UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

C.E.S., V.A.S., and H.M.S., Minors, by their Legal Guardians Timothy P. Donn and Anne L. Donn,

Plaintiffs,

v.

HON. LARRY J. NELSON, in his official capacity as a Leelanau County Family Court Judge, MATTHEW FEIL, in his official capacity as Tribal Prosecutor for the Grand Traverse of Ottawa and Chippewa Indians, and HELEN COOK, in her official capacity as Supervisor of Anishinaabek Family Services for the Grand Traverse Band of Ottawa and Chippewa Indians,

Defendants.

Case No. 1:15-cv-00982
Hon. JANET T. NEFF

TRIBAL DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Introduction

Plaintiffs ask this Court to enjoin two tribal officials from participating in a Tribal Court proceeding regarding Indian children, over which the Tribal Court exercises jurisdiction. Even if these tribal defendants were not immune to this suit, plaintiffs have failed to carry their burden under the four-part test for a preliminary injunction.

Two of the named Defendants, Matthew Feil and Helen Cook, are employed officials of the Grand Traverse Band of Ottawa and Chippewa Indians, a federally-acknowledged and sovereign Indian tribe. They are sued in their official employment capacities – Defendant Feil as the Tribal Prosecutor and Defendant Cook as the Supervisor of the Anishinaabek Family Service tribal agency. These "tribal defendants" are responsible for advocating on behalf of the Grand Traverse

Band in the Tribal and state courts and representing its interests for the well-being of its minor members under the Tribe's Constitution,[1] its Children's Code,[2] and the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901, *et seq*. Both tribal defendants submit affidavits in support of this Response.[3]

On January 21, 2014, the Grand Traverse Band Tribal Court granted a motion of Defendant Feil, filed in his capacity as Tribal prosecutor, and accepted the transfer of jurisdiction over competing petitions to adopt three minor Indian children, the nominal plaintiffs in the instant case.[4] However, the Leelanau County Family Court denied the corresponding motion, and the Tribe appealed to the Michigan Court of Appeals.[5] The Michigan Court of Appeals reversed the Leelanau County Family Court's order and remanded the case.[6] Following remand, the Tribe, through Defendant Feil, renewed its request to transfer jurisdiction, and the minor children's foster parents filed a motion to deny transfer and stay the case.[7] The Leelanau County Family Court denied the foster parents' motion on transfer, but granted their motion to stay the case.[8] The Michigan Court of Appeals, in lieu of leave to appeal, vacated the stay and remanded for transfer.[9] After the foster parents exhausted their appeals, on September 21, 2015, the state court judge (defendant Hon. Larry J. Nelson) "ORDERED that the case be transferred to the tribal court of the Grand Traverse Band of

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[1] The Constitution of the Grand Traverse Band of Ottawa and Chippewa Indians, Article V, §§ 1 and 6, < http://www.narf.org/nill/codes/grand_traverse//constitution.pdf> (accessed Oct. 13, 2015).
[2] Title 10, Grand Traverse Band Code ("GTBC"), Chapter 1, <http://www.narf.org/nill/codes/grand_traverse//Title_10.pdf> (accessed Oct. 13, 2015). (For the Court's convenience, the Children's Code is attached to the Affidavit of Matthew J. Feil, **Exhibit 1.**)
[3] **Exhibit 1**, Aff. of Matthew J. Feil and **Exhibit 2**, Aff. of Helen Cook.
[4] **Exhibit 3.**
[5] **Exhibit 1**, pp. 3-4, ¶¶5(q)-(v).
[6] Id., p. 4, ¶ 5(w).
[7] Id., p. 4, ¶¶ 5(aa)-(bb).
[8] Id., p. 4, ¶ 5(cc).
[9] Id., p. 5, ¶5(ee).

Ottawa and Chippewa Indians, …"[10] On October 1, 2015, Tribal Court Judge Gregory Blanche reiterated the Band's acceptance of jurisdiction over the proceedings by signing the acceptance.[11] The Grand Traverse Band Tribal Court currently has jurisdiction over the minor children, the nominal plaintiffs in this federal court civil action.

Argument

I. This Court Lacks Jurisdiction Over The Tribal Defendants.

A. Tribal Sovereign Immunity Bars Claims Against Tribal Defendants.

Plaintiffs seek to enjoin the exercise of what they characterize as the Band's "unconstitutional, statutory right to transfer proceedings" to Tribal Court, as though the state statute is the source of the Band's authority to exercise its jurisdiction over Indian children.[12] Candidly, they state that their "chief goal of this lawsuit is to prevent the transfer of plaintiffs' adoption proceedings to tribal court."[13] Neither tribal defendant has authority to effectuate such a transfer. That determination is solely the province of the Tribal Court. The stated purpose of this civil action is to impede a fundamental aspect of the Grand Traverse Band's sovereignty – its ability and inherent right to "provide for the welfare, care and protection of the children … within [its] jurisdiction."[14] Contrary to plaintiffs' contention, a "statutory right" under state law is not at issue in this litigation. The Indian Tribe's inherent self-governmental authority to make decisions in the

[10] **Exhibit 4**; with respect to W.D. Mich. LCivR 5.7(d)(vii)(B), although this order may have been attached as Exhibit A to counsel's affidavit (Doc #4, PageID #44), that copy had not yet been signed by the Tribal Court Judge.
[11] **Exhibit 4.**
[12] Complaint, ¶¶ 7-8 at p. 2 (Doc #1, PageID #2).
[13] Complaint, ¶ 3 at p. 2 (Doc #1, PageID #2); it should be noted that neither tribal defendant has the ability to reverse the Tribal Court's acceptance of the transfer, which has already occurred. See generally **Exhibits 1, 2**, **3** and **4**.
[14] 10 GTBC § 101(B)(1), attached to **Exhibit 1**.

best interest of tribal children is at the foundation of tribal jurisdiction,[15] not delegation of authority from the state's legislature. *See, e.g. Kobogum v. Jackson Iron Co.,* 43 N.W. 602, 606 (Mich. 1889); *Fisher v. Dist. Ct. of Sixteenth Jud. Dist. of Mont.,* 424 U.S. 382, 386-387 (1976).

