Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Clint Bolick (021684)
Aditya Dynar (031583)
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
litigation@goldwaterinstitute.org

COOPER & KIRK, PLLC
Michael W. Kirk (admitted *pro hac vice*)
Brian W. Barnes (admitted *pro hac vice*)
Harold S. Reeves (admitted *pro hac vice*)
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 (fax)
Attorneys for Plaintiffs

Steve Miskinis
Ragu-Jara Gregg
U.S. DEPARTMENT OF JUSTICE
ENRD/Indian Resources Section
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
Telephone: (202) 305-0262
Email: steven.miskinis@usdoj.gov
Attorneys for Defendants Kevin Washburn and Sally Jewell

MARK BRNOVICH
ARIZONA ATTORNEY GENERAL
Firm Bar No. 14000
John S. Johnson (016575)
Division Chief Counsel
1275 West Washington Street
Phoenix, Arizona 85007
Telephone: (602) 542-9948
e-mail: John.Johnson@azag.gov
Attorney for Defendant Gregory A. McKay

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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

vs.

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

No. CV-15-1259-PHX-NVW

JOINT STATUS REPORT

On September 4, 2015, this Court issued an order setting a briefing schedule for Defendants' motions to dismiss and directing the parties to confer about the timing of briefing on Plaintiffs' motion for class certification. Doc. 29 ("Sept. 4 Order"); *see* Plaintiffs' Motion for Class Certification (Aug. 21, 2015), Doc. 22 ("Class Certification Motion"). Defendants' response to the class certification motion is currently due on September 17, 2015. However, after conferring in good faith, the parties have been unable to agree on the deadline for Defendants' response. Accordingly, as contemplated by the Court's order of September 4, the parties submit this joint filing outlining their respective positions;

Plaintiffs' Position

Plaintiffs respectfully submit that the Court should not extend Defendants' time to respond to the pending class certification motion beyond November 13, 2015, the date on which Plaintiffs' opposition to the forthcoming motion to dismiss will be due, and Plaintiffs' reply due no later than December 4, 2015. That will enable the Court to hear, consider, and decide the dispositive motion(s)[1] together with the class certification motion as expeditiously as possible. *See* Sept. 4 Order at 2.

This is a civil rights case in which Plaintiffs seek certification of a class of individuals all of whom are uniformly subject to a regime of *de jure* racial discrimination that is written into the United States Code and the Federal Register. Class certification in civil rights cases like this one is utterly routine, and for good reason. Every member of the class is subject to the same official policy, and if the Court agrees with Plaintiff that the policy is indeed one of *de jure* racial discrimination contrary to the Equal Protection Clause, every member of the class will be entitled to the

[1] Plaintiffs may respond to the forthcoming motion to dismiss with a cross-motion for summary judgment in addition to opposing the motion to dismiss, but have not yet reached a final decision as to whether a cross-motion would be appropriate.

same declaratory and injunctive relief. Under these circumstances, assessing whether Plaintiffs satisfy Rule 23(a)'s class certification prerequisites—numerosity, commonality, typicality, and adequacy of representation—is a simple matter. *See Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014) ("[T]he class suit is a uniquely appropriate procedure in civil-rights cases, which generally involve an allegation of discrimination against a group . . . ." (quoting Wright & Miller, 7AA Fed. Prac. & Proc. Civ. § 1776 (3d ed.)); *Daniels v. City of New York*, 198 F.R.D. 409, 414 (S.D.N.Y. 2001) (observing that class certification is "especially appropriate where a plaintiff seeks injunctive relief against discriminatory practices by a defendant").

