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

A.D., C.C., L.G., and C.R., by CAROL
COGHLAN CARTER, and DR. RONALD
FEDERICI, their next friends;
S.H. and J.H., a married couple;
M.C. and K.C., a married couple;
K.R. and P.R., a married couple;
for themselves and on behalf of a class of
similarly-situated individuals,
Plaintiffs,

vs.

KEVIN WASHBURN, in his official
capacity as Assistant Secretary of Indian
Affairs, BUREAU OF INDIAN AFFAIRS;
SALLY JEWELL, in her official capacity as
Secretary of the Interior, U.S.
DEPARTMENT OF THE INTERIOR;
GREGORY A. McKAY, in his official
capacity as Director of ARIZONA
DEPARTMENT OF CHILD SAFETY,
Defendants,

GILA RIVER INDIAN COMMUNITY; and
NAVAJO NATION,
Intervenor Defendants.

No. CV-15-1259-PHX-NVW

**PLAINTIFFS' RESPONSE TO
NAVAJO NATION'S AMENDED
MOTION TO DISMISS, AND
GILA RIVER INDIAN
COMMUNITY'S MOTION TO
DISMISS**

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1 Plaintiffs respond to Navajo Nation’s Amended Motion to Dismiss (“NM”), Doc.
2 218, and Gila River Indian Community’s Motion to Dismiss (“GM”), Doc. 217. Both
3 motions should be denied.

4 **I. INTRODUCTION**

5 The Motions to Dismiss filed by the Intervenor Defendants add little to the
6 arguments already raised by the federal and state Defendants in their pending Motions
7 (Doc. 178 & 179). To conserve the Court’s time, therefore, Plaintiffs will respond only to
8 those arguments raised for the first time in the Intervenors’ motions, and, insofar as
9 Intervenor’s arguments duplicate those raised by Defendants, incorporate by reference
10 their earlier responses to those arguments (Docs. 80, 187).

11 Plaintiffs, all American citizens, challenge six provisions of the Indian Child
12 Welfare Act (“ICWA”)—specifically, 25 U.S.C. §§ 1911(b), 1912(d), 1912(e), 1912(f),
13 1915(a), 1915(b)—and the corresponding Guidelines issued by the Bureau of Indian
14 Affairs (BIA) in 2015 for the application of ICWA.¹ Doc. 173 (“Am. Compl.”). All these
15 provisions have concretely injured and are currently injuring Plaintiffs by depriving them
16 of the protections and guarantees of the United States Constitution. To be precise,
17 Plaintiffs allege:

- 18 (1) Count 1 – that the six ICWA provisions and corresponding Guidelines have
19 violated, are violating, and unless enjoined by this Court will continue to violate
20 the Plaintiffs’ rights under the Equal Protection Component of the Due Process
21 Clause of the Fifth Amendment;
- 22 (2) Count 2 – that those same provisions violate the Due Process Clause of the Fifth
23 Amendment because they have deprived, are depriving, and unless enjoined by
24 this Court will continue to deprive Plaintiffs of their right to an individualized
25 determination of their specific best interests; and the jurisdiction-transfer
26 provision, § 1911(b), and corresponding Guidelines, §§ C.1, C.2, C.3, violate the
27 “minimum contacts” requirement for personal jurisdiction under the Due Process
28 Clause;
- (3) Count 3 – that the six ICWA provisions and corresponding Guidelines have
violated, are violating, and unless enjoined by this Court will continue to violate
the Plaintiffs’ rights to due process of law and equal protection of law under the
Fourteenth Amendment;

¹ Specifically, 80 Fed. Reg. 10,146 (Feb. 25, 2015), §§ A.2, A.3, B.1, B.2, B.4, B.8, C.1, C.2, C.3, D.2, D.3, F.1, F.2, F.3, F.4.

- 1 (4) Count 4 – that by imposing a national child-welfare legal regime, the Act exceeds
2 Congress’s power under the Indian Commerce Clause, and that by forcing state
3 officials to enforce that federally-mandated regime, the Act commandeers state
4 actors in violation of the Tenth Amendment;
- 5 (5) Count 5 – that by seeking to compel child and adult Plaintiffs to associate with
6 tribes and tribal communities and to subject them to tribal jurisdiction, the six
7 ICWA provisions and corresponding Guidelines have violated, are violating, and
8 unless enjoined by this Court will continue to violate the Plaintiffs’ First
9 Amendment right to Freedom of Association;
- 10 (6) Count 6 – that the jurisdiction-transfer provisions of the Guidelines, §§ C.1, C.2,
11 C.3, exceed the BIA’s lawful authority and are therefore unlawful agency action
12 under 5 U.S.C. § 706; and
- 13 (7) Count 7 – that by subjecting the Plaintiffs to *de jure* discrimination on the basis
14 of race, color, and/or national origin, the Defendants have in the past and are now
15 violating Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000d–2000d-7.

16 This Court granted the tribes permissive intervention, Doc. 216, on the express condition
17 that the tribes “not ... assert additional claims,” *id.* at 8, and that the tribes not “expan[d]
18 ... issues” or impose “unwarranted burdens on existing parties.” *Id.* at 9.

19 Intervenor Navajo Nation seeks dismissal of only Count 1 (Fifth Amendment Equal
20 Protection), and the Fifth Amendment Substantive Due Process component of Count 2 of
21 Plaintiffs’ amended complaint. NM.2 (citing Amd. Compl. ¶ 116), NM.5 (citing Amd.
22 Compl. ¶ 122). The Navajo motion also addresses the issue of Navajo membership
23 requirements, NM.2–5, but because this is not an issue before the Court, and not relevant
24 to any issue that is before the Court, this portion of the Navajo motion should be stricken
25 for violating the express terms of this Court’s order regarding intervention. Doc. 216 at 8,
26 9; *see also* 9/28/16 Oral Arg. Tr. (Doc. 227 (“TR”)) at 31:25–32:1; 32:23. This case does
27 not challenge how Navajo Nation defines tribal membership. It challenges the *federal* and
28 *state* laws that treat “Indian children” differently based on their race, color, and/or national
origin.

Intervenor Gila River’s motion to dismiss² seeks dismissal only of Plaintiffs’
challenge to the jurisdiction-transfer and active efforts provisions of ICWA and the BIA

² Because Gila River did not file an amended motion to dismiss, it references Plaintiffs’ original complaint, Doc. 1 (“Compl.”). Plaintiffs assume that Gila River seeks

1 Guidelines in Count 1, GM.4 (citing Compl. ¶¶ 89, 90), the “minimum contacts”
 2 component of Count 2, GM.4 (citing Compl. ¶ 98), Fifth Amendment Substantive Due
 3 Process component of Count 2, GM.4 (citing Compl. ¶ 99, 100), Fourteenth Amendment
 4 Substantive Due Process challenge to foster/preadoptive and adoptive placement
 5 preferences under state law, ICWA, and BIA Guidelines of Count 3, GM.4 (citing Compl.
 6 ¶ 108), Count 4, GM.4 (citing Compl. ¶ 110, 111), Count 5, GM.4 (citing Compl. ¶¶ 116–
 7 18), and Count 6,³ GM.15–16.⁴ Gila River has not moved to dismiss the remaining
 8 portions of the complaint.

