

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

---

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

Case No.

Plaintiffs,

vs.

**VERIFIED COMPLAINT  
FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

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

Defendants.

---

For their Verified Complaint for Declaratory and Injunctive Relief, Plaintiffs state  
and allege as follows:

1. This is a complaint for declaratory and injunctive relief challenging the  
constitutionality of certain provisions of the Minnesota Indian Family Preservation Act  
(MIFPA), Minn. Stat. §§ 260.751 – 260.835, Minnesota’s state corollary and complement  
to the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-63.

2. Plaintiffs allege that Minn. Stat. § 260.761, subds. 3, 6 (2014) are facially  
unconstitutional, and unconstitutional as applied to Plaintiffs, under the Fourteenth  
Amendment to the United States Constitution.

**Parties**

3. Plaintiff Jane Doe is over the age of 18, is domiciled in the State of Minnesota, and is enrolled in the Mille Lacs Band of Ojibwe. Jane Doe does not domicile within or reside on an Indian reservation.

4. Plaintiff John Doe is over the age of 18, domiciled in the State of Minnesota, and is also enrolled in an Indian tribe. John Doe does not domicile within or reside on an Indian reservation.

5. Plaintiffs Jane and John Doe are Baby Doe's biological parents and remain his legal guardians pending the completion of Baby Doe's adoption by his "Adoptive Parents." Jane Doe believes Baby Doe is eligible for membership in the Mille Lacs Band of Ojibwe because her other children, also born to John Doe, are enrolled there. Baby Doe is not and has never been domiciled or resided within an Indian reservation.

6. The use of anonymous identifiers for Plaintiffs is appropriate given the privacy issue at the heart of this case.

7. Lucinda E. Jesson is the Commissioner of the Minnesota Department of Human Services. She and her office are legally obligated to ensure the provisions of Minn. Stat. § 260.761, subs. 3, 6, are enforced. This would include investigating, disciplining, enforcing, and/or affecting the license status of on any "private child-placing agency" which fails to comply with the terms of Minn. Stat. § 260.761, subd. 3.

8. Lori Swanson is the Minnesota Attorney General. She and her office are legally obligated to ensure the provisions of Minn. Stat. § 260.761, subs. 3, 6, are enforced. This would include investigating, disciplining, enforcing, and/or affecting the

license status of any “private child-placing agency” which fails to comply with the terms of Minn. Stat. § 260.761, subds. 3, 6.

9. Samuel Moose is the Commissioner of Health and Human Services for the Mille Lacs Band of Ojibwe. He is the head official for the tribal agency that exercises that tribe’s right to intervention pursuant to Minn. Stat. § 260.761, subds. 3, 6.

### **Jurisdiction and Venue**

10. This Court has original jurisdiction pursuant to 28 U.S.C. § 1331, 42 U.S.C. §§ 1983, 1988, and the federal common law jurisdictional doctrine established in *Ex parte Young*, 209 U.S. 123 (1908), to redress the deprivation under color of state law of rights secured by the federal constitution.

11. This Court also has jurisdiction under 28 U.S.C. §§ 1331, 2201 over Plaintiffs’ facial challenges to Minn. Stat. § 260.761, subds. 3, 6.

12. The relevant acts and omissions occurred, and are likely to continue occurring, in the State of Minnesota; therefore, venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2).

13. A preliminary injunction, enjoining Defendants from taking any action to enforce the challenged MIFPA provisions, will protect Plaintiffs’ rights while these proceedings are pending. A permanent injunction, enjoining Defendants from enforcing the challenged provisions of the Act, will protect Plaintiffs’ rights after the final resolution of these proceedings.

### **ICWA’s Notice Provisions for Involuntary Proceedings**

14. Congress passed ICWA in response to a high number of Indian children

being removed from their homes by both public and private agencies. Congress's intent was to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" 25 U.S.C. § 1902.

15. 25 U.S.C. § 1912(b) provides tribes with a right of intervention during state court proceedings for the *involuntary* termination of an Indian parent(s) parental rights:

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention...

16. By granting a tribe the right to intervene in involuntary foster care or termination proceedings, Congress enabled the tribe to seek enforcement of ICWA's placement preferences. In cases where the parents rights are terminated, an Indian child must be placed in accordance with 25 U.S.C. § 1915(a):

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with

- (1) a member of the child's extended family;
- (2) other members of the Indian child's tribe; or
- (3) other Indian families.

