UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ERIN FISHER; RICHARD FISHER; AND ERIN FISHER,
AS NEXT FRIEND AND NATURAL MOTHER
OF MINOR CHILD, A.C. PLAINTIFFS

v. No. 2:19cv2034

JASON COOK; TARA KATUK MAC LEAN SWEENEY,
IN HER OFFICIAL CAPACITY AS ACTING ASSISTANT
SECRETARY-INDIAN AFFAIRS; BUREAU OF INDIAN
AFFAIRS; DAVID BERNHARDT, IN HIS OFFICIAL
CAPACITY AS ACTING SECRETARY OF THE INTERIOR;
AND CHEROKEE NATION, A FEDERALLY-RECOGNIZED
INDIAN TRIBE DEFENDANTS

CHEROKEE NATION'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Defendant Cherokee Nation responds in opposition[1] to Plaintiffs' Motion for Temporary Restraining Order (Doc. 22) because this Court lacks jurisdiction to grant such relief. Further, Plaintiffs fail to discharge the heavy burden of establishing that any of the four prerequisites for extraordinary relief are satisfied.

I. INTRODUCTION

Plaintiffs seek a Temporary Restraining Order "stating that the ICWA does not require visitation to commence in such a private family dispute." (Doc. 22, ¶ 5). In the alternative, Plaintiffs seek a Temporary Restraining Order "preventing Cook from seeking visitation until this Court determines the applicability or constitutionality of ICWA." *Id.*

[1] The within Response is filed without waivers, and the Cherokee Nation reserves the right to raise both personal and subject matter jurisdictional challenges. Defendant Cherokee Nation does not concede that this Court has jurisdiction over it or this matter and does not waive any defenses provided by Rule 12(b)(1), 12(b)(6), or on any other basis.

As Cherokee Nation will more comprehensively detail in their response to the Complaint due on May 6, Plaintiffs fail to meet the threshold standing requirement of a case or controversy, and subject matter jurisdiction does not exist in the absence of constitutional standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992). Plaintiffs fail to present a federal question because the Indian Child Welfare Act ("ICWA") does not provide a cause of action or remedy for the alleged particularized injury.

Next, even if Plaintiffs prevail on jurisdictional challenges, the remedy of a Temporary Restraining Order is foreclosed by the Anti-Injunction Act ("AIA") 28 U.S.C. § 2283 and Congress has not authorized federal courts to grant an injunction to stay proceedings in a State court where ongoing child custody proceedings are at issue. In addition, the *Younger* abstention doctrine and overriding principles of federalism, comity and the balance of relationships between state and federal courts, should guide the Court to allow the ongoing Arkansas state court case to proceed uninterrupted.

Finally, Plaintiffs have failed to meet their burden on each of the requisite four factors in determining whether the extraordinary relief requested in their Motion for a Temporary Restraining Order (Doc. 22) is warranted.

II. BACKGROUND

Plaintiffs conflate two Arkansas state court cases into one "family dispute." The two independent and distinct cases are: (1) an ongoing divorce modification case in the Domestic Relations Division of Sebastian County Circuit Court, *Fisher v. Cook*, Case No. DR-2011-446, and (2) a hypothetical future adoption case that might be filed by Plaintiffs at a later date in the Probate Division of Sebastian County Circuit Court.

This Court lacks subject matter jurisdiction as to both Arkansas state court cases. The divorce modification case is exclusively a matter of Arkansas state law that presents no issues of federal law. Plaintiffs' hypothetical future adoption case is not justiciable because there is no actual case or controversy.

The only proceeding in which the ICWA would apply is in an adoption case. Plaintiff Richard Fisher is not currently seeking adoption. He initiated a step-parent adoption petition in Arkansas state court in 2018 and voluntarily dismissed that case by nonsuit at the very early stages of the adoption proceeding in 2019. *See In the Matter of the Adoption of AJC*, Sebastian County Circuit Court, Probate Division, Case No. PR-2018-139.

