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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO

EFRIM RENTERIA; TALISHA RENTERIA, Plaintiffs, vs. SHINGLE SPRINGS BAND OF MIWOK INDIANS, et al., Defendants.	No. 2:16-cv-1685-MCE-AC **MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE BY THE GOLDWATER INSTITUTE**

Pursuant to Fed R. Civ. P. 7 and Local Rule 230, as well as the Court's inherent authority to regulate its own proceedings, the Goldwater Institute respectfully moves for permission to file a brief amicus curiae in opposition to the Defendants' Motion for Reconsideration. A copy of the proposed brief is attached to this Motion. A separate proposed order is filed concurrently herewith, pursuant to Local Rule 137(b).

IDENTITY AND INTEREST OF AMICI CURIAE

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research papers, editorials, policy briefings and forums. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates and files amicus briefs when its or its clients' objectives are directly implicated.

The Goldwater Institute's Equal Protection for Indian Children project is devoted to reforming the federal and state legal treatment of Native American children subject to the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901, *et seq*. The Institute is currently litigating a federal civil rights case in the Arizona Federal District Court which contends that ICWA violates the fundamental principles of equal treatment under law, respect for individual rights, and federalism embedded in the federal Constitution. *Carter v. Washburn*, No. 15-cv-01259 (D. Ariz. filed July 6, 2015). The Institute has also represented parties in cases involving ICWA (*Gila River Indian Cmty. v. Dep't of Child Safety*, 379 P.3d 1016 (Ariz. App. 2016)), and appeared as amicus curiae in state courts in cases involving ICWA (*see, e.g., In re. T.A.W.*, Washington Supreme Court No. 92127-0 (pending); *In re Matter of A.P.* (California Supreme Court No. S233216)).

Goldwater Institute scholars have also published ground-breaking research on the well-intentioned but profoundly flawed workings of ICWA. *See, e.g.,* Mark Flatten, *Death on a Reservation* (Goldwater Institute, 2015)[1]; Timothy Sandefur, *Escaping The ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD LEG. RTS. J. __ (forthcoming, 2017).[2]

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[1] Available at http://goldwaterinstitute.org/en/work/topics/constitutional-rights/equal-protection/death-on-a-reservation-interactive-pdf/.

[2] Available at http://ssrn.com/abstract=2796082.

THE COURT SHOULD GRANT THE MOTION TO APPEAR AS AMICUS CURIAE

"An amicus brief should normally be allowed . . . when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Cmty. Ass'n for Restoration of Env't (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999).

Given the Goldwater Institute's expertise and experience with regard to ICWA, and its familiarity with the jurisdictional issues, amicus believes its legal expertise and public policy experience will assist this Court in its consideration of this motion. The proposed amicus brief addresses an additional ground for this Court to deny the motion for reconsideration and to grant relief to the parties: specifically, that the tribal court cannot assert a constitutional basis for exercising personal jurisdiction over the children in this case. The only basis for the tribal court's assertion of personal jurisdiction is the children's genetic ancestry, which is insufficient to satisfy the due process requirement of fair play and substantial justice. The brief also contends that this Court could, in the alternative, exercise jurisdiction over Defendant Christine Williams pursuant to *Ex Parte Young*, 209 U.S. 123 (1908).

All parties were notified on October 3 of the Institute's intent to file this motion and accompanying brief. No party will be prejudiced by the filing of this brief, because this motion is filed immediately after the brief of the Plaintiffs in opposition to the motion, enabling Defendants sufficient time to respond to all arguments herein.

No counsel for any party authored the proposed amicus brief in whole or in part and no person or entity, other than the Institute, its members, or counsel, made a monetary contribution to the preparation or submission of this brief.

RESPECTFULLY SUBMITTED this 20th day of October, 2016 by:

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CERTIFICATE OF SERVICE

Document Electronically Filed and Served by ECF this 20th day of October, 2016.

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FOR THE EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO

EFRIM RENTERIA; TALISHA RENTERIA,

Plaintiffs,

vs.

SHINGLE SPRINGS BAND OF MIWOK INDIANS, et al.,

Defendants.

