UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Plaintiffs,

vs.

Emily Johnson Piper, in her official capacity as Commissioner of the Minnesota Department of Human Services, and Lori Swanson, in her official capacity as Minnesota Attorney General,

Defendants.

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

Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment

Introduction

Defendants spend the majority of their memorandum rehashing threshold issues that the Court has squarely addressed and firmly decided in Plaintiffs' favor in its well-reasoned February 25, 2016 Order, denying Defendants' motion to dismiss. *See Doe v. Piper*, 165 F. Supp. 3d 789 (D. Minn. 2016). Plaintiffs have standing. Piper and Swanson are proper defendants in their official capacities. This case is not moot because it is capable of repetition, yet evading review. Therefore, Defendants' procedural arguments should be summarily rejected, and the Court should substantively address whether the Minnesota Indian Family Preservation Act's (MIFPA) notice and intervention provisions, Minn. Stat. § 260.761, subds. 3, 6 (2016), violate Plaintiffs' Due Process and Equal Protection rights afforded under the Fourteenth Amendment to the United States Constitution.

To that end, Defendants confuse the fundamental difference between biological and adoptive parents. A biological parent's right to place a child for adoption falls well within the scope of parental rights recognized as fundamental by the Supreme Court. MIFPA's notice and intervention provision infringes upon those fundamental rights. Moreover, MIFPA's expanded definition of "Indian child" places the statute outside the narrow holding in *Morton v. Mancari*, 417 U.S. 535 (1974). As a result, MIFPA discriminates on the basis of race, not political class, and is subject to strict scrutiny. Because MIFPA's notice and intervention provisions are not narrowly tailored to achieve a compelling state interest, those provisions violate Due Process and Equal Protection.

No genuine issues of material fact exist. The Court should deny Defendants' motion. The Court should grant Plaintiff's cross-motion for summary judgment, declare that MIFPA's notice and intervention provisions are unconstitutional, and enter a permanent injunction enjoining their future implementation and enforcement.

Factual Background

Plaintiffs have already set forth an applicable, detailed, factual basis in Plaintiffs' Memorandum in Support of Their Motion for Summary Judgment. As such, Plaintiffs will not burden the Court with a wholesale recitation of the facts and contextual background already set forth in that memorandum. Instead, Plaintiffs will provide only a truncated version of facts herein.

Jane and John Doe were both Indian tribe members, who did not reside on an

Indian reservation and gave birth to Baby Doe in April 2015 in Minneapolis, MN.[1] Jane and John voluntarily chose to place Baby Doe for adoption and terminate their parental rights.[2] The couple that Jane and John chose were not Indian.[3]

Jane and John learned that they were required to comply with MIFPA throughout Baby Doe's adoption because Baby Doe met MIFPA's definition of an "Indian child," which included providing notice to Jane's tribe, the Mille Lacs Band of Ojibwe (the "Band").[4] Upon receiving notice, the Band would have had the right to intervene in Baby Doe's adoption, transfer the adoption to tribal court, and seek to apply the Indian Child Welfare Act's preference provisions to Baby Doe's adoption.[5] Jane and John believed MIFPA's notice and intervention provisions invaded their fundamental parental rights, did not want to comply with them, and initiated this federal litigation as a result.[6]

The Band waived its notice and intervention rights as a result of this litigation, and Baby Doe's adoption was finalized in Minnesota state court with Jane and John's chosen adoptive couple.[7] Despite the Band's decision not to intervene and the completion of Baby Doe's adoption, the Does maintained this action in hopes that if they ever again conceive a child, both they and other Indian parents like them, will be treated like all other fit, biological parents of non-Indian children.

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[1] ECF Doc. No. 1, Verified Complaint for Declaratory and Injunctive Relief ("Complaint") ¶¶ 3, 4, and 28. *See Roberson v. Hayti Police Dep't*, 241 F.3d 992, 994-95
[2] Complaint ¶¶ 30, 31.
[3] *Id.* ¶ 34.
[4] Complaint ¶¶ 36, 37; ECF Doc. No. 93, Declaration Mark Fiddler ¶¶ 3, 4 (12/30/16).
[5] *Id.*
[6] *See generally* Complaint.
[7] *See* ECF Doc. No. 26-1; *see also* Fiddler Dec. ¶ 6.