This Court lacks jurisdiction over the named tribal defendants because they are cloaked with the sovereign immunity of the Grand Traverse Band. An Indian tribe is immune from suit unless it has waived immunity or unless Congress has "unequivocally" waived it in an exercise of plenary authority.[16] A tribal official in turn is entitled to the same immunity when acting in a representative capacity for the Tribe and within the scope of the official's duties.[17] The affidavits filed by the tribal defendants in support of this Response establish that their actions in this matter are within each defendant's official duties in a representative capacity for the Tribe.[18] A suit against a government's actors in their official capacities is the equivalent to a suit against a government and entitles the actors to the government's immunity.[19] Due to their sovereign status, suits against tribes or tribal officials in their official capacity "are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress."[20]

Grand Traverse Band law specifically extends tribal sovereign immunity to the tribal defendants, providing that "Officers of the Court shall be immune from civil suit arising from any

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[15] Tribal sovereign immunity is a "necessary corollary to Indian sovereignty and self-governance." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. ___, 134 S. Ct. 2024, 2030 (2014) (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 890 (1986).

[16] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. ___, 134 S. Ct. at 2031-32 (2014); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

[17] *Cameron v. Bay Mills Indian Cmty.*, 843 F. Supp. 334, 336 (W.D. Mich. 1994); *Linneen v. Gila River Indian Cmty.*, 276 F. 3d 489, 492 (9th Cir. 2002); *Fletcher v. United States*, 116 F. 3d 1315, 1324 (10th Cir. 1997).

[18] See **Exhibits 1** and **2**.

[19] *Cf.* 13 Wright, Miller, Cooper and Freer, *Federal Practice and Procedure* §3524.2, at pp. 273-75 (3rd ed. 2008): "The [Eleventh] Amendment will bar a suit if the state is the real party in interest, even if it is not a named party."

[20] *Dry v. United States*, 235 F.3d 1249, 1253 (10th Cir. 2000) (citations omitted).

act or omission occurring pursuant to or in execution of their official duties as officers of the Court."[21] Each of the tribal defendants is described in the Children's Code as an officer of the court clothed with the Tribe's immunity.[22]

The Supreme Court's goal of protecting the dignity of the states from suit in federal courts[23] applies equally to Indian Tribes. Last year, the United States Supreme Court affirmed a Sixth Circuit decision holding that claims against an Indian Tribe are barred by sovereign immunity.[24] Because tribal sovereign immunity extends to tribal officials, absent a waiver, the only possible exception is an *Ex parte Young*-type claim against tribal officials in their individual capacities. Based on the Supreme Court's dicta in *Bay Mills*, it appears that an *Ex parte Young* exception to tribal official immunity would have to be based on violations of state law.[25] On October 5, 2015 the Supreme Court denied certiorari in the State of Oklahoma's appeal from the Tenth Circuit's decision in *Oklahoma v. Hobia*, 775 F.3d 1204 (10th Cir. 2014)[26]. Consistent with the Supreme Court's analysis in *Bay Mills*, the Tenth Circuit ruled that claims against tribal officials were barred by tribal immunity because the claims did not involve alleged violations of state law.[27] Here, neither tribal defendant is alleged to have violated state law.

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[21] 10 GTBC § 108(e)(3).
[22] 10 GTBC § 108(e)(4)-(7).
[23] 13 Wright, Miller, Cooper and Freer, *supra*, §3524.2, at p. 287; *see also Fed. Mar. Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743, 759-60 (2002); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 282 (1997).
[24] *Michigan v. Bay Mills Indian Comty.*, 572 U.S.at ___, 134 S. Ct. at 2031-32, affirming *Bay Mills Indian Comty. v. Michigan*, 695 F.3d 406 (6th Cir. 2012).
Id., at p. 606.
[26] *Oklahoma v. Hobia*, ___ S. Ct. ___, 2015 WL 1331689.
[27] *Oklahoma v. Hobia*, 775 F.3d 1204, 1213 (10th Cir. 2014).

B. Tribal Defendants Enjoy Absolute Immunity To 42 U.S.C. § 1983 Claims.

In addition to tribal sovereign immunity, both Defendant Feil and Defendant Cook are absolutely immune to plaintiffs' claims asserted under 42 U.S.C. § 1983. Prosecutors acting as advocates are entitled to absolute immunity.[28] Whether a prosecutor is acting as an advocate is determined by a "functional" approach, which can be satisfied by the "acts undertaken by a prosecutor in preparation for the initiation of judicial proceedings or for trial, and which occur in the course of his roles as an advocate for the State."[29] These are precisely the duties undertaken by Defendant Feil as presenting officer for the Tribe in judicial proceedings, as set forth in his affidavit, and which duties plaintiffs seek to enjoin.

The Sixth Circuit has held that social workers are absolutely immune for actions undertaken as part of their official duties within the judicial process.[30] Immunity has been extended to social workers for initiating proceedings, conducting investigations and making recommendations, which are the same functions undertaken by Defendant Cook, as set forth in her affidavit. To the extent plaintiffs seek to enjoin Defendant Cook from "enforc[ing]" [Complaint ¶ 7] the transfer order at issue (a duty and authority she does not possess), that act also is intimately related to the judicial process and as such is a further basis for her absolute immunity.[31]

In the case before this Court, the plaintiffs complain of nothing against either tribal defendant except that each performed duties according to their roles as prosecutor and social worker

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[28] *Kalina v Fletcher*, 522 U.S. 118, 125-26 (1997). *See also, Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (stating that absolute immunity applied to a prosecutor while "initiating a prosecution and in presenting the State's case."); *Holloway v. Brush*, 220 F.3d 767, 774-75 (6th Cir. 2000).

