UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jane Doe and John Doe, individually, and on behalf of Baby Doe, Plaintiffs, v. 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)

Memorandum of Law
in Response to Plaintiffs'
Motion for Preliminary Injunction

PLEASE TAKE NOTICE that Samuel A. Moose, Commissioner of Health & Human Services, Mille Lacs Band of Ojibwe, by and through undersigned counselors, hereby responds to Plaintiffs' Motion for Preliminary Injunctive Relief.

Commissioner Moose opposes Plaintiffs' request for preliminary injunctive relief. Plaintiffs seek to enjoin Commissioner Moose from implementing

or enforcing the notice and intervention provisions of MINN. STAT. § 260.761, a portion of the Minnesota Indian Family Preservation Act (hereinafter "MIFPA"). *Id.*, § 260.751 (3,6). Commissioner Moose opposes the preliminary injunction because Plaintiffs have not demonstrated that they are likely to succeed on the merits and they have not demonstrated that they are likely to suffer irreparable harm. Issuing the requested preliminary injunction would put a much greater burden on Commissioner Moose than not issuing the preliminary injunction would place on Plaintiffs, particularly where Plaintiffs have made no showing of attempting to address the matter in the adoption proceeding itself. Rather than preserving the status-quo, Plaintiffs seek a preliminary injunction to allow them to complete and finalize the state court adoption. The Court should not grant the motion.

FACTUAL ALLEGATIONS

Plaintiff and mother, Jane Doe, is an enrolled member of the Mille Lacs Band of Ojibwe (hereinafter "Band" or "MLB"), *Compl.*, para. 3 at 2, a constituent band of the Minnesota Chippewa Tribe, a federally recognized Indian Tribe. 80 Fed. Reg. 1942-02, 1944 (Jan. 14, 2015). Plaintiff and father, John Doe, is an enrolled member of a different federally recognized Indian Tribe. *Compl.*, paras. 4, 29 at 2, 7. In April 2015, Jane Doe gave birth to plaintiff, Baby Doe, in Minneapolis, MN. *Id.*, para. 28 at 7. Baby Doe is eligible for membership in the Band. *Id.*, para. 5 at 2. None of the plaintiffs are domiciled

within or reside on the Mille Lacs Band Indian Reservation. *Id.*, paras. 3-4 at 2.

In or around April 2015, Jane and John Doe opted to pursue a direct adoptive placement with assistance from a private child placing agency. *Id.*, para. 31 at 7 (citing MINN. STAT. § 259.47 (2015)). On May 8, 2015, Judge Margaret A. Daly, Hennepin County District Court, issued an Ex Parte Pre-Adoptive Custody Order, providing temporary preadoptive custody to prospective adoptive parents subject to a right of reversion to Jane and John Doe "until the consents of the child's adoption become irrevocable." *Mem. in Supp. of Pls.' Mot. for Prelim. Injunctive Relief* (hereinafter "Plaintiffs' Memorandum"), Ex. 1 (citing MINN. STAT. § 259.47(3)). At the June 16, 2015 initial conference, plaintiffs' counsel informed the Court and parties that Judge Daly will convene the consent hearing on July 7, 2015. *See* MINN. STAT. § 259.47(7) (requiring, at a minimum, the presence of the parents executing consents).

State of Minnesota adoption proceedings, including direct adoptive placements, "shall be confidential and shall be held in closed court," but "persons entitled to notice by sections 259.21 to 259.63" are allowed admittance. MINN. STAT. § 259.61; *see also Compl.*, para. 32 at 8. In particular, "notice of the hearing upon a petition to adopt a child must be given to the child's tribe

pursuant to section 260.761, subdivision 3 . . . ," MINN. STAT. § 259.49(1)(c),[1] by "notify[ing] the Indian child's tribal social services agency by registered mail." *Id.*, § 260.761(3); *see also Compl.*, paras. 23, 33 at 4-5, 8. In this matter, Jane and John Doe, the prospective adoptive parents, and/or the private child placing agency would be obligated to provide notice. *Id.* The notice can omit "the identity of the birth parents and child" in the event of a "written objection by the birth parents." MINN. STAT. § 260.761(3); *see also Compl.*, paras. 23, 37 at4-5, 9.

