  
16 ancestry and all off-reservation non-Indian Arizona-resident  
17 foster, preadoptive, and prospective adoptive parents in child  
custody proceedings involving children with Indian ancestry  
and who are not members of the child’s extended family.

18 All plaintiffs seek to represent the class. The class seeks only declaratory and injunctive  
19 relief.

#### 20 **BACKGROUND**

21 In considering a motion for class certification, the court does not reach the merits.  
22 Instead, the determination of whether class certification is appropriate should be made  
23 on the pleadings in light solely of the procedural requirements of Rule 23. *See, e.g.,*  
24 *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013);  
25 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974).

---

26  
27 <sup>1</sup> Plaintiffs use the term “Indian children” within the meaning of ICWA, 25  
28 U.S.C. § 1903. Plaintiffs do not waive any argument pertaining to whether the children  
are racially Indian, members of Indian tribes, or subject to the jurisdiction of the tribes.

1 **I. ICWA ESTABLISHES A SEPARATE AND UNEQUAL CHILD WELFARE**  
2 **SYSTEM APPLICABLE SOLELY TO INDIAN CHILDREN.**

3 ICWA defines “Indian child” as “any unmarried person who is under age  
4 eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in  
5 an Indian tribe and is the biological child of a member of an Indian tribe.” 25 U.S.C. §  
6 1903(4). Most tribes use a blood quantum or lineage requirement as prerequisites for  
7 membership. Some will consider an individual with only a tiny percentage of Indian  
8 blood to be Indian, even when the child otherwise has no contact or connection with the  
9 tribe. *See, e.g.,* CHEROKEE NATION CONST. art. IV, § 1; *see also Adoptive Couple v.*  
10 *Baby Girl*, 133 S. Ct. 2552, 2556 (2013) (noting that child was “classified as an Indian  
because she is 1.2% (3/256) Cherokee”).

11 ICWA imposes a variety of standards, preferences, and procedures in the case  
12 solely of Indian children. First, Indian children are subject to the jurisdictional transfer  
13 provision of ICWA, 25 U.S.C. § 1911(b). As a result, a child custody proceeding that  
14 involves a child with Indian blood may be transferred at the sole insistence of the tribe to  
15 a forum to which the child and his parents may have no other connection and with which  
16 they may not have even minimum contacts. Neither federal nor Arizona law imposes a  
17 comparable burden on children of other races.

18 Second, ICWA requires that the courts apply a more stringent standard and  
19 follow cumbersome additional procedures before determining that an Indian child’s  
20 emotional and physical safety warrant placement in foster care or the termination of  
21 parental rights. 25 U.S.C. § 1912(d)–(f). In cases involving Indian children, the standard  
22 of proof that must be satisfied before the child is subjected to mental or physical abuse is  
23 removed is uniformly higher than the standard applied to children of other races.

24 Finally, ICWA creates a separate system of placement preferences that are  
25 applicable solely to Indian children in the foster care and adoption systems. Under  
26 ICWA, absent good cause to the contrary, Indian children must be placed with a member  
27 of their extended family, other members of the Indian tribe, or other Indian families. 25  
28 U.S.C. § 1915. In contrast, the primary criterion governing the placement of children of

1 other races is the child's best interests. *Antonio M. v. Arizona Dep't of Econ. Sec.*, 214  
2 P.3d 1010, 1011–12 (Ariz. Ct. App. 2009).

3 **II. THE NAMED PLAINTIFFS HAVE SUFFERED INJURIES AS A RESULT**  
4 **OF ICWA THAT ARE TYPICAL OF THOSE SUFFERED BY ALL CLASS**  
5 **MEMBERS.**

6 ICWA causes real and substantial injuries to the members of the class. All Indian  
7 children suffer the indignity of having their best interests afforded less respect than those  
8 of all other children solely because of their blood. ICWA lowers the quality of life of  
9 many Indian children and has led, in far too many cases, to the abuse and even death of  
10 Indian children trapped in a system that treats them as racial tokens. Indian children  
11 remain in the limbo of foster care and adoption longer than non-Indian children, during  
12 which time they are deprived of the benefits of a stable family environment. The non-  
13 Indian Arizona men and women who seek to adopt or provide foster care to these  
14 children are likewise victims of ICWA. Frequently, they spend years in legal limbo,  
15 confronted by delays and incurring mounting legal bills. They suffer those injuries solely  
16 because they are non-Indian parents seeking to adopt Indian children.

