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.

Case No. 15-cv-02639 (JRT/SER)

COMBINED RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Introduction

Plaintiffs submit this response to Jesson's and Swanson's Rule 12(b)(1), (6) and Moose's 12(b)(1) motion to dismiss. Presently, fit, biological parents of Indian children are the only class of people in Minnesota, who do not have the right to exercise their fundamental parental rights to voluntarily place their children for adoption without government interference. The Does brought and maintain this action to ensure such interference never happens again in Minnesota. They meet all standing and other subject matter jurisdiction requirements, and have stated claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Therefore, Defendants' motions should be denied.

Statement of Facts

1. ICWA's Notice Provisions for Involuntary Proceedings

Congress passed the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963, in response to a high number of Indian children being removed from their homes by both public and private agencies. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Congress's intent was to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902.

25 U.S.C. § 1912(b) provides tribes with a right of intervention during state court proceedings for the *involuntary* termination[1] of an Indian parent(s)' parental rights. The purpose of the tribe's intervention is to enable the tribe to seek enforcement of an adoptive placement in line with ICWA's preference provisions after parental rights are terminated (*e.g.*, where a local social services agency has intervened):

> In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with
>
> (1) a member of the child's extended family;
>
> (2) other members of the Indian child's tribe; or
>
> (3) other Indian families.

[1] Voluntary and involuntary proceedings are governed by Minn. Stat. § 260C.301. Voluntary termination of parental rights occurs "with the written consent of a parent who for good cause desires to terminate parental rights…" *Id.*, subd. 1(a). Involuntary proceedings occur for a number of reasons including abandonment, neglect, or failure to contribute to the support or financial aid of the child. *Id.* at subd. 1(b)(1)-(3). Jane and John Doe are *voluntarily* terminating their rights.

25 U.S.C. § 1915(a).

25 U.S.C. § 1916 provides courts the authority to invalidate any adoptive placement following involuntary removal of a child from its Indian parents where notice was not properly provided pursuant to 25 U.S.C. § 1912(b). But courts have repeatedly held or otherwise recognized that ICWA's notice provisions contained in Section 1912(b) do not pertain to *voluntary* adoption proceedings. *See, e.g., Navajo Nation v. Super. Court of the State of Washington*, 47 F. Supp. 2d 1233, 1238 (E.D. Wash. 1999); *see also Catholic Soc. Servs., Inc. v. C.A.A.*, 783 P.2d 1159, 1160 (Alaska 1989).

2. The Extended Reach of the Minnesota Indian Family Preservation Act

The Minnesota Indian Family Preservation Act ("MIFPA") was originally enacted in 1985, codified at §§ 257.35 – 257.357 (1985). The 1985 law provided notice to tribes in cases where an Indian child was in a "dependent" condition that could lead to involuntary out of home placement. Minn. Stat. § 257.352, subd. 2. As originally enacted, the law did not mandate notice to Indian tribes of a *voluntary* adoptive placement.

That changed in 1997, when the Minnesota Legislature expanded upon ICWA and enacted notice and intervention provisions pertaining to voluntary adoptions:

> 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," as defined in section 260.755, subdivision 8, and United States Code, title 25, section 1903(4), *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 (emphasis added) (the statute was renumbered from

§ 257 to § 260 in 1999). Minn. Stat. § 260.761, subd. 6, provides tribes with an express right to intervene in voluntary adoptions: "In any state court proceeding for the voluntary adoptive or preadoptive placement of an Indian child, the Indian child's tribe shall have a right to intervene at any point in the proceeding."

MIFPA defines an "Indian child" as "an unmarried person who is under age 18 and is: (1) a member of an Indian tribe; or (2) eligible for membership in an Indian tribe." Minn. Stat. § 260.755, subd. 8. By contrast, ICWA defines an Indian child as either "(a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe *and is the biological child of a member of an Indian tribe."* 25 U.S.C. § 1903(4) (emphasis added). Thus, MIFPA is even more sweeping in scope in that it expands ICWA to children whose parents are not members of a tribe, but who are merely eligible for membership.

Many Indian tribes have only blood quantum or lineage requirements as prerequisites for membership. *See, e.g.,* Paul Spruhan, *The Origins, Current Status, & Future Prospects of Blood Quantum as the Definition of Membership in the Navajo Nation*, 8 Tribal L.J. 1, 5 (2007); *see also* Rev. Const. & Bylaws of the Minnesota Chippewa Tribe, Minnesota, art. II, § 1(c). So, MIFPA's wider scope of applicability requires notice to tribes and permits intervention where ICWA does not – *e.g.,* where Indian parents did not enroll or the tribe denied an enrollment application. Unlike ICWA, MIFPA, facially and as applied, gives Indian tribes the right under the color of state law to interfere with voluntary, private adoptions.

3. Baby Doe's Private Direct Placement Adoption

Jane Doe gave birth to Baby Doe in April 2015 in Minneapolis, Minnesota.[2] Jane and John Doe are unmarried, but have been a couple living together continuously since 2003 and have other children together.[3] No possibility exists that anyone other than John is the father.[4] Jane and John have *not* had their parental rights terminated.[5] Instead, they reached the difficult decision that adoption is best for Baby Doe in light of their personal circumstances.[6]

Jane and John elected to proceed with a private direct placement adoption through a private child-placing agency.[7] A private direct placement adoption, commencing under Minn. Stat. § 259.47 with supervision by the juvenile court, allows them specifically to elect who Baby Doe's adoptive parents will be.[8] No one other than the selected adoptive parents is legally able to adopt Baby Doe under this adoption method since no other individual or agency has the parents' consent to adopt and the child is not otherwise "free" for adoption.[9]

Adoption proceedings are strictly confidential under state law. Minn. Stat. § 259.61. In private "direct adoptive placements" under Minn. Stat. § 259.47, where the parent directly places a child with adoptive parents of her choosing, notice is required to

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[2] ECF No. 1, Verified Complaint for Declaratory and Injunctive Relief ("Complaint") ¶ 28.
[3] *Id.* ¶¶ 5, 29.
[4] *Id.*
[5] *Id.* ¶ 30.
[6] *Id.*
[7] *Id.* ¶ 31.
[8] *Id.*
[9] *Id.*

be sent only to the child's guardian, if there is one, and parents with notice rights. Minn. Stat. § 259.49. Neither state government nor any third party must be notified in non-Indian adoption proceedings.

By contrast, in proceedings involving "Indian children," a tribe has the right to intervene and challenge the parents' choice of adoptive parents by invoking Section 1915(a)'s placement preferences. The tribe can also invoke Minn. Stat. § 260.763, subd. 7: "[a]ny agency considering[10] placement of an Indian child *shall* make active efforts to identify and locate extended family members." MIFPA stands as a glaring exception to this scheme of statutorily protected parental privacy and autonomy in private adoptions: for if the child is "Indian" under MIFPA, the tribal government must be notified of the adoption and granted the right to intervene.