Commissioner Moose exercises administrative oversight of the MLB Social Services Department, and is designated as the individual agent for receipt of notice regarding pending state court child custody proceedings. 4 MLBSA §§ 4, 7; 8 MLBSA § 5(d);[2] *see also Compl.*, para. 9 at 3. Commissioner Moose became informed of the present adoptive proceedings upon service of the Complaint. Plaintiffs have sought to enjoin Commissioner Moose from enforcing the notice provision and corresponding statutory right of intervention; however, Commissioner Moose has not threatened any such action. *Compl.*, paras. 13, 65, 68 at 3, 14 (citing MINN. STAT. § 260.761(3, 6)). Presumably, Hennepin County District Court has neither ordered Plaintiffs to comply with

[1] The preceding provision forms part of the Minnesota adoption statute. MINN. STAT. §§ 259.20-259.89.

[2] The acronym "MLBSA" refers to Mille Lacs Band Statutes Annotated, which are accessible in current form on the Band's website. http://millelacsband.com/tribal-government-home/band-statutesordinances/.

the notice provision nor offered an interpretation of the interplay between the two (2) provisions under review in this Court. *Id.*, para. 41 at 10; *Pls.' Mem.*, Ex. 1.

ARGUMENT

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Generally, when determining whether to issue a preliminary injunction, a court in the Eighth Circuit must consider four factors: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc.,* 640 F.2d 109, 112 (8th Cir. 1981).

When considering a request to enjoin a state statute, however, a court must first find that the movant is likely to succeed on the merits before it looks to the other three factors. *Planned Parenthood v. Rounds*, 530 F.3d 724, 731-732 (8th Cir. 2008).

I. Plaintiffs' motion does not meet the more rigorous "likely to succeed" threshold.

Motions to preliminarily enjoin state statutes must meet a higher standard than other preliminary injunction motions. In the Eighth Circuit,

> a party seeking a preliminary injunction of the implementation of a state statute must demonstrate more than just a "fair chance" that it will succeed on the merits. We characterize this more rigorous standard, drawn from the traditional test's requirement for showing a likelihood of success on the merits, as requiring a showing that the movant "is likely to prevail on the merits."

Planned Parenthood, 530 F.3d at 731-732 (8th Cir. 2008) (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975)). This "more rigorous standard 'reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.'" *Id.* at 732 (quoting *Able v. United States,* 44 F.3d 128, 131 (2d Cir. 1995)). Only when a plaintiff shows a likelihood of proof should the district court "proceed to weight the other *Dataphase* factors." *Id.*

Plaintiffs have not shown that they are likely to prevail on the merits. They have neither shown that their claimed harms – being identified to the Mille Lacs Band or having their choice of adoptive parents disrupted – are likely to result from enforcement of MINN. STAT. § 260.761, subd. 3 and subd. 6. Neither have they shown that they have any fundamental right to avoid the outcomes they fear.

A. Plaintiffs have not shown that their identities are likely to be revealed or that their choice of adoptive couple is likely to be disrupted.

1. Confidentiality

Plaintiffs claim, without evidentiary support, that tribal notification pursuant to MINN. STAT. § 260.761, subd. 3 "will result in word spreading in the tribal offices of their adoption plan." *Pls.' Mem.*, at 8-9. This contention ignores the language of the very statute they seek to invalidate – while it requires notification to the tribe "of the pending proceeding and of the right of intervention under subdivision 6," it goes on to allow parents to object to their identifying information being included in the notice. MINN. STAT. § 260.761, subd. 3. "The agency or notifying party shall include in the notice the identity of the birth parents and child *absent written objection by the parents*." *Id.* (emphasis added). Plaintiffs do not address how their anonymity would be breached through operation of a notice provision that expressly states that their identifying information need not be provided with the notice.

Plaintiffs proceed to claim to that "[t]ribal intervention threatens a profound breach of confidentiality." *Pls.' Mem.*, at 9. Plaintiffs point to 25 U.S.C. § 1912(c) as giving the Band access to a number of documents upon intervention. This particular provision, however, gives parties the right to documents in foster care placement or termination of parental rights proceed-

ings. 25 U.S.C. § 1912(c). The Minnesota Supreme Court, in dicta, has stated that this provision "does not extend that right [to examine reports and other documents] in state court proceedings for preadoptive or adoptive placement." *In re Welfare of R.S.*, 805 N.W.2d 44, 49 (Minn. 2011).