17 The named plaintiffs have suffered injuries typical of the injuries inflicted by  
18 ICWA.

19 Baby girl A.D. is an Indian child who was approximately 10 months old when  
20 this suit was filed. After being taken into custody and having had the parental rights of  
21 her parents terminated, Baby girl A.D. has lived with her foster parents, S.H. and J.H.,  
22 who have provided her with the treatment she has needed to recover from the deleterious  
23 effects of second-hand drug addiction. S.H.-J.H. Decl. ¶¶ 2, 6, 9–11. S.H. and J.H.,  
24 along with their adopted son who also has Indian ancestry, are the only family baby girl  
25 A.D. has ever known. *Id.* ¶ 6.

26 Nevertheless, in response to the efforts of S.H. and J.H. to adopt baby girl A.D.,  
27 the Gila River Indian Community has announced that it will likely seek to transfer the  
28 case to tribal court. Any such transfer would force A.D., S.H., and J.H., who have no  
contact with the tribal forum, to submit to that forum's jurisdiction. *Id.* ¶ 15. Such

1 transfer and the resulting assertion of jurisdiction, if successful, would be solely based  
2 on baby girl A.D.'s race. But for ICWA, A.D. would already have very likely been  
3 cleared for adoption, if not already adopted, by S.H. and J.H. *Id.* ¶ 17.

4 Boy C. is almost 5 years old. Since being taken into protective custody by DCS,  
5 C. has been in foster care placement with M.C. and K.C. M.C.-K.C. Decl. ¶ 6. The  
6 parental rights of C.'s birth parents have already been terminated. M.C. and K.C. hope  
7 to adopt boy C. The birth mother is on record saying she supports boy C.'s adoption by  
8 M.C. and K.C. The adoption has been blocked, however, solely because the Navajo  
9 Nation repeatedly has proposed alternative ICWA-compliant placements, all of which  
10 have then turned out to be inappropriate for placement of boy C. The tribe has  
11 nonetheless continued to ask for additional opportunities from state court to find other  
12 ICWA-compliant placements. Consequently, boy C. has remained in foster care for four  
13 years. *Id.* ¶¶ 3, 7–9.

14 Boy C. suffers serious emotional and psychological distress as a result of these  
15 ICWA-mandated delays. Each time the tribe proposes an ICWA-compliant placement,  
16 M.C. and K.C. must drive him, sometimes over 100 miles, to visit with the proposed  
17 placement. Boy C. instinctively calls M.C. and K.C. “mommy” and “daddy,” but is told  
18 by proposed placements that M.C. and K.C. are not his real “mommy” and “daddy.” Boy  
19 C. must endure this solely because he was born with Indian ancestry. *Id.* ¶¶ 9–13.

20 Plaintiffs S.H. and J.H., and M.C. and K.C., are married couples. They are  
21 Arizona residents. S.H.-J.H. Decl. ¶ 1; M.C.-K.C. Decl. ¶ 1. They have no Indian blood.  
22 But for ICWA, a strong likelihood exists that these families—baby girl A.D, S.H., and  
23 J.H., and boy C., M.C., and K.C.—would become permanent under race-neutral Arizona  
24 laws requiring individualized evaluation by the state court of the best interests of these  
25 two children. Declaration of Carol Coghlan Carter ¶¶ 25–27 (“Carter Decl.”). Under  
26 ICWA, these families are subjected to procedural and substantive provisions that are  
27 based solely on the race of the children and the adults involved. ICWA has severely  
28 disrupted all of their lives contrary to the best interests of these children. *Id.*

1 Carol Coghlan Carter is a citizen of the United States and the State of Arizona,  
2 and domiciled in the State of Arizona. She is an attorney licensed to practice in the State  
3 of Arizona. She has practiced in the area of family law for several decades. *Id.* ¶¶ 1–3. In  
4 the course of her legal career, she has represented during all stages of child custody  
5 proceedings children, including children with Indian ancestry as their court-appointed  
6 guardian-ad-litem; birth parents, including birth parents with Indian ancestry; and  
7 foster/adoptive parents, including foster/adoptive parents with Indian ancestry and those  
8 in child custody proceedings involving children with Indian ancestry. *Id.* ¶ 3. She is  
9 “next friend” to baby girl A.D. and boy C. and all off-reservation children with Indian  
10 ancestry in the State of Arizona in child custody proceedings. *See* FRCP 17(c).

