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June 21, 2015

Ak-Chin Indian Community
Ak-Chin Indian Community Tribal Council
Louis Manuel Jr. in his capacity as Member and Chairman of the Ak-Chin Indian
Community Tribal Council
Delia Carlyle, in her capacity as Member and Vice-Chairman of the Ak-Chin Indian
Community Tribal Council
Robert Miguel, in his capacity as Member of the Ak-Chin Indian Community Tribal Council
Gabriel Lopez, in his capacity as Member of the Ak-Chin Indian Community Tribal Council
Ann Antone, in her capacity as Member of the Ak-Chin Indian Community Tribal Council
42507 West Peters & Nall Rd
Maricopa, Arizona 85138

Marlene Garcia, Director of Housing, Ak-Chin Indian Community
48277 W. Ferrell Rd.
Maricopa, Arizona 85138

Ak-Chin Indian Community Employee Benefit Trust
42507 West Peters & Nall Rd
Maricopa, Arizona 85138
(Agent for Service of Process: William E. Strickland, Jr. 400 E. Broadway, Ste. 700
Tucson, Arizona 85711)

Joan Jackson-Deal, Chairperson of Board of Ak-Chin Indian Community Employee
Benefit Trust
42507 West Peters & Nall Rd
Maricopa, Arizona 85138

RE: NOTICE OF CLAIM; CLEO PABLO V AK-CHIN INDIAN COMMUNITY ET AL.

I. **Introduction**

I represent Cleo Pablo in her claims against the Ak-Chin Indian Community, Tribal Council, The Housing Department, the Employee Benefit Trust and all representatives responsible for implementing the relevant regulations.

Pursuant to the Ak-Chin Law & Order Code Title 5, Chapter 1, Section 1.15 et seq. the purpose of this letter is to put you on notice that my client intends to move forward with litigation in an attempt to secure equal protection rights under the Law and Order Code and for the Ak-Chin Indian Community to recognize same sex marriage under the Community code. This **Notice of Claim** is an attempt in resolve the issues in accordance with my client's basic fundamental human rights prior to filing a lawsuit in the Ak-Chin Indian Community Court.

As detailed *infra*, Mrs. Pablo is seeking both monetary relief associated with all the financial losses she suffers from as a result of being treated unequally under the law, in addition to equitable and injunctive relief securing equal rights. Specifically, Mrs. Pablo is seeking to have Council reform laws respecting housing, employee benefits and the Law and Order code. She also seeks declaratory relief regarding her spouse's eligibility for benefits as spouse under the Employee Benefits Plan.

As we move forward and negotiate in good faith, we are positive that the individuals responsible for handling these issues for the Community will seize this opportunity to do the right thing and lead tribal courts in Arizona to effect the necessary changes required to ensure all of its people, all of its members, will be afforded equal rights under the law.

II. Factual Background

In May 2015, Cleo Pablo married the love of her life- her same-sex partner, Tara Roy, under Arizona law. Mrs. Pablo is a registered member of the federally recognized tribe known as the Ak-Chin Indian Community. Under Ak-Chin's Law and Order Code, Cleo Pablo and Tara Roy's same-sex marriage is void under tribal law.

Mrs. Pablo was denied employee benefits covering her spouse and her dependents. Upon marriage, my client sought to apply for employee benefits to cover her wife and dependents but was told that her wife and dependents would not be covered because of the Ak-Chin Code rules and regulations prohibiting the recognition of same sex marriages. She was also specifically told amongst other things and without clarification that the plan was grandfathered into the Patient Protection and Accountability Act. In other words, she was denied equal protection of rights and has been banned from having her marriage recognized in her own community. She was not provided equal benefits.

The Ak-Chin Code has also essentially banned Mrs. Pablo from ever being able to live in her own community as long as she is married to the love of her life. My client had dated her now wife for ten years in the past and as of May 10, 2015 she had to arrange alternative living arrangements for herself and son due to the fact that under the Ak-Chin Law & Order Code, she is not permitted to live with her wife at 44980 Ross St, Maricopa,

AZ 85139, a home that is located within the exterior boundaries of the AK-Chin Indian Community. If she did, she would be arrested for cohabitation and any other laws prohibiting her from living with her wife.