No. 2:16-cv-1685-MCE-AC

BRIEF OF AMICUS CURIAE GOLDWATER INSTITUTE IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION FOR RECONSIDERATION

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should deny Defendants' motion for reconsideration and grant permanent injunctive relief against Defendants for an additional reason not addressed in this Court's September 2 order (Doc. No. 58): specifically, the tribal court cannot exercise personal jurisdiction over the Minors, the estate, or Efrim Renteria and Talisha Renteria, even aside from the due process concerns discussed in the September 2 order.

The tribe asserts two bases for exercising personal jurisdiction over the children: the Indian Child Welfare Act (ICWA), specifically 25 U.S.C. § 1911,[1] and inherent tribal sovereignty.[2] Neither, however, satisfies the "minimum contacts" requirement of due process. *See generally World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292–93 (1980); *International Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945). The *only* connection between the tribal forum and the Renteria family or the children is *biological*: it is undisputed that the children have never been domiciled on reservation, and their *only* connection to the tribe is the DNA in the cells of their bodies. It need hardly be said that biological ancestry does not satisfy the "minimum contacts" requirement for the exercise of *in personam* jurisdiction consonant with "'traditional notions of fair play and substantial justice.'" *Id.* (quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940)).

Without a constitutionally adequate basis for personal jurisdiction, the tribal court cannot render a decision in this case. This means that the tribe's arguments in the motion for reconsideration are essentially moot. The tribal court lacked jurisdiction to hear this case, and this Court should, pursuant to 28 U.S.C. § 1331 and *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850–53 (1985), permanently enjoin the tribal court from asserting personal jurisdiction over the parties.

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[1] The tribe asserts "primary jurisdiction" under Section 1911(a). Defendant's Motion for Reconsideration (Docket No. 64) at 6. ICWA, however, makes no reference to "primary" jurisdiction, and Section 1911(a) applies only to children who reside on or are domiciled on reservation. Neither is the case here.

[2] It is unnecessary to determine the source of the tribe's powers, because even if the basis of the tribe's assertion of power is inherent sovereignty—doubtful, since such sovereignty does not include power to regulate activities of non-members, *Montana v. United States*, 450 U.S. 544, 565 (1981)—that would only establish *subject-matter* jurisdiction, not *personal* jurisdiction, which is lacking here. *Cf. Kulko v. Superior Court*, 436 U.S. 84 (1978) (California courts lacked personal jurisdiction over father in child custody matter even though child lived in California with mother).

ARGUMENT

I. THE TRIBE LACKS PERSONAL JURISDICTION OVER THE PARTIES TO THIS CASE

To decide a case, a tribal court, no less than a state court, must have both subject matter jurisdiction and personal jurisdiction. *Wilson v. Marchington,* 127 F.3d 805, 811 (9th Cir. 1997); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 820 (9th Cir. 2011). To assert personal jurisdiction means the court has an adequate basis for binding the parties to a judgment—simply put, that the defendant has taken some step to subject himself to the court's authority. In *International Shoe,* the Supreme Court explained that this means a defendant must either reside in the forum—not the case here—or "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316 (quoting *Milliken,* 311 U.S. at 463). That is also not the case here.

A. The Only Contacts With The Tribe Here Are Biological

The "minimum contacts" requirement is an inherent requirement of due process of law. Due process simply "does not contemplate" that a court "may make binding a judgment *in personam* against an individual" who has "no contacts, ties, or relations" to that court's jurisdiction. *World-Wide Volkswagen,* 444 U.S. at 294. Where a person has "carr[ied] on no activity whatsoever" in the forum jurisdiction, and has "avail[ed] [himself] of none of the privileges and benefits of [the forum's] law," then the forum cannot exercise personal jurisdiction because there are no "affiliating circumstances" that would satisfy the requirements of "fair play and substantial justice." *Id.* at 292, 295.

