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**UNITED STATES DISTRICT COURT**

**DISTRICT OF ARIZONA**

A.D. and C. by CAROL COUGHLIN 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,

v.

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; AND GREGORY MCKAY, in his official capacity as Director of the ARIZONA DEPARTMENT OF CHILD SAFETY,

Defendants.

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

**LODGED: PROPOSED STATE DEFENDANT'S REPLY TO PLAINTIFFS' CONSOLIDATED RESPONSE TO DEFENDANTS' MOTION TO ABSTAIN AND DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1), (6) ATTACHED**

(Honorable Neil V. Wake)

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**STATE DEFENDANT'S REPLY TO PLAINTIFFS' CONSOLIDATED RESPONSE TO DEFENDANTS' MOTION TO ABSTAIN AND DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1), (6)**

(Honorable Neil V. Wake)

## INTRODUCTION

Plaintiffs' Complaint asks this Court to take the extraordinary act of entering an injunction to prevent compliance with a federal law, The Indian Child Welfare Act (ICWA), which has been binding law for almost forty years; a federal law that was duly enacted to remediate generations of forced assimilation that weakened or severed Indian children's ties to their tribes. Further, in contravention of the *Younger* abstention doctrine, Plaintiffs' Complaint asks this Court to intrude upon and interfere with on-going child dependency proceedings in the Arizona juvenile state courts, contrary to the concepts of federalism and separation of powers.

The State Defendant through the Department of Child Safety (the Department) asks this Court to decline Plaintiffs' invitation to insert itself into a well-established system of state jurisprudence that protects and serves Arizona's children and families, including those that fall under the auspices of the ICWA. ICWA is designed to counter exactly the harm complained of by Plaintiffs: Indian children's attenuated ties to their tribes caused by abusive child-welfare practices. Arizona's codification of ICWA supports Congress's goal of protecting tribal futures by requiring minimum standards for removal and placement of Indian children.

Plaintiffs seek broad and sweeping intrusion on Arizona juvenile courts despite their fatal inability to establish constitutional standing, ripeness or harm. While the individual Plaintiffs allege that ICWA has subjected them to harm, far more members of their proposed class depend upon the so-called "penalty box" to preserve the family relationships that ICWA was designed to protect when an Indian child is involved. The Supreme Court recognized that ICWA's substantive provisions—including the rights guaranteed to tribes—are "a means of protecting ... the interests of individual Indian children and families" in addition to those of their tribes. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49, 109 S. Ct. 1597, 1609 (1989). With respect to ICWA's preference for placement of Indian children in Indian homes, the Court cited to "evidence of the detrimental impact" on Indian children when subjected to "placements outside their culture." *Id.* at 50, 109 S. Ct. at 1609. In fact, the Court cited an

Arizona case to support the "fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." *Id.* at 50, n.24, 109 S. Ct. at 1609, n.24 (quoting *Pima Cty. Juv. Action No. S-903*, 130 Ariz. 202, 204, 635 P.2d 187, 189 (App. 1981)).

Plaintiffs fail to recognize that the parent of an Indian child—unlike that child's foster parent or prospective adoptive parent—has a recognized fundamental liberty interest in raising that child and preserving that family relationship. *See Santosky v. Kramer, 455 U.S. 745, 753,102 S. Ct. 1388, 1394-95 (1982).* The law so recognizes that right in all cases where the child has relatives available to preserve the child's familial ties, whether the child is Indian or not. *See Bechtel v. Rose*, 150 Ariz. 68, 73, 722 P.2d 236, 241 (1986). In fact, Arizona "has … repeatedly emphasized that 'courts should bend over backwards, if possible, to maintain the natural ties of birth.'" *Id.* (quoting *Anonymous v. Anonymous*, 25 Ariz. App. 10, 11, 540 P.2d 741, 742 (1975)). Foster parents, however, do not share that constitutionally protected interest.

Finally, Plaintiffs ignore the valid governmental interest in ensuring the continued existence of Indian tribes, the very reason Congress enacted ICWA in the first place. *See* 25 U.S.C. § 1901(2), (3) (reporting Congressional findings that "Congress … has assumed the responsibility for the protection and preservation of Indian tribes and their resources" and that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children"). Consequently, in any child custody proceeding where a member child—or a child eligible for membership with at least one member parent—is involved, the tribe is a necessary party to the proceeding.