[29] *Kalina v. Fletcher, supra*, 522 U.S. at 126, quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993); *Holloway v. Brus*h, *supra*, 220 F.3d 767, at 774-75.

[30] *Holloway v. Brush*, *supra*, 220 F.3d. at 774.

[31] *Rippy ex rel. Rippy v. Hathaway*, 270 F. 3d. 416, 422 (6th Cir. 2001) ("[S]ocial workers who initiate proceedings related to the welfare of a child are entitled to absolute immunity while functioning in roles intimately associated with the judicial phase of proceedings.")(citation omitted); **Exhibit 2**, pp.1-2,¶¶ 2-4.

for the Grand Traverse Band. In these capacities, both tribal defendants are entitled to absolute common law immunity.

"[C]ommon law immunity … constitutes a right not to be sued. It is not merely an immunity from *liability*. It is an immunity from *suit*."[32] This immunity is absolute, rather than the qualified immunity generally applicable in § 1983 cases. "[A]bsolute immunity is available to only a limited number of actors—judges, … prosecutors, …"[33] Both tribal defendants are entitled to this absolute immunity - not just the Grand Traverse Band's prosecutor[34] but also Defendant Cook as supervisor of Anishinaabek Family Service (and interim department manager[35]) because she assists closely in the prosecutor's functions as presenting officer under the Children's Code.[36]

C. Tribal Defendants Do Not Act "Under Color of State Law".

Moreover, by its terms § 1983 does not apply to the tribal defendants, because 42 U.S.C. § 1983 authorizes a cause of action against "[a] person who, under color of any statute, ordinance, regulation, custom or usage, *of any State or Territory or the District of Columbia* . . ." (emphasis added). Again, both Defendant Feil and Defendant Cook are, in all instances, acting appropriately under the authority imparted to them by the law of the Grand Traverse Band of Ottawa Indians.[37]

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[32] 13D Wright, Miller, Cooper and Freer §3573.3, at p. 605 (emphasis in original).
[33] *Id*., at p. 606.
[34] The revised Children's Code of the Grand Traverse Band of Ottawa and Chippewa Indians defines "Presenting Officer" as: "The Tribal prosecuting attorney or an assistant Tribal prosecuting attorney who represents the Tribe in all matters related to this Code and the Indian Child Welfare Act 25 U.S.C. § 1901 et seq.; or one charged by the Chief Judge of Tribal Court to present cases involving abuse and neglect to the GTB Children's Court for adjudication and to represent the interests of GTB in court cases involving GTB member families. 10 GTBC § 102(kk).
[35] **Exhibit 2**, p. 1, ¶ 1.
[36] Anishinaabek Family Service is the Tribal agency responsible for administering the protective services provided for in this Children's Code, including but not limited to, investigating reports of abuse or neglect, planning and implementing reunification efforts, placement, monitoring family progress, permanency planning and serving as the representative services agency of the GTB government in all actions involving member children within other jurisdictions. 10 GTBC § 102(c).
[37] **Exhibit 1**, pp.1 and 6, ¶¶ 3 and 8; **Exhibit 2**, p. 2, ¶¶ 3-4.

The tribal defendants at all times act under color of tribal law. Neither of them enforces or implements state law; and neither of them acts or purports to act under the authority of state law.[38]

D. The *Ex parte Young* Exception Is Not Applicable To Tribal Defendants.

Plaintiffs contend this Court may exercise jurisdiction under the "doctrine established in *Ex parte Young*, 209 U.S. 123 (1908)."[39] More than 100 years later, this doctrine remains vital.[40] However, over the years the Supreme Court has clarified the standards for invoking *Ex parte Young*, summarized by the as six important qualifications.[41] But only one needs to be considered in this case:

> First, the state officer sued must have a *duty* to enforce the challenged state law. The Court was clear on this requirement in Ex parte Young itself, in which it said:
>
> > In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party. [209 U.S. at 157]
>
> 13 Wright, Miller, Cooper and Freer, § 3524.3, at p. 381

This condition was emphasized repeatedly by the Supreme Court in the *Ex parte Young* opinion and holding:

> The Attorney General of the State of Minnesota, under his common law power and the state statutes, has the general authority imposed upon him of enforcing constitutional statutes of the State, and is a proper party defendant to a suit brought to prevent the enforcement of a State statute on the ground of its unconstitutionality. [209 U.S. at 125]
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>
> While making a state officer who has no connection with the enforcement of an act

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[38] *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir.2006) ("A § 1983 action is unavailable for persons alleging deprivation of constitutional rights under color of tribal law, as opposed to state law."); *Polk Cnty. v. Dodson*, 454 U.S. 312, 315 (1981) (observing that acting under color of state law is "a jurisdictional requisite for a § 1983 action").

[39] Complaint, ¶ 10 at p. 3 (Doc #1, PageID #3).

[40] *See generally*, 13 Wright, Miller, Cooper and Freer, *supra*, § 3524.3.

[41] *Id.*, p. 380, § 3524.3.

