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6 *Application for Admission *Pro Hac Vice* Pending
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7

8
9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 Stephen C., a minor, by Frank C., guardian ad)
litem; Anna D., a minor, by Elsa D., guardian ad)
12 litem; Durell P., a minor, by Billie P., guardian)
ad litem; Taylor P., a minor, by Billie P.,)
guardian ad litem; Levi R., a minor, by Laila R.,)
13 guardian ad litem; Leo R., a minor, by Laila R.,)
guardian ad litem; Jenny A., a minor, by Jasmine)
14 A., guardian ad litem; Jeremy A., a minor, by)
Jasmine A., guardian ad litem; Jordan A., a)
15 minor, by Jasmine A., guardian ad litem; and The)
Native American Disability Law Center,)

16 Plaintiffs,)
17)

18 v.)

19 Bureau of Indian Education; United States)
Department of the Interior; Ryan Zinke, in his)
official capacity as Secretary of the Interior;)
20 Michael Black, in his official capacity as Acting)
Assistant Secretary - Indian Affairs; Tony)
21 Dearman, in his official capacity as Director of)
the Bureau of Indian Education; Jeff Williamson,)
22 in his official capacity as Principal of Havasupai)
Elementary School,)

23 Defendants.)
24)

Case No. 3:17-cv-08004-SPL

Judge's Name: Steven P. Logan

**BRIEF OF AMICUS CURIAE THE
HAVASUPAI TRIBE;
DECLARATION OF CHAIRMAN
DON WATAHOMIGIE**

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1 **II. THE FEDERAL GOVERNMENT TOOK THE TRIBE’S LAND AND**
 2 **RESTRICTED ITS RIGHTS**

3 In the late 1800s, the federal government took almost all of the Tribe’s ancestral land,
 4 which encompassed approximately three million acres across what is now northern Arizona.⁶
 5 In 1882, President Chester Arthur restricted the Tribe to a small patch of land on the floor of
 6 the Grand Canyon—approximately 500 acres—in what became known as Supai, Arizona.⁷
 7 The Tribe still occupies this land, where many Tribal members live with their families.
 8 Decades of battling with the federal government and lobbying federal officials resulted in the
 9 return of hundreds of thousands of acres of the Tribe’s ancestral lands.⁸ Since being relegated
 10 to this reservation, the Havasupai have been marginalized by the federal government for more
 11 than a century. For instance, Tribal members could not vote in federal and state elections until
 12 1968.⁹

13 The Havasupai reservation is very remote. It is walled by the Grand Canyon, and there
 14 are only two ways in: an eight-mile trail into the Grand Canyon or a ride in a helicopter.¹⁰ As
 15 discussed more fully below, the federal government has forced children to leave the
 16 reservation at early ages and encouraged the Havasupai to abandon what little remained of
 17 their reservation.¹¹

18 **III. THE FEDERAL GOVERNMENT’S HISTORY OF DEPRIVING NATIVE**
 19 **AMERICAN YOUTH OF ADEQUATE EDUCATION**

20 The history of Havasupai education is better understood in the context of Native
 21

22 ⁶ Hirst, *supra*, at 1-2, 65.

23 ⁷ Alden Woods, *A Hidden Tribe, a Disastrous School and Finally, a Cry for Help*, THE
 24 REPUBLIC (March 2017) (hereinafter “Woods”), available at
 25 [http://www.azcentral.com/story/news/local/arizona-best-reads/2017/03/15/havasupai-
 elementary-grand-canyon-supai/98355588/](http://www.azcentral.com/story/news/local/arizona-best-reads/2017/03/15/havasupai-elementary-grand-canyon-supai/98355588/).

26 ⁸ Hirst, *supra*, at 1-2, 205-37.

27 ⁹ *Id.* at 197.

28 ¹⁰ Woods, *supra*.

¹¹ Hirst, *supra*, at 192-93.

1 American education more broadly. After the Civil War, the federal government opened Native
2 American boarding schools to forcibly assimilate indigenous peoples into mainstream
3 culture.¹² One of the key figures was Richard Henry Pratt, who, in 1879, founded a Native
4 American boarding school in Pennsylvania.¹³ Students were given new names, forced to
5 abandon their traditional garb, and banned from speaking their Native languages.¹⁴ Pratt wrote
6 that “[a] great general has stated that the only good Indian is a dead one I agree with the
7 sentiment but only in this: that all the Indian there is in the race should be dead. Kill the Indian
8 in him and save the man.”¹⁵ The Bureau of Indian Affairs (“BIA”) opened dozens more
9 boarding schools in this mold.¹⁶ Native American families tried to resist sending their children
10 to these boarding schools, but Congress authorized the Department of the Interior (“DOI”) to
11 withhold food from families that did not turn over their children.¹⁷

12 A 1928 report commissioned by the DOI found that the BIA educational system was
13 completely dysfunctional, relying on underqualified and at times malnourished Native
14 American children to serve as teachers.¹⁸ After the report, the BIA began opening schools on
15 reservations.¹⁹ This trend toward more on-reservation schools continued until World War II,
16 when the House Select Committee on Indian Affairs proposed “a final solution of the Indian
17
18

19 12 Maggie Severns, *How Washington Created Some of the Worst Schools in America*,
20 POLITICO (Nov. 25, 2015) (hereinafter “Severns”), available at
21 <http://www.politico.com/story/2015/11/how-washington-created-the-worst-schools-in-america-215774>.