Plaintiffs' underlying Complaint (Doc. 1) seeks a federal advisory opinion on a state adoption case Plaintiffs intend to refile in the future. Plaintiffs seek a TRO to enjoin a different state court case, the divorce modification case, as a means of manipulating the facts to better situate Plaintiffs to initiate a future adoption petition.

The underlying Complaint asserts that Plaintiffs will seek to terminate parental rights in state court and seek an adoption in state court (Doc. 1, ¶ 62), but acknowledges that Plaintiffs do not seek termination of parental rights or adoption remedies in federal court.

Defendant Cherokee Nation agrees that the Arkansas state court is the proper venue for both the application of state substantive adoption laws and for any legal challenges of state and federal statutory and constitutional law questions. In fact, Arkansas has exclusive and continuing jurisdiction over matters of child custody as discussed below.

A. The State Court Divorce Proceedings with Subsequent Divorce Modifications

The only pending Arkansas state court case is *Fisher v. Cook*, DR-2011-446, a divorce proceeding initiated by Plaintiff Erin Fisher in 2011 in the Domestic Relations Division of the

Circuit Court of Sebastian County, Arkansas. Plaintiff Erin Fisher and Defendant Jason Cook divorced, and as part of the divorce proceeding, the Arkansas state court entered child custody and visitation orders as to the minor child A.C.

Pursuant to A.C.A. § 9-13-101 and the Uniform Child Custody Jurisdiction and Enforcement Act as adopted in Arkansas at A.C.A. § 9-19-101 et seq., "exclusive and continuing jurisdiction" for child custody litigation rests in the courts of the child's "home state" of Arkansas. A.C.A. § 9-19-202.

It is critical to note that the ICWA does not apply to Arkansas state divorces or divorce modifications. The plain language of ICWA expressly resolves this issue—a divorce proceeding is not a child custody proceeding as defined in and subject to ICWA. *See* 25 U.S.C. § 1903(1) ("Such terms or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.") (emphasis added). Therefore, the Arkansas state divorce proceedings and modifications thereto have been, and will continue to be, outside the scope and reach of ICWA. Arkansas retains exclusive jurisdiction over the matter, and there is no federal question before this Court.

Further, Defendant Cherokee Nation is not entitled to notice of the state court proceeding and lacks the right to intervene in a state divorce proceeding or divorce modification proceeding involving parental custody or visitation between Plaintiff Erin Fisher and Defendant Jason Cook. The Cherokee Nation only became aware of Mr. Cook's pending state court divorce modification motion after Plaintiffs initiated the underlying federal lawsuit with more information gleaned from Plaintiff's Motion for a Temporary Restraining Order (Doc. 22). As a nonparty to the state

court litigation, the Cherokee Nation immediately placed the Arkansas state court on notice that ICWA is inapplicable. *See* letter attached hereto as Exhibit A.

Any assertion that ICWA applies to the divorce modification in state court is inconsistent with the plain language of ICWA and over forty years of ICWA precedent in numerous state and federal courts. *See infra*, section regarding Plaintiffs' failure to demonstrate a likelihood of success on the merits.

In exercising its exclusive and continuing jurisdiction over the divorce proceedings and subsequent modifications from 2011 to the present, the Arkansas state court has been petitioned to order at least two modifications—Plaintiff Erin Fisher advanced one motion and Defendant Jason Cook advanced one motion. Both modification proceedings relate to the pre-existing divorce case and are governed exclusively by Arkansas domestic relations law. No other source of federal law is applicable to the divorce case or subsequent modifications. No source of Cherokee Nation law is applicable to the divorce case or subsequent modifications.

B. The Adoption Proceeding

In contrast to the continuing divorce proceedings, Defendant Cherokee Nation was an intervening party in a previous adoption proceeding involving the minor child A.C., a citizen of the Cherokee Nation. Plaintiff Richard Fisher filed an adoption petition in the Probate Division of the Circuit Court of Sebastian County Arkansas in March 2018 and then voluntarily dismissed the case without prejudice in January 2019. *See In the Matter of the Adoption of AJC*, Case No. PR-2018-139.