Disputed Facts

Plaintiffs dispute all "facts" set forth by Defendants to the extent they purport to establish that Defendants bear no enforcement responsibility related to MIFPA. *See* Def. Mem. at 3-4. In reality, the question about Defendants' enforcement responsibility is not a question of fact, as much as it is a question of law (statutory interpretation) that the Court has already decided in Plaintiffs' favor. *See Doe*, 165 F. Supp. 3d at 801-03. The Court correctly held Swanson and Piper are granted specific statutory enforcement authority that directly relates to MIFPA. *Id.*

MIFPA remains actively enforced in Minnesota today, including MIFPA's notice and intervention provisions in voluntary adoptive placements.[8] For example, DHS publishes an Indian Children Welfare Manual, which specifically details that agencies are required to provide notice to Tribes in the context of voluntary relinquishment of parental rights.[9] DHS also provides on its website, an "ICWA Non-compliance Reporting Form," which is made available publicly so that "[r]eports of Indian Child Welfare Act and Minnesota Indian Family Preservation Act non-compliance" can be reported to DHS's "ICWA program consultant."[10]

[8] *See* "DHS Program Resources, Indian Child Welfare," *available at* http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=dhs16_174266 (last accessed Jan. 14, 2017).
[9] *See* Declaration of Jeffrey S. Storms (1/20/17) ("Storms Dec.") Ex. A, "Indian Children Welfare Manual," *available at* http://www.dhs.state.mn.us/main/groups/county_access/documents/pub/dhs16_157701.pdf (last accessed January 14, 2017).
[10] *See* "DHS Program Resources," Indian Child Welfare."

These reporting forms are actively utilized throughout the State of Minnesota.[11] When complaints are received or non-compliance is identified, DHS issues notice of non-compliance and corrective actions plans.[12] DHS also actively mandates compliance and commitment to compliance with MIFPA for local social services agencies and private licensing agencies.[13] The documents produced by Defendants in this case reveal that MIFPA's enforcement is alive and active in the State of Minnesota.

Argument

A. Plaintiffs meet the requirements of *Ex parte Young*

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 doctrine 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 Unknown 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 involves 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.*,

[11] *See* Storms Dec. Ex. B, ICWA Non-Compliance Complaints.
[12] Storms Dec. Ex. C, MIFPA Complaint.
[13] Storms Dec. Ex. D, Orders(s) of Conditional License.

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. Nevertheless, Defendants again rely upon *Ex parte Young*'s dicta in arguing that its test for jurisdiction requires a showing of the official's connection with the enforcement and the threat of commencing proceedings.[14] The Court has already disposed of this issue, finding that Plaintiff have established both the connection and threat elements, and Defendants have produced no genuine issues of material fact that would or should alter the Court's analysis. *Doe*, 165 F. Supp. 3d at 801-03.

1. Defendants both are sufficiently connected to MIFPA's enforcement.

For the *Ex parte Young* exception to Eleventh Amendment immunity to apply, courts often require that plaintiffs demonstrate that the subject government official have "'**some connection** with the enforcement of the act.'" *Doe*, 165 F. Supp. 3d at 801 (quoting *Ex parte Young*, 209 U.S. at 155-60 (emphasis added in *Doe*)). In its prior decision, the Court properly recognized that this connection "to the enforcement of an act may arise out of the general law or be specifically created by the act itself." *Doe*, 165 F. Supp. 3d at 801 (quoting *Ex parte Young*, 209 U.S. at 157) (internal quotes omitted).

[14] Piper & Swanson Mem. at 8-11.