17. 25 U.S.C. § 1916 provides the authority to invalidate any adoptive placement where notice was not properly provided pursuant to 25 U.S.C. § 1912(b).

18. Courts have repeatedly held or otherwise recognized that ICWA's notice provisions contained in Section 1912(b) do not pertain to *voluntary* adoption proceedings.

*See, e.g., Navajo Nation v. Super. Court of the State of Washington*, 47 F. Supp. 2d 1233, 1238 (E.D. Wash. 1999); *see also Catholic Soc. Servs., Inc. v. C.A.A.*, 783 P.2d 1159, 1160 (Alaska 1989).

19. Voluntary and involuntary termination proceedings are governed in Minnesota by Minn. Stat. § 260C.301. A voluntary termination of parental rights occurs “with the written consent of a parent who for good cause desires to terminate parental rights...” *Id.*, subd. 1(a). Involuntary proceedings can occur for a number of reasons including abandonment, neglect, or failure to contribute to the support or financial aid of the child. *Id.* at subds. 1(b)(1)-(3). In Minnesota, parents may also voluntarily consent to *adoption* by signing consents to adoption under Minn. Stat. § 259.24.

**The Extended Reach of the Minnesota Indian Family Preservation Act**

20. The Minnesota Indian Family Preservation Act was originally enacted in 1985, codified at Minn. Stat. §§ 257.35 – 257.357 (repealed and renumbered 1999).

21. This law provided notice to tribes in cases where an Indian child was in a “dependent” condition that could lead to involuntary out of home placements. Minn. Stat. § 257.352, subd. 2.

22. But even as originally enacted the law did not mandate notice to Indian tribes of voluntary proceeding where Indian parents desired to place their children for adoption.

23. In 1997, the Minnesota Legislature expanded upon ICWA and enacted notice and intervention provisions pertaining to *voluntary* adoptions:

In any voluntary adoptive or preadoptive placement proceeding in which a local social services agency, private child-placing agency, petitioner in the adoption, or any other party has reason to believe that a child who is the subject of an adoptive or preadoptive placement proceeding is or may be an "Indian child," as defined in section 260.755, subdivision 8, and United States Code, title 25, section 1903(4), the agency or person shall notify the Indian child's tribal social services agency by registered mail with return receipt requested of the pending proceeding and of the right of intervention under subdivision 6. If the identity or location of the child's tribe cannot be determined, the notice must be given to the United States secretary of interior in like manner, who will have 15 days after receipt of the notice to provide the requisite notice to the tribe. No preadoptive or adoptive placement proceeding may be held until at least ten days after receipt of the notice by the tribe or secretary. Upon request, the tribe must be granted up to 20 additional days to prepare for the proceeding. The agency or notifying party shall include in the notice the identity of the birth parents and child absent written objection by the birth parents. The private child-placing agency shall inform the birth parents of the Indian child of any services available to the Indian child through the child's tribal social services agency, including child placement services, and shall additionally provide the birth parents of the Indian child with all information sent from the tribal social services agency in response to the notice.

Minn. Stat. § 260.761, subd. 3 (renumbered from § 257 to § 260 in 1999).

24. Minn. Stat. § 260.761, subd. 6, states: "In any state court proceeding for the voluntary adoptive or preadoptive placement of an Indian child, the Indian child's tribe shall have a right to intervene at any point in the proceeding."

25. MIFPA defines an "Indian child" as "an unmarried person who is under age 18 and is: (1) a member of an Indian tribe; or (2) eligible for membership in an Indian tribe." Minn. Stat. § 260.755, subd. 8. By contrast, ICWA defines an Indian child as either "(a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe *and is the biological child of a member of an Indian tribe.*" 25 U.S.C. § 1903(4) (emphasis added).

26. Many Indian tribes have only blood quantum or lineage requirements as prerequisites for membership. *See, e.g.*, Paul Spruhan, *The Origins, Current Status, & Future Prospects of Blood Quantum as the Definition of Membership in the Navajo Nation*, 8 Tribal L.J. 1, 5 (2007); *see also* Rev. Const. & Bylaws of the Minnesota Chippewa Tribe, Minnesota, art. II, § 1(c) (child eligible if born to a member and child is at least one quarter Minnesota Chippewa Indian blood). The Mille Lacs Band of Ojibwe is a member of the Minnesota Chippewa Tribe. *Id.* at art. III.

