UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jane Doe and John Doe, individually, and on behalf of Baby Doe,

Plaintiffs,

vs.

Lucinda E. Jesson, in her official capacity as Commissioner of the Minnesota Department of Human Services, Lori Swanson, in her official capacity as Minnesota Attorney General, and Samuel Moose, in his official capacity as Commissioner of Health and Human Services for the Mille Lacs Band of Ojibwe,

Defendants.

Civil File No. 15-cv-02639 (JRT/SER)

STATE DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

INTRODUCTION

State Defendants[1] move the Court for an Order dismissing Plaintiffs' Complaint with prejudice for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted under Federal Rule Civil Procedure 12(b)(1) and (6). Plaintiffs' claims against State Defendants should be dismissed with prejudice because Plaintiffs fail to state an actionable claim against State Defendants.

[1] "State Defendants" refers to the Minnesota Attorney General Lori Swanson ("Attorney General") and Commissioner of the Minnesota Department of Human Services Lucinda E. Jesson ("Commissioner").

FACTS[2]

Plaintiffs are the biological parents of Baby Doe. Doc. 1 p. 2 ¶ 5. Plaintiff Jane Doe is a member of the Mille Lacs Band of Ojibwe ("Band"), and Plaintiff John Doe's tribal relationship is not identified. Doc. 1 p. 2 ¶¶ 3 & 4. Baby Doe is an Indian Child under the law. Doc. 1 p. 2 ¶ 5; Minn. Stat. § 260.755, subd. 8. Plaintiffs seek to terminate their parental rights of Baby Doe and allow Adoptive Couple to adopt Baby Doe. Doc. 1 pp. 7-8 ¶¶ 30-31.

Under the Minnesota Indian Family Preservation Act ("MIFPA"), Plaintiffs must give notice of the proposed adoption to the Band:

> In any voluntary adoptive or preadoptive placement proceeding in which a local social services agency, private child-placing agency, petitioner in the adoption, or any other party has reason to believe that a child who is the subject of an adoptive or preadoptive placement proceeding is or may be an "Indian child," . . . the agency or person shall notify the Indian child's tribal social services agency by registered mail with return receipt requested of the pending proceeding and of the right of intervention under subdivision 6.

Minn. Stat. § 260.761 subd. 3. As part of the adoption process, there is an adoption proceeding in Hennepin County District Court. Doc. 1 p. 10 ¶ 41.

Rather than object to the constitutionality of MIFPA's notice requirement in the pending state court proceeding, Plaintiffs chose to commence this separate federal lawsuit

[2] The relevant fact come from Plaintiffs' Verified Complaint. *See generally* Doc. No. 1. In this motion to dismiss, the Court must accept the pled facts as true. *See Bhd. of Maint. of Way Employees v. Burlington N. Santa Fe R.R.*, 270 F.3d 637, 638 (8th Cir. 2001). Defendants' do not concede, however, that they are in fact true.

to address their argument that Minnesota Statutes, section 260.761, subdivisions 3 and 6, are unconstitutional.

STANDARD OF REVIEW

When considering a motion to dismiss under Rule 12(b)(6), the Court considers all facts alleged in the complaint as true, and construes the pleadings in a light most favorable to the non-moving party. *See Bhd. of Maint. of Way Employees v. Burlington N. Santa Fe R.R.*, 270 F.3d 637, 638 (8th Cir. 2001). Rule 12(b)(6) eliminates actions that are fatally flawed in their legal premises, streamlining "litigation by dispensing with needless discovery and fact finding." *Neitzke v. Williams*, 490 U.S. 319, 326-37 (1989). To survive a motion to dismiss, a complaint must provide more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 680-81 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). This requires a plaintiff to allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Courts must undertake the "context-specific task" of determining whether the Plaintiffs' allegations "nudge" their claims against each defendant "across the line from conceivable to plausible." *Iqbal*, 556 U.S. at 680. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Farnham Street Fin., Inc. v. Pump Media, Inc.*,

No. 09-233, 2009 WL 4672668, at *3 (D. Minn. Dec. 8, 2009) (quoting *Iqbal*, 556 U.S. at 678).[3]