Jane and John selected adoptive parents (the "Adoptive Parents"), who are not of Indian descent, because they believed it to be in Baby Doe's best interests for a number of reasons.[11] Jane and John made an open adoption plan, including plans for Baby Doe to learn about and stay connected with his Indian heritage.[12] Jane and John are well aware of the purpose of ICWA and MIFPA, as well as their rights under these statutes.[13] However,

[10] While Jane and John made a decision to place, which was approved by order of Hennepin County Juvenile Court, an agency remained involved in their case. The agency must consider the suitability of a family to adopt in a completed home study prior to placement under Minn. Stat. § 259.41, and must consider the placement in completing a post-placement assessment of the adoptive family under Section 259.53.
[11] Complaint ¶¶ 34, 36.
[12] *Id.* ¶ 35.
[13] *Id.* ¶ 36.

they believe they are making the best decision about Baby Doe's care, custody, control, and future upbringing.[14]

4. The Current Status of Baby Doe's Adoption

In response to this lawsuit, Moose filed a Covenant Not to Intervene in Baby Doe's adoption, which he had full and final authority to execute under the Mille Lacs Band Statutes Annotated.[15] Jane and John recorded their consents on July 7, 2015, in closed court proceedings, and it is anticipated that the Adoptive Parents adoption of Baby Doe shall be finalized in August 2015.[16] Jane and John Doe were adamant that they did not want their tribes notified and given the opportunity to intervene in Baby Doe's adoption.[17] They were extremely concerned about the embarrassment, humiliation, and second-guessing that would ensue if notice and intervention occurred.[18] Therefore, despite Moose's waiver in this case on behalf of his tribe, the Does maintain this action in hopes that the parents of Indian children will be treated like all other fit, biological parents in the course of private, voluntary adoptions.

Argument

A. The Court has Subject Matter Jurisdiction over this Case.

1. The narrow scope of *Younger* abstention is inapplicable because a private placement adoption is not akin to a criminal prosecution.

"[F]ederal courts are obliged to decide cases within the scope of federal

[14] *Id.*
[15] ECF No. 26-1; *see also* Affidavit of Mark Fiddler ¶¶ 3, 4, Ex. 1 (Tribe waived all rights to further notice as well).
[16] Fiddler Aff. ¶¶ 5, 6.
[17] Complaint ¶ 37.
[18] *Id.* ¶ 37.

jurisdiction. Abstention is not in order simply because a pending state-court proceeding involves the same subject matter." *Sprint Comm., Inc. v. Jacobs*, 134 S.Ct. 584, 588 (2013) (citing *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 373 (1989) ("*NOPSI*")). The Supreme Court recently stressed that *Younger* abstention is only:

> [W]arranted when one of a few "exceptional" types of parallel pending state court proceedings exist: "state criminal proceedings, civil enforcement proceedings, and civil proceedings involving certain orders that are uniquely in furtherance of the state court's ability to perform their judicial function."

Banks v. Slay, No. 14-1959, 2015 WL 3797605, at *4 --- F.3d --- (8th Cir. June 19, 2015) (citing *Sprint Comm.*, 134 S.Ct. at 588); *see also Hill v. Barnacle*, 598 Fed. Appx. 55, 56, n.1 (3rd Cir. 2015) (*Sprint* "emphasized the narrow scope of the *Younger* abstention doctrine"); *Johnson v. Weber*, 549 Fed. Appx. 597, 598 (8th Cir. 2014) (*Sprint* "clarif[ied] limited applicability of *Younger* abstention doctrine.").

The category of "state criminal proceedings" speaks for itself. "Civil enforcement proceedings" are those that are "akin to criminal prosecutions." *Sprint Comm.*, 134 S.Ct. at 588 (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)). An example includes a suit brought by the State to sanction a party for a "wrongful act." *Sprint Comm.*, 134 S.Ct. at 592 (citations omitted). The "civil proceedings involving certain orders…" category refers to situations such as civil contempt or requirements for posting bond. *NOPSI*, 491 U.S. at 368 (citations omitted).

Moose, without mentioning *Sprint*, argues that this Court should abstain based upon a three-part test employed by the Eighth Circuit in *Plouffe v. Ligon*, 606 F.3d 890,

892 (8th Cir. 2010), derived from the Supreme Court's decision in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).[19] Moose ignores that *Sprint* expressly overruled that test, finding that the Eighth Circuit was misinterpreting its *Middlesex* decision. 134 S.Ct. at 587, 593-94. The *Sprint* Court explained that the Eighth Circuit's improper application of the *Middlesex* factors would "extend *Younger* to virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest." *Id.* at 593. *Younger* does not apply as broadly as Moose argues, and only "extends to the three 'exceptional circumstances' identified in *NOPSI*, but no further." *Id.* at 594.

Moose also relies heavily on the Tenth Circuit's decision in *Morrow v. Winslow*, 94 F.3d 1386 (10th Cir. 1996), where it applied *Younger* in a case involving an Indian father attempting to enforce his parental rights at the eleventh hour of adoption proceedings. The Tenth Circuit did not consider whether the case fell within any of the three "exceptional circumstances" described by the Court in *NOPSI* and re-affirmed in *Sprint*. Instead, it improperly relied on *Middlesex* reasoning, holding abstention was warranted because there was "a sufficient state interest." *Id.* at 1397. *Morrow's* holding is inapplicable following *Sprint*.

The *Morrow* Court relied on *Moore v. Sims*, 442 U.S. 415, 435 (1979), focusing on its language that "family relations are a traditional area of state concern." *Id.* (internal quotes omitted). Swanson and Jesson also rely on *Moore*, noting the *NOPSI* court cited it

[19] *See* ECF No. 25, Moose Mem. at 24.

as an example of "a civil enforcement proceeding."[20] They argue that application of *Younger* to the child custody proceedings in *Moore* requires similar treatment to the private adoption proceedings here.

Moore is inapposite because its proceedings truly were "akin to criminal proceedings." *Sprint Comm.*, 134 S.Ct. at 588 (citation omitted); *see also* at 592, 593. *Moore* involved a state agency involuntarily removing three battered children from their parents' home, and seeking an emergency temporary custody order. 442 U.S. at 419-21. Abstention applied in *Moore* because the State was a party "and the temporary removal of a child in a child-abuse context is, like the public nuisance statute involved in *Huffman*, "in aid of and closely related to criminal statutes." 442 U.S. at 423 (citations omitted). Here, the state is not a party to the voluntary adoption proceeding and such proceedings bear no resemblance to any criminal matter.[21]

Parties cannot simply assert than an "important state interest" exists and expect *Younger* abstention to apply. *Sprint* leaves no room for Defendants to argue that because MIFPA reflects important governmental interests, the Court must abstain. *Younger* only applies in three narrow instances, none of which are applicable. It cannot be credibly argued that the child abuse proceedings in *Moore* are akin to the private adoption circumstances here. Because none of the three narrow *Younger* circumstances are present, the Court is "obliged" to exercise its jurisdiction. *Sprint Comm.*, 134 S.Ct. at 588.

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[20] ECF No. 32, Jesson & Swanson Mem. at 7-8.

[21] *See also*, *Belinda K v. Baldovinos*, No. 10-cv-02507, 2012 WL 13571, at *3 (N.D. Cal. Jan. 4, 2012) (distinguishing *Morrow* and noting that *Younger* abstention typically applies where a party attempts to stay a state court matter). Plaintiffs do not seek to stay state court proceedings – another reason *Younger* abstention is inapplicable.

2. Plaintiffs have standing to seek a declaration that Minn. Stat. § 260.761, subds. 3 and 6 are unconstitutional.

Plaintiffs must allege three elements to establish standing: (1) that they have personally suffered an "injury in fact" (2) that is "fairly traceable to the challenged action of the defendant" and (3) that is "likely [to] be redressed by a favorable decision." *Adedipe v. U.S. Bank, Nat. Ass'n*, 62 F. Supp. 3d 879, 890 (D. Minn. 2014) (quoting *Braden v. Wal-Mart Stores*, 588 F.3d 585, 593 (8th Cir. 2009); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). *See also In re Hen House Interstate, Inc.*, 177 F.3d F.3d 719, 726 (8th Cir. 1999) ("To satisfy Article III standing, a plaintiff must allege that (1) he or she suffered *or imminently will suffer* an injury in fact…") (emphasis added) (citation omitted). At this stage, the court must accept all allegations set forth in Plaintiffs' Complaint as true. *Adedipe*, 62 F. Supp. 3d at 889-90.

a. Plaintiffs will imminently suffer an injury in fact.