This Court found sufficient connections based upon Swanson's and Piper's enforcement authority under Minnesota Statute § 259.45, subdivision 2, and Piper's enforcement authority under Minnesota Statute § 245A.07, subdivision 3. Defendants do not deny Piper's enforcement authority pursuant to Section 245A.07, subdivision 3, which should be dispositive as to granting summary judgment against Piper.[15] However, Defendants again argue as a matter of statutory construction that neither Swanson nor Piper (even though this argument is irrelevant to Piper since Defendants admit her connection under § 245A.07, subd.3) have enforcement authority under Section 259.45, subdivision 2, which reads, in relevant part:

> 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 or 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.

Defendants' argument is based upon an illogical reading, arguing that the only way to give effect to all of its provisions is to read "toward a client of the agency" as modifying the terms "fraudulently," "illegally," and "in a manner unfairly prejudicial."[16] The proper reading is that the phrase "toward a client of the agency" modifies only "in a manner unfairly prejudicial." As this Court has already recognized, Swanson's and

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[15] *See* Def. Mem. at 10, n.3 ("As discussed above, DHS may enforce MIFPA solely pursuant to its ability to sanction a private child-placing agency under Minn. Stat. § 245A.07 for failure to follow the law."); *see also* Storms Dec. Ex. E, Hopkins LTR Storms (9/16/16) at 6 ("Finally, the information sought by this Interrogatory is only relevant to Plaintiffs' case insofar as it attempts to establish that DHS (and therefore Commissioner Piper) is connected to the enforcement of MIFPA through its authority to affect the license status of an adoption agency that violates applicable law. **But this fact is already admitted.**) (emphasis added).

[16] Def. Mem. at 10.

Piper's enforcement authority applies more broadly to instances where a director or one in control of the agency "act[s] … illegally…" *Doe*, 165 F. Supp. 3d at 802 ("Under this section, either Piper or Swanson could bring an action against an agency director who failed to provide the required MIFPA notice, because failing to do so would be 'act [ing] … illegally' in § 259.45, subdivision 2's terms.").

The Court's reading of "illegally" standing on its own without being modified by the last phrase in the standing is the proper reading that actually gives meaning to all of the provision's terms. Defendants' proposed reading (i.e., acting fraudulently toward a client, illegally toward a client, or in a manner unfairly prejudicial toward a client) is redundant — any and all fraudulent or illegal conduct is also by definition "unfairly prejudicial" toward a client. However, giving individual effect to "fraudulently" or "illegally" is reasonable and gives meaning to all terms. The legislature bestowing power upon the Attorney General or Commissioner to take action for fraud, civil or criminal, or any other illegal act, is appropriate and reflects an appropriate limitation on their powers.

In any event, in an instance where an agency failed to give notice to a tribe (*i.e.*, acted illegally), that illegality would still be directed "toward a client." Indeed, such a failure could subject the Does to a gauntlet of consequences,[17] which could undermine

[17] *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.

the stability of their adoption. Accordingly, even under Defendants' statutory interpretation, their second crack at this argument fails as well.

2. An actual threat of enforcement is not required in the face of mandatory statutory compliance.

Defendants also argue that Swanson and Piper are not proper Defendants because they are not actually threatening or about to commence proceedings.[18] This Court has already recognized that "[t]he Does need not comply with the very law they believe illegal before receiving the chance to adjudicate their claims in federal court." *Doe*, 165 F. Supp. 3d at 799. This Eighth Circuit has long recognized this principle:

> 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); *see also Blatnik Co. v. Ketola*, 587 F.2d 379, 381 (8th Cir. 1978) (plaintiffs had standing for declaratory relief against city officials responsible for enforcing ordinance absent specific threat by officials). Consistent with these principles of Article III standing, lower courts have specifically recognized that *Ex parte Young* jurisdiction does not require an actual threat:

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).

[18] Def. Mem. at 11.

> 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)).