Due to the brief nature of that proceeding, the state adoption court record includes only a few pleadings: (1) a petition, (2) an intervention by Cherokee Nation, (3) a request for the court

to appointment guardian ad litem for the minor child and counsel for the father, and (4) a voluntary nonsuit by Plaintiff Richard Fisher.

Although the state adoption proceedings offered the proper forum and a competent jurisdiction to hear all claims, Plaintiffs failed to raise any legal challenges regarding the applicability of either Arkansas domestic relations law or the federal ICWA. Instead, ICWA constitutes the core of the Plaintiff's Complaint in this Court (Doc. 1), where Plaintiffs seek declaratory and injunctive relief, in the absence of a case or controversy.

Although limited by the brief duration of the case, the record in the state adoption proceedings contains documents that present facts in conflict with Plaintiffs' assertions in the underlying Complaint (Doc. 1) and Motion for Temporary Restraining Order (Doc. 22). These material questions of fact and law should be resolved by Arkansas state courts pursuant to Arkansas adoption laws and ICWA.

Plaintiffs' underlying Complaint (Doc. 1) alleges that Plaintiffs are injured because ICWA kept Plaintiff Richard Fisher from prevailing in a state adoption proceeding that he never advanced to the merits. It is premature and highly speculative to presume the adoption petition would have been granted by the Arkansas state court as a matter of Arkansas law, even if ICWA is somehow deemed inapplicable in a future adoption proceeding.

Under Arkansas law, visitation and custody deliberations involve the state court's consideration of the best interest of the child. *Baber v. Baber*, 378 S.W. 3d. 699 (Ark. 2011). "The primary consideration regarding visitation is the best interest of the child." *Id*. Important factors the Arkansas court will consider in determining reasonable visitation are (1) the wishes of the child, (2) the capacity of the party desiring visitation to supervise and care for the child, (3) problems of transportation and prior conduct in abusing visitation, (4) the work schedule or

stability of the parties, and (5) the relationship with siblings and other relatives." *Id*. Visitation and custody decisions rightfully lie with the sound discretion of the Arkansas circuit court after a full consideration of the merits. *Id*. at 705.

Under Arkansas adoption law, the mere fact that a biological parent's consent is dispensed with, as Plaintiff sought in the adoption petition, does not mean that the step-parent has an absolute right to adopt. The Arkansas statutory scheme requires the state court to find from clear and convincing evidence that the adoption is in the best interest of the child. Best interest is never presumed. The best interest inquiry must occur in the Arkansas courts with or without the provisions of the ICWA. The mere fact that a biological parent has forfeited the right to have his or her consent to an adoption required, does not mean that the adoption must be granted—the Arkansas state court must further find from clear and convincing evidence that the adoption is in the best interest of the child. *See Ballard v. Howard*, 560 S.W.3d 800 (Ark. App. 2018); *Waldrip v. Davis*, 842 S.W.2d 49, 50 (Ark. App. 1992). According to A.C.A § 9-9-214(c), even where an Arkansas state court determines that parental consent has been obtained or excused, the state court must also determine that the adoption is in the best interest of the child.

Even if ICWA is deemed inapplicable by the Arkansas state court, an adoption proceeding in state court is still be a derogation of the natural rights of parents, and Arkansas law requires construction in the light favoring continuation of the rights of natural parents. *See In Re Adoption of A.M.C.*, 246 S.W.3d 426, 427 (Ark. 2007); *In re Adoption of M.K.C.*, 313 S.W.3d 513, 514 (Ark. 2009).

Plaintiffs' arguments before this Court conveniently ignore the codified standard repeated throughout Arkansas case law requiring adoption to be in the best interest of the child. This is

for the state court judge to determine and cannot be abrogated, regardless of the application of ICWA.

III. ARGUMENT

A. Plaintiffs lack standing to ask the Court to rule on what effectively amounts to a request for an advisory opinion.

This Court lacks jurisdiction to entertain Plaintiffs' Motion for Temporary Restraining Order (Doc. 22). Plaintiffs seek an advisory opinion on an adoption case they plan to file at a future date. To manufacture an outcome in a future adoption case, Plaintiffs seek to deprive the Arkansas state court the opportunity to make factual findings and conclusions of law that turn on the application of Arkansas domestic relations law in an ongoing divorce modification proceeding currently pending before the Sebastian County Circuit Court. Plaintiffs also seek to enjoin the Defendant Jason Cook from asserting visitation rights or presenting arguments to the state court in advance his legal claims in a pending state divorce modification proceeding.