> alleged to be unconstitutional a party defendant is merely making him a party as a representative of the State, and thereby amounts to making the State a party within the prohibition of the Eleventh Amendment, individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence an action, either civil or criminal, to enforce an unconstitutional state statute, may be enjoined from so doing by a Federal court. [209 U.S. at 125]
>
> ***
>
> It would seem to be clear that the Attorney General, under his power existing at common law, and by virtue of these various statutes, had a general duty imposed upon him which includes the right and the power to enforce the statutes of the State, including, of course, the act in question, if it were constitutional. His power, by virtue of his office, sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States Circuit Court. [209 U.S. at 161]

Under no stretch of the imagination could it be concluded that the tribal defendants – employees of an Indian Tribe – have a duty to enforce the state statute challenged in this civil action. Their duties are to implement tribal law, as set forth in their affidavits. Neither of them enforces or implements state law; and neither of them acts or purports to act under the authority of state law. Contrary to plaintiffs' assertion in paragraph 10 of the complaint, the doctrine established in *Ex parte Young*, does not provide a basis for this Court to exercise jurisdiction over the tribal defendants. As in *Ex parte Young* the correct party for a suit to challenge the constitutionality of a state statute is the state's Attorney General. Indeed, plaintiffs are required to provide notice to and serve pleadings upon the Michigan Attorney General because this civil action challenges the constitutionality of a state statute.[42] As of when this response was filed on October 13, 2015, the docket does not reflect compliance with the mandate of that federal rule.

[42] FED.R.CIV.P. 5.1(a)(1)(B) and 5.1(a)(2)

E. Plaintiffs Lack Standing To Assert Claims On Behalf Of Foster Children.

Paragraph 5 of the Complaint asserts that plaintiffs Timothy P. Donn and Anne L. Donn "are the legal guardians" of the minor children, verified under penalty of perjury.[43] But it simply is not true that the Donns are the legal guardians. The state court's three "Order[s] Placing Child After Consent" entered on December 13, 2013, and included with the plaintiffs' *ex parte* pleadings, only confirm placement in the Donns' home and authorize them to consent to certain services. The minor children are wards of the Grand Traverse Band Tribal Court, just as they had been wards of the state court before the transfer was effectuated on October 1, 2015.[44] As wards of the state, the Michigan Department of Human Services was considered the legal guardian of the minor children and the Superintendent of the Michigan Children's Institute ("MCI") is designated by operation of Michigan law to represent the state as the legal guardian for minor children committed to MCI for adoption.[45] This has not been disturbed by transfer, and the same guardian *ad litem* continues to represent the plaintiffs' interests in Tribal Court as in state court.[46] The Donns are the foster parents and as foster parents they have no standing to assert rights on behalf of their foster children.[47] Neither the guardian designated under Michigan law nor the guardian *ad lite*m appointed by either the state court or the Tribal Court has asserted claims on plaintiffs' behalf.

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[43] Complaint, ¶5 at p. 2 (Doc #1, PageID #2).
[44] **Exhibit 1**, Affidavit of Matthew Feil, p. 5,¶.
[45] MCL 400.203 *et seq*; *see* MCL 400.203(i).
[46] **Exhibit 5**, Leelanau County Family Court, Addendum to Order After Posttermination Review/Permanency Planning Hearing, appointing Cheryl Gore Follette as guardian *ad litem* (April 9, 2015); **Exhibit 6**, Grand Traverse Band Tribal Court, Order Appointing Attorney/Guardian *Ad Litem*, Oct. 1, 2015.
[47] Nothing in the "foster parent's bill of rights law", MCL 722.958a, purports to provide representational standing to foster parents.

Michigan law is clear. Constitutional protections generally are personal and cannot be asserted vicariously, but rather only "'at the instance of one whose own protection was infringed.'"[48] Thus, a plaintiff must assert her/his own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties.[49] While the children's lawyer-guardian *ad litem* may have standing to present these constitutional arguments on behalf of the minor children, the Donns do not.

Standing under federal law as a child's representative is "ordinarily governed by state law, and standing is limited to that authorized by the formal representative."[50] With respect to the matter before this Court, the record[51] reflects that Michigan law and tribal law grants such representational standing to the guardian *ad litem*, not the foster parents who filed this suit.

II. A Preliminary Injunction Is Not Justified Under The Four-Part Test.

Tribal sovereign immunity and absolute immunity for prosecutors and social workers to 42 U.S.C. § 1983 claims preclude this Court from exercising jurisdiction to consider the claims asserted in plaintiffs' complaint claims, and there is no applicable exception under *Ex parte Young*. But even if the tribal defendants were not immune, and the minor children were appropriately represented by their guardian, an examination of applicable law shows that plaintiffs have failed to meet their burden justifying preliminary injunctive relief.

The Supreme Court has delineated a four-part test for the determination of whether a preliminary injunction should be issued under FED. R. CIV. P. 65.[52] The court must consider 1)

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[48] *People v. Smith*, 420 Mich. 1, 17, 360 N.W.2d 841 (1984), quoting *Simmons v. United States*, 390 U.S. 377, 389 (1968).
[49] *Fieger v. Comm'r of Ins*, 174 Mich. App. 467, 471, 437 N.W.2d 271 (1988), citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975) and *Tileston v Ullman*, 318 U.S. 44 (1943).
[50] 13A Wright, Miller and Cooper, §3531.9.1., at p. 681.
[51] *See* **Exhibits 4** and **5**.
[52] *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

whether the movant has a strong likelihood of success on the merits; 2) whether the movant would suffer irreparable injury without the injunction; 3) whether the issuance of the injunction would cause substantial harm to others (whether the balance of equities tips in the movant's favor); and 4) whether the public interest would be served by the issuance of the injunction.[53] These factors should be balanced, and a district court must "make specific findings concerning each of the four factors, unless fewer are dispositive of the issue."[54] The factors balance against the issuance of a preliminary injunction.

A. Plaintiffs Have No Likelihood Of Success On The Merits.

(1) Tribal Defendants are Immune and Plaintiffs Lack Standing

As discussed above, plaintiffs' suit against the tribal defendants is barred by tribal sovereign immunity and by the absolute immunity that cloaks prosecutors and social workers undertaking duties that are part of the judicial process. Additionally, the tribal defendants do not act under color of state law for §1983 purposes and have no duty to enforce the state statute at issue. As the tribal defendants' immunity to this suit is a clear jurisdictional bar, plaintiffs' likelihood of success on the merits is extremely low. Furthermore, as also discussed above, the plaintiffs lack standing to maintain this suit

(2) Preliminary Injunction Motion Is Based On Misrepresentations.