### 11 ARGUMENT

12 For a class action to be certified, all that is required is that the proposed class  
13 “satisfy the requirements of Federal Rule of Civil Procedure 23(a) and the requirements  
14 of at least one of the categories under Rule 23(b).” *Wang v. Chinese Daily News, Inc.*,  
15 737 F.3d 538, 542 (9th Cir. 2013). The proposed class both satisfies the four  
16 requirements of Rule 23(a) and meets the criteria for certification under Rule 23(b)(1),  
17 (2), and (3).

#### 18 **I. THE PROPOSED CLASS SATISFIES THE REQUIREMENTS OF** 19 **RULE 23(a).**

20 For a class to satisfy Rule 23(a), there must be “(1) numerosity of the parties; (2)  
21 commonality of legal and factual issues; (3) typicality of claims and defenses; and (4)  
22 adequacy of representation.” *Miller v. American Standard Ins. Co. of Wis.*, 759 F. Supp.  
23 2d 1144, 1146 (D. Ariz. 2010). The proposed class of children and parents meets this  
24 standard.

##### 25 **A. Joinder of the over 1,300 Indian children and their Arizona foster and** 26 **prospective adoptive parents would be impracticable.**

27 The numerosity requirement of Rule 23(a) requires only that there be “difficulty  
28 or inconvenience of joining all members of the class.” *Collinge v. IntelliQuick Delivery,*  
*Inc.*, 2015 WL 1292444, at \*10 (D. Ariz. Mar. 23, 2015). Although there is no specific

1 numerical cut-off, this Court has said that “[n]umerosity will normally exist when the  
2 class consists of forty or more members.” *In re Lifelock, Inc. Mktg. & Sales Practices*  
3 *Litig.*, 2010 WL 3715138, at \*2 (D. Ariz. Aug. 31, 2010) (citing *Lowdermilk v. U.S.*  
4 *Bank Nat’l Ass’n*, 479 F.3d 994, 997 (9th Cir. 2007)). Moreover, when only injunctive  
5 and declaratory relief are being sought, “the numerosity requirement is relaxed and  
6 plaintiffs may rely on [ ] reasonable inference[s] arising from plaintiffs’ other evidence  
7 that the number of unknown and future members of [the] proposed subclass . . . is  
8 sufficient to make joinder impracticable.” *Arnott v. U.S. Citizenship and Immigration*  
9 *Servs.*, 290 F.R.D. 579, 586 (C.D. Cal. 2012) (alterations in original) (quoting *Sueoka v.*  
10 *United States*, 101 F. App’x. 649, 653 (9th Cir.2004)); *Jones v. Diamond*, 519 F.2d  
11 1090, 1100 (5th Cir. 1975) (“The general rule encouraging liberal construction of civil  
12 rights class actions applies with equal force to the numerosity requirement of Rule  
13 23(a)(1).”).

14 The putative class of off-reservation Arizona-resident Indian children and of the  
15 foster, preadoptive, and adoptive parents who seek to care for these children is so large  
16 that joinder of all of its members would be impracticable. The Arizona Department of  
17 Child Safety reported that there were 1,336 American Indian Children in out-of-home  
18 care as of September 30, 2014. *See* Exhibit 1 to Complaint at 43 (July 6, 2015), Doc. 1-  
19 1. That number rose to 1,396 as of March 31, 2015. ARIZONA DEP’T OF CHILD SAFETY,  
20 SEMI-ANNUAL REPORT FOR THE PERIOD OF OCT. 1, 2014 THROUGH MAR. 31, 2015, pg.  
21 43 (Exhibit 1). The number of foster, preadoptive, and adoptive parents seeking to care  
22 for these children is comparable. Especially in light of the more lenient standard  
23 applicable to suits seeking only declaratory and injunctive relief, the criterion of  
24 numerosity is more than satisfied by the proposed class.