9 **II. PLAINTIFFS HAVE STANDING.**

10 Intervenor Gila River’s motion contends that Plaintiffs lack standing to challenge
 11 25 U.S.C. §§ 1912(d), (e), (f), 1915(b). GM.16–17. This is incorrect. Standing requires
 12 that a plaintiff state a concrete and particularized injury, fairly traceable to the actions of
 13 the defendant, which a favorable ruling can redress. *Lujan v. Defenders of Wildlife*, 504
 14 U.S. 555, 560–61 (1992). Plaintiffs easily meet this test. They have been injured in the
 15 past and continue to be injured today by the application of each of the challenged
 16 Sections.⁵ The relief sought from this Court will remedy these injuries.

17 **A. Section 1912(d)**

18 Defendants’ enforcement of the active efforts requirement of Section 1912(d), has
 19 injured Plaintiffs and continues to injure them. That provision requires state officials to
 20 make “active efforts ... to prevent the breakup of the Indian family,” and to show “that
 21 these efforts have proved unsuccessful,” before an Indian child may be placed in foster
 22 care, or parental rights may be terminated (often a necessary step to clear a child for

23 _____
 24 dismissal of only those portions of the original complaint that are retained in the amended
 25 complaint.

25 ³ Gila River seeks dismissal of Plaintiffs’ Count 6. GM.15–16. Plaintiffs have
 26 already briefed this issue and for the sake of brevity will not repeat those arguments here.
 27 The 2015 Guidelines are final agency action and conflict with ICWA’s jurisdiction-
 28 transfer provision, 25 U.S.C. § 1911(b).

27 ⁴ Gila River, unlike the Navajo motion, does not incorporate by reference any other
 28 filings.

28 ⁵ For past injuries, they claim Title VI damages; for continuing and future injuries to
 themselves and putative class members, they seek declaratory and injunctive relief.

1 adoption). The BIA Guidelines require active efforts “to *maintain and reunite* an Indian
2 child with his or her family *or tribal community*.” BIA Guidelines, § A.2 (emphasis
3 added). In the course of enforcing this requirement, Defendants have subjected the
4 Plaintiffs to *forced association* with the Intervenor tribes with which they had no prior
5 association. Specifically, the child Plaintiffs had no social, cultural, or political affiliation
6 with the Intervenor tribes, but, as a consequence of ICWA, were subjected to processes
7 designed to impose such an affiliation upon them—solely because of their genetic
8 ancestry. *See* Amd. Compl. ¶¶ 21, 32, 38, 139.

9 Furthermore, the active efforts provision has resulted in the safety and well-being
10 of child Plaintiffs being jeopardized. As a direct consequence of the active efforts
11 provision, State Defendant has taken active efforts to “reunite” child Plaintiffs not only
12 with birth parents but also with complete strangers, and have done so despite the presence
13 of “aggravated circumstances,” such as “abandonment” and in-utero “chronic abuse” (due
14 to birth mother’s addiction to controlled substances). *See id.* ¶¶ 21, 26–27, 37, 79. Where
15 a child is *not* classified as Indian child, State Defendant is *not* required to take efforts to
16 maintain or reunite that child with parents if there are “aggravated circumstances.” *See* 42
17 U.S.C. § 671(a)(15)(D). But where the child *is* classified as an “Indian child,” ICWA’s
18 “active efforts” provision *does* require such efforts—and does not excuse them in the case
19 of “aggravated circumstances.” BIA Guidelines, § A.2; Amd. Compl. ¶ 79.

20 Children of other races do not have their cases delayed in order to satisfy any such
21 reunification procedures, *see, e.g.*, 42 U.S.C. § 675(5)(E) (the “reasonable efforts” and the
22 15/22 rule)—indeed, it is illegal to deny or delay adoption of children on the basis of race.
23 *See* 42 U.S.C. § 1996b. But termination-of-parental-rights motions for Indian children—
24 and only Indian children—are delayed in order to satisfy ICWA’s active efforts provision.
25 *See* BIA Guidelines, § D.2. Likewise, the prohibition on delay or denial of adoption does
26 not apply to children classified as Indian children under ICWA. 42 U.S.C. § 1996b(3). In
27 short, children of other races are moved toward permanency and stability quicker than
28 children classified as Indian.

1 Consequently, state and federal Defendants, by enforcing the challenged laws and
2 regulations, have imposed legal disadvantages and inflicted concrete injuries on the child
3 Plaintiffs by delaying their cases, undertaking “active efforts” to “reunite” them with birth
4 parents in a way that would not apply to non-Indian children, and delaying or denying
5 them permanency. Amd. Compl. ¶ 44–49. This process has also injured the adult
6 Plaintiffs, by imposing on them greater burdens, delaying the procedure for adoption, and
7 requiring them to experience the stress and difficulty of this separate, race-based system
8 of law. *Id.*

9 All of this is a consequence of Defendants’ implementation and enforcement of 25
10 U.S.C. § 1912(d). Such differential treatment is itself a constitutional injury sufficient to
11 confer standing upon the plaintiffs. *Northeastern Fla. Chapter of Assoc. Gen. Contractors*
12 *of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *see also* Doc. 187 at 1–8.

13 The adult Plaintiffs are the only family the child Plaintiffs have ever known. The
14 parent and child Plaintiffs are in all respects families—except for the fact that these
15 families have been denied legal recognition, solely as a consequence of ICWA. *Cf.*
16 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015) (“Without the recognition, stability,
17 and predictability marriage offers, children suffer the stigma of knowing their families are
18 somehow lesser.”). As a consequence of psychological and physical injuries to the child
19 Plaintiffs, the injuries suffered by foster/preadoptive and adoptive parent Plaintiffs, who
20 are “*de facto* and psychological parents,” Amd. Compl. ¶ 40, of the child Plaintiffs, are
21 “poignantly evident.” *Lauver v. Cornelius*, 85 A.D.2d 866, 867 (N.Y. Sup. Ct. App. Div.
22 1981). Depriving these adult and child Plaintiffs of the recognition of their family status,
23 solely as a consequence of their racial ancestry, is a constitutional injury sufficient to
24 confer standing. *Cf. Obergefell*, 135 S.Ct. at 2605–06.

25 **B. Section 1912(e)**

26 ICWA imposes a higher evidentiary standard when the state seeks to place an at-
27 risk Indian child in foster care than state law imposes in the case of children of other races.
28 Amd. Compl. ¶ 94–95. A child classified as Indian under ICWA is subject to a “clear and

1 convincing” standard, while children of all other races are subject to more protective
2 evidentiary standards. *Id.* As a consequence, unlike children of other races, Indian children
3 must be—and the minor Plaintiffs in fact were—more obviously and extensively abused,
4 abandoned, or neglected before they can be taken into DCS protective custody and placed
5 in foster care. *Id.* ¶¶ 25, 32, 47.