Plaintiffs are aware of the Eighth Circuit's ruling in *281 Care Comm. v. Arneson*, 766 F.3d 774, 797 (8th Cir. 2014), where the Attorney General was dismissed after making "assurances" that it would not prosecute. That opinion is inapposite for several reasons. First, neither Swanson nor Piper has provided affidavit testimony representing that they no longer intend to enforce or exercise their rights associated with Minnesota Statute § 259.45, subdivision 2 or Minnesota Statute § 245A.07, subdivision 3. As set forth above, DHS very much continues to actively enforce compliance with MIFPA throughout the State today. *See also* Minn. Stat. 260.785, subd. 3 (Piper establishes grants to incentivize compliance with MIFPA). Second, *281 Care* did not address a situation where it was found that the injury was capable of repetition yet evading review. Finally, *281 Care* only addressed injunctive relief as to the Attorney General, not a declaratory judgment.

Defendants' argument that *Ex parte Young* is inapplicable is an argument for the proposition that an unconstitutional statute that affects 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. Defendants' argument to the contrary must be rejected again.

B. Plaintiffs have standing to seek a declaration that Minnesota Statute § 260.761, subdivisions 3 and 6 are unconstitutional.

Standing requires three elements: (1) that the plaintiff has 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).

The Court has already ruled that the verified facts set forth in Plaintiffs' Complaint satisfy all three of these requirements. Without disputing any of the material facts set forth by Plaintiffs' Complaint, Defendants essentially ask this Court to reconsider its February 25, 2016 ruling – *as a matter of law* – as to the issues of causation (fairly traceable) and redressability. The Court's prior ruling was and remains correct.

1. Plaintiffs' alleged injuries are fairly traceable to 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,* 135 S.Ct. 2584 (2015)). In the context of "'a pre-enforcement challenge to the constitutionality of a particular statutory provision, … the named defendants [must] possess authority to enforce the complained-of provisions,' because a plaintiff's alleged injury must be 'fairly traceable' to the official sued." *Doe*, 165 F. Supp. 3d at 801 (quotations omitted).

This Court, like the Eighth Circuit before it, correctly recognized that the traceability prong tracks closely with the question of whether a defendant has "some connection" under *Ex parte Young*, 209 U.S. 123, 157 (1908). *Id.* ("This requirement — that a government defendant must be connected to the enforcement of the relevant law — has multiple doctrinal roots."); *see also Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957 (8th Cir. 2015) ("In a case like this one, the questions of Article III jurisdiction and Eleventh Amendment immunity are related."). Indeed, the showing of "some connection" alone is sufficient to satisfy *both* the causation and redressability prongs of Article III standing in this case. *Digital Recognition Network*, 803 F.3d at 960 ("…our court's decision in *Bruning*, 455 F.3d at 864, reasoned that a showing of 'some connection' between a state official and enforcement of a state law for purposes of *Ex*

Parte Young also satisfies the Article III requirements of causation and redressability…").

In its prior ruling, this Court effectively summed up Plaintiffs' alleged constitutional injuries, *id.* at 796, and precisely identified Piper's and Swanson's connection to MIFPA's notice and intervention provisions, which thereby established that Plaintiffs met this element of standing. *Id.* at 801-02. As a matter of statutory construction, Defendants are sufficiently connected to MIFPA's notice and intervention provisions through the enforcement powers afforded them pursuant to Minnesota Statute §§ 259.45 and 245A.07. Defendants do not allege that any material facts have arisen that should alter the Court's analysis on this prong. The materials submitted in opposition to this motion demonstrate how rigorously compliance with MIFPA is enforced.[19] Nevertheless, Defendants assert legal arguments that are misplaced and/or have already been rejected.

Defendants allege that this action is not fairly traceable to Defendants' conduct because "state adoption courts have an independent duty under MIFPA to ensure that no adoption proceeding takes place unless notice has been given…."[20] Defendants' reasoning supporting this argument, *i.e.,* that the state court would still have to uphold the law regarding of a ruling against Defendants, is a misplaced redressability argument.