Those "minimum contacts" must not only exist, but they also must "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum." *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 109 (1987) (citations omitted). It is not enough that the exercise of personal jurisdiction be foreseeable; the

exercise of personal jurisdiction must also result from the party *purposely availing* himself or herself of the privilege of conducting activities within the forum. *Id.* at 110.[3]

Tribal courts are subject to the "minimum contacts" requirement just as federal and state courts are. *See, e.g., Marchington,* 127 F.3d at 811; *LaRance*, 642 F.3d at 820; *In re J.D.M.C.,* 739 N.W.2d 796, 811 (S.D. 2007) ("whether tribal courts have personal jurisdiction over a party is analyzed using the minimum contacts standard expressed in *International Shoe*."); *cf. DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 514–15 (8th Cir. 1989) ("a tribal court exercising *in personam* jurisdiction over a nonmember nonresident parent of a minor child domiciled within the Indian reservation may violate due process.")

Thus for the tribal court to exercise jurisdiction here, there must be purposeful contact between the parties and the Miwok tribal forum—such as domicile on, or activities on, the Miwok reservation or contracts with tribal entities—enough that the tribal court's exercise of personal jurisdiction would conform to traditional notions of fair play and substantial justice.

There are no such contacts here. Neither the Renterias nor the children, nor the deceased parents, were ever domiciled on reservation,[4] and the children and the Renterias have no connection to the tribe other than *biological*: the deceased father was a member

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[3] The recent case of *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians,* 746 F.3d 167 (5th Cir. 2014), *aff'd by an equally divided Court* 136 S. Ct. 2159 (2016), involved subject matter jurisdiction, not personal jurisdiction, but the question has some parallels with the personal jurisdiction "minimum contacts" test. The Fifth Circuit held that the tribal court had subject matter jurisdiction to adjudicate a civil dispute because the corporate defendant had entered into a "consensual relationship" with the tribe and its members—specifically, employment. There was no dispute that the corporate defendant was subject to the tribe's *personal* jurisdiction, as it was doing business on the reservation. Here, by contrast, there is *no* consensual relationship or minimum contact with the tribal forum.

[4] In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), the Supreme Court found that the tribe had jurisdiction, because the children were domiciled on reservation, as a consequence of their mother's domicile. *Id.* at 47–53. The children's deceased parents in this case were not domiciled on reservation.

of the tribe. The question, then, is whether this biological connection is enough that the tribal court's exercise of personal jurisdiction satisfies fair play and substantial justice. It does not.

ICWA's grant of tribal court jurisdiction in Sections 1911(a) and (b), and its grant of authority to tribal governments to intervene as parties in child welfare cases in Section 1911(c), apply whenever the children in question are "eligible for membership" in a tribe, and have at least one biological[5] tribal member parent. 25 U.S.C. § 1903(4). The Miwok Tribe's Articles of Association define membership by biological descent from a person whose name appears on the 1916 Census Roll of Indians. *See* Shingle Springs Band of Miwok Indians Articles of Association[6] Art. II § 1. It follows syllogistically that the only basis for tribal authority in this case is the biological ancestry of the children.

It should go without saying that due process and equal protection principles do not tolerate a legal regime whereby the exercise of jurisdiction is triggered solely by a person's biological ancestry or ethnicity. As the California Court of Appeal has put it, there are "significant constitutional impediments to applying ICWA, rather than state law, in proceedings affecting ... persons who are not residents or domiciliaries of an Indian reservation, are not socially or culturally connected with an Indian community, and, in all respects *except genetic heritage*, are indistinguishable from other residents of the state." *In re Bridget R.*, 41 Cal. App. 4th 1483, 1501 (1996).

It would be absurd for Congress to authorize, say, the government of Japan to adjudicate cases involving American citizens of Japanese ancestry, or to order that cases involving children whose great-great-great-great grandparents were born in Ohio be heard in Ohio courts, regardless of where the children were born and raised. Analogies are difficult to imagine here, because virtually no other law in the United States contains a

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[5] Children who are adopted into the tribe are not "Indian children" under Section 1903(4). Biology is the *sole and dispositive* criterion for ICWA's applicability.

[6] Available at http://shinglespringsrancheria.com/ssr/wp-content/uploads/documents/ordinances/Articles%20of%20Association.pdf.

provision that, like ICWA, erects a separate legal system for cases involving people of a particular ethnic ancestry.[7] Separate-but-equal simply violates due process of law. *Bolling v. Sharpe,* 347 U.S. 497, 500 (1954). For personal jurisdiction to hinge on a person's biological heritage contradicts traditional notions of fair play and substantial justice.