A party need not first violate the law or "await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending, that is enough." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1974)). The Eighth Circuit has long recognized this principal:

> Where plaintiffs allege an intention to engage in a course of conduct arguably affected with a constitutional interest which is clearly proscribed by statute, courts have found standing to challenge the statute, even absent a specific threat of enforcement … This court has also entertained constitutional challenges where the statute clearly applies to plaintiff, and the plaintiff has stated a desire not to comply with its mandate.

United Food and Commercial Workers Intern. Union, AFL-CIO, CLC v. IBP, Inc., 857

F.2d 422, 428 (8th Cir. 1988) (citing *Pursley v. City of Fayetteville*, 820 F.2d 951, 953, 957 (8th Cir. 1987); *Blatnik Co. v. Ketola*, 587 F.2d 379, 381 (8th Cir. 1978)). The Eighth Circuit recently applied *United Food's* reasoning:

> [C]ommentators agree with this result: "[w]here the enforcement of a regulatory statute would cause plaintiff to sustain a direct injury, the action may properly be maintained, whether or not the public officer has 'threatened' suit; the presence of the statute is threat enough," at least where the challenged statute is not moribund.

Gray v. City of Valley Park, 567 F.3d 976, 985-86 (8th Cir. 2009) (quoting *United Food*, 857 F.2d at 428; 6A Moore's Federal Practice, paragraph 57.18[2] at 57-189 (2d ed 1987)).

Plaintiffs do not seek a declaration merely as members of the public at large. *Lujan*, 504 U.S. at 573-74. They are parties to an ongoing, private adoption proceeding involving an "Indian child," and face complying with a *mandatory* statutory scheme enforced and implemented by the Commissioner of the Minnesota Department of Human Services, the Minnesota Attorney General, and, in this instance, the Commissioner of the Department of Health and Human Services for the Mille Lacs Band of Ojibwe. *See* Minn. Stat. § 260.761, subd. 3 ("*shall* notify the Indian child's tribal social services agency") and subd. 6 ("the Indian child's tribe *shall* have a right to intervene at any point in the proceeding."). There is nothing abstract about the necessary compliance with MIFPA's notice and intervention provisions in order to complete Baby Doe's adoption.

Under Defendants' argument, no plaintiff could *ever* have standing to challenge MIFPA's notice and intervention provisions until *after* the adoption agency, the adoptive

parents, or "any other party" (i.e., even the birth parents)[22] chose not to comply with them. *See* Minn. Stat. § 260.761, subd. 3. Plaintiffs are not required to risk the gauntlet of consequences, such as penalties for non-compliance or the invalidation of the pursued adoption now or later. *See* Minn. Stat. § 259.45, subd. 2 (attorney general and commissioner have independent authority to bring a civil action for any illegal actions of adoption agency); *see also* Minn. Stat. §§ 245A.06, 245A.07, subd 3 (commissioner may revoke a private agency's license for failure to comply with applicable laws); 25 U.S.C. § 1914 (invalidation of Indian child adoption for failure to provide notice); Minn. Stat. § 259.25, subd. 2a (adoption may be vacated for fraud); Minn. R. Adopt. P. 47.02 (adoption may be vacated for fraud); Minn. R. Adopt. P. 47.03 (Indian child cases can be set aside for non-compliance with ICWA); *In re J.E.E.*, No. A11-1399, 2012 WL 171418, at *3 (Minn. Ct. App. Jan. 2012) (adoption can be vacated for fraud on the court); *In re C.M.A.,* 557 N.W.2d 353, 358 (Minn. Ct. App. 1996) (holding fraud would exist in adoption proceeding for failure to notify a party with right to notice).

At the initiation of this suit, Plaintiffs credibly feared that a failure to comply would compromise their adoption plans, and that the adoption agency would notice the tribe in order to comply with the mandatory statutory scheme. Moose argues MIFPA's intervention scheme does not *necessarily* burden Indian parents or threaten their privacy. Protective orders can be implemented and a tribe can choose not to intervene, but that is beside the point. The harm to Plaintiffs already arose even though an official did not specifically threaten suit or intervene. As recognized in *United Food,* the "*presence* of the

[22] *See* Minn. R. Adopt. P. 20.01(g) (biological parents are parties to an adoption).

statute is threat enough." 857 F.2d at 428 (citations omitted) (emphasis added).

For Article III standing, it is threat enough that MIFPA *allows* a tribe to intervene and oppose an adoption petition under the same intrusive "best interests" test struck down in *Troxel*. *See* Minn. R. Adopt P. 22.02(h) (party has right to argue against petition); Minn. Stat. § 259.57 (establishing best interest standard for approval of adoption petition). Jane and John will imminently suffer an injury non-Indian parents do not face because MIFPA's intervention allows tribes to second guess Jane and John Doe's decision-making and permits the tribe to demand confidential information to enforce ICWA's placement preference regime. Non-Indian parents do not face this threat. This is a sufficient injury in fact.

b. Plaintiffs' claims are fairly traceable to the challenged actions of the Defendants.

Article III standing does not require proximate causation, it only requires that the injury "be fairly traceable to the defendant's conduct." *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391 n.6 (2014). Broad enforcement authority is sufficient to meet this test. *See Planned Parenthood of Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1039-40 (D. Neb. 2010) (citing *Citizens for Equal Protection v. Bruning*, 455 F3d 859, 863-64 (8th Cir. 2006) (governor and attorney general's broad enforcement authority sufficient for standing) (*abrogated on other grounds by Obergefell v. Hodges,* No. 14-556, 2015 WL 2473451 (U.S. June 26, 2015)). Neither Swanson nor Jesson argue Plaintiffs fail to meet this prong.

Moose argues that the injuries are not fairly traceable to him (and that the case is

not ripe)[23] because he, unlike the State, has no "statutory" authority to enforce Minnesota Statute Section 260.763, subds. 3, 6. To the contrary, Moose has enforcement authority that relates even more directly to Plaintiffs under MIFPA's notice and intervention provisions, as he is the commanding official of his Tribe's "social services agency." Minn. Stat. § 260.761, subd. 3. His tribal agency receives notice regarding Indian child adoptions, and makes a determination as to intervention. Moose *admits* that he has the final say as to whether his tribe will intervene.[24]

Minnesota law also provides an adoption may be vacated for fraud, which includes the failure to notify a party with notice rights. *See* Minn. Stat. § 259.25, subd. 2a; *see also* Minn. R. Adopt. P. 33.09, subd. 3. Common law also provides the tribe a separate enforcement mechanism to vacate the adoption on the grounds of fraud. *In re C.M.A.,* 557 N.W.2d at 358. If Jane and John failed to notice the tribe, their adoption plan and the adoption itself, would be put under a cloud, with the Does and Adoptive Parents living under the fear and uncertainty that their family arrangement could be undone. Therefore, the Does have standing to request that the Commissioner be prevented from enforcing *his rights* under Minn. Stat. § 260.761, subds. 3, 6.

c. Redressability is easily met.

Despite Jesson's and Swanson's contentions, nothing about Plaintiffs' lawsuit limits the relief sought as seeking approval for the adoption agency to move forward

[23] Plaintiffs do not separately address ripeness. Given its close proximity to standing, *see* Moose Mem. at 19, and the standing arguments set forth herein, Plaintiffs establish that this case is ripe.