Plaintiffs do not explain why they could not request the adoption court to structure the proceedings in a way that would maintain the confidentiality of the parents and child after intervention. The Rules of Adoption Procedure specify that adoption records and files are not available

> for inspection or copying by any person except: (a) the court and court personnel; (b) the Commissioner of Human Services or the Commissioner's representatives, including the responsible social services agency, local social services agency, or child placing agency; (c) an agency acting under Minnesota Statutes, section 259.47, subdivision 10; or (d) upon an order of the court expressly permitting inspection and copying pursuant to a petition filed as provided in Rule 7.02.

MINN. R. ADOPT. P. 7.01. The Rules further allow the adoption court to issue protective orders "[u]pon motion pursuant to Rule 15, and for good cause shown, the court may at any time issue a protective order regarding any adoption case record or portion of such a record." MINN. R. ADOPT. P. 7.05. The adoption court also has the ability to exclude individuals from particular hearings. MINN. R. ADOPT. P. 8.03. Plaintiffs have not indicated that they have made any attempt to operate within the existing Minnesota Rules of Adoption Procedures to structure the adoption proceeding in a way that pro-

vides for the Band's participation while maintaining the anonymity of the parents as it relates to the Band.

Even applicable Bureau of Indian Affairs guidelines, which provide guidance to state courts on implementation of ICWA provisions, describe the flexibility that adoption courts have in maintaining requested confidentiality. "Execution of consent need not be made in open court where confidentiality is requested or indicated." Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings* E.2 (hereinafter "Guidelines"), 80 Fed. Reg. 10,146, 10,157 (February 25, 2015).[3]

Finally, Plaintiffs have not shown that providing the identifying information would result in Plaintiffs' family or community being made aware of the adoption. Mille Lacs Band Statutes require that

> [a]ll law enforcement and social services records shall be kept confidential and shall not be open to inspection to any but the following: (1) the child; (2) the child's parent, guardian or custodian; (3) the child's counsel or guardian ad litem; (4) law enforcement and social services personnel directly involved in the handling of the case; (5) the Children's Court personnel directly involved in the handling of the case; (6) any other person by order of the Court, having a legitimate interest in the particular case or the work of the court.

[3] Minnesota courts often look to the BIA Guidelines for guidance on implementing ICWA. *In re Welfare of Child of T.T.B. & G.W.*, 724 N.W.2d 300 (Minn. 2006) (relying heavily on the 1979 BIA Guidelines to determine whether there was good cause to deny a motion to transfer to tribal court). *In re Welfare of Children of R.M.B.*, 735 N.W.2d 348, 351 (Minn. Ct. App. 2007) ("Minnesota courts have looked to the guidelines published by the Bureau of Indian Affairs … for guidance in interpreting ICWA.").

8 MLBSA § 3104(b). Plaintiff has provided no evidence or argument to support the conclusion that the Band would be unable to maintain confidentiality to the same degree as the State of Minnesota.

2. Placement Preference

Plaintiffs imply that if the Band were to intervene, it could disrupt the placement with Adoptive Parents, which would cause the biological parents to revoke their consents and be coerced into parenting Baby Doe. *Pls.' Mem.*, at 9. Plaintiffs fail to show how this would occur.

ICWA requires that "[i]n 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." 25 U.S.C. § 1915(a). This provision makes no distinction between cases where an Indian tribe has intervened and cases where it has not – the requirement applies to "any adoptive placement." *Id.* Plaintiffs have not shown how the Band's intervention affects in any way the enforceability of this provision.

Further, Plaintiffs ignore that the parents' preference for Adoptive Parents would constitute good cause to deviate from the preference order. The BIA recently issued updated "Guidelines for State Courts and Agencies in Indian Child Custody Proceedings." *Guidelines,* 80 Fed. Reg. 10,146 (February

25, 2015). The *Guidelines* address the parents' preferences at least twice. They provide:

> (a) In any adoptive placement of an Indian child under State law, preference must be given in descending order, as listed below, to placement of the child with:
>
> (1) A member of the child's extended family;
>
> (2) Other members of the Indian child's tribe; or
>
> (3) Other Indian families, including unwed individuals.
>
> (b) The court should, where appropriate, also consider the preference of the Indian child or parent.