B. ICWA Relies On A Racial, Not Political, Distinction

This distinction is why ICWA's separate-and-unequal treatment cannot be shielded by the Supreme Court's ruling in *Morton v. Mancari*, 417 U.S. 535 (1974). That case involved adult members of a tribe, not children eligible for membership solely on the basis of genetics. Indeed, *Mancari* expressly declined to address whether laws "directed towards a 'racial' group consisting of 'Indians'" would pass constitutional muster. *Id.* at 553 n.24. In *United States v. Antelope*, 430 U.S. 641 (1977), the Court again refused to establish an absolute rule that all laws treating Native Americans differently from other ethnic groups were "political" rather than "racial"; the Court upheld the distinction in that case because it did *not* depend on whether a person was "racially to be classified as 'Indian[].'" *Id.* at 646 n.7. The Ninth Circuit has also refused to hold that all laws differentiating between people of Indian descent and people of non-Indian descent are

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[7] The only possible analogy is the Indian Major Crimes Act, 18 U.S.C. § 1153, which applies only where the perpetrator of a crime is an Indian, but even that law applies only to persons who are members of federally recognized tribes, *see United States v. Zepeda,* 792 F.3d 1103, 1111–13 (9th Cir. 2015) (en banc), not to persons who are merely *eligible* for membership, and whose eligibility depends solely on genetics. In *United States v. Burland*, 441 F.2d 1199, 1203–04 (9th Cir. 1971), the Ninth Circuit found that basing jurisdiction on race would not be unconstitutional because "[t]he charge and the penalty are the same … . Only the court is different." Because the defendant had "not suggested how this difference might have injured him," the court rejected his due process argument. *Id.* at 1204. This conclusion is irreconcilable with the Supreme Court's admonition that separate is "inherently unequal," *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954), but it is also inapplicable here, because ICWA establishes *different rules*, not just a different court system. The adoption and foster placement preferences and burdens of proof imposed by ICWA differ from those that under California law apply to children of other races. *See generally In re Santos Y.,* 92 Cal. App. 4th 1274, 1317–22 (2001).

categorically exempt from the strict scrutiny. *See Malabed v. North Slope Borough*, 335 F.3d 864, 868 n. 5 (9th Cir. 2003); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004).

In *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), the Court refused to simply declare that ICWA's differential treatment of "Indian child[ren]" and children of other races was a "political" classification subject to rational basis review. On the contrary, the Court warned that using ICWA "to override ... the child's best interests ... solely because an ancestor—even a remote one—was an Indian" "*would raise equal protection concerns*." *Id.* at 2565 (emphasis added). The Court found it unnecessary to address those concerns because it resolved the case on statutory grounds. However, in *Bridget R., supra*, and *Santos Y., supra*, the California Courts of Appeal made clear how ICWA's discriminatory provisions conflict with principles of due process and equal protection.

As in *Adoptive Couple,* there is no need for this Court to address the many constitutional problems with ICWA. It is sufficient to find that for the tribal court to exercise personal jurisdiction over the children and the Renterias in this case, solely on the basis of the children's genetics, is too much for the "minimum contacts" rule to tolerate.

C. Race-Based "Minimum Contacts" Offend Traditional Notions of Fair Play And Substantial Justice

A South Dakota case notably similar to this one provides helpful guidance. In *In re J.D.M.C.,* 739 N.W.2d 796 (S.D. 2007), the court found that a tribal court lacked personal jurisdiction in a child custody matter where the children were not domiciled on reservation and the defendant lacked minimum contacts with the tribe.