If this Court were to reach the merits of this case even after an analysis of immunity and standing, plaintiffs' *ex parte* pleadings misrepresented matters of fact, omitted contrary controlling law and failed to present arguments why well-established existing law should be changed. Plaintiffs' attorney swore in his affidavit that "notice would likely result in causing the tribal

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[53] *Id.*

[54] *Performance Unlimited, Inc., v. Questar Publishers, Inc.*, 52 F. 3d 1373, 1381 (6th Cir. 1995); *In re DeLorean Motor Co.*, 755 F. 2d 1223, 1228 (6th Cir. 1985).

defendants to expedite and even complete the removal" of the plaintiffs from the Donns' home based on "[his] own experience serving as an attorney in the underlying adoption proceedings."[55] In fact, although Attorney Fiddler entered a motion for *pro hac vice* admission in the plaintiffs' adoption case, Defendant Feil has never had a direct conversation with him nor any other personal interaction.[56] There simply is no basis for Attorney Fiddler to assert personal knowledge of how Defendant Feil or Defendant Cook would have responded. In fact, had Attorney Fiddler (or the Donns' local counsel) contacted either Defendant Feil or Defendant Cook prior to seeking an *ex parte* Temporary Restraining Order and bringing this motion,[57] he would have been informed that there is no pending action for the plaintiffs' "imminent" removal from the Donns' home.

Plaintiffs' *ex parte* pleadings also demonstrate a fundamental misunderstanding of the effect of Grand Traverse Band law in requesting the temporary restraining order and preliminary injunction. Plaintiffs' attorney swore to this Court that the plaintiffs "face imminent hearings in tribal court to strip them . . . of custody and guardianship, as GTB Code mandates a hearing *no later* than 15 days of the order of transfer,"[58] and that plaintiffs are compromised because the Tribal Court has authority "to accept and schedule the case for hearing on an ex parte basis."[59]

The assertion that Grand Traverse Band law requires a hearing to decide an adoption petition within 15 days of transfer, and that one may be scheduled at any time without notice, is simply not true. The correct subsection cited in the affidavit reads in its entirety:

> The Tribal Court has sole discretion to accept or deny transfers of jurisdiction from State courts. *A Judge may accept transfer of jurisdiction without hearing when*

[55] Aff. of Mark D. Fiddler p. 2, ¶ 2 (Doc #4, PageID #44).
[56] **Exhibit 1**, p. 6, ¶ 9.
[57] Local Rule 7.1 states: "With respect to all motions, the moving party shall ascertain whether the motion will be opposed." Although this Court's 2014 Guidelines provide an exception ("or, [state] why contacting the opposing counsel would be inappropriate under the circumstances."), the facts belie the assertions offered to justify the temporary restraining order.
[58] Aff. of Mark D. Fiddler, p. 2, ¶5 (Doc. #4, PageID #44) (emphasis in original).
[59] Aff. of Mark D. Fiddler, p. 2, ¶4 (Doc. #4, PageID #44).

> *exigent circumstances are presented in an ex parte motion* and indicate that the best interest of the child and GTB will be clearly served best by immediate transfer of jurisdiction. Subsequent to a hearing in State Court on a valid Motion to Transfer Jurisdiction resulting in a ruling in favor of transfer, the Court must make and [sic] immediate determination regarding acceptance or denial of jurisdiction and notify the State Court in writing of its determination.
> 10 GTBC § 105(h) (emphasis added).

To imply that the Tribal Court's authority to hear *ex parte* motions in exigent circumstances equates to scheduling an *ex parte* hearing to rule on the competing adoption petitions is, it's best, disingenuous. The Tribal Court accepted transfer of this case in January of 2014 and has been waiting to proceed until after exhaustion of the foster parents' objection and appeals filed with the state courts.[60] Neither tribal defendant has ever asserted that there are exigent reasons to have the plaintiffs removed from the Donns' home on an *ex parte* basis.

The 15-day time frame referenced in plaintiffs' *ex parte* pleadings portrayed a sense of urgency when in fact there is none. The appropriate subsection reads in its entirety: "Hearings upon Transfer. Upon Transfer of Jurisdiction from state court and entry of Children's Court Order of Acceptance, the Court shall proceed in accordance with provisions of this Code within fifteen (15) days."[61] This provision simply does not "mandate" a hearing within 15 days; it establishes a time frame for the Tribal Court and its personnel to follow. In this case a status conference was scheduled within the 15-day time period.[62] Many courts have similar housekeeping provisions. This does not mean that the Tribal Court routinely receives and disposes of entire adoption cases within fifteen days.

[60] **Exhibit 1**, pp. 3-5, ¶¶ 5(s)-(ee).
[61] 10 GTBC § 106(j).
[62] **Exhibit 4**; *see also* **Exhibit 8**.

Next, plaintiffs rely on outdated and superseded federal guidelines.[63] The verified complaint contains lengthy references to the 1979 Department of the Interior-Bureau of Indian Affairs ("DOI-BIA") ICWA guidelines for state courts while completely failing to disclose that these were replaced by revised DOI-BIA guidelines effective February 25 of this year.[64] The 1979 guidelines central to plaintiffs' arguments for why the Michigan statute is unconstitutional are no longer in effect. The Court should be fully informed that the 2015 changes to the guidelines directly address the plaintiffs' central contentions. The changes adopted in 2015 indicate that the relatively new state law protecting Indian families[65] was developed on more modern notions of federal Indian law, which the new federal guidelines now reflect as well. The correct guidelines, while not binding on this Court, have been given great weight as the administrative interpretation of the ICWA.[66]

The most egregious example is plaintiffs' reliance on the 1979 commentary to Guideline C.1.[67] Portions of this outdated comment are cited pertaining to the timeliness of transfer requests, implying that the Tribe (through the named tribal defendants) is "gaming" the system in a manner that justifies good cause not to transfer. The complaint fails to inform this Court that the guidelines, and their accompanying comments, have changed so materially that the cited prior guideline effectively have been rewritten to have the completely opposite effect.