27. Unlike ICWA, the Minnesota Indian Family Preservation Act, facially and as applied, gives Indian tribes the right under the color of state law to interfere with voluntary, private adoptions.

**Baby Doe's Private Direct Placement Adoption**

28. Jane Doe gave birth to Baby Doe in April 2015 in Minneapolis, Minnesota.

29. Jane and John Doe are unmarried but have been a couple and continuously lived together since 2003. There is no possibility that anyone other than John Doe is the father.

30. Jane and John Doe have *not* had their parental rights terminated. Instead, they reached the difficult decision that adoption would be best for Baby Doe in light of their personal circumstances.

31. Jane and John Doe specifically elected to proceed with a private direct placement adoption through a private child-placing agency. A private direct placement adoption, commencing under Minn. Stat. § 259.47, allows Jane and John Doe to specifically elect who Baby Doe's Adoptive Parents will be. No one other than the

selected Adoptive Parents is legally able to adopt Baby Doe under this adoption method since they do not have the parents' consent and the child is not otherwise "free" for adoption.

32. Adoptions proceedings are strictly confidential under state law. Minn. Stat. § 259.61 (hearings confidential except as to person and entities having right to notice). All adoption *records*, such as birth certificates (confidential under Minn. Stat. § 144.225, subd. 2), detailed social and medical histories on the birth parents (required under Minn. Stat. § 259.43, and adoption studies and criminal background checks on adoptive parents (required under Minn. Stat. § 259.41), are likewise confidential, open to inspection only by the commissioner of human services or a licensed child placing agency. *Id.*

33. In private "direct adoptive placements" under Minn. Stat. § 259.47, where the parent directly places a child with adoptive parents of their choosing, notice is required to be sent only to the child's guardian, if there is one, and parents with notice rights. Minn. Stat. § 259.49. No governmental entity has the right to notice in such adoption proceedings — unless the child is an Indian child under MIFPA, in which case the tribe must be notified of its right to intervene. Minn. Stat. ¶ 260.761, subd. 3. As an intervenor, the tribe has the right to discovery of all reports or other documents filed with the court. 25 U.S.C. § 1912(c).

34. The Adoptive Parents selected by Jane and John Doe are not of Indian descent. However, Jane and John Doe chose the Adoptive Parents after learning about them from their adoption profile. They chose the Adoptive Parents because they appeared to be very good people and excellent parents to another adopted boy. Jane and John Doe

were particularly happy about the idea that Baby Doe would have an older brother.

35. Jane and John Doe made an open adoption plan, including plans for Baby Doe to learn about and stay connected with his Indian heritage. Jane and John Doe have arranged with the adoptive parents to share pictures, text each other, and meet with Baby Doe from time to time. Adoptive Parents are already in a similar open adoption situation with their older boy.

36. Jane and John Doe are well aware of their rights under ICWA and MIFPA. However, they believe they are making the best decision about Baby Doe's care, custody, control, and future upbringing.

37. Jane and John Doe are also adamant that they do not want their tribes put on notice regarding Baby Doe's adoption. This notice will result in word spreading in the tribal offices of their adoption plan, and if the tribes seek out alternate placements then their families and others in the tribal community will learn of their private adoption plan. John and Jane Doe have intentionally kept Jane Doe's pregnancy and birth a secret, even from their own parents and family. This will result in embarrassment and immense pressure to deviate from what Jane and John Doe have determined to be the best decision for Baby Doe. This will also provide the tribes with the opportunity to intervene and interfere with what Jane and John Doe have determined to be the best decision for Baby Doe.

38. Jane and John Doe are also embarrassed and alarmed at the breach of confidentiality that would ensue if the tribe intervened in their adoption proceeding and obtained discovery of very private adoption files and records, including Baby Doe's

confidential birth certificate, their detailed social medical history statements that they have submitted to the state juvenile court, the names and addresses of the Adoptive Parents and their adoption home study and criminal background checks.

39. As Indian parents, Jane and John Doe are aware of their right to revoke their consent at any time until the adoption is final. If the tribes attempt to interfere with their private direct placement adoption, and it becomes apparent that the Adoptive Parents will not be permitted to adopt Baby Doe, Jane and John Doe will revoke the consent already given and will not give consent to anyone else for Baby Doe's adoption.

40. Jane and John Doe are profoundly worried that any attempt to interfere with their private direct placement adoption will not be in Baby Doe's best interest and will be devastating to them and the Adoptive Parents.