22 13 *Id.*

23 14 *Id.*

24 15 Richard Pratt, *The Advantages of Mingling Indians with Whites*, in AMERICANIZING THE
25 AMERICAN INDIAN at 260, 260-61 (Francis P. Prucha ed. 1973).

26 16 *See* Severns, *supra*.

27 17 *Id.*

28 18 Lewis Meriam, *The Problem of Indian Administration*, INST. FOR GOV'T RESEARCH 3-21,
155-69 (1928).

19 *See* Severns, *supra*.

1 problem,” which reverted to a policy of sending Native Americans to boarding schools.²⁰
 2 According to the Committee, “[t]he goal of Indian education[] should be to make the Indian
 3 child a better American rather than to equip him to be a better Indian.”²¹

4 **IV. THE FEDERAL GOVERNMENT’S PATHETIC EFFORTS TO PROVIDE**
 5 **EDUCATION TO HAVASUPAI CHILDREN**

6 **A. The Federal Government Fails for Decades.**

7 In Supai, the BIA opened a school that only operated two grades.²² In 1955, the school
 8 shut down altogether, and students were forced to leave their homes to get an education.²³
 9 Ethnographer Stephen Hirst wrote about this “low point” in Havasupai history:

10 Their children were torn from their families during their most dependent post-
 11 infancy years and cast into a boarding school for incorrigibles . . . [The] children
 12 had . . . no one to protect them except the older Havasupai children. . . [and] few
 13 of them had the time or opportunity to learn to be Havasupai. They were
 14 constantly in and out of trouble, involved in drinking violations, fighting, and
 theft. The pressure fell most unrelentingly on boys, and the number of them who
 graduated from high school . . . can literally be counted on one hand.²⁴

15 In the mid-1960s, pressure again mounted for the BIA to provide a better education.²⁵ As a
 16 result, the BIA reopened Havasupai Elementary School (hereinafter, “the School”).²⁶ Parents
 17 pressured the BIA to add more grades to the School, and the Agency acquiesced.²⁷ The quality
 18 of education, however, remained exceptionally poor.

19 In light of the BIE’s failure to adequately serve its children, the Tribe became one of
 20
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22 ²⁰ *Id.*

23 ²¹ *Id.*

24 ²² Hirst, *supra*, at 19.

25 ²³ *Id.* at 189.

26 ²⁴ Hirst, *supra*, at 192.

27 ²⁵ *See* Severns, *supra*.

28 ²⁶ Hirst, *supra*, at 194.

²⁷ *Id.* at 19.

1 the first to seek funding under the Tribally Controlled Schools Act.²⁸ With more community
 2 involvement in the School's operation, the school children showed greater motivation.²⁹
 3 However, these improvements were undermined by the federal government's continued failure
 4 to provide sufficient assistance to overcome decades of neglect and mismanagement of the
 5 School.

6 With the implementation of the No Child Left Behind Act of 2001 and the
 7 accompanying use of national standards, the lingering achievement gap at the Havasupai
 8 Elementary School became more apparent. Concerned that students attending Havasupai
 9 Elementary were struggling with low academic achievement levels, the tribe returned control
 10 of the School to the federal government.³⁰ The Bureau of Indian Education ("BIE") is squarely
 11 responsible for the provision of adequate education, special education and provision of
 12 necessary wellness and mental health support to the K-8 students in Supai. While children can
 13 attend the BIE's elementary school in Supai, all are eventually forced to leave home to attend
 14 boarding schools in other states or stay with foster families at nearby public schools starting
 15 in ninth grade.³¹ Improvements made under the Tribe's leadership have disappeared.