ARGUMENT

I. PLAINTIFFS' COMPLAINT FAILS UNDER WELL-SETTLED STANDING AND ABSTENTION DOCTRINES.

As a threshold matter, Plaintiffs' Complaint suffers from four procedural infirmities that require denial. First, it seeks an injunction on behalf of a third party not before the Court. Second, it requests declaratory and injunctive relief be entered against improper parties. Third, the Court should abstain from hearing this case because a state adoption proceeding already exists in which these issues can and should be litigated. Fourth, it seeks to enjoin behavior that does not threaten to cause the alleged harm. For these reasons, Plaintiffs' Complaint must be dismissed.

A. Plaintiffs Lack Standing To Preliminarily Enjoin The Speculative Enforcement Of A Statute Against A Third Party.

Plaintiffs are barred by standing principles from requesting an injunction on a third party's behalf, or from asking this Court to resolve a conflict that has not yet arisen. First, Plaintiffs' action essentially seeks an injunction on behalf of the adoption agency (the "Agency") with whom they are working to place Baby Doe, which is not even a party to this case. Doc. No. 1. They have no standing to do so. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (a plaintiff may only assert his own injury in fact and "cannot rest his claim to relief on the legal rights or interests of third parties").

[3] Pursuant to D. Minn. L.R. 7.1(k), a copy of all judicial opinions not available in a publicaly accessible electronic database is attached as an exhibit.

Second, "the plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *see also Longshoremen's Union*, 347 U.S. at 224 ("Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function."). Here, based on Plaintiffs' allegations, Minnesota Statutes section 260.761 has not been violated, and it is unclear whether the Hennepin County District Court would even allow Baby Doe's adoption to proceed in the absence of notice to the Band. Plaintiffs' Complaint should therefore be dismissed because it is based on speculative facts.

B. This Court Lacks Jurisdiction To Enter An Injunction Against The Attorney General And The Commissioner Because They Are Not Proper Parties.

Plaintiffs' allegations are insufficient to bring the Attorney General or the Commissioner within this Court's jurisdiction, and therefore no injunction can be entered against them. "The Eleventh Amendment establishes a general prohibition of suits in federal court by a citizen of a state against his state or an officer or agency of that state." *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984)). In *Ex parte Young*, the Supreme Court established a very limited exception to this rule allowing suit against a government official for prospective injunctive relief when two conditions are met: (1) the official "must have some connection with the enforcement" of the challenged statute; and (2) the official must "threaten and [be] about to commence proceedings" to enforce the statute.

209 U.S. 123, 156-57 (1908). "General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law." *Minn. Citizens Concerned for Life, Inc., v. Swanson*, Civ. No. 10-2938, 2011 WL 797462, at *3 (D. Minn. Mar. 1, 2011) (citations and quotations omitted).

Although the Commissioner has the authority to affect the license status of an adoption agency that fails to "comply with an applicable law or rule," s*ee generally* Minnesota Statues sections 245A.03, .06-.07, Plaintiffs have not alleged that the Commissioner has "threaten[ed and is] about to commence proceedings" to enforce Minnesota Statutes section 260.761, subdivisions 3, 6. The allegations against the Attorney General are even more deficient because she is not even mentioned in the applicable law, and has not sought to enforce the law or threatened to do so. The Commissioner and the Attorney General are therefore immune from suit. *See, e.g.*, *Advanced Auto Transp., Inc. v. Pawlenty*, No. CIV.10-159, 2010 WL 2265159, at *3 (D. Minn. Jun. 2, 2010) (Attorney General immune because plaintiff alleged only that she is authorized to represent the state agency with enforcement authority); *Minn. Citizens Concerned for Life*, 2011 WL 797462, at *4 ("[C]onditional authority to prosecute an indictable offense at the Governor's request is insufficient to maintain the attorney general as a defendant in this action.").