25 Finally, that the “membership of the class may change over time in no way  
26 qualifies or undermines the identity of the class for purposes of Rule 23.” *Glover v.*  
27 *Johnson*, 85 F.R.D. 1, 3 (E.D. Mich. 1977). “If anything, the inevitable turnover of the  
28 [class] population makes class certification advantageous in this case, since joinder of all

1 class members becomes correspondingly more impractical and mootness of individual  
2 claims more likely.” *Id.* at 4. The fact that some Indian children will leave the class as  
3 they are adopted or turn 18 and that Indian children will join the class as they are born  
4 does not call into question the class definition; if anything, it makes certification  
5 particularly advantageous and appropriate in this case.

6 **B. The class challenges a policy of discrimination that applies to all class  
members.**

7 The common questions of law and fact that Plaintiffs raise in their challenge to  
8 ICWA satisfy the commonality requirement of Rule 23(a). The Rule provides that there  
9 need only be some question “of law or fact common to the class.” FRCP 23(a)(2). As  
10 this Court has explained, “[t]his is a minimal standard: ‘all that is required is a common  
11 issue of law or fact.’ ” *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 2006 WL 89938,  
12 at \*5 (D. Ariz. Jan. 12, 2006) (emphasis omitted) (quoting *Blackie v. Barrack*, 524 F.2d  
13 891, 904 (9th Cir. 1975)); *see also Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th  
14 Cir. 2014) (“[A] class meets Rule 23(a)(2)’s commonality requirement when the  
15 common questions it has raised are apt to drive the resolution of the litigation, no matter  
16 their number” (internal quotation marks omitted)). In the civil rights context, moreover,  
17 the requirement of commonality is satisfied where, as here, “the lawsuit challenges a  
18 system-wide practice or policy that affects all of the putative class members.” *Parsons v.*  
19 *Ryan*, 289 F.R.D. 513, 516 (D. Ariz. 2013) (quoting *Armstrong v. Davis*, 275 F.3d 849,  
20 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499,  
21 504–05 (2005)).

22 The commonality requirement of Rule 23(a) is satisfied because the class  
23 challenges the discriminatory policies that ICWA adopts and that Defendants apply to all  
24 Indian children and all non-Indian foster and adoptive parents who seek to care for them.  
25 Carter Decl. ¶ 12. This action turns on one essential question common to all class  
26 members: Do ICWA and the federal and Arizona regulations and policies that  
27 implement ICWA unlawfully or unconstitutionally subject Indian children and parents  
28



1 seeking to care for them to discrimination? All of the Indian children and all of the  
2 parents who are seeking to care for and adopt them are affected by ICWA on the basis of  
3 the race of these children. All of the claims they raise are common to all of the members  
4 of the class.

5       It is irrelevant that the children and parents in the class may be in different stages  
6 in the child custody process because all of the class members are suffering their injuries  
7 because of the same practices and policies that treat Indian children as second class  
8 citizens solely because of their race. The unique factual and legal situations of the  
9 individual class members does not defeat commonality where, as here, the class  
10 challenges a discriminatory scheme or policy applicable to all members of the class.  
11 *Rodriguez v. Hayes*, 591 F.3d 1105, 1122–23 (9th Cir. 2009) (class action challenge to  
12 common detention policy did not lack commonality even though prisoners were in  
13 different stages and phases of detention and had been imprisoned for different reasons  
14 under different statutes); *LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985)  
15 (uniform pattern of INS conduct established commonality among residents of migrant  
16 farm dwellings, even though the residents were affected differently by the conduct).

17       Indeed, it is not even necessary for all of the absent members of the class to be  
18 currently suffering actual injury as a result of these discriminatory policies and practices,  
19 “demonstrating that all class members are subject to the same harm will suffice.” *Baby*  
20 *Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) (emphasis omitted). ICWA subjects all  
21 class members to the same discriminatory policies and practices. This suffices to  
22 establish commonality for purposes of Rule 23(a).