Although Defendant Cherokee Nation agrees that ripe adoption proceedings and proceedings for the termination of parental rights are subject to ICWA, Plaintiffs do not have standing to seek a remedy from this Court for a hypothetical adoption case of the future, and this is particularly problematic when extraordinary relief is requested, such as a Temporary Restraining Order.

A claim is ripe when the facts of the case have matured into an existing substantial controversy warranting judicial intervention to invoke Article III. The Complaint does not contain a factual allegation demonstrating a justiciable case or controversy over which the federal court has jurisdiction. Courts are not permitted to decide merely hypothetical questions or possibilities. Although a case may be considered ripe if it presents a purely legal issue, those

instances are limited to situations where further development of the facts will not render the issue more concrete.

B. Even if the Court has jurisdiction, it should abstain from ruling on the matter.

Plaintiff's request for injunctive relief against a pending state court proceeding raises issues of federalism and abstention.

1. The Requested Relief is Prohibited by the Anti-Injunction Act.

If granted, the Temporary Restraining Order would prohibit a litigant from arguing a pending motion properly before an Arkansas state court in an ongoing divorce modification case. This would have the practical effect of staying the state court proceeding, and would effectively enjoin the state court from exercising jurisdiction over the pending domestic relations case. The underlying state court is not a new proceeding, it has been ongoing since 2011.

The Anti-Injunction Act ("AIA"), 28. U.S.C. § 2283, provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." When a litigant is enjoined from proceeding in pending state court case, as is urged by Plaintiffs, it is considered a stay of proceedings for purposes of the Act. "One assumption underlying § 2283 is that state courts will vindicate constitutional claims as fairly and efficiently as federal courts." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 556 (1972).

The AIA includes three exceptions that empower a federal court to enjoin a state proceeding when necessary to give full effect to a federal right or remedy, or to protect or preserve the federal court's exercise of jurisdiction or a prior federal judgment. None of the exceptions apply in the present case. Further, these exceptions embedded in AIA's language

would be intended to preserve the effectiveness of federal law and the authority of federal courts and not to protect purely private interests of the party that seeks the injunction.

AIA provides that a federal court may enjoin state court proceedings when "expressly authorized by Act of Congress." The test is "whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the state of a state court proceeding." *Mitchum v. Foster*, 407 U.S. 225, 237-38 (1972).

An example of a federal statute that expressly authorizes federal injunctions against lawsuits in state courts is the Civil Rights Act and § 1983 actions. Based on Plaintiffs' claims, the ICWA would be the only federal statute that could arguably embody an exception to the AIA, but ICWA does not contain a federal cause of action or federal remedy. Two ICWA cases have been reviewed by the United States Supreme Court, and in each instance, the claims reached Court on appeal of state supreme courts after the ICWA claims had been fully exhausted in the state courts. *See Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013).

When federally recognized Indian tribes or individual plaintiffs have sought federal court relief to enforce ICWA in state courts their claims have been dismissed. See e.g., *Morrow v. Winslow*, 94 F.3d 1386 (Tenth Cir. 1996) (Cherokee father was denied relief under the *Younger* abstention).

2. Abstention is Warranted Pursuant to *Younger* and Related Policy Concerns

Even if the AIA is found to be inapplicable, Plaintiffs must overcome substantial prudential barriers, such as the *Younger* abstention doctrine and judicial efficiency concerns, where an adequate and complete remedy is otherwise available in Arkansas state court. Plaintiffs in this case have an adequate remedy to contest modification of visitation orders in the currently

pending state court case, and, should they decide to refile the adoption petition, the Arkansas state courts are equally equipped to entertain constitutional challenges in the state proceeding.