The mother was a tribal member, and father was non-Indian. When the parents divorced, they shared custody, but the children resided with the father in South Dakota while the mother lived in Mississippi. *Id.* at 799. Some months later, one child died while in the father's care. The mother filed a petition in tribal court alleging neglect, and seeking

custody of the other child. *Id.* The tribe issued an emergency order granting the mother custody. *Id.* at 800. The tribal court asserted exclusive jurisdiction under ICWA, and filed for an order in state court to get its order enforced. But because ICWA confers exclusive jurisdiction only where a child resides or is domiciled on reservation, the state supreme court rejected that argument, *id.* at 803–04, and found that the tribe lacked authority to declare the child a ward of the court when the child had never been domiciled on reservation. *Id.* at 804–05.

More importantly, the court found that the tribal court lacked personal jurisdiction over the father under the minimum contacts test. *Id.* at 811–13. Because the father was "a nonresident, non-tribal member," neither his children nor his ex-wife had resided on the reservation, and the father had never "purposefully availed himself to the benefits and protections of the laws of the … reservation," the connections between the father and the tribe were "too attenuated to constitute minimum contacts." *Id.* at 812. The quality and nature of his connections to the tribal forum were "not such that it would be reasonable and fair for him to require him to conduct his defense in this forum." *Id.*

The same is true here. Although one parent of the minors was a tribal member—as was the mother in *J.D.M.C.*—the other was not, and at no time were they domiciliaries or residents of the reservation. Nor is there any connection to the tribe that would support personal jurisdiction. *See also John v. Baker*, 982 P.2d 738, 763 (Alaska, 1999) ("courts should refrain from enforcing tribal court judgments if the tribal court lacked personal or subject matter jurisdiction. A requirement that a tribal court possess personal jurisdiction over litigants appearing before it ensures that the tribal court will not be called upon to adjudicate the disputes of parents and children who live far from their tribal villages and have little or no contact with those villages."). When a court lacks either personal or subject matter jurisdiction, its judgment is void and not entitled to full faith and credit in the second forum. *See* Restatement (Second) of Conflict of Laws §§ 104–05 (1969). The second (federal) forum is not precluded from deciding the jurisdictional question where, as here, the question was not adversarially litigated in the first (tribal) forum. *Baldwin v.*

Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931); *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 468 (1873). This is because "[a] mere recitation in the [first forum's] judgment that the court had jurisdiction is not ... the sort of 'litigation' that would preclude the jurisdictional issue from being litigated in [the second forum]." William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412, 426 (1994) (citing Restatement (Second) of Judgments §§ 10, 12 (1980)).

Some have urged federal and state courts to relax their judicial skepticism toward ICWA's race-based differential treatment, in order to respect the unreviewable discretion of tribal governments in determining tribal membership. *Cf. In re N.B.*, 199 P.3d 16, 22 (Colo. App. 2007) (to decline to apply ICWA to children whose only relationship to a tribe is biological "would result in each state court using its own value system to decide whether a child is 'Indian enough.'"). But this objection overlooks the crucial distinction—recently emphasized by the California Supreme Court in *In re Abbigail A.*, 375 P.3d 879, 885 (Cal. Ct. App. 2016)—between tribal membership, which is wholly a matter of tribal law, and "Indian child" status under ICWA, which is a matter of federal law, and subject to constitutional limits such as due process. ICWA's grant of tribal court jurisdiction and tribal government power to intervene in child custody matters is a matter of federal law, and must therefore remain within the limits of due process. Tribes may determine citizenship as they please, but for tribal courts to assert personal jurisdiction to impose binding judgments on non-members, or on people whose connection to the tribe is only genetic, fails the minimum contacts test of due process.

Nor would such a holding interfere with the tribe's *legitimate* interests. As many critics have observed, racial lines like those ICWA draws are not a creature of Native American culture. To put it simply, "you can't measure culture by percentages of blood." DAVID TREUER, REZ LIFE 279 (2012); *see also* CHARLES C. GLENN, AMERICAN INDIAN/FIRST NATIONS SCHOOLING: FROM THE COLONIAL PERIOD TO THE PRESENT 196 (2011) ("Continuing to emphasize generic 'Indian' separateness detached from specific tribal identities and cultures ... has the effect of reviving the assumptions about

fundamental racial differences that have been so profoundly harmful to the education of Indian youth."). Indeed, efforts to establish "racially contingent" jurisdiction in cases involving Indians "detrimentally affects the self-determination of Indian nations since it departs from a territorial conception of jurisdiction." Kim Benita Furumoto & David Theo Goldberg, *Boundaries of the Racial State: Two Faces of Racist Exclusion in United States Law*, 17 HARV. BLACK LETTER L.J. 85, 102 (2001).