Id. F.2, 80 Fed. Reg. at 10,158. The Guidelines explicitly address the current scenario – when parents wish to depart from the placement preferences. "A determination of good cause to depart from the placement preferences must be based on one or more of the following considerations: (1) The request of the parents, if both parents attest that they have reviewed the placement options that comply with the order of preference." *Id.* F.4, 80 Fed. Reg. at 10,158.

Even if the Band were to intervene under MINN. STAT. § 260.761, subd. 6, and assuming that the Band would argue that another placement ought to be considered, the parents would merely have to review any option offered and indicate to the adoption court that they would like the court to depart from the placement preferences in favor of Adoptive Parents.

B. Plaintiffs have not shown that they have the right to keep their identities confidential or to determine who will adopt their child.

Even if Plaintiffs had shown that their confidentiality was likely to be breached or that their placement choice could be disrupted, they have not shown that they have a fundamental right to either of these things.

Plaintiffs contend that their right to parent their children extends to decisions they make in placing their child for adoption. As a statutory creation, and a relatively new one at that, it is difficult to see how adoption can be considered "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." *Pls.' Mem.*, at 13 (quoting *Washington v. Glucksberg*, 521 U.S. 702, (1997)).

Plaintiffs provide very little support for their contention. Plaintiffs' reliance on a state of Florida appellate decision is misplaced, as the right recognized in that case was created by a state statute. *In the Interest of S.N.W.*, 912 So.2d 368 (Fla. Dist. Ct. App. 2005). The District Court of Appeal of Florida indicated in a footnote that Florida Statute § 63.082, subd. (6)(d) required the court to "give consideration to the rights of the birth parent to determine an appropriate placement for the child." *Id.* at 373 n.4 . That court then went on in the footnote to describe the statute as "an explicit recognition of the parents' constitutional right to the care, custody, and control of their chil-

dren." *Id.* The cases cited by that court for this proposition related to the rights of parents whose rights were being involuntarily terminated, not those who were voluntarily relinquishing their rights to parent entirely.

Plaintiffs also cite to an Iowa Supreme Court case, *In re N.N.E.*, 752 N.W.2d 1 (Iowa 2008), which found a constitutional right to parent in the Iowa Constitution that extended to a parent choosing an adoption placement for her child. *Pls.' Mem.*, at 14-15. In *N.N.E.*, the Iowa Supreme Court invalidated an Iowa statutory placement preference that did not allow for consideration of the parent's choice of placement absent "clear and convincing evidence that placement within the order of preference…would be harmful to the Indian child." *N.N.E.*, 752 N.W.2d at 8. In fact, after invalidating the Iowa provision according to the Iowa Constitution, the Iowa Supreme Court then applied ICWA's placement preferences, with which it found no fault and by which Plaintiffs now claim would violate their rights to parent. *Id.* at 9.

In contrast to these two cases cited by Plaintiffs, one in a footnote interpreting the purpose of a statute and another finding a right to parent in a state constitution, many courts have declined to enlarge the rights of parents to adoption and have recognized the indisputable statutory nature of the proceeding.

The Tennessee Supreme Court addressed the issue in 1999.

> The decision of whether to carry a pregnancy to term implicates privacy rights under the federal and state constitutions. This decision differs fundamentally from the decision of whether to surrender a child for adoption. The right of adoption is statutory. It was created to protect the interests of children whose parents are unable or unwilling to provide for their care and not to advance a procreational right to privacy of the biological parent.

Doe v. Sundquist, 2 S.W.3d 919, 926 (Tenn. 1999)(citations omitted).

Similarly, the Wisconsin Supreme Court determined that "because adoption is a relatively recent statutory development, we cannot conclude that adoption has traditionally been protected by our society." *In the Interest of Angel Lace M.*, 516 N.W.2d 678, 685 (Wis. 1994).

In Indiana, the Indiana Supreme Court long ago recognized the statutory nature of adoption.