Defendants seek an indefinite delay of class certification briefing so that they can take discovery, but discovery on the class certification issue is not needed and in any event can be completed in short order. The Manuel for Complex Litigation explains why discovery at the class certification stage is often unnecessary where, as here, plaintiffs challenge the application of a statute on constitutional grounds: "Discovery may not be necessary when claims for relief rest on readily available and undisputed facts or raise only issues of law (such as a challenge to the legality of a statute or regulation)." MANUEL FOR COMPLEX LITIGATION § 21.14, at 255 (4th ed. 2004). By virtue of Defendants' enforcement of a racially discriminatory policy codified in federal law, every member of the class who participates in child custody proceedings is subject to a legal standard less favorable to him or her than the best interest of the child standard that would otherwise apply under Arizona law. *See Antonio M. v. Arizona Dep't of Econ. Sec.*, 214 P.3d 1010, 1011–12 (Ariz. Ct. App. 2009). It follows that class certification is appropriate, and Defendants cannot hope to rebut this reality with evidence produced in discovery.

The fundamental difference between this case and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 (2011), underscores why class certification discovery is not needed. In *Wal-Mart*, the plaintiffs sought "to sue about literally millions of

employment decisions at once" without any "glue holding the alleged *reasons* for all those decisions together," thus making it "impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why I was disfavored*." Here, in contrast, the "glue" that holds the class together—the basis on which every class member is disfavored—is the official policy of racial discrimination that Defendants apply across the class, a policy enacted into law by the Indian Child Welfare Act and the state and federal regulations that implement it. Defendants' enforcement of that policy, the large number of individuals subjected to it, and the fact that the named plaintiffs are members of the class cannot be reasonably disputed. The Court does not need to know more to determine that class certification is appropriate.

Although Plaintiffs do not believe that any discovery on class certification is warranted, in an effort to reach agreement, they offered to respond to any reasonable discovery requests that Defendants believe would assist them in preparing a brief on class certification by November 13. Defendants rejected the offer, arguing that this is not enough time because an Arizona statute requires a state superior court judge to approve certain disclosures of Department of Child Safety ("DCS") records. *See* Ariz. Rev. Stat. § 8-807(K). Plaintiffs offered to agree to entry of an order by this Court approving the disclosures subject to an appropriate protective order,[2] but Defendants rejected that alternative as well, asserting that separate proceedings in Arizona state court would be necessary.

[2] Because evidence relevant to the named plaintiffs' family court proceedings concerns sensitive matters and is in part protected by Arizona law, there is good cause for the entry of a protective order limiting public disclosure of materials produced in discovery. *See* FED. R. CIV. P. 26(c)(1). If the Court authorizes discovery on class certification, Plaintiffs will work with Defendants to expeditiously craft a joint proposed protective order.

But this Court does not need permission from an Arizona court to order discovery, a fact that is expressly recognized by the very state statute on which the Defendants rely. *See id.* § 8-807(C) ("The department shall disclose DCS information to a court . . . ."); *id.* § 8-807(U) ("A person who receives DCS information shall . . . not further disclose the information unless the disclosure is authorized by . . . a court order."); *see also Welsh v. City and County of San Francisco*, 887 F. Supp. 1293, 1299 (N.D. Cal. 1995) ("Although California Penal Code prohibits disclosure of peace officer personnel records, the federal judiciary has an unquestionable obligation to ensure that cases are decided fairly in Federal proceedings based upon all relevant, nonprivileged documents. State law is not binding on federal courts in these kinds of cases." (internal citations omitted)); *Royce v. Douglas County School Dist. No. 54*, 2012 WL 2952381, at *2 (D. Neb. July 19, 2012) (recognizing that materials protected from disclosure by state statute are "subject to production as part of discovery in claims involving federal rights.").[3] Ironically, all of the documents that Defendants say they need to respond to Plaintiffs' class certification motion are already in the possession of DCS, whose director is named as a defendant in this action. To the extent that there is any state law obstacle to Defendants reviewing those documents in connection with this litigation, this Court can remove it by issuing an order authorizing discovery.