[24] ECF Doc. 26-1, "Covenant Not to Intervene" (6/23/15) ("I possess full authority to sanction or decline intervention in such proceeding.").

without giving notice and without adverse consequence. The real harm is requiring notice to the Tribe and authorizing it to intervene in voluntary, private adoption proceedings. That is precisely what Plaintiffs seek to avoid through injunctive relief and a declaratory judgment. If this Court declares Minn. Stat. § 260.761, subds. 3, 6, unconstitutional and enjoins their application, Plaintiffs are "likely" to obtain the relief they seek (i.e., no notice or intervention). *See Braden*, 588 F.3d at 591 (citing *Lujan*, 504 U.S. at 560-61).

3. Plaintiffs seek an injunction to enforce their own constitutional rights.

Jesson and Swanson seemingly argue that Plaintiffs seek improper third-party standing: "Plaintiffs' action essentially seeks an injunction on behalf of the adoption agency…"[25] This is untrue. Plaintiffs seek an injunction and declaratory judgment to prevent the implementation and enforcement of Minn. Stat. § 260.761, subds. 3, 6, now and in any instance here forward. Subdivision 3 requires more than just the "private child-placing agency" to provide notice to the tribe. It imposes this requirement upon "a local social services agency, private child-placing agency, petitioner in the adoption, or any other party [who] 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'…" Minn. Stat. § 260.761, subd. 3. This is why Plaintiffs asked for relief stating, "the adoption may proceed in state court without notice to the tribe."[26] Also, as an agency licensed and governed by the state, the agency would be served with "actual notice" of the injunctive relief, and would no longer be permitted to actively participate with the State in enforcing

[25] Jesson & Swanson Mem. at *4.
[26] *See* Proposed Preliminary Injunction.

MIFPA's notice and intervention provisions. *See* Fed. R. Civ. P. 65(d)(2).

While the adoptive agency might have third-party standing in a case like this, *see Powers v. Ohio*, 499 U.S. 400, 410-11 (1991) (setting forth test for third-party standing), the fundamental rights impinged upon by Minn. Stat. § 260.761, subds. 3, 6, belong to the Does. Any harm to the adoption agency is incidental to the injury they will suffer if forced to comply with MIFPA's unconstitutional notice and intervention provisions. To the extent the agency's rights are implicated, that does not doom standing:

> Article III generally requires injury to the plaintiff's personal legal interests, *see Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771–72, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), but that does not mean that a plaintiff with Article III standing may only assert his own rights or redress his own injuries. To the contrary, constitutional standing is only a threshold inquiry, and "so long as [Article III] is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others." *Id.* at 501, 95 S.Ct. 2197. In such a case, a plaintiff may be able to assert causes of action which are based on conduct that harmed him, but which sweep more broadly than the injury he personally suffered. *See Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 128 S.Ct. 2531, 2543, 171 L.Ed.2d 424 (2008) ("[F]ederal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit.").

Braden, 588 F.3d at 591-92.

The agency is the middleman. Plaintiffs seek to enforce their own rights, but to the extent this action implicates rights of the agency, that is appropriate as well.

4. *Ex parte Young* jurisdiction exists as to the Commissioner and Attorney General.

In *Ex parte Young*, 209 U.S. 123 (1907), the Supreme Court "established an *important* limit on the sovereign immunity principle." *Virginia Office for Prot. &*

Advocacy v. Stewart, 131 S.Ct. 1632, 1638 (2011) (emphasis added). The *Ex parte Young* doctrine stems from the well-established principle that federal courts will fashion remedies to protect constitutional rights. *See Carlson v. Green*, 446 U.S. 14, 42-43 (1980); *see also Bivens v. Six Unkown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (citations omitted). The Supreme Court has recently and repeatedly held that the test for *Ex parte Young* jurisdiction is a simple, two-step analysis: "In determining the *Ex parte Young* doctrine's applicability, 'a court need *only* conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Virginia Office*, 131 S.Ct. at 1639 (emphasis added) (quoting *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)).

The Supreme Court's "straightforward" test is easily met here. Plaintiffs have alleged that they face imminent compliance with a mandatory, unconstitutional notice and intervention scheme as to voluntary adoptions involving Indian children. They do not seek to remedy past wrongs; they solely seek prospective relief in the form of an injunction and declaratory judgment.

Defendants cite dicta from *Ex parte Young* in arguing that its test for jurisdiction requires a showing of the official's connection with the enforcement and the threat of commencement of proceedings.[27] Defendants cite no Supreme Court case requiring such a showing to establish jurisdiction under *Ex parte Young*. The facts of *Virginia Office* do not involve the threat of commencing proceedings by a government official whatsoever.

[27] Jesson & Swanson Mem. at 5-6.

In that case, *Ex parte Young* jurisdiction was appropriate where the respondents refused to turn over medical records from state-run mental hospitals, claiming state-law privilege. *Virginia Office*, 131 S.Ct. at 1637, 1642. *Virginia Office* was a situation where there was an ongoing violation of federal law and prospective relief was sought.

Consistent with principles of Article III standing, lower courts have specifically recognized that *Ex parte Young* jurisdiction does not require an actual threat:

> Threat of future enforcement is relevant under *Ex Parte Young* only to the extent it shows that the plaintiff is suing the correct state official and is seeking prospective relief for future harms … If state law clearly empowers the named defendant to enforce the statute and the plaintiff seeks only prospective relief, then whether the defendant has *actually threatened* the plaintiff with enforcement is irrelevant … *Ex Parte Young* applies anyway.

Deida v. City of Milwaukee, 192 F. Supp. 2d 899, 915 (E.D. Wis. 2002) (emphasis added) (citing *Green v. Mansour*, 474 U.S. 64, 73 (1986); *Summit Med. Assocs. v. Pryor*, 180 F.3d 1326, 1338 (11th Cir. 1999); *Hearne v. Board of Educ. of City of Chicago*, 185 F.3d 770, 777 (7th Cir. 1999)). *See also Blatnik Co.*, 587 F.2d at 38 (plaintiffs had standing for declaratory relief against city officials responsible for enforcing ordinance absent specific threat by officials).

At the motion to dismiss stage, the Eighth Circuit looks only to whether the government official is "potentially" a proper defendant by assessing whether there is "some connection" between the official and the challenged statute. *281 Care Committee*

v. Arneson, 638 F.3d 621, 632-33 (8th Cir. 2011).[28] Under the holding in *281 Care Committee*, both Swanson and Jesson have more than a sufficient connection to MIFPA's notice and intervention provisions based upon their respective, specific enforcement powers over private child placements agencies that violate the law. Minn. Stat. § 259.45, subd. 2[29] states, in relevant part, that:

> The attorney general ***or*** the commissioner may bring an action in district court if the directors or those in control of the agency have misapplied or wasted assets of the agency *have acted fraudulently, illegally, or in a manner unfairly prejudicial toward a client of the agency in the capacity of a director or one in control of the agency.*

(emphasis added). *See also* Sections 2(a), (b) above regarding Defendants' enforcement authority.

Plaintiffs' jurisdictional allegations are not based upon the mere, general enforcement powers of any of the three officials. The two unpublished District of Minnesota cases that Jesson and Swanson rely on are inapposite.[30] The prosecutorial authority in *Minn. Citizens Concerned for Life, Inc., v. Swanson*, Civ. No. 10-2938, 2011 WL 797462, *3 (D. Minn. Mar. 1, 2011) was conditional; the attorney general only had prosecutorial authority at the governor's request. Jesson's and Swanson's prosecutorial

[28] The Eighth Circuit's ruling in *281 Care Comm. v. Arneson*, 766 F.3d 774, 797 (8th Cir. 2014) is irrelevant at the motion to dismiss stage. (*See* Moose Mem. at 23). Also, this opinion only addresses the attorney general in the context of injunctive relief with no discussion regarding whether the attorney general would remain a proper party for a declaratory judgment.