The language Defendants rely upon from *Simon* is a half-quote.[21] The complete

[19] *See* Storms Dec. Exs. A – D.
[20] Def. Mem. at 14.
[21] *Id.* citing *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976).

quote from *Simon* and its subsequent analysis reflect that the standing concern in that case was about redressability (*i.e.*, would the ruling against a government entity affect the conduct of non-profit hospitals). 426 U.S. at 41-42 ("the 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the Court."). As discussed on the issue of redressability below, because the entry of a declaratory judgment and permanent injunction on this case is "likely" to provide a remedy for the Does – there would not be *speculation* as to the effect of this Court's order as there would have been in *Simon*. *Id.* at 42-43.

Defendants also more generally argue that Plaintiffs alleged injuries are not fairly traceable to Defendants because other parties also impact whether notice is given. This Court has already addressed and rejected this issue. The fact that other parties may also have some connection to these statutes does nothing to undermine standing. *See Doe*, 165 F. Supp. 3d at 803 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (emphasis in original) ("While … it does not suffice if the injury complained of is 'th[e] result [of] the *independent* action of some third party not before the court,' … that does not exclude injury produced by determinative or coercive effect upon the action of someone else."); *see also Doe*, 165 F. Supp. 3d at 799 (citing *Davis v. FEC*, 554 U.S. 724, 733-35 (2008) (injury imminent even though injury may be contingent upon third party's conduct)). Here, the conduct of any contingent third party is coerced by the existence of the illegal MIFPA provisions, and the Defendants' enforcement of those

provisions. Furthermore, even if Defendants can imagine a third party whose actions are not influenced by the law and its enforcement by Defendants, this is not fatal to Plaintiffs' case, because the injury is still imminent.

2. Redressability is easily met.

Again, the Court need look no further than its "some connection" analysis, which alone also definitively answers the question of redressability. *Digital Recognition*, 803 F.3d at 960 (citing *Bruning*, 455 F.3d at 864). To the extent the Court proceeds further, the Does "need demonstrate only that [their] injury is '*likely* to be redressed by a favorable judicial decision.'" *Annex Medical, Inc. v. Burwell*, 769 F.3d 578, 585 (8th Cir. 2014) (citing *Lexmark*, 134 S.Ct. at 1386) (emphasis added). Although Defendants did not specifically raise redressability in their initial motion to dismiss, the Court squarely found that the relief Plaintiffs seek is likely to redress their alleged injuries:

> Piper and Swanson's ability to enforce MIFPA's notice provisions against an adoption agency made it much more likely that the Does' adoption agency might notify the Mille Lacs Band of Baby Doe's adoption proceeding, in turn increasing the likelihood of the Band's intervention. Put another way, prospective relief against Piper and Swanson as of the date the complaint was filed would have made it less likely that the Does' anticipated injuries would come to pass.

Doe, 165 F. Supp. 3d at 803.

Defendants rely on a number of distinguishable cases in support of their argument. For example, in *Digital Recognition*, the court found no connection between the challenged statute, which provided citizens with a private right of enforcement, and the Nebraska Attorney General — that is, again, not the case here. 803 F.3d at 958-59. In *Lujan*, the Court was presented with actual evidence that the subject agencies were

actually denying the Secretary of Interior's authority over them. 504 U.S. 555, 568-69 (1992). *Ashley v. U.S. Dep't of Interior*, 408 F.3d 997 (8th Cir. 2005) is also distinguishable because it is not a case about a declaratory judgment on the constitutionality of a statute, and the Tribe in that case was solely responsible for the harm.

Defendants cite no case where redressability is not met just because a state court judge may also have some connection to the challenged law. Indeed, a state court judge does not *enforce* the law in the same manner the Attorney General or Commissioner would, nor is it the same as a civilian's private right of enforcement. *See, e.g.,* 803 F.3d at 958-59. Moreover, Plaintiffs cannot seek to enjoin a state court judge under Section 1983 precisely because declaratory relief **is** available in this federal action. *See* 42 U.S.C. § 1983. Additionally, the Court has already ruled that the Tribe has no enforcement authority over MIFPA. *Doe v. Piper*, 165 F. Supp. 3d at 804.