Moreover, even if there were some reason that Defendants could not review documents in their own files after being directed to do so by this Court, the named plaintiff parents possess copies of the most salient DCS documents and stand ready to expeditiously produce them to Defendants in response to a court order. Indeed, the

[3] Defendants seek further support for their position in an uncited provision of the federal Child Abuse Prevention and Treatment Act ("CAPTA") that they say "mirrors" the Arizona statute. But CAPTA expressly recognizes that confidential child protective services information should be made available to a "court, upon a finding that information in the record is necessary for the determination of an issue before the court," 42 U.S.C. § 5106a(b)(2)(viii)(V), and nothing in the Act suggests that a federal court needs permission from a state judge to order production of such information.

information Defendants say they need to respond to Plaintiffs' motion will be readily apparent from the court records in the named plaintiff parents' possession. Defendants propose discovery, for example, into whether baby girl A.D. and boy C. are Indian children to whom the ICWA applies, into whether the transfer provisions of the ICWA have been invoked, into the role that guardians ad litem have played in the proceedings, and in order to understand whether and how the ICWA requirements may have affected the class representatives' cases. These are facts that, although either irrelevant to class certification or, to the extent relevant, fully set forth in the declarations attached to Plaintiffs' class certification motion, would nevertheless be immediately clarified by the state court records that Plaintiffs are prepared to produce. The same holds true for the termination of the parental rights in the case of baby girl A.D. and boy C.; the fact of termination is set forth fully in the state court's severance order, and from the nature of the ensuing state proceeding, documented adequately in records Plaintiffs created or have access to.

Defendants fare no better when they argue that, because Carol Coghlan Carter is acting as "next friend" to baby girl A.D. and boy C. and all off-reservation Indian children in child custody proceedings, they will therefore need access to those proceedings in order to understand whether and how Ms. Carter has been involved in their cases.[4] As her declaration makes clear, Ms. Carter played no role in the state court child custody proceedings involving baby girl A.D. and boy C., but has volunteered to participate in this suit precisely because she believes that the best interests of those

[4] Plaintiffs assume that Defendants are seeking to discover Ms. Carter's role in the child custody proceedings involving only baby girl A.D. and boy C., and not into all past Arizona Indian Child custody proceedings or even into all of the past child custody matters in which Ms. Carter has played a role. Plaintiffs submit that her past experience is more than adequately set forth in her declaration for purposes of class certification and would, in any event, be a matter properly discovered through interrogatories or by deposition rather than by a discovery request seeking access to all Arizona child custody proceedings involving Indian children.

children were not being adequately represented in those proceedings. Her qualifications, her experience, and her familiarity with the case, *not* her prior role in the state court proceedings, has been offered to establish her fitness to serve in this capacity. That is all that the law requires. For, as the First Circuit has explained, in assessing a representative's fitness to serve as "next friend," courts "consider the individual's familiarity with the litigation, the reasons that move her to pursue the litigation, and her ability to pursue the case on the child's behalf" to determine whether or not the next friend is dedicated to the minor's best interests. *Sam M. v. Carcieri*, 608 F.3d 77, 92 (1st Cir. 2010). Ms. Carter's declaration more than suffices to establish that she is qualified to serve as next friend under that standard.

In sum, both Plaintiffs[5] and Defendants themselves already possess the documents Defendants say they need, and there is no obstacle to the Court immediately issuing an order authorizing Defendants to review those documents for purposes of this litigation. Any necessary depositions can accordingly be scheduled for the coming

[5] Indeed, all information that Defendants Washburn and Jewell request discovery on is in Defendant McKay's possession. Arizona foster parents, typically not being parties to termination of parental rights proceedings, do not have access to those documents. Arizona prospective adoptive parents have access to the court's severance order terminating parental rights of birth parents and certifying the child as available for adoption, for that forms the basis of their adoption petition. Plaintiffs are prepared, upon court order, to produce documents relating to their state child custody proceedings that they created and that they have access to under state law. Defendants Washburn and Jewell's demand for discovery rests on a fundamental misunderstanding of Arizona law. Consequently, the burden of discovery the state and federal Defendants wish to impose on Plaintiffs ought really to be borne by their co-defendant, Defendant McKay. Put differently, Plaintiffs should not be penalized for the reluctance or recalcitrance of one co-defendant to share information with other co-defendants. Defendants' desire to delay briefing on class certification is self-serving; they already possess all information upon which they desire to conduct discovery. Any order to compel discovery, to the extent such order is necessary, should be issued in the first instance against Defendant McKay, not against Plaintiffs. Defendant McKay's concerns about confidentiality are adequately addressed by an appropriate motion to seal.

weeks, thus making it entirely reasonable for Defendants to respond to Plaintiffs' motion by November 13.