16 **B. Havasupai Elementary is the Worst School in a Deplorable BIE System.**

17 The federal government has acknowledged that the BIE system is horrible. In the 1928
 18 report discussed above, the authors described it as "[g]rossly inadequate."³² In a 1969 Senate
 19 Report, Senator Edward Kennedy called the system a "national tragedy."³³ More recently,
 20 President Barack Obama's Secretary of Education, Arne Duncan called it the "epitome of
 21 broken."³⁴ Yet even within this broken system, the miseducation of Havasupai children stands
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23 ²⁸ *Id.*

24 ²⁹ *Id.*

25 ³⁰ *Id.*

26 ³¹ *Id.*

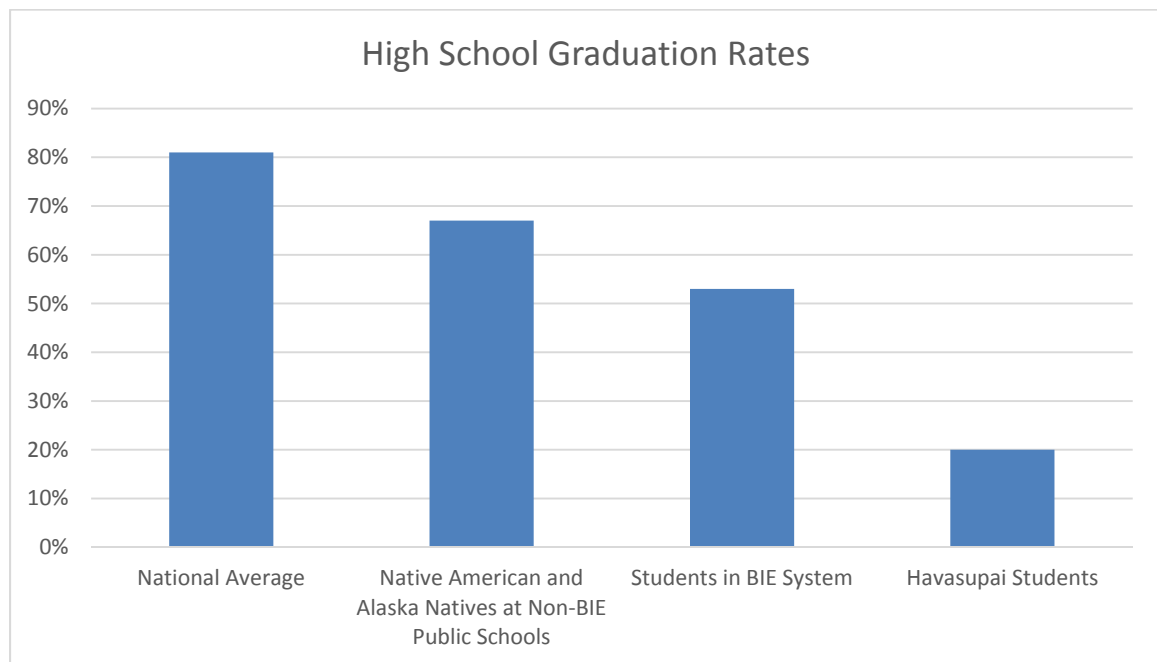
27 ³² *See Severns, supra.*

28 ³³ *Id.*

³⁴ *Id.*

1 out. Havasupai Elementary School is widely regarded as the worst school in the BIE system.³⁵

2 These assessments are backed by hard data. Across the board, Native American youth
 3 have the lowest graduation rates of any racial group in the country. While the national high
 4 school graduation rate is 81 percent, only 53 percent of high schoolers in the BIE system
 5 graduate.³⁶ Yet when the Native American youth are not subjected to the substandard BIE
 6 system, they perform much better. Sixty-seven percent of American Indian and Alaska Native
 7 youth at regular public high school schools graduate.³⁷ These numbers show that the BIE is to
 8 blame. And no one is hurt by the BIE system more than Havasupai children and families.
 9 Only 20 percent of Havasupai students go on to graduate from high school.³⁸ These numbers
 10 are reflected in the telling chart below:



22 To say that the BIE is even offering the most minimal requirements would be giving
 23 the BIE too much credit. Havasupai Elementary School only offers instruction in math and
 24

25
 26 ³⁵ See Woods, *supra*.

27 ³⁶ *Id.*

28 ³⁷ See Severns, *supra*.

³⁸ See Woods, *supra*.

1 English.³⁹ Yet BIE is failing to educate Havasupai youth even in these subjects. Among BIE
2 schools, Havasupai Elementary School ranks in the third-percentile in math and the first-
3 percentile in reading.⁴⁰ In other words, 97% of BIE schools perform better than Havasuapai
4 Elementary School in math and 99% perform better in reading.

5 There are many reasons for BIE’s failings: Teachers often end school early. Shockingly,
6 janitors and secretaries sometimes fill in as surrogate teachers.⁴¹ There is also a high turnover
7 rate for teachers and administrators.⁴² Many of the students need special education, but there
8 are not enough specialized teachers or trained health and wellness staff to educate them.⁴³

9 The effects are devastating to any chance Havasupai children have to succeed
10 academically. When the students leave the Grand Canyon to attend public schools or BIE
11 boarding schools in places like Oklahoma and Utah, they are often at a permanent academic
12 deficit, trailing far behind other students because of the poor quality of their nearly nonexistent
13 primary education.⁴⁴

14 Despite limited resources, the Tribe has attempted to improve the situation. The Tribe
15 has a Head Start program that is not operated by the BIE.⁴⁵ Tribal Council members describe
16 the program as better than the BIE school.⁴⁶ The program correctly identifies students who
17 need and have Individualized Educational Programs (“IEPs”).⁴⁷ Unfortunately, the Tribe’s
18 efforts cannot fix BIE’s failings. When students transition to Havasupai Elementary School,
19
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21 ³⁹ *Id.*

22 ⁴⁰ *Id.*

23 ⁴¹ *Id.*

24 ⁴² *Id.*

25 ⁴³ *Id.*

26 ⁴⁴ *Id.*

27 ⁴⁵ Hirst, *supra*, at 19.