## ARGUMENT

### I. RULE 12(b)(1)

Plaintiffs erroneously assert that "[o]nce ICWA is implicated in a child custody proceeding, state rules and procedures no longer apply in ordinary fashion." (Response at 2:27-28.) To the contrary, in Arizona at least, state rules and procedures continue to apply, both because state-law findings must be made under state-law burdens of proof (*see Valerie M. v.*

*Ariz. Dep't of Econ. Sec.*, 219 Ariz. 331, 335, ¶¶ 16, 18, 198 P.3d 1203, 1207 (2009)), and because Arizona has chosen to adopt and reflect ICWA in its statutory and rules schemes (*see, e.g.*, A.R.S. §§ 8-815, 8-872, 25-1004; Ariz. R.P. Juv. Ct. 8, 37, 50, 57, 68, 81).

More fundamentally, the fact that ICWA "places Indian children and families who wish to foster or adopt them on a different legal track than all other American children and families" (Response at 3:4-7) does *not* offend any constitutional principle. Varying procedures apply based on specific facts of their cases. For example, when out-of-state custody orders exist, the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (codified in Arizona at A.R.S. §§ 25-1001 through -1067), requires additional procedural steps, notice provisions, and jurisdictional requirements that would not apply to other children. That is based, of course, on the child's and parent's legal relationship with the state that issued the original custody order. The affected children, and their caregivers, may not wish to litigate matters in the original forum state, or to suffer the delay inherent in the process required for courts to confer to determine the most appropriate jurisdiction (*see, e.g.*, A.R.S. §§ 25-1010, -1011), but due process requires it. The same is true for compliance with ICWA. *See Reed v. Reed*, 404 U.S. 71, 75-76, 92 S. Ct. 251, 253-54 (1971) (holding that "the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways" so long as the differing classes are not determined by "criteria wholly unrelated to the objective of [the] statute").

**A. STANDING**

Plaintiffs argue that this Court should not "ignore factual allegations made pertaining to members of the class" proposed by Plaintiffs. (Response at 4:14-15.) They argue that their "lawsuit conjoins individual named plaintiffs who have sustained injuries with proposed class members who have alleged similar or related injuries arising from the same set of policies." (*Id.* at 5:1-3.) That, however, is not the case.

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**1. Not All Members of the Proposed Class are Affected by ICWA.**

Plaintiffs argue that ICWA is generally harmful in its application (*see* Response, p. 5:11-14), yet propose a class comprised of individuals unaffected by the Act (*see* Complaint, ¶¶ 30-33). ICWA does not, and cannot, apply to "all off-reservation Arizona-resident children with Indian ancestry" as asserted by Plaintiffs. (Complaint, ¶ 30.) Rather, it applies only to cases involving "Indian children," narrowly defined to include only children who are already members of an Indian tribe or children who are eligible for membership *and also* who have at least one parent who is already a member of a tribe. 25 U.S.C. § 1903(4) (emphasis added).

Children who can claim only "Indian ancestry" are merely subject to an inquiry to determine whether they meet ICWA's definition of "Indian child." *See Ariz. Dep't of Econ. Sec. v. Bernini*, 202 Ariz. 562, 565, ¶¶ 11, 12, 48 P.3d 512, 515 (App. 2002) (holding that "ICWA only applies if a proceeding is a child custody proceeding and if the child involved is an Indian child," and information that a "paternal great-grandmother [or] maternal grandmother might be enrolled in Indian tribes" was sufficient only to require the state agency "to inquire farther into the matter," in part by serving notice on the alleged affected tribes).

**2. ICWA and Non-Binding Guidelines Do Not Mandate Enrollment for an Un-Enrolled Child.**

Likewise, Plaintiffs' claim that ICWA "applies to children who are 'eligible' for membership" and that the Act and Guidelines require their enrollment "even against their parents' wishes" (Response at 8:12-15) is incorrect. As noted above, a child's mere eligibility for membership in a tribe alone does not trigger ICWA's application. The child's parent must also be a member of a tribe. 25 U.S.C. § 1903(4). Nor does Guideline B.4(d)(iii) require the State to secure a child's enrollment in a tribe over the parent's wishes. On the contrary, the Guideline indicates only that "the agency should take steps necessary to obtain membership for the child in the tribe that is designated as the Indian child's tribe." 80 Fed. Reg. 10,146, 10,153 (Feb. 25, 2015).