[29] Plaintiffs admit that they did not expressly plead this statute in their Complaint; however, they are not required to do so under notice pleading and *Ex parte Young*'s "straightforward" jurisdictional test. *See also Saffold v. McGraw-Edison Company*, 566 F.2d 621, 623 (8th Cir. 1977) (state statute should be judicially noticed without pleading).

[30] Swanson and Jesson Mem. at 6.

authority under Minn. Stat. 259.45, subd. 2 is direct and independent—neither acts at the direction of the other. Moose's authority stems directly from the right to intervention specifically given to the tribal social services agency pursuant to Minn. Stat. 260.761, subds. 3, 6, combined with the authority afforded to him by his tribal law. *See* "Covenant Not to Intervene."

The statute at issue in *Advanced Auto Transp., Inc. v. Pawlenty*, Civ. No. 10-159, 2010 WL 2265159, at *3 (D. Minn. June 2, 2010), merely gave the attorney general authority to represent the Commissioner of the Minnesota Department of Employment and Economic Development in an action (i.e., not direct, independent authority). Both unpublished cases were decided before *281 Care Committee*, where, in finding "some connection," the court gave consideration to contingent authority and authority to act as counsel. 638 F.3d at 632. Neither unpublished case is persuasive authority.

Defendants also have not represented that they no longer intend to enforce or exercise their rights under MIFPA here forward. Each Defendant argues that these provisions should remain in effect. Swanson recently demonstrated her willingness to utilize her enforcement powers under Minn. Stat. § 259.45.[31] *See also* Minn. Stat. 260.785, subd. 3 (Jesson establishes grants to incentivize compliance with MIFPA). Discovery in this case will bear upon the extent to which any of these officials enforce or incentivize compliance with MIFPA.

Defendants' argument that *Ex parte Young* is inapplicable is an argument for the

[31] ECF Doc. No. 38, Affidavit of Jeffrey S. Storms, Ex. A, Complaint in *Swanson v. Reaching Arms International Incorporated*, Case No. 07-2198 (Henn. Dist. Ct. Jan. 31, 2007) (audit action under subdivision 1).

proposition that an unconstitutional statute that effects fundamental, federal constitutional rights shall remain in force *every time* an Indian child is adopted in Minnesota but can never be challenged. That is anathema to long-standing Supreme Court jurisprudence. Jurisdiction must exist when a party is required to comply with an unconstitutional, mandatory, statutory scheme which conflicts with the exercise of fundamental rights.

5. Moose is not entitled to tribal sovereign immunity because this case falls within the *Ex parte Young* exception.

While tribal officials may sometimes be protected by tribal sovereign immunity when acting in their official capacity, that immunity does not shield tribal officials from suits for prospective relief for ongoing violations of federal law. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034-35 (2014) ("As this Court has stated before, analogizing to *Ex parte Young* ... tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct.") (emphasis in original) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (holding tribal official not immune from suit under *Ex parte Young* analysis)); *accord Baker Elec. Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994). As set forth above, Moose has a sufficient connection to the ongoing violation of federal law for which Plaintiffs seek prospective relief. Sovereign tribal immunity is unavailable.

6. Moose's waiver of notice and intervention does not moot this case.

While Article III standing applies to "actual 'cases' and 'controversies,'" *Turner v. Rogers*, 131 S.Ct. 2507, 2514 (2011), there are exceptions to the "mootness" doctrine. The first applies when a matter is "capable of repetition yet evades review." *Advantage*

Media, L.L.C. v. City of Hopkins, 408 F. Supp. 2d 780, 794 (D. Minn. 2006) (citing *Arkansas AFL-CIO v. F.C.C.*, 11 F.3d 1430, 1435 (8th Cir. 1993) (en banc)). The second is the voluntary cessation exception: "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Advantage Media*, 408 F. Supp. 2d at 794 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)).

a. The Does injury is capable of repetition yet evading review.

A dispute falls into this "category, and a case based on that dispute remains live, if '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.'" *Turner*, 131 S.Ct. at 2514. In *Turner*, the Court found that a twelve-month imprisonment period was brief enough to meet the "too short" prong. *Id.* at 2515. *Turner* relied on Supreme Court precedent recognizing time periods of eighteen months and two years as "too short." *Id.* (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978); *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 514-16 (1911)).

Parties required to comply with MIFPA's notice and intervention provisions in voluntary adoption proceedings are given a very brief period to comply. The biological parents must execute their consents to adoption within 60 days of the date of their adoptive placement. Minn. Stat. § 259.47, subd. 7. ICWA requires that Indian parents consent to adoption in court. 25 U.S.C. § 1913(a). MIFPA requires tribal notification. Minn. Stat. § 260.761, subd. 3. If biological parents fail to execute consents in 60 days,

the state juvenile court is required to refer the matter to the county child protection agency to investigate whether Plaintiffs should have their rights terminated on the basis of abandonment. Minn. Stat. § 259.47, subd. 8. Thus, biological parents who place a child with adoptive parents at or near the time of birth, are given mere months before they are required to comply with MIFPA's unconstitutional notice and intervention provisions.

Issues related to pregnancy epitomize the appropriate use of the repetition yet evading review exception:

> But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be capable of repetition, yet evading review.

Roe v. Wade, 410 U.S. 113, 125 (1973) (citations and internal quotations omitted); *see also Doe v. Poelker*, 497 F.2d 1063, 1067 (8th Cir. 1974). Plaintiffs have multiple children together, the most recent of which was born just months ago. It is reasonably likely that Jane and John Doe, together or separately, could have another child they may choose to put up for adoption, which would again force them to confront MIFPA's unconstitutional notice and intervention provisions. This case is not moot because it falls under the capable of repetition yet evading review exception.

b. Defendants cannot meet the heavy burden of demonstrating that the voluntary cessation of any conduct moots this case.

The Supreme Court's standard for the voluntary cessation of a challenged practice

sufficing to moot a case "is stringent":

> A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur … The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

Young v. Hayes, 218 F.3d 850, 852 (8th Cir. 2000) (quoting *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968)). If courts were to summarily accept such conduct, it would leave defendants "free to return to [their] old ways." *City of Mesquite*, 455 U.S. at 289, n.10 (quotation omitted). Accordingly, a defendant can only moot a case by demonstrating it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Center for Special Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 697 (8th Cir. 2012) (quoting *Strutton v. Meade*, 668 F.3d 549, 556 (8th Cir. 2012); *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 189 (2000)).

Moose's waiver is insufficient to meet the high burden of proof necessary to moot this case. Again, Defendants have argued that MIFPA's notice and intervention provisions should remain in force. *See Center for Special Needs*, 676 F.3d at 697 ("North Dakota expressly reserved the right to apply its regulations against the Center in the future."). This is not a situation like *Advantage Media*, where the case was moot because the legislation was enjoined and repealed. 408 F. Supp. 2d at 794 ("Generally, if a challenged law is repealed or expires then the case becomes moot.") (citations omitted). Defendants cannot meet their burden of establishing mootness.

B. Plaintiffs state a claim for Due Process and Equal Protection Violations under the Fourteenth Amendment.

1. Plaintiffs state a Due Process violation.

The Fourteenth Amendment precludes any state from "depriving any person of life, liberty or property, without the due process of law." U.S. Const. amend. XIV, § 1. "The doctrine of substantive due process protects unenumerated fundamental rights and liberties under the Due Process Clause of the Fourteenth Amendment." *Gallagher v. City of Clayton*, 699 F.3d 1013, 1017 (8th Cir. 2012) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). To state a substantive due process claim, a party must: (1) establish the existence of a fundamental right or liberty and (2) provide a "careful description of the asserted fundamental liberty interest." *Glucksberg*, 521 U.S. at 720-21 (internal quotations and citations omitted). "The Due Process Clause 'forbids the government to infringe certain fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" *Rosenbrahn v. Daugaard*, No. 14-cv-04081, --- F. Supp. 3d ---, 2015 WL 144567, at *4 (D.S.D. Jan 12, 2015) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993) (emphasis in original)).

a. The right (or liberty) of fit, biological parents to choose the best upbringing for their children is a fundamental privacy right subject to strict scrutiny.[32]

The right to privacy is not expressly enumerated within the Constitution, but the Supreme Court has recognized since at least 1891 "that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade*, 410 U.S. at 152 (citation omitted). The Supreme Court recognizes two distinct interests within the scope of the constitutional right to privacy: "one is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-00 (1977). The fundamental rights associated with parenting fall under the second category described by the *Whalen* Court.