As the Court has recognized, "[c]lass certification is supposed to be decided early." Sept. 4 Order at 1; *see also* FED. R. CIV. P. 23(c)(1)(A) (class certification should be resolved "[a]t an early practicable time"). That directive deserves special weight here because members of the class are daily subjected to racial discrimination in proceedings that will fundamentally alter their lives. The Court has also recognized the motion to dismiss briefing schedule is "generous." Sept. 4 Order at 1. There is no reason why briefing on the class certification motion – which after all, is far less complex than the merits briefing – should be even more generous.

Defendants' Position

Defendants request that the Court set the deadline for responding to Plaintiffs' class certification motion as 60 days from the release by the Arizona state court(s) and DCS of the child welfare records of each of the two proposed class representative children (A.D. and C.).[6] The central dispute regarding the timing of class certification briefing is whether Defendants should be provided a reasonable period for discovery in order to meaningfully respond to Plaintiffs' motion for class certification. The discovery period needs to accommodate the fact that the central information at issue in this case – information about the child welfare proceedings involving the proposed class representatives in the possession of the Arizona courts and DCS – is shielded by confidentiality provisions of Arizona state law. Getting access to those records is, therefore, more complicated than gathering documents through a typical third-party subpoena and may entail delays. Rather than setting unrealistic deadlines that will likely need to be revisited by the Court, Defendants request that the Court link the class

[6] Defendants also intend to seek the child welfare proceeding documents for the children discussed in the Joint Declaration of M.G. and B.G., Doc. 26, given that Plaintiffs use their information to support their Motion for Class Certification.

certification briefing deadlines to the release of the child welfare proceeding documents. Defendants request a modest period of time – 60 days – from receipt of these documents to complete other discovery and file an opposition to class certification.

Background

Pursuant to the Court's Sept. 4 Order, the parties conferred by telephone on September 8, 2015 in an effort to agree upon a briefing schedule for the Class Certification Motion. Defendants stated that discovery related to class issues is necessary in order to fully respond to the Class Certification Motion and proposed that discovery be conducted concurrent with the briefing on Defendants' upcoming Motions to Dismiss. Specifically, Defendants proposed that discovery limited to class issues close on February 12, 2016 with opposition briefs to follow on March 4, 2016.
In response, Plaintiffs proposed that briefing on the Class Certification Motion follow the same briefing schedule as the Motions to Dismiss:

a. Filing of Defendants' opposition briefs on October 16, 2015; and
b. Filing of Plaintiffs' reply brief on November 13, 2015

Defendants responded that 38 days is not a reasonable time period within which to conduct their contemplated discovery and draft a response, particularly since a court order is required before the documents from the underlying state proceedings involving the named plaintiffs/proposed class representatives can be released and used in these proceedings.

The parties agreed to reconvene on September 10, 2015 to attempt again to reach an agreement on a briefing schedule. On September 10, Plaintiffs reiterated their counter-proposal of the October 16 deadline to oppose the Class Certification Motion. Defendants again addressed the need for discovery and the potential difficulties in obtaining documents related to the underlying state court proceedings. Plaintiffs stated that unless a date certain in November was agreed to by the parties, there would be no agreement. Defendants explained their preference for a deadline that was triggered by

receipt of the documents to ensure that there is a sufficient time to review the documents prior to deposing the named plaintiffs. A discussion ensued about the requirements for a court order under A.R.S. § 8-807, the state confidentiality statute governing Department of Child Safety ("DCS") information. Plaintiffs suggested that this Court issue an order authorizing release of the documents as well as a protective order. Defendants stated that the plain language of the statute requires an order from an Arizona superior court and outlines a process that involves input from the county attorney. Defendants indicated that they would need to consult with others within the Arizona Office of the Attorney General to determine if Plaintiffs' proposal would satisfy the statute.