41. This is an emergency. Plaintiffs placed Baby Doe with Adoptive Parents, for eventual adoption, on May 8, 2015, pursuant to a preadoptive custody order signed by the Hennepin County Juvenile Court. Plaintiffs must execute their consents to adoption within 60 days of this date of placement. Minn. Stat. § 259.47, subd. 7. ICWA requires that Indian parents consent to adoption in court. 25 U.S.C. § 1913(a). Minn. Stat. § 260.761, subd. 3, requires tribal notification. If Plaintiffs fail to execute consents in 60 days (i.e., by July 8, 2015), the state juvenile court is required to refer the matter to the county child protection agency to investigate whether Plaintiffs should have their rights terminated on the basis of abandonment. Minn. Stat. § 259.47, subd. 8. Plaintiffs request preliminary injunctive relief so that they may timely sign their consents without notice to the tribe.

**Count I**  
**(All Defendants - Due Process, 42 U.S.C. §§ 1983, 1988)**

42. Plaintiffs incorporate by reference all preceding allegations as if fully stated herein.

43. The Fourteenth Amendment to the United States Constitution precludes any State from “depriving any person of life, liberty, or property, without the due process of law.” U.S. Const. amend. XIV, § 1.

44. The privacy interest of parents is a well-established liberty and right protected by the Due Process Clause of the United States Constitution.

45. Plaintiffs have a liberty and privacy interest in their parental rights and should be entitled to the certain rights, responsibilities, benefits and protections regardless of their race.

46. Defendants’ infringement upon the Plaintiffs’ liberty and right to privately pursue a direct private placement adoption violates the Due Process Clause.

47. Defendants’ interference upon Plaintiffs’ direct private placement adoption violates the Plaintiffs’ fundamental parental rights and fundamental freedom in liberty, dignity, privacy, and family integrity under the Fourteenth Amendment.

48. Minn. Stat. § 260.761, subds. 3, 6, facially and as applied to ICWA’s preference provisions (25 U.S.C. § 1915(a)), deprives Plaintiffs of their Due Process rights under the Fourteenth Amendment and is not narrowly tailored to serve a compelling governmental interest.

49. Defendants, acting under color of state law, are depriving Plaintiffs of their

rights secured by the Due Process Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983

50. Plaintiffs are entitled to their costs, including their reasonable attorneys' fees, pursuant 42 U.S.C. § 1988.

51. Pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and Fed. R. Civ. P. 57, Plaintiffs seek a declaratory judgment that Minn. Stat. § 260.761, subs. 3, 6, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

52. Plaintiffs have no other adequate remedy at law.

**Count II**  
**(All Defendants - Equal Protection, 42 U.S.C. §§ 1983, 1988)**

53. Plaintiffs incorporate by reference all preceding allegations as if fully stated herein.

54. Minn. Stat. § 260.761, subs. 3, 6, facially and as applied to ICWA's preference provisions (25 U.S.C. § 1915(a)), deprives Plaintiffs of Equal Protection under the Fourteenth Amendment by discriminating on the basis of race, national origin, and/or ethnicity.

55. On their face, the notification and intervention provisions of Minn. Stat. § 260.761, subs. 3, 6, discriminate on the basis of race, national origin, and/or ethnicity, do not relate to parents or children domiciled on Indian land, do not relate to Indian self-governance, and therefore these discriminatory provisions are subject to strict scrutiny.

56. The notification and intervention provisions of Minn. Stat. § 260.761,

subds. 3, 6, as applied to ICWA's preference provisions discriminate on the basis of race, national origin, and/or ethnicity, do not relate to parents or children domiciled on Indian land, do not relate to Indian self-governance, and therefore these discriminatory provisions are subject to strict scrutiny.

57. The notification and intervention provisions of Minn. Stat. § 260.761, subds. 3, 6, fail strict scrutiny because they are not narrowly tailored to advance a compelling state interest.

58. Defendants, acting under color of state law, are depriving Plaintiffs of their rights secured by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983.

59. Plaintiffs are entitled to their costs, including their reasonable attorneys' fees, pursuant 42 U.S.C. § 1988.

60. Pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and Fed. R. Civ. P. 57, Plaintiffs seek a declaratory judgment that Minn. Stat. § 260.761, subds. 3, 6, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

61. Plaintiffs have no other adequate remedy at law.

**Count III**  
**(All Defendants - Request for a Preliminary Injunction)**

62. Plaintiffs incorporate by reference all preceding allegations as if fully stated herein.

63. As discussed above, timing is critical to avoid an investigation into the

issue of abandonment.