Here, Plaintiffs have established the direct coercive power Swanson and Piper would have over child placing agencies if they are not enjoined, and over Plaintiffs as a result. Those agencies play a substantial role in an adoption like Baby Doe's. In a voluntary, private direct adoptive placement under Minnesota Statute § 259.47, notice is only required to be sent to the child's guardian, if one exists, and any parent with notice rights. *See* Minnesota Statute § 259.49. Neither the state government nor any third party is required to be notified in non-Indian adoption proceedings. Thus, the only parties to Baby Doe's adoption were: (1) Jane and John Doe; (2) the Adoptive Parents; and (3) the private child placing agency. *See* Minn. R. Adopt. P. 20.01 (note that a social services

agency is only a party if the child is under guardianship of the Commissioner of Human Services).

It is highly unlikely that a state court judge would require compliance with MIFPA's notice and intervention provisions in a voluntary, private direct adoptive placement, where a Chief Federal District Court Judge has ruled them unconstitutional and no party to the proceedings is likely to argue in favor of notice or intervention. *See, e.g., Utah v. Evans*, 536 U.S. 452, 464 (2002) (standing for declaratory judgment exists where there is "a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered."). The factual record in this case strongly supports such a presumption. There is no statutory mechanism for a Tribe to waive notice and intervention in order to alleviate a state adoption court of its alleged statutory duty to notify an Indian child's tribe; however, Plaintiffs' lawsuit precipitated exactly that relief in this case. Moreover, an order enjoining the Attorney General or Commissioner from proceeding with an action against the private child-placing agency, would make it more likely that such an agency would voluntarily proceed in that manner because there would be no potential for collateral consequences. As this Court has already decided, a declaratory judgment and a permanent injunction are likely to provide the relief Plaintiffs seek.

C. Plaintiffs' claims are not moot.

The Court has already correctly ruled that Plaintiffs' injuries are "capable of repetition, yet evading review[.]" *Doe*, 165 F. Supp. 3d at 806-7 (citations omitted). 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 v. Rogers*, 131 S.Ct. 2507, 2514 (2011). Defendants claim that adoption proceedings are too long in duration to fit within this exception, yet fail to note that a voluntary adoption proceeding is typically concluded within 90 days from filing of the petition, a period of time much shorter than the nine month period of pregnancy at issue in cases such as *Roe v. Wade*. Minn. R. Adopt P. 41.02. As the Court correctly concluded, both prongs are met in this case. *Doe*, 165. Supp. 3d at 807.

Defendants ask the Court to reconsider its ruling by relying upon the Eighth Circuit opinions of *Minnesota Humane Society v. Clark*, 184 F.3d 795 (8th Cir. 1999) and *Neighborhood Transp. Network, Inc. v. Pena*, 42 F.3d 1169, 1173 (8th Cir. 1994). Both of those cases are irrelevant because they both involve instances where the plaintiffs lost their preliminary injunctions, failed to appeal, and allowed the undesirable conduct to commence. In this case, Plaintiffs achieved the desired result through their preliminary injunction proceedings — Jane and John Doe prevented Tribal notice and intervention. *See Young v. Hayes*, 218 F.3d 850, 852 (8th Cir. 2000) (setting forth "voluntary cessation" exception to mootness). The Does did not allow the harm to befall them, and there was nothing to be gained by an appeal of the denial of the preliminary injunction. Furthermore, indefinitely continuing Baby Doe's adoption is entirely impracticable and potentially detrimental, as it would serve only to disrupt the stability Jane and John wanted for their child. Once again, Defendants' mootness argument fails.