Defendants are Entitled to Discovery Regarding the Child Welfare Proceedings

Plaintiffs' assertion that discovery is not warranted is incorrect. Even for a constitutional challenge, the putative class must meet the standards of Rule 23. *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 848-49 (5th Cir. 2012) (denying class certification in case alleging violation of the constitutional rights of children in Texas's foster care system); *see also* H. Newberg & A. Conte, Newberg on Class Actions § 7:14 ("[D]efendant is entitled to utilize those same discovery devices to demonstrate that the facts cut against certification."). The Supreme Court has emphasized that district courts must engage in a "rigorous analysis" – including probing behind the pleadings – before ruling on certification. *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S.Ct. 2541, 2551 (2011);[7] *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982)

[7] It is no longer true (if it ever was) that class action certification is routine in litigation brought against government officials and agencies for injunctive relief for constitutional and other claims. In the wake of the Supreme Court's *Wal-Mart* decision, "proposed classes in public law litigation have drawn unprecedented judicial scrutiny," with the result that a notable number of such classes have subsequently been denied or decertified. *See* David Marcus, *The Public Interest Class Action*, Arizona Legal Studies Discussion Paper No. 15-11 at 6, 13-18 (2015), *to be published at* 104 Geo. L.J. ___ (forthcoming 2015) (available at http://ssrn.com/abstract=2565988).

(noting "sometimes it is necessary for a court to probe beyond the pleadings before coming to rest on the certification question"). The Ninth Circuit has recognized that "the propriety of a class action cannot be determined in some cases without discovery." *Doninger v. Pacific Northwest Bell*, 564 F.2d 1304, 1313 (9th Cir. 1977) (noting that "den[ial of] discovery in a case of that nature would be an abuse of discretion"); *see also Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009) (explaining that "our cases stand for the unremarkable proposition that often pleadings alone will not resolve the question of class certification and that some discovery will be warranted."); *see also* Fed. R. Civ. P. 23 advisory committee's note (2003) (noting that "[t]ime may be needed to gather information necessary to make the related decision," and discussing parameters of discovery). Thus, "the better and more advisable practice for a District Court to follow is to afford litigants an opportunity to present evidence as to whether a class action is maintainable" and "enough discovery to obtain the material." *Id.* Indeed, once a party seeking discovery carries the burden of proving its necessity, the failure to grant such discovery constitutes an abuse of trial court discretion. *Perez v. Safelite Grp. Inc.*, 553 F. App'x 667, 669 (9th Cir. 2014), *as amended on denial of reh'g and reh'g en banc* (Mar. 7, 2014) (citing *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir.1975)).

Here, a limited period of discovery is warranted because Plaintiffs premise their request for class certification on the claim that "[t]he named plaintiffs have suffered injuries typical of the injuries inflicted by ICWA." Doc. 22 at 4. They go on to spend several pages of their motion, supported by four separate declarations, describing how they believe ICWA has impacted the Plaintiffs' child welfare proceedings and thereby harmed the children and the foster parents in this case. Based on these alleged injuries, Plantiffs have requested that these individuals be class representatives for a class of all "off-reservation Arizona-resident children with Indian ancestry" along with all non-Indian Arizona foster, preadoptive, and prospective adoptive parents involved in "child

custody proceedings involving children with Indian ancestry." Class Certification Motion at 2.

Defendants are entitled to probe whether Plaintiffs' lengthy factual submissions and vague and unverified accounts of alleged harm are true, based on something more than declarations crafted to support Plaintiffs' motion. Most prominently, Defendants need time to acquire and review the child welfare proceeding records of the proposed representative plaintiffs in order to evaluate their claim that the challenged provisions of ICWA and the Bureau of Indian Affairs Guidelines for State Courts and Agencies in Indian Child Custody Proceedings are injuring them.

