UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Plaintiffs,

vs.

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

Defendants.

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

STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION AND PROCEDURAL BACKGROUND

Plaintiffs' preliminary injunction motion should be denied for several reasons. It requests a preliminary injunction against the wrong parties, and seeks to enjoin conduct that would not alleviate the harm Plaintiffs wish to avoid. Their motion also interferes with an ongoing Hennepin County adoption proceeding in violation of the well-established *Younger* abstention doctrine. In addition, the motion fails on the merits because, among other things, it relies on an unsupportable legal theory.

ARGUMENT

I. PLAINTIFFS' MOTION SHOULD BE DENIED DUE TO A NUMBER OF PROCEDURAL INFIRMITIES.

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

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

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

Second, "the plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *see also Longshoremen's Union*, 347 U.S. at 224 ("Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and

abstract an inquiry for the proper exercise of the judicial function."). Here, based on Plaintiffs' allegations, Minn. Stat. § 260.761 has not been violated, and it is unclear whether the Hennepin County District Court would even allow Baby Doe's adoption to proceed in the absence of notice to the Band. Plaintiffs' motion should therefore be denied because it is based on speculative facts.

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

Plaintiffs' allegations are insufficient to bring the Attorney General or the Commissioner within this Court's jurisdiction, and therefore no injunction can be entered against them. "The Eleventh Amendment establishes a general prohibition of suits in federal court by a citizen of a state against his state or an officer or agency of that state." *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984)). In *Ex parte Young*, the Supreme Court established a very limited exception to this rule allowing suit against a government official for prospective injunctive relief when two conditions are met: (1) the official "must have some connection with the enforcement" of the challenged statute; and (2) the official must "threaten and [be] about to commence proceedings" to enforce the statute. 209 U.S. 123, 156-57 (1908). "General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law." *Minn. Citizens Concerned for Life, Inc., v. Swanson*, Civ. No. 10-2938, 2011 WL 797462, at *3 (D. Minn. Mar. 1, 2011).

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

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

In addition, there is no reason the constitutionality of the Minnesota Indian Family Preservation Act's ("MIFPA") tribal notice and intervention provisions should be resolved in a freestanding federal proceeding when there is already a state adoption proceeding underway in which all relevant issues can be decided. *See* Doc. No. 1 at p. 10 ¶ 41. The abstention doctrine announced in *Younger v. Harris*, 410 U.S. 37 (1971), "espouse[s] a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics*

Committee v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982). "Minimal respect for the state processes . . . precludes any *presumption* that the state courts will not safeguard federal constitutional rights." *Id*. *Younger* abstention is required when: (1) there is an ongoing state adjudicative proceeding; (2) the proceeding implicates important state interests; and (3) there is an adequate opportunity in the state proceeding to raise constitutional challenges. *Id*. at 432.

The pending state-court adoption proceeding implicates Minnesota's important interest in "providing for participation by Indian tribes in the placement of their children." 1985 Minn. Laws ch. 111, title, at 306; *see also Essling v. Markman*, 335 N.W.2d 237, 240 (Minn. 1983) (stating that courts may rely on the title of a statute as an indicator of legislative intent). And the Hennepin County District Court has the authority to hear and decide constitutional challenges to state statutes. Indeed, "when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy." *Night Clubs, Inc. v. City of Fort Smith, Ark.*, 163 F.3d 475, 481 (8th Cir. 1998) (citing *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987)). *Younger* therefore requires this Court to abstain.

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

Finally, the speculative enforcement action Plaintiffs believe might be taken against the Agency is not the cause of the harm they wish to avert. The real cause of this alleged harm is the giving of notice to the Band. But the harm Plaintiffs want to avoid

will not be "redressed by a favorable judicial decision" on their motion. *Lexmark*, 134 S. Ct. at 1386. In essence, Plaintiffs are attempting to solicit an advisory opinion from this Court stating that the non-party child placement agency need not comply with Minn. Stat. § 260.761, subd. 3. Plaintiffs' motion must be denied and their Complaint dismissed.