Fundamental rights and liberties are those "which are, objectively, deeply rooted in this Nation's history and tradition … and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720-21 (internal quotations and citations omitted). The Supreme Court has "long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *see also Meyer v.*

[32] An Indian child also suffers a constitutional violation when the state prevents that child's fit, biological parents from exercising their right or liberty to make parenting choices. *See, e.g., In the Interest of J.L., L.R., and S.G.*, 779 N.W.2d 481, 489 (Iowa Ct. App. 2009) ("A child's liberty interest in familial association is protected by the Due Process Clause and the State may only interfere with this liberty interest after providing the child due process of law.") (citing *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (additional citation omitted)).

Nebraska, 262 U.S. 390, 399 (1923) (holding the right to "bring up children" is a liberty protected by the Due Process Clause); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (choices about "the upbringing of children are among associational rights this Court has ranked as of basic importance to our society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect") (internal quotations omitted); *Glucksberg*, 521 U.S. at 720 (fundamental rights include the rights "to have children, to direct the education and upbringing of one's children…") (citations omitted).

The Supreme Court held in *Troxel v. Gransville* that "[t]he Due Process Clause of the Fourteenth Amendment protects the fundamental rights of parents to make parenting decisions concerning the care, custody, and control of their children." 530 U.S. 57, 66 (2000). It reasoned that:

> [O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations … The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Id. at 68. Relying in part on the fundamental right to parent established in *Troxel*, the Iowa Supreme Court recognized a fundamental right of parenting in *In re the Interests of N.N.E.*, and held that ICWA's preference provisions violated the Due Process Clause of the Iowa Constitution when applied to a voluntary adoption proceeding. 752 N.W.2d 1, 16 (Iowa 2008). In *N.N.E.*, the court held:

> [Mother] was faced with an unintended pregnancy. A woman in her position has three choices: to keep the child, put the child up for adoption, or terminate the pregnancy. Such a decision is undoubtedly gut wrenching and will forever impact her as well as the unborn child. The State has no right to influence her decision by preventing her from choosing a family she feels is best suited to raise her child. Moreover, we do not believe the federal ICWA condones state law curtailing a parent's rights in this manner.

Id. at 9. The Florida Court of Appeals similarly recognized that a birth parent's choice of adoptive parents is part and parcel of their fundamental constitutional right "to the care, custody, and control of their children." *In the Interest of S.N.W.*, 912 So.2d 368, 373, n.4 (Fla. Ct. App. 2005) (citations omitted).

Moose cites in his injunction papers, but not here, a series of cases reflecting that *adoptive* parents have no fundamental rights regarding adoption.[33] That issue is not before the Court.[34] Moose similarly argued that adoption is not a fundamental right because it is a creature of statute.[35] While it is true adoption did not exist at common law, "[a]doption has an ancient origin in world legal systems, and was recognized in Roman law." NORMAN SINGER & SHAMBIE SINGER, 3A SUTHERLAND STATUTORY CONSTRUCTION § 69:4 (7th ed. Nov. 2014) (online) (citations omitted); *see also* YIGAL LEVIN, *Jesus, 'Son of God' and 'Son of David': The 'Adoption' of Jesus into the Davidic Line*, JOURNAL FOR THE STUDY OF THE NEW TESTAMENT, 28.4 (2006), http://www.academia.edu/239076/Jesus_Son _of_God_and_Son_of_David_

[33] ECF No. 21, Moose Inj. Mem. at 13-16.
[34] Additionally, *Doe v. Sundquist*, 2 S.W.3d 919 (Tenn. 1999) cited in Moose's injunction papers is also inapposite because its holding pertains to "informational privacy" claims privacy regarding fundamental rights.
[35] *Id.*

The_Adoption_of_Jesus_into_the_Davidic_Line. That adoption statutes did not develop in the United States until the 1800s, is not pertinent and is certainly not dispositive of whether the Does articulate a fundamental right here. *See id.* (first state adoption statute enacted in 1851).

First, fundamental rights associated with parenting existed long before the drafting of the Constitution, and the enactment of adoption statutes were to give rights to *adoptive couples*:

> The family relationship which lies at the core of this action is an adoptive one. While the biological family relationship is a recognized and protected interest in both our Constitution and natural law, the adoptive family relationship differs in several substantial ways. The adoptive family's rights, like those of the foster family, arise from state statute.

See Collier v. Krane, 763 F. Supp. 473, 476 (D. Colo. 1991). Second, to the extent a biological parent's fundamental rights related to adoption are intertwined with the enactment of adoption statutes, that would still not undermine the fundamental nature of a parent's rights regarding the care, custody, and control of their children. *See Obergefell*, 2015 WL 2473451, at *11 ("History and tradition guide and discipline [the inquiry into fundamental rights] but do not set its outer boundaries."). Defendants cite no case and Plaintiffs are aware of none holding that the right of fit, biological parents to choose an adoptive placement for their child is not part of their fundamental rights of parenting. That is also not the proper question; instead, the court must ask what is exceptional about the adoption context for parental decision-making that it should not be afforded the same protection as in other contexts (i.e., education (*Wisconsin v. Yoder*, 406 U.S. 205 (1972)) or visitation (*Troxel*). *Id.* The limited authority on point finds this right is based upon

deeply rooted principles of parenting recognized by the Supreme Court. *See id.* at *16 (a fundamental right must be viewed in its "comprehensive sense" and narrow specificity based upon history context).

Jane and John's decision to pursue a private direct placement adoption for Baby Doe was a difficult decision made in accordance with their fundamental right to choose the best upbringing for their child. Jane and John's immensely private decision to place Baby Doe with the Adoptive Parents — because they believe it is in Baby Doe's best interests — is at least as private, if not more so, than parents choosing how to educate their children. *See Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (compulsory public education encroaches fundamental right of parents to direct their children's education). "Accordingly, so long as a parent adequately cares for his or her children (*i.e.,* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68-69. Any state restriction that prevents or otherwise interferes with two, fit, biological parents from freely choosing with whom they can place their adoptive children, must be subject to strict scrutiny.

b. ICWA, as enacted, specifically accounted for the privacy interest associated with fit parents pursuing voluntary adoption.

No provision of ICWA requires notice of proceedings to be provided to tribes in voluntary adoption proceedings. *See* 25 U.S.C. § 1912(a) (notice required only in

involuntary proceedings).[36] Every reported case considering the issue of notice has concluded there is no tribal right of notice for voluntary proceedings under ICWA. In *Navajo Nation v. Superior Court*, 47 F. Supp. 2d 1233 (E.D. Wash. 1999), the court held that neither ICWA nor the Constitution require notice to a tribe in voluntary proceedings:

> The plain reading of section 1913 requires no notice to the tribe for a voluntary relinquishment of custody. A reading with other statutory sections does not reveal inconsistences. No ambiguity exists…
>
> In addition to the plain language of the statute, the legislative history of the ICWA supports the argument that there is no notice requirement for voluntary adoption proceedings of an Indian child. Congress has yet to include a notice provision for voluntary adoption proceedings.