6 For example, Baby Boy C.C. was not removed from the custody of his birth mother
7 for a long period, and only *after* his birth mother was convicted of a felony. *Id.* ¶ 25. This
8 delay resulted from DCS’s compliance with ICWA’s mandate that DCS prove “by clear
9 and convincing evidence” “that the continued custody” of C.C. by his neglectful and
10 abusive birth mother “is likely to result in serious emotional or physical damage to the
11 child.” 25 U.S.C. § 1912(e).

12 Under Arizona law, had C.C. been classified a while child, the standard would have
13 been “probable cause” and “reasonable grounds.” A.R.S. §§ 8-821(A), 8-824(F); *see* Amd.
14 Compl. ¶ 94. In other words, under Arizona law, had C.C. *not* been an “Indian child,” he
15 would have been taken into temporary protective custody as soon as allegations of child
16 abuse and child neglect were corroborated through DCS’s investigatory apparatus. *Id.* He
17 would have been placed in temporary foster care in order “to protect [him] from suffering
18 abuse or neglect.” A.R.S. § 8-821(A)–(B).

19 But solely as a consequence of his Indian genetic ancestry, C.C. was forced to
20 remain in conditions of neglect longer and to undergo “reunification” efforts with
21 *complete strangers* during a prolonged period. Amd. Compl. ¶¶ 26–27. This was all
22 because of Defendants’ enforcement of the “active efforts” and “clear and convincing
23 evidence” provisions of Sections 1912(d) and 1912(e). Under Arizona law, he would not
24 have suffered the injuries that he did; those injuries were caused by the enforcement of
25 ICWA’s race-based double standard.

1 The same was true for L.G. and C.R. Their birth mother had a history of chronic
2 abuse of dangerous drugs and controlled substances.⁶ Amd. Compl. ¶ 32. C.R. was born
3 substance-exposed. *Id.* Nonetheless, in order to meet the “serious emotional or physical
4 damage to the child” standard of ICWA, DCS required both L.G. and C.R. to continue to
5 visit their abusive and neglectful birth mother before they could be meaningfully protected
6 and placed in an environment suited to their individual best interests. *Id.* ¶ 37. L.G. and
7 C.R., as a result, suffered physical and emotional distress. *Id.* ¶ 43–49. Likewise, the adult
8 Plaintiffs were forced, and are being forced, to experience delay in adoption proceedings
9 and the stress and stigma of being subjected to a separate set of rules that treated them and
10 the children they love differently solely on account of race, color, and/or national origin.
11 *Id.* All of these consequences flowed and still flow directly from Defendants’
12 implementation of ICWA; non-Indian children are not subject to the same legal regime,
13 because a situation such as L.G. and C.R.’s would qualify as “aggravated circumstances”
14 and would relieve DCS of any obligation to attempt reunification. *See id.* ¶ 79.

15 As this (and other matters in Plaintiffs’ prior oppositions to motions to dismiss,
16 Doc. Nos. 80 and 187) demonstrates, ICWA protects the individual rights of the child
17 Plaintiffs to a *lesser degree* than ordinary state law protects non-Indian children—and
18 does so solely as a consequence of their genetic ancestry. Such unequal treatment is a
19 constitutional injury, *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984), and there is no
20 adequate forum for the children to seek resolution of that injury at this stage: the removal
21 action and initial foster care placement occurs speedily—as occurred in the cases of child
22 Plaintiffs.⁷ The foster parents are not parties to the state court proceedings relating to the

23
24 ⁶ The tribes counter that ICWA addresses the problem of Indian children being
25 disproportionately removed from their birth parents’ custody because of substance abuse.
26 But if substance abuse is the problem, the “policy choice[],” GM.2, would be to address
27 substance abuse problems of Indian parents and Indian families, not to create an ICWA
28 penalty box for the children who are not at fault. Race-, color- or national-origin-based
segregation and unequal treatment has been firmly rejected as an unconstitutional policy
choice in the United States.

⁷ Intervenor’s concern with “abusive child welfare practices,” GM.2, that led to
“unwarranted” “removal,” 25 U.S.C. § 1901(4), is fully addressed at the state and federal
level. The federal government abandoned its education policy that it admitted was “a

1 foster child at this stage and are unable to act to protect the rights of the foster children in
 2 their care—as occurred in the Plaintiffs’ cases. Amd. Compl. ¶¶ 29, 38. DCS merely
 3 follows the federal standard dictated by ICWA—and did so in the cases of Plaintiffs.

4 This shows how Plaintiffs have been and continue to be injured. They have
 5 experienced race-based differential treatment in the past, and the Amended Complaint
 6 seeks Title VI damages for their past injuries—a claim that neither the *Gila River nor*
 7 *Navajo Intervenors seeks to dismiss*. Also, in their own name and as named Plaintiffs of a
 8 putative class, they seek declaratory and injunctive relief against future race-based
 9 differential treatment due to future enforcement of §§ 1912(e) and (f).⁸

10 C. Section 1912(f)

11 Section 1912(f) unquestionably inflicted a concrete injury on Plaintiffs for which
 12 they now seek Title VI damages. As a result of section 1912(f), the child Plaintiffs had to
 13 overcome the “beyond a reasonable doubt” standard in order to obtain an order terminating
 14 parental rights while *non*-Indian children had to satisfy only clear and convincing and
 15 preponderance of the evidence standards to move forward in the adoption process. Amd.
 16 Compl. ¶¶ 96, 98.

17 The difference between the standards “is not merely academic.” *Gila River Indian*
 18 *Community v. DCS*, 363 P.3d 148, 153 (Ariz. App. 2015). The “psychiatric evidence” that
 19 child Plaintiffs needed to show “emotional or physical damage” under section 1912(f) is
 20 precisely the type of evidence that is “rarely susceptible to proof beyond a reasonable
 21 doubt.” *Santosky v. Kramer*, 455 U.S. 745, 768–69 (1982). Indeed, the *Santosky* Court
 22 expressly pointed out this flaw in section 1912(f) when it refused to adopt a reasonable-

23
 24 failure of major proportions.” Cohen’s Handbook of Federal Indian Law, § 22.03(1)(a) at
 25 1397 (2012). In Arizona, DCS removals are closely regulated and scrutinized with various
 levels of administrative checks in place under A.R.S. § 8-822.

26 ⁸ By operation of ICWA, any removal of the child Plaintiffs “for the purpose of
 27 further foster care, preadoptive, or adoptive placement” is also governed by “the
 28 provisions of this chapter.” 25 U.S.C. § 1916(b) (emphasis added). This means that if the
 child Plaintiffs are removed from the custody of the adult Plaintiffs because of the
 placement preferences provisions, *id.* §§ 1915(a), (b), they will again be subject to the
 provisions of ICWA challenged here, and particularly, section 1912(e).