Mrs. Pablo has had to officially relinquishing her rights to her home on the reservation due to the Ak-Chin Housing policies. If she did not relinquish the house, it would be taken from her due to the housing policies. While not complete and total banishment, the housing policy creates situations akin to banishment where individuals like Mrs. Pablo have to leave their own community in order to live with their spouse.

The information provided below describes in detail the legal issues Mrs. Pablo would like to address before filing a lawsuit against all relevant parties.

III. Legal and Other Issues

A. Exhaustion of Remedies

The Ak-Chin Indian Community Notice statute includes an Exhaustion provision whereby individual complainants would first have to exhaust all remedies as provided under the relevant rules and regulations. In regards to Housing, while the Housing Policies and Procedures has an appeals process, the appeals process would be absolutely futile under the circumstances as the Housing Department is guided strictly by the Law and Order Code that does not recognize same sex marriage. As such, there is no point for Mrs. Pablo to continue to deal directly with the Housing department appeals process as it related to her ability to lease a home within the Community with her wife.

The same issue of futility exists as respects obtaining employee benefits although it is unclear if there is in fact an appeals process for eligibility determinations under the Plan. There does not appear to be one under the Plan. As such, it is the position of Mrs. Pablo that any and all other remedies have either been exhausted or the appeals process would be futile under the law.

B. Employee Benefits and Housing Issues

1. Employee Benefits

Mrs Pablo is seeking employee benefits for her spouse and dependents but those benefits have been denied because of her same sex marriage. First, coverage under the employee benefits plan should be in effect for eligible employees and designated dependents when either party satisfies the waiting period and eligibility requirement. Here, Mrs. Pablo is an eligible employee and a Plan participant. Under §1

individuals of the opposite sex only. Id. The Supreme Court held that DOMA's definition of marriage in §3 was unconstitutional as a deprivation of liberty under the Fifth Amendment. Id. at 2693. The court reasoned that DOMA departed from the history/tradition of reliance on state law to define marriage. Id. at 2691. The court further reasoned that DOMA injured a class of people that state law desired to protect. Id. at 2693. Here, the Plan's eligibility has similar language and identical effect in discrimination of a same-sex couple. Thus, the Plan's eligibility status violates federal law under Windsor.

In sum, Mrs. Pablo is a Plan Participant and is validly married under Arizona law. The Plan Document correctly states that the Health Reform Act applies to their insurance plan and provides special enrollment provisions for plan participants. Here, Mrs. Pablo meets the special enrollment provisions of the Health Reform Act as a married plan participant. However, the Plan's eligibility status violates federal law under Windsor, when it provides special enrollment provisions for heterosexual couples. This needs to change immediately.

2. Housing Policies and Procedures

As you all know, the Housing Department is responsible for the administration and overall property management of Community Homes and is responsible for ensuring compliance with eligibility requirements. The policies and procedures, including the definitions therein, must follow Ak-Chin Law and Order Code. As such, the definition of spouse under the Housing policies would not include Mrs. Pablo's wife as their marriage is void under Ak-Chin laws. Their family would not be eligible for housing in the Community nor entitled to the benefits of other married couples. Moreover, due to cohabitation rules under the criminal code, Mrs. Pablo cannot live with her spouse without the risk of arrest and incarceration. Further, due to Mrs. Pablo's status as a gay woman, she is being forced to terminate her lease on her community home in violation of equal protection rights.

C. Federal, State, Tribal Law and Public Policy Violations

Ak-Chin's failure to recognize Cleo Pablo's same-sex marriage violates public policy. There is persuasive federal, state, and tribal case law that holds same-sex marriage bans such as those written in Ak-Chin's Law and Order Code are unconstitutional under the equal protection clause of the U.S. Constitution. Furthermore, there has been a radical social shift in support of same-sex marriage within the last five years. And lastly, the Ak-Chin's partnerships in community are avid supporters of same-sex marriage such as the WNBA's Mercury Basketball team located in Phoenix, AZ.