Plaintiffs' assertion that discovery is not warranted because this is a simple racial discrimination claim is simply incorrect. Plaintiffs are challenging both "the facial and as-applied constitutionality of several provisions of ICWA and accompanying Guidelines to the members of the class." Doc. 1 at 3, 8 (Complaint). For the putative class to be able to bring as-applied challenges to particular provisions of ICWA, Plaintiffs must show that the challenged statutory provisions are actually impacting these plaintiffs, based on a developed factual record, in order to demonstrate that the proposed class representatives meet the commonality and typicality requirements. *See Tennison v. Paulus*, 144 F.3d 1285, 1286-87 (9th Cir. 1998) (dismissing as applied substantive due-process claim for lack of standing where plaintiffs failed to allege violation of constitutional rights by any specific individual). More fundamentally, if the class representatives were not injured by particular ICWA provisions – or are unlikely to be injured by in the future even if previously injured – they lack standing to seek equitable relief on that provision and cannot, therefore, serve as class representatives for a challenge to those provisions. *See* H. Newberg & A. Conte, Newberg on Class Actions § 2:7 ("[P]laintiff who has suffered an actual injury but is unlikely to suffer further injury … [will be] unable to seek equitable relief even if other class members are likely to suffer future injury.").

Therefore, in order to address typicality, commonality, and other Rule 23 requirements, Defendants need at least the following types of information:[8]

- Defendants require discovery on whether ICWA even applies to the proposed class representative plaintiffs. ICWA only applies to proceedings involving an "Indian child," which is defined based on membership, or eligibility for membership plus a parent who is a member, of a federally recognized Indian tribe. 25 U.S.C. § 1903(4). Since Plaintiffs' motion and supporting documents fail to establish that the proposed representative children are "Indian children" as defined by the statute, there are questions of fact as to whether these plaintiffs can claim injury from ICWA. *See* Doc. 24 ¶ 3 (S.H.-J.H. Decl.); Doc. 25 ¶ 4 (M.C.-K.C. Decl.) (asserting facts that suggest that the children may be "Indian children"). The child welfare proceeding documents will answer those questions.
- Because Plaintiffs challenge ICWA's jurisdictional transfer provision, Class Certification Motion at 3, Defendants need access to the child welfare proceeding documents to understand if that provision has been invoked in the class representatives' cases and, if so, how that provision has impacted those cases.
- Because Plaintiffs challenge the ICWA's provision governing the termination of parental rights, *id.*, Defendants need access to the child welfare proceeding documents to understand the facts surrounding the parental rights terminations that occurred in the class representatives' cases and the role that ICWA requirements played in those terminations (e.g., whether and how the ICWA Section 1912(d) active efforts requirements were satisfied).
- Because Plaintiffs challenge the ICWA's provisions governing the placement preferences for Indian children, *id.* at 3-4, Defendants need access to the child welfare proceeding documents to understand whether and how the ICWA requirements may have impacted the class representatives' cases.

[8] The list is intended to be an illustrative, non-exhaustive list.

- Because Plaintiffs assert that Carol Coghlan Carter is acting as "'next friend' to baby girl A.D. and boy C. and all off-reservation children with Indian ancestry in the State of Arizona in child custody proceedings," *id.* at 6., Defendants need access to the child welfare proceeding documents to understand whether Ms. Carter has even been involved in those proceedings and, if so, in what capacity. Her declaration is completely silent on that issue. *See* Doc. 23 (Carol Coghlan Carter Decl.).
- Defendants also need access to the child welfare proceeding documents to understand whether other individuals (such as Guardian ad litems) represent or have represented the children and what positions those individuals have taken regarding whether ICWA's requirements are benefiting, harming, or even impacting the children.