D. MIFPA violates Due Process because it interferes with the fundamental right of parenting, and is not narrowly tailored to achieve a compelling state interest.[22]

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." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The United States Supreme Court has long recognized fundamental rights associated with parental decision-making. *See, e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (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."); *see also Meyer v. 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 Court must look at the right to parent in its "comprehensive sense,"

[22] Plaintiffs set out in their Memorandum in Support of Motion for Summary Judgment, in great detail, why MIFPA's notice and intervention provisions violate Due Process and Equal Protection. *See* Pl's Mem. Supp. Mot. Summ. Judg. at 14-41. Plaintiffs will summarize and not restate the entirety of those arguments herein.

Obergefell v. Hodges, 135 S. Ct. at 2602, and ask: why should the right of fit, biological parents to place their children for adoption be excluded from the fundamental right of parenting? *See id* at 2598 ("History and tradition guide and discipline this inquiry but do not set its outer boundaries.") (citations omitted). The ancient history forming a significant part of the basis for Western Law reveals that the fundamental parental rights and practices associated with placing a child with another for care has existed since long before the drafting of the Constitution.[23] The courts that have addressed this issue have recognized the fundamental right of parenting associated with adoptive placement decisions of *biological* parents. *See In re Interests of N.N.E.*, 752 N.W.2d 1, 16 (Iowa 2008); *see also In the Interest of S.N.W.*, 912 So.2d 368, 373, n.4 (Fla. Ct. App. 2005) (citations omitted).

Defendants confuse the issue by relying on cases that stand for the proposition that there is no fundamental right of *adoptive parents to adopt*. *See* Def. Mem. at 25 (citing *Lindley for Lindley v. Sullivan*, 889 F.2d 124, 129-30 (7th Cir. 1989) ("The parents contend that because they are unable to conceive, their right to adopt a child is constitutionally tantamount to their right to have a natural child and is thus fundamental right under the Constitution."); *Lofton v. Sec. of Dep't of Children and Family Servs.*, 358 F.3d 804, 811 (11th Cir. 2004) ("there is no fundamental right to adopt, nor any fundamental right to be adopted."). The *Lofton* Court, in the context of a case involving foster parent rights, specifically highlighted differences between biological and non-biological parents with respect to questions of fundamental, parental right. *Id.* at 811-13.

[23] *See* Pl's Mem. Supp. Mot. Summ. Judg. at 17-20.

Defendants cite no case that directly addresses the *rights of biological parents* associated with adoption. Defendants' analysis only supports Plaintiffs' argument that parenting decisions made by biological parents fundamentally differ from issues arising the adoptive or foster context:

> 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). Adoption statutes were created to provide legal rights and certainty to adoptive parents — they are not the foundation of biological parents' ancient parental right of choosing the best living situation for their child.

Plaintiffs do not dispute that adoption statutes are relatively new. Nor do Plaintiffs claim that all adoption statutes illegally infringe upon parental rights. It is appropriate for states to pass narrowly tailored statutes that pertain to the rights of birth parents, to account for their fundamental rights and also account for the safety of the child to be adopted. For example, a home study to ensure safety is reasonable. In open adoptions, which this is not,[24] it is reasonable to consider factors related to the best possible adoptive placement; however, Minnesota statutes expressly give deference to biological parents in those situations. *See* Minn. Stat. § 259.29, subd. 2 (giving complete deference to biological parents' religious preference and strong deference to placement with relatives

[24] To this extent, Defendants' reference to Minnesota Statute § 259.29, subd. 1, is misplaced because it is not applicable in the same context it is in a direct adoptive placement under Minnesota Statute § 259.47.

or friends).

Unlike Minnesota's more tailored adoption statutes, MIFPA provides none of the same deference towards the decision making of biological parents. MIFPA's requirement of notice and permitting intervention in voluntary adoptions of Indian children is not narrowly tailored to serve a compelling state interest because "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). Defendants do not argue that this statute is narrowly tailored to address the compelling state interest undergirding MIFPA, and have provided no argument or evidence that MIFPA's notice and intervention provisions are narrowly tailored and should apply in the context of voluntary adoptions.

E. MIFPA violates Equal Protection because it discriminates on the basis of race, and is not narrowly tailored to achieve a compelling state interest.