28 ⁴⁶ Decl., ¶¶ 4, 7.

⁴⁷ *Id.* ¶ 7.

1 their IEP status does not always follow them.⁴⁸ This is in part because School staff lack the
 2 training and expertise to determine each student’s special education needs.⁴⁹ These students
 3 require individualized attention, but Defendants have ignored them. Instead, BIE teachers send
 4 children with disabilities home, suspending them for weeks at a time, rather than giving them
 5 the specialized instruction they are entitled to.⁵⁰ Children acting out in school are frequently
 6 arrested in public in front of fellow students and neighbors rather than receiving appropriate
 7 wellness and mental health services.⁵¹ The BIE has completely failed to help students cope
 8 with the violence and substance abuse in the community.⁵² This failure directly interferes with
 9 the students’ education and attentiveness in schools.⁵³ Such a dysfunctional disciplinary
 10 system alienates all children, but especially those who need individualized education.⁵⁴ The
 11 toxic relationship between very young elementary-aged students and BIE teachers is
 12 reminiscent of the way the students were treated in the 1950s.

13 **C. Due to Poor Educational Opportunities, Children Must Move Away from the**
 14 **Tribe.**

15 As discussed above, the original purpose of BIA boarding schools was to assimilate
 16 Native American youth.⁵⁵ The system was deliberately “designed to degrade tribal culture and
 17 thereby encourage the tribal Indian to sever tribal ties.”⁵⁶

18 Even today, the BIE system for Havasupai effectively continues this practice, which
 19 degrades the Tribe’s history and threatens the Tribe’s future. Once Havasupai students

20
 21 ⁴⁸ *Id.*

22 ⁴⁹ *Id.*

23 ⁵⁰ *Id.* ¶ 8.

24 ⁵¹ *Id.*

25 ⁵² *Id.*

26 ⁵³ *Id.*

27 ⁵⁴ *Id.*

28 ⁵⁵ Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1051 (1981).

⁵⁶ *Id.*

1 complete eighth grade, they can only receive education by leaving the Grand Canyon.⁵⁷ Often,
 2 this means that students, with or without their families, have to relocate to attend public
 3 schools.⁵⁸ Alternatively, the students may end up attending out-of-state BIE boarding
 4 schools—putting emotional and financial strain on students and family alike.⁵⁹ Some families
 5 send their children away from Supai even before eighth grade to avoid the failing Havasupai
 6 Elementary School.⁶⁰ The Havasupai are forced to leave their homes and their Tribal
 7 community in order to complete their basic education and access the same educational and
 8 economic opportunities available to other children.

9 **D. The School Has Completely Eradicated Havasupai Cultural Education from**
 10 **the Curriculum, in Violation of the Law.**

11 To correct for the historic and horrific policy of eliminating students’ tribal identities
 12 and affiliation, the BIE is now required under the Code of Federal Regulations to provide
 13 multi-cultural and multi-ethnic education.⁶¹ It must also use “culturally appropriate
 14 methodologies and teaching . . . that will reinforce, preserve and maintain Indian . . . languages,
 15 cultures, and histories”⁶² But once again, BIE ignores its obligations at Havasupai
 16 Elementary to the detriment of the Tribe and Havasupai children.

17 Defendants have made no effort to provide the required multi-cultural and multi-ethnic
 18 curriculum at Havasupai Elementary.⁶³ In fact, stacks of Havasupai-to-English dictionaries
 19 and translated storybooks were taken out of storage and left outside to rot.⁶⁴ Much like during
 20 the days of Richard Henry Pratt, Havasupai students are not receiving education strengthening
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22 ⁵⁷ See Woods, *supra*.

23 ⁵⁸ Decl., ¶ 9.

24 ⁵⁹ *Id.*

25 ⁶⁰ *Id.*

26 ⁶¹ 25 C.F.R. § 36.20.

27 ⁶² 25 C.F.R. § 32.4.

28 ⁶³ See Woods, *supra*.

⁶⁴ *Id.*

1 their understanding of their ethnic and cultural history. This degrades their sense of tribal
2 identity and violates the law.