Federal abstention doctrine can prohibit a federal court, even in an effort to protect federal constitutional rights, from enjoining pending state court proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). Although *Younger* involved an injunction that enjoined a state criminal proceeding, the same logic now applies to civil cases. As the U.S. Supreme Court noted in *Sprint Communications v. Jacobs*, there are "certain instances in which the prospect of undue interference with state proceedings counsels against federal relief." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69 (2013) (citing *New Orleans Public Service, Ind. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989)).

"The *Younger* doctrine, which counsels federal-court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff." *Moore v. Sims*, 442 U.S. 415, 423 (1979). In *Moore*, the Supreme Court noted that "family relations are a traditional area of state concern." *Id*. at 435. Although *Moore* involved matters of child abuse initiated by state actors rather the private parties, the comprehensive state domestic relations statutory scheme at issue is similar to the subject matter at the core of the current case.

In *Oglala Sioux Tribe v. Fleming*, the Eighth Circuit stated:

> The question under the abstention doctrine is not whether the claims have merit such that the exercise of federal jurisdiction would support the state's interest in affording its residents protection under the law. The issue is whether the federal court should refrain from exercising jurisdiction and allow the claims to be resolved in the state proceedings. A federal court order dictating what procedures must be used in an ongoing state proceeding would interfere with that proceeding by inhibiting the legitimate functioning of the individual state's judicial system.

904 F.3d 603, 611 (8th Cir. 2018) (internal quotations omitted); s*ee also Amerson v. State of Iowa,* 94 F.3d 510, 512–14 (8th Cir.1996) (noting the Supreme Court has long rejected federal court interference in state domestic relations policy). In the *Oglala* decision handed down by the Eighth Circuit in 2018, the Court ultimately held: "Family relations are a traditional area of state concern, and federal courts should be unwilling to conclude that state processes are unequal to the task of accommodating the various interests and deciding the constitutional questions that may arise in child-welfare litigation." *Oglala*, 904 F.3d at 614 (internal quotations omitted) (emphasis added). For the same reasons stated in *Oglala*, the Court should abstain here.

The Court should abstain pursuant to *Younger* based on the strong policy against federal intervention in ongoing state court domestic relations proceedings involving the welfare of children, for which state courts have a recognized interest. *See Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245, 1249 (8th Cir. 2012) ("[T]here is no doubt that state-court proceedings regarding the welfare of children reflect an important state interest…"); *Bergstrom v. Bergstrom*, 623 F.2d 517, 520 (8th Cir. 1980) ("Reexamination of custody arrangements is a matter which belongs exclusively in state court; domestic relations disputes have been traditionally subject to exclusive state jurisdiction. Where a constitutional issue arises out of a custody dispute, and the initial determination involves a reexamination of the custody arrangement, the proper course is to dismiss the case and remand to the state court."); *In re Dennis*, 218 B.R. 52, 55 (Bankr. E.D. Ark. 1997) ("Generally, courts of the United States follow the traditional notion that domestic relations issues can be best resolved in state court.").

It cannot be overemphasized that Plaintiffs are seeking to stay a state divorce modification proceeding to which ICWA does not apply. *Younger* abstention and related policy concerns would caution this Court against issuing injunctive relief as to a state proceeding even

if there was an open adoption subject to ICWA. Here, the relevant state court proceeding contains no issues of federal law whatsoever.

C. Plaintiffs have failed to meet their burden for the establishment of a Temporary Restraining Order.

Rule 65 of the Federal Rules of Civil Procedure governs the issuance of a temporary restraining order. In deciding a motion for a temporary restraining order, courts are instructed to consider the following factors: (1) the probability of success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) whether the issuance of an injunction is in the public interest. *Minnesota Mining and Mfg. Co. v. Rauh Rubber, Inc.*, 130 F.3d 1305, 1307 (8th Cir. 1997). Plaintiffs bear the burden of establishing that the requested relief is appropriate. *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994).

A temporary restraining order, like a "preliminary injunction [,] is an extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689 (2008). A district court may enter such an extraordinary measure only "upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 21 (2008). Plaintiffs must establish a relationship between the injury claimed in their motion and the conduct alleged in the complaint. *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir.1994). Plaintiffs have failed to meet their burden of proof on each of the four factors.