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[63] Complaint, ¶¶ 15-17 at pp. 4-5 (Doc #1, PageID #4-5); Pls.' Brief Supporting Ex Parte Motion for Temporary Restraining Order and Motion for Preliminary Injunction, p. 2, fn.1 (Doc #3, PageID #23).

[64] Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Welfare Proceedings*, 80 Fed. Reg. 10146-10159 (February 25, 2015) < http://www.gpo.gov/fdsys/pkg/FR-2015-02-25/html/2015-03925.htm> (accessed Oct. 13, 2015).

[65] Michigan Indian Family Preservation Act, MCL 712B.1, *et seq*. ("MIFPA").

[66] *United States v. American Trucking Associations*, 310 U. S. 534, 549 (1940); *Mitchell v. Burgess*, 239 F.2d 484, 487 (8th Cir. 1956); *Oglala Sioux Tribe & Rosebud Sioux Tribe v. Hunnik*, ___ F. 3d ___, 2015 WL 1466067 (W.D. S.D.).

[67] Complaint, ¶ 16 at p. 4 (Doc#1, PageID#4).

Revised Guideline C.1 actually emphasizes that transfer to a tribal court may be requested "at each distinct Indian child custody proceeding."[68] The current guideline continues:

> (b) The right to request a transfer occurs with each proceeding. For example, a parent may request a transfer to tribal court during the first proceeding for foster placement and/or at a proceeding to determine whether to continue foster placement, and/or at a later proceeding, for example at a hearing for termination of parental rights.
>
> (c) The right to request a transfer is available at any stage of an Indian child custody proceeding, including during any period of emergency removal.
> 80 Fed. Reg. at 10156 §§ C.1(b) and (c).

Not only does the Tribe, through the named tribal defendants, have the right to make multiple requests to transfer this case, but a court may not insert a subjective analysis of good cause, nor may it consider the stage of the case:

> In determining whether good cause exists, *the court may not consider whether the case is at an advanced stage* or whether transfer would result in a change in the placement of the child because the Act created concurrent, but presumptively, tribal jurisdiction over proceedings involving children not residing or domiciled on the reservation, and seeks to protect, not only the rights of the Indian child as an Indian, but the rights of Indian communities and tribes in retaining Indian children.
> 80 Fed. Reg. at 10156 § C.3(c) (emphasis added).

Plaintiffs' claims that the transfer provisions of state law are unconstitutional for alleged inconsistency with ICWA must fail, as the two statutes are consistent.

(3) MCL 712B.7(3)-(5) Does Not Violate The Due Process Clause.

Plaintiffs assert that the MCL 712B.7(3)-(5) violates both procedural and substantive due process because it does not consider the best interests of the child in the jurisdictional step of determining whether good cause exists not to transfer a case to tribal court.[69] These constitutional arguments are without merit. No court has ever recognized a substantive liberty interest in foster parents or children so as to require a "best interests" finding prior to a determination of court

[68] 80 Fed. Reg. at 10156 § C.1(a).
[69] Complaint, pp. 9-13, ¶¶ 55-80.

jurisdiction. The creation of such a right would be a significant expansion of substantive due process rights that would disrupt the application of MIFPA, ICWA, and the entire system of foster care and child custody statutes. Furthermore, the Michigan Court of Appeals already has determined in this case that there is no such liberty interest under the Michigan due process clause, which offers much of the same protections as the federal Constitution.[70]

The MIFPA transfer provisions center on the concurrent and presumptive tribal jurisdiction over cases involving Indian children within the state of Michigan. The resolution of a dispute over MCL 712.B.7(3)-(5) would not make any substantive determination about the placement of children, only a determination about which court will make the placement decision. And it should be noted that, although constitutional law does not require a best interest analysis when conducting jurisdictional transfers, the Grand Traverse Band has elected to do so when deciding whether to accept jurisdiction.[71]

Only one state appellate court has addressed the question of whether a state law modeled after ICWA must consider the child's participation or best interests as a factor transferring a case to tribal court. The Iowa Court of Appeals found that "[a] child's liberty interest in familial association is protected by the Due Process Clause, and then concluded the transfer provision of the Iowa Indian Child Welfare Act violate the Iowa due process clause because it does not allow children to object or participate in the consideration of transferring a child welfare case to tribal court.[72] However, this case's finding of a child's liberty interest as good cause to prohibit transfer to tribal court has not been cited either in any subsequent decision of the Iowa Court of Appeals, or by any other court, and is not binding here. Furthermore, the cases relied upon by the Iowa Court of

[70] *In re Spears*, ___ N.W.2d ___, 2015 WL 1258102 (Mich. Ct. App. March 19, 2015), *leave to appeal denied*, 864 N.W.2d 140 (Mich. 2015); Mich. Const. of 1963, §17.
[71] 10 GTBC § 105(g).
[72] *In re J.L.*, 779 N.W.2d 481, 489 (Iowa Ct. App. 2009).

Appeals refer only to a *parent's* liberty interest in the care and custody of their children, and does not create substantive rights for minors.[73]

(4) MCL 712B.7(3)-(5) Does Not Violate The Equal Protection Clause.