Plaintiffs seek to compress this discovery in a 56-day period. This is not adequate time because the most critical documents – the state court and DCS records regarding Plaintiffs' child welfare proceedings – are in the possession of the Arizona courts and DCS and a state statute, A.R.S. § 8-807, renders those documents confidential and subject to release only upon court order. Defendants will move expeditiously to obtain these documents, but as described below, this process may be delayed by the need to obtain court orders and redact documents prior to release. Once in receipt of the relevant court and DCS records, the Defendants will expeditiously pursue deposition discovery and limited written discovery on matters relevant to class certification. The requested 60-day period after release of the records is necessary for defendants to engage in the following discovery activities: 1) review the records and propound relevant written discovery requests, 2) obtain responses to those written discovery requests, and 3) take depositions of at least the seven individuals who submitted declarations in support of Plaintiffs' motion for class certification (six foster parents and Carol Coghlan Carter); and (4) prepare an opposition brief.

Documents Related to Plaintiffs' Child Welfare Proceedings Are Confidential Under Arizona State Law, and Obtaining These Documents Requires Compliance with State Procedures.

Records of Plaintiffs' child welfare proceedings are in the custody of both the Arizona Juvenile Court and DCS. Arizona state confidentiality provisions apply to information held by DCS and the courts. *See* A.R.S. § 8-208(F)("Except as otherwise provided by law, the records of an adoption, severance or dependency proceeding shall not be open to public inspection"); A.R.S. § 8-841(A) ("All files, records, reports and other papers complied in accord with this article, whether filed in or in possession of the court . . . are subject to disclosure pursuant to §§ 8-807 and 8-807.01.").

DCS information, as defined by A.R.S. § 8-807(X), "includes all information the department gathers during the course of an investigation conducted under this chapter from the time a file is opened and until it is closed." DCS information is made confidential by state and federal law to protect the privacy of individuals. Arizona's DCS confidentiality statutes mirror the confidentiality provisions of the federal Child Abuse Prevention and Treatment Act (CAPTA), which both provide for specific circumstances in which confidential child welfare information can and cannot be shared. Arizona Juvenile Court records are also protected by statute and court rule. *See* A.R.S. § 8-541 (providing that DCS information is subject to disclosure pursuant to A.R.S. § 8-807); *see also* 17B Ariz. Rev. Stat. Juv. Ct. Rules of Proc., Rule 47 (requiring that records pertaining to dependency, guardianship, and termination of parental rights proceedings are confidential, will be available only on order of the court or otherwise provided by law and if released, shall have certain information redacted).

Due to the sensitive nature of DCS information, dissemination is limited and highly protected by law. A.R.S. § 8-807(C) provides for release of DCS information only in a dependency or termination of parental rights proceeding, and A.R.S. § 8-

807(D) only permits release of DCS information to family and conciliation courts if the "information is necessary to promote the safety and well-being of children." Even after DCS information is released in accordance with the statute, A.R.S. § 8-807(U) provides for the continued confidentiality of the information.

A.R.S. § 8-807(K) provides for a procedure to obtain confidential DCS information whereby a person who is not statutorily entitled to DCS information (i.e., in this instance, the Federal Defendants and named Plaintiffs) can seek to obtain DCS information by petitioning a judge of the superior court to order the department to release DCS information. After the petitioner notifies the county attorney and the child's attorney or guardian ad litem, the court balances "the rights of the parties who are entitled to confidentiality pursuant to this section against the rights of the parties who are seeking the release of the DCS information" *in camera*. A.R.S. § 8-807(K). After the *in camera* review, "the court may release otherwise confidential DCS information only if the rights of the parties seeking the DCS information and any benefits from releasing the DCS information outweigh the rights of the parties who are entitled to confidentiality and any harm that may result from releasing the DCS information." *Id*. Even after an *in camera* review, Arizona law requires the court "take reasonable steps to prevent any clearly unwarranted invasions of privacy…" *Id*.