3 The Tribe has developed its own approaches to teaching Tribal history and promoting
4 mental health and wellness.⁶⁵ If the BIE would consult with the Tribe as required by law, then
5 the two could work together to incorporate the Tribe's culturally-appropriate strategies for
6 improving the well-being of students.⁶⁶ But as discussed above and below, BIE consistently
7 ignores and rebuffs the Tribe's efforts to improve Havasupai children's lives and education.

8 **E. Havasupai Students Have Limited Economic Opportunities.**

9 The federal government and scholars alike have long recognized that the poor quality
10 of Native American education prevents tribal members from developing the skills they need
11 to compete in the broader job market.⁶⁷ Native Americans are nearly twice as likely to be
12 unemployed as Caucasians, due in part to the substantial difference in educational outcomes
13 between the two populations.⁶⁸ The future of students throughout the BIE system is in
14 jeopardy. After visiting a Native American elementary school, President Obama said of the
15 students, "[a]t their core, there was a nagging doubt that they would have the opportunities
16 that my daughters had."⁶⁹

17 Regrettably, Havasupai children are no exception. The Tribe is struggling
18 economically: 37% of the Tribe lives in poverty, which is almost three times the national
19

21
22 ⁶⁵ Decl., ¶ 6.

23 ⁶⁶ *Id.*

24 ⁶⁷ Clinton, *supra*, at 1051 (1981); *see also* AMERICAN INDIAN POLICY REVIEW COMM'N, 95TH
25 CONG., 1ST SESS., FINAL REPORT at 91-92 (1977); SENATE SPECIAL SUBCOMM. ON INDIAN
26 EDUCATION, INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, S.
27 REP. NO. 501, 91ST CONG., 2D SESS. (1969).

28 ⁶⁸ Algernon Austin, *Native Americans and Jobs: The Challenge and the Promise*, ECON.
POL'Y INST. (Dec. 17, 2013), *available at* <http://www.epi.org/publication/bp370-native-americans-jobs/>.

⁶⁹ *See* Severns, *supra*.

1 rate.⁷⁰ The Tribe relies on tourist spending and permit fees for income.⁷¹ Since many tourism
 2 jobs require a high school diploma or GED, only 20% of young Tribe members are eligible
 3 for the highest paying jobs.⁷² Former Havasupai Elementary School students often have no
 4 choice but to turn to illicit activities for income because their poor education makes them
 5 unable to find jobs on or off the reservation.⁷³ The Tribe does not count any doctors or lawyers
 6 among its ranks, in part due to the poor quality of primary education in Supai.⁷⁴

7 **V. DEFENDANTS HAVE MARGINALIZED THE TRIBE**

8 **A. The BIE Has Ignored and Rebuffed the Tribe's Persistent Attempts to** 9 **Change Conditions at Havasupai Elementary School.**

10 For decades, in response to the situation at Havasupai Elementary School, the
 11 community has tried to force the BIE to act. Members of the Tribe have contacted federal
 12 officials approximately once a month about issues related to the School.⁷⁵ Parents have written
 13 letters to the BIE.⁷⁶ Members of the Tribal Council have even traveled to Washington to meet
 14 with top BIE and DOI officials on multiple occasions, including a face-to-face meeting in
 15 April 2016 with the then-Acting Director of the BIE, Ann Marie Bledsoe Downes.⁷⁷ The Tribe
 16 has also spoken with BIE Director Tony Dearman before and after his appointment.⁷⁸ The BIE
 17 even acknowledged that “[t]he continued low academic achievement of [Havasupai
 18 Elementary School] students cannot be overstated.”⁷⁹ Nevertheless, despite these efforts and
 19 their acknowledgement of the problems, the BIE has not brought the school up to federal

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 21 ⁷⁰ See Woods, *supra*.

22 ⁷¹ *Id.*

23 ⁷² Decl., ¶ 10; *see also* Woods, *supra*.

24 ⁷³ Decl., ¶ 10.

25 ⁷⁴ *Id.*

26 ⁷⁵ Decl., ¶ 11.

27 ⁷⁶ See Woods, *supra*.

28 ⁷⁷ 2d Amend. Compl. (ECF No. 60) ¶ 191.

⁷⁸ Decl., ¶ 11.

⁷⁹ 2d Amend. Compl. (ECF No. 60) ¶ 191.

1 standards.