> Proceedings for the adoption of the children of other persons are of civil, and not of common, law origin. Hence, in all the States and places in this country in which the common law is in force, such proceedings can only be had under the authority of some express statute, unaided by any common law precedents. Many of the States have no law authorizing proceedings of the kind indicated, and all the statutes enacted by any of the States on the subject are of comparatively recent date.

Krug v. Davis, 87 Ind. 590, 591-92 (Ind. 1882).

In California, the California Supreme Court wrote

> "[t]he adoption of a child was a proceeding unknown to the common law. The transfer of the natural right of the parents to their children was against its policy and repugnant to its principles. It had its origin in the civil law, and exists in the state only by virtue of the statute which, as above stated, expressly prescribes the conditions under which adoption may be legally effected."

In re Cozza, 126 P. 161, 164 (Cal. 1912).

Most notably, the Seventh Circuit declined to extend fundamental rights protection to adoption.

> The adoption process is entirely a creature of state law, and parental rights and expectations involving adoption have historically been governed by legislative enactment. The Illinois courts have recognized that because the common law does not provide for adoption, all rights and duties relating to adoption are statutory. On the other hand, the rights to marry and to procreate biologically are older than any state law, and, for that matter, older than the Constitution or the Bill of Rights. As the Court recognized in *Smith*, the contours of the rights to marry and bear a child 'are ordinarily to be sought, no in state law, but in intrinisic human rights, as they have been understood in "this Nation's history and tradition."' Because of its statutory basis, adoption differs from natural procreation in a most important and striking way. Adoption always involves the weighing and balancing of many competing interests. The rights of a couple to adopt must be reconciled with the state's interest in protecting the existing rights of the natural parents, as well as in securing ultimately the welfare of the child.

Lindley for Lindley v. Sullivan, 889 F.2d 124, 130-31 (7th Cir. 1989)(citations omitted).

Adoption in Minnesota is also a creature of statute. "Historically, common law adoption did not exist and was created through statute. The philosophical views of society are reflected in statutory change. The rights of birth parents, adoptive parents and children have shifted over time as those attitudes have shifted." Wright S. Walling, *Adoption Law in Minnesota: A Historical Perspective*, 33 Wm. Mitchell L. Rev. 871, 883 (2007). The first known adop-

tion statute in Minnesota was enacted in 1876. *Id.* The statute underwent revisions in 1894, 1905 and 1917, when it required "that notice be given to all 'known kindred of the child,'" among others. *Id.* (quoting MINN. STAT. § 7155 (1917)). In this revision, the county attorney was required to represent the child's interests and the "files and records of the court in these proceedings would 'not be open to inspection or copy by other persons than the parties in interest and their attorneys…except upon order of the court expressly permitting the same.'" *Id.* at 887 (quoting MINN. STAT. § 7159 (1917)). In 1951, the statutes utilized the phrase, "best interests of the child," and required the hearings to be confidential and open only to authorized people. *Id.* at 887-888 (quoting MINN. STAT. §§ 259.24(6), 259.31 (1953)).

Further major revisions were made in 1972, 1980, 1983 and 1994. *Id.* at 888-889. Adoption has only existed in Minnesota for approximately 139 years. Hearings have only been required to be confidential for sixty-four (64) of those. And, the provisions under scrutiny here have been in effect for eighteen (18). It is not logical that a process that was structured and defined by statute can now be considered so fundamental as to justify invalidating another part of that same statute. The concept of adoption must be considered in light of all of the provisions, as the Minnesota legislature created all of the provisions in defining the concept.

Importantly, other provisions in the current version of Minnesota's adoption statute do not protect a parent's right to unrestricted confidentiality. The Minnesota Commissioner of Human Services receives a copy of any adoption petition upon its filing, even in a direct placement adoption. MINN. STAT. § 259.53, 1(a)(3). Upon the filing of the postplacement assessment, also required in direct adoptive placements pursuant to MINN. STAT. § 259.47, subd. 3(a)(6), the agency conducting the assessment "shall send a copy of the report to the commissioner at the time it files the report with the court." *Id.*, § 259.53(2). Minnesota's adoption statute further specifies that

> [t]he commissioner of human services shall maintain a permanent record of all adoptions granted in district court in Minnesota regarding children who are…:
>
> (3) adopted after a direct placement approved by the district court under section 259.47.
>
> Each record shall contain identifying information about the child, the birth or legal parents, and adoptive parents, including race where such data is available. The record must also contain: (1) the date the child was legally freed for adoption; (2) the date of the adoptive placement; (3) the name of the placing agency; (4) the county where the adoptive placement occurred; (5) the date that the petition to adopt was filed; (6) the county where the petition to adopt was filed; and (7) the date and county where the adoption decree was granted.