1 doubt standard for children of other races. *Id.* at 769. But under the ICWA standard, child
2 Plaintiffs had to marshal “medical and psychiatric testimony,” proof of “lack of parental
3 motive, absence of affection between parent and child, and failure of parental foresight
4 and progress,” “*to a level of absolute certainty.*” *Id.* (emphasis added).

5 This harm suffered by child Plaintiffs is unquestionably redressable through an
6 award of damages under Title VI. The tribes are, moreover, not seeking dismissal of
7 Plaintiffs’ Count 7. Their argument that Plaintiffs have no standing to challenge section
8 1912(f) because no plaintiff seeks termination of parental rights is therefore meritless.

9 **D. Section 1915(b)**

10 Gila River’s standing argument rests on the presumption that Plaintiffs’ challenge
11 to 25 U.S.C. §§ 1912(d), 1912(e), 1912(f), and 1915(b), is “not based on any live issues.”
12 GM.16.⁹ Not so. As an initial matter, Plaintiffs seek damages under Title VI for past
13 injuries that resulted from prior application of these four provisions. Gila River does not
14 seek dismissal of those claims.

15 Moreover, Plaintiffs are now being, and, unless this Court acts, will continue to be
16 harmed by application of the race-based preferences for foster and preadoptive placements
17 of Indian children imposed by Section 1915(b). Those preferences require state
18 Defendants to place an Indian child first with “a member of the Indian child’s extended
19 family” (as defined “by the law or custom of the Indian child’s tribe.” 25 U.S.C.
20 § 1903(2)). Failing that, state Defendants must place that Indian child with “a foster home
21 licensed, approved, or specified by the Indian child’s tribe.” Failing that, the child must
22 next be placed with “*an Indian foster home* licensed or approved by an authorized non-
23 Indian licensing authority,” and, failing that, with “an institution for children approved by
24 *an Indian tribe* or operated by an Indian organization which has a program suitable to
25 meet the Indian child’s needs”—regardless of tribe. 25 U.S.C. § 1915(b) (emphases
26 added). No such preferences exist for children of other races.

27 _____
28 ⁹ Gila River spends one sentence on *Pullman* abstention. GM.17. Plaintiffs hereby
incorporate by reference their previous briefing on this issue. Doc. 80 at 17–20.

1 For *non-Indian* children, the foster/preadoptive placement standard is primarily the
2 best interest of the child. Amd. Compl. ¶ 103. Arizona law applicable to *non-Indian*
3 children requires state Defendants to place a non-Indian child in the “least restrictive”
4 setting from an ordered list of *race-neutral* placement preferences. A.R.S. § 8-514(B);
5 *compare with* A.R.S. § 8-514(C) (mirroring ICWA placement preferences). The first
6 preference is with “a parent,” the second, with “a grandparent.” A.R.S. § 8-514(B). The
7 third preference is with “the child’s extended family, *including a person who has a*
8 *significant relationship with the child.*” *Id.* (emphasis added). “Extended family” is not
9 defined in Title 8 of A.R.S., but the term “relative” is defined as “a grandparent, great-
10 grandparent, brother or sister of whole or half blood, aunt, uncle or first cousin.” *See*
11 A.R.S. § 8-501(A)(14). Because “relative” is defined but “extended family” is not,
12 Arizona courts have held that the term “extended family” in A.R.S. § 8-514(B) embodies
13 “a more expansive notion of family placement than the one defined by ‘relative.’” *Jeff D.*
14 *v. DCS*, 367 P.3d 109, 115 (Ariz. App. 2016). This expansive notion of family placement
15 is, and should be, more than adequate to address the tribe’s concern with placing an Indian
16 child with her extended family.

17 Gila River claims the “good cause” standard in Section 1915(b) is “ample
18 protection *in any situation where tribal membership or tribal jurisdiction is outweighed*
19 *by other circumstances.*” GM.10 (emphasis added). This is false. Although “good cause”
20 is not defined in ICWA, one thing is clear: it is *not* sufficient to protect children in cases
21 where their individual interests outweigh the rest of ICWA’s race-based mandates. Indeed,
22 the BIA, the tribes, and many state courts¹⁰ hold that the “good cause” determination must
23 *not* include an individualized assessment of the best interests of the child in § 1915(b)
24 cases. Amd. Compl. ¶ 102 (quoting BIA Guidelines, § F.4); GM.9. In reality, the “good
25

26 ¹⁰ *See, e.g., In re C.H.*, 997 P.2d 776, 782 (Mont. 2000) (“while the best interests of
27 the child is an appropriate and significant factor in custody cases under state law, it is
28 *improper*” in ICWA cases because “ICWA expresses the presumption that it is in an
Indian child’s best interests to be placed in conformance with the preferences.” (emphasis
added)); *In re Interest of Zylena R.*, 284 Neb. 834, 852 (2012) (same).

1 cause” standard, like the rest of ICWA, prioritizes the racial ancestry of the child and the
2 foster/preadoptive parents over any individualized assessment of an “Indian child’s”
3 needs.

4 ICWA’s separate and unequal rules, particularly its race-based placement
5 preferences, harm both the child and adult Plaintiffs. They harm the child Plaintiffs by
6 sharply limiting their placement opportunities. *See In re Bridget R.*, 41 Cal. App. 4th 1483,
7 1508 (1996) (“As a result [of ICWA] ... the number and variety of adoptive homes that
8 are potentially available to an Indian child are more limited than those available to non-
9 Indian children, and an Indian child who has been placed in an adoptive or potential
10 adoptive home has a greater risk ... of being taken from that home and placed with
11 strangers.”). They harm the adult Plaintiffs who, because they do not qualify as “Indian,”
12 receive no placement preferences under ICWA, and consequently must clear a higher
13 hurdle when seeking to provide foster care to an Indian child, to adopt an Indian child, or
14 to defend the interests of Indian children placed in their care. Amd. Compl. ¶ 44–46.

15 Navajo Nation argues that ICWA’s placement preferences are “based on the
16 fundamental *assumption* that it is in the Indian child’s best interest that its relationship to
17 the tribe be protected.” NM.5 (emphasis added). But the question here is not *whether*
18 ICWA imposes that assumption, but whether that assumption is constitutional. Plaintiffs
19 argue that this assumption is an unconstitutional race-based preference that injures
20 Plaintiffs by depriving them of their constitutional rights, including the “individualized
21 determination” of their cases that “the Due Process Clause require[s].” *Cleveland Bd. of*
22 *Educ. v. LaFleur*, 414 U.S. 632, 645 (1974). Navajo Nation’s argument is not a response
23 to this constitutional objection.

24 Plaintiffs have shown, here and in their prior pleadings, that they are injured by
25 Defendants as a consequence of Defendants’ enforcement of the challenged provisions of
26 ICWA. They have therefore stated a concrete and particularized injury, fairly traceable to
27 Defendants’ actions, which this Court can redress. The tribes’ standing arguments must
28 be rejected.