2 **B. Defendants Have Silenced the Havasupai Elementary School Board So that**
 3 **the Parents and Community Leaders Have No Voice in the Operation of the**
 4 **School.**

5 The Supreme Court has long recognized the inherent right of tribes to regulate their
 6 internal and social relations.⁸⁰ As such, when Congress passed the Indian Self-Determination
 7 and Education Assistance Act in 1975, it acknowledged the importance of involving tribes in
 8 decision-making. In particular, it found that “the prolonged Federal domination of Indian
 9 service programs has served to retard rather than enhance the progress of Indian people and
 10 their communities . . . and has denied to the Indian people an effective voice in the planning
 11 and implementation of programs . . . which are responsive to the true needs of Indian
 12 communities.”⁸¹ It further noted that “parental and community control of the educational
 13 process is of crucial importance.”⁸² As a result, Congress requires the BIE to “[e]nsure that
 14 each agency or local school board [] be authorized and empowered to function as the policy
 15 making body for the school.”⁸³

16 Rather than try to engage the parents and community leaders in the Tribe, the BIE has
 17 in effect barred the Havasupai Elementary School Board (the “Board”) from meeting.⁸⁴ The
 18 agency demanded that Board members obtain FBI background checks before they could meet,
 19 even though the Board does not meet at the school when children are present.⁸⁵ The rule only
 20 applies to Board members, not other individuals who may be present on school grounds,
 21 suggesting that this was not done for safety and security reasons, but instead was designed to
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23 ⁸⁰ *Talton v. Mayes*, 163 U.S. 376, 384 (1986); *see also United States v. Lara*, 541 U.S. 193,
 24 197 (2004).

25 ⁸¹ 25 U.S.C. § 5301.

26 ⁸² *Id.*

27 ⁸³ 25 C.F.R. § 32.4.

28 ⁸⁴ 2d Amend. Compl. (ECF No. 60) ¶ 155.

⁸⁵ *Id.*

1 prevent the Tribe from making an impact on the operation of the school.⁸⁶ As a result, the
 2 Board was unable to meet between January 2015 and mid-2017.⁸⁷ Now, after several years,
 3 the Board members have passed their background checks.⁸⁸ Nevertheless, because the Board
 4 has not been provided with school board training, they are not provided adequate support to
 5 address the important issues facing the school.⁸⁹

6 **C. The School Is So Dysfunctional the Tribe Has Dedicated Its Very Limited**
 7 **Resources to Create New Educational Opportunities for Students Outside the**
 8 **BIE System.**

9 Rather than sit by and wait for the BIE to act, the Tribe has done what it can to help its
 10 students. Since the 1970s, the Tribe has been operating a Head Start program to provide
 11 education for younger children and supplementing the program's budget with Tribal
 12 resources.⁹⁰ The Tribe is also finishing construction of a new learning center, which will offer
 13 remedial educational services to Supai's children.⁹¹ The Tribe is paying for the center out of
 14 its own limited funds.⁹² It hopes that the services offered there will augment the limited
 15 services at Havasupai Elementary School and improve educational outcomes.⁹³ Ultimately,
 16 however, the BIE should live up to its obligations under federal law and provide an adequately
 17 functioning school offering multiple subjects, culturally-appropriate curriculum and wellness
 18 services, and fully-staffed with competent faculty and administrators.⁹⁴ Without a functioning
 19 school, the Tribe's auxiliary efforts—including the new learning center—are unlikely to
 20 effectively provide current and former Havasupai Elementary School students with the

21 ⁸⁶ *Id.*

22 ⁸⁷ *Id.*

23 ⁸⁸ Decl., ¶ 12.

24 ⁸⁹ *Id.*

25 ⁹⁰ *See* Hirst, *supra*, at 19.

26 ⁹¹ Decl., ¶ 13.

27 ⁹² *Id.*

28 ⁹³ *Id.*

⁹⁴ *Id.*

1 remedial education that they need to compete for jobs and basic economic opportunity.⁹⁵ For
2 that, the BIE needs to step in, and, hopefully, this Court will order it to do so.

3 ARGUMENT

4 **A. Plaintiffs Who Have Left Havasupai Elementary Have Standing.**

5 Defendants should not be allowed to skirt their obligations because some Plaintiffs no
6 longer attend Havasupai Elementary School. Plaintiffs correctly note that those children who
7 have graduated are entitled to compensatory education to make up for years of substandard
8 education.⁹⁶ But putting aside this basis for standing, all Plaintiffs, including those who have
9 graduated or left Supai, have standing given the important public policy questions at issue in
10 this case and the potential for these harms to be repeated without being subject to judicial
11 review.⁹⁷

12 **B. Plaintiffs Have Plausibly Alleged Disabilities Due to Complex Trauma.**

13 Nor should the federal government be allowed to rely on the Catch-22 argument that
14 its failure to provide staff capable of *identifying* and responding to complex trauma and
15 associated learning disabilities excuses it from providing appropriate special education
16 services. As Plaintiffs explain, the Count IV Plaintiffs are individuals with disabilities.⁹⁸ This
17 Court should not reward Defendants' decision to stick their heads in the sand regarding the
18 presence of students with learning disabilities related to complex trauma. If Defendants' are
19

20
21 ⁹⁵ *Id.*

22 ⁹⁶ See Plfs.' Opp. (ECF No. 76) at 3-6 (citing *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*,
631 F.3d 1117, 1125 (9th Cir. 2011)).