23  
24  
25  
26  
27  
28

1           **C. The claims asserted by the named Plaintiffs are typical of—indeed, identical**  
2           **with— the claims of the absent plaintiffs.**

3           Plaintiffs satisfy the typicality requirement of Rule 23(a)(3) because the  
4           challenged policies and practices affect all of the class members in the same way. In  
5           order to show typicality, the named Plaintiffs need show only that “the claims or  
6           defenses of the representative parties are typical of the claims or defenses of the class.”  
7           FRCP 23(a)(3). “ ‘The premise of the typicality requirement is simply stated: as goes the  
8           claim of the named plaintiff, so go the claims of the class.’ ” *O’Connor v. Boeing North*  
9           *American, Inc.*, 197 F.R.D. 404, 412 (C.D. Cal. 2000) (quoting *Sprague v. General*  
10           *Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (en banc)). Typicality is satisfied,  
11           therefore, if the claims of the representative parties “are reasonably coextensive with  
12           those of absent class members.” *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003).

13           ICWA applies uniformly to all “child custody proceedings” involving Indian  
14           children, including termination of parental rights, foster care placement, and adoption  
15           placement. *See* 25 U.S.C. §§ 1911, 1912, 1914, 1915. It follows that the injuries suffered  
16           by the named plaintiffs— application of the discriminatory policies imposed by  
17           ICWA—are typical of, indeed, identical to, the injuries the Act inflicts upon all class  
18           members. The named plaintiffs challenge the legality and the constitutionality of this  
19           entire regime. If the named plaintiffs prevail on their challenge to ICWA, all class  
20           members will receive the same relief: declaratory and injunctive relief prohibiting  
21           application of the discriminatory provisions of ICWA in Arizona child custody cases  
22           involving Indian children. Rule 23(a) requires no more to establish the typicality of the  
23           claims of the class representative.

24           That Indian children and parents in the putative class are not all currently in the  
25           same place in the foster care system or in the adoption process, it should be noted, does  
26           not render the claims of the named plaintiffs atypical. *Staton*, 327 F.3d at 957. There is  
27           no need for there to be a separate “class representative for each type of discrimination  
28           claim alleged. That level of specificity is not necessary for class representatives to  
          satisfy the typicality requirement.” *Id.* at 957. The “named plaintiffs’ injuries [need not]

1 be identical with those of the other class members, only that the unnamed class members  
2 have injuries similar to those of the named plaintiffs and that the injuries result from the  
3 same, injurious course of conduct.” *Armstrong*, 275 F.3d at 869.

4 “A representative’s claim is typical if it is based upon the same event or course  
5 of conduct that is the basis of the other class members’ claims, as well as the same legal  
6 theory.” *Brink v. First Credit Res.*, 185 F.R.D. 567, 570 (D. Ariz. 1999) (citation  
7 omitted). The named plaintiffs in this case have suffered the same statutorily-mandated  
8 discrimination to which the defendants subject all of the absent class members. *See*  
9 *supra* 4–5; Carter Decl. ¶¶ 12–14; S.H.-J.H. Decl.; M.C.-K.C. Decl.; M.G.-B.G. Decl.

10 **D. Class certification will ensure that the best interests of the class are**  
11 **adequately represented and aggressively pursued.**

12 To satisfy the adequacy requirement of Rule 23(a), “[t]he class representative  
13 must have no interests antagonistic to the class and be able to prosecute the action  
14 vigorously, and class counsel must possess the competence to undertake the litigation.”  
15 *In re Lifelock, Inc. Mktg. & Sales Practices Litig.*, 2010 WL 3715138, at \*2 (citing *In re*  
16 *Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000)). Both prongs of this test  
17 are met in this case.

18 First, as noted above, the named plaintiffs and the proposed class members are all  
19 subject to the same racially discriminatory procedures, policies, and race-based  
20 preferences and have experienced, and continue to experience, the same harm that flows  
21 from this discrimination. Baby girl A.D. and boy C. have each suffered harm because of  
22 ICWA and, through their next friend, Ms. Carter, they are highly motivated to escape  
23 from its discriminatory treatment and find stable care in loving homes. The parents who  
24 have been working to care for these two children have likewise had to navigate the  
25 intricacies of ICWA, a burden they share with the other parent-members of the proposed  
26 class and a burden not imposed on parents seeking to adopt children of other races. The  
27 parents and children now before the Court share with the absent class members a  
28 common interest in obtaining a judicial declaration of the unlawfulness both of ICWA

1 and of the defendants' policies, and an order enjoining the use of those policies in the  
2 future. Indeed, as a practical matter, the named plaintiffs could not obtain this relief from  
3 ICWA for themselves without also obtaining it for all of the other members of the class.  
4 Declaratory and injunctive relief holding that ICWA is unconstitutional is the only  
5 adequate remedy to redress the named Plaintiffs' injuries, and any such declaration  
6 would inevitably benefit all class members.