1 **III. PLAINTIFFS ARE SUBJECT TO UNEQUAL TREATMENT.**

2 Both the Navajo and Gila River motions argue that ICWA does not treat Plaintiffs
3 differently on the basis of race, but on the basis of tribal membership, which they claim is
4 a political distinction. NM.2, GM.7–10. Plaintiffs have already responded extensively to
5 this argument and refer the Court to Plaintiffs’ earlier-filed briefs.

6 Plaintiffs observe, however, that the Navajo Nation’s lengthy explanation of the
7 process of obtaining tribal membership is irrelevant because ICWA is not triggered by
8 tribal membership, but by *eligibility* for membership. 25 U.S.C. § 1903(4). The fact that a
9 racially-eligible child’s application for membership would also have to obtain approval
10 through the procedures detailed in the Navajo Nation’s brief is beside the point.

11 That Navajo Nation (like other tribes) imposes requirements *in addition* to
12 biological requirements in no way means that ICWA’s differential treatment of Indian
13 children is not a racial classification. As explained in Plaintiffs’ Opposition to Motion to
14 Dismiss (Doc. No. 187 at 11–12), a race-based classification is not made any *less* race-
15 based by the fact that criteria in *addition* to race define the class. In *Rice v. Cayetano*, 528
16 U.S. 495, 516 (2000), the Supreme Court found that the Hawaii statute allowing only
17 Native Hawaiians to vote in an election created a racial, not a political, classification, even
18 though factors in addition to race were considered when defining the class: “Simply
19 because a class defined by ancestry does not include all members of the race does not
20 suffice to make the classification race neutral,” the Court declared. *Id.* at 516–17.
21 Likewise, the fact that a person must not only have the required quantum of Navajo blood,
22 but must also satisfy other requirements does not make that classification race-neutral.

23 Plaintiffs reiterate: tribal membership is entirely a matter of tribal law, and
24 Plaintiffs do not dispute it, or challenge any provision of the Navajo code.¹¹ But there is a

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26 ¹¹ Still, it is revealing that the Navajo brief details the intensely *racial* nature of the
27 membership criteria. The “Screening Committee,” it says, “is required to base its
28 recommendation for citizenship on an individual’s degree of Navajo blood,” NM.3, and
“a showing of one-fourth degree of Navajo blood is required.” NM.4. Political, social, or
cultural affiliation plays no role whatsoever in the determination; tribal membership
depends exclusively on biological criteria.

1 distinction between *tribal membership*, on one hand, and “*Indian child*” status under
2 ICWA, on the other. *In re Abbigail A.*, 375 P.3d 879, 885 (Cal. 2016). The latter “is a
3 conclusion of federal and state law based on the tribe’s determination,” *id.*, and
4 accordingly must meet the constitutional standards of due process and equal protection.
5 Whatever the tribe’s views regarding the proper relationship of a child to her genetic
6 ancestry, the state and federal Defendants are not free to give legal effect to racial
7 distinctions. “The Constitution cannot control such prejudices but neither can it tolerate
8 them. Private biases may be outside the reach of the law, but the law cannot, directly or
9 indirectly, give them effect.” *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

10 It is simply not true, as Gila River contends, GM.8–9, that laws that treat Indians
11 as a class differently from other ethnic groups are immune from scrutiny as racial
12 classifications. *Malabed v. North Slope Borough*, 335 F.3d 864, 868 n.5 (9th Cir. 2003);
13 *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004). As explained in Plaintiffs’
14 previous briefs (Doc. 187 at 13–14; Doc. 80 at 20–25), *Morton v. Mancari*, 417 U.S. 535
15 (1974), involved adults who chose to become, or remain, members of recognized tribes.
16 The Court made a point of *not* deciding whether a law “directed towards a ‘racial’ group
17 consisting of ‘Indians’” would be subject to strict scrutiny. *Id.* at 553 n.24. And the Ninth
18 Circuit has expressly “reject[ed] the notion that distinctions based on Indian or tribal status
19 can never be racial classifications subject to strict scrutiny.” *Kahawaiolaa*, 386 F.3d at
20 1279. ICWA does not apply to adult members of tribes. It applies to children who, for
21 genetic reasons alone, are eligible for tribal membership—without regard to political,
22 social, or cultural affiliation. In other words, it “singles out identifiable classes of persons
23 ... solely because of their ancestry or ethnic characteristics ... [and] use[s] ancestry as a
24 racial definition and for a racial purpose.” *Rice*, 528 U.S. at 515 (citation and quotation
25 marks omitted).

26 The rule that “a statutory scheme” framed “solely on the basis of racial
27 classifications violates the Equal Protection and Due Process Clauses of the Fourteenth
28

1 Amendment” is not new. *Loving v. Virginia*, 388 U.S. 1, 2 (1967).¹² For Plaintiffs,
2 however, their race, color or national origin is the determinative factor in the Defendants’
3 placement determinations, in the application of “active efforts” rather than “reasonable
4 efforts,” in the application of the various delays in finalizing adoption or foster placement,
5 and in the various other provisions of ICWA and the Guidelines challenged in the
6 Amended Complaint. There is no question that both the child Plaintiffs (through their next
7 friends) and the adult Plaintiffs have standing to challenge the constitutionality of such
8 discrimination. *Cf. Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 495 (D.N.J. 2000).
9 Intervenors have come forth with no justification, much less one that shows Plaintiffs’
10 claim is implausible on its face, for dismissing this case.

11 **IV. ICWA VIOLATES PLAINTIFFS’ FREEDOM OF ASSOCIATION RIGHTS.**

12 Gila River’s arguments seeking dismissal of Plaintiffs’ Count 5 are meritless.
13 GM.14–15. Indian tribes, as Gila River admits, “are governmental entities, analogous to
14 state and local governments.” GM.15. As explained previously by Plaintiffs (Doc. No.
15 187 at 14–17), ICWA forces Plaintiffs to associate with those government entities—and
16 does so solely on the basis of their race. Only Indian children are forced to associate with
17 a governmental entity that is analogous to state and local governments. California’s
18 government cannot force children born in California, who move to other states, to
19 associate with the California government. A child whose parents were born in Las Vegas,
20 but who has never himself been to Las Vegas, is not automatically subject to the
21 jurisdiction of the Superior Court there in consequence of his racial ancestry.¹³

24 ¹² Gila River argues that ICWA does not involve racial classification because ICWA
25 “excludes children who are racially “Indian,” but who are not members of, and are not
26 eligible for membership ... in, a federally recognized Indian tribe.” GM.8. That question
27 was asked and has been answered. *See* Doc. 187 at 10–14.

28 ¹³ On the contrary—that would plainly violate the “minimum contacts” requirement.
See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980) (the Due
Process Clause “does not contemplate that a state may make binding a judgment *in*
personam against an individual or corporate defendant with which the state has no
contacts, ties, or relations.” (citation omitted)).