23 ⁹⁷ See, e.g., *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1117 (9th Cir. 2003) (finding
24 standing where plaintiffs challenged not only individual pretrial detention conditions, "but also
25 the policy that results in such delays" and the "continued and uncontested existence of the
26 policy that gave rise to [plaintiff's] legal challenge foreclose[d defendant's] mootness
27 argument") (citing *Gerstein v. Pugh*, 420 U.S. 103, 110-11 n.11 (1975) (holding that while
28 individual plaintiffs might no longer be subject to the offending policy "the constant existence
of a class of persons suffering the deprivation is certain") and *Ukrainian-Am. Bar Ass'n v.*
Baker, 893 F.2d 1374, 1377 (D.C. Cir. 1990)).

⁹⁸ See Plfs.' Opp. (ECF No. 76) at 7-12.

1 to be believed, an isolated and under-resourced tribe is barred from complaining about the
2 federal government’s inadequate educational system precisely because that system is so
3 inadequate that it cannot even identify its own shortcomings. Not only is this position unfair
4 to Plaintiffs and the Tribe, it is out of step with federal pleading standards, which do not require
5 plaintiffs to prove their claims at the pleading stage, but only to “contain sufficient factual
6 matter, accepted as true, to state a claim for relief that is plausible on its face.”⁹⁹ Plaintiffs here
7 have done so, and contrary to Defendants’ argument, have pleaded far more factual content
8 than “threadbare and conclusory assertion[s] that basically amount[] to a recitation of the legal
9 definition of ‘disability.’”¹⁰⁰

10 CONCLUSION

11 Like every community, the Tribe cherishes its children. Unlike most communities,
12 however, the Havasupai people have been isolated at the bottom of one of the world’s most
13 rugged canyons and for more than a century have been forced to depend on the federal
14 government to educate their children. The history of federal efforts to educate Native
15 American youth is a dark one, and although the days of forced removal and assimilation are
16 over, the BIE is still failing its students. Nowhere is that failure more apparent than at
17 Havasupai Elementary School, which teaches only reading and math, closes unexpectedly and
18 for long stretches of time, and consistently ranks among the worst schools in the BIE system.
19 Despite decades of advocacy by the Tribe and its members, the federal government has never
20 devoted the resources or attention that the School and its students require. Recognizing that its
21 children are its future, the Tribe has done what it can to shore up the educational system, but
22 ultimately the BIE is responsible for ensuring that Havasupai Elementary School functions as
23 a real, adequate, effective school. This lawsuit offers a chance for Plaintiffs and the Tribe to
24 reclaim something more valuable than land—it is a chance to reclaim hope and opportunity.
25 The Tribe is accustomed to evasion, but every day that Plaintiffs and other Tribal children

26
27 ⁹⁹ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

28 ¹⁰⁰ Defs.’ Partial Mot. to Dismiss (ECF No. 69) at 10.

1 attend Havasupai Elementary School is a day that the Tribe's future gets a little bit dimmer.
2 Enough is enough.

3 For the foregoing reasons, the Tribe respectfully requests that this Court deny
4 Defendants' partial motion to dismiss and grant Plaintiffs' request for declaratory and
5 injunctive relief.

6
7 Dated this 30th day of August, 2017.

8
9 Jenner & Block LLP

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DECLARATION OF CHAIRMAN DON WATAHOMIGIE

I, Chairman Don Watahomigie, hereby declare and state as follows:

1. I have personal knowledge of the facts set forth herein, and if called as a witness, could and would competently testify thereto under oath.

2. I am Chairman of the Havasupai Tribe. The Tribe is governed by the Havasupai Tribal Council. Although the Council was once an informal gathering of community leaders, it is now an elected body of seven members that holds monthly meetings open to the public. Our small Tribe has 1,036 enrolled tribal members and approximately 750 of those members live on the Havasupai Reservation.

3. As Chairman, I am familiar with the Havasupai Elementary School (sometimes, “the School”) and our Tribe’s interactions with the Bureau of Indian Education (“BIE”) and other federal agencies and officials responsible for the operation of the School.

4. The School has long been a source of concern in our community. For brief periods of time when our Tribal Council was given more input into school governance and BIE communicated with Tribal Council and the community, the School seemed to operate better and the parties worked together to build a successful education environment. However, for the majority of its existence, the School has been substandard and plagued by lack of resources and lack of qualified, permanent staff. In light of the poor quality of education at Havasupai Elementary School, we helped create a Head Start program in the 1970s. The Head Start program offers educational services to younger children before they enroll in the School. We supplement the Head Start program’s budget with our own Tribal resources.

5. Because of the history of the federal government’s policies and actions, the Havasupai Tribe is very poor. Our economy is largely dependent on tourism. Tribal children have only one public educational option in Supai, the inadequate Havasupai Elementary School run by the Bureau of Indian Education which only offers grades K through 8.