Id. § 259.79(1).

II. Plaintiffs' motion does not demonstrate that Plaintiffs are likely to suffer irreparable harm before a decision on the merits can be reached.

While Plaintiffs are required to show that they are likely to succeed on the merits as a preliminary matter before a preliminary injunction may issue, Plaintiffs must also "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 22 (2008).

> ("[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury"). Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

Id. (citations omitted).

Indeed, the Eighth Circuit in *Planned Parenthood* acknowledged that the irreparable injury factor may itself be considered a threshold factor alongside the merits.

> Our focus on likelihood of success on the merits as a threshold issue should not be construed to lessen the importance of irreparable harm in the *Dataphase* analysis. "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959). Indeed, in some cases, lack of irreparable injury is the factor that should begin and end the *Dataphase* analysis. *See Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297 (8th Cir. 1996). In this respect, where a duly enacted statute is involved, a likelihood of success on the merits

> may be characterized as one, but not the only, threshold showing that must be met by a movant for a preliminary injunction.

Planned Parenthood, 530 F.3d at 732 (parallel citation omitted). "The absence of a finding of irreparable injury is alone sufficient ground for vacating the preliminary injunction." *Dataphase Sys.*, 640 F.2d at 114.

As already argued, Plaintiffs provide little support for the outcomes they speculate will occur. *See supra* Part I. Speculation is insufficient to meet the irreparable injury prong.

> Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction…"[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future harm." Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

Winter, 555 U.S. at 22. Plaintiffs' claimed harm is based on multiple assumptions that are unsupported in law or fact. Plaintiffs assume that they would fail at any attempt in the state court to limit access to the documents by the Band. They assume that if they failed in this endeavor that the Band would act contrary to its own statutes and make public Plaintiffs' identities. They assume that the Band would choose to intervene and that they would disrupt their choice of Adoptive Parents, despite the protections of their pref-

erence under ICWA. The scenario suggested by Plaintiffs, if it can be considered harm, certainly must be considered "some remote future harm." *Id.*

Finally, Plaintiffs do not explain their assertion that they are in an emergency situation. They indicate that they have to execute their consents with the adoption court before July 8, but do not indicate why this is the important deadline for MIFPA compliance. Presumably, they have been in a continual state of non-compliance and will not be able to finalize any adoption until they become compliant. Plaintiffs' selection of July 8 as their deadline for MIFPA compliance is arbitrary.[4]

[4] Additionally, Plaintiffs do not address how their desired injunction will prevent the adoption court from implementing the provisions at issue. They seek to enjoin the named Defendants, none of which would actually enforce the provisions. In fact, it is Plaintiffs that must act next by providing the notice with right of intervention language. MINN. STAT. § 260.761(3). The adoption court would presumably not enter a final adoption decree until the parties are compliant. Plaintiffs do not explain how their requested preliminary injunction would operate to prevent the adoption court, not a defendant to the instant action and not a person bound according to FRCP 65(d)(2), from enforcing the statute. "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction . . . . This immunity applies even when the judge is accused of acting maliciously and corruptly . . . ." *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967). However, "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in [his or] her judicial capacity." *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984); *see also In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 25-26 (1st Cir. 1982); *but see* Federal Courts Improvement Act of 1996, Pub.L. No. 104–317, § 309(c), 110 Stat. 3847, 3853 (codified at 42 U.S.C. § 1983 (2015)) ("[I]n any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.").