The Equal Protection question overwhelmingly boils down to whether MIFPA discriminates on the basis of race.[25] There is no doubt that tribal Indians are identified as a distinct race in the United States of America. *See, e.g, Village of Freeport v. Barella*, 814 F.3d 594, 602 n.13 (2d Cir. 2016) (citation omitted) (Census recognizes American

[25] The Court could also determine, in the context of an Equal Protection analysis, that MIFPA burdens a fundamental right, but the Court may not even need to venture into an Equal Protection analysis if such conclusion is reached because MIFPA would then violate Due Process. *See* Def. Mem. at 27-28 (quoting *Am. Family Ins. v. City of Minneapolis*, 129 F. Supp. 2d 674, 680 (D. Minn. 2015) ("If, however, a 'State treats similarly-situated persons differently, but without targeting a suspect class or burdening a fundamental right, the State's actions are subject to rational basis review.'").

Indian as race). The *only* way Defendants can avoid a strict scrutiny analysis based upon racial discrimination is through application of the Supreme Court's holding in *Morton v. Mancari*, 417 U.S. 535 (1974).[26] As Plaintiffs have already detailed in their cross-briefing on summary judgment, *Mancari* is inapplicable for several reasons.[27]

Perhaps the clearest reason why *Mancari* does not apply is that the plain language of MIFPA reflects that its definition of an Indian child is based upon race and not political status:

> "Indian child" means 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 (emphasis added). Eligibility for many, if not most, federally recognized Indian tribes requires only a blood quantum for membership.[28] Plaintiffs recognize that the Constitution *presently* governing the Mille Lacs Band of Ojibwe requires parental enrollment; however, that Constitution is also subject to Amendment.[29] Thus, MIFPA discriminates on its face on the basis of race, and allows

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[26] Defendants' reliance upon *Fisher v. Dist. of Sixteenth Jud. Dist. of Montana*, 424 U.S. 382, 390-91 (1976) is wholly misplaced and irrelevant because it involves a dispute arising on an Indian reservation, and where all parties to that litigation reside on the reservation. *See* at 387-88 ("It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves.").
[27] *See* Pl's Mem. Supp. Mot. Summ. Judg. at 29-34.
[28] *See, e.g.,* Otoe-Missouria Tribe of Oklahoma Const. Art. IV § 1(b) ("All persons who are of at least one-eight (1/8) degree Otoe-Missouria Tribal blood"); Hualapai Indian Tribe Const. Art. II § 1 (b) ("All persons one-fourth (1/4) degree or more Hualapai Indian blood"); and Yavapai-Apache Nation Const. Art. II § 1(c) ("All persons who are one fourth (1/4) or more Yavapai-Apache Indian blood."). *See* Storms Dec. Exs. F - H.
[29] ECF Doc. No. 88-1, Winter Dec. at Ex. 4, Rev. Const. and Bylaws of the Minnesota Chippewa Tribe, Minnesota.

the Tribes, and not the State, to control the reach of the discrimination.

MIFPA's definition of "Indian child" differs from the statute at issue in *Mancari*, the applicability of which was expressly limited to Tribal members: "To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe." 417 U.S. at 553 n.24. ICWA similarly restricts its application to tribal members:

> (4) "Indian child" means any unmarried person who is under age eighteen and is 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).

MIFPA's definition of "Indian child" establishes on its face that it discriminates on the basis of race. Therefore, its notice and intervention provisions are subject to strict scrutiny. As discussed above, Defendants cannot meet that demanding standard.

Conclusion

Plaintiffs have once again established that they meet all standing a prudential requirements to proceed to the substantive issues in this case. MIFPA's notice and intervention provisions violate Plaintiffs Due Process rights. Accordingly, the Court should deny Defendants' motion and grant Plaintiffs' cross-motion for summary judgment, declaring MIFPA's notice and intervention provisions unconstitutional and enjoining Defendants from enforcing them in the future.

Respectfully submitted,

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