Furthermore, the Guidelines are not binding. *See Oglala Sioux Tribe v. Van Hunnik*, No. CIV.13-5020-JLV, 2015 WL 1466067, at *14 (D.S.D. Mar. 30, 2015) ("The DOI Guidelines are not binding on the court but are an administrative interpretation of ICWA entitled to great weight"). The Department of the Interior's *proposed* regulations codifying ICWA (which *would* be binding) do not even suggest that a state court or agency take steps to enroll an unenrolled child. *See* 80 Fed. Reg. 14,880, 14,888 (Mar. 20, 2015) at §§ 23.108, 230.109. And both the 2015 Guidelines and the proposed regulations mandate that a parent's preference for the child's membership be taken into consideration when enrolling a child. *Id.*; Guideline B.4(c)(1)(i), (d)(ii)(A), 80 Fed. Reg. at 10,153.

**3. Not All Members of the Putative Class Suffer the Alleged Harm.**

Even assuming that the putative class consists only of children affected by ICWA and their caregivers, rather than all children with Indian ancestry, ICWA is not a "disadvantageous set of laws" necessitating remediation. (*See* Response at 5:17.) ICWA's procedural requirements plainly do benefit Indian children and families as Congress intended. *See Holyfield*, 490 U.S. at 49, 109 S. Ct. at 1609 ("The numerous prerogatives accorded to the tribes through the ICWA's substantive provisions … must … be seen as a means of protecting … the interests of individual Indian children and families").

**4. Not All Alleged Harms are Caused Solely by ICWA.**

Nor do Plaintiffs recognize that many of the harms allegedly caused by placement in ICWA-preferred homes would occur even without ICWA's protections. For example, in Arizona, the Department is required to "identify and assess placement of [a dependent] child with a grandparent or another member of the child's extended family," A.R.S. § 8-824(E)(10), and to "make reasonable efforts to place a child with siblings," *id.* at (G). *See also* A.R.S. §§ 8-829(A)(4); 8-842(B)(2), (3); 8-845(A)(2), (B)(4); 8-847(E)(1); 8-862(H), (I). Thus for any Arizona child, permanency may be delayed while efforts are made to locate an appropriate relative placement or to ensure the placement of siblings together. This so-called harm reflects

Arizona's commitment to "bend over backwards . . . to maintain the natural ties of birth" because doing so is "in harmony with" nature and the State's "high value on the integrity of the family." *Bechtel*, 150 Ariz. at 73, 722 P.2d at 241.

**5. Tribes' Rights are No More Harmful Than Those of Other Parties.**

Plaintiffs argue that they wish only to "participate, like other Americans, in a legal system that does not provide … prerogatives to Indian tribes that can be exercised in ways adverse to their interests." (Response at 8:21-13.) They also argue that "[a]part from the tribes, whose presence in child custody proceedings is facilitated by ICWA, there is no third party lurking outside the proceedings that is inflicting upon plaintiffs the injuries that are the subject of this lawsuit." (*Id.* at 9:12-15.)

These arguments are fundamentally flawed. First, any party to a child custody proceeding can assert rights that are adverse to the interests of other parties. Even the most neglectful and abusive parents may contest the termination of their parental rights, even though it prolongs the child's time in foster care and inflicts the emotional turmoil of a contested trial. Intervening relatives may fight among themselves to determine placement of the child without consideration of the impact of that protracted litigation on the child. The court may order a child returned to the care of his parent despite the hurt it will cause to the foster family that hoped to adopt him. The system of laws designed to protect abused and neglected children is not unconstitutional because it is adversarial. The adversarial process ensures that all parties' rights are protected in the process of ensuring the child's health and welfare. Cases involving Indian children are no different.

Second, the tribe's intervention is essentially the same as intervention by any other interested party. Even without ICWA, tribes could intervene based on their interest in their member children. *See* Fed. R. Civ. P. 24. In doing so, tribes may assert their rights contrary to the wishes of other parties, including the state, the parents, and the child. Likewise, relatives and even foster-care providers can intervene and assert their own interests, often in conflict with

those of another party. This can delay permanency, subject a child to placement changes, or even require a new forum, just as it would under ICWA.