1. Plaintiffs are unlikely to succeed on the merits of their Complaint.

Even if ICWA applied to divorce modifications and visitation amendments in Arkansas state court (which it does not), Plaintiffs do not establish a likelihood of success on the merits, especially regarding the constitutionality of ICWA.

Plaintiffs are unlikely to prevail on the equal protection issues. As a federal statute enacted to carrying out the federal government's trust responsibility in Indian affairs, ICWA is subject only to rational basis review because the ICWA and the whole of Title 25 of the United State Code entitled "Indians" makes a political, not racial, classification under *Morton v. Mancari*, 417 U.S. 535 (1974), and the many cases upholding broad congressional power over Indian-related matter before and following *Mancari*. ICWA has been adjudicated on the equal protection argument repeatedly in the forty years following its enactment and always found to be constitutional. *See In the Interest of A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *see also In re A.A.*, 176 P.3d 237, 240 (Kan. App. 2008); *In re Adoption of Hannah S.*, 48 Cal. Rptr. 3d 605, 610-11 (Cal. Ct. App., 3rd. Dist. 2006); *In re Interest of Phoenix L.*, 708 N.W.2d 786, 797-89 (Neb. 2006), *rev'd on other grounds*; *Matter of M.K.*, 964 P.2d 241, 244 (Okla. Ct. App. 1998); *In re Marcus S.*, 638 A.2d 1158, 1159 (Maine 1994); *State ex rel. Children's Services Div. v. Graves*, 848 P.2d 133, 134 (Or. Ct. App. 1993); *In re Miller*, 451 N.W.2d 576, 579 (Mich. App. 1990); *Matter of Appeal in Pima County Juvenile Action No. S-903*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981); *Matter of Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980). In one case, the U.S. Supreme Court refused to review a state court's decision holding that the equal protection scrutiny should not be heightened for ICWA cases. *In the Matter of Application of Angus*, 655 P.2d 208 (1982), *review den.* 294 Or. 569, 660 P.2d 683 (1983), *cert. den.* 464 U.S. 830 (1983).

The United States Supreme Court found ancestry to be a proxy for race in *Rice v. Cayetano*, 528 U.S. 495 (2000), because the law did not require *any* political relationship with a separate sovereign. ICWA, by contrast, requires a political tie: citizenship/membership in a federally recognized tribe —the child must either be a member of a tribe or be eligible for membership and a biological child of a member. *See* 25 U.S.C. § 1903(4). Congress has power

to act for the protection of Indian children and the United States has a well-established trust responsibility to the tribes and tribal citizen that is uniquely tied to a lengthy government-to-government relationship. This trust responsibility plays out in a broad range of subject areas including Indian country criminal jurisdiction, economic development and ICWA. *See Oneida Cnty. v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (describing the unique trust relationship between the United States and the Indians). ICWA is a direct product of that unique trust relationship. *Doe v. Mann*, 285 F. Supp. 2d 1229, 1234 (N.D. Cal. 2003). It is in the public interest to continue the United States' effort to protect Indian children and families.

2. There will be no irreparable harm if Plaintiffs' Motion is denied because the matter at issue is well-recognized to be best resolved in state court proceedings.

Plaintiffs acknowledge that federal courts typically do not consider domestic relations cases. (Doc. 22, p. 6). "Generally, courts of the United States follow the traditional notion that domestic relations issues can be best resolved in state court." *In re Dennis*, 218 B.R. at 55.

The alleged injury presumes that the Arkansas state court will incorrectly apply ICWA in a future adoption case. The alleged injury is remote and lacks immediacy in that in order to be denied an adoption petition, Plaintiff would first have to file an adoption proceeding in a court that has the power to grant adoptions.

The alleged injury also presumes the Arkansas state court currently hearing the divorce modification case will not reach Plaintiffs desired decision when applying Arkansas domestic relation law which embodies a best interest of the child standard.

