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

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

27 vs.

28 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

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' NOTICES OF
SUPPLEMENTAL AUTHORITIES**

1 Plaintiffs respectfully submit this response to the Notices of Supplemental
2 Authority filed by the Federal and State Defendants regarding the Eastern District of
3 Virginia's recent decision in *National Council for Adoption Building Arizona Families v.*
4 *Jewell*, No. 1:15-00675-GBL-MSN (E.D. Va. Dec. 9, 2015), ECF No. 69 ("*National*
5 *Council MTD Order*"). See Federal Defs.' Notice of Suppl. Authorities (Dec. 10, 2015),
6 Doc. 110; State Def.'s Notice of Suppl. Authority in Supp. of Its Mot. to Abstain and
7 Dismiss (Dec. 11, 2015), Doc. 112.

8 The plaintiffs' principal claim in *National Council* was that the BIA's 2015
9 Guidelines violate the Administrative Procedure Act. The *National Council* court
10 dismissed that claim, ruling that the plaintiffs could demonstrate neither standing nor
11 final agency action on the theory that the Guidelines are not mandatory. *National*
12 *Council MTD Order* at 9–10; see also Mem. Op. & Order, *National Council for*
13 *Adoption Building Arizona Families v. Jewell*, No 15-675 (E.D. Va. Oct. 20, 2015), ECF
14 No. 66. But as Plaintiffs explained in their consolidated response to the motions to
15 dismiss, legal consequences unquestionably flow from the Guidelines, the stated purpose
16 of which is to "clarify the *minimum Federal standards* . . . governing implementation of
17 the Indian Child Welfare Act." 80 Fed. Reg. at 10,150 (emphasis added). Accordingly,
18 the BIA's 2015 Guidelines constitute final agency action, and the *National Council*
19 court's conclusion to the contrary cannot be sustained.

20 Defendants also point to portions of the *National Council* court's opinion that
21 address equal protection and due process challenges to the 2015 Guidelines. As an
22 initial matter, the *National Council* court's discussion of these issues amounts to an
23 advisory opinion. The parties in *National Council* stipulated to the voluntary dismissal
24 of all plaintiffs who alleged equal protection or due process claims, thus depriving the
25 court of jurisdiction over those claims before it issued its opinion. See *Jones, Blechman,*
26 *Woltz & Kelly, PC v. Babakaeva*, 375 F. App'x 349, 350 (4th Cir. 2010) (explaining that
27 "the district court was divested of jurisdiction" upon proper filing of notice of voluntary
28 dismissal and that order subsequently issued in suit was therefore void). In any event,

1 the *National Council* court’s equal protection analysis is fatally flawed, for it makes no
2 effort to reconcile its suggestion that ICWA’s definition of “Indian child” is political
3 rather than racial with the “equal protection concerns” that the Supreme Court said are
4 implicated when vulnerable children are put “at a great disadvantage solely because an
5 ancestor—even a remote one—was an Indian.” *Adoptive Couple v. Baby Girl*, 133
6 S. Ct. 2552, 2565 (2013). And while it is difficult to follow the *National Council* court’s
7 explanation for why *Roe v. Wade*, 410 U.S. 113, 155 (1973), forecloses a due process
8 challenge to the 2015 Guidelines brought by an adoptive child’s birth parents, *see*
9 *National Council* MTD Order at 12–13, the court’s analysis is plainly inapplicable to the
10 very different due process claims at issue here.

11 The *National Council* court’s cursory federalism analysis also misses the mark in
12 numerous respects. *See National Council* MTD Order at 13–15. Whatever the scope of
13 Congress’ powers under the Indian Commerce Clause, a child with nothing more than a
14 biological connection to an Indian tribe is not an article of commerce subject to
15 regulation under that constitutional provision. *See Adoptive Couple*, 133 S. Ct. at 2567
16 (Thomas, J., concurring) (Indian Commerce Clause does not authorize Congress to
17 regulate “noneconomic activity such as adoption of children”). The federal
18 government’s “preconstitutional powers” to regulate Indian Tribes derive from its
19 authority to implement “military and foreign policy” and plainly do not extend to off-
20 reservation Indian children. *See United States v. Lara*, 541 U.S. 193, 201 (2004). The
21 *National Council* court’s suggestion that the President’s treaty power provides a basis
22 for extensive federal involvement in domestic adoption proceedings rests on a legal
23 principle called into serious doubt by the Supreme Court’s decision in *Lara*, 541 U.S. at
24 201, and that in any event has no application here given that neither ICWA nor the 2015
25 Guidelines were adopted pursuant to a valid treaty. And the *National Council* court’s
26 focus on application of the anti-commandeering principle to state court judges ignores
27 the fact that ICWA and the 2015 Guidelines direct not only state judges but also other
28 state officials to implement federal adoption policy for off-reservation Indian children.

1 In short, the district court's decision in *National Council* is seriously flawed in
2 numerous respects, opines on difficult constitutional questions that were not before the
3 court, and much of its analysis is distinguishable. The opinion is not binding precedent,
4 and this Court should not follow it.

5 **RESPECTFULLY SUBMITTED** this 14th day of December, 2015 by:

6 /s/ Aditya Dynar

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CERTIFICATE OF SERVICE

Document Electronically Filed and Served by ECF this 14th day of December,
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Courtesy Copy Mailed this 14th day of December, 2015 to:

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/s/ Kris Schlott
Kris Schlott