**6. Membership Does Confer Jurisdiction and Constitutes the Necessary Forum Contacts.**

Contrary to Plaintiffs' argument (*see* Response at 10), Indian children's membership in a federally recognized Indian tribe does, indeed, confer concurrent jurisdiction on that tribe and the state. *See Montana v. U.S.*, 450 U.S. 544, 565, 101 S. Ct. 1245, 1257-58 (1981) ("Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members," essentially they retain the power "necessary to protect tribal self-government or to control internal relations").

Tribes need not condition membership on contacts with or residence on a reservation. Plaintiffs argue the attenuated ties of many Indian children to their tribes (*see* Response at 10) as if it reflects a harm rather than a problem. ICWA was enacted to prevent the very cause of the attenuation in the first place: generations of forced assimilation and unwarranted removals of Indian children form tribal communities into non-Indian homes, *see* 25 U.S.C. § 1901(4), (5); *see also Montana*, 450 U.S. at 559, n.9, 101 S. Ct. at 1255, n.9 ("The policy of the [allotment] Acts was the eventual assimilation of the Indian population [and] the gradual extinction of Indian reservations and Indian titles") (internal quotes and citations omitted).

**7. Foster-Care Providers and Prospective Adoptive Parents Lack a Constitutionally Protected Interest in the Foster/Adoptive Family.**

Neither foster or prospective adoptive parents have a constitutionally protected interest in maintaining the foster or adoptive family, particularly when relatives or other family members are involved. Instead, "the source of the foster family relationship is contractual in nature and is carefully circumscribed by the state in the foster care agreement." *Gibson v. Merced County Dept. of Human Resources*, 799 F.2d 582, 586 (9th Cir. 1986) (citing *Smith v. Organization of*

*Foster Families*, 431 U.S. 816, 845, 97 S. Ct. 2094, 2110 (1977)). Thus, "'it is appropriate to ascertain from state law the expectations and entitlements of the parties.'" *Id*.

Plaintiffs acknowledge the holding in *Smith* (Response at 11:7-8), which recognizes that the foster-family relationship "has its source in state law and contractual arrangements" and thus is entitled to only "the most limited constitutional 'liberty'" interest. *Smith*, 431 U.S. at 845-846, 97 S. Ct. at 2110. Therefore, "[w]hatever liberty interest might otherwise exist in the foster family as an institution . . . must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents" in light of the "constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right." *Id.* at 846-74, 97 S. Ct. at 2111. Placing the child with extended relatives—including tribal members who may share a blood relationship with the child—thus comports with basic notions of due process for fundamentally protected family relationships.

Here, the State law reflects such a preference for maintaining family connections, a preference also present in ICWA. For example, in A.R.S. § 8-103(B)(3), cited by Plaintiffs to support a "preference for adoption by 'a person who has a significant relationship with the child'" (Response at 11:18-20), the section in total evinces a preference for "placement with a grandparent or another member of the child's extended family including a person or foster parent who has a significant relationship with the child."

**8. Plaintiffs' Next Friend Lacks Standing.**

Plaintiffs ignore Rule 17(c)'s requirement that a next friend or guardian ad litem may sue for a minor "who does not have a duly appointed representative." Fed. R. Civ. P. 17(c)(2). Here, the named plaintiff Indian children, and indeed all children involved in dependency proceedings in Arizona, have a duly appointed representative. *See* A.R.S. § 8-221(A), (I); Ariz. R.P. Juv. Ct. 38, 39, 4.[1]

[1] Contrary to Plaintiffs' unfounded assertion (Response at 13, n. 6), counsel and guardians ad litem are not paid for by the State defendants. Rather, they are provided by independent county contracts or county public defender offices.

Moreover, there is no indication that Ms. Carter has any relationship with any named plaintiff or with any member of the proposed class. The mere fact that she may have represented children, even Indian children, in the past does not confer "next friend" status on her with respect to all off-reservation Indian children in state-court proceedings.

**9. Specific Harms.**

Plaintiffs cite to State Defendant's "factual error" in stating that no motion to transfer jurisdiction had been filed in named Plaintiff A.D.'s case. (Response at 38:11.) The State Defendant was simply relying on the "facts" set out in the Plaintiffs' Complaint, without referring to specific information in A.D.'s case or that of any other named or prospective plaintiff, given that the information pertaining to those cases is protected by strict confidentiality requirements. *See* A.R.S. § 8-807.