Tribal Code §9.1.1(B) explicitly denies the recognition of same-sex marriages and violates basic equal protection and due process rights given to all tribal members under Amendment IV and X of Ak-Chin's Indian Community Constitution. Under the Ak-Chin

Indian Community Constitution, the powers of the community council are "subject to any limitations imposed by applicable statutes of the United States." Moreover, the powers of the community council are to "promote and protect the health, peace, morals, education, and general welfare of the community and its members." Under the Ak-Chin Indian Community Constitution, the rights of all Ak-Chin Indian Community members "shall enjoy rights of life, liberty, industrial pursuits, and the economic resources and activities of the community." Moreover, Ak-Chin Indian Community members are not to be denied "within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law[.]"

The Tribal Constitution grants Ak-Chin members equal protection and due process rights, yet, the Ak-Chin Law and Order Code states that "Marriage between persons of the same-sex is prohibited and void" under §9.1.1. Moreover, the Ak-Chin Law and Order Code states that "Parties residing in Ak-Chin may not evade the laws of this Community by going to another jurisdiction for solemnization of a marriage" under §9.1.4. And lastly, the Ak-Chin Law and Order Code states, "the law pertaining to marriage licensing shall follow Arizona Revised Statutes §25-121, and §25-122, §25-126, and §25-127 where those do not conflict with this code" under §9.1.5.A.

The Ak-Chin Indian Community adopted their Amendment provisions from the Indian Civil Rights Act of 1968 ("IRCA") to its "Articles of Association." It is important to realize that Congress' "central purpose" of ICRA was to guarantee American Indians with the same "broad constitutional rights" afforded to other Americans, thus, protecting "individual Indians from arbitrary and unjust actions of tribal governments." S. Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967). Therefore, there is no doubt that the Ak-Chin Indian Community adoption of Amendment IV and X was meant to enforce the identical purpose of ICRA, especially when Ak-Chin's tribal constitution uses identical language stated in ICRA. Indian tribes are allowed to interpret the Bill of Rights, where it may fit their "unique political, cultural, and economic needs" as a tribal government, Ak-Chin has not presented any legislative history or reason(s) for its same-sex marriage ban. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 50 (1978).

However, the decision in U.S. v. Windsor is binding on Ak-Chin's tribal court because the Ak-Chin's Tribal Constitution expressly incorporated federal constitutional rights into its tribal laws. In Windsor, a surviving lesbian spouse was denied the federal state tax exemption for a spouse. United States v. Windsor, 133 S. Ct. 2675, 2682 (2013). The surviving spouse and decedent were recognized as validly married under New York State law. Id. at 2683. However, the Internal Revenue Services denied the federal state tax exemption because the Defense of Marriage Act (DOMA) defined marriage between individuals of the opposite sex only. Id. The Supreme Court held that DOMA's definition of marriage in §3 was unconstitutional as a deprivation of liberty under the Fifth Amendment. Id. at 2693. The court reasoned that DOMA departed from the history/tradition of reliance on state law to define marriage. Id. at 2691. The court further reasoned that DOMA injured a class of people that state law desired to protect. Id. at 2693.

Some legal theorists have stated that it is a strong possibility that Windsor is binding on Indian Tribes that have expressly incorporated federal constitutional rights into its tribal laws. And if Windsor is binding under Ak-Chin Tribal Law, its same-sex marriage ban would be in direct conflict with Ak-Chin's Tribal Constitution. The decision in Windsor, at minimum, is extremely persuasive law in favor of my client's position.