II. THE "STATUS EXCEPTION" TO THE MINIMUM CONTACTS RULE DOES NOT APPLY HERE

There is an exception to the minimum contacts requirement—the "status exception"—which allows courts to hear certain actions to determine the status of their citizens, even if the defendants are outside the jurisdiction. *See Pennoyer v. Neff,* 95 U.S. (5 Otto) 714, 734 (1877). But this exception does not apply to ICWA cases involving off-reservation children, and does not justify tribal court jurisdiction here.

The status exception only allows a court to hear a case where the *child* is present in the forum, while the parent is not. *See id.* at 737; *see also State ex rel. W.A.*, 63 P.3d 607, 616 (Utah 2002) (status exception enables state courts to determine interests of children residing in that state, and in order to prevent putting children in legal limbo); *McCaffery v. Green*, 931 P.2d 407, 411 (Alaska 1997) ("the ties and relations between a parent and child create ties and relations between the parent and the state in which the child lives sufficient to satisfy notions of fairness in exercising personal jurisdiction."). It is therefore inapplicable to ICWA cases involving off-reservation children who are not present in the tribal forum.

Also, the purposes of the status exception are to prevent jurisdictional conflicts. *See In re Termination of Parental Rights to Thomas J.R.*, 663 N.W.2d 734, 747 (Wis. 2003). But for the tribal court to take jurisdiction here does not prevent jurisdictional conflicts, it *causes* them. There is *no* risk that, absent tribal adjudication, the children might be left in any legal limbo—which is the main concern underlying the status exception. *Id.* at 744. The jurisdiction closest to these children is Tulare County Superior

Court. The tribal court's assertion of jurisdiction would require that their case—which would ordinarily be decided by that court under California child welfare laws that do not discriminate based on race—be decided by an entity geographically distant, and which is connected to the child *solely* by genetics.

In *J.D.M.C.*, the court rejected the tribe's effort to use the status exception to minimum contacts. 739 N.W.2d at 812. Because a "fundamental part of the status exception is the child's presence in the forum," the fact that the child did not reside on the reservation meant that the tribal court lacked jurisdiction. *Id.* Likewise here, the status exception to the minimum contacts rule cannot justify tribal court jurisdiction over this case. Because the tribal forum lacks minimum contacts with the children or the parties—other than the constitutionally unacceptable basis of genetics—the tribal court cannot assert jurisdiction.

III. BECAUSE THE TRIBAL COURT LACKED JURISDICTION FROM THE OUTSET, THIS COURT SHOULD ISSUE A PERMANENT INJUNCTION AND DISMISS THE MOTION FOR RECONSIDERATION AS MOOT

A. Given The Jurisdictional Defect, There Is No Basis for the Tribal Court Proceeding, And The Court Should Grant Plaintiffs Judgment on Their First Cause of Action

Where a tribal court plainly lacks jurisdiction, a district court may issue a permanent injunction barring it from acting on the case, even if the parties have not exhausted tribal remedies. *BNSF Ry. Co. v. Ray*, 297 F. App'x 675, 677 (9th Cir. 2008). The invalidity of tribal court proceedings here means that Defendant Regina Cuellar has no authority to proceed in seeking custody of the children.

Personal jurisdiction is an absolute prerequisite to the rendering of a valid judgment. Where it is lacking, a court must dismiss a case—and another court is excused from according full faith and credit to any judgment that fails this test. *Marchington*, 127 F.3d at 810–11. This Court therefore need not even decide this Motion for Reconsideration. The Plaintiffs are entitled to judgment as a matter of law on their First Claim for Relief. A permanent injunction barring the tribal court from asserting jurisdiction will resolve the matter fully.