7       There is no conflict with the interests of any class members. In particular, Indian  
8 children whose best interests would be served by a foster or adoptive placement with a  
9 member of an Indian tribe will be fully served by the relief sought by the representative  
10 plaintiffs because they seek application of Arizona's best interest of the child standard –  
11 the standard that applies to all non-Indian children. Application of that standard in some  
12 cases would result in placement with an on- or off-reservation Indian family.

13       The attorneys who have undertaken to represent the class are experienced in  
14 constitutional, administrative, and class action litigation at the federal level. They bring a  
15 breadth of experience and expertise to bear on this suit that would ordinarily be absent  
16 from an individual child custody proceeding. The class action suit provides a vehicle by  
17 which all of Arizona's Indian children and parents will be able to benefit from this  
18 representation. See Declaration of Clint Bolick (Exhibit 2); Declaration of Michael W.  
19 Kirk (Exhibit 3).

20 **II. THE PROPOSED CLASS SATISFIES THE REQUIREMENTS FOR**  
21 **CERTIFICATION UNDER RULE 23(b).**

22       When the prerequisites of Rule 23(a) are satisfied, the class action may proceed  
23 provided it satisfies any one of the three criteria set forth under Rule 23(b). The named  
24 plaintiffs seek certification under Rules 23(b)(1) and (b)(2), or, in the alternative, under  
25 Rule 23(b)(3).

26 **A. The proposed class satisfies the requirements for an injunctive and**  
27 **declaratory class under Rule 23(b)(2).**

28       Class certification is proper under Rule 23(b)(2) because Defendants have  
consistently acted in a way that discriminates against all of the members of the class.

1 Rule 23(b)(2) permits class certification when “the party opposing the class has acted or  
2 refused to act on grounds that apply generally to the class, so that final injunctive relief  
3 or corresponding declaratory relief is appropriate respecting the class as a whole.” FRCP  
4 23(b)(2).

5 This suit seeks injunctive and declaratory relief from the very type of class-wide  
6 conduct contemplated by Rule 23(b)(2). First, defendants have discriminated and  
7 continue to discriminate against the class members based upon their race. A suit to  
8 challenge class-based discrimination is the prime example of a class action properly  
9 certified under Rule 23(b)(2). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614  
10 (1997); *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) (“[Rule] 23(b)(2) was  
11 adopted in order to permit the prosecution of civil rights actions.”). Class certification is  
12 particularly appropriate where, as here, the suit seeks to challenge “widespread rights  
13 violations of people who are individually unable to vindicate their own rights.” *Baby*  
14 *Neal*, 43 F.3d at 63.

15 Second, the Arizona Indian children and Arizona parents seek only the  
16 declaratory and injunctive relief that Rule 23(b)(2) class actions ordinarily seek. These  
17 remedies will vindicate the rights of all class members and provide all of the members of  
18 the class with relief from these discriminatory laws, regulations, policies, and practices.  
19 *See, e.g., Society for Individual Rights, Inc. v. Hampton*, 528 F.2d 905, 906 (9th Cir.  
20 1975) (“As a practical matter, a judgment enjoining application of a discriminatory  
21 regulation or policy will affect the class against which the discrimination occurs.”).

22 Consequently, certification should be granted under Rule 23(b)(2).

23 **B. The risk of inconsistent judgments warrants certification under Rule**  
24 **23(b)(1).**

25 Absent class certification, there is a clear risk that inconsistent judgments would  
26 result in Defendants applying ICWA standards, procedures, and practices in some cases  
27 but not in others. A class action should be certified under Rule 23(b)(1) if the  
28 “prosecuti[on of] separate actions by or against individual class members would create a

1 risk of” either (A) “inconsistent or varying adjudications with respect to individual class  
2 members that would establish incompatible standards of conduct for the party opposing  
3 the class,” or (B) “adjudications with respect to individual class members that, as a  
4 practical matter, would be dispositive of the interests of the other members not parties to  
5 the individual adjudications or would substantially impair or impede their ability to  
6 protect their interests.” FRCP 23(b)(1)(A) & (B).