**B. RIPENESS**

Plaintiffs claim that because of the application of ICWA, they "live in a perpetual state of fear and uncertainty." (Response at 15:21.) That situation is no different than with any foster or adoptive parent who hopes to maintain ties with the children in their care. That is the nature of fostering children: one is expected to love and nurture a child without any assurance of permanency. The alleged harm is not unique to Indian children or those who care for them.

Further, Plaintiffs cannot show that the State Defendant will apply the 2015 Guidelines "regardless of whether state courts render decisions based on them." (Response at 39:19-20.) On the contrary, the State Defendant is required to ensure that the Department of Child Safety follows all applicable state and federal law, which could be profoundly impacted by state court decisions involving the application of the 2015 Guidelines. Most importantly, however, Plaintiffs, despite all of their complaints, have failed to demonstrate that ICWA harms Indian children, either as an entire class, or as to the named Plaintiffs.

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**C. ABSTENTION**

The U.S. has not "hijacked" state social policy via ICWA. (Response at 17:15.) States determine what constitutes a child custody proceeding under ICWA by establishing the conduct that will give rise to foster care placements; states determine the grounds to terminate a parent's rights; states establish differing burdens of proof for a variety of state-law findings; and states establish bodies of case law interpreting ICWA according to the understanding of the state judiciary. *See*, *e.g.*, *Valerie M.*, 219 Ariz. at 334-35, 198 P.3d 1203, 1206-07.

Moreover, the relevant determination of state law *is* unclear, at least with respect to the application of the 2015 Guidelines. (*See* Response at 17, arguing the contrary.) Although Arizona's courts have traditionally "looked to [the Guidelines] for assistance in interpreting and applying the provisions of ICWA," *Steven H. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 566, 572, ¶ 24, 190 P.3d 180, 186 (2008), they have also recognized the nonbinding status of the Guidelines, *id.*, and departed from them on occasion, *see Navajo Nation v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 339, 345, ¶ 20, 284 P.3d 29, 35 (App. 2012). To date, however, no published Arizona decision addresses the applicability of the revised Guidelines. Although the State Defendant has indicated an intent to follow the guidance provided therein, nothing requires the state courts to adhere to the Guidelines. Until that issue is decided, Plaintiffs' claim is not ripe.

Similarly, Plaintiffs cannot support their claim that nothing about their federal lawsuit "would interrupt or displace ongoing proceedings" in the juvenile court. (Response at 19:19-21.) On the contrary, any Court orders mandating specific compliance or noncompliance with ICWA will have immediate and detrimental effects on the named Plaintiffs and members of the proposed class. Burdens of proof will be altered, possibly even mid-trial, causing delays and engendering new appeals; placements will be disrupted; ongoing litigation will be thrown into disarray and confusion; tribes' and parties' status will need to be litigated; etc. Only some children or families identified as part of the proposed class may agree with Plaintiffs that ICWA harms them; a ruling by this Court invalidating any portion of ICWA would affect every case

involving an Indian child regardless of that child's, tribe's, foster-care placement's, or parent's views about ICWA. Moreover, a ruling by this Court would subject Arizona and Arizona's children to uncertainty not faced by children in states without such a broad-reaching challenge to an almost-forty-year-old federal law. The harm attendant on a federal court order invalidating ICWA is far more serious and insidious than any harm alleged by Plaintiffs.

And Plaintiffs claim that they "do not challenge a *state* statutory scheme" (Response at 35:22) without recognizing that Arizona has incorporated ICWA's provisions in its state statutory scheme, such that state law would necessarily be impacted by any adjustment to ICWA. *See, e.g.*, A.R.S. §§ 8-815, 8-872.