Plaintiffs' focus on which parties may already possess some or most of the relevant documents is a distinction without a difference and does not negate the obligation to comply with existing confidentiality laws. A court order is still required in order to release the protected information to other parties and use the information in this proceeding. Moreover, Plaintiffs' suggestion that production of the child welfare records can be ordered without the benefit of the process set forth in statute demonstrates a fundamental lack of understanding of the privacy interests at play. An *in camera* review of potentially responsive documents is critical in the instant case. The DCS information potentially sought by the Federal Defendants implicates the privacy

interests of the named plaintiffs as well as non-biologically related children, biological parents, prospective adoptive parents, and adoptive parents. Defendants believe that the balancing of privacy concerns (which may weigh in favor of redacting documents prior to release) may be better suited to the Arizona state court handling the underlying proceedings. This is particularly true here where Plaintiffs have admitted that they do not represent the children who are named plaintiffs in this case, and there is no indication that the next friend, Carol Coughlan, has been authorized to represent these children as named plaintiffs in this proceeding, which raises issues central to the proposed class certification and as to the childrens' privacy interests.

DCS information regarding the named children and their families will likely be voluminous and require extensive review prior to production. These records would require redaction of information that does not pertain to the Plaintiffs; confidential Hotline reporting source information; information that would cause specific material harm to a DCS investigation, criminal investigation, or criminal prosecution; and information made confidential by law, such as attorney-client privileged information and confidential criminal history information. *See* A.R.S. § 8-807(L), A.R.S. § 8-807(P), A.R.S. § 12-2234, A.R.S. § 41-1750.

Conclusion

Defendants' proposed schedule enables appropriate discovery on class certification and minimizes the possibility that the parties will need to return to this Court to seek further modifications to the schedule. It also minimizes delays to the proceeding, and Plaintiffs have failed to show why the additional time for necessary discovery prejudices their case. Thus, Defendants request that the Court set the deadline for responding to Plaintiffs' class certification motion to be 60 days from the release by the Arizona state court(s) and DCS of the child welfare records of each of the two proposed class representative children (A.D. and C.).

RESPECTFULLY SUBMITTED this 17th day of September, 2015 by:

MARK BRNOVICH
Attorney General

s/John S. Johnson
John S. Johnson
Division Chief Counsel
1275 West Washington Street
Phoenix, Arizona 85007
Telephone: (602) 542-9948
Facsimile: (602) 542-9279
John.Johnson@azag.gov
Attorney for Defendant Gregory A. McKay

/s/Steve Miskinis with permission
JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice
Steve Miskinis
Indian Resources Section
Ragu-Jara Gregg
Law and Policy Section
Environment and Natural Resources Div.
United States Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
Telephone: (202) 305-0262
Email: steven.miskinis@usdoj.gov
Attorneys for Federal Defendants

/s/ Clint Bolick with permission
Clint Bolick (021684)
Aditya Dynar (031583)
Scharf-Norton Center for Constitutional Litigation
at the GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
litigation@goldwaterinstitute.org

Michael W. Kirk (admitted *pro hac vice*)
Brian W. Barnes (admitted *pro hac vice*)
Harold S. Reeves (admitted *pro hac vice*)
COOPER & KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 (fax)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2015, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice
Steve Miskinis
Indian Resources Section
Ragu-Jara Gregg
Law and Policy Section
Environment and Natural Resources Div.
United States Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
Telephone: (202) 305-0262
Email: steven.miskinis@usdoj.gov
Attorneys for Federal Defendants

Clint Bolick (021684)
Aditya Dynar (031583)
Courtney Van Cott (031507)
Scharf-Norton Center for Constitutional Litigation at the
Goldwater Institute
500 East Coronado Road
Phoenix, Arizona 85004
(602) 462-5000
e-mail: litigation@goldwaterinstitute.org

Michael W. Kirk *(admitted pro hac vice)*
Brian W. Barnes (*admitted pro hac vice)*
Harold S. Reeves *(admitted pro hac vice)*
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D. C. 20036
(202) 220-9600
(202) 220-9601 (fax)
Attorneys for Plaintiffs

MARK BRNOVICH
Attorney General

s/ John S. Johnson
Division Chief Counsel
Attorney for Defendant Gregory A. McKay