1 Gila River also acknowledges that the standard for evaluating a First Amendment
2 freedom of association claim is whether the mandatory association “serve[s] a compelling
3 state interest that cannot be achieved through means *significantly less restrictive* of
4 associational freedoms.” GM.15 (quoting *Knox v. SEIU*, 132 S. Ct. 2277, 2289 (2012)).
5 Gila River has identified no compelling state interest sufficient to justify ICWA’s
6 challenged elements that exist for the purpose of compelling a child’s association with a
7 tribe. Nor has Gila River shown that a less restrictive means that is readily available under
8 the best-interests standard (letting children and their parents to choose whether to associate
9 with tribes and tribal culture) would fail to achieve or address Gila River’s concerns.
10 ICWA’s applicability is not triggered by any *existing* political, social, or cultural
11 affiliation with a tribe; instead, it aims to force the *creation* of such an affiliation *where*
12 *none existed before*.

13 Gila River counters that Indian children brought up in non-Indian homes will face
14 an identity crisis when they grow up and feel that they have been deprived of a connection
15 to Native American culture. GM.9. That is not a dispute this Court must resolve for
16 purposes of this motion. That is a *merits* argument as to whether ICWA serves a
17 sufficiently compelling government interest, and should therefore be raised in a motion
18 for summary judgment. It suffices for now to note the binding Supreme Court precedent
19 that holds that while “[t]here is a risk that a child living with a stepparent of a different
20 race may be subject to a variety of pressures and stresses not present if the child were
21 living with parents of the same racial or ethnic origin,” state and federal officials may not
22 draw racial or ethnic lines for that reason; nor may they ““avoid a constitutional duty by
23 bowing to the hypothetical effects of private racial prejudice that they assume to be both
24 widely and deeply held.”” *Palmore*, 466 U.S. at 433 (quoting *Palmer v. Thompson*, 403
25 U.S. 217, 260–61 (1971) (White, J., dissenting)).

26 Adult Plaintiffs’ freedom-of-association rights are also violated by ICWA. As a
27 consequence of ICWA, they must accommodate all visits with proposed placements. This
28 was especially evident in the situation faced by M.C. and K.C. who had to repeatedly

1 drive, for four years, sometimes over 100 miles, to visit with supposed ICWA-compliant
2 placements proposed for C.C. Amd. Compl. ¶ 27. C.C. was significantly distressed after
3 each such visit, which in turn caused psychological and emotional harm to M.C. and K.C.,
4 his then-*de facto* parents. *Id.* Each such visit reminded them that their family was not
5 legally recognized as permanent because C.C. is deemed an Indian child but M.C. and
6 K.C. have no Indian ancestry. *Id.*

7 **V. INHERENT TRIBAL SOVEREIGNTY OR INHERENT TRIBAL**
8 **JURISDICTION OVER MEMBER CHILDREN IS NOT AT ISSUE IN THIS**
9 **CASE.**

10 Both tribes emphasize the importance of tribal government sovereignty. That is
11 simply not at issue here. Plaintiffs did not sue the tribes, and do not seek any relief against
12 the tribes. They do not challenge the tribes' right to determine the conditions of tribal
13 citizenship, or to adjudicate on-reservation child custody disputes. Also, Plaintiffs in no
14 way seek to minimize the abuses suffered by Native Americans at the hands of state and
15 federal governments throughout American history. None of that is at issue here. What *are*
16 at issue here are federal and state laws and regulations that “put certain vulnerable children
17 at a great disadvantage solely because an ancestor—even a remote one—was an Indian.”
18 *Adoptive Couple*, 133 S. Ct. at 2565. What is at issue is whether the challenged federal
19 and state laws and regulations violate the Constitution.

20 **A. Imposing a *per se* “best interests” presumption on children of one race**
21 **violates Due Process.**

22 Both Gila River and Navajo Nation argue that ICWA reflects Congress's
23 determination that it is inherently in the best interests of children with Indian genetic
24 ancestry to be placed with foster or adoptive families of Indian genetic ancestry—and
25 therefore, that ICWA does not violate Due Process. NM.5–6, GM.9. True, a mere
26 “disagreement with Congress” on a matter of public policy does not give rise to a
27 constitutional violation, *id.*, but for Congress to decree across the board what is in the best
28 interests of a class of children on the basis of their genetic makeup most certainly does.
Congress has no authority to decree that children of one race should attend one school,

1 and children of another race attend a different school. *Bolling v. Sharpe*, 347 U.S. 497
2 (1954). Likewise, it cannot constitutionally decree that it is necessarily in a child’s best
3 interests—because of his race—to be placed in accordance with preconceived—that is,
4 pre-judged, or *prejudiced*—race-based preferences.

5 Navajo Nation asserts that “the relationship between a child and the Nation is
6 considered sacred in Navajo thinking,” and that knowledge of a person’s ancestry is
7 important to that person’s well-being. NM.5–6. That is not disputed. But it simply does
8 not prove that ICWA does not violate due process. For the federal government to impose
9 a separate and substandard set of rules on children because of their race is unconstitutional
10 even where doing so is alleged to be in accord with sincerely-held beliefs about the best
11 interests of the child. *Johnson v. California*, 543 U.S. 499, 505 (2005) (“We have insisted
12 on strict scrutiny in every context, even for so-called ‘benign’ racial classifications.”).

13 In *Palmore, supra*, the Supreme Court expressly and unanimously rejected the
14 proposition that cross-racial adoption could be barred on such grounds. There, the Florida
15 state court granted custody to the father on the grounds that the child would be harmed by
16 living with his mother and her boyfriend of a different race. 466 U.S. at 433–34. The Court
17 acknowledged that this was not an unrealistic concern, but concluded that even goals that
18 are “[d]esirable ... and important ... cannot be accomplished by laws or ordinances which
19 deny rights created or protected by the Federal Constitution.” *Id.* (quoting *Buchanan v.*
20 *Warley*, 245 U.S. 60, 81 (1917)).

21 Preserving ancestral ties might be important, but it cannot justify a deprivation of
22 due process or equal protection. Congress may not impose a one-size-fits-all
23 “presumption” that Indian children, solely because of their ethnic heritage, must be placed
24 with Indian families.¹⁴ To do so deprives those children of their due process rights to an

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26 ¹⁴ The “separate” ICWA standards applied to Indian children “are inherently
27 unequal” to Arizona law applied to all other children in Arizona state courts. *Brown v.*
28 *Board of Educ.*, 347 U.S. 483, 495 (1954). To reiterate, Sections 1915(a) and (b) of ICWA
require placement with “an Indian foster home” or “other Indian families,” *regardless of*
tribe, meaning that a Navajo child must be placed with a Ute, Hopi, or Comanche family
rather than a white, black, Hispanic, or Asian family—regardless of the substantial

1 individualized determination of their cases and their right to equal treatment before the
2 law.

