

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

C.E.S., V.A.S., and H.M.S., Minors, by)	
Next Friends Timothy P. Donn and)	
Anne L. Donn,)	
)	
Plaintiffs,)	Case No. 1:15-cv-982
)	
)	HON. Janet T. Neff
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 Band)	
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.)	

**REPLY BRIEF IN SUPPORT OF MOTION FOR APPOINTMENT
OF NEXT FRIENDS ON BEHALF OF MINOR PLAINTIFFS**

Plaintiffs submit the following reply brief pursuant to W.D. Mich. LCivR.7.3(c).

Plaintiffs sought leave to file this memorandum to address three brief points.

First, the crux of the Tribal Defendants' argument is that the Children's ability to assert their own constitutional rights should be wholly governed by the Tribe. The Tribal Defendants acknowledge that the Tribal-appointed guardian ad litem, Cheryl Gore, could only bring this

constitutional litigation on behalf of the Children **if approved by the Tribe** – the very entity¹ the Children allege is violating their constitutional rights. The conflict between the Children and the Tribe could not be any clearer, as they are adverse in this litigation. *Developmental Disabilities Advocacy Center, Inc. v. Melton*, 689 F.2d 281, 285 (1st Cir. 1982) (court should appoint next friend or guardian ad litem “when it appears that the minor’s general representative has interests which may conflict with those of the person he is supposed to represent.”) (quotation omitted). Moreover, the record before the state court and this Court unequivocally demonstrate that the Children’s wish is to be adopted by Timothy and Anne Donn, yet Ms. Gore has made no effort to interject herself into these proceedings in an effort to advocate for the Children’s constitutional rights or desired outcome. Nor could Ms. Gore, because she is powerless and without standing absent approval by the Tribe. The Tribal Defendants’ argument that the Tribe or Ms. Gore could ever serve as the Children’s representative in this matter strains credulity.

Second, an appointed next friend is supposed to advocate on behalf of the minor, not take into account the political concerns of a **defendant** to the litigation. A proposed next friend who is hesitant to be adverse to an opposing party cannot serve as next friend. The only evidence in the record, statements (not challenged as false) made to the State of Michigan and Plaintiffs’ counsel,² definitively establish that the Children wish to be adopted by the Donns. That evidence has not been contradicted nor challenged by the Tribal Defendants, nor do the Tribal Defendants dare suggest that an evidentiary hearing is necessary to hear from the Children themselves. The Tribal Defendants know the answer – the Children want to be adopted by the Donns. The Tribal

¹ Bringing suit against tribal officials in their official capacities is effectively bringing suit against the tribe itself, though the *Ex parte Young*, 209 U.S. 123 (1908) doctrine exists to provide an exception to sovereign immunity in cases (like this one) seeking injunctive relief. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, n.10 (1989) (citations omitted).

² See Brief in Support of Motion for Appointment of Next Friends on Behalf of Minor Plaintiffs at 2, 3, and 5.

Defendants admit that victory in this case would advance that interest.³ Also, the close relationship between the Children and the Donns creates support for their appointment, not conflict. *See Sam M. ex rel. Elliot v. Carcieri*, 608 F.3d 77, 92 (1st Cir. 2010) (“...the more attenuated the relationship between the proposed Next Friend and the real party in interest, the less likely the Next Friend can know the party’s best interests.”) (citation omitted). Accordingly, the Tribal Defendants fail to demonstrate any conflict of interest between the Donns and the Children that would preclude the Donns from serving as next friends.

Finally, the Tribal Defendants’ attempt at labeling this case as staged litigation is disingenuous. The Children and the Donns are real people stuck in Kafka-esque legal proceedings, who desperately need their constitutional remedy from this Court to maintain their loving home, which the unconstitutional provisions of the Michigan Indian Adoption Statute have jeopardized. The fact that the undersigned counsel believes Plaintiffs’ claims are meritorious only better allows counsel to fulfill their ethically-obligated duty to provide zealous representation. *See Mich. R. Prof. Con. (Preamble)* (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”). The Tribal Defendants’ assertion that the First Circuit’s opinion in *Sam M.* bears upon whether an attorney’s bias affects the appointment of next friend is a blatant misrepresentation of that opinion.⁴ That portion of the *Sam M.* opinion expresses disapproval of proposed **next friends** (not their lawyers), who have attenuated relationships to the party and seek only to serve political motives. Again, the Donns obviously have a close relationship with the Children, and all the evidence demonstrates that their motives are personal and not political. Moreover, the Tribal Defendants cite no case law

³ Tribal Defendants’ Response at 6.

⁴ Tribal Defendants’ Response at 8 (citing *Sam M.*, 608 F.3d at 92; *Ad Hoc Committee of Concerned Teachers*, 873 F.2d 25, 31 (2d Cir. 1989)).

stating that the proposed next friends cannot hire experienced attorneys who believe in their case. Accordingly, the undersigned counsel's participation in other litigation should have no bearing upon the Donns appointment as next friends in this matter, other than to demonstrate that the Children have sought and retained counsel who are knowledgeable, experienced, and believe that the Children's constitutional claims have merit.

Respectfully submitted,

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