47 F. Supp. 2d at 1238. Thus, Congress clearly did not require tribal notice in voluntary proceedings under ICWA, and Congress did not change the law in 1996 when it considered the issue or anytime thereafter. The court in *Navajo Nation* concluded that "[n]either § 1913 nor the U.S. Constitution require notice to the Navajo Nation in the circumstances of this case where the adoption was voluntary and the child was not domiciled on the Reservation of the Navajo Nation." *Id.* at 1239.[37]

In *Catholic Social Services*, the Alaska Supreme Court similarly held that Congress did not grant tribes the right to notice of, or to intervene in, voluntary termination of parental rights proceedings. 783 P.2d at 1160 ("Congress explicitly

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[36] The recent Bureau of Indian Affairs' *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings* do not mandate notice in voluntary proceedings. *See* 80 Fed. Reg. 10,146 (Feb. 25, 2015) (using precatory "should" instead of "must" as used 101 times elsewhere in Guidelines). The tribe does not have exclusive jurisdiction here since none of the Plaintiffs reside on the reservation. 25 U.S.C. § 1911 (a).

[37] The tribe appealed from this order, but did not challenge the district court's findings on notice. *See Navajo Nation v. Norris*, 331 F.3d 1041 (9th Cir. 2003).

granted intervention rights to tribes in involuntary termination proceedings, but did not do so in voluntary termination proceedings."). *See also Duncan v. Wiley*, 657 P.2d 1212, 1213 (Okla. Ct. App. 1982) ("[t]he notice requirements of § 1912 are mandatory in involuntary actions. The requirements do not apply to voluntary court proceedings."); *accord In re Baby Girl A*, 230 Cal. App. 3d 1611, 1620-21 (Cal. 1991); *In the matter of the petition of Philip A.C.*, 149 P.3d 51, 60 (Nev. 2006).

Even the Bureau of Indian Affairs previously agreed that notice was not required in voluntary proceedings. In stating so, the Bureau highlighted a parent's right to confidentiality and anonymity in voluntary proceedings:

> Under the Act confidentiality is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. For voluntary placements, … the Act specifically directs state courts to respect parental requests for confidentiality. The most common voluntary placement involves a newborn infant….
>
> Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones.

1979 Guidelines, 44 Fed. Reg. at 67,586. The Bureau's position at that time reflected that of the tribes. Calvin Issac, Tribal Chief of the Mississippi Bank of Choctaw Indians stated: "The ultimate responsibility for child welfare rests with the parents and we would not support legislation which interfered with that basic relationship." *Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs*, 95th Cong., 2d Sess., 62 (1978).

Congress, in enacting ICWA, recognized the critical difference between the voluntary and involuntary termination of parental rights. The voluntary termination of parental rights is a decision made by a legally fit parent in accordance with their fundamental right to choose the best upbringing for their child. Congress's intentional omission of notice and intervention provisions pertaining to voluntary adoption gives recognition of fundamental, parental rights. But what Congress giveth, the State of Minnesota has taken away. *See* PHILIP (JAY) MCCARTHY, JR., *The Oncoming Storm: State Indian Child Welfare Act Laws and the Clash of Tribal, Parental, and Child Rights*, 15 J.L. & FAM. STUD. 43 (2013).

c. Minn. Stat. § 260.761, subds. 3, 6, violate due process because they are not narrowly tailored to serve a compelling state interest.

Legislation that infringes upon a fundamental right must survive strict scrutiny, which means the law must be "narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 721 (additional citation omitted). "Under both the Due Process and Equal Protection Clauses, interference with a fundamental right warrants the application of strict scrutiny." *Bostic v. Schaefer*, 760 F.3d 352, 375 (4th Cir. 2014) (citing *Glucksberg*, 521 U.S. at 719-20). "Under strict scrutiny, the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests." *Johnson v. California*, 543 U.S. 499, 505 (2005) (internal quotation omitted); *c.f. Rosenbrahn*, 2015 WL 144567, at *9 ("Defendants bear the burden of demonstrating that South Dakota's laws banning same-sex marriage meet this exacting standard.") (citing *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411, 2420

(2013)). Furthermore, "the state's 'justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Rosenbrahn*, 2015 WL 144567, at *9 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). Accordingly, this Court must "carefully analyze the purpose and effect" of MIFPA and the provisions contained in Section 260.761, subds. 3, 6, that provide a tribe with a right to notice and to intervene whenever an Indian child is the subject of a voluntary adoption. *See Karsjens v. Jesson*, 6 F. Supp. 3d 916, 928 (D. Minn. 2014) (finding, in part, that inmates pleaded viable claims for Due Process violations).

The Supreme Court recently recognized that "the primary mischief the ICWA was designed to counteract was the unwarranted *removal* of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2561 (2013) (emphasis in original). ICWA's text expressly states this concern:

> that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions…

25 U.S.C. § 1901(4). The Minnesota Supreme Court recognized MIFPA was based on ICWA, and was similarly enacted "to protect Indian families and cultural values under circumstances in which an Indian family is broken up." *Desjarlait v. Desjarlait*, 379 N.W.2d 139, 144 (Minn. 1985).

While Plaintiffs in no way acquiesce to the constitutionality of ICWA, this Court need look no further than ICWA to recognize that MIFPA notice and intervention

provisions, Minn. Stat. § 260.761, subds. 3, 6, are not narrowly tailored. The purpose of this state and federal legislation is to preserve heritage and curtail racially insensitive abuses when an Indian family is *involuntarily* broken up by non-tribal parties and private agencies (i.e., involuntary removal of children in child protection proceedings and the involuntary termination of parental rights).

ICWA, despite its own constitutional shortcomings not at issue in this litigation, is far more narrowly tailored than MIFPA in addressing tribal concerns about their need to receive notice in order to monitor, or "police," state court cases involving the breakup of an Indian family. As noted above, ICWA does not require tribal notice when Indian parents decide to pursue a voluntary adoption, no doubt because Congress recognized the privacy rights Indian parents have to make decisions about their children without tribal, state, or federal government oversight. Moreover, under ICWA, the *court* is charged with the duty to monitor proceedings and certify that a parent voluntarily terminating parental rights is fully informed of the decision the parent is making. *See* 25 U.S.C. § 1913.

MIFPA on the other hand, contains notice and intervention provisions for voluntary adoptions without providing any rationale or justification for the State of Minnesota to require tribal notice and the right of tribes to intervene in voluntary adoption proceedings.[38] MIPFA expands ICWA to provide tribes with these rights, mandating unwanted, unnecessary and extremely burdensome state and tribal intervention in the privacy and decision-making of Indian parents. The result is that

[38] Thus, these provisions are not even rationally related to a legitimate government interest. *See Glucksberg*, 521 U.S. at 728.

MIFPA's notice and intervention provisions usurp fit, biological parents' right (singling out only Indian parents) to make fundamentally protected and private decisions related to the upbringing of their children. Minnesota Statute § 260.761, subds. 3, 6, cannot survive strict scrutiny.

2. Plaintiffs state an Equal Protection violation.

The Equal Protection Clause of the Fourteenth Amendment states that a state shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Analysis under the Equal Protection clause is necessary when a state law creates disparate treatment between similarly circumstanced persons. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Generally, state laws are constitutional if the disparity is "rationally related to a legitimate government interest." *Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996) (citations omitted). When the disparate treatment infringes upon a fundamental right or affects a suspect class, the law is subject to strict scrutiny, "by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling government interest." *Plyler*, 457 U.S. at 216-17; *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) ("The general rule gives way, however, when a statute classifies by race, alienage, or national origin."); *Fisher*, 133 S.Ct. at 417-18 (ethnicity also subject to strict scrutiny).

a. Biological Indian parents who pursue voluntary adoption in the best interest of their children and Indian children are treated differently than ALL similarly situated, non-Indian parents and non-Indian children.