Also as respects the Indian Civil Rights Act, Mrs. Pablo may also determine that she may want to seek federal review of the issue via a Writ of Habeas Corpus arguing that not being able to live in her own Community is a form of property loss and even a form of banishment, without being afforded procedural due process. It amounts to a form of detention under ICRA and at the very least restrains Mrs. Pablo's liberty and property interests. Moreover, should Mrs. Pablo or any other person in her position ever be arrested for a violation of the Law and Order Code for living with their same sex spouse, that would absolutely amount to a detention potentially reviewable by a federal court. The Ak-Chin Indian Community would not be able to hide behind the tribal sovereignty defense under this type of litigation. We ask that the Community face the issue head on and resolve it in the best interest of all members.

Going further, the Ak-Chin Indian Community's failure to recognize same-sex marriage violates public policy. First, persuasive federal law holds that statutes and constitutional amendment prohibiting same-sex marriages are unconstitutional under the Equal Protection Clause. See Latta v. Otter, 771 F.3d 456, 485 (9th Cir. 2014).

Second, there is persuasive state law that holds Arizona laws prohibiting same-sex marriages violate same-sex couples' right to equal protection under the law. Majors v. Horne, 14 F. Supp. 3d 1313, 1315 (D. Ariz. 2014); Connolly v. Jeanes, No. 2:14-CV-00024 JWS, 2014 WL 5320642, at *1 (D. Ariz. Oct. 17, 2014). The court reasoned that the Court of Appeals for the Ninth Circuit had ruled similar laws in Nevada and Idaho that prohibited same-sex marriages was unconstitutional under the equal protection clause and that Arizona court is bound by decisions of the Court of Appeals for the Ninth Circuit. Id at 1315.

Third, there is persuasive tribal law outside of Arizona, where there is a minimum of twelve tribes that have recognized same-sex marriages. Moreover, there are five tribes that have specifically expressly recognized same-sex marriage, where Law and Order Codes have states marriages can be entered into "regardless of...sex" or specifically referring to same-sex marriage. These tribes include the Coquille Tribe in Oregon, the Suquamish in Seattle, Washington, the Pokaogon in Michigan, the Puyallup Tribe in Western Washington, and the Central Council of the Tlingit & Haida Indian Tribes of Alaska.

Fourth, there is persuasive tribal law inside the state of Arizona that supports same-sex marriage. Although, most tribes in Arizona recognize same-sex marriage on the basis of gender-neutral laws, it incorporates same-sex marriages. Nevertheless, there is a plethora of Arizona tribes that recognize same-sex marriage. These tribes include the Fort McDowell Yavapai Nation under §10-11, the Salt River Pima Tribe under §10-30(a), the Pascua Yaqui Tribe under §10(A), the White Mountain Apache under §1.3,

the San Carlos Apache Tribe under §XII of their Tribal Constitution or Tribal Law and Order Codes'. Moreover, there has been a radical social shift in support of same-sex marriage within the last few years. Currently, there are 37 states, including Washington D.C. that recognizes same-sex marriage in the United States. Furthermore, there is persuasive polling data that suggests 55% of voters in Arizona support same-sex marriage.

Fifth, the U.N. Declaration on the Rights of Indigenous Peoples states that "indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such[.]" The Community should follow the directives of the U.N. in this regard as well.

Also, it should be noted that it has been stated that some individuals regard "same-sex marriage as contrary to the traditional culture and values of the community." In actuality, this notion is based on the hetero-normative and Christian viewpoints forced upon the Ak-Chin Indian Community by the United States with its goal of total assimilation. Historically, Native American culture was regularly attacked by European settlers with Catholic/Christian ideals perpetuating the ideology that Native American culture and/or communities was less than European communities because Native Americans did not adhere to their cultural concept of the "nuclear family." Ak-Chin's same-sex marriage ban does not adhere to traditional values, but represents assimilation in allowing the same-sex marriage ban.