C. This Court Should Abstain From Assuming Jurisdiction Over This Case.

In addition, there is no reason the constitutionality of MIFPA's tribal notice and intervention provisions should be resolved in a freestanding federal proceeding when

there is already a state adoption proceeding underway in which all relevant issues can be decided. *See* Doc. No. 1 at p. 10 ¶ 41. The abstention doctrine announced in *Younger v. Harris*, 410 U.S. 37 (1971), "espouse[s] a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). "Minimal respect for the state processes . . . precludes any *presumption* that the state courts will not safeguard federal constitutional rights." *Id*. *Younger* abstention is required when: (1) there is an ongoing state adjudicative proceeding; (2) the proceeding implicates important state interests; and (3) there is an adequate opportunity in the state proceeding to raise constitutional challenges. *Id*. at 432.

Younger abstention applies in three circumstances: (1) state criminal prosecutions; (2) civil enforcement proceedings; and (3) "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013) (citing *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) ("NOPSI"). In *NOPSI*, the Supreme Court cited *Moore v. Sims*, 442 U.S. 415 (1979) as an example of a "civil enforcement proceeding." *NOPSI*, 491 U.S. at 368.

Moore involved a federal court preliminary injunction that enjoined the state department "from filing or prosecuting any state suit under the challenged state statutes until a final determination by the three-judge court" while a state court child welfare proceeding was pending. *Moore*, 442 U.S. at 422. In *Moore*, the Supreme Court was "unwilling to conclude that state processes are unequal to the task of accommodating the

various interests and deciding the constitutional questions that may arise in child-welfare litigation." *Moore*, 442 U.S. at 435 (holding that the *Younger* abstention doctrine applies to state child custody actions).

Here, even assuming Plaintiffs had standing or sued the right parties, which they did not, (see *supra* Sections I.A and I.B), Plaintiffs are trying to prevent state officials from taking adverse licensing action against the Agency if the Agency does not comply with the tribal notice requirement under Minnesota state law: according to Plaintiffs, State Defendants are responsible for "investigating, disciplining, enforcing, and/or affecting the license status of on any 'private child-placing agency' which fails to comply with the terms of Minn. Stat. § 260.761, subd. 3," and should be "enjoin[ed] … from enforcing Minn. Stat. § 260.761, subds. 3, 6." Doc. No. 1 at ¶¶ 7-8, 65 & 68. Abstention from cases that seek an injunction of a state civil enforcement proceeding is encompassed by *Younger* abstention.

Moreover, the pending state-court adoption proceeding implicates Minnesota's important interest in "providing for participation by Indian tribes in the placement of their children." 1985 Minn. Laws ch. 111, title, at 306; *see also Essling v. Markman*, 335 N.W.2d 237, 240 (Minn. 1983) (stating that courts may rely on the title of a statute as an indicator of legislative intent). And the Hennepin County District Court has the authority to hear and decide constitutional challenges to state statutes. Indeed, "when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy."

Night Clubs, Inc. v. City of Fort Smith, Ark., 163 F.3d 475, 481 (8th Cir. 1998) (citing *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987)).

This Court should abstain.

D. The Requested Relief Would Not Avert The Harm Plaintiffs Allege Will Occur.

Finally, the speculative enforcement action Plaintiffs believe might be taken against the Agency is not the cause of the harm they wish to avert. The real cause of this alleged harm is the giving of notice to the Band. But the harm Plaintiffs want to avoid will not be "redressed by a favorable judicial decision" on their motion. *Lexmark*, 134 S. Ct. at 1386. In essence, Plaintiffs are attempting to solicit an advisory opinion from this Court stating that the non-party child placement agency need not comply with Minnesota Statutes section 260.761, subdivision 3. Plaintiffs' Complaint must be dismissed.

II. PLAINTIFFS' EQUAL PROTECTION CLAIM FAILS AS A MATTER OF LAW.

Minnesota Statutes section 260.761, subdivision 3 requires parties to a voluntary adoptive placement proceeding to give notice to their tribe when the subject of the adoption is an "Indian child." By statute, an "Indian child" is a person under age eighteen who is either already "a member of an Indian tribe" – apparently not the case for Baby Doe – or "eligible for membership in an Indian tribe." Minn. Stat. § 260.755, subd. 8.