The fit, biological parents of Indian children are the only class of parents in the State of Minnesota deprived of the right to *privately* pursue an adoption without being forced to give notice to a government, their community, or their family. These parents are also the only class of persons in Minnesota where third parties are given the opportunity to intervene and interfere with fit, biological parents' decision to pursue a private direct placement adoption of their child. As a result, Indian children are the only class of persons in Minnesota who are deprived of their fundamental right to have their parents make the best choices pertaining to their upbringing. *See Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013).

As Justice Alito articulated in *Adoptive Couple*:

> The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court's reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian. As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child in utero and refuse any support for the birth mother—perhaps contributing to the mother's decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to *override the mother's decision* and the *child's best interests*. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. Such an interpretation *would raise equal protection concerns*...

Id. (emphasis added). There is little doubt that disparate treatment exists here. Indian parents and children are treated differently than every other similarly situated set of parents and children in Minnesota when it comes to voluntary adoption.

b. Minn. Stat. § 260.761, subds. 3, 6, is subject to strict scrutiny because it discriminates on the basis of race.[39]

Jesson and Swanson cite *Morton v. Mancari*, 417 U.S. 535 (1974)[40] for the proposition that being "Indian" is a political rather than national origin or racial classification, thus subjecting the challenge to the rational basis test. In *Mancari*, there was a Due Process challenge to the Bureau of Indian Affair's policy of hiring Indian applicants over non-Indians. *Id.* at 538-39. The Court recognized that the preference there was "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to its constituent groups." *Id.* at 554. The Court further explained that "[t]he preference applies only to employment in the Indian service." *Id.* at 554. Accordingly, the Court narrowly held that "where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process." *Id.* at 555.

The Supreme Court's holding in *Mancari* and its scope has increasingly come under scrutiny. *See, e.g., Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997) (interpretation of Reindeer Industry Act that prohibited non-natives in Alaska from entering into reindeer herding industry not protected by *Mancari* because the interest was not "uniquely native"); *see also KG Urban Enterprises, LLC v. Patrick*, 693 F.3d 1 (1st Cir. 2012) (recognizing that states do not have same broad authority afforded under *Mancari*).

[39] As discussed above, Minn. Stat. § 260.761, subds. 3, 6, is also subject to strict scrutiny — regardless of the parents' so-called "political" class status — because it infringes upon Jane and John Doe's *fundamental right* to parent. Plaintiffs fully incorporate that argument into their Equal Protection argument as well.

[40] This case is referred to in short-form as either *Mancari* or *Morton*, but *Mancari* appears to be the prevailing form at the Supreme Court.

Mancari is distinguishable because it does not address instances where legislation discriminates *against* members of Indian tribes — especially tribal Indians exercising fundamental due process rights. Recent Eighth Circuit case law reflects that members of Indian tribes do, in fact, constitute a race in instances where an Indian is being discriminated against. *See Spirit Lake Tribe of Indians ex rel. Committee of Understanding and Respect v. National Collegiate Athletic Ass'n,* 715 F.3d 1089, 1092 (8th Cir. 2013) (undisputed that Indian tribe was a race for purposes of a 42 U.S.C. § 1981 racial discrimination claim); *see also Albers v. Mellegard, Inc.*, Case No. 06-4242, 2008 WL 7122683, at *6 (D.S.D. 2008) (status of plaintiffs as Indian tribe members was sufficient to allege Section 1981 racial discrimination claim). The Ninth Circuit has similarly recognized that "discrimination in employment on the basis of membership in a particular tribe constitutes national origin discrimination … under Title VII." *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 154 F.3d 1117, 1120 (9th Cir. 1998). Regardless of whether this Court treats discrimination *against* Indians as an issue of race, ethnicity, or national origin, the result is the same — Defendants bear the burden of meeting strict scrutiny.

Membership in many tribes, including the Ojibwe, is based on racial factors (i.e., bloodlines). "Ancestral tracing of this sort achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (striking down Hawaiian electoral system based on heritage). An "Indian child" is treated disparately based solely on his or her "eligibility" for tribal membership, which is, in

turn, based exclusively on racial factors. *See* Minn. Stat. § 260.755, subd. 8(2) (a child is "Indian" based on bloodline-based eligibility for membership alone, notwithstanding parent's political membership status).

MIFPA's notice and intervention provisions in voluntary adoptions are not uniquely Indian, are not related to Indian self-governance,[41] and do not work solely to give preference to or benefit Indians over non-Indians. These provisions *discriminate against* Indian parents and children based solely on their race and should be subject to strict scrutiny.

c. Minn. Stat. § 260.761, subds. 3, 6, are not narrowly tailored to serve a compelling government interest.

As discussed in the context of Due Process above, Minn. Stat. § 260.761, subds. 3, 6, cannot survive strict scrutiny. *See Johnson v. California*, 543 U.S. 499, 505 (2005) ("Under strict scrutiny, the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests.") (internal quotation omitted). MIFPA's notice and intervention provisions as to voluntary adoption, facially and as applied, are not narrowly tailored to serve the true government interest of preventing the improper and insensitive breakup of Indian families.

Instead, these notice and intervention provisions have the effect of taking a subset of families and making them unequal in the fundamental right of parenting. *Cf. United*

[41] The ruling in *Fisher v. District Court of Sixteenth Judicial Dist.*, 424 U.S. 382, 3901-91 (1976) is also inapposite because it involves exclusive tribal jurisdiction on an Indian reservation. That is not the case here.

States v. Windsor, 133 S. Ct. 2675, 2681 (2013) (recognizing that DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal). MIFPA's notice and intervention provisions reflect a bias against Indian parents — that unlike all other parents in Minnesota — they, as a class, are incapable of making the same fundamental decisions other Minnesota parents make regarding the upbringing of their children. It tells the world that parenting choices made by Indians are unworthy of State recognition. It demeans Indian parents and children by depriving them of parental decision-making in the best interest of the child. And because of this presumed parental infirmity, it allows the tribal government the opportunity to try and override their choice.

The interplay between the fundamental right to make decisions regarding care, custody, and control of one's child in adoptions proceedings — free from governmental meddling — and the equal protection right for *Indians* to participate in that same freedom — highlights the fundamental right at stake in this case. "To deny … fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Obergefell*, 2015 WL 2473451, at *17. "Each concept—liberty and equal protection—leads to a stronger understanding of the other." *Id.*

Congress passed ICWA to protect Indian parents' rights and granted states power to enact laws providing greater protections than those contained in ICWA. *See* 25 U.S.C. § 1921 (providing state law may provide a "higher standard of protection to the right of the parent"). Congress did not and could not authorize a state to single out Indians and

take *away* their due process and equal protection rights. Nor can states enact laws that give tribes rights that trump those of parents. *N.N.E.*, 752 N.W.2d at 10 (additional rights granted to tribes by state law cannot come at the expense of the parents' of child's rights).

No doubt, should Jane chose to have an abortion, *Roe v. Wade* unquestionably would protect her privacy and liberty interest to make that choice. Yet under MIFPA, the Does' decision to have the baby, and place it for adoption, is not afforded the same protection. The Fourteenth Amendment does not favor abortion over adoption, creating greater rights of choice in the former than in the latter. Likewise, state law cannot single out Indian parents and tell them: "you can freely abort, but you can't freely place for adoption."

Conclusion

The Court has subject matter jurisdiction, and Plaintiffs have stated a claim under the Fourteenth Amendment. Defendants' Motions to Dismiss should be denied.

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