## II. RULE 12(b)(6)

### A. EQUAL PROTECTION

Plaintiffs decry the "two-track system of child custody proceedings" as antithetical to notions of equal protection. (*See*, Response at 20.) At the same time, they ignore the compelling and ongoing discriminatory circumstances that motivated Congress to act in the first place: in 2016, despite almost forty years of protective measures, Indian children are still disproportionately removed from their families and placed into non-Indian homes. *See* Casey Family Programs, *Measuring Compliance with the Indian Child Welfare Act* (March 2015) at 6.[2]

In misconstruing ICWA as a race-based system, Plaintiffs attempt to limit its applicability to only those Indian children with sufficient ties to their tribes or reservations. (*See*, Response at 21.) Plaintiffs are, in effect, asking this Court to invalidate ICWA based on the "Existing Indian Family" (or "EIF") exception, a judicially created doctrine that Arizona has already found meritless. *Michael J. Jr. v. Michael J. Sr.*, 198 Ariz. 154, 157-58, 7 P.3d 960, 9603-64 (App. 2000). Arizona's court of appeals held that the EIF doctrine (1) "frustrates the policy of protecting the tribe's interest in its children" because ICWA reflects "the notion that protecting tribal interests best serves the interests of Indian children;" (2) is contrary to the plain

[2] Accessible at http://www.casey.org/media/measuring-compliance-icwa.pdf, last accessed 11/30/15.

language of ICWA and frustrates its purpose; (3) is not supported by ICWA's legislative history, considering that Congress rejected a "significant contacts" provision; (4) is inconsistent with the Supreme Court's recognition in *Holyfield* that ICWA was concerned both with the welfare of Indian children but also the impact of child-welfare practices on tribes, and that an Indian child's interest in maintaining contact with the tribe may be different from the child's parent's interest; and (5) was already implicitly rejected in Arizona. *Id.* at 157-58, ¶¶ 13-18, 7 P.3d at 963-64.

Contrary to Plaintiffs' argument, the State Defendant is not "attempt[ing] to craft a categorical rule that any federal law affecting 'Indians' is immune from challenge as a racial classification," (Response at 21:25-27), but rather points out the already existing rule that federal laws pertaining to tribes' ability to define themselves and their members—and their interactions with them—are based on *political*, rather than racial, classifications.

As the Supreme Court recognized in *Mancari*, federal laws appropriately distinguish between those who have and do not have ties to federally recognized Indian tribes, but cannot permissibly distinguish between those who are racially "Indian" without the requisite political affiliation. *Morton v. Mancari*, 417 U.S. 535, 553, n.24, 94 S. Ct. 2474, 2484, n.24 (1974). ICWA does not cover any racially Indian child; contrary to Plaintiffs' repeated assertion, it does not even cover every child eligible for membership.[3] ICWA requires the additional component of a parent with membership in a federally recognized tribe. "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," statutes that treat "Indians"—that is, members of federally recognized Indian tribes—differently are permitted and do not violate due process. *Mancari*, 417 U.S. at 555, 94 S. Ct. at 2485. Here, ICWA fulfills Congress's recognized duty to protect tribal resources, of which none is more vital than their children. 25 U.S.C. § 1901(2),(3).

[3] Plaintiffs correctly assert that "[o]nly children with Indian heritage are made subject to ICWA." (Response, p. 40:18.) What they stubbornly avoid, however, is acknowledgment of the fact that not every child with Indian heritage is affected, but rather only those who meet the very narrow definition of "Indian child" described in 25 U.S.C. § 1903(4).

Moreover, ICWA does not create a race-based placement preference status, as Plaintiffs claim. (*See*, Response at 41:15-17) Rather, ICWA prefers placements that reflect an Indian child's unique cultural identity, which can be addressed foremost by members of that child's extended family. ICWA does not require that the preferred family members be from the Indian side of the family tree. *See* 25 U.S.C. § 1915. That relatives may be preferred to foster parents does not equate to unequal racial preferences; instead, it reflects the commitment by state and federal courts to recognize and preserve family ties, regardless of a child's racial heritage.

**B. DUE PROCESS**

**1. Transfer of Jurisdiction.**

Plaintiffs persistently refer to a child's "mere eligibility" as insufficient to create sufficient contacts with a tribe to support ICWA's provisions. (*See*, *e.g.*, Response at 26.) ICWA requires more. A child must be a member or be eligible for membership, *and* must be the biological child of a member. *See* 25 U.S.C. § 1903(4). By so doing, Congress limited the effect of ICWA to only those children with sufficient ties to the tribe to necessitate protection.