Further, there is ample evidence that exists to refute the notion that same-sex marriage violates the traditional culture and values of Indian culture as a whole. In fact, historically, "at least 155 Indian Tribes embraced two spirit individuals, which within their tribal communication." Trista Wilson, Changed Embraces, Changes Embraced? Renouncing the Heterosexual Majority in Favor of A Return to Traditional Two-Spirit Culture, 36 Am. Indian L. Rev. 161, 172 (2012). "Two spirits" references "3rd gender" individuals that existed historically in Indian communities, where certain individuals could perform both gender roles of male and female members. *Id.* And more importantly, two spirits were permitted to enter long-term relationships or marriages with other tribal members of either sex. *Id.* Therefore, it is clear that the Ak-Chin Indian Community has violated the basic equal protection and due process rights given to tribal members under Amendment IV and X of Ak-Chin's Indian Community Constitution in prohibiting the recognition of same-sex marriages.

And lastly, the AK-Chin has partnered with the WNBA Mercury, which is an organization that avidly supports same-sex marriage. Further, Ak-Chin has maintained and supported events hosted with Brittney Griner, who is a member of the LGBTQIA community and avid supporter of same-sex marriage.

It is abundantly clear that the Ak-Chin Indian Community's failure to recognize same-sex marriage violates public policy under Federal law, Arizona state law, tribal law as well as violating the U.N. Declaration on the Rights of Indigenous Peoples. It also conflicts with its social support of organizations that are openly LGBT friendly.

Overall Summary Conclusion

Here, the tribal court, if it does the right thing, must find Ak-Chin's same-sex marriage ban is unconstitutional under the Ak-Chin's Indian Community Constitution, Am IV, §1, Am IV, §1(c), Am X, §1, and Am X §2(h). First, Ak-Chin's Tribal Code §9.1.1(B) explicitly denies the recognition of same-sex marriages and violates basic equal protection and due process rights given to all tribal members under Ak-Chin's Indian Community Constitution. Moreover, Ak-Chin is bound by the decision in Windsor because Ak-Chin's Tribal Constitution expressly incorporated federal constitutional rights (ICRA) into its tribal laws. Under these circumstances, Ak-Chin's failure to recognize Cleo Pablo's same-sex marriage is unconstitutional under the Ak-Chin's Indian Community Constitution, Am IV, §1, Am IV, §1(c), Am X, §1, and Am X §2(h).

Second, the tribal court must find that the Ak-Chin Indian Community's failure to recognize same-sex marriage violates public policy. There is persuasive federal, state, and tribal case law that holds same-sex marriage bans such as those written in Ak-Chin's Law and Order Code are unconstitutional under the equal protection clause of the U.S. Constitution. Furthermore, there has been a radical social shift in support of same-sex marriage within the last five years across the U.S. And lastly, the Ak-Chin maintains partnerships in community, which are avid supporters of same-sex marriage, such as the WNBA's Mercury Basketball team located in Phoenix, AZ. Its laws should conform to its practical on goings in public.

IV. Demand for Relief

Mrs. Pablo has suffered from tremendous financial repercussions based on being treated unfairly. Attached as Exhibit A is a detailed memorandum of costs associated with being treated unfairly and without equal protection rights. These are real costs my client needs to pay just because the Ak-Chin Indian Community won't recognize the love she has for her wife. This will never be ok. She is seeking monetary relief from Council for the sum certain amount of \$45,280 from each member of the current Council. Attorney fees associated with the matter are also being sought in amount to be determined.

More importantly, Mrs Pablo has suffered emotionally by the actions of tribal council. Like many other members waiting in the dark for tribal council to act, she simply wants basic human rights to be recognized. By making the necessary changes and ensuring the protection of civil rights of tribal members you will be promoting trust in tribal institutions, avoiding litigation, Bureau of Indian Affairs (BIA) interference, and negative media publicity. Most importantly, these changes will strengthen tribal sovereignty by allowing Council to protect tribal members' rights in a manner that best comports with tribal laws, customs, and traditions.

The changes Mrs. Pablo is seeking are changes relating to the Law and Order code on Domestic Relations, Criminal Cohabitation and the Employee Benefits plan. Simply

put, Mrs Pablo is seeking to have the Ak-Chin Indian Community recognize her same sex marriage and afford her equal protections under the law. We expect representatives will negotiate in good faith moving forward and look forward to hearing from you soon.

Sincerely,

/s/Sonia Martinez

Sonia Martinez