In *Morton v. Mancari*, 417 U.S. 535 (1974), the Court held that a federal Bureau of Indian Affairs ("BIA") hiring preference favoring Indian applicants was, like

Minnesota Statutes section 260.761, applied to Indians "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities," and on that basis held that the hiring practice did not violate the Fifth Amendment. 417 U.S. at 554. In so doing, the Supreme Court reasoned that the hiring preference was "not even a 'racial' preference," but instead was "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups."[4] *Id.* at 553. Like in *Morton*, MIFPA is designed to "further the cause of Indian self-government" by requiring notice to tribes of the adoption of either its members or those eligible for membership. *Id.* at 553-54.

Indeed, the Supreme Court has held that an Indian couple's adoption proceeding could be *completely barred* from state court without constituting racial discrimination because "the exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law." *Fisher v. Dist. Ct. of Sixteenth Jud. Dist. of Montana, in and for Rosebud Cnty*, 424 U.S. 382, 390-91 (1976). "[E]ven if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." *Id.* (citing *Morton*, 417 U.S. at 551-55).

[4] The Supreme Court could not have been more clear in applying rational basis scrutiny: the hiring preference is upheld because it "is reasonable and rationally related to further Indian self-government." *Id.* at 555.

Plaintiffs' equal protection claim should be dismissed.

III. PLAINTIFFS' SUBSTANTIVE DUE PROCESS CLAIM FAILS AS A MATTER OF LAW.

"'Substantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires [the Supreme Court] to exercise the utmost care whenever [it is] are asked to break new ground in this field.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted). In this case, Plaintiffs seek to avoid state interference that might "coerce[] [them] into parenting Baby Doe." Doc. No. 9 p. 9; *see also* Doc. No. 1 p. 10 ¶ 39 ("If the tribes attempt to interfere with their private direct placement adoption, and it becomes apparent that the Adoptive Parents will not be permitted to adopt Baby Doe, Jane and John Doe will revoke the consent already given and will not consent to anyone else for Baby Doe's Adoption."). However, there is no authority for the proposition that this is a right that is subject to strict scrutiny review.[5] *See, e.g., Reno v. Flores*, 507 U.S. 292, 303 (1993) (holding that the absence of a recognized fundamental right is evidence that no such right exists). The statute therefore is subject to rational basis review. *Glucksberg*, 521 U.S. at 728.

[5] The two cases relied on by Plaintiffs in their preliminary injunction motion are inapposite. In the case of *In re the Interest of N.N.E.*, 752 N.W.2d 1 (Iowa 2008), the court applied strict scrutiny to the Iowa Indian Child Welfare Act's notice provisions based solely on language and a legal interpretation unique to the Iowa Constitution. *Id.* at 9; *compare* Iowa Const. Art. 1, §§ 1, 9 with U.S. Const. amend. XIV. Plaintiffs reliance on a quote from a Florida Court of Appeals decision is also misplaced. In that case, the court did not recognize the type of right asserted by Plaintiffs, but rather stated that the court has a duty to ensure "that the birth parent's choice of prospective adoptive parents is appropriate and protects the well-being of the child." *In re S.N.W.*, 912 So.2d 368, 373 n.4 (Fla. Dist. Ct. App. 2005).

Under rational basis review, "[w]here there are 'plausible reasons' for [the Legislature's] action, '[judicial] inquiry is at an end.'" *F.C.C. v. Beach Communic'ns*, 508 U.S. 307, 313-14 (1994) (quoting *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). "[T]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *Id*. (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (quotation marks omitted)).

As in *Morton*, MIFPA is supported by a clear rational basis, *i.e.*, "further[ing] the cause of Indian self-government," by requiring notice to tribes of the adoption of either its members or those eligible for membership. 417 U.S. at 553-54. Plaintiffs' substantive due process claim should be dismissed.

CONCLUSION

For the foregoing reasons, State Defendants respectfully request that the Court dismiss Plaintiffs' Complaint.

Dated: June 25, 2015.

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