Plaintiffs next assert that MCL 712B.7(3)-(5) deprives them of equal protection under the Fourteenth Amendment because it discriminates on the basis of race, national origin, or ethnicity. Their contention is that, in this case, the statute's transfer provisions "do not relate to parents or children domiciled on Indian land" and so "do not relate to Indian self-governance…"[74] But this ignores a basic doctrine: laws that provide a preference for American Indians are constitutional because of the political, rather than racial, classification of individuals enrolled in American Indian tribes. Federal legislation, such as the ICWA, that "relates to Indian land, tribal status, self-government or culture,"[75] satisfies the rational relation test required by *Morton v. Mancari*, 417 U.S. 535 (1974).[76] The ICWA is a law "rooted in the unique status of Indians,"[77] and as such "is not based on impermissible racial classifications."[78] It is well established that classifications based on a person's status as Native American are not classifications based on race for purposes of the equal protection clause.[79] The federal ICWA statute upon which MIFPA's protections for Indian

[73] *See F.K. v. Iowa Dist. Court for Polk County*, 630 N.W. 2d 801, 808 (Iowa 2001) (citing *Lehr v. Robertson*, 463 U.S. 248, 256 (1983) (referencing the reciprocal interest as between a parent's rights and a parent's duties, not as between a parent and child); *Moore v. City of East Cleveland*, 431 U.S. 494, 503-05 (1977) (protecting the "sanctity of the family," not a child's liberty interest in familial association)); *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (referring to a "vital interest" that a child has in the parent-child relationship, but not a liberty interest).
[74] Complaint, ¶76 at p. 12 (Doc #1, PageID #12).
[75] *Williams v. Babbit*, 115 F.3d 657 (9th Cir. 1997).
[76] *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974).
[77] *United States v. Antelope*, 430 U.S. 641, 646 (1977).
[78] *Id*.
[79] See, e.g., *Fisher v. Dist. Ct. of Sixteenth Jud. Dist. of Mont.*, 424 U.S. 382, 390-91 (1976) (rejecting equal protection challenge to statute vesting tribal court with exclusive jurisdiction over custody proceeding regarding Indian child because such statute did "not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.").

children are based has been upheld repeatedly against equal protection challenges consistent with the ruling in *Morton*.[80]

There have been no judicial decisions striking down state laws modeled after ICWA on the basis of equal protection violations. The ICWA itself contemplates that states would enact Indian child welfare laws with more stringent projections:

> In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.
> 25 U.S.C. § 1921.

MIFPA complies with the rational basis test required under *Morton* and sets a higher standard of protection as allowed by ICWA. Consistent with the sovereignty of Indian Tribes implemented by the federal ICWA, MIFPA recognizes that tribal interests must be protected in proceedings involving Indian children, regardless of their domicile, because of the vital resource that children are to the continuing existence and integrity of tribal nations, including the future self-governance of the tribe.[81] The state statute is constitutional, and the plaintiffs' pleadings demonstrate no likelihood of success in light of the extensive body of federal law.

B. Plaintiffs Would Not Suffer Irreparable Injury In The Absence Of Injunction.

The next factor for the Court to is whether plaintiffs will suffer irreparable injury without the injunction. They will not. At this stage in the proceedings, the case is in the jurisdiction of the

[80] See *In re Appeal in Pima County Juvenile Action No. S-903*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981); *In re Armell*, 550 N.E.2d 1060, 1068 (Ill. Ct. App. 1990); *In re Adoption of Child of Indian Heritage*, 529 A.2d 1009, 1010 (N.J. Super. Ct. App. Div. 1987); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *In re Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980).

[81] 25 U.S.C. § 1901(3); see, e.g. *Cherokee Nation v. Nomura*, 160 P.3d 967, 977 (Okl. 2007) ("The Oklahoma Act supports the Federal Act by recognizing the Tribe's interests must be protected in adoption proceedings involving Indian children. The Oklahoma Act is thus consistent with the Federal Act and its purposes as recognized by the United States Supreme Court.").

Grand Traverse Band Tribal Court.[82] There is no imminent threat to any change in the position of the children, as the Grand Traverse Band Tribal Court will proceed with due process for all interested parties. Neither of the tribal defendants has taken any action to disturb placement of the children, nor would they do so absent exigent circumstances.[83]

The Tribal defendants are not aware of any exigent circumstances that would justify ex parte or immediate action, and so they have no plans to seek immediate modification to the *status quo*. As noted above, the transfer provisions of MIFPA at issue in this case are jurisdictional in nature. The outcome of the jurisdictional determination will have no bearing on the substantive outcome of who will ultimately adopt the children. Rather, as a matter of federal Indian law, after a case is transferred to tribal court, a tribal judge determines the outcome of the case based on the relevant tribal code.[84] Defendant Cook does not, as the plaintiffs assert, have any final authority to accept a transfer to Tribal Court.[85] This decision is within the sole purview of the assigned judge in the Grand Traverse Band Tribal Court: "Acceptance of Transfer [sic] of jurisdiction to tribal court in ICWA cases shall be at the sole discretion of a Tribal Court Judge."[86]

The final decision on adoption also lies with the Tribal Court.[87] The absence of the injunction, therefore, will not modify at all the transfer of the plaintiffs' adoption case, nor will it affect the ability of the Tribal Court to make an ultimate disposition of the Donns' petition for adoption. The Children's Code requires a tribal judge to find that the adoption is in the child's best

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[82] **Exhibit 4**.
[83] **Exhibit 1**, p. 6, ¶ 8; **Exhibit 2**, p. 2, ¶¶ 2-7.
[84] *See e.g.*, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53 (1989) ("We have been asked to decide the legal question of who should make the custody determination concerning these children – not what the outcome of that determination should be. The law places that decision in the hands of the Choctaw tribal court.").
[85] Complaint, ¶7 at p. 2 (Doc #1, PageID #2); **Exhibit 2**, p. 2, ¶ 5.
[86] 10 GTBC § 104(b); 10 GTBC § 105(h).
[87] 10 GTBC § 129(l).