3 **B. Congress cannot give tribes personal adjudicative jurisdiction in the**
4 **absence of minimum contacts.**

5 This case is not about inherent tribal sovereignty. GM.10–13. Gila River conflates
6 jurisdiction over member children with the tribe’s *adjudicative* jurisdiction. Adjudicative
7 jurisdiction requires *personal* jurisdiction, which, in turn, requires that the party have such
8 “minimum contacts” with the forum that the forum may issue a binding judgment
9 consistent with due process of law. *International Shoe Co. v. Washington*, 326 U.S. 310,
10 324 (1945). Tribal courts may not be bound by the Bill of Rights, *United States v. Bryant*,
11 136 S. Ct. 1954, 1962 (2016), but *Congress is*, and *Congress* cannot disregard the
12 “minimum contacts” / “purposeful availment” requirement, or impose a different set of
13 jurisdictional rules for children identified by genetic ancestry. In short, the fact that tribes
14 are “domestic dependent nations” does not necessarily mean that Congress can give tribes
15 power to exercise *adjudicative* jurisdiction in the absence of minimum contacts. Suffice
16 to say that genetic ancestry does not satisfy “fair play and substantial justice.” *Int’l Shoe*,
17 326 U.S. at 324.

18 Gila River argues that its purported power to adjudicate child welfare proceedings
19 involving children who are not domiciled on reservation, and who lack any political,
20 social, or cultural affiliation with a tribe, but are simply eligible for membership because
21 of the DNA in their cells, is a facet of inherent tribal sovereignty. GM.10. It further argues
22 that “because Congress’s power to legislate for the protection and benefit of Indians
23 operates *in personam* and is not limited to any land base or reservation,” *id.* at 11,
24 Congress can give the tribes race-based personal jurisdiction. This is incorrect, and the
25 cases Gila River cites simply do not support the broad proposition that constitutional
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28 differences or even traditional enmity between these Native cultures. ICWA does not
depend on culture; it depends on race.

1 limitations on the exercise of *in personam* jurisdiction are inapplicable to American
2 citizens of Indian ancestry.

3 On the contrary, the minimum contacts requirement *does* apply to tribal courts.
4 *Wilson v. Marchington*, 127 F.3d 805, 810–11 (9th Cir. 1997); *Water Wheel Camp*
5 *Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 820 (9th Cir. 2011). *Miss. Band of*
6 *Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) proves the point. Had ICWA granted
7 tribes authority over all children who are biologically eligible for membership in a tribe,
8 regardless of domicile, the *Holyfield* Court would not have spent 11 pages discussing the
9 definition of “domicile”—it would instead have declared in one sentence that the children
10 were subject to ICWA because of their race. That was not what the Court did. To the
11 contrary, the Court found that “the sole issue”—the dispositive question—was whether
12 the children were domiciled on-reservation. *Id.* at 42. Its affirmative conclusion on that
13 question was the *sole* basis supporting tribal jurisdiction. Gila River’s effort to interpret
14 *Holyfield* as standing for the proposition that tribes may exercise jurisdiction over children
15 of Indian ancestry without regard to domicile therefore flies in the face of the Court’s
16 decision.

17 *United States v. Wheeler*, 435 U.S. 313 (1978), on which Gila River relies, GM.10–
18 11, involved a tribal court conviction of an adult tribal member for a crime that occurred
19 *on reservation*. *Id.* at 314. The Court found that the defendant could be tried again under
20 federal law because the tribal conviction was under a separate sovereign. *Id.* at 329–30.
21 Nothing about that precedent is applicable to this case. This case involves a class of
22 *children* who are *not* domiciled on reservation, and who are subject to ICWA “solely
23 because an ancestor—even a remote one—was an Indian.” *Adoptive Couple*, 133 S. Ct. at
24 2565. Neither *Wheeler* nor any other case has held that tribes may exercise personal
25 jurisdiction, in the absence of minimum contacts, over *off-reservation* minors, and who
26 are members or eligible for membership solely because of their biological ancestry.¹⁵

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28 ¹⁵ As this Court noted in oral argument on the intervention motion, Gila River’s
position would mean that tribes could prescribe the tort rules governing car accidents

1 Moreover, this case is not about whether Congress has “power over Indian
2 children.” GM.11. The question is whether, in exercising that power, Congress may
3 exceed the limits of the Constitution. The Supreme Court has made clear that respect for
4 tribal sovereignty requires balancing the “interests of the Tribes and the Federal
5 Government ... and those of the State.” *Nevada v. Hicks*, 533 U.S. 353, 362 (2001). The
6 state and federal interests are “derive[d] from the basic principle that the Fifth and
7 Fourteenth Amendments” to the Constitution “protect *persons*, not *groups*.” *Adarand*
8 *Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (emphasis in original; citation
9 omitted). The proper balancing of interests, therefore, requires that “a *group*
10 classification” give way “to ensure that the *personal* right to equal protection of the laws
11 has not been infringed.” *Id.* (emphasis in original).

12 For Congress to subject citizens of the United States who have no political, social,
13 or cultural connection to a tribe—but are connected to that tribe solely because of their
14 chromosomes—“to a sovereignty outside the basic structure” of our Constitution, would
15 be “a serious step,” and one the Supreme Court has never authorized in the off-reservation
16 context. *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the
17 judgment).

18 Gila River seeks to create the impression that there is no difference between on-
19 and off-reservation tribal court jurisdiction. GM.11–12. But ICWA *itself* recognizes that
20 distinction, in the different language of sections 1911(a) and 1911(b). Section 1911(a)—
21 which is not at issue in this case—recognizes that tribes have exclusive jurisdiction over
22 on-reservation child custody proceedings. Section 1911(b), by contrast, imposes a
23 different rule for off-reservation child custody matters. Those are for state courts to decide
24 unless a tribe obtains jurisdiction transfer. As for the constitutional issues here, tribal
25 adjudication of on-reservation child custody proceedings easily satisfies the jurisdictional
26 minimum of due process, which is why Plaintiffs do not challenge Section 1911(a). But

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28 involving tribal members—or even the children of tribal members—driving on highways
beyond the reservation, certainly an absurd result. TR.18:1–18:9.

1 *off-reservation* child custody proceedings—like out-of-state proceedings in cases
2 involving non-Indian children—must satisfy due process, including the minimum contacts
3 rule. *See In re J.D.M.C.*, 739 N.W.2d 796, 811–13 (S.D. 2007) (rejecting tribe’s effort to
4 exercise ICWA power due to lack of minimum contacts).

5 Gila River’s argument that minimum contacts analysis is inapplicable because
6 people who seek adoption of children are plaintiffs, while minimum contacts analysis
7 applies to defendants, GM.13, is sophistry. First, the minimum contacts requirement *does*
8 apply to plaintiffs—it’s just that a plaintiff satisfies that requirement by filing a lawsuit.
9 *Threlkeld v. Tucker*, 496 F.2d 1101, 1103 (9th Cir. 1974). Second, in jurisdiction-transfer
10 situations at issue in this case, a prospective adoptive parent is a plaintiff *in a state court*
11 *action* (and thereby subjects herself to the personal jurisdiction of *that state* court—not
12 tribal court), but ICWA’s transfer provision then sends the case to tribal court, to which
13 *no* party has voluntarily subjected herself, and with which the parties may have *no*
14 contacts, let alone the minimum contacts required by due process. *That* is what violates
15 due process.