Moreover, Plaintiffs ignore the fact that the relationship between an off-reservation Indian child and his foster or prospective adoptive parent is based in state law and contract (*see* Argument I.A.7, *supra*), meaning that the foster parent is not a party to the proceeding at all, but rather a participant with limited rights. *See* A.R.S. § 8-847(B)(2), (8), (9); Ariz. R.P. Juv. Ct. 37(A), (B). Thus a transfer to tribal court simply recognizes that foster parents, unlike natural parents or other parties to the proceedings, have limited rights in dependency matters.

Nor does ICWA require transfer of a child custody matter to tribal court; instead, the Act allows for the state court to deny transfer upon a showing of good cause. 25 U.S.C. § 1911(b). And although the 2015 Guidelines explicitly reject certain considerations from the "good cause" determination, the convenience of the forum for the participating parties is not one of the exempted criteria. *See* Guideline C.3, 80 Fed. Reg. at 10,156; *cf.* 1979 Guideline C.3(b)(iii), Commentary, 44 Fed. Reg. 67,584, 67,591 (Nov. 26, 1979).

**2. Individualized Determination.**

Plaintiffs reassert their argument that foster parents "have a liberty interest that cannot be deprived without due process." (Response at 27:1-2.) Foster parents, however, do not have such liberty interests. The process that foster parents are due, however, differs greatly from that which is due to the child, parents, and tribe, all of whom have a recognized fundamental liberty interest in preserving relationships. Foster parents, on the other hand, are entitled to proceedings under state law or through their state contracts to review their ability to maintain children in their care. *See* A.R.S. §§ 8-514, 8-515.05, 8-517. They are not entitled to thwart the State's goal of family preservation no matter how strong their emotional attachment to the child, and nothing in *Smith* grants them that right.

**3. Children's Best Interests.**

Plaintiffs have not, and cannot, show that ICWA's minimum protections and placement preferences are not in the best interests of Indian children. As Congress (25 U.S.C. § 1902), the Supreme Court (*Holyfield*, 490 U.S. at 49-50, 109 S. Ct. at 1609), and Arizona (*Navajo Nation*, 230 Ariz. at 345, ¶ 21, 284 P.3d at 35) have recognized, ICWA's protections inherently serve the best interests of Indian children.

Contrary to Plaintiffs' arguments, the Guidelines are not the exclusive criteria for determining good cause to deviate from ICWA's placement preferences (*compare* Response at 27-28 *with Navajo Nation*, 230 Ariz. at 35, ¶ 22, 284 P.3d at 345), nor do they require removal of a bonded child to a tribe when the child "may not even be eligible for membership" (Response at 28; 25 U.S.C. § 1903(4) [requiring that an "Indian child" be a member or eligible for membership and the child of a member]). And states can—and do—place children across state lines with distant relatives despite the availability of local foster parents with whom they have a loving relationship. In fact, Arizona has recognized that children should be placed in the following order of preference: (1) with a parent; (2) with a grandparent; (3) in kinship care with another member of the child's extended family, including a person who has a significant

relationship with the child; (4) in licensed foster care; (5) in therapeutic foster care; (6) in a group home; and (7) in a residential treatment facility. A.R.S. § 8-514(B). This statute, like ICWA, recognizes the importance of family ties, and both prefer placement with an extended family member, which may include non-Indian family members, over tribal placements. 25 U.S.C. §1915(a), (b).

**C. FEDERALISM**

Plaintiffs argue that the people of Arizona spoke "in crafting their child custody laws, whose protection plaintiffs would enjoy were they not displaced by ICWA." (Response at 29:16-18.) They ignore the fact, however, that the people of Arizona likewise spoke when Arizona promulgated statutes and rules adopting, codifying, and, in the case of permanent guardianships under A.R.S. § 8-871 through -874, extended ICWA's protections to the State's Indian children.