II. IN THE ALTERNATIVE, PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION UNDER THE *DATAPHASE* FACTORS.

When deciding a motion for preliminary injunction, a court must consider: (1) the moving party's probability of success on the merits; (2) the threat of irreparable harm to the moving party; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) the public interest in the issuance of the injunction. *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). However, in a case such as this, Plaintiffs bear the heavy burden of establishing as a threshold matter that they are likely to succeed on the merits. The Eighth Circuit reasoned in *Planned Parenthood of Minn., N.D., S.D. v. Rounds* as follows:

> [A] 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.' If the party with the burden of proof makes a threshold showing that *it is likely to prevail on the merits, the district court should then proceed to weigh the other Dataphase factors*.

530 F.3d 724, 731 (8th Cir. 2008) (emphasis added; citation omitted). Plaintiffs have not and cannot meet their burden.

A. Plaintiffs Are Not Likely To Succeed On The Merits Of Their Claims That MIFPA's Tribal Notice Provision Is Unconstitutional.

Plaintiffs cannot show that their substantive due process claim or their equal protection claim is likely to succeed on the merits.

1. Plaintiffs' equal protection claim is unlikely to succeed on the merits because Baby Doe's race does not render him an "Indian child" under Minn. Stat. § 260.755, subd. 8, and MIFPA's tribal notice and intervention provisions satisfy rational basis review.

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

In *Morton*, the Court held that a federal Bureau of Indian Affairs hiring preference favoring Indian applicants was, like Minn. Stat. § 260.761, applied to Indians "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities," and on that basis held that the hiring practice did not violate the Fifth Amendment. 417 U.S. at 554. In so doing, the Supreme Court reasoned that the hiring preference was "not even a 'racial' preference," but instead was "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the

needs of its constituent groups."[1] *Id.* at 553. Like *Morton*, the MIFPA is designed to "further the cause of Indian self-government" by requiring notice to tribes of the adoption of either its members or those eligible for membership. *Id.* at 553-54.

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

Plaintiffs' equal protection claim is without merit.

2. Plaintiffs' substantive due process claim is unlikely to succeed on the merits because MIFPA's tribal notice and intervention provisions satisfy rational basis review.

"'Substantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires [the Supreme Court] to exercise the utmost care whenever [it is] are asked to break new ground in this field.'"

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

Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (citations omitted). In this case, Plaintiffs seek to avoid state interference that might "coerce[] [them] into parenting Baby Doe." Doc. No. 9 at p. 9. However, there is no authority for the proposition that this is a right that is subject to strict scrutiny review.[2] *See, e.g., Reno v. Flores*, 507 U.S. 292, 303 (1993) (holding that the absence of a recognized fundamental right is evidence that no such right exists). The statute therefore is subject to rational basis review. *Glucksberg*, 521 U.S. at 728.

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

As in *Morton*, MIFPA is supported by a clear rational basis, *i.e.*, "further[ing] the cause of Indian self-government," by requiring notice to tribes of the adoption of either

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

its members or those eligible for membership. 417 U.S. at 553-54. Plaintiffs are therefore unlikely to succeed on the merits of their substantive due process claim.

B. The Balance Of Harms And Public Interest.

As discussed in Section I, *supra*, Plaintiffs have not alleged any "concrete and particularized 'injury in fact'" that either the Attorney General or Commissioner could remedy, speculating at most that the Commissioner may take negative licensing action against Plaintiffs' adoption placement agency rather than Plaintiffs themselves. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *see also* Doc. No. 1, Verified Compl. at ¶¶ 7-8 (alleging the Commissioner and Attorney General are responsible for "investigating, disciplining, enforcing, and/or affecting the license status of *any 'private child-placing agency'* which fails to comply with the terms of Minn. Stat. § 260.761, subd. 3) (emphasis added).

The public interest is also served by enforcing a statute that was passed by the State's duly-elected legislative representatives.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' motion for a preliminary injunction.

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