

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

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

Plaintiffs,

vs.

**STATE DEFENDANTS' REPLY IN
SUPPORT OF THEIR MOTION TO
DISMISS**

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.

INTRODUCTION

This case should be dismissed, and Plaintiffs essentially concede as much in their opposition, acknowledging that they (1) anonymously gave the Band notice of Baby Doe's adoption, (2) signed the consent forms so the adoption could proceed, and (3) expect the adoption to be finalized in August 2015. Doc. Nos. 43 at p. 7, 44-1. Nothing about the relief Plaintiffs seek in this case would benefit them, nor did Plaintiffs challenge the notice to the Band in the state court adoption proceeding, as they could have. Yet Plaintiffs persist in asking this Court for an impermissible advisory opinion. This Court should dismiss Plaintiffs in this case because: (1) Plaintiffs improperly sued

the Commissioner and Attorney General (collectively, the “State Defendants”); (2) well settled abstention doctrine mandates dismissal; and (3) Plaintiffs fail to articulate a plausible due process or equal protection claim.

RELEVANT PROCEDURAL BACKGROUND

Plaintiffs filed a motion for preliminary injunction shortly after filing their complaint. Doc. Nos. 1, 8. All defendants opposed the motion for preliminary injunction. Doc. Nos. 21, 22. All defendants filed motions to dismiss on June 25, 2015. *See* Doc. Nos. 25, 32. As an exhibit to his motion to dismiss, Commissioner Moose filed a covenant not to intervene in Baby Doe’s state adoption proceeding. Doc. No. 26-1.

On July 2, 2015, the Court denied Plaintiffs’ motion for preliminary injunction, concluding that: (1) Plaintiffs’ privacy was not likely to be violated by disclosure of their identities to the Band, because such disclosure was not required; and (2) Plaintiffs’ proposed adoption plan was not likely to be infringed upon given Commissioner Moose’s decision not to intervene. Doc. No. 42 at pp. 8-10. Plaintiffs have since confirmed that they have given anonymous notice to the Band, and that on July 7, 2015 they executed their consents to Baby Doe’s adoption in closed court. Doc. No. 44 at p. 2. Plaintiffs now expect Baby Doe’s adoption to be finalized in August, 2015. *Id.*

On July 16, 2015, Plaintiffs filed a combined response to the defendants’ motions to dismiss. The State Defendants submit this reply in support of dismissal of Plaintiffs’ complaint.

ARGUMENT

I. THE STATE DEFENDANTS ARE IMPROPER PARTIES.

Plaintiffs continue to assert that the State Defendants are proper parties, but their theory is flawed for two reasons. First, Plaintiffs' argument that the State Defendants could bring an enforcement action against Plaintiffs' adoption agency for violation of the tribal notice provision, *see* Minn. Stat. § 260.761, subd. 3, has been rendered moot by their own actions. Plaintiffs have already given anonymous notice to the Band, *see* Doc. No. 44-1, thereby removing any possibility that their adoption agency could be subject to an enforcement action for failing to give notice. *See* Minn. Stat. § 260.761, subd. 3 (stating that "the agency *or* person shall notify the Indian child's tribal social services agency by registered mail" (emphasis added)). Under *Ex Parte Young*, an "actual threat" of statutory enforcement is required to bypass the Eleventh Amendment. 209 U.S. 123, 156-57 (1907) (only state officials who "have some connection with the enforcement" of a statute and who "threaten and are about to commence" enforcement proceedings may be enjoined by a federal court). Plaintiffs concede there now exists no threat of enforcement at all.

Second, Plaintiffs cannot maintain suit against the State Defendants based on a possible licensing action against a third party. State Defendants cannot take any action adverse to *Plaintiffs*, and Plaintiffs never allege (or even argue) that State Defendants

could.¹ A person cannot assert the rights of a third party but must show a connection between the claimed injury and the defendants. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Quinones v. City of Evanston, Ill.*, 58 F.3d 275, 277 (7th Cir. 1995) “[a] person aggrieved by the application of a legal rule does not sue the rule maker . . . [h]e sues the persons whose acts hurt him.” Neither the Attorney General or the Commissioner has harmed or threatened to harm Plaintiffs in any way, and this Court should dismiss based on Plaintiffs’ lack of standing. *See Lujan*, 540 U.S. at 559.

Finally, even if theoretical enforcement power against a third party could render a government official subject to suit, Plaintiffs’ case against the Attorney General is even further flawed based on Plaintiffs’ apparent misperception of the scope of the Attorney General’s role under Minnesota Statutes, section 259.45. Plaintiffs now argue the Attorney General is a proper party because she has “recently demonstrated her willingness to utilize her enforcement powers under Minn. Stat. § 259.45.” *See* Doc. No. 43 at p. 21. In the example Plaintiffs cite, however, the Attorney General is not enforcing any provision of MIFPA, but is only exercising her specifically enumerated authority under Minn. Stat. § 259.45, subd. 1 to “seek a court order requiring a financial audit of [a child-placing agency]” when there is “good cause to believe that a child-placing agency has violated [Minn. Stat. §] 259.37, subdivision 1, 259.55, 317A.907, or any other applicable law dealing with fees, payments, accounts, or financial disclosure by

¹ “[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.” *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984).

a child-placing agency.” *See* Doc. No. 38 at pp. 3-31. The Attorney General is therefore not a proper party for this additional reason.