16 **VI. EVEN IF VIEWED AS A “SOVEREIGN-TO-SOVEREIGN” ACT, ICWA IS**
17 **UNCONSTITUTIONAL.**

18 **A. Even under its “plenary” powers, Congress cannot disregard**
19 **constitutional limits.**

20 Gila River argues that Congress adopted ICWA as part of its “sovereign-to-
21 sovereign dealings” akin to its treaty powers, GM.6, and that this entitled Congress to
22 establish the separate system of rules that ICWA imposes for child protection and child
23 custody proceedings involving Indian children. That argument is unavailing, because “the
24 power of Congress in Indian affairs, although ‘plenary,’ is not absolute.” *Bugenig v.*
25 *Hoopa Valley Tribe*, 266 F.3d 1201, 1219 (9th Cir. 2001). It must remain within
26 constitutional boundaries.

27 *Reid v. Covert*, 354 U.S. 1, 17 (1957), is instructive. *Reid* involved a statute that—
28 like ICWA—imposed separate jurisdictional rules and a special judicial system for a
particular class of American citizens; specifically, civilian dependents of servicemen

1 stationed in Great Britain and Japan. *Id.* at 3–5. The civilians in that case were women
2 convicted in military courts of murdering their husbands. *Id.* at 3–4. They argued that they
3 could not constitutionally be tried by military authorities, and the Supreme Court agreed.
4 It held that “no agreement with a foreign nation can confer power on the Congress, or on
5 any other branch of Government, which is free from the restraints of the Constitution,” *id.*
6 at 16, including those restraints that apply in the courtroom. Congress’s *plenary* power
7 over the military and agreements with foreign governments did not permit Congress to
8 “set[] up a rival system of ... courts to compete with civilian courts for jurisdiction over
9 civilians who might have some contact or relationship with the armed forces.” *Id.* at 30.
10 Given that “[t]he United States is entirely a creature of the Constitution,” Congress could
11 not “strip[] away” the “shield which the Bill of Rights and other parts of the Constitution
12 provide ... just because [the citizen] happens to be in another land.” *Id.* at 5–6.

13 In the same way, Congress has no power to create a separate legal system which
14 strips away that shield, ignores the requirements of due process, disregards the minimum
15 contacts requirement, overrides state law, vetoes application of the “best interests of the
16 child” standard, and “place[s] vulnerable Indian children at a unique disadvantage in
17 finding a permanent and loving home ... solely because an ancestor—even a remote one—
18 was an Indian.” *Adoptive Couple*, 133 S. Ct. at 2564–65—not even as part of sovereign-
19 to-sovereign dealings.

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1 **B. Even if acting under its “sovereign-to-sovereign” powers, Congress cannot**
2 **commandeer state authorities in violation of the Tenth Amendment.**

3 Gila River’s arguments regarding Count 4, GM.6–7, 13–14, largely repeat
4 arguments already answered both in the Plaintiffs’ prior briefs, Doc. 80 at 29–31, and in
5 the Ohio Attorney General’s amicus brief, Doc. 191. In short, the challenged ICWA
6 provisions and BIA Guidelines commandeer Arizona officers and compel them to
7 implement rules that impose separate, unequal treatment on children deemed Indian.

8 Gila River’s argument is essentially that the anti-commandeering principle of the
9 Tenth Amendment is inapplicable when Congress acts on the basis of “sovereign-to-
10 sovereign dealings,” as through its treaty power. GM.6. This is incorrect. The Supreme
11 Court has made clear that Congress cannot circumvent the Constitution. *Covert*, 354 U.S.
12 at 16–17. Nor can Congress use its treaty powers to override a state’s constitutionally
13 protected authority. Thus in *Bond v. United States*, 134 S. Ct. 2077 (2014), the Court
14 refused to construe the chemical weapons treaty in such a manner as to regulate domestic
15 disputes. To do otherwise, warned Justice Thomas, “would destroy the basic constitutional
16 distinction between domestic and foreign powers.” *Id.* at 2103 (Thomas, J., concurring).
17 Likewise, in *Medellin v. Texas*, 552 U.S. 491, 528–29 (2008), the Court found that even
18 when acting pursuant to an international obligation, the President could not issue an order
19 preempting state law.

20 The challenged provisions of ICWA and the Guidelines override state law
21 regarding domestic relations, and “dragoon” state officials into implementing a
22 nationwide child welfare regime, *Printz v. United States*, 521 U.S. 898, 927–28 (1997),
23 despite the fact that child welfare is a subject reserved to state, not federal, authority. *See,*
24 *e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (“[t]he whole subject
25 of the domestic relations of ... parent and child, belongs to the laws of the States and not
26 to the laws of the United States.” (citation and quotation marks omitted)). In fact, ICWA
27 is *only* applied by state officials and in state courts—it does not apply to tribal courts. BIA
28 Guidelines § A.3(e). ICWA—at least, with regard to the named Plaintiffs and the putative
class—has nothing to do with foreign or “external affairs.” It regulates the “domestic or

1 internal affairs” reserved to the states. *Cf. United States v. Curtiss-Wright Export Corp.*,
2 299 U.S. 304, 315–16, 319 (1936).

3 This case does not involve children who are politically, culturally, or socially
4 affiliated with a tribe or who live on a reservation. It involves children who are utterly
5 indistinguishable from the black, white, Hispanic, or Asian kids who live in Phoenix,
6 Tucson, or Mesa. They have no political, social, or cultural connection to a tribe. They
7 may have never visited a reservation. They may not even know that they are eligible for
8 tribal membership. Yet ICWA requires state officials to treat them differently solely on
9 account of their genetic ancestry. ICWA requires DCS and state courts to delay their foster
10 and adoption proceedings, to place them in accordance with race-based preferences, to
11 engage in “active efforts,” to transfer cases to tribal jurisdiction, to set aside the evidentiary
12 standards that apply to these children’s black, white, Hispanic, or Asian playmates, and
13 take other steps to “administer[] federal law.” *Printz*, 521 U.S. at 929.

14 Of course, whether ICWA violates the Constitution’s limits on Congressional
15 power to regulate internal affairs is a matter to be decided upon trial or summary judgment,
16 not a motion to dismiss. It is enough here that Plaintiffs have put forth a plausible argument
17 for relief—one that “raise[s] [their] right to relief above the speculative level,” *Bell Atl.*
18 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)—and that the tribes’ motions to dismiss
19 should be denied.

20 VII. CONCLUSION

21 The Gila River and Navajo motions to dismiss do not show how Fed. R. Civ. P.
22 12(b)(1) and 12(b)(6) standards are met. The motions should be *denied*.

23 **RESPECTFULLY SUBMITTED** this 31st day of October, 2016 by:

24
25 /s/ Aditya Dynar

Christina Sandefur (027983)

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15 Courtesy Copy Mailed this 31st day of October, 2016 to:

16 Honorable Neil V. Wake
United States District Court
17 Sandra Day O'Connor U.S. Courthouse, Ste. 524
401 W. Washington St., SPC 52
18 Phoenix, AZ 85003-2154

19 /s/ Kris Schlott

20 Kris Schlott
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