6. The BIE does not teach a Tribal curriculum. This degrades our children’s sense of Tribal identity. This does not have to be the case. We have developed our own approaches to

1 teaching Tribal history and promoting mental health and wellness that are tailored to our
2 children. If the BIE would consult with our Tribe, then we could work together to incorporate
3 the Tribe’s culturally-appropriate strategies for improving the well-being of students. The BIE
4 has ignored more than just our cultural heritage—it also ignores the real problems of substance
5 abuse and violence in the community. This failure directly interferes with the students’
6 education and attentiveness in schools.

7 7. I have spoken with Tribal Council members who describe the Head Start program as
8 better than the BIE school. The program correctly identifies students who need and have
9 Individualized Educational Programs (“IEPs”). Unfortunately, when those students transition
10 to Havasupai Elementary School, their IEP status does not always follow them. This is in part
11 because Havasupai Elementary School staff lack the training and expertise to determine each
12 student’s special education needs.

13 8. The failure of the IEP program results in harm to our children. BIE teachers send
14 children with disabilities home, suspending them for weeks at a time, rather than giving them
15 the specialized attention they deserve. Children acting out in school are frequently arrested in
16 public in front of fellow students and neighbors rather than receiving appropriate wellness and
17 mental health services. This dysfunctional disciplinary system alienates all of our Tribe’s
18 children, but especially those who need individualized education and support.

19 9. Because we lack a high school here in the Canyon, our children are separated from the
20 Tribe and their families. Students, with or without their families, have to relocate to attend
21 public schools after the eighth grade. Alternatively, students may end up attending out-of-state
22 BIE boarding schools—putting emotional and financial strain on students and family alike.
23 Some families send their children away from Supai even before eighth grade to avoid the
24 failing Havasupai Elementary School.

25 10. The failures of the education system hurt the Tribe and its members when our children
26 become adults. Certain tourism jobs require a high school diploma or GED, so the low
27 graduation rate means only a few of the young members of the Tribe are eligible for the highest
28 paying jobs. Former Havasupai Elementary School students often have no choice but to turn

1 to illicit activities for income because their poor education makes them unable to find jobs on
2 or off the reservation. To my knowledge, no Tribal members are doctors or lawyers, in part
3 because of the lack of educational opportunities available to the Tribe.

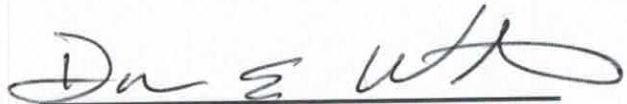
4 11. In response to the BIE's failure to educate Havasupai children, our community has tried
5 for decades to force the BIE to act. I, along with other members of the Tribe, contact federal
6 officials approximately once a month about issues related to Havasupai Elementary School.
7 Parents have written letters to the BIE. Our Tribe has also spoken with BIE Director Tony
8 Dearman before and after his appointment.

9 12. Rather than try to engage the parents and community leaders in the Tribe, the BIE has
10 in effect barred the Havasupai Elementary School Board (the "Board") from meeting. Several
11 years ago, the BIE demanded that Board members obtain FBI background checks before they
12 could meet, even though the Board does not meet at the school when children are present.
13 While background checks were pending, the Board was unable to meet for almost two years.
14 Only just recently have the Board members passed their FBI background checks. Nevertheless,
15 because the Board has not been provided with school board training, they are not provided
16 adequate support to address the important issues facing the school.

17 13. Our Tribe recognizes how dire this situation has become. To that end, we are close to
18 finishing construction of a new learning center, which will offer remedial educational services
19 to Supai's children. The Tribe is paying for the center out of its own limited funds. We hope
20 the services we offer there will augment Havasupai Elementary School to improve educational
21 outcomes. Ultimately, however, the Tribe believes that the BIE should live up to its obligations
22 under federal law and provide an adequately functioning school offering multiple subjects,
23 culturally-appropriate curriculum and wellness services, and fully-staffed with competent
24 faculty and administrators. Without a functioning school, our auxiliary efforts—including the
25 new learning center—are unlikely to be effective at providing current and former Havasupai
26 Elementary students with the remedial education that they need to compete for jobs and basic
27 economic opportunity.

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1 I declare under penalty of perjury under the laws of the State of Arizona that the
2 foregoing is true and correct. This Declaration was executed on August 30, 2017
3 2017, at Supai, Arizona.

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6 By: 
7 Chairman Don Watahomigie
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of Amicus Curiae The Havasupai Tribe; Declaration Of Chairman Don Watahomigie was filed on August 30, 2017 with the Clerk of the Court using CM/ECF system, which will effect electronic service on all parties and attorneys registered to receive notifications via CM/ECF system.

Dated: August 30, 2017

By: /s/ Brandon D. Fox
Brandon D. Fox

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