7 Certification is appropriate under Rule 23(b)(1)(A) if separate actions would  
8 create a “risk that defendants’ efforts to comply with the judgment in one action will  
9 require them to act inconsistently with the judgment in another.” *Sueoka*, 101 F. App’x  
10 at 654. Rule 23(b)(1)(A) applies to “cases where the party is obliged by law to treat the  
11 members of the class alike.” *Traylor v. Avnet, Inc.*, 257 F.R.D. 521, 528 (D. Ariz. 2009).  
12 Arizona’s Indian children should be treated consistently under the law. Class  
13 certification is appropriate under Rule 23(b)(1)(A), therefore, in order to ensure that  
14 Defendants are able to apply a consistent legal standard to these Indian children and  
15 these Arizona parents.

16 **C. Plaintiffs satisfy Rule 23(b)(3)’s requirements because the common question  
17 of the constitutionality of ICWA and its implementing regulations  
18 predominates and the class action provides a superior method for  
19 vindicating the rights of class members.**

20 The proposed class also satisfies the criteria set forth under Rule 23(b)(3). A Rule  
21 23(b)(3) class may be certified so long as two conditions are met: “[c]ommon questions  
22 must ‘predominate over any questions affecting only individual members’; and class  
23 resolution must be ‘superior to other available methods for the fair and efficient  
24 adjudication of the controversy.’ ” *Amchem Prods., Inc.*, 521 U.S. at 615 (quoting FRCP  
25 23(b)(3)). The “predominance inquiry tests whether proposed classes are sufficiently  
26 cohesive to warrant adjudication by representation.” *Id.* at 623. *See also Hanlon v.*  
27 *Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998). The proposed class meets this  
28 definition.

First, a common question of law predominates because ICWA raises the same

1 barriers to all Indian children who are seeking to ensure that their best interests are  
2 respected in the foster care and adoption process and to the parents who are seeking to  
3 care for and adopt those Indian children. ICWA is an obstacle standing in the path of  
4 each and every one of these children and these parents. By discriminating against these  
5 children and these parents, ICWA creates the required cohesion among the class. The  
6 question in this action is, ultimately, whether ICWA legally and constitutionally applies  
7 to the Indian children whom Arizona parents are trying to care for and to adopt.

8 Plaintiffs' proposed class also satisfies the four criteria that Rule 23(b)(3)  
9 enumerates to aid in assessing whether class resolution provides a superior method for  
10 the fair and efficient adjudication of the controversy. First, class certification will not  
11 interfere with "the class members' interests in individually controlling the prosecution or  
12 defense of [their] separate [child custody] actions." Rule 23(b)(3)(A). The class action  
13 seeks declaratory and injunctive relief that will settle only the single common question  
14 of law that binds the class. This action does not seek to resolve the individual placement  
15 and adoption decisions over which individual class members would, naturally, wish to  
16 exercise full and independent control. This suit does not interfere, therefore, with the  
17 class members interests in controlling their child custody proceedings and vindicating  
18 their own respective best interests.

19 Second, although the class members are in different procedural stages in the  
20 Arizona child welfare system, there is no already-pending litigation concerning this  
21 controversy that would warrant refusing to certify the class. Rule 23(b)(3)(B). ICWA  
22 imposes burdens upon children in every phase of the process, requiring that the best  
23 interests of Indian children be subordinated to, indeed disregarded in favor of, the  
24 interests of the tribe. Resolution of the constitutional question raised in this action will  
25 benefit all of these children, therefore, regardless of where their cases might currently be  
26 in the child welfare system.

27 Third, avoiding the costs and the inefficiency of litigating the constitutionality of  
28 ICWA in individual cases strongly favors resolving this action in a single judicial forum.

1 Rule 23(b)(3)(C). The children and the parents who make up the proposed class would  
2 derive no benefit from being forced to retain separate counsel in order to litigate the  
3 constitutionality of ICWA. Litigating this constitutional question in a single class action  
4 will permit both the individual class members and the Arizona child welfare system to  
5 focus their limited resources in each individual child custody proceeding on the question  
6 that is of ultimate importance to these children and their prospective parents: What  
7 outcome would be in the best interest of this child?