64. Plaintiffs have no adequate remedy at law.

65. Plaintiffs seek the entry of a preliminary injunction, enjoining Defendants and Defendants' officers, agents, servants, employees, attorneys, and other persons in active concert or participation with Defendants or Defendants' officers, agents, servants, employees or attorneys from enforcing Minn. Stat. § 260.761, subs. 3, 6.

**Count IV**

**(All Defendants - Request for a Permanent Injunction)**

66. Plaintiffs incorporate by reference all preceding allegations as if fully stated herein.

67. Plaintiffs have no adequate remedy at law.

68. Plaintiffs seek the entry of a preliminary injunction, enjoining Defendants and Defendants' officers, agents, servants, employees, attorneys, and other persons in active concert or participation with Defendants or Defendants' officers, agents, servants, employees or attorneys from enforcing Minn. Stat. § 260.761, subs. 3, 6.

**Prayer for Relief**

WHEREFORE, Plaintiffs pray that this Court:

- (A) enter a judgment declaring that Minn. Stat. § 260.761, subs. 3, 6, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution;
- (B) enter a judgment declaring that Minn. Stat. § 260.761, subs. 3, 6, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;
- (C) enter a preliminary and permanent injunction enjoining Defendants from enforcing Minn. Stat. § 260.761, subs. 3, 6, as challenged herein;

- (D) award costs and expenses to Plaintiffs, including reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988; and
- (E) award such additional relief as this Court deems just and proper.

Dated: June 3, 2015

**HOVLAND & RASMUS, P.A.**

/s/ R. Daniel Rasmus

R. Daniel Rasmus, #0260289  
6800 France Avenue South, Suite 190  
Edina, MN 55435  
Phone: 612.874.8550  
Fax: 612.874.9362  
Email: drasmus@hovlandrasmus.com

- and -

**FIDDLER LAW OFFICE, P.A.**

Mark D. Fiddler, #0197853  
6800 France Avenue South, Suite 190  
Edina, MN 55435  
Phone: 612.822.4095  
Fax: 612.822.4096  
Email: mark@fiddler-law.com

- and -

**NEWMARK STORMS LAW OFFICE LLC**

Jeffrey S. Storms, #0387240  
Jill A. Brisbois, #0345477  
100 South Fifth Street, Suite 2100  
Minneapolis, MN 55402  
Phone: 612-455-7500  
Fax: 612.455.7051  
Email: jeff@newmarkstorms.com  
jill@newmarkstorms.com

*Attorneys for Plaintiffs*

**CONFIDENTIAL – FILE ONLY UNDER SEAL**

**Verification of [REDACTED]**

I, [REDACTED] hereby declare as follows:

1. I am a Plaintiff in the present case, individually and on behalf of [REDACTED], born on [REDACTED], in the City of Minneapolis, Minnesota, County of Hennepin. I am a citizen of the United States of America, and resident of the State of Minnesota. My address is [REDACTED] My date of birth is [REDACTED]

2. I have personal knowledge of myself, my activities, my intentions, including those set out in the *Verified Complaint for Declaratory and Injunctive Relief* filed in this matter on June 3, 2015, and if called on to testify I would competently testify as to the matters stated herein.

3. Pursuant to 28 U.S.C. § 1746, I verify under penalty of perjury under the laws of the United States of America that the factual statements in the *Verified Complaint for Declaratory and Injunctive Relief* concerning myself, my activities, and my intentions are true and correct.

Dated: 6/3/15

[REDACTED]

**CONFIDENTIAL – FILE ONLY UNDER SEAL**

**Verification of** [REDACTED]

I, [REDACTED] hereby declare as follows:

1. I am a Plaintiff in the present case, individually and on behalf of [REDACTED]

[REDACTED], born on [REDACTED] in the City of Minneapolis, Minnesota, County of Hennepin. I am a citizen of the United States of America, and resident of the State of Minnesota. My address is [REDACTED] My date of birth is [REDACTED]

2. I have personal knowledge of myself, my activities, my intentions, including those set out in the foregoing *Verified Complaint for Declaratory and Injunctive Relief*, and if called on to testify I would competently testify as to the matters stated herein.

3. Pursuant to 28 U.S.C. § 1746, I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Verified Complaint for Declaratory and Injunctive Relief* concerning myself, my activities, and my intentions are true and correct.

Dated: 6-3-15

[REDACTED]