interest, after the completion of a home study by an adoption worker.[88] In making this decision, the tribal judge must "protect the rights and the welfare of Indian children, natural parents, and adoptive parents."[89]

C. Issuance of Requested Injunction Would Cause Substantial Harm to Others.

The third factor in considering whether to issue a preliminary injunction is if it would cause substantial harm to others. The *ex parte* restraining order and the requested preliminary injunction against the Tribal officials (who explicitly are designated officers of the Tribal Court by tribal law[90]) effectively prevent the Tribe from executing its own laws and fulfilling the obligations prescribed in both the Children's Code and the ICWA. The injunction, if entered, would operate to prohibit Defendant Feil and Defendant Cook from following any forthcoming orders of the Grand Traverse Band Tribal Court – even an order by that tribunal to continue oversight of the minor children to aid it in its ultimate decision regarding adoption. Indeed, the tribal defendants were under order to attend a status conference on October 13,[91] but sought adjournment, as they are careful to avoid any action that may be construed by this Court as a violation of its current order.[92] Because these tribal defendants are uniquely situated as officers of the Tribal Court, granting the requested injunction would render the Tribal Court of a sovereign powerless to exercise its judicial functions – or, according to the Donns' interpretation of the current order, from exercising any jurisdictional oversight over its members.[93] This result indeed harms the Tribe as a sovereign entity by crippling its essential government functions with respect to its inherent powers to provide for the welfare of its children.

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[88] 10 GTBC 129(k).
[89] 10 GTBC 129(a).
[90] 10 GTBC § 104(e)
[91] **Exhibit 4**.
[92] **Exhibit 1**, p. 4, ¶5(ll), *see* **Exhibit 8**.
[93] **Exhibit 2**, p. 3, ¶ 9.

It must also be recalled that the minor children are the nominal plaintiffs, not the foster parents. What if unforeseen circumstances arose threatening the well-being of the children? At some point in the future the requested preliminary injunction might have an adverse impact upon the children (plaintiffs herein) because the social worker(s) and prosecutor responsible for their well-being "are ENJOINED from proceeding with any process to remove and/or removing the minor children…"[94] Defendant Cook and her department would be unable to act – and as the case is now transferred to Tribal Court, the Grand Traverse Band department has exclusive jurisdiction. If entered, an injunction could pose a serious threat of harm to the plaintiffs themselves if circumstances were suddenly to change.

In addition, the injunctions, if issued under the same terms as the temporary restraining order, would significantly undermine the traditional functions of human services departments and offices in many jurisdictions, not just at the Grand Traverse Band. The idea of enjoining a social worker from "proceeding with any process to remove" minor children could be exploited by those in positions of control over minors or other legally incompetent people. While there is no suggestion here that the plaintiffs are currently being mistreated by the Donns, in another case an injunction could be used to prevent a social services worker from even approaching a situation where a child or vulnerable adult was being mistreated.

D. Public Interest Would Not Be Served by Issuance Of The Injunction.

Finally, this Court must consider whether the public interest would be served by the issuance of the injunction. The federal government adopted (and continues to implement) the ICWA in fulfillment of its trust responsibility toward Indian Tribes. The ICWA pronounces a policy of protecting the best interests of Indian children, of promoting the stability and security of

[94] Temporary Restraining Order, at p. 2 (Doc #8, PageID #58). *See, e.g.,* **Exhibit 2** (the Donns interpret this Court's temporary restraining order as basis for denying social workers contact with the children).

Indian tribes and families, and of providing assistance to tribes to operate child and family services programs.[95] This is the relevant public interest. An injunction that operates to constrain the Tribal Court from exercising its exclusive jurisdiction over Indian children would controvert this federal policy and infringe tribal sovereignty. It is in the public interest to enhance the paramount federal policy of tribal self-government, *see Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1253-55 (10th Cir. 2001). Therefore the public interest would not be served by issuing an injunction that prevents the Grand Traverse Band's Tribal Court from exercising jurisdiction over the minor children.

Conclusion

Plaintiffs' Verified Complaint for Declaratory and Injunctive Relief should be dismissed in its entirety because the Grand Traverse Band's sovereign immunity shields the tribal defendants sued in their official capacities. The claims asserted against the Indian Tribe's prosecutor and social worker/tribal agency supervisor in their official capacities infringe the Grand Traverse Band's sovereignty. The tribal defendants are not state actors with a duty to enforce the contested state statute and are not the appropriate parties to defend it. They do not act under color of state law, but are operating under the independent laws of the Grand Traverse Band of Ottawa and Chippewa Indians.

If the plaintiffs' complaint is not dismissed after consideration of the immunity and standing issues, then at the very least the motion for a preliminary injunction should be denied and the temporary restraining order extinguished. The foregoing discussion demonstrates that the plaintiffs have no likelihood of success on the merits because of extensive federal court rulings that ICWA and ICWA-like state statutes are constitutional. This Response also shows that while the absence of

[95] 25 U.S.C. § 1902.

an injunction presents no harm or even change of circumstances to the plaintiffs, an injunction harms the ability of the Grand Traverse Band of Ottawa and Chippewa Indians to conduct its governmental functions as a sovereign. Federal and state policies strongly respect and support the development of tribal courts and their jurisdiction over Indian children; the temporary restraining order and requested preliminary injunction violates this policy, adversely affecting tribal sovereignty.

This Response brief demonstrates that the tribal defendants are cloaked with immunity to this suit and also that plaintiffs have not sustained their burden required to justify preliminary injunctive relief. For these reasons, the tribal defendants respectfully request this Honorable Court to deny the motion for a preliminary injunction.

This Response should not be construed as the tribal defendants' responsive pleading to the complaint, which will be filed within the time period prescribed in the rules.

Respectfully submitted:

Date: October 13, 2015

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