Marchington involved a Blackfeet tribal member plaintiff and a non-Indian defendant who were in a car accident on a highway that passed through the reservation. *Id.* at 807. The plaintiff obtained a tort judgment in tribal court, but the Ninth Circuit ruled that it was not entitled to enforcement in federal court because the tribal court lacked jurisdiction over incidents on that highway. *Id.* Although that case involved a defect in subject-matter jurisdiction, the court observed that "the existence of both personal and subject matter jurisdiction is a necessary predicate for federal court recognition and enforcement of a tribal judgment," and therefore "[t]he lack of personal jurisdiction mandates rejection of a foreign judgment ... and that requirement must logically extend to tribal judgments." *Id.* at 810–11. The court added that a violation of due process would also be grounds for federal courts to deny recognition of tribal court judgments: "The guarantees of due process are vital to our system of democracy. We demand that foreign nations afford United States citizens due process of law before recognizing foreign judgments; we must ask no less of Native American tribes." *Id.* at 811.

Given the lack of personal jurisdiction, the Miwok tribal court has no power to adjudicate this case, and this Court cannot be bound by comity to recognize any judgment it might render. The Plaintiffs are therefore entitled to judgment on their First Cause of Action. This Court should grant that relief by permanently enjoining Regina Cuellar or any other party from taking actions based on the invalid tribal court judgment.

B. In The Alternative, The Court Should Vacate Dismissal With Regard to The Tribal Court and Christine Williams, And Enjoin Them From Proceeding

In the alternative, this Court should grant the motion solely for purposes of vacating the dismissal order with regard to Defendant Christine Williams, and issuing an injunction barring her in her official capacity from asserting personal jurisdiction over the Renterias or the children in this case.

A plaintiff may sue a tribal court official in her official capacity for injunctive relief, pursuant to *Ex Parte Young*, 209 U.S. 123 (1908). *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2035 (2014) ("tribal immunity does not bar [an *Ex Parte Young*]

suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct") (emphasis in original); *Ray,* 297 F. App'x at 676–77; *Crowe & Dunlevy, P.C. v. Stidham*, 609 F. Supp. 2d 1211, 1219–20 (N.D. Okla. 2009), *aff'd*, 640 F.3d 1140 (10th Cir. 2011). This affords an adequate basis for the Plaintiffs to enjoin Defendant Williams from taking official actions that violate constitutional rights, including due process.

In *Crowe and Dunlevy,* a law firm obtained an injunction against a tribal court judge, finding that the tribal court lacked jurisdiction over the firm in a dispute regarding attorney fees. The judge asserted sovereign immunity, but the district court found that an *Ex Parte Young* suit could be brought because "the case sought 'prospective injunctive relief against [a] tribal officer[] acting in [his] official capacit[y]' and because plaintiff 'alleged an ongoing violation of federal law'—namely, 'the unlawful exercise of tribal court jurisdiction.'" *Id.* at 1220 (quoting *Ray*, 297 F. App'x at 676). Precisely the same is true here. This Court does have authority under the All Writs Act, 28 U.S.C. § 1651, and the Anti-Injunction Act, 28 U.S.C. § 2283, to issue any injunction necessary to preserve its own jurisdiction. The tribe's assertion of sovereign immunity therefore does not bar this Court from exercising jurisdiction over Christine Williams in her official capacity, or from enjoining the tribal court from purporting to exercise personal jurisdiction over the Plaintiffs and the children.

CONCLUSION

This Court should issue a permanent injunction barring the tribal court from further proceedings in this matter, issue judgment for the Plaintiffs, and deny the motion for reconsideration as moot.

RESPECTFULLY SUBMITTED this 20th day of October, 2016 by:

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CERTIFICATE OF SERVICE

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Kris Schlott

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO

EFRIM RENTERIA; TALISHA RENTERIA,

Plaintiffs,

vs.

SHINGLE SPRINGS BAND OF MIWOK INDIANS, et al.,

Defendants.

No. 2:16-cv-1685-MCE-AC

[PROPOSED] ORDER

Pursuant to Fed R. Civ. P. 7 and Local Rule 230, as well as this Court's inherent authority to regulate its own proceedings, the Goldwater Institute's motion for leave to file a brief amicus curiae in opposition to the Defendants' Motion for Reconsideration is hereby granted.