II. *YOUNGER ABSTENTION IS APPROPRIATE.*

Even if Plaintiffs were able to maintain suit against the State Defendants based on the possibility of a licensing action by the Commissioner against a third party, abstention is appropriate here. Plaintiffs seek to enjoin a class of state civil enforcement proceedings, specifically licensing actions brought due to noncompliance with MIFPA’s notice provision. The Supreme Court recognized the appropriateness of *Younger* abstention in the type of “civil enforcement proceedings” Plaintiffs wish to permanently enjoin from being brought against their adoption agency. In *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013), the Court recognized that *Younger* abstention is appropriate where a federal proceeding threatens interference with state civil actions “akin to criminal prosecutions.” such as proceedings targeted here. *Id.* at 588.

Plaintiffs provide state courts with no opportunity to consider the relationship between MIFPA’s notice provisions and Plaintiffs’ complained-of enforcement actions. Abstention is appropriate because while Plaintiffs are correct that they do not seek to stay an existing state court proceeding, Doc. No. 43 at p. 10 n.21, their request to this Court runs against the federal system’s “sensitivity to the primacy of the State in the interpretation of its own laws.” *Moore v. Sims*, 442 U.S. 415, 427 (1979).

Abstention is therefore appropriate because this case presents an instance in which “the prospect of undue interference with state proceedings counsel against federal relief.” *Sprint*, 134 S. Ct. at 588 (citing *New Orleans Public Service, Inc. v. Council of City of*

New Orleans, 491 U.S. 350, 368 (1989)). As in *Moore*, where the Supreme Court was accordingly “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,” this Court should abstain and dismiss Plaintiff’s complaint. 442 U.S. at 435.

III. PLAINTIFFS FAIL TO PLAUSIBLY PLEAD THAT MIFPA’S NOTICE AND INTERVENTION PROVISIONS VIOLATE THE CONSTITUTION.

In the event the Court reaches the merits of Plaintiffs’ claims – which it should not do – Plaintiffs have failed to plausibly plead a constitutional violation.

A. Plaintiffs Have Not Pled An Equal Protection Violation.

Equal protection only requires strict scrutiny of laws that treat similarly situated people differently based on “immutable characteristic[s] determined solely by the accident of birth.” *Frontiero v. Richardson*, 411 U.S. 677, 683, 686 (1973). These suspect classifications include sex, race, alienage, and national origin. *Id.* at 683. The United States Supreme Court could not be clearer that tribal membership does not trigger strict scrutiny.² *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

² Plaintiffs’ assertion that “[m]any Indian tribes have only blood quantum or lineage requirements as prerequisites for membership,” Doc. No. 43 at p. 4, is not relevant because it is not implicated by the facts of this case given the Band’s membership eligibility requirements are not based on “only blood quantum or lineage requirements.” See Doc. No. 1 at p. 7 ¶ 26 (eligibility for membership in Minnesota Chippewa Tribe requires that child be born to a member, in addition to blood quantum). Just as Plaintiffs cannot make claims on behalf of their third-party adoption agency, they cannot make claims on behalf of absent putative plaintiffs whose facts and circumstances materially differ from their own. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (plaintiffs “generally (Footnote Continued on Next Page)

MIFPA, like *Morton*, is designed to “further the cause of Indian self-government,” and is applied to Indians “not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities.” 417 U.S. at 553-54. Plaintiffs’ equal protection claim should be dismissed.

B. Plaintiffs Have Not Pled A Substantive Due Process Violation.

No court has held that substantive due process guarantees a child’s parents the unfettered right to choose that child’s adoptive placement, and Plaintiffs are therefore not entitled to strict scrutiny review. *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). Plaintiffs essentially concede this, acknowledging that there is “limited authority on point” and urging this Court to hold that parental decisionmaking in the adoption context should be “afforded the same protection as in other contexts.” Doc. No. 43 at p. 30. The statute therefore is subject to rational basis review. *Glucksberg*, 521 U.S. at 728.

Rational basis is satisfied because MIFPA’s notice requirement “further[s] the cause of Indian self-government.” *Morton*, 417 U.S. at 553-54. Plaintiffs have failed to plead a substantive due process claim.

(Footnote Continued from Previous Page)

must assert [their] own legal rights and interests, and cannot rest [their] claim to relief on the legal rights or interests of third parties.”).

CONCLUSION

Plaintiffs' case does not belong in federal court, and fails to state any constitutional violation. The Court should dismiss Plaintiffs' Complaint.

Dated: July 30, 2015.

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