Nor does ICWA "do[ ] great violence to principles of federalism." (Response at 29:26.) Arizona and other states recognize a wide variety of federal laws requiring specific factual findings, resource allocation, and other duties in child welfare matters. *See, e.g.*, Aid to Families with Dependent Children, Pub. L. 74-271, 42 U.S.C. ch. 7 (Title IV of the Social Security Act); Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101 *et seq.*; Foster Care Independence Act, Pub. L. 106-169; Temporary Aid to Needy Families, Pub. L. 104-193; Adoption and Safe Families Act, Pub. L. 105-89; Child Abuse Reform and Enforcement Act, Pub. L. 106-177; Adam Walsh Act, Pub. L. 109-248, 42 U.S.C. §§ 16911 *et seq.*; Fostering Connections Act, 42 U.S.C. §§ 621 *et seq.*, 670 *et seq.* Plaintiffs embrace Justice Thomas's views regarding Congress's power over Indians, (*see*, Response at 30), but those views do not reflect current Supreme Court doctrine. *See Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (Thomas, J., concurring without joinder); *N.W. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 129 S. Ct. 2504 (2009) (Thomas, J., concurring in part and dissenting in part without joinder).

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And, as discussed above, nothing in the nonbinding Guidelines requires state actors to provide "genograms or ancestry charts" or to enroll unenrolled children. (*See* Response at 31:9.) The proposed regulations, in fact, do not include these suggested steps. *See* 80 Fed. Reg. at 14,887- 14,888 (§§ 23.107, -108, -109). Similarly, ICWA's mandates continue to be necessary to combat the disproportionate representation of Indian children in American foster-care systems, just as they did in 1978. *See Measuring Compliance, supra at n.2*.

**D. FREEDOM OF ASSOCIATION**

Plaintiffs conflate an Indian child's "ties to the tribe" with the child's "association" with the tribe. (*See* Response at 31-32.) There is no basis for this claim. A child without "ties," may still have an association with the tribe through the child's membership in the tribe or eligibility coupled with a parent's membership. That association must exist for ICWA to apply. While some Indian children may lack *ties* to their tribes or reservations, no Indian child, as defined by 25 U.S.C. § 1903(f), lacks an *association* with a federally recognized tribe. ICWA may serve to transmute an Indian child's association into ties with the tribe. That was, in fact, the whole purpose of the Act - it was designed to remediate the decades of contrary efforts to sever those ties even if the associations were left intact. Plaintiffs' example of political party affiliation is absurd. (*See* Response at 32, 38.) The federal government has not assumed, and cannot assume, "the responsibility for the protection and preservation" of political parties as it has for Indian tribes. *See* 25 U.S.C. § 1901(2). A child or parent who wishes to forego association with a tribe can do so, although the tribe's right to associate with the child or parent must also be considered. Nothing in ICWA, however, creates that association. It must already exist for ICWA to apply.

**E. BIA GUIDELINES**

There is no authority for Plaintiffs' argument that the 2015 Guidelines "have the force of law through the State's adoption of them." (Response at 33:8.) On the contrary, courts are free to apply or ignore the Guidelines as the needs of a particular case dictate, regardless of the State Defendant's position. *See* Argument I.A.2, *supra*.

Regardless, the 2015 Guidelines are not "final agency action." (Response at 33:13.) The Department of the Interior has proposed regulations that differ from the Guidelines in several notable ways, particularly with respect to the challenged provisions, and which if codified *would* constitute final agency action. *See* Memorandum Opinion and Order at 10-13, *Nat'l Council for Adoption v. Jewell*, No. 1:15-cv-00675-GBL (D. Va. Oct. 20, 2015), ECF No. 66 (holding that "the 2015 Guidelines do not constitute 'final agency action' within the meaning of the [Administrative Procedure Act]" because they do not "create rights, obligations, or legal consequences" despite "voluntary compliance" with them by state courts).

Further, Plaintiffs' conclusory statements that the Guidelines are binding (Response at 39:16-17), and that "Arizona has adopted the BIA Guidelines and given them the force of official policy," (Response at 14:24-25), are unsupported by law or fact. Plaintiffs' primary support: a "Practice Tip" by Dept. counsel showing the changes made in the 2015 Guidelines. (*See* Response, Exhibit "A".) The Practice Tip does not, and cannot, promulgate binding authority. Regardless, as has been shown by the State Defendants, the Guidelines are not legally binding, and have not been "adopted" by the State of Arizona. *See, e.g.,* Argument I.C., *supra*.

## CONCLUSION

For the reasons stated herein, the State Defendant reaffirms its *Motion to Abstain and Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1),(6),* and requests that it be dismissed from the entirety of this action.

RESPECTFULLY SUBMITTED this 4th day of December, 2015.

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 4th, 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 an Electronic Filing to the following CM/ECF registrants:

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