8 Finally, Plaintiffs foresee no potential problems that could arise in managing the  
9 case as a class suit. Rule 23(b)(3)(D). No child ultimately benefits from being subject to  
10 an unconstitutional law. Although there may arise situations in which an individual  
11 child, or individual biological, foster, or adoptive parent, might deem it preferable to  
12 have their proceeding adjudicated before a tribal court, a ruling that ICWA is  
13 unconstitutional would in no way prevent that action from being transferred to an Indian  
14 court under Arizona laws applicable to all children. There may arise—indeed, there  
15 almost certainly will arise—a situation in which an Indian relative is the best prospective  
16 parent for a child; nothing in Arizona law would stand in the way of awarding custody to  
17 that Indian parent. The sole result of this action would be that these suits would be  
18 decided based upon the best interests of the child, not the interests of a tribe. All this suit  
19 seeks is that the best interests of all Arizona children, both Indian and non-Indian, be  
20 afforded the same respect and protection of the law.

21 Thus, this suit satisfies the requirements of Rule 23(b)(3). Plaintiffs seek  
22 certification under Rule 23(b)(3), however, only should the Court first conclude that  
23 Rule 23(b)(1) and (b)(2) are somehow inapplicable. While the Federal Rules of Civil  
24 Procedure permit certification under all three provisions of Rule 23(b), “[w]hen either  
25 subsection (b)(1) or (b)(2) is applicable, . . . (b)(3) should not be used, so as to avoid  
26 unnecessary inconsistencies and compromises in future litigation.” *DeBoer v. Mellon*  
27 *Mortg. Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995). *See also* 7Aa CHARLES A. WRIGHT &  
28 ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1772, 1775, 1784.1 (3d



1 ed.). For this reason, Plaintiffs request that the Court certify this suit under Rule 23(b)(3)  
2 only should it conclude that certification under Rules 23(b)(1) and (b)(2) would be  
3 inappropriate.

4 **CONCLUSION**

5 For all the foregoing reasons, Plaintiffs respectfully request that the Court grant  
6 the motion for class certification pursuant to Rule 23(b)(1) & (b)(2), or, in the  
7 alternative, pursuant to Rule 23(b)(3).

8 **RESPECTFULLY SUBMITTED** this 21<sup>st</sup> day of August, 2015 by:

9  
10 /s/ Harold Reeves

11 Clint Bolick (021684)

12 Aditya Dynar (031583)

13 Courtney Van Cott (031507)

14 **Scharf-Norton Center for Constitutional Litigation**  
15 **at the GOLDWATER INSTITUTE**

16 Michael W. Kirk (admitted *pro hac vice*)

17 Brian W. Barnes (admitted *pro hac vice*)

18 Harold S. Reeves (admitted *pro hac vice*)

19 **COOPER & KIRK, PLLC**

20 *Attorneys for Plaintiffs*

21 **CERTIFICATE OF SERVICE**

22 Document Electronically Filed by ECF and copies mailed this 21<sup>st</sup> day of August,  
23 2015 to:

24 Gregory A. McKay  
25 Director, Ariz. Dept. of Child Safety  
26 1717 West Jefferson Street  
27 Site Code 005A  
28 Phoenix, AZ 85007

1 John S. Leonardo  
2 United States Attorney, District of Arizona  
3 U.S. Department of Justice  
4 Two Renaissance Square  
40 North Central Avenue, Suite 1200  
Phoenix, AZ 85004-4408

5  
6 Kevin K. Washburn  
Assistant Secretary  
7 Bureau of Indian Affairs  
8 U.S. Department of the Interior  
MS-3658-MIB  
9 1849 C Street, N.W.  
Washington, D.C. 20240

10  
11 Sally Jewell  
Secretary of the Interior  
12 U.S. Department of the Interior  
13 1849 C Street, N.W.  
Washington, D.C. 20240

14  
15 Loretta E. Lynch  
U.S. Attorney General  
16 U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
17 Washington, D.C. 20530-0001

18  
19 /s/ Kris Schlott  
20 Kris Schlott

21  
22  
23  
24  
25  
26  
27  
28