The federal court should not issue an injunction based on the possibility that Plaintiffs might disagree with a state court finding on an issues exclusively within the continuing jurisdiction of the state court. Plaintiff's entire argument for Temporary Restraining Order is

based on the flawed argument that ICWA applies to divorce and divorce modifications, when the plain language of the statutes say otherwise. Plaintiffs must establish a relationship between the injury claimed in their motion and the conduct alleged in the complaint. *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir.1994).

Courts are cautioned that, "injunctive force may be unleashed only against conditions generating a presently existing actual threat; it may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by the common law." *Rogers v. Scurr*, 676 F.2d 1211,1214 (8th Cir.1982) (quoting *Holiday Inns of Am. v. B & B Corp.*, 409 F.2d 614, 618 (3rd Cir.1969)).

Plaintiffs' Complaint seeks declaratory judgment on ICWA §§ 1912(d)(f), 1914, 1915(a) and the 2016 Regulations. None of these provisions are applicable to the only open state court proceedings involving Plaintiff Fisher and Defendant Cook. Instead, all the questions in the state court case are questions of Arkansas law.

Plaintiff's irreparable harm argument hinges on several steps that lack immediacy. Step one would require that a state court judge rule on the merits of the pending modification request and rule in favor of Defendant Cook. At present, no hearing date appears to be docketed and Plaintiff Erin Fisher has not filed a responsive pleading in the state court case to oppose Defendant Cook's motion to modify. Step two would require Plaintiffs to initiate an adoption proceeding in state court and then be unsuccessful on the merits of terminating Defendant Cook's parental rights.

3. A balancing of the respective interests does not favor the Plaintiffs.

Plaintiffs rest the entirety of their argument around the balancing of risk on an emotional distress argument that presumes a conclusion in the Arkansas state courts that is not supported by

Arkansas domestic relations law or ICWA. They have attempted to conjure a crisis requiring the Court to take immediate action pursuant to its extraordinary powers. Yet, no such crisis exists. Longstanding principles of subject matter jurisdiction, standing, federalism, comity, and the balancing of relationships between state and federal courts would weigh against the Court entering an injunction even if ICWA applied to the pending state court divorce proceeding. However, as discussed throughout this Response, Plaintiffs are seeking to stay a state divorce modification proceeding for which ICWA is inapplicable. The requested relief cannot be used "simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by the common law." *Scurr,* 676 F.2d at 1214. The resultant harm to Defendants heavily weighs against a temporary restraining order.

4. The public interest would be best served by the Court following the long-recognized understanding that state courts have a strong interest in domestic relations matters, particularly those involving the welfare of children.

The public interest is not served by a federal court granting a TRO that will interfere with a state divorce proceeding that has been within the exclusive and continuing jurisdiction of a state court for eight years. To the contrary, it would invite multiple future litigants in ICWA and non-ICWA child custody proceedings to unduly burden the federal dockets with attempts to interfere with state judicial process by seeking injunctive and declaratory orders that prevent the cases from reaching the merits. This would set a precedent for cases pending in state courts like the divorce modification, and for cases that litigants are contemplating for the future.

The within response to motion is filed without waivers and the Cherokee Nation reserves the right to raise both personal and subject matter jurisdictional challenges. The Defendant Cherokee Nation does not concede that this Court has jurisdiction over them or this matter and do not waive any defenses provided by Rule 12(b)(1), 12(b)(6) or on any other basis.

IV. CONCLUSION

Plaintiffs propose that this Court intertwine itself in a state court domestic relations matter that has absolutely no bearing on the constitutionality of the ICWA, and for which state courts have a long-recognized interest and jurisdiction. Plaintiffs lack standing to bring this lawsuit, *Younger* abstention is warranted, and Plaintiffs have not met their burden for the establishment of the extraordinary measure they now seek. The Court should deny their Motion.

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CERTIFICATE OF SERVICE

I, Danita R. Cox, hereby certify that on April 11th, 2019, I electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system which shall send notification of such filing to the following counsel of record:

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I further certify that on April 11th, 2019, I mailed the foregoing pleading by U.S. Postal Serving to non-CM/ECF participant at:

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