In fact, the Minnesota Rules of Adoption Procedure clarify that notice to the tribe must happen immediately upon placement:

> Notice of Motion and Motion for a Preadoptive Custody Order
>
> In a direct placement adoption, whether involving an emergency or nonemergency situation, the petitioner shall file with the court and serve a notice of motion and motion for a preadoptive custody order upon:
>
> (a) the biological mother;
> (b) the biological father if his consent is required;
> (c) any parent whose consent is required; and
> (d) the Indian tribe, if the child is an Indian child.

MINN. R. ADOPT. P. 29.01.

This rule requires that notice be provided to the Band upon the filing of a motion for pre-adoptive custody order. It is unclear from Plaintiffs' document when this motion was filed, but the resulting Ex Parte Pre-Adoptive Custody Order was issued May 8, 2015. *Compl.*, para. 41 at 10. The parties to the adoption proceeding have been out of compliance for a month and a half by the date of the filing of this memorandum. Plaintiffs' selection of the next interaction with the adoption court as the date by which they must be compliant with MIFPA is inaccurate and arbitrary. And, as stated above, the Guidelines make clear that the execution of consents can occur in a closed hearing. *Guidelines* E.2, 80 Fed. Reg. at 10,146.

III. The severity of the impact of the preliminary injunction on the Defendants outweighs the impact of not granting the preliminary injunction on Plaintiffs.

Plaintiffs argue that if the Band were to prevail on the merits of their claims after the issuance of a preliminary injunction, the Band could simply seek to invalidate the finalized adoption. *Pls.' Mem.*, at 28. Aside from the expense of litigating such an action, it is extraordinary to suggest that invalidating a final adoption and disrupting an existing, albeit statutorily-created, parent-child relationship would be a simple undertaking. "The policy against the imposition of judicial restraints prior to an adjudication of the merits becomes more significant when there is reason to believe that the decree will be burdensome." *Winter,* 555 U.S. at 27 (2008)(citing Wright & Miller § 2948.2, at 167-68).

Here, the balance of the harms weighs in favor of not granting the preliminary injunction. Plaintiffs have not shown that they have attempted to invoke a myriad of protections available to them in adoption proceedings to avoid the outcomes asserted. The only likely outcome for Plaintiffs in not obtaining the preliminary injunction is that they will not be able to finalize their adoption until resolution of their claims.

Plaintiffs are asking this court to allow the adoption to proceed and be finalized before the matter can be heard on the merits. Rather than asking

this court to "preserve the relative positions of the parties until a trial on the merits can be held," they are asking the Court to issue a preliminary injunction allowing them to do the opposite. *Camenisch,* 451 U.S. at 395. They are seeking to put the Band in a position to have to disrupt an adoption in order to enforce its rights, an action no government would undertake lightly.

IV. It is not in the public interest to issue the preliminary injunction.

The public interest is best served by continued implementation of the notice and intervention provisions. In this instance, invalidating the notice and intervention provisions would leave the adoption court and the Adoptive Parents without information that the Band may be able to provide with respect to Baby Doe's enrollment and other services that might be offered. Invalidating the provisions would leave Indian parents who do not wish to remain anonymous in voluntary adoption proceedings without the help of their tribes.

CONCLUSION

The Court must balance all of the factors in its determination. *Winter*, 555 U.S. at 32. Even if the Court were to decide that the parents had a fundamental right to an adoption proceeding contrary to a long-standing state statute creating the adoption proceeding, they have not shown the statute operates in a manner that would deprive them of such rights. Plaintiffs have

not provided evidence that they could not avoid their claimed harm (losing their anonymity and losing their choice of adoptive couple) by other means. In fact, Minnesota adoption statutes and rules, ICWA and the newly released Guidelines all provide ways for Plaintiffs to secure their anonymity and adoption placement preference. The extraordinary act of preliminarily enjoining two long-standing provisions of state law is not justified when so many options are available and left untried by Plaintiffs.

Dated: June 23, 2015

MLB Office of the Solicitor General

s/*Barbara E. Cole*

Barbara E. Cole, Minn. Bar No. 0350278
Att'y Registration No. 350278
barbara.cole@millelacsband.com
Todd R. Matha, Minn. Bar No. 0391968
Att'y Registration No. 391968
todd.matha@millelacsband.com

43408 Oodena Drive
Onamia, MN 56359-2236
Tel. No.: 320.532.